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The Italian Reform of the Law on Filiation and Constitutional Legality

Cristiano Cicero*

Abstract

There is a tendency within modern legal systems towards mitigating or eliminating the differences between filiation within or outside of wedlock. The Italian law on filiation has been subject to important reforms driven by constitutional law, with the aim of guaranteeing equality between children. The endpoint of this legislative process has been to stipulate one single status for all children. The absolute equivalence between the legal status of all children, with no distinction between those born within or outside of wedlock, parental responsibility, the right of the child to be heard, the obligation to provide maintenance (*Unterhaltspflicht*), the principle of the welfare of the child (*Kindeswohlprinzip*) and the relevance of natural parentage are principles enshrined within European law; however – from a more general perspective – the formation of a common European family law is still a distant prospect on account of the different social sensitivities inherent within each legal system.

I. The Principle of Uniform Status of Filiation

The tendency within modern legal systems, which is probably irreversible, is towards mitigating or eliminating the differences between filiation within or outside of wedlock.¹ German law established full equivalence between children in 1997, following the reform of the law on filiation (*Kindschaftsrecht*). Filiation (*Abstammung*) is the legal relationship between a natural person and the persons who conceived him.² The *Bürgerliches Gesetzbuch* (German Civil Code) states in relation to maternity (*Mutterschaft*) that the mother of a child is the woman who gave birth to that child (§ 1591: ‘The mother of a

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¹ Within the Italian literature, see recently M. Dogliotti, ‘La filiazione fuori del matrimonio’, in F.D. Busnelli ed, *Il codice civile. Commentario* (Milano: Giuffrè, 2015), 7.

² At least in general. This is not biologically the case eg for adoption (some legal systems, eg Spain, distinguish between *filación por naturaleza y por adopción* (Art 108 of the *Código Civil*) or for heterologous medically assisted reproduction (see below, section VIII). This is not to speak in addition of the questions raised by so-called surrogate pregnancy, including in particular the preferential status of the right of the genetic mother over that of the mother who gave birth.

child is the woman who gave birth to it').³ As far as paternity is concerned, the father is the man 1) who was married to the mother at the time of birth, 2) who recognised paternity or 3) whose paternity has been established by a court of law (§ 1592 BGB). There is a presumption of paternity in both the French *Code Civil* and in the Spanish *Código Civil*, according to which the father of a child conceived or born within marriage is the husband of the mother (Art 312 of the *Code Civil* and Art 116 of the *Código Civil*). This presumption is also present in the Italian *Codice Civile*, which provides that the father of a child conceived or born within marriage is the husband (Art 231 of the *Codice Civile*).

The Italian legislation on filiation, which has abolished the distinction between legitimate children and children born out of wedlock,⁴ has been subject to important reforms driven by constitutional law, with the aim of guaranteeing equality between children. The endpoint of this legislative process has been to stipulate one single status for all children. The absolute equivalence between the legal status of all children, with no distinction between those born within or outside of wedlock, parental responsibility, the right of the child to be heard, the obligation to provide maintenance (*Unterhaltspflicht*), the principle of the welfare of the child (*Kindeswohlprinzip*) and the relevance of natural parentage are principles enshrined within European law; however – from a more general perspective – the formation of a common European family law is still a distant prospect on account of the different social sensitivities inherent within each legal system (according to the *motto* of Jean Carbonnier, 'to each his family, to each his law').

The provisions of § 42 of the Austrian ABGB (General Civil Code) classify all descendants related by birth as children (*Kinder*). In France, according to Art 310 of the *Code Civil*: 'All children whose parentage is lawfully established have the same rights and the same duties in their relations with their father and mother'. They enter into the family of each of them.⁵ In the same way, the Spanish *Código Civil* provides – with the aim of establishing equivalent status for all children – that (Art 108) 'Matrimonial and non-matrimonial filiation, and adoptive filiation, shall have the same effect'.⁶ The original normative framework of the 1942 Italian *Codice Civile* was

³ 'Mutter eines Kindes ist die Frau, die es geboren hat'.

⁴ C.M. Bianca, 'La riforma del diritto della filiazione' *Nuove leggi civili commentate*, 437-440, 437 (2013); M. Mantovani, 'I fondamenti della filiazione', in P. Zatti ed, *Trattato di diritto di famiglia* (Milano: Giuffrè, 2012), II, 3.

⁵ 'Tous les enfants dont la filiation est légalement établie ont les mêmes droits et les mêmes devoirs dans leurs rapports avec leur père et mère. Ils entrent dans la famille de chacun d'eux'.

⁶ 'La filiación matrimonial y la no matrimonial, así como la adoptiva surten los mismos efectos'.

characterised by considerable disparities between so-called ‘legitimate’ and ‘illegitimate’ children. Drawing on the Napoleonic tradition, the 1942 *Codice Civile* drew a sharp distinction between the status of a legitimate child conceived by married parents, and an illegitimate child born out of the union of persons who were not married.⁷ There were also further categories which received even less protection, such as so-called ‘adulterous’ children and so-called ‘incestuous’ children.⁸ The Italian law on the reform of family law (legge 19 May 1975 no 151) reformulated the issue, but did not provide for equivalent treatment between the various categories of child.⁹ It is firmly established that the legal status of children born out of wedlock has traditionally been worse than that of legitimate children.¹⁰ Protection for the legitimate family has always been a fixed point within the social conscience, with the result that illegitimate children were accorded a lesser status than that of legitimate children.¹¹ This aversion towards natural filiation started to be reversed with the adoption of the Italian Constitution, which sought to provide better rights to biological children while still respecting the overriding requirements of the legitimate family,¹² but remained particularly severe in some instances, for example in relation to children born out of incestuous relationships (see section V below).¹³ The law on the reform of filiation (legge 10 December 2012 no 219) enshrined the principle of the uniform status of filiation. Art 315 of the Italian *Codice Civile* provides that all children shall have the same legal status. The child consequently has a fundamental right to equality of treatment and protection, which is expressed through the principle of the uniform status of filiation. Equality between children thus is definitively detached from the status of the parents.¹⁴

Art 315 in amended form represents a genuine Copernican revolution within the system of family law and creates a clean break with the past, laying

⁷ M. Dogliotti, n 1 above, 29.

⁸ D. Carusi, ‘La filiazione fuori del matrimonio nel diritto italiano (1865-2013)’ *Rassegna di diritto civile*, 369-389, 369 (2015); M. Porcelli, ‘Note preliminari allo studio sull’unificazione dello stato giuridico dei figli’ *Diritto di famiglia e delle persone*, 654-675, 654 (2013); R. Pane, ‘Il nuovo diritto di filiazione tra modernità e tradizione’, in Id, *Nuove frontiere della famiglia* (Napoli: Edizioni Scientifiche Italiane, 2014), 11.

⁹ M. Sesta, ‘La parità dei figli nell’opera di Rosario Nicolò’ *Rivista trimestrale di diritto e di procedura civile*, 141-158, 141 (2012).

¹⁰ C.M. Bianca, n 4 above, 437.

¹¹ R. Nicolò, ‘La filiazione illegittima nel quadro dell’art. 30 della Costituzione’ *Democrazia e diritto*, II, 3 (1960); M. Paradiso, ‘Filiazione, stato di figlio e gruppi familiari tra innovazioni normative e riforme annunciate’ *Diritto delle successioni e della famiglia*, 101-118, 101 (2016).

¹² U. Majello, *Profili costituzionali della filiazione legittima e naturale* (Napoli: Morano, 1965), passim; M. Sesta, ‘La filiazione’, in M. Bessone ed, *Trattato di diritto privato, Il diritto di famiglia* (Torino: Giappichelli, 1999), IV, 3.

¹³ M. Costanza, ‘Filiazione naturale’ *Enciclopedia giuridica* (Roma: Treccani, 1989), XIV, 1.

¹⁴ R. Amagliani, ‘L’unicità dello stato giuridico di figlio’ *Rivista di diritto civile*, 554-574, 554 (2015).

the basis for the reconstruction of the entire body of rules on family law and inheritance. The assertion of the principle laid down in the provision under examination expresses the policy manifesto of the new law and has the status of a general canon of interpretation throughout the area of law.¹⁵

II. The Legal Significance of Biological Family Relations

Before the reform of Art 315, one of the residual differences in treatment between children born within wedlock and those born to unmarried parents resulted from the lack of recognition for biological family relations. The Italian reform removed the discrimination against children born to unmarried parents, which prevented the establishment of legal relations (biological family relations) between a child born out of wedlock and the relatives of the parent who had recognised the child.¹⁶ The reform was enacted against the backdrop of the ongoing refusal for some time, on the basis of the combined provisions of the previously applicable Arts 74 and 258 of the Italian *Codice Civile*, to acknowledge the legal significance of biological parentage.¹⁷ According to those resistant to acknowledging biological parentage, the institution of marriage and the legitimate family had to be safeguarded, taking care to ensure that any excessively beneficial treatment of the new social arrangements was not detrimental to the protection afforded to marriage. The entry into force of the Constitution, followed by the 1975 reform of family law, gave rise to a progressive development of the principles, thereby leading to a change in the interpretation of the legislation based on the central focus on the individual as a human being and the principle of equality and non-discrimination. It is important from the outset to stress the importance of supranational law and to point to its impact on the development of the principle of the equal status of all children.¹⁸ This includes in particular Art 21 (non-discrimination) of the Nice Charter of Fundamental Rights of the European Union, along with Arts 8 (Right to respect for private and family

¹⁵ L. Lenti, 'La sedicente riforma della filiazione' *Nuova giurisprudenza civile commentata*, II, 201-217, 207 (2013).

¹⁶ F. Prosperi, 'Parentela e famiglia nel prisma dell'unicità dello stato di filiazione', in R. Pane ed, *Il nuovo diritto di famiglia* (Napoli: Edizioni Scientifiche Italiane, 2015), 9; M.F. Tommasini, 'Parentela e filiazione nel nuovo sistema' *Diritto delle successioni e della famiglia*, 123-145, 124 (2015). In the area of inheritance law, L. Mengoni, 'Successioni per causa di morte. Successione legittima', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1990), 118, wrote that in the event that 'the deceased does not leave a spouse, ascendants, descendants or relatives within the sixth degree (...) In such an eventuality there are no principles that contrast with the claim of the natural brother or sister'.

¹⁷ F. Santoro-Passarelli, 'Parentela naturale, famiglia e successione' *Rivista trimestrale di diritto e di procedura civile*, 27-37, 33 (1981).

¹⁸ A. Morace Pinelli, 'Il problema della rilevanza giuridica della c.d. parentela naturale' *Rivista di diritto civile*, 345-358, 345 (2012).

life) and 14 (Prohibition of discrimination) of the European Convention on Human Rights (ECHR). The Italian law reforming the provisions governing filiation reformulated Art 74 of the *Codice Civile*, which stipulates that *parentela* (ie relationship by birth) is the bond between persons with a common ascendant, by adding the following phrase: ‘irrespective of whether filiation arose within marriage, outside of marriage, or if the child was adopted’, thereby redefining also the content of Art 258 by extending the effects of recognition to the parent’s relatives.¹⁹ Accordingly, following the entry into force of the amended legislation, all children are equal not only as regards their relations with their parents but also *vis-a-vis* other persons related to them by birth. The fact that children benefit from uniform legal status also implies uniform legal status for relationships with biological relatives arising as a result of recognition by a biological parent or a court order recognising filiation.

In reforming Art 74, Italian lawmakers adjusted the concept of *stirpes* – the branch of a family originating from an individual ascendant, establishing descendants and persons related by birth – enshrining the principle that a relationship by birth is associated with the fact of biological descent, irrespective of whether this was established within or out of wedlock. Following the amendments to Arts 74 and 258, the very notion of family as a matter of law has now changed, as it is no longer necessarily founded on marriage.²⁰ Thus there appears to be an increasingly strong tendency to set aside marriage as the constitutive locus of family law status. Accordingly, a question arises concerning the consistency of that new framework with Art 29 of the Constitution, which stipulates that marriage is a constituent and foundational element of the family, and with the part of the last paragraph of Art 30 of the Constitution that guarantees full legal and social protection to children born out of wedlock, insofar as compatible with the rights of the members of the legitimate family.

III. Recognition by a Biological Parent and Court Orders Recognising Filiation

As referenced above, the 1942 *Codice Civile* discriminated heavily against children born out of adulterous and incestuous relationships, who could not be recognised and to whom it was forbidden to make donations, and to some extent also to designate as beneficiaries of a will. The 1975 law on the reform of family law eliminated the prohibition on the recognition of

¹⁹ G. Frezza, ‘Gli effetti del riconoscimento’ *Nuove leggi civili commentate*, 493-498, 493 (2013).

²⁰ M. Sesta, ‘Stato unico di filiazione e diritto ereditario’ *Rivista di diritto civile*, 1-34, 7-8 (2014).

adulterous children and established in Art 261 of the *Codice Civile* that recognition entails the assumption by the parent of all duties and rights that apply to legitimate children. The new law on filiation, in Art 251 of the *Codice Civile*, permitted the recognition of incestuous children born to persons who are related either by direct descent or ascent or related by collateral descent or ascent to the second degree, or by direct descent or ascent with the spouse of the other person, subject to authorisation by a court of law, considering the interest of the child and the need to avoid any detriment to him.

The prevailing view within the literature is that the legal status of a child born out of wedlock is not an immediate effect of conception, as it is necessary that the relationship of filiation be recognised by one or both of the parents or by a court of law.²¹ In other words, conception becomes relevant for the right to recognise a child. According to the general view within the literature following the reform, the institution of recognition may be considered to reflect the development towards the separation of filiation from marriage, and an assertion of the protection of the relationship of filiation as a value that is self-standing and independent of the relationship between the parents.²² The new Art 250 of the *Codice Civile* permits the joint or separate recognition of a child born out of wedlock, provided that the effective assent of the child is obtained if he is older than fourteen (para 2). If the child is not older than fourteen, he cannot be recognised without the consent of the other parent, where that parent has already recognised the child; however, that consent cannot be refused if the interests of the child so dictate (paras 3-4). The amendment thereby acknowledges the child's right to participate in the choices of existential significance for him.²³ Prior to the reform, the purported recognition of a child by an individual under the age of sixteen was void due to lack of capacity. This law violated the right to the status of parent, and correspondingly the right of the child to the status of son or daughter, with the result that the child was ineligible for recognition.²⁴ The last paragraph of Art 250 of the *Codice Civile* now stipulates that parents younger than the age of sixteen cannot recognise a child unless authorised by a court.

IV. Codification of the 'Right to Be Oneself'

²¹ C.M. Bianca, *Diritto civile*, 2, I, *La famiglia* (Milano: Giuffrè, 2014), 364.

²² G. Ferrando, 'La nuova legge sulla filiazione. Profili sostanziali' *Corriere giuridico*, 525-535, 527 (2013).

²³ S. Troiano, 'Le innovazioni alla disciplina del riconoscimento del figlio naturale' *Nuove leggi civili commentate*, 451-474, 460 (2013); P. Virgadamo, 'Il riconoscimento del figlio a séguito della riforma della filiazione', in R. Pane ed, *Il nuovo diritto di famiglia* n 16 above, 193.

²⁴ C.M. Bianca, 'La crescita di personalità del minore nel nuovo diritto della filiazione', in G. Chiappetta ed, *Lo stato unico di figlio* (Napoli: Edizioni Scientifiche Italiane, 2014), 34.

The surname has the function of identifying a person.²⁵ The right to a surname satisfies the interest of the individual in the enjoyment of his own identity within society, and is a particularly important aspect of the right to personal identity. A change in surname may prevent the attribution to a person, within the social context in which he moves, of the full range of his conduct; it is the means by which the individual is commonly known within social relations. In addition, the surname offers a potential means for identifying any member of the family.²⁶

The case law of the Italian *Corte Costituzionale* has stressed for some time in relation to the issue of the allocation by the courts of the surname to a child born out of wedlock that the criteria for identifying the child's surname were dependent upon his interest in avoiding harm being caused to his personal identity.²⁷

Under Art 262 of the *Codice Civile*, the child takes the surname of the parent who recognised him. If both parents recognize the child at the same time, the child takes the father's name.²⁸ The right of the child to the maintenance of his personal identity and the expression of the family tie is broadly protected, as he is able to take his father's surname by adding it to that of the mother, replacing that of the mother, or placing it before that of the mother (para 2).

V. Children Born of Incestuous Relationships

The provision for a uniform status of filiation, (Art 315 of the *Codice Civile*) which completes the cultural process of establishing equality of filiation,²⁹ requires an end to the prohibition on the recognition of incestuous children, within the context of a clear distinction between the conduct of the parents and the dignity of the child, who is a person and certainly not a mere by-product of incest.³⁰ The repulsion towards the *damnatus coitus* is an

²⁵ L. Lenti, 'Nome e cognome' *Digesto delle discipline privatistiche, Sezione civile* (Torino: Utet, 1995), XII, 136.

²⁶ P. Perlingieri, *Il diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), II, 784.

²⁷ Corte costituzionale 23 July 1996 no 297, *Giurisprudenza costituzionale*, 2475 (1996). Within the literature, M. Dogliotti, n 1 above, 332.

²⁸ Eur. Court H.R., *Cusan and Fazzo v Italy*, Judgment of 7 January 2014, available at www.hudoc.echr.coe.it, ruled that the Italian legislation which allocates the male surname to legitimate children violates Art 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Pending the publication of the essay, the Italian Constitutional Court held the unconstitutionality of the rule which provides for the automatic attribution of father's name to the legitimate son, in presence of a different wish of the parents.

²⁹ C.M. Bianca, *Diritto civile* n 21 above, 325.

³⁰ L. Bardaro, *La filiazione non riconoscibile tra istanze di tutela e valori giuridici* (Napoli: Edizioni Scientifiche Italiane, 2015), 44.

objective fact: the fear and disgust aroused by incest cannot be denied.³¹ Incest is still a taboo at the root of social cohabitation.³² The prohibition on incestuous unions reflects the passage from nature to culture.³³ According to general rules, the child's express consent is required for recognition of an incestuous child if the child is a minor over the age of fourteen; moreover, if the child is younger than fourteen he must be consulted, with the appropriate precautions.³⁴ In the event that an action is brought by a child over the age of eighteen seeking recognition, there is no need for authorisation by the courts. The relationship between recognition and the commission of an offence pursuant to Art 564 of the Italian *Codice Penale*, in other words if recognition in itself will result in the criminal responsibility of the parents, is a delicate issue, which cannot be considered here in the depth that it would deserve.³⁵ It would be preferable for this not to be the result, which appears to be a more balanced solution. The abolition of the prohibition on the recognition of incestuous children is hailed today as one of the most significant innovations introduced by legge 10 December 2012 no 219.³⁶

VI. Parental Responsibility

Decreto legislativo 28 December 2013 no 154 replaced the concept of parental authority with the model of parental responsibility (*parental responsibility*, in the United Kingdom; *elterliche Sorge*, in Germany; *Obsorge*, in Austria; *autorité parentale*, in France; *Ouderlijk gezag* in the Netherlands).³⁷ The amendment stipulated that within all provisions of the *Codice Civile*, the *Codice di Procedura Civile*, the *Codice Penale* and in any legislation in force, the expressions 'authority' and 'parental authority' should be replaced by the expression 'parental responsibility'. The aim of this legislative change was to place the focus on the child and his rights. In other words, to move beyond a perspective centred on the parent. The replacement

³¹ C. Cicero, 'Il problema della filiazione incestuosa' *Rivista giuridica sarda*, 851 - 870, 854 (2003).

³² A. Horkheimer and T. Adorno, *Lezioni di sociologia* (Torino: Einaudi, 1966), 151.

³³ C. Lévi Strauss, *Le strutture elementari della parentela* (Milano: Feltrinelli, 1969), 67.

³⁴ C.M. Bianca, *Diritto civile* n 21 above, 367.

³⁵ Art 564 of the Criminal Code: '(Incesto) 1) *Chiunque, in modo che ne derivi pubblico scandalo, commette incesto con un discendente o un ascendente, o con un affine in linea retta, ovvero con una sorella o un fratello, è punito con la reclusione da uno a cinque anni. 2) La pena è della reclusione da due a otto anni nel caso di relazione incestuosa*'.

³⁶ T. Auletta, 'Riconoscimento dei figli incestuosi' *Nuove leggi civili commentate*, 475-492, 475 (2013).

³⁷ G. De Cristofaro, 'Dalla potestà alla responsabilità genitoriale: profili problematici di una innovazione discutibile' *Nuove leggi civili commentate*, 782-803, 782, (2014); G. Recinto, *Le genitorialità* (Napoli: Edizioni Scientifiche Italiane, 2016), 16; M. Dogliotti, n 1 above, 137.

of the term ‘authority’ with ‘responsibility’ indicates that the duties of parents are no longer strictly related to the legally subordinate status of the child.³⁸ It must however be stressed that the conception of parental authority according to the authoritarian conception of subjection had been in decline for a significant period before the reform.³⁹ The Italian literature has stressed the difficulties in classifying on a conceptual level the revocation of the parental responsibility.⁴⁰

It is a general principle that an underage child falls under the responsibility of the parents. A logical corollary of this, enshrined in Art 318 of the *Codice Civile*, is that the child cannot leave the family home definitively or temporarily without their consent.⁴¹ Under Art 316 of the *Codice Civile*, parental responsibility attaches to both parents, who must exercise it by mutual agreement, taking account of the abilities, natural inclinations and aspirations of the child. In the event of any differences of opinion relating to questions of particular importance, each parent may apply to the courts, which, after hearing the parents and ordering that the underage child be consulted if aged over twelve (or if younger but able to understand the situation), will suggest the solutions that are best capable of pursuing the interest of the child and family unity. If the dispute persists, the court will vest decision-making authority in the parent considered more capable of attending to the interests of the child in the specific case.⁴² Accordingly, the father is no longer attributed a more important role in situations in which it is necessary to take urgent action in relation to the child.

Under the new version of Art 315-*bis* of the *Codice Civile*, the child has the right to be maintained, educated and instructed and to receive moral assistance from his parents, taking due account of his abilities, inclinations and aspirations (para 1). This provision has now been incorporated into ordinary European law, establishing duties for the parent as a result of the filiation relationship, irrespective of the issue of parental responsibility. It should be pointed out that the right to moral assistance embraces the right of the child to receive loving care from his parents. The German BGB obliges direct ascendants and descendants to provide one another with maintenance and support (§ 1601: ‘Lineal relatives are under an obligation to maintain

³⁸ E. Al Mureden, ‘La responsabilità genitoriale tra condizione unica del figlio e pluralità di modelli familiari’ *Famiglia e diritto*, 466 (2014).

³⁹ A.G. Cianci, *Diritto privato e libertà costituzionali* (Napoli: Jovene, 2016), 157.

⁴⁰ M. Giacobbe, ‘Il prevalente interesse del minore e la responsabilità genitoriale. Riflessioni sulla riforma “Bianca”’ *Diritto di famiglia e delle persone*, 817-840, 818 (2014).

⁴¹ M. Porcelli, ‘Figli minori e divieto di abbandono della casa familiare’, in G. Carapezza Figlia, J.R. De Verda y Beamonte et al eds, *La casa familiare nelle esperienze giuridiche latine* (Napoli: Edizioni Scientifiche Italiane, 2016), 39-48, 39.

⁴² F. Ruscello, ‘Autonomia dei genitori, responsabilità genitoriale e intervento «pubblico»’ *Nuova giurisprudenza civile*, II, 717-727, 717 (2015).

each other’).⁴³ In Austria, the ABGB subjects both spouses to the obligation to provide for the needs of the children on a level commensurate with the financial and intellectual capabilities of the parent. Taking care of an underage child involves in particular attending both to his physical wellbeing and health, as well as his education, along with the development of his physical, mental, spiritual and moral capacity, in addition to the promotion of investments, abilities, inclinations and the child’s potential for development and his schooling and preparation for work (ABGB, § 160).⁴⁴ Similarly, Art 203 of the French *Code Civil* subjects parents to the obligation to provide maintenance, instruction and education (‘The spouses contract together, by the sole fact of marriage, the obligation of feeding, supporting and educating their children’).⁴⁵ In Spain, Art 110 of the *Código Civil* provides that ‘the father and the mother, even if they do not hold parental authority, are obliged to care for their underage children and to provide them with support’.⁴⁶

The Italian case law stipulates that the violation of the parental duties of maintenance, instruction and education towards their children may constitute a civil offence, resulting in the violation of rights protected under constitutional law. It may thus give rise to a self-standing action seeking the award of non-pecuniary damages pursuant to Art 2059 of the *Codice Civile*.⁴⁷ The traditional Italian view of family and civil liability as mutually exclusive appears to lie firmly in the past.⁴⁸

An underage child who is older than the age of twelve, or younger provided that he is able to understand the situation, has a right to be heard in relation to all questions and procedures that affect him (para 3).⁴⁹ The right to be heard, which is enshrined on the international level by Art 12 of the Convention on the Rights of the Child and Art 24 of the Nice Charter, has thus been established as a right of the child, and encompasses a right to the

⁴³ ‘*Verwandte in gerader Linie sind verpflichtet, einander Unterhalt zu gewähren*’.

⁴⁴ ABGB, §160: ‘(1) *Die Pflege des minderjährigen Kindes umfasst besonders die Wahrnehmung des körperlichen Wohles und der Gesundheit sowie die unmittelbare Aufsicht, die Erziehung besonders die Entfaltung der körperlichen, geistigen, seelischen und sittlichen Kräfte, die Förderung der Anlagen, Fähigkeiten, Neigungen und Entwicklungsmöglichkeiten des Kindes sowie dessen Ausbildung in Schule und Beruf*’.

⁴⁵ Art 203 French *Code Civil*: ‘*Les époux contractent ensemble, par le fait seul du mariage, l’obligation de nourrir, entretenir et élever leurs enfants*’.

⁴⁶ Art 110 *Código Civil*: ‘*el padre y la madre, aunque no ostenten la patria potestad, están obligados a velar por los hijos menores y a prestarles alimentos*’.

⁴⁷ Corte di Cassazione 22 July 2014, no 16657, *Foro italiano*, 2015 (2015); Corte di Cassazione 16 February 2015 no 1625, *Giurisprudenza italiana*, 2333 (2015); Corte di Cassazione 12 April 2016 no 7168, available at www.iusexplorer.it.

⁴⁸ A.C. Jemolo, ‘La famiglia e il diritto’ *Annali Seminario Giuridico dell’Università di Catania* (Napoli: Jovene, 1948-1949), III, 38; C. Cicero, ‘Responsabilità civile e tutela dei diritti coniugali: verso la configurazione del diritto al risarcimento del danno per violazione della serenità familiare’ *Responsabilità civile e previdenza*, 2449-2459, 2449 (2007).

⁴⁹ Corte di Cassazione 5 March 2014 no 5097, *Foro italiano*, 1067 (2014).

free expression of his own opinion in order to protect his overriding interests.

Finally, the child must respect the parents and must contribute, in line with his own capacities, his own belongings and his own income, to the maintenance of the family for as long as he lives within it (para 4).⁵⁰

The child has the right to grow up within the family and to maintain meaningful relations with relatives (Art 315-*bis*, para 2). The provision should be construed as recognising the fundamental contribution that relatives can make to the physical and psychological development of the child. The rule laid down in Art 317-*bis* of the *Codice Civile* is particularly significant in this regard in recognising that ascendants (grandparents) have the right to maintain significant relations with underage grandchildren. The case law of the European Court of Human Rights now includes relations between grandparents and grandchildren within the protection provided for under Art 8 ECHR (right to respect for private and family life).⁵¹ In France, the *Code Civil* recognises the right of the child to a relationship with his ascendants (Art 371-4: ‘A child has the right to have personal relations with his ascendants’).⁵² Section 1685 of the German BGB establishes a right in these terms for the grandparents, siblings and even for the previous ‘registered’ cohabitant of the parent, if this furthers the interests of the child (‘(1) Grandparents and siblings have a right to contact with the child if this serves the best interests of the child. (2) The same applies to persons to whom the child relates closely if these have or have had actual responsibility for the child (social and family relationship)’). It is in general to be assumed that actual responsibility has been taken on if the person has been living for a long period in domestic community with the child).⁵³ The Italian case law has recently stressed the significance of the so-called social parent, in accordance with Arts 7 and 24 of the Nice Charter and Art 8 ECHR, recognising the interest of the child in a stable and meaningful relationship with the cohabitant of the biological parent.⁵⁴

The child’s right to maintenance, which may be provided in various ways, for example through the transfer of ownership of particular assets,⁵⁵

⁵⁰ A. Bellelli, ‘I doveri del figlio verso i genitori nella legge di riforma della filiazione’ *Diritto di famiglia e delle persone*, 645-653, 649 (2013).

⁵¹ Eur. Court H.R., *Manuello and Nevi v Italy*, Judgment of 20 January 2015, available at www.hudoc.echr.coe.int; M. Bianca, ‘Il diritto del minore all’«amore» dei nonni’ *Rivista di diritto civile*, 155-178, 155 (2006); L. Lenti, ‘La sedicente riforma della filiazione’ *Nuova giurisprudenza civile commentata*, II, 201-217, 213 (2013).

⁵² ‘*L’enfant a le droit d’entretenir des relations personnelles avec ses ascendants*’.

⁵³ ‘1. *Großeltern und Geschwister haben ein Recht auf Umgang mit dem Kind, wenn dieser dem Wohl des Kindes dient. 2. Gleiches gilt für enge Bezugspersonen des Kindes, wenn diese für das Kind tatsächliche Verantwortung tragen oder getragen haben (sozial-familiäre Beziehung)*’.

⁵⁴ Corte d’Appello di Palermo 17 July 2015, *Corriere Giuridico*, 1549 (2015).

⁵⁵ Corte di Cassazione 23 September 2013 no 21736, *Diritto di famiglia e delle persone*, 590 (2013).

applies not only to underage children but also to adult children who have not yet become financially independent.⁵⁶ In some European legal systems there is a presumption that financial independence has been achieved at the twenty-first birthday; for example, in the Netherlands the obligation to provide maintenance extends until the twenty-first birthday of the child, but only if he remains in education, and otherwise ends at the age of eighteen (*Burgerlijk Wetboek Boek 1, Personen - en familierecht*, Art 394).

The position within the case law that is most widely supported in Italy is that maintenance is no longer owed when the child is able to secure a dignified life for himself out of his own income,⁵⁷ or when the failure to engage in gainful activity is due to inertia on the part of or an unjustified refusal by the child.⁵⁸ The parents' obligation to contribute to the maintenance of the children does not cease *ipso facto* when they reach the age of majority but continues unchanged until the parent seeks a declaration that the obligation no longer applies and furnishes proof that the child has become financially independent or that the failure to engage in gainful activity is due to inertia on the part of or an unjustified refusal by the child.⁵⁹

VII. Medically Assisted Reproduction

The biological relationship of filiation (characterised by a blood relationship between parents and children) and adoption are not the only forms of filiation recognised under Italian law.

Medically assisted reproduction (MAR) enables a relationship of filiation to be established without sexual intercourse between a man and a woman. Fertilisation may theoretically be homologous or heterologous, depending upon whether the gametes used originate from the couple or from third party donors.

Recourse to MAR is only permitted subject to the conditions and in the manner prescribed by law, which assures rights to all parties involved, including the embryo (legge 19 February 2004 no 40, Art 1, para 1). This form of fertilisation must be regarded as a therapeutic treatment aimed at resolving reproductive problems resulting from the couple's inability to carry a pregnancy to term. On this basis, in Italy medically assisted reproduction is only available to adult, heterosexual couples (both of whom must be alive), who must at least be cohabiting and of potentially fertile age (legge 19 February 2004 no 40, Art 5).

A child born as a result of the application of medically assisted

⁵⁶ Corte di Cassazione 8 February 2012 no 1773, available at www.iusexplorer.it.

⁵⁷ Corte di Cassazione 9 May 2013 no 11020, available at www.iusexplorer.it.

⁵⁸ Corte di Cassazione 2 April 2013 no 7970, available at www.iusexplorer.it.

⁵⁹ Corte di Cassazione 21 February 2007 no 4102, available at www.iusexplorer.it.

reproduction acquires the status of a child born of a marriage (if the couple was married at the time of birth) or of a child who has been recognised (if he was born when the couple was cohabiting). By contrast, children born to cohabitees not using MAR are not automatically recognised, and recognition by both parents is necessary.⁶⁰

The *Corte Costituzionale* has found the prohibition of heterologous fertilization to be unconstitutional.⁶¹ In cases involving heterologous reproduction, a spouse or cohabitee who has provided his consent (either expressly or if such consent can be implied from his actions) is prohibited from bringing an action to disclaim paternity (legge 19 February 2004 no 40, Art 9, para 1). The law also provides that a party who has donated gametes does not acquire any legal relationship with the newly born child (Art 9, para 3). The judgment of the *Corte Costituzionale* resulted from a long and lively debate centred on the need to balance and protect a variety of values, such as human life, freedom of self-determination in relation to reproductive choices, the family, health, freedom and scientific research. For a number of years, case law in Italy has acted as a substitute for the legislator; in some senses, Italian law endorses the provision contained in the Swiss Civil Code that enables a court to decide according to the rule that it would adopt as legislator in the event that no provision can be inferred either directly or by analogy from legislation.⁶²

VIII. On the Rights of Children Born as a Result of MAR

Drawing on Norberto Bobbio's discussion of the 'age of rights',⁶³ there is a fundamental question as to whether there is actually a right to have children that is guaranteed under constitutional law. This position is not currently unconditionally supported in the literature.⁶⁴

As discussed in Section VII, the *Corte Costituzionale*⁶⁵ has enabled couples who are completely sterile and infertile to resolve problems associated

⁶⁰ M. Dogliotti, n 1 above, 221; G. Ferrando, 'La fecondazione assistita nel dialogo fra le Corti' *Nuova giurisprudenza civile commentata*, 165 - 170, 165 (2016).

⁶¹ Corte costituzionale 10 June 2014 no 162, *Diritto di famiglia e delle persone*, 973 (2014); C. Cicero and E. Peluffo, 'L'incredibile vita di Timothy Green e il giudice legislatore alla ricerca dei confini tra etica e diritto; ovverosia, quando diventare genitori non sembra (apparire) più un dono divino' *Diritto di famiglia e delle persone*, 1290-1318, 1290 (2014); M. Porcelli, *Accertamento della filiazione e interesse del minore* (Napoli: Edizioni Scientifiche italiane, 2016), 71.

⁶² P. Rescigno, 'Il giudice come legislatore nel codice civile svizzero', in Id, *Codici. Storia e geografia di un'idea* (Roma-Bari: Laterza, 2013), 156.

⁶³ G. Vettori, 'Il tempo dei diritti' *Rivista trimestrale di diritto e di procedura civile*, 881-905, 881 (2014).

⁶⁴ S. Rodotà, *Tecnologie e diritti* (Bologna: Il mulino, 1995), 153.

⁶⁵ Corte costituzionale 10 June 2014 no 162, *Foro italiano*, 2324 (2014).

with the inability to procreate, thanks to the possibility of accessing systems of heterologous medically assisted reproduction. It is now important to understand what kind of protection the law guarantees to individuals born as a result of the use of those methods. This is a particularly emotive issue in Italy, especially following the enactment of the Law on civil unions between persons of the same sex (legge 20 May 2016 no 76). Legge 19 February 2004 no 40, regarding heterologous reproduction, intends to protection to the unborn not only by imposing a prohibition on the disclaimer of paternity and the prohibition on the mother's refusal to be designated as such (Art 9, paras 1 and 2), but also by guaranteeing the anonymity of the donor (Art 9, para 3). Within other European legal systems, protection is guaranteed by a general rule, for example within the *Code Civil* in France, which provides in relation to *assistance médicale à la procréation* (Art 311-19) that 'in case of a medically assisted procreation with a third party donor, no parental bonds may be established between the donor and the child born of the procreation (para 1); and consequently 'no claim in tort may lie against a donor (para 2)'.⁶⁶

One key problem associated with the recourse to heterologous medically assisted reproduction is the right of the child to know his own origins. The need to know one's own generic identity is related to the biological and social dimensions of human procreation. Such risks are not limited solely to potential tensions with other relatives or the anxiety experienced by the parents, but also to possible identity problems that a child born in this manner could develop after becoming aware of the three persons involved in his very existence.⁶⁷ This is in addition to the possibility of negative psychological dynamics that may arise when the child becomes aware that he was conceived with the egg or sperm of a third party unknown to him, and whom he might never have the opportunity to know.⁶⁸ It is thus difficult to resolve the question as to whether it is ideal for a person to be recognised as a child of certain parents notwithstanding that he is unaware of his own genetic heritage, or whether by contrast it is preferable for a person to be able to know who he is, where he comes from and why he was born.⁶⁹ The right guaranteed to biological parents to conceal the manner in which their child was procreated is without doubt at odds with the need, which is being

⁶⁶ 'En cas de procréation médicalement assistée avec tiers donneur, aucun lien de filiation ne peut être établi entre l'auteur du don et l'enfant issu de la procréation. Aucune action en responsabilité ne peut être exercée à l'encontre du donneur'.

⁶⁷ C. Flamigni, *Il secondo libro della sterilità. La fecondazione assistita* (Torino: Utet, 2008), 474; L. D'Avack, 'Diritti dell'uomo e biotecnologie: un conflitto da arbitrare' *Rivista di filosofia del diritto*, 9-30, 9 (2013).

⁶⁸ R. Pane, 'Ancóra sul diritto di conoscere le proprie origini' *Diritto delle successioni e della famiglia*, 435-455, 435 (2015).

⁶⁹ L. D'Avack, 'Il diritto alle proprie origini tra segreto, anonimato e verità nella P.M.A. con donatori/trici di gameti' *Diritto di famiglia e delle persone*, 815 - 836, 815 (2012).

increasingly felt within our society, to be able to know one's own origins.⁷⁰ It would be reasonable to treat the situation in a manner analogous to the legal regulation of adoption, where the identity of the biological parents can be revealed to adoptive parents, with the approval of the Juvenile Court, and to the adoptee. Certainly, in particular, the child should never be denied access to critical information that does not involve the identity of the parent.⁷¹ For a child, the need to know one's own genetic identity is a need rooted in the depths of the human condition – a natural right which is vested in the person solely by virtue of his human dignity.⁷² Additionally, a child born as a result of heterologous fertilisation may during his lifetime require access to genetic information that is relevant for his health.⁷³ However in such an eventuality it would be necessary to access this information without violating the confidential status of the various items of information relating to the identity of the donor.⁷⁴ In contrast to the current Italian law, Switzerland has not only established a right to access to one's own genetic data under constitutional law but also stipulates that, in situations involving heterologous fertilisation, the child has a right to know the identity of the donor once he has become an adult.⁷⁵ The situation is no different in Germany, where according to case law any agreement reached between doctors and parents seeking to exempt the former from the obligation to disclose information relating to the donor will be void as it is classified as causing harm to the third party.⁷⁶ This is not to mention the issues that would arrive from a request by the child to disclaim his parentage.

⁷⁰ R. Pane, 'Ancóra sul diritto di conoscere le proprie origini' n 68 above, 440.

⁷¹ Legge 4 May 1983 no 184, Art 28, para 1. In literature, T. Auletta, *Diritto di famiglia* (Torino: Giappichelli, 2014), 396.

⁷² The adoptee's right to know his own origin is a principle. In Italy, when the adopted person is twenty-five years old, he has the right to access information about his origin and get to know the identity of his biological parents (legge 4 May 1983 no 184, Art 28, para 5).

⁷³ U. Salanitro, 'Procreazione medicalmente assistita', in E. Gabrielli ed, *Commentario al codice civile* (Torino: Utet, 2010), IV, 505.

⁷⁴ The necessary balance between the right of the born to know his genetic origins and the right to anonymity of gamete donor, is legally defined by providing that the donor does not acquire any legal parental relationship with the born (legge 19 February 2004 no 40, Art. 9, para 3).

⁷⁵ The Swiss Federal Constitution, Art 119, para 2.

⁷⁶ OLG Hamm 6 February 2013.

Confidentiality and the (Un)Sustainable Development of the Internet

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Abstract

The right to privacy is compromised on a daily basis by the commercial practices of today's information society. The Schrems case is an example of the risks of the processing of personal data on the internet. The European regulatory system for the protection of personal data cannot ensure effective protection of its citizens' information. Therefore, this article proposes a reconceptualisation of the internet by classifying it as an aspect of the environment in which people live. Although it is a virtual dimension, there is still a need to apply the rules established to protect the real habitat, such as, for example, those that recognise a specific corporate social responsibility.

I. Introduction: Lost Privacy

There was once a young student who had long conversations, posted images of his life and opinions of all kinds via a large virtual community of friends, like all of his peers. In short, thanks to the community, he was in contact with others, and his life was shared with them.

As in the best stories, it is worth including an element of drama, in this case, Orwellian.

One day, the hero of our story found out that all of this information, which he had given in good faith to the community, was transferred and collected in another country, far from his own. Upon hearing the news, he was amazed, as he had never thought about where all of the different aspects of his private life were preserved. Unfortunately, that was not all. The young man learned that the information was at the mercy of the State where the community had sent it. The intimacy of his life had been violated. He was not as safe as he had believed.

The student therefore decided to seek justice. He appealed to a judge, who received his complaints, recognised the injustice of what had happened, and in order to protect the young man, eliminated the conditions which led to the violation of his rights and his freedom.

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It could be possible to conclude that they lived happily ever after! However, what seems like a happy ending actually is not.

Narrative prudence would include a warning that any reference to real events or circumstances is totally random. However, this story is not fictional, but a recounting of real events. The protagonist of the story is, in fact, Maximilian Schrems, an Austrian student, who one day decided to challenge the opaque personal information management practices of the most famous global social network.

In order to address the challenges posed by the (un)sustainable development of the internet, the present essay is structured as follows: part II describes the *Schrems* case; part III discusses the current regulatory environment as regards protection of privacy; part IV highlights the environmental dimension of the internet and the role of market participants in leading its development; and finally, part V focuses on Corporate Social Responsibility as potentially a feasible way to address the issues at stake.

II. The *Schrems* Case

The *Schrems* case, decided by the European Court of Justice on 6 October 2015,¹ is one of the recent cases that have been among the most shocking to the internet community.

Judges in Italy² and around the world³ often make decisions regarding

¹ Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* (European Court of Justice Grand Chambre 6 October 2015) available at www.curia.europa.eu.

² On a national level, Tribunale di Roma 14 July 2015, *Annali italiani del diritto d'autore*, 1020 (2015); Tribunale di Roma 9 July 2014, *Diritto dell'informazione e dell'informatica*, 953-956 (2014); Corte di Appello di Milano 27 February 2013, with commentary by F. Resta, 'Diritti individuali e libertà della rete nel caso "Vivi Down"' *Giurisprudenza di merito*, 1589-1600 (2013); Corte di Appello di Milano 21 December 2012, *Foro italiano*, II, 593-599 (2013); Tribunale di Roma 8 August 2012, 'Diritti d'autore' *Repertorio del Foro italiano*, 163 (2015); Tribunale di Roma 20 October 2011, *Annali italiani del diritto d'autore*, 772-779 (2012); Tribunale di Catania 21 April 2011, *Giurisprudenza annotata di diritto industriale*, 245 (2012); Tribunale di Milano 12 April 2010, with commentary by V. Pezzella, 'Google Italia, diffamazione e riservatezza: il difficile compito del provider' *Giurisprudenza di merito*, 2232-2261, 2219 (2010); Tribunale di Roma 11 February 2010, with commentary by L. Guidobaldi, 'YouTube e la diffusione di opere protette dal diritto d'autore: ancora sulla responsabilità dei providers tra hoster attivi, conoscenza dell'illecito e obbligo di sorveglianza' *Diritto dell'informazione e dell'informatica*, 275-293, 278 (2010); Tribunale di Mantova 24 November 2009, with commentary by N. De Luca and E. Tucci, 'Il caso Google/Vivi Down e la responsabilità dell'Internet service provider – Una materia che esige chiarezza' *Giurisprudenza commerciale*, II, 1215-1232 (2011).

³ In relation to foreign courts, for example, in Germany see Bundesgerichtshof 14 May 2013, with commentary by G. Giannone Codiglione, 'Funzione "auto-complete" e neutralità del prestatore di servizi' *Diritto dell'informazione e dell'informatica*, 541-557, 547 (2013); and Eur. Court H.R., *Delfi AS v Gov. Estonia*, Judgment of 10 October 2013, with commentary by F. Vecchio, 'Libertà di espressione e diritto all'onore in Internet secondo la sentenza "Delfi As contro Estonia" della corte europea dei diritti dell'uomo' *Diritto dell'informazione e*

the internet. It is worth considering the cases related to the liability of hosting providers, which consider the recognition and protection of the so-called right to be forgotten.⁴ However, service providers have generally failed to implement the guidelines created by these cases. Although some judges have attempted to challenge the service providers' responsibility regimes, which strongly favour their own interests,⁵ significant breaches in the security systems of information society companies have appeared.⁶

dell'informatica, 29-56, 43 (2014); in France, see Tribunal de grande instance de Paris 2 July 2007, with commentary by N. Lombardi, 'Il lato oscuro dell'avatar e la responsabilità dell'Internet provider: second life davanti alla giustizia francese' *Diritto dell'internet*, 39-44, 42 (2008); and Tribunal de grande instance de Paris 19 October 2006, with commentary by E. Falletti, 'La responsabilità dell'Internet provider in diritto comparato per materiale pubblicato da terzi' *Diritto dell'internet*, 137-147, 140 (2007); in the United Kingdom, see Court of appeal 14 February 2013, with commentary by T. Scannicchio, 'La responsabilità del provider di fronte alle corti inglesi: una vittoria di Pirro per Google?' *Diritto dell'informazione e dell'informatica*, suppl. 732-762, 751 (2013); in the USA see Federal jurisdiction Southern District Court New York 23 June 2010, with commentary by F. Giovanella, 'Responsabilità indiretta per violazione del diritto d'autore: You Tube attracca (per ora) in un porto sicuro – In tema di responsabilità del service provider' *Danno e responsabilità*, 240-253, 243 (2011).

⁴ Recently, Case C-131/12 *Google Spain SL v Agencia Española de Protección de Datos* (European Court of Justice Grand Chamber 13 May 2014) available at www.curia.europa.eu. European judges recognise in the holder of personal data, the object of treatment, the right to the control over the protection of their own social image, which can result, even in the case of real news, for the record, in the claim to the 'contextualisation and updating' of the same, and if appropriate, also to its deletion. This is because the owner of an *online* information organisation is recognised as responsible for ensuring the constant updating of disclosed information. The fact that the information is moved, after some time, to historical archives published on the web, does not exempt the *internet* site operator from the obligation of maintaining 'the characters of truth and accuracy and therefore of lawfulness and fairness, the right to protection concerned the treatment of the moral or personal identity as well as safeguarding of the citizen's right to receive complete and correct information'. More recently, on a national level, Tribunale di Roma 3 December 2015, *Foro italiano*, I, 1040-1044 (2016). See the particular position of the Tribunal de grande instance de Paris 24 November 2014, *Diritto dell'informazione e dell'informatica*, 532-538 (2015).

⁵ On the theme of the responsibility of the *provider*, see F. Di Ciommo, *Evoluzione tecnologica e responsabilità del provider* (Napoli: Edizioni Scientifiche Italiane, 2003); T. Pasquino, *Servizi telematici e criteri di responsabilità* (Milano: Giuffrè, 2003); M. Gambini, 'Colpa e responsabilità nella fornitura di servizi internet', in R. Clarizia ed, *I contratti informatici*, in P. Rescigno and E. Gabrielli eds, *Trattato dei contratti* (Torino: Utet, 2007), 610; E. Tosi, 'Le responsabilità civili dei prestatori di servizi della società dell'informazione' *Responsabilità civile*, 197-209 (2008); S. Sica and N. Brutti, 'La responsabilità in internet e nel commercio elettronico', in G. Visintini ed, *Trattato della responsabilità contrattuale* (Padova: Cedam, 2009), II, 503-538; M. De Cata, *La responsabilità civile dell'internet service provider* (Milano: Giuffrè, 2010), 190-213; M.G. Materna, 'Protecting Generation Z: A Brief Policy Argument Advocating Liability for Internet Service Providers' 47 *University of San Francisco Law Review*, 109, 119-124 (2012); C. Robustella, 'Contratti di fornitura di servizi telematici', in S. Monticelli and G. Porcelli eds, *I contratti dell'impresa* (Torino: Giappichelli, 2013), 195-207, 199; B.A. Oliver, 'Now Playing at a YouTube Near You: "Innocence of Internet Service Providers"' 21 *University of Miami International and Comparative Law Review*, 107, 126-136 (2013).

⁶ See Tribunale di Milano 12 April 2010 n 2 above, 2232; and Tribunale di Milano 31 March 2011, with commentary by E. Tosi, 'La responsabilità civile per fatto illecito degli

In contrast to these cases, the *Schrems* case immediately assumed – and continues to have – extraordinary economic and diplomatic importance.

At this point, it is necessary to retell the story.

The *Schrems* case called on the Court of Justice to interpret Arts 7, 8 and 47 of the Charter of Fundamental Rights of the European Union and Arts 25, para 6, and 28 of the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data – in this case, making reference to the provisions governing the transfer of data to third countries and the establishment of supervisory authorities in relation to data processing. In addition, the Court of Justice was requested to rule on the validity of Decision no 520 of 2000 of the European Commission⁷ (the so-called Safe Harbour), and in particular, on the adequacy of the protection offered by the principles contained therein and the information on privacy published by the Department of Commerce of the United States of America.⁸

The appeal arose in the context of a dispute between Schrems and the Irish Data Protection Commissioner concerning the Commissioner's refusal to investigate a complaint filed by Schrems about the fact that Facebook Ireland transfers the personal data of its users to the United States, storing it on servers there.

Schrems requested the Commissioner to exercise his powers to prohibit the transfer of personal data, based on the assertion that the law and current practices in the United States did not offer sufficient protection of personal data against control activities by public authorities. Schrems was referring to revelations made in 2013 by Edward Snowden, a former CIA technician, regarding mass-media surveillance programs set up by US intelligence, in particular the National Security Agency (NSA).⁹

The Irish Commissioner dismissed Schrems's complaint as unfounded on the basis of the absence of evidence that the NSA had had access to the personal data concerned. The Commissioner also added that the complaints put forward could not be invoked, since the level of protection of personal

Internet service provider e dei motori di ricerca a margine dei recenti casi "Google suggest" per errata programmazione del software di ricerca e "Yahoo! Italia" per link illecito in violazione dei diritti di proprietà intellettuale' *Rivista di diritto industriale*, II, 17-66, 44 (2012).

⁷ For further details, see <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000D0520> (last visited 6 December 2016).

⁸ For further details, see www.export.gov/safeharbor/index.asp (last visited 6 December 2016).

⁹ For the reconstruction of events, see https://it.wikipedia.org/wiki/Edward_Snowden (last visited 6 December 2016) and M. de Zwart, 'Whistleblowers and the Media – Friends or "Frenemies"?' 38 *Alternative Law Journal*, 250, 252 (2013); R. Huseyin, 'EU Demands that Light is Thrown on PRISM' 13 *Privacy and Data Protection*, 16-17 (2013); G.A. Sinha, 'NSA Surveillance Since 9/11 and the Human Right to Privacy' 59 *Loyola Law Review*, 861-946 (2013); R. Corbet, 'Expert Comment – Data Protection' 7 *Data Protection Ireland*, 2 (2014); G. Greenwald, *No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State* (New York: Macmillan, 2014), 90.

data in the United States had been assessed by the Commission to be in compliance with European law through the so-called Safe Harbour.

Subsequently, Schrems appealed the decision of the Commissioner before the Irish High Court, which held that although the electronic surveillance and interception of personal data transferred from the European Union to the United States was necessary for the public interest, Mr Snowden's revelations showed that the NSA and other federal agencies had committed 'considerable excesses'.¹⁰

The Court of Appeal found that the matter concerned the implementation of EU law under Art 51 of the Charter of Fundamental Rights, so that the legality of the decision referred to in the main proceedings had to be assessed on the basis of EU law. According to the Irish judges, the Safe Harbour did not meet the requirements of European law. For the High Court, the right to respect for privacy,¹¹ as guaranteed by the Charter of Fundamental Rights and the constitutional systems of many Member States,¹² would be meaningless if the authorities were authorised to access electronic communications on a random and generalised basis, without any objective justification based on the grounds of national security or crime prevention.

Based on this interpretation, the Irish High Court suspended the proceedings and referred the case to the Court of Justice for a preliminary ruling. The Irish judges asked the European Court of Justice whether and to what extent, in light of the Charter of Fundamental Rights, Directive 95/46/EC should be interpreted as meaning that a decision adopted under that Directive (such as the Safe Harbour) prevents a national supervisory authority from examining the application of a party requesting protection for personal data transferred to a third country whose legal system does not ensure an adequate level of protection.

¹⁰ High Court of Ireland 18 June 2014, available at <http://www.courts.ie/Judgments.nsf/0/481F4670D038F43380257CFB004BB125> (last visited 6 December 2016), wherein it is also recognised that '(g)iven the general novelty and practical importance of these issues which have considerable practical implications for all 28 Member States of the European Union, it is appropriate that this question should be determined by the Court of Justice'.

¹¹ Ibid: 'in this regard, it is very difficult to see how the mass and undifferentiated accessing by State authorities of personal data generated perhaps especially within the home – such as e-mails, text messages, internet usage and telephone calls – would pass any proportionality test or could survive constitutional scrutiny on this ground alone. The potential for abuse in such cases would be enormous and might even give rise to the possibility that no facet of private or domestic life within the home would be immune from potential State scrutiny and observation'. On top of that, the controversial effectiveness of the Safe Harbour principles was called into question by the Commission itself in 2013 and fuelled new negotiations between the EU and the US. To this extent, see X. Tracol, '“Invalidator” Strikes Back: The Harbour Has Never Been Safe' 32 *Computer Law and Security Review*, 345, 348-349 (2016); and M. Corley, 'The Need for an International Convention on Data Privacy: Taking a Cue from the CISG' 41 *Brooklyn Journal of International Law*, 721, 750 (2016).

¹² Arts 7 and 8 of the Charter of Fundamental Rights of the European Union, and, for example, Arts 13-15 of the Italian Constitution.

This requires examination of the meaning of an ‘adequate level of protection’. The Court of Justice stated that although it cannot ‘demand that a third country ensures a level of protection identical to that provided by European Law’,¹³ the expression ‘adequate protection’ must be interpreted so as to mean that the third country must ensure ‘effectively, in view of its national legislation or its international commitments, a level of protection of freedom and fundamental rights substantially equivalent to that provided in the European Union’.¹⁴ The Court stressed that otherwise ‘the high level of protection guaranteed by European law could be easily circumvented by transfers of personal data (...) to third countries’.¹⁵ This point illustrates a common fear that partially recurs in the present case.

Essentially, the European judges allowed that the instruments that a third country uses to ensure an adequate level of protection might be different from those implemented in the EU. However, in order to ensure compliance with the requirements of European legislation, these instruments must nevertheless ‘be effective in practice, in order to ensure a substantially equivalent protection’¹⁶ throughout Europe.

Thus, the interpretation offered by the Court of Justice implies a strict standard and raises some concerns.

Initially, the European judges held that a provision allowing public authorities to gain general access to the content of electronic communications ‘undermines the essential content of the fundamental right to privacy’.¹⁷ For the Court, a valid decision, such as the one regarding the Safe Harbour, requires a finding that the third country in question effectively ensures a level of protection of fundamental rights equivalent to that provided under European law.¹⁸

Since the Commission, in the Safe Harbour decision, did not ‘claim’ that the United States effectively ‘guarantees’ an adequate level of protection,¹⁹ the Court did not find it necessary to ‘examine the Safe Harbour Principles in terms of their content’, but rather concluded that the Commission’s decision infringes the requirements set out by European legislation and is, for this reason, invalid.

Thus, the Safe Harbour has been eliminated, as it was found to be too vague and too lenient regarding the transfer and processing of personal data

¹³ See Case C-362/14 n 1 above, para 73.

¹⁴ European judges clarify that: ‘(i)t is clear from the express wording of Art 25(6) of Directive 95/46 that it is the legal order of the third country covered by the Commission decision that must ensure an adequate level of protection’ (Case C-362/14 n 1 above, para 74).

¹⁵ *Ibid* para 73.

¹⁶ *Ibid* para 74.

¹⁷ *Ibid* para 94.

¹⁸ *Ibid* para 96.

¹⁹ *Ibid* para 97.

in (or directed towards) the United States.

The effects of this ruling are still unfolding. If the Safe Harbour agreement falls short, there is no longer a guarantee that the transfer and processing of personal data in (or directed towards) the United States is compliant with an adequate level of protection. Nevertheless, *mutatis mutandis*, some might say: The undertaking must go on! The ball seems to have been passed to the national supervisory authorities, which have the power to examine individual instances of the protection of privacy in relation to information that has been transferred from the EU to a third country.

III. Protection of Privacy

The issue of protection of personal data is part of a delicate institutional relationship.

In October 2015, the Italian Data Protection Authority, in light of the ruling in the *Schrems* case, issued a measure (no 564) entitled ‘Personal data transfer to the US: unconstitutionality of the Authority ruling of 10 October 2001 of recognition of the agreement on the so-called ‘Safe Harbour’’.²⁰ With this measure, the Guarantor for privacy nullified a previous authorisation that allowed the transfer of data to the United States and made clear that in order to transfer information overseas, multinational companies, organisations and Italian companies will have to make use of other possibilities provided for by the legislation on the protection of personal data.

The Guarantor therefore confirmed that the businesses can lawfully transfer the data, but only by making use of tools such as model contracts or Codes of Conduct adopted within the same group (the so-called BCR, Binding Corporate Rules).²¹ The Control Authority has ultimately retained the power to verify the legality and correctness of the data transfer from those who export them.

In the absence of an agreement, the trans-border transfer should be allowed in light of the exceptions laid down by Art 26 of Directive 95/46/EC and the Data Protection Code.²² The reference, in this case, is to the authorisation freely expressed by the parties concerned on the basis of a

²⁰ Ruling by the Authority for Personal Data Protection no 564 of 22 October 2015 (doc web no 4396484), available at <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/4396484> (last visited 6 December 2016).

²¹ The Authority, in this way, ‘orders the unconstitutionality of the authorisation adopted by the Authority on 10 October 2001 by resolution n. 36 and the effect prohibits, under Arts 154, paragraph 1, lett. d) and 45 of the Code, to the exporters subject to transfer, on the basis of this resolution and of the conditions specified in that, personal data from the State’s territory to the United States of America’.

²² Arts 43 and 44 Data Protection Code.

specific and informed consent, through the use of model contracts.²³

The Control Authority emphasised that these contractual provisions must, however, be quoted or incorporated into contracts so that they can be recognisable to the people to whom the data refers to, or to those who ask to access it.²⁴

Returning to the specific issue in the *Schrems* case, the transfer of data by Facebook Ireland to the United States seems to have reached a questionable impasse. The Court of Justice chose to privilege the protection of privacy over business activities, thus forcing European and North American institutions to promptly counterbalance the potentially negative economic consequences of the ruling.²⁵

In February 2016, the EU and the United States took an important step to overcome the dispute by reaching a new agreement to replace the Safe Harbour. The Privacy Shield²⁶ is a new international agreement that aims to

²³ Which gives authorisations, ex art 44, para 1, letter b) of the Data Protection Code, by the Guarantor dated October 10, 2001, by resolution no 35 (doc web no 42156), 9 June 2005, by resolution no 12 (doc web no 1214121) and 27 May 2010, by resolution no 35 (doc web no 1,728,496, in this regard, see also the subsequent Authority Provision of 15 November 2012, web doc no 2191156); or otherwise by reason of the adoption, within companies belonging to the same group, the rules of conduct in Art 44, para 1, letter a) of the Data Protection Code, referred to as Binding Corporate Rules ('BCR', cf in order to 'Bcr for Controller' among others, the documents of the 'Group ex Art 29', WP 74 of 3 June 2003, WP 108 of 14 April 2005 and WP 153 of 24 June 2008; whereas, with regard to 'Bcr for Processor', the documents WP 195 of 6 June 2012 and WP 204 of 19 April 2013); or if they are authorised by the Guarantor, pursuant to Art 44, para 1, letter a) of the Code, on the basis of appropriate safeguards for the rights identified by this scheme in relation to warranties offered with a contract. For the definition of the Model Contracts for the transfer of personal data to third countries, see http://ec.europa.eu/justice/data-protection/international-transfers/transfer/index_en.htm (last visited 6 December 2016).

²⁴ Ruling by the Authority for Personal Data Protection no 35 of 10 October 2001 (doc web no 42156), available at <http://www.garantepriacy.it/web/guest/home/docweb/-/docweb-display/docweb/1669728> (last visited 6 December 2016), with it being set out that 'the data exporter and the data importer refer to or incorporate the clauses in the data transfer contract so as to make them also recognisable for the individuals to whom the data refer, where they request to be informed about the clauses; additionally, they may not lay down contractual provisions that impose limitations on or contradict the standard contractual clauses (see Clause no 4, letter c) and no 5, letter e), and Recital no 5 in the Commission's decision)'.
²⁵ See http://europa.eu/rapid/press-release_IP-16-433_it.htm (last visited 6 December 2016).

²⁶ The details are summarised in http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_eu-us_privacy_shield_en.pdf (last visited 6 December 2016). The Commission has recently assessed the new agreement against the criteria set out in the *Schrems* case – and confirmed its adequacy. See Commission implementing Decision of 12/7/2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Privacy Shield, available at http://ec.europa.eu/justice/data-protection/files/privacy-shield-adequacy-decision_en.pdf (last visited 6 December 2016). As regards the key features and academic reception of the Privacy Shield, see K.K. Dort and J.T. Criss, 'Trends in Cybersecurity Law: The Privacy Shield, and Best Practices for Business Operating in the Global Marketplace' 33 *The Computer & Internet Lawyer*, 3, 6-7 (2016); S. Kahn, 'Invalidity of US-EU Safe Harbour Part 2: Practical Implications and the New Privacy

re-establish confidence in the flow of data by providing a system of rules with which US companies are required to comply when handling the data of European citizens.

In addition, the US government formally committed itself to ensuring the implementation of the agreement. The goal is to prevent the US authorities from gaining general access to European citizens' data in the future. In this sense, US companies will have to comply with solid obligations concerning personal data processing to guarantee the rights of individuals, while the Department of Commerce of the United States will have to verify that the companies publicly disclose their commitments.²⁷

Nevertheless, in September 2016, Facebook's website on 'data-regulation' in the 'how our global services operate' section still reads:

'Facebook Inc. complies with the Safe Harbour framework, in force between the US and European Union (...), in relation to the collection, use and retention of data from the EU. Information collected within the European Economic Area ('EEA') may be transferred to countries outside for the purposes described in this policy'.²⁸

Currently, Facebook only refers to the standard contractual clauses approved by the European Commission. However it is not clear to the user where to find these clauses and when they have been signed. Facebook has no other relevant provisions in its contract or in its declaration of rights and responsibilities. Therefore, a transfer of data by Facebook to the United States would not be adequately safeguarded in accordance with Art 25 of Directive 95/46/EC and Arts 43 and 44 of the Data Protection Code.

It is therefore ironic that the service provider has continued for many months to refer to an agreement that is no longer valid. Above all, it is surprising to note that there are no clear and recognisable contract clauses allowing for an agreement to weaker personal data protection legislation. The transfer to the North American servers would thus seem to take place outside of a fully legal context.²⁹

Shield' 5 *Compliance and Risk*, 10-12 (2016); E. Ustaran, 'The Privacy Shield Explained – Part 2' 16(6) *Privacy and Data Protection*, 3-4 (2016); Id, 'The Privacy Shield Explained – Part 3' 16(7) *Privacy and Data Protection*, 3-4 (2016).

²⁷ See <https://www.commerce.gov/news/fact-sheets/2016/02/eu-us-privacy-shield> (last visited 6 December 2016).

²⁸ See <https://www.facebook.com/privacy/explanation#> (last visited 6 December 2016).

²⁹ The Data Protection Commissioner has announced, through the document 'Statement by the Office of the Data Protection Commissioner in respect of application for Declaratory Relief in the Irish High Court and Referral to the CJEU' that 'We continue to thoroughly and diligently investigate Mr Schrems' complaint to ensure the adequate protection of personal data. We yesterday informed Mr Schrems and Facebook of our intention to seek declaratory relief in the Irish High Court and a referral to the CJEU to determine the legal status of data transfers under Standard Contractual Clauses. We will update all relevant parties as our

Alarming, this phenomenon involves more than thirty five million users in Italy alone.³⁰ What is even more noteworthy is the position of the Guarantor for the protection of personal data, who, as previously mentioned, formally verifies the legality and correctness of such data transfers: he does not seem to have taken a position on this particular case, and is probably waiting for a user complaint.

IV. The Internet as an Environmental Dimension

The *Schrems* case is only one of numerous disputes highlighting a need to reconsider the internet as neither as a mere communication tool nor as a simple market space.³¹ It is necessary to be fully aware of the relationship between the internet and the habitat in which individuals live.³²

According to a common definition, the environment is everything that surrounds an organism.³³ It refers to a complex system that surrounds a subjective reference point. This leads us to think that this universe of elements

investigation continues', available at <https://www.dataprotection.ie/docs/25-05-2016-State-ment-by-this-Office-in-respect-of-application-for-Declaratory-Relief-in-the-Irish-High-Court-and-Referral-to-the-CJEU/1570.htm> (last visited 6 December 2016).

³⁰ The data are taken from <http://www.panorama.it/mytech/social/facebook-numeri-impressionanti/> (last visited 6 December 2016).

³¹ See M. D'Ambrosio, 'Social network e diritti della personalità. Considerazioni in tema di privacy e responsabilità civile' *Rivista giuridica del Molise e del Sannio*, 330-344 (2012); G. Briscoe, S. Sadedin and P. De Wilde, 'Digital Ecosystems: Ecosystem-oriented Architectures' 10 *Natural Computing*, 1143, 1160-1161 (2011); A. Fischer-Lescano, 'Struggles for a Global Internet Constitution: Protecting Global Communication Structures Against Surveillance Measures' 5 *Global Constitutionalism*, 145-172 (2016). Regarding the web as a useful tool for uniting communication techniques, see M. Betzu, 'La libertà di corrispondenza e comunicazione nel contesto digitale' *Quaderni costituzionali*, 511-524, 513 (2006).

³² For a more detailed reconstruction of the concept of environment and its interaction with the market, see P. Cough, 'Trade-environment Tensions' 19 *EPA Journal*, 28-30 (1993); H. Weiss, 'Making Market Forces Work to Improve the Environment' 21 *Environmental Policy and Law*, 153-155 (1993); I. Barailuc, 'Copyright Enforcement in the Digital Age: A Post-ACTA View on the Balancing of Fundamental Rights' 21 *International Journal of Law and Information Technology*, 92, 95 (2013); M. Pennasilico, 'Sostenibilità ambientale e riconcettualizzazione della categorie civilistiche', in Id, *Manuale di diritto civile dell'ambiente* (Napoli: Edizioni Scientifiche Italiane, 2014), 161-268; P. Passaglia, 'Internet nella Costituzione italiana: considerazioni introduttive', in M. Nisticò and Id eds, *Internet e Costituzione* (Torino: Giappichelli, 2014), 1-55; F. Capra and U Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland: Berrett-Koehler Pub, 2015); M.R. Allegri, 'Riflessioni e ipotesi sulla costituzionalizzazione del diritto di accesso ad internet (o al ciber spazio?)' *Rivista AIC*, 1-31, 8 (2016), available at <http://www.rivistaaic.it/riflessioni-e-ipotesi-sulla-costituzionalizzazione-del-diritto-di-accesso-a-internet-o-al-ciberspazio.html> (last visited 6 December 2016); B. Cooreman, 'Addressing Environmental Concerns Through Trade' 65 *International and Comparative Law Quarterly*, 229, 236-239 (2016); P. Yeoh, 'International Trade Agreements and Global Economic Governance' 37 *Company Lawyer*, 235, 236-237 (2016).

³³ See the item 'Ambiente' available at www.treccani.it.

has an exclusively physical nature. The environment is imagined as a natural place made up of biotic and abiotic elements in which individuals are immersed. However, it is worth noting that, for some time, many other factors contribute to the definition of environment. This is evident when considering the current parameters used to define the quality of a habitat in which people live.³⁴ A healthy environment, in fact, no longer depends only on the natural characteristics of places, but also on the social aspects, which mirror the relationships between individuals.³⁵ The reference is to intangible, non-physical characteristics, which are deeply relevant in determining the quality of life of people.

Individuals in the globalised world are immersed in a context that is no longer exclusively related to their place of birth or residence. People constantly operate in a virtual space, where they establish both economic and personal relationships, while considering the internet to be their future.³⁶ The internet expresses human nature, and thus, is a metaphysical extension of the environment in which humans live and work.

This highlights the need for this dimension of the habitat to be governed by regulations that take into consideration the value of the person.³⁷ Too often, rules are shaped to satisfy, first of all, economic interests. The regulatory framework of the internet consists of a set of rules that mostly regulate economic aspects.³⁸ The early concern of European legislators, and in turn,

³⁴ The reference is, for example, the Report of the World Commission on Environment and Development of 1987 (known as Brundtland) and the Report by the Commission on the Measurement of Economic Performance and Social Progress (also known as Stiglitz).

³⁵ As highlighted by M. Pennasilico, 'Sviluppo sostenibile, legalità costituzionale, e analisi "ecologica" del contratto' *Persone e mercato*, 37-50, 39 (2015), who recalls that the environmental interests, 'which have long constituted an external "limit" to European policies, since the original EU legislation responded only to the economic interest of the protection of competition, may be regarded today as an immanent and an "internal" limit to development policies, consistent with the symbiotic relationship between the two terms of the phrase "sustainable development" '.

³⁶ See A. Cunningham, 'Rights Expression on Digital Communication Networks: Some Implications for Copyright' 13 *International Journal of Law and Information Technology*, 1, 8-9 (2005); J. Stanley, 'The ABC of Digital Business Ecosystems' 1 *Communication Law*, 12-25 (2010); M. D'Ambrosio, n 31 above, 331-333; I. Barailuc, n 32 above, 95; C. Perlingieri, *Profili civilistici dei social networks* (Napoli: Edizioni Scientifiche Italiane, 2014), 66-68; J.J.A. Shaw, 'From *Homo Economicus* to *Homo Roboticus*: An Exploration of the Transformative Impact of the Technological Imaginary' 11 *International Journal of Law in Context*, 245, 256 (2015).

³⁷ Regarding the reconstruction of environmental protection in relation to protection of the person, see M. Pennasilico, n 35 above, 39-41. The worldwide scale of the issue involves uncertainty in terms of governing law, as outlined by S.G. Schulhofer, 'An International Right to Privacy? Be Careful What You Wish For' 14 *International Journal of Constitutional Law*, 238, 242 (2016); M. Corley, n 11 above, 721-722 (2016), and B. Zhao and G.P. Misfud Bonnici, 'Protecting EU Citizens' Personal Data in China: A Reality or a Fantasy?' 24 *International Journal of Law and Information Technology*, 128, 141-148 (2016).

³⁸ It is worth recalling that the discipline on the liability of *providers* is contained in

of national ones, was to contribute to a booming economic phenomenon and the significant potential for business development. The aim was to define a nurturing regulatory environment for financial transactions, and in general, private businesses.³⁹ The objective of ensuring growth in the volume of

decreto legislativo 9 April 2003 no 70 on 'Implementation of Directive 2000/31/EC on certain legal aspects of information society services in the internal market, with particular reference to e-commerce'.

³⁹ A set of limits are represented by L. Bugliolacchi, *(Dis)orientamenti giurisprudenziali in tema di responsabilità degli internet provider (ovvero del difficile rapporto tra assenza di obblighi di controllo e conoscenza dell'illecito)*, commentary at Tribunale di Roma 16 December 2009, *Responsabilità civile e previdenza*, 1568-1599 (2010); and G. Pino, 'Assenza di un obbligo di sorveglianza a carico degli internet service providers sui contenuti immessi da terzi in rete' *Danno e responsabilità*, 832-840 (2004); G.M. Riccio, 'La responsabilità degli internet providers nel d.lgs. n. 70/2003' *Danno e responsabilità*, 1157-1169 (2003); R.H. Weber and S. Gunnarson, 'A Constitutional Solution for Internet Governance' 14 *The Columbia Science & Technology Law Review*, 1, 47-71 (2013); B.A. Oliver, n 5 above, 126-138 (2013); W.C. Larson, 'Internet Service Provider Liability: Imposing a Higher Duty of Care' 37 *The Columbia Journal of Law and the Arts*, 573-582 (2014); G.M. Martins and J.V. Rozatti Longhi, 'Internet Service Providers' Liability for Personal Damages on Social Networking Websites' 11 *US-China Law Review*, 286-309 (2014). However, the company cannot underestimate the impact of its activities in the social context. The doctrine has raised the issue that any economic activities should not adversely affect the environment in which they are carried out: see A. Berle, 'Corporate Powers as Powers in Trust' 44 *Harvard Law Review*, 1049 (1931); E.M. Dodd, 'For Whom Are Corporate Managers Trustees' 45 *Harvard Law Review*, 1148-1163 (1932); as well as the considerations expressed by K. Davis and R.L. Blomstrom, *Business and Society: Environment and Responsibility* (New York: McGraw-Hill, 1975), 50; by W.C. Frederick, *From CSR to CSR: The Maturing of Business and Society Thought* (Pittsburgh: University of Pittsburgh, 1978), 5. More recently, see M. Burri-Nenova, 'Trade Versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition' 12 *Journal of International Economic Law*, 17, 34-45 (2009). This hermeneutic option has been called into question by both scholars and case law. As to the former, see M. Friedman, 'The Social Responsibility of Business is to Increase its Profits' *The New York Times Magazine* (1970), available at www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html (last visited 6 December 2016); for a quick recap of the main terms of the debate, see L. Moratis, 'Out of the Ordinary? Appraising ISO 26000's CSR Definition' 58 *International Journal of Law and Management*, 26, 27-28 (2016). As to case law, see Tribunale di Roma 27 April 2016, available at www.plurisonline.it; *contra* Corte d'Appello di Milano 27 February 2013, *Giurisprudenza italiana*, 2633 (2013), it is therefore worth highlighting that there would be no obligation to prevent crimes committed by users for the heads of the *host providers*, even if active, 'since there is no legal provision that requires them to stop other people's offenses, nor the preventative powers competent to conduct such an activity effectively'. See V. Zeno-Zencovich, 'I rapporti tra responsabilità civile e responsabilità penale nelle comunicazioni su Internet (riflessioni preliminari)' *Diritto dell'informazione e dell'informatica*, 1049-1057, 1050 (1999); J. Bayer, 'Liability of Internet Service Providers for Third Party Content' 1 *Victoria University of Wellington Working Papers Series*, 1, 59-84 (2008); A. Anchayil and A. Mattamana, 'Intermediary Liability and Child Pornography: A Comparative Analysis' 5 *Journal of International Law and Technology*, 48, 55-57 (2010); K. Weckström, 'Liability for Trademark Infringement for Internet Service Providers' 16 *Marquette Intellectual Property Law Review*, 1, 30-36 (2012). It is well-known that the aim of the regulations on liability for fault is not only to reduce any harmful events and to distribute their costs, but also to contain the implementation costs: see G. Calabresi, *Costo degli incidenti e responsabilità civile. Analisi economico giuridica* (Milano: Giuffrè,

business has led to limited liability for providers.⁴⁰ The use of criteria based on subjective elements for attributing behaviour has served to spread digital literacy and make the web a particularly attractive market.

The privilege given to the economic aspect of the issues in question is demonstrated by the supervisory authorities' inaction regarding flagrant violations of individual freedom, which only emerged in the *Schrems* case thanks to the obstinacy of a young university student.

Thus, market logic has dominated the protection of the rights and freedom of people. However, the future appears to hold timid regulatory efforts and forms of 'constitutionalisation' of the means of protection.⁴¹ They include attempts to carry out reforms aimed at building a system of fairer rules, more attentive to the needs of individuals, (who will no longer be viewed as mere 'users'), and based on a logical and yet not acceptable categorisation based on status.⁴²

1975); A. Kolk and J. Pinkse, 'The Integration of Corporate Governance' 17 *Corporate Social Responsibility and Environmental Management*, 15, 18-19, 21-25 (2010); H. Jo and M.A. Harjoto, 'Corporate Governance and Firm Value: The Impact of Corporate Social Responsibility' 103 *Journal of Business Ethics*, 351-383 (2011); D. Chatzoudes, D. Papadopoulos and E. Dimitriadis, 'Investigating the Impact of Corporate Social Responsibility (CSR) Policies: An Empirical Research' 57 *International Journal of Law and Management*, 265, 267-268 (2015).

⁴⁰ Art 16 of decreto legislativo 9 April 2003 no 70. For more details, see M. Gambini, n 5 above, 558; and V. Zeno-Zencovich, 'Profili attivi e passivi della responsabilità dell'utente in Internet', in A. Palazzo and U. Ruffolo eds, *La tutela del navigatore in Internet* (Milano: Giuffrè, 2002), 57; G. Giacobbe, 'La responsabilità civile per l'uso di internet', in V. Ricciuto and N. Zorzi, *Il contratto telematico*, in F. Galgano, *Trattato di diritto commerciale e di diritto pubblico dell'economia* (Padova: Cedam, 2002), XX, 222; A. Piazza, 'La responsabilità civile dell'Internet Provider' *Contratto e impresa*, 130-150, 147 (2004); G. Sartor, 'The Italian Google Case: Privacy, Freedom of Speech and Responsibility of Providers for User-generated Contents' 18 *International Journal of Law and Information Technology*, 356, 362-372 (2010); E. Smith, 'Lord of the Files: International Secondary Liability for Internet Service Providers' 68 *Washington and Lee Law Review*, 1555, 1564-1580 (2011); Case C-484/14 *McFadden v Sony Music Entertainment Germany GmbH*, 16 March 2016, with commentary by J. Welch, 'Free Wi-fi Providers Not Liable for Users' Copyright Infringements' 27 *Entertainment Law Review*, 207, 208 (2016); C. Perlingieri, 'La tutela dei minori di età nei social networks' *Rassegna di diritto civile*, 1324-1340 (2016).

⁴¹ It is worth considering, for example, the 'Declaration of Rights on the Internet' of 28 July 2015, approved by the 'Commission for the rights and duties on the Internet' of the Italian Chamber of Deputies.

⁴² The consideration of P. Perlingieri is illuminating, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 663. It is worth recalling that on the issue of *status*, 'the doctrine has reserved an alternative attention. The greatest danger lies in making undue generalisations, identifying that a vague and general notion of status in which to insert realities and situations that are very different, forgetting the particular features of each case'. For a reconstruction of the concept in the doctrine, see G. D'Amelio, 'Capacità e "status" delle persone', in S. Rodotà ed, *Il diritto privato nella società moderna* (Bologna: Il Mulino, 2nd ed, 1977), 139; P. Rescigno, 'Situazione e status nell'esperienza del diritto' *Rivista di diritto civile*, I, 209-229 (1973); G. Criscuoli, 'Variazioni e scelte in tema di status' *Rivista di diritto civile*, I, 157-209, 185 (1984); A. Corasaniti, 'Stato delle persone' *Enciclopedia del diritto* (Milano: Giuffrè, 1990), XLIII, 948-977; G. Alpa, *Status e capacità. La costruzione giuridica delle differenze individuali*

Effectively, a process has been set in motion to ensure a harmonious evolution of the internet. The web is only one dimension of the reality in which we all live; it is an aspect of the environment in which the person is formed. If everything can be shared, the virtual space cannot be a no-man's land, abandoned to spontaneously determined forms of regulation. There is no 'invisible hand' influencing the behaviour of the parties.⁴³ Rules are the basis of democratic life, and the internet as a realm of social interaction cannot escape from the principles and values of the legal system.⁴⁴

V. Sustainable Development of the Web: Corporate Social Responsibility in the Information Society

Having realised that the internet is part of the environment in which individuals live, we must commit to ensuring its sustainable development, in its broadest sense.⁴⁵ In this sense, the *Schrems* case is an exemplar. No matter how attractive the potential of science and technology to improve the quality of human relationships, internet usage cannot be governed solely by corporate and market logic; rather, it requires careful regulation.⁴⁶ This should prevent

(Roma-Bari: Laterza, 1993), 61; F. Prosperi, 'Rilevanza della persona e nozione di status' *Rivista critica di diritto privato*, 810-857 (1997). As regards the US regulatory framework, see S.G. Schulhofer, n 37 above, 250-254.

⁴³ Contemporary society has significantly evolved from the one observed by Adam Smith in *An Inquiry into the Nature and Causes of the Wealth of Nations* of 1776, available at http://www.ifaarchive.com/pdf/smith_-_an_inquiry_into_the_nature_and_causes_of_the_wealth_of_nations%5B1%5D.pdf (last visited 6 December 2016)

⁴⁴ In general, see P. Perlingieri, 'Complessità e unitarietà dell'ordinamento giuridico vigente' *Rassegna di diritto civile*, 188-214 (2005); and Id, *Il diritto civile nella legalità costituzionale* n 42 above, 159-215.

⁴⁵ See P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 42 above, 751; and Id, 'Spunti in tema di tutela dell'ambiente' *Legalità e giustizia*, 136-139 (1989); P. D'Addino Serravalle, 'La tutela del patrimonio ambientale, culturale e naturalistico nelle pagine della Rassegna di diritto civile', in P. Perlingieri ed, *Temi e problemi della civilistica contemporanea. Venticinque anni della Rassegna di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2005), 308; D. Jamali, A.M. Safieddine and M. Rabbath, 'Corporate Governance and Corporate Social Responsibility Synergies and Interrelationships' 16 *Corporate Governance*, 443, 445-447 (2008); D. Sharma and P. Bhatnagar, 'Corporate Social Responsibility of Mining Industries' 57 *International Journal of Law and Management*, 367, 370 (2015) point out that even greater responsibility is borne by large companies in developing countries, where the social community may literally experience economic dependency on high environmental impact activities. In case-law, see Italian Constitutional Court 30 December 1987 no 641, with commentary by G. Ponzanelli, 'Corte costituzionale e responsabilità civile: rilievi di un privatista' *Foro italiano*, I, 1057-1062 (1988). *Sulla nozione e rilevanza giuridica dell'ambiente* see B. Caravita, *Diritto dell'ambiente* (Bologna: Il Mulino, 3rd ed, 2005), 16.

⁴⁶ A regulatory effort that is not simple, considering the distances between the legal systems involved. For example, in the processing of sensitive data, the European perspective is very different from that of North America. If compared with the EU, the US regulatory environment is weaker, with respect to three main issues: restricting access to personal data on intelligence (once acquired by public authorities); law user protection with regard to

private and public behaviour which, although technically legitimate, may be harmful to personal freedoms.

For example, the protection afforded to privacy with regard to the transfer of data to third countries, to date has not been very attentive to the enunciation of general mandatory principles ensuring the protection of the individual. This is a fact that should make legislators reflect, especially at the European level, when dealing with globalised and ever-changing cases.⁴⁷

For example, it is not possible to nurture particular expectations about the future application of the new European regulation on the processing of personal data.⁴⁸ Even if the regulation is in accordance with an extensive legislation on data transfers to third countries (Arts 44-50), it will still need to create new and significant solutions for the events that may arise.

It is also worth mentioning the non-negligible concern that the application of the aforementioned regulations has been postponed to 25 May 2018, a very long implementation period when considering the speed with which technological progress offers new communication tools.

To conclude, in light of the above, it is possible to perceive an underlying common concern, namely ensuring the continuation of business, since the facts described negatively affect its performance. It is therefore worth

information held by third parties; the so-called incidental collection, allowing US authorities to collect the content of communications of Americans in contact with non-US citizens. See S.G. Schulhofer, n 37 above, 242-245, 261 (2016). A bilateral agreement may be the most effective way to overcome regulatory loopholes, as advocated by D. Cole and F. Fabbrini, 'Bridging the Transatlantic Divide' 14 *International Journal of Constitutional Law*, 220, 233-237 (2016). X. Tracol, n 11 above, 359-362 (2016), provides solutions that are viable in the short and in the medium/long term in this regard. Accordingly, the EU and the US have recently agreed on the Privacy Shield. However, it shows similarities with its criticised predecessor, the Safe Harbour, notably, the narrow scope of the agreement. See M. Corley, n 11 above, 750-754 (2016). It is also worth considering the issue of the right to be forgotten, as highlighted by R. Antani, 'The Resistance of Memory: Could the European Union's Right to Be Forgotten Exist in the United States?' 30 *Berkeley Technology Law Journal*, 1173-1210 (2015); S. Wechsler, 'The Right to Remember: The European Convention on Human Rights and the Right to Be Forgotten' 49 *Columbia Journal Law Social Problems*, 135 (2015); A. Forde, 'Implications of the Right to be Forgotten' 18 *Tulane Journal of Technology and Intellectual Property*, 83, 90-102 (2015); M.L. Rustad and S. Kulevska, 'Reconceptualizing the Right to be Forgotten to Enable Transatlantic Data Flow' 28 *Harvard Journal Law Technology*, 349-417, 376-380 (2015), where there is a markedly liberal order in the American matrix, so much so as to push the interpreter not to mortify the private economic initiative in the name of an exasperated protection of *privacy*.

⁴⁷ See P. Perlingieri, 'Quella di Hugh Collins sul "Codice civile europeo" non è la via da seguire' *Rassegna di diritto civile*, 1205-1222 (2014), in reply to the work by H. Collins, *The European Civil Code. The Way Forward* (Cambridge: Cambridge University Press, 2008).

⁴⁸ Regulation (EU) 2016/679 of The European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679> (last visited 6 December 2016).

remembering that information society services are only apparently free.⁴⁹

Usage is the compensation they receive for the services they provide, monetised by the company through the sale of advertising space.⁵⁰ All of this is certainly permissible, provided that the cost for using these services is not an unreasonable compression of individual liberties.

It may be worth recalling that companies carry out their activities in a social context and answer socially for their actions.⁵¹ The responsibility system on the internet must therefore be a system of obligations that is not only public, but above all, private. It is not necessary to invent this system from scratch, since it is possible to refer to known concepts, such as corporate social responsibility.⁵²

Thus, service providers must do business by satisfying user requirements while knowing, at the same time, how to manage the expectations of the other stakeholders in the operating environment. This may bring order to the chaos of cyberspace.

⁴⁹ An issue dealt with by C. Perlingieri, n 36 above, 92.

⁵⁰ Once again, as highlighted *ibid.* For a description of the characteristics of the information market, for all, see the considerations expressed by V. Zeno-Zencovich, 'A Comparative Reading of the 675/96 on the Processing of Personal Data', in V. Cuffaro, V. Ricciuto and Id eds, *Trattamento dei dati e tutela della persona* (Milano: Giuffrè, 1998), 159-168.

⁵¹ Beyond the mere respect for legislative data, as also noted in the European Union's Green Paper of 18 July 2001 [COM (2001) 366 final] 'Promoting a European framework for corporate social responsibility', where it is stated that socially responsible corporate behaviour is not solved by simple legal compliance, but requires greater investment in human capital, the environment and other relationships with interested parties, with the Commission Communication of 2 July 2002 '*Corporate social responsibility: a business contribution to sustainable development*'. On this point, see C. Chirieleison, 'L'evoluzione del concetto di Corporate Social Responsibility', in G. Rusconi and M. Dorigatti, *La responsabilità sociale d'impresa* (Milano: Franco Angeli, 2004), 87; M. Ryznar and K.E. Woody, 'A Framework on Mandating Versus Incentivizing Corporate Social Responsibility' 98 *Marquette Law Review*, 1167, 1690-1694 (2015); A. Telesetsky, 'Beyond Voluntary Corporate Social Responsibility: Corporate Human Rights Obligations to Prevent Disasters and to Provide Temporary Emergency Relief' 48 *Vanderbilt Journal of Transnational Law*, 1003, 1016-1024 (2015); A. Thrasyvoulou, 'Corporate Social Responsibility: Here to Stay' 4 *Legal Issues Journal*, 69, 76-80 (2016).

⁵² Regarding corporate social responsibility, see R. Korn, 'Tutela, consumatori e responsabilità sociale d'impresa: i nuovi strumenti della sostenibilità aziendale' *Contratto e impresa/Europa*, 663-706 (2012); and A. Addante, 'Ambiente e responsabilità sociale dell'impresa', in M. Pennasilico ed, *Manuale di diritto civile dell'ambiente* n 32 above, 177-178; B.J. Richardson, 'Socially Responsible Investing for Sustainability: Overcoming Its Incomplete and Conflicting Rationales' 2 *Transnational Environmental Law*, 311, 332-337 (2013). As regards the profitability of corporates engaging in social goals, see A. Stone, 'Improving Labour Relations Through Corporate Social Responsibility: Lessons from Germany and France' 46 *California Western International Law Journal*, 147, 170-175 (2016); U. Nwoke, 'Two Complementary Duties Under Corporate Social Responsibility Multinationals and the Moral Minimum in Nigeria's Delta Region' 58 *International Journal of Law and Management*, 2, 12-14 (2016); S.H. Uzma, 'Embedding Corporate Governance and Corporate Social Responsibility in Emerging Countries' 58 *International Journal of Law and Management*, 299, 301-305 (2016).

The Italian Class Action: New Paradigm or ‘Much Ado about Nothing’?

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Abstract

For several years there has been an increasing awareness that in order effectively to protect consumers’ rights, it is necessary to improve legal action through the use of more adequate tools. This has stimulated efforts by policy makers and regulators worldwide to introduce actions for damages in their legal systems in the wake of the US experience of the class action (Federal Rule of Civil Procedure no 23). Bearing in mind the specific nature of US regulation, each legal system and especially those of a Civil Law model, had to refine and adapt their damages class action provisions in accordance with legal, economic, social and political factors applicable in each country. The risks attached to this process of refinement relate to the possible decoupling of new rules introduced to protect consumer rights from the pre-existing legal, cultural, social, political and economic environment of the country, itself not yet ready to accept the new rules that may threaten the legitimization of the new legal provisions. In consequence, some countries, pressured to achieve legitimization quickly through symbolic accountability and compliance, have frequently introduced class action regulation hastily without truly considering the systemic effects of the above-mentioned issues and their consequences on the legal system, above all from the perspective of application of the regulation in practice. Therefore, this study seeks to explore whether or not extant regulation on class action is capable of fostering effective consumer rights protection or if the prospective paradigms represent only ‘much ado about nothing’. With this aim, the paper relies upon the juridification concept developed by Jürgen Habermas (1987) and focuses on the Italian regulatory environment. The research analyzes the changing regulatory context, employing a comparative methodology that contrasts the US model with the Italian one. The results highlight limitations of the complex system of norms of the Italian setting, providing a basis for critical thought on the positive aspects of this regulation and on areas for intervention and improvement.

I. Introduction

Consumer rights’ protection is a topic which has gained renewed attention

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over the past fifteen years, especially after significant corporate failures such as those of Enron, World Com, Parmalat, etc. Such attention mainly resulted in strong commitment to improved legal process through the use of more adequate tools. What should be noted is that initially the raised focus on questions relating to the damages class action resulted in substantial pressure on the US courts where, thanks to the forum shopping rule, even in the absence of specific norms among the majority of legal systems worldwide, these actions were pursued.¹ Despite the initial acceptance of a number of cases by the US courts, in 2004 the emblematic case of *Hoffmann-La Roche*² is the first instance of rejection of a class action procedure by a US court. Such a rejection, officially justified on the basis of the unfounded nature of the action, was based on the policy of lightening the burden on US courts.³

Consequently, as a result of the rejection by US courts in 2004 of class action procedure from abroad, the efforts of policy makers and regulators brought about the introduction of actions for damages in several legal systems in the wake of the US experience of the class action (*Federal Rule of Civil Procedure* no 23).⁴ Each legal system and especially those of a Civil Law model, had to refine and adapt the damages class action provisions specific

¹ The phenomenon is analysed by H.L. Buxbaum, 'Transnational Regulatory Litigation' *Virginia Journal of International Law*, 251 (2006). Regarding the judicial case of Royal Ahold, see the critical reflections proposed by J.C. Coffee Jr, 'Law and the Market: The Impact of Enforcement' 156 *University of Pennsylvania Law Review*, 275 (2007). Furthermore, with reference to *in re Vivendi Universal Sa Securities Litigation* (decided on 21 May 2007 by the US District Court, S.D. New York – 242 F.R.D. 76) the judicial reasoning is summarised. In particular, reference is made to the so-called 'delegated jurisdiction' which legitimized the transnational judgement and in consequence the strategy of the global players in order to benefit from opportunities offered by forum shopping. Such a delegated jurisdiction has been considered consistent with 'à la fonction de régulation économique qui incombe désormais aux Jurisdictions étatiques dans l'ordre global, dans l'intérêt de la communauté des Etats et parfois même application de normes communes', see H.M. Watt, 'Régulation de l'économie globale et l'émergence de compétences dé-léguées: sur le droit international privé des actions de groupe' *Revue critique de droit international privé*, 581 (2008).

² Case C-85/76 *Hoffmann v La Roche*, [1979] 3 CMLR 211.

³ In this regard see the critical position proposed in R. Michaels and D. Zimmer, 'US – Gerichte als Weltgerichte?' *Praxis des Internationalen Privat- und Verfahrensrechts*, 451 (2004). See also N. Trocker, 'Class actions negli USA – e in Europa?' *Contratto e impresa/Europa*, 207 (2009).

⁴ In particular, it is possible to refer to the legal experience of Continental Europe, which introduced a similar regime to that of North American, with the essential aim of overcoming the constraint that mass litigation can result, incongruously, in a multiplicity of individual actions. Nevertheless, class actions have gained increasing popularity throughout Europe. The European Parliament and Council Directive (EU) 1998/27 of 19 May 1998 on injunctions for the protection of consumers' interests, state that 'qualified entities' such as consumer associations or independent public authorities are authorized to take legal action on behalf of a group of persons affected by the conduct of commercial operators. In recent years, several EU countries have introduced rules on class actions in order to facilitate them. These include: Netherlands (1994); Portugal (1995); England and Wales (2000); Spain (2001); Sweden (2002).

to the US setting, to take into account of the legal, economic, social, and political factors featuring in those jurisdictions.⁵ However, despite the extensive efforts of these countries, in many cases the process of refinement has been conducted without properly considering the pre-existing legal, cultural, social, political and economic environment within those which were not yet ready to accept the new rules and then likely to threaten the legitimization of the class action provisions. Indeed, a major problem that some countries had to face related to the pressures to achieve a quick introduction of the new measures, in order to assuage public opinion after the resonance of the scandals cited above. This rush to gain early legitimization through symbolic accountability and compliance may have lead some countries, above all the European ones, to neglect proper consideration of the systemic effect of previous cultural, legal, economic, and political archetypes, thereby resulting in serious negative effects of the new norms, in terms of very limited applicability.⁶

⁵ Class actions for damages potentially allow the pursuit of heterogeneous policy aims not achievable through individual litigation. In this regard, Harald Koch observes that '(...) by doing so, we must put up with all of the problems of a poorly-motivated, cumbersome, and perhaps understaffed bureaucracy, as well as the question of legitimacy of representation'. See H. Koch, 'Non-Class Group Litigation Under EU and German Law' *Duke Journal of Comparative & International Law*, 358 (2001).

⁶ It is possible to examine, *prima facie*, this particular aspect of the discipline present in the *code de la consommation* (L 421-1) in the French legal system. The legislation provides that consumer associations may take legal action independently, in the general interest of their members, presenting criminal complaints and intervening as a civil party in criminal proceedings, when it comes to a criminal law violation, when it is a criminal law violation that generates a collective prejudice and not limited to a particular subject. Civil associations may intervene in order to achieve the elimination of unfair terms in the general conditions of contracts or the cessation of unlawful conduct by a trader or professional who harms the collective interests of consumers. In these cases, the association may also seek compensation for the collective harm. Currently these standards are not particularly effective, as the consumer requirement is to send written mandates to associations and prohibit the most potentially harmful forms of advertising actions. In 2005, following President Chirac's proposal to give consumers and their associations remedies for collective action against abusive practices present in some markets, a working group was established in order to create a law on class actions. New civil procedures were introduced in 2000 under Spanish law. This law permits the complainant to be a party to proceedings as well as consumer groups affected by the same action, when members of the group are identified and the group constitutes a majority of its members (Art 6.7), when both associations are approved by the European Directive on injunctions in defense of the collective interests of consumers and when disseminated (Art 6.8). More specifically, the law (Art 11) permits associations which protect consumers and users the right to take legal action in defense of the interests and rights of its members, for purposes of the general interests of the category and the collective rights of groups of consumers affected by the consumption of a product or the use of the same service, where members there of are exactly identifiable. Art 15 provides that in proceedings initiated by the associations or affected consumer groups, all concerned will be contacted through mass media, if they have used the product or have taken advantage of the service that caused the damage. When those affected are all easily identified, they must already have been summoned by the same judicial authority; stakeholders are identified and

In this context, this study seeks to discover if extant regulation on class action is capable of fostering effective consumer rights protection or if the following paradigms represent only ‘much a do about nothing’. With this aim, the paper relies upon the juridification concept developed by Jürgen Habermas and focuses on the Italian regulatory framework. The research analyses a changing regulatory context, comparing and contrasting the US model with the Italian one.⁷ The focus on Italian regulation is founded on the view that the legge 23 July 2009 no 99 and the legge 24 March 2012 no 27 are the most recent ones at a European level and provide a more complete regulatory framework compared to other EU settings.⁸

The remainder of the paper is organized as follows:

The second section presents the framework of the analysis, ie the

when called will intervene even after the submission of the application but will only address those matters on which judgment has not been concluded. Where there is difficulty in identifying harm due to several unspecified factors, the course of the proceedings may be suspended for a period to be determined but not exceeding two months. After the start of the proceedings the identification and establishment of other parties shall not be accepted, but whose rights, however, can be separately asserted.

⁷ An important overview is offered by A. Briguglio, *L'azione collettiva risarcitoria. (Art. 140-bis Codice del Consumo)* (Torino: Giappichelli, 2008), 33.

⁸ On this topic, it is appropriate to highlight some aspects that characterize Italian legislation on consumer protection, specifically the present regulation in Art 2, para 445, of legge 24 December 2007 no 244 which established and regulated the class actions to protect consumers. The protection afforded to consumers, by Art 140-bis, which provides that the consumer associations and users included in the list at the Ministry of Productive Activities and the associations and committees that are sufficiently representative of collective interests are entitled to act to protect the collective interests of consumers and users by requiring the court at the place where the undertaking is established to ascertain the right to compensation and restitution of the sums paid to individual consumers or users on having regard to the parties to contracts concluded under Art 1342 Civil Code or by any non-contractual unlawful acts, unfair trade practices or anti-competitive behavior, when the rights of a plurality of consumers or users are affected. The Ministry's goals are identified as the protection of the rights of a plurality of consumers and users who find themselves in relation to the same company in the same situation ('homogeneous individual rights'); there may be damages resulting from breach of contractual rights or rights in any case due to the final consumer product (apart from a contractual relation), by anti-competitive behavior or unfair business practices. Legal standing in court is accorded to individual consumers, and through associations which grant mandates or committees involving them. It is possible for other consumers to join class action; membership implies the renunciation of any restitution or individual action for damages. The process is articulated in two phases; the first, once a ruling on the admissibility of class action; the second, aiming instead to the decision on the merits. If the application is accepted, the proceedings may culminate in a judgment of conviction to the settlement, on an equitable basis, with amounts due to those who have joined the action or after the definition of a uniform method of calculation for such clearance. The new legislation is not retrospective; the exercise of the action is permitted only for offenses committed after 15 August 2009, the date of entry into force of the measure. The need for a clearer definition of protectable legal situations through the new institute and a more precise identification of the person entitled to sue and be sued, as well as the theme of the institute retroactivity, in particular, have been the subject of much debate during the parliamentary review, resulting in the opinions given by the relevant parliamentary committees.

juridification concept developed by Habermas. The third section describes the US legal provisions for a class action (limited to Federal ones and not focusing on each individual state), while the fourth section explains Italian regulation. The fifth section compares the two different models through the lens of the juridification conception developed by Habermas and provides brief concluding remarks.

II. The Juridification View

Jürgen Habermas' contribution to democratic theory is well-acknowledged, especially with reference to his communicative model, which provides the testing ground and legitimisation tool for normative statements in a democratic context.⁹ His theory of private and public autonomy is in itself dependent on a working framework where discursive practices involve all participants under ideal speech conditions.¹⁰

Habermas regards society as the combination of three elements; lifeworld (ie a normative context in which culture, tradition and identity can be reproduced); systems (ie a functionally definable arrangement of operations, such as organizations, which represent the tangible expressions of the lifeworld); and steering media (ie mechanisms such as power, money or law, that steer the interaction between lifeworld and systems). Steering media have to ensure that the systems reflecting the lifeworld but in the case of increasing complexity steering media possibly follow the systems instead of the lifeworld, thus leading to a colonization of the lifeworld by those systems. Habermas clarifies that it is not possible to predict which pathways will be followed in any specific situation and that the problem hangs on the difference between the types of legal norms.¹¹

He distinguishes 'law as medium', which is justified solely by its appeal to procedure, from 'law as institutions', those which admit of substantive justification at the level of the lifeworld. He suggests that society is increasingly characterized by a juridification process which leads to growing formal, positive and written law.¹² Notably, juridification does not represent a simple expansion of the volume of regulation but a specific manifestation

⁹ A. Asteriti, 'Social Dialogue, Laval-style' 5(2) *European Journal of Legal Studies*, 58-79 (2013).

¹⁰ J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by W. Rehg (Cambridge: Polity Press, 1996).

¹¹ J. Habermas, *The Theory of Communicative Action*, translated by T. McCarthy (Cambridge: Polity Press, 1987). See also C. Joerges, 'Integration Through De-juridification? An Interjection' 1(3) *European Journal of Legal Studies*, 1-34 (2008).

¹² J. Habermas, *The Theory of Communicative Action*, translated by T. McCarthy (Cambridge: Polity Press, 1984); in addition, Id, *The Theory of Communicative Action* n 11 above.

of the dialectic of the enlightenment in which welfarist intentions culminate in the 'violent abstraction' of regulation.¹³ Juridification implies a proceduralization of relations which are morally substantive and this is corrosive of lifeworld values. Habermas' preoccupation here is with the colonizing, constitutive and condensing force that law (as a medium) exerts over social action in contrast to its potential for a facilitating, regulative one (law as institution, which is seen as an enabler). Habermas' view is that if it is possible to understand the constituent elements of 'good' and 'bad' law, it is also possible to understand the constituent elements of 'good' and 'bad' steering mechanisms.¹⁴

On these grounds, this paper focuses on evolving regulation for the protection of consumer rights, to understand if such control is regulative and amenable to substantive justification. The evaluation of steering mechanisms is complex and cannot be undertaken assuming, *a priori*, that all societal steering mechanisms from a particular steering media are 'regulative and amenable to substantive justification' or are 'constitutive and only legitimized through procedure'.

On this basis, embracing Gunther Teubner's view, in this paper we attempt to find out, in relation to regulation, if the fundamental limits of effectiveness have been reached, by focusing on the problem of structural coupling of this law with social state policies and various social life areas.¹⁵ The breach of structural coupling appears when the relevance criteria are not met or when the condition of self-reproductive organization is endangered.¹⁶ We follow Jane Broadbent and Richard Laughlin, despite Teubner referring to both Habermas' and Niklas Luhmann's thinking in explaining the conditions of relevance and self-reproduction and his understanding is developed here through Habermasian critical theory.¹⁷

Teubner's first condition (the relevance criteria) relies on a model of law developed by Habermas. Habermas suggests that the 'colonization of the lifeworld'¹⁸ appears when materialized law 'gets out of hand' and, driven by political processes which do not adequately express the societal lifeworld, attempts to move societal systems into new levels of activity and concern. Such a material law is 'constitutive' (ie constituting new forms of behaviour)

¹³ M. Power and R. Laughlin, 'Habermas, Law and Accounting' 21(5) *Accounting, Organizations and Society*, 441-465 (1996).

¹⁴ J. Broadbent and R. Laughlin, *Accounting Control and Controlling Accounting: Interdisciplinary and Critical Perspectives* (Bingley, UK: Emerald, 2013).

¹⁵ G. Teubner, 'Juridification – Concepts, Aspects Limits, Solutions', in G. Teubner ed, *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate Antitrust and Social Welfare Law* (Berlin-NewYork: Walter de Gruyter, 1987), 3-48.

¹⁶ J. Broadbent and R. Laughlin, 'Accounting and the Law: Partners in the Juridification of the Public Sector in the UK?' 4 *Critical Perspectives on Accounting*, 337-368 (1993).

¹⁷ *Ibid.*

¹⁸ See J. Habermas, *The Theory of Communicative Action* n 11 above, 33.

and can be only 'legitimized through procedure',¹⁹ triggering societal systems into domains of activity detached from the societal lifeworld, thus breaking the 'relevance' criteria.

The second aspect of the breach of structural coupling, according to Teubner, relates to the disturbance of the self-reproductive processes of politics, law and social systems. Once an organization has been created and a degree of autonomy of action has been granted, there needs to be a demonstrable abuse defined in the context of a full democratic debate before encouraging an attack on the organizational lifeworld. When this intrusion comes from a societal steering medium, such as the law, without the backing from or the expression of the societal lifeworld, then it is not justifiable.²⁰

If law breaches structurally-coupled situations, the repercussions are uncertain. Moreover, organizations are able to manage to appear compliant, for the sake of legitimacy, while pursuing alternative strategies and juridified law can play a destroying role, even though there will be all manner of powers to prevent this occurring and can either have disintegrating effects on the organizations being regulated or can be absorbed (albeit in costly ways).

On this basis, Teubner claims that responsible regulation of organizational behaviour should be decided by internal participants shifting the specification of detailed regulatory processes from outside legal direction to inside inner compulsion or self-regulation and that it is for law to try to ensure that these enabling discursive processes are conducted.

With this in mind we will examine the issues relating to the protection of consumer rights by analysing current laws in the context of the developed model of juridification discussed above, to identify if such law is regulative and amenable to substantive justification and thus able to support effective consumer protection.

III. The US Regulatory Setting

The Federal Rules of Civil Procedure, which were promulgated under the Rules Enabling Act of 1934, include in Rule 23 a comprehensive set of principles that govern class actions in Federal Court. This rule was designed to weed out cases that are unlikely to achieve the overarching goals of judicial efficiency and due process by prescribing the procedures that courts must follow to certify a case as a class action. Rules 23(a) and (b) set out the criteria that plaintiffs must meet to certify a case as a class action. Rule 23 (a) indicates the *Prerequisites to Class Action* and, to favour the aggregation of interests, requires the identification of a leading plaintiff with the mandate

¹⁹ Ibid 365-366.

²⁰ J. Broadbent and R. Laughlin, 'Recent Financial and Administrative Changes in the NHS: A Critical Theory Analysis' 2(1) *Critical Perspectives on Accounting*, 1-29 (1991).

to promote the class action for the other class members, with judicial effects falling in the subjective sphere of each one. The leading plaintiff becomes the unique spokesperson of the class and is the only party entitled to remain in the judgment for the class, to attain either damages aims (damages class actions), to obtain financial remedies (mass tort cases) or inhibitory aims (injunctive class actions), to obtain both financial remedies and the determination of the offence committed.²¹ In addition to the leading plaintiff, a primary role is played by the plaintiffs' law firms. These may be entrepreneurial firms that often act on their own and in advance by binding members to a class, with contingency fees and they assume all the economic burdens of any purposeful initiative, to embody the judgment for the class.²²

Rule 23(a) requires the plaintiff to establish four elements, usually referred to as numerosity, commonality, typicality and adequacy of representation. It is normal to have in place the mandatory presence of the above characteristics to allow the exercise of the class action.

The numerosity criterion means that the procedure can be taken forward if the number of class members impedes the contextual access to judgment to all the components. Commonality implies that the class members require the tutelage of common and shared questions of law or fact, thus rendering the judgment of interests to all the members. Typicality lies in the fact that the claims and the objections raised by the plaintiff are homogeneous for the class and that the claim can be exercised by any member of the class. Then, the adequacy of representation refers to the judge's function to evaluate the adequacy of the leading plaintiff, the class and the class counsel, who are supposed to act fairly and adequately.

The leading plaintiff also must meet the requirements of one of Rule 23(b) subsections. Subsection 23(b) (3) requires proof that a class action would be superior to other methods of fairly and efficiently adjudicating the case and that common questions of law or fact predominate over individual issues. This subsection also provides that once a class is certified, class

²¹ Timely intervention of the Supreme Court had circumscribed within defined technical lines the character of the 'punitive damages' at the end of the last century. Supreme Court USA, 26 June 1989, *Foro italiano*, IV, 174 (1990), with a note by M.S. Romano. In addition, Federal Court for the District of New Jersey, 9 March, *Foro italiano*, IV, 78 (1989), with a note by M. Santi Romano; Supreme Court USA, 4 March 1991, *Foro italiano*, IV, 235 (1991), with a note by G. Ponzanelli; Supreme Court USA, 7 April 2003, *Foro italiano*, IV, 355, with a note by G. Colangelo. See also G. Ponzanelli, 'I danni punitivi' *Nuova giurisprudenza civile commentata*, 27 (2008). The author clarifies that the US punitive damages represents aliens impossible to introduce in the Italian regulatory framework because of Institutional reasons preventing from a legal transplant.

²² J. Cooper Alexander, 'An Introduction to Class Action Procedure in the United States' *Conference: Debates over Group Litigation in Comparative Perspective* (Geneva, July 2000), highlights that such an entrepreneurial nature of the plaintiff's law firm should be understood as one of the most interesting peculiarities of the US class action, being one of the elements that render the US class action a successful best practice.

members are bound by any judgment unless they opt-out of the litigation.

Rule 23(c) requires courts to decide class certification ‘at an early practicable time’. The Supreme Court has instructed courts to engage in a ‘rigorous analysis’ of the pleadings, declarations and other record evidence to assess whether or not plaintiffs have satisfied those burdens. The issues may be plain enough from the pleadings to determine whether or not the interests of the absent parties are fairly encompassed within the named plaintiff’s claim and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.

The certification provides a number of components of the necessary information, such as the identification of the class, the indication of the distinctive elements of the members, the illustration of the claim made by the class, the terms of the obligation in question, the illustration of the acts of defense, the indication and appointment of the class counsel. Indeed, if a class is certified, Rule 23(c) prescribes that the court must issue an order defining the class, identifying class claims, and appointing class counsel.

Rule 23(g) indicates the factors which the court must consider in making that appointment. Rule 23(c) also prescribes the content of the notice that the court must direct to class members after the class is certified, explaining the nature of the action and the class member’s right to opt out. The notice answers the need for collective information in an appropriate form and structure such as the publication in newspapers and entering information in mass media circuits and it is mandatory in relation to class actions for damages.

Rule 23(d) describes the District Court’s power to issue orders controlling the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument. It may require any step in the action, the proposed extent of the judgment or the members’ opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defences, or to otherwise come into the action.

Rule 23(e) specifies the terms under which a class action may be settled, dismissed or compromised. The settlement, voluntary dismissal or compromise refers to the agreement between the parts. The tutelage of common interests implies that the Court has the power to ask for clarification and modifications of the settlement. Moreover, for class actions for damages, the Court has also the power, in extreme cases, to reject the agreement.

In 1998, the Supreme Court amended Rule 23 to include subsection (f), providing for a permissive interlocutory appeal, at the sole discretion of a court of appeals, from a certification order. Rule 23(h) concerns the attorney’s fee that may be awarded to counsel and the procedures that govern that determination.

Before concluding this brief review of the Rule 23 requirements, it is

worth noting that two further issues deserve more attention. Indeed, the US setting is well-acknowledged as a best practice model due to the presence of two peculiar characteristics; the (efficient) discovery devices and the opt-out right; not common in other regulatory settings and that due to their positive effects on the whole action, need to be separately considered.

1. Discovery Devices and the Opt Out Right

A primary element of distinction is related to discovery devices. The US legal system can be interpreted as an open one from a twofold perspective. First, from a functional point of view, adopting appropriate remedies and identifying proper devices to ensure correct solutions can overcome the complexity, the unpredictability and even possible aporias. Second, from a more substantial perspective, the system is responsive to what comes from the outside, thus being capable of accommodating complex needs.

A strong contribution to resolving the dysfunctionality of the legal system is made by the class action and Rule 23 of the Federal Rules of Civil Procedure provides the regulatory support for it. The characteristics of versatility, flexibility and deterrence underlying the class action recur in discovery devices, which can be understood as the correct indices to proper handling of disputes.

Discovery is usually divided into two phases; (1) pre-class certification discovery and (2) post-class certification discovery.

In the pre-class certification phase, discovery is limited to the issues relevant to the class-certification analysis, inclusive of the plaintiff's standing to pursue the asserted claims. If a class is certified and makes it to the post-class certification phase, discovery will focus on the merits of the underlying claims.

The issues relating to discovery devices represent complex questions mainly dealing with the correct relationships between the parties. More specifically, these questions are related to the exchange of information between the actors involved, as the US judicial system provides mechanisms for continuous dialogue between the contenders about the material of investigation and the acceptance of the notice pleading. These practices are legitimate only if they provide knowledge of useful elements to the integration of the *thema decidendum*, in addition to the initial knowledge deduced from the pleadings documents forming the basis for the judgment. Much depends on whether the dispute is substantial or minor, so the balance point may vary. Therefore, in routine cases discovery will be minimal and the efforts made and associated costs are proportional. For larger cases, discovery takes a decisive role and the procedure and its results are based on a complex set of facts, events and cognitive elements usually hidden from the counterparty that are revealed through a sophisticated process of discovery. In this way,

discovery devices become effective tools supporting class actions, as they underpin a strong collective claim and are necessary in achieving parity when confronting a powerful opponent.²³

In addition to discovery devices and their role in ensuring successful actions, another peculiar and innovative element is the provision of the opt-out right for the class members in actions for damages.²⁴ In this regard it is worth noting that as soon as the certification is authorized by the court, the class is validated and the class members will be bound by the outcome of the trial or the transaction. From the time of the certification, each class member is no longer allowed to promote an individual trial for the same claim and will rely upon a common destiny.²⁵ However, for actions for damages only, as highlighted before, the current approach of Rule 23 is based on the opt-out option, that is the option for each class member to require his or her exclusion.²⁶ The self-exclusion involves notification to all class members. The notice is communicated using each available channel, including mass

²³ Ibid: ‘Our discovery rules, which permit parties a wide scope for investigating the facts of the case by compelling information from their opponents, have also been essential for the success of class actions and, indeed, for the success of all consumer litigation. Of necessity, when consumers are injured by products or practices of large corporations, they lack much essential information about how the events came to occur. This information is not available to the public. If consumers are to have a reasonable chance to prove the case, they must be able to obtain information from the defendant’.

²⁴ H.L. Buxbaum, ‘Defining the Function and Scope of Group Litigation: The Role of Class Actions for Monetary Damages in the United States’, in P. Gottwald ed, *Europäisches Insolvenzrecht-Kollektiver Rechtsschutz (Veröffentlichungen der Wissenschaftlichen Vereinigung für Internationales Verfahrensrecht)* (Bielefeld: Gieseck, 2008), passim; N.M. Pace, ‘Class action in the United States of America. An Overview of the Process and the Empirical Literature’, 1 (2007), paper presented at the Conference ‘The Globalization of Class Actions’, Oxford, 13-14 December 2006, available at http://globalclassactions.stanford.edu/sites/default/files/documents/USA__National_Report.pdf (last visited 6 December 2016).

²⁵ It is worth noting that opt-out schemes are usually claimed to ensure that the group of claimants will be sufficiently large since the action is brought on behalf of the whole group. For example, in the US, on average opt-out rates are very low (less than zero point two per cent), given that parties cannot litigate individually. This increases access to justice, for consumer-users involved in multiple claims of low value. See T. Eisenberg and G. Miller, ‘The Role of Opt-outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues’ *New York University Law and Economics Research Paper No 04-004* (2004); S. Issacharoff, ‘Preclusion, Due Process and the Right to Opt Out’ *77 Notre Dame Law Review*, 1057, 1060 (2002).

²⁶ The opt-out approach offers advantages because the class consists of everyone who has not opted out, which will be the vast majority of class members, given consumers’ inertia. However, ‘(...) The members of the Class who have filed timely and valid requests for exclusion in accordance with the Preliminary Approval Order and the Notice, and whose names appear on Exhibit 1 hereto, are no longer members of the Class and, accordingly, are not bound by tis Judgment. Requests for exclusion submitted by members of the Class whose names appear on Exhibit 1 hereto, are hereby approved by the Court and those persons may pursue their own individual claims and remedies, if any (...)’ (Bausch & Lomb Securities Litigation, US District Court Western District New York – Order and Final Judgment, December 2004, Art 5).

media, so as to reach effectively as many stakeholders as possible. What should be noted is that the value of the opt-out option is related to the unfairness of many mandatory class actions. Indeed, although opt-out rights cannot always guarantee the fairness of a settlement, they can ensure that class members, particularly those with high stakes claims, will have the option of avoiding the agency problems frequently associated with class litigation and pursuing individual actions for redress.²⁷

IV. Italian Regulation: An Example of Innovation at the European Level

The collective damages action to protect consumers (*l'azione collettiva risarcitoria a tutela dei consumatori*, Art 140-bis *Codice del consumo*, decreto legislativo 6 September 2005 no 206) was introduced into the Italian legal system with the legge 24 December 2007 no 244, and then further refined with the legge 23 July 2009 no 99, when renamed as class action (*azione di classe*) and lastly with the legge 24 March 2012 no 27.²⁸ The new Italian class action represents a unique innovation in the range of remedies to protect the rights of consumers. It represents a procedural device of a general nature, inspired by Federal US class action, replicating its salient

²⁷ S.T.O. Cottreau, 'The Due Process Right to Opt Out of Class Actions' 73 *New York University Law Review*, 1-49 (1998). See, also, C. Consolo and B. Zuffi, *L'azione di classe - ex Art. 140 bis Codice del Consumo. Lineamenti processuali* (Padova: Cedam, 2012); E. Cesaro and F. Bocchini, *La nuova Class Action a tutela dei consumatori e degli utenti. Commentario all'art. 140 bis del Codice del consumo* (Padova: Cedam, 2012).

²⁸ Indeed, the legge 24 December 2007 no 244 has never been applied, so the class action has been effectively introduced with the legge 23 July 2009 no 99. This provision allows consumers to promote class actions individually, through associations and through committees. It implies that associations or committees are not mandatory required for the commencement of the action. An interesting issue pertains to judicial protection, so that in the case of the legge 23 July 2009 no 99, it was limited to the parties to the action or to those who adhered to it and not extended to the common interests of class members. This means that the action was aimed at the protection of collective identical interests rather than class interests, not extending the effects of the judgment beyond the parties involved in the trial. On the contrary, under the current legge 24 March 2012 no 27, instead of the collective interests, the reference is to homogeneous individual rights, protectable through the class action. For an overview of these developments, see G. Finocchiaro, 'Class action: una chance per i consumatori' 5 *Guida al diritto*, XXI-XXVII (2008); M. Cappiello, 'Una svolta per le cause risarcitorie ma occorrono ancora "aggiustamenti"' 1 *Responsabilità e risarcimento*, 18 (2008); S. Mantovani, 'L'azione collettiva risarcitoria' available at <http://www.filodiritto.com/articoli/2008/01/lazione-collettiva-risarcitoria/> (last visited 6 December 2016); Id, 'Azioni seriali e tutela giurisdizionale: aspetti critici e prospettive ricostruttive', in Id, *Le azioni seriali* (Napoli: Edizioni Scientifiche Italiane, 2008), 55; G. Comandé, 'Usò distorto dell'azione collettiva diventa un boomerang per il cittadino' 2 *Responsabilità e risarcimento*, 8 (2008); C. Consolo, 'È legge una disposizione sull'azione collettiva risarcitoria: si è scelta la via svedese dello "opt-in" anziché quella danese dello "opt-out" e il filtro ("L'inutil precauzione")' *Corriere giuridico*, 5 (2008).

features but also encompassing typically national characteristics.²⁹

It is important to specify that a primary aspect that deserves attention is related to the scope of the class action provisions within the Italian setting. The legislator has limited the application of the class action to the matter of contractual relationships between consumer-users and professionals, which exclusively relates to the protection of consumers' rights, as contractual rights are rooted in private law (also in adherence to Art 38 of the *Codice del Consumo*). As a result, the class action device does not fully address the rights of consumers, excluding the protection of a) the constitutionally guaranteed and inviolable fundamental rights of the person; b) the rights recognized in the Charter of Fundamental Rights of the European Union; c) human rights subject to protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms; d) environmental rights³⁰ in terms of both the right to health harmed by pollution and environmental deterioration and the collective interest in the preservation of the environment; e) the rights of investors equated to those of consumers but guaranteed by two *Testi Unici*, the *Testo Unico Bancario* (TUB) and the *Testo Unico della Finanza* (TUF) thereby excluded from the protection of the *Codice del Consumo*. Clearly, such a reduction in the scope of the norm not only represents a crucial difference between the Italian and the US Federal class action but to some extent reduces the deterrence potential of the action.

Another difference relates to the right to activate the class action, which in Italy lies with individual harmed consumers who can directly promote the action as well as through associations or committees (that are admitted differently to the US Federal class action process). Consequently, the objective of the judgment is to ascertain the rights of class members as individuals damaged and having a direct interest in view of the liquidation of damages. There are no law firms involved in the judgment, as the contingency fee is not admitted in our regulatory framework.³¹

²⁹ A number of studies have addressed class action concerns over the past years. See M. Taruffo, 'I limiti soggettivi del giudicato e le "class actions"' *Rivista di diritto processuale*, 609 (1970); P. Rescigno, 'Sulla compatibilità tra il modello processuale della "class action" ed i principi fondamentali dell'ordinamento italiano' *Giurisprudenza italiana*, 2224 (2000); P. Fava, 'L'importabilità delle class actions in Italia' *Contratto e impresa*, 166 (2004); M. Rescigno, 'L'introduzione della class action nell'ordinamento italiano. Profili generali' *Giurisprudenza commerciale*, 407 (2005).

³⁰ The questions pertaining the environmental damage are of central importance and deserve particular consideration, given the increasing media attention in these issues. See B. Pozzo ed, *La responsabilità ambientale. La nuova direttiva sulla responsabilità ambientale in materia di prevenzione e riparazione del danno ambientale* (Milano: Giuffrè, 2005); Id, 'La nuova direttiva del Parlamento europeo e del Consiglio sulla responsabilità ambientale in materia di prevenzione e riparazione del danno' *Rivista giuridica dell'ambiente*, 1 (2006).

³¹ This kind of position is strongly supported by a great body of case-law; see for example the recent decision of the *Cassazione* (Corte di Cassazione 4 February 2016 no 2169). Regarding the contingency fee in Italian legislation, see C. Consolo and B. Zuffi, n 27

Another essential aspect to take into account is that Italian regulation has progressively switched from an initial approach based on the protection of identical interests (pursued with the laws emanated in 2007 and 2009) to an approach aimed at protecting homogeneous interests (2012). Homogeneity implies the presence of individual rights, which have some aspects (the substantial ones) in common with other consumer rights, while differing in other ways.³² The law covers three types of homogeneous interests,³³ namely:

above; E. Cesaro and F. Bocchini, n 27 above. On the topic also recommend R. Caponi, 'Italian 'Class Action' Suits in the Field of Consumer Protection: 2016 Update', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2796611 (last visited 6 December 2016).

³² The question is not one of collective interest, assimilated or not to a subjective right, or the assessment of the common issues, the occurrence of the offense or multi-offensiveness and its attribution to the defendant, but the individual interests, however homogeneous; individual claims compensatory damages and restitution, protection of which the courts can enforce either on an individual basis, in the usual forms and collectively through the mechanism in Art 140-bis. See, S. Menchini, 'Il provvedimento finale: oggetto, contenuto, effetti' *Analisi Giuridica dell'Economia*, 167 (2008); R. Caponi, 'Litisconsorzio "aggregato". L'azione risarcitoria in forma collettiva dei consumatori' *Rivista trimestrale di diritto e procedura civile*, 819 (2008); Id, 'Azioni collettive: interessi protetti e modelli processuali di tutela' 5 *Rivista di diritto processuale*, 1205 (2008); G. Costantino, 'La tutela collettiva risarcitoria 2009: la tela di Penelope' *Foro italiano*, V, 388 (2009); in addition, A. Riccio, 'L'azione collettiva risarcitoria non è, dunque, una class action' *Contratto e impresa*, 500 (2008). The current action formulation of class, as described, addressed these uncertainties since it attaches collective protection to the individual rights of more subjects, with protection that takes the form of an application for assessment of the liability of the defendant and an order to pay compensation and/or restitution. The protection can result in a final judgment that determines the precise amount of the claims of the promoters and members or in a measure that establishes the existence of the standard measurement of an award, establishes uniform criteria for liquidation, refurbishing and subsequent autonomous individual processes. Cf G. Alpa, 'L'art. 140-bis del codice del consumo nella prospettiva del diritto privato' *Rivista trimestrale di diritto e procedura civile*, 379, 382 (2010).

³³ The homogeneous nature of the interests protected by the Italian class action is well-established by the literature and case-law but concerns are recognized because it is necessary to start from the premise that with the class action, the legislature seeks to achieve simultaneous processes in relation to individual claims promoted by consumers and users, provided that such claims have as their object the protection of related rights that are united by common characteristics such as the requirement to justify a serial assessment and procedural joint scrutiny. See R. Poli, 'Sulla natura e sull'oggetto dell'azione di classe' *Rivista di diritto processuale*, 38 (2012); A. Giussani, 'Intorno alla tutelabilità con l'azione di classe dei soli diritti "omogenei"' *Giurisprudenza italiana*, 3 (2014). Instead, the Supreme Court addressed the issue of homogeneity of consumer and user protection in the following decisions Corte di Cassazione 13 February 2009 no 3640, *Foro Italiano*, I, 1901 (2010); Corte di Cassazione 9 December 2002 no 17475, *Foro Italiano*, I, 1121 (2003). Additionally, there have been recent judgments in Tribunale di Milano ordinanza 9 December 2013 and Tribunale di Venezia ordinanza 12 January 2016. The court which handed down this latest judgment predicted that 'È inammissibile una azione di classe proposta da un consumatore ed avanzata al fine di accertare una presunta pratica commerciale scorretta posta in essere da una casa automobilistica, attraverso la quale sarebbero stati omologati e diffusi dati errati e scorretti circa le emissioni inquinanti e i consumi di carburante di numerose autovetture in quanto non sussistono diritti omogenei al ristoro del pregiudizio derivante ai consumatori, come è invece espressamente richiesto dal Codice del Consumo'.

- a) formal homogeneity, derived from the same type of contract,
- b) substantial homogeneity, derived from the same type of damage,
- c) absolute homogeneity, derived from objective situations repeated over time.

From a technical point of view, the Italian class action is characterized by a self-inclusion mechanism exerted by consumer-users, the so called opt-in system,³⁴ centred on the crucial importance ascribed to the explicit manifestation of intention by the subjects involved to adhere to the claims made by others.³⁵ Thanks to this mechanism the judgment is effective for the proponents and for the adherents, who no longer can activate any action individually. The opt-in implies that each adherent has to communicate and deposit at the Court Registry information concerning his domicile, claim and any supporting evidence by the one hundred twentieth day after the final term for announcement of the action. The announcement is aimed at gaining the maximum support possible for the judgment and is mandatory in order to proceed with the action. Clearly, participation is expected to be ‘adequate’ because either an unreasonable expansion or an unjustified restriction would endanger the ability of the procedure to achieve the well-known deterrence and equity expectations ascribed to the class action.³⁶ The opt-in system is rather different from the US Federal approach of the above-noted opt-out option. This latter allows the self-exclusion from the class in accordance with technical mechanisms that are completely dissimilar to the European ones aimed at reducing the very high legal and procedural costs for both the State and the parties involved. Notably, within the European setting, any decisions on common concerns underpin an individual judgment referring to the facts and/or laws common to the class. Bearing this in mind, it is worth considering that the auto-inclusion system proposed by the Italian regulator, given the

³⁴ It is worth noting that the opt-in system was in being within the US setting before the 1966 reform. See H. Kalven Jr and M. Rosenfield, ‘The Contemporary Function of the Class Suit’ *University of Chicago Law Review*, 684 (1941). In addition, on the choice to move to an opt-out system see B. Kaplan, ‘Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)’ 81 *Harvard Law Review*, 356 (1967). On the debate focusing on the possible re-introduction of the opt-in system – a failure so far – see A. Miller, ‘Of Frankenstein Monsters and Shining Knights: Myth, Reality and the Class Action Problem’ 92 *Harvard Law Review*, 689 (1979); P. Wells, ‘Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal’ 16 *Harvard Journal of Legislation*, 572 (1979); E.H. Cooper, ‘Class Action Advice in the Form of Questions’ 11 *Duke Journal of Comparative & International Law*, 231 (2001).

³⁵ The Italian approach to the opt-in system and its implications are usefully explained by C. Consolo, n 28 above, 5; in addition, Id, ‘L’art. 140-bis: nuovo congegno dai chiari contorni funzionali seppur, processualisticamente, un poco “Opera aperta”’ *Foro Italiano*, V, 205 (2008).

³⁶ This kind of position is strongly supported by A. Briguglio, ‘Class Action Arbitration in Italia: spunti di metodo per la (eventuale) prosecuzione delle indagini’ available at <http://www.judicium.it/admin/saggi/630/Briguglio%20judicium%20maggio%202015.pdf> (last visited 6 December 2016). The author opines that the Italian class action would represent a defense of undertakings filter, as a barrier to provocative or spurious actions.

limitations derived from pre-existing constitutional, civil, and procedural norms, represents a unique and innovative solution to introduce a mechanism aimed at reducing the risk that each complainant would promote individual claims.

The opt-in system is not alone in identifying the Italian scenario as an innovative one at a European level, because also the issues relating to the homogeneous individual rights deserve attention, especially if other systems that are well-recognized as valuable are considered. Reference is to the German legal system. A number of studies have argued that the '*Kapitalanleger-Musterverfahren*' (KapMuG) introduced in Germany in 2005 might be considered a successful experiment.³⁷ The KapMuG is a device that finds application in the presence of a number of parallel cases and that operates by introducing a pilot-process (*Muster-Prozess*) and contextually suspending the other judgments, so as to solve a common controversial issue in an identical and binding manner for the subjects involved. In this way, thanks to the efficacy of the judgment of the pilot-process and for parallel cases, there is an increase in the efficiency of judicial protection.

At first sight, the German model appears as an effective one when considering the need to pursue efficient aggregated protection while respecting individual guarantees for the parties involved. Actually, despite this positive element, the German model is highly different from the Italian one by reference to the approach chosen, which neglects the definition of the class and the commencement of unitary proceedings. In so doing, the German model remains limited to the protection of identical rights, which have long been superseded by the Italian provision of the protection of homogeneous individual rights. Moreover, the absence of any procedures to form the class and to ascertain the class claim reduces the deterrence capability of the German model, especially with reference to the reputation of the companies involved and awareness of the public opinion. Therefore, the innovative and broad impact of the Italian legal system within the European context remains

³⁷ Gesetz zur Einführung von Kapitalanleger-Musterverfahren (*KapMuG*), 16 August 2005, *Bundesgesetzblatt Jahrgang* (BGBl) Teil 1, no 50 (2005), ausgegeben zu Bonn, August 19th 2005. See also M. Strüner, 'Model Case Proceedings in the Capital Markets – Tentative Steps towards Group Litigation in Germany' *Civil Justice Quarterly*, 250 (2007). R. Caponi, 'Modelli europei di tutela collettiva nel processo civile: esperienze tedesche e italiane a confronto' *Rivista trimestrale di diritto e procedura civile*, 1229 (2007); E. Camilleri, *Contratti a valle: rimedi civilistici e tutela della concorrenza* (Napoli: Jovene, 2008), 305; C. Consolo and D. Rizzardo, 'Due modi di mettere le azioni collettive alla prova: Inghilterra e Germania' *Rivista trimestrale di diritto e procedura civile*, 891 (2006); C. Consolo, 'Class actions "fuori dagli Usa": qualcosa si muove anche alle nostre (ex-) frontiere settentrionali almeno quanto al case management' *Rivista di diritto processuale internazionale e arbitrato internazionale*, 38 (2006); C. Poncibò, 'La controriforma delle class actions' *Danno e responsabilità*, 131 (2006). Lastly, C. Di Marzo, 'La via italiana alla class action per danni extracontrattuali ed i principali modelli di tutela collettiva risarcitoria' *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente*, 428 (2010).

unquestionable.

Despite this, several limitations are still detectible within the Italian approach in comparison to US best practice. The following section will explain this issues in more detail.

V. Discussion and Concluding Remarks

This paper, focusing on the Italian setting, employs a framework to understand if extant regulation for the class action is operable and amenable to substantive justification and thereby able to afford effective consumer rights protection.

In line with the framework, the analysis allows us better to determine whether or not in the case of the regulation that we examine, the fundamental limits of effectiveness have been reached, by focusing on the problem of structural coupling of this law with social state policies and various real life areas. As already stated, the breaching of structural coupling appears when the relevance criteria are not met or when the condition of self-reproductive organization is endangered.³⁸

With reference to the first of the two conditions, the relevance criteria, it is worth recalling that Habermas suggests that materialized law ‘gets out of hand’ and, driven by political processes which do not adequately express the societal lifeworld, attempts to move societal systems into new levels of activity and concern, thus breaking the ‘relevance’ criteria.

In this regard, what should be noted is that a first positive aspect to consider relates to the fact that the Italian class action represents the culmination of a progressive enrichment and enlargement in the number of measures available, their applicability and their social implications. This more systematic and renewed regulation was long-awaited and generally desired and above all is surely in line with the lifeworld of reference, which is characterized by increasing commitment to the social and ethical importance of consumer rights protection. On this basis, it is possible to argue that the norms examined satisfy the relevance criteria. However, the Italian class action provisions are still affected by several limitations by comparison to the US approach, that comprise the effectiveness of the actions undertaken.

The main differences between these two systems are shown in the table 1 below.

Table 1 – A brief comparison of the US and Italian settings

³⁸ J. Broadbent and R. Laughlin, ‘Accounting and the Law: Partners in the Juridification of the Public Sector in the UK?’ n 16 above, 337-368.

| | US setting | Italian setting |
|---|--|--|
| Aims | Consumers' rights protection | Consumers' rights protection |
| Scope | Broad | Limited to contractual relationships between consumer-users and professionals |
| Deterrence | Broad | Limited to the scope of the action |
| Subjects entitled to the procedure | Leading plaintiffs and law firms | Consumer-users, Consumer Associations, Committees |
| Pros | The entrepreneurial nature of the law firm favours the increase in the number of actions carried out | The norm has a twofold nature: procedural and substantive |
| Cons | Excessive procedural emphasis | The contingency fee is not allowed, the law firms, of which there are just a few, are not involved in the action |
| Inclusion | Opt-out system | Opt-in system |
| Discovery devices | Pre-trial phase (reduced legal costs) | Trial phase (high legal costs) |

A primary aspect to highlight is that, despite the fact that in both cases regulators commence with the need to achieve the same aim, ie the protection of consumer rights, the two scenarios, due to pre-existing legal frameworks of the countries examined, result in rather different approaches.

In particular, the relative scope of the starting points in each jurisdiction represents a crucial issue which deserves further attention. Indeed, the differences in scope have a direct effect on the deterrence power of the class action, so that in Italy, and despite its system being regarded as the most innovative one in the European context, as argued in the fourth section, is greatly reduced.³⁹ Another relevant difference refers to the subject entitled

³⁹ This point of view was supported by authoritative literature that has identified a new procedural instrument in the Italian class action. It found potential applications, as well as numerous problematic aspects of the recent discipline. According to scholars, the Italian class action presents itself as an innovative tool, which allows the individual consumer to take action before a civil court for damages or repayment of amounts not only for himself but also for all other consumers who, finding themselves in a substantially similar situation to that of the applicant, become part of the class and adhere to the action. Access to forms of collective legal protection, thanks to the class action, however, is no longer the exclusive preserve of significant consumer associations, but is also open to individual consumers. See, G. Chiné and G. Miccolis eds, *La nuova class action e la tutela collettiva dei consumatori* (Roma: Nel diritto, 2010), 69. Conversely, the idea supported by other authorities on the subject of the Italian class action, for example, Professor Briguglio takes the view that this

to the action because in the US setting the law firms, absent in the Italian approach due to the fact that the contingency fee is not allowed, play a crucial entrepreneurial role also ensuring a constant increase in the number of actions carried out, which are just a few in Italy.⁴⁰ On the other hand, a fundamental feature of the Italian approach that in the US is actually lacking is that the class action regulation has a twofold nature, namely procedural and substantive and is then potentially able to be more generally relevant in the European context (eg with reference to the opt-in provisions, which can be regarded as the best possible option for these jurisdictions, where the efficient opt-out of the US practice cannot be applied) because it supersedes the excessive emphasis on procedural issues. Despite this, and differently from the US, the absence of any provisions for pre-trial discovery devices in the Italian model still threaten the effectiveness and feasibility of the action due to the high legal costs associated with the judgement and the indefinite length of the procedure.

The limitations described above, interpreted in the light of the second element of the theoretical framework that allows an evaluation of the breach of structural coupling (ie the self-reproductive capability of politics, law and social systems) represent crucial issues to take into consideration. Indeed, Broadbent (1991) clarifies that that once an organization has been created and a degree of autonomy of action has been granted, there needs to be a demonstrable abuse defined in the context of a full democratic debate before encouraging an attack on the organizational lifeworld (Broadbent and Laughlin, 1993). Where this intrusion comes from a societal steering medium, such as the law, without the backing from or the expression of the societal lifeworld,

remedy is, in its essential structure and as a first step, best referred to arbitration. This is said to be more objective, and, as identified by para II (contractual rights or rights compensatory damages against the manufacturer arising from unfair trade practices or anti-competitive behavior), definitely available and indeed negotiable (for the avoidance of doubt, see the last paragraph of Art 140-bis) both as to compatibility between his way of execution and outcome, on the one hand and the basis of voluntary arbitration on the other. Since someone may not be party to a process, the positive or negative effects of the decision are themselves sufficient and compatible with the bilateral agreement of compromise and arbitration (see A. Briguglio, n 36 above, 1-14).

⁴⁰ The low use of the Italian class action is a recurrent problem in our legal system. Research has analyzed the problem in numerous studies and despite having found in this legal instrument 'significant new elements to the system of protection of rights' also records low utilization in practice. The low usage is due to high litigation costs and the duration of the process. These aspects, according to some authors, might undermine the usefulness of the consumer protection mechanism introduced in Italy. Certainly the principle captures the enormous potential of the class action introduced by Art 140-bis of the Consumer Code because it allows members of the group to 'organize themselves and make their voices heard' but it cannot hide the negative aspects that have a significant impact on the usefulness and effectiveness of the legal instrument. See, G. Abbamonte, 'L'oggetto della giustizia nell'Amministrazione' *Diritto e processo amministrativo*, 2 (2013); M. Santise, *Coordinate ermeneutiche di Diritto Amministrativo* (Torino: Giappichelli, 2014), 365-366.

then it is not justifiable. In the case of Italian regulation for the class action, the condition of self-reproductive organization is not respected because law has determined a situation in which, despite the high legal costs, the procedures are not able effectively to mediate the weak position of consumers and the strong position of the companies on a number of issues. To this effect, the Italian literature has considered the class action introduced by Art 140-*bis* of the Consumer Code as '*conclusione fin troppo ardita e perfino vessatoria dal punto di vista della tutela effettiva del consumatore e/o della classe di appartenenza*'.⁴¹ On the contrary, the class action legal provisions of Rule 23 provide an efficient means of mediation between the general and particular interests of the class and of its members respectively. The class action, as it is conceived within the US setting, represents the sole mechanism properly able to mediate the weak position of consumers and the strong position of companies.

The deterrence aspect condenses the utilitarian calculation with the behavioral morality. Both aspects are essential for a successful class action and, if the utilitarian calculation ensures weighting the risks resulting from a judicially imprudent conduct, the behavioural morality is an expression of the ethical conduct of the case, so as to achieve a virtuous exclusion of unlawful conduct. This is not to say that the Italian approach will be never able to achieve these aims. Conversely, possible areas of improvement may be highlighted to achieve more effective consumer rights' protection. First, two connected needs are represented by the enlargement of the scope of the action, and efforts to expand solutions capable of being introduced in the entrepreneurial law firms' procedure. Second, it is worth considering in the foreseeable future the need to develop a lean procedure which admits pre-trial discovery devices, thereby reducing the length of the process and its costs.

In summary, the research show that there are limitations in the rules examined and they provide a basis for examination of critical policy. We can conclude that the Italian class action provisions represent a good starting point, which, however, is not yet an example of law which is effective and amenable to substantive justification. More specifically, in line with Broadbent and Laughlin⁴² highlighting reflexive law being far from reality, we maintain here that there are potential alternatives to excessive regulation. This is not to say that the current regulatory provisions should be reduced, leaving space for practice. On the contrary, our concern surrounds the need for incorporating into current procedure the above-cited aspects that are still neglected and that, consequently, threaten the effectiveness of the regulation in supporting

⁴¹ This reflection offers authoritative Italian literature on the subject of class action introduced by Art 140-*bis* of the Consumer Code and that this study aims to share. See, A. Briguglio, n 36 above, 7.

⁴² J. Broadbent and R. Laughlin, 'Accounting and the Law: Partners in the Juridification of the Public Sector in the UK?' n 16 above, 337-368.

consumer rights' protection. Clearly, these kinds of improvements will be possible only by embracing a broader view. We believe that our results have a threefold value.

First, they complement the theoretical framework showing its relevance in examining the issues relating to judicial processes in messy regulative contexts such as the one investigated in this paper. Second, our findings shed light on the type of change that regulation has fostered over past years, especially focusing on the capability of regulators to work towards effective consumer protection. From this perspective, the real contribution of this work lies in its ability to allow us to identify the existence of any limitations within the Italian system of regulation, highlighting overlaps and/or lack of multiple requirements. Furthermore, the findings provide a basis for critical thinking emphasizing that any weaknesses in the current Italian class action procedures do not relate to compliance but reflect certain inefficiencies of regulation *per se*.

Certainly the Habermas Juridification's theory has revealed the empirical value of the idea that the class action forms part of the study of sociology of law. As we have already noted in other sections of the paper, Habermas is based on the concept of legalization (*Verrechtlichung*) to further the development of the welfare state.

In general terms, juridification refers to an increase of the formal or written law, either in the form of a conducting hitherto unregulated expansion of rights or by way of broadening rights by way of more detailed regulation of conduct already regulated by law.

In this context, the Federal class action of the United States presents itself as a remedy more related to the ideas proposed by Habermas' theory and allows for further approaches to dealing with the claims of American consumers.

In fact, these needs have not been met by the class action characteristics of Italian law and the Federal law of the United States presents itself as a means of guaranteeing the protection of the basic needs of citizens, perhaps because it is heavily based on the capitalist nature of that culture.

Conversely, Art 140-*bis* of the Italian Consumer Code looks like a standard which is too detailed and decontextualized compared to other rules of the Italian Civil Code intended for the protection of citizens' rights and remedies in the Code of Civil Procedure. Unlike the article of the Italian Consumer Code in question, Federal Rule 23 manages to be a better remedy for ensuring the affirmation of the principles of fairness and equity among parties and affords protection for American consumers arising from wrongs committed by corporations.

We can now return to propositions in Habermas' Juridification Theory and conclude that the American system, which is more evolved than the

Italian system, shows that welfare laws can be interpreted in terms of the institutionalization of the rights of the life-world against economic and political systems.

In this way US Federal Rule 23 manages to ensure individual protection as well as social rights on the basis of a balance of the principles of freedom and equality between parties. The development of the right of citizens to welfare and the protection of their interests is the basis of Habermas' theory and these issues are given better protection by way of US Federal Order, Rule 23, where they are found especially in class action requirements for 'commonality' and 'adequacy'.

Therefore, from this perspective, the third contribution is more practical, in that this paper may be interpreted as a starting point to encourage regulators and lawyers towards collaboration and dialogue to find alternative ways and strategies further to improve consumer rights' protection. Otherwise, the Italian class action, a potentially relevant paradigm, will be only *much a do about nothing*.

Good Faith and Pre-Contractual Liability in Italy: Recent Developments in the Interpretation of Article 1337 of the Italian Civil Code

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Abstract

In Italy, pre-contractual liability is governed by a statutory provision that requires parties to act in good faith during the negotiation and formation of the contract (Art 1337 Civil Code).

Nonetheless, since the entry into force in Italy of the current 1942 Civil Code, Art 1337 has been consistently given a narrow interpretation. From this narrow perspective, pre-contractual liability applies only in two cases: 1) when a party terminates negotiations without a valid reason or 2) when a party, aware of the existence of grounds for invalidity of the contract, fails to communicate these grounds to the other party. Over the last decade, however, courts seem to have phased out this narrow interpretation, and case law has broadened the boundaries of pre-contractual liability.

This paper retraces the key steps that led to the broader interpretation of pre-contractual liability currently adopted within Italian courts and outlines the new and innovative broad scope of pre-contractual liability, with the aim of indicating when the duty of good faith attaches and what this duty entails. The article then illustrates to what extent damage relating to pre-contractual liability is compensable and what role the traditional distinction between positive and negative interests actually plays.

I. Introduction

A survey of the provisions set out in the Italian Civil Code shows that ‘good faith’ – and the identical concept of ‘fairness’ – come into play at different stages of contractual relations: a) Art 1175 provides that ‘the debtor and the creditor shall behave according to rules of fairness’, b) Art 1366 provides that the ‘contract must be interpreted in good faith’, and c) Art 1375 provides that the ‘contract must be executed in good faith’.¹

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¹ For an effective description of the Italian conception of the duty of good faith, see A.M. Musy, ‘The Good Faith Principle in Contract Law and the Precontractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures’ *Global Jurist Advances*, 1, 295 (2001).

At the pre-contractual stage, Art 1337, entitled ‘negotiations and pre-contractual liability’, states that ‘the parties, in the conduct of negotiations and the formation of the contract, shall behave according to good faith’. This article contains an express provision that imposes a duty on each party to deal in good faith both during contract negotiations and during the contract drafting stage. Any party engaging in unfair behaviour faces the risk of incurring pre-contractual liability. Such a responsibility to behave in good faith does not safeguard the interests underlying the fulfilment of the contract; rather, it safeguards fair dealing during negotiations and the party’s right to not engage in negotiations that might prove futile due to the other contracting party’s lack of good faith or their lack of a genuine intent to conclude the contract.² Nonetheless, unlike other rules, good faith does not imply a specific kind of formally pre-determined behaviour. Good faith is, therefore, understood as an open term (a general clause). The content of good faith cannot be established *a priori*, but depends on the circumstances of the specific case and must be specified by judges and courts.³

Since the entry into force of the current Civil Code in 1942, Art 1337 has been systematically interpreted in a narrow fashion. Although the provision envisages an open rule, the majority of courts do not allow Art 1337 to perform such an intense and general role, allowing liability for damages to arise out of this legal norm only in the following two cases: 1) where a party breaks off negotiations without a valid reason (so-called ‘unjustified withdrawal’), when negotiations have reached such a stage that the other party may reasonably expect that a contract will be concluded; 2) where a party, aware of the existence of grounds for invalidity of the contract, fails to inform the other party as provided for under Art 1338 of the Civil Code.⁴ Moreover, according to the approach traditionally followed by Italian courts, the conclusion of a valid contract precludes any pre-contractual liability. Finally, a well-established principle states that in cases of pre-contractual liability, the guilty party is only obliged to compensate the other party for

² Corte di Cassazione 24 April 2012 no 6526, *Danno e Responsabilità*, 799 (2012).

³ M.W. Hesselink, ‘The concept of good faith’, in A.S. Hartkamp, E.H. Hondius et al eds, *Towards a European Civil Code* (Boston and London: Kluwer Law International, 2004), 474; H.B. Schäfer and H.C. Aksoy, ‘Good Faith’, in A. Marciano and G.B. Ramello eds, *Encyclopedia of Law and Economics* (New York: Springer, 2015), 1-8; C.B. Andersen, ‘Good Faith; Good Grief’ *International Trade and Business Law Review*, 310 (2014). For a general overview of the issues relating to the role of general clauses and their enforcement: P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006).

⁴ F. Benatti, ‘Responsabilità precontrattuale, I) Diritto civile’ *Enciclopedia giuridica* (Roma: Treccani, 1991), XXVII, 7; G. D’Amico, *La responsabilità precontrattuale*, in V. Roppo ed, *Rimedi*, V, 2, *Trattato del contratto* Roppo (Milano: Giuffrè, 2006), 983. See also: G. Alpa, ‘Appunti sulla responsabilità precontrattuale nella prospettiva della comparazione giuridica’ *Responsabilità civile e previdenza*, 535 (1981); G. Perlingieri, ‘La responsabilità precontrattuale di Francesco Benatti, cinquanta anni dopo’ *Rassegna di diritto civile*, 1301 (2012).

their so-called ‘negative interest’, namely for costs incurred during negotiations and for lost opportunities for income. Compensation cannot be awarded, however, for the so-called ‘positive interest’, or the benefit that the aggrieved party would have received from the contract if it had been validly concluded and performed.⁵

Over the last decade, this position appears to have been phased out,⁶ as case law has broadened the material scope of pre-contractual liability to the detriment of the traditionally strict interpretation of Art 1337.

Thanks to this new approach, the duty to act in good faith during negotiations as set forth in this rule recovers its proper role in legislation as a general clause.

This paper retraces the key steps that led to the broader interpretation currently adopted by Italian courts and outlines the new and innovative scope of pre-contractual liability, with the aim of indicating when the duty of good faith attaches and what this duty entails. The paper then illustrates the extent to which a party may be compensated for damages they have sustained and the actual role that the distinction between positive and negative interests plays in determining this compensation.

II. The Duty of Good Faith in the Pre-Contractual Context: The Italian Paradox

⁵ The distinction between ‘positive’ and ‘negative’ interest was drawn by Rudolf von Jhering in 1860: R. von Jhering, ‘Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen’ *Jahrbücher Für Die Dogmatik Des Heutigen Römischen Und Deutschen Privatrechts*, I, (1861). According to this German scholar, positive interest refers to ‘everything which (the obligee) would have had if the contract have been valid’ (p 16). Conversely, negative interest is defined as the ‘interest in the non-conclusion of the contract. (...). It is intended more widely to compensate for damage arising out of the reliance placed in vain by the obligee upon a contract which never proceeded, either because the contract was cancelled, or because the obligor defaulted’ (p 17).

The distinction between ‘positive’ and ‘negative’ interest would appear to have been adopted by a number of legal systems today. These notions are frequently also invoked today in common law systems to determine the function of damages and their amount. Academics and judges, in both America and England, retranscribe these notions through the concepts of ‘expectation interest’ and ‘reliance interest’: E. McKendrick, *Contract Law* (London: Palgrave Macmillan, 2015), 402; H. Collins, *The Law of Contract* (Cambridge: Cambridge University Press, 2003), 405.

⁶ Corte di Cassazione-Sezioni Unite 19 December 2007 no 26724 and no 26725, *Danno e responsabilità*, 536 (2008), annotated by V. Roppo, ‘La nullità virtuale del contratto dopo la sentenza Rordorf’. Among the several comments, see also T. Febbrajo, ‘Violazione delle regole di comportamento nell’intermediazione finanziaria e nullità del contratto: la decisione delle sezioni unite’ *Giustizia civile*, 2785 (2008). Upholding this approach, see Corte di Cassazione 8 October 2008 no 24795, *Foro italiano*, 440 (2009), with remarks by E. Scoditti, ‘Responsabilità precontrattuale e conclusione di contratto valido: l’area degli obblighi di informazione’; Corte di Cassazione 11 June 2010 no 14056, *Foro italiano*, 320 (2010).

As previously mentioned, in Italian case law pre-contractual liability is traditionally subject to a dual limitation: a) absence of liability when a valid contract is concluded, and b) compensation only for costs and earnings lost during negotiations (which represents the 'negative interest' not 'positive interest', and does not consist of income arising from the contract, which cannot be compensated in any way).

The boundaries limiting the imposition of pre-contractual liability have been significantly reduced, especially through the application of the first of these limitations. Under the traditional view followed by Italian case law, 'when a valid contract is concluded, pre-contractual liability is therefore precluded'.⁷ Such a statement also holds true when misconduct engaged in by one party has led the other party to enter into a contract with disadvantageous terms to which, under normal circumstances, she or he would not have agreed.⁸ When negotiations result in the formation of a valid contract, any unfair behaviour by the parties is considered to be 'absorbed' and can no longer lead to pre-contractual liability, with the result that a victim of unfairness is deprived of any specific legal protection.⁹

The outcomes of this interpretation are especially evident with regard to duties of information: a lack of information is irrelevant unless it entails a defect of consent, such as fraud or error.

Some specific examples are revealing: the *Corte di Cassazione* has held that there was no pre-contractual liability where, a) a seller failed to inform a foreign buyer of the need for an import license,¹⁰ b) a seller failed to inform the purchaser that no building work could be carried out on a piece of land sold in the contract,¹¹ and c) used cars were sold without any notification that they originated from a foreign market.¹² In all these cases, the lack of the disclosure of the information from one party to the other was not an impediment to consent, and was, therefore, deemed to entail no pre-contractual liability.

In contrast to prevailing doctrine,¹³ the courts maintained their narrow

⁷ For an illustration of this trend see Corte di Cassazione 25 July 2006 no 16937, *Corriere giuridico*, 539 (2007). Further references in C. Crea, *Sub. Art. 1337*, in G. Perlingieri ed, *Codice civile annotato con la dottrina e la giurisprudenza. Delle obbligazioni*, I, (Napoli: Edizioni Scientifiche Italiane, 2010), 471.

⁸ Corte di Cassazione 16 April 1994 no 3621, *Responsabilità civile e previdenza*, 1085 (1994).

⁹ Corte di Cassazione 25 July 2006 no 16937 n 7 above; Corte di Cassazione 14 February 2001 no 2080, *Nuova giurisprudenza civile commentata*, II, 311 (2002).

¹⁰ Corte di Cassazione 4 April 1975 no 1204, *Foro italiano*, I, 1990 (1975).

¹¹ Corte di Cassazione 2 November 1961 no 2537, *Foro padano*, I, 1029 (1962).

¹² Corte di Cassazione 5 February 2007 no 2479, *Giurisprudenza italiana*, 134 (2007).

¹³ F. Benatti, *La responsabilità precontrattuale* (Milano: Giuffrè, 1963), 13 and 109; L. Mengoni, 'Sulla natura della responsabilità precontrattuale' *Rivista di diritto commerciale*, II, 365 (1956); R. Sacco, *Il contratto*, in R. Sacco and G. De Nova eds, *Trattato di diritto privato* Rescigno (Torino: Utet, 2004), 503. See also V. Roppo, 'Formation of Contract and

interpretation for at least fifty years. This situation gave rise to an ‘Italian paradox’: pre-contractual liability was restricted, even though Italian legislators were the first in Europe to codify the requirement of good faith and fair dealing during pre-contractual negotiations (Art 1337 of the Italian Civil Code).¹⁴ Since Art 1337 enshrines a general clause, the courts could have extended the boundaries of this liability to include a variety of cases in which a party could claim damages. Nonetheless, as mentioned above, under the narrow interpretation followed by Italian courts for almost fifty years, pre-contractual liability was considered an appropriate ground for legal action only upon breakdown of negotiations without a valid justification and upon knowledge of contract invalidity (Art 1338).

This condition arose for the following reasons:

a) In the Italian legal system, general clauses as a whole have long been viewed with a certain degree of suspicion. This is due, on the one hand, to the excessively broad judicial discretion that they entail,¹⁵ and on the other, to the clear link that existed between the general principles of good faith and fairness set forth in the 1942 Civil Code and Fascism.¹⁶ An illustration of this is evident in the fact that, under its original formulation, Art 1175 established that the creditor and the debtor needed to comply with the rule of fairness, ‘by reference to the principles of the corporatist legal order’¹⁷ (the article was

Pre-Contractual Information from an Italian Perspective’, in S. Grundmann and M. Schauer eds, *The Architecture of European Codes and Contractual Law* (New York: Kluwer Law International, 2006), 286, who appropriately summarizes how the Italian system understands pre-contractual liability in terms of ‘courts versus scholars.’

¹⁴ For example, in Germany, a provision similar to Art 1337 was only enacted with the 2002 reform of the law of obligations. However, even before then, pre-contractual liability was already considered applicable where the parties concluded a valid but disadvantageous contract. For further details, see: F. Benatti, *La responsabilità precontrattuale* n 13 above, 13.

¹⁵ H.B. Schäfer and H.C. Aksoy, ‘Good Faith’ n 3 above, 4, who point out that in all legal systems, ‘a major point of critique of the principle of good faith is its generality and broad scope. This is also in close relationship with the critique that the judiciary can arbitrarily interfere with the contract by using this principle’; S. Patti, ‘Clausole generali e discrezionalità del giudice’ *Rivista del notariato*, 304 (2010).

¹⁶ P. Cappellini, ‘Il fascismo invisibile. Una ipotesi di esperimento storiografico sui rapporti tra codificazione civile e regime’ *Quaderni fiorentini*, 200 (1999); A. Somma, ‘Fascismo e diritto: una ricerca sul nulla?’ *Rivista trimestrale di diritto e procedura civile*, 597 (2001).

¹⁷ The *Relazione al codice civile*, no 638, explains that under Art 1337, good faith is the basis for the behaviour of the parties during negotiations and formation of the contract, meaning that the parties must negotiate while ‘always bearing in mind the purpose that the contract is intended to satisfy, the harmony of the interests of the parties, and the superior interests of the nation requiring productive cooperation’. It should be noted that since the 1970s, several Italian legal scholars have suggested re-reading general clauses from the perspective of constitutional solidarity, rather than from the original point of view of the Fascist corporatist system: P. Perlingieri, *Profili istituzionali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1979), 84; S. Rodotà, *Le fonti di integrazione del contratto* (Milano: Giuffrè, 1969), 126; P. Rescigno, ‘Per una rilettura del Codice civile’ *Giurisprudenza italiana*, IV, 224 (1968).

amended after the fall of the Fascist regime). These reasons gave rise, in Italian courts, and especially in the *Corte di Cassazione*, to a sort of reluctance to apply general clauses, described as a ‘flight away from general clauses’,¹⁸ unlike the ‘flight towards general clauses’ embraced by the German legal system during the 1930s – and its well-known tragic outcomes.¹⁹

b) Secondly, when implementing Art 1337, courts were affected by the pre-contractual liability system that took shape by virtue of the Code of 1865, previously in force. Under the Code of 1865, while pre-contractual liability was not governed by statutory rules, case law already held, through *culpa in contrahendo*, that damages were compensable in two cases: 1) the conclusion of an invalid contract, and 2) the unjustified termination of negotiations.²⁰ In the interpretation of the two new rules expressly dealing with pre-contractual liability enshrined in Arts 1337 and 1338 of the 1942 Civil Code, courts and legal scholars were affected by a sort of ‘path dependence.’ These new provisions were deemed to be a ‘statutory validation’ of the ‘two-sided’ scope of application of the liability already applied by courts: Art 1337 was considered to govern the case breaking off negotiations and Art 1338 seemingly governed the case where the parties concluded an invalid contract.

c) Moreover, Rudolf von Jhering’s²¹ doctrine of *culpa in contrahendo*, which relies on the failed stipulation of a valid contract,²² also influenced the narrow approach adopted by Italian case law towards the application of the good faith principle to negotiations.

According to this theory, a party who, through his or her own culpable conduct, prevents a contract from being formed or causes the contract to be invalid, should be liable for damages suffered by the innocent party who relied on the validity of the forthcoming contract. This liability is based on the principle of good faith and duty of care required of the parties not only in performing contractual duties, but also during the stage of negotiation and drafting of the contract.

Nonetheless, in this respect it must be noted that German legal scholars have severely criticized this doctrine since the turn of the twentieth century, notably with regard to its perceived boundaries: once it has been established that parties must also perform their duties with diligence during negotiations, there is no point in limiting *culpa in contrahendo* to the case of a void

¹⁸ P. Rescigno, ‘Appunti sulle «clausole generali»’ *Rivista di diritto commerciale*, 2 (1998).

¹⁹ J.W. Hedemann, *Die Flucht in die Generalklauseln. Eine Gefahr für Staat und Recht* (Tübingen, 1933).

²⁰ A cornerstone in defining the scope of precontractual liability was Gabriele Faggella’s theory of ‘precontractual periods’: G. Faggella, *I periodi precontrattuali e la responsabilità precontrattuale* (Roma: Cartiere Centrali, 2nd ed, 1918).

²¹ R. von Jhering, ‘Culpa in contrahendo’ n 5 above, 16.

²² *Ibid* 17.

contract.²³ These observations have not been upheld by Italian case law, and for more than fifty years Italian case law has claimed that pre-contractual liability cannot attach where the parties conclude a valid contract.

III. Key Steps Towards Full Enforcement of Contractual Good Faith: A Brief Overview

As mentioned above, Italian courts were, for a lengthy period of time, reluctant to apply the general duties laid down in the 1942 Civil Code whereby the parties were to act in accordance with the principle of good faith and fairness. These duties are clearly evidenced by Art 1175, which applies to all obligations and states that ‘the debtor and the creditor shall behave according to rules of fairness’. For more than two decades since the enactment of the 1942 Civil Code, both the meaning and impact of this provision were undercut by the courts’ narrow interpretation that any unfair behaviour contrary to Art 1175 only entitles the aggrieved party to consequential damages if it also breaches an individual right already set forth in a statutory provision.²⁴

However, as of the 1980s, Italian case law gradually phased out this narrow approach, which undermined the enforcement of good faith in contract law, and began to adopt a much broader conception of the principle of good faith and its application in the pre-contractual stage.

The process began with the acknowledgement of the fact that the normative value underlying the duty of good faith is an objective standard. In this respect, it was stated that the principle of good faith is ‘one of the hinges and overriding principles of the legal discipline of obligations and establishes a proper legal duty’ which is violated not only if one of the parties has acted maliciously, to the other party’s detriment, but also when the conduct of said party has not been guided by openness, diligent fairness, and a sense of social solidarity, which are an integral part of good faith.²⁵

Another major step in this direction was marked by a clarification of the constitutional principles underlying the duty of good faith, namely the principle of social solidarity enshrined in Art 2 of the Italian Constitution. From this point of view, the duty to act in accordance with good faith becomes

²³ See T. Mommsen, *Erörterungen aus dem Obligationenrecht, II, Ueber die Haftung der Contrahenten bei der Abschliessung von Schuldverträgen* (Braunschweig: C.A. Schwetschke, 1879), 16.

²⁴ Corte di Cassazione 16 February 1963 no 357, *Foro padano*, I, 1284 (1964). Among scholars, S. Rodotà criticizes this view in ‘Appunti sul principio di buona fede’ *Foro padano*, 128 (1964). Recently on this issue, see G. Perlingieri, *Regole e comportamenti nella formazione del contratto. Una rilettura dell’art. 1337 del codice civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 53.

²⁵ See Corte di Cassazione 18 February 1986 no 960, *Giustizia civile*, 234 (1987).

a source of implied contractual obligations, in addition to the express terms set out in the agreement, and entails a duty to ‘safeguard the interests of the other party, as long as this does not unfairly limit the legitimate interests of the acting party’.²⁶

This obligation to preserve and safeguard the interests of the counterpart could lead the parties to modify their performances, to meet duties not laid down in the contractual program, or to tolerate modifications relating to the other party’s performance.²⁷

Finally, this development reached its climax in some recent judgments in which the *Corte di Cassazione* held that the standard of good faith provides a

‘tool that allows courts not only to control but also to replace and supplement contractual terms if the outcome is not considered fair and equitable, in order to assure a proper balance between the parties’ interests’.²⁸

In other words, setting aside this latest and controversial trend, Italian case law now universally acknowledges that the notions of good faith and fairness are expressions of the general principle of social solidarity recognized by the Italian Constitution, and that they refer to specific obligations that apply both during contract negotiations and during the performance of contracts. These obligations are in addition to any other contractual duty already binding on the parties; in the event of their infringement, the aggrieved party is entitled to claim damages. It is also generally accepted that public policy imposes the requirement of good faith in all dealings (Art 1175 of the Civil Code) and during the pre-contractual stage (Art 1337 of the Civil Code).

IV. Towards a ‘New’ Model of Pre-Contractual Liability: The Case of ‘Delay’ when Concluding a Contract

This being said, it is now time to focus on the process that led Italian case law to broaden the scope of pre-contractual liability, growing out of the traditional restraining approach.

²⁶ A landmark decision upholding this approach is the so-called ‘Fiuggi judgment’: Corte di Cassazione 20 April 1994 no 3775, *Giustizia civile*, 246 (1994).

²⁷ See for instance, Corte di Cassazione 9 March 1991 no 2503, *Corriere Giuridico*, 789 (1991). In this case, the Court held that good faith required the seller of real estate to conclude the contract with a party other than the one with whom he had concluded the preliminary contract, since that was the only way to achieve the result foreseen by the parties.

²⁸ Corte di Cassazione-Sezioni Unite 13 September 2005 no 18128, *Foro italiano*, I, 2985 (2005); Corte di Cassazione-Sezioni Unite 15 November 2007 no 23726, *Nuova giurisprudenza civile commentata*, 458 (2008); Cassazione 18 September 2009 no 2010, *Contratti*, 5 (2010).

The first departure from the conventional understanding of pre-contractual liability took place in 1998, when the *Corte di Cassazione* held that damages caused by a delay in concluding a contract were compensable.²⁹ The facts of the dispute were the following: a farmer applied to ENEL (at the time, the sole supplier of electricity in Italy) to irrigate his fields, paying the necessary contribution. However, electricity only began to be supplied a year-and-a-half after the request. The farmer claimed damages caused by the undue delay. The court of first instance upheld the claim. The court of appeal rejected the request, under the then prevailing interpretation of Art 1337. The court reasoned that Enel's misconduct during negotiations was 'absorbed' by the subsequent conclusion of a valid contract.

The *Corte di Cassazione* rejected the latter interpretation, stating that 'the conclusion of the contract does not render irrelevant the behaviour contrary to good faith during the formation of a contract'. Therefore, pre-contractual liability can be applied if a party, contrary to the duty to act in good faith, concludes the contract with notable and undue delay. Thus, for the first time, pre-contractual liability was considered to apply even if a valid contract had been subsequently concluded.

V. The Complete Overturning of the Traditional Interpretation of Art 1337: The Case of the Conclusion of a 'Valid but Disadvantageous' Contract

The traditionally strict interpretation of pre-contractual liability was definitively abandoned in 2007 when the *Sezioni Unite* (Joint Chambers) of the *Corte di Cassazione* rendered two identical judgments (the so-called 'twin judgments') concerning the infringement of information duties by a bank in its dealings with customers.³⁰

To understand the issue better, it is first necessary to note that Italian legislation on financial services does not provide specific remedies the breach of a broker's duties of disclosure under private law.³¹ This is an example of

²⁹ Corte di Cassazione 16 October 1998 no 10249, *Giustizia civile*, I, 89 (1999).

³⁰ Corte di Cassazione-Sezioni Unite 19 December 2007 no 26724 and no 26725 n 4 above. The judgments confirm the conclusions already reached on precontractual liability a few years earlier, by Corte di Cassazione 29 September 2005 no 19024, *Danno e responsabilità*, I, 25 (2006) annotated by V. Roppo and G. Afferni, 'Dai contratti finanziari al contratto in genere: punti fermi della cassazione su nullità virtuale e responsabilità precontrattuale'.

³¹ The only exception to this absence of regulation in the Italian context is the law implementing Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services, where it is stated that: 'the contract is void, if the supplier (...) breaches pre-contractual information duties so as to significantly distort the representation of its terms. Voidance may be enforced only by the consumer and requires parties to repay what has been received' (Art 67-*septiesdecies*, Codice del consumo, decreto legislativo 6 September 2005 no 206).

what is considered to be the 'crucial issue' in the field of duties of information affecting European contract law: there is an absence of provisions specifying what legal consequences (sanctions and remedies) will attach when due information is not given by the obliged party.³² This problem rose to dramatic heights following the notorious scandals involving Cirio, Parmalat and Argentine bonds in Italy in 2001 and 2002.³³ Indeed, from 2003 onwards, thousands of investors seeking to recover their lost capital filed actions against the banks and brokers involved in the placement of 'junk bonds'.

The lower courts adopted very different solutions to this regulatory gap in contractual remedies available for the breach of information duties, thus giving rise to a patchy framework with unpredictable legal outcomes.³⁴ In some cases, the remedy awarded to the aggrieved party was due to the financial contract's invalidity due to its breach of mandatory rules (Art 1418 of the Italian Civil Code);³⁵ in other cases, the contract was deemed void for fraud or error;³⁶ and in yet other cases, damages were awarded under pre-contractual or contractual liability.³⁷

With the aforementioned 'twin judgments' handed down in 2007, the Supreme Court clarified the controversial issue, overruling the traditional interpretation of pre-contractual liability. In these revolutionary leading judgments, the *Sezioni Unite* clearly affirmed the following statements: a) violations of mandatory rules prescribing behaviour and conduct (such as good faith) can render a contract void only when expressly provided by law; Art 1418 of the Civil Code (which establishes the nullity of the contract in case mandatory rules are violated) applies only to mandatory provisions concerning the structure or content of the contract; b) contrary to the traditional stance, the material scope of pre-contractual liability is not limited to cases of unjustified termination of negotiations or to the conclusion

³² V. Roppo, 'Formation of contract and precontractual information from an Italian perspective' n 13 above, 296.

³³ For further details on these cases, see C. Amato, 'Financial Contracts and 'Junk Titles' Purchases: A Matter of (In)Correct Information', in M. Kenny, J. Devenney and L. Fox O'Mahony eds, *Unconscionability in European Private Financial Transactions. Protecting the Vulnerable* (Cambridge: Cambridge University Press, 2010), 321.

³⁴ G. Alpa, 'Gli obblighi informativi precontrattuali nei contratti di investimento finanziario. Per l'armonizzazione dei modelli regolatori e per l'uniformazione delle regole di diritto comune' *Contratto e impresa*, 889 (2008).

³⁵ Tribunale di Mantova 12 December 2004, *Contratti*, 585 (2005); Tribunale di Avezzano 23 June 2005, *Foro italiano*, I, 2535 (2005); Tribunale di Genova 18 April 2005, *Danno responsabilità*, 604 (2005); Tribunale di Cagliari 2 January 2006, *Responsabilità civile previdenza*, 1418 (2007).

³⁶ Tribunale di Lanciano 30 April 2007, available at http://www.ilcaso.it/giurisprudenza/archivio/fin.php?id_cont=598.php (last visited 6 December 2016).

³⁷ Tribunale di Asti 29 March 2007, *Corriere del merito*, 1023 (2007); Tribunale di Foggia 30 June 2006, *Contratti*, 423 (2007).

of a voidable contract; c) the extent of pre-contractual liability (Art 1337 of the Civil Code) cannot be predetermined with any degree of precision; it certainly imposes a requirement to deal fairly and to disclose to the other party all information relevant to the conclusion of the contract; d) there is pre-contractual liability when the contract is valid but deemed ‘disadvantageous’ for one party as a result of behaviour engaged in by the other during negotiations which is contrary to the principle of good faith; in this case, the compensable damage lies in the ‘decrease in profitability’ or in the ‘increase in economic burden’ produced by the behaviour that was contrary to good faith, in addition to further provable damages if proved.³⁸

This ruling rejected the traditional limit whereby no liability attached if a valid contract is concluded.³⁹ It broadened the boundaries of pre-contractual liability to include a new scope of application: a breach of good faith during negotiations that leads to a ‘valid but disadvantageous contract’.

VI. Compensable Damage when a ‘Valid but Disadvantageous’ Contract Is Concluded

After reviewing the key steps in the juridical understanding of Art 1337 of the Civil Code, it is now time to more closely examine the new case of pre-contractual liability arising when a party enters into a contract that is valid but disadvantageous due to the other party’s unlawful behaviour.

A survey of the case law following the leading case of 2007 shows that two kinds of ‘valid but disadvantageous contracts’ may be identified.

a) The first kind occurs when improper behaviour leads to contractual terms that differ from those that would have been stipulated if the principle of good faith had been followed. In this case, the disadvantage is *objective*: one of the parties, due to the misconduct of the other, purchases at a price that is different from the market value.

An example is illustrated by the proceedings concerning an investor who bought shares in a reputable Italian bank, paying a higher price than the market value because of misleading information contained in the prospectus. The *Corte di Cassazione* stated that under Art 1337 of the Italian Civil Code, the buyer was entitled to a compensatory sum equal to the difference between the paid price and the real value of the shares.⁴⁰

b) In the second kind of cases, misleading statements during negotiations result in commercial transactions that are less advantageous than one of the

³⁸ Corte di Cassazione-Sezioni Unite 19 December 2007 no 26724 and no 26725 n 6 above.

³⁹ To this effect, see: Corte di Cassazione 23 March 2016 no 5762 available at <http://dirittoci.vilecontemporaneo.com/wp-content/uploads/2016/04/Cassazione-1337.pdf> (last visited 6 December 2016).

⁴⁰ Corte di Cassazione 11 June 2010 no 14056, *Guida al diritto*, 29, 35 (2010).

parties could reasonably have expected. In this situation, the disadvantage is *subjective* and unrelated to the market value of the transaction. This kind of damage is illustrated in a case handed down by the *Corte di Cassazione* in 2008.⁴¹ During the negotiations for the purchase of an industrial machine, a seller informed his client that the sale would be subject to a tax benefit of thirty-three percent of the asset value, without knowing that the benefit had been suspended by the Italian Government a few months earlier. The buyer trusted the seller and bought the machinery. As soon as he discovered that he was not entitled to the tax benefit, he sought compensation for damages assessed at thirty-three percent of the asset's value, as he had not been properly informed.

The seller claimed that there could be no pre-contractual liability because the parties had entered into a valid contract.

The *Corte di Cassazione* considered this to be a case of pre-contractual liability arising from a 'valid, but disadvantageous contract', such that the 'decrease in profitability or the increase in economic burden' due to the breach of good faith had to be compensated. In this case, the contractual terms experienced a 'decrease in profitability' equal to the tax benefit that could not be enjoyed: thirty-three percent of the asset's value.

It appears clear that for the buyer, this solution is more advantageous than other remedies, such as the invalidity of the contract or a right of withdrawal, which seek to restore the claimant to the same position in which he would have been if no breach of good faith had occurred. Indeed, this solution allows the buyer to maintain the contract at the same price that he reasonably believed he could afford. On the other hand, such a decision is highly detrimental to the seller who did not act in good faith, forcing him to sell the asset at a non-market price (thirty-three percent lower than the originally planned price).

Such a solution was envisioned in a ruling given by the *Corte di Cassazione* in 1980: in that case, the victim of unfairness during negotiations suffered both types of damages (subjective *and* objective).⁴² A buyer purchased a property with the false belief – created by misleading information given by the owner – that he could obtain an annuity of seven point five-eight per cent of its value by renting it out. Having discovered the fraud (in fact, the annual gain was approximately three per cent), the buyer sued for damages. The *Corte di Cassazione* ruled that the victim was entitled to obtain the following damages: 1) the difference between the expected income and the actual income for a period equitably assessed at five years (loss of profit); 2) the

⁴¹ Corte di Cassazione 8 October 2008 no 24795, *Foro italiano*, 440 (2009), with commentary by E. Scoditti, 'Responsabilità precontrattuale e conclusione di contratto valido: l'area degli obblighi di informazione'.

⁴² Corte di Cassazione 9 February 1980 no 921, *Giustizia civile*, 2 (1980).

difference between the price paid for the asset and its actual market value (actual loss).

It is noteworthy that the remedy for such a specific violation of good faith makes the pre-contractual information given by one party to the other legally binding as terms of the agreement: the party providing information is bound to perform in accordance with what was said, regardless of his or her intentions, aims and awareness.

Thus, the Italian legal system incorporates and generalizes a kind of remedy that had already been adopted in European private law when information duties are breached in business-to-consumer relations.

The binding effect of information available in the pre-contractual context is established, for example, in the Timeshare Directive,⁴³ the Package Travel Directive⁴⁴ and especially in the Consumer Sales Directive.⁴⁵

Moreover, the *Draft Common Frame of Reference*⁴⁶ set out in Art II-3:109, entitled ‘Remedies for breach of information duties’, provides that

‘if a business has failed to comply with any duty imposed by the preceding Articles of this Section and a contract has been concluded (...) the business has such obligations under the contract as the other party has reasonably expected as a consequence of the absence or incorrectness

⁴³ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. See, in particular, Art 3(2): ‘The Member States shall make provision in their legislation to ensure that all the information referred to in para 1 which must be provided in the document referred to in para 1 forms an integral part of the contract. Unless the parties expressly agree otherwise, only changes resulting from circumstances beyond the vendor’s control may be made to the information provided in the document referred to in paragraph 1. Any changes to that information shall be communicated to the purchaser before the contract is concluded. The contract shall expressly mention any such changes’.

⁴⁴ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. See especially Art 3, which regulates the content of the brochure when available to the consumer: ‘The particulars contained in the brochure are binding on the organizer or retailer (...)’. On this topic, M.B.M. Loos, ‘Precontractual Information Obligations for Package Travel Contracts’ *Journal of European Consumer and Market Law*, 128 (2016).

⁴⁵ Directive 1999/44/EC of the European Parliament and the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. See, in particular, Art 2(2): ‘Consumer goods are presumed to be in conformity with the contract if they: (...) (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labeling’. The binding effect of precontractual statements from the seller is clearly provided in Art 4: ‘The seller shall not be bound by public statements, as referred to in paragraph 2(d) (...)’.

⁴⁶ C. von Bar, E. Clive and H. Schulte – Nölke eds, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Full Edition (Munich: Sellier European Law Publisher, 2009).

of the information'.⁴⁷

A similar provision is established in Art 69 of the draft proposal for a Common European Sales Law (CESL)⁴⁸ and in the Principles of the Existing EC Contract Law (the 'Acquis Principles'):⁴⁹ Art 2:208 (Remedies for breach of information duties) states that 'if a party has failed to comply with its duties under Art 2:201 (Duty to inform about goods or services) to 2:204 (Clarity and form of information) and a contract has been concluded, this contract contains the obligations which the other party could reasonably expect as a consequence of the incorrectness of the information'.

VII. The Current Roles of 'Positive Interest', 'Negative Interest', and Their Differences

Art 1337 of the Italian Civil Code does not establish a remedy for a breach of the pre-contractual duty of good faith. Traditionally, it has always been stated that the party who has behaved unfairly must pay damages. It should be noted that Art 1418 of the Civil Code states that if mandatory rules are violated (among which the rule requiring the observance of good faith in negotiations is certainly included), the contract is void.⁵⁰ However, to guarantee

⁴⁷ On this subject, C. Castronovo, 'Information Duties and Precontractual Good Faith' *European Review of Private Law*, 559 (2009); R. Schulze, 'Precontractual Duties and Conclusion of Contract in European Law' *European Review of Private Law*, 852 (2005).

⁴⁸ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final. Art 69 of the Proposal (*Contract terms derived from certain pre-contractual statements*), holds the seller liable not only for his own statements but, in certain circumstances, also for those made by the producer and other persons in the chain of transactions: 'Where the trader makes a statement before the contract is concluded, either to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract'. On this subject, B. Seifert, 'Art. 69: Pre-contractual Statements Under Article 69 CESL – Remake or Revolution?', in A.C. Ciacchi ed, *Contents and Effects of Contracts-Lessons to Learn From The Common European Sales Law* (Berlin: Springer, 2016), 133; J. Plaza Penades and L.M. Martinez Velencoso eds, 'European Perspectives on the Common European Sales Law' (Berlin: Springer, 2014), 89; P. Sirena and Y. Adar, 'Principles and Rules in the Emerging European Contract Law: From the Pecl to the Cesl, and Beyond' *European Review of Contract Law*, 9 (2013); D.G. Baird, 'Precontractual Disclosure Duties under the Common European Sales Law' *Common Market Law Review*, 50 (2013); F. Cafaggi, 'From a Status to a Transaction-based Approach? Institutional Design in European Contract Law' *Common Market Law Review*, 318 (2013); P. Giliker, 'Pre-contractual Good Faith and the Common European Sales Law: A Compromise Too Far?' *European Review of Private Law*, 85 (2013).

⁴⁹ Prepared by the Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles), Contract II*, (Munich: Sellier European Law Publisher, 2009).

⁵⁰ A European overview on this topic in R. Schulze and P. P. Viscasillas eds, *The Formation of Contract* (Baden-Baden: Nomos, 2016), 25-96; R.I. Ortiz, 'Pre-contractual Liability in the Civil Law', in L.A. Di Matteo, A. Janssen, U. Magnus et al eds, *International Sales Law*

certainty in legal relations and the predictability of legal outcomes, most Italian jurists and Italian case law agree that voidance of the contract under Art 1418 of the Civil Code does not apply in cases where the rules that have been violated require specific behaviour (such as the rule on good faith), even if they are mandatory in character; rather, voidance applies only if the rules regarding the form or the content of the contract are violated.⁵¹

According to the traditional view followed by the Italian courts, in cases of pre-contractual liability, not all damage can be compensated; only negative interests, ie the costs and earnings lost during negotiations,⁵² may be. Positive interests, the gains that would have been obtained with the conclusion and performance of the contract, cannot be compensated. This interpretation is clearly influenced by the studies of the German scholar Rudolph von Jhering and his distinction between *Negatives Vertragsinteresse*, regarding the interest that recovers the situation prior to the conclusion of the invalid contract, and *Erfüllungsinteresse*, concerning the situation after the contract's performance.⁵³ Although von Jhering's thesis was formulated to identify a form of liability only when a contract is invalid, Italian scholars and case law have extended it to cover all pre-contractual liability.

It is worth verifying whether such a distinction is still valid in the face of the most recent developments in Italian case law that have extended the scope of pre-contractual liability to the conclusion of a valid but disadvantageous contract.

It should first be noted that, in practical terms, it has never been possible to apply the distinction between positive and negative interests rigorously. As both scholars and the courts have already pointed out, the lost opportunities recoverable under the negative interest could be equal to or

(Baden-Baden: Nomos, 2016), 39-56; J. Cartwright and M. Hesselink eds, *Precontractual Liability in European Private Law* (Cambridge: Cambridge University Press, 2008), 30-68.

⁵¹ Corte di Cassazione-Sezioni Unite 19 December 2007 no 26724 and no 26725 n 6 above; Corte di Cassazione 29 September 2005 no 19024 n 30 above; Corte di Cassazione 25 September 2003 no 14234, *Contratti*, 145 (2004); Corte di Cassazione 14 July 2000 no 9321, *Corriere giuridico*, 1479 (2000). In legal literature: F. Santoro Passarelli, *Dottrine generali del diritto civile* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1981), 171; G. Perlingieri, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo* (Napoli: Edizioni Scientifiche Italiane, 2013). Opposing this view, see: F. Prospero, 'Violazione degli obblighi di informazione nei servizi di investimento e rimedi contrattuali (a proposito di Cass., sez. un., 19 dicembre 2007, nn. 26724 e 26725)' *Contratto e impresa*, 953 (2008). See also L. Di Donna, 'Remedies for the Breach of the Duty to Inform Consumers' *European Business Law Review*, 2, 253 (2012), who points out how Italian 'doctrine has always affirmed the independence of the rules of conduct and the rules of validity, so that the breach of the principle of precontractual good faith could never result in the invalidity of the contract, but only in a compensation for damages'.

⁵² To this effect, see: Corte di Cassazione 30 July 2004 no 14539, *Foro italiano*, I, 3009 (2004).

⁵³ R. von Jhering, 'Culpa in contrahendo' n 5 above, 16.

greater than the positive interest.⁵⁴

This being said, it must be stressed that in the light of the current boundaries of pre-contractual liability, it no longer appears possible to uphold the traditional view where, in cases of the breach of good faith during negotiations, compensable damage is limited to compensating the negative interest. The extent of compensation must be established on a case-by-case basis, with reference to the specific circumstances of the unlawful conduct. Currently, compensable damages in pre-contractual liability must be considered as ‘a set of various types of harm, with the shared premise that they are all consequences of the breach of the duty to act in good faith set forth in Article 1337 of the Civil Code’.⁵⁵

With this view, in terms of the grounds for compensable damage, a new distinction must be drawn between cases where no valid contract results from the contractual negotiations, and cases where a valid but disadvantageous contract is concluded as a consequence of the pre-contractual misconduct of one party. The distinction between positive and negative interest may continue to play a role only with respect to the former case. With regard to the latter, such a distinction now appears almost redundant; in pre-contractual fault, the extent of the compensation must be determined according to a criterion that focuses on providing the utmost protection for the aggrieved party.

VIII. Pre-Contractual Liability in Contract Relations between the Public Administration and Private Parties

To complete the survey of the recent developments regarding pre-contractual liability in Italy, it is worth retracing the major steps that led to the application of Art 1337 to the activities of the public administration.

In the first phase, which lasted until the late 1950s, the public administration was not considered subject to pre-contractual liability for negotiations with private parties. Case law held that the public administration was incapable of unfair behaviour because its institutional purpose was the pursuit of the common good.⁵⁶

The situation began to change in the early sixties, as the *Corte di Cassazione* for the first time assigned pre-contractual liability to the public administration where it unjustifiably withdrew from negotiations.⁵⁷

⁵⁴ Corte di Cassazione 13 December 1994 no 10649, *Contratti*, 164 (1995); F. Benatti, *La responsabilità precontrattuale* n 13 above, 151.

⁵⁵ See G. Meruzzi, ‘La responsabilità per rottura di trattative’, in G. Visintini ed, *Trattato della responsabilità contrattuale*, I, *Inadempimento e rimedi* (Padova: Cedam, 2009), 808.

⁵⁶ For further references to the understanding of the public administration’s role at the time, see R. Alessi, *La responsabilità precontrattuale della P.A.* (Milano: Giuffrè, 1951).

⁵⁷ Corte di Cassazione-Sezioni Unite 12 July 1961 no 1675, *Foro italiano*, I, 98 (1962); Corte di Cassazione 8 May 1963 no 1142, *Foro italiano*, I, 1699 (1963). According to these

Nevertheless, this responsibility was limited to cases where the public administration was in a private negotiation (*iure privatorum*). In this specific case, the unfair behaviour of public bodies during pre-contractual negotiations was assessed by taking into account the rules envisaged in the Italian Civil Code. On the contrary, under Art 1337, *culpa in contrahendo* could not be implemented in the case of public procurement tendering procedures due to the nature of the public authority's exercise of power.⁵⁸ Indeed, in Italian Administrative Law, personal rights that have their basis in the powers and actions of public administrative authorities are known as 'legitimate interests' (*interessi legittimi*). Before 1999, no action for damages could be filed for infringements of *interessi legittimi*.⁵⁹ Accordingly, authorities in the public administration were exempt from civil liability for unlawful exercise of their public powers.⁵⁹

Such a restrictive interpretation has been gradually phased out thanks in part to provisions introduced on this topic by European Union Law. In particular, Council Directive 89/665/EEC and Directive 92/13/EEC⁶⁰ on Review Procedures provide that in the Member States 'effective and rapid remedies must be available in case of infringements of Community law in the field of public procurement or national rules implementing that law'.

In light of this framework, a change in the traditional trend was inevitable and, according to most Italian scholars,⁶¹ even desirable. As for public procurement law, these Directives called for the implementation of effective remedies to ensure not only the correction of procedures and the annulment of unlawful acts, but also to grant bidders the right to claim damages if harmed by any unfair behaviour on the part of the public administration.

The turning point in the traditional understanding eventually came with

rulings, civil courts only have the power to assess whether the public body negotiated fairly and not whether it was a proper administrator.

⁵⁸ Corte di Cassazione 29 July 1987 no 6545, *Foro italiano*, I, 460 (1988); Corte di Cassazione-Sezioni Unite 6 October 1993 no 9892, *Giurisprudenza italiana*, I, 95, (1995).

⁵⁹ See generally, R. Caranta, 'Public Law Illegality and Governmental Liability', in D. Fairgrieve, M. Andenas and J. Bell eds, *Tort Liability of Public Authorities in a Comparative Perspective* (London: BIICL, 2002).

⁶⁰ Council Directive 89/665/EEC of 21 December 1989, on the 'application of review procedures to the award of public supply and public works contracts' and Council Directive 92/13/EEC of 25 February 1992, 'coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors', implemented in Italy by legge 6 December 1991 no 1034 and legge 19 February 1992 no 142.

⁶¹ E. Casetta, 'Responsabilità della Pubblica Amministrazione' *Digesto delle discipline pubblicistiche* (Torino: Utet, 1997), XIII, 210; S. Cassese ed, *Trattato di diritto amministrativo* (Milano: Giuffrè, 2003), II, 1649; G.M. Racca, 'La responsabilità contrattuale e precontrattuale della Pubblica Amministrazione', in P. Rescigno and E. Gabrielli eds, *Trattato dei contratti*, I, *I contratti della pubblica amministrazione* (Torino: Utet, 2007), 637.

the landmark judgment of the Joint Chambers of the *Corte di Cassazione* 22 July 1999 no 500.⁶² This judgment overruled the previous principle that no claim for damages could arise from the breach of legitimate interests. It stated that public entities could be held liable under civil law for damages caused during the exercise of their powers, including damages resulting from an infringement of the principle of fairness and good faith set out in Art 1337 of the Italian Civil Code.

Since the principle of public entity liability has been established, case law has increasingly broadened the scope of pre-contractual liability in the field of the public administration.⁶³

The courts currently identify two different cases for liability resulting from the award of public contracts:

a) Liability for the adoption of unlawful provisions. In determining this kind of liability, courts are required to rule on the legitimacy of the administrative acts. This judgment refers to the legality of any aspect of an administrative decision and the liability is considered to be of an extra-contractual (tortious) nature. The judgment upholding contract validity safeguards the legitimate interest of the private party and may result in the annulment of decisions involving the ground of illegality.⁶⁴

b) Liability for the adoption of unfair behaviour, identified regardless of the lawfulness of the administrative action. The judgment on the issue of liability enables the administrative courts to evaluate the overall behaviour of the public administration during the competitive bidding procedure for public contracts, in order to establish whether the public administration has fulfilled or failed to fulfil its duties of fairness and of good faith. If any improper behaviour during negotiations is ascertained and if all the elements for liability are present, a judgment requiring the contracting entity to compensate the damages incurred by private parties under Art 1337 of the Italian Civil Code may result.⁶⁵

Public procurement tendering procedures are one of the most interesting areas in which liability of public bodies first occurred, and later developed into a more extensive application.⁶⁶ In particular, the *Consiglio di Stato*

⁶² Corte di Cassazione-Sezioni Unite 22 July 1999 no 500, *Foro italiano*, 3201 (1999).

⁶³ Consiglio di Stato 8 September 2010 no 6489; Consiglio di Stato 28 May 2010 no 3393; Consiglio di Stato 8 October 2008 no 4947, all available at www.giustizia-amministrativa.it.

⁶⁴ Consiglio di Stato 27 June 2013 no 3521, available at <http://www.diritto.it/docs/35829-responsabilit-della-pubblica-amministrazione-da-provvedimento-illegittimo> (last visited 6 December 2016); Consiglio di Stato 20 October 2008 no 5124, available at www.giustizia-amministrativa.it.

⁶⁵ Corte di Cassazione 03 July 2014 no 15260, *Urbanistica e appalti*, 1181 (2014); Consiglio di Stato 10 December 2015 no 5611, available at www.giustizia-amministrativa.it.

⁶⁶ For further remarks on this topic, see S. Ponzio, 'State Liability in Public Procurement. The Case of Italy', in D. Fairgrieve and F. Lichère eds, *Public Procurement Law: Damages*

recently stated that, during a tender procedure for the award of public contracts, pre-contractual liability may occur not only when the tendering procedure is set aside by a Court, but also: a) when a public authority calls off a tender because it changes its project, and many years have passed since the first act of the procedure, b) if the project can no longer be realised for technical reasons, c) if the public authority has become aware that the procedure was flawed from the beginning and should have been annulled from the start, and d) when a public authority calls off the tender or refuses to sign the contract after the adjudication decision because of a lack of funds.⁶⁷

In such cases, liability has been found despite the lack of administrative unlawfulness, merely on the basis of the public party's unfair behaviour which violated the private party's the legitimate expected interest upon the positive conclusion of the negotiation.⁶⁸

In recent times, Italian case law made further progress in overruling the traditional approach, which had excluded any liability before the award of the contract.⁶⁹ In this regard, it was stated that contracting authorities may be held liable for the loss caused by infringements of any of the rules relating to the selection of the contractor, even when the economic operator is unable to demonstrate its right to be awarded a contract.⁷⁰

Italian case law commonly holds that all claims stemming from pre-contractual liability are of a tort law character (under Art 2043 of the Italian Civil Code).⁷¹ As an aspect of its 'tort' nature, pre-contractual liability of public entities does not arise from the mere unlawfulness of the administrative action, but also requires that fault on the part of the public authority be established.⁷² Indeed, a necessary element of an Italian damages claim is demonstrable fault, and the same set of rules applies to damages actions in public procurement law.

as an Effective Remedy (London: Bloomsbury Publishing, 2011), 67-80.

⁶⁷ Consiglio di Stato 7 February 2012 no 662, *Corriere Giuridico*, 675 (2012).

⁶⁸ Consiglio di Stato-Adunanza Plenaria 5 September 2005 no 6, available at www.giustizia-amministrativa.it; Consiglio di Stato 8 October 2008 no 4947, available at www.giustizia-amministrativa.it, both find pre-contractual liability for unfair behaviour despite considering the revocation of the award procedure to be legal.

⁶⁹ Consiglio di Stato 3 February 2011 no 780, *Danno e Responsabilità*, 4, 447 (2011).

⁷⁰ Consiglio di Stato 15 July 2013 no 3831, available at www.giustizia-amministrativa.it; Consiglio di Stato 13 December 2013, no 6000, available at www.giustizia-amministrativa.it; Corte di Cassazione 12 May 2015 no 9636, *Corriere Giuridico*, 1, 56 (2016).

⁷¹ Recently, Corte di Cassazione 17 September 2013 no 21255, *Corriere Giuridico*, 489 (2014). It is worth noting that two recent rulings, contrary to the established trend, base their reasoning in the contractual nature of *culpa in contrahendo*: Corte di Cassazione 12 July 2016 no 14188, available at <http://dirittocivilecontemporaneo.com/wp-content/uploads/2016/07/Cass.-12-luglio-2016-n.-14188-Rel.-Valitutti.pdf> (last visited 6 December 2016); Corte di Cassazione 20 December 2011 no 27648, *Europa e diritto privato*, 1227 (2012).

⁷² Among the most recent rulings: Consiglio di Stato 13 February 2009 no 775, *Urbanistica e appalti*, 734 (2009); Consiglio di Stato 9 June 2008 no 2751, *Urbanistica e appalti*, 1285 (2008).

From this perspective, the Italian legal system appears to be inconsistent with EU principles. Indeed, under the European directives on this topic,⁷³ the right to damages arising from the infringement of rules on public procurement does not require the court to pre-emptively ascertain the fault of the public entity.

On this point, the Court of Justice's case law has clarified that the Procurement Remedies Directives⁷⁴ must be interpreted as 'precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable',⁷⁵ including where the application of such legislation rests on a presumption that the contracting authority is at fault. The Court noted that a fault requirement means that an injured party runs the risk of not being compensated. This is deemed contrary to the objective of this directive, namely to ensure effective and rapid review.⁷⁶

From this point of view, the Italian system still has a long way to go to ensure that the rules regulating the public administration's pre-contractual liability fully comply with European principles.

IX. Conclusion

As recent developments in Italian case law have made clear, in contrast to traditionally-held rules, the material scope of pre-contractual liability is not limited to cases of unjustified termination of negotiations or to conclusions of a voidable contract. Pre-contractual liability also attaches when the contract is valid but 'disadvantageous' for a party as a result of the other party's behaviour during negotiations which is not in good faith and when there is 'delay' in conclusion of the contract.

Italian law now definitely rejects the conventional principle claiming that there is no pre-contractual liability when a valid contract has been concluded.

This certainly constitutes a great achievement, allowing, on the one hand,

⁷³ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts and the recent Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

⁷⁴ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992.

⁷⁵ Case 314/09 *Stadt Graz v Strabag AG and Others*, available at www.eurlex.europa.eu; Case 46/93 *Brasserie du Pecheur – Factorame*, available at www.eurlex.europa.eu; Case 6/90 *Francovich v Italy*, available at www.eurlex.europa.eu.

⁷⁶ F. Wilman, *Private Enforcement of EU Law Before National Courts: The EU Legislative Framework* (Cheltenham: Edward Elgar Publishing, 2015), 265.

for Art 1337 to recover its proper role in legislation as a general clause and, on the other, for enhanced standards of fairness during negotiations as well as enhanced protection for the aggrieved party.

However, it is worth noting that recent developments have extended the material scope of pre-contractual liability without establishing new definitive boundaries. As the *Corte di Cassazione* clearly emphasized in 2007,⁷⁷ ‘the extent of pre-contractual liability (Art 1337 of the Civil Code) cannot be precisely predetermined’. This new approach requires Italian courts and scholars to face a challenging task: they must establish the new and innovative shape of pre-contractual liability, attempting to identify when the duty of good faith attaches and what the breach of this duty entails.⁷⁸ It can be assumed that further developments in the area of pre-contractual liability in Italy will focus on identifying new cases that will trigger such a liability. In general terms, courts must draw a clear distinction between lawful behaviours that parties are allowed to pursue in negotiations to advance their own legitimate interests thanks to contractual freedom, and unfair courses of conduct relevant under Art 1337 of the Italian Civil Code. In this perspective, the duty of disclosure is a field in which a great need for balance arises between, on the one hand, the enforcement of good faith, morality and fairness during negotiations and, on the other, the liberal principle of contractual freedom.

Even with its ‘new’ and expanded boundaries, pre-contractual liability in Italy still does not appear to entail a generally applicable duty to inform in all situations and for all information. Silence, in and of itself, does not constitute a breach of good faith during negotiations; under certain circumstances, a party could fail to inform without being held responsible for any damage, as remaining silent does constitute an expression of the individual’s right.⁷⁹ As has clearly been stated in this respect, a ‘*one against all*’ form of protection would constitute a Pyrrhic victory, since it would overwhelm ‘the competition mechanism, which is ultimately the key element in a self-regulated and decentralized economic system’.⁸⁰ In performing this crucial task, which

⁷⁷ Corte di Cassazione-Sezioni Unite 19 December 2007 no 26724 and no 26725 n 6 above.

⁷⁸ An international overview of this issue is in: O. Crespo, M. and G. Rubio, M. Paz, ‘Precontractual Liability in European Contract Law’ *InDret*, 2 (2010) available at <http://ssrn.com/abstract=1638990> (last visited 6 December 2016).

⁷⁹ The issue has been traditionally addressed from an economic point of view, in an attempt to provide precise criteria to determine when a duty to disclosure exists: A. Porat, ‘The Law and Economics of Mistake in European Sales Law’ *Common Market Law Review*, 127-146 (2013); H. Kötz, ‘Precontractual Duties of Disclosure: A Comparative and Economic Perspective’ *European Journal of Law and Economics*, 5-19 (2000). For the European perspective, see T. Wilhelmsson and C. Twigg-Flesner, ‘Pre-contractual Information Duties in the *Acquis Communautaire*’ *European Review of Contract Law*, 441-470 (2006).

⁸⁰ H. Rösler, ‘Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-level Private Law’ *European Review of Private Law*, 733

consists in drawing a distinction between what is ‘fair’ and what is ‘unfair’, courts must take into account the circumstances of each specific case. Indeed, good faith and standards of fairness cannot but vary according to the nature of the contract and the contracting parties. For example, the level of protection resulting from the enforcement of general clauses should increase, and freedom of contract be restrained, when the transaction involves a perceived ‘weaker’ party, namely a party that, for various reasons, has less bargaining power than the counterpart (not only consumers but also small businesses, franchisees, investors, etc).⁸¹ Recently, on this note, the *Corte di Cassazione*,⁸² ruling on a case concerning an insurance contract, held that Art 1337 requires the insurer to provide customers in a comprehensive and timely manner with all the information necessary to assist their decision-making, and to avoid misleading or deceptive representations; in addition, insurers must offer policies that are truly suitable to clients’ needs. Thus, pre-contractual good faith is considered a source of a far-reaching set of duties and obligations which, prior to this judgment, were deemed applicable only when expressly established as such in specific legislation.

(2010). For similar remarks in the Italian context, see F. Galgano, *Diritto civile e commerciale*, 1, II (Padova: Cedam, 2004), 320.

⁸¹ O. Cherednychenko, ‘Public Regulation, Contract Law, and the Protection of the Weaker Party: Some Lessons from the Field of Financial Services’ *European Review of Private Law*, 663-684 (2014); S. Weatherill, ‘Use and Abuse of the EU’s Charter of Fundamental Rights: on the Improper Veneration of ‘Freedom of Contract’ *European Review of Contract Law*, 167-182 (2014); G. Vettori, ‘Contract without Numbers and without Adjectives. Beyond the Consumer and the Weak Enterprise’ *European Review of Contract Law*, 221-248 (2013).

⁸² Corte di Cassazione 24 April 2015 no 8412, available at <http://dirittocivilecontemporaneo.com/wp-content/uploads/2016/01/Cass.-24-aprile-2015-n.-8412.pdf> (last visited 6 December 2016).

Transfer of Ownership and Preliminary Agreements*

Paolo Gallo**

Abstract

This work aims to provide a contribution to the standardization of European law in the field of transfer of ownership. At first sight, the European scenario appears to present a very marked contrast between the French model of transfer of property based on the contract (*titulus*), and the German one, which is based on delivery (*modus*). Nevertheless, deeper analysis reveals that the differences are not as great as they seem. For instance, let us consider the Italian case, where, in spite of the fact that according to the *principio consensualistico* the transfer of property takes place at the very moment that agreement between the parties is reached, with the introduction of the preliminary contract, the transfer of ownership does not occur immediately, but only upon full payment of the agreed price. Under these circumstances, as far as immovables are concerned, the best solution from the European point of view seems to be to distinguish between the moment when the contract is signed and the moment in which the transfer of ownership takes place. Conversely, in the case of movable property, the need for rapid circulation of wealth makes the *principio consensualistico* approach more suitable.

I. An Historical and Comparative Perspective

In Roman law, a contract was not *per se* capable of producing real effects.¹ To this end, a subsequent act of fulfilment was required, namely the

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¹ F. Carnelutti, *Teoria giuridica della circolazione* (Padova: Cedam, 1933); E. Redenti, *Dei contratti di alienazione a titolo oneroso* (Padova: Cedam, 1935); G. Gorla, *L'atto di disposizione dei diritti* (Padova: Cedam, 1936); A. Dal Martello, 'La prestazione dell'obbligazione di dare' *Rivista trimestrale di diritto e procedura civile*, 214 (1947); V. Colorni, *Per la storia della pubblicità immobiliare e mobiliare* (Milano: Giuffrè, 1954); R. Sacco, 'Circolazione giuridica' *Enciclopedia del diritto* (Milano: Giuffrè, 1960), VII, 4; Id, 'Le transfert de la propriété des choses mobilières déterminées par acte entre vifs en droit comparé' *Rivista di diritto civile*, I, 442-487 (1979); Id, 'Consensualismo' *Digesto delle discipline privatistiche* (Torino: Giappichelli, 2009), 109; E. Russo, *La responsabilità per inattuazione dell'effetto reale* (Milano: Giuffrè, 1965); C.M. Bianca, 'Riflessioni sul principio del consenso traslativo' *Rivista di diritto civile*, I, 535 (1969); G. Palermo, *Contratto di alienazione e titolo dell'acquisto* (Milano: Giuffrè, 1974); G. Stolfi, 'Appunti sul c.d. principio consensualistico' *Rivista di diritto commerciale*, I, 1 (1977); A. Chianale, *Obbligazione di dare e trasferimento della proprietà* (Milano: Giuffrè, 1990); L. Vacca, *Vendita e trasferimento della proprietà nella prospettiva storico-comparatistica* (Milano: Giuffrè, 1991); F. Ferrari, 'Principio consensualistico

traditio, the *mancipatio*, or the *in iure cessio*, which produced the transfer itself. Such acts were abstract insofar as the transfer of ownership was possible regardless of the existence or validity of the underlying relationship.² Consequently, the ownership was transferred only upon delivery, meaning that the agreement alone did not have value unless accompanied by delivery. In reality, the rigidity of this system began to break down in the course of the evolution of Roman law, thanks to the admission that its effect could be replaced by non material forms of *traditio*, such as, for example, the *constituto possessorio*.³ The *Digest*, however, reiterated the classical scheme of transfer of ownership, which focused on *traditio*, subject to the admission of non material forms of *traditio*. This system would be implemented by the *jus commune*, in which we note, however, the passing of the principle of abstraction. In particular, in the *jus commune* system, transfer of ownership requires both the existence of a valid contract (*titulus*), and an act of execution, such as the *traditio (modus)*, or other non material forms of delivery. This system still appears essentially unchanged in the Austrian Code (ABGB), which, for the purpose of transfer of ownership, requires both *titulus* and *modus*.

In French Law, the system of *jus commune* was, however, simplified by the practice of including a *constituto possessorio* in the contracts themselves. In this way, through the use of forms of non material delivery, the conclusion

e Abstraktionprinzip: un'indagine comparativa' *Contratto e Impresa*, 889 (1992); Id, 'Abstraktionprinzip, Traditionsprinzip e consensualismo nel trasferimento di beni mobili' *Rivista di diritto civile*, I, 729 (1993); G. Maccarone, 'Obbligazioni di dare e consenso traslativo' *Rivista del Notariato*, 1319 (1994); G. Vettori, *Consenso traslativo e circolazione dei beni* (Milano: Giuffrè, 1995); Id, 'I contratti ad effetti reali', in M. Bessone ed, *Trattato di diritto civile* (Torino: Giappichelli, 2002), XIII, 85; G. Gandolfi, 'Sulla sorte del contratto con effetti reali (nella prospettiva di una codificazione europea)' *Rivista trimestrale di diritto e procedura civile*, 1015 (1997); P. Gallo, 'I rimedi restitutori in diritto comparato', in R. Sacco ed, *Trattato di diritto comparato* (Torino: UTET, 1997), 207-229; C. Camardi, 'Principio consensualistico, produzione e differimento dell'effetto reale' *Contratto e Impresa*, 572-601 (1998); P.M. Vecchi, *Il principio consensualistico* (Torino: Giappichelli, 1999); N. Muccioli, *Efficacia del contratto e circolazione della ricchezza* (Padova: Cedam, 2004); P. Sirena, 'Il principio del consenso traslativo', in V. Roppo ed, *Trattato del contratto* (Milano: Giuffrè, 2006), III, 23; P.G. Monateri, *Contratto e trasferimento della proprietà. I sistemi romanisti* (Milano: Giuffrè, 2008); E. Ferrante, *Consensualismo e trascrizione* (Padova: Cedam, 2008); Id, 'Contrattazione immobiliare e trasferimento della proprietà', in G. Visintini ed, *Trattato di diritto immobiliare* (Padova: Cedam, 2013), VI, 699-746; I.A. Caggiano, 'Il denaro tra proprietà e credito: le logiche dell'appartenenza' *Contratto e Impresa*, 491 (2009); M. Cenini, *Gli acquisti a non domino* (Milano: Giuffrè, 2009); E. Russo, 'Vendita e consenso traslativo' *Contratto e Impresa*, 599 (2010); G. Donadio, 'Diritto privato europeo e trasferimento della proprietà' *Nuova giurisprudenza civile commentata*, II, 151 (2012); P. Spada, 'Consensus e indici di circolazione' *Rivista di diritto civile*, 393-401 (2014).

² The question of transfer of property in classical Roman Law has been widely discussed; for a deeper analysis of doctrinal opinions for and against abstraction see, in particular, the canonical text by F. Gallo, *Il principio emptione dominium transfertur nel diritto pregiustiniano* (Milano: Giuffrè, 1966), passim.

³ *Ibid*; P.M. Vecchi, n 1 above, 18.

of the contract (*titulus*) was considered sufficient to transfer ownership.⁴ This then marks the emergence of the *principio consensualistico*, which would then be incorporated into the *Code Napoleon*.⁵

In Germany, the system has evolved rather differently. Savigny in particular affirmed the principle of abstraction of delivery as well as its ability to produce the effect of transferring ownership even in the absence of an underlying relationship, clearly converging with the classical Roman system of transfer of ownership, focusing on *traditio*, as well as on other equivalent acts. From this perspective, exchange of consent alone may not be enough for the purpose of transfer of ownership if not accompanied by exterior events such as delivery or registration.

This has led to a deep rift in Europe between the French/Italian and the German/English models of transfer of property. Comparative studies, however, have demonstrated that the contrast is much less marked than might appear at first sight;⁶ suffice it to recall that in Germany, for example, the principle of abstractness has been subject to some criticism, with the consequent development of numerous techniques to neutralize it. On the other hand, in French/Italian law there are also many cases where delivery produces the effect of transferring property even in the absence of a supporting or underlying relationship; consider for example manual donation, the fulfilment of a natural obligation, or the conscious payment of an undue obligation.

II. Arguments for and against the *Principio Consensualistico*

The problem, however, remains as to which system should be adopted to govern the transfer of ownership, also from the perspective of the unification of European private law. In favour of the *principio consensualistico*, we might consider that, beyond the philosophical suggestions from natural law about the suitability of requiring consent alone in order to produce legal effect, the *principio consensualistico* has also evolved in response to the practical need to simplify procedures for the transfer of ownership. Let us consider once more that from an economic point of view it is desirable to try to reduce to a minimum the formalities required in order to conclude a contract, and thus to bring about the transfer of ownership.⁷ So it is possible to reduce the necessary requirements to a minimum, and as a further

⁴ R. Sacco, 'Le transfert de la propriété' n 1 above, 442.

⁵ A. Chianale, n 1 above, 69; G. Vettori, *Consenso* n 1 above, 4.

⁶ R. Sacco, 'Un cryptotype en droit français: la remise abstraite?' *Etudes offertes à Jean Rodière* (Paris: Dalloz, 1981), 273-287; P. Gallo, 'I rimedi restitutori in diritto comparato' n 1 above, 219.

⁷ Corte di Cassazione 8 April 1981 no 1996, *Giurisprudenza italiana*, I, 498 (1983).

consequence, the transaction costs. From this standpoint, the principle of delivery may seem old-fashioned and may appear to no longer meet the needs of a modern and dynamic economy, where trading and exchanges increasingly occur at a distance, via telephone, by exchange of letters, fax, and telegram, not to mention electronic trading via the Internet. Under these conditions, requiring delivery in order to transfer property would not appear suitable to the needs of a modern economy. What of a person who purchases a significant amount of goods in New York with a view to immediately reselling them in electronic form? Let us also consider the electronic market for securities, stocks and bonds, which could not physically be able to work if the transfer of ownership of the securities were subject to their delivery. In effect, sending an electronic order is sufficient for the purchase, which allows for immediate resale of securities without need for physical delivery. A similar reasoning can be applied to the payment of the price. It is true that to permit the transfer of property without payment, it may go against the interests of the seller to keep the property in the event of lack of payment. However, at the same time it promotes the circulation of wealth even if the seller has not yet been paid. The result is in accordance with the needs of a modern economy based more on credit than on cash payment. In any event, the contracting parties can modify this rule.

Under these conditions, it would obviously not be possible to return to the past. Modern bargaining requires speed, without which the process could be seriously hampered, resulting in a serious and unacceptable reduction in the volume of trade, where the fulfilment of the purpose of transfer of ownership requires something more than the exchange of consent. From this perspective, the emergence of the *principio consensualistico* must be considered to be closely related to the gradual reduction of the elements necessary for the valid conclusion of a contract.⁸ One example of this is the increasing use of the modern, purely consensual, contract and the progressively diminishing importance of formal and real contracts, once again influenced by principles of natural law philosophy. The *principio consensualistico* therefore promotes the circulation of goods, minimizing requirements for the valid conclusion of a contract, and allowing the buyer to immediately make use of assets of which he has not yet even come into possession and perhaps never will. At the same time, however, a buyer runs the risk that a seller who has retained possession of an asset may subtract, destroy, damage, consume, or alienate it to third parties, such as someone who, unaware of the earlier contract of sale, acquires property by virtue of possession (Art 1153 Italian Civil Code) or registration, regardless of his good or bad faith. The German system, based on delivery or registration, eliminates these risks, insofar as the buyer becomes the owner

⁸ Corte di Cassazione 10 November 1979 no 5813, *Massimario della Giustizia civile*, 11 (1979).

solely by virtue of delivery or registration. The German system, based on the Roman abstract *traditio* model, is also very protective of third party buyers, who are not at risk of losing the purchased asset as a consequence of the previous sale not coming to fruition. Under these conditions it is not easy to say which is the better system of property transfer, especially from the perspective of a future single European law. For some, an initial solution would be to return to the system of *jus commune*, which required both *titulus* and *modus*.⁹ This, however, makes trade unnecessarily complex and would not in fact be feasible in a number of markets such as, for instance, contracts concluded at a distance, or electronic securities trading.

On the one hand, the need for speed in trading and exchanges, typical of modern economic systems, tends to favour the *principio consensualistico*, which requires only the exchange of consent in order to transfer property, at least between the parties.

This does not mean, however, that delivery or registration loses all relevance to the transfer of ownership, especially in relation to third parties. English law is emblematic from this point of view. Here, delivery or conveyance is traditionally required for the purpose of transfer of ownership; in more recent times, under the pressure of commercial needs, English law has come to accept the *principio consensualistico* of French origin.¹⁰

It follows that in England, exchange of consent is currently sufficient for the purpose of transfer of ownership between parties, so delivery or conveyance is necessary for any kind of transfer of ownership. The *principio consensualistico* does not exclude the eventuality that in certain cases delivery can *per se* produce the effect of transferring the property, in spite of the invalidity or absence of an underlying relationship. English law is once again emblematic in this regard insofar as the admission of the *principio consensualistico* has not led to the undermining of the efficacy of delivery to transfer property.¹¹ However, we should also bear in mind the residual importance of *traditio* in French law, especially in the fields of manual donation, fulfilment of natural obligation, and conscious payment of an amount not due.¹² The affirmation of the *principio consensualistico* has not in fact completely done away with the role of delivery as an autonomous means of transferring ownership.

What has been said thus far concerns movable property. As far as immovable property is concerned, there is a preference in Italy for the parties to postpone the transfer of ownership to a later time.

⁹ F. Ferrari, n 1 above, 729-757.

¹⁰ J.P. Benjamin, *A Treatise on the Law of Personal Property, with References to the American Decisions and to the French Code and Civil Law* (London: H. Sweet, 1868).

¹¹ P. Gallo, 'I rimedi restitutori in diritto comparato' n 1 above, 207-215.

¹² R. Sacco, *Un cryptotype* n 6 above, 273-287; P. Gallo, 'I rimedi restitutori in diritto comparato' n 1 above, 225.

III. Transfer of Ownership in the Projects for Uniform and European Private Law

The plurality of models relating to the transfer of ownership, as well as the models' strong roots in different areas of Europe, at least in part explains the reluctance of European jurists to take a clear position in favour of one model or another. There is no reference to transfer of ownership in the draft of the International Institute for the Unification of Private Law (UNIDROIT) or in the Principles of European Contract Law (PECL). The situation is no different for the Vienna Convention, which merely regulates transfer of risk (Art 66).¹³ In particular, the transfer of risk takes place by virtue of delivery, except in the case of goods in transit, in which case the time of transfer of risk coincides with the conclusion of the contract. On the other hand, the European Contract Code is worthy of consideration. As far as chattels are concerned, the Code provides that, unless explicitly agreed otherwise, the contract produces real effects both between the parties and against third parties from the moment of delivery (Art 6, para 1). On the other hand, as far as real estate and registered movable property are concerned, it refers to the laws in force in the various States (Art 6, para 3).¹⁴

The transfer of ownership is also mentioned in the Draft Common Frame of Reference (DCFR). In particular, Art VIII.2.101 states that parties are free to agree on the time and manner of transfer of ownership; in the absence of a specific provision, the principle whereby the property changes hands by virtue of delivery operates as a default rule.

IV. Resistance to Accepting the *Principio Consensualistico*

Historically, the *principio consensualistico* introduced a great innovation that simplifies the procedure for transfer of ownership, making delivery unnecessary. The affirmation of the *principio consensualistico* was not painless however; indeed it has always met with great resistance, that has not yet been completely overcome.¹⁵

Suffice it to recall, for example, that even in the early twentieth century, Italian scholarship rejected the idea that the exchange of consent alone was sufficient for the purpose of transfer of ownership, resulting in the need for

¹³ C. Angelici, *Consegna e proprietà nella vendita internazionale* (Milano: Giuffrè, 1979); G. Vettori, *Consenso* n 1 above, 97.

¹⁴ G. Gandolfi, n 1 above, 1015.

¹⁵ R. Sacco, 'Circolazione giuridica' n 1 above, 4; C.M. Bianca, *Il principio del consenso traslativo*, in Id, *Diritto privato, I, Il trasferimento in proprietà* (Padova: Cedam, 1995), 5; A. Gambaro, 'Il diritto di proprietà', in A. Cicu and F. Messineo eds, *Trattato di diritto civile* (Milano: Giuffrè, 1995), 685.

delivery or additional requirements.¹⁶ In spite of this, the Italian Civil Code of 1942 stated that the conclusion of the contract is sufficient to transfer property (Art 1376, Italian Civil Code). Despite the clarity of the wording of Art 1376 of the Italian Civil Code. However, many doubts that remain; in particular the *principio consensualistico* is not easy to reconcile with the principles laid down in the field of registration.

V. Sales Producing no Real Effect

The exchange of consent does not always produce the immediate effect of transferring ownership, depending on the nature of the goods, or other circumstances; cases of this kind involve purchases which do not produce real effects.¹⁷

A. Alternative Sale. A first example can be found in the field of alternative sale (Art 1285 Italian Civil Code). Imagine, for example, a purchase agreement whose object is either a car or a motorcycle; in such cases the transfer of ownership takes place only through the exercise of the power of choice.

B. General Sale. A second example comes from the field of the sale of general goods. If the contract relates to certain things only in general, the transfer of ownership takes place upon identification (Art 1378 Italian Civil Code).¹⁸ The Code merely states that identification must be made by agreement between the parties or in the manner they establish, without specifying their nature. Many interpretative doubts have arisen about this topic; in effect the nature of identification can vary depending on whether the parties have already established the criteria for identification or not. In the first case, the act that relates to the fulfilment is executive, while in the second case it is only a part of the agreement.¹⁹

In principle, once they have been established, assets can no longer be substituted, except to the exclusive benefit of the buyer, for example when

¹⁶ F. Carnelutti, n 1 above, 72-89; G. Gorla, *La compravendita e la permuta* (Torino: Utet, 1937), 6-9.

¹⁷ F. Gazzara, *La vendita obbligatoria* (Milano: Giuffrè, 1957); A. Rizzieri, *La vendita obbligatoria* (Milano: Giuffrè, 2000).

¹⁸ F. Sensini, *La specificazione nella compravendita di genere* (Firenze: Casa editrice Poligrafica Universitaria, 1934); U. Majello, 'L'individuazione nella vendita di genere' *Rivista di diritto civile*, I, 181 (1957); L. Ricca, 'Individuazione' *Enciclopedia del diritto* (Milano: Giuffrè, 1971), XXI, 172; M. Orlandi, 'Sulla natura dell'accordo di individuazione nella vendita di cosa generica' *Giustizia civile*, II, 171 (1987); G. Vettori, *Consenso* n 1 above, 110; Corte di Cassazione 24 April 1982 no 2548, *Rivista di diritto commerciale*, II, 391 (1983); Corte di Cassazione 15 November 1995 no 11834, *Società*, 771 (1996); Corte di Cassazione 14 January 1985 no 31, *Giustizia civile*, I, 3126 (1985).

¹⁹ Corte di Appello Genova 30 June 1953, *Repertorio del Foro italiano*, 263 (1953); Corte di Cassazione 18 May 1960 no 1223, *Giurisprudenza italiana*, I, 600 (1961).

the goods are replaced by others of higher quality.

The methods of identification may indeed be very different; the choice can be left to the seller, the buyer, or to a third party. Normally, the sale of general goods takes place in the field of fungible goods, unless the quantity of goods to be transferred has already been established when the contract is entered into, as in cases where the subject of the contract is something like a bulk sale (Art 1377 Italian Civil Code).

A general sale can also take place in the field of real estate, provided that the properties are considered homogeneous;²⁰ for example, the sale of a certain quantity of land to be identified as part of a larger plot;²¹ the sale of a newly constructed apartment, left to the choice of the buyer²² and so on.²³ As specifically provided for by Art 1378 of the Italian Civil Code, if goods have to be transported from place to place, possession, and subsequent transfer of ownership and risk exist by virtue of delivery to the carrier.²⁴

C. Sale of the Property of Others. It is not essential to have ownership to sell property (Art 1478 Italian Civil Code).²⁵ The Italian Civil Code expressly contemplates situations where the seller is not the owner of the thing sold at the time a contract is entered into.²⁶ The contract is neither void nor voidable, but it is perfectly valid.²⁷ It may not, however, obviously

²⁰ A. Auricchio, *La individuazione dei beni immobili* (Napoli: Edizioni Scientifiche Italiane, 1960); D. Valentino, 'Note sulla vendita generica di immobili' *Rassegna di diritto civile*, 808 (1980); E. Perego, 'La vendita di immobili non individuati' *Rivista trimestrale di diritto e procedura civile*, 657 (1991); Corte di Appello Cagliari 24 June 1991, *Rivista giuridica sarda*, 601 (1993); Corte di Cassazione 4 February 1992 no 1194, *Giurisprudenza italiana*, I, 1, 1084 (1993); Corte di Appello Cagliari 4 March 2004, *Rivista giuridica sarda*, 41 (2006).

²¹ Corte di Cassazione 18 January 1979 no 367, *Giustizia civile*, I, 829 (1979); Corte di Cassazione 8 November 1983 no 6588, *Giustizia civile*, I, 49 (1984); Corte di Cassazione 24 November 1977 no 5113, *Foro italiano*, I, 1256 (1978); Corte di Cassazione 10 June 1991 no 6570, *Giustizia civile*, I, 1021 (1992).

²² Corte di Cassazione 29 July 1983 no 5225, *Foro italiano*, 1080 (1983).

²³ Corte di Cassazione 13 December 1977 no 5427, *Giurisprudenza italiana*, I, 1, 518 (1979).

²⁴ G. Valeri, 'Sulla teoria della specificazione nella vendita di genere da piazza a piazza' *Rivista di diritto commerciale*, I, 588 (1932); A. Toscano, 'La vendita con spedizione di cose determinate solo nel genere' *Rivista trimestrale di diritto e procedura civile*, 832 (1954); Corte di Cassazione 13 October 1970 no 1965, *Giurisprudenza italiana*, I, 212 (1971); Corte di Cassazione 18 May 1984 no 3064, *Foro italiano*, I, 2182 (1984); Corte di Cassazione 25 March 1995 no 3559, *Giustizia civile*, 691 (1995); Corte di Appello Milano 17 September 1999, *Banca, borsa e titoli di credito*, II, 174 (2001); Corte di Cassazione 26 March 2001 no 4344, *Giustizia civile*, 586 (2001); Corte di Cassazione 24 June 2002 no 91166, *Giustizia civile*, I, 2896 (2003).

²⁵ L. Cariota Ferrara, *I negozi sul patrimonio altrui* (Padova: Cedam, 1936); R. Cavallo Borgia, *Profili giuridici della vendita di cosa altrui* (Milano: Giuffrè, 1972); A.M. Musy and S. Ferreri, *La vendita*, in R. Sacco ed, *Trattato di diritto civile* (Milano: Giuffrè, 2006), 196.

²⁶ Corte di Cassazione-Sezione penale 15 March 1985, *Corte di Cassazione penale*, 1960 (1986).

²⁷ Corte di Cassazione 11 December 1992 no 13123, *Nuova Giurisprudenza civile commentata*, I, 1009 (1993).

produce an immediate effect of transfer of the property to the buyer, but compels the seller to obtain the promised good. In practice, for these purposes it is sufficient that the seller obtain the goods. According to Art 1478 para 2 of the Italian Civil Code, the buyer becomes the owner when the seller himself acquires ownership of the goods.²⁸ The same result can be achieved if the third party participates in the purchase, directly transferring the asset to the buyer.²⁹

The question becomes slightly more problematic when a property belongs to more than one person. In cases of this kind, the purchase agreement is not completed owing to the lack of consent by some of the owners,³⁰ unless alienation on a pro rata basis is envisaged.³¹ In this case, alienation has actual effect in proportion to the share that belongs to the transferee, and has binding effect with respect to the portion that belongs to the third parties.³²

Lastly, if the buyer has obtained possession in good faith, according to Art 1153 of the Italian Civil Code, he obtains ownership. This should obviate the need for the buyer to request the termination of the contract,³³ although on some occasions the Court has allowed termination.³⁴

D. Sale of Future Goods. In accordance with general principles, future goods may also be sold (Art 1348 Italian Civil Code), although the donation of future goods is not permitted under the Italian Civil Code (Art 771). The sale of future goods is specifically contemplated by legislature in Art 1472 of the Italian Civil Code.³⁵ In fact it is necessary to distinguish between two different hypotheses regarding the sale of future goods.

1) If the contract relates to future goods, such as the harvest of a field,³⁶

²⁸ Corte di Cassazione 26 November 1986 no 6977, *Foro Padano*, 229 (1988).

²⁹ Corte di Cassazione 25 January 1980 no 609, *Giurisprudenza italiana*, I, 1184 (1980); Corte di Cassazione 21 February 1986 no 1052, *Giurisprudenza italiana*, I, 674 (1986); Corte di Cassazione 5 July 1990 no 7054, *Giustizia civile Massimario*, 7 (1990); Corte di Cassazione 26 June 2006 no 14751, *Giustizia civile Massimario*, 1677 (2006); Corte di Cassazione 18 May 2006 no 11624, *Vita Notarile*, 802 (2006).

³⁰ Corte di Cassazione-Sezioni Unite 8 July 1993 no 7481, *Rivista del Notariato*, 1308 (1995).

³¹ Corte di Cassazione 12 November 1997 no 11154, *Foro Italiano*, I, 834 (1998).

³² Corte di Cassazione 24 October 1978 no 4801, *Giustizia civile*, I, 492 (1979); Tribunale di Lucera 9 January 1980, *Giurisprudenza di merito*, 510 (1980); Corte di Cassazione 10 March 1981 no 1341, *Foro italiano*, 508 (1982); Corte di Cassazione 27 June 1983 no 4405, *Giustizia civile Massimario*, 6 (1983).

³³ Corte d'Appello di Brescia 20 October 1983, *Vita Notarile*, 347 (1985).

³⁴ Corte di Cassazione 25 July 1977 no 3306, *Foro italiano*, I, 2164 (1977); Corte di Cassazione 6 December 1988 no 6626, *Foro Italiano*, I, 721 (1989).

³⁵ P. Perlingieri, *I negozi sui beni futuri, la compravendita di cosa futura* (Napoli: Edizioni Scientifiche Italiane, 1962); G. Furguele, *Vendita di cosa futura e aspetti di teoria del contratto* (Milano: Giuffrè, 1974); Corte di Cassazione 6 January 1981 no 61, *Foro Italiano*, I, 2246 (1981).

³⁶ Corte di Cassazione 21 March 1987 no 2827, *Giustizia civile Massimario*, 3 (1987); Tribunale di Reggio Emilia 18 November 2002, *Giurisprudenza di merito*, 1750 (2003); Tribunale di Locri 4 November 1982, *Giurisprudenza italiana*, I, 174 (1984).

2) the birth of an animal, an invention not yet finished, a book not yet written, and so on, it is perfectly valid and the purchase of the property occurs as soon as it comes into existence (Art 1472 para 1 Italian Civil Code),³⁷ but obviously only if the thing comes into existence. Otherwise the sale is considered void (Art 1472 para 2 Italian Civil Code).³⁸

3) However, it may happen that the parties wish to conclude a contract under uncertain conditions;³⁹ in this case, the contract is valid and binding even in the event that the good does not come into existence. It follows that the buyer is compelled to make full payment even if the harvest of the field is lost, the animal is not born, and so on (Art 1472 para 2 Italian Civil Code). In the case of immovable property, the contract must be made in writing.⁴⁰ The contract for the sale of future goods is liable to immediate transcription.⁴¹

E. The Donation of Future Goods. The donation of future goods is not permitted (Art 771 Italian Civil Code). A donation must be free and spontaneous, so it is not possible to dispose of an asset one will only own in the future. Traditionally, for the same reason the donation of the goods of others is also not permitted.⁴²

F. The Preliminary Contract. Although the preliminary contract appears to have the function of compelling parties to conclude a subsequent contract, in practice it has come to denote a sale which does not produce real effects, in some ways comparable to the German sale.⁴³

The success with which the preliminary contract has been welcomed in Italy is due to the fact that the seller does not intend to relinquish ownership immediately, so under these conditions the transfer of property only takes place when the parties formally conclude the final contract of sale. Generally speaking, on this occasion the transfer of ownership takes place only when

³⁷ Corte di Cassazione 21 March 1987 no 2827 n 36 above; Corte di Cassazione 18 May 2001 no 6851, *Vita notarile*, 829 (2001); Tribunale di Ancona, 22 February 1980, *Giurisprudenza commerciale*, II, 129 (1981); Corte di Cassazione 22 April 2003 no 6422, *Foro padano*, I, 19 (2004).

³⁸ Corte di Cassazione 15 June 1988 no 4094, *Archivio civile*, 39 (1989); Corte di Cassazione 10 November 1989 no 4772, *Vita notarile*, 136 (1989); Corte di Cassazione 10 November 1989 no 4772, *Giurisprudenza italiana*, I, 1, 1754 (1990).

³⁹ Tribunale di Locri 4 November 1982 n 36 above.

⁴⁰ Corte di Cassazione 29 May 1980 no 3538, *Massimario giustizia civile*, 1532 (1980); Corte di Cassazione 6 November 1991 no 11840, *Giustizia civile Massimario*, 1602 (1991).

⁴¹ Corte di Cassazione 10 July 1986 no 4497, *Rivista del Notariato*, 1216 (1987), with an annotation by L. Sebastiani, *Natura giuridica della vendita di cosa futura e sua immediata o meno trascrivibilità*; Corte di Cassazione 10 March 1997 no 2126, *Giurisprudenza italiana*, 648 (1998); Tribunale Ivrea 9 June 2003, *Giurisprudenza di merito*, 2173 (2003).

⁴² Corte di Cassazione, 20 December 1985, n. 6544, *Giustizia civile*, 12 (1985); Corte di Cassazione, 18 December 1996, no 11311, *I contratti*, 460 (1997); F. Rinaldi, *La donazione di beni altrui* (Napoli: Edizioni Scientifiche Italiane, 2012).

⁴³ A. Chianale, n 1 above, 39, 89; F. Delfini, 'Itinerari del contratto preliminare e derogabilità dell'art. 1376 c.c.', in A. Albisetti et al, *Scritti in onore di G. Cattaneo* (Milano: Giuffrè, 2002), I, 437.

the parties conclude the final contract of sale, respecting all the formalities. Generally speaking on this occasion the buyer also pays the amount due. In practice it is a matter of interpretation to distinguish whether a contract is preliminary or final.⁴⁴

Art 2645 para 1 of the Italian Civil Code, permits also the transcription of preliminary contracts. The transcription of preliminary contracts allows the prospective buyer to take precedence over subsequent assignees who may have registered their deed of purchase at a later time.

G. Sale with Reservation of Ownership. In the event of a sale with reservation of ownership,⁴⁵ the effect of transferral is subject to the suspensive condition of full payment. This kind of sale is widespread especially in the field of movable goods and is designed to increase consumption. The Courts have recognized, however, that the sale with reservation of title also applies to the sale of real estate.⁴⁶

H. Leasing. The lease contract also comes into this category⁴⁷ and plays a role very similar to that of sale with reservation of ownership – namely to allow those who do not have the money required to buy an asset, such as a vehicle, to immediately obtain it, upon payment of a regular instalment, with the option of purchasing or returning it upon expiry of the contract.

VI. The Preliminary of the Preliminary

A thornier question is whether it is possible to conclude a preliminary contract binding on the parties to conclude another preliminary contract.⁴⁸

⁴⁴ Corte di Cassazione 3 September 1985 no 4584, *Repertorio Foro Italiano*, 3245 (1985).

⁴⁵ G. Cattaneo, 'Riserva della proprietà e aspettativa reale' *Rivista trimestrale di diritto e procedura civile*, 965 (1965); S. Gatti, 'Le situazioni soggettive attive del compratore nella vendita con riserva di proprietà' *Rivista di diritto commerciale*, I, 483 (1965); R. Calvo, 'Situazioni di appartenenza e garanzia nella riserva di proprietà' *Rivista di diritto civile*, 863-877 (2015).

⁴⁶ Corte di Cassazione 3 Aprile 1980 no 2167, *Rivista del Notariato*, 1288 (1980); Corte di Cassazione 8 April 1999 no 3415, *Notariato*, 473 (2001).

⁴⁷ M. Bussani, *Proprietà-garanzia e contratto. Formule e regole nel leasing finanziario* (Trento, 1992); G. De Nova, 'Leasing' *Digesto delle discipline privatistiche, sezione civile* (Torino: Utet, 1993), X, 462; R. Clarizia, 'I contratti nuovi. Factoring. Locazione finanziaria', in M. Bessone ed, *Trattato di diritto privato* (Torino: Giappichelli, 1999), XV; A. Frignani, 'Leasing finanziario internazionale (analisi comparata)' *Digesto delle discipline privatistiche, sezione commerciale, Aggiornamento* (Torino: Utet, 2000), 495; F. Mancuso, *Per la storia del leasing in Italia* (Bologna: Monduzzi, 2008); M. Serra, 'Il contratto di leasing', in E. Gabrielli ed, *Commentario del codice civile, Dei singoli contratti* (Torino: Utet, 2011), 471; B. Inzitari, 'Leasing nel fallimento: soddisfazione integrale del concedente fuori dal concorso sostanziale e necessità dell'accertamento del credito nel concorso formale' *Contratto e impresa*, 1369 (2012).

⁴⁸ M. D'Ambrosio, 'Contratto preliminare e contratto definitivo, contratto preparatorio e preliminare del preliminare' *Rivista del notariato*, 1546 (1980); P. Giammaria, 'Opzione di

In fact, although on some occasions the law has denied this possibility,⁴⁹ there is nothing to prevent parties doing so.⁵⁰

It is becoming increasingly frequent for the preliminary contract to be preceded by the signing of a document prepared by real estate agents and variously described as a purchase order or a so-called ‘preliminary of the preliminary’, and so on. Very often, when the buyer signs the firm offer, he pays a sum of money as a guarantee of the seriousness of the commitment. At this stage, one can normally withdraw from the contract, but this comports losing what has already been paid.

The meaning of this document, which precedes the conclusion of the

preliminare o preliminare di preliminare?’ *Giustizia civile*, II, 2813 (1993); L. Giorgianni, ‘In tema di formazione progressiva del contratto’ *Corriere giuridico*, 574 (1993); A. Ravazzoni, ‘Gradualità dei vincoli dell’alienante e conclusione del contratto’ *Rivista del notariato*, 35 (1994); G. Gabrielli, ‘Prassi della compravendita immobiliare in tre fasi: consenso a mani dell’intermediario, scrittura privata preliminare, atto notarile definitivo’ *Rivista del notariato*, 23 (1994); the same article appears in E. Marmocchi ed, *Dalle proposte di acquisto al preliminare formale* (Milano: Giuffrè, 1995), 123-139, with contributions by P. Vitucci, *Impegni assunti con il mediatore e proposta contrattuale*, 91-101, A. Ravazzoni, *Gradualità dei vincoli a carico dell’alienante e conclusione del contratto*, 103-121, P. Rescigno, *Dalla proposta di acquisto al preliminare formale: analisi di una prassi immobiliare*, 141-154; F. Tassinari, ‘Dalle proposte di acquisto al preliminare formale’ *Rivista del notariato*, 23 (1994); G. Malaguti, ‘Rilievi nell’ottica del proponente l’acquisto, su alcune clausole contenute nelle c.d. proposte d’acquisto’ *Rivista del notariato*, 61 (1994); F.A. Magni, ‘Puntuazione di contratto, preliminare e preliminare del preliminare’ *Giurisprudenza italiana*, I, 2, 539 (1997); F. Toschi Vespasiani, ‘Il preliminare di preliminare stipulato dalle agenzie immobiliari’ *Contratti*, 927 (2005); V. De Casamassimi, ‘Contrattazione immobiliare e preliminare di preliminare’ *Nuova giurisprudenza civile e commentata*, II, 248 (2008); G. Napoli, ‘Il contratto preliminare di preliminare’ *Rivista di diritto civile*, II, 81 (2010); A. Chianale, ‘Il preliminare di preliminare’ *Rivista del notariato*, I, 42 (2010); U. La Porta, ‘La salutare nullità del contratto inutile’ *Rivista del notariato*, I, 48 (2010); U. Stefani, ‘Il preliminare di preliminare e le intese precontrattuali nella contrattazione immobiliare’ *Rivista di diritto civile*, 1230-1251 (2015); G. Villa, ‘Mera puntuazione e puntuazione vincolante?’, in G. Gitti, F. Delfini and D. Maffei eds, *Studi in onore di Giorgio De Nova: Prospettive e limiti dell’autonomia privata* (Milano: Giuffrè, 2015), IV, 3213-3229; G. D’Amico, ‘Sul c.d. preliminare di preliminare’ *Rivista di diritto civile*, 40-65 (2016).

⁴⁹ Tribunale di Napoli 23 November 1982, *Giustizia civile*, I, 283 (1982); Tribunale di Napoli 21 February 1985, *Diritto e giurisprudenza*, 725 (1985); Tribunale di Firenze 19 December 1989, *Giurisprudenza di merito*, 466 (1990); Tribunale di Napoli 22 March 2003, *Giurisprudenza napoletana*, 265 (2003); Tribunale di Imperia 21 March 2005, *Il civilista*, 12 (2010); Corte d’Appello di Genova 21 February 2006, *Obbligazioni e contratti*, 648 (2006); identifying the parameters of *puntuazione non vincolante*: Corte di Cassazione 2 April 2009 no 8038, *Nuova giurisprudenza civile e commerciale*, I, 998 (2009), with a note by M. G. Salvadori, ‘La validità del c.d. preliminare di preliminare: una questione (non ancora) risolta’; with a commentary by G. Napoli, n 48 above, 81; see also: V. Roppo, ‘Causa concreta’ *Rivista di diritto civile*, 957, 971 (2013).

⁵⁰ Tribunale Napoli 11 January 1994, *Diritto e giurisprudenza*, 501 (1996); Tribunale Napoli 28 February 1995, *Diritto e giurisprudenza*, 463 (1995); Tribunale Nola 11 May 2010, *Giurisprudenza di merito*, 76 (2011); A. Chianale, ‘Contratto preliminare’ *Digesto delle Discipline privatistiche, Sezione Civile* (Torino: Utet, 1989), IV, 285; Corte di Cassazione 9 February 1998 no 1317, *Studium Juris*, 533 (1998).

preliminary contract, is the subject of much debate. A first interpretation is to assume that it is not yet a binding agreement, which would explain why it is possible to withdraw, while a second is to assume that it is a binding agreement which produces real effects.⁵¹ It could still be a preliminary of a preliminary, ie an agreement whereby the parties accept the commitment to conclude a preliminary, which will perhaps be more detailed in the presence of a lawyer. In any event, signing the purchase order does not give the right to seek specific performance (Art 2932 Italian Civil Code), and in this it differs from the preliminary agreement. Very often, the forms provided by real estate agents in fact allow withdrawal by the buyer with the understanding that in this case he will lose the amount that was paid when the preliminary of the preliminary was signed.⁵²

VII. Money

Generally speaking, the exchange of consent is not sufficient to transfer the ownership of money.⁵³ In fact, sale produces three main effects; a) the transfer of ownership of the property, b) the obligation to deliver to the purchaser, c) the obligation to pay the amount due. In other words, the exchange of consent does not produce the transfer of ownership of money, even if it has already been identified and set aside for payment. In fact, if the buyer loses the money an instant before payment, he would not be exonerated from payment. It follows, therefore, that in general the transfer of ownership of money can be fulfilled only by means of delivery.

VIII. Derogability of the *Principio Consensualistico*

Legal scholars long denied the possibility of derogation from the *principio consensualistico*, which was considered to be of public order. The

⁵¹ Tribunale di Firenze 19 December 1989 n 49 above, 466.

⁵² Corte di Cassazione-Sezioni Unite 6 March 2015 no 4628, *Giurisprudenza italiana*, 1064 (2015), with an annotation by A. Di Majo, 'Il preliminare torna alle origini', and a commentary by G. Palermo, 'L'atipicità dei procedimenti di formazione del contratto' *Nuova giurisprudenza civile e commentata*, I, 601 (2015), with a note by G. Buset, 'Le sezioni unite sul preliminare di vendita immobiliare' *Contratti*, 609 (2015); with an annotation by R. De Matteis, 'Accordi preliminari e modularità del vincolo a contrarre' *Nuova giurisprudenza civile e commentata*, II, 389 (2015); with an annotation by M. Capecchi, 'Riflessi operativi della sentenza delle sezioni unite sul preliminare di preliminare' *Nuova giurisprudenza civile e commentata*, II, 397 (2015); with an annotation by G. Napoli, 'Il riconoscimento giurisprudenziale del contratto preliminare del preliminare' *Rivista di diritto civile*, 1252-1277 (2015); with a commentary by G. Carapezza Figlia and O. Clarizia, 'Puntuazione vincolante o preliminare di preliminare?' *Contratto e impresa*, 874-883 (2015).

⁵³ A. Burdese, 'In tema di *consumptio nummorum*' *Rivista di diritto commerciale*, I, 269, 288 (1953).

same is also true of French law.⁵⁴ In reality there is no reason not to allow the parties to conclude a sale which does not transfer property.⁵⁵ In fact it may be in the interest of the seller not to relinquish ownership immediately; the immediate loss of ownership, regardless of the actual payment of the amount due, in fact exposes the seller to the risk of not obtaining anything in return for the property. This is the reason why the preliminary agreement has become so common in Italy.

However, if there is no immediate transfer of ownership, there is no contract of sale, but rather a preliminary agreement.⁵⁶ In spite of this, nowadays the preliminary contract is considered to be none other than a contract of sale in which the parties, in derogation from the provisions of Art 1376 of the Italian Civil Code, defer transfer of ownership until a later time, usually concurrent with the preparation of the deed of ownership and the payment of the amount due.

This solution obviously leads to a loss of the owner's prerogatives, as in the case of a mandate or fiduciary relationship. It is evident that the party who assumes the obligation to transfer ownership loses at least part of his powers of enjoyment and use of the property, of which he may avail himself solely in accordance with the commitments made in order to meet the expectations of the buyer (Art 1177 Italian Civil Code).⁵⁷

IX. The Obligation to Transfer Ownership

Signing a preliminary contract does not transfer ownership immediately, but gives rise to an obligation to do so. The obligation to give is typical of systems such as the Roman and German ones, where the difference between a binding contract and the act of transferral of ownership is clearly marked. The obligation to transfer does not seem to have any reason to exist in legal systems based on *consensualismo*, given that the transfer of ownership

⁵⁴ J. Ghestin, 'Riflessioni di un giurista francese sulla clausola di riserva della proprietà' *Rivista di diritto civile*, I, 440 (1981); G. Vettori, *Consenso* n 1 above, 5.

⁵⁵ F. Benatti, 'Il pagamento con cose altrui' *Rivista trimestrale di diritto e procedura civile*, 467, 481 (1976); A. Chianale, *Obbligazione di dare e trasferimento della proprietà* n 1 above, 48; F. Ferrari, n 1 above, 889, 892, 897; G. Maccarone, 'Obbligazioni di dare e consenso traslativo' *Rivista del notariato*, 1319, 1334 (1994); A. Gambaro, n 15 above, 687; C. Camardi, n 1 above, I, 572, 591; F. Delfini, n 43 above, 437, 438, 443; G. Vettori, *Consenso* n 1 above, 106; R. Sacco and G. De Nova, *Il contratto* (Torino: Utet, 3rd ed, 2004), I, 905; P. Sirena, n 1 above, 42; Id, 'Sulla derogabilità del principio consensualistico' in C.A. Graziani ed, *Colloqui in ricordo di Michele Giorgianni* (Napoli: Edizioni Scientifiche Italiane, 2007), 1071; Corte di Cassazione 4 March 1969 no 692, *Giustizia civile*, I, 748 (1969); Corte di Cassazione 29 July 1978 no 3807, *Massimario giurisprudenza italiana*, 897 (1978); Tribunale Lecco 21 September 1987, *Giurisprudenza italiana*, I, 2, 808 (1989).

⁵⁶ A. Chianale, *Obbligazione di dare e trasferimento della proprietà* n 1 above, 97.

⁵⁷ A. Chianale, *Obbligazione di dare e trasferimento della proprietà* n 1 above, 51; A. Gambaro, n 15 above, 687; P.M. Vecchi, n 1 above, 152.

takes place at the precise moment when the contract is signed.

Despite some resistance to accepting the *principio consensualistico* in the early twentieth century, which has led some commentators to remark on the centrality of the obligation to give, later scholars have largely ignored the issue. It is in fact only from the last decades of the twentieth century that a new interest in the obligation to give has come to the fore.⁵⁸ Numerous examples of the obligation to give are set out in the civil code; for example, we can consider the obligation of an agent without representation to transfer the ownership of real property not purchased in his own name but on behalf of his principal (Art 1706 para 2 Italian Civil Code), and so forth (Art 651 para 1, Arts 746, 769, 2041 para 2, Arts 2058, 2286 para 3, Italian Civil Code).

To these cases we must also add the preliminary contract, which does not immediately transfer ownership.

But once the obligation to give is accepted, there remains the question of the nature of the act of fulfilment of this duty.⁵⁹ The problem is certainly a delicate one, given that such an admission will collide with the traditional thesis concerning the typicality of the means of transferring ownership (sale and donation).

X. Double Selling

Considerable interpretative doubts have arisen with regard to the conciliation of the principle laid down in Art 1376 of the Italian Civil Code (*principio consensualistico*) with the principle of registration, which by common admission is not required for the transfer of property between the parties, but is important for the enforceability of the purchase against third parties. The conflict emerges in all its fullness in the event of double alienation of real estate.⁶⁰

Sellers of immovable property pursuant to the provisions of Art 1376 relinquish ownership, making it impossible to transfer the property to third parties; in fact, this conclusion collides with the existing provisions regarding registration. In fact, it is clear that in the event of conflict between multiple assignees, the one who registers first prevails, regardless of the date of the sale contract (Art 2644 Italian Civil Code).⁶¹

⁵⁸ A. Chianale, *Obbligazione di dare e trasferimento della proprietà* n 1 above; P.M. Vecchi, n 1 above, 52.

⁵⁹ A. Chianale, *Trascrizione del contratto preliminare e trasferimento della proprietà* (Torino: Giappichelli, 1998), 45, 73; E. Navarretta, 'Le prestazioni isolate nel dibattito attuale. Dal pagamento traslativo all'atto di destinazione', in C.A. Graziani ed, *Colloqui in ricordo di Michele Giorgianni* n 55 above, 219.

⁶⁰ E. Ferrante, n 1 above; A. Vitucci, *La trascrizione nel procedimento traslativo* (Napoli: Edizioni Scientifiche Italiane, 2015).

⁶¹ G. Vettori, *Consenso* n 1 above, VII, 76, 77, 81, 85; Id, 'I contratti ad effetti reali' n 1

The regulation on registration seems to contradict the *principio consensualistico* and supports the thesis of those who argue that the transfer of ownership could be considered fully concluded only upon registration. Others speak of dissociation of ownership.⁶²

Prior to execution, the seller is subject to a duty of care regarding the property to safeguard the buyer, but at the same time he retains the option to dispose of it in favour of a third party.⁶³

From this perspective, the *principio consensualistico* would therefore not be able to completely disregard the importance of registration of the contract, at least for the purpose of its enforceability against third parties.

The unenforceability of the contract against third parties undoubtedly constitutes an important limitation of the *principio consensualistico* and reveals some similarities to the German system based on the effectiveness of constitutive registration in the land register.⁶⁴ The one who purchases first does not obtain ownership and can only rely on the contractual liability of the seller. Many solutions have been proposed to overcome these difficulties; according to some, registration may be considered invalid if knowingly infringing the rights of others.⁶⁵ This solution however has not been accepted. As of 1982, the *Corte di Cassazione* has finally concluded that in the event of the double alienation of real estate, if the second buyer is in bad faith, he may be required to restore the property to the first buyer under Art 2043 of the Italian Civil Code.⁶⁶

This solution undoubtedly benefits the first purchaser, who can thus take advantage of the contractual liability of the seller and the tortious liability of the second buyer.

XI. Invitation to Treat

An offer should not be confused with a mere invitation to treat.⁶⁷

above, 103.

⁶² R. Sacco, 'Modificazione soggettiva della proprietà e dissociazione del diritto' *Studi in onore di Giocchino Scaduto* (Padova: Cedam, 1970), III, 115; Id, 'Le transfert de la propriété' n 1 above, 485; R. Sacco and G. De Nova, n 55 above, 906; P. G. Monateri, *La sineddoche* (Milano: Giuffrè, 1984); A. Chianale, *Obbligazione di dare e trasferimento della proprietà* n 1 above; A. Gambaro, n 15 above, 672; C.M. Bianca, *Il principio del consenso traslativo* n 15 above, 5, 19, 23; F. Delfini, n 43 above, 444.

⁶³ P.M. Vecchi, n 1 above, 152.

⁶⁴ A. Gambaro, n 15 above, 690.

⁶⁵ Corte di Cassazione Napoli 25 June 1915, *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, II, 770-774 (1915), with an annotation by B. Brugi, *Nullità di trascrizione*; E. Ferrante, n 1 above, 198, 200.

⁶⁶ Corte di Cassazione 8 January 1982 no 76, *Foro italiano*, I, 393 (1982); Corte di Cassazione 15 January 1988 no 4090, *Foro italiano*, I, 1568 (1989); Tribunale di Ivrea 16 May 2003, *Giurisprudenza italiana*, 778 (2004).

⁶⁷ A. D'Angelo, 'Proposta e accettazione', in V. Roppo ed, *Trattato del contratto* (Milano:

Normally it is thought that sending catalogues which advertise goods or the insertion of advertisements in newspapers or magazines could not be considered an offer, but as a mere invitation to treat, with the result that any acceptance by the recipient of the message does not imply the conclusion of the contract. For example, someone who publishes an offer in a newspaper for an apartment to lease normally intends to choose from all the responses he receives; this would not be possible if the act were qualified as an offer, rather than as an invitation to treat.

It is also important to discuss the meaning of displaying goods in shop windows with an indication of the price. According to the traditional view, to do so would be a typical example of a public offer, considering the completeness of the offer irrespective of the person who buys. Obviously the clause ‘subject to availability’ is considered to be implicit. On the other hand, some authors believe that the display of the goods can only mean an invitation to treat, insofar as the dealer reserves the opportunity to check the availability of goods.

The common law tradition also favours this solution where the display of goods in shop windows is considered to be an invitation to treat; the same holds true as far as the United Nations Convention on Contracts for the International Sale of Goods (CISG) is concerned (Art 14 para 2).

We can also consider that if displaying goods in shop windows is considered an offer, not only may the shopkeeper default if he does not have sufficient stock to meet all requests, but in order to conclude the contract, and the subsequent transfer of ownership, a declaration of acceptance would be sufficient, even in the absence of payment. The result would be that the buyer can take his property and leave without paying, without prejudice to the right of the seller to claim the amount due. However, this does not correspond to the normal practice of business. Normally no one can take goods out of the shop without payment!

XII. Final Remarks

Under these conditions, it is not easy to draw definite conclusions. The transfer of ownership is one of the most complex issues in modern times, especially in view of the unification of European law. The age of codification has in fact broken the typical legal uniformity of the *jus commune*, opening the way for two different contrasting models: on the one hand the French

Giuffrè, 2006), I, 51; P. Gallo, *Contratto e buona fede* (Torino: Utet, 2014), VI, § 2; Corte di Cassazione 12 May 1941 no 1416, *Repertorio Foro Italiano*, ‘Obbligazioni e contratti’, 116 (1941); Corte di Cassazione 15 December 1982 no 6922, *Repertorio Foro Italiano*, ‘Contratto in genere’, 79 (1982); Corte di Cassazione 7 December 2004 no 22983, *Nuova giurisprudenza civile commentata*, I, 101 (2006).

model, which is founded on the *principio consensualistico*, and on the other the German model, which is based on delivery. In spite of the fact that these two models may at first sight appear very different, the study of operational rules makes it clear that the distances are less extreme than they might initially appear. In effect, it may be observed that even in Italy in the field of sale of real estate it is usual to postpone the transfer of property to a later time, normally coinciding with the full payment of the amount due. From this perspective we can conclude that, at least in the field of real estate sale, the best solution is to postpone the actual moment of the transfer of ownership.

The situation may be different as far as movables are concerned; in this area the need for rapidity appears to prevail, and can be better fulfilled by the *principio consensualistico*.

International Issues Regarding Surrogacy

Ismini Kriari* and Alessia Valongo**

Abstract

The global spread of surrogacy and the changes to the concept of family resulting from historical, social and cultural factors should lead lawmakers to address the issue of children born through this procedure. This should draw both on the most recent academic literature as well as an interdisciplinary perspective.

The purpose of this article is to propose solutions on an international level to the complex problems arising as a result of both the violation of Italian law and the differences between the court rulings adopted in relation to specific cases. In fact, the current prohibition on surrogacy gives rise to interpretative uncertainties and the principle of *favor minoris* risks being compromised whenever an Italian couple returns to Italy with a child born abroad of a surrogate mother.

I. Introduction: The Need to Overcome the Impediments Posed by Italian Law

The traditional family comprising a mother, a father and their children conceived through sexual intercourse has been challenged both by medical technology offering alternative paths to reproduction and by engagement with foreign legal systems.

Over the last thirty years, the desire to become a parent has been achieved in many cases through surrogacy, a widespread practice that is today one of the most heated issues in law and bioethics, within both the Italian¹ and foreign literature.²

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¹ A. Trabucchi, 'Procreazione artificiale e genetica umana nella prospettiva del giurista' *Rivista di diritto civile*, I, 495 (1986); V. Franceschelli, 'Verso una paternità contrattuale: famiglia artificiale e diritto privato' *Diritto di famiglia e delle persone*, 1159-1174 (1987); D. Clerici, 'Procreazione artificiale, pratica della surroga e contratto di maternità: problemi giuridici' *Diritto di famiglia e delle persone*, 1011 (1987); F.P. Sisto, 'Mater non semper certa est: la gestazione per conto terzi fra (pieni di) scienza e (vuoti di) legislazione' *Diritto di famiglia e delle persone*, 1467-1473 (1987); P. Zatti, 'Verso un diritto per la bioetica: risorse e limiti del discorso giuridico' *Rivista di diritto civile*, I, 43-57 (1995); I. Corti, *La maternità per sostituzione* (Milano: Giuffrè, 2000), 94; F.D. Busnelli, 'Verso una madre intercambiabile?', in G. Visintini ed, *Dieci lezioni di diritto civile* (Milano: Giuffrè, 2001), 99.

² C. Shalev, *Birth Power. The Case for Surrogacy* (New Haven and London: Yale University

This essay focuses exclusively on issues related to heterosexual couples, as the circumstances of same-sex couples are specific and call for a different analysis.

Surrogacy involves a woman (the surrogate or 'parturient' mother) who agrees to carry a child for one or two persons (the commissioning couple or intended parents) who want to become parents and raise this child. This procedure is often sought after by women suffering from serious reproductive pathologies, such as endometriosis, the absence of a uterus or the presence of tubal malformations as well as those who have undergone a hysterectomy.

A distinction may be drawn between two core scenarios: the first is gestational surrogacy (in Italian '*maternità surrogata per sola gestazione*', or '*gestazione per altri*', also known as total or full surrogacy), under which the commissioning couple provides the genetic material or when it is provided by a donor.

Another form of surrogacy is traditional surrogacy (in Italian '*maternità surrogata per concepimento e gestazione*', also called partial surrogacy), where the surrogate mother also supplies the eggs.

While a number of jurisdictions permit human reproduction through surrogate motherhood, Italian legge 19 February 2004 no 40 on medically assisted procreation expressly prohibits it (Art 12 para 6 of legge 19 February 2004 no 40). Various justifications are offered for this prohibition: first, the state has an interest in preventing children from being turned into commodities and reduced to mere merchandise; moreover, surrogacy makes maternity uncertain, due to the separation of the various mother figures, which has negative consequences for the psychological and social development of the child.

The ban under Italian law is also rooted in the claim that surrogacy involves the exploitation of women because it treats the surrogate mother as a means to an end, relegating her from a person worthy of respect to a mere object. According to this view, a woman acting as a surrogate is often

Press, 1989), Italian translation by G. Ajani and A. Maffiodo: *Nascere per contratto* (Milano: Giuffrè, 1992), 16, 92; M. Coleman, 'Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction' 17 *Cardozo Law Review*, 497 (1996); R. Schuz, 'The Right to Parenthood: Surrogacy and Frozen Embryos' *The International Survey of Family Law*, 237 (1996); M.H. Baughman, 'In Search of Common Ground: One Pragmatist Perspective on the Debate Over Contract Surrogacy' 10 *Columbia Journal of Gender and Law*, 263 (2001); J. Wallbank, 'Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child' 10 *Medical Law Review*, 271 (2002); V.S. Browne-Barbour, 'Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?' 26 *Whittier Law*, 429 (2004); J.B. Reich and D. Swink, 'Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era' 14 *Journal of Health Care Law & Policy*, 241 (2011); S. Dar, T. Lazer et al, 'Assisted Reproduction Involving Gestational Surrogacy: An Analysis of the Medical, Psychosocial and Legal Issues: Experience from a Large Surrogacy Program' 30 *Human Reproduction*, 345 (2015), available at <http://humrep.oxfordjournals.org/content/30/2/345.full.pdf+html> (last visited 6 December 2016).

persuaded by the substantial amount of compensation offered and is thus not able to decide freely to hand over the child to whom she has just given birth. Therefore, the principle contained in Art 2 of the Italian Constitution, which enshrines respect for human dignity in the light of a social awareness, lies at the root of the decision to consider such agreements unlawful.

The potential for exploitation created by this practice, especially when the commissioning couple is rich and the surrogate mother is poor, cannot be denied. Nevertheless, this is only a risk, not a certainty, as is shown by the spread of altruistic surrogacy on a wide scale.

Among Italian scholars, there is greater acceptance of the practice by which the surrogate mother is inseminated with the commissioning couple's gametes, as the woman then only carries a child who has genetic links with both intended parents. According to this view, the existence of this biological relationship, which is particularly significant for the identity of the child, can justify the child being 'handed over' to the couple immediately after birth.

It is obvious that the enormous advances made by medical technology in the field of human reproduction have had a profound effect on the Italian prohibition on surrogacy and the rules on maternity. As a result, couples have started to travel to more permissive foreign States in order to overcome sterility and fulfil their desire of becoming parents.

Under Italian law, when a child is born of an unmarried surrogate mother and there is a genetic link with the commissioning father, the fact that the two have acted illegally cannot constitute grounds for a refusal to perform a DNA test to confirm the paternity of the latter: the commissioning father can formally recognise the child and will as a result be registered as the father on the birth certificate. However, if the child is born to a married surrogate mother, the presumption of paternity within marriage would result in the surrogate mother's husband being considered to be the legal father of the child. This presumption could again be rebutted by a DNA test.

The discussion concerning the possible ways of identifying a child's mother is more complex since, according to Italian law, the woman who gives birth is unequivocally the child's mother (Art 269 para 2 of the Civil Code).

In our contemporary societies, the issue of who must care for and bring up a child after birth seems to be addressed less with reference to Italian norms and the country's legal tradition and more on the basis of a new concept of responsible motherhood. This notion, which evokes the idea of affection and love, appears to be better suited to the requirements of developing the child's personality.

The central questions are: is the commissioning parents' desire to have a child really unconstitutional if it is satisfied thanks to a surrogate? Is it reasonable to make a presumption unequivocally, without taking account of the particular circumstances of a case, of the fact that a woman is unable to

decide freely to become a surrogate mother? Is it at all possible to view surrogacy as a lawful 'free act of giving', comparable to free acts of tissue or blood donation?

The compelling interests underpinning the prohibition under Italian law justify the state's intrusion into reproductive decisions in the area of commercial surrogacy contracts. However, the reasons influencing the decision by the surrogate mother to provide an infertile couple with a child may not always be financial; in some cases it may result from an altruistic desire. Recent changes to social attitudes are provoking new, positive reactions among legal scholars in Italy.³ Some argue that the sole biological fact of giving birth should be put into perspective and that the focus should be placed on evaluating the reasons for free procreative choices; by drawing on notions such as the protection of human health and solidarity among women, they attempt to legitimise surrogacy agreements by framing them as a 'gift relationship'.⁴

In support of this view, one can point to the relevance acquired by a concept of parenthood that is founded both on the notion of 'procreative choice' derived from Arts 2 and 32 of the Italian Constitution and on the notion of 'procreative responsibility' based on Art 30 para 1.

In spite of this shift within the Italian literature, the existence of a blanket ban under Italian law means that it is impossible to consider each situation individually, even though it would be vastly preferable to avoid any kind of automatism and to scrutinise the full circumstances of each particular case. Traditional surrogacy should not be regulated in the same way as gestational surrogacy because in the latter case the child is not genetically related to the surrogate mother and the intended parents may be the child's genetic parents.

There is, in particular, a legal gap with regard to children born abroad to foreign surrogate mothers. In fact, no Italian legislation deals with the issues that arise when Italian citizens travel abroad, conclude a surrogacy agreement in accordance with foreign law and then return to Italy with the children. In Italy, any children born through such a process are not considered to be the children of the commissioning couple and may also end up not holding Italian citizenship.⁵

³ M. Dell'Utri, 'Maternità surrogata, dignità della persona e filiazione' *Giurisprudenza di merito*, 358 (2010); F. Turlon, 'Nuovi scenari procreativi: rilevanza della maternità sociale, interesse del minore e *favor veritatis*' *Nuova giurisprudenza civile commentata*, 712 (2013); A. Pioggia, 'La disciplina in materia di procreazione e la riconquistata legittimità della fecondazione eterologa: un altro passo avanti per una legge che resta indietro' *GenIus*, 85 (2014); M. Di Masi, 'Maternità surrogata: dal contratto allo «status»' *Rassegna critica di giurisprudenza*, 615 (2015).

⁴ J. Colban, 'Out of the Goodness of My Heart, I Give You this Child' *Law School Student Scholarship*, 764 (2016), available at http://scholarship.shu.edu/student_scholarship/764 (last visited 6 December 2016).

⁵ S. Stefanelli, 'Procreazione e diritti fondamentali', in A. Sassi, F. Scaglione and S.

A survey of practical outcomes reveals that courts have adopted different positions. When some couples return to Italy, they provide the civil registry office with foreign documents in which the commissioning couple is stated to be the legal parents; the surrogate mother's name may also be noted. Some documents are judicial decisions while others are simple birth certificates. In some cases, the documents presented are not valid in Italy because they are not accepted by the national authorities as attesting the status of the child, who consequently will not be able to be legally recognised as an Italian citizen.

Turning to the position taken by the civil courts, it appears that a twofold trend can be identified as far as the registration of foreign birth certificates in Italy is concerned. On the one hand, the lower courts tend to endorse the acceptance of the commissioning couple as the legal parents when at least the man has contributed genetically to the surrogacy process. On the other hand, the Court of Cassation has rejected surrogate motherhood outright when neither the commissioning man nor the commissioning woman has a genetic link with the child.

However, the protection of the best interests of the child does not appear to be compatible with contrasting decisions which jeopardise the right of all children to the same legal status.⁶ Under Italian law, children have acquired a unique legal status since the enactment of the legislation reforming the law on filiation (by legge 10 December 2012 no 219 and decreto legislativo 28 December 2013 no 154).⁷ Hence, it is necessary to respect the principle of non-discrimination on the basis of the circumstances of conception or birth. Consequently, the state should acknowledge foreign birth certificates whenever such acknowledgement is required in order to guarantee the human rights of the child, such as right to privacy, to identity, to be loved, etc.

The following sections will argue in favour of the legal recognition of parentage between the newborn child and the intended parents in certain cases, specifically when the process has been completed in accordance with the law of another state and the child needs to continue in Italy the family

Stefanelli eds, *La filiazione e i minori. Trattato di diritto civile diretto da R. Sacco* (Torino: Utet, 2015), 4, 112; S. Mohapatra, 'Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy' 30 *Berkeley Journal of International Law*, 412 (2012); K. Trimmings and P. Beaumont, *International Surrogacy Arrangements: Legal Regulation at the International Level* (Oxford: Hart Publishing, 2013); J. Tobin, 'To Prohibit or Permit: What Is the Human Rights Response to the Practice of International Commercial Surrogacy?' *International and Comparative Law Quarterly*, 317-348 (2014).

⁶ G. Chiappetta, *Famiglie e minori nella leale collaborazione tra le corti* (Napoli: Edizioni Scientifiche Italiane, 2011), 323-351; M. Paradiso, 'Unicità dello stato di filiazione e unificazione delle denominazioni' *Nuove leggi civili commentate*, 589 (2013).

⁷ See M. Bianca, 'Tutti i figli hanno lo stesso stato giuridico' *Nuove leggi civili commentate*, 507 (2013); A. Palazzo, 'La riforma dello status di filiazione' *Rivista di diritto civile*, 245 (2013); F. Prospero, 'Unicità dello status filiationis e rilevanza della famiglia non fondata sul matrimonio' *Rivista critica di diritto privato*, 273 (2013).

relationship previously established with the intended parents.⁸

II. Examples from Abroad

Starting with an overview of all foreign legal systems, it is apparent that surrogacy is banned in several European countries⁹ but permitted in others, such as Greece, the United Kingdom, Russia, Ukraine, in addition to various non-European nations.¹⁰

⁸ R. Baratta, 'Verso la «comunitarizzazione» dei principi fondamentali del diritto di famiglia' *Rivista di diritto internazionale privato e processuale*, 591-601 (2005); L. Tomasi, *La tutela degli status familiari nel diritto dell'Unione europea* (Padova: Cedam, 2007), 348; A. Scalisi, '«Famiglia» e «Famiglie» in Europa', Presentation held during the 'Persona e comunità familiare' Conference, Salerno, 28-29 September 2012, available at http://comparazioneDirittoCivile.it/prova/files/convpersona_scalisi_famiglia.pdf (last visited 6 December 2016); S. Stefanelli, 'Status e modelli procreativi nel sistema attuale', in R. Cippitani and S. Stefanelli eds, *La parificazione degli status di filiazione* (Roma-Perugia-Mexico: ISEG Gioacchino Scaduto, 2013), 51, 80; A. Palazzo, *Eros e jus* (Milano: Mimesis, 2015), 67; A. Bellelli, 'La filiazione nella coppia omosessuale' *Giurisprudenza italiana*, 1819-1823 (2016).

⁹ Surrogacy is forbidden in France, Germany, Spain, Austria, Sweden and Denmark. For the position under Spanish law, see H. Corral, 'La nuova legislazione civile spagnola sulle tecniche di riproduzione artificiale e sui processi affini' *Rivista di diritto civile*, I, 79 (1990).

¹⁰ In California, the Family Code (available at https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=12.&title=&part=7.&chapter=&article, last visited 6 December 2016), Section 7962, f), provides that: 'the judgment or order shall establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children. The judgment or order shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section'. Regarding this issue, see D.E. Lawrence, 'Surrogacy in California: Genetic and Gestational Rights' 21 *Golden Gate University Law Review*, 3 (1991); A. Garrity, 'A Comparative Analysis of Surrogacy Law in the United States and Great Britain – A Proposed Model Statute for Louisiana' 60 *Louisiana Law Review*, 809 (2000), available at <http://digitalcommons.law.lsu.edu/lalrev/vol60/iss3/6> (last visited 6 December 2016).

In Canada, the *Assisted Human Reproduction Act* (SC 2004, c 2) allows altruistic surrogacy, while commercial arrangements are banned. On this issue, see R. Ruparelia, 'Giving away the «Gift of Life»: Surrogacy and the Canadian Assisted Human Reproduction Act' 23 *Canadian Journal of Family Law*, 12 (2007); A.L. Burpee, 'Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy' 37 *Georgia Journal of International & Comparative Law*, 305 (2009), available at: <http://digitalcommons.law.uga.edu/gjicl/vol37/iss2/4> (last visited 6 December 2016).

In Israel, the 1996 *Embryo Carrying Agreements Law* regulates surrogate motherhood and provides that the agreement must be authorised by a public authority. See C. Shalev, 'Halakha and Patriarchal Motherhood – An Anatomy of the New Israeli Surrogacy Law' 32 *Israel Law Review*, 51 (1998); R. Schuz, 'Surrogacy and PAS in the Israeli Supreme Court and the Reports of the Committee on Children's Rights' 247 *International Survey of Family Law*, 197 (2004).

Under Ukrainian law,¹¹ commissioning parents are considered to be the child's parents from birth, provided that they follow a specific procedure; on the other hand, in the United Kingdom and Greece they can only be declared by a court order to be the parents from birth.

In most Member States of the European Union, the legal mother is the woman who gives birth to the child.

The differences among the approaches followed in the various jurisdictions in the area of surrogacy reflect the combinations of legal values that are linked to the cultural, historical and social characteristics of the various nations.

On a European level, an overview of existing legal approaches indicates that it is not possible to identify a common core of uniform norms,¹² though the Member States of the European Union appear to agree on the need for a clear definition of parenthood and the status of the child.

The rapid spread of surrogacy arrangements within the European Union has had serious implications in terms of free movement of persons and the variety of parental models.

It may be noted that almost all legislation adopted until now has been founded on some common general principles: the protection of the right to decide freely to become a parent, state control over access to available techniques of medically assisted reproduction, the protection of the participants'

In South Africa, the 2005 *Children Act*, which was amended in 2007-2008 and entered in force in 2010 (available at <http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf>, last visited 6 December 2016), allows single persons and same-sex couples to enter into an altruistic agreement with a surrogate mother, provided that all parties are domiciled in that state. The validation of the agreement by the High Court enables the intended parents to be recognised as the legal parents before the birth, although the surrogate retains the right to revoke her consent until sixty days after the birth. If the woman decides to terminate the pregnancy for non-medical grounds, she can be obliged to pay back the money received in advance for health expenses. Moreover, if the commissioning person is a single person, he/she must be genetically related to the child; if the applicant is a couple, both must be genetically related to the child unless they are a same-sex couple (see Chapter 19, South Africa Children's Act of 2005). See, D. Meyerson, 'Surrogacy Agreements' *Acta Juridica*, 121 (1994); L. Mills, 'Certainty about Surrogacy' 21 *Stellenbosch Law Review*, 429 (2010).

¹¹ See the Ukrainian Family Code, available at <http://www.familylaw.com.ua/> (last visited 6 December 2016). Art 123 provides that: '1. If the wife is fertilised by artificial procreation techniques upon written consent of her husband, the latter is registered as the father of the child born by his wife. 2. If an ovum conceived by the spouses is implanted into another woman, the spouses shall be the parents of the child. 3. Whenever an ovum conceived by the husband with another woman is implanted into his wife, the child is considered to be the child of the spouses'. The specific aspects have been regulated by the Ukrainian Ministry of Health by Act no 771 of 23 December 2008. See S.N. Kirshner, 'Selling a Miracle? Surrogacy Through International Borders: Exploration of Ukrainian Surrogacy' 14 *Journal of International Business and Law*, 1 (2015), available at <http://scholarlycommons.law.hofstra.edu/jibl/vol14/iss1/4> (last visited 6 December 2016).

¹² On 12 October 2016, the Parliamentary Assembly of the Council of Europe (PACE) voted against the proposal by the Health Parliamentary Commission of 21 September 2016 to fix certain guidelines to ensure children's rights in relation to surrogate agreements.

health during the procedure, procreative responsibility in the interest of the child's welfare and the principles of solidarity, altruism and humanity.¹³

In the United Kingdom, the Surrogacy Arrangements Act 1985 permits altruistic agreements between commissioning couples and surrogate mothers.¹⁴ Under UK Law, it is an offence to pay the surrogate mother for the service, aside from 'reasonable expenses'; where this prerequisite is fulfilled, a surrogacy agreement is considered not to violate human dignity.

According to UK law, the *in vitro* fertilisation of the surrogate mother must take place in a clinic licensed by the Human Fertilisation and Embryology Authority. Before providing medical treatment to a woman, the physicians must consider the welfare of any future child and if any, of the surrogate's existing children who may be affected by the birth. An independent ethics committee must resolve any complicated cases and may impose its own restrictions on access to surrogacy.

An essential element of the agreement is its non-enforceability; none of the parties is bound by any obligation¹⁵ and thus the intended parents cannot compel the surrogate mother to hand over the child, while the surrogate cannot force them to take the child after birth if they refuse. These obligations may only arise after a court has ruled on the matter. The Human Fertilisation and Embryology Act 1990, the Adoption and Children Act 2002 and the Human Fertilisation and Embryology Act 2008 introduced important changes to UK surrogacy law. These changes aim to strike a balance between the different interests at stake: the desire to become a parent and the right of the child to grow up in a stable family.

The woman who has carried a child after the implantation of an embryo is the mother of the child, regardless of whether or not she is genetically related to the child. However, legal motherhood can be formally transferred to the commissioning woman through parental orders or adoption. In

¹³ R. Torino, 'Legittimità e tutela giuridica degli accordi di maternità surrogata nelle principali esperienze straniere e in Italia' *Famiglia*, 179 (2002); J. Tobin, 'To Prohibit or Permit: What Is the Human Rights Response to the Practice of International Commercial Surrogacy?' *International and Comparative Law Quarterly*, 317-348 (2014).

¹⁴ G. Criscuoli, 'La legge inglese sulla «surrogazione materna» tra riserve e proposte' *Diritto della famiglia e delle persone*, 1029-1047 (1988); D. Brahams, 'The Hasty British Ban on Commercial Surrogacy' 17 *The Hastings Centre Report*, 16-19 (1987); S. Cretney, *Family Law in the Twentieth Century* (Oxford: Oxford University Press, 2003), 543; K. Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' 22 *Child and Family Law Quarterly*, 449 (2010); F. Burton, *Family Law* (London, New York: Routledge, 2012), 300; M. Vijay, 'Commercial Surrogacy Arrangements: The Unresolved Dilemmas' 3 *UCL Journal of Law and Jurisprudence*, 200 (2014).

¹⁵ Specifically, agreements relating to surrogate motherhood are considered to be admissible under UK law, but unenforceable in the event of non-compliance by the parties. See, on this aspect, W.J. Giacomo and A. Di Biasi, 'Mommy Dearest: Determining Parental Rights and Enforceability of Surrogacy Agreements' 36 *Pace Law Review*, 250 (2015), available at: <http://digitalcommons.pace.edu/plr/vol36/iss1/7> (last visited 6 December 2016).

particular, the 2008 Act permits applications for a parental order within six months of birth, provided that the child is already living with the applicants.¹⁶ When deciding whether or not to grant a parental order, the court must consider all the relevant circumstances in order to safeguard and promote the welfare of the child.

The Social Services Department must carry out enquiries in order to ensure that the child is not at risk of any harm or in danger; if it has reasonable grounds to believe that this is the case, it can seek a care order in family proceedings. The court is entitled to issue an alternative order, such as a residence order or an additional order, for example, to the effect that the child should continue to have contact with the surrogate mother. This means that, in certain circumstances, the commissioning couple will not formally acquire legal parenthood. Once a child reaches adulthood, he or she can access the original birth certificate, after receiving specific counselling.

Several aspects can give rise to difficulties, especially the gap that is apparent between theory and practice.

First, the UK courts may uphold a substantial payment that was made illegally if they consider that it is in the child's best interest to remain with the commissioning couple and such a payment will make this possible.¹⁷ Since one of the statutory criteria for making a parental order is that the child must be living with the applicants, his or her welfare will rarely be safeguarded by removal from a settled family home. Thus, even if an unlawful payment has in fact been made, the child's interest may still be best served by upholding it as lawful.

¹⁶ Regarding the time limit, see the judgment of the High Court 3 October 2014: *X A Child* [2014] EWHC Fam 3135. This decision authorised the recording of a parental order even though the statutory time limit of six months (fixed by Section 54 of the 2008 Human Fertilisation and Embryology Act) had expired. The case concerned a child born in 2011 following a cross-border surrogacy arrangement between a British couple and an Indian surrogate mother. Only the commissioning man was genetically related to the child, while the ovules were supplied by a donor. The High Court issued the parental order on the following grounds: the good faith of the commissioning couple; their UK nationality; the free and informed consent of the surrogate mother and her husband; the report of social services attesting that there was no alternative way to legally establish the parental relationship, as the children did not have any family other than the commissioning couple in the receiving State. The couple was mentioned as the legal parents on a birth certificate issued by the Indian authorities and they declared to the court that they had started the parental order proceedings out of time because they were unaware of the time limit. The English High Court took into account the interest of the child in continuing the relationship already established with the couple and held that the time limit was too strict.

¹⁷ With regard to the payments that can be made to the surrogate mother to reimburse the expenses incurred as a result of the pregnancy, see in the UK: *Re C* [1985] FLR 445; *Re Q* [1996] FLR 396, with comment by G. Douglas. On this issue, see M.J. Radin, 'Market-Inalienability' 100 *Harvard Law Review*, 1849 (1987); A.M. Capron and M.J. Radin, 'Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood' 16 *Law Medicine & Health Care*, 34-43 (1988).

Secondly, the ban on commercialisation entails a bar on access to professional expertise and legal advice, with potentially adverse effects for all persons concerned. However, changes made to the law have allowed non-profit organisations to place prospective surrogate mothers into contact with commissioning couples and to charge a reasonable fee in order to cover their expenses. The problematic issue is whether or not it is acceptable for these non-profit bodies to act as intermediates.¹⁸

In the United Kingdom, surrogacy may be an option for men who do not have a female partner. Regarding this aspect, a difference compared to the Greek legal system may be highlighted. According to Law 19 December 2002 no 3089, gestational surrogacy is understood in Greece exclusively as a method for overcoming female sterility. Under Greek legislation, as amended by Law 18 January 2005 no 3305, a court may only authorise a surrogacy arrangement before the embryo is transferred if the following conditions are met: a written agreement between all parties, without any financial benefit for the surrogate mother; the consent of the husband of the surrogate mother, if she is married; the procedure is practised on humanitarian grounds, through the implantation of embryos into a woman who has not provided the eggs. The surrogate mother will thus carry an embryo that is genetically 'unrelated' to her and give away the unborn child to his or her genetic parents. The embryo may be genetically related to a third woman, if the commissioning woman does not produce eggs.

The commissioning mother must provide a medical certificate attesting her inability to conceive and the surrogate mother must also provide a medical certificate to confirm that she is in good health (Art 1458 of the Civil Code).

Under the conditions set out in Art 1458 of the Civil Code, the child's mother is presumed to be the woman who has obtained the court's permission. This presumption may be rebutted within six months of the child's birth by a legal action to challenge maternity. A challenge to maternity may be brought by the intended mother or by the surrogate, provided that evidence is submitted that the child was conceived from the latter's eggs (Art 1464 of the Civil Code).

A number of problems affect the law governing surrogacy in Greece.

¹⁸ See the website: www.surrogacy.org.uk (last visited 6 December 2016). Regarding the necessity of regulation, M. Cartine, 'Surrogacy and Silence: Why State Legislatures Should Attempt to Regulate Surrogacy Contracts' *Law School Student Scholarship*, 417 (2014), available at http://scholarship.shu.edu/student_scholarship/417 (last visited 6 December 2016); M. Strasser, 'Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law' 18 *Journal of Health Care Law and Policy*, 85 (2015), available at <http://digitalcommons.law.umaryland.edu/jhclp/vol18/iss1/4> (last visited 6 December 2016).

First of all, the ban on commercial surrogacy has failed to prevent the routine payment of money to surrogate mothers. Another issue is that the complexity of the rules governing the transfer of legal parenthood sometimes prevents the commissioning couple from establishing a formal relationship with the child. For example, if maternity is contested within six months of birth and it is proved that the surrogate actually carried her own child (and is also the genetic mother), the court may cancel the first authorisation and establish a legal relationship with the surrogate mother. The problem is that the child will in all likelihood already have lived for several years with the commissioning couple while awaiting the court order. In order to avoid pain, suffering and costs and to promote the child's best interests, it would be preferable to perform DNA tests on all persons involved immediately after birth.¹⁹

The examples from these European countries suggest that the possibility should be considered of recognising birth certificates issued by a foreign state attesting that a surrogacy agreement has been concluded and implemented abroad. The specific cases will be resolved differently by the Italian courts, depending upon the effects of the foreign document presented (a judicial authorisation or a birth certificate) and, above all, upon whether or not there is a genetic link between the child and at least one of the intended parents.

Nevertheless, the Italian state's punitive policy cannot constitute adequate grounds for denying a family status to the child. Even if the infant does not have a genetic link with one of the commissioning parents, he or she should not be deprived of a continued relationship with the persons who have been identified as his or her parents since birth. Separation from the commissioning family is surely not advantageous for the child whenever a fulfilling and stable social relationship has already been established.²⁰

For the reasons indicated above, there is a need for new legislative solutions in Italy to allow for the international recognition of documents certifying family status. Within this perspective,²¹ if a person acquires a status

¹⁹ I. Kriaris Catranis, 'Assisted Procreation Technologies and Human Rights – Legal Developments in Greece and Abroad' *Ethics and Morality of Health* (Athens: Paschalides, 2012), 67; Id, 'Human Assisted Procreation, Donor Anonymity and Surrogacy in the Greek Legal Frame' *Legal Essays in Honour of Prof. Theod. Panagopoulos* (Athens: Sakkoulas, 2011), 437.

²⁰ G. Ferrando, 'Stato unico di figlio e varietà dei modelli familiari' *Famiglia e diritto*, 952 (2015), who underlines the need for a concrete approach that starts from the efficacy of the family relationship in order to grant legal protection to each member of the family group.

²¹ R. Baratta, 'Verso la «comunitarizzazione» dei principi fondamentali del diritto di famiglia' *Rivista di diritto internazionale privato e processuale*, 591-601 (2005); A. Scalisi, '«Famiglia» e «Famiglie» in Europa' n 8 above; M. Condinanzi and C. Amalfitano, 'La libera circolazione della «coppia» nel diritto comunitario', in S.M. Carbone and I. Queirolo eds, *Diritto di famiglia e Unione Europea* (Torino: Giappichelli, 2008), 63; V. Colcelli, 'La parificazione degli status di filiazione', in R. Cippitani and S. Stefanelli eds, *Status di minore e status individuali nell'Unione Europea* n 8 above, 153; G. Chiappetta, 'I nuovi orizzonti del

as a legal child in a foreign country in accordance with the law of that country, this legal situation legitimately established abroad should be recognised by the home state once the family returns there, regardless of any prohibitions under the law of the latter state. According to this theory, the principle of unity of status for European Union citizens would be expressed in the area of family law and would operate in parallel with the expansion of the principles of mutual recognition of civil status documents between Member States and non-discrimination within the European Union.

Since all children have the right to a unique status wherever they live, they must be treated equally by the law, even if they are born abroad to surrogate mothers.²² For these reasons, it would appear to be desirable to achieve convergence internationally amongst nations in order to avoid discriminating against children, based solely on the circumstances of their birth.

Thus, the harmonisation of different legal rules could be achieved through international cooperation initiatives. In particular, an international convention on the recognition of foreign judgements and birth certificates could help to ensure coordination and cooperation among states, with the ultimate aim of promoting the evolution of legal systems and strengthening the protection of children's fundamental rights.

III. The Inconsistent Course of Italian Case Law

Italy does not have adequate tools to tackle the phenomenon of 'surrogate motherhood'. Such agreements are considered to be incompatible with Italian law, which does not recognise 'contracts' involving an obligation to give birth. However, despite the prohibition, surrogacy is practised unlawfully.

diritto allo stato unico di figlio', in G. Chiappetta et al ed, *Lo stato unico di figlio* (Napoli: Edizioni Scientifiche Italiane, 2014), 23.

²² For a brief reference to other states, it should be noted that in France, the highest court has established that children born to a surrogate mother abroad can be recognised by the state. In particular, reversing its previous trend, on 3 July 2015 the *Cour de Cassation* issued two rulings – no 619 and no 620 – regarding the transcription into French birth registers of foreign birth certificates concerning children born abroad to a surrogate mother (https://www.courdecassation.fr/cour_cassation_1/in_six_2850/english_2851/the_transcription_7252/press_release_32236.html, last visited 6 December 2016). In both cases, the Public Prosecutor had opposed the transcription, suspecting the birth to have resulted from a process involving surrogacy; the French Supreme Court dismissed the appeal against the decision ordering the transcription, stating that 'surrogate motherhood alone cannot justify the refusal to transcribe into French birth registers the foreign birth certificate of a child who has one French parent'. In the United Kingdom, in a ruling dated 9 December 2008, the High Court of Justice, Family Division (*X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam)) issued a parental order to ensure the interests of the minor, despite the conclusion of a commercial surrogate motherhood agreement abroad.

In such a scenario, any of three women could conceivably claim to be the mother: the woman who wants the child (the commissioning or intended mother), even if she was not otherwise involved in the procreation; the woman who supplied her genetic material (the genetic mother) and the woman who carried the child until birth (the surrogate or biological mother).

Since the overriding consideration is the effective fulfilment of the child's best interests, Italian law gives precedence to the surrogate mother, due to the greater importance of the relationship that the child establishes during the pregnancy compared to the relationship with the genetic mother.

Nonetheless, it is possible that a woman who agreed to give birth on behalf of others subsequently does not wish to have a parent-child relationship and wishes to hand the child over to the commissioning couple. In one case,²³ after considering the best interests of the child, the Court of Monza allowed the 'commissioning' father who supplied the gametes to recognise the newborn child as his own while allowing his wife, the 'commissioning' mother, to proceed with an adoption.

The first Italian court ruling that clearly endorsed the practice dates back to 2000,²⁴ when the Court of Rome ruled that surrogacy was ethically acceptable because in that instance it had not been agreed to on a commercial basis. According to the court, the surrogacy agreement was not incompatible with the general principles of Italian law, as the surrogate mother had given birth to the child for humanitarian reasons and did not have any genetic link with it; moreover, it did not violate 'the prohibition on a permanent reduction of physical integrity' (Art 5 Italian Civil Code) due to the temporary nature of pregnancy.

A comprehensive overview of recent Italian case law points to the emergence of several parallel tendencies: the first aims to protect the identity of the child born from a surrogate mother (especially when there is a genetic link with the commissioning father) and to safeguard the affective relationships created around him; the second seeks to interpret the concept of incompatibility with public policy in accordance with the principle of *favor minoris*; finally, the third calls for the acceptance of the registration in Italy of foreign certificates attesting the birth of children from surrogate mothers.

As far as these trends are concerned, a marked shift in the courts'

²³ Tribunale di Monza 27 October 1989, *Foro italiano*, I, 298 (1990), with comment by G. Ponzanelli.

²⁴ Tribunale di Roma 17 February 2000, *Famiglia e diritto*, 165 (2000), with comment by G. Cassano. On this issue, see M. Sesta, *La maternità surrogata tra norme etiche, deontologia e diritto giurisprudenziale*, in G. Visintini ed, *Dieci lezioni di diritto civile* n 1 above, 87; L. Rossi Carleo, 'Maternità surrogata e status del nato' *Familia*, 377 (2002); A.B. Faraoni, 'La maternità surrogata', in P. Cendon ed, *Il diritto privato oggi* (Milano: Giuffrè, 2002), 21.

attitude towards surrogacy occurred in 2009²⁵ when the Bari Court of Appeal ruled two parental orders made in the United Kingdom to be enforceable in Italy; these orders attributed maternity to the commissioning mother rather than to the biological mother.

The case involved a married couple, a British man and an Italian woman. Due to a serious illness, the woman could not have children and could not resort to homologous insemination with her own eggs. Following an altruistic surrogacy agreement with another British woman, two children were born and immediately handed over to the commissioning couple. Two parental orders issued by the Croydon Family Proceedings Court subsequently attributed the maternity of the two children to the wife, while the surrogate formally renounced maternity.

Once the parental orders had become definitive, the commissioning mother became the mother in all respects for the purposes of UK civil status records. The couple subsequently moved to Italy with the children and then separated by mutual agreement. During the separation proceedings, there it was necessary to provide certainty with respect to the status of the two children, who on a formal level had different mothers in Italy and in Britain.

To that end, the commissioning mother requested the Municipality of Bari to recognise the parental orders. Following the rejection of her request, the woman applied to the Court of Appeal, which ruled in her favour on the grounds that a refusal of recognition would certainly be detrimental to the two children.

The problem was how these parental orders could be rendered enforceable in Italy. If this could not be done, the two children would be considered to be the children of the surrogate mother in Italy and of the commissioning mother in the United Kingdom; this discrepancy would have adverse consequences for their stability and development. Hence, the Bari Court of Appeal ordered the transcription of the British parental orders into the Italian registers of civil status. From the time of their birth, the children had lived, for around ten years, stably and happily in Italy with the commissioning couple and for this reason it was in their interests to recognise the parental orders in Italy.

However, on 25 October 2011 the Court of Forlì ruled in precisely the opposite direction.²⁶ Also in this case, twins born abroad of a foreign surrogate mother had a genetic link with the commissioning father. However, while the commissioning father's request for recognition was accepted by the Italian authorities, in this case the commissioning mother's request was not,

²⁵ Corte d'Appello di Bari 13 February 2009, *Famiglia e minori, Guida al diritto*, 50 (2009), with comment of M. Castellaneta, *Dietro l'interesse del minore si nasconde il rischio di un turismo procreativo*. See C. Campiglio, 'Lo stato di figlio nato da contratto internazionale di maternità' *Rivista di diritto internazionale privato e processuale*, 589 (2009).

²⁶ Tribunale di Forlì 25 October 2011, *Diritto della famiglia e delle persone*, 532 (2013).

because it was considered to be contrary to public policy. More specifically, it was held that a woman who had not given birth to the children could not be their legal mother.

The rigid stance adopted by this court is not satisfactory because it is strictly rooted in the traditional notion of purely biological parenthood and risks damaging the children's right to their personal identities and to a stable and ongoing relationship with both parents.

Aside from the genetic links with a group of blood relatives, one's identity is founded on many aspects, such as membership of a national community, an ethnic group, a sex, gender, etc. However, first and foremost, it is founded on possession of a single status, indicative of membership of an unchangeable and established family.

IV. The Contribution of the Criminal Courts

The most noteworthy features that stand out within a general analysis of Italian case law are first, the inability of the legislature to rise to the challenge of continuous technological progress and second, the capacity of parts of the judiciary to adapt to social changes by filling the regulatory gap.

It is now necessary to provide an outline of several judgments from the criminal courts in surrogacy cases because of their implications for the question of determining parenthood.

First, it should be recalled that if a couple is convicted of the offence of misrepresentation of family status, the sentence imposed will not automatically entail a loss of parental responsibility,²⁷ as it is necessary to consider the needs of the child in the specific individual case in accordance with the European Convention on the Exercise of Children's Rights (Art 6(1)(a)).

Second, in most criminal proceedings, it is significant that judges do not interfere with legal relationships that have already been established between commissioning couples and their children in accordance with foreign law. Thus, criminal decisions must be carefully considered due to the indirect pressure that they could exert on the development of case law in the civil court. Indeed, social, political and legal thinking has evolved from a stance of clear opposition towards a vision of interaction and communication between the realms of criminal and private law.²⁸

²⁷ Tribunale di Brescia, Criminal Division, 26 November 2013, available at http://www.pe.nalecontemporaneo.it/upload/1394865082TRIBUNALE_BRESCIA_FECONDAZIONE.doc.pdf (last visited 6 December 2016).

²⁸ Regarding this vision of an unitary legal system and of a communication between the public and private law spheres, see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), I, 196-209.

A ruling issued by the Court of Pisa on 19 June 2015²⁹ can be interpreted as conforming to this view of reciprocal influence between civil and criminal case law. Here, the court ruled that an Italian commissioning couple accused of misrepresentation of family status (Art 567(2) of the Criminal Code) after having returned to Italy with their two sons, who were born in Ukraine according to a surrogacy arrangement involving a donation of ovules, had not committed any criminal offence. In this case, the woman's position was considered to be the same as the man's, even though she had not made any genetic contribution to the reproduction process. The Court of Pisa rejected the Public Prosecutor's request, ruling that the facts alleged did not constitute a criminal offence. According to the *lex loci*, the commissioning man and woman were defined as the legal parents in the birth certificates released by the Ukrainian authorities; they would only have violated the law in Ukraine if they had specifically declared the woman who had carried the children or the woman who had donated her ovules as the 'mother'.

In another groundbreaking decision issued on 13 January 2014,³⁰ the Court of Milan had to deal with a surrogacy agreement involving a donation of ovules that had been signed by an Italian couple in a Kiev clinic. Even though the intended parents had been obliged to pay a fee to the clinic and to reimburse the expenses incurred by the surrogate mother (totalling thirty thousand Euros), they were acquitted of the charge of misrepresentation of family status. As in the case discussed above, the commissioning couple was found not guilty because the family status of the child had been determined in accordance with Art 15 of Decreto del Presidente della Repubblica 3 November 2000 no 396 (Regulation concerning the Review and Simplification of the Legislation on Civil Status), which provides that declarations of birth made by Italian citizens abroad 'must be made on the basis of the law in force where the birth takes place'.

Both the rulings by the Pisa and Milan courts made the foreign birth certificates effective in Italy, having found that they did not give rise to any legal consequences that were contrary to 'public policy'.

'Public policy' is shorthand for 'international public policy', that is to say 'the complex of fundamental principles characterising the legal system in a certain historic period, founded on common needs of protection of human rights'. The correct concept of public policy must be considered carefully and

²⁹ Tribunale di Pisa, Criminal Division, 19 June 2015, available at <http://www.biodiritto.org/index.php/item/684-surrogata-pisa> (last visited 6 December 2016). See also in the same direction, Tribunale di Trieste 6 June 2013, available at http://www.dirittoegiustizia.it/news/15/000064963/Non_e_reato_ricorrere_alla_maternita_surrogata_in_Ucraina_e_chiedere_la_trascrivibilita_in_Italia_dell_atto_di_nascita.html (last visited 6 December 2016).

³⁰ Tribunale di Milano, Criminal Division, 13 January 2014, available at http://www.penalcontemporaneo.it/upload/1392834706TRIBUNALE_MILANO_FECONDAZIONE.pdf (last visited 6 December 2016).

coordinated with the principle of *favor minoris*. Surrogacy does not run contrary to this understanding of public policy nor to the need to promote human rights in the face of different provision in different legal systems in relation to societies as a whole; in particular, it is not at odds with the European Convention on the Protection of Human Rights and Fundamental Freedoms.

This tendency within the criminal courts has been confirmed by a recent decision of the Italian Court of Cassation;³¹ in its judgment of 10 March 2016, the Supreme Court found the accused commissioning parents not guilty of the offense criminalised under the Italian Criminal Code (Art 567(2)), because the birth certificates had been issued in accordance with the foreign law.

The numerous acquittals of commissioning couples demonstrate the difficulty, or even impossibility, of accepting the ban on surrogacy as a rule that operates effectively within the current social context. In the interests of the uniformity of the legal system, the above-mentioned criminal cases could have an indirect impact on private law. In particular, they suggest that, if the commissioning couple are genetically related to the child, they should continue to bring him or her up as their own child where a surrogacy agreement has been lawfully concluded abroad and family life has already been established. In such a case, the family should not be broken up, even if there is only a genetic link with the commissioning man, because the paramount consideration is to guarantee the best possible situation for the minor. The principle of the best interests of the child should result in priority importance being given to maintaining the relationship with the intended mother (even if she is genetically unrelated to the child).

The judgments examined above underline a new core of interests in the field of family status and parenthood. This core rejects an absolute ban³² and casts aside the rigid legislative models of motherhood or fatherhood in favour of a method based on continuous reference to the fundamental principles of international public policy and a considering of the specific circumstances of individual cases.

Following this line of thought, legal scholars might persuade future legislators to intervene and review their current restrictive positions. The

³¹ Corte di Cassazione-Sezione Penale V 10 March 2016 no 13525, *Foro italiano*, II, 286 (2016).

³² G. Ferrando, 'Le nuove realtà familiari nell'ordinamento interno', in I. Queirolo, A.M. Benedetti and L. Carpaneto eds, *Le nuove famiglie tra globalizzazione e identità statuali* (Roma: Aracne, 2014), 75. For a different position, G. Berti De Marinis, 'Maternità surrogata e tutela dell'interesse superiore del minore: una lettura critica alla luce di un recente intervento della Corte EDU' 3 *Actualidad Jurídica Iberoamericana*, 287 (2015), who argues that protection for the child does not imply the recognition of illegal conduct by the commissioning couples.

choice made by the Italian Parliament to ban surrogacy outright is not a realistic option because social reality demonstrates that increasing numbers of children are being born to surrogate mothers and that people who intend to become parents do so within a regulatory vacuum.

V. The Importance of the Genetic Link According to the Italian Court of Cassation

The Italian Court of Cassation displayed excessive rigidity when the Civil Division issued its first decision on 11 November 2014.³³

The Supreme Court ruled that a child born as a result of a surrogacy agreement implemented in Ukraine could not be kept by the Italian commissioning couple and had to be put up for adoption.

The Italian intended parents had decided to conclude a contract with a Ukraine surrogate and paid twenty-five thousand euros for her to give birth to the child and decline maternity by omitting her name from the birth certificate. When the couple later returned to Italy with the three-year-old child, they did not disclose the truth concerning the birth and were charged with fraud.

In spite of the Attorney General's submission that the child should remain in the couple's care, the Supreme Court held that no regulatory framework enabled it to recognise them as the parents as neither of the commissioning parents had a biological link with the child. Hence, this 'child of nobody' should be given up for adoption.

The Court of Cassation refused to recognise a legal relationship between the intended parents and the child, arguing that the ban on surrogacy remained in place even after the Constitutional Court's ruling in June 2014 that the ban on heterologous insemination was unconstitutional.

The reasoning followed by the supreme court was thus based on the fact that the practice was actually prohibited by both Italian and Ukrainian law; according to the Court of Cassation, the latter only allows surrogacy

‘provided that the woman who carries out the gestation does not provide her ovules and at least fifty per cent of the genetic heritage of the child comes from the commissioning couple. Thus, the surrogacy agreement was null and void’.

Consequently, the birth certificate attesting family status was false and the newborn child could not be recognised as the son of the commissioning

³³ Corte di Cassazione 11 November 2014 no 24001, *Foro italiano*, I, 3414-3416 (2014), with comment by G. Casaburi, ‘Sangue e suolo: la Cassazione e il divieto di maternità surrogata’.

couple.

More generally, the Supreme Court examined the situation of children on the assumption that the decisive element is the genetic link, as the determination of blood relatives is an important element of the child's personal identity. Accordingly, Western countries that accept surrogacy often require that a biological link exist with at least one of the commissioning couple; this legislative requirement reflects the concern to respect the child's rights, especially the right to know of his or her lineage.

Hence, in the opinion of the Court of Cassation, the absence of a genetic relationship between intended parents and a child conceived abroad according to surrogacy arrangements clashes with the general principle of *favor veritatis* and collides with public policy as a whole.

A further reason for the strict application of national laws probably stems from the fact that the intended parents had not been considered fit to adopt; more specifically, their bid to adopt a child had been turned down three times in the past. Thus, the judgment focused on the need to guarantee the child's best interest.

As a result of this judicial ruling, one nevertheless has to wonder if the removal of the child from the family home, where he had been raised by the intended parents for the past three years, really could be defined as the best solution to protect his or her personal identity and effective interests.

In our view, the enactment of legislation to allow a legal relationship to be established between the child and the commissioning couple would be preferable. In this way, the child would be spared confusion and trauma. Indeed, since the couple had taken care of the child since birth, they should at least have been given priority when the child was placed in a foster family. In Italy, this was not possible at the time of the judgment because the rules on adoption and foster families were quite different; specifically, if a minor had been abandoned by the birth family, the foster persons had no priority in relation to the adoption of the child.

The regulatory framework has now changed. After a protracted legislative enactment process (Bill 11 March 2015 no 1209), the Italian Parliament finally passed legge 19 October 2015 no 173, amending the Law on Adoption (legge 4 May 1983 no 184). As part of this reform, a procedure was put in place and the prerequisites were stipulated for allowing foster parents to become adoptive parents. Therefore, the law now gives preference to the foster family as adoptive parents if the child has lived with them for a substantial period of time. If, at the end of this period, the child goes back to his or her biological parents or is adopted by another family, the law protects the child's right to affective continuity with the foster parents.

VI. The Protection of Children Born Through Surrogacy from a European Perspective

The lower Italian courts have attempted, in the decisions examined in section IV, to offer a solution to the numerous delicate situations they were facing.

In accordance with the principle of non-discrimination between children, some Italian courts have tried to abandon the restrictive approach towards surrogacy when specific conditions were met.

In other European states,³⁴ the courts also protect the child's need to establish the essence of his or her identity, which includes parentage, when weighing up the commissioning couple's right to a child against the child's rights to the registration of his or her birth and the recognition of his or her parents.

This need to strike a fair balance between the conflicting interests at stake means that Italy cannot categorically deny the legal value of a parental relationship established by a foreign court, as otherwise the respect for private and family life would be irremediably compromised.

From this perspective, the increasing importance of the European Court of Human Rights can be properly understood, especially where it addresses the issue of the minor's family status.³⁵ Even though it often refers to the wide margin of appreciation of Contracting States when making decisions relating to surrogacy, this margin is necessarily limited in the area of the registration of documents establishing parentage, which constitutes a key aspect of a person's identity.

This stance is apparent in a judgement issued on 26 June 2014³⁶ by the Strasbourg Court in two cases (*Menesson v France* and *Labasse v France*), which were both decided upon at the same time. The cases involved two French commissioning couples who had obtained judicial decisions attesting the status of children born to surrogate mothers respectively in California

³⁴ For example, the German Supreme Court (Federal Supreme Court of Germany) upheld the appeal by a gay couple and ruled that a Californian judgement that named them as the legal parents of a child born from surrogacy had to be recognised in Germany. *Bundesgerichtshof* 10 December 2014, decision no XII ZB 463/13, available at <https://www.crin.org/en/library/legal-database/supreme-court-germany-decision-xii-zb-463/13-bundesgerichtshof-beschluss-xii> (last visited 6 December 2016). Regarding the German approach to surrogacy, see R. Wagner, 'International Surrogacy Agreements: Some Thoughts from a German Perspective' *International Family Law*, 129 (2012).

³⁵ G. Chiappetta, 'I nuovi orizzonti del diritto allo stato unico di figlio' n 21 above, 23.

³⁶ Eur. Court H.R., *Menesson v Francia*, Judgment of 26 June 2014 (application no 65192/11) and Eur. Court H.R., *Labasse v Francia*, Judgment of 26 June 2014 (application no 65941/11), available at www.hudoc.echr.coe.int. For first comments, see G. Casaburi, 'La Corte europea apre (con riserve) alla maternità surrogata (Osservazioni a Corte europea diritti dell'uomo 26 giugno 2014)' *Foro italiano*, IV, 561-568 (2014); A. Vesto, 'La maternità surrogata: Cassazione e Cedu a confronto' *Famiglia e diritto*, 306 (2015).

and Minnesota. The commissioning women were suffering from infertility and the embryos produced from the sperm of the commissioning men were implanted into the surrogates. As a result, twins were born in the first case in 2000 and a girl in the second case in 2001; the intended mothers were designated in the birth certificates as the mothers, even though they did not have any biological links to the children concerned.

After the French authorities refused to register the birth certificates in the French register of civil status, the applicants appealed to the Court of Cassation. The French Supreme Court dismissed their claim on 6 April 2011 on the public policy ground that the inclusion of such entries in the register would give effect to a surrogacy agreement forbidden under the French Civil Code.

According to the European Court of Human Rights, France overstepped its permissible margin of appreciation as its refusal to grant legal recognition to a parent-child relationship legally established abroad infringed the children's right to private life (Art 8 European Convention on Human Rights (ECHR)). A child's right to identity appears in fact to be closely related to genetic parentage and in order to avoid a violation of Art 8 of the European Convention on Human Rights, every national authority is obliged to recognise parentage established abroad between a child born through surrogacy and his or her genetic parent. The European Court focused on the lack of recognition for parental relations between biological fathers and their children, which causes disproportionate prejudice to the children's private life on various levels. In particular, while on the American birth certificates the applicants were mentioned as the children's parents, in France the commissioning fathers were not reported, even though they were the genetic fathers. As a result, the intended parents were French citizens while their children were American citizens. Consequently, the best interests of the children were also breached by the fact that it was impossible to obtain French citizenship, which is another component of personal identity. To sum up, the European Court of Human Rights ordered France to pay compensation for the damage suffered by the children who had been placed in a discriminatory legal situation.

In another ruling issued on 27 January 2015,³⁷ the European Court of Human Rights (*Paradiso and Campanelli v Italy*) asserted the principle that, under Art 8, a genetic link was not a necessary prerequisite for the existence of 'family life' when a *de facto* family had been created.

The applicants in that case were an Italian couple who had entered into a surrogacy arrangement with a Moscow-based clinic specialising in assisted reproduction techniques. In line with the provisions of Russian law, the

³⁷ Eur. Court H.R., *Paradiso e Campanelli v Italia*, Judgment of 27 January 2015 (application no 25358/12), available at www.hudoc.echr.coe.int.

surrogate mother consented to the child's registration as the commissioning couple's son after his birth in February 2011. In accordance with the Hague Convention (Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents of 5 October 1961), an *apostille* was issued for the Russian birth certificate that mentioned the applicants as the parents and did not refer at all to the surrogacy.

The Italian authorities, suspecting that the case involved a surrogacy agreement, refused to register the birth certificate in the Italian register of civil status and charged the couple with fraud. In October 2011, an Italian Children's Court decided to remove the child from his home and placed him in foster care because it had been established that he was genetically unrelated to either of the intended parents. In April 2013 a new birth certificate was ordered which indicated that the child had been born of unknown parents; as a result, he was put up for adoption.

In addition, a Russian company had received money from the applicants, purchased the gametes from unknown donors and assisted the commissioning parents throughout the entire procedure. On grounds that the minor's status has been illegally established abroad, the Strasbourg Court reached the conclusion that the child could not be returned to the applicants, who had been found unsuitable to be parents for the sole reason of having violated the law. Nevertheless, the European Court ordered Italy to pay compensation to the commissioning couple for having been deprived of a *de facto* life which could be seen to be advantageous to the minor; indeed, together as a family, they had loved and nourished the child throughout his first six months of life. The Strasbourg Court highlighted that the Italian State had failed to strike a balance between the competing interests at stake when it deemed the child's removal and subsequent placing into care to be reasonable, without giving sufficient consideration to the interests of the child.

On 21 July 2016³⁸ the European Court resolved two cases (*Foulon v France* and *Bouvet v France*), upholding the rights of children born through surrogacy for their relationships with the biological fathers to be legally recognised.

The applicants were Didier Foulon and his daughter in the first case and Philippe Bouvet and his twin sons in the second case. In both cases, the French nationals were not granted recognition for their biological affiliation as established in India, because the French authorities, which suspected that surrogacy agreements had been concluded, had refused to transcribe the Indian birth certificates into the civil status registers. The Strasbourg Court unanimously considered the refusal to enter the birth as a violation of Art 8

³⁸ Eur. Court H.R., *Foulon v France*, Judgement of 21 July 2016 (application no 9063/14) and Eur. Court H.R., *Bouvet v France*, Judgment of 21 July 2016 (application no 10410/14), available at www.hudoc.echr.coe.int.

of the European Convention on Human Rights with regard to the right to privacy of the children concerned. No violation of Art 8 was found to have occurred by reference to the biological parents' right to respect for family life.

The two cases did not deal with the issue of the transcription of filiation established abroad with respect to intended parents, but only with respect to genetic parents. However, the judgements can be seen as important signs of change as the European Court first accepted that family life exists in contexts involving surrogacy and in addition applied its earlier reasoning for the first time to non-traditional families; in the *Foulon* and *Bouvet* cases, both applicants were single (Philippe Bouvet had concluded a registered partnership with an individual of the same sex) and the birth certificates correctly indicated the respective Indian surrogates as the mothers.

VII. Final Remarks

This paper has shown that the numerous ethical arguments in favour of the Italian prohibition of surrogacy are clashing with a completely different social reality, in which free procreative choices are emphasised by reference to issues of protection of health and solidarity among women.

The restrictive régimes have played a part in creating reproductive black markets which have lead to dangerous consequences both for mothers and children. While some states remain opposed to surrogacy, which they view as contrary to their basic principles of morality, a majority of people worldwide believe that gestational surrogacy agreements should be enforceable, provided that the procedure is used with the aim of protecting both infertile women and unborn children.

The trends within the case law outlined in this essay are indicative of a tentative and partial opening up to the phenomenon, which to some extent appears to be tolerated by the criminal and civil courts. The courts often allow the *de facto* relationships created in the family group to continue; civil courts allow for the legal acknowledgement of parentage and the special adoption of the child, while criminal courts have acquitted intended parents of criminal offences.

The question of whether it is acceptable to pay a surrogate mother remains one of the most controversial because it raises serious concerns over the commercialisation of conception.³⁹ In order to prevent the exploitation of women and children, it is necessary to prevent infertile couples from

³⁹ L. Bianchi, 'Dentro o fuori il mercato? «Commodification» e dignità umana' *Rivista critica di diritto privato*, 489 (2006); M.M. Ertman, 'What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification' 82 *North Carolina Law Review*, 1 (2003); D. Gruenbaum, 'Foreign Surrogate Motherhood: *Mater Semper Certa Erat*' 60 *American Journal of Comparative Law*, 475-498 (2012).

making commercial surrogacy arrangements and by so doing, operating in a regulatory vacuum.

The global spread of surrogacy and the changes affecting the family should lead the Italian legislator to address the issue both by taking account of the most recent legal literature and by adopting an interdisciplinary perspective. As a result, Italian lawmakers should rise to the challenges posed by medicine and biotechnology and establish a legal framework for *de facto* family situations where they are centred on the welfare of individual people.

We have seen that the rules vary considerably from state to state, which results in a detrimental lack of uniformity.

Thus, a possible solution to the problem might involve international cooperation among states. An international convention on surrogacy might be developed in order to avoid unforeseeability within the applicable law and to guarantee not only coordination between different jurisdictions but also the recognition of birth certificates.⁴⁰

The first prerequisite for the recognition of cross-border surrogacy should be compliance with all the legal requirements of the foreign country. Accordingly, national authorities should have access to uniform mechanisms to resolve the complex questions they are facing, while safeguarding the free of movement of persons and respect for human rights.

⁴⁰ M. Carbone and I. Queirolo, *La libera circolazione della «coppia» nel diritto comunitario*, in S.M. Carbone and I. Queirolo eds, *Diritto di famiglia e Unione Europea* n 21 above, 6, 27. On this issue, see C.A. Choudhury, 'The Political Economy and Legal Regulation of Transnational Commercial Surrogate' 48 *Vanderbilt Journal Transnational Law*, 1 (2015), available at: http://ecollections.law.fiu.edu/faculty_publications/125 (last visited 6 December 2016).

Liquid Citizenship – Citizens’ Rights in the European Union*

Massimo La Torre**

Abstract

My paper is structured in three sections. In the first, I will introduce a debate about the form of the modern State in terms of a ‘conditional’ and ‘purposive’ programme. This debate was particularly acute in the late Seventies and Eighties, and gave rise to an alternative presented as ‘responsive’ or ‘reflective’. However, and this is my point in this first section, this alternative in a context of globalisation and neo-liberal hegemony has deviated from its previous aims and has been used to give a new impetus to a reshaping of the political order that is indeed very far away from being ‘responsive’. This development has been taking place especially within the discourse of the EU law doctrine.

In the second section, I will present a view of the normative evolution of EU institutions. In particular, I will contend that we have witnessed a strong ‘constitutionalization’ of the EU Treaties, particularly of its so-called ‘four freedoms’, and that this development has been exacerbated in the emergency which arose from the financial crisis surrounding the European Monetary Union. This new sort of (supranational) constitutionalism which is not supported by an equivalent supranational projection of democratic deliberation puts at risk the role played by member States as arenas of robust public discourse and locus for the re-allocation and re-distribution of resources, wealth, and rights among citizens.

In the third and final section, I will focus on European Citizenship as laid down in the EU Treaties and as concretely shaped by the European Courts. My contention here will be that this supranational citizenship is very much a creature of the Spirit of the Time and its ‘liquidity’. It makes individuals, if you like, closer to being the holders of a credit card, the visitors to a shopping centre, or travellers leading to a holiday resort, than committed members of a civil society.

I. Introduction

This is a special occasion. Forty years are for an academic institution but a short lapse of time. And yet these years have been my entire active academic life, a great part of which I have spent between the Badia and the Villa Schifanoia. Forty years, in any case, are sufficient for giving a sense of

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achievement. And an achievement and a success indeed were these forty years of our Department. And today here I am, grateful for being allowed to be back, even if for only one day, surrounded by four generations of EUI law scholars. I see here some of my teachers from my time as a researcher at the Badia; I see colleagues from my term as a professor; I see some of my students, and the students of those students that are now here teachers. We are a community, and proud of it.

Let me also say a few words about those that cannot be with us: Professor Mauro Cappelletti, a pupil of Piero Calamandrei, a liberal socialist, who gave his in-printing to much law research at the Institute; Nino Cassese, that I remember as a worried visitor of prisons in his quality of member of the European Committee for the prevention of torture; Brian Bercusson, a staunch defender of workers' rights and a perplexed commentator of Viking and Laval; Yota Kravaritou, whose criticism of neoliberalism should now be vindicated; and our previous President, Werner Maihofer, one of the protagonists of the liberal reform of the German penal code in 1969. In all these years the Law Department – as is proved by these names alone – has been a centre of excellence not only for scholarship, but also for moral and civic commitment.

Now, to my paper.

II. A Debate as Background

What has happened in the European Union over the course of these last forty years can perhaps be best understood by going back to a debate that took place in the 1980s and that was for the most part hosted by our law.

It was a debate over the fiscal crisis of the State,¹ meaning the welfare State, which was laying an increasingly heavy tax burden on its citizens. At the same time, the welfare State was being criticized as a pervasive presence in society in its effort to directly set unemployment and family policies and regulate social life at large. One concern was that this encroachment would bureaucratize and juridicize the so-called 'world of life'. Another concern was that this overcommitted welfare state would make citizens irresponsible by turning them into passive recipients of government handouts, to the extent that they would lapse into a frame of mind where they would not even try to find a job, thereby sucking vitality out of the labour market.

¹ Essential in this regard is J. O'Connor, *The Fiscal Crisis of the State* (London: St. Martin's Press, 1973), as well as W. Streeck, *Gekaufte Zeit: Die vertagte Krise des demokratischen Kapitalismus* (Frankfurt am Main: Suhrkamp, 2013), who reconstructs the concrete ways in which that debate wound up affecting economic policy in the Western countries. See also W. Streeck, 'Demokratie oder Kapitalismus? Europa in der Krise' *Blätter für deutsche und internationale Politik* (Berlin: Blätter Verlagsgesellschaft, 2013), who describes the debate on these issues between Streeck and Habermas.

This scenario was sometimes thematized by resorting to Niklas Luhmann's distinction between two ways in which the State's law can connect with the citizens' activity: under a 'conditional' programme or under a 'purposive' one.² In the former case, the law acts as it does in a classic liberal state, for it confines itself to laying down a set of rules under which everyone is to go about their business, typically in the strictly economic sense which explains why these are the rules of the market and the free exchange and movement of goods, capital, labour, and services. In this framework, the state does not set any aims to be pursued, but only conditions to be satisfied. Under the purposive programme, by contrast, the state sets out teleological directives and standards of conduct, and engages actively in an effort to achieve the basic aims posited as having primacy. The state itself turns into an economic agent and no longer limits itself to acting as the 'night watchman' of the nineteenth-century liberal tradition. It steps into the market and models it in its own image, while ensuring its operation.

The Luhmannian dichotomy was felt by many to be unsatisfactory, and so a 'third way' was proposed: that of the so-called responsive, procedural, or reflexive programme.³ Following this model, the State should neither retreat from its role as a social actor, nor should it fill that role as an overbearing, much less authoritarian, actor. It should rather strike a middle ground, acting conditionally but as an agent *within* society. It is an active State that does not abstain from social action, but it does so only by setting out procedures or a framework within which society can preserve its own autonomy without giving in to any paternalist intrusion into the 'world of life.' The society envisioned in this third programme is made up of agents who are not directly or primarily economic but are rather social: labour unions, community organisations, cooperatives, and all manner of collective forms of association – a sort of neocorporativism in which the state acts merely as watchdog, an arbiter of disputes and protector of rights.

Now, what does all of this have to do with the European Union and its law? The procedural programme, no more than the 'responsive' or 'procedural' law it is an expression of, regrettably never got off the ground: it never made it past its conception stage as a normative ideal. It was thought to be coded into the evolutionary force of history, but history, as it turned out, was taking quite a different turn. Even so, the 'procedural' programme did fulfil some of its promise, though in an area it was not thought capable of

² See, for example, N. Luhmann, *Zweckbegriff und Systemrationalität: Über die Funktion von Zwecken in sozialen Systemen* (Frankfurt am Main: Suhrkamp, 6th ed, 1999).

³ See G. Teubner, 'Reflexives Recht: Entwicklungsmodelle des Rechts in vergleichender Perspektive' *Archiv für Rechts- und Sozialphilosophie*, 13-59 (1982). See also G. Teubner, 'Das regulatorische Trilemma' *Quaderni fiorentini*, 109-149 (1984), and K. Ladeur, *Postmoderne Rechtstheorie: Selbstreferenz, Selbstorganisation, Prozeduralisierung* (Berlin: Duncker & Humblot, 1995).

investing in or at least not until, even within Luhmann's theoretical framework itself, certain trends began to take hold that could likewise be characterized as neoliberal. This new turn was in fact a full reversal: we went from democratic corporatism to neoliberalism. And all it took to set in motion this new course of events was a background change in society or the community, which morphed from an 'association' into a 'business firm.' Industry, in other words, no longer found itself interfacing with an antagonistic association but with a willing partner: communication and interchange, hitherto discursively and deliberatively conflictual, became functional. And what form of communication and interchange is more functional and effective than the market? 'Proceduralism' hitherto applied to the network of cooperatives, unions, associations, and groups which were thought to provide the support needed to actually exercise citizenship in the state, and which were even poised to grow in that role. But henceforth 'Proceduralism' would be brought to bear on a more traditional and traditionally well-established form of association within civil society, namely, and as suggested, the market. We need only take a functionalist view of how behaviour can be coordinated, and such coordination conveniently realizes itself in the form of competition and the market. And 'responsive' law might accordingly be recast as *lex mercatoria*.

However, what the 'responsive' or 'proceduralist' diagnosis calls for is not a return to Manchester liberalism and the minimalist, *laissez faire* State that refrains from engaging in economic activity: the point is rather to set out a regulatory framework that is *internal* to the economy. In other words, as much as the state does, following this view, have a part to play as an economic actor within the broader economy, the point of its action should not be to constrain the market and mould it in view of a social end, but rather to enable it to do what it does without hitting any bumps in the road, much less roadblocks: the market is designed to ensure an efficient allocation of resources so as to stimulate growth and yield profits, and the state is there to provide the conditions necessary for that to happen. If we set this doctrine in the broader context of the history of ideas, however, we may find it curious to discover that it has been with us for quite some time, operating more or less latently as the driving force behind the 'functionalism' of European integration. This is the driving idea of 'ordoliberalism', that essentially Germanic strand of liberalism which sees in the State not an adversary but a powerful ally, and which is aimed at bringing free competition into the fold of the State. The aim — in a statement of Franz Böhm, one fountainhead of ordoliberalism — is to mould 'natural law' into State law, where *natural law* is understood to refer to a spontaneous order, that is to say the *market*, and where *State law* refers in the first instance to the classical order of a rigid

legal constitution, which is not easily disposable by parliamentary majorities.⁴ If you want *more market* — the Ordoliberal claims —, you should have *more rules*, or, better, *more authority*.

III. Citizenship Versus Constitutionalism?

Now, that is precisely the trend we have been witnessing in the evolution of EU law, especially with regards to its case law. What happened is that, following the view that integration should come about by free trade and market competition, the European Court of Justice (ECJ) has ‘constitutionalized’ the EU’s primary law, and indeed its secondary law as well.

The ‘constitutionalization’ at stake, however, is not of the democratic kind which occurs at the moment of constitutional enactment, when the people resolve to bind themselves to a form of government under which to ensure their own coexistence and conduct their political action, their ‘acting in concert’ as Hannah Arendt would say. By contrast, none of these elements ever featured in the process of European integration, which from the outset has been built from the top by political elites.

Constitutionalization here means that the decision-making rules available to national parliaments are transformed into rules under which the same parliaments have no deliberative powers. National law is demoted to a rank below that of EU law. And that supremacy of EU law is made rigid, in the sense that national parliaments are *de jure* barred from making changes to this law, while governments themselves are *de facto* prevented from doing so (the latter is also, to some extent, a *de jure* impediment as a result of the *acquis communautaire* and also the *effet utile*). European Union constitutionalism is thus fashioned as a counterweight to Member States democracy and plastically creates what we are permanently wont to refer to as the EU’s democratic deficit.⁵ The constitutionalization of EU law, in other words, might be seen as built on the deconstitutionalization of the member States — and yet these States’ constitutions are the outcome of a ‘constitutional moment’ and of some form of constituent power, while nothing of the sort can be observed at the supra-national, European level.

But there is more. Citizenship in a sense ‘duplicates’ sovereignty: by acting as its ‘counterpart’ it takes on the same features as sovereignty itself. An effective way to frame sovereignty is through *Kompetenz-Kompetenz*, a

⁴ See F. Böhm and E. Mestmäcker, *Reden und Schriften über die Ordnung einer freien Gesellschaft, einer freien Wirtschaft und über die Wiedergutmachung*, (Karlsruhe: C.F. Müller, 1960), 158, 174. See also E. Mestmäcker, *Die sichtbare Hand des Rechts: Über das Verhältnis von Rechtsordnung und Wirtschaftssystem* (Baden-Baden: Nomos, 1978), 27.

⁵ On this whole situation, see the lucid analysis offered in D. Grimm, ‘The Democratic Costs of Constitutionalization: The European Case’ 21 *European Law Journal*, 460-473 (2015).

concept developed by the German theory of public law. Sovereignty, in other words, is conceptualized as a 'self-reflexive meta-competence' or power, for the object of this power is itself. Stated otherwise, sovereignty is that power which can normatively define itself, providing its own content and drawing its own boundaries. The sovereign needs to be empowered to set out its own powers, and something to this effect applies to citizenship as well.⁶

Citizenship means, in the first place, that one has political rights and can take part in the process of making laws — the same laws that define citizenship itself, by shaping its contour and content. One is a citizen, rather than a subject, to the extent that one can exercise decision-making powers in framing one's own citizenship and establishing what it normatively entails. One is a citizen to the extent that one can contribute to the law-making process, especially when it comes to framing the laws by which citizenship itself is governed.⁷ Now, no part of this description applies to EU citizenship. Only recently, under the Treaty of Lisbon, has the European Parliament gained actual decision-making powers. But this is still a co-decision power shared with the Council of Ministers (the intergovernmental body that brings together all the member states' executive governments), and the EU Parliament still lacks the power to initiate legislation (which it would do by introducing proposals for regulations and EU law) — a power that remains firmly in the hands of the European Commission.

But there are subject matters that the Treaty of Lisbon removes from parliamentary co-decision, and everything that pertains to EU citizenship is included in that grouping.⁸ EU citizens are, therefore, deprived of any political right which would enable them to directly shape the rules by which the contents and contours of EU citizenship is framed: that rulemaking ability is denied to the European Parliament, and so is off limits to the voting public that elects members of this body. Therefore, unlike citizenship of the member States, EU citizenship cannot be described as a *Kompetenz-Kompetenz*, or metacompetence, a power over the rules concerning the political rights through which citizenship itself gains substance.

So what we have in Europe is a rigid constitutionalism without democracy or, rather, with a democracy that is not robust enough to counteract the rigidity of a 'constitutional' design — consisting of primary, and sometimes secondary, legislation — that takes primacy over national law. This constitutional rigidity results from the doctrines of direct effect and primacy, as well as from the ECJ's interpretive principles (the *effet utile*, and the

⁶ See M. La Torre, 'Ciudadanía y *gubernaculum* en el Tratado sobre la Constitución de la Unión Europea' 11 *Derechos y libertades*, 41-55 (2007).

⁷ In this regard, *ibid.*

⁸ See M. La Torre, 'Citizenship and European Democracy: Between the European Constitution and the Treaty of Lisbon', in P. Birkinshaw and M. Verney eds, *The European Union Legal Order after Lisbon* (Alphen aan den Rijn: Kluwer Law International, 2010).

acquis communautaire, which weigh in favour of the four freedoms) and the unwieldy mechanism for amending or reforming the treaties. But there is, in addition, a key factor that takes us back to the previous distinction made between the three types of programs – conditional, teleological (purposive), and procedural – with regard to which thirty years ago a lively debate took place within theory and sociology of law. This additional factor lies in the (higher order) ‘constitutional’ norms in question.

In the liberal State, the constitution is light, essentially setting out general rules whose function is to guarantee the operation of the institutions through which citizens are enabled to coexist. A constitution of this kind will consist of two parts: a first part laying out the basic principles of the political and legal order, and a second part containing the rules that regulate the state’s bodies and institutions, and hence the law-making procedure, the executive power, and the judiciary. A democratic state will have a more intense and representative law-making activity, and so the menu of basic rights will be longer and more extensive. And in a welfare state, the civil and political rights will be buttressed by social rights; likewise, equality will operate not only as a formal principle but also as a substantive one, entailing a system of wealth redistribution on top of progressive taxation and free access to certain social services and public goods. But even here the constitution does not constitutionalize: it does not confine economic and social policy within the bounds of specific rules, nor does it restrict too much the free play of parliamentary contention and party politics. In the same vein, and even more importantly, even if a democratic state operates under a rigid constitution, its law-making activity does not simply consist of applying and enforcing constitutional norms. That is because legislation – next to the constitution, which frames its procedure and grounds its legitimacy – continues to act as an essential source and instrument of popular sovereignty.

However, the Union’s rigid, extra-democratic constitutionalism changes this model in profound ways, in part because the provisions of the EU treaties, now recast under the Treaty of Lisbon, cannot be described as constitutional in any substantive sense for they are not designed to set up a broad framework within which citizens can coexist and politics follows its own free course. In the original Treaty of Rome, liked today in the Reform Treaty of Lisbon, a framework is set out to closely regulate matters that bear any strong connection to the aim of European integration, be it the question of customs duties, or that of competition and the free movement of goods, or that of monetary and budgetary policy.⁹ This feature of the European

⁹ See D. Grimm, ‘The Democratic Costs of Constitutionalization: The European Case’ n 5 above; Id, ‘Über einige Asymmetrien der europäischen Integration’, in Id, *Die Zukunft der Verfassung II: Auswirkungen von Europäisierung und Globalisierung* (Frankfurt am Main: Suhrkamp, 2012), 262.

‘constitution’ comes out particularly clearly with the introduction of the single currency, the Euro, which requires a close web of fiscal and monetary regulations. Finally, there is the European Fiscal Compact, an intergovernmental agreement applying to the Eurozone that was signed outside the frame established by the EU.

The Maastricht Treaty introduced a rule preventing member States from passing any budget exceeding three per cent of their gross domestic product (GDP), in effect ‘constitutionalizing’ a certain view of political economy that makes it essentially impossible to pursue any economic policy based on Keynesian principles. The European Fiscal Compact requires that the three-percent ‘golden’ rule defining a balanced budget be written into the legal order of every member State, possibly with formal constitutional dignity, thus radicalizing the economic policy architecture established by the Maastricht Treaty.¹⁰ Moreover, the budgets of member States are to be monitored and approved by the Commission. National lawmakers are thereby deprived of several key economic levers, for they are restricted in their ability to decide on the kind of economic policy that is deemed most effective in responding to a certain contingency or economic cycle.

Nor are there any mechanisms making it possible to democratically reach such fundamental decisions on a supranational level. Here, too, the European co-legislator (the European Parliament) has little say in the matter as much of the decision-making power remains firmly in the grip of the European Commission and the European Central Bank. The latter has deprived national central banks of their powers over policy and, moreover, is designed as an entity acting independently of both the Council of Ministers and the European Parliament. And while national governments retain important powers in the Council, they often act as executive organs and abide by an essentially intergovernmental logic rather than a Union one. There is also the newly born divide between member States that are debtors and those that are creditors, as a result of their respective positions in the European Stability Mechanism.

The paradoxical effect of this whole setup is that it seems to conjure into existence the ‘procedural programme’ that was being dissected in the 1980s, albeit upending its sense and driving principle. By way of procedures and regulations, the European ‘constitution’ and its law are now being entrusted with directly providing for the ‘civil society’, except that the latter is distilled down to its free-market form. We no longer have the conditional programme that more or less left the market to its own devices, allowing it to self-regulate except for a set of framework rules. Nor do we have the purposive programme, since the EU no longer intervenes in the market in its own name or through

¹⁰ See M. La Torre, ‘A Weberian Moment for Europe? Constitutionalism and the Crisis of European Integration’ 20 *European Public Law*, 3, 421–433 (2014).

its own agencies and enterprises. What we do have is a *constitutionalized market*: its principles are put into place and guaranteed through a regulatory scheme that, operating on the primary level of EU law, assumes a higher-order ‘constitutional’ form.¹¹

IV. A ‘Liquid’ Law

There is a dispute as to whether the current phase can still be understood as part of modernity or whether we have already crossed over into what many are keen to call the postmodern. As for myself, rather than referring to a nebulous postmodernity, I would suggest speaking of a ‘liquid’ modernity. Its distinguishing trait lies not so much in our having moved beyond the ‘old’ modernity as in our having radicalized some of its features, especially its blanket, totalizing embrace of instrumental or strategic rationality – turning away from communicative or discursive rationality – and the central role of techniques, which ‘liquefies’ nature and fashions it as a mere ‘product’ that can be manipulated at will without regard to any ‘substance’ or ‘essence’ it may have. Politics turns into ‘biopolitics’, while law dissolves into a myriad network of functional relations described as ‘soft’ only because the associated sanction consists not in a penalty but only in being excluded from the communicative (commercial) circuit. Relationships are no longer discursive; they are no longer predicated on sense but on waves of ‘annoyance’, a bit like the autopoietic closure of systems disturbed by the environment, in the manner described by Luhmann. The law dissolves into a network of mutual annoyance, and in this way it, too, becomes ‘liquefied’, proceeds by hypothetical, rather than categorical, imperatives, and responds to ‘information’ that acts as a causal stimulus rather than as propositional content.

The ‘liquidity’ of the human condition in general comes as a result of the breaking up of three boundaries: (a) the normative boundary, in that norms are interpreted as technical rules or functional imperatives (an expression of this breakup in legal scholarship can be seen in the ‘law and economics’ movement); (b) the empirical or ‘natural’ boundary, in that nature can now be reproduced in the laboratory, where it can be manipulated even at its core, to such an extent that it can no longer curb the human drive to consume and exert power; and (c) geographic or spatial boundaries, in that with the breakup of the first two barriers human action gains the ability to bend in any direction and extend its reach almost boundlessly, so much so that space shrinks into some form of single place or ‘nowhere’, and finally ‘the shrinking

¹¹ See D. Grimm, ‘La forza dell’UE sta in un’accorta autolimitazione’ *Nomos*, 2, 2-9 (2014) (translated from the German original).

of space abolishes the flow of time'.¹² We have fallen into a sort of black hole of eternal iteration, an echo chamber that reduces our very existence, which otherwise essentially unfolds over time and projects a future that is open to change.

The condition of 'liquidity' is that of a society in constant flux. Let me quote here Zygmunt Bauman:

'Many of us change places — moving homes or travelling to and from places which are not our homes. (...) In the world we inhabit, distance does not seem to matter much. Sometimes it seems that it exists solely in order to be cancelled; as if space was but a constant invitation to slight it, refute and deny. Space stopped being an obstacle (...).'¹³

Now, this whole description recalls the way the ECJ often seems to envision EU citizenship, the fundamental content of which is equated precisely with freedom of movement¹⁴ and the context of which is identified with the European single market understood as the Union's basic public space.

This is the space essentially defined by the 'four freedoms' of the EU citizen, and perhaps nowhere does it come alive more vividly than in the social artefact of the shopping centre, where the market economy takes on a visual form through which it can be observed concretely at work. Here life is organized 'around consumption'.¹⁵ Herein lies the ideal 'architectural' embodiment of the unchecked circulation of goods and persons. The basic personal status in a shopping centre is that of seller or of buyer/consumer, the latter being an individual moving freely about from storefront to storefront — the interface through which to peruse the goods on offer, the medium in virtue of which supply meets demand. In the context of this interchange, one can bring along parents and friends (as buyer) and interact with others under any assumed identity (as seller). EU citizenship — such as it takes shape in its present normative and judicial framework — bears more than a passing resemblance to the status of participant to the festival of consumption celebrated at the shopping centre. In fact, we can think of EU citizenship as the normative transliteration of that status. In light of that analogy, even the ECJ's compassionate move to extend the purview of EU citizenship appears

¹² Z. Bauman, *Globalization: The Human Consequences* (New York: Columbia University Press, 1998), 88.

¹³ *Ibid* 77.

¹⁴ See, for example, the Opinion of Advocate General Poiares Maduro in Joined Cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* (European Court of Justice First Chamber 14 September 2006), delivered on March 30, 2006, available at www.eur-lex.europa.eu. Cf M. Everson, 'A Citizenship in Movement' 15 *German Law Journal*, 975–976 (2014).

¹⁵ Z. Bauman, *Liquid Modernity* (London: Polity, 2015), 76.

functional to the 'liquid' construct of the individual qua consumer,¹⁶ ceaselessly ambling to and fro amid the alluring panoply of goods, possibly with a retinue of family and friends.

The 'liquidity' is reflected and condensed in the flexibility of the labour market:

'The labour market is too rigid; it needs to be made flexible. That means more pliant and compliant, easy to knead and mould, to slice and roll, and putting up no resistance whatever is being done to it.'¹⁷

Corresponding to this flexibility in the demand for labour, however, is an equally strong 'rigidity' of supply.

'And so to meet the standards of flexibility set for them by those who make and unmake the rules — to be 'flexible' in the eyes of the investors — the plight of the 'suppliers of labour' must be as rigid and *inflexible* as possible — indeed, the very contrary of 'flexible': their freedom to choose, to accept or refuse, let alone to impose their own rules on the game, must be cut to the bare bone.'¹⁸

Stated otherwise, 'liquid' citizenship must not be allowed to 'solidify' into the rights and powers of collective and political action. The rules of 'liquid' citizenship — EU citizenship being now its archetype — are there to be used, consumed, 'enjoyed', but must not be set by those who hold rights as individuals under those rules. Quite significantly, this dialectic of 'flexibility' and 'rigidity' can be found in the case law of the ECJ, which on the one hand is quite generous in recognizing EU citizens as having rights of free movement and residence, but on the other hand, in so doing, not only restricts the leeway afforded to the welfare State, driving up its costs, but also, and crucially, undercuts or outright denies or ignores those rights that can be turned into rights to collective and political action, like those typically associated with trade union activity.¹⁹

¹⁶ See A. Somek, *Individualism: An Essay on the Authority of the European Union* (Oxford: Oxford University Press, 2008).

¹⁷ Z. Bauman, *Globalization: The Human Consequences* n 12 above, 104.

¹⁸ *Ibid* 115.

¹⁹ In that regard, Stefano Giubboni underscores the 'fundamental conceptual aversion of the Luxembourg judges to the idea of 'industrial citizenship'. S. Giubboni, 'European Citizenship and Social Rights in Times of Crisis', in 'EU Citizenship: Twenty Years On', special issue, 15 *German Law Journal*, 935–964, 949 (2014). And that development seems paradoxical, even dystopian, if we look at it today in light of Art 117 of the 1957 Treaty of Rome, which sought and anticipated improved conditions for workers in the member states, see A. Supiot, 'Under Eastern Eyes' 73 *New Left Review*, 29–36, 33 (2012).

Machine Rules. Of Drones, Robots, and the Info-Capitalist Society

Guido Noto La Diega*

Abstract

Italy has been one of the first countries in the world to enact ad hoc regulations on drones. Therefore, the Italian approach may constitute a model for many regulations to come; nonetheless, the legal literature seems to overlook the phenomenon. In this article, I place the discourse on drones in the context of some more general considerations on the main legal issues related to the deployment of machines, including robots, in our everyday life. Indeed, most considerations apply equally to robots and drones, moving from the unrefined, albeit practical, observation that the latter are robots equipped with wings. An analysis of the intellectual property, data protection, privacy, and liability issues is carried out bearing in mind the complexity arising from the increasing implementation of cloud computing and artificial intelligence technologies. The article claims that autonomous machines will outclass human beings in all their tasks, but the horror vacui ought to be avoided: a new unforeseeable society will come. Therein, human beings – granted that a distinction between them and machines will still make sense – will not have to work in order to be able to live.

Wiederum aber steigt aus der Zerstörung neuer schöpferischer Geist empor; der Mangel an Holz und die Notdurft des täglichen Lebens drängten auf die hin, drängten auf die Auffindung oder die Erfindung von Ersatzstoffen für das Holz hin, drängten zur Nutzung der Steinkohle als Heizmaterial, drängten zur Erfindung des Kokesverfahrens bei der Eisenbereitung. Daß dieses aber die ganze Großartige Entwicklung des Kapitalismus im 19. Jahrhundert erst möglich gemacht hat, steht für jeden Kundigen außer Zweifel.

W. Sombart, *Krieg und Kapitalismus*
(Barsinghausen: Unikum-Verlag, 2013), 207.

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I. Introduction

It has been a while since the Count de Jonval, assertedly moving from Gottfried Wilhelm von Leibniz's and Giovanni Alfonso Borelli's theories,¹ said that

*'la machine creuse qu'il faudroit imaginer pour soutenir le corps de l'homme, & le mettre en équilibre avec l'air, seroit si démesurément grande & embarrassante, que le gouvernement & l'usage en ont paru à d'habile gens des choses totalment desespérées, & aussi interdites à l'homme aussi que le mouvement perpétuel.'*²

Not only men have flown,³ but today they can make use of drones, so that they can fly and explore the world while sitting on a sofa.

Italy has been one of the first countries in the world to enact ad hoc regulations⁴ on remotely piloted aircraft systems (RPAS).⁵ Therefore, the

¹ In a scholium, N.-A. Pluche, *Le spectacle de la nature, ou Entretiens sur le particularités de l'histoire naturelle* (Amsterdam, I, 1, 1741), 291, attributes the idea to Giovanni Alfonso Borelli and to the famous thinker of Leipzig. In the English edition Id, *Nature Delineated* (London, 1740), 177, there is no mention to Borelli, but Leibniz himself clarified, in 1686, that he owed much to the Neapolitan scientist, who had anticipated him in this field. See, in particular, G.A. Borelli, *De vi percussiois* (Bologna, 1667), 279, proposition 116, on 'il metodo della estimazion delle forze pe' quadrati delle velocità' (cf F. Colangelo, *Storia dei filosofi e dei matematici napoletani, e delle loro dottrine* (Napoli, III, 1834), 291). One could agree with P. Napoli-Signorelli, *Vicende della coltura nelle due Sicilie. Dalla venuta delle Colonie straniere sino a' nostri giorni* (Napoli, V, 1811), 339, whereby the original work 'De motu animalium' positions Borelli above the philosophers of his time: he belongs to the most excellent circle of Kepler, Galileo, Leibniz, and Newton.

² N.-A. Pluche, *Le spectacle* n 1 above, 291-292.

³ The analogy is justified also from a historical point of view. In order to build the first airplane, the Wright brothers tested their ideas by using remotely piloted gliders (see for instance R. Freedman, *The Wright Brothers: How They Invented the Airplane* (New York: Holiday House, 1991), 31).

⁴ Ente Nazionale per l'Aviazione Civile (ENAC), Regolamento 'Mezzi aerei a pilotaggio remoto', 2nd ed, 16 July 2015 as amended on 21 December 2015 (hereinafter also 'regolamento ENAC' or 'regolamento'). The first edition had been adopted by ENAC, *Consiglio di Amministrazione, delibera* no 42 of 16 December 2013. A courtesy English translation is available at https://www.enac.gov.it/repository/ContentManagement/information/N1220929004/Regulation_RPAS_Issue_2_Rev%201_eng_0203.pdf (last visited 6 December 2016). See also the lettera no 136156/CRT of 29 December 2015, available at https://www.enac.gov.it/repository/ContentManagement/information/N353070060/136156_CRT-Chiarimenti.pdf (last visited 6 December 2016); the draft guidelines on 'qualificazione del personale di volo APR' (delibera 22 May 2014 no 1 and the 'Nota esplicativa ai fini della presentazione della dichiarazione o autorizzazione' of 26 May 2014).

⁵ Drones are also known as unmanned aerial vehicles (UAV), remotely piloted aerial vehicles (RPAV), remotely piloted aircrafts (RPA) and unmanned aircraft system (UAS). ENAC, the Italian regulator of civil aviation, calls them 'mezzi aerei a pilotaggio remoto', translated, rather approximately, as RPAVs. The single aircraft is referred to as RPA. However, UASs (endorsed by ISO, see ISO/TC 20/SC16) and UAVs are to be considered as the genus, RPAVs

Italian approach may constitute a model for many regulations to come; nonetheless, the legal literature seems to overlook the phenomenon.⁶

In this article, I attempt to place the discourse on drones in the context of more general considerations of the main legal issues related to the deployment of machines, including robots, in our everyday life.

Most considerations apply equally to robots and drones, moving from the unrefined, albeit practical, observation that the latter are robots equipped with wings.⁷ The study of data protection, privacy, and liability will be carried out,⁸ bearing in mind the complexity arising from the increasing use of cloud computing (cloud robotics), machine learning, and other artificial intelligence (AI) technologies.⁹

Machines are indeed an ordinary topic in the news.¹⁰ Unfortunately,

and RPASs as the species, and drones as the customary term in common language.

⁶ In Italy, before the adoption of the ENAC regulations, a notable exception was constituted by U. La Torre, 'La navigazione degli UAV: un'occasione di riflessione sull'art. 965 c.nav. in tema di danni a terzi sulla superficie' *Rivista del diritto della navigazione*, I, 553 (2012); B. Franchi, 'Aeromobili senza pilota (UAV): inquadramento giuridico e profili di responsabilità (prima parte)' *Responsabilità civile e previdenza*, 732 (2010); Id, 'Aeromobili senza pilota (UAV): inquadramento giuridico e profili di responsabilità (seconda parte)' *Responsabilità civile e previdenza*, 1213 (2010); Id, 'Gli aeromobili a pilotaggio remoto: profili normativi e assicurativi' *Responsabilità civile e previdenza*, VI, 1770 (2014). In the matter of robots, one can find a slightly clearer field thanks to U. Pagallo (see, eg, Id, 'Robots in the Cloud with Privacy: A New Threat to Data Protection?' 29 *Computer Law & Security Review*, 501 (2013)). Cf also C. Artusio and M.A. Senor eds, 'The Law of Service Robots. Ricognizione dell'assetto normativo rilevante nell'ambito della robotica di servizio: stato dell'arte e prime raccomandazioni di policy in una prospettiva multidisciplinare' 4 December 2015, available at <http://nexa.polito.it/nexacenterfiles/robots-2015.pdf> (last visited 6 December 2016); A. Santosuosso et al, 'Robot e diritto: una prima ricognizione' *Nuova giurisprudenza civile commentata*, II, 494 (2012).

⁷ I will point out below that most mistakenly think that drones constitute a higher danger for privacy, if compared to robots. Moreover, the provisions of the *codice della navigazione* (regio decreto 30 March 1942 no 327, navigation code) apply to drones and not to robots. In general, since the drone is a species of the genus *robot*, all the provisions relevant for the latter apply to the former, but not necessarily the other way around.

⁸ Some legal issues will be overlooked, especially those emerging from the perspective of rights of robots and legal personality (issues that are becoming critical due to the developments of AI). Cf C. Sarzana di S. Ippolito, 'I riflessi giuridici delle nuove tecnologie informatiche' *Diritto dell'informazione e dell'informatica*, III, 505 (1994); P. McNally and S. Inayatullah, 'The Rights of Robots: Technology, Culture and Law in the 21st Century' 20(2) *Futures*, 119 (1988); H. Putnam, *Mente, linguaggio e realtà* (Milano: Adelphi, 1987), 426; S. Gozzano, 'I cinque sensi dei robot. Percezioni artificiali: l'informatica non imita solo l'intelligenza ma anche le capacità sensoriali' *Sapere*, IV, 9 (1990).

⁹ In G. Noto La Diega, 'The Internet of Citizens. A Lawyer's View on Some Technological Developments in the United Kingdom and India' *Indian Journal of Law & Technology* (forthcoming), I suggest using *Thing* instead of *smart device*, *smart home*, etc, for at least two reasons that apply also to the phrase *artificial intelligence*. Firstly, most new products are designed with *smart* capabilities; thus if everything is smart, nothing is. Secondly, *smartness* and *intelligence* are human attributes and one does not want to commit the epistemological crime named *anthropocentrism*.

¹⁰ It would be impossible to give account of the most recent news on drones, but by

there is also some sad news. For instance, in the wars carried out by the US against Pakistan and Yemen, in the failed attempt to kill forty-one targeted individuals, drones have killed one thousand one hundred forty-seven innocent people.¹¹

Now, the law is characterised by an increasingly central role played by facts, in the sense that there is ‘an extreme virulence of facts, which have the vigour to affect the law and shape it.’¹² Therefore, the factual importance of machines is already in itself sufficient to justify some legal considerations on the topic. This is a task that cannot be delayed any longer, since the *regolamento* of the *Ente Nazionale per l’Aviazione Civile* (ENAC) has come into force.¹³ Machines stand amongst us and are here to stay.

The focus of this article will be on intellectual property, data protection, privacy, and liability, but it is clear that there are numerous legal issues emerging from the deployment of robots and drones, which shall be the subject of future research from a comparative perspective.¹⁴

II. Scope of the Study and Methodological Caveats

Before going into detailed legal analysis, one ought to define the scope of the investigation and to justify a methodology that appears heterodox from a traditional *civil law* approach.

Since drones are a species of the genus *robot*, one ought to define the

analysing the press, one notes a trend: drones are increasingly coupled with other protagonists of the Internet of Things. See, for instance, the research of the Aerial Robotics Lab (Imperial College London, <http://www3.imperial.ac.uk/aerialrobotics>, last visited 6 December 2016) that has led to the creation of a hexacopter, which 3D-prints while flying. R. Moro Visconti, ‘Valutazione dei Big data e impatto su innovazione e digital branding’ *Il diritto industriale*, I, 46, 47 (2016) considers robotics and avionic systems as the first species of the Internet of Things.

¹¹ Cf Reprieve, ‘You Never Die Twice. Multiple Kills in the US Drone Program’ 25 November 2014, available at http://www.reprieve.org/wp-content/uploads/2014_11_24_PUB-You-Never-Die-Twice-Multiple-Kills-in-the-US-Drone-Program-1.pdf (last visited 6 December 2016). Less tragically, it is not rare to hear of falling drones, as one may want to ask the world cup skier Marcel Hirscher.

¹² P. Grossi, ‘Sulla odierna fattualità del diritto’ *Giustizia civile*, I, 13 (2014).

¹³ Even though legal scholars have generally overlooked robotics, one should mention the monographic contributions of R. Calo, A.M. Froomkin and I. Kerr eds, *Robot Law* (Cheltenham: Edward Elgar, 2016) and U. Pagallo, *The Laws of Robots: Crimes, Contracts, and Torts* (Dordrecht-Heidelberg-New York-London: Springer, 2013), as well as C. Holder et al, ‘Robotics and Law: Key legal and Regulatory Implications of the Robotics Age (Part I of II)’ 32 *Computer Law & Security Review*, 383 (2016).

¹⁴ For instance, on 21 June 2016, the US Federal Aviation Administration (FAA) adopted the first operational rules for routine commercial use of small unmanned aircraft systems. The Advisory Circular 21 June 2016 no 107-2 ‘Small Unmanned Aircraft Systems (sUAS)’ is available at http://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_107-2.pdf (last visited 6 December 2016). It would be interesting to compare the ENAC regulations with those of the US FAA, as well as with those in the UK.

latter.¹⁵ Following the International Organization for Standardization (ISO) definition, a robot is an ‘actuated mechanism programmable in two or more axes with a degree of autonomy, moving within its environment, to perform intended tasks’.¹⁶ A robot includes the control system and interface of the control system. ISO classifies robots into industrial robot and service robot; the former will not be the object of this article.

There are several robotic taxonomies. For instance, some argue that the main characteristics of a robot are interactivity, autonomy, and adaptability.¹⁷ To be precise, interactivity is not an intrinsic characteristic of all robots, but only of the collaborative ones,¹⁸ while adaptability applies to intelligent robots.¹⁹ It would seem, consequently, that the core concept, the one ontologically attached to all the robots, is *autonomy*; that is, the ‘ability to perform intended tasks based on current state and sensing, without human intervention.’²⁰ What is happening with machine learning, predictive analytics, etc, is a switch of paradigm. In a bizarre return to the original meaning of the word, *autonomy* is not only the capability of acting without human intervention; it means the power to dictate laws to oneself, with clear consequences for the human beings interacting with the machine. Even though not every robot and drone is genuinely autonomous, notwithstanding some Artificial Intelligence (AI) fiascoes,²¹ one cannot deny the spread of AI algorithms made possible by the processing capability of cloud robotics.

¹⁵ According to P. Comanducci, ‘Le tre leggi della robotica e l’insegnamento della filosofia del diritto’ *Materiali per una storia della cultura giuridica*, I, 193 (2006), the laws have been first conceived by I. Asimov, *Runaround* (New York: Street and Smith Publications, 1942). U. Pagallo, ‘Ermeneuti, visionari, circospetti: La “quarta via” alla robotica tra diritto e letteratura’, in M.P. Mittica ed, *Diritto e narrazioni. Temi di diritto, letteratura e altre arti* (Milano: Ledizioni, 2011), 159, considered it as a ‘*primo, suggestivo elemento di raccordo tra diritto, letteratura e robotica.*’

¹⁶ ISO 8373:2012(en) Robots and robotic devices – Vocabulary, para 2.6. Cf UN World Robotics, *Statistics, Market Analysis, Forecasts, Case Studies and Profitability of Robot Investment* (Geneva: UN Economic Commission for Europe e International Federation of Robotics, 2005), 21.

¹⁷ C. Allen et al, ‘Prolegomena to Any Future Artificial Moral Agent’ 12 *Journal of Experimental and Theoretical Artificial Intelligence*, 251 (2000).

¹⁸ Collaborative robots are those designed for direct interaction with a human (ISO 8373: 2012, n 16 above, para 2.26).

¹⁹ An ‘intelligent robot’ is, indeed, ‘capable of performing tasks by sensing its environment and/or interacting with external sources and adapting its behaviour.’ (ISO 8373:2012, n 16 above, para 2.28). ISO makes the examples of an industrial robot with vision sensor to pick and place an object; a mobile robot with collision avoidance; and a legged robot walking over uneven terrain.

²⁰ ISO 8373:2012, n 16 above, para 2.2.

²¹ B. Fung, ‘Why Microsoft’s racist Twitter bot should make us fear human nature, not A.I.’ 24 March 2016 available at <https://www.washingtonpost.com/news/the-switch/wp/2016/03/24/why-microsofts-racist-twitter-bot-should-make-us-fear-human-nature-not-a-i/> (last visited 6 December 2016). As to self-driving cars, see <https://static.googleusercontent.com/media/www.google.com/it/selfdrivingcar/files/reports/report-0216.pdf> (last visited 6 December

The bridge between robots and drones is the category of *mobile robots*. These machines are ‘able to travel under (their) own control’²² and can well encompass aerial mobility.

Drones are no longer limited to remotely piloted and radio-controlled aerial systems used for military purposes.²³ Alongside the military drones, popularised during the Gulf War,²⁴ one has ‘all sorts and sizes of radio controlled, remotely piloted, semi-autonomous or fully autonomous aircraft, including hobbyist, radio controlled airplanes.’²⁵ Sometimes they serve the public interest, as in the *green* use in the *Terra dei Fuochi*²⁶ or the cargo-drones that transport medicines to Africa.²⁷ Nonetheless, one should not be

2016).

²² ISO 8373:2012, n16 above, para 2.13.

²³ Even though, when thinking military machines, drones come to mind first, robots are also significantly used for military purposes. For instance, on 7 July 2016 the Dallas Police Department used a bomb-disposal robot to kill one of the shooters involved in the killing of five law enforcement officers.

²⁴ ENAC has no jurisdiction over military drones. Art 15 of decreto ministeriale 16 January 2013 (*Struttura del Segretariato generale, delle Direzioni generali e degli Uffici centrali del Ministero della difesa, in attuazione dell'articolo 113, comma 4 del decreto del Presidente della Repubblica 15 Marzo 2010 no 90, recante il testo unico delle disposizioni regolamentari in materia di ordinamento militare*), reads that the *Direzione degli armamenti aeronautici* (ARMAEREO) is responsible for authorising the navigation of military aircrafts. Before the regolamento ENAC, nearly all the Italian provisions on drones dealt with the phenomenon from a military perspective. One need only think to Art 1 para 1 of the decreto del Presidente del Consiglio dei Ministri 30 November 2012 no 253 (*Regolamento recante individuazione delle attività di rilevanza strategica per il sistema di difesa e sicurezza nazionale*), whereby the study, research, design, development, production, and integration of *velivoli a pilotaggio remoto* (remotely-piloted aerial means) both for surveillance (UAV MALE) and for attack (UCAV) are considered as activities which are of strategic relevance for the defence and national security system (therefore, business operating in the field of military drones are bound to Art 1, decreto legge 15 March 2012 no 21 converted by legge 11 May 2012 no 56; cf Art 1 para 1 letter b) no 3 of the decreto del Presidente del Consiglio dei Ministri 6 June 2014 no 108). The Italian legislature has *discovered* drones with the legge 14 July 2004 no 178 *Disposizioni in materia di aeromobili a pilotaggio remoto delle Forze armate*, repealed by Art 2268 para 1 no 1027 of decreto legislativo 15 March 2010 no 66 (*Codice dell'ordinamento militare*). The said *codice* has introduced the *ad hoc* provisions of the *codice dell'ordinamento militare*, which will be touched on below.

²⁵ T.T. Takahashi, ‘Drones and Privacy’ *Columbia Science & Technology Law Review*, 83 (2012), who refers to J. Ukman, ‘Privacy Group Seeks to Lift Veil on Domestic Drones’ *Washington Post*, 13 January 2012.

²⁶ As pointed out in G. Noto La Diega, ‘Il cloud computing. Alla ricerca del diritto perduto nel web 3.0’ *Europa e diritto privato*, II, 577, 631 (2014), the decentralised legislatures (Regioni) show to be more sensitive to new technologies, in comparison to the central one. It is the case of Art 8 para 2 of the legge regionale Campania 9 December 2013 no 20 (*Misure straordinarie per la prevenzione e la lotta al fenomeno dell'abbandono e dei roghi di rifiuti*), which promotes agreements with the defence corps aimed to develop programs of environmental monitoring; these agreements have to provide the use of innovative technologies, included RPAs.

²⁷ On ‘The Flying Donkey Challenge’ project, see <http://www.flyingdonkey.org/> (last visited 6 December 2016).

naïve, since the military use is still the main use, as suggested, *inter alia*, by the fact that the first commercial drone has been approved by the US Federal Aviation Administration (FAA) fairly recently and its first flight was in June 2014.²⁸

The same applies to robots, which are mainly used for military and industrial purposes²⁹ and are thus ignored by most scholars. However, today's drones and 'robot(s) leave the factory floor and battlefield and enter the public and private sphere in meaningful numbers',³⁰ and the phenomenon will affect society even more than computers.³¹ Therefore, a thorough analysis of machine rules is long overdue.

In Italy, Art 743 of the *codice della navigazione*,³² as amended by the decreto legislativo 15 March 2006 no 151,³³ included in the concept of *aeromobile* (aircraft):

'Aircraft shall mean any machine designed for the transportation by air of persons or property. Remotely piloted aerial vehicles are also considered aircraft, as defined by special laws, ENAC regulations and, for the military, by decrees of the Ministry of Defence. The distinctions of the aircraft, according to their technical specifications and use shall be established by ENAC with its regulations and, in any case, by special

²⁸ The Puma AE drone of AeroVironment Inc monitors BP Exploration Inc's oil pipelines in Alaska as from 8 June 2014 (see the licence of 19 July 2013).

²⁹ Cf the decreto ministeriale 7 May 2014 (*Ministero della Difesa*) on the 'Approvazione del nuovo elenco dei materiali d'armamento da comprendere nelle categorie previste dall'articolo 2, comma 2, della legge 9 luglio 1990 no 185, in attuazione della direttiva 2014/18/UE.' It regards also robots and the relevant component, provided that they have at least one of the following characteristics: 1. Built for military purposes. 2. Equipped with idraulic junctions resistant to perforations cause by ballistic framents and designed for fluids having an inflammation point superior to eight hundred thirty-nine K (five hundred sixty-six°C); or 3. Designed for or apt to function in an environment with electromagnetic pulses (Annex, category 17, letter e).

³⁰ R. Calo, 'Robots and Privacy', in P. Lin et al eds, *Robot Ethics: The Ethical and Social Implications of Robotics* (Cambridge: MIT Press, 2011), 187 (but one of the online versions available at ssrn.com/abstract=1599189, last visited 6 December 2016). In the footnotes of this article, the page number of the cited work will be the one of the online version.

³¹ B. Gates, 'A Robot in Every Home' *Scientific American*, 58 (2006), describes robotics as the first technological revolution after computers; indeed 'we may be on the verge of a new era, when the PC will get up off the desktop and allow us to see, hear, touch and manipulate objects in places where we are not physically present.'

³² Regio decreto 30 March 1942 no 327. It has been amended several times, most recently by decreto legge 12 September 2014 no 133, converted with amendments by legge 11 November 2014 no 164, which has introduced Art 733 bis. See also decreto del Presidente della Repubblica 15 February 1952 no 328 'Approvazione del Regolamento per l'esecuzione del Codice della navigazione' (maritime navigation regulation), last amended by decreto legislativo 12 May 2015 no 71, which has amended Art 271, para 2, no 2.

³³ 'Disposizioni correttive ed integrative al decreto legislativo 9 maggio 2005 n. 96, recante la revisione della parte aeronautica del codice della navigazione'.

legislation in this field.’³⁴

The regolamento ENAC includes, therefore, implementation of this provision and denotes a scope that is narrower than what is indicated by Art 743. It concerns two species of RPASs: remotely piloted aerial vehicles and model aircrafts. The former are RPASs ‘operated or intended to be operated for specialised operations or for experimental, scientific or research activities’ (Art 1 para 3 regolamento ENAC) and fall within the scope of the codice della navigazione. The latter are not regarded as aircraft for the purposes of the provisions of the *codice della navigazione* and can be used for recreational and sporting activities only. Nevertheless, the regolamento ENAC sets out specific provisions and limitations applicable to the use of the model aircraft to ensure the safety of persons and property on the ground and of other airspace users. Moreover, pursuant to the EU regulation no 216/2008,³⁵ RPASs of operating take-off mass not exceeding one hundred fifty kilograms and those designed or modified for research, experimental, or scientific purposes fall under the competence of ENAC.³⁶

A notable provision is Art 5 (Glossary and acronyms), which looks very peculiar to civil law scholars.³⁷ It is useful to report on the distinction between RPAS and autonomous systems. A RPAS is

‘a system consisting of an aerial vehicle (remotely piloted aircraft)

³⁴ According to the traditional approach of legal scholars, the concept of aircrafts under criminal law does not cover RPASs. Consequently, Art 428 of the codice penale (criminal code) does not apply. Under Art 428 it is punished with the imprisonment from five to twelve years whomever causes the wreck or submersion of a ship or other sailing means, or the fall of an aerial vehicle, which do not belong to the person who caused the said events. Cf E. Battaglini and B. Bruno, ‘Incolumità pubblica (delitti contro la)’ *Novissimo Digesto italiano* (Torino: Utet, 1962), VIII, 552 and C. Erra, ‘Disastro ferroviario, marittimo, aviatorio’ *Enciclopedia del diritto* (Milano: Giuffrè, 1963), XIII, 4. However, in favour of a broad interpretation see C. Medina, ‘Aeromobile’ *Novissimo Digesto italiano* (Torino: Utet, 1980), appendix I, 119. The translation of the provision is provided by ENAC in the courtesy version referred to above.

³⁵ Art 2 para 2 *regolamento* ENAC refers to ‘Regulation (EC) no 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC’. See namely Art 4 para 4 and letter i) of Annex II.

³⁶ Equally, the regolamento ENAC does not apply to a) State RPASs (Arts 744, 746 and 748 of the *codice della navigazione*); b) RPASs operating within indoor space (but to fly over gatherings of persons during parades, sports events, or different forms of entertainment or any areas where there is an unusual concentration of people, is prohibited); c) Balloons used for scientific observations or tethered balloons.

³⁷ The *codice dell’ordinamento militare* includes a notable exception, where it introduces an *ad hoc* section to definitions. For present purposes, one need only refer to Art 246 of the *ordinamento*, where it provides that a RPA is an aerial means piloted by a crew that operates from a remote command and control station, thus excluding completely autonomous systems also from military avionics.

without persons on board, not used for recreation and sports, and the related components necessary for the command and control (remote ground pilot station) by a remote pilot.’

In turn, an autonomous system is a RPAS that does not allow the pilot intervention in the management of the flight on a real time basis. It falls outside the scope of the *regolamento*.

It is rather self-explanatory that the main risks, especially in terms of liability, come from the latter. Therefore, it is a commendable decision to leave this use unregulated, while progress in terms of the security of autonomous systems is not yet advanced enough. However, risks are present also in the current system, particularly when it comes to Beyond Visual Line Of Sight (BVLOS)³⁸ and Extended Visual Line Of Sight (EVLOS)³⁹ operations.

Notwithstanding the above definition, I claim that one should not draw a clear line between robots, drones, and human beings. Thanks to artificial enhancement techniques, human beings are becoming more and more similar to machines. At the same time, machines are becoming increasingly more similar to human beings, both in their aspect and in their sensing and actuating capabilities. Therefore, one should view the considered phenomena as a continuum of machine to human being.⁴⁰

The last caveats are of a methodological nature. First, whereas common law scholars are relatively used to studying unconventional legal documents, the tradition of civil law (especially the one guarded by the *civilisti*)⁴¹ frowns

³⁸ BVLOS are ‘operations at a distance that do not allow the remote pilot to continuously remain in direct visual contact with the RPA, that do not allow him to manage the flight, to maintain separation and avoid collisions.’ (Art 5 para 1 regolamento ENAC).

³⁹ EVLOS are operations at a distance exceeding the limits of the Visual Line of Sight (VLOS) operations, which comply with the VLOS conditions via alternative means. In principle, the safest operations should be the VLOS ones: ‘operations at distances, both horizontal and vertical, in which the remote pilot maintains continuous visual contact with the aerial vehicle, without the aid of tools to enhance the view, so to be able to directly control it with the aim to conduct the flight and to meet separation and collision avoidance responsibilities.’ (Art 5, para 1, regolamento ENAC). Distances by which operations can be considered VLOS are subject to the capability of the pilot to be aware of the actual RPA conditions in terms of position, altitude, and speed as well as of obstacles and other aircraft. The remote pilot has the final responsibility to define the VLOS conditions that might be affected by weather conditions, sunlight, and the presence of obstructions.

⁴⁰ This assertion is far from being widely accepted. Just to name an example, the Court of Justice has stated that ‘when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families.’ (Case C-34/09 *Ruiz Zambrano v Office National de l’Emploi (ONEm)*, [2011] ECR I-1177) This may be true now, but it is likely to become incorrect in a near future.

⁴¹ Although there are many notable exceptions, the Italian academy has traditionally focused on the *Costituzione*, the *leggi*, and kindred primary legislation. Many scholars tend even to diminish the role of case law. To be precise, I still think that *leggi*, *codici*, and judgements are the patricians of the law-poietic society, but one ought to look at the microhistory *à la* Braudel, being aware of the actual, albeit rarely formalised, influence that the

upon studies focused on secondary legislation and soft law. In the age of global law and legal hysteresis,⁴² the scholar has to abandon the cathedral⁴³ and walk the unbeaten path of guidelines, *circolari*, codes of conduct, terms of service, and even press releases, hardware designs, and algorithms.⁴⁴

The proliferation of legal sources and legal *inflation* have been described as the reasons for the defeat of both Antigone and Creon.⁴⁵ I do not know if the regolamento ENAC and the galaxy of robot *law* is the last expression of these phenomena. However, I do know that heterodox norms are affecting people's lives and their violation is punished, even in informal and privately enforced ways;⁴⁶ therefore, they ought not to be overlooked.

As a conclusive methodological (and *ideological*) caveat, one should point out that, when it comes to binomial-technology law, legal scholars tend either to declare that we are facing a revolution (a *disruptive innovation*)⁴⁷ and traditional principles will not apply, or to affirm that the technology is

plebeians had on history.

⁴² See G. Noto La Diega, 'In Light of the Ends. Copyright Hysteresis and Private Copy Exception after the British Academy of Songwriters, Composers and Authors (BASCA) and Others v Secretary of State for Business, Innovation and Skills Case' *Studi giuridici europei* 2014, 39, (2016).

⁴³ Cf G. Calabresi and A.D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' 85(6) *Harvard Law Review*, 1089, 1090, fn 2 (1972), who recognise, with mirable humility and foresight, that their approach is only one of Monet's paintings of the Cathedral at Rouen: 'to understand the Cathedral one must see all of them' (the reference is to G.H. Hamilton, *Claude Monet's Paintings of Rouen Cathedral* (London: Oxford University Press, 1960), 4-5, 19-20, 27).

⁴⁴ With ubiquitous computing, the law is increasingly implemented in technological ways, which suggests, *inter alia*, to adopt a multidisciplinary methodology. The most common example is the *privacy by design* approach followed by the general data protection regulation (GDPR). In G. Noto La Diega, 'Uber Law and Awareness by Design. An Empirical Study on Online Platforms and Dehumanised Negotiations', *Revue européenne de droit de la consommation*, II, 383, (2016), I suggest an *awareness by design* mobile application.

⁴⁵ It is the opinion expressed by L. Ferrajoli, 'Antigone e Creonte, entrambi sconfitti dalla crisi della legalità' *Giustizia civile*, I, 27 (2014). As is common knowledge, Antigone represents justice and Creon represents certainty. Cf T. Ascarelli, 'Antigone e Porzia' *Rivista Internazionale di Filosofia del Diritto*, 756 (1955) translated by C. Crea in this *Journal*, II, 167 (2015).

⁴⁶ Rating agencies grades are the most obvious, albeit not the only, example of this trend. One could also think of the policies of the main social networks: to be excluded by the platform (for instance due to the *real name policy*) may soon be perceived as an *aquae et igni interdictio*. See Hamburgische Beauftragte für Datenschutz und Informationsfreiheit, *Anordnung* of 24 July 2015 and Verwaltungsgericht Hamburg, *Beschluss* of 3 March 2016, 15 E 4482/15, available at <http://justiz.hamburg.de/contentblob/5359282/data/15e4482-15.pdf> (last visited 6 December 2016). More generally, the role of online platforms in oligopolistic markets – with a focus on consumers and not only on competitors – should be the subject of future research.

⁴⁷ For a critique to Clayton M. Christensen's idea of disruptive innovation (first sketched in his *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (Boston: Harvard Business School Press, 1997)), see A.A. King and B. Baatartogtokh, 'How Useful Is the Theory of Disruptive Innovation?' *MIT Sloan Management Review* (2015), available at <http://sloanreview.mit.edu/article/how-useful-is-the-theory-of-disruptive-innovation/> (last visited 6 December 2016).

not actually new, but is just ‘*die erzwungene Vernichtung einer Masse von Produktivkräften*’;⁴⁸ that is, the problems may be old, but old barrels are suitable for new wine. It is the perennial conflict between *apocalyptic* and *integrated*.⁴⁹ This article stands for a middle way and advocates a problem-based multidisciplinary approach, whereby one should assess whether the technology at issue is new and how and whether the existing (if any) legal framework can accommodate the emerging problems. Whilst the psychological and social consequences of the increasing deployment of robots and drones might justify, to some extent, a nihilistic approach,⁵⁰ the same does not apply to law. The dynamic combined action of interpretation of the existing legal framework, soft law tools (especially co-regulatory ones) and *enforcement by design* can provide the solution. Beware of whoever relies entirely on the law or, alternatively, on technology: neither will suffice with autonomous robots and drones becoming commonplace.

III. Machine-Related Inventions and Machine-Generated Works

Intellectual property is a critical aspect that must be addressed when it comes to contemporary machines. To make two general remarks: first, proprietary models can hinder interoperability, which is vital to the interaction between (and sometimes the functioning itself of) most machines in an Internet of Things era. Moreover, many machines can be carried by the user in several jurisdictions, and intellectual property, given the principle of territoriality, can constitute an obstacle in the access to the service provided by the machine, especially as long as geo-blocking is not tackled properly.⁵¹

Research commissioned by the World Intellectual Property Organization⁵²

⁴⁸ Building on the idea of ‘enforced destruction of a mass of productive forces’ expressed by K. Marx and F. Engels, *Manifest der Kommunistischen Partei* (London: Bildungsgesellschaft für Arbeiter, 1848) I, read at <https://www.marxists.org/deutsch/archiv/marx-engels/1848/manifest/1-bourprol.htm> (last visited 6 December 2016), J.A. Schumpeter, *Capitalism, Socialism and Democracy* (London: Routledge, 1994, 1942), 82-83, developed the theory of the *schöpferische Zerstörung*, the creative destruction.

⁴⁹ Cf U. Eco, *Apocalittici e integrati. Comunicazioni di massa e teorie della cultura di massa* (Milano: Bompiani, 1964). A balanced position has been recently expressed by L. Floridi, ‘Should we be afraid of AI?’ *Aeon* (2016), available at <https://aeon.co/essays/true-ai-is-both-logically-possible-and-utterly-implausible> (last visited 6 December 2016).

⁵⁰ I am studying the right to solitude in a context of ubiquitous computing, but an already studied, albeit still interesting, phenomenon is the so-called uncanny valley. Cf M. Mori, ‘Bukimi No Tani – The Uncanny Valley’ *Energy*, IV, 33 (1970).

⁵¹ On 25 May 2016, the European Commission has adopted the Proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (COM(2016) 289 final).

⁵² C.A. Keisner, J. Raffo, and S. Wunsch-Vincent, ‘Breakthrough Technologies – Robotics,

has shown that the countries with the highest number of patent filings are Japan, China, Republic of Korea and the US. Businesses in the car and electronics sectors file the most, but medical technologies and the Internet are growing in importance. Copyright protection is relevant too,⁵³ mainly in its role in protecting computer programmes and netlists.

In this paragraph, I will touch on intellectual property through the prisms of machine-related inventions and machine-generated works.⁵⁴

In Italy, as in most European countries, computer programmes *per se* are copyrightable, but they cannot be patented. Indeed, under Art 2 of the legge 22 April 1941 no 633 (*Protezione del diritto d'autore e altri diritti connessi*, hereinafter also 'copyright act'), computer programmes are protected as literary works under the Berne Convention for the Protection of Literary and Artistic Works, ratified and implemented by the legge 20 June 1978 no 399, regardless of how they are expressed, provided that they are original, being the outcome of the author's intellectual creation. In turn, the *codice della proprietà industriale* (decreto legislativo 10 February 2005 no 30), which regards mainly inventions, designs, and trade marks, clarifies that computer programmes are not inventions and, therefore, cannot be patented (Art 45, para 2, letter b). Lastly, when it comes to registered designs, Art 31 specifies that the concept of product whose design can be registered encompasses its components, but it openly excludes the software components.

Nonetheless, the patentability exclusion regards only computer programmes *per se* (as such, '*in quanto tali*', under Art 14 para 3 of the *codice della proprietà industriale*). This phrase refers to the constantly growing world of the computer-implemented (or computer-related) inventions which – we claim – would be better named *machine-related*, because their scope is broader than the one identified with traditional computers. (For instance software implemented in a wearable device can easily qualify as a machine-related invention). A machine-related invention involves the use of a computer, computer network or other programmable apparatus (that is, also robots and drones), where one or more features are realised wholly or partly by means of a computer programme.

Since nearly all machines are equipped with computer programmes, the growth of the former will result in the spread of machine-related inventions. Indeed, these kind of inventions are a critical topic in patent law, since a too-

Innovation and Intellectual Property', Economic Research Working Paper No 30 (2015).

⁵³ Cf M. de Cock Buning, 'Is the EU Exposed on the Copyright of Robot Creations?' *The Robotics Law Journal*, 8 (2015).

⁵⁴ There are several other intellectual property issues when it comes to machines. For instance, nowadays, sporting events are recorded by smart cameras and drones, equipped with slow motion features, high-definition videos, etc. In this context, the original contribution of the director is of a quality that renders it difficult to deny copyright protection. Cf S. Longhini and F. Catanzaro, 'Tra il dire e il fare c'è di mezzo ... il piratare' *Diritto d'autore*, I, 72 (2014).

relaxed approach in granting patents for these kind of inventions may risk allowing a double protection for computer programmes: copyright and patents. A much too broad monopoly would be legitimised, with a subsequent increased propertisation of intangibles.

The protection of computer programmes has always been a much debated topic: whether to protect them, how to protect them, using copyright, patents, both? The European Patent Convention excludes the patentability of computer programmes claimed *as such* (Art 52(2)(c) and (3)).⁵⁵ Patents are not granted merely for programme listings, which are protected by copyright. If a technical problem is solved in a novel and non-obvious manner, a machine-related patent can be granted.⁵⁶

Computer program/computer program product is one of the trickiest categories. The European Patent Office (EPO), indeed, stresses the (unclear) difference between this category and computer programmes as a list of instructions: the subject matter is patentable

‘if the computer program resulting from implementation of the corresponding method is capable of bringing about, when running on a computer or loaded into a computer, a “further technical effect” going beyond the “normal” physical interactions between the computer program and the computer hardware on which it is run.’⁵⁷

⁵⁵ In an attempt to address whether case-law concerning excluded matter is settled, and derive uniformity of application of European patent law, the President of the EPO referred four questions on the patentability of computer programs to the Enlarged Board of Appeal in October 2008 (G3/08, opinion on 12 May 2010, available at <http://www.epo.org/law-practice/case-law-appeals/pdf/g080003ex1.pdf> (last visited 6 December 2016)). However, the Board concluded that the referral was inadmissible because the decisions referred to were not considered to be *divergent*, and declined to answer the questions beyond determining their admissibility. This led to the Court of Appeal reaffirming its view that practice was not yet settled in *HTC Europe Co Ltd v Apple Inc* (Rev 1) [2013] EWCA Civ 451 (3 May 2013) at 44.

⁵⁶ The machine-related inventions do not receive a stricter assessment in comparison to other inventions. Indeed, in EPO Board of Appeal, T 1606/06 (*DNS determination of telephone number/HEWLETT-PACKARD*) of 17 July 2007, EP:BA:2007:T160606.20070717, the appellant argued that, since the patent concerned a CII, the triviality test should have been stricter. According to the Board, there is no basis for doing so and ‘(t)he only “special” treatment for computer-implemented inventions relates to aspects or features of a non-technical nature; in fact this treatment is only special in the sense that the presence of non-technical features is a problem which does not arise in many fields.’

⁵⁷ European Patent Office, ‘Patents for software? European law and practice’ (2013), available at [documents.epo.org/projects/babylon/eponet.nsf/o/a0be115260b5ff71c125746d004c51a5/\\$FILE/patents_for_software_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/o/a0be115260b5ff71c125746d004c51a5/$FILE/patents_for_software_en.pdf) (last visited 6 December 2016). For a landmark case of the Board of Appeal see T 1227/05 (Circuit simulation I/Infineon Technologies) of 13 December 2006, EP:BA:2006:T122705.20061213, available at <https://www.epo.org/law-practice/case-law-appeals/pdf/t051227ep1.pdf> (last visited 6 December 2016), whereby ‘technical and inventive Specific technical applications of computer-implemented simulation methods, even if involving mathematical formulae, are to be regarded as “inventions” in the sense of Article

Mischievous commentators may argue that machine-related inventions are a surreptitious way to obtain a double binary for software protection. This may become true with the rise of machines, especially in the context of the Internet of Things. Indeed, with the gradual substitution of old machines with connected devices, we will face an unprecedented growth of machine-related inventions; therefore, asserting that computer programmes are not patentable in Europe may sound hypocritical. I predict that in the future most computer programmes will be embedded in machines, with the consequential patentability of most computer programmes under the label of machine-related inventions.

The second IP-related aspect I will briefly touch on regards machine-generated works (more commonly known as computer-generated works).

Machines can already create copyrightable works without any human intervention or with little human input.⁵⁸ Let us think, for example, of the weather images created by a machine directly in communication with a satellite. With machines becoming more and more autonomous, machine-generated works will increase, leading scholars to rethink the traditional solutions for the relevant authorship, usually revolving around the developer of the software and the user operating the machine. In Italy, whilst it is believed that machine-generated works are protected as long as they are distinct from the computer programme that generated them,⁵⁹ the legislature has not taken a position on their authorship,⁶⁰ whereas in other countries

52(1) of the European Patent Convention. Circuit simulations possess the required technical character because they form an essential part of the circuit fabrication process.’ The most recent EPO case regarding computer programmes is T 1722/11 of 18 December 2015 on an Apple Inc’s application for a ‘Method and system for message delivery management in broadcast networks.’ It is available at <https://www.epo.org/law-practice/case-law-appeals/pdf/t111722eu1.pdf> (last visited 6 December 2016). As Fox LJ stated in *Merrill Lynch’s Application* [1989] RPC 561, 569, ‘it cannot be permissible to patent an item excluded by section 1(2) [of the Copyright, Designs, and Patents Act 1988] under the guise of an article which contains that item – that is to say, in the case of a computer program, the patenting of a conventional computer containing that program. Something further is necessary.’

⁵⁸ I am taking into consideration only *pure* machine-generated works. There are already umpteen websites and apps offering tools to edit (sometimes radically) the photos uploaded by the user. I will not cover this kind of works, but let us just say that usually authorship and ownership will be vested on the user, but the latter is required to grant a very broad licence to the service provider. For instance, under s 3 of the Snapchat’s Terms of Service (effective as of 29 March 2016, available at <https://www.snapchat.com/l/en-gb/terms> (last visited 6 December 2016)), the user must grant Snapchat ‘a worldwide, royalty-free, sublicensable, and transferable licence to host, store, use, display, reproduce, modify, adapt, edit, publish, and distribute that content.’ It is arguable that such a broad licence is not very different from a proper transfer of ownership.

⁵⁹ And, of course, as long as the other copyright requirements occur, for instance originality. Cf B.M. Gutierrez, *La tutela del diritto di autore* (Milano: Giuffrè, 2008), 43. Cf, in general, V. Ercolani, ‘Computer-generated works’ *Diritto d’autore*, 604 (1998).

⁶⁰ One could be misled by Art 7 para 2 of the copyright law. Indeed, it provides that the author of the elaborations is the *elaboratore*, which in Italian means both computer and

there are *ad hoc* provisions on the subject. For instance, in the UK, a computer-generated work is defined as one generated in circumstances when there is no human author of the work (s 178 of the Copyright, Designs, and Patents Act 1988) and under s 9(3) of the Act, which concerns literary, dramatic, musical or artistic works that have been computer-generated, the author is the person who made the necessary arrangements to create the work, such as the program author.⁶¹

The regime in the UK seems to exclude that the author can be the machine itself, which could be unfair when proper superintelligence becomes a reality. Given that there is no *ad hoc* provision in Italy and given that the Italian copyright act does not limit the concept of *author* to humans,⁶² one could argue that the Italian regime is more suitable for an AI scenario,⁶³ since it allows machines to be authors and hence owners of the works they produce.⁶⁴

IV. Inner Eye. Privacy, Data Protection, and Security

It is hard and probably useless to propose a unitary discourse on robots and drones when it comes to privacy and data protection. Therefore, I will take a concentric circles approach by analysing the genus and then assessing whether the same rules apply to the species.

As the first Asimov law of robotics reads, ‘a robot may not harm a human being, or, through inaction, allow a human being to come to harm.’ Even though the reference was originally to physical arms, nowadays one of the

person who does the elaboration. The impression of an authorship attributed to the machine is soon dispelled by the first para of the same article, which clarifies the scope of the provision: collective works. See Consiglio di Stato 21 January 1993 no 77, *Giustizia civile*, I, 1125 (1993).

⁶¹ Cf *Nova Productions Ltd v Mazooma Games Ltd & Ors* (CA) [2007] EWCA Civ 219.

⁶² Under Art 8 para 1 of the copyright act, the author is the entity (not necessarily the human being) who is indicated to be the author according to custom or, who is mentioned to be the author in the acting, execution, performance, or broadcasting of the work. Thus it is important to read the contracts or the terms of service to understand who is the author.

⁶³ An *ad hoc* regime or a revision of the current general regime would be needed to accommodate the specific characteristics of the works generated by machines. For instance, machines do not die, therefore the usual duration system (seventy years after the death of the author) would be unsuitable. One could either provide *ad hoc* mechanisms (eg the British system, with the machine-generated works falling into the public domain after fifty years from the date they had been made), or the rise of machines could constitute a good opportunity to review the current system by, for instance, limiting the duration of copyright to the author’s lifetime.

⁶⁴ Given the current development of AI, it is still valid the theory of P. Samuelson, ‘Allocating Ownership Rights in Computer-Generated Works’ 47 *University of Pittsburgh Law Review*, 1185 (1985), whereby it is more convenient to consider the user as the original owner of the work (even though one should assess on a case-by-case basis the individual contribution of the user).

main risks of the deployment of robots and drones is the threats to citizens' privacy.⁶⁵

It ought to be said that the relationship between robots and privacy is amphibious. Not only can robots jeopardise privacy, but they can also protect it. The existence of the latter is somehow usually ignored.⁶⁶ There are several commercial offers for security robots,⁶⁷ such as Knightscope K5, allegedly an autonomous⁶⁸ 'force multiplier, data gatherer and smart eyes and ears on the ground helping protect your customers, your property and your employees 24/7.'⁶⁹ Making use of cloud computing,⁷⁰ it patrols geo-fenced areas randomly or based on a particular patrolling algorithm and is defined as a 'marked law enforcement vehicle'.⁷¹ It is noteworthy that Knightscope's motto is 'hardware + software + humans' and it is explained by observing that

'(h)umans are best at decision-making and situational analysis, while our technologies excel at monotonous, computationally heavy and sometimes dangerous work'.⁷²

This approach is likely to be overcome soon, when the company deploys the new version equipped with object recognition tools and machine learning algorithms.⁷³ Finally, under K2's privacy policy, the personal and non-personal data collected by the robots may be shared for law enforcement purposes 'if we are compelled to by a court order'.⁷⁴ Elsewhere, however, the

⁶⁵ According to ComRes, 'Big Brother Watch – Online Privacy', 31 March 2015 available at http://www.comres.co.uk/wp-content/uploads/2015/03/Big-Brother-Watch_UK-Tables_9-March-2015.pdf (last visited 6 December 2016), seventy-eight per cent of the one thousand respondents are very concerned or at least fairly concerned about privacy online. The axiological statute of privacy in Italy may well be inferred by the *Dichiarazione dei diritti in Internet* (the charter of rights in the Internet) of 14 July 2015, whereby Art 8 of the Charter of Fundamental Rights of the EU (Protection of personal data) '*costituisce il riferimento necessario per una specificazione dei principi riguardanti il funzionamento di Internet, anche in una prospettiva globale*' (preamble). See also Arts 5-11 of the *Dichiarazione*.

⁶⁶ Along the same lines, see R. Calo, n 30 above, 3, whereby 'vulnerable populations such as victims of domestic violence may one day use robots to prevent access to their person or home and police against abuse.'

⁶⁷ See, eg, <http://robotsecuritysystems.com/> and <http://www.irobot.com/For-Defense-and-Security.aspx#PublicSafety> (last visited 6 December 2016).

⁶⁸ *Autonomous* at least in the double sense of non-remotely-controlled and capable of charging itself.

⁶⁹ <http://knightscope.com/> (last visited 6 December 2016).

⁷⁰ It comes with a browser-based web application, with no downloading of black box software required.

⁷¹ n 69 above.

⁷² *Ibid.*

⁷³ B. Schiller, 'Meet the Scary Little Security Robot That's Patrolling Silicon Valley', 13 August 2015, available at <http://www.fastcoexist.com/3049708/meet-the-scary-little-security-robot-thats-patrolling-silicon-valley> (last visited 6 December 2016).

⁷⁴ Section 5 of the Knightscope Privacy Policy, last modified on 13 August 2015, available

company admits that they may also proactively report the user and release its information ‘without receiving any request to third parties where we believe that it is proper to do so for legal reasons’⁷⁵ (at least they will not do so for illegal reasons). It is debatable that all the sections of the policy and of the terms of service are enforceable, for example when the former reads ‘(i)f you have submitted information to our Site you will be unable to edit that information’.⁷⁶ Moreover, K5 shares data with third party individuals and organizations, including contractors, web hosts, ‘and others’⁷⁷ and gives them the right to ‘collect, access, use, and *disseminate* your information’.⁷⁸ Therefore, it would be preferable to have the company bind third parties to confidentiality agreements, especially given that the user is forced to agree ‘not to hold (the company) liable for the actions of any of these third parties’⁷⁹ and that the third parties will not ask for the user’s consent when processing its data.⁸⁰

On the other hand, the potential for privacy-threatening uses are considerable. Robots can interact with human beings (‘human-robot interaction, or HRI), with other robots, and with the environment overall;⁸¹ they are equipped with sensors to perceive reality and can process and store big data, especially due to the developments of cloud robotics.⁸² The main categories of robots are military, industrial, and service: each of them can be used to monitor people, acquire their data, and make decisions from the data.

Robots can see and hear better than human beings and can go where human beings cannot, with resistance and memory capabilities that are increasingly superior to human capabilities.⁸³ In principle, drones can

at <http://knightscope.com/terms-conditions/> (last visited 6 December 2016). The scope of the section is not clear, since the following sentence reads ‘(a)dditionally, you agree that we may disclose your information if we reasonably believe that you have violated US laws or the terms of any of our agreements with you or if we believe that a third party is at risk of bodily harm.’

⁷⁵ Ibid, section 9.

⁷⁶ Ibid, section 6. Cf Art 7 para 3 letter a) of the *codice della privacy* (decreto legislativo 30 June 2003 no 196), whereby data subjects have the right to have their data up-to-date, to rectify them, and complete them. All the Member States have a similar provision on the right to amend one’s personal data.

⁷⁷ Ibid, section 8.

⁷⁸ Ibid, section 8, italics added.

⁷⁹ Ibid, section 8.

⁸⁰ Ibid, section 8.

⁸¹ Cf T. Fong et al, ‘A Survey of Socially Interactive Robots’ 42 *Robotics and Autonomous Systems*, 143-166 (2003).

⁸² Cf P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (London: Penguin, 2009) and T. Denning et al, ‘A Spotlight on Security and Privacy Risks with Future Household Robots: Attacks and Lessons’ 11th *International Conference on Ubiquitous Computing* (New York: ACM Press, 2010).

⁸³ According to B.J. Fogg, *Persuasive Technologies: Using Computers to Change What We Think and Do* (Burlington: Morgan Kaufmann Publishers Inc, 2003), 8, ‘(c)omputers don’t get tired, discouraged, or frustrated. They don’t need to eat or sleep. They can work around the

constitute an even more dangerous threat to privacy and data protection because in principle they can move more than robots. However, this is not always the case, not only because the distinction between robots and drones is blurred (for example, the Shigeo Hirose Ninja can climb, thanks to a suction cup system), but also and most importantly because robots are likely to become familiar components of our everyday life. Consequently, even in the event robots were not anthropomorphic, one would feel free to behave and talk in front of them as if they were family.

A society of machines and surveillance might easily recall Orwell's *1984*. It is, however, possible to suggest some similarity with Kafka's *The Trial*.⁸⁴ It is arguable that the problem of contemporary life is the lack of knowledge as to whether information will be used against us. Incidentally, this may be confirmed by the incredible fortune of the Google Spain ruling⁸⁵ on the so-called *right to be forgotten*.

Nonetheless, I have the feeling that our scenario is rather Orwellian. In fact, we are not capable of assessing the degree of control to which we are subject throughout our lives, thanks to the combined use of new technologies and bad laws.⁸⁶ I suggest everyone use Lightbeam, a Firefox add-on that enables users to see who is tracking them. The consequent shock may worsen once users realise that the tool is limited to the tracking that is carried out via cookies.

Surveillance capabilities and the possibility of accessing private spaces make drones and robots an unprecedented threat to privacy. Indeed,

‘the home robot in particular presents a novel opportunity for government, private litigants, and hackers to access information about the interior of a living space’.⁸⁷

clock in active efforts to persuade, or watch and wait for the right moment to intervene.’

⁸⁴ D. Solove, ‘The Digital Person: Technology and Privacy in the Digital Age’ 36 *GWU Law School Public Law Research Paper no 121* (2004).

⁸⁵ Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (European Court of Justice Grand Chambre 13 May 2014). Cf A. Mantelero, ‘The Protection of the Right to Be Forgotten: Lessons and Perspectives from Open Data’ *Contratto e Impresa / Europa*, II, 734 (2015); Id, ‘Il futuro regolamento EU sui dati personali e la valenza ‘politica’ del caso Google: ricordare e dimenticare nella digital economy’, in G. Resta and V. Zeno-Zencovich eds, *Il diritto all’oblio su Internet dopo la sentenza Google Spain* (Roma: Roma-Tre Press, 2015), 125; A. Viglianisi Ferraro, ‘La sentenza Google Spain ed il diritto all’oblio nello spazio giuridico europeo’ *Contratto e impresa/Europa*, 159 (2015).

⁸⁶ The increasing importance of cloud robotics enables me to refer to G. Noto La Diega, ‘Cloud computing e protezione dei dati nel web 3.0’ available at <http://giustiziacivile.com/soggetti-e-nuove-tecnologie/approfondimenti/cloud-computing-e-protezione-dei-dati-nel-web-30> (last visited 6 December 2016), where I stress, *inter alia*, the problem that there is no technical means of ensuring that no one is accessing our data on the cloud.

⁸⁷ R. Calo, n 30 above, 2. Even before robots and drones, it was possible to gather personal

A hacker who accesses our computer can steal data, but a hacker who accesses a robot can map the house, record the habits of the inhabitants, and be remotely controlled so as to steal physical properties without the risk of being caught. It is not a coincidence that law enforcement agencies are increasingly making use of robots.⁸⁸

Robots, and especially service robots, are becoming commonplace, thanks to increasing competition and a decrease in prices. Houses are being invaded by computers with legs (and sometimes wings) – machines usually connected to the Internet and capable of collaborating with other machines – due to cloud technologies. Public authorities, competitors, hackers, as well as the parties to a trial, can have access to the big data gathered by these machines, especially if they transmit information to or through the cloud. The relevant data are big in quantity and (potentially) personal in quality. Robots are increasingly equipped with sophisticated infrared cameras, Global Positioning System (GPS), accelerometers, sonars, electronic noses,⁸⁹ etc.

The issues are not different from those we are observing in the context of the Internet of Things. One need only consider the possibility of remotely activating the microphone in a car without the driver knowing it.⁹⁰ Similarly, one can intercept the audio-visual flows processed by robots and remotely control their moves, as well as orientate the sensors and the cameras. Moreover, every robot can be (and increasingly is) a component of a network of connected devices, which provides a formidable chance to third parties willing to recombine the information produced by the devices in order to exploit it for commercial purposes.⁹¹

One of the reasons why privacy is critical in every robotic scenario is that the internal memory of the machines is limited, whereas they need a fair

information – for instance, via webcams. However, nowadays there are more tools to gather and analyse information, thus changing the quantity and quality of the data themselves.

⁸⁸ See N. Sharkey, '2084: Big Robot is Watching You. Report on the Future of Robots for policing, surveillance and security' (2008), available at <https://www.scribd.com/doc/139971746/Noel-Sharkey-2084-Big-robot-is-watching-you-Future-Robot-Policing-Report-Final> (last visited 6 December 2016).

⁸⁹ Cf, eg, N. Schactman, 'Drones See, Smell Evil from Above', available at <https://www.wired.com/2003/03/drones-see-smell-evil-from-above/> (last visited 6 December 2016) and J. B. Chang and V. Subramanian, 'Electronic Noses Sniff Success' *IEEE Spectrum* (2008), available at <http://spectrum.ieee.org/biomedical/devices/electronic-noses-sniff-success/> (last visited 6 December 2016).

⁹⁰ This fact is cited by J. Zittrain, *The Future of the Internet: And How to Stop It* (New Haven-London: Yale University Press, 2008), 110.

⁹¹ One need only think of the problem of cross-device tracking through advertisements that cannot be heard by human beings, but which enable the identification of the devices which are part of the relevant network. It is not coincidental that the Federal Trade Commission (FTC) has organised a workshop on the topic. See C. Calabrese et al, 'Comments for November 2015 Workshop on Cross-Device Tracking' (2015), available at <https://cdt.org/files/2015/11/10.16.15-CDT-Cross-Device-Comments.pdf> (last visited 6 December 2016).

amount of processing and storing resources, especially with the diffusion of artificial intelligence technologies. Therefore, traditionally, 'lacking the onboard capability to process all of the data, the robot periodically uploads it the manufacturer for analysis and retrieval'.⁹² This leads to the issue of cloud robotics.

Cloud robotics enables, *inter alia*, potentially infinite storing and processing capabilities. Therefore, there is not necessarily the need to send over the information to the manufacturer (which usually retains this possibility), since the information is sent to the cloud provider (which is usually a third party). Cybersecurity in the cloud is becoming sound, especially thanks to the latest developments of homomorphic encryption; consequently, one can rely on the currently deployed clouds. As a recommendation to lawyers drafting cloud robotics contracts, it is critical to address encryption, redundancy, and geo-location of servers through *ad hoc* contractual sections.

Cloud servers are often outside Europe, which can cause problems in terms of jurisdiction, applicable law, and, recently, legality of the transnational transfer of personal data. The legal basis for the transfer of European personal data to the United States had always been the so-called Safe Harbour agreement, which was nearly automatically integrated in most of the contracts with big transnational corporations. Mostly as a consequence of Snowden revelations and kindred scandals, the Court of Justice has declared this international agreement void,⁹³ which has created a situation of utter uncertainty. In order to fully overcome the uncertainty, one should wait for the full effectiveness of the EU-US Privacy Shield.⁹⁴

⁹² R. Calo, n 30 above, 8.

⁹³ Case C-362/14 *Maximilian Schrems v Data Protection Commissioner* (European Court of Justice Grand Chamber 6 October 2015) available at www.eurlex.europa.eu. According to A. Mantelero, 'The "medieval" sovereignty on personal data. Considerations on the nature and scope of the EU regulatory model', available at <http://biletta2016.co.uk/wp-content/uploads/2016/03/Mantelero-Alessandro.pdf> (last visited 6 December 2016), only in appearance would the Schrems case reaffirm the strength of the European protection of personal data, 'but actually unveils the frail nature of this regulatory wall: the ECJ judgment has pointed out the inadequacy and the limits of the different remedies available to legitimate trans-border data flows and, therefore, the frailness of the apparent EU supremacy in protecting personal data.' Cf G. Resta, 'La sorveglianza elettronica di massa e il conflitto regolatorio USA/UE' *Il diritto dell'informazione e dell'informatica*, 697-718 (2015).

⁹⁴ On 2 February 2016, the EU and the US agreed on a new framework for transatlantic data flows: the EU-US Privacy Shield. The College of Commissioners has mandated Vice-President Ansip and Commissioner Jourová to prepare a draft adequacy decision, which should be adopted by the College after obtaining the advice of the Article 29 Working Party and after consulting a committee composed of representatives of the Member States. In the meantime, the US side will make the necessary preparations to put in place the new framework, monitoring mechanisms, and new Ombudsman. The draft adequacy decision (http://ec.europa.eu/justice/data-protection/files/privacy-shield-adequacy-decision_en.pdf (last visited 6 December 2016)) and the text of the Privacy Shield (http://ec.europa.eu/justice/data-protection/files/privacy-shield-adequacy-decision-annex-2_en.pdf (last visited 6 December 2016)) were presented on 29

Service robots, however, are not merely home robots. Robots are increasingly used in commercial contexts, such as the robotic shopping assistants first used in Japan and now becoming commonplace in Europe and America. Like a human shopping assistant, this robot identifies the potential client and drives him or her towards the product. However, unlike the human, the robot can record all of the information produced during the (attempted) transaction, crunch big data, and identify a customer who is returning (for example through the use of face-recognition technologies).⁹⁵ The resulting data can be exploited ‘in both loss prevention and marketing research’.⁹⁶

Shifting to the applicable law, one should move from Directive 2006/42 (machinery directive),⁹⁷ implemented in Italy through decreto legislativo 27 January 2010 no 17 (*decreto macchine*).

Art 18 of the machinery directive provides a regime that juxtaposes with the general data protection rules.⁹⁸ The directive calls on the Member States to ensure that the people involved in its application do not disclose confidential information, such as trade, professional, and commercial secrets.⁹⁹ However, there is awareness of the central role of the balance of opposed interests; therefore, the disclosure of confidential information is allowed when the health and security of people require it.

February 2016. On 13 April 2016, Article 29 Working Party adopted its ‘Opinion 01/2016 on the EU – US Privacy Shield draft adequacy decision’, thus pointing out that further clarification of the adequacy decision is in order. According to Commissioner Jurova, the ‘European Commission is set to present a new draft of its data-exchange pact with the US, the Privacy Shield, in early July.’ (N. Nielsen, ‘EU to adopt new US data rules in July’, available at <https://euobserver.com/justice/133941> (last visited 6 December 2016)).

⁹⁵ On face recognition and machines see, for instance, Article 29 Working Party, opinion 27 April 2012 no 3 on the development of biometric technologies. On 5 May 2016, the District Court of Northern California rejected Facebook’s motion seeking dismissal of a complaint filed under the Illinois Biometric Information Privacy Act. Some users of the social networking platform complained that the collection and storage of biometric data derived from their faces in photographs, for the purposes of *tag suggestions*, were illegal. The decision is available at <https://cdn.arstechnica.net/wp-content/uploads/2016/05/Biometric-Ruling.pdf> (last visited 6 December 2016).

⁹⁶ R. Calo, n 30 above, 4.

⁹⁷ The wording of the machinery directive is broad enough to encompass the vast majority of robots and drones. Some applications, however, may be excluded. See, for instance, machinery that is also a medical device, hence subject to the Medical Devices Directive 93/42/EC.

⁹⁸ On 4 May 2016, the GDPR was published on the Official Journal. See Regulation (EU) 2016/679 of the Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. It must be transposed by 25 May 2018, but it does not need acts of implementation.

⁹⁹ The listed types of information do not have a clear classification. In some countries they may fall under *intellectual property*, and in other systems under *data protection and privacy*. In Italy, I argue that they would be closer to the intellectual property realm.

It is not a *lex specialis* which applies instead of the general regime (it does not *derogat generali*). It adds to it. Indeed, Art 14 of *decreto macchine* is clear where it reads that the application of the code of privacy and of decreto legislativo 10 February 2005 no 30 (*codice della proprietà industriale*) is not affected. The domestic provision reproduces verbatim the European one, but the privacy is not balanced only with the health and security of people. The balance encompasses also the security of pets, goods, and the environment as a whole.

The Italian legislature might have been braver by introducing stronger privacy protections. However, the existing regime can be interpreted in a more privacy-friendly way. The manufacturer can determine that the machine does not threaten security and health before putting it on to the market. These data must be part of the technical attachment (Art 3, para 3, *decreto macchine*). The annex I of the directive clarifies the essential security requirements. The manufacturer must assess the limitations of the machine, including the foreseen usage and reasonably foreseeable incorrect usage.

Now, my suggestion is that the limitations to be assessed have to encompass privacy and data protection. The measures to be enacted in order to avoid an incorrect usage of the machine have to include the so-called privacy by design and privacy by default approaches that have become binding, due to the general data protection regulation (GDPR).¹⁰⁰ Without being naive, it is clear that these measures can only minimise, rather than eliminate the risks. However, the annex I is ready to face this scenario. If the measures *by design* do not eliminate all the risks, the manufacturer has to adequately inform the customer.

As to the mentioned technical attachment, it must include the documents related to risk assessment and give account of the essential requirements of security and health, as well as of the protection measures embedded, in order to avoid risks where possible and clarify the remaining risks. As a policy recommendation, the data protection impact assessment (DPIA)¹⁰¹ needs to

¹⁰⁰ Under Art 25 para 1 GDPR, '(t)aking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects.'

¹⁰¹ Under Art 35 para 1 GDPR, '(w)here a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a

become a compulsory tool for manufacturers of machines, be they robots, drones or the devices of the Internet of Things. Now, Art 15 of the *decreto macchina* provides fines for placing on to the market products inconsistent with annex I or products without the required technical attachment. Even though privacy and data protection can be interpreted as already included in the concept of security, I recommend that the legislature expressly state it and impose the DPIA (whilst the privacy by design and by default measures have become compulsory, thanks to the GDPR).

Shifting to drones, a communication of the European Commission on civil RPAS¹⁰² is one of the main relevant documents.¹⁰³ The European strategy stresses the need for a public debate on societal concerns, that is, namely, data protection, privacy, liability, insurance, and security.¹⁰⁴ At a closer look, its para 3.4, entitled ‘Protecting the citizens’ fundamental rights,’ is a sort of handbook on privacy in a drone context. The Commission recognises that some civil RPAS applications can jeopardise privacy; therefore, the operators of RPASs must respect the European privacy regimes.¹⁰⁵ The communication goes on to point out that the processing of data must always be carried out for a legitimate purpose. The creation itself of a market for RPASs is held dependent on the assessment of the appropriate measures to protect the fundamental rights, such as data protection and privacy. There is more. The Commission underlines that there shall be a constant monitoring of data protection.

Even if the *Garante per la Protezione dei Dati Personali (Garante)* does

set of similar processing operations that present similar high risks.’

¹⁰² Communication from the Commission to the European Parliament and the Council on ‘A new era for aviation – Opening the aviation market to the civil use of remotely piloted aircraft systems in a safe and sustainable manner’, COM/2014/207, para 3.

¹⁰³ Cf also the communication of 13 February 2008 on ‘Examining the creation of a European Border Surveillance System (EUROSUR)’, COM/2008/68 final, whereby many activities, such as the monitoring of frontiers by using UAV ‘may involve the processing of personal data. Thus the principles of personal data protection law applicable in the European Union are to be observed, meaning that personal data must be processed fairly and lawfully, collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. The processing of personal data within the context of EUROSUR must therefore be based on appropriate legislative measures, which define the nature of the processing and lay down appropriate safeguards.’ (Para 5).

¹⁰⁴ Com. 2014/207 final, para 3.

¹⁰⁵ The reference was to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, now repealed by the GDPR and to the Council Framework Decision 2008/977/JHA, now repealed by Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data. The directive must be transposed by 6 June 2018.

not seem to have taken clear steps in the matter of machines, things are moving. One should mention two recent facts.

On the one hand, it ought to be mentioned that in April 2016, twenty-eight data protection authorities launched the ‘Privacy Sweep 2016’. It is an international survey coordinated by the Global Privacy Enforcement Network and it aims to assess the relation between the Internet of Things and privacy. Its results will be of great relevance also in the robotics sector.

On the other hand, the *Garante* has recently ruled¹⁰⁶ in favour of the use of smart closed-circuit televisions (CCTVs) for access control and surveillance. It is noteworthy that the *Garante* authorises the processing on the ground that the requesting company was following an ISO standard. It is recognised that, even though standards are not legally binding provisions, they concern areas of critical public interest, which are technologically very complex. Therefore, public bodies endorse them increasingly and there is a long-standing practice to refer to standards in contracts. Consequently, one cannot deny that ‘actually, one recognises in these technical specifications a statute which is considerably higher than the one they should have, given their adoption procedures’. The *Garante* concludes that such security standards have become, nationally and internationally, an inescapable reference point in high-tech markets.

The European Commission committed itself to launch consultations in order to assess how RPAS applications can be consistent with data protection. I am not aware of any such consultation, at least not one that has involved civil society. However, the Commission has sought some institutions’ advice. It is worth mentioning the European Data Protection Supervisor (EDPS)’s opinion.¹⁰⁷ EDPS stresses that ‘only those RPAS that will have integrated data protection and privacy in their design will be well regarded by society at large’.¹⁰⁸ According to the EDPS, most of RPAS applications process personal data, due to the broad scope of application and technologies in use.¹⁰⁹ Things get trickier when it comes to the full adoption of technologies, such as machine learning, that are leading to the creation of autonomous machines.

Some observations, then, would need an update. For instance, according to the EDPS, the European data protection regime is applicable ‘as long as the processing takes place in the context of the activities of an establishment of

¹⁰⁶ *Garante per la Protezione dei Dati Personali* (Garante or GPD) 17 March 2016 no 127 on ‘*Verifica preliminare. Sistemi di videosorveglianza dotati di software “intelligent video”*’.

¹⁰⁷ EDPS, Opinion on the Communication from the Commission to the European Parliament and the Council on ‘A new era for aviation - Opening the aviation market to the civil use of remotely piloted aircraft systems in a safe and sustainable manner’, 26 November 2014.

¹⁰⁸ *Ibid*, para 10.

¹⁰⁹ EDPS refers to the example of a camera with video processing software; it could be capable of high power zoom, facial recognition, behaviour profiling, movement detection, and number plate recognition.

the controller in the EU or with equipment or means located in the EU'.¹¹⁰ As stated by the Court of Justice in *Weltimmo*,¹¹¹ the absence of a physical establishment and even of any equipment in the territory of the European Union is immaterial, insofar as there is evidence that the service is targeted at a Member State (for example, if a website is translated into a certain language).

The RPAS are usually compared to airplanes and CCTVs. According to the EDPS, however, drones constitute an even higher threat to privacy. Even though an airplane can be equipped with sensors and technologies far more refined than those of drones, the latter fly closer to the human being, and thus able to catch more personal data. The main difference between drones and CCTVs is the former's mobility, which 'offers more and also increasingly different uses.' Mobility and stealth make drones a perfect surveillance tool.

As stated by the European Court of Human Rights in *Von Hannover v Germany*,¹¹² the fact that certain activities are carried out in public does not exclude, in principle, any expectation of privacy. In fact, there is 'a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life'.¹¹³ For instance, a citizen would have the right not to be targeted by zooming cameras and directional microphones, regardless of the public or private nature of the setting.

For what concerns private activities, for example for hobby purposes, the EDPS espouses a restrictive interpretation of the personal and domestic use exception (Art 3, para 2, second hyphen of directive 95/46/EC).¹¹⁴ This is in line with the subsequent ruling in *František Ryněš v Úřad pro ochranu osobních údajů*,¹¹⁵ where the Court of Justice found that the European privacy regime applies to the recording carried out by a private surveillance camera installed in a house and directed to a public path. On this point, the EDPS refers to *Lindqvist*¹¹⁶ and infers that the processing of personal data carried out by private subjects does not fall within the said exception,¹¹⁷

¹¹⁰ EDPS, n 107 above, para 31.

¹¹¹ Case C-230/ *Weltimmo s.r.o. v Nemzeti Adatvédelmi és Információszabadság Hatóság* (European Court of Justice Third Chamber 1 October 2015), available at www.eurlex.europa.eu.

¹¹² Eur. Court H.R., *Von Hannover v Germany*, Judgement of 24 June 2004, Reports of Judgments and Decisions 2004-VI, on Princess Caroline of Munich and her attempts to prevent the publication of pictures of her private life on tabloids.

¹¹³ *Ibid.*, para 97.

¹¹⁴ The reference was Directive 95/46/EC. The relevant provision of the GDPR is Art 2 para 2 letter c, which repeats verbatim the wording of the directive.

¹¹⁵ Case C-212/13 *František Ryněš v Úřad pro ochranu osobních údajů* (European Court of Justice Fourth Chamber 11 December 2014), available at www.eurlex.europa.eu.

¹¹⁶ Case C-101/01 Criminal proceedings against Bodil Lindqvist, [2003] ECR I-12971.

¹¹⁷ According to Article 29 Working Party, when assessing the household exception, one needs to take into consideration ' - if the personal data is disseminated to an indefinite number of persons, rather than to a limited community of friends, family members or acquaintances, -

when it is aimed

‘at sharing or even publishing the resulting video/sound captures/images or any data allowing the direct or indirect identification of an individual on the Internet and, consequently, to an indefinite number of people (for instance, via a social network)’.¹¹⁸

Moreover, as to the commercial and administrative use of drones, *Google Spain*¹¹⁹ justifies an extraterritorial application of the GDPR. It follows that even the manufacturers of RPASs that are established outside the European Union need to embody data protection by design and by default measures, as well as to adopt a DPIA.

Finally, a couple of recommendations. The European Commission has no jurisdiction on RPASs under one hundred and fifty kilograms. Yet, the manufacturers of small RPASs need to be aware that the privacy and data protection regimes still apply. Moreover, it is important to raise customers’ awareness; therefore, I suggest carefully drafting privacy notices to be included with the packaging of drones.

More recently, the Article 29 Working Party¹²⁰ has issued its opinion ‘on Privacy and Data Protection Issues relating to the Utilisation of Drones’.¹²¹

The Article 29 Working Party calls on policy makers and regulators so that the deployment of civil drones is accompanied by several measures. Let us only mention the need to make the authorisation to fly dependent on declarations of the assessment of the impact on data protection, as well as the invitation to draft DPIAs by liaising with stakeholders.

if the personal data is about individuals who have no personal or household relationship with the person posting it, - if the scale and frequency of the processing of personal data suggest professional or full-time activity, - if there is evidence of a number of individuals acting together in a collective and organised manner,- if there is a potential adverse impact on individuals, including intrusion into their privacy.’ See Annex 2, Proposals for Amendments regarding exemption for personal or household activities, available at http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2013/20130227_statement_dp_annex2_en.pdf (last visited 6 December 2016).

¹¹⁸ EDPS, n 107 above, para 35.

¹¹⁹ Case C-131/12 *Google Spain* n 85 above, particularly when it states that the exception must be interpreted ‘as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State’ (para 60).

¹²⁰ The Article 29 Working Party is about to be substituted by the European Data Protection Board (see Art 68 GDPR).

¹²¹ Article 29 Working Party, Opinion 01/2015 on Privacy and Data Protection Issues relating to the Utilisation of Drones, 16 June 2015, available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2015/wp231_en.pdf (last visited 6 December 2016).

Manufacturers and operators, then, shall embody privacy by design and by default; adopt codes of conduct assisted by *ad hoc* remedies (in a *sui generis* co-regulation model);¹²² and render the drone identifiable (for example through wireless signals or bright colours).¹²³

Law enforcement agencies, finally, shall respect the principles of necessity, proportionality, and minimisation; inform the data subjects ‘as far as possible’;¹²⁴ ensure that the continuous surveillance is covered by a warrant; as to the automated execution of decisions, ensure that a human operator controls the data processed by the drone.

The Italian *lex specialis* is the regolamento ENAC. Its Art 34 is rather different from the wording of the above analysed provision of the machinery directive, inasmuch as it provides the following. First, when the RPAS operations involve (or can involve) the processing of personal data, this risk ought to be mentioned in the documents produced when applying for an authorisation. Second, the processing of personal data ought to be consistent with the code of privacy, especially with regard to adopting techniques that render the data subject identifiable only when necessary under Art 3 of the said code. The data processing, third, ought to follow the measures enacted by the *Garante*. It should also be noted that, in case of operations carried out on behalf of third parties, the regolamento mandates the parties to include provisions relevant to data protection (Art 7 para 3).

Art 34 does not go beyond the mere reference to the general data protection regime. However, it is commendable that the *Garante* suggests what I have wished above with regard to the machinery directive, that is, the need for the documents accompanying the authorisation to cover privacy issues. The sensitiveness towards the trend of data minimisation is noteworthy.¹²⁵ Lastly, the reference to the decisions of the *Garante* can be a dynamic and flexible tool, as the procedures of the authorities are simpler than those of the legislature.¹²⁶ One should wish that the reference was

¹²² The code of conduct is usually an example of self-regulation. However, in this context, it is accompanied by proper remedies, thus giving rise to a public-private collaboration which can be described as co-regulation.

¹²³ Given that the invisibility of drones is one of the reasons of their appeal, marketing considerations may lead to not enforcing this provision.

¹²⁴ Article 29 Working Party, n 121 above, para 5.4.

¹²⁵ Cf, eg, Article 29 Working Party, *Remotely Piloted Aircraft Systems (RPAS) – Response to the Questionnaire*, 16 December 2013, para 3, whereby a ‘need for policy guidelines has been identified in order to address the practical difficulties regarding the enforcement of some data protection rules regarding the use of data processing equipment onboard RPAS, for example fair processing, information notice, data minimization and compliance with data subjects’ access rights’.

¹²⁶ The *Garante* has not taken a position yet. However, there are many documents which are indirectly relevant to machines and privacy (see, in text, the reference to smart CCTV and the survey on the Internet of Things). On robots as internet bots see GPDP, opinion 4 July 2013, doc. web no 2574977 on *Linee guida redatte dall’Agenzia per l’Italia Digitale ai sensi*

extended also to EDPS and the Article 29 Working Party (and in the future to the European Data Protection Board).

To conclude, there are three takeaways. First, machines can both help protect us from privacy threats, yet also constitute a threat themselves. Second, even though there seems to be more concern about drones, robots can be even more dangerous, because they are present in the most private spaces and they become a familiar component of the everyday landscape in a household. Third, existing legislation and regulations – *in primis* the code of privacy and the regolamento ENAC – are applicable even in the event of threats to privacy posed by robots and drones. However, on the one hand, the Italian legislature needs to amend the code of privacy to react to the GDPR, particularly regarding the DPIA, data protection by design and by default, and certifications.¹²⁷ On the other hand, the Italian and European data protection authorities need to take machines seriously and hopefully the results of the survey on the Internet of Things will constitute a good step towards this direction.

V. Torts, Contracts, and Special Regimes of Liability

In late June 2016, Tesla announced that a man died while driving in autopilot mode because the sensors of the vehicle, which help to steer the car by identifying obstructions, had failed to recognise ‘the white side of the tractor trailer against a brightly lit sky’.¹²⁸ The US *National Highway Traffic Safety Administration* has just opened a preliminary evaluation into the performance of the autopilot, so it is too soon to reach any conclusions, but the first fatal crash of a (quasi)¹²⁹ driverless car has reminded us all of the importance of the topic of liability.

dell’art. 58, comma 2, del D. Lgs. 7 marzo 2005, n. 82 (CAD), especially para 5.5.2.3. Robots and bots, however, shall not be confused.

¹²⁷ Art 42 of the GDPR encourages the establishment of data protection certification mechanisms and of data protection seals and marks, for the purpose of demonstrating compliance with the regulation of processing operations by controllers and processors.

¹²⁸ The Tesla Team, ‘A tragic loss’, 31 June 2016, available at <https://www.teslamotors.com/blog/tragic-loss> (last visited 6 December 2016).

¹²⁹ The Tesla model S’s autopilot requires the driver to leave the hands on the steer, in order to allow them to contradict the machine’s decisions. In a case like this, Tesla could argue that the driver should have distinguished the white side of the tractor from the bright sky. Probably, the conclusion will be different with proper driverless cars. Since the tests are showing that mortality and accidents are by far less frequent with driverless cars, in comparison with human-driven cars, I believe that regulators should allow the deployment of this kind of machines, but they should clarify that manufacturers of cars are liable for driverless cars even in the case the driver (or their family) was not able to prove the manufacturers’ or the developer’s fault. Indeed, the manufacturer is the (economically and contractually) strongest actor in the supply chain and the one who can have a more direct control on the embedded software (for security reasons, driverless cars will likely be ‘closed’ systems), therefore a

From an Italian civil law perspective, the main general liability regimes that apply to machines are breach of contract (*responsabilità contrattuale*), torts (*responsabilità extracontrattuale*), and product liability. When it comes to drones, one should also take into account the special provisions of the regolamento ENAC and of the codice della navigazione.

The *responsabilità contrattuale* is an objective liability, insofar as it does not require the proof of negligence or fault of the defendant. It derives from the *inadempimento*, the violation of an obligation (be it contractual or not) and it is accompanied by a large array of remedies, such as damages and specific performance. Machine contracts (that is, contracts created when buying a robot or a drone) may contain disclaimers of any liability, but such sections may not be enforceable, especially in business-to-consumer transactions.¹³⁰ Moreover, there are specific provisions, such as Art 1494 para 2 of the codice civile, regarding the seller's liability for damages deriving from the defects of the sold good.¹³¹ A good use case is provided by the Unibox service provided by Octo Telematics Italia srl to the clients of the insurance company Unipol Assicurazioni spa. The company provides a *black box* equipped with several sensors that drivers install in their car in order to allow the insurance company to monitor their driving habits, while the driver can benefit from discounts on the insurance fee. As one can read in the *Condizioni Generali del Contratto di abbonamento ai servizi* (terms of service),¹³² the contract is a *comodato* – that is, a complimentary leasing.¹³³

presumptive strict liability regime should operate.

¹³⁰ The *codice del consumo* (decreto legislativo 6 September 2005 no 206) provides a higher level of protection to consumers; this results, for instance, in special remedies and in the restriction of the freedom of contract on the side of businesses. The codice del consumo has been amended several times, lastly by decreto legislativo 6 August 2015 no 130, which has transposed Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

¹³¹ Under Art 1490 of the codice civile, the seller shall guarantee that the sold good has no defects that render the good unsuitable for the designated use or that decrease its value substantially. However, the seller has two defences: either he proves that the buyer knew the defects, or he proves that the defects could easily be recognised. In the latter scenario, the buyer can rebut the evidence by showing that the seller has declared that the good had no defects (Art 1491). On the nature of this liability, see Corte di Cassazione 11 February 2014 no 3021, in R. Mazzoni, *Risarcimento del danno per inadempimento contrattuale* (Sant'Arcangelo di Romagna: Maggioli, 2014), 276.

¹³² *Condizioni Generali del Contratto di abbonamento ai servizi Octo Telematics Italia srl*, edition of 1 July 2011, available at http://www.unipol.unipolsai.it/utile-e-facile/preventivatori/autoveicoli/Documents/05_Condizioni-Octotelematics_9533_PA002%20OCTO%20TEL.EM.pdf (last visited 6 December 2016).

¹³³ Under Art 1803 of the *codice civile*, the *comodato* is an essentially complimentary contract whereby a party delivers a movable or immovable good to another party, so that the latter can use it for a limited time and specified purpose, with the duty to return the same thing they had received.

One of the relevant provisions of the codice civile reads that if the defects of the good damage the *comodatario* (the user), the *comodante* (the provider) shall compensate the loss, provided that the latter knew the defects and did not warn the former (Art 1812).

It is harder for a claimant to be successful in a *responsabilità extracontrattuale* claim, since there are less favourable rules, especially on the burden of proof, causality link, and subjective element (for example, the *dolo* and *colpa grave* required by Art 2043 of the codice civile). The more complex regime is due to the fact that the damage occurs in a moment when there is not a qualified relationship between the claimant and the defendant. Furthermore, there are a number of specific provisions that can apply, depending on the characteristics of the specific dispute. For instance, Art 2050 of the civil code creates a form of objective liability for those who carry out dangerous activities (*responsabilità per esercizio di attività pericolose*). Another provision that is potentially applicable is Art 2049 of the civil code, which deals with the liability of the owner and of the commissioner for the damages caused by the tort of the person under the former's responsibility. Lastly, Art 2052 of the civil code regards the damages caused by things held in custody.

Machines *per se* do not lead one to rethink these general liability regimes. Autonomy is the real question. The use of artificial intelligence is leading to the manufacturing of machines that can make autonomous decisions, learn from experience, and act in a way that was not foreseeable at the time of production. Currently, machines have no legal personality; therefore they cannot be subject to rights, enter into contracts, be bound by obligations, be condemned to pay damages, be arrested, etc. Nevertheless, for reasons I will explain in the conclusions, it is just a matter of time until we will have to recognise legal personality of machines.

Nonetheless, let us deal with the current status of autonomy and the lack of personality. Even though the machine itself cannot be found liable, if no obligations bind the damaged person or the person behind the machine, it becomes harder and harder to spot a causality link when one faces autonomous decisions. Moreover, who is the person behind the machine? The manufacturer of the hardware? The developer of the software? What if the damage derives from the interoperability with third-party software and machines?

A generalised system of compulsory insurance, along the lines of the *responsabilità civile auto* (mandatory car insurance), as well as a public debate on simpler and fairer contracts, should be the answers. In the meantime, the product liability regime¹³⁴ may provide temporary and imperfect answers.

¹³⁴ The decreto del Presidente della Repubblica 24 May 1988 no 224 implemented Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and

This regime is imperfect mainly because it is limited to just some items of losses and only if they are the consequence of a defect. Moreover, it is not entirely clear what happens if the defect is to the software and not to the hardware component. Elsewhere,¹³⁵ I have argued that the devices of the Internet of Things (and most robots and drones are subsumable under said category) are an inextricable mixture of hardware, software, and service. Consequently, I argue that even defects to software can give rise to product liability claims. As a policy recommendation, updates to the defective products directive and to the codice del consumo are much needed. However, the rules are still most suitable for when one deals with damages caused by machines because it is a strict liability regime.¹³⁶ The burden to prove damages does not fall on the person actually responsible for the defect but falls presumptively on the manufacturer. However, these rules are still the most suitable when one deals with damages caused by machines, since it is a strict liability and does not impose on the damaged person the burden to find the single person actually responsible for the defect, thanks to a presumptive system revolving around the manufacturer.

It is unclear whether the machinery directive and the decreto machine apply to drones. They both leave out of their scope, *inter alia*, the means of transport by air. It is not certain whether all drones can be considered means of transport, but one should take these regimes into account because they undoubtedly apply to robots.

From a liability perspective, the manufacturer (*fabbricante*) is at the centre. It is defined as the legal or natural person who designs and/or builds a machine: he is responsible for conforming to the decreto machine (Art 2 para 2 letter i). This regime comes with a notable array of remedies. For

administrative provisions of the Member States concerning liability for defective products (product liability directive). The current regime is provided by art 114 ff of the *codice del consumo*, which is completed by the health and safety regime provided by art 102 ff of the same codice.

¹³⁵ G. Noto La Diega and I. Walden, 'Contracting for the 'Internet of Things': Looking into the Nest' *Queen Mary School of Law Legal Studies Research Paper no 219/2016*, available at <http://ssrn.com/abstract=2725913> (last visited 6 December 2016), now in *European Journal of Law & Technology*, 2016, II.

¹³⁶ As clarified by Corte di Cassazione 28 July 2015 no 15851, *Danno e responsabilità*, I, 41 (2016), it is a presumptive regime, whereby one assumes the manufacturer's fault, but it can still prove the inexistence of the defect (it is a *colpa presunta* regime, not a *responsabilità oggettiva* one). The Italian ruling is inconsistent with Joined cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE* (European Court of Justice Fourth Chamber 5 March 2015), available at www.eurlex.europa.eu, whereby Art 6(1) of the product liability directive must be interpreted as meaning that, where it is found that products belonging to the same group or forming part of the same production series have a potential defect, such a product may be classified as defective without there being any need to establish that that product has such a defect.

instance, unless the offence is criminal, the manufacturer or its agent (*mandatario*), which places the machine on the market without meeting the provided requirements of conformity, is fined with a sum up to twenty-four thousand euros.

Shifting to the special regimes that are applicable to drones, the *regolamento* ENAC is relevant also with respect to liability, since it regulates the conditions of the flight and the role and responsibility of pilots, as well as the mandatory insurance¹³⁷ (which it is not clear why should be limited to this kind of machine).

In order to fly a drone, one needs the ENAC's authorisation or a declaration of conformity.¹³⁸ The main content of these documents is safeguards for security and safety, for the same reasons it is compulsory to have a flight manual. It is noteworthy that the RPAS has to be identified through a placard with information about the system and the operator. Since the identification is fundamental in order to be able to allocate responsibilities, this mechanism appeared rather inadequate. Therefore, the new version of the *regolamento* provides that, as of 1 July 2016, RPASs must be equipped with an electronic identity device, which enables the real-time transmission and recording of the data on the drone and on the owner/operator, alongside the basic flight data.

The main person responsible appears to be the remote pilot.¹³⁹ The remote pilot is defined as the person charged by the operator as responsible for the conduct of the flight, who commands the RPAS by manipulating the remote ground pilot station. This applies particularly to visual line of sight (VLOS) operations, where the remote pilot keeps continuous visual contact with the aerial vehicle, without the aid of tools to enhance the view, thus being able to control it directly with the aim to conduct the flight and to meet separation and collision avoidance responsibilities. The remote pilot has the final responsibility to define the VLOS conditions, which might be affected by the weather condition, the sunlight, or the presence of obstacles. It is their responsibility to ensure the continued compliance with the conditions for the experimental activity, which is an essential prerequisite for the critical operations. More generally, pursuant to *codice della navigazione*, 'the pilot is responsible for the safe management of the flight' (Art 20).

¹³⁷ Under Art 32 of the *regolamento* ENAC, '(n)o RPAS shall be operated unless it has in place a third party insurance, adequate for the operations and not less than the minimum insurance coverage of the table in Art. 7 of Regulation (CE) 785/2004 is in place for the operations.'

¹³⁸ The dichotomy is between critical and non-critical operations. The former must be preceded by an authorisation, and the latter by a declaration.

¹³⁹ However, see Art 28 of the *regolamento*, whereby 'The operator, the manufacturer, the design organization, the pilot shall keep and make available to ENAC documents issued in order to demonstrate compliance with this Regulation, upon to their respective responsibilities.'

The operator plays an important role in terms of prevention and security (Art 33). He shall put in place appropriate measures to protect the RPAS from unlawful acts during operations, including the prevention of unlawful interference with the radio link. Moreover, the operator shall establish procedures to prevent unauthorized access to the area of operations, with particular attention to the remote ground pilot station, and to the storage location of the RPAS.

RPAS operations can be carried out on behalf of third parties. In this event, a contract between the RPAS operator and the client shall allocate the responsibilities for such specific operations.

Some remedies accompany the *regolamento*. For instance, ENAC can suspend authorisations and certifications if the *regolamento* is violated. Moreover, if one undertakes specialised operations without authorisation for critical operations or declaration of conformity, they shall be subject to the remedies provided by Arts 1174, 1216, 1228, and 1231 of the *codice della navigazione*.

The second title of the third book of the codice is dedicated to the liability for damages to third parties both for what are known as *surface* and *impact* damages. Under Art 965, the *esercente*¹⁴⁰ is liable for the damages caused by the aerial system to people and goods on the Earth's surface, even in the case of *force majeure*. However, the *esercente* can still prove that the damage was the consequence of the harmed person's fault. Moreover, the harmed person will not be entitled to damages if he could have avoided the injury or the loss by being diligent (Art 966). A cap to damages is provided, depending on the weight of the system (Art 967, but see Art 971 for the exclusion of the limitation) and it is excluded an overlap between this special tort¹⁴¹ liability and the contractual one. Indeed, Art 965 ff are not applicable when there is a contract binding the *esercente* and the harmed person (Art 972).

A second scenario is the impact damage (*danno da urto*) due to slipstream effects or a similar cause (Art 974). Unlike surface damages, in the event of *force majeure* or unforeseeable circumstances, no damages will be granted. It is irrelevant whether there has been a material collision between the aerial systems or between the aerial system and the moving ship.

Lastly, Art 978 regards surface damages occurring from in-flight impact.

¹⁴⁰ The *esercente* is the person entitled to operate the aerial system. Under Art 874 of the *codice della navigazione*, the one who operates the aerial system has to declare it to ENAC, as well as record it in the *Registro Aeronautico Italiano* and on the *Certificato di Immatricolazione*.

¹⁴¹ For instance, the right to damages lapses after one year from the day of the loss or injury (Art 973 of the *codice della navigazione*). On the contrary, the general term of *prescrizione* for torts is five years, which is reduced to two years in case of vehicle traffic (Art 2947 of the *codice civile*). The *prescrizione* for the second scenario (impact damage) is two years (Art 487 of the *codice della navigazione*).

For instance, what happens if two drones collide and, therefore, plummet to the ground, injuring a passerby? The *esercenti* are jointly and severally liable (*responsabilità solidale*). Therefore, the passerby is entitled to claim damages from each of them for the entire sum. The *esercenti*, then, will split the amount in proportion to the severity of fault and of the relevant consequences. If the accident occurred due to *force majeure* or if it is not possible to ascertain the fault or the severity of the respective faults (or of the consequences), the damages will be shared equally.

The compliance with the regolamento and with the technical standards provide a good defence in liability claims, but it may not help when strict liability regimes apply.

VI. 'If This Is a Machine.' Conclusions

No contemporary discourse on machines can end without some words on autonomous systems and the future of the info-capitalist¹⁴² society. Recently,¹⁴³ the polarisation of the debate between *Singularitarians*¹⁴⁴ and *AItheists*¹⁴⁵ has been underlined. The former are sure that true superintelligence is around the corner and it will disrupt everything we know, thus leading to an apocalyptic scenario where human labour will become useless and human beings will become the machines' slaves. In turn, the latter argue that even imagining an intelligent machine is preposterous and, in any case, no real disruption will come, since we will be able to keep machines under our control. The author of the Singularitarians/AItheists classification proposes a more nuanced approach, but ultimately he affirms that real AI is utterly implausible and invites intellectuals to focus on more important issues.

It is probably true that both positions are incorrect and I have dealt with the current legal issues because I cannot see proper superintelligence¹⁴⁶ happening in the next few years.¹⁴⁷ However, I am quite sure that AI will

¹⁴² I use *info-capitalism* to focus on a major aspect of the so-called biocapitalism; that is, the mass exploitation of personal data, big data, and, more generally, information.

¹⁴³ L. Floridi, n 49 above.

¹⁴⁴ For those who are not familiar with this kind of literature, the reference is to K. Kurzweil, *The Singularity Is Near: When Humans Transcend Biology* (New York: Viking, 2006). An eminent intellectual belonging to this class is Stephen Hawking, who said that 'the development of full artificial intelligence could spell the end of the human race.' (R. Cellan-Jones, 'Stephen Hawking warns artificial intelligence could end mankind' (2014), available at [http://www.bbc.co.uk/news/technology-\(last visited 6 December 2016\)](http://www.bbc.co.uk/news/technology-(last%20visited%206%20December%202016))).

¹⁴⁵ See, eg, J.R. Searle, 'What Your Computer Can't Know' *The New York Review of Books* (2014).

¹⁴⁶ On a caveat against the anthropocentrism underlying expressions such as artificial intelligence, smart city, etc, please see G. Noto La Diega, n 9 above, fn 1.

¹⁴⁷ Cf, eg, W.E. Halal, 'Artificial Intelligence Is Almost Here' *On The Horizon – The*

happen, for at least four reasons.

First, machines have been constantly, sometimes exponentially, increasing – far faster than human beings. Let us think what a computer could do fifty years ago and what a human being could do. If we think of the development of the latter, it is mainly due to the use of machines.

Second, big transnational corporations are massively investing in AI technologies¹⁴⁸ and governments¹⁴⁹ are increasingly interested in this realm. One may suppose that this is related to the potential of AI in terms of predictive analytics, profiling, and surveillance.

Third, it is wrong to assume there is a *before* and an *after* of AI: AI is already happening¹⁵⁰ and it is doing so incrementally. This is due mainly to the fact that we are growing over-dependent on machines. Consider our addiction to smartphones.¹⁵¹ The British check their smartphones fifty times a day, adding up to more than two hours of staring at the screen.¹⁵² Moreover, if one has a smartphone, one is quite likely to be constantly connected to Facebook.¹⁵³ As pointed out by a survey of four thousand respondents in thirty countries, the

‘most fascinating aspect of the adoption of the smartphone is the extent to which it has become not just our primary access to digital sources, but an ever more comprehensive and capable remote control to life’.¹⁵⁴

Strategic Planning Resource for Education Professionals, II, 37 (2003) and the more realistic R. Kumar et al, ‘Prediction of Metabolism of Drugs Using Artificial Intelligence: How far Have We Reached?’, *Current Drug Metabolism*, II, 129 (2016).

¹⁴⁸ See, eg, the alarming H. Hodson, ‘Revealed: Google AI Has Access to Huge Haul of NHS Patient Data’ *New Scientist* (2016), available at <https://www.newscientist.com/article/2086454-revealed-google-ai-has-access-to-huge-haul-of-nhs-patient-data/> (last visited 6 December 2016).

¹⁴⁹ For instance, on 3 May 2016, the White House announced a workshop series and an interagency working group on artificial intelligence. In particular, it is established a new National Science and Technology Council (NSTC) Subcommittee on Machine Learning and Artificial Intelligence; the first meeting will be in June 2016.

¹⁵⁰ Let us just think to Google’s Deepmind AlphaGo, which (who?) defeated the world’s best player of the boardgame Go.

¹⁵¹ For a complementary aspect see E.H. Kwon et al, ‘Excessive Dependence on Mobile Social Apps: A Rational Addiction Perspective’ (2016), available at <http://ssrn.com/abstract=2713567> (last visited 6 December 2016).

¹⁵² See T. Tamblyn, ‘Brits Check Their Phones 50 Times a Day’ *The Huffington Post* (2015), available at http://www.huffingtonpost.co.uk/2015/05/07/brits-check-their-phones-50-times-a-day-on-average_n_7233188.html (last visited 6 December 2016).

¹⁵³ International Data Corporation (IDC), ‘Always Connected to Facebook’ (2013) available at https://www.idc.com/prodserv/custom_solutions/download/case_studies/PLAN-BB_Always_Connected_for_Facebook.pdf (last visited 6 December 2016).

¹⁵⁴ Deloitte, ‘Mobile Consumer 2015: The UK Cut Game of Phones’ (2015), available at <http://www.deloitte.co.uk/mobileuk2015/assets/pdf/Deloitte-Mobile-Consumer-2015.pdf>

In fact, the current dependence (and sometimes addiction) to machines is part of a clearly upward trend, due to the critical role played by the smartphone in the Internet of Things.

Intertwined with the third reason is a fourth, which refers to Kahnemann's theories on System 1 and System 2 of the brain.¹⁵⁵ The Nobel Prize in Economics winner describes two ways the brain forms thoughts. System 1, which we use for tasks such as speaking our mother tongue is fast, automatic, frequent, emotional, stereotypic, and subconscious. When I speak Italian, I do not have to put considerable effort in building propositions and I can do other things at the same time. In turn, we use System 2 for complicated tasks, such as doing maths problems; this system is slow, effortful, infrequent, logical, calculating, and conscious. Its laziness is the fourth reason why proper superintelligence will be a reality. It is common experience that we started using calculators to save time and now most of us are incapable of doing maths, because we have delegated that chore to machines. Therefore, on the one hand we keep on delegating to machines tasks pertaining to System 2 (and consequently we demand that these machines are as accurate and *intelligent* as possible). On the other hand, the boundaries between System 1 and System 2 are shifting. One may assume, for instance, that reading in one's mother tongue is clearly subsumable under System 1. Maybe surprisingly, it has been shown¹⁵⁶ that only twenty per cent of the Italian population has mastered the minimal reading, writing, and calculating skills required to navigate contemporary society.

When machines become truly intelligent, the legal discourse will have to change radically. We will not only be required to discuss which rights we have in terms of intellectual property, privacy, liability, etc. Indeed, we will have to recognise the legal personality of machines, and, accordingly, accept that they are entitled to rights and obligations. This will happen for several reasons. To name one: we are becoming machines ourselves. Even leaving aside artificial enhancement developments, it is already happening that if one is deaf, he can get an artificial ear; if one loses a limb, he can get a prosthetic one, or cells and tissues can be 3D printed; if one cannot see, biometric eyes will soon be found in shopping centres. Any traditionally human function will soon be potentially substituted by chips. It is hard to draw a clear line between a *being* who was born as a machine but now it is fully autonomous and a *being* who was born *human* but whose functions are entirely carried out by chips and other artificial substitutes. Since distinguishing between human beings and machines, human and artificial, legislators and regulators will no longer be able to discriminate on biological

(last visited 6 December 2016).

¹⁵⁵ D. Kahnemann, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011).

¹⁵⁶ T. De Mauro, 'Analfabeti d'Italia' 734 *Internazionale* (2008).

grounds. Therefore, real AI may have machines' rights and machines' obligations as the main consequence.

If one must use Floridi's dichotomy, I can be considered a Singularitarian in a moderate sense. I do believe that we will have true superintelligence,¹⁵⁷ but, at the same time, this will not lead to the apocalypse. I believe that machines will outclass us in all our tasks, but the *horror vacui* ought to be avoided: an unforeseeable society will come and we will not have to work in order to be able to live (at least, not work in the traditional sense of the word).¹⁵⁸ For most academics' happiness, *usefulness* will not be the benchmark of social value and mass unemployment will be a treat, as opposed to a threat.¹⁵⁹ In the post-biocapitalist society, freed from the fight on the control of the means of production, human beings – granted that such a category will exist as separate from machines – will have the time to regain control of themselves and construct the foundation of a new society,¹⁶⁰ which shall be more just for everyone, no matter how many chips and transistors they have in their body.

¹⁵⁷ A caveat always stands. Following the mostly still valid A.M. Turing, 'Computing Machinery and Intelligence' 59 *Mind*, 433 (1950), to pose the question, 'can machines think?' is absurd.

¹⁵⁸ Just a few years ago, who could have imagined that people could have earned a living by allowing others to watch them play videogames? See, for instance, the incredible growth of Amazon's Twitch.tv, with more than one million five hundred thousand broadcasters and one-hundred million visitors per month.

¹⁵⁹ Cf. M. Ford, *The Rise of the Robots – Technology and the Threat of Mass Unemployment* (London: Oneworld Publications, 2015).

¹⁶⁰ I share the optimism of N. Srnicek and A. Williams, *Inventing the Future: Postcapitalism and a World without Work* (London-New York: Verso, 2015).

Making a Centralized System of Judicial Review Coexist with Decentralized Guardians of the Constitution: The Italian Way*

Paolo Passaglia**

Abstract

In the aftermaths of World War II, a mechanism for constitutional review was set up, to provide the system with means of reacting against infringements of the Supreme Law. Even though a Constitutional Court was established, the Italian system of constitutional adjudication is only partially inspired by Kelsen's centralized model: actually, one its main features of the system is the cooperation between the Constitutional Court and ordinary courts. In the last decades, major changes have increased the system's rate of decentralization, in connection with European integration and, most notably, with the new role for ordinary courts in the context of constitutional review. In this regard, the Constitutional Court required ordinary courts to refrain from submitting a question of constitutionality until they had examined – and excluded – the possibility of interpreting the provision at issue so as to render it constitutional. The constitutionally oriented legislative interpretation can be linked to the fact that Constitution has deeply penetrated society and the courtrooms, to the point that currently the protection of the Constitution can be effectively achieved by ordinary means, so that Constitutional Court's guidance is needed much less frequently than in the past.

I. Historical Background

The history of judicial review of legislation begins in the nineteenth century. At a first glance, this may be a surprising statement, since it was only in the aftermath of World War II that a written Constitution characterized by supremacy over the rest of the law came into force. However, in reality, by that time, the courts and legal scholarship had long been inquiring into the judicial review of legislation, both in Italy and in several other countries.¹

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¹ For instance, extensive discussion among scholars on the possibility and the opportunity to introduce judicial review of legislation, even though the Constitutional Acts did not provide for any form of review, took place in France during the Third Republic. See eg J. Barthélème and

When Italy became a unitary State, the so-called Albertine Statute, adopted in 1848 for the Kingdom of Sardinia, was extended to the whole Italian territory as its first *constitution*.² The Statute defined itself as unamendable. Nevertheless, it was soon agreed that any act of Parliament could derogate from *constitutional* provisions. This was consistent with the strong influence exerted on Italian legal culture by the ideals of the French Revolution and Rousseau's theory of the law (of Parliament) as *the expression of the general will*, and the subsequent conception of (parliamentary) law as the product of the sovereign and materialization of rationality.³

Notwithstanding the resulting centrality of Parliament-enacted law, the judicial branch gradually developed a doctrine according to which legislation could be reviewed in procedural terms, since infringements of the Albertine Statute's provisions on the legislative process could empower courts to declare the final act as null and void. In other words, the breach of procedural provisions was deemed not only to indicate the act's unlawfulness, but – more radically – also to hinder its very existence from the legal point of view. Some scholars and judges thus stated that courts were allowed to refrain from applying the act solely because of their 'duty (...) to say what the law is'⁴ – and the act was not law at all.

The founding principle of judicial review of legislation emerged gradually, but was never completely implemented by the judiciary, at least in relation to acts of Parliament: as a matter of fact, the most significant declarations of invalidity involved legislation adopted by means of governmental decrees and were delivered at a turning point of Italian history, namely just before and at the dawn of the Fascist regime. The dictatorship prevented further development of the doctrine and froze judicial activism, in favour of a rigid judicial deference

G. Jèze, 'Pouvoir et devoir des tribunaux en général et des tribunaux roumains en particulier de vérifier la constitutionnalité des lois à l'occasion des procès portés devant eux' *Revue du droit public et de la science politique en France et à l'étranger*, 138 (1912); P. Duez, 'Le contrôle juridictionnel des lois en France. Comment il convient de poser la question', in M. Hauriou ed, *Mélanges Maurice Hauriou* (Paris: Sirey, 1929), 211-249.

² It is noteworthy that the act was named *statute* precisely to avoid the name *Constitution*, which the Sardinian establishment considered too liberal. Indeed, the notion of the *revolutionary* nuance of the term *Constitution* was deeply entrenched in Italian liberal culture, as demonstrated by the definition of constitution given by Pellegrino Rossi, one of the most important figures of Italian liberalism; in his lectures on constitutional law in Paris during the eighteen-thirties, he stated that the constitution was 'the law of free states, those which escaped the rule of privileges': see P. Rossi, *Cours de Droit constitutionnel professé à la Faculté de Paris, recueilli par M.A. Porée* (Paris: Librairie du Guillaumin, 1866), I, 8 (the lectures collected were delivered in 1835-1836 and in 1836-1837).

³ See J.-J. Rousseau, *Du contrat social, ou Principes du droit politique* (Amsterdam: Rey, 1762), II, Chapter VI.

⁴ The words in brackets are from the opinion of the US Supreme Court in *Marbury v Madison* 5 US 137, 177 (1803).

towards the Executive (and political power more broadly).⁵

After World War II, the legal and political reconstruction began with the drafting of a new Constitution, that was adopted at the end of 1947. Italian constitutionalism thus entered a brand new phase, marked by the establishment of a human-rights oriented system and in which a new wave of jurisprudence inspired by natural law imposed limits on the government and even on the legislature, which were now bound by a Constitution conceived as the Supreme Law of the Land. In this connection, two features of the new Charter must be highlighted.

On one hand, for the first time, a genuine bill of rights was adopted to protect human rights from all kinds of infringement, by any type of authority: the only way to avoid the obligations enshrined in the Constitution was supposed to be through adopting constitutional amendments, for which it was necessary to follow a complex procedure that was practically guaranteed either to generate parliamentary opposition or to afford the People with the chance to block the majority's illiberal initiatives.⁶

On the other hand, for the first time, a mechanism for constitutional review was set up, to provide the system with an effective means of reacting against infringements of the Supreme Law. This aim was pursued by Arts 134-137 of the Constitution, which contained the provisions on the Constitutional Court. Oddly enough, but perhaps not surprisingly, these articles too were subjected to majority filibustering, since the Court began its functions only in 1956, ie over eight years from the Constitution's entry into force. However, constitutional review preceded the Constitutional Court thanks to Clause 2 of the VII Transitional and Final Provision of the Constitution, which allowed ordinary courts to decide the controversies that would ordinarily have been referred to the Constitutional Court.⁷

⁵ Concerning attempts to establish a form of judicial review of legislation before the Fascist dictatorship, see F. Racioppi, 'Il sindacato giudiziario sulla costituzionalità delle leggi' *La legge*, 705 (1905); A. Pizzorusso, 'Garanzie costituzionali – Article 134', in G. Branca ed, *Commentario della Costituzione* (Bologna: Zanichelli-Il Foro italiano, 1981), 43; F. Roselli, 'Giudici e limiti al potere legislativo vigente lo Statuto albertino' *Rivista trimestrale di diritto e procedura civile*, 476 (1986); J. Luther, *Idee e storie di giustizia costituzionale nell'Ottocento* (Torino: Giappichelli, 1990), 190.

⁶ Unfortunately, another way would be discovered very soon: delaying the implementation of constitutional provisions. The use and abuse of this *instrument* (a kind of *majority filibustering*: see P. Calamandrei, 'L'ostruzionismo di maggioranza' *Il ponte*, 129-136, 274-281, 433-450 (1953)) paralysed the concrete protection of many constitutional rights, especially social rights and rights to equality, for a long time, such that several constitutional provisions were implemented only in the nineteen-seventies.

⁷ Cf P. Costanzo, 'Disposizioni transitorie e finali I-XVIII. Leggi costituzionali e di revisione costituzionale (1948-1993) – Disp. trans. VII', in G. Branca and A. Pizzorusso eds, *Commentario della Costituzione* (Bologna: Zanichelli-Il Foro italiano, 1995), 143; M. Bignami, *Costituzione flessibile, Costituzione rigida e controllo di costituzionalità in Italia (1848-1956)* (Milano: Giuffrè, 1997); A. Simoncini, 'L'avvio della Corte costituzionale e gli strumenti per la definizione

II. The Establishment of a System of Judicial Review of Legislation

The history of the drafting of the Constitution, and in particular the debates held within the Constituent Assembly reveal a variety of attitudes towards the establishment of a system of constitutional adjudication. On one hand, a considerable part of the Assembly's members, especially to the political left, challenged the very idea of a body endowed with the power to review legislation; on the other hand, proponents of judicial review were divided between a minority that advocated for the adoption of a decentralized system based on the American model and a majority that favoured the establishment of a specialized body.

The latter solution was eventually chosen, also due to its vagueness: the establishment of a wholly new body meant that it was not necessary to determine whether it should be a real court or a sort of political body. This vagueness made the solution acceptable, at least as a lesser evil, even to left-wing parties.

Debates on the nature of the body to be established clearly reflected Hans Kelsen's idea that the power to review legislation was best allocated to a body that fell within neither the legislature nor the judiciary, and that was autonomous from any other power:⁸

‘the protection of constitutional principles (should) be performed by a body that, although independent from Parliament, considers laws not only from the perspective of citizens' individual rights, but that shares at the same the legislature's approach, without ever neglecting the “political point of view”; a body ultimately located in an intermediate position between primary legislation's opposing needs for constitutionality and legitimate authority’.⁹

del suo ruolo: un problema storico aperto' *Giurisprudenza costituzionale*, 3065 (2004); U. De Siervo, 'L'istituzione della Corte costituzionale: dall'Assemblea costituente ai primi anni di attività della Corte', in P. Carnevale and C. Colapietro eds, *La giustizia costituzionale fra memoria e prospettive: a cinquant'anni dalla pubblicazione della prima sentenza della Corte costituzionale* (Torino: Giappichelli, 2008), 55.

⁸ See H. Kelsen, 'La Garantie juridictionnelle de la constitution (La Justice constitutionnelle)' *Revue du droit public et de la science politique en France et à l'étranger*, 197 (1928) (especially para IV).

⁹ See C. Mezzanotte, *Il giudizio sulle leggi. Le ideologie del Costituente* (Napoli: Editoriale Scientifica, 2014), 75. With regard to the drafting of constitutional provisions concerning the Constitutional Court, see, moreover, G. D'Orazio, *La genesi della Corte costituzionale. Ideologia, politica, dibattito dottrinale: un saggio di storia delle istituzioni* (Milano: Giuffrè, 1981); G. Ferrari, 'La difficile nascita della Corte costituzionale' 81-82 *Studi parlamentari e di politica costituzionale*, 5 (1988); P. Costanzo, 'L'organizzazione e il funzionamento della Corte costituzionale nei lavori preparatori dell'assemblea costituente', in P. Costanzo ed, *L'organizzazione e il funzionamento della Corte costituzionale. Atti del Convegno di Imperia, 12-13 maggio 1995* (Torino: Giappichelli, 1996), 7; C. Margiotta Broglio, 'La Corte costituzionale

The search for balance within the Court is certainly represented well: first, by the constitutional provisions on the Constitutional Court's composition. According to these, the Court is a body whose members' legal skills are accompanied with an ability to grasp the political contexts in which legislation is adopted and is reviewed. The need to ensure the legal qualification of the Court's members results in rather strict conditions:

'(t)he judges of the Constitutional Courts shall be chosen from among judges, including those retired, of the ordinary and administrative higher Courts, university full professors of law and lawyers with at least twenty years practice' (Art 135, para 2 of the Constitution).

The diversity of approaches to law thus guaranteed is enhanced by the authorities endowed with the power to appoint or elect members:

'(t)he Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative supreme Courts' (Art 135, para 1).

Second, the refusal to establish a body that risked being excessively enmeshed in politics and, at the same time, the need to ensure its relative distance from ordinary courts appears in the provisions on the powers entrusted to the Court.

The Constitutional Court wields two kinds of power: the power to decide special constitutional controversies, and the power to perform constitutional review of legislation.

The special controversies are those that arise from the distribution of power among the supreme bodies of the State, or between the central State and the Regions (Art 134, para 2, of the Constitution). The Constitutional Court also has the power to decide whether a referendum can be held, depending on whether its object falls within the domain determined by Art 75 of the Constitution. Finally, the Court decides on charges of high treason or attempts to subvert the constitutional order brought against the President of the Republic (Art 90 of the Constitution; before 1989, the same power was also wielded in relation to ministers). From a comparative point of view, it could be noted that the Italian Court was not endowed with many *accessory* competences: for instance, the Court – unlike many other European Constitutional Courts – does not have any say as far as elections are concerned.

italiana e il modello kelseniano' *Quaderni costituzionali*, 333 (2000); G. Volpe, 'L'accesso alla giustizia costituzionale: le origini di un modello', in R. Romboli ed, *L'accesso alla giustizia costituzionale: caratteri, limiti, prospettive di un modello* (Napoli: Edizioni Scientifiche Italiane, 2006), 3; G. Bisogni, *Teoria giuridica e giustizia costituzionale in Italia. Un profilo storico-filosofico* (Milano: Mimesis, 2012).

Notwithstanding its original hybrid (or rather, vague) nature, the Court soon identified itself as a judicial body, whose peculiar responsibilities prevented its straightforward inclusion in the system of courts. Therefore, one could conclude, on this point, that the Constitutional Court is a judicial body, that is separate from the other courts due to its powers and its means of adjudicating, which does not fail to take into account the political impact of its judgments.¹⁰

III. A Weakly Centralized System

The definition of a centralized model might suggest that its adoption sought to establish a sort of monopoly over the review of legislation. Actually, it is fair to state that one of the main features of the Italian system of constitutional adjudication is, rather, the cooperation between the Constitutional Court and ordinary courts¹¹ in performing the functions that a constitutional court generally carries out in a centralized model.

The coexistence of a monopoly and a cooperation within a centralized model clearly requires to provide some clarifications. The main need is to clarify in general terms the notion of *centralized*. Later, it will be possible to identify the most significant features of the Italian system.

1. The Features of a Centralized System

In Hans Kelsen's view, the opposite of the American decentralized model consisted in a specialized court that adjudicated special cases on the basis of special appeals lodged by special (political) authorities, without any connection with the actual implementation of the contested provisions (these features identified the so-called abstract review). Constitutional justice was thus conceived as being completely separate from ordinary justice.¹² A

¹⁰ A detailed analysis of the establishment, the role, and the powers of the Constitutional Court is now available in English: see V. Barsotti, P.G. Carrozza et al, *Italian Constitutional Justice in Global Context* (Oxford: Oxford University Press, 2015).

¹¹ The Italian judiciary consists of various kinds of courts and magistrates. The ordinary judiciary is established and regulated by the law governing the judicial system (ie Arts 101-104 of the Constitution and regio decreto 30 January 1941 no 12). According to Art 102 of the Constitution, '(e)xttraordinary or special courts may not be established. Only specialized sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the Judiciary'. However, a limited number of special courts does exist. These are the administrative courts, the Court of Auditors, and military tribunals. Hereinafter, the term *ordinary* will also refer to special judges and courts: in particular, it will not be used in a technical sense, but rather to designate any court that decides *common cases*, as opposed to the *constitutional cases* adjudicated upon by the Constitutional Court.

¹² As a matter of fact, Kelsen strongly criticized the Austrian constitutional reform of 1929 that introduced review of legislation by means of judicial reference to the Constitutional Court:

system in which these features exist perfectly matches the Kelsenian model of constitutional adjudication.¹³

The reference to Kelsen's model becomes much more complicated when the constitutionality of legislative acts is or must be contested via ordinary courts. This occurs when the latter are empowered to refer to the Constitutional Court their doubts as to the consistency with the Constitution of a legislative provision that should be applied in proceedings before them. Such preliminary reference proceedings constitute the basis for a concrete review, because when the Constitutional Court reviews legislation, it cannot neglect the case from which the judicial proceeding originated and, eventually, the constitutional review requested.

In concrete review, the notion of monopoly appears to fade, for the simple reason that if the legislation is to be reviewed, the ordinary courts and the Constitutional Court must cooperate: without the activity of the former, the latter could not be accessed. The preliminary reference is in itself a review, since only if the ordinary court suspects of an inconsistency between the Constitution and legislation can there be scope for the Constitutional Court to adjudicate. Thus, two different reviews are necessary: the first aims to establish whether the conditions for accessing the Constitutional Court are met; the second is that which may result in a declaration of unconstitutionality. If there still is any monopoly on part of the Constitutional Court, this certainly does not lie in its power to review, but rather in its power to strike down legislation with general effects (ie with a judgment that affects the legal order as a whole, and not only the parties to the case).

Nevertheless, the monopoly over the power to strike down legislation can hardly ensure, *per se*, an effective *centralization* of the system. Insofar as ordinary courts have the exclusive power to decide whether to make a reference to the Constitutional Court, their first-stage decentralized review easily prevents any centralized review, and consequently neutralizes the

H. Kelsen, 'Judicial Review of Legislation. A Comparative Study of the Austrian and the American Constitution' 2 *The Journal of Politics*, 183 (1942).

¹³ Comparing patterns of constitutional adjudication is one of the most important topics of comparative constitutional law. Traditional approaches all tend to draw a clear distinction between the American model and the European (or Kelsenian) model. See, eg, M. Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs Merrill, 1971); F. Rubio Llorente, 'Constitutional Jurisdiction as Law-Making', in A. Pizzorusso ed, *Law in the Making. A Comparative Survey* (Assago-Milano: Springer-Verlang, 1988), 156. See also A. Pizzorusso, 'I sistemi di giustizia costituzionale: dai modelli alla prassi' *Quaderni costituzionali*, 521 (1982); L. Favoreu, *Les Cours constitutionnelles* (Paris: Presses Universitaires de France, 2nd ed, 1992). More recently, different approaches have emerged that focus on different models: see, for instance, S. Gardbaum, 'The New Commonwealth Model of Constitutionalism' 49 *American Journal of Comparative Law*, 707 (2001); M.V. Tushnet, 'New Forms of Judicial Review and the Persistence of Rights – And Democracy-Based Worries' 38 *Wake Forest Law Review*, 813 (2003); Id, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008).

power to strike down legislation.¹⁴

Hence, a major defining feature of a centralized system addresses the powers of the Constitutional Court to react to such a neutralization. In theory, judicial decisions concerning references can be appealed to a superior court (although there can obviously be no appeals against decisions by supreme courts); they can also be the subject of a direct appeal lodged by one of the parties with the Constitutional Court. In these two cases, the degree of centralization changes considerably, since only a direct appeal before the Constitutional Court endows it with the power to influence judicial activity related to the review of legislation; the appeals before the superior courts leave the Constitutional Court aside, thereby depriving it of the power to have a say on the constitutional matter concerned.

These features demonstrate that the notion of *centralized system* of judicial review of legislation is far from being an all-of-nothing alternative to American decentralization: actually, several degrees of centralization are possible, according to the kinds of appeals that can be brought before the Constitutional Court and to its powers to concentrate decisions concerning constitutional matters.

2. The Distinctive Features of the Italian System

Even at a first glance, it is plain that in Italy, the choice for a centralized model of constitutional adjudication did not lead to a real monopoly for the Constitutional Court over the review of legislation. Several features of the system suggest that the Constituent Assembly opted for a system that could be described as a weakly centralized one.

a) A Centralized Review only for Primary Legislation

A first distinction must be drawn between primary and subordinate legislation, since only primary legislation can be subject to centralized review.

The Constitutional Court is empowered to review all legislative acts, both national and Regional, and governmental decrees that have the same force as parliamentary legislation either by virtue of a delegation of power from the Parliament to the executive (Art 76 of the Constitution) or because an emergency that requires immediately-effective provisions has arisen (Art 77 of the Constitution).

The power to review primary legislation is not limited to acts adopted after the Constitution entered into force. Contrary to the German and the Spanish Constitutional Courts, which denied that they had any power to strike down legislation adopted prior to the Constitution, and thus allowed

¹⁴ How such a neutralization could take place is a key issue which will be explored further below (para IV no 2 and para V).

ordinary courts to refrain from applying legislation that was inconsistent with the subsequently issued Constitution, the Italian Court opted for a centralized review of all primary legislation from its very first judgment, emphasizing the supremacy of the Constitution (assuming that this required the intervention of its *guardian*) instead of the application of the principle according to which *lex posterior derogat priori*.¹⁵

When it comes to subordinate legislation, however, the Constitutional Court does not exercise any competence: the consistency of this category of measures with (the Constitution and) primary legislation is ascertained by ordinary courts; these have the power to refuse to apply inconsistent measures, while administrative courts may also strike them down, and thus achieve general effects for their declarations.

b) An Abstract Review Confined to State v Regions Disputes

As for review of primary legislation, two main ways to access the Constitutional Court were established.

One of the two forms of judicial review of legislation provided by Italian law is clearly inspired by the Kelsenian model: the abstract review, which addresses either appeals from the national government against a Regional legislative act or appeals lodged by a Region against a national legislative act. Complaints must be filed within sixty days following the publication of the challenged act(s). In these cases, the Court decides – in principle – without referring at all to the concrete implementation of legislative provisions, even though the submission of a complaint does not paralyze the implementation of questioned provisions, so that these may have already produced effects when the Court reviews them.¹⁶ In these cases, the constitutional proceedings are designed to resolve disputes on the limits of the central State's and Regions' respective powers; the Court therefore either protects the autonomy of the Regions from encroachment by the central government, or protects the State's legislative power against misuse of power by Regional legislatures.¹⁷

¹⁵ See Corte costituzionale 14 June 1956 no 1, available at <http://www.giurcost.org/decisioni/1956/0001s-56.html> (last visited 6 December 2016).

¹⁶ This statement is true for complaints that fall under the 2001 constitutional reform. Previously, the review of provisions already in force was conceivable only for national primary legislation, since Regional legislation was challenged before the promulgation of the President of the Region, such that the law-making process was suspended and the Act could enter into force only after the Court had decided on its consistency with the Constitution. On this subject, see C. Padula, *L'asimmetria nel giudizio in via principale. La posizione dello Stato e delle Regioni davanti alla Corte costituzionale* (Padova: Cedam, 2006); in French, see M. Luciani and P. Passaglia, 'Autonomie régionale et locale et Constitutions – Rapport italien' *Annuaire international de justice constitutionnelle*, 229 (2006).

¹⁷ As a matter of fact, the national government can censure any kind of breach of the Constitution; thus, its claim is not necessarily related to the aim of protecting the State's legislative power.

Although abstract review has undergone a significant evolution and a dramatic growth since 2003, when it comes to the number of appeals lodged and judgments delivered, it certainly cannot be defined as the *usual* way to access the Constitutional Court. Indeed, very few authorities have standing and only one of these – the national Government – is empowered to question the consistency of legislation with constitutional provisions: The Regions may only question national law with regard to the separation of legislative powers between the central State and the Regions. Given these limitations, abstract review alone would not guarantee an adequate protection of the Constitution. Indeed, the Italian system has been mainly characterized by another form of review.

c) The Concrete Form of Review as the System's Essential Feature

Contrary to what Kelsenian orthodoxy would suggest, constitutional review can also be concrete, and, in fact, the concrete review has immediately become the core of the powers of the Constitutional Court, being by far the ordinary way to stimulate a constitutional review. The constitutionality of legislative acts must be invoked through the activity of ordinary (or administrative) courts, that are empowered to refer a question to the Constitutional Court when there are doubts as to the constitutionality of a legislative provision that should be applied in proceedings before them: thus, the Constitutional Court reviews the provisions' constitutionality on the basis of the case in which the issue arose, such that the concrete implementation of the provision is one of the elements that should be germane to the Court's judgment.¹⁸

This two-step procedure creates a hybrid system, in the sense that it is both decentralized and centralized. It is decentralized with regard to its first stage, because any ordinary court, from the lowest court to the Court of Cassation (the Italian Supreme Court), can raise a question on the constitutionality of a legislative provision; without these initiatives, the

¹⁸ Due to the sheer number of contributions, it is impossible to compile a complete bibliography on the judicial reference procedure. Among the most recent ones, see, S. Bagni, *La questione incidentale nel controllo di costituzionalità. I sistemi italiano e spagnolo a confronto nel quadro dei modelli elaborati dalla dottrina* (Bologna: Clueb, 2007); L. Delli Priscoli and P.G. Demarchi, *L'eccezione di incostituzionalità: profili processuali* (Bologna: Zanichelli, 2008); N. Pignatelli, *Le "interazioni" tra processo amministrativo e processo costituzionale in via incidentale* (Torino: Giappichelli, 2008); G.L. Conti, 'Mantenere nel tempo il valore del giudizio incidentale di legittimità costituzionale', in C. Decaro et al eds, *La "manutenzione" della giustizia costituzionale. Il giudizio sulle leggi in Italia* (Torino: Giappichelli, 2012); A. Patroni Griffi, *Accesso incidentale e legittimazione degli «organi a quo»* (Napoli: Jovene, 2012); R. Romboli, 'Natura incidentale del giudizio incidentale e tutela dei diritti: in margine alla sentenza n. 10 del 2015' *Quaderni costituzionali*, 607 (2015).

Constitutional Court could not operate, since it has no power to initiate the constitutional review of legal provisions. Ordinary courts are thus the *gatekeepers* of constitutional review proceedings (this definition was suggested by Piero Calamandrei,¹⁹ a legal scholar who had been a Member of the Constituent Assembly): their task is to decide whether a question of constitutionality, that can be raised either by the parties to the proceedings or by the court itself, should be submitted to the Constitutional Court. Submission requires two conditions to be met: first, the court must consider that to decide the case, it will have to apply the legislative provision in question (the condition of *rilevanza*, ie of influence on the decision); second, the court must have doubts as to the consistency of the legislative provision with the Constitution. In other words, the court needs not be confident of the provision's unconstitutionality, but simply lack certainty as to its consistency with the Constitution (the condition of *non manifesta infondatezza*; the referring court cannot be certain that the Constitutional Court would reject the question).²⁰

In the second stage, the procedure is characterized by a centralized model: the Court itself affirmed the principle of the unity of constitutional adjudication, which means that only one court can issue judgments on the constitutionality of legislation.²¹ More precisely, as described above, the Constitutional Court is the only authority empowered to strike down legislation: indeed, any ordinary court takes a stand on the constitutionality of a legislative provision, when it decides whether the conditions for submitting a question to the Constitutional Court have been met; the principle of unity of constitutional adjudication, however, implies that the Constitutional Court exceeds this operation, since it has the power to declare a provision unconstitutional, such that the provision is withdrawn and expelled from the legal system. The withdrawal is effective on the day after the judgment is published and has retrospective effect, because once the Court has issued a declaration of unconstitutionality the provision can no

¹⁹ P. Calamandrei, *La illegittimità costituzionale delle leggi nel processo civile* (Padova: Cedam, 1950), XII.

²⁰ On the conditions required for submitting a question of constitutionality to the Court, see M. Cappelletti, *La pregiudizialità costituzionale nel processo civile* (Milano: Giuffrè, 1957); F. Pizzetti and G. Zagrebelsky, «*Non manifesta infondatezza*» e «*rilevanza*» nell'instaurazione incidentale del giudizio sulle leggi (Milano: Giuffrè, 1974); N. Trocker, 'La pregiudizialità costituzionale' *Rivista trimestrale di diritto e procedura civile*, 796 (1988); F. Dal Canto, 'La rilevanza e il valore del fatto nel giudizio di costituzionalità delle leggi in via incidentale', in E. Malfatti, R. Romboli et al eds, *Il giudizio sulle leggi e la sua "diffusione"* (Torino: Giappichelli, 2001), 145; G.P. Dolso, *Giudici e Corti alle soglie del giudizio di costituzionalità* (Milano: Giuffrè, 2003); L. Azzena, *La rilevanza nel sindacato di costituzionalità dalle origini alla dimensione europea* (Napoli: Jovene, 2012).

²¹ See A. Agrò, A. Cerri and F. Modugno, *Il principio di unità del controllo sulle leggi nella giurisprudenza della Corte costituzionale* (Torino: Giappichelli, 5th ed, 2008).

longer be applied, neither to facts that may happen in the future, nor to facts that have already taken place but on which final judgment has not yet been entered.

d) The Absence of a Means of Direct Appeal to the Constitutional Court: The Italian Separate but Equal Doctrine

The Constituent Assembly rejected the idea of giving individuals the power to appeal to the Court directly. This choice had two major outcomes.

First, the protection of individual rights and, more generally, of the Constitution against legislative acts was concentrated on the concrete review enabled by judicial references: the conditions for making the judicial reference the ordinary way to access the Court were therefore fulfilled.

Second, the Constitutional Court was not endowed with the power to *control its docket*, in particular to decide whether a constitutional issue settled autonomously by the ordinary courts should have been settled, rather, only after a reference and a concrete review. This power is essential in other centralized systems, such as in Germany and Spain: in both of these systems, direct appeals lodged by individuals lie at the root of the most significant part of the Constitutional Courts work, and the cases brought before them can be considered as the response to the absence of actions to protect rights in ordinary courts. The contested absence of protection is the result of inappropriate consideration of the Constitution, that may possibly – but not necessarily – be demonstrated even by the refusal to refer the question of constitutionality regarding a legislative provision: in any case, what is disputed in a direct appeal to the Constitutional Court is that an issue concerning the respect of the Constitution was improperly decided. And what is relevant for the nature of the system of constitutional adjudication is that the Constitutional Court, while reviewing the judicial decision, and eventually the law that was applied in the decision, has the opportunity to *centralize* the constitutional issue, so as to supposedly decide it in the most appropriate way.

The Italian Constitutional Court does not have a similar power to *centralize*: the absence of a direct appeal leaves ordinary courts free to decide, and – above all – to have the final say, whether to submit to the Constitutional Court the constitutional matter at issue and, thus, even to decide whether or not a review of the legislation aimed at striking it down is needed.

Rather than a monopoly of the Constitutional Court, the judicial review of legislation appears to be the result of the concurrence of different courts, with different points of strength (and weakness): on one hand, the Constitutional Court can count on its monopoly to strike down a legislative provision or a legislative act; on the other hand, ordinary courts are endowed with the power to decide whether a review by the Constitutional

Court must take place and thus, at the end of the day, it is up to these courts to choose – to some extent – which of the judicial bodies will check the compatibility between the Constitution and the legislation. Since the Constitutional Court cannot do without ordinary courts and ordinary courts cannot do what the Constitutional Court is capable of doing (because of the monopoly in declaring null and void a legislative provision), a cooperation is required for the system to work.

Once the cooperation defined as the cornerstone of the whole system of judicial review, the Constitutional Court could hardly see itself as superior to ordinary courts. Maybe when it comes to judicial review of legislation, in Italy the *Plessy v Ferguson* doctrine still applies: as a matter of fact, the courts are supposed to be *separate but equal*.²²

From time to time, a major change in the framework of the system is proposed through the introduction of a remedy to give standing to individuals seeking to protect their constitutional rights.²³ Such a reform would certainly enable the Constitutional Court to intervene in cases in which judicial references would fail. Nevertheless, the cost of these benefits would not be insignificant, because endowing individuals with standing for constitutional review leads to a massive increase in the cases to be decided. Ultimately, the alternative would be to accept either the protracting of constitutional proceedings and the consequent delay in decisions, or selectivity in deciding cases. The first option does not appear very attractive: the Italian Constitutional Court had experienced a backlog in the nineteen-eighties, and the reduction in the time required to decide a case that was achieved at the end of that decade was considered an important result for the protection of rights, since the principle that *justice delayed is justice denied* is unanimously shared. The second option is therefore almost necessary, but case selection in civil law countries is not as *normal* and *acceptable* as it may be in common law countries, where the practice plays an important part in the efficient operation of courts (the example of the US Supreme Court speaks for itself). On the contrary, the tradition in civil law countries tends to require courts to decide (all the) cases brought before them: the French concept of *déni de justice* (ie denial of justice),²⁴ as an infringement of the

²² As it is well known, *Plessy v Ferguson* 163 US 537 (1896), is the United States Supreme Court decision upholding the constitutionality of state laws requiring racial segregation in public facilities.

²³ On these propositions, see R. Romboli, 'La riforma dell'amparo costituzionale in Spagna e l'introduzione di un ricorso individuale diretto in Italia', in G. Brunelli et al eds, *Scritti in onore di Lorenza Carlassare* (Napoli: Jovene, 2009), 1555; P. Passaglia, 'Sull'inopportunità di introdurre il ricorso diretto individuale: il dibattito italiano', in R. Tarchi ed, *Patrimonio costituzionale europeo e tutela dei diritti fondamentali. Il ricorso diretto di costituzionalità* (Torino: Giappichelli, 2012), 323.

²⁴ Art 4 of the French Civil Code of 1804 states that '(a) judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being

fundamental right to justice, illustrates the Continental approach to the issue quite paradigmatically. If it is difficult to accept the introduction of individual constitutional appeal together with a procedure of case selection, then the only alternative could be to accept a *de facto* selection (eg by deciding minor cases by summary judgment), that could however lead to problems of excessive judicial subjectivity.

IV. The System's Gradual Decentralization

The provisions regulating the Italian system of constitutional review have not been fundamentally amended since the nineteen-fifties.²⁵

Despite a rather steady legislative and constitutional regulation, the role and activity of the Constitutional Court have changed significantly over the years. On the whole, these changes have increased the system's rate of *decentralization*, contributing to a weakening of the original option in favour of a basically, but partly hybrid, Kelsenian model.

Setting aside several other factors, some changes concerning the specific role of the Constitutional Court as the body endowed with the power to review legislation must be considered.

1. The Decentralized Judicial Review of Legislation Imposed by EU Law

As for many other European systems, a major change for Italian constitutional review occurred in connection with European integration. With regard to the Council of Europe's impact on the Italian legal order, over the years the European Court of Human Rights (ECtHR) has developed a body of case law concerning fundamental rights that created the conditions for it to compete with the Constitutional Court. Nevertheless, the ECtHR decides on the cases at issue adjudicating only with regard to possible breaches of individual rights; it does not review legislation. As a result, the competition between the national and the European Courts relates to the kind of protection granted to a fundamental right and the settlement of conflicts between opposing rights.

When it comes to judicial review of legislation, the real *rival* of the Constitutional Court appears to be the Court of Justice of the European Union (CJEU), that has been taking advantage of the expansion of the Union's

guilty of a denial of justice'.

²⁵ Nevertheless, there are some exceptions that should be mentioned. The first is the restriction of the criminal cases that can be brought before the Constitutional Court (since the constitutional reform of 1989, ministers are no longer subject to the Court's jurisdiction). The second is the change introduced in 2001 regarding abstract review of Regional law; whereas previously this review occurred *a priori*, now it takes place *a posteriori* (see n 16 above).

competences, especially of the enforcement of the European Charter of Fundamental Rights. The latter allows the Court of Justice to develop a case law that has the potential to become a genuine alternative to that issued by the Constitutional Court, for the simple reason that the preliminary ruling mechanism is very similar to the internal system for referring cases to the Constitutional Court: indeed, judges can often choose between the two, to determine which (the constitutional or the European one) is more convenient to pursue. The dialogue between national courts and the Court of Justice has much intensified, so that the Constitutional Court no longer enjoys a *monopoly* in interacting with ordinary courts. In other words, review of legislation takes place at both national and European levels: the main difference consists in the standards that apply: namely – and roughly – the Constitution at the national level, and EU primary legislation, in Luxembourg.

The interaction between EU law and Italian law had been a very controversial subject for several years, until the Constitutional Court accepted, in 1984, the principle of primacy of what was then called *Community* law over national law.²⁶ Since then, the situation has changed little, even though the 2001 reform of Art 117 of the Constitution recognized the primacy of EU law over national legislation through the new Clause 1, according to which:

‘(I)ndicative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from European Union law and international obligations’.

²⁶ On this subject, see, *ex plurimis*, P. Falzea, A. Spadaro and L. Ventura, *La Corte costituzionale e le Corti d'Europa* (Torino: Giappichelli, 2003); A. D'Atena and P. Grossi, *Tutela dei diritti fondamentali e costituzionalismo multilivello* (Milano: Giuffrè, 2004); P. Bilancia and E. De Marco, *La tutela multilivello dei diritti* (Milano: Giuffrè, 2004); N. Zanon, *Le Corti dell'integrazione europea e la Corte costituzionale italiana* (Napoli: Edizioni Scientifiche Italiane, 2006); V. Sciarabba, *Tra Fonti e Corti. Diritti e principi fondamentali in Europa: profili costituzionali e comparati degli sviluppi sovranazionali* (Padova: Cedam, 2008); P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee* (Napoli: Edizioni Scientifiche Italiane, 2008); D. Butturini, *La tutela dei diritti fondamentali nell'ordinamento costituzionale italiano ed europeo* (Napoli: Edizioni Scientifiche Italiane, 2009); T. Giovannetti, *L'Europa dei giudici. La funzione giurisdizionale nell'integrazione comunitaria* (Torino: Giappichelli, 2009); G. Martinico, *L'integrazione silente. La funzione interpretativa della Corte di giustizia e il diritto costituzionale europeo* (Napoli: Jovene, 2009); G. De Vergottini, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione* (Bologna: Il Mulino, 2010); G. Rolla, *Il sistema europeo di protezione dei diritti fondamentali e i rapporti tra le giurisdizioni* (Milano: Giuffrè, 2010); E. Falletti and V. Piccone, *Il nodo gordiano tra diritto nazionale e diritto europeo* (Bari: Cacucci, 2012); P.L. Portaluri, *L'Europa del diritto: i giudici e gli ordinamenti* (Napoli: Edizioni Scientifiche Italiane, 2012); R. Cosio and R. Foglia, *Il diritto europeo nel dialogo delle corti* (Milano: Giuffrè, 2013). In English, see G. Martinico and O. Pollicino, *The Interaction between Europe's Legal Systems. Judicial Dialogue and the Creation of Supranational Laws* (Camberley Surrey: Edward Elgar, 2012). In French, see M. Luciani, P. Passaglia, et al, 'Justice constitutionnelle, justice ordinaire, justice supranationale: à qui revient la protection des droits fondamentaux en Europe? – Rapport italien' *Annuaire international de justice constitutionnelle*, 251 (2004).

In *Corte costituzionale* 5 June 1984 no 170, the Court allowed ordinary courts to decide conflicts between Community law having direct effect and national legislation, in the sense that the latter cannot be applied if it is inconsistent with the former. To avoid derogating from the principle of the unity of constitutional justice, however, the Constitutional Court recognized EU law's primacy only pragmatically, rather than theoretically: the decision on whether to apply national law was not to be considered as resulting from an illegitimacy, but simply as the consequence of judicial choice in favor of the special provision (the European one) over the general (national) one; the national provision thus still remained in force, because only EU acts prevented it from being applied. Thus, the Constitutional Court *de facto* granted immediate operation to the primacy of EU law, as the European Court of Justice had ordered in the *Simmenthal* judgment of 9 March 1978;²⁷ but the price to pay was the elimination of the Constitutional Court's power to review the compatibility of national legislation with European law. Previously, this was conceived as a matter of constitutionality, since a breach of EU law meant that the legislation (also) infringed the constitutional provision that obliges Italian legislatures (at both national and regional levels) to act in conformity with European law. Before 2001, the fundamental constitutional provision was Art 11, according to which 'Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations' (European integration being perceived as establishing organizations that pursue such an objective); however, as mentioned above, after 2001 the relevant constitutional provision is Art 117, para 1.

The *Corte costituzionale* 5 June 1984 no 170 marked the beginning of the trend of self-exclusion from European matters that led to the longstanding refusal to engage in any dialogue with the European Court of Justice. Indeed, the Constitutional Court *exiled* itself from the interaction between European and national law. This became plain when, in the nineteen-nineties, the Constitutional Court ordered ordinary courts to refer to it only once the interaction between EU and national law had been settled: if the compatibility between the two was at issue, ordinary courts were supposed to first submit the question to the Court of Justice through a reference for a preliminary ruling; only once the Court of Justice had decided, could the Constitutional Court be called upon to settle the constitutional issue.²⁸

The only power that the Constitutional Court reserved for itself – by virtue of the so-called *counter-limits* doctrine, the *dottrina dei controlimiti*

²⁷ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978] ECR 629.

²⁸ See, in particular, *Corte costituzionale* 29 December 1995 no 536, *Giustizia civile*, I, 930 (1996), which has been repeatedly followed so far.

– was that to review the compatibility of European law with the supreme principles of the Italian legal order and inalienable individual rights,²⁹ thereby expressing a position that is not too different from that adopted by the German Federal Constitutional Court with the *Solange I* doctrine. Unlike the evolution experienced by German case law, however, in Italy the doctrine has not changed, so far. Still, it was merely a theoretical reservation, since it is difficult to imagine the Italian Constitutional Court declaring an EU act to be inconsistent with inalienable rights. Indeed, since the counter-limits doctrine was established, the Court has never applied it in practice.

The refusal to participate in European judicial integration was confirmed for a long time by the attitude towards references for preliminary rulings. The Constitutional Court considered itself to not be in the position to make such references, since it could not be conceived as a *judge* in the sense envisaged by the EC Treaty. The idea was that if a conflict between European and national law existed, it was not for the Constitutional Court to request the Court of Justice to settle it: the doctrine imposing an obligation on ordinary courts to settle the question *before* submitting a constitutional reference released the Constitutional Court from having to defer to the Luxembourg Court. This reasoning held as long as the Constitutional Court had to decide a judicial reference, but the problem persisted in cases of abstract review, because there was no judge (and thus no institution empowered to refer questions to the Court of Justice for a preliminary ruling) that could take part in the proceedings, and the Constitutional Court's self-exclusion could not be remedied by other courts.

Taking these problems into consideration, the Constitutional Court eventually changed its attitude with others judgments (Corte costituzionale 15 April 2008 no 102 and no 103), at least as far as abstract constitutional review is concerned. The Court accepted to define itself as a *judge* in the sense envisaged by the Treaty on European Union, so that it is empowered (or rather, obliged – with the exception carved out by the *acte clair* doctrine –, since it is the only jurisdiction that can take part in the proceedings) to submit a reference for a preliminary ruling. This is a very important step towards a more cooperative attitude in European matters, and the best indication yet that the Constitutional Court has finally agreed to engage in dialogue with the European Court of Justice and transcended its traditional conception of the separation of the EU and national legal orders. The new attitude was confirmed even in judicial reference procedure, when the

²⁹ The *counter-limits doctrine* was first affirmed in Corte costituzionale 27 December 1965 no 98, *Giurisprudenza costituzionale*, 1322 (1965) and was confirmed in several others (such as Corte costituzionale 28 November 1973 no 173, *Giurisprudenza costituzionale*, I, 2401 (1973); Corte costituzionale 5 June 1984 no 170, *Giurisprudenza costituzionale*, I, 1098 (1984) and Corte costituzionale 21 April 1989 no 232, *Giustizia civile*, I, 315 (1990)).

Constitutional Court, in *ordinanza* 18 July 2013 no 207, overruled its previous judgments on the point and accepted to make a reference for preliminary ruling.

The evolution of the Constitutional Court's case law and its cooperative attitude has helped to overcome the practical problems that arose regarding the relationship between EU law and the national Constitution. When dealing with the system of judicial review, however, European integration has indisputably led not only to the establishment of a competitor of the Constitutional Court, in terms of its power to review national legislation through the *de facto* review operated in interpreting EU law, but also – and especially – to the creation of a decentralized system in which national ordinary courts are empowered to review even primary legislation, and – where appropriate – declare it incompatible with EU law and thus refuse to apply it. The impact of this power on the system of constitutional adjudication is clear, and becomes even more so if it is considered that to date, no safeguard for the Constitutional Court's role in the legal system has been established, unlike the *question prioritaire de constitutionnalité* that was introduced some years ago in France (the notion of *priority* referring to the ordinary courts' obligation to raise a question of unconstitutionality *before* proceeding to a review for compatibility with supranational law).³⁰

2. The Huge Transformation of the Concrete Form of Review

The ability to hear references from ordinary courts has always been by far – at least until the last few years – the Constitutional Court's most important competence, because, on the one hand, the vast majority of judgments issued defines this type of procedure and, on the other, most of the major constitutional case law had been decided pursuant to such references. Until ten years ago, references were the source of over eighty per cent of judgments and in some years were accountable for over ninety per cent.³¹ The Court delivers averagely four hundred/five hundred judgments every year, which means that at least three hundred judgments (but often more than four hundred) would reach the Court through references, while the other competences of the Court did not exceed, altogether, a hundred judgments per year.

In the early two-thousands, the situation changed dramatically. References decreased, along with the judgments to which they gave rise, whereas

³⁰ See Art 61-1 of the French Constitution, introduced by the 2008 reform and Ordinance no 58-1067, as amended by Organic Law no 2009-1523, on the implementation of Art 61-1 of the Constitution.

³¹ See P. Passaglia, 'Les âges du contrôle de la constitutionnalité des lois par voie d'exception en Italie', in L. Gay ed, *La question prioritaire de constitutionnalité. Approche de droit comparé* (Brussel: Bruylant, 2014), 573, and statistical reports at 699.

conflicts increased, especially between the central State and the Regions. In 2012, for the first time in the Constitutional Court's history, the judgments originating from references accounted for less than half of the total amount, not even reaching forty-five per cent: concrete review had been overtaken by abstract review.³² The same occurred in 2013, while over the next two years, concrete review regained momentum, again exceeding the share of fifty per cent of total judgments. In absolute numbers, however, there have been little changes, due to the overall decrease in the judgments delivered by the Court: this fell from three hundred twenty-six in 2013 to two hundred and seventy-six in 2015.³³

Only a few years ago, these results would have been simply inconceivable.

Analysis of the recent evolution is, of course, crucial when dealing with the transformation of the model of Italian constitutional justice. And once the increasing number of conflicts has been explained, the core question is to understand the reason why judicial references have been decreasing.

a) A New Role for Judges

As outlined above, with specific regard to the concrete review, the structure of the system of judicial review has been dramatically evolving in relation to the type of interaction established with ordinary courts. One of the reasons that led to the establishment of the Constitutional Court was that ordinary courts were not considered sufficiently responsive to the new constitutional values. Since the entry into force of the Constitution, the situation has changed significantly: the Constitution has been recognized as the foundation of the legal system; constitutional provisions have proven to be effective in shaping a new civil society; and legal education has considered constitutional law to be a key field of study. All these factors have resulted in judges adopting a different approach to the Constitution: they have increasingly chosen to apply it directly, considering it a law and not only a political document that requires legislative implementation.

This different approach to the Constitution seems to be rather closely related to the growing awareness of the complexity of contemporary societies. A complexity that has set a new balance in the relations between enacted law and case law: indeed, the idea that it is possible to meet any social need through legislation, as the most appropriate way to ensure equality and justice, is no longer defensible. Contemporary societies' complexity, in fact, requires specific regulations rather than general rules, since every case appears to be different from another. In other words, the best solution for a

³² Ibid 592 and statistical report at 712.

³³ See the statistical report: Court's Research Department, *Giurisprudenza costituzionale dell'anno 2015. Dati quantitativi e di analisi*, available at www.cortecostituzionale.it/documenti/interventi_presidente/Dati_2015.pdf (last visited 6 December 2016).

case is that which enables consideration of the individual situation in as much detail and as precisely as possible. If every case is different from another, there is no general rule that can even aspire to take all possible variables into account without creating the risk of hyper-regulation, which would have the consequence of requiring judges to apply provisions that may be logical in theory, but, once applied to a specific case, could lead to a situation where the *summum jus* is equivalent to *summa iniuria*.

These considerations formed the basis for a new conception of enacted law; although this was never recognized as an *official* doctrine, it nevertheless greatly influenced legislation and case law in practice.

Pursuant to this doctrine, enacted law must be *flexible*, in the sense that it should be limited to the expression of principles and general rules. As a result, also the judiciary's role should change, since it should be for the judge to apply those principles and general rules and deliver a decision that takes all the elements of individual cases into account, to reach a solution that matches Justice as much as possible.³⁴

The increasing consideration for the role played by ordinary courts formed the basis for a new role for judges. In Italy, as in many other civil law countries, the influence of the French model resulted in a *downgrading* of the role of judges, who were supposed to be nothing more than 'the mouth that pronounces the words of the (enacted) law, inanimate beings who can moderate neither its force nor its rigour'.³⁵ The end of the utopian conception of the law as the expression of rationality, and the need to do justice on a case-by-case basis, gave judges a pivotal role in ensuring a new approach to the law, freeing them from strict deference to the will of legislatures.

This evolving attitude towards enacted law has created the conditions for major changes to occur in the dialogue between the Constitutional Court and ordinary courts, the latter having been authorized to frequently set aside the duty to refer to the former.

b) The Legislative Interpretation as an Increasingly Viable Alternative to Reference

One of the most powerful demonstrations of the cooperation established between the Constitutional and ordinary courts over the years concerns legislative interpretation. The time when conflicts between the Constitutional Court and the Court of Cassation as to which of the two authorities had the

³⁴ The doctrine was expressed, in the nineteen-nineties, by Gustavo Zagrebelsky, and thus it probably (greatly) influenced the Constitutional Court's case law while Zagrebelsky was a member of the Court (as well as in the aftermath of his mandate). See G. Zagrebelsky, *Il diritto mite. Leggi, diritto, giustizia* (Torino: Einaudi, 1992).

³⁵ See Ch.-L. de Secondat Montesquieu, *De l'Esprit des Lois* (Paris: Chatelain, 1748), Book XI, Chapter VI.

final word over legislative interpretation is long past. In the 1960s, those conflicts had led to the so-called *war between the Courts*, that eventually ended with the courts mutually recognizing their respective responsibilities. Today, the Constitutional Court is acknowledged as the supreme interpreter of the Constitution, and the Court of Cassation as the supreme interpreter of legislation.³⁶ Since then, the Constitutional Court defers to the Cassation's interpretation of laws, claiming only the power to strike down legislation or, at most, proposing its own interpretation of primary legislation when there is no consolidated interpretation. This is the *living law* doctrine, an expression that may recall Roscoe Pound's distinction between *the law in books* and *the law in action*,³⁷ the latter being – in the Italian adaptation – the law as it *lives*, ie the law resulting from the way in which a text (the legal provision) is interpreted. By accepting this doctrine, the Constitutional Court bound itself to accepting the consolidated interpretation of a provision; thus, the Court cannot override an interpretation that is generally adopted by ordinary courts.³⁸

Over the years, the Constitutional Court itself became the forerunner of a new role for ordinary courts in the context of constitutional review, by encouraging a new approach to legislative provisions, based on the expansion of judicial means of interpretation. In *Corte costituzionale* 22 October 1996 no 356, the Court expressed the new approach with words that would later be repeated continuously:

‘(i)n principle, legislative acts are not declared unconstitutional because it is possible to interpret them so as to render them unconstitutional (and there are courts willing to apply such an interpretation), but because it is impossible to interpret them so as to render them constitutional’.

This led to constitutional case law that required ordinary courts to refrain from submitting a reference to the Constitutional Court until they had examined – and excluded – the possibility of interpreting the provision

³⁶ On this subject, see G. Campanelli, *Incontri e scontri tra Corte suprema e Corte costituzionale in Italia e in Spagna* (Torino: Giappichelli, 2005), 217.

³⁷ R. Pound, ‘Law in Books and Law in Action’ *American Law Review*, 12 (1910).

³⁸ For Italian scholars, the *living law* doctrine is one of the most important research topics. See, *ex plurimis*, A. Pugiotto, *Sindacato di costituzionalità e «diritto vivente»* (Milano: Giuffrè, 1994); V. Marinelli, *Studi sul diritto vivente* (Napoli: Jovene, 2008); E. Resta, *Diritto vivente* (Bari-Roma: Laterza, 2008); M. Cavino, *Esperienze di diritto vivente. La giurisprudenza negli ordinamenti di diritto legislativo* (Milano: Giuffrè, 2009), I; M. Cavino, ‘Diritto vivente’ *Digesto delle discipline pubblicistiche – Aggiornamento* (Torino: UTET, 2010), 134; A.S. Bruno and M. Cavino, *Esperienze di diritto vivente. La giurisprudenza negli ordinamenti di diritto legislativo*, II (Milano: Giuffrè, 2011); for a greater focus on case law, see, recently, L. Salvato, *Profili del «diritto vivente» nella giurisprudenza costituzionale*, available at www.cortecostituzionale.it/documenti/convegni_seminari/stu_276.pdf (last visited 6 December 2016).

at issue so as to render it constitutional.³⁹ A third condition for the submission of a judicial reference to the Constitutional Court was thus introduced by means of case law: in addition to *rilevanza* and *non manifesta infondatezza*, established, respectively, by Art 1 of legge costituzionale 9 February 1948 no 1 and Art 23 of legge 11 March 1953 no 87, now ordinary courts must first examine the possibility of making the legislative provision consistent with the Constitution by means of interpretation.⁴⁰ Indeed, it is a well-established doctrine that the Constitutional Court will not decide on the merits of a case unless the referring court has documented the need for the reference due to the inefficiency of interpretation alone.

From a comparative point of view, the new condition may call to mind the UK Human Rights Act 1998, s 3(1) on the interpretation of legislation. This could be redrafted as follows to adapt it to the Italian situation: ‘(s)o far as it is possible to do so, primary legislation (...) must be read and given effect in a way which is compatible with the (Constitution)’. To continue the comparison between the UK system and judicial reference in Italy, s 4(2) of the Human Rights Act could be redrafted as follows: ‘(i)f the court is satisfied that the provision is incompatible with (the Constitution), it may make a declaration of that incompatibility’. However, the similarities with the United Kingdom end there, since a British declaration of incompatibility leads (or at least should lead) to political decisions to amend the legislation in question, whereas Italian declarations give rise to a review for constitutionality. To sum up, while in a weak form of judicial review, as that established in the UK, a declaration of incompatibility is a substitute for a decision of unconstitutionality, in a strong form of judicial review, such as

³⁹ The importance of the subject is demonstrated by the sheer number of works on it. See, among many others, G. Sorrenti, *L’interpretazione conforme a Costituzione* (Milano: Giuffrè, 2006); P. Femia, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006); R. Romboli, ‘Qualcosa di nuovo ... anzi d’antico: la contesa sull’interpretazione conforme della legge’, in P. Carnevale and C. Colapietro eds, *La giustizia costituzionale fra memoria e prospettive* n 7 above, 89; M. D’Amico and B. Randazzo, *Interpretazione conforme e tecniche argomentative* (Torino: Giappichelli, 2009); F. Amirante et al, *Corte costituzionale, giudici comuni e interpretazioni adeguatrici* (Milano: Giuffrè 2010); A. Ciervo, *Saggio sull’interpretazione adeguatrice* (Roma: Aracne, 2011); F. Mannella, *Giudici comuni e applicazione della Costituzione* (Napoli: Editoriale Scientifica, 2011); E. Lamarque, *Corte costituzionale e giudici nell’Italia repubblicana* (Bari-Roma: Laterza, 2012); G. Laneve, *La giustizia costituzionale nel sistema dei poteri*, Vol I, *Interpretazione e giustizia costituzionale: profili ricostruttivi* (Bari: Cacucci, 2014); M. Ruotolo, *Interpretare: nel segno della Costituzione* (Napoli: Editoriale Scientifica, 2014); F. Modugno, ‘Al fondo della teoria dell’ “interpretazione conforme alla Costituzione”’ *Diritto e società*, 461 (2015).

⁴⁰ The question should arise on the compatibility of the new condition and the *non manifesta infondatezza*, since when the Constitutional Court requires ordinary courts to state that it is impossible to give the provision a constitutional interpretation, it can be hardly maintained that to the condition for submitting a question to constitutional review is only a lack of certainty as to the provision’s consistency with the Constitution.

that in Italy, declarations of incompatibility are the prerequisite for a decision of unconstitutionality.⁴¹

This conclusion should not be limited to judicial references and concrete review of legislation. As a matter of fact, in abstract review too, the idea that a decision of unconstitutionality is the last resort is well-entrenched. This is demonstrated by the rather high number of *interpretative dismissals* issued by the Court, ie decisions in which the Constitutional Court does not declare a provision unconstitutional but rather offers an interpretation itself, one that makes the provision compatible with the Constitution: originally, this type of decision was used only in concrete review, where it is conceived as a normal form of dialogue between the Constitutional Court and the referring court on how to provide a constitutionally compatible interpretation of a provision. In recent years, the usage of interpretative decisions has also become rather frequent in disputes between the central State and the Regions concerning legislation; therefore, in abstract review too, the Constitutional Court is entitled to experiment with interpretations that seek to achieve consistency with the Constitution.

Only in the event that the experiment fails, the Court comes to decide whether there are grounds for a declaration of unconstitutionality. Reference to a Latin maxim warns against extremity in dealing with the validity of legal acts: *utile per inutile non vitiatur*, meaning that *the useful must not be vitiated by the useless*.

This reference helps remarkably in understanding the approach adopted by the Constitutional Court. Nevertheless, a question remains: to what extent can legislative interpretation be an alternative to a reference? In other words, how far can the judge go in interpreting a legislative provision so as to make it consistent with the Constitution?

The answer is far from obvious. At a first glance, a literal approach may help, assuming that a judge is to *restrain* himself or herself and interpret the provision in accordance with the meaning of the words that he or she reads.

This common-sense conclusion, however, is only apparently indisputable. As a matter of fact, in Italy, rules of interpretation are not rigidly stated. Thus, the literal approach is only one of many approaches from which the judge can choose: if it is reasonable to deem that the provisions' formulation is to always be the starting point in interpretation, judges are not prevented from departing from strict deference to the words, to take into account the true intention of the legislature or even societal evolution and changes in the broader legal order.

Ultimately, it is not possible to establish a clear rule; therefore, when it comes to the limits of *constitutionally oriented* interpretation, it is for the

⁴¹ For the opposition between weak and strong forms of judicial review, see M.V. Tushnet, *Weak Courts, Strong Rights* n 13 above.

judge to decide whether a departure from the literal approach is or is not reasonable. In this regard, the Constitutional Court itself, despite some *swaying* over the years, appears to have reached a conclusion that calls upon judges and their *prudence*. A recent judgment is rather explicit in upholding the idea that the Court asks judges to display both their legal skills and their reasonableness in deciding whether *to interpret* (the provision consistently with the Constitution) or *to refer* (the question of constitutionality to the Constitutional Court):

‘(t)he obligation to come to an interpretation consistent with the Constitution gives way to the incidental question of constitutionality whenever the said interpretation is inconsistent with the wording of the provision and proves to be quite eccentric and bizarre, especially in light of the context in which the provision is placed’; ‘interpretation according to the Constitution is a duty and has unquestionable priority over any other (...), nonetheless it belongs to the family of exegetical approaches – available to the judge when he/she exercises the judicial function – having declaratory nature’;

‘(t)herefore, when, by means of these approaches, it is impossible to derive, from the words of the provisions, any interpretation consistent with the Constitution, the judge is required to refer the question of constitutionality to the (Constitutional) Court’.⁴²

c) The Entrenchment of the Constitution and Its Impact on the Reference Proceeding

As described above, the constitutional case law of the last two decades has strengthened ordinary courts’ powers, reserving for the Constitutional Court only those matters that cannot be solved by ordinary judicial interpretation.

The new approach to judicial legislative interpretation can be easily connected to the rising awareness that a Constitution is above all a source of law, no matter how peculiar it may be and no matter how important its political dimension. Also, a Constitution conceived as a source of law must be treated as a source of law, just like any other. After all, this is nothing more than an application of Chief Justice Marshall’s legacy, which was to see *the very essence of judicial duty* in deciding on the operation of each of the conflicting laws, the Constitution being one of them:

‘if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law,

⁴² See Corte costituzionale 19 February 2016 no 36, *Foro amministrativo*, 530 (2016).

disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case'.⁴³

Thus, also the interplay between the Constitutional Court and ordinary courts is influenced by the growing need to make the Constitution the cornerstone of the entire legal system. Paradoxically, the way to pursue this objective requires a diminution of the factual importance precisely of the first guardian of the Constitution: the more the Constitution is perceived as a law that differs from others only because of its supremacy, the less is the Constitutional Court needed to assess this supremacy; the more widely is the Constitution applied (especially to influence legislative interpretation), the less must the Constitutional Court apply it (especially to react against infringements by legislative acts).

V. Centralized vs Decentralized Systems: Is It Time to Reconsider the Alternative? A Few Concluding Remarks

The evolving concept and strength of the Constitution have produced changes in the system of constitutional justice, and it is reasonable to expect, in the near future, a strengthening of the trends described above.

With regard to abstract review, it is likely to remain a significant part of the Constitutional Court's docket. It may also be improved with other ways to access the Court. For example, reforms could focus on constitutional review of parliamentary elections, or could grant the parliamentary opposition the power to submit questions of constitutionality, so that legislative acts that would be difficult to refer to the Constitutional Court could be brought before it, thanks to the dissenting minority of Parliament. These reforms, associated with others, would create a *more perfect* system, thus empowering the guardian of the Constitution to accomplish its tasks even in areas where currently a lack of protection can be observed.

Setting aside possible constitutional and legislative reforms, the core issue for the judicial review of legislation still appears to be the concrete form of review.

The development of *constitutionally oriented* legislative interpretation reduced the number of judicial references to the Constitutional Court. It is worth asking whether this process has gone too far, whether the Court designed for itself a role that is now becoming excessively marginal. In other words, the question is whether a centralized system of constitutional review can tolerate the importance that the Constitutional Court has granted to

⁴³ *Marbury v Madison* 5 US 137 (1803).

ordinary courts.⁴⁴ A negative answer would lead to calls for an overruling in constitutional case law, to force ordinary courts to submit constitutional questions as soon as a doubt of constitutionality arises: this would mean reverting to the original distribution of responsibilities between the Constitutional Court and ordinary courts, the distribution suggested by the constitutional and legislative provisions that regulate constitutional justice through the condition of *non manifesta infondatezza*.

However, ultimately, this point of view would amount to nothing more than turning back time. Thus the question is whether the Constitutional Court and the legal system as a whole can ignore the fact that Constitution has deeply penetrated society and the courtrooms, to the point that the system of constitutional justice as conceived many decades ago no longer suits present needs. Indeed, such a change in the conception of the Constitution has occurred that perhaps the Constitutional Court's guidance in implementing the Constitution is no longer needed; or rather, is needed only infrequently, and not constantly, as it had been in the past. As a result, instead of trying to revitalize judicial references to the Constitutional Court, the core of the problem could be addressed by accepting the fact that since constitutional consciousness has *grown up*, the reference proceeding has begun to *grow old*.

Maybe, the time has come to think of the Italian system of constitutional review from a different point of view. When the Constitution was adopted, the establishment of special proceedings to review primary legislation was necessary to effectively guarantee the Supreme Law; and such a purpose fully justified the introduction of a double-track form of protection that, from the ordinary courts' perspective, could be seen as *unnatural*, since it implied – for the court before which the case was brought – the deprivation of the power to decide it fully. From a more general perspective, rather than depriving ordinary courts of power, this double-track protection was the means to achieve more efficient protection.

Currently, due only to the entrenchment of the Constitution, ordinary courts no longer appear inadequate to protect the Constitution. Ultimately, the real argument in favour of a centralized form of concrete review lies in the Constitutional Court's power to strike down legislation, a power that is supposed to ensure legal certainty better than any declaration delivered by ordinary courts, which are subject to reversal or overruling.

⁴⁴ For the analysis of the evolution towards a decentralized model, see E. Malfatti, R. Romboli et al, *Il giudizio sulle leggi e la sua "diffusione"* n 20 above; A.M. Nico, *L'accentramento e la diffusione nel giudizio sulle leggi* (Torino: Giappichelli, 2007). I began to address the issue in a previous work in English: see P. Passaglia, 'The Italian System of Constitutional Review: A Kelsenian Model Moving Towards a Decentralized Model?', in J. Bell and M.-L. Paris eds, *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Camberley Surrey: Edward Elgar, 2016), 247.

In a civil law country as is Italy, the absence of a doctrine of precedent traditionally undermines any attempt to establish legal certainty focusing on case law. Nevertheless, in recent decades, the idea that the system works as if a doctrine of precedent (albeit not binding) did exist has gained momentum,⁴⁵ to the point that the very notion of legal certainty has dramatically changed, and the Constitutional Court's⁴⁶ function as *negative legislator* is only part of the solution: as shown by the abovementioned *living law* doctrine, it is impossible to dissociate the words of the provision from its interpretation. Therefore, certainty is no longer the result of enacted law alone. To gain knowledge of the law, reading acts of Parliament is only a part of the activity required, because it is also necessary to engage in a thorough analysis of case law. In other words, legal certainty is the result of both clear enacted law (and thus, among other things, of the removal of legislative provisions that are inconsistent with the Constitution) and of a relatively predictable case law.

If – the absence of a doctrine of precedent notwithstanding – Italian case law can be considered sufficiently predictable,⁴⁷ it may be possible to reconsider the alternative between centralized and decentralized forms of concrete review. This does not necessarily mean that the Italian system of judicial review should or could be subverted to introduce a wholly decentralized system. If such a reform appears to be very difficult to accomplish (and perhaps also to conceive), a humbler but no less significant achievement could be the genuine recognition of *constitutionally oriented* interpretation by ordinary courts as a full form of constitutional adjudication, equal in rank to the Constitutional Court's concrete review. This recognition may act as the ultimate enshrinement of the notion that the Constitution is a legal act to be applied whenever possible, for the simple reason that it is the *Supreme Law of the Land* and that its observance is the foremost and essential duty of all.

⁴⁵ See, in particular, A. Pizzorusso, 'Fonti del diritto – Disposizioni sulla legge in generale art. 1-9', in A. Scialoja and G. Branca eds, *Commentario del Codice civile* (Bologna: Zanichelli-Il Foro italiano, 2nd ed, 2011), 705.

⁴⁶ The notion of *negative legislator*, referred to Constitutional Courts, was developed by Kelsen himself (see H. Kelsen, 'La Garantie juridictionnelle de la constitution (La Justice constitutionnelle)' n 8 above) to emphasize the role of Courts, which do not make law but only strike down legislation that is inconsistent with a higher law. As a matter of fact, currently such a definition could be confirmed with difficulty, if anything because the Court has granted itself the power not only to strike down provisions, but also individual words or expressions in the text of a provision. In this case, by erasing part of the text but not the provision itself, the Court changes the contents of the provision. The distance from the idea of *negative legislator* is even greater when the Court declares a legislative provision to be unconstitutional for what it fails to contain, and thus adds a part to its contents to make the provision consistent with the Constitution.

⁴⁷ With regard to the impact of precedents on Italian case law, see, in English, M. Taruffo and M. La Torre, 'Precedent in Italy', in D.N. MacCormick and R.S. Summers eds, *Interpreting Precedents: A Comparative Study* (Farnham: Ashgate Dartmouth, 1997), 141.

The Notion of ‘Cultural Diversity’ in the EU Trade Agreements and Negotiations: New Challenges and Perspectives

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Abstract

This article analyses the notion of ‘cultural diversity’ as adopted within and adapted for the European Union’s (EU) external trade relations. Its law in context approach, underlines the socio-political framework in which the notion of ‘cultural diversity’ has taken shape, and the conflicting interests involved in its negotiation, promotion and protection. This article explains the concept of cultural diversity as first developed within the World Trade Organization (WTO) negotiations and then the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. It argues that CETA brings new perspectives with regard to the notion of ‘cultural diversity’ into EU external trade relations and that the Transatlantic Trade and Investment Partnership (TTIP) negotiations may represent a challenge to this notion. It contributes to furthering our understanding of these agreements and offering a few remarks on their impact on cultural diversity.

I. Introduction

In a 2012 article on cultural diversity and regional trade agreements, Lilian Richieri Hanania underlines the need to avoid ‘falling into the ‘trade and culture debate’ as an opposition between liberalization and protectionism’.¹ It is worth spending some time on this statement, which points to an important debate on the subject of cultural diversity and international trade.

The debate in question has often been oversimplified, ‘trade’ and ‘culture’ have repeatedly been characterized as distant poles of a dichotomy. As I have discussed in previous writings on the subject of state aid to cinematographic works,

‘the Commission (namely the Directorate-General (DG) for Competition) has drawn a sharp distinction between the cultural and

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¹ L.R. Hanania, ‘Cultural Diversity and Regional Trade Agreements – The European Union Experience with Cultural Cooperation Frameworks’ 7:2 *Asian Journal of WTO & International Health Law and Policy*, 423, 453 (2012).

the industrial nature of aid, between cinema as a cultural expression and cinema as an industry'.²

Even though the Commission has recognised the crucial role of state aid to cinematographic works in the promotion of cultural diversity, it nonetheless imposes this factious distinction on Member States. The only way to effectively support film as a cultural expression is by fostering the underlying industry.³

Nevertheless, I still have not found a theoretical framework for analyzing the relationship between international trade and cultural diversity that is more convincing than liberalization versus protectionism. Following the path developed by C. Edwin Baker,⁴ I will explore this relationship in the framework of the notion of protectionism. I draw from the Oxford English Dictionary's definition of protectionism as: 'the theory or practice of shielding a country's domestic industries from foreign competition by taxing imports'. I will try to avoid an ideological approach that considers *a priori* 'liberalization' and 'protectionism' in the cultural sector respectively as the 'bad' and 'good guy'. I argue in fact that the regulation of cultural sectors needs 'doses' of both liberalization and protectionism and its analysis requires taking into account the social, political and economic context in which the regulation takes place. Therefore, this paper examines the notion of 'cultural diversity' through an approach of law in context that acknowledges the socio-political framework in which its meanings have taken shape.

During international negotiations on trade in services held with the World Trade Organization (hereafter WTO), the European Union (hereafter EU) 'defined' the notion of 'cultural diversity'.⁵ The EU took a protectionist stance, seeking to limit global cultural homogenization through the promotion of local cultural industries. Its approach tried to limit the power of transnational oligopolies in the cultural sector. At the level of the film industry, for example, cultural diversity refers to the state support of cinematographic production.

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereafter UNESCO Convention)⁶ – adopted

² L. Bellucci, 'National Support for Film Production in the EU: An Analysis of the Commission Decision-Making Practice' 16:2 *European Law Journal*, 211, 222 and 211 (2010).

³ Ibid 223.

⁴ See C.E. Baker, *Media, Markets, and Democracy* (Cambridge: Cambridge University Press, 2002). Baker is inspired by Oliver Goodenough, whose application of these categories is of a different scope. See O. Goodenough, 'Defending the Imaginary to Death? Free Trade, National Identity and Canada's Cultural Preoccupation' 15 *Arizona Journal of International & Comparative Law*, 203 (1988).

⁵ Cf C. Arup, *The New World Trade Organization Agreements. Globalizing Law Through Services and Intellectual Property* (Cambridge: Cambridge University Press, 2000), 97.

⁶ English text available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> (last visited 6 December 2016).

on 20 October 2005 by the thirty-third session of the UNESCO General Conference – contributed to strengthening the notion of cultural diversity at an international scale. The UNESCO Convention considers cultural diversity as a positive response to the trends toward cultural homogenisation. It provides a broad definition of cultural diversity and adopts an interpretation of culture both as artistic expression and as an expression of traditions and customs. It recognises the states' 'sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory',⁷ including measures to support cultural industries and foster the diversity of media.⁸ It therefore enables states to protect and promote their national cultural welfare, for example through state aid to audiovisual⁹ works, which was at the heart of the conflict during the multilateral WTO negotiations on trade in services.¹⁰ During these negotiations, WTO Members had diverging opinions about the liberalisation and protection of cultural markets and did not reach a shared position. These negotiations have currently been suspended, but they are crucial to our understanding of cultural diversity as developed in international trade relations.

The difficulties related to the multilateral framework of the WTO pushed its Members towards bilateral Free Trade Agreements (FTAs). Issues involving the protection and promotion of cultural diversity were negotiated within FTAs. Currently, the most relevant FTAs for the EU, and therefore the main challenge to the notion of cultural diversity in the context of external relations, are the Comprehensive Economic and Trade Agreement (CETA),¹¹ which was concluded between Canada and the EU, and the Transatlantic Trade and

⁷ Cf also Art 1 letter h), Art 5 para 1 and Art 6 para 2 letter c).

⁸ See, in particular, Art 1 letters a) and h), Art 2 para 2, Art 5 para 1 and Art 6 letters a) and b).

⁹ I follow the Commission's understanding of the term 'audiovisual', which includes both cinema and television.

¹⁰ For further details as well as critical commentary on the UNESCO Convention see R. Craufurd Smith, 'The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order' 1 *International Journal of Communication*, 24, 48 (2007); L. Bellucci, *Media, diritto e diversità culturale nell'Unione europea tra mito e realtà* (Pisa: ETS, 2012), 19-32; L. Bellucci and R. Soprano, *The WTO System and the Implementation of the UNESCO Convention: Two Case Studies*, in Germann Avocats (Geneva) and multidisciplinary research team, *Implementing the UNESCO Convention of 2005 in the European Union*, Full Version of the Study commissioned by the European Parliament, Directorate General for Internal Policies. Policy Department B: Structural and Cohesion Policies. Culture and Education (Bruxelles: European Parliament, 2010) 159, 162-164, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/438587/IPOL-CULT_ET\(2010\)438587_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/438587/IPOL-CULT_ET(2010)438587_EN.pdf) (last visited 6 December 2016); www.diversitystudy.eu/ms/ep_study_long_version_20_nov_2010_final.pdf (last visited 6 December 2016).

¹¹ A consolidated CETA text was made public on 26 September 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (last visited 6 December 2016).

Investment Partnership (TTIP), which the EU is currently negotiating with the US. CETA will be subject to legal revision and then transmitted to the Council and Parliament for ratification. It will only become binding under international law once the ratification process is complete. I will show in this article that CETA brings new perspectives with regard to cultural diversity into EU external trade relations and that the TTIP negotiations may represent a challenge to the notion of cultural diversity.

Section II of this article discloses the roots of the notion of cultural diversity as it emerged in the context of EU external trade relations, in particular as a result of the WTO negotiations. Section III focuses on the new perspectives that CETA introduced with regard to cultural diversity. Section IV discusses the impact of the TTIP negotiations on the notion of 'cultural diversity'. Section V concludes the analysis and focuses on the challenges that may affect these negotiations.

II. The Notion of 'Cultural Diversity' and the WTO Doha Round

The notion of cultural diversity in the EU external trade relations has its roots in the humus of the WTO multilateral negotiations on audiovisual services. The EU adopted it during the Ministerial Conference in Doha launched under Art XIX of the General Agreement on Trade in Services (hereafter GATS) in November 2001. The transition to the notion of 'cultural diversity' occurred in the mandate given by the Council of the European Union (hereafter Council) to the Commission¹² on the occasion of the general Affairs Council meeting of 26 October 1999, and was supported by the Commission and the Parliament.¹³ This mandate declared that in future

¹² Cf *Consultation sur les négociations GATS 2000/OMC portant sur certains services audiovisuels (musique et logiciel de loisirs), ainsi que sur les services culturels*, available at http://europa.eu.int/comm/avpolicy/extern/gats2000/ncon_fr.htm (last visited 5 December 2006).

¹³ Cf P. Lamy, *Les négociations sur le commerce des services à l'OMC*, Parlement européen, Strasbourg (10 March 2003), 3 available at http://europa.eu.int/comm/commissioners/lamy/speeches_articles/sp1a_158_fr.htm (last visited 6 December 2006); V. Reding, *La diversité culturelle*, Parlement européen (10 March 2003), available at <http://europa.eu.int/rapid/start/cgi/guesten.ks> (last visited 25 February 2015); Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Principles and Guidelines for the Community Audiovisual Policy in the Digital Age (14 September 1999) COM(1999) 657 final, para 7; J.A. McMahon, 'Preserving and Promoting Differences? The External Dimension of Cultural Cooperation', in R. Craufurd Smith ed, *Culture and European Union Law* (Oxford: Oxford University Press, 2004), 345; European Parliament resolution on the communication from the Commission to the Council and the European Parliament on the EU approach to the WTO Millennium Round (COM (1999) 331 - C5-0155/1999 - 1999/2149(COS)) [2000] OJ C 189/213, paras 24-26; European Parliament Resolution on the Fourth WTO Ministerial Conference [2002] OJ C 112 E/321, paras 21-22; European Parliament resolution on the General Agreement on Trade in Services

negotiations within the WTO, the European Community (hereafter Community)¹⁴ would ensure, as it did during the Uruguay Round, that both the Community and its Member States would be able to define and implement cultural and audiovisual policies respecting their own cultural diversity.¹⁵

Without changing its policy on audiovisual services, the EU considered that the notion of cultural diversity would reconcile the varying interpretations of public intervention on the part of Member States in the sphere of culture as well as their diverging economic interests, and encourage a unified voice for these states during international trade negotiations. Some Member States' interest in supporting their film industry and therefore in protecting cultural services has been, for example, in conflict with other Member States' interest in having open markets to facilitate their music industry's exports. Through the notion of cultural diversity the EU overcame Member States' diverging economic interests with the aim of conducting successful negotiations.

The EU opted for the notion of 'cultural diversity', rather than 'cultural exception' – which would exclude the audiovisual sector from the scope of GATS – or 'cultural specificity'. The Commission itself had supported the latter during the Uruguay Round negotiations, according to which audiovisual services should have fallen under the scope of GATS, despite being subject to a specific legal regime.¹⁶

The notions of 'cultural exception,' 'cultural specificity' and 'cultural diversity'¹⁷ all represent different degrees of protection granted to the cultural sphere in trade agreements. In sharp contrast, US negotiators argued that cultural services should be considered as any other services and therefore liberalised.

During the WTO negotiations, the Parties failed to reach an agreement on audiovisual services, which have therefore been integrated into GATS without a specific legal regime. None of these notions was legally recognised in the WTO agreements. Nevertheless, the EU presented a list of exemptions to the most favoured nation principle¹⁸ under Art II GATS and the Annex on

(GATS) within the WTO, including cultural diversity, 12 March 2003 [2004] *OJ C* 61 E/289, paras 12-13.

¹⁴ It was not yet called 'European Union' (EU).

¹⁵ Cf Council resolution of 21 February 2001 national aid to the film and audiovisual industries [2001] *OJ C* 73/3, para 5; Council resolution of 21 January 2002 on the development of the audiovisual sector [2002] *OJ C* 32/4, para 5.

¹⁶ Cf A. Herold, 'European Public Film Support within the WTO Framework' 6 *IRIS plus*, 2, 6 (2003).

¹⁷ For details on these notions or the negotiations on audiovisual services held during the Uruguay Round see L. Bellucci, '“Cultural Diversity” from WTO Negotiations to CETA and TTIP: More than Words in International Trade Law and EU External Relations' 20:2 *Lex Electronica*, 39, 45-48 (2015) available at: <http://www.lex-electronica.org/en/s/1413> (last visited 6 December 2016).

¹⁸ Which aims at avoiding the application of a different treatment based on the origin or the supplier of a service for an equivalent service. Countries are not allowed to discriminate

Art II Exemptions.¹⁹ Furthermore, with regard to the national treatment principle under Art XVII GATS,²⁰ the EU did not make any liberalisation commitments. It adopted this policy during the Uruguay Round and confirmed it during the Doha Round.

Since the Doha Round, the EU refers to the notion of cultural diversity. Nevertheless, media, stakeholders, artists and the general public in Europe often refer to the concept of 'cultural exception'. Broadly speaking, 'cultural exception' means excluding cultural services from the liberalisation process and therefore from a commercial logic.²¹ The term is still preferred by the media and public opinion, in Europe generally speaking and most particularly in France, which has the biggest film production industry in Europe and the strongest support system in the continent. France, it should also be noted, was among the proponents of the notion of 'cultural exception' during the Uruguay Round.

III. The Notion of 'Cultural Diversity' and the New Perspectives Introduced by the Comprehensive Economic and Trade Agreement (CETA)

As previously mentioned, given the lack of success within the WTO's multilateral context, commercial partners turned to bilateral agreements,

between their trading partners. All Parties must apply this treatment to one another. Art II para 1 GATS constitutes a general obligation. It states that: 'With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country'.

¹⁹ Cf Additional Own-Initiative Opinion of the Economic and Social Committee on the Effects of the Uruguay Round Agreements [1994] *OJ* C393/200, para 8.2.

²⁰ According to the national treatment principle '(...) each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers' (para 1). The principle aim is to avoid discrimination between foreigners and nationals. It guarantees that foreign services and service providers, precisely those of another Member of the trade agreement, are treated no less favourably than local services and service providers. It applies only to the services explicitly listed by Members in the schedules of commitments and the extent to which they may be provided individually on the various modes of supply (G. Venturini (with the collaborative work of G. Adinolfi, C. Dordi and A. Lupone), *L'Organizzazione Mondiale del Commercio* (Milano: Giuffrè, 2004), 102), that is only pertaining to states that have taken liberalisation commitments concerning certain services. Cf G. Sacerdoti, 'L'Accordo generale sugli scambi di servizi (GATS): dal quadro OMC all'attuazione interna', in Id and G. Venturini eds, *La liberalizzazione multilaterale dei servizi e i suoi riflessi per l'Italia* (Milano: Giuffrè, 1997), 9.

²¹ Cf L. Bellucci, *Cinema e aiuti di Stato nell'integrazione europea. Un diritto promozionale in Italia e in Francia* (Milano: Giuffrè, 2006), 311 and M. del Corral ed, *Culture, Trade and Globalisation: Questions and Answers* (Paris: UNESCO, 2000), 35-38, available at <http://unesdoc.unesco.org/images/0012/001213/121360e.pdf> (last visited 6 December 2016).

the FTAs. These agreements did not adopt the so-called ‘positive list approach’ that has shaped the EU’s international trade negotiations, that is to say sectors that a Party to the FTA wants to liberalise are listed in a schedule of commitments. Only those that are explicitly mentioned are liberalised. Instead, they have adopted the so-called ‘negative list approach’, used, notably, in the North American Free Trade Agreement (hereafter NAFTA), concluded between Canada, Mexico and the United States (hereafter US). According to this approach, an agreement covers all service sectors and measures, except for those expressly included in a list of reservations.

CETA negotiations have resulted in a ‘redefinition’ of the notion of ‘cultural diversity’. Expressed in the Preamble is this bilateral trade agreement’s debt to the UNESCO Convention.²² The EU is the only regional economic integration organization to be Party to this Convention,²³ while Canada was among the most engaged promoters of the Convention. It was also the first country to become Party to it. This commitment shared by Canada and the EU speaks to their shared views on cultural diversity. The CETA agreement accounts for these similarities. Nevertheless, it also makes room for some of the differences. For instance, while the EU is invested only as far as audiovisual services are concerned, Canada’s stake in the agreement includes a wide range of cultural sectors and activities.²⁴

Other particularities include the so-called ‘negative list approach’, by which Parties establish a definitive list of restrictions. They are therefore prevented from making gradual, liberalising commitments. Furthermore, CETA has adopted an innovative approach of ‘targeted’ exemption; that is, an exemption ‘chapter by chapter’.²⁵ The subsidies chapter is one such example where, as noted, nothing ‘in this Agreement applies to subsidies or government support with respect to audio-visual services for the EU and to

²² The CETA’s Preamble recognises that the provisions of this agreement ‘preserve the right to regulate within their territories and resolving to preserve their flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity, (the EU and Canada affirm) their commitments as Parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. (They recognize) that states have the right to preserve, develop and implement their cultural policies, and to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and preserving their cultural identity, including through the use of regulatory measures and financial support.’

²³ The EU joined the UNESCO Convention in 2006. See Council decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2006/515/CE) [2006] OJ L201/15.

²⁴ Canada has embraced a broad definition of cultural industries since NAFTA. For the definition see Art 2107, letters a) - e) NAFTA.

²⁵ C. Vallerand, ‘Exemption culturelle - Trouver un accord avec les Européens’ *Le Devoir* (30 March 2013), available at www.ledevoir.com/international/actualites-internationales/374574/trouver-un-accord-avec-les-europeens (last visited 6 December 2016).

cultural industries for Canada.'²⁶

IV. The Notion of Cultural Diversity and the Transatlantic Trade and Investment Partnership (TTIP)

Negotiations for the TTIP, a bilateral trade agreement between the EU and the US, were launched at the G8 summit at Lough Erne in June 2013. That these economies account for almost half of the global gross domestic product (GDP) and nearly a third of world trade,²⁷ and that the US is the largest economy in the world goes a long way to explaining the importance of this agreement.

TTIP has encountered a degree of criticism in Europe, and is considered to epitomize the harsh, neo-liberal policies adopted by the EU. That the public protests toward the negotiations were so widely publicized with so little reference to their actual content made it very hard for citizens, including scholars, to develop an informed opinion. The most controversial issue concerning TTIP, disclosed to the general public by the media, was over the Investor State Dispute Settlement (ISDS): the possibility for investors to bring proceedings against governments that are Parties to the treaty and how this in turn affects their freedom to determine public policies if they might be sued by corporations. The crux of the conflict had long and largely to do with the choice of dispute settlement body.

Much less is known about the conflict over the audiovisual sector. This conflict is not new and has economic, socio-political and cultural roots. As previously mentioned, during the negotiations with the WTO, the EU had defended the support of audiovisual services through government-funded incentives such as state aid. The US, instead, pushed for the liberalisation of these services which would have undermined this form of support. The TTIP is therefore an extremely delicate agreement. If, as discussed earlier, negotiations between Canada and the EU on issues pertaining to the protection and the promotion of cultural diversity were particularly complex due to the partially differing views of the Parties, it is easy to imagine that the TTIP negotiations on the matter are even more complex. The power of the US cultural industries and the position historically held by the US during international trade negotiations led many people (including the audiovisual sector) to believe that the TTIP could weaken the instruments put in place in Europe to protect the audiovisual industry.

The Federation of European Film Directors/*Fédération Européenne des*

²⁶ Consolidated CETA text, n 11 above.

²⁷ Cf D. Webb, 'The Transatlantic Trade and Investment Partnership' Briefing paper, no 06688, 4 December 2015, House of Commons (3), available at www.parliament.uk/briefing-papers/sno6688 (last visited 6 December 2016).

Réalisateurs de l'Audiovisuel (FERA) and other organisations belonging to the audiovisual sector supported the exclusion of this industry from TTIP negotiations. The feeling of insecurity that had spread in the European audiovisual sector regarding its potentially diminished ability to defend its achievements in film was largely due to the contradictory approach adopted by the Commission on this issue. The Trade Commissioner, Karel de Gucht, opposed the idea of an exclusion of the audiovisual sector from the TTIP negotiations. In his view the EU must avoid 'red lines' in its mandate so as not to limit the scope of its negotiations. This approach was clearly stated by the US Ambassador to the EU, William Kennard, who affirmed that a mandate that constrains negotiators because of a red line (a carve-out, an exception) is not a clean mandate and would increase the pressure on the US side to introduce the same. It would have been a natural consequence to have a price to pay.²⁸ In response to de Gucht's stance, many European filmmakers presented a petition in favour of the so-called 'cultural exception',²⁹ which was signed by more than seven thousand professionals.³⁰ On the other hand, the Commissioner for Education, Culture, Multilingualism and Youth, Androulla Vassiliou, underlined³¹ the importance of ensur(ing) that an agreement with the US does not jeopardize the ability of the EU and its Member States to maintain their commitment to cultural diversity and fully implement and adapt their policies and instruments to the rapid evolution of the environment. (According to Vassiliou ...), protecting and promoting cultural diversity in the up-coming trade negotiations with the US means respecting three clear red-lines: The existing EU policies and instruments and corresponding measures at member States' level (... as well as ...) the existing national measures to regulate the audiovisual sector and support domestic and European content shall not be touched. (... Furthermore, ...) the ability to continue adapting and developing meaningful policies for cultural

²⁸ P. Spiegel, 'US warns EU against exempting film industry from trade talks. Brussels insists it is not breaking vow to avoid excluding any issue' *Financial Times*, 11 June 2013, available at <https://www.ft.com/content/8a2b759e-d2b1-11e2-aac2-00144feab7de> (last visited 6 December 2016).

²⁹ 'The Cultural Exception is Non-Negotiable', 18 April 2013, available at <https://www.lapetition.be/petition.php/THE-CULTURAL-EXCEPTION-IS-NON-NEGOTIABLE/12826> (last visited 6 December 2016).

³⁰ Cf also Federation of European Film Directors/Fédération Européenne des Réalisateurs de l'Audiovisuel, 'The Cultural Exception VS TTIP' *Newsletter*, July 2013, available at http://www.filmdirectors.eu/wp-content/uploads/2013/07/FERA-Newsletter-July-2013_English.pdf (last visited 6 December 2016).

³¹ A. Vassiliou, 'Cultural Diversity and the Transatlantic Trade and Investment Partnership, European Commission Press Release', available at http://europa.eu/rapid/press-release_SP-EECH-13-429_en.htm (last visited 6 December 2016). See also A. Vassiliou, 'Cultural Diversity, global politics and the role of Europe, European Commission Press Release', available at http://europa.eu/rapid/press-release_SPEECH-14-165_en.htm?locale=en (last visited 6 December 2016).

diversity, both at the EU and Member States' level' (shall be maintained).

The conflict between two Directorate Generals (DGs) over the audiovisual sector is not unusual within the Commission. For example, as I have shown elsewhere, with regard to the conflict between the DG Information Society and Media and the DG Competition over State aid to film,³² the DGs expressed two forces having different orientations. Their different aims were a source of a conflict, even if *latent* (as opposed to *declared*).

The Commission President, José Manuel Barroso, supported the idea that the EU must avoid 'red lines', but at the same time claimed that the cultural exception would remain untouched, which made the audiovisual sector even more suspicious with regard to the outcome of the TTIP negotiations.³³ On the contrary, the Parliament clearly supported the exclusion of the audiovisual sector from the negotiations of the agreement. In its resolution of 23 May 2013 on EU trade investment negotiations with the United States of America, the Parliament³⁴ stressed that TTIP 'should not risk prejudicing the Union's cultural and linguistic diversity, including in the audiovisual and cultural services sector (it also considered) essential for the EU and its Member States to maintain the possibility of preserving and developing their cultural and audiovisual policies, and to do so in the context of their existing laws, standards and agreements; (it called), therefore, for the exclusion of cultural and audiovisual services, including those provided online, to be clearly stated in the negotiating mandate.'³⁵

Finally, in the mandate given to the Commission, the Council excluded audiovisual services from the negotiations. In fact, in the directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America of 17 June 2013, it stated that audiovisual services would not be covered by the chapter on trade in services and establishment.³⁶

As indicated by these directives, the 'Commission, according to the Treaties, may make recommendations to the Council on possible additional negotiation directives on any issue.'³⁷ However, without hiding that 'the US has a strong interest in gaining access to markets for services related to films and television',³⁸ the Commission affirmed that the EU position on cultural diversity would not change during the TTIP negotiations. It reassured

³² See L. Bellucci, n 2 above, 222 and 231.

³³ Cf Federation of European Film Directors/Fédération Européenne des Réalisateur de l'Audiovisuel, n 30 above.

³⁴ P7_TA(2013)0227.

³⁵ Paras 10-11.

³⁶ Cf para 21.

³⁷ Para 44.

³⁸ European Commission, *TTIP and Culture*, 1, available at http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152670.pdf (last visited 6 December 2016).

stakeholders and the public opinion that fostering ‘cultural diversity will remain a guiding principle for TTIP, just as it has been in other EU trade agreements’.³⁹

V. Conclusion

Even though the protection the EU opted for is limited to the audiovisual sector and was never conceived as a general exemption, the EU is one of the few socio-economic actors to have strongly supported cultural diversity in international trade. During the WTO Doha Round, it adopted the notion of ‘cultural diversity’ as a means of preventing liberalisation in the audiovisual sector and, as a result, found common ground despite the Member States’ diverging economic interests.

The EU fostered the idea that the notion of ‘cultural diversity’ should be recognised by a legally-binding text, the UNESCO Convention. That this notion leans more toward cultural promotion rather than cultural defence has appealed to many developing countries, which embrace and now adhere to the proactive stance of the Convention.

CETA introduced new developments surrounding the notion of cultural diversity. Among these developments includes the EU’s abandoning of its traditional ‘positive list approach’ in favour of a ‘chapter by chapter’ exemption.⁴⁰ Critics have considered the ‘targeted’ exemption adopted by CETA to be a step toward globalisation rather than a tool for fostering cultural diversity. Supporters of this approach have underlined that it could be used in negotiations with the US, whose position on the liberalisation of cultural sectors is much more pronounced than those of the EU and Canada.⁴¹ They have also underlined that CETA is the first trade agreement to mention the UNESCO Convention in its Preamble. CETA has been perceived as a ‘training agreement’ for even more complex bilateral negotiations.⁴²

If CETA introduced important changes with regard to cultural diversity, it is evident that TTIP – whose two actors hold very different positions on cultural diversity and international trade – is a major challenge for the *acquis* related to Member States’ support of cultural works, like state aid to film. Even though the Commission currently allows a ‘red line’ with regard to the audiovisual sector, thus preventing TTIP from negatively affecting the European status quo, future negotiations on this agreement will show whether

³⁹ Ibid 6.

⁴⁰ Cf Vallerand, n 25 above.

⁴¹ Ibid.

⁴² Cf Coalition pour la diversité culturelle, ‘Libre-échange Canada-UE – L’occasion de renforcer la diversité culturelle’ (18 October 2012), available at <http://cdc-ccd.org/Libre-échange-Canada-UE-L-occasion?lang=fr> (last visited 6 December 2016).

the EU Member States will be united by the notion of cultural diversity despite their different cultural policies.

Member States' different and competing interests with regard to liberalisation in the audiovisual sector will play a major role in future TIPP negotiations. To enable the Commission to negotiate for the EU on culturally sensitive issues, these states will need to find some common ground with respect to their disparate cultural policies and economic interests. The Member States' unity may be undermined by the economic crisis affecting most of them, which may induce even the states that have cultural welfare to exchange it for commercial benefits. This unity is also threatened by a general tendency toward disaggregation developing within the EU.

Furthermore, since the Second World War, some Member States have stronger political and economic ties with the US than others and therefore may be inclined to support liberalisation to fulfill the obligations related to their 'alliance'. Another crucial factor may be the long-running tendency of the EU and many of its Member States – irrespective of proclamations on the welfare state and equal access to services – to adopt neo-liberal policies that will negatively impact those sectors including health, education and culture, that for many Member States have long and heavily relied on public funding.

With regard to CETA, and TTIP to an even greater extent given that negotiations are still in progress, a crucial role will be played by the so-called Brexit, the UK's choice to exit the EU, which has not been legally formalised by the UK yet but will be the subject of future negotiations with the EU. On the one hand the UK's exit could make the CETA's signature more complex if managed post Brexit. On the other hand, the UK is one of the Member States whose music industry can compete on a global scale, and can thus stand to benefit from market liberalisation in the audiovisual sector. Its absence at the negotiation table could therefore reduce the conflict over liberalisation policies. Indeed, the issue of cultural diversity in the EU external trade relations seems to be a good example of the uncertainty that citizens currently perceive within the EU itself.

A Critical Comparative Analysis of Online Tools for Legal Translations

Patrizia Giampieri*

Abstract

In the current fast-paced digital world, legal translators are often confronted with a vast array of online resources that they can hardly use or understand. This paper aims to outline some of the pitfalls arising from the Internet for legal translators and the shortcomings of some online tools. In particular, it will analyse and compare online dictionaries, fora, and institutional and professional monolingual websites. In this way, it seeks to shed light on how an online search of legal terms (or better, equivalents) can become time-consuming or, if not carried out properly, confusing. Accordingly, the paper highlights the usefulness of aligned bilingual corpora, providing that the texts composing the corpora are reliable. This paper will argue that without proper training on how to use such corpora and on how to dissect the overwhelming information available on the Internet, both professional and inexperienced translators may have difficulties finding suitable legal equivalents. Finally, the paper urges that practitioners call for major interventions at the level of EU language databases, given the wide spectrum of translation mismatches demonstrated throughout.

I. Introduction

As many scholars claim,¹ the best way to approach the translation of a legal text is to be acquainted not only with the legal system of the source text, but also with the legal system of the target text. Therefore, legal translation can be regarded as ‘a tool of comparative legal analysis’² and legal translators must have a good knowledge of comparative law before engaging in any translation work.³ Translators must consider the system-specificity of legal

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¹ G.R. De Groot G.R. and C.J.P. Van Laer, *The Quality of Legal Dictionaries: An Assessment* (Maastricht: University of Maastricht, 2008); R. Rotman, ‘The Inherent Problems of Legal Translation: Theoretical Aspects’ 6(1) *Indiana International and Comparative Law Review*, 187-196 (1995).

² S. Šarčević, *Language and Culture in EU Law: Multidisciplinary Perspectives* (London and New York: Routledge Taylor and Francis Group, 2015), 4; B. Pozzo, ‘Comparative Law and the New Frontiers of Legal Translation’, in S. Šarčević ed, *Language and Culture in EU Law: Multidisciplinary Perspective* (London and New York: Routledge Taylor and Francis Group, 2015), 73-90.

³ C.J.P. Van Laer, ‘Comparatieve Begrippen voor Juridische Vertalers’ *Terminologie et Traduction*, 65-75 (1999).

terminology⁴ when delivering their work. Furthermore, legal translations involve not only varying legal systems, but also differences between the source and the target cultures.⁵ Accordingly, a full equivalence between two legal terms pertaining to two different languages occurs only rarely. A full equivalence, in fact, can only take place when both the source and the target languages refer to the same legal system, as in Switzerland or Belgium.⁶ As a result, books and articles propose a number of translation solutions outlining the best suitable equivalents in a given legal matter and trying to tackle translation issues. Proposed solutions include preserving the foreign source term, paraphrasing or resorting to calques and neologisms.⁷ Although this paper aims neither to endorse nor challenge these alternatives, it is worthwhile to mention the difficulties encountered in legal translations and the means by which translators seek to meet those deriving difficulties. What this paper will focus on instead are the digital tools available to translators today and the ways that both first-time and professional translators can apply them. This paper argues that today's digital world, using online tools can be stimulating and challenging, but also time-consuming⁸ and, sometimes, misleading.⁹ In fact, an overabundance of resources, like that found on the Internet today, may lead to confusion and make students (ie inexperienced translators) focus on tools rather than contents.¹⁰ Therefore, translators should be equipped with reliable resources and taught how to grasp the meaning in context of legal terms, as well as how to find their corresponding equivalents in their own language. In order to highlight the strengths and weaknesses of online translation resources, this paper describes an illustrative search of legal equivalents. In particular, it describes an online search for the equivalent(s) of the Italian legal cluster (or lexical bundle) *risoluzione del contratto*. A lexical bundle, or cluster, is a recurring sequence of words that frequently appear together.¹¹ In this case, the equivalent of *risoluzione* (noun)

⁴ G.R. De Groot G.R. and C.J.P. Van Laer, n 1 above, 1.

⁵ R. Rotman, n 1 above, 189.

⁶ G.R. De Groot G.R. and C.J.P. Van Laer, n 1 above, 2.

⁷ Ibid; D. Longinotti, *Problemi specifici della traduzione giuridica. Quaderni di palazzo Serra* (Genova: Università di Genova, 2009), 17.

⁸ K. Varantola, 'Translators and Their Use of Dictionaries', in B.T.S. Atkins ed, *Using Dictionaries* (Tübingen: Niemeyer, 1998), 179-192.

⁹ F. Zanettin, 'DIY Corpora: The www and the Translator', in B. Maia, J. Haller and M. Ulrych eds, *Training the Language Services Provider for the New Millennium* (Porto: Faculdade de Letras da Universidade do Porto, 2002), 239-248; A. Galán-Mañas, 'Traducción 2.0. Las herramientas sociales en la formación de traductores' (Translation 2.0. The social tools in translators' training), in M. Cánovas, G. Delgar, L. Keim et al eds, *Challenges in Language and Translation Teaching in the Web 2.0 Era* (Granada: Comares 2012), 135-144; L. Butler-Kisber, 'Teaching and Learning in the Digital World: Possibilities and Challenges' 6(2) *Learning Landscapes*, 9 (2013).

¹⁰ A. Galán-Mañas, n 9 above, 135.

¹¹ D. Biber, S. Johansson, G. Leech et al eds, *Longman Grammar of Spoken and Written*

is the pivotal, critical term to search since *del contratto* (preposition + noun) can be easily translated as *of the contract*. Conducting this search using different digital tools verifies whether particular translation resources are reliable and elucidates the pitfalls and shortcomings which a translator might encounter. The search begins with online dictionaries, then fora, institutional websites, professionals' monolingual websites and finally corpora, both monolingual and bilingual. The paper focuses particularly on the digital tools available at the EU level.

II. Premises

On the basis of the literature outlined above, this article will illustrate the pitfalls of online translation tools. Before testing the digital tools, it is necessary to define the legal cluster *risoluzione del contratto*. According to the Italian civil code, a contract ceases to be binding between the contracting parties in three specific circumstances: breach of the contract¹² (eg: one party does not pay the other one for the services or the goods received); hardship¹³ (such as unexpected over-expenditures); and acts of god¹⁴ (like a flood; or an earthquake, etc). It must be highlighted that in the particular legal matter of a *risoluzione del contratto*, the contract neither expires naturally (ie at the agreed term), nor is it ended by a mutual decision. One party can in fact claim the ending (or unmaking) of the contract for the reasons above and ask for damages, under certain, well-specified circumstances. Once the contract has been ended (or unmade), the legal matter is restored to its original conditions as if the parties had never entered into a contract. These concepts are of vital importance in finding the ideal equivalents in English, providing that they exist. With this definition in mind, it is now possible to proceed to test online tools to see which best fit a translator's requirements.

III. Dictionaries

In this part, an analysis of dictionaries will be carried out. First, it is important to note that not all bilingual dictionaries are reliable, sometimes not even the technical (or legal) ones. As reported by De Groot and Van Laer: 'The majority of the (...) dictionaries fails (*sic.*) to offer much more than glossaries containing unsubstantiated translations'.¹⁵ The greatest

English (Harlow: Pearson Longman, 1999); K. Hyland, 'As Can Be Seen: Lexical Bundles and Disciplinary Variation' 27 *English for Specific Purposes*, 4-21 (2008).

¹² Civil Code, Art 1453 and following.

¹³ Civil Code, Art 1467.

¹⁴ Civil Code, Art 1467.

¹⁵ G.R. De Groot G.R. and C.J.P. Van Laer, n 1 above, 8.

‘deadly sin’¹⁶ of some dictionary compilers, occurs when the translation suggestions and the source words are reversed, in order to offer a sort of glossary in the target language. This practice is argued to be very dangerous, because the derived word list is not used in the legal system of the source language.¹⁷ Commentators have suggested that dictionaries should instead propose the most acceptable equivalents on the basis of the circumstances, or better, of the legal matters in question, arguing, for example, that ‘the acceptability of a potential equivalent is determined primarily by the results in practice, ie, the legal effects’.¹⁸ Although these arguments might also refer to classic, paper dictionaries, this analysis focuses on the reliability of online dictionaries, which may not necessarily be technical or legal. For a first-time Italian translator, who might access online dictionaries in order to translate the Italian *risoluzione del contratto*, the following translations could be retrieved (Table 1):

Table 1: Bilingual dictionaries¹⁹

| Legal matter (Italian) | Collins | Hoepli | Il Ragazzini | Sansoni |
|------------------------------------|-------------------------|------------------------|------------------------|----------------------------|
| <i>Risoluzione (del contratto)</i> | Annulment, cancellation | Rescission of contract | Rescission of contract | Cancellation of a contract |

Clearly these sources do not agree on a sole term. Unfortunately, the various translations suggested are not acceptable equivalents, as they are not interchangeable. As a matter of fact, each term highlights a different legal matter. An inexperienced translator could thus be confused by the variety of options and his or her client can only hope that s/he will not choose a translation at random. Rather than doing this, in order to determine the right equivalent to use, a translator may then resort to online fora.

IV. Fora

Internet fora are virtual places where surfers share their knowledge and opinions. Wordreference is a widely-used Internet forum where members submit their queries on English or other languages (mostly Spanish, Italian

¹⁶ G.R. De Groot G.R. and C.J.P. Van Laer, n 1 above, 12.

¹⁷ Ibid.

¹⁸ S. Šarčević, ‘Conceptual Dictionaries for Translation in the Field of Law’ *International Journal of Lexicography*, 229 (1989).

¹⁹ Collins (free), available at <http://www.collinsdictionary.com>; Hoepli (free), available at <http://dizionari.repubblica.it>; IATE, available at <http://iate.europa.eu>; Il Ragazzini 2016 Zanichelli (paid with annual subscription), available at <http://ubidictionary.zanichelli.it>; Il Sansoni, Corriere della Sera (free), available at <http://dizionari.corriere.it/>.

and French).²⁰ It is considered helpful as ‘the community collectively creates knowledge and actively participates in argumentation’.²¹ However, as far as technical translations are concerned, general fora like this are not always advisable. Professional fora (ie, fora where professionals meet to discuss technicalities), such as Proz or Translatorscafé are, to some extent, more reliable. Table 2 records the results obtained from these three fora for the test phrase *risoluzione (del contratto)*:

Table 2: Fora²²

| Legal matter (Italian) | Wordreference | Proz | Translatorscafé |
|------------------------------------|--|--------------------------------|-----------------|
| <i>Risoluzione (del contratto)</i> | Termination/ cancellation/ rescission (<i>sic</i>) | Termination of the contract | Termination |

In order to clearly understand the wide variety of the legal matters encompassing each of the above terms, a translator might seek further clarification from professional or institutional websites.

V. Professional and Institutional Websites

While professional or institutional monolingual websites may be a useful resource for translators, it takes effort to understand how and where to find such resources. On the Internet, there are numerous websites available, containing glossaries and/or legal definitions. Furthermore, as outlined above, legal systems vary greatly from country to country (if not within one nation), as well as legal matters. There are many legal issues revolving around the term *contract*, including, for example, those involving sales contracts, insurance contracts, and employment contracts, and it may not be easy to clearly distinguish terms among them. Therefore, looking for definitions on professional or experts’ websites can be time-consuming and can lead translators astray if they are not careful. As an example, consider an effort to research the differences (if any) between the terms *termination*, *cancellation* and *rescission*. The results are shown in Table 3 and highlight how confusing this sort of search might be.

²⁰ K. Maleewong, C. Anutariya, V. Wuwongse, ‘Is Vote Effective? An Empirical Study of Community Deliberation in Social Webs’, in D.K.W. Chiu, L. Bellatreche et al eds, *Web Information Systems Engineering – WISE 2010 Workshops* (Berlin, Heidelberg: Springer-Verlag, 2011), 171-183.

²¹ Ibid 174.

²² Wordreference: www.wordreference.com; Proz: www.proz.com/forum; Translatorscafé: www.translatorscafe.com.

Table 3: Professional Websites

| Websites | What and where | Termination | Cancellation | Rescission |
|------------------------------|--|--|---|---|
| Translegal.com ²³ | Private legal English courses and resources provider. Sweden | Termination refers to the ending of a contract, usually before the natural end of the anticipated term of the contract, which may be by mutual agreement or by exercise of one of his remedies due to the default of the other party. | Cancellation refers to the ending of a contract by destroying its force, validity, or effectiveness. Generally, cancellation puts an end to a contract by discharging the other party from obligations as yet unperformed, usually because the other party has breached or defaulted. | Rescission refers to the act, process of rescinding (ie undoing or unmaking) a contract. More specifically, it refers to the right of a parties involved within a contract to return to the identical state as before they entered into the agreement. |
| Anglofon.com ²⁴ | Private legal translation provider for the EU market. Hungary | A contract can come to an end for the future, <i>ex nunc</i> , meaning from now. In this case one or both parties decide not to maintain the contractual relationship but put an end to it. In this case, the contractual relationships is said in English to be terminated. | This is an unmaking of the contract, where the parties are restored to the original condition as if they had never entered into a contract. Either party can cancel a contract without the consent of the other party. | This is an unmaking of the contract, where the parties are restored to the original condition as if they had never entered into a contract. Rescission requires some action of the other party. Either a judicial decision or an order under equity, or simply a consent of the other party to ending the contractual relationship, depending on the law. |

²³ Translegal: <https://www.translegal.com/lesson/7035> (last visited 6 December 2016).

²⁴ Anglofon.com: <http://anglofon.com/difference-between-termination-and-cancellation> (last visited 6 December 2016).

| | | | | |
|-------------------|---|---|---|---|
| UCC ²⁵ | Uniform Commercial Code. USA | ‘Termination’ occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. | ‘Cancellation’ occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of ‘termination’ except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance. | (unclear) expressions of (...) ‘rescission’ of the contract (...) shall not be construed as a renunciation or discharge of any claim. |
| Drukker.co.uk | Solicitors’ firm UK | <i>Termination by agreement:</i> Where both parties consent, the mutual obligations to perform contractual obligations will come to an end. <i>Termination by breach:</i> When a breach of contract takes place, the innocent party has the option of either accepting the breach and terminating the contract or suing for damages. <i>Termination by frustration:</i> Discharge by frustration occurs where it is impossible to | - | - |

²⁵ UCC: Act 174 of 1962 available at https://www.michigan.gov/documents/entireucbbook_18831_7.pdf (last visited 6 December 2016) courtesy of www.legislature.mi.gov.

| | | | | |
|--------------------|--|---|--|---|
| | | perform the obligations under a contract due to a subsequent change in circumstances. | | |
| Acts ²⁶ | Consumer Credit Act 1974; The Consumer Contracts Regulations 2013 UK | The debtor (...) may by notice terminate the agreement, free of charge, at any time, subject to any period of notice. (Consumer Credit Act 1974) | The consumer may cancel (...) at any time in the cancellation period without giving any reason, and without incurring any liability except under these provisions: (a)(where enhanced delivery chosen by consumer); (b)(where value of goods diminished by consumer handling); (c)(where goods returned by consumer); (d)(where consumer requests early supply of service). (Consumer Contracts Reg 2013) | - |

It is clear that the terms and their explanations differ greatly. Some similarities can however be found, at least among some sources. On the basis of the explanations provided by the European translation firms and the

²⁶ UK Acts: The consumer contracts regulations 2013 available at http://www.legislation.gov.uk/uksi/2013/3134/pdfs/uksi_20133134_en.pdf (last visited 6 December 2016); Consumer Credit act 1974 available at http://www.legislation.gov.uk/ukpga/1974/39/pdfs/ukpga_1974039_en.pdf (last visited 6 December 2016).

UCC, it is possible to infer that *risoluzione* is best translated as *cancellation*, while *termination* can refer to any other *interruption* of a contract. Although resorting to professional websites might seem to provide the necessary information, such research can be extremely time-consuming. Furthermore, an inexperienced translator must have some knowledge of the source legal system, in order not to commit translation mistakes or misinterpret texts. It is also clear that research on these professional websites must be focused, in order to understand the specificity of the legal matter and apply the correct equivalent term.

In light of the above, a legal translator may seek to resort to European institutional websites, which may have already resolved the translation differences of the legal systems of the EU member states. Searching in European institutional websites may be likely to be more fruitful, given that each EU citizen is supposed to have access to the EU laws in his/her own language.²⁷ Commentators argue that the European Union has access to the world's largest translation service.²⁸ Eur-lex™ is the European database of the EU law and publications, with translations in all European languages. Although this might seem a panacea for all the problems outlined above, some pitfalls remains. For instance, if one looks, again, for *risoluzione del contratto* in the Eur-lex™ database, both in Italian and in the corresponding English texts, the information retrieved is unfortunately inconsistent (Table 4):

Table 4 : Eur-lex™ (Italian-English)

Source Italian English

| | | |
|--|------------------------------------|-------------------------|
| Judgment of the Court (Third Chamber) - 1 June 1995 ²⁹ | <i>Risoluzione di un contratto</i> | Termination of contract |
| Judgment of the Court (Second Chamber) - 12 October 2004 ³⁰ | <i>Risoluzione (contratto)</i> | (contract) cancellation |

²⁷ R. Rotman, n 1 above, 191.

²⁸ R. Huntington, 'European Unity and the Tower of Babel' 9 *Boston University International Law Journal*, 321-348 (1991).

²⁹ Case C-42/94 *Heidemij Advies BV v European Parliament* (European Court of Justice Third Chamber 1 June 1995), available at www.eur-lex.europa.eu.

³⁰ Case C-55/02 *Commission of the European Communities v Portuguese Republic* (European Court of Justice Second Chamber 12 October 2004), available at www.curia.europa.eu.

| | | |
|--|----------------------------------|----------------------------|
| Proposal for a regulation of the European parliament and of the council 2011 ³¹ | <i>Risoluzione del contratto</i> | The contract is terminated |
| Judgment of the court (First Chamber) - 3 October 2013 ³² | <i>Risoluzione del contratto</i> | Rescission of the contract |

Clearly even institutional resources cannot always be reliable. Moreover, when trying a reverse translation, other misleading peculiarities arise, as shown in Table 5, where words such as *terminate*, *rescission* and *cancellation* were searched in the Eur-lexTM database:

Table 5: Eur-lexTM (English-Italian)

Source English Italian

| | | |
|--|--|---|
| Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 ³³ | cancellation | <i>risoluzione</i> |
| Judgment of the Court (Second Chamber) - 12 October 2004 ³⁴ | -a contract may be <u>terminated</u> -shall not <u>terminate</u> the -rescission | - <i>il contratto può cessare</i> - <i>non pone termine a</i> - <i>revoca</i> |
| Judgment of the Court (First Chamber) of 17 December 2009 ³⁵ | cancellation of a contract | <i>recesso dal contratto</i> |

³¹ Proposal for a regulation of the European parliament and of the council on a common European Sales Law /* com/2011/0635 final - 2011/0284 (cod), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011PC0635> (last visited 6 December 2016).

³² Case C-32/12 *Soledad Duarte Hueros v Autociba SA* (European Court of Justice First Chamber 3 October 2013), available at www.curia.europa.eu.

³³ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

³⁴ Case C-55/02, n 30 above.

³⁵ Case C-227/08 *Eva Martín Martín v EDP Editores SL* (European Court of Justice First Chamber 17 December 2009), available at www.eur-lex.europa.eu.

| | | |
|--|---|---|
| Judgment of the Court (Grand Chamber) of 13 September 2011 ³⁶ | -termination <u>-termination</u> | -cessazione <u>-risolvere il contratto</u> |
| Judgment of the Court (First Chamber) of 8 December 2011 ³⁷ | cancellation of a contract | <i>annullamento di un contratto</i> |

It is apparent that the same lemma (in this case: terminate) can be given different translations within the same source (*cessare*, to cease; *porre termine*, to end and *risolvere*, to terminate or to cancel, respectively). It could be argued that the translation renderings of *risoluzione del contratto* take into account the types and functions or purposes of documents from which they are sourced. Nonetheless, translators may encounter difficulties in choosing the right equivalent. At the beginning of the EU era, many scholars argued that translation imprecision (or variety) in EU texts was due to a lack of proper experience, training and coordination among EU translators, asserting, for example that:

(there were) ‘two problems for drafting in the Commission: the continued rise of bad English as the Commission’s *lingua franca*, and the massive influx of new staff who naturally adopted the prevailing in-house style, rather than trying to reform it’.³⁸

In addition Annarita Felici³⁹ argues that the first texts translated into English were sourced from French. Therefore, the terminology and drafting style were not only influenced by that particular Romance language, but they were also based on the continental legal tradition. It could, however, also be argued that this imprecision or translation variety stems from the variety in types and purposes of documents for wider use in EU legal communication, as well as in-house, institutional policy. Alternatively, this sort of imprecision

³⁶ Case C-447/09 *Reinhard Prigge and Others v Deutsche Lufthansa AG* (European Court of Justice Grand Chamber 13 September 2011), available at www.eur-lex.europa.eu.

³⁷ Case C-275/10 *Residex Capital IV CV v Gemeente Rotterdam* (European Court of Justice First Chamber 8 December 2011), available at www.eur-lex.europa.eu.

³⁸ E. Wagner, ‘Why Does the Commission Need a Clear Writing Campaign’, in A. Pereira ed, *Languages and Translation: Clear Writing, European Commission Directorate-General for Translation*, 4 (2010), available at http://ec.europa.eu/dgs/translation/publications/magazines/languagestranslation/documents/issue_01_en.pdf (last visited 6 December 2016).

³⁹ A. Felici, ‘Translating EU Legislation from a Lingua Franca: Advantages and Disadvantages’, in S. Šarčević ed, *Language and Culture in EU Law* n 2 above, 123-140.

might be caused by the blind competence of a translation machine. Many are, in fact, the researchers who demonstrate how machine translation can give rise to a variety of mismatches.⁴⁰ The discrepancies encountered in the EU institutional websites are unfortunately mirrored in the IATE™ (InterActive Terminology for Europe) free online dictionary. The IATE™ dictionary defines itself as

‘the EU’s inter-institutional terminology database (...) (which) has been used in the EU institutions and agencies since summer 2004 for the collection, dissemination and shared management of EU-specific terminology.’⁴¹

Many scholars claim that inconsistent terminologies can still be found in the IATE™ database,⁴² ‘at both the level of the term and the concept’.⁴³ As a matter of fact, even after selecting *law* as the field of expertise in the IATE™ drop-down menu, the following options are found (Table 6):

Table 6: IATE™ (Italian-English)

| | |
|---------------------------------------|---|
| <i>Risoluzione di (del) contratto</i> | Termination of a contract Rescission of a contract Dissolution of the contract Rescinding the contract Cancellation of (lease) End of (franchise) contract |
|---------------------------------------|---|

This further demonstrates that (online) dictionaries are not always reliable. Furthermore, there is a clear need for improvements in the translation database of the European institutions. Thus Barbara Pozzo⁴⁴ advocates for the creation of a common European terminology as developed in the Draft Common Frame of Reference (DCFR), which employs a neutral English associated with uniform EU terminology.

⁴⁰ K. Eberle, W. Kasper and C. Roher, ‘Contextual Constraints for Mt’ 4th International Conference on Theoretical and Methodological Issues in Machine Translation (Montreal, 1992); A. Doug, ‘Why Translation Is Difficult for Computers’, in H.L. Somers ed, *Computer and Translation: A Handbook for Translators* (Amsterdam: John Benjamins, 2000); I. Mel’čuk and L. Wanner, ‘Syntactic Mismatches in Machine Translation’ 20 *Machine Translation*, 81-138 (2006); Id, ‘Morphological Mismatches in Machine Translation’ 22 *Machine Translation*, 101-152 (2008).

⁴¹ [Http://iate.europa.eu/about_IATE.html](http://iate.europa.eu/about_IATE.html) (last visited 6 December 2016).

⁴² M. Bratanić and M. Lončar, ‘The Myth of EU Terminology Harmonization on National and EU Level’, in S. Šarčević ed, *Language and Culture in EU Law* n 2 above, 207-218.

⁴³ S. Šarčević, n 2 above, 12.

⁴⁴ B. Pozzo, n 2 above, 73-90.

VI. Corpora

As demonstrated above, searching for legal words in dictionaries and in professional or institutional websites might be both unreliable and time-consuming. Research has shown that translators spend up to fifty percent of their time on consulting reference resources.⁴⁵ Accordingly, translators would benefit from more effective ways to find equivalents, and to overcome the challenges outlined above. One way to deliver accurate and reliable translations is by using corpora. A corpus (plural: corpora) is a 'body of language representative of a particular variety of language or genre which is collected and stored in electronic form'.⁴⁶ According to some scholars, the uptake of corpora among professional translators seems to be quite slow⁴⁷ and there is a need to offer translators training in order to know and understand the full potentialities of corpora. Other scholars, however, argue that corpora were used by translators even before the advent of online corpora⁴⁸ and are now increasingly more popular.⁴⁹ Corpora are powerful resources because they can complement dictionaries and overcome the problems arising from the mismatches highlighted above. In online monolingual corpora translators can run queries and find concordance lines showing collocations, colligations, recurrent terms, clusters and even synonyms (although synonyms can be unreliable in a legal context). Concordance lines are phrases where the terms sought appear.⁵⁰ Collocations are words or phrases which frequently appear together. Colligations show the co-occurrence of grammatical categories (eg, verbs followed by adverbs),⁵¹ which are of paramount importance, especially for non-native speakers. Clusters are sequences of words that are frequent, in this case, in legal texts.⁵² Thus it is evident that corpora can contribute to an accurate translation work, as translators can see the words in context and understand whether the terms they choose are perfect or suitable equivalents. There are a number of corpora covering legal matters, including the British National Corpus™ (BNC),⁵³ the

⁴⁵ K. Varantola, n 8 above, 179-192.

⁴⁶ T. McEnery, *Corpus Linguistics: Some Key Terms* (Lancaster: The ESRC Centre for Corpus Approaches to Social Sciences, 2013), 5.

⁴⁷ L. Bowker, 'Corpus Resources for Translators: Academic Luxury or Professional Necessity?' 10 *TradTerm*, 213 (2004).

⁴⁸ F. Zanettin, 'Bilingual Comparable Corpora and the Training of Translators' 43(4) *Meta: Translators' Journal*, 616-630 (1998).

⁴⁹ V. Pastor and A. Alcina, 'Search Techniques in Corpora for the Training of Translators' *Proceedings of the Workshop on Natural Language Processing Methods and Corpora in Translation, Lexicography, and Language Learning*, Association for Computational Linguistics, 13-20 (2009).

⁵⁰ *Ibid* 19; T. McEnery, n 46 above, 4.

⁵¹ T. McEnery, n 46 above, 4.

⁵² V. Pastor and A. Alcina, n 49 above, 19.

⁵³ British National Corpus™, available at <http://corpus.byu.edu/bnc/> (last visited 6

Corpus of Contemporary American English^{TM54} and Lextutor^{TM55}, where it is possible to select a legal subcorpus in a drop-down menu. The BNCTM is often claimed to be outdated and non-representative.⁵⁶ However, for a first-time translator without a wide array of translation tools available, these corpora can at least provide a good starting point. There are several ways in which a corpus can be helpful to translators. For example, when searching for 'terminate' in the LextutorTM corpus, the following concordance line appears:

'It is not in (the seller's) interest to terminate the contract prematurely, nor would he wish to give the buyer the opportunity to do so. The seller might wish to cancel the contract if it proves too difficult or costly to perform.'

This excerpt makes it clear that *cancellation* is a suitable equivalent of *risoluzione*, particularly, in the case of hardship and over-expenditure. Another useful corpus is the Bononia Legal CorpusTM (BoLC),⁵⁷ which is a parallel corpus, composed of two subcorpora: Italian and English. When searching for *contract termination* in the English subcorpus, the following concordance line appears:

'compensation for loss of office, payments for breach of contract and other termination.'

From this search result, it can be understood that *termination* is a legal matter which does not encompass the case of breach of a contract. Therefore, it would likely not be a suitable equivalent of *risoluzione*. Although such findings can provide certainty, reading entire concordance lines may be time consuming for a translator, as s/he would have to read many of them before grasping the exact meaning of words or finding suitable equivalents. However, aligned bilingual corpora may provide a solution. Aligned corpora are essentially composed of two corpora: a corpus containing the source texts and a corpus containing their translations. Aligned bilingual corpora can clearly provide translators with the most reliable translation equivalents.⁵⁸ Not only can users understand the word(s) in context, but they can also verify the proposed equivalent(s) directly in the target language and in the target context. The European institutions are also leaders in the area of

December 2016).

⁵⁴ Corpus of Contemporary American EnglishTM, available at <http://corpus.byu.edu/coca/> (last visited 6 December 2016).

⁵⁵ Lexical TutorTM, available at <http://lextutor.ca/conc/eng/> (last visited 6 December 2016).

⁵⁶ F. Zanettin, n 9 above, 241.

⁵⁷ Bononia Legal Corpus – BoLCTM: <http://corpora.dslo.unibo.it/BOLCCorpQuery.html> (last visited 6 December 2016).

⁵⁸ V. Pastor and A. Alcina, n 49 above, 18.

aligned bilingual corpora. There are aligned corpora at EU level, including the European Central Bank,⁵⁹ the European Constitution⁶⁰ and the European Parliament Proceedings⁶¹ aligned corpora. Table 7 provides some examples.

Table 7: EU bilingual corpora

Type of corpus Italian English

| | | |
|---------------|---|--|
| EU Centr.Bank | <i>Risoluzione del contratto</i> | Termination |
| EU Const. | <u><i>Risoluzione del contratto di lavoro</i></u> | (their) employment contract is <u>terminated</u> |
| EU Parl.Proc. | <i>Risoluzione del contratto</i> | <u>Rescission</u> of contract <u>termination</u> of the contract <u>cancellation</u> of the contract |

Clearly, the EU aligned corpora do not overcome the issues demonstrated above in the EU dictionaries and monolingual corpora. Moreover, a reverse query will unfortunately provide the same mismatches (Table 8):

Table 8: EU bilingual corpora

Type of corpus English Italian

| | | |
|---------------|--|---|
| EU Centr.bank | <u>Termination</u> of a (framework) contract | <u>Rescissione di un contratto (quadro)</u> |
| EU Centr.bank | Early <u>termination</u> of a contract | <u>Risoluzione anticipata del contratto</u> |

The results of this search reinforce the findings described above, that major interventions are called for in the linguistic database of the EU institutions. Although a corpus can be a reliable tool for accurate translations, it ‘can’t tell us what’s possible or correct or not possible or incorrect in language; it can only tell us what is or is not present in the corpus’.⁶² This is thus a limit of using a monolingual or a bilingual corpus as a translation tool, which

⁵⁹ European Central bank: <http://opus.lingfil.uu.se/ECB.php> (last visited 6 December 2016).

⁶⁰ European Constitution: <http://opus.lingfil.uu.se/cwb/EUconst/frames-cqp.html> (last visited 6 December 2016).

⁶¹ European Parliament proceedings: <http://opus.lingfil.uu.se/cwb/Europarl7/frames-cqp.html> (last visited 6 December 2016).

⁶² G. Bennet, *Using Corpora in the Language Learning Classroom: Corpus Linguistics for Teachers* (Ann Arbor, Michigan: The University of Michigan Press, 2010), 3.

translators must always keep in mind.

After consulting dictionaries, fora, professional websites and corpora, the question of a suitable equivalent of *risoluzione del contratto* still remains unanswered. *Contract cancellation* provides a weak solution, but more painstaking research is called for, before it can be deemed a suitable equivalent. It is thus clear that the digital tools available online can often be confusing.⁶³ As a consequence, either inexperienced or professional translators should be taught how to skim the information they find online⁶⁴ and how to take a critical approach to the translation solutions found on the Internet.

VII. Conclusion

Each country is characterized by a different linguistic, cultural and legal system.⁶⁵ Therefore, legal translations entail a certain level of system specificity and are not only challenging from a linguistic point of view, but also from a legal point of view.⁶⁶ Taking this into consideration, this paper aimed to verify whether legal translators could find online resources to provide accurate and reliable equivalents of legal terms. As an example, the paper demonstrated a search of the suitable equivalent(s) of the Italian cluster *risoluzione del contratto*. This search showed that finding a satisfactory translation of the cluster by using online resources is far from an easy task to accomplish. This was due to the inaccuracy of general online dictionaries, the unreliability of fora (which may not be implemented by professionals) and translator's lack of familiarity with corpora. Further, the difficulties in finding accurate equivalents were aggravated by some mismatches in EU documents. The EU online databases and language resources (which range from online dictionaries to monolingual and bilingual corpora) are in need of some improvements.⁶⁷ These findings are rather daunting, especially those at the EU level. In the EU all laws are translated in the national languages of the member states. Therefore, users should have access to a vast and accurate linguistic database. What this study demonstrated, instead, was the unexpected imprecision of the EU's tools, although the creation of a common European terminology (namely, the Draft Common Frame of Reference) is in sight.⁶⁸ There is thus a need for major improvements, in order to offer translators more reliable resources. This paper also highlighted

⁶³ F. Zanettin, n 9 above, 239-48.

⁶⁴ W. Fletcher, 'Concordancing the Web with KWICFinder', presentation given at the Third North American Symposium on Corpus Linguistics and Language Teaching, Boston, 23-25 (2001).

⁶⁵ S. Šarčević, n 2 above.

⁶⁶ R. Rotman, n 5 above, 187-196; G.R. De Groot and C.J.P. Van Laer, n 1 above.

⁶⁷ R. Huntington, n 28 above, 321-348; R. Rotman, n 5 above, 187-196.

⁶⁸ B. Pozzo, n 2 above.

the importance of training translators on how to skim the information sourced online and on how to use monolingual and aligned corpora in order to tackle the issues outlined above. Corpora have a great deal of potential, provided that the texts which they are based on are reliable, but this potential is still unrecognized by translators.⁶⁹ The improvements recommended above are mandatory, in order to reduce the time spent on Internet research and to provide translators with accurate resources.

⁶⁹ L. Bowker, n 47 above, 213-247 (2004).

Carolene in Reverse **Contractual Interpretation for Dismantling** **the Dictatorship of ‘Discrete and Insular Minorities’** **in Transnational Private Ordering Regimes***

Pasquale Femia**

*Nor need we enquire whether similar considerations enter into the review of **statutes**^a directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. 284, or racial **minorities**^b, *Nixon v. Herndon*, supra; *Nixon v. Condon*, supra: whether prejudice **against**^c discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect **minorities**^d, and which may call for a correspondingly more searching judicial inquiry. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 184, n 2, and cases cited’.*

United States v Carolene Products Co. (No. 640), 304 U.S. 144, fn 4 (Argued: April 6, 1938; Decided: April 25, 1938; 7 F. Supp. 500, reversed)

^a [what if we read: ‘private ordering’?]

^b [what if we add: ‘and every other weak community’?]

^c [what if we read: ‘caused by’?]

^d [what if we read: ‘diffuse and unorganized majorities’?]

I. In his profound and brilliant analysis, Dan Wielsch leads us to a turning point in the theory of contractual interpretation. Neither text nor context, neither textualism nor contextualism represent the core question but the fine acknowledgment and construction of the adequate institutional structures in which the ‘interaction system’, mediated by contractual *semiosis*, occurs. The methodological imperative of an institutionalized interpretation rings out

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‘follow the institution!’. Thus, if in the classical model ‘text replaces context’, in the ongoing process of bargaining (the premise of every institutional theory) ‘augmented context is reintroduced into text’.¹

According to the threefold levels’ contract theory elaborated by Gunther Teubner,² Dan Wielsch highlights that

‘The words of the contract are not just afforded meaning by the parties. They also constitute a communication within the legal system, eventually being subject to the interpretative acts of a nation state’s legal organs. In fact, this simultaneity of relevance for a plurality of systems of meaning production lays the ground for the social function of contracts. It provides the concrete personal relation – that forms a social interaction system – with the capacity of the law as a highly differentiated calculus of justice determinations’.³

Within this interlaced scriptural design, we are now invited to distinguish between established and rising institutions; the former needs an ‘institution-preserving interpretation’, the latter an ‘institution-creating’ one. In the author’s words, when

‘institutional context for certain types of transactions is well-established and its main normative features are known, then courts should apply an institution-preserving interpretation’.

When, on the contrary,

‘the institutional context required for a specific transaction or project may still have to evolve and its normative requirements may still have to be elucidated’,

‘an institution-creating interpretation would instead have to acknowledge the primarily societal character of institutional development and would have to facilitate innovative contractual practice in shaping a socially responsible institutional arrangement for novel types of

¹ D. Wielsch, ‘Interpretation Regimes’, unpublished manuscript on file with the author, respectively at 1 and 3.

² G. Teubner, ‘In the Blind Spot. The Hybridization of Contracting’ 7 *Theoretical Inquires in Law*, 51-71, 52 (2006): ‘Today’s individual contract today typically breaks down into several operations within different contexts: (1) an economic transaction which, recursively intermeshed in accordance with the intrinsic logic of the economy, changes the market situation, (2) a productive act which, in accordance with the intrinsic logic of the relevant social context (e.g. medicine, media, science, art, technology, and other social areas where goods and services are produced) changes the productive situation, and (3) a legal act which, recursively intermeshed with other legal acts in accordance with the intrinsic logic of the law, changes the legal situation’.

³ D. Wielsch, n 1 above, 2.

cooperation'.⁴

Here, interpretation is a way of constructing (or almost strengthening) a rising institution.

Private autonomy – traditionally focusing on State law conceptual assessment – is an established institution; we must preserve it through an interpretation principally oriented to restoring the regulative ruptures grounded in the inequality of bargaining power. From this basically State-centered point of view, the private transaction, standard contract⁵ and even collective agreements all flow in the same direction, that of institution-preserving interpretation. The other side of this institution – the most uncertain, that of the still not (completely) emerged institution – is transnational private ordering. Here 'interpretation through state legal organs is thus forced to respect the institutional imperatives of the transnational creative community'.⁶

II. Dan Wielsch's shift from *text/context* to *preserving/creating institution* is the way forward for contractual theory. It involves deep theoretical developments and raises some radical questions. Interpretation rules are rightly conceived as a way of preserving the autonomy of societal subsystems and as a necessary means by which to regulate the bargaining process (one gamer in a multiple player contract-writing game).

Here is the first question in this process:

Observations. How can we observe each institution's movements? Institutions are being observed during their shaping and reshaping of themselves and we preserve (or construct) them somewhat through our observations. Therefore, Wielsch's analysis clearly demonstrates that when they refer to contract interpretation, epistemic and institutional moments are held in pragmatic unity. Knowledge and policy go together.

The second question concerns *power structures* (courts, governments, non-governmental organizations, strong and organized or weak and diffuse communities). If 'institutional context' is the sub-system in which the private norm emerges (the specific area of private ordering), we must consider the complexity of regulatory powers that factually adjudicate every semantic contractual battle between the parties as a fragment of the whole. The design of this empowerment produces the semantic space, the event of signification.

⁴ Ibid 16-17.

⁵ Here 'the fairness test emulates the missing discourse as if it had happened: the counterparty is only subject to the standard terms if they stipulate rights and duties that would at minimum result from actual discourse. A fairness test for standard contract terms thus operates as a public rule of recognition for a special type of private regulation that is prone to neglect environmental reference': Ibid 7.

⁶ Ibid 16.

Institutions result in a multiple set of practices and semiotic codes, mutually connected in an ongoing process.

But this is the point; the process selects its outputs because the process itself takes the form of an institution. No content arises spontaneously but always in a specific institutional space. Therefore, no institution is neutral and defining the structure of possibility for human events is its proper function.

The confluence of an epistemic question ('how much should I know before judging?') and of a political one ('how should I see the future of the interaction process that this contract shapes and by which this contract is mutually reshaped?') reveals the great paradoxical status of interpretation; it occurs in the *is/ought* divide but locates itself in the blind spot of this divide, in which its inner structure requires its self-crossing or almost its suspension. Echoing Giorgio Agamben,⁷ we could say that interpretation introduces a permanent state of exception in the 'jurisgenesis' (in Robert Cover's sense).⁸ Nevertheless, it seems clear that it is better to locate the interpretation theory at the same level as the complex multiple game named *contractual semiosis*.

Both standard contracts and for instance, transnational contracts under master agreements by private institutions such as the ISDA (International Swaps and Derivatives Association) are 'polyphonic':⁹ their terms derive from multiple writers (legal firms, boards of experts, courts). Every contract is a fragment of a complex architecture. Here is the hard work; regulating contracts by contractual tools (master agreements simulate and regulate future contracts and consequently private regulatory institutions are also contracts). The difference between old and new contractual spaces exists in their scale and vagueness.¹⁰

Hence, we come to the (perhaps surprisingly) third question; *contractual*

⁷ G. Agamben, *State of Exception*, translated by K. Attell (Chicago: Chicago University Press, 2005), 7 (state of exception as 'paradigm of government').

⁸ R. Cover, 'Nomos and Narrative' 97 (4) *Harvard Law Review*, 4-68, 50, fn 137 (1983): 'Jurisgenesis is a process that takes place in communities that already have an identity'.

⁹ In the sense mediated by M. Bakhtin, *Problems of Dostoevsky's Poetics*, edited and translated by C. Emerson (Minneapolis: University of Minnesota Press, 1984), 9 (author's emphasis): 'A plurality of independent and unmerged voices and consciousnesses, a genuine polyphony of fully valid voices is in fact the chief characteristic of Dostoevsky's novels'. What unfolds in his works is not a multitude of characters and fates in a single objective world, illuminated by a single authorial consciousness; 'rather a plurality of consciousnesses, with equal rights and each with its own world, combine but are not merged in the unity of the event'; so 'The essence of polyphony lies precisely in the fact that the voices remain independent and, as such, are combined in a unity of a higher order than in homophony' (Ibid 21).

¹⁰ Perhaps in their degree of the five requirements for a generative system, according to Jonathan Zittrain's argument: leverage, adaptability, ease of mastery, accessibility, transferability. However, the problem has common roots. J. Zittrain, *The Future of Internet and How to Stop It* (New Haven and London: Yale University Press & Penguin UK, 2008), 71-73; Id, 'The Generative Internet' 119 *Harvard Law Review*, 1974, 1980-1982 (2006).

structural violence against weak majorities. The generation of any institutional context (either old or new but especially if it is a developing one) is not a one-way street to a unique solution. By virtue of their power, mediated as it is by contracts, few masters of (contractual) writing can manage this process in their own best interest. As a societal autonomous phenomenon, private ordering at an institutional transnational level is a matter of complexification of power, the next stage of the normative process constructed by standard contractual terms.¹¹

III. We are confronted with a position, which is the reverse of the doctrine expressed in the celebrated *footnote 4* in the United States Supreme Court's *Carolene Products* case.¹² There the objective was to protect 'discrete and insular minorities' from a legislative process that had neglected their interest despite democracy. Now the question is about protecting unorganized and weak majorities (of actual or potential contractual parties) from the scriptural power of an organized minority of private regulators. The method is based on an ambivalent conviction; not only is private ordering the key to regulate complex contracting ('in private ordering we *trust*'), but is also a permanent factor of hegemonic disruption ('in private ordering we *distrust*').¹³

Dan Wielsch first noticed the reverse polarity of private ordering in his essay *Global Law's Toolbox*.¹⁴ In search of a criterion for 'developing public rules of recognition', he warns that 'recognition of private normative orders requires some form of representation of the interests affected';¹⁵ he insists on the necessity of a 'right to opt out' of the private legal order and advocates a

¹¹ Every social space mediated by exchange (therefore, by money) is a contractual space of mutual action. Every semiotic in a contractual space is a structure for a granted endless exchange. 'As has been stated, the greater the number of traders engaged in the same kind of a transaction, the more likely the contracting infrastructure will be provided jointly as a club or industry-specific public good by a trade association alone or in collaboration with public authorities': D. Wielsch, 'Interpretation Regimes' n 1 above, 13. 'Public' is not the same as 'common'. Interpretation distances the common dimension of contract from its public dimension.

¹² *United States v Carolene Products Co.* (No. 640), 304 U.S. 144, fn 4. See J.M. Balkin, 'The Footnote' 83 *Northwestern University Law Review*, 275-320 (1989); B. Ackerman, 'Beyond Carolene Products' 98 *Harvard Law Review*, 713-746 (1985); L. Weinberg, 'Unlikely Beginnings of Modern Constitutional Thought' 15 *Journal of Constitutional Law*, 291-330 (2012); D.A. Strauss, 'Is Carolene Products Obsolete?' 4 *University of Illinois Law Review*, 1251-1269 (2010).

¹³ We see the classic Ely model, according to which the purpose of constitutional law 'has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of the majority rule' (J. Hart Ely, *Democracy and Distrust. A Theory of Judicial Review* (Cambridge MA: Harvard University Press, 1981), 8) as part of a more complex model, that regulates the danger of tyranny on each side (majority and minority) of social systems.

¹⁴ D. Wielsch, 'Global Law's Toolbox: Private Regulation by Standards' 60 *The American Journal of Comparative Law*, 1075-1104 (2012).

¹⁵ *Ibid* 1096.

reflexive ‘compliance with *ordre public*’.¹⁶ The public rules of recognition show us all, therefore, the many faces of private ordering. Wielsch’s critical approach lends itself to wide critical analysis. The mutual transformation of State law and private ordering in this struggle for recognition occurs in the shadow of structural violence and structural empowerment.

This time, the *Carolene*’s salvation by distrust finds itself at the segmented system, that of interaction between the parties, whose content is repeatedly at risk of being hegemonized by a dominant internal group. Interpretation becomes here the least dangerous branch (in a paradoxical version of Alexander Bickel’s formula)¹⁷ for diffuse and unorganized weak majorities as contractual parties to restore the balance of power.

The only strategy is: Beware of powerful minorities! Private ordering lives always in dark times; the institutions of private regulation are permanently in danger of falling under the dictatorship of discrete and insular transnational minorities.¹⁸

With a ‘*Carolene* in reverse’ approach like that, we can hope to reach democracy (or constitutionalization) by distrust.

¹⁶ Ibid 1096-1100.

¹⁷ A. Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1962). With Bickel’s formula things also go backwards. His ‘countermajoritarian difficulty’ becomes a ‘contermajoritarian remedy’.

¹⁸ See (but exclusively with reference to racial questions) G.J. Chin and R. Wagner, ‘The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty’ 43 *Harvard Civil Rights-Civil Liberties Law Review*, 65-125 (2008).

Appendix: A Tribonian's Game

| Carolene Footnote 4 | Carolene reframed (interpolated) for a global contracting world |
|--|--|
| <p>Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, <i>Pierce v. Society of Sisters</i>, 268 U.S. 510, or national, <i>Meyer v. Nebraska</i>, 262 U.S. 390; <i>Bartels v. Iowa</i>, 262 U.S. 404; <i>Farrington v. Tokushige</i>, 273 U.S. 284, or racial minorities, <i>Nixon v. Herndon</i>, <i>supra</i>; <i>Nixon v. Condon</i>, <i>supra</i>: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare <i>McCulloch v. Maryland</i>, 4 Wheat. 316, 428; <i>South Carolina v. Barnwell Bros.</i>, 303 U.S. 177, 184, n 2, and cases cited.</p> <p><i>United States v Carolene Products Co.</i> (No. 640), 304 U.S. 144, footnote 4 (Argued: April 6, 1938; Decided: April 25, 1938; 7 F. Supp. 500, reversed)</p> | <p>Nor need we enquire whether similar considerations enter into the review of private ordering directed at particular religious, <i>Pierce v. Society of Sisters</i>, 268 U.S. 510, or national, <i>Meyer v. Nebraska</i>, 262 U.S. 390; <i>Bartels v. Iowa</i>, 262 U.S. 404; <i>Farrington v. Tokushige</i>, 273 U.S. 284, or racial minorities and every other weak community, <i>Nixon v. Herndon</i>, <i>supra</i>; <i>Nixon v. Condon</i>, <i>supra</i>: whether prejudice caused by discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect diffuse and unorganized majorities, and which may call for a correspondingly more searching judicial inquiry. Compare <i>McCulloch v. Maryland</i>, 4 Wheat. 316, 428; <i>South Carolina v. Barnwell Bros.</i>, 303 U.S. 177, 184, n 2, and cases cited.</p> |

Some Inconvenient Truths About Antitrust Law and Economics

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Abstract

United States' antitrust policy and, to a lesser extent, that of the European Union stress three economic goals – consumer surplus, allocative efficiency, and productive efficiency. When they are discussed or debated, antitrust scholars omit a number of points that undercut their desirability. This Essay describes them briefly and highlights their frailties. The problem is so severe that scholars who rely on those terms to influence others without full disclosure are very close to engaging in misrepresentation.

I. Introduction

United States' antitrust policy and, to a lesser extent, that of the European Union stress three economic goals: consumer surplus, allocative efficiency, and productive efficiency.¹ When they are discussed or debated, antitrust scholars omit a number of points that undercut their desirability. These points are the subject of this essay. A complete understanding of these goals is available from almost any work on antitrust and the law. Consequently, this essay describes them briefly. Then the frailties of these conventional measures of antitrust success are discussed. The problem is so severe that scholars who rely on those terms to influence others without full disclosure are very close to engaging in misrepresentation.²

II. Consumer Surplus

Consumer surplus is the difference between what a buyer is required to pay and the most that buyer would have been willing to pay. Thus, if a buyer purchases an automobile for thirty thousand dollars but, had it been necessary,

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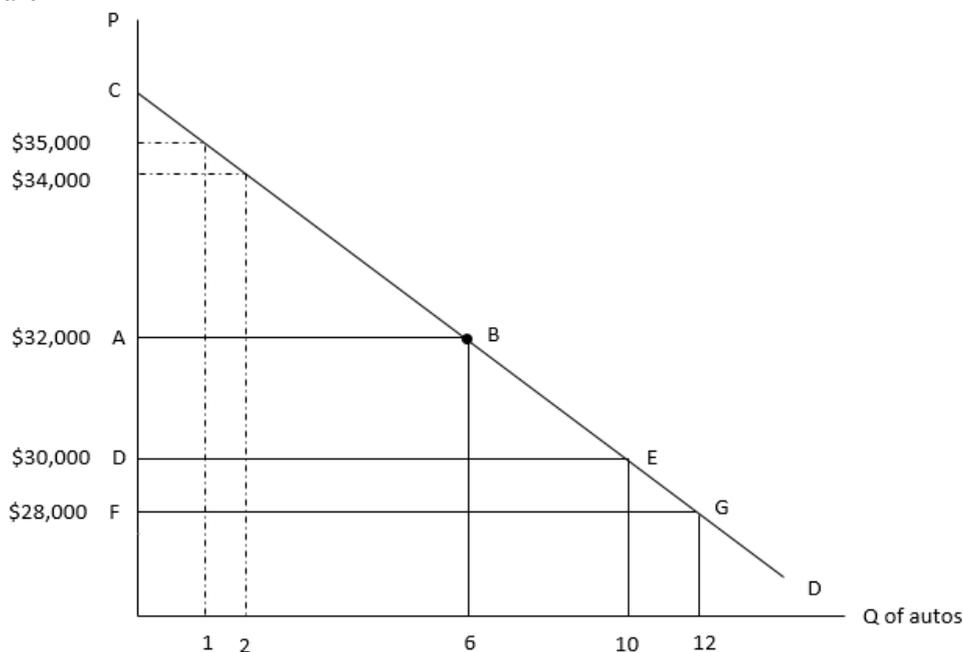
¹ H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (St Paul: Thomson Reuters, 4th ed, 2011), 4; E.T. Sullivan and J.L. Harrison, *Understanding Antitrust and Its Economic Implications* (New York: LexisNexis, 6th ed, 2013), 396-398.

² Because of the nature of this submission, the terms will not be fully explained in depth here. All are discussed in any microeconomics text.

he would have paid thirty-five thousand dollars, the consumer surplus is five thousand dollars. It could be viewed as a form of psychic profit. But, more importantly, it represents the ability to make other utility increasing purchases with what was not spent. Obviously the greater the difference between what was paid and the amount a buyer is willing to pay, the greater the consumer surplus. Herein lies much of the rationale for antitrust. Competition typically leads to lower prices and, consequently, greater consumer surplus not simply for the single buyer but for all buyers in a market.

Figure 1 illustrates the proposition in graphical form.

Figure 1



D is the demand curve and normally is viewed as indicating how much will be demanded at each price. It also tells us the most people would be willing to pay for each quantity. *P* is the actual price in the market. Take a look at quantity 1. That could be buyer *A*, referred to above, who was willing to pay thirty-five thousand dollars for the auto only had to pay thirty thousand dollars. Another seller might have been willing to pay thirty-four thousand dollars for the car and that buyer as well only paid thirty thousand dollars.

Each consumer who would have paid more than the price actually paid experiences consumer surplus. If we all it up for each consumer in a market, at price of thirty thousand dollars it is equal to area *DEC*. If price goes up it decreases to the area of triangle *ABC*. And, if price should fall to twenty-eight

thousand dollars, it increases to the area of *FGC*. From this, it is clear that lower prices mean greater consumer surplus. Lower prices typically result when firms do not collude or when a market is occupied by several as opposed to one firm – a monopolist.

So far so good but, before any reader or policy maker jumps on the consumer surplus bandwagon, there are several things to consider – most of which lead to the question of whether consumer welfare and consumer surplus have much to do with actual wellbeing. For example, the hypothetical buyer in the above example must have sufficient funding to be able to afford an automobile. The same is true with respect to more necessary items like food and shelter. Left out of the consumer surplus analysis are all people who are unable to express themselves in the market. No matter how much *actual* wellbeing, happiness, or delight they might derive from the auto or from food or shelter, they are invisible to antitrust law. In effect, the fascination with consumer surplus comes with the caveat that the less affluent, to one degree or another, are irrelevant.³

That is only part of the problem.⁴ The triangle tells us very little about how much better off people are in total. Think about a simpler example. Suppose four buyers are willing to buy an apple for one dollar and the market price is seventy-five cents. This means a total of one dollar in consumer surplus. This also means funds are left to buy other things from which the buyers derive utility. One buyer may be poor and need the twenty-five cents to buy something necessary. Another may take the twenty-five cents and toss it in the cup holder of his car where it is forgotten. The point is that consumer surpluses that nominally are the same are not the same in terms of actual consumer welfare. To add them together and characterize the sum as ‘consumer surplus’ tells us little about real welfare even for those who are able to pay.

More misleading are market to market comparisons. We might conclude that the gains in consumer surplus by making the market for yachts more competitive is equal to the consumer surplus derived from a more competitive baby food market. Nominally it may be, but this is hardly the same as saying the gains in actual consumer welfare are the same. In fact, simple appeals to greater consumer surplus tells us very little about where antitrust enforcement should be focused.

A final problem with consumer surplus is that it is based on expectations

³ Of course, lower prices may mean they are able to express themselves in markets that were previously not accessible.

⁴ Yet another problem concerns the determination of the level of consumer surplus. This depends on the price buyers are willing to pay. What they are willing to pay, however, may be a function of the actual price. They may value higher priced items more than lower priced ones. If so, what comes first: information about the price or a question of what is the most you would pay in an information vacuum?

at an instant in time, not on the utility experienced. This distinction has been noted and studied by Daniel Kahneman and others.⁵ Decisional or expected utility is what determines choices. In a sense, it is what the buyer believes will happen. Experienced utility is the actual impact of the purchase.⁶ All people actually understand this difference because they have all purchased something that that did not live up to expectations or which exceeded expectations. These two common occurrences are not part of traditional antitrust economics. The term ‘expected consumer surplus’ is actually more accurate. It does not correct anything with respect to the realities of consumer surplus but it does alert people to the distinction between consumer surplus and actual gains in welfare.

III. Allocative Efficiency

The principal alternative to consumer surplus is allocative efficiency. In simple terms, allocative efficiency maximizes the sum of consumer and producer surplus.⁷ Producer surplus is the price paid by buyers in excess of the lowest price a producer would accept. Ideally all markets would be in allocatively efficient states. This requires producing units of the output as long as that output is the most valued use of the resources consumed. When this is the case total welfare is said to be maximized.⁸ How it is divided is not part of the analysis because economics has no principled way to distinguish gains to consumers (consumer surplus) from gains to sellers (producers’ surplus) and how it should be divided between consumer and producers would be a distributive question.⁹

The decision to favor maximization of consumer surplus over the goal of allocative efficiency is purely normative since there is no rationale in economics, as a discipline, for favoring consumers over a combination of

⁵ D. Kahneman, ‘Experienced Utility and Objective Happiness’, in D. Kahneman and A. Tversky eds, *Choices, Values and Frames* (Cambridge: Cambridge University Press, 2000), 673; D. Kahneman et al, ‘Back to Bentham? Explorations of Experienced Utility’ *The Quarterly Journals of Economics*, 112, 375 (1997).

⁶ In fact, by adopting surrogate measures of welfare and defending them, economics abandoned notions of actual well-being long ago mainly to save the relevance of the discipline. For a brief history of ‘efficiency’ and its limitations see, J.L. Harrison, ‘Happiness, Efficiency, and Decisional Equity: From Outcome to Process’ 36 *Pepperdine Law Review*, 935, 942-946 (2009).

⁷ Many readers will be familiar with the basic marginal cost/marginal revenue analysis which results in arriving at an allocatively efficient level of production. See R. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978), 91-104; T.F. Cotter and J.L. Harrison, *Law and Economics. Positive, Normative and Behavioral Perspectives* (St Paul: West Academic Publishing, 3rd ed, 2013), 43-44.

⁸ Owing the problems already discussed with respect to consumer surplus, this is doubtful.

⁹ And this raises issues of interpersonal comparisons of utility which are impossible to make except by hunch.

consumers and producers. Plus, it is not clear that it matters. Consumers, after all, are likely to be investors who are better off when producer surplus is higher. Conversely producers – shareholders and other business owners – are likely to be made better off when consumer surplus is increased. By in large, we are talking about people who are on both sides of the market at once.

More relevant, though, is the fact that the same problems that render reliance on consumer surplus questionable are carried over to allocative efficiency. To understand why, it is important to note that a critical part of determining allocatively efficient levels of output is the proper measurement of the costs of production. Those costs are determined by prices paid in output markets by sellers for whatever they produce. In those markets, producers bid against each other with each bidding the most they can pay and still be profitable in their respective output markets. In determining how much they can pay the pivotal issue is what consumers will pay for their output. But as demonstrated already, willingness to pay is hardly a good substitute for actual welfare. For example, the sellers of an expensive anti-aging lotion based on snake venom may outbid producers of important medications made from the same venom because buyers in the skin cream market, as a result of vanity and advertising, pay high prices for the cream. The outcome may be quite distant from one that maximizes actual welfare. Plus, even if the skin cream buyers later realize the anti-aging properties were vastly overstated, they will continue to be counted as recipients of consumer surplus.

The bigger problem with invoking the idea of allocative efficiency in the context of antitrust is no less than shocking. Perhaps it is best summarized by saying antitrust law has not gone ‘green’. For allocatively efficient levels of production to be achieved, the producer-seller must internalize all costs of production. The level of those costs guide the decision about how much to produce. If some costs are not paid the cost of production will be understated and the result will be to encourage higher (now allocatively inefficient) levels of production. For example, assume there are two equally efficient producers of a product and both use water as an input. One has water shipped in by tank trucks and another simply draws it from a nearby pond and has no out of pocket costs despite the fact that its use of the water results in the destruction of an animal habitat. It will continue to produce oblivious to the actual costs of production but, in the world of antitrust economics, it will appear to be operating at an allocatively efficient level.

The importance of externalities also can be understood by thinking again about consumer surplus. First consider an admittedly artificial example. Suppose a farm operates near a residential neighborhood. The farm sells its produce to a local supermarket at attractive prices made possible by the low costs incurred by the farmer. In fact, prices are kept low because the farmer

allows fertilizer and animal waste to spill into a local lake rather than having it hauled away or treated. People in the neighborhood enjoy consumer surplus because of the low prices but also become ill from the tainted water in the lake. Here there is a direct offset between consumer surplus and negative externalities.¹⁰ In fact, the example can be generalized. Any externality offsets any supposed gains in consumer surplus, making claims of greater consumer surplus as a result of lower prices questionable.

IV. Productive Efficiency

Although not the principal concern of antitrust, productive efficiency is probably the term to which most people refer when they mention efficiency. Productive efficiency means focusing on the individual firm and its ability to produce at the lowest per unit cost.¹¹ Under highly artificial conditions it is possible to have allocative and productive efficiency but that is rarely if ever possible. Nevertheless, productive efficiency is critical in certain types of antitrust cases including predatory pricing and bundling.¹² The central question in both those types of cases is whether a party is charging prices below its costs.¹³

Here again the fact that antitrust policy is anything but ‘green’ and ignores externalities can result in misleading and flatly incorrect outcomes. Suppose two firms buy wood to make toy soldiers and each pays two thousand five hundred dollars per ton of wood and makes two thousand five hundred soldiers. For the sake of simplicity, also suppose that wood is the only production cost paid by the firms. If that is the case, their productive efficiency is equal – one dollar per soldier. Now consider the possibility that one of those firms is near a residential area and dust from the wood spreads into the air causing respiratory problems for those nearby. The true average

¹⁰ See generally, R. Claassen and A. Gerbrandy, ‘Rethinking European Competition Law: From Consumer Welfare to a Capability Approach’ *Utrecht Law Review*, 1 (2016).

¹¹ R. Bork, n 7 above, 91 fn *; H.A. Shelanski and J.G. Sidak, ‘Antitrust Divestiture in Network Industries’ 68 *University of Chicago Law Review*, 1, 18 (2001).

¹² See, eg *Brook Group Ltd. v Brown and Williamson Tobacco Co.* 509 US 209 (1993); *Cascade Health Solutions v PeaceHealth* 515 F.3d 883 (9th Cir. 2007). For the Justice Department’s view see <https://www.justice.gov/archives/atr/merger-guidelines-and-integration-efficiencies-antitrust-review-horizontal-mergers> (last visited 6 December 2016).

¹³ Low cost pricing violates section 2 of the Sherman Act when the price is below cost and there is a reasonable likelihood the firm will recoup losses incurred during the period of predation when competitors exit the market. *Brook Group Ltd. v Brown and Williamson Tobacco Co.*, n 12 above. For the EU approach see Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, [2012] ECR I-0000. See generally, H. Rosenblatt et al, ‘Post Danmark: Predatory Pricing in the European Union’ *The European Antitrust Review*, 23 (2013).

Bundling is similar in that the product in question is sold in a bundle with others so the actual price of that product is unknown.

cost per soldier for that firm is two thousand five hundred dollars plus the value of the discomfort and treatment of those suffering respiratory ills all divided by two thousand five hundred. Hardly anyone would regard the firms as equally efficient. Well, hardly anyone that is, except those who write about antitrust. Just as with allocative efficiency, external costs are absent from the analysis. It is extraordinary, given the level of attention paid to predatory pricing¹⁴ and bundling¹⁵ that the basic measure of when these antitrust offenses occur is imprecise especially when no scholar could be unaware of the problem. Oddly, it is those who write about efficiency in the context of antitrust that seem to be most willing to ignore a variable that affects their analysis at such a fundamental level.

V. Conclusion

The more interesting problem is why today's antitrust scholars ignore the imprecision of the measures they employ. The dismissal of externalities in an age of global warming is particularly alarming. Here are two possible answers. First, it is less costly to have a system of antitrust when the economic measures are simplistic. The problem with this is that it is also very costly to ignore the lost welfare gains to which a more sophisticated set of goals would lead. A second possibility is that adherence to today's standard results in a lower likelihood that firms will be found to have violated the antitrust laws. Unfortunately, this cynical view cannot be discounted.

¹⁴ A WestLaw search conducted on 23 April 2016 revealed that the terms 'predatory pricing' and 'antitrust' appear in over five thousand seven hundred items of scholarship in the data base.

¹⁵ A WestLaw search conducted on 23 April 2016 revealed that the terms 'bundling' and 'antitrust' appear in over three thousand two hundred items of scholarship in the data base.

Hard Cases

The Social-Environmental Function of Property and the EU ‘Polluter Pays’ Principle: The Compatibility between Italian and European Law

Valeria Corriero*

Abstract

This article analyses the legal scholarship and Italian jurisprudential debate over the obligations imposed on an owner who is not the polluter of a contaminated site, a debate which culminated in a landmark decision by the European Court of Justice on 4 March 2015. The ‘social-environmental’ function of property provides the most appropriate balance between the interests and the rights at stake. Civil liability rules, even after the amendments introduced by legge 6 August 2013 no 97 (the so called *legge europea* 2013) which reintroduce references to the polluter in accordance with Directive 2004/35/EC, and its regime of strict liability, do not always lead to the identification of the person responsible for the damage. Where the polluter cannot be identified or is insolvent, it is not possible to oblige the owner, who is not the polluter, to reimburse the competent authority for the measures it took to rehabilitate the polluted site (Art 253 Environmental Code) beyond the limits of the market value of the land. This is in accordance with the constitutional principle of the social function of property (Art 42, para 2, Constitution). This interpretation is also in line with the EU law principle that the ‘polluter pays’.

I. Background

The plenary assembly of the *Consiglio di Stato* referred the question of whether Arts 244, 245 and 253 of the decreto legislativo 3 April 2006 no 152 (hereinafter Environmental Code) were compatible with Directive 2004/35/EC on environmental liability to the European Court of Justice (hereinafter ECJ) for a preliminary ruling. This Italian legislation provided that, in cases where it is impossible to identify the polluter of a plot of land or to have that person adopt remedial measures

‘the administrative authority (may not) require the owner (who is not responsible for the pollution) to implement emergency safety and rehabilitation measures, (but may merely attribute) to that person

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financial liability limited to the value of the site once the rehabilitation measures have been carried out'.¹

The Luxembourg Court upheld, in its judgment of 4 March 2015,² the compatibility of the Italian legislation. It specifically held that the Italian law limiting the obligations of an owner who is not responsible for the pollution to the value of the estimated encumbrances was in line with the European environmental principles set out in Art 191, para 2, Treaty on the Functioning of the European Union (hereinafter TFEU). These environmental principles were primarily the 'polluter pays' principle (implemented by Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage),³ the precautionary principle, the principles that preventive action should be taken, and that environmental damage should, as a matter of priority, be rectified at the source.

The encumbrance, along with the special security interest, is a form of collateral security (Art 253 Environmental Code),⁴ albeit within the limits of the market value of the land, aimed at ensuring recovery of the costs related to the measures adopted by the competent authority. The encumbrance is determined after the implementation of those measures. These two private law instruments (the encumbrance and the special security interest) guarantee reimbursement of the costs that the public administration incurs when rehabilitating polluted sites. The special security interest is a guarantee in its

¹ Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 and Consiglio di Stato-Adunanza Plenaria ordinanza 25 September 2013 no 21, para 50, available at www.giustizia-amministrativa.it. See the comment of P.M. Vipiana Perpetua, 'La figura del proprietario di un sito inquinato non responsabile dell'inquinamento: la parola definitiva dell'Adunanza plenaria sull'interpretazione della normativa italiana' *Giurisprudenza italiana*, 947-955 (2014). The two ordinances have the same text. In the text that follows, the more recent is cited, but the reference will regard both, because they are the same.

² Case C-534/13 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare and other v Fipa Group s.r.l., Tws Automation s.r.l. and Ivan s.r.l.* (European Court of Justice 4 March 2015) available at www.eur-lex.europa.eu. See the comments of P.M. Vipiana Perpetua, 'La soluzione "all'italiana" della posizione del proprietario di un sito inquinato non responsabile dell'inquinamento: il suggello della ECJ' and C. Vivani, 'Chi non inquina non paga? La ECJ ancora sulla responsabilità ambientale' *Giurisprudenza italiana*, 1480-1492 (2015); V. Fogleman, 'Landowners' Liability for Remediating Contaminated Land in the EU: EU or National Law? Part I: EU Law' available at <http://www.lawtext.com/pdfs/sampleArticles/EL23-2FOGLEMANT1.pdf> (last visited 6 December 2016), in Part I of the paper, 'examines the effect on the ELD (Environmental Liability Directive) of the WFD (Waste Framework Directive), which provides, amongst other things, that a 'waste holder' (which includes the owner of land on which there are waste contaminants) is responsible for the proper disposal of the contaminants'.

³ F. Giampietro, *La responsabilità per danno all'ambiente. L'attuazione della direttiva 2004/35/CE* (Milano: Giuffrè, 2006); B. Pozzo, *La responsabilità ambientale. La nuova Direttiva sulla responsabilità ambientale in materia di prevenzione e di riparazione del danno ambientale* (Milano: Giuffrè, 2005).

⁴ V. Corriero, 'Garanzie reali e personali in funzione di tutela ambientale' *Rassegna diritto civile*, 43-75 (2012).

very nature: the credit which the government provides increases the value of the site by decontaminating it.

The preliminary ruling was, however, susceptible to varying interpretations. This susceptibility led to further references to the Italian courts so that determinations could be made in regards to the correct application of European environmental principles to the nature and the limits of obligations placed on owners of polluted sites.

The VI Chamber of the *Consiglio di Stato*⁵ referred the question of whether the competent authority may impose emergency safety measures on owners of polluted land who are not responsible for the pollution to the plenary assembly of the same Court.⁶

An absolute minority of Italian administrative courts place a liability ‘by position’⁷ on the owner of the polluted site: in such cases neither the subjective criteria of liability (fault and negligence), nor an objective test (causation) are taken into consideration. The differences under the law between the positions of the owner who is not responsible for the contamination and the original polluter would derive from the lack of both these subjective and objective conditions in a judgment of liability, so that the non-polluting owner would only be obliged to bear the costs of decontamination embodied in the encumbrance (Art 253 Environmental Code).

The plenary assembly of the *Consiglio di Stato*, while referring the

⁵ Consiglio di Stato-Sezione VI ordinanza 21 May 2013 no 2740, *Foro Amministrativo Consiglio di Stato*, 1420-1428 (2013).

⁶ Such emergency safety measures should be imposed in accordance with Art 240, para 1, lett *m* of the Environmental Code.

⁷ Tribunale amministrativo regionale Lazio-Roma 14 March 2011 no 2263, *Ambiente sviluppo*, 543-551 (2011), with critical comment by F. Giampietro, ‘Ordine di bonifica, in via provvisoria, a carico del proprietario incolpevole?’; Tribunale amministrativo regionale Piemonte-Torino 11 February 2011 no 136, *Rivista Giuridica dell’Ambiente*, 660 (2011), with comment by F. Vanetti, ‘Bonifica da parte del proprietario incolpevole: è un obbligo o una facoltà?’. See also, after the Consiglio di Stato Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, Tribunale amministrativo regionale Lazio-Roma 12 February 2015 no 2509, available at www.giustizia-amministrativa.it, which justifies the possibility of requiring the non-polluting owner, who is not responsible for the contamination, to implement emergency safety measures without incurring any sanction and/or compensatory obligation, in light of the precautionary principle. For P.M. Vipiana Perpetua, ‘La figura del proprietario di un sito inquinato non responsabile dell’inquinamento’ n 1 above, 950, some judgments ‘have, in fact, also extended the obligation of rehabilitation to the non-polluting owner who is not responsible for the pollution, restoring, in fact, his burden to an obligation *propter rem*’. In this sense, see the opinion, given in an extraordinary appeal by the Consiglio di Stato-Sezione II 30 April 2012 no 2038, *Foro amministrativo-Consiglio di Stato*, 979 (2012). For Tribunale Amministrativo Regionale Lombardia-Milano 30 May 2014 no 1373, available at www.giustizia-amministrativa.it, ‘while in the obligations *propter rem* the person identified on the basis of the property of the *res* as obligated remains liable, in encumbrance the same situation arises, considering the fact that, as explained in Art 253, the person subject to the encumbrance is liable within the limits of the market value of the *res*’.

matter for a preliminary ruling to the ECJ, opted for a literal interpretation of the law and affirmed the majority judgment:⁸ the non-polluting owner, while at liberty to intervene on a voluntary basis, is neither obliged to rehabilitate polluted sites, nor to implement emergency safety measures.⁹

The curial passage of the plenary assembly's decision,¹⁰ which held that the encumbrance does not necessarily entail a rehabilitation, which Art 245 Environmental Code qualified as a mere faculty, is particularly significant. In implementing the 'polluter pays' principle, the obligation of rehabilitating the site is imposed upon the person responsible for the contamination (Arts 242, 244, 253 and 257 Environmental Code); such a person may be different from the owner or the administrator of the land.

The encumbrance arises where rehabilitation measures are implemented by the competent authority on its own initiative (that is, by the municipality that is territorially competent or – where that municipality does not adopt those measures – by the region, in accordance with Art 250 Environmental Code). This occurs if the polluter does not provide for the rehabilitation or if the polluter is not identifiable and is not replaced by site owners or other persons not responsible for contamination. In accordance with Art 245 of the Environmental Code, the 'other persons' are defined as 'interested parties' who have the right at any time to voluntarily intervene for the purpose of rehabilitation.

Although in no way connected with the pollution, the owner is obliged, by virtue of the encumbrance, to reimburse, within the limits of the market value of the land, the public administration for the costs related to the rehabilitation of the contaminated land. These costs are determined after the implementation of those measures (Art 253 Environmental Code).

Sites of national interest (hereinafter SNI) fall within the competence of the Environment Ministry, and not of the local authorities (municipalities and regions).¹¹

⁸ *Ex multis* Consiglio di Stato 5 September 2005 no 4525, *Ambiente sviluppo*, 281 (2007), with comment by F. Giampietro, 'Bonifica di siti contaminati: obblighi e diritti del proprietario incolpevole nel T.U.A.'; Consiglio di Stato 16 July 2015 no 3544, available at www.giustizia-amministrativa.it, which addressed the same issue and, by endorsing the majority view of Italian courts, recalled a view in a decisive Judgment 4 March 2015, C-534/13 of the ECJ, which is reported herein, and one which was already expressed in Judgment 9 March 2010, C-378/08, affirming that the 'polluter pays' principle was compatible with imposing the personal financial liability on the owner since such liability was limited to the encumbrance and special security interest on the land.

⁹ Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, para 24.

¹⁰ *Ibid* para 17.

¹¹ Title V of Part IV of the Environmental Code makes reference to SNIs and regulates contaminated sites in general. It is followed by Part VI dealing with environmental damage. On competence framework see S. Grassi, 'La bonifica dei siti contaminati', in R. Ferrara and M.A. Sandulli eds, *Trattato di Diritto dell'Ambiente* (Milano: Giuffrè, 2014), II, 687, 694-698.

The owner, although not responsible for the pollution, may, in order to avoid the imposition of an encumbrance on the site and the creation of an associated special security interest, carry out the rehabilitation work that would be required of the person responsible.

In the present case referred to the ECJ, three private companies, between 2006 and 2011, had become the owners of land falling within the SNI of Massa Carrara. The companies carried out health and environmental activities that did not pose any risk to health.¹² Nonetheless, the companies were notified by the Ministry of the Environment that they were required to carry out three emergency safety actions. The measures in question, adopted by the Ministry, in accordance with the usual remediation procedure relating to SNIs, involved the construction of a hydraulic capture barrier to protect a groundwater table and the submission of an amendment to a project, dating back to 1995, for the rehabilitation of the land. The grounds for issuing the order were that the companies had, on acquiring the land, incurred a sort of ‘custodial liability’, regardless of the fact that they were not in any way factually responsible for the historical contamination of the Massa Carrara SNI (Case C-534/13, para 28).

The Ministry of the Environment had declared the lands in question an SNI in 1998 in order to provide for the land’s environmental rehabilitation. Further environmental remedial measures were required since the land, which had been contaminated in the 1960s and 1980s by various chemical substances (including dichloroethane and ammonia) used for the manufacture of insecticides and herbicides, had not been fully decontaminated by the polluter companies.

The ECJ, before considering the merits of the question, reiterated the demarcation lines between European law and national law, which had been drawn in previous judgments.¹³ The ECJ assigned a programmatic nature¹⁴

¹² These activities included the sale of electronic devices, real estate and the construction and repair of boats.

¹³ Cases C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other v Ministero dello Sviluppo economico and other* (European Court of Justice Grande Chambre 9 March 2010), with comment of P. Bertolini, ‘Il Principio “chi inquina paga” e la responsabilità per danno ambientale nella sentenza della ECJ 9 marzo 2010’ *Rivista italiana di diritto pubblico comunitario*, 1607-1632 (2010) and Joined Cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) s.p.a. and other v Ministero dello Sviluppo economico and other* (European Court of Justice 9 March 2010) available at www.eur-lex.europa.eu. See also the notes relating to the decisions D.T. Würtenberger, ‘Beweismaß bei der Umwelthaftung: Die Konkretisierung des Verursacherprinzips liegt bei den Mitgliedstaaten, die durch die Richtlinie 2004/35/EG nicht gehindert sind, auch strengere Maßnahmen vorzusehen – “Augusta-Priolo”’ *Europäisches Wirtschafts- & Steuerrecht*, 282-284 (2010); C. Brüls, ‘Responsabilité environnementale des entreprises: Application du principe du pollueur-payeur en cas d’une pollution diffuse’ *Revue pratique des sociétés*, 84-103 (2010).

¹⁴ A regulation having a programmatic nature is considered unenforceable: it is only binding for the legislator.

to the ‘polluter pays’ principle (Art 191, para 2, TFUE), which concerns the action of the Community, rather than individuals, and cannot be invoked to exclude the application of national law.

In contrast, the *Consiglio di Stato*¹⁵ considers the ‘polluter pays’ principle to be a prescriptive rule¹⁶ underlying the system of environmental liability. The conformation of national legislation to the ‘polluter pays’ EU principle is justified by the Italian constitutional principle (Art 42, para 2) of the social function of property. In accordance with this principle,¹⁷ national legislation, by virtue of a decontamination carried out by a public authority, prevents an unjustified enrichment of the owner at the expense of the collectivity. At the same time, the congruence of European and national principles on this issue has produced a situation where, through excessive exploitation of the mechanism of encumbrance, a polluter, who cannot be identified or who is insolvent, is absolved of all responsibility; this breaches the ‘polluter pays’ principle.

An hermeneutical error is attributable to the VI Chamber of the *Consiglio di Stato*, which referred the question of law to the plenary assembly, providing an upstream statutory interpretation that was not in accordance with the Italian Constitution.¹⁸ The possibility that the Administration would compel non-polluting owners to take emergency safety measures in accordance with Art 240, para 1, lett *m* of the Environmental Code, indicates the competent authorities’ improper application of Art 191, para 2, TFEU. The authorities effectively impose such measures in the absence of any national legal basis (paras 41, 39-42 and more extensively 39-42 judgment C-534/2014), as emphasised on a number of occasions by the Luxembourg Court.¹⁹

¹⁵ Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, para 24, paras 31-36.

¹⁶ In this sense, see M. Pennasilico, ‘Sviluppo sostenibile, legalità costituzionale e analisi “ecologica” del contratto’ *Persona e Mercato*, 37-50 (2015); Id, ‘Fonti e principi del “diritto civile dell’ambiente”’, in M. Pennasilico ed, *Manuale di diritto civile dell’ambiente* (Napoli: Edizioni Scientifiche Italiane, 2014), 26-28, who argues that ‘to allow environmental principles to effectively accommodate the intent of the legislator, the application of the law and the relationships between stakeholders, it is appropriate to place the same principles at the apex of the legislative system, that is in the Constitution’.

¹⁷ On the ‘re-reading of the civil code and statutes in the light of the Republican Constitution’ see P. Perlingieri, ‘Constitutional Norms and Civil Law Relations’ *The Italian Law Journal*, 17-49 (2015) and *ibid* further bibliographical references, among others, P. Rescigno, ‘Per una rilettura del Codice civile’ *Giurisprudenza italiana*, IV, 224 (1968); P. Perlingieri, ‘Produzione scientifica e realtà pratica: una frattura da evitare’ *Rivista di diritto commerciale*, I, 475 (1969); M. Pennasilico, ‘Legalità costituzionale e diritto civile’ *Rassegna di diritto civile*, 840-876 (2011).

¹⁸ Consiglio di Stato-Sezione VI ordinanza 21 May 2013 no 2740 n 5 above.

¹⁹ See also the precedents Cases C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other v Ministero dello Sviluppo economico and other* (European Court of Justice Grande Chambre 9 March 2010), n 13 above, paras 45-46 and Joined Cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) s.p.a. and other v Ministero dello Sviluppo economico and*

The ECJ has also expressed doubt as to the temporal applicability *ratione temporis* of Directive 2004/35/EC to historic environmental damages, which took place before 30 April 2007, such as in the case in point. This reasoning provides another argument in support of the groundlessness of the order to take the emergency safety measures in accordance with Art 240, para 1, lett *m* of the Environmental Code.

The ECJ confers the function of assessing the temporal applicability *ratione temporis* of Directive 2004/35/EC, which necessarily includes an ascertainment of the permanence of any environmental damage, on the national court, even if the damage took place before 30 April 2007.²⁰ In the event that the Directive is deemed not applicable, the issue is then resolved in light of national legislation with due observance of the rules of the Treaty. If, however, the national court decides that the Directive should be applied in the context of a particular fact, the national court must then follow the reasoning of the Luxembourg Court.

II. The Groundlessness of ‘Custodial Liability’ of the Owner Who Is Not Responsible for Contamination and the Social-Environmental Function of Property in Italian-European Law

The systematic interpretation of the rules on the rehabilitation of contaminated sites does not allow for the qualification of the responsibility – either subjective or objective – of the owner who is not the polluter of the contaminated site due to the lack of a causal link, which is an indispensable element in a judgment of civil liability.

The ECJ came to the same interpretive results and qualified the interpretation given by the referring court as a literal interpretation of the Environmental Code and of the principles of civil liability, which require a causal link between the act and the damage in order for environmental liability to be triggered (para 36).

In reality, the interpretation of the referring court – as it acknowledged

other (European Court of Justice 9 March 2010) n 13 above, para 39; Joined Cases C-478/08 and C-479/08 *Buzzi Unicem S.p.A. and other v Ministero dello Sviluppo Economico and other* (European Court of Justice 9 March 2010) available at www.eur-lex.europa.eu, paras 35-36. L. Bergkamp, ‘Comment on Case C-378/08, 9 March 2010; Joined Cases C-379/08 and 380/08, 9 March 2010; Joined Cases C-478/08 and C-479/08, 9 March 2010’ 7.3 *Journal for European Environmental & Planning Law*, 355-361 (2010).

²⁰ In this sense, see para 44 of Case C-534/13. See, to that effect, Cases C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other v Ministero dello Sviluppo economico and other* (European Court of Justice Grande Chambre 9 March 2010) n 13 above, paras 40-41; *Raffinerie Mediterranee (ERG) s.p.a. and other v Ministero dello Sviluppo economico and other* (European Court of Justice 9 March 2010) n 13 above, para 34; Joined Cases C-478/08 and C-479/08 *Buzzi Unicem S.p.A. and other v Ministero dello Sviluppo Economico and other* (European Court of Justice 9 March 2010) n 19 above, paras 32 and 38.

(para 36) – was founded on a systematic and axiological interpretation²¹ of Italian-European law, in line with previous judgments of the Luxembourg Court.²²

The burdens imposed on a non-polluting owner arise from the quality of the land which is the object of his property right.

The real nature of these burdens is confirmed by the different categories of prohibitions on abandonment and unchecked deposit of waste on land and subsoil (Art 192 Environmental Code).

The Environmental Code establishes that anyone who violates this prohibition ‘must proceed with the removal, recycle or the disposal of the waste, and a restoration of the (original) state of the (affected) areas jointly and severally with the owner and with those who hold real or personal rights to enjoy the area’ – and, in accordance with the Cassazione Sezioni Unite no 4472/2009, the holders of the lands –,²³ on the basis of the conditions specified under Art 192, para 3, Environmental Code.²⁴

The legislator has adopted two different attitudes towards an owner.²⁵ The subjective liability of the owner in the abandonment of waste stems from supervisory duties which are imposed on the owner, the possessor and also the qualified holder of the estate by virtue of a lease or service. The nature of the joint liability of a site owner and of one who is guilty of abandonment

²¹ On the scope of the major branches of private law, such as property, contract, enterprise and liability, which see the human person as having a fundamental value, at the top of the axiological hierarchy provided by the Constitution, see P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1972), 74. For M. Costantino, ‘Il diritto di proprietà’, in P. Rescigno ed, *Trattato di diritto privato* (Torino: Utet, 2th ed, 2005), 7, I, 253, the social function of property must be taken into account so as to protect the legitimate interests of non-owners who interact with the owner. With particular reference to the autonomy of a legal transaction see, for example, M. Pennasilico, *Metodo e valori nell'interpretazione dei contratti. Per un'ermeneutica contrattuale rinnovata* (Napoli: Edizioni Scientifiche Italiane, 2011), 135-185, 392-406. In Latin-American law, on the systematic and axiological interpretation in a ‘*perspectiva civil-constitucional*’ (civil-constitutional perspective) del *código civil* see G. Tepedino, H.H. Barboza and M.C. Bodin de Moraes, *Código Civil Interpretado conforme a Constituição da República* (Rio de Janeiro: Renovar, 2014 and 2012), I and II. See also C.I. Salvadores De Arzuaga, ‘Protección constitucional y legal del medio ambiente y la interpretación sudicia en la República Argentina’, in A.M. Citrigno and G. Moschella eds, *Tutela dell'ambiente e principio “chi inquina paga”* (Milano: Giuffrè, 2014), 397-414.

²² Cases C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other v Ministero dello Sviluppo economico and other* and Joined Cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) s.p.a. and other v Ministero dello Sviluppo economico and other* (European Court of Justice 9 March 2010) n 13 above.

²³ A. Jannarelli, ‘L’articolazione delle responsabilità nell’«abbandono dei rifiuti»: a proposito della disciplina giuridica dei rifiuti come non-beni sia in concreto sia in chiave prospettica (nota a Cass., S.U., 4472/09)’ *Rivista di diritto agrario*, 128-153 (2009).

²⁴ Consiglio di Stato 26 June 2013 no 3515, available at www.giustizia-amministrativa.it.

²⁵ In this sense see, Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, para 23.

and waste deposit often masks the attempt of public administrators to allocate the costs of disposal, cleaning and collection of abandoned waste to the person who is easy to identify and target in practice: the owner (who is not guilty of abandonment and waste deposit). In doing this, administrators are transforming subjective liability under Art 192, para 3, Environmental Code into objective liability, because they do not demonstrate the owner's negligence (*culpa in vigilando*).²⁶

The regulation of the rehabilitation of contaminated sites should implement the constitutional principle of the social function of property.²⁷ The difference between the provisions of Arts 253 and 192, para 3, Environmental Code is justified because rehabilitation returns commercial value to the contaminated estate, and is more expensive than the removal of waste and the restoration of places where only abandoned waste has been placed on other people's land. The abandonment of waste on soil does not necessarily involve a contamination of environmental matrices.

Providing liability because of goods 'in custody' as part of the regulation of the rehabilitation of contaminated sites would not only be contrary to the EU 'polluter pays' principle,²⁸ transposed into the Art 3-*ter*, para 2, Environmental Code, but would also be contrary to the principle of the social function of property, enunciated in Art 42, para 2, Constitution.

This contrast is unavoidable whether the owner of the polluted site's 'liability by position' is cast as a subjective responsibility,²⁹ when the owner's

²⁶ A. Jannarelli, n 23 above, 150.

²⁷ S. Pugliatti, 'La proprietà e le proprietà (con riguardo particolare alla proprietà terriera)', in Id, *La proprietà nel nuovo diritto* (Milano: Giuffrè, 1964), 145-309, proponent of the theory of properties, on the presupposition of the impossibility of remaining anchored to a unitary model of property, being in reality a plurality of its own statutes. For a comparative study on the right to property see S. Rodotà, 'La logica proprietaria tra schemi ricostruttivi e interessi reali', in Id, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* (Bologna: Il Mulino, 3th ed, 2013), 47-72. For a reading of the right to property in the light of constitutional legality, see P. Perlingieri, *Introduzione alla problematica della proprietà* (Camerino-Napoli: Jovene, 1971); A. Iannelli, *La proprietà costituzionale* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1980), passim; E. Caterini, 'Proprietà', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2005), 85-136; U. Mattei, 'Una primavera di movimento per la «funzione sociale della proprietà»' *Rivista critica del diritto privato*, 531-568 (2013). For a historical framing of the property see P. Grossi, 'La proprietà e le proprietà nell'officina dello storico' *Quaderni fiorentini*, 17, 1988, 359-422.

²⁸ In terms of criminal law, in the absence of direct participation in the offense or in the absence of a material or moral contribution to the illicit waste management a 'liability by position' may not be imposed on the owner of the land, see Corte di Cassazione-Sezione penale 1 October 2014 no 40528, *Ambiente & sviluppo*, 247-248 (2015), (addressing the absence of direct participation in the offense or in a material or moral contribution in the illicit waste management.)

²⁹ In this sense, see Tribunale amministrativo regionale Lazio-Roma 14 March 2011 no 2263 n 7 above. For a contrary view, see Corte di Cassazione-Sezione penale 1 October 2014 no 40528 n 28 above, which excludes the existence of *culpa in vigilando* against third

culpa in vigilando is accentuated,³⁰ or as an objective liability, when the traditional interpretation of the Art 2051 Civil Code is followed.³¹

The rules of property in Italian law, inspired by the traditional social function of property and reinterpreted in light of European values, might not justify a 'custodial liability' of the owner³² as part of the regime of environmental liability.

The only obligation on the owner who is not responsible – besides the previously mentioned obligation to communicate an actual or apprehended contamination of a site to territorial authorities – is to carry out preventive measures (Art 245, para 2, Environmental Code), ie initiatives aimed at countering an event that constitutes an imminent threat to the environment. Art 245, para 2, Environmental Code contains this innovation, absent from the previous legislation; it provides that the owner or the administrator who are not responsible – even if willing to intervene in the proceedings – are now obliged to do so, thereby facilitating the province's carrying out of investigations to identify the person responsible (Art 244, para 2, Environmental Code), and to apply the obligation of rehabilitation to him.

The *Consiglio di Stato* explained that a liability 'by position' cannot be traced back to Art 253 Environmental Code, as the encumbrance only represents collateral limited to the value of the property. This encumbrance is only meant to cover a reimbursement of the costs of the environmental rehabilitation undertaken by the public administration to substitute for the punishment of those responsible for the contamination.³³ Contradictorily,

parties, as the obligations of correct management and disposal are placed exclusively on the producers and holders of waste, or, in the case of abandonment or uncontrolled storage of waste by the employees of a business corporation, on the owner of the company.

³⁰ On the contrasting views in case law, see Tribunale amministrativo regionale Friuli-Venezia Giulia-Trieste 9 April 2013 no 229, which considers Art 2051 Civil Code inapplicable to specialty disciplines contained in the Environmental Code. For a trend that is developing with respect to the liability ex Art 2051 Civil Code of the owner who is not responsible for the pollution as the guardian of the contaminated site see Tribunale di Ferrara 17 January 2013 no 65, Tribunale amministrativo regionale Veneto-Venezia 8 February 2013 no 196, Tribunale amministrativo regionale Veneto-Venezia 8 February 2013 no 197, available at www.giustizia-amministrativa.it.

³¹ C.M. Bianca, *Diritto civile, V, La responsabilità* (Milano: Giuffrè, 2th, 2012), 717-727.

³² G. Atzori, 'Chi (non) inquina, paga? La giurisprudenza più recente sugli obblighi del proprietario incolpevole' *Ambiente & sviluppo*, 557-563 (2015), points out the contrast between the imposition of rehabilitation costs on non-polluting owners not responsible and Art 17 of the European Charter of Fundamental Rights and Art 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms. See also M. Jaeger, 'Il diritto di proprietà quale diritto fondamentale nella giurisprudenza della Corte di Giustizia' *Europa e diritto privato*, 348-364 (2011); M. Comporti, 'La proprietà europea e la proprietà italiana' *Rivista di diritto civile*, I, 189, 192-199 (2008), on the conflict between the European concept of property and the 'criterion of social function'; C. Tenella Sillani, 'I diversi profili del diritto di proprietà nel XXI secolo: brevi spunti di riflessione' *Rassegna di diritto civile*, 1058-1076 (2013).

³³ Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above,

however, the *Consiglio di Stato*, raising interpretative doubts, also recalled another Italian case tackled by the ECJ, although judged differently, which was predicated on the assumption that demonstrating a causal link in any type of pollution, including diffuse pollution,³⁴ is necessary.

Environmental liability is cast as a special liability system derived from general tort (Arts 2043 ff Civil Code) and is viewed in such a way by the majority of administrative justice. This precludes the extension of Civil Code Art 2050 (relating to liability for operation of dangerous activities) and Art 2051 Civil Code (relating to damages to things in custody) to environmental damage or to issues of rehabilitation.³⁵

On the other hand the Court of Venice,³⁶ while admitting that the ‘provision of Art 2051 Civil Code was unusual for cases of environmental damage’, did not exclude the potential applicability of the provision to such cases and, in the context of the episode in question, acknowledged that the owner and alleged tortfeasor would bear substantial liability.

Moreover, even if the Court wanted to, by analogy, apply Art 2051 Civil Code, this kind of liability could not be mapped onto this type of environmental harm due to the fact that a corporeal possession of the estates upon pollution is lacking.

Art 253, para 4, Environmental Code, in fact, points to the general criteria to be applied to future rehabilitated sites in cases of diffuse pollution; in the alternative, such sites may also be the object of specific provisions contained in special plans approved by Regions. At the same time, however, the ECJ highlights the limits of the civil liability system, paying particular attention to cases of diffuse pollution³⁷ (which may also include cases of historical pollution),³⁸ given the difficulty of both establishing the requisite causal link and applying the ‘polluter pays’ principle.

Art 4, para 5, of Directive 2004/35/EC, affirming the importance of the principle of causation, limits the application of the directive to cases of diffuse pollution in which it is possible to establish a causal link between the

para 44.

³⁴ Cases C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other v Ministero dello Sviluppo economico and other* (European Court of Justice Grande Chambre 9 March 2010) n 13 above, paras 44-45.

³⁵ Tribunale di Milano 16 September 2010 no 10655, *Ambiente & sviluppo*, 432-439 (2011), with comment of L. Prati, ‘La responsabilità soggettiva per inquinamento e bonifica in danno della procedura fallimentare’.

³⁶ Tribunale di Venezia 4 February 2010 no 304, *Ambiente & sviluppo*, 631-640 (2010), with comment of F. Giampietro e F. Lalli, ‘Sito inquinato e responsabilità da custodia: il giudice italiano e comunitario a confronto’.

³⁷ C-534/13 *Ministero dell’Ambiente e della Tutela del Territorio e del Mare and other v Fipa Group s.r.l., Tws Automation s.r.l. and Ivan s.r.l.* (European Court of Justice 4 March 2015) n 2 above, para 13.

³⁸ The term ‘historical pollution’ is used to refer to a case of pollution that has historically occurred.

damage and the activities of individual operators.

The owner of the contaminated site who has not contributed to the contamination in any way cannot be held accountable under an objective liability test. The regulation must necessarily hold the polluter responsible for all the costs related to an area's rehabilitation; therefore, in such circumstances the non-polluting owner of the property cannot be held liable.

Any exercise of discretion by a Member State that would impose liability beyond the limits of the value of the site on an owner of the site who is in no way connected with the pollution, in the sense envisaged by the plenary assembly of the *Consiglio di Stato*, would not be in accordance with either the 'polluter pays' principle,³⁹ or with EU environmental principles.

Moreover, it would not be possible to impose greater liability on a non-polluting owner by relying on Art 16 of the Directive 2004/35/EC. This Directive, in accordance with Art 193 TFUE, allows Member States to maintain or to introduce more stringent protective measures, including that additional activities may be subject to obligations of prevention and remediation and that additional responsible parties may be identified.⁴⁰

First of all, extending the limits of liability in this way would not lead to 'more stringent provisions' as envisaged by Directive 2004/35/EC. It would also subvert the EU 'polluter pays' principle: such an approach is not cognizant of 'who is the polluter' but rather 'who is the owner' and imputes liability to a person who is not responsible for the contamination.

The *Consiglio di Stato* plenary assembly's decision, pending a preliminary ruling from the ECJ, to interpret a person's liability in such a way that would include not only persons who engage in polluting activities, those who enter or deposit pollutants on the territory, but also the owner who – by omission or negligence – does not perform an act to eliminate or reduce the area's pollution, is not only at odds with judicial consensus but is also, frankly, open to criticism.⁴¹

The understanding that property has a social function finds its rationale in pragmatic considerations (Art 832 Civil Code)⁴² such as the need to

³⁹ Consiglio di Stato Adunanza-Plenaria ordinanza 13 November 2013 no 25 n 1 above, paras 45-48, recalls the opinion of Advocate General Juliane Kokott delivered on 22 October 2009 in C-378/08, para 98, according to which 'Liability irrespective of any causal contribution would neither follow the policy of the Environmental Liability Directive nor be compatible with it if it diminished the liability of the person who is responsible for the environmental damage under the directive. The directive creates an incentive specifically for the responsible operator to prevent environmental damage and provides that he is to bear the costs of remedying damage which nevertheless occurs'.

⁴⁰ In this sense, see previously, F. Goisis, 'Caratteri e rilevanza del principio comunitario «chi inquina paga» nell'ordinamento nazionale' *Foro amministrativo Consiglio di Stato*, 2711, 2724-2725 (2009).

⁴¹ Consiglio di Stato-Adunanza Plenaria ordinanza 25 September 2013 no 21, available at www.giustizia-amministrativa.it.

⁴² In this sense, see P. Rescigno, 'Proprietà (diritto privato)' *Enciclopedia del diritto*

safeguard values of constitutional relevance, including health and the environment (Arts 9, 32 and 117, para 2, lett s, Constitution).

Recourse to the outdated private law concept of the encumbrance (Art 253 Environmental Code), as re-interpreted in light of Art 42, para 2, Constitution⁴³ assigning a social function to property, circumvents the limits of subjective liability favoured by the Italian legislature, although that preference is in violation of the ‘polluter pays’ EU principle⁴⁴ (Art 191, para 2, TFEU), that is, before the amendment by legge 6 August 2013 no 97 (hereinafter *legge europea* 2013, came into force on 4 September 2013). The elements of subjective liability were inadequate compared to the actual requirements for imposing liability: the causal link between the active or omissive conduct and the damage; the criteria for imputation of fault and negligence; and, identification of the person responsible.

The non-polluting owner, although not obliged to undertake rehabilitation, is in an unfortunate position, due to the authority’s inability to hold the person actually responsible for the contamination accountable (Art 257 Environmental Code). The non-polluting owner must – at least, if he wishes to remain the owner of the property and not be subject to expropriation – necessarily undertake the burden of rehabilitation.

The administrative courts, in accordance with Art 244, para 3, Environmental Code, held that the notice issued to the person responsible for contamination must also be sent to the non-polluting owner, in order to apprise him of both the encumbrance and the special security interest and to allow him to exercise his right to initiate the rehabilitation. This notice cannot, however, require an implementation of rehabilitation measures without an adequate assessment of the parties’ respective liabilities for the pollution of the site.⁴⁵

By the combined provisions of Arts 244, 250 and 253 Environmental Code, the non-polluting owner, although not responsible for the pollution, has the burden – not the obligation – to ascertain both the level of

(Milano: Giuffrè, 1988), XXXVII, 254, 275-276.

⁴³ U. Salanitro, ‘La bonifica dei siti contaminati nel sistema della responsabilità ambientale’ *Giornale di diritto amministrativo*, 1270 (2009), doubts that the encumbrance as a mechanism is constitutional ‘because it would require the owner to incur the cost of public interventions whose purpose is guaranteeing the property’s suitability, in terms of health protection, for the urban planning discipline’s required appropriation use’.

⁴⁴ On the infringement procedure no 2007/4679 by the EU Commission against Italy, see below para III and following footnotes. See also S. Cassotta and C. Verdure, ‘Recent Developments Regarding EU Environmental Liability for Enterprises: Lessons Learned Italian’s Implementation with “Raffinerie Mediterranee” Cases’ 2 *Environment and Internal Market*, 1, 6-16 (2012).

⁴⁵ Consiglio di Stato 5 September 2005 no 4525 n 8 above; Tribunale amministrativo regionale Friuli-Venezia Giulia 5 May 2014 no 183, available at www.giustizia-amministrativa.it; Tribunale amministrativo regionale Friuli-Venezia Giulia-Trieste 9 April 2013 no 227, *Foro amministrativo TAR*, 1133-1135 (2013).

contamination and the amount of possible rehabilitation if he is to avoid encumbrances on the land. The collateral system provided for in Art 253 Environmental Code induces the non-polluting owner – frequently in cases of inaction, or of failure to identify the responsible person, or of non-fulfilment of executive action – to bear the costs of environmental restoration.

The public administration creditor may legitimately initiate an action for recovery of costs against a non-polluting owner, but only after officials have carried out a diligent investigation to establish the identity of the person actually responsible.⁴⁶ This obligation of the competent Administration (specifically, the province) to take steps to identify the person responsible for the contamination acts as a guarantee of the public interest that informs the ‘polluter pays’ EU principle and as a way to protect the owner. Indeed, a voluntary rehabilitation of the land by the non-polluting owner does not negate this administrative responsibility. The action is predicated upon a public administration’s reasoned decision which attests that it is impossible to identify the person responsible or that the recovery action against that person, if identified (Art 253, para 3, Environmental Code),⁴⁷ has failed.

Only by virtue of a reasoned decision and the provisions of legge 7 August 1990 no 241, the maximum reimbursement the non-polluting owner can be required to pay is the market value of the land, which must be determined after the implementation of measures to be taken by the competent authority (Art 253, para 4, Environmental Code). With respect to the non-polluting owner who has rehabilitated the polluted site voluntarily, that person

‘shall be entitled to bring an action for damages against the person responsible for the pollution in respect for costs incurred and any additional damage suffered’ (Art 253, para 4, Environmental Code).

The wording of the provision appears to preclude recovery in cases of rehabilitation by the public administration where the public administration has been reimbursed by the non-polluting owner through an encumbrance. The restriction on the right to recovery is justified because, in light of Art 253, para 1 Environmental Code, the encumbrance should not exist where the competent authority does not intervene, as, for example, in the case a non-polluting owner’s spontaneous performance. An action for compensation for further damage is determined by the general rules of civil liability.

⁴⁶ Tribunale amministrativo regionale Lombardia-Milano 15 April 2015 no 940, available at www.giustizia-amministrativa.it.

⁴⁷ On the ‘ejecución forzosa y recuperación de costes por parte de la Administración’ in Spain see A.J. Quesada Sánchez, ‘Principi europei e regole di responsabilità ambientale in Spagna: quale ruolo per il diritto civile?’, in A. D’Adda, I.A. Nicotra and U. Salanitro eds, *Principi europei e illecito ambientale* (Torino: Giappichelli, 2013), 160-195.

III. The Correct Implementation of the ‘Polluter Pays’ Principle in Italian-European Law and the Legislative Hypertrophy of the Italian Environmental Liability System

Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage,⁴⁸ implemented the EU ‘polluter pays’ principle. Recital 2 of the Directive specifies that:

‘an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced’.

The principle – which is compensatory rather than punitive in nature – is premised on the notion that environmental justice requires the prevention of environmental damage, especially with regard to professional activities which pose a risk to health or the environment.

The Environmental Code separates matters that have many common features into two distinct parts: the rehabilitation of contaminated sites; (Title V, Part IV) and compensatory protection against environmental damages (Part VI).⁴⁹

However, defects with respect to coordination and the risk of unnecessary procedural duplications remain, resulting in a slowness that could have been obviated by a national unitary framework, in line with the European Directive on environmental liability.

A responsible person, faced with an event that could potentially contaminate a site, may choose to initiate the rehabilitation procedure pursuant to Art 242 Environmental Code or, alternatively, to activate the procedure for the adoption of the necessary measures for prevention and emergency safety pursuant to Art 304 Environmental Code.

The substantial connection between the scope of the two provisions indirectly derives from their identical notification procedures: Art 242, para

⁴⁸ M. Meli, *Il principio comunitario “chi inquina paga”* n 16 above, 269-275; S. Grassi, *Problemi di diritto costituzionale dell’ambiente* (Milano: Giuffrè, 2012), 300-313; L. Krämer, *EU Environmental Law* (London: Sweet & Maxwell, 7th ed, 2012), 27; M. Meli, ‘Il principio chi inquina paga e il costo delle bonifiche’ and V. Fogleman, ‘The Polluter Pays Principle for Accidental Environmental Damage; Its Implementation in the Environmental Liability Directive’, in A. D’Adda, I.A. Nicotra and U. Salanitro eds, n 47 above, 59-80 and 116-161. See also V. Corriero, ‘Il principio “chi inquina paga”’ n 16 above, 269-275.

⁴⁹ M. Gorgoni, ‘Ripristino, bonifica, risarcimento in forma specifica: dei vari volti della «riparazione» del danno all’ambiente’, in G. Ponzanelli ed, *Liber amicorum per Francesco D. Busnelli. Il diritto civile tra principi e regole* (Milano: Giuffrè, 2008), I, 319-338; F. de Leonardis, ‘La bonifica ambientale’, in P. Dell’Anno and E. Picozza eds, *Trattato di diritto ambientale*, II, *Discipline ambientali di settore* (Padova: Cedam, 2013), 273-374.

1, Environmental Code refers back to Art 304, para 2, Environmental Code. According to both procedures, the responsible party has an obligation to communicate the potential contamination to the municipality, the province, the region and the prefect of the province, who, in turn, inform the Environment Ministry.

The obligation of rehabilitation, according to the repealed Art 17, para 2, of the decreto legislativo 5 February 1997 no 22, was imposed on anyone who had either caused environmental contamination ‘in an accidental way’, or who had exceeded – or were genuinely at risk of exceeding – the limits of acceptability of environmental contamination. The expression ‘in an accidental way’ had influenced part of the legal scholarship⁵⁰ and courts⁵¹ causing the expression, in line with the ‘polluter pays’ EU principle, to reformulate the responsibility of the polluter in terms of strict liability: excluding the subjective criteria of fault or negligence, liability became exclusively based on the causal link between the act or omission of the polluter and the contamination.

The fact that the Environmental Code was silent as to the criteria needed to allocate liability for sites to be rehabilitated, combined with the suppression of the expression ‘in an accidental way’, led the courts – prior to amendments made in 2013 –⁵² to reformulate the responsibility of the polluter in subjective terms, in accordance with the general clause of Art 2043 Civil Code and general legislation on environmental damage (in Part VI of the Environmental Code).⁵³ The legislation on rehabilitation itself, contained in the Environmental Code, retained the subjective nature of liability of the polluter, and integrated encumbrance into it to combat inefficiency.

Following the conversion of decreto legge 25 September 135 no 2009,

⁵⁰ L. Prati, ‘Il danno da inquinamento e la disciplina delle bonifiche: l’aspetto della responsabilità civile’, in B. Pozzo ed, *La nuova responsabilità civile per danno all’ambiente. Le problematiche italiane alla luce delle iniziative dell’Unione europea* (Milano: Giuffrè, 2002), 147 and see also B. Pozzo, ‘La giurisprudenza in tema di bonifiche dopo il D.Lgs. 152/2006’ *Rivista giuridica dell’ambiente*, 838-843 (2007).

⁵¹ For the Tribunale Amministrativo Regionale Liguria 21 November 2005 no 1494, available at www.giustizia-amministrativa.it, responsibility of an objective nature would derive from the enterprise risk associated with the operation of an activity which is potentially damaging to the environment. A recent confirmation is by Consiglio di Stato 26 September 2013 no 4784, available at www.giustizia-amministrativa.it.

⁵² In contrast with the ‘polluter pays’ principle and with Directive 2004/35/EC, the rehabilitation discipline, before the 2013 amendments, required environmental damage and attributed a form of subjective liability to the polluter, founded on the general clause of Art 2043 Civil Code and on the subjective imputation criteria of fault and negligence. In this sense, see L. Prati, ‘I criteri di imputazione delle responsabilità per la bonifica dei siti contaminati dopo il D.Lgs. n. 152/2006’ *Ambiente & sviluppo*, 635, 636 (2006).

⁵³ Tribunale Amministrativo Regionale della Sicilia-Catania 20 July 2007 no 1254, available at www.giustizia-amministrativa.it.

with amendments, into legge 20 November 2009 no 166, the legislature added Art 5-bis, '*Attuazione della direttiva 2004/35/CE – Procedura di infrazione n. 2007/4679, ex articolo 226 Trattato CE*' which, in response to community censures, had passed through a number of amendments (Arts 303, 311, 317 Environmental Code, 2 decreto legge 30 December 2008 no 208, converted in legge 27 February 2009 no 13), which, however, only affected the assessment criteria for environmental damage.

In line with the original provisions of the Environmental Code, the legislative amendments did not affect the subjective nature of the liability of the polluter, nor did they eliminate the consequences for a violation of the Directive. In this way, in frequent cases of failure to identify the person responsible or in cases of that person's insolvency, the social cost of rehabilitation, fell upon the owner – not the polluter – through the imposition of an encumbrance.⁵⁴

The Italian legislature's inadequate enforcement of the 'polluter pays' principle is due to its frequent recourse to the rules of property, and, in particular, to its application of forms of collateral to contaminated sites such as the encumbrance and the special security interest (Art 253 Environmental Code), intended to allow an effective environmental restoration. Despite the proliferation of tort cases in environmental liability, there is a marked retreat from the use of responsibility rules, as the function of property is used as a tool of restoration (Art 42, para 2, Constitution). The understanding that property has a social function is intended as an effective environmental protection when contaminated sites are to be rehabilitated. The rules of liability, supported by subjective parameters, did not – until the amendments made in 2013 – ensure identification of the person actually responsible for the contamination and, in fact, while inspired by a policy preference for objective imputational criteria, actually defeated their intended purpose.

The *legge europea* 2013⁵⁵ reformulated certain rules on environmental damage in response to the objections of the European Commission (infringement procedure 4679/07). The *legge europea* 2013 marked a confused return to a form of strict liability, poorly coordinated with the rules contained in the Environmental Code (Arts 298-bis and 311, para 2).

The current legal regime on environmental damage has finally – despite persistent contradictions – brought the Italian system into line with EU legislation, allowing for the application of strict liability to dangerous activities listed in Annex V (as well as to energy industry, refineries, coke ovens, chemical activity, mining, production and processing of metals and waste

⁵⁴ V. Corriero, 'La «responsabilità» del proprietario del sito inquinato' *Responsabilità civile e previdenza*, 2440-2460 (2011).

⁵⁵ F. Giampietro, 'Danno ambientale e bonifica dopo la legge europea n. 97/2013' *Ambiente & sviluppo*, 973-979 (2013); U. Salanitro, 'La novella sulla responsabilità ambientale nella «legge europea» del 2013' *Le nuove leggi civili commentate*, 1309-1330 (2013).

management), which includes contaminated sites. In both Art 311 and the new Art 298-*bis*⁵⁶ of the Environmental Code, there is a reference to strict liability for damage caused by any activity listed in Annex 5 to Part VI of the Environmental Code.

In both the original formulation of Art 311 of the Environmental Code, before its 2013 amendments,⁵⁷ and in that currently in force, a subjective test determines liability for damage to protected species and natural habitats. This subjective test may allow damage to be attributable to ‘anyone’ and not only – as required by Directive 2004/35/EC – to operators of professional activities not included in Annex III. The inherent vagueness of the term ‘anyone’ coupled with the reference to the imputation criteria of fault and negligence could facilitate a self-serving construction of the liability criteria by a putative polluter intent on side-stepping liability under the ‘polluter pays’ principle. These elements combine to obfuscate the application of the framework of environmental liability.

The major review of Part VI of the Code, although incomplete and unsystematic, implemented some fundamental changes:

a) the introduction of strict liability to Art 298-*bis* of the Environmental Code (*Principi generali*) distinguishes damage and imminent threat of damage caused by any of the occupational activities listed in Annex 5 to part VI of the Code – for which a form of strict liability is imposed – from damage and any imminent threat of such damage from occupational activities other than those listed in Annex III – for which liability arises whenever the operator has been at fault or negligent;

b) the repeal of lett i) of Art 303, para 1, Environmental Code, in accordance with Art 4 of the Directive 2004/35/EC, which effectively widened the scope of the regulation on compensation for environmental damage to situations of pollution for which rehabilitation procedures have been activated or realised;

c) any references to pecuniary compensation as the only form of compensation for environmental damage (Art 311, para 3, Environmental Code) were deleted, as well as references to monetary valuation criteria designed only to determine the extent of damage for remedial actions.

⁵⁶ The new Art 298-*bis* of the Environmental Code could be renumbered as Art 298-*ter* (in this sense see Data bank online De Jure), following the unintentional insertion by the legislature which was ‘distracted’ by another Art 298-*bis* in the same Environmental Code and by the Art 25, para 1, decreto legislativo 4 March 2014 no 46, in the Part Quinta-*bis* addressing installations and establishments producing titanium dioxide industry.

⁵⁷ E. Leccese, *Danno all’ambiente e danno alla persona* (Milano: Franco Angeli, 2011), 120, advocates the solution adopted by the Italian legislature in the earlier version of Art 311 of the Environmental Code ‘in an area of “mediation” between the old and the new’, with the inevitable consequence of ‘betraying the aspiration of objectivity’ and, in violation of the ‘polluter pays’ principle, incorrectly transposing the European directive on environmental liability.

However, the amended part VI still incorrectly implements European principles because it suffers from a lack of coordination with the provisions on the rehabilitation of contaminated sites. The text of Art 311 sets forth elusive and contradictory formulations of European law: the heading, although modified by the deletion of the words ‘pecuniary equivalent’, still retains a reference to that very form of compensation in the first paragraph, thanks to legislator oversight.

Administrative justice provides for the imputation of damage ‘to those who control the conditions of risk’,⁵⁸ rather than allowing the principle of ‘modeling liability in relation to litigious fact scenarios by reference to the subjective element of fault or negligence’ to guide it. In this way, society imputes the cost of the damage to the person who has the possibility of performing a ‘cost-benefit analysis’ before the damage actually occurs, and imposes responsibility on such a person for his failure to carry out this function. The aim of this approach is to foster the internalisation of negative externalities – ie the costs of environmental alteration – into enterprise budgetary planning as part of corporate social responsibility.⁵⁹

After integrating the encumbrance into the social function of property, the legislature avoids imposing the burden of the costs of rehabilitation on the collectivity through the public administration. It does this in order to avoid that the owner could derive an unwarranted benefit from the rehabilitation of the polluted site,⁶⁰ according to the principle provided for by Art 2041 Civil Code.⁶¹

The recoupment action exercised by the public administration is based on the principle of unjust enrichment. Such a principle is predicated on a proportionality of values, which has its roots in the constitutional principle of economic and social solidarity (Art 2 Constitution); unjust enrichment exceeds individualistic concerns and makes itself known as the ‘parameter of active and passive situations under both public law and private law’.⁶²

In practice, unjust enrichment is implemented by placing an encumbrance on sites to be rehabilitated.

⁵⁸ Tribunale Amministrativo Regionale del Lazio-Roma 16 March 2015 no 1680, available at www.giustizia-amministrativa.it, imputing damage to the polluter; Consiglio di Stato 30 April 2012 no 2038 n 7 above, imputing damage to the owner.

⁵⁹ A. Addante, *Autonomia privata e responsabilità sociale dell'impresa* (Napoli: Edizioni Scientifiche Italiane, 2012), passim; G. Mastrodonato, ‘Gli strumenti privatistici nella tutela amministrativa dell'ambiente’ *Rivista giuridica dell'ambiente*, 707, 722-723 (2010).

⁶⁰ In the same sense see F. Goisis, n 40 above, 2711.

⁶¹ F. Giampietro, n 7 above, 284, states that the Art 253, para 4, Environmental Code derives from the unjustified enrichment principle ex Art 2041 Civil Code (in case law see Tribunale Amministrativo Regionale of Sicilia-Catania 20 July 2007 no 1254 no 53 above) and, therefore, it is open to criticism, as it imposes on the Public Administration heavy and unnecessary burdens of proof (referred to in para 3) given the residual nature of the unjustified enrichment action.

⁶² L. Barbiera, *L'ingiustificato arricchimento* (Napoli: Jovene, 1964), 210.

As other commentators have noted,⁶³ in circumstances where the rehabilitation costs exceed the market value of the site, the owner may find it cheaper to bypass the dual system of collateral imposed on the site to be rehabilitated by abandoning the land to the public administration.

The European 'polluter pays' principle, as implemented into Italian law, was considered in the context of scholarly discussion on the doctrine of unjust enrichment, to be a 'stylistic clause',⁶⁴ inappropriately implemented by the legislator and incorrectly applied by the courts.⁶⁵ The Italian legislation on environmental damage, not based on strict liability criteria and therefore in violation of Directive 2004/35/EC,⁶⁶ is grounded in constitutional solidarity (Art 2 Constitution), which is connected with the social function of property (Art 42, para 2, Constitution)⁶⁷ and with the protection of relevant constitutional interests, such as health and the environment (Arts 2, 32 and 117, para 2, lett s Constitution).

The actual Italian environmental liability regime is in large part based on objective criteria and is fully in line with the 'polluter pays' principle as it relates to dangerous activities. Its regulation of dangerous activities is also congruent with the principle of the social function of property and corresponds to European law as interpreted by the ECJ. These contaminated properties are destined for environmental rehabilitation, in the personal, social and environmental interest.⁶⁸

However, in the process of 'civilization in the environmental interest', which is based on European environmental principles, as enshrined in Art 192, para 2, TFEU and now transposed into Italian law by Art 3-ter Environmental Code, the 'who pays' principle cannot be uncoupled from the 'polluter' principle and transferred to the owner for the sole reason of direct possession of the land at the time the competent authority issues notice to

⁶³ P. Carpentieri, 'Bonifica e ripristino ambientale dei siti inquinati: obblighi del proprietario (I) (II)' *Ambiente*, 631, 845-846 (2002); A. Nervi, 'Tutela ambientale e bonifica dei siti contaminati' *Rivista diritto civile*, II, 693-709 (2004).

⁶⁴ F. Giampietro, 'Ordine di bonifica', in his comment on Tribunale amministrativo regionale Lazio-Roma 14 March 2011 no 2263 n 7 above, 547, fn 16, criticizes the extensive and arbitrary interpretation of TAR Lazio, which derives the intention to exclude the collectivity's responsibility for the rehabilitation costs and an attribution of such responsibility to the culpable person from the 'polluter pays' principle by applying objective imputation criteria, regardless of any subjective element (fault or negligence).

⁶⁵ Consiglio di Stato 15 luglio 2010 no 4561, available at www.giustizia-amministrativa.it.

⁶⁶ F. Giampietro, 'Codice dell'ambiente: l'(incoerente) attuazione dei principi ambientali in materia di bonifica e danno ambientale' *Ambiente & Sviluppo*, 333, 337 (2009); B. Pozzo, 'La direttiva 2004/35/CE e il suo recepimento in Italia' *Rivista giuridica dell'ambiente*, 1-80 (2010). See also, V. Corriero, 'Il principio "chi inquina paga"' n 48 above, 271-275.

⁶⁷ See on this point P. Dell'Anno, 'La tutela dell'ambiente come «materia» e come valore costituzionale di solidarietà e di elevata protezione' *Ambiente & sviluppo*, 585, 590 (2009).

⁶⁸ V. Corriero, *Autonomia negoziale e vincoli negli atti di destinazione patrimoniale* (Napoli: Edizioni Scientifiche Italiane, 2015), 178-189 and below para III.

adopt specific emergency safety measures.

The private law instruments used – the rules of strict liability, with respect to activities damaging to health and environment (Annex III to Directive 2004/35/EC), the principle of the social function of property (Art 42, para 2, Constitution) and the doctrine of unjust enrichment *ex* Art 2041 Civil Code – dovetail perfectly with the *ratio* which has grown out of the ECJ's construction of the 'polluter pays' principle, supporting the notion of a unitary legal system.⁶⁹

The alternative interpretation proposed by the plenary assembly of the *Consiglio di Stato* is a further attempt to shift the rehabilitation costs exclusively to the owner of the site. In its referral orders to the ECJ for a preliminary ruling,⁷⁰ the *Consiglio* indirectly intended to allow the public administration to require the reimbursement of rehabilitation costs which amounted to more than the value of the site. In this regard, the dissenting judgments, demurring to the correctness of the majority view, do not justify the decision of the *Consiglio* to refer this point of disagreement to the ECJ, only seeing some possible justification for it in the desire to devise a method to hold the polluter responsible.

Part of administrative case law, while denying that the burdens falling on the non-culpable owner for the contamination constitute a form of liability, are nonetheless aware of EU case law which, in its interpretation of the EU 'polluter pays' principle, precludes the transfer of the costs resulting from the restoration of polluted sites to the collectivity. Administrative case law resolves the problem by attaching these costs to the property by virtue of the constitutional principle of the social function of property (Art 42, para 2, Constitution).⁷¹

The plenary assembly of the *Consiglio di Stato*, instead of justifying such an interpretation in light of Art 42, para 2, Constitution, however, framed its reasoning by referring to 'limits that meet this operation of 'internalisation' of the environmental cost (so-called externalities or social costs unconnected with the ordinary operations of the accounts).' These limits recognize that the 'who' of the EU principle 'polluter pays' might include the owner of the contaminated site, in the event that the culpable person is not identified or

⁶⁹ In particular, see P. Perlingieri, *Leale collaborazione tra Corte Costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008), 54-64; Id, 'Diritto comunitario e identità nazionali' *Rassegna di diritto civile*, 530-545 (2011); A. Tartaglia Polcini, 'Integrazione sistematica e assiologica dirimente nel dialogo tra Corte costituzionale e Corte di giustizia', in P. Femia ed, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 421-478.

⁷⁰ Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25, n 1 above.

⁷¹ In this sense, see the opinion, given in an extraordinary appeal, of the Consiglio di Stato 30 April 2012 no 2038 (unreported); Tribunale amministrativo regionale Lazio-Roma 14 March 2011 no 2263 n 7 above.

insolvent.⁷²

The costs of decontamination, generally borne by the community or single guiltless subjects, must be imputed to the polluters.⁷³ Such application of the ‘polluter pays’ principle is based on recital 18 of Directive 2004/35/EC, according to which

‘an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures. In cases where a competent authority acts, itself or through a third party, in the place of an operator, that authority should ensure that the cost incurred by it is recovered from the operator.’

From this viewpoint, administrative law constrains the boundaries of the ‘polluter pays’ principle by subjecting its application to a proportionality test, referenced in the same Directive 2004/35/EC (recital 3), so that the legislature and the administrative organs may ‘distribute any costs of protection proportionally to the negative incidence that each person causes on overall environment’.⁷⁴

Likewise, the principle of proportionality must be harmonised with the precautionary principle – which provides that, when preventive action is intended, the burden of proof necessarily shifts to the proponent of harm in the absence of scientific proof that harm actually exists.

The logic of the ‘polluter pays’ principle derives primarily from its preventive function and secondly from its compensatory role *ex post factum*. With respect to prevention, enterprises must internalise the potential costs of environmental alteration by incorporating such costs into commodity prices. It therefore appears unlikely that these costs, included in the costs of production, would lead to a decrease in the price of goods; they would, rather, lead to an increase. The different opinion of the *Consiglio di Stato*⁷⁵ contradicts the principles of the Consumer Code (decreto legislativo 6 September 2005 no 206), as it necessarily imposes the burden of decontamination costs on the consumer. In fact, the social costs borne by the collectivity, both *ex ante* and *ex post*, would decrease if all enterprises were – in accordance with the prevention and precautionary principles – required

⁷² Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, para 32.

⁷³ Tribunale Amministrativo Regionale Piemonte-Torino 11 February 2011 no 136, available at www.giustizia-amministrativa.it.

⁷⁴ Tribunale Amministrativo Regionale Puglia-Lecce 13 April 2011 no 664, available at www.giustizia-amministrativa.it.

⁷⁵ Consiglio di Stato-Sezione V 16 June 2009 no 3885, available at www.giustizia-amministrativa.it.

to adopt appropriate measures to avoid the damage (Art 2050 Civil Code).⁷⁶ From the perspective of sustainable development,⁷⁷ the ‘polluter pays’ principle provides the final straw with respect to the principles of prevention and precaution.

IV. The Encumbrance on the Contaminated Site as a Burden Imposed in the Personal, Social and Environmental Interest

Placing encumbrance under the rubric of contaminated sites confirms the need to reinterpret it in a historical-comparative perspective.⁷⁸ The encumbrance is characterised by its innate ability to satisfy common interests, such as environmental protection, as a result of its typicality,⁷⁹ which works well with the provisions of Art 42, para 2, Constitution, which requires law to ensure the social function of property.⁸⁰

⁷⁶ On the implementation of Directive 2004/35/EC in a comparative perspective, see B. Pozzo, ‘Il recepimento della direttiva 2004/35/CE sulla responsabilità ambientale in Germania, Spagna, Francia e Regno Unito’ *Rivista giuridica dell’ambiente*, 207, 210 (2010), which highlights how the German Civil Code (Bürgerliches Gesetzbuch, BGB) provides no strict liability provision for the exercise of dangerous activities comparable to the content of Art 2050 Civil Code.

⁷⁷ M. Pennasilico, ‘Sviluppo sostenibile e solidarietà ambientale’, in M. Pennasilico ed, n 16 above, 49-53.

⁷⁸ The third book of the BGB, entitled *Sachenrecht* (Right of the things), dedicates the sixth section on encumbrances (*Reallasten*), establishing at §1105 that ‘*ein Grundstück kann in der Weise belastet werden, dass an denjenigen, zu dessen Gunsten die Belastung erfolgt, wiederkehrende Leistungen aus dem Grundstück zu entrichten sind (Reallast)*’ (‘A plot of land may be encumbered in such a way that recurring acts of performance are to be made from the plot of land to the person in whose favour the encumbrance is created (charge on land)’), English translation available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p4244 (last visited 6 December 2016)). See, also, A. Fusaro, ‘«Affectation», «destination» e vincoli di destinazione’, in P. Cendon ed, *Scritti in onore di Rodolfo Sacco. La comparazione* (Milano: Giuffrè, 1994), II, 455-480.

⁷⁹ The typicality of the encumbrance exemplifies a legal technique envisaged by Art 42, para 2, Constitution, according to which the legislator realizes the balance between the individual interest of the owner and the social interest. The overcoming of the inviolable concept of ownership as established by the Constitution, which defines the prevalence of the social interest in terms of balancing the interest of the owner, is analyzed by S. Rodotà, ‘Art. 42’, in Id and F. Galgano eds, *Rapporti economici*, II, *Arts 41-44*, in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zanichelli-Foro italiano, 1982), 110. With particular reference to the properties of polluted sites, see P. Carpentieri, n 63 above, 851 and *contra* Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, para 21.

⁸⁰ P. Carpentieri, n 63 above, 635, 846, 850-851, allows the framing of the encumbrance in the context of the rehabilitation of contaminated sites from the viewpoint of the social function of property, where a foundation of reasonableness is found and proportionality in the legislative choice of private property involvement in the pursuit of health objectives and of environmental protection of decontamination. In the same sense, see also A. Nervi, n 63 above, 708; V. Corriero, ‘La «responsabilità» del proprietario’ n 54 above, 333-345; Id, ‘Garanzie reali e personali in funzione di tutela ambientale’ n 4 above, 49-52, 60, 69; Id, *Autonomia negoziale e vincoli negli atti di destinazione patrimoniale* n 68 above, 178-189; A.

The plenary assembly of the *Consiglio di Stato* is, however, of a different opinion. In the two orders referring the question of the application of EU principles (Art 191, para 2, TFUE) concerning sites to be rehabilitated⁸¹ to the ECJ, the plenary assembly denied that the clauses contained a legal provision that could justify the imposition of an encumbrance within the social function of private property (Art 42 Constitution) –⁸² as also requested by the European Court of Human Rights case law (hereinafter ECHR).⁸³

The *ratio* of legislation on sites to be rehabilitated lies between the rules of property and those of liability.⁸⁴ The provisions seek to represent a judicious balance between multiple constitutional values: the right to private property (Art 42 Constitution), freedom of economic initiative (Art 41 Constitution), safeguarding of human health (Art 32 Constitution) and environmental protection (Art 117, para 2, lett s, Constitution). The balance finds its equilibrium in respect for the centrality of the person (Art 2 Constitution),⁸⁵ which time and again has been identified as the prevalent interest.

Art 253, para 1, Environmental Code constitutes a typical model of how to destine certain goods (Art 2645-ter Civil Code) for the purpose of health and environmental protection. It reconciles a number of interests: the interest in the repair of polluted environmental matrices (soil, landfills, subsoil and groundwater); the social interest in the protection of public health; the community interest in not being exposed to rehabilitation costs and the personal interest of the owner in good health and in owning a rehabilitated site (even if he is not responsible for the contamination).⁸⁶

This view is not in accord with the body of administrative case law that,

Tommasini, 'Proprietà privata, sicurezza agroalimentare e tutela ambientale (a proposito della gestione dei siti contaminati)' *Rivista di diritto alimentare* (2015), 64, 74.

⁸¹ Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, para 21.

⁸² For P. Rescigno, 'Proprietà (diritto privato)' n 42 above, 254, 271-272, the rereading of property rights within a social perspective is influenced by Catholic thinking, which is sensitive to the rights of non-owners.

⁸³ On the relations between the two European Courts (Strasbourg and Luxembourg) for environmental protection, see A. Randazzo, 'Ambiente e tutela sovranazionale: il contributo della Corte di Strasburgo', in A.M. Citrigno and G. Moschella eds, n 21 above, 320-324. See, also, P. Carballo Armas, 'Il diritto all'ambiente nella giurisprudenza del Tribunale europeo dei diritti umani ed il suo recepimento nella dottrina del Tribunale costituzionale spagnolo', *ibid* 381-395.

⁸⁴ G. Calabresi and D. Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' 85 *Harvard Law Review*, 1089, 1115-1124 (1972), on the pollution control rules.

⁸⁵ P. Perlingieri, 'Complessità e unitarietà dell'ordinamento giuridico vigente' *Rassegna di diritto civile*, 188, 199-207 (2005); Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 159-215.

⁸⁶ V. Corriero, *Autonomia negoziale* n 68 above, 178-189.

due to the fact that the encumbrance is inserted into para 2 and not para 3, Art 42 Constitution, characterises Art 253 as ‘more similar to expropriation than to compensation for environmental damage’.⁸⁷ Such expropriation would derive from a breach of the encumbrance and the consequential forced execution of the special security interest (Arts 253 Environmental Code and 2910 Civil Code). There is a parallel between this provision and the expropriation of real estate ex Art 42, para 3, Constitution, although these rehabilitation measures constitute public utility works (Arts 17, para 7, decreto legislativo 5 February 1997 no 22, now in 242, para 7, Environmental Code).

The fact that the provision exposes the non-polluter owner to the same measure of liability as the polluter⁸⁸ raised doubts as to the provision’s constitutionality. The encumbrance has been likened to expropriation, which necessarily gives rise to a possible indemnity from the administration. Without such an indemnity the non-polluting owner would necessarily incur the social cost of rehabilitation.

This approach is not acceptable, however, because the provision, while not within the scope of Art 42, para 3, Constitution, is unequivocally within the scope of Art 42, para 2. The encumbrance places a legal limit on property, in order to ensure that it achieves a social function – the safeguarding of constitutionally guaranteed values, such as human health and environmental protection (Arts 2, 9, 32 e 117, para 2, lett s, Constitution). An encumbrance does not merely serve an egoistic-individual function, nor does it serve as an assurance of the owner’s exclusive economic enjoyment in his real estate.

The revised Art 252-*bis*, para 7, Environmental Code, introduced by decreto ‘*Destinazione Italia*’ (Art 4 decreto legislativo 23 December 2013 no 145, converted with modifications into legge 21 February 2014 no 9) has

⁸⁷ Tribunale Amministrativo Regionale Piemonte-Torino 21 November 2008 no 2928, available at www.giustizia-amministrativa.it. *Contra* P. Carpentieri, n 63 above, 846-847, who qualifies the *iter* procedural designed by the decreto Ronchi – which tracks that provided by the Environmental Code – as ‘alternative to, and incompatible with, expropriation’.

⁸⁸ D. Röttgen, ‘Siti inquinati: responsabilità del proprietario non autore dell’inquinamento’ *Ambiente*, 1088, 1089 (2001) and S. D’Angiulli, ‘Privilegi e bonifiche: diritto italiano e tedesco a confronto’ *Ambiente*, 1092-1095, reflect on the constitutionality of the Art 17, paras 10 and 11, decreto legislativo 5 February 1997 no 22, in light of the judgment of 16 February 2000 of the German Federal Constitutional Court (*Bundesverfassungsgericht*), which declared the law for the protection from harmful changes of soil and for rehabilitation of contaminated sites (*Gesetz zum Schutz vor schädlichen Bodenveränderungen und zur Sanierung von Altlasten, Bundes-Bodenschutzgesetz-BBodSchG*) illegitimate on the grounds that it exposed the owner of the site to unlimited personal financial liability, regardless of the valuation of the subjective conditions of the owner, then the state of good or bad faith in relation to the presence of contamination on the site in question, for breach of the constitutional norm for the protection of property (Art 14 *Grundgesetz*) and for conflicts with the principle of reasonableness (*Verhältnismäßigkeitsprinzip*). For a more detailed comparison between Italian and German law, see M. Mazzoleni, ‘Tecniche di tutela del suolo: disciplina tedesca ed italiana a confronto’, in F. Giampietro ed, *La bonifica dei siti contaminati. I nodi interpretativi giuridici e tecnici* (Milano: Giuffrè, 2001), 363-379.

eliminated the subsidiary liability of the owner (already provided for by Art 252-*bis*, para 2, Environmental Code, as formulated by decreto legislativo 16 January 2008 no 4) where national interest sites in the process of industrial reorganization are contaminated. The constitutionality of an owner's subsidiary liability was in doubt due to a misuse of power by the legislator and due to the violation of the 'polluter pays' principle,⁸⁹ albeit in relation to a special possession. The subsidiary liability was arguably justified on the grounds that it represented a balance between the public interests relating to the polluted site – or the decontamination and re-industrialisation thereof – and the private interest in the economic exploitation of the real estate, in accordance with the sustainable development principle (Art 3-*quater*, para 1, Environmental Code).

Among the most important and discussed novelties of the new law, are the concepts of 'encumbrance revocation' and 'conditional revocation'. 'Encumbrance revocation relates to all acts committed prior to the program agreement designed to promote the realisation of the rehabilitation of sites of national interest', whereas conditional revocation concerns a case where 'the person responsible for the contamination has been certified as having undertaken rehabilitation of, and implemented safety measures on, the polluted sites' (Art 252-*bis*, para 6, Environmental Code). This latter provision was introduced at the urging of environmental associations, in order to mitigate the violation of the 'polluter pays' principle, given the anticipated 'tomb amnesty' for environmental disasters which displayed an unjustified bias in *favor* of big companies responsible for the pollution of SNIs.⁹⁰

The norm confirms the centrality of the encumbrance and of the special security interest. The special security interest also assists *ex officio* interventions by the public administration with regard to sites of national interest,⁹¹ while, at the same time, evading the *ratio* of the encumbrance, which is effectively a residual environmental protection. All other obligations of rehabilitation and environmental remedying governed by the Environmental Code can be excluded and/or 'evaded' by a legal agreement between the persons responsible

⁸⁹ L. Butti and F. Peres, 'Articolo 252-*bis*', in V. Italia ed, *Codice dell'ambiente. Commento al D.lgs. 3 aprile 2006, n. 152, aggiornato alla Legge 6 giugno 2008, n. 101* (Milano: Giuffrè, 2008), 2041-2042; F. Goisis, n 40 above, 2724.

⁹⁰ V. Corriero, 'Responsabilità e riparazione ambientale nella bonifica dei siti contaminati', in M. Pennasilico ed, n 16 above, 359, 364-365.

⁹¹ According to Tribunale Udine 9 May 2011 no 1840, available at *Data bank online De Jure*, the logical and systematic interpretation of Art 253, whatever the application of the principle of Art 3 Constitution, leads to a solution in which all office actions (Arts 250 and 252, para 5) carried out by the competent local authorities for sites of regional relevance, or by the Ministry for the sites of national interest, are assisted by a special security interest. This use of the special security interest is subject to the rule in art. 2748, para 2, Civil Code and to the registrability of the connected encumbrance on the real estate which is the object of the special security interest.

for the contamination and the public administration (Art 252-*bis*, para 6, Environmental Code) covering ‘all acts committed prior to that agreement.’ These legal agreements do seem, however, to prioritize the interests of re-industrialisation over the protection of health and the environment.

The same provision – this time in line with the ‘polluter pays’ principle – establishes that public contributions and other economic and financial support measures (Art 252-*bis*, para 2, lett *e*, Environmental Code), which are imposed upon those responsible for the contamination, may concern ‘only the buying of inconsumable things to industrial reorganisation and economic development of the area’ (Art 252-*bis*, para 6, Environmental Code), but not the safety measures, rehabilitation and remedying of environmental damage, which are part of the polluter’s competence.

A notable provision is Art 306-*bis* which has been introduced by the so called ‘environmental connected’ provision in the Environmental Code,⁹² and which deals with damages and the environmental restoration of sites of national interest in the context of reinforcing ‘environmental negotiation.’ For the first time this article incorporates a provision on environmental transactions (new Art 306-*bis* on transactions aimed at environmental restoration of SNIs) into the Environmental Code, a provision previously introduced into the law by Art 2 decreto legge 30 December 2008 no 208, and converted into the (now repealed) legge 27 February 2009 no 13. The ‘global transaction’ is an alternative dispute resolution mechanism, with the purpose of diminishing the need for legal cases. The norm establishes the possibility of a form of pecuniary compensation which is not in accord with the specific form of compensation indicated by Directive 2004/35/EC.⁹³

V. The Essential Requirement of a Causal Link for Environmental Liability

One of the most significant aspects of the judgment of the Luxembourg Court is the necessity for proof of causation.⁹⁴ The Luxembourg Court

⁹² Art 31, para 1, legge 28 December 2015 no 221 ‘*Disposizioni in materia ambientale per promuovere misure di green economy e per il contenimento dell’uso eccessivo di risorse naturali*’. For more details, see M. Meli, ‘La nuova disciplina delle transazioni nelle procedure di bonifica e di riparazione del danno ambientale concernenti i siti di interesse nazionale’ *Le nuove leggi civili commentate*, 456, 470 (2016).

⁹³ V. Corriero, ‘La “transazione globale” per il ripristino dei siti inquinati di interesse nazionale (SIN)’, in M. Pennasilico ed, n 16 above, 367-370.

⁹⁴ On the problem of strict liability, on the consequential insurability of environmental damage, and on the relevance of the causal link in strict liability in environmental responsibility, see L. Villani, ‘Il danno ambientale e le recenti modifiche del Codice dell’Ambiente (D.Lgs. n. 152 del 3 aprile 2006) nel sistema della responsabilità civile’ *Responsabilità civile e previdenza*, 2173, 2179 (2008) and there for further bibliography (fn 31). On the causal relationship in the unitary and complex legal system, see M. Pennasilico, ‘Dalla causalità alle

requires proof of causation in the context of strict liability for damages caused by any of the occupational activities listed in Annex 3 of the Directive 2004/35/EC, and by the corresponding activities in Annex 5 to part VI of the Environmental Code.⁹⁵ The court also requires proof for damages caused to species and natural protected habitats⁹⁶ and ascertained under subjective liability where the operator is at fault or has been negligent and where the operator's activity is different from those listed in the abovementioned annexes (Art 3, para 1, lett *a* and *b* Directive 2004/35/EC correspondent to Art 298-*bis* Environmental Code).

The position adopted by the Luxembourg Court on the question of the obligations imposed on a non-polluting owner confirms the previous reasoning of Luxembourg judges, recalled and applied to the peculiarities of the present case.⁹⁷

The difficulty of demonstrating a causal link in relation to environmental pollutions, especially those of historic origin and diffuse character, may be particularly evident when several dangerous substances posing a threat to health and the environmental activities are alternately used on a site. Such difficulty has led the ECJ to consider whether national legislation which, in the transposition of the Directive, allows the competent authority *to presume* and *not to exclude* the existence of a causal link between the exercise of activities, which fall within the types referred to Annex III of the Directive, and contamination of environmental matrices,⁹⁸ is compatible with European

causalità: il problema del nesso eziologico tra diritto civile e diritto penale' *Rassegna di diritto civile*, 1295-1315 (2013).

⁹⁵ Tribunale Amministrativo Regionale della Lombardia-Milano 19 April 2007 no 1913, *Rivista giuridica dell'ambiente*, 830 (2007), according to which, when the party responsible no longer exists, a subject entirely foreign to pollution cannot be held responsible, not even in strict liability, which presupposes the conduct, despite the absence of subjective imputation criteria of fault or negligence. This *dicta* is published in the same review with other decisions, with comments of A.L. De Cesaris, 'L'Amministrazione fa male all'ambiente e all'impresa'; L. Prati, 'La giurisprudenza in tema di bonifiche dopo il D.Lgs. 152/2006'; M. Panni, 'Inquinamento storico e obblighi attuali di bonifica', in which the Italian administrative case law denies the liability of the owner and of the administrator of the area, who carry out occupational activities, on the grounds that they are not the authors of the pollutions on the national interest sites in question. The Ministero dell'Ambiente nevertheless, however, imposes the obligation to establish an emergency safety system of the groundwater table, through the construction of a hydraulic capture barrier in order to protect the groundwater table, regardless of technician ascertainment of the actual contamination *status*.

⁹⁶ V. Corriero, *La funzione sociale della proprietà nelle aree protette* (Napoli: Edizioni Scientifiche Italiane, 2005), 40-47, 148-154.

⁹⁷ Joined Cases C-478/08 and C-479/08 *Buzzi Unicem S.p.A. and other v Ministero dello Sviluppo Economico and other* (European Court of Justice 9 March 2010) n 19 above, para 38.

⁹⁸ Cases C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other v Ministero dello Sviluppo economico and other* and Joined Cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) s.p.a. and other v Ministero dello Sviluppo economico and other* n 13 above.

law. As provided in Art 11, para 2, of Directive 2004/35/EC, the causal link must be demonstrated by the competent authority. This evidence may, if necessary, be plausible evidence, which corresponds to the presumptions – serious, precise and consistent – set out in Art 2729, para 1, Civil Code.

The evidence of the causal link between the act or omission of the polluter and the contamination of environmental matrices can, according to Italian administrative case law, also be demonstrated indirectly, in accordance with the ECJ guidelines, through simple presumptions (Art 2729, para 1, Civil Code), or ‘elements of fact from which serious, precise and consistent evidence can be drawn, which raises the probability that pollution has occurred and that it is attributable to certain authors’.⁹⁹ Evidence that could support such a conclusion would be the existence of an industrial plant in proximity to the polluted site or a similarity between chemicals used in industrial activities and pollutants found in the environmental matrices.¹⁰⁰

In fact, according to the ‘polluter pays’ principle, the obligation to remedy environmental damage falls neither on the non-polluting owner nor on the collectivity (ie the public administration). Rather, it falls on the polluters in proportion to their contribution to the damage that has occurred.

To impose custodial liability on an owner who is not the polluter would transform that owner into a sort of State designated ‘licensee’. From the moment the owner would entrust the management of the property to third parties, he would be obliged to examine, under pain of liability, the reliability of the third parties in terms of sustainable approaches to industrial activities which would be carried out *in situ*. The result would be aberrant, illogical and would openly violate the Italian constitutional principles (reflecting European environmental values). It would involve excessive responsibility on the part of the owner and would result in a real lack of accountability for the polluter. Contrary to the fundamental principles of national law, the limitation of real estate circulation would also follow as another indirect effect.

⁹⁹ Consiglio di Stato-Sezione V 16 June 2009 no 3885, Tribunale Amministrativo Regionale della Toscana-Firenze 17 September 2009 no 1448, Tribunale Amministrativo Regionale della Toscana-Firenze 24 August 2009 no 1398, *Rivista giuridica dell’ambiente*, 152 (2010). For a contrary view, see Consiglio di Stato-Sezione VI 9 January 2013 no 56, available at www.giustizia-amministrativa.it, which considers ‘the rigorous assessment of the causal link between the act of ‘responsibility’ and the phenomenon of pollution’ necessary and provides that ‘such a determination must be based on adequate reasoning, on suitable instructors elements’ and ‘on evidence and not on mere presumptions.’

¹⁰⁰ In this sense, see Tribunale Amministrativo Regionale della Sicilia-Catania 11 September 2012 no 2117, *Rivista giuridica dell’ambiente*, 114 (2013), with comment of L. Prati in accordance with Case C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other v Ministero dello Sviluppo economico and other* n 13 above, cited in para 57 of motivation of the judgment. See, by analogy, Case C-188/07 *Commune de Mesquer v Total France SA e Total International Ltd* (European Court of Justice Grande Chambre 24 June 2008), available at www.eur-lex.europa.eu, para 77.

Hard Cases

The Worthiness of Claims Made Clauses in Liability Insurance Contracts

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Abstract

The Italian Supreme Court has ruled on the worthiness control of clauses in insurance contracts and particularly of the claims made clauses contained in insurance policies against professional liability. This essay examines the conclusions of the Court with some considerations about the issue of the adequacy of the insurance products in respect to the needs of policyholders.

I. The Decision of the United Sections of the Court of Cassation

The Italian Supreme Court of Cassation in a nine-judge panel known as the ‘united sections’¹ has ruled on the validity of claims made clauses in liability insurance contracts.²

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¹ Cases brought to the Italian Supreme Court are normally heard by a panel of five judges. In more complex cases, especially those concerning compounded matters of interpretation, an extended panel of nine judges (‘united sections’ of the Supreme Court) decides the case.

² Corte di Cassazione-Sezioni Unite 6 May 2016 no 9140, with the comment of E. Cosconati, ‘La clausola c.d. *claims made* mista o impura: valida, non vessatoria, ma a rischio nullità per difetto di meritevolezza’ *La Rivista Nel diritto*, 844 (2016); with the comment of R. Pardolesi, ‘Le sezioni unite sulla clausola *claims made*: a capofitto nella tempesta perfetta’ *Foro italiano*, I, 2026 (2016); A. Palmieri, ‘Polizze *claims made*: bandito il controllo di vessatorietà ex art. 1341 c.c.’ *Foro italiano*, I, 2032 (2016) and B. Tassone, ‘Le clausole *claims made* al vaglio delle sezioni unite: gran finale di stagione o prodromo di una nuova serie?’ *Foro italiano*, I, 2036 (2016).

On the worthiness of claims made clauses, taking in to account the concrete interest of the insured party, G. Volpe Putzolu, ‘Assicurazione r.c. dei professionisti e clausola *claims made*’ *Diritto del mercato assicurativo e finanziario*, forthcoming (2016); Id, ‘La clausola *claims made* – Rischio e sinistro nell’assicurazione r.c.’ *Assicurazioni*, 3 (2010). On the validity of claims made clauses see also M. Gazzara, ‘L’assicurazione di responsabilità civile professionale’ (Napoli: Edizioni Scientifiche Italiane, 2016), 88; P. Gaggero, ‘Validità ed efficacia dell’assicurazione della responsabilità civile *claims made*’ *Contratto e impresa*, 401 (2013); S. Monticelli, ‘Responsabilità dei professionisti: la clausola *claims made* tra abuso del diritto ed immeritevolezza’ *Danno e responsabilità*, 701 (2013); G. Volpe Putzolu, ‘La clausola *claims made* – Rischio e sinistro nell’assicurazione r.c.’ *Assicurazioni*, 3 (2010).

The principle affirmed by Corte di Cassazione-Sezioni Unite has been applied by Tribunale di Milano 17 June 2016, *Redazione Giuffré* (2016).

In civil liability insurance there are essentially two pricing models: The loss occurrence formula, where the covered event is verification of the damaging event, or the claims made formula, where the covered event is the victim's claim. In the case of policies with a claims made clause, the insurance coverage includes all claims that occurred during the duration of the policy; in the case of policies with a loss occurrence clause the coverage includes all the claims for compensation of the damages that occurred during the duration of the policy.

These two models are based on the different liability insurance needs: if there could be a significant lapse of time between the occurrence of the damaging event and the claim (as in case of medical malpractice), it is preferable to use the claims made formula; otherwise (as in cases of general liability insurance) the loss occurrence formula will be preferable. The two models are not always clearly distinct, as it is possible to have a so called impure claims made clause; pure claims made clauses provide for compensation of all damage claims received during the duration of the contract, regardless of the time of verification of the damaging event, while impure claims made clauses provide for compensation of all damage claims received during the duration of the contract, provided that the time of verification of the damaging event is in some earlier period with respect to the conclusion of the contract.³

The Court affirmed that Art 1917 of the Civil Code on liability insurance recognizes the loss occurrence formula as the legal formula. This article provides that:

A judgment after the Cassation Court 2016 on claims made has been held by the Tribunale di Bologna 18 August 2016, *Foro italiano*, 1605 (2016), affirming that the clause is valid. The discipline on unfair condition in consumers contract is not applicable because the actor is a professional; the clause doesn't derogate to an imperative norm nor to the principle of good faith. This judgement seems to follow past judgements of the Supreme Court: Corte di Cassazione 10 November 2015 no 22891, *Responsabilità civile e previdenza*, 528 (2016); Corte di Cassazione 17 February 2014 no 3622, *Giustizia Civile Massimario* (2014); Corte di Cassazione 22 March 2013 no 7273, *Guida al diritto* 22, 57 (2013). Moreover, the Tribunal of Bologna affirms that the nullity profiles are not attached and proved, especially in the light of the amount of the premium, in relation to the insurance coverage limit (five hundred seventeen euros) and to the coverage including also events occurred before the stipulation.

³ Claims made clauses are well diffused not only in case of professional liability insurance but also in other cases, like in hypothesis of coverage of environmental liability. In such case generally along the length of time between the occurrence of the cause of the damage and the occurrence of its consequences, the coverage is technically possible only with the claims made formula. Cf M.A. Clarke, *The Law of Insurance Contracts* (London-Hong Kong: Informa Law, 3rd ed, 1997), 429.

Even in Germany the introduction of such clauses, and then the *Feststellungsprinzip* regarding identification of covered claims during the period of operation of the insurance coverage, is proposed with particular reference to *Umwelthaftpflichtversicherung*. See in particular P. Schimikowski, *Umwelthaftungsrecht und Umwelthaftpflichtversicherung* (Karlsruhe: Verlag Versicherungswirtschaft, 1998), 231-234.

‘In insurance of civil liability the insurer is obliged to indemnify the insured for the incidents during the insurance period he has to pay to a third party, depending on the responsibilities deduced in the contract’.

Following this principle the Cassation Court affirmed that:

1. Pure claims made clauses, covering damage claims received in the period of effectiveness of the guarantee, regardless of when the damaging event occurred, introduce a new model of insurance contract different from the one in Art 1917 of the Civil Code on liability insurance. The new model could be called insurance for ‘claimed responsibility’.

2. Impure claims made clauses provide insurance coverage with a backdating of the guarantee. They do not affect the cause of the contract, but they are subject to the judgment of worthiness according to Art 1322.⁴ This

⁴ The word *meritevole* (worthy in English) comes from the Latin *mereri* which means ‘to make himself worthy of something’. Control of ‘worthiness’ in Italian law is found in various regulatory assumptions. Recall the Art 1322 which provides that ‘The parties may also enter into contracts that do not belong to the types having a particular discipline, provided they are intended to achieve the interests worthy of protection under the law’, and the Art 2645-ter entitled ‘Transcription of acts of destination for the realization of interests worthy of protection related to people with disabilities, to public authorities, or to other organizations or individuals.’ The assessment of legal acts in Italy is subject both to the judgment of legality and to the judgment of worthiness of protection. This is accomplished on the basis of the fundamental principles of and values that characterize the legal system (P. Perlingieri and P. Femia, ‘Nozioni introduttive e principi fondamentali’, in P. Perlingieri et al, *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2014), 73). It means that a lawful act may be invalid as not worthy of protection. According to Art 1322 the parties are free to conclude contracts belonging to different types from those indicated by the law, provided they are in pursuit of interest that deserve protection.

A past interpretation of the norm assumed that the control of worthiness take place only in case of atypical contracts (See R. Sacco, ‘Interesse meritevole di tutela’ *Digesto (discipline privatistiche) sezione civile* (Torino: Utet Giuridica 2010), 783). On the contrary, on the basis of an interpretation that seems to be followed also by the present United Section Cassation Court, worthiness control is a way to assess the social value of the content of the contract in concrete (E. La Rosa, *Percorsi della causa nel Sistema* (Torino: Giappichelli 2014), 74; M. Costanza, ‘Meritevolezza degli interessi ed equilibrio contrattuale’ *Contratto e Impresa*, 423 (2008); P. Perlingieri, ‘In tema di tipicità e atipicità nei contratti’, in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 395; Id, *Il diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 1984), 235; M. Nuzzo, *Utilità sociale e autonomia privata* (Milano: Giuffrè, 1974), 105.

The question of the worthiness and proportionality of the contractual settlement lies on a different plane from the control of legality and regards the inclusion of the all private provisions included the Constitutional norms. See E. Scoditti, ‘Il contratto tra legalità e ragionevolezza’ *Foro italiano*, V, 417 (2015); N. Irti, ‘La crisi della fattispecie’ *Rivista di diritto processuale*, 43 (2014); Id, ‘Un diritto incalcolabile’ *Rivista di diritto civile*, I, 11 (2015); S. Pagliantini, ‘I derivati tra meritevolezza dell’interesse ed effettività della tutela: *quid noctis?*’ *Europa e diritto privato*, 383 (2015); M. Barcellona, ‘I derivati e la causa negoziale – L’«azzardo» oltre la scommessa: i derivati speculativi, l’eccezione di gioco e il vaglio del giudizio di meritevolezza’ *Contratto e impresa*, 571 and 588 (2015); G. De Nova, ‘I singoli contratti: dal titolo terzo del libro quarto del codice civile alla disciplina attuale’

verification will be conducted by the lower courts (Judge of peace, Tribunal, Court of Appeal). If the clause is found not to be worthy, then the judge can replace the claims made clause with a loss occurrence clause that in the opinion of the court would correspond to the legal model outlined by Art 1917.

The United Sections Court seems to focus on the existence of a legal model of liability insurance contract based on the loss occurrence formula.

Moreover the Court recognizes the integration power of a judicial order to cover the gap arising from the declaration of the nullity of the contract.

Upon finding a lack of worthiness, the lower court will apply the statutory scheme for insurance contract liabilities and substitute a loss occurrence formula for the claims made formula. According to the Court's opinion Art 1419 of the Civil Code and Art 2 of the Constitution allow the courts to 'intervene also in amending or integrative way on negotiating status when this is necessary to ensure fair balance between the interests of the parties'.

II. Some Past Judgments

The Supreme Court, in its judgment of 2005,⁵ had already expressed

Cinquant'anni del codice civile, atti del convegno di Milano 4-6 giugno 1991 (Milano: Giuffrè, 1993), I, 236; P. Barcellona, 'Note critiche in tema di rapporti fra negozio e giusta causa dell'attribuzione' *Rivista trimestrale di diritto e procedura civile*, 56 (1965); Id, 'Sui controlli della libertà contrattuale' *Rivista di diritto civile*, II, 596 (1965); R. Scognamiglio, 'Fatto giuridico e fattispecie complessa - Considerazioni critiche intorno alla dinamica del diritto' *Rivista trimestrale di diritto e procedura civile*, 335 (1954).

After the introduction of Art 2645-ter the discussion on 'worthiness' has been huge. This norm provides the registration of acts of destination for the realization of interest worthy of protection according to Art 1322. See particularly G. Perlingieri, 'Il controllo di «meritevolezza» degli atti di destinazione ex art. 2645 ter c.c.' *Notariato*, 11 (2014); G. Guizzi, 'Le destinazioni patrimoniali e nuovi interessi: il problema della meritevolezza nell'esperienza privatistica' *Diritto e giurisprudenza*, 350 (2011); M. Bianca, 'Alcune riflessioni sul concetto di meritevolezza degli interessi' *Rivista di diritto civile*, I, 789 (2011).

⁵ See Corte di Cassazione 15 March 2005 no 5624, with the comment of R. Simone, 'Assicurazione *claims made*, sinistro (latente) e dilatazione (temporale) della responsabilità civile' and C. Lanzani, 'Clausole *claims made*: legittime, ma vessatorie' *Danno e responsabilità*, 1071 (2005); with the comment of S. Landini, 'La clausola *claims made* è vessatoria?' *Assicurazioni*, 3 (2006). *Contra* Tribunale of Milano 18 March 2010, with the comment of I. Partenza, 'Assicurazione di rc delle aziende ospedaliere e clausole *claims made*: un equivoco senza fine' *Assicurazioni*, 673 (2010); with the comment of C. Lanzani, 'La travagliata storia delle clausole *claims made*: le incertezze continuano' *Nuova giurisprudenza civile commentata*, I, 857 (2010). In other cases judges considered insurance contract with claims made clause lacking of the typical function of liability insurance contract: Tribunale di Genova 8 April 2008, with the comment of I. Carassale, 'La nullità della clausola *claims made* nel contratto di assicurazione della responsabilità civile' *Danno e responsabilità*, 103 (2009); Tribunale di Genova 23 January 2012, *Assicurazioni*, 177 (2012): 'the inclusion in the process of insurance relationship of a claims-made clause implies a reduction of the guarantee: if such modification is not accompanied by a different equilibrium structure synallagmatic contract (eg reduced premium, waives the right of withdrawal, extension warranty on other bases, general extension of the time), it is causeless and so void.'

doubts about claims made clauses, both pure and impure. Taking up the notion of ‘fact’ as in Art 1917 the Supreme Court noted that a person who wants to be insured for his professional responsibilities normally takes into account his future ability to cause harm to others. In case of a claims made clause, given the variability of time that can elapse between the loss and the claim, it is difficult for the insured party to assess whether or not the contract covers all possible losses.

It is possible, as happened in the case in question in 2005, that damage caused by the policyholder in the insurance period may not be covered under the claims made formula because the third party claim is made outside of the period of coverage.

The Court declined to adopt the defensive argument assumed by the insurance company: that the claims made clause does not necessarily run contrary to the interests of the insured party, as when the damage occurs prior to the conclusion of the insurance contract, but the third party claim is made within the period of coverage.

The Supreme Court noted in 2005 that in any case the coverage of previous accidents is excluded because the insured has to declare that he is not aware of compensable claims that have already occurred. In the case of intentional or reckless reticence (or false declaration) according to Art 1892, the insurance contract is voidable.⁶ In the case of mild negligence the contract is valid but the insurer has the right to withdraw the contract as stated by Art 1893 of the Civil Code.

The Supreme Court in 2005 seemed to re-examine the old question of the retroactivity of the policy against civil liability in which a claims made clause is inserted. If the ‘fact’, as referenced in Art 1917, is the harmful event, then the provision of coverage for ‘facts’ prior to the conclusion of the contract constitutes retroactive coverage, in violation of Art 1895, which states that an insurance contract lacking the existence of a risk at the time of conclusion is void. A retroactive insurance contract is void because, there are no risks related to an event that has not yet occurred.⁷

⁶ Art 1892 of the Italian Civil Code (*codice civile*) – named Misrepresentations or fraudulent or grossly negligent failure in disclose – provides that ‘If the contracting party, fraudulently or through gross negligence, misrepresents or fails to disclose circumstances which, if known to the insurer, would have caused him to withhold his consent to the contract, or to withhold his consent on the same conditions, the insurer can annul the contract. The insurer is entitled to the premiums covering the period of insurance running at the time when he petitioned for annulment of the contract, and in all cases to the premiums agreed upon for the first year. If the loss occurs before the expiration of the period indicated in the preceding paragraph, the insurer is not bound to pay the sum insured.’ See M. Bin ‘Informazione e contratto di assicurazione’ *Rivista trimestrale di diritto e procedura civile*, 726 (1993); A. De Cupis, ‘Precisazioni sulla buona fede nell’assicurazione’ *Diritto e giurisprudenza*, 625 (1971).

⁷ G. Scalfi, ‘I contratti di assicurazione: l’assicurazione danni’, in Id et al, *Il diritto delle assicurazioni* (Torino: Giappichelli, 1991), 52; G. De Gregorio and A. Fanelli, *Diritto delle assicurazioni: il contratto di assicurazione* (Milano: Giuffrè, 1987), II, 80.

However, if the ‘fact’ in question is the term identified in the policy by the contracting parties on the basis of their private autonomy, the fact could be either the claim or the harmful act.⁸ On this reading there is no legal formula and the ‘fact’ could be either the loss or the claim.

III. A Comparative View

This is not only an Italian problem. The French Court of Cassation has also examined the idea that the covered fact in liability insurance is identified with the loss or damage, and in 1990 declared unlawful and therefore void the clause in liability insurance contracts limiting the time of the insurance guarantee according to the claims made formula.⁹

Recently the claims made clause was rehabilitated in France in professional liability insurance by the law of 30 December 2002.¹⁰ In addition, the new Art L 124-5 of the Code des Assurances recognizes the right of the parties to choose compensation ‘*par le fait dommageable*’ or ‘*par la réclamation de la victime*’. Thus now in France, contrary to the French Supreme Court’s 1990 decision, the loss occurrence model is no longer the only legal model.

Under German law the covered fact in liability insurance can be identified according to one of the following methods: *Schadensereignis Prinzip*, *Manifestations Prinzip* or *Anspruch*, respectively translated in English as: the harmful fact, the loss occurrence or the claim for damages.

The German Supreme Court (*BGH*) in its recent judgment of 26 March 2014 ruled that in Germany there is no legal definition of covered fact in the case of insurance against civil liability.¹¹ Instead the German Court focuses on the adequacy of the contract. A contract is inadequate when the temporal delimitation of the risk does not meet the policyholder’s insurance needs, particularly in terms of retroactivity.

⁸ G. Volpe Putzolu, *Le assicurazioni. Produzione e distribuzione. Problemi giuridici* (Bologna: Il Mulino, 1992), 142.

The Supreme Court reopens the debate preceding the 1942 Civil Code on the identification of the covered event in civil liability insurance, a debate that saw opposing two theories: on one hand those identifying the insured fact with a claim for damages issued by the third (C. Viterbo, *Assicurazione della responsabilità civile* (Milano: Giuffrè, 1936)), because only the claim determines the detriment of the insured property, on the other hand those identifying the insured fact with the harmful act, because it is cause of the claim covered by the insurance guarantee (T. Ascarelli, ‘Sul momento iniziale nella decorrenza della prescrizione nella assicurazione responsabilità civile’ *Assicurazioni*, II, 194 (1934)).

⁹ Cour de Cassation 19 December 1990, available at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007025478> (last visited 6 December 2016).

¹⁰ See M. Fontaine and F. De Ly, *The drafting of international contracts* (Brill: Transnational Publishers Inc, 2006), 771.

¹¹ *BGH* 26 March 2014, *De jure*, available at <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=26.03.2014&Aktenzeichen=IV%20ZR%20422/12> (last visited 6 December 2016).

IV. Worthiness Control and Conduct Rules

Perhaps now, it is also doubtful whether a legal model exists in Italian law, since the term ‘fact’ can be interpreted both as the harmful act and the claim. The protection of the insured party is accomplished through information and the obligation of insurers and insurance intermediaries to provide appropriate products. It is therefore a problem of product governance.¹²

The concept of product governance was introduced by MiFID 2 (Markets in Financial Instruments Directive)¹³ in the context of financial markets and can be defined as an organizational structure and rules of conduct relating to the creation, supply and distribution of financial products in the interests of investors.

When considering policyholders’ protection in terms of product governance, it is important to consider the value of the insurance contract with respect to the interest of the insured parties, from its creation to its distribution.

This dynamic is now part of insurance intermediation after IDD2 (Insurance Distribution Directive) focusing on the ‘best interest of the customer’.¹⁴ The Directive (EU) 2016/97 of the European Parliament and of

¹² See R. Natoli, *Il contratto “adeguato”. La protezione del cliente nei servizi di credito, di investimento e di assicurazione* (Milano: Giuffrè, 2012), 87.

Generally speaking with regard to information in financial markets and information asymmetry S. Amorosino, ‘Principi “costituzionali”, poteri pubblici e fonti normative in tema di mercati finanziari’, in S. Amorosino ed, *Manuale di diritto del mercato finanziario* (Milano: Giuffrè, 3rd ed, 2014), 3; M.C. Cherubini, ‘Tutela del “contraente debole” nella formazione del consenso’ (Torino: Giappichelli, 2005), 43; L. Rossi Carleo, ‘Il diritto all’informazione: dalla conoscibilità al documento informativo’ *Rivista di Diritto Privato*, 363 (2004); A. Gentili, ‘Informazione contrattuale e regole dello scambio’ *Rivista di Diritto Privato*, 578 (2004); G. Alpa, ‘Quando il segno diventa comando: la “trasparenza” dei contratti bancari, assicurativi e dell’intermediazione finanziaria’, in M. Paradiso ed, *I mobili confini dell’autonomia privata* (Milano: Giuffrè, 2005), 475; S. Grundmann, ‘L’autonomia privata nel mercato interno: le regole d’informazione come strumento’ *Europa e diritto privato*, 257 (2001); A.C. Nazzaro, *Obblighi d’informare e procedimenti contrattuali* (Napoli: Edizioni Scientifiche Italiane, 2000), 193; L. Lonardo, *Informazione e persona. Conflitti di interesse e concorso di valori* (Napoli: Edizioni Scientifiche Italiane, 1999), 202; D. Valentino, *Obblighi di informazione, contenuto e forma negoziale* (Napoli: Edizioni Scientifiche Italiane, 1999), 9, 67; Id, ‘Obblighi di informazione e vendite a distanza’ *Rassegna di diritto civile*, 394 (1998); G. De Nova, ‘Informazione e contratto: il regolamento contrattuale’ *Rivista trimestrale di diritto processuale civile*, 705 (1993).

¹³ MiFID is the Markets in Financial Instruments Directive (Directive 2004/39/EC). In force since November 2007, it governs the provision of investment services in financial instruments by banks and investment firms and the operation of traditional stock exchanges and alternative trading venues.

In October 2011, the European Commission tabled proposals to revise the Markets in Financial Instruments Directive (MiFID 2) with the aim of making financial markets more efficient, resilient and transparent, and to strengthen the protection of investors.

¹⁴ The Insurance Distribution Directive or IDD (Directive 2016/97/EU) regulates the activities of all distributors of insurance products: intermediaries, insurance companies, their employees, bank-assurance, ancillary insurance intermediaries (eg travel agents or car

the Council of 20 January 2016 will replace the insurance mediation directive (2002/92/EC). Member States will have two years to transpose the IDD into national law. Art 20 says that,

‘Prior to the conclusion of an insurance contract, the insurance distributor shall specify, on the basis of information obtained from the customer, the demands and the needs of that customer and shall provide the customer with objective information about the insurance product in a comprehensible form to allow that customer to make an informed decision. *Any contract proposed shall be consistent with the customer’s insurance demands and needs*’.

The concept of adequacy was, in some ways, already present in the Italian Insurance Code (decreto legislativo 7 September 2005 no 209), in Art 183, which states that:

‘in the offer and performance of contracts companies and intermediaries must:

a) act diligently, fairly and transparently towards policyholders and insured persons; (and)

b) acquire from contracting parties the information necessary to assess the insurance companies or pension needs and operate so that they are always adequately informed’.

However under Art 183 the distributor of insurance policies has to acquire information on an insured’s needs only to determine the information and the counselling he or she needs.¹⁵

With the transposition of IDD2 directive the law will provide a stronger protection for policyholders in terms of adequacy.¹⁶ Additionally, Art 120, para 3 Insurance Code requires insurers and intermediaries to propose or recommend to customers products that are ‘suited to (their) needs’, taking

rental companies), including online distribution. The Directive determines the information that should be given to consumers before they sign an insurance contract, imposes certain conduct of business and transparency rules for distributors, clarifies the rules for cross-border business and addresses the supervision and sanctioning of insurance distributors if they breach the provisions of the Directive. It also includes additional requirements for the sale of insurance products with investment elements to ensure that insurance policyholders get a similar level of protection as buyers of other investment products regulated under MiFID2. The IDD was adopted on 20 January 2016. Member States will need to transpose it into national legislation by 23 February 2018.

¹⁵ The concept of insurance counselling raises from French Jurisprudence interpreting Art L 112-4 Insurance Code. The intermediary must be ‘*un guide sur et un conseiller expérimenté*’: Cour de Cassation, 10 november 1964, *Revue general des assurances terrestres*, 176 (1965) with comment by A. Besson.

¹⁶ See Corte di Cassazione 22 November 2000 no 15101, *Contratti*, 785 (2001), contrary to the direct horizontal application of EU Directive also in lack of timely transposition.

into account the risk inclination of the person concerned (Art 52 regolamento ISVAP 16 October 2006 no 5).¹⁷ Moreover it is also possible to consider such a duty as an element of the general duty of good faith in the pre-contractual relationships according to Art 1337 of the Civil Code.

Under these rules, an insurance contract for professional liability sold to a professional that contains the claims made formula and a very short retroactivity, as well as a general declaration of the insured party that ‘for the effect of Art 1892, I declare to be not aware of facts that could cause my responsibility’, is not adequate, because as a result of such declaration, in cases where the claims occurred during the insurance period regarding damage that occurred outside the coverage period, the insurer can refuse to pay indemnification according to Art 1892, assuming that the insured is in breach of an obligation to declare any awareness of the harmful fact causing

¹⁷ ‘Art 120 (Pre-contractual information and rules of conduct).

1. Insurance intermediaries recorded in the register referred to in Art 109 (2) and those under Art 116 shall furnish policyholders with the information laid down by ISVAP’s Regolamento, before concluding the contract and in case of subsequent significant changes or renewal, in compliance with the provisions of this article.

2. In relation to the contract offered insurance intermediaries shall declare to the policyholder: a) whether they give their advice on the basis of a fair analysis – in that case they are obliged to give that advice on the basis of an analysis of a sufficiently large number of contracts available on the market, so that they recommend an adequate product to meet the policyholder’s needs; b) whether they offer certain products under a contractual obligation with one or more insurance undertakings - in that case they shall provide the names of those undertakings; c) whether they offer certain products under no contractual obligation with any insurance undertakings – in that case they shall, at the customer’s request, provide the names of the insurance undertakings with which they do or may conduct business, without prejudice to the obligation to inform policyholders of their right to request such information.

3. In any case prior to the conclusion of the contract the insurance intermediary referred to in para 1 shall offer or recommend a product which is adequate to meet the policyholder’s needs, in particular on the basis of information provided by the latter, and shall previously illustrate the main features of the contract as well as the benefits that the insurance undertaking is obliged to provide.

4. On account of the different policyholders’ protection needs, of the different types of risks, as well as of the knowledge and ability of the staff involved in mediation ISVAP shall, by its own regulation, lay down:

a) The rules on the way intermediaries shall introduce themselves and behave in relation to policyholders, with regard to the information requirements relating to intermediaries themselves and their relations, also of corporate nature, with the insurance undertaking, and to the features of the contract offered in relation to the advice they could possibly give on the basis of a fair analysis or to the existence of an obligation, involving promotion and mediation, with one or more insurance undertakings. b) the way how information shall be provided to policyholders, and envisage the cases in which it may be provided upon request, it being understood that the need for protection usually calls for the use of the Italian language and the communication on a durable and accessible medium, soon after the contract has been concluded at the latest; c) how records shall be kept of the business activity; d) the violations for which the disciplinary sanctions envisaged by Art 329 shall apply.

5. Insurance intermediaries dealing with large risks and reinsurance intermediaries shall be exempted from information requirements’.

the claim before the conclusion of the contract.

As the German Court ruled, the problem is not to identify the abstract legal model for liability insurance, but the appropriate product for the insured party in the concrete case at hand. It is a question of adequacy.

Given these considerations, it is important to identify the juridical consequences in case of the distribution of an inadequate insurance product. Of course the insurer will be subject to administrative sanctions of IVASS (the Italian insurance market regulator), but what about the contract and the private relationship between insurer and insured?

In the interest of policyholders, the solution could be civil liability and the obligation to pay damage (included the lost indemnification) on the part of the distributor (Insurers, Banks, Agents, Brokers ...).¹⁸

Another solution could be the nullification of the contract concluded in violation of mandatory conduct rules like those contained in the law of insurance products distribution (see Arts 120, 182 and regolamenti ISVAP 16 October 2006 no 5 and 26 May 2010 no 35). But such a solution could be contrary to the interest of the party to be covered. A void contract does not produce any effect.¹⁹

A third option could be the nullification of the single clause which makes the contract inadequate in its protection of the insured party's interests. According to Art 183 Insurance Code undertakings and intermediaries shall acquire from policyholders information to evaluate their insurance risk. Art 120, para 3, Insurance Code requires insurers and intermediaries to propose or recommend to customers products that are 'suited to (their) needs'. These are imperative norms taking into account the terminology used by the legislator and the general interest of policyholders. Thus a clause that is

¹⁸ See Corte di Cassazione-Sezioni Unite 19 December 2007 no 26724 and 26725, with comment by E. Scoditti, 'La violazione delle regole di comportamento dell'intermediario finanziario e le sezioni unite' *Foro Italiano*, I, 784 (2008); Corte di Cassazione 17 February 2009 no 3778, with the comment of V. Sangiovanni, 'Informativa precontrattuale e norme di comportamento degli intermediari assicurativi' *Danno e responsabilità*, 503 (2009); Corte di Cassazione 19 October 2012 no 18039, *Massimario del Foro italiano* (2012).

¹⁹ Cf E. Scoditti, 'Regole di validità e principio di correttezza nei contratti del consumatore' *Rivista di diritto civile*, II, 119 (2006); G. Amadio, 'Nullità del contratto e formazione del contratto (note minime in tema di 'abuso dell'autonomia contrattuale')' *Rivista di diritto civile*, I, 299 (2005); E. Navarretta, 'Buona fede oggettiva, contratti di impresa e diritto europeo' *Rivista di diritto civile*, I, 521 (2005); P.M. Putti, 'L'invalidità dei contratti' *Trattato di diritto privato europeo. L'attività e il contratto* (Padova: Cedam, 2003), III, 603; V. Roppo, 'La tutela del risparmiatore tra nullità e risoluzione (a proposito di Cirio bond & tango bond)' *Danno e responsabilità*, 627 (2005); G. D'Amico, *Regole di validità e principio di correttezza nella formazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 1996), 99; Id, 'Regole di validità e regole di comportamento nella formazione del contratto' *Rivista di diritto civile*, I, 39 (2002); F.D. Busnelli, 'Itinerari europei nella terra di nessuno tra contratto e fatto illecito: la responsabilità per informazioni inesatte' *Contratto e impresa*, 556 (1991); G. Vettori, *Anomalie e tutele nei rapporti di distribuzione fra imprese. Diritto dei contratti e regole di concorrenza* (Milano: Giuffrè, 1983), 83.

contrary to the expressed insurance needs of the policyholders could be considered void because it is contrary to imperative norms as stated in Art 1418 Civil Code. This method substitutes a worthiness control with an adequacy control, requiring the judge to take into account the interests of the policyholder based on the information given to the insurer or to the intermediaries, and on that basis the judge will be able to integrate the contract.

In the case of total violation of Art 183, where the insurer and the intermediary have failed to acquire the necessary information from the policyholder, such a control of adequacy will not be possible, and the judge will be required to conduct a general control of worthiness with the discretionary integration affirmed by United Sections Supreme Court 6 May 2016 no 9140.

A policyholder's declaration affirming that he or she does not want to give information to the intermediary or to the insurer would render it impossible to sell adequate insurance contracts. In this case, especially according to the new rules contained in the above-mentioned IDD2 directive, the insurer and the intermediaries are likely to refuse the stipulation of any contract, much as a shopkeeper might be unable to sell a dress to a customer without knowing what kind of dress in the shop he or she wants. Adequacy is not only a matter of correct information and of counselling, it is also a matter of selling the product that meets the interest of the client.

V. From the Consumer's Protection to the Customer's Protection

The norms protecting policyholders do not contain a distinction between consumers and professionals.²⁰ The above-mentioned Arts 120 and 182 Insurance Code refer to policyholders in general.²¹

²⁰ About the problem of the application of consumers protection discipline in case of contracts between professionals see R. Pardolesi, 'Clausole abusive (nei contratti con i consumatori). Una direttiva abusata?' *Foro Italiano*, V, 137 (1994); L. Patroni Griffi, 'Le clausole abusive nei contratti conclusi con i consumatori (direttiva 13/1993)' *Rassegna di diritto civile*, 356 (1995); F.D. Busnelli, 'Una traccia per una analisi sistematica della disciplina delle clausole abusive' *Commentario al capo 14 bis del Codice civile: Dei contratti del consumatore: art. 1469 bis-1469 sexies*, in C.M. Bianca, F.D. Busnelli and L. Bigliuzzi Geri eds, *Nuove leggi civili commentate*, 758 (1997); L. Gatt, 'Ambito soggettivo di applicazione della disciplina. Il consumatore ed il professionista' *Commentario al capo 14 bis del Codice civile: Dei contratti del consumatore: art. 1469 bis-1469 sexies*, in C.M. Bianca, F.D. Busnelli and L. Bigliuzzi Geri eds, *Nuove leggi civili commentate*, 832 (1997); G. Furguele, 'Problemas jurisprudenciales en Italia entorno a la prohibición de cláusulas abusivas' *Derecho privado*, 141 (2001); Corte costituzionale 23 June 1999 no 252, *Foro italiano*, 3125 (1999) with comment by A. Palmieri, 'L'ibrida definizione di consumatore e i beneficiari (talvolta pretermessi) degli strumenti di riequilibrio contrattuale'.

²¹ About the problem of coordination of consumers code and sectorial codes see L. Rossi Carleo, 'Consumatore, consumatore medio, investitore e cliente: frazionamento e sintesi nella

In the judgment 6 May 2016 no 9140 on claims made clauses the Court underlined that in the case of professional liability insurance there is evidently

‘the existence of a context of strong asymmetry of the parties’ power and where the policyholder, even though in theory qualified as “professional”, is, in fact, more often unprotected by comprehensive information in order to understand the complex legal mechanisms that govern the system of civil liability insurance’.

It is a matter of fact that professionals need information and counsel regarding the selection of an insurance product that meets their interest. The question of the weakness of the contracting parties must be addressed by distinguishing socio-economic weakness from contractual weakness, which is mainly linked to information asymmetry that can also exist for professional parties. With regard to professional contracts it is also necessary to distinguish the acts of the profession from acts relating to the profession. The former concern contracts concluded for the exercise of the profession with their clients, for example, while the latter are related to contracts entered in connection with the performance of the profession, such as contracts for the purchase of goods or services to facilitate the profession or required for its operation, including policies covering professional liability.²²

Moreover it is necessary to remember the basic norm of the Italian Constitution in financial market matters: Art 43 says that

‘For the purposes of the common good, the law may establish that an enterprise or a category thereof be, through a pre-emptive decision or compulsory purchase authority with provision of compensation, reserved to the Government, a public agency, a workers’ or users’ association, provided that such enterprise operates in the field of essential public services, energy sources or monopolies and are of general public interest’.²³

This norm recognizes the rights of users in the financial market, not only of consumers as in Art 3 of Italian Consumers Code (decreto legislativo 6

disciplina delle pratiche commerciali scorrette’ *Europa e diritto privato*, 688 (2010); P. Corrias, ‘La disciplina del contratto di assicurazione tra codice civile, codice delle assicurazioni e codice del consumo’, in F. Addis et al eds, *Studi in onore di Nicolò Lipari* (Milano: Giuffrè, 2008), I, 543 (and *Responsabilità civile e previdenza*, 1749 (2007)).

²² For those distinctions see E. Gabrielli, ‘Sulla nozione di consumatore’, in F. Addis et al eds, *Studi in onore di Cesare Massimo Bianca* (Milano: Giuffrè, 2006), 227.

²³ P. Perlingieri, ‘La tutela del consumatore nella Costituzione e nel Trattato di Amsterdam’, in P. Perlingieri and E. Caterini eds, *Il diritto dei consumi* (Napoli: Edizioni Scientifiche Italiane, 2004), I, 20; P. Corrias, ‘Le aree di interferenza delle attività bancaria e assicurativa tra tutela dell’utente e esigenze di armonizzazione del mercato finanziario’ *Giustizia Civile*, 617 (2015).

September 2005 no 206), who are physical persons purchasing goods and service for personal use. Also at the community level (we must remember that the Italian norms on consumers' protection derive from an EU Directive), the notion of 'consumer' is a key concept delimiting the application of consumer-protection rules. In any case, there is no consistent and uniform definition in EU law and there are also divergences amongst the Member States.²⁴

²⁴ R. Manko, 'The notion of "consumer" in Eu law', available at [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI\(2013\)130477_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf) (last visited 6 December 2016).

Book reviews

Guido Calabresi's *The Future of Law & Economics*

Rafael A. Porrata-Doria, Jr.* and Mauro Grondona**

The Future of Law & Economics: Essays in Reform and Recollection

by Guido CALABRESI

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I. Introduction

Judge Guido Calabresi's new book, *The Future of Law & Economics: Essays in Reform and Recollection*,¹ is a passionate and convincing intellectual *tour-de-force*. It puts into context one of the most discussed (and controversial) issues in modern legal and economic thought: the appropriate relationship between law and economics. In eight clear and elegant essays, Judge Calabresi clarifies misconceptions involving the relationship between law and economics, convincingly concludes that economic analysis can be a useful tool in analyzing legal norms, enumerates the concepts that economic theorists must consider in order to effectively analyze the law, and shows how these concepts can be integrated into economic theory.

In the first part of this review, and in order to put law and economics into context, we will enumerate the various approaches that scholars have used to analyze law and legal system. As we move into the relationship into law and economics, we will note Judge Calabresi's distinction between the economic analysis of law and law and economics, a distinction that is often disregarded. We will then consider one of principal questions that Judge Calabresi asks in the book: what economics can do for law. Since many scholars have viewed the economic analysis of law as a common law phenomenon, we will then consider whether the answer to the previous question depends on the nature of the legal system involved. Lastly, we will

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¹ G. Calabresi, *The Future of Law & Economics: Essays in Reform and Recollection* (New Haven and London: Yale University Press, 2016).

briefly describe the concepts that Judge Calabresi feels need to be incorporated into economic analysis in order to make it a truly useful tool to use in the consideration of legal norms.

II. The Four Theoretical Approaches to Law

In the United States, Judge Calabresi notes, four approaches to law have been prominent among legal scholars.² He describes these approaches as 'doctrinalism,' 'law and...,' 'the legal process school' and 'law and status', with each having strengths and weaknesses.

The first of these approaches, formalism, views law and autonomous and distinct from other fields of learning. Legal analysis can be carried out independently of, and without reference to, any other disciplines or sources for its value. Its purpose is to make the rules of law consistent and coherent with each other so that similar cases can be treated similarly. This approach, Judge Calabresi notes, seeks to rationalize 'a mishmash of common law precedents as well as statutory and constitutional norms, both at the state and federal level.'³ In Europe, on the other hand, it is meant solely to 'rationalize and render coherent the rules that derive from the great Codes of Law'.⁴ In the United States, an example of this approach can be found in the American Law Institute's famed Restatements of the Law.⁵ An important point to note is that the difference in how this approach is implemented by common and civil law legal scholars is in the materials that they analyze, rather than in their basic approach to their analysis.

The 'law and ...' approach aims to

'break out of a self-contained system of legal values which are either unchanging or change only mystically, revolutionarily, or at the hands of legislators unguided by legal scholars' critiques or suggestions'.⁶

This is so because legal scholars, by themselves, bring no special insight into the values that go into law making and law reform. How do legal scholars acquire this insight? By considering economics, philosophy, psychology or other fields in developing a scholarly critique of the legal system or particular parts thereof. For the 'law and ...' scholars, law is neither independent nor

² G. Calabresi, 'An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts' 55 *Stanford Law Review*, 2113 (2003).

³ *Ibid* 2115.

⁴ *Ibid* 2115.

⁵ See, eg, E.A. Farnsworth, *Restatement (Second) of Contracts* (Philadelphia: American Law Institute, 1981).

⁶ G. Calabresi, *An Introduction* n 2 above, 2119.

autonomous, but dependent on other fields.⁷

Judge Calabresi describes the legal process school as one whose scholars concentrate on a comparative analysis of institutions such as courts, legislatures, and administrative agencies and other institutions to understand what particular attributes of each of these institutions made them better suited to decide some issues rather than others. What these scholars would do is to objectively suggest, based on institutional capacity, which institutions should be the definers and determiners of the values that guide the legal system.

‘Law and status’, on the other hand, instructs legal scholars to examine how laws and the legal system affect specific categories of people and questions and criticizes all law on the basis of its treatment of certain preselected groups, chiefly those who have been exploited, disadvantaged or dominated.⁸

As one reads Judge Calabresi’s analysis of these approaches, it becomes clear that all of these approaches can be applied into both common and civil law systems. He believes that each of these approaches has much to be said for it. Indeed, he feels that a mixture of these approaches, and the insights that they can bring, is essential and that legal scholars, regardless of their preference for any of these approaches, should be ‘well advised to be open to those whose preferences are far different’.⁹ The history of law, he concludes, suggests that crucial insights can come from each and every one of these approaches.¹⁰ Each of these approaches can be applied.

This conclusion is important, since it forms the basis of Judge Calabresi’s thesis in *The Future of Law and Economics*: that economics and economic analysis have a valid role to play in legal analysis and policymaking.

III. Economic Analysis of Law vs Law and Economics

In the beginning of his examination of the relationship between law and economics, Judge Calabresi makes a very important distinction between two different approaches: that between the economic analysis of law and law and economics.¹¹ The economic analysis of law, following Bentham’s notion of utilitarianism, uses economic theory to examine the legal world through the prism of economic theory and, as a result of that examination, confirms, denies or seeks reform of legal reality. If a legal norm does not conform to

⁷ Ibid 2119-2120.

⁸ Ibid 2127.

⁹ Ibid 2151.

¹⁰ Ibid 2151.

¹¹ As Judge Calabresi notes, others scholars do not recognize this distinction, or make the distinction in a very different fashion. See *The Future* n 1 above, 177 n 2.

existing economic theory, then that legal norm is irrational and should be reformed or eliminated.¹² Judge Calabresi concludes that, in this analysis, economics and economic theory dominate, and the law is the subject of it analysis and criticism.¹³ This is a problem because there are relevant issues in legal reality that are not adequately explained in current economic theory.¹⁴

What Judge Calabresi calls law and economics is a different approach. He describes it as beginning with an acceptance of legal reality and sees if economic theory can explain that reality. If economic theory cannot do so, then the scholar must ask two questions. The first is whether the scholars who are describing legal reality are looking at the world as it really is, or if something is causing them to mischaracterize reality. The second question is whether economic theory can be made broader or subtler so that it can explain why the real world of law is as it is. If the answer to this question is affirmative, then law and economics suggests that changes shall be made to economic theory to enable it to explain a specific legal reality.¹⁵ As opposed to the economic analysis of law, law and economics creates a bilateral relationship between both disciplines. This, Judge Calabresi notes, is akin to John Stuart Mills' analysis and criticism.¹⁶ He is careful to point out, however, there will be situations where economic theory (even an expanded one) will not be able to explain a particular legal reality.¹⁷ In other words, law and economics may not satisfactorily explain all of legal reality.

IV. What Can Economics Do for Law?

At this point, we are facing the topic of prescriptive (or deontological)/descriptive (or ontological) dualism. This dualism is relevant not only from a strictly legal or legal point of view, but also from the economic point of view. The always critical questions of *quid ius?* (what is law?), *quid iuris?* (which is the legal solution in this case?) in the long run of history have obtained two major answers. The first says that law is what a formal legal source dictates and prescribes. If so, for solving a case we have to turn to the sources of law. The second says that law (as a set of rules) is, to a certain extent, the mirror of society, and this connection between law and society is precisely what legitimates the law as a set of rules provided imposing a legal order upon society. The problem lies in the definition of the concept of 'legal rules'.

¹² Ibid 2-3.

¹³ Ibid 6.

¹⁴ See *infra* nn 21-22 and accompanying text.

¹⁵ G. Calabresi, *The Future* n 1 above, 3-4.

¹⁶ Ibid 1, 6.

¹⁷ Ibid 4.

Legal rules can be analyzed from either a ‘top-down’ vs a ‘bottom-up’ approach.

The first focus, mainly, on legal sources of law, and to their prescriptive function of imposing something on someone, when adjudicating a conflict. Here the approach is formal and dogmatic, because the law is something coming from above, and social reality only has to receive, from outside, the law, ie the norm. The second mainly focuses on the variety of social (in the sense of human) experience (an Italian legal philosopher of the past, and not always – still today – well received by his colleagues, used to refer to the ‘legal experience’, as a field much larger than law is, and most profitable to understand which legal rule better fits to the concrete factual situation).¹⁸ Here the approach is substantial and factualist, in the sense that the content of law could and should be influenced (to an extent which must be scrutinized by legal scholarship, applying the various methodologies and technologies existing within the social sciences) by the content of social reality.

Obviously, there is not a lack of deontology in the bottom-up approach for the very basic reason that law is a way to express and apply deontology to social facts, but law may vary (and in fact it does) the features of this deontology related to that peculiar social fact which is under legal scrutiny in the perspective of adjudication. If we look at society and at social facts as a historical and an empirical proof of the pluralism of actions and values, we should conclude that the best way to face adjudication questions is the one that is the broadest, and not the narrowest. According to this assumption, the jurist should consider this broader approach to achieve ‘a more accurate, more comprehensive view of legal reality’.¹⁹

So, when confronting with the social reality (what is happened and what is happening), we have, as jurists in a broad sense (legislators, legal scholars, judges, lawyers), some technical tools to use: legal and economic, from the past and from the present. Theories are the ordinary means to achieve what should be outlined as the social role of the jurist: the enforcing of legal rules, which move herself, to a certain extent, along the path of social life – considered from a historical point of view.

Within this framework, ontology and deontology, the realms of is and of ought, are not opposite each other; on the contrary, what is a social fact could (and should) influence the content of the law as a prescriptive rule. But if this is the general perspective of the law, we do need to know which are these social facts, how much are they socially rooted, and to what extent can they influence the law.²⁰

¹⁸ G. Capograssi, *Studi sull'esperienza giuridica* (Roma: Maglione, 1932).

¹⁹ G. Calabresi, *The Future* n 1 above, 3.

²⁰ This point emerges with linearity from this passage: ‘The (...) capacity to employ any of many economic theories applies also to Law and Economics. The theory that is amplified to make it explain and respond to the actual legal world can be Marxist economics, pure

The relation between law and economics enriches both: they are communicating vessels. Both law and economics are parts of social science; but neither law nor economics are the unique ways of approaching and clarifying the variety of reality. Both are empirical, sociological, historical and anthropological weapons of understanding what society is, and what society looks for. And to properly do its job, law and economics analysis tries to maximize the substantial and material meaning of social facts, recurring to the theories 'on the roster' – legal and economic, but also in the field of other social sciences²¹ in terms of scientific paradigms. These paradigms are sometime recessive, sometime dominant: but it would be a misleading assumption to think that there are theories definitely dead, or evergreen: this attitude would be negatively dogmatic in the sense that theoretical statements must always prevail on empirical analysis of the concrete circumstances, and on concrete, specific needs.

This opens, also, the perilous field of rational and irrational human action,²² along with the 'Idealtypus' of the homo oeconomicus, the rational human being whose action is nothing but maximization. This is, in fact, a 'perilous field' because if we draw the line between what is, by definition, considered rational, and what not, then we will use a criterion (legal and economic, but not only) to put aside real factors that, as they exist, affect individual and social life. Repeatedly, the economic analysis of law approach appears to be too much a dogmatic one (in the sense of too much rigid and too much closed to what effectively happens).

Judge Calabresi makes it clear in his book that law and economics,

utilitarianism, Vienna transplanted to the Windy City, or Keynes redux in New Haven. It is not the *theory* used that distinguishes the approaches. The theory can vary. It is, rather, the relationship between the theory and the world it examines that separate them': Ibid 7.

²¹ This 'much more' could be problematic, and there is no doubt that this scientific abundance may produce a sort of involuntary rigidity descending from the theoretical field and oppressing the reality of facts: on this crucial point, see the most interesting 'Appendix' of the book: the 'Farewell Letter of Arthur Corbin to the Yale Law School Faculty.' Here we read: 'Admitting, as our latest discovery, that there are no principles, that there is no law, we turn to fields with other names – to economics, ethics, political science. Surely here we can find our absolutes, our eternal principles of right and of justice. (...) The less we know of economics and ethics and politics, the more likely we are to enjoy the illusion that in them we find certainty, or at least the illusion that certainty is just around the corner. But just as in the field called Law, that corner is never turned. The fact is that these are merely different names for a single field – the field of human experience. I believe that there is greater hope, of human welfare and happiness, if we are conscious of our limitations, if we abandon the quest for absolutes, if we confess that justice is wholly relative and human, and if we erect our temple of peace upon a foundation, made as stable as we can by a neat balancing of interests, determined by as careful and complete a study of human experience as is possible. Rules and principles, where we call them political, economic, ethical or legal, are the result of this balancing of interests. They are the tentative working rules of life – not to be scorned because they are not absolute': Ibid 174-175.

²² See G. Calabresi, 'Of Tasted and Values Ignored', in Id, *The Future* n 1 above, 131.

notwithstanding being two different social sciences fields, are strongly interconnected – and should be even more so. This interconnection does mean that either the law is the main criterion to understand economics, or that economics is the main criterion to understand law. Neither the former nor the latter are self-sufficient as ways to a serious comprehension of the *mare magnum* called society – a comprehension, indeed, which is also, to a certain extent, a prescription in terms of legal rules: to comprehend in order to prescribe.

Therefore, Judge Calabresi describes (and gives various arguments and examples for) a sort of methodological parallelism by virtue of which law and economics are complementary tools to investigate social reality, or, in other words – that may sound better –, the social dimension of human beings, the social interconnection of the individual actions: the interconnection of lives. Judge Calabresi's distinction between the economic analysis of law and law and economics (which we discussed above) is critical because each gives rise to different and opposing outputs.

If we think of law as a criterion by which better ordering human social life (social, because it is a function of the innumerable individual actions), and if we think of economics as a criterion for a better assessment of what it is usually expressed in terms of 'complexity of social reality', we are, methodologically, applying law and economics approach. The sole combination of law and economics could and should address to the individuation of a rule – relevant both from a legal and an economic point of view – which is not the mere reproduction of legal and economic theories, to which adequate the social complexity, but is (and properly should be) the result of the scientific cooperation between the lawyer and the economist, to better answer towards the needs of the present.²³ On the contrary, if we consider economics as the best way to put in order the societal dimension, and in doing so we assume that the deontological standards are, and must be, a logical consequence of some economic theories, we are, methodologically, applying the economic analysis of law approach, because we are convinced that social reality must be governed by those legal rules that are the product of just some economic theories – the true ones, or, most probably, the true one. In this perspective,

²³ This anti-dogmatic and I would say, to a certain extent, relativistic methodological attitude (which is necessary within a pluralistic context) of Judge Calabresi well emerges from this passage: 'To summarize: The lawyer, the legal scholar, has a special, and especially crucial, role in the bilateral relationship that Law and Economics scholarship involves. This is because it is *law* and legal institutions that are the subject of that scholarship. It is also because the legal scholars' part in that bilateral relationship is played by legal scholars of every sort of ideological persuasion. But, let me be careful. I am not for a moment suggesting that this is the sole or even the most important role that legal scholars should play. Law is an immensely rich and complex field. What are and what should be legal rules must, I believe, be looked at in any number of different ways by any number of differently guided legal scholars': G. Calabresi, *The Future* n 1 above, 21.

the factual dimension is and must remain totally silent.

V. Does the Answer to this Question Depend on the Legal System?

Law and economics and the question of what economics can do for law has been the subject of extensive commentary and discussion in the United States.²⁴ The question that arises is whether law and economics is relevant only to a common law system like that of the United States, or whether it has validity and utility in a civil law system like Italy's. If law and economics is a method, and not but simply theories which are affected by the historical and political framework of the society along its evolvement, it should be quite appropriate that the 'role of the lawyer' changes.

Considering this topic from an Italian perspective, many questions are on the table. The first one, and today most notable, is connected with the actual (but to a certain point, always actual) debate on legal methodology and legal teaching. To what extent law and society must be interconnected? How do we learn law in law schools? What does it mean to be a lawyer today? What do we have to do to form good lawyers in university and post lauream courses?

This debate is, or, better, these interconnected debates, are mostly tributary to the new global framework of the sources of law, and in particularly to the well-known phenomenon of the dialogue among courts and jurisdictions, which so many new perspectives and problems has pushed to an emersion – perspectives and problems deeply affecting legal scholars' self-consciousness and their social role, also confronting with the social role of other social sciences scholars, as the economists.

When things change, methods and concepts to understand those new things (or the same old things, but in a new epiphany) must change. The law and economics approach could have a new chance – thanks to Judge Calabresi's book – to become an operating tool for the average Italian lawyer, who in the past was, and still is, quite skeptic when not incredulous about the interrelationship between law and economics.²⁵ In brief, and along with the Italian perspective, the first concrete utility of the law and economics approach as presented and depicted by Judge Calabresi has a true didactic

²⁴ See, eg, R. Cooter and T. Ulen, *Law and Economics* (Boston: Addison-Wesley, 6th ed, 2016); A. Marciano and G.B. Ramello (special eds), 'Law and Economics: The Legacy of Guido Calabresi' 77 *Law and Contemporary Problems*, (2014); G. Calabresi and A.D. Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' 85 *Harvard Law Review*, 1089 (1972).

²⁵ See R. Pardolesi and G. Bellantuono, 'The History and Methodology of Law and Economics', in B. Bouckaert and G. De Geest eds, *Encyclopedia Of Law and Economics* (Cheltenham: Edward Elgar, 2000), 244, 246-250, expressing some reasons for why Italian lawyers and economists usually 'do not listen' to law 'and' economics.

nature: to show to the law students and to the legal scholars how many ‘things’ exist beyond the law intended in the formal and traditional way – and these many things are, in sum, our lives. The lesson from law and economics approach is that the range and the boundaries of legal reasoning are and must be much more extended than usual, at least in Italy; to do so, we do need to consider the field of economics as a real intellectual aid and support.

Indeed, Judge Calabresi himself makes it clear that he believes that the law and economics approach has value and utility in the analysis of the Italian legal system.²⁶

VI. What Economics Need to Consider in Analyzing Law?

Judge Calabresi identifies two key issues that economic theory needs to better consider in order to analyze existing legal reality: merit goods and altruism and values.

1. Merit Goods

Merit goods are those that correspond to merit wants and whose purchase and use do not take into account their costs²⁷ or benefits to others in society.²⁸ There are two types of merit goods: goods that a significant number of people in society do not wish to have priced; they are ‘pearls beyond price’ whose commodification is indeed costly. Others are goods whose pricing is not costly in itself, but whose allocation through the prevailing system of wealth inequality is highly undesirable to a significant number of people.²⁹

How does one then deal with merit goods? One can, through

²⁶ As Judge Calabresi noted in a recent interview: ‘Well, I’m also European. (...) This book says law, and your notion that law has had something to tell us for a long time and still does, is true. It discusses this in a systematic way by talking about law and economics, rather than economic analysis of law, and says the two things work together. This traditional European notion that law had things to say about the unanalyzed experience of the human race, and economic theory, this Benthamite, powerful, out-of-law engine of reform were now coming together. And the two sides of me, Italian and American, were now coming together in my scholarship’: ‘Law and Guido Calabresi’ 63 *Yale Law Reporter*, 118, 128 (2016).

²⁷ Judge Calabresi notes that, for merit goods, external costs are the ‘mental sufferings that their allocation in the ordinary market imposes on other people. The external costs attributable to these goods, when they are priced or allocated through the ordinary market, are the pain other people feel because they do not like that kind of pricing allocation. They are similar to moral costs, but that does not make them less real or less needful of attention’: G. Calabresi, *The Future* n 1 above, 27.

²⁸ *Ibid* 24-25.

²⁹ As Judge Calabresi notes: ‘It is not the pricing that is objected to by many; it is the capacity of the rich to outbid the poor that renders their allocation through the ordinary market unacceptable, utility diminishing, and therefore costly to many people’: *Ibid* 26.

commodification, put a market price on them, but pricing these goods through market mechanisms is painful to many members of society. The alternative is what Professor Calabresi calls commandification, which substitutes market pricing by the collective allocation.³⁰ Most often, societies deal with this category of merit good through a combination of markets and commands.³¹ As Professor Calabresi shows, the incorporation of these concepts into economic theory, and their application to the world of law, is complicated.³²

Consideration of the second type of merit goods³³ brings Judge Calabresi to deal with the issue of inequality. Since distributing these goods through regular market mechanisms is not feasible, two alternatives surface: the use of collecting allocation schemes (either public or private) that take into account preferences and involve a more equal distribution; or the modification of markets (through rationing, taxes or subsidies or markets where the medium of exchange is not money) so that the distribution of these goods does not depend on the regular market. Professor Calabresi notes that, although the use of these mechanisms alone creates issues that need to be resolved, it is possible, through a combination of these methods, to deal with the effect of income inequality on different merit goods.³⁴ He ends this discussion by asking what his examination of merit goods tells us about the demands that the lawyer-economist must make on economic theory. His first response is to focus on the importance of the availability and usefulness of modified markets and modified command structures. Secondly, he underscores that the use of these command and market mechanisms to achieve the goals of a given society are far more complex and intertwined than is usually considered in economic models. Lastly, he notes that traditional economic theorists have ignored or treated as non-existent or irrational, cost and values that people in the real world deem real.³⁵

2. Altruism and Values

Two other issues that Judge Calabresi believes need to be considered further in economic theory are altruism and values.

Altruism is a collection of goods that are not only a means to an end, but

³⁰ Ibid 31.

³¹ Ibid 36.

³² See, eg, *ibid* 35-40.

³³ Judge Calabresi uses military service, the right to have children, the right to some level of education and the right to body parts as examples of this category of merit goods. These goods all elicit the feeling in a large number of people that they are goods which the rich should not be able to get, or the poor have to forego, simply because of their status. There is also a feeling that is wrong to price these goods: *Ibid* 43-44.

³⁴ See, eg, *ibid* 59-73.

³⁵ *Ibid* 88.

also ends in themselves. When economists ask themselves whether altruistic behavior is an efficient or cost effective way to deliver a good or service they usually say no. If self-interested behavior is more effective at producing goods and services that we want why, Judge Calabresi asks, is there so much altruism? His answer is that altruism is not only a means to an end, but an end in itself because we like it and are willing to pay for it.³⁶ With regard to altruism, the job for the lawyer economist is to suggest that economic theory need to be amplified to explain what is the legal world. Specifically, economic theory needs to consider three issues, Judge Calabresi believes. The first issue is whether altruism is one good in itself or several goods that we desire. The second is what means have actually been used to optimize these different goods and why these means have been chosen. Lastly, Judge Calabresi asks what indications there are as to the 'price' that people are willing to pay for altruistic goods and as to what demand exists for these goods.³⁷ After an outstanding examination and analysis, Judge Calabresi answers these questions in a clear and convincing manner.³⁸

The relationship between law and values is critical. Although the law and legal structures of a society depend on the values of that society, its laws and legal structures also profoundly affect society's values. Moreover, a change in law can both accelerate the change in the values that brought about the change and give rise to a powerful reaction thereto.³⁹ Judge Calabresi believes that economists can tell lawmakers a great deal about what value changes can be viewed as desirable or undesirable.⁴⁰

VII. Conclusion

The Future of Law and Economics convincingly argues that there is an appropriate relationship between law and economics. In this relationship, economic analysis, in the form of the law and economics analytical methodology articulated and explained in the book can be very useful in analyzing legal reality. As Judge Calabresi expresses it, there are questions as to which legal rulemaking needs help and the skills that economists have

³⁶ Ibid 90.

³⁷ Ibid 98.

³⁸ Ibid 100-115. Judge Calabresi concludes that: 1) there are goods and bads whose optimization through pure market and command mechanisms is counterproductive, but whose existence must be recognized and dealt with; 2) the examination and incorporation of modified markets and command systems into economic theory would be very useful, and 3) goods must be recognized as being both means and ends: *ibid* 115.

³⁹ Ibid 157.

⁴⁰ Ibid 160. Judge Calabresi notes that it would not violate the rigor of economic analysis to conclude that a society has a number of fundamental values and, starting from there, economists could develop interesting joint maximization models based on the relationship between fundamental values and subsidiary values promoted by legislation: *Ibid* 168.

make them particularly capable of giving lawmakers this help. The problem, he notes, is that applying economic skills in the areas in which this help is most needed requires economists to do certain things that they have traditionally been reluctant to do.⁴¹ Judge Calabresi clearly and elegantly shows how legal and economic scholars can do this.

Judge Calabresi makes it clear that law and economics, as a legal methodology, is of equal assistance and utility in a civil law system such as that of Italy as in a common law system. As he so eloquently put it, this book puts together both his Italian and American sides.⁴²

The Future of Law and Economics is an essential book for legal scholars, judges, lawmakers, lawyers and students of the law, both in Italy and the United States.

⁴¹ Ibid 171.

⁴² See n 27 above and accompanying text.