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Essays

The Same-Sex Parented Family Option: The View from Italian Case Law

Gianni Ballarani*

Abstract

The essay offers a critical look at the recent Italian case law on same-sex parenting, investigating the relationship between the adult freedom of self-determination in the family sphere and the best interests of the child. After investigating the legal meaning of this formula as it is understood under the Italian legal system, the essay examines whether the original legislative framework aimed at the superiority of the child's interest has given way, in the case law, to an adult-centric path. Moreover, this topic represents an important challenge for the 'argumentation by principles' and for the subsidiary role of the legal institutions (Legislator and Courts), with regards to the freedom of self-determination of adults and the position of the child.

I. Introduction

Nowadays the complex context of dynamics of affections and the issue of same-sex parenting allow for an investigation of the relationship between the adult freedom of self-determination in the family sphere and the (best) interest of the children, whose emerging personalities are affected and influenced, in their developmental dynamics, by the choices of the adults. These include the adults who are, or are assumed to be, or want to be, their parents; as well as those who are legislators, legal scholars, and judges. This topic represents an important challenge for the 'argumentation by principles'¹ and for the subsidiary role of the

* Full Professor of Private Law, Pontifical Lateran University.

The contents of this essay reproduce those of the lecture delivered during the International Conference on 'The Best Interests of the Child', organized by the 'Research Center of Sapienza University for the protection of the child's person'. Sapienza-University of Rome, September 20-22, 2018.

¹ It is important to recall the path that has led to affirmation of the *Drittwirkung* of constitutional principles: it began with the reflections of those who first promoted a constitutionally-oriented reading of civil law as necessary, stimulating a radical renewal of traditional dogmatic tools and calling for a legislative technique founded on constitutional principles, through which society's needs can penetrate into the legal order: S. Rodotà, 'Ideologie e tecniche della riforma del diritto civile' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 83 (1967); P. Barcellona, *Gli istituti fondamentali del diritto privato* (Napoli: Jovene, 1970), passim; Id, *L'uso alternativo del diritto*, I, *Scienza giuridica e analisi marxista*, II, *Ortodossia giuridica e pratica politica* (Roma-Bari: Laterza, 1973), passim; N. Lipari, *Diritto privato. Una ricerca per l'insegnamento?* (Roma-Bari: Laterza, 2nd ed, 1974), XVI; P. Perlingieri, *Il*

regulatory institutions² (the legislator and courts), with regards to the freedom of self-determination of adults and the position of the child.

The essay attempts to offer a critical look at the recent Italian case law on same-sex parenting.

First, it investigates the formula of the best interests of the child, as it has been interpreted in the Italian legal system. This section will begin to address the constitutional foundation of the (allegedly) superiority of the child's interest.

After identifying this foundation for the personality-solidarity binomial, the essay moves on to examine the superiority of the child's interest in the normative framework.

In this context, the analysis deals with how case law on same-sex parenting is applying the child's interests standard. Here, it will focus on whether courts have tended to keep the child's interest as a primary and preventive criterion, acting to limit the wishes of adults and their choices within a very narrow perimeter of rules, in harmony with current regulatory provisions, or whether, on the contrary,

diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti (Napoli: Edizioni Scientifiche Italiane, 1983), passim. In this context, a fundamental role is played by the interpreter – the judge – who, as the guarantor of a new balance between legal regulation and reconstruction of reality, and through the persuasiveness of the argumentation, restores the connection with the social reality from which s/he draws value criteria, only apparently summarized in the elasticity of constitutional formulas, verifying the compliance of the rule with hierarchically superior principles: supranational, international and constitutional ones: N. Lipari, 'Il diritto civile dalle fonti ai principi' *Rivista trimestrale di diritto e procedura civile*, 5 (2018); E. Navarretta, *Costituzione, Europa e diritto privato. Effettività e Drittwirkung ripensando la complessità giuridica* (Torino: Giappichelli, 2017), passim; P. Femia ed, *Drittwirkung: principi costituzionali e rapporti tra privati* (Napoli: Edizioni Scientifiche Italiane, 2018), passim; P. Perlingieri, 'Il diritto come discorso? Dialogo con Aurelio Gentili' *Rassegna di diritto civile*, 781 (2014); Id, 'I principi giuridici tra pregiudizi, diffidenza e conservatorismo' *Annali SISDiC*, 1 (2017). In this line of work, Constitutional and European principles are the new criteria to be taken as a reference point for decisions leveraging on the direct applicability (*Drittwirkung*) of the values that they express in the application processes of law (N. Lipari, 'Costituzione e diritto civile' *Rivista trimestrale di diritto e procedura civile*, 1260 (2018).

² The subsidiary function of the legal system, reflected in the principle of horizontal subsidiarity, aims to contain the intervention of the State within the limits of the efficiency of the action of private people. It expresses 'the vicarious function of law with respect to the determinations of private people': E. Del Prato, 'Principio di sussidiarietà sociale e diritto privato' *Giustizia civile*, 381 (2014). The principle of subsidiarity can be understood, both as a principle of legitimacy for the interpreter to protect concrete situations not directly envisaged in specific regulatory provisions, but marked by interests worthy of protection, as well as a criterion of legitimization for the legislator to define the limits within which the action of private persons can be allowed. Although the natural soil giving rise the principle of subsidiarity was that of a patrimonial relationship (based on the Ordoliberal doctrine elaborated by the Friborg School: among many, L. Di Nella, 'La Scuola di Friburgo, o dell'ordoliberalismo', in N. Irti ed, *Diritto ed Economia* (Padova: CEDAM, 1999), 171, the model is now extending itself into the family context. However, it should be noted that this can hardly be applied in the context of relationships between adults and children, due to the legal duty of child protection: R. Giampetraglia, 'Il principio di sussidiarietà nel diritto di famiglia', in M. Nuzzo ed, *Il principio di sussidiarietà nel diritto privato* (Torino: Giappichelli, 2014), I, 329; G. Ballarani, 'La mediazione familiare alla luce dei valori della Costituzione italiana e delle norme del diritto europeo' *Giustizia civile*, 495 (2012).

courts have adopted an adult-centric trajectory with regard to the freedom of self-determination of adults, consequently applying the child's best interests in a secondary and remedial way.

Finally, the essay focuses on whether the rights of children have been sacrificed in same-sex parenting rulings.

The first aspect to be analysed is the legal meaning of the formula 'the best interests of the child' (to a healthy and harmonious psychophysical development) in the way in which the Italian legal system has interpreted it.³

Considering that this formula plays a fundamental role both from the regulatory perspective, and from the judicial one, it is necessary to investigate its scope and the concrete meaning under which it must be accepted in the legal context. The purpose of this analysis is to avoid the risk of degrading the expression to a mere style clause⁴ that can be easily used to justify contradictory situations and can be interpreted in a subjective and discretionary way. The analysis leads into a consideration of the function that the legal system as a whole (legislator and courts) is called to perform (as a mediator) between the need to guarantee proper

³ On the legal concept of the best interests of the child, see among many, P. Stanzione, 'Minori (condizione giuridica dei)' *Enciclopedia del diritto* (Milano: Giuffrè, 2011), IV, 725; G. Ferrando, 'Diritti e interesse del minore tra principi e clausole generali' *Politica del diritto*, 169 (1998); F. Ruscello, 'La potestà dei genitori. Rapporti personali (artt. 315-319)', in P. Schlesinger ed, *Commentario del codice civile* (Milano: Giuffrè, 1996), 78; E. Quadri, 'L'interesse del minore nel sistema della legge civile' *Famiglia e diritto*, 80 (1999); M. Dogliotti, 'La potestà dei genitori e l'autonomia del minore', in A. Cicu, F. Messineo and P. Schlesinger eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2007), VI, 93; P. Perlingieri, 'Norme costituzionali e rapporti di diritto civile', in Id ed, *Tendenze e metodi della civilistica italiana* (Napoli: Edizioni Scientifiche Italiane, 1979), 95; G. Ballarani, 'La responsabilità genitoriale e l'interesse del minore (tra norme e principi)', in P. Perlingieri and S. Gioia eds, *Comunioni di vita e familiari tra libertà, sussidiarietà e inderogabilità. Atti del 13° Convegno nazionale della SISDIC – Napoli 3-5 maggio 2018* (Napoli: Edizioni Scientifiche Italiane, 2019), 317; Id, 'Diritti dei figli e della famiglia: antinomia o integrazione?', in G. Dalla Torre ed, *Studi in onore di Giovanni Giacobbe* (Milano: Giuffrè, 2010), II, 473.

⁴ The principle of the best interests of the child has been strongly criticized in legal scholarship, due to its excessive vagueness, which allows for the risk of conflicting readings based on subjective discretion: Cf Y. Benhamou, 'The New York Convention, le droit international et le juge français' 2 *La Semaine Juridique Edition Générale*, 321 (11 Janvier 1995). It has induced scholars to define it as a 'fairy-tale' concept (P. Ronfani, 'L'interesse del minore: dato assiomatico o nozione magica?' *Sociologia del diritto*, 55 (1997)), where the Author takes up the famous expression of J. Carbonier, 'Note sous cour d'appel de Paris, 30 avril 1959' *Dalloz*, 673, 675 (1960), or magic potion (I. Thery, 'Nouveaux droits de l'enfant, the potion magique?' *Esprit*, 5 (1994)), or having an empty tautology (M. Dogliotti, 'Cos'è l'interesse del minore' *Diritto di famiglia e delle persone*, 1093 (1992)), or again as a sort of discretionary passepartout (G. Dosi, 'Dall'interesse ai diritti del minore' *Diritto di famiglia e delle persone*, 1604 (1995)); see also, among many, J. Eekelaar, 'Interests of child and child's wishes: The Role of Dynamic Self-Determinism', in P. Alston ed, *The best interests of the child* (Oxford: Clarendon Press, 1994), 57; I. Gaber and J. Aldridge, *In the Best Interests of the Child: Culture, Identity, and Transracial Adoption* (London: Free Association Books, 1994), passim; C. Breen, *The Standard of the Best Interests of the Child* (The Hague: Martinus Nijhoff, 2002), passim; M. Freeman, *Article 3* (Leiden-Boston: Martinus Nijhoff, 2007), passim; Id, 'Why it remains important to take Children's rights seriously' *The International Journal of Children's Rights*, 5 (2007); T. Buck, *International Child Law* (London: Routledge, 2014), passim.

protection of children and the need to respect the spaces of self-determination of adults who are partners in an affective relationship.

In this perspective, the starting point is represented by the Art 3, para 1, of the UN Convention on the Rights of the Child (UNCRC):⁵

‘In all actions concerning children, whether by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.

The best interests of the child formula is the basic element underlying the entire legal framework concerning children in the Italian, European and international legal systems. It is a general and flexible clause that commits the legal system and every institution to the protection of children, in general, and to the protection of a specific child in particular.⁶ The concept of the superior interest of the child is, in fact, aimed at considering the specificity of the childhood as a broad temporal space, characterized by a presumptively continuous evolutionary path, in which the personality and identity of a person grow.⁷ This is why the formula is projected towards the healthy and harmonious psychophysical development of the child.⁸

II. The Superiority of the Child's Interest

The Italian legal system has accepted the formula of the ‘best interests of the child’ in terms of the ‘superior’ (or sometimes ‘prominent’) interest of the child. It has done so using comparative and relational words, which invoke the comparison with the interests of other people with their respective legal positions. This, however requires the identification of a constitutional justification in order to assess its acceptability and consequences.

If the superiority of the child's interest applies in relation to the interests of

⁵ The Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on November 20, 1989 with resolution 44/25, was then ratified in Italy with legge no 176 of 27 May 1991.

⁶ G. Ballarani, ‘Contenuto e limiti del diritto all'ascolto nel nuovo art 336-bis c.c.: il legislatore riconosce il diritto del minore a non essere ascoltato’ *Diritto di famiglia e delle persone*, II, 841 (2014); A. Nicolussi, ‘La filiazione nella cultura giuridica europea’, in Id ed, *Diritto civile della famiglia* (Milano: EduCatt, 2012), 341.

⁷ C. Ruperto, ‘Età (diritto privato)’ *Enciclopedia del diritto* (Milano: Giuffrè, 1977), XVI, 85.

⁸ P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 1972), 22; Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), I, 717; P. Stanzione, *Capacità e minore età nella problematica della persona umana* (Napoli: Edizioni Scientifiche Italiane, 1975), 127; V. Scalisi, *Il valore della persona umana e i nuovi diritti della personalità* (Milano: Giuffrè, 1990), 43; G. Ballarani, *La capacità autodeterminativa del minore nelle situazioni esistenziali* (Milano: Giuffrè, 2008), 5.

other subjects, the axis of reflection shifts towards balancing operations⁹ because the horizontal geometry¹⁰ of the constitutional ‘table of values’¹¹ does not allow for the abstract primacy of one value over another.¹² Indeed, balancing criteria must be applied every time that, between values, interests and principles (that are equal to each other)¹³ ‘a simple coordination without sacrifice or subordination of one to the other is not possible’.¹⁴

III. The Superiority of the Child’s Interest in Comparison with Constitutional Principles: The Dignity-Solidarity Binomial

Since, as stated above, it is necessary to analyse the assumed superiority of the child’s interest in light of constitutional principles, the analysis must be oriented primarily under the ‘open-scheme case’¹⁵ of Art 2 of the Italian Constitution,¹⁶ according to which the personalist principle is linked to that of solidarity.

The main element that allows the superiority of the child’s interest to be affirmed derives from the constitutional provision that includes children in the concept of human person (Art 2) – the primary value in the constitutional framework –¹⁷ but with their own, unique specificity (Arts 30, 31 and 37 of the Constitution).

The anthropocentric vision on which the architecture of the constitutional

⁹ *Expulsi*, Eur. Court H.R., *Odièvre v Francia*, Judgment of 13 February 2003, available at www.hudoc.echr.coe.int; J. Long, ‘La Corte Europea dei Diritti dell’Uomo, il parto anonimo e l’accesso alle informazioni sulle proprie origini: il caso Odièvre c. Francia’ *Nuova giurisprudenza civile commentata*, 283 (2004); Corte costituzionale 16 November 2005 no 425, *Famiglia*, 161 (2006); Eur. Court H.R., *Godelli v Italia*, Judgment of 25 September 2012, available at www.hudoc.echr.coe.int; Corte costituzionale 18 November 2013 no 278, *Famiglia e diritto*, 11 (2014); Corte di Cassazione 21 July 2016 no 15024, *Corriere giuridico*, 21 (2017) and Corte di Cassazione 9 November 2016 no 22838, *Famiglia e diritto*, 19 (2017); Corte di Cassazione-Sezioni Unite 25 January 2017 no 1946, available at www.italgiureweb.it.

¹⁰ R. De Stefano, *Assiologia (Schema di una teoria generale del valore e dei valori)* (Reggio Calabria: Laruffa, 1982), 377, now published in Id, *Scritti sul diritto e sulla scienza giuridica* (Milano: Giuffrè, 1990), 353; V. Scalisi, ‘Assiologia e teoria del diritto (Rileggendo Rodolfo De Stefano)’ *Rivista di diritto civile*, I, 1 (2010).

¹¹ A. Baldassarre, ‘Costituzione e teoria dei valori’ *Politica del diritto*, 639 (1991).

¹² *ibid* 65.

¹³ R. De Stefano, n 10 above, 353; Id, *Il problema del diritto non naturale* (Milano: Giuffrè, 1955), *passim*; V. Scalisi, ‘Assiologia e teoria del diritto’ n 10 above, 1.

¹⁴ G. Oppo, ‘L’esperienza privatistica’, in *Atti del Convegno Linceo I principi generali del diritto* (Roma, 27-29 maggio 1991) (Roma: Accademia Nazionale dei Lincei, 1992), 220.

¹⁵ N. Lipari, ‘Costituzione e diritto civile’ n 1 above, 1265.

¹⁶ C.M. Bianca, *Diritto civile*, I, *La norma giuridica. I soggetti* (Milano: Giuffrè, 2002), 136; S. Cotta, ‘Soggetto di diritto’ *Enciclopedia del diritto* (Milano: Giuffrè, 1990), XLII, 1225; G. Capograssi, ‘Il diritto dopo la catastrofe’, in Id ed, *Opere* (Milano: Giuffrè, 1959), V, 185.

¹⁷ P. Perlingieri, *La personalità umana* n 8 above, 22; V. Scalisi, ‘Complessità e sistema delle fonti di diritto privato’ *Rivista di diritto civile*, I, 147 (2009); C.M. Bianca, n 16 above, 136; S. Cotta, n 16 above, 1225; G. Capograssi, n 16 above, 185.

principles rests¹⁸ is revealed by the connection between the personalist principle and that of solidarity, set in Art 2 of the Constitution. Individual and community interests, like an inseparable hendiadys, merge together to form the indissoluble binomial dignity-solidarity,¹⁹ which forms the axiological foundation of the constitutional system²⁰ and represents the principal inspiration and criterion for every other constitutional principle.²¹

This reveals the anti-individualistic tenor of the constitutional system, which prevents the human person from being considered an 'entity' detached from the social system itself, as if it were an absolute monad.²² Therefore, in a system that aims to govern interpersonal relations through the link between personhood and solidarity, the superiority of the child's interests is rooted in the State's primary function, such as protecting the weak.²³ The State has to assure that the physical and mental integrity of people will be protected (Art 32 of the Constitution), especially in the moments of greatest weakness and fragility in human life, such as childhood, the period of maximum development of the personality.

IV. The Superiority of the Child's Interest in the Normative Framework: The Relationship Between Parents and Children from the Child-Centric Perspective of the Italian Family Law

As the family law framework has adapted to constitutional requirements,²⁴

¹⁸ V. Scalisi, 'Ermeneutica dei diritti fondamentali e principio «personalista» in Italia e nell'Unione Europea' *Rivista di diritto civile*, I, 145 (2010); Id, 'Il diritto naturale e l'eterno problema del diritto giusto' *Europa e diritto privato*, 448 (2010); L. Mengoni, *Diritto e valori* (Bologna: il Mulino, 1985), 5; L. Ferrajoli, *Diritti fondamentali. Un dibattito teorico* (Roma-Bari: Laterza, 2002), 35.

¹⁹ F.D. Busnelli, 'Idee-forza costituzionali e nuovi principi: sussidiarietà, autodeterminazione, ragionevolezza' *Rivista critica del diritto privato*, 18 (2014).

²⁰ P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 8 above, II, 433.

²¹ F.D. Busnelli, n 19 above, 9; R. Nicolò, 'Codice civile' *Enciclopedia del diritto* (Milano: Giuffrè, 1960), VII, 248; G. Ballarani, *Il matrimonio concordatario nella metamorfosi della famiglia* (Napoli: Edizioni Scientifiche Italiane, 2018), 79.

²² F.D. Busnelli, n 19 above, 18; S. Cotta, 'Il diritto naturale e l'universalizzazione del diritto' *Iustitia*, 1 (1991); G. Ballarani, *Il matrimonio concordatario* n 21 above, 79.

²³ D. Poletti, 'Soggetti deboli' *Enciclopedia del diritto*, (Milano: Giuffrè, 2014), VII, 962.

²⁴ The constitutionally oriented reading of the civil law has led to the gradual move beyond the concept of parental authority, establishing the conditions for a radical inversion of the trend in analyzing the legal position of the parents *vis-à-vis* that of the child: P. Perlingieri, *Il diritto civile* n 8 above, I, 114; Id, 'Depatrimonializzazione e diritto civile' *Rassegna di diritto civile*, 1 (1983); C.M. Bianca, *Diritto civile*, II, 1, *La famiglia* (Milano: Giuffrè, 2014), 329; G. Giacobbe, *Le nuove frontiere della giurisprudenza* (Milano: Giuffrè, 2001), 461, 581, 629; G. Ballarani, 'Sub art. 155 c.c.', in S. Patti and L. Rossi Carleo, 'Provvedimenti riguardo ai figli, art. 155 – 155-sexies', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 2010), 28; Cf, among many, Corte di Cassazione 17 April 2008 no 10094, available at www.dejure.it; Corte di Cassazione 11 January 1978 no 83, available at www.dejure.it; Corte di Cassazione 2 June 1983 no 3776, *Diritto di famiglia e delle persone*, I, 39 (1984); Corte costituzionale 27 March 1992 no 132, *Quaderni di diritto e politica ecclesiastica*, 3, 685 (1993).

the link between the superiority of the child's interest and the personalist and solidarity principles has stimulated a redetermination of the normative paradigms that apply to the relationship between adults and minor-age people (especially parents and children), with child-centricity dominating (an outcome neatly summarized in the '*favor minoris*' formula). These principles, codified into legislations, were then given concrete application in case law.

This child-centred, constitutional-based approach to the relationship between adults and children has made it possible for a plurality of new concepts to emerge, in both the regulatory and judicial fields, which aim to supplement the available tools for governing situations involving a child, as well as to orient the action of the interpreter in the solidarity-based and altruistic perspective of constitutional principles:

- the right of the child to grow up in his or her family, pursuant Art 1 of the adoption law (legge 4 May 1983 no 184);²⁵
- the right of an adopted child to know his or her origins, as a direct corollary of the inviolable right to personal identity, established by the adoption reform (legge 28 March 2001 no 149);
- the concept of 'affective continuity' as derived from the reform of the Italian family custody law in relation to adoption²⁶ (legge 19 October 2015 no 173);
- the child's right to have (the affectionate and educational contribution of) two parents ('bi-parenting') in the context of the crisis of couple relationships,²⁷ established by legge 8 February 2006 no 54 and confirmed most recently by decreto legislativo 28 December 2013 no 154;
- the affirmation, in the same above regulatory context described above, of the child's right to be heard during legal proceedings;²⁸ and,
- finally, the definitive affirmation, under the reform of the children's legge 10 December 2012 no 219,²⁹ of the child having homogeneous *status*³⁰ (whether born to married couples or not), and a related remodulation of the traditional

²⁵ G. Ballarani, 'L'adozione che verrà', in A. Scavuzzo et al eds, *L'adozione che verrà. Atti del Convegno Nazionale del CIAI, Università di Milano Bicocca, 14 novembre 2016* (Milano: CIAI, 2016), 11.

²⁶ M. Dogliotti, 'Modifiche alla disciplina dell'affidamento familiare, positive e condivisibili, nell'interesse del minore' *Famiglia e diritto*, 1107 (2015).

²⁷ G. Ballarani, 'Sub art. 155 c.c.' n 24 above, 28; A. Morace Pinelli, 'I provvedimenti riguardo ai figli. L'affidamento condiviso', in C.M. Bianca ed, *La riforma della filiazione* (Padova: CEDAM, 2015), 68.

²⁸ G. Ballarani, *Contenuto e limiti del diritto all'ascolto* n 6 above, 841.

²⁹ *Ex pluribus* C.M. Bianca, 'La legge italiana conosce solo figli' *Rivista di diritto civile*, 1 (2013); E. Giacobbe, 'Il prevalente interesse del minore e la responsabilità genitoriale. Riflessioni sulla Riforma "Bianca"' *Diritto di famiglia e delle persone*, 817 (2014); G. Ferrando, 'La legge sulla filiazione. Profili sostanziali', available at www.juscivile.it, 132 (2013); M. Bianca ed, *Filiazione. Commento al decreto attuativo* (Milano: Giuffrè, 2014), passim; M. Sesta, 'L'unicità dello stato di filiazione e i nuovi assetti delle relazioni familiari' *Famiglia e diritto*, 231 (2013).

³⁰ G. Ballarani, *La capacità autodeterminativa del minore* n 8 above, 4, 38; P. Perlingieri, *Il diritto civile* n 8 above, II, 735, 944; C.M. Bianca, *Diritto civile* n 16 above, 157, 233, 236.

concept of parental authority in the new terms of parental responsibility,³¹ as provided by the new statute on children's rights.³² This reform, in keeping with a move toward harmonization with European legal standards,³³ included affirmation of the concept of 'social parenting', which extends liability to anyone (including both individuals and organizations) who takes care of the child.

The flexibility of all these concepts allows for divergent interpretations, depending on the perspective (child-centric or adult-centric) that is chosen, consequently leading to opposite results in the case law.

From the child-centric perspective, the child's interest is always taken as a primary criterion, aimed at preventing the production of a *vulnus*. On the contrary, from an adult-centric perspective, the child's interest can be taken as a secondary criterion, applied to a *vulnus* which, however, has already been produced.

Although initially lawmakers and courts converged in applying a child-centric perspective, more recently an intrinsically adult-centric approach seems to be emerging as dominant in the matter of same-sex parenting. Courts, making recourse to the plurality of the new concepts referred to above, disregard the preventive criteria,³⁴ invoking constitutional and European principles in order to adapt the legal system to social changes, offering the results that they believe

³¹ C.M. Bianca, 'La legge italiana conosce solo figli' n 29 above, 3; G. Ballarani and P. Sirena, 'Il diritto dei figli di crescere in famiglia' *Nuove leggi civili commentate*, 534 (2010); G. Recinto, 'Genitori e figli tra tendenze interne "adultocentriche" e spinte "minorecentriche" della Corte EDU', in F. Dell'Anna Misurale and F.G. Viterbo eds, *Nuove sfide del diritto di famiglia. Il ruolo dell'interprete. Atti del Convegno di Lecce del 7-8 aprile 2017* (Napoli: Edizioni Scientifiche Italiane, 2018), 75, 86; Id, *Le genitorialità* (Napoli: Edizioni Scientifiche Italiane, 2016), 11.

³² M. Sesta, n 29 above, 231; G. Ballarani and P. Sirena, n 31 above, 534; G. Giacobbe and G. Frezza, 'Ipotesi di disciplina comune nella separazione e nel divorzio', in P. Zatti ed, *Trattato di diritto di famiglia*, I, *Famiglia e matrimonio*, G. Ferrando, M. Fortino and F. Ruscello eds, 2, *Separazione e divorzio* (Milano: Giuffrè, 2002), 1325.

³³ Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no 1347/2000 [2003] OJ L338/1; G. Ballarani, *Diritti dei figli e della famiglia* n 3 above, 473; J. Long, 'L'impatto del Regolamento CE 2201/2003 sul diritto di famiglia italiano: tra diritto internazionale privato e diritto sostanziale' *Famiglia*, 1127 (2007); Corte di Cassazione 20 dicembre 2006 no 27188, *Famiglia e diritto*, 697 (2007).

³⁴ F. Di Giovanni, 'Il «diritto dei giuristi» e la complessità della realtà' *Rassegna di diritto civile*, 981 (2014); G. Doria, 'Pluralismo e verità della legge' *Giustizia civile*, 394 (2014); P. Grossi, 'La formazione del giurista e l'esigenza di un ripensamento metodologico' *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 26 (2004); V. Scalisi, 'Regola e metodo nel diritto civile della postmodernità' *Rivista di diritto civile*, 57 (2005); G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 16, 86; N. Lipari, 'Il diritto civile dalle fonti ai principi' n 1 above, 21, 28; Id, 'Costituzione e diritto civile' n 1 above, 1272; P. Perlingieri, 'La «grande dicotomia» diritto positivo-diritto naturale', in P. Sirena ed, *Oltre il «positivismo giuridico» in onore di Angelo Falzea* (Napoli: Edizioni Scientifiche Italiane, 2011), 87, 89; Id, 'Complessità e unitarietà dell'ordinamento giuridico vigente', in *Scritti in onore di Vincenzo Buonocore*, I (Milano: Giuffrè, 2005), 635; A. Falzea, 'Complessità giuridica' *Enciclopedia del diritto* (Milano: Giuffrè, 2007), Agg. I, 201; P. Grossi, 'L'identità del giurista oggi' *Rivista trimestrale di diritto e procedura civile*, 1089, 1095 (2010).

to be *embraceable* by society.³⁵

The individual self-determination of adults in the context of affective relationships have claimed and obtained ever greater recognitions in the European legal context, effecting a true Copernican revolution the effects of which extend from the family law system to that of children's rights, opening the way for an implicit adult-centric view of the relationship between adults and children in the field of reproductive and parenting choices.

The Italian legal system's acceptance of the legitimation of homosexual loving relationships³⁶ has led to the propagation of the related effects in the context of reproductive freedom (made concrete, beyond any ontological impediment, with the help of reproductive techniques). The now achievable desire to be parents and the related desire to be considered a parental couple are starting to be intended in the social context as an actual existential right, with resulting reflections on the pre-existing life, on the one hand, and on the nascent life, on the other.

Taking the perspective of presumed unquestionability of the reproductive self-determination, legal scholarship and case law have been making the following deductions, through the propensity to argue by principles in the case law according to the *Drittwirkung* of constitutional values:

- the child's right to grow up in a family,³⁷ derived from the child's right to grow up *in his or her own family*;³⁸
- the adult's right to have children, derived from the child's right to have a family;³⁹ and,
- the couple's right to be considered parents, derived from the adult's right to have children.

The fundamental principles invoked to support these positions, presumed to derive from them, are principles that were initially part of the child-centric perspective, under which they were assumed to place limits upon the free determination of adults, such as:

- parental responsibility;⁴⁰
- the related concept of 'social parenting';
- the 'affective continuity';⁴¹ and,

³⁵ N. Lipari, 'Il diritto civile dalle fonti ai principi' n 1 above, 24.

³⁶ *Ex multis*, G. Ballarani, 'La legge sulle unioni civili e sulla disciplina delle convivenze di fatto. Una prima lettura critica' *Diritto delle successioni e della famiglia*, 623 (2016); Id, 'Verso la piena autonomia privata in ambito familiare?' *Diritto delle successioni e della famiglia*, 27 (2019); G. Perlingieri, 'Interferenze fra unione civile e matrimonio. Pluralismo familiare e unitarietà dei valori normativi' *Rassegna di diritto civile*, 101 (2018); Id, 'Discriminazione di coppie eterosessuali?' *Diritto delle successioni e della famiglia*, 1 (2019).

³⁷ Art 315-bis Civil Code.

³⁸ Art 1, legge 4 May 1983 no 184.

³⁹ Art 1, comma 4, legge no 184 of 1983; Corte costituzionale 6 July 1994 no 281, *Giustizia civile*, I, 2706 (1994).

⁴⁰ Council Regulation (EC) 2201/2003.

⁴¹ Legge 19 October 2015 no 173.

- a child's right to have two parents ('bi-parenting').

Thus, the results achieved by the case law through the argumentation by principles allow to verify if the original legal order aimed at the superiority and pre-eminence of the child's interest has given way to an adult-centric path.

V. The Judicial Paths Toward Same-Sex Parenting, Between Rules and Principles

Here, a preliminary look at the main case law in the field of same-sex parenting is necessary in order to identify the most critical issues.

The first case concerns a couple of women. After one of them gave birth to a child through *in vitro* fertilization (IVF), her partner asked (with the other's consent) to be recognized as a parent under the 'adoption in particular cases' provision (Art 44, para 1, letter *d* of legge no 184/1983), which governs adoptions in cases where pre-adoptive custody is not possible.

Although the impossibility of pre-adoptive custody had been consistently understood as the 'factual impossibility'⁴² to implement custody, the court⁴³ allowed the request by interpreting it broadly as a 'legal impossibility'. More specifically, the court connected the lack or impossibility of a declaration of adoptability to the non-existence of a prior state of abandonment. In its decision, the court then relied on the need to guarantee the child's right to 'affective continuity'.

The theory put forward by the court was then confirmed by the Italian Supreme Court of Cassation (SC),⁴⁴ which held that Art 44, para 1, letter *d* can

⁴² In the traditional reconstruction, in fact, the formula refers to the factual impossibility, referring to those hypotheses in which, besides the abandonment situation, there are *de facto* obstacles (particular character elements of the child, age of the child, disabled child) that prevent pre-adoption custody and full adoption. In this perspective, unfailing conditions remain the state of abandonment and the declaration of adoptability: T. Auletta, *Diritto di famiglia* (Torino: Giappichelli, 2014), 399; M. Dogliotti, 'Adozione di maggiorenni e minori', in P. Schlesinger ed, *Codice civile. Commentario* (Milano: Giuffrè, 2002), 807; L. Rossi Carleo, 'L'affidamento e le adozioni', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1997), 397; P. Vercellone, 'La filiazione legittima, naturale, adottiva e la procreazione artificiale', in F. Vassalli ed, *Trattato di diritto civile* (Torino: Giuffrè, 1987), 194. Cf G. Salvi, *Percorsi giurisprudenziali in tema di omogenitorialità* (Napoli: Edizioni Scientifiche Italiane, 2018), 17.

⁴³ Tribunale per i minorenni di Roma, 30 July 2014 no 299, among many in *Rassegna di diritto civile*, 679 (2015). In the same sense, cf Tribunale per i minorenni di Roma, 22 October 2015, among many in *Foro italiano*, 339 (2016); Tribunale per i minorenni di Roma 23 December 2015, *Nuova giurisprudenza civile commentata*, 969 (2016).

⁴⁴ Corte di Cassazione 22 June 2016 no 12962, among many in *Nuova giurisprudenza civile commentata*, 1218 (2016), with annotation by G. Ferrando, 'Il problema dell'adozione del figlio del partner. Commento a prima lettura della sentenza della Corte di Cassazione n. 12962 del 2016'. In this case law, the Corte di Cassazione recall two precedents of Eur. Court H.R.: *Moretti and Benedetti v Italia*, Judgment of 27 April 2010, available at www.hudoc.echr.coe.int, and *X and others v Austria*, Judgment of 19 February 2013, *Giurisprudenza italiana*, 1764 (2013); *Nuova giurisprudenza civile commentata*, I, 519 (2013).

be applied in cases where the pre-condition of a child's abandonment does not exist (Art 7, para 1, legge no 184/1983). It was the view of the SC that the need to consolidate the emotional relation between the child and the parent's partner should be emphasized.

This interpretation of the legislative provision has been subjected to various criticisms, first of all based on the exceptional nature of the provision regarding adoption in particular cases, which prevents its analogical interpretation (Art 14 of the Preliminary Provisions of the Civil Code),⁴⁵ as well as the risk of indiscriminately opening the way for distorted or abusive uses of the law, in accordance with what the Corte di Cassazione has established in its decision.⁴⁶

The second case involved a couple of men who made use of surrogacy in a country where it was lawful. After obtaining a birth certificate from that country which indicated the two men as parents of the child, they requested registration of the birth in Italy, and the Public Official refused to produce it.

This case differs from the earlier one, due to the prohibition (with criminal repercussions) of surrogacy and similar practices in Italy, established by Art 12, para 6 of legge 19 February 2004 no 40.

In this regard, the court⁴⁷ stated that, despite of the prohibition of surrogacy under legge no 40/2004, the best interest of the child in the continuity of his or her *status* must prevail over the international public order, in accordance with the definition recently handed down by the SC.⁴⁸ As some scholars have pointed out,

‘according to a correct balance of values, there can be no axiological prevalence of the punitive logic towards the parents, over the logic of protecting the child, as the child itself is a person worthy of special protection’.⁴⁹

This interpretation is only acceptable if we carry out an analysis under an

⁴⁵ Corte di Cassazione 2 February 2015 no 1792. Upon the exceptional nature of a rule, see, among many, P. Perlingeri, *Il diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 1991), 102.

⁴⁶ Cf Corte di Cassazione 27 September 2013 no 22292, 46 *Guida al diritto*, 34 (2013); Corte di Cassazione 2 February 2015 no 1792 n 45 above; Tribunale per i minorenni del Piemonte e Valle d'Aosta 11 September 2015, nos 258 and 259, *Nuova giurisprudenza civile commentata*, I, 205 (2016); Tribunale per i minorenni di Milano 17 October 2016, no 261; Tribunale per i minorenni di Milano 20 October 2016, no 268, *Nuova giurisprudenza civile commentata*, 271 (2017); Tribunale per i minorenni di Potenza 15 May 1984, *Diritto di famiglia e delle persone*, I, 1039 (1984); Tribunale di Roma 22 December 1992, *Giurisprudenza di merito*, 924 (1993); Corte d'Appello di Torino 9 June 1993, *Diritto di famiglia e delle persone*, I, 165 (1994); Tribunale per i minorenni di Ancona 15 January 1998, *Giustizia civile*, I, 1711 (1998); G. Salvi, *Percorsi giurisprudenziali in tema di omogenitorialità* n 42 above, 21.

⁴⁷ Corte d'Appello di Trento 23 February 2017, *Foro italiano*, 1034 (2017).

⁴⁸ Corte di Cassazione 30 September 2016 no 19599, among many in *Nuova giurisprudenza civile commentata*, 372 (2017).

⁴⁹ G. Salvi, *Percorsi giurisprudenziali* n 42 above, 72; A. Valongo, *Nuove genitorialità nel diritto delle tecnologie riproduttive* (Napoli: Edizioni Scientifiche Italiane, 2017), 91.

exclusively adult-centric perspective. After all, the 'logic of the child's protection as a person worthy of special protection' is precisely the same logic which underlies the criminal prohibition of surrogacy (Art 12, para 6 of legge no 40/2004) and which justifies the punishment established by this article. Furthermore, adhering to the proposed reconstruction also means legitimizing behaviour that is contrary to the law, transforming the decision to violate the prohibition into an act triggering a reward procedure.

If it is true that the consequences of the illegal actions of adults should be managed in a way as not to prejudice the child,⁵⁰ when a reproductive procedure (in addition to disposing, monetizing and objectifying on the mother's body) ends with the act of transferring the child (like transferring a good), and the practice is subject to criminal sanctions in Italy⁵¹ and condemned by the European Union,⁵² a failure to recognize that the dignity of the human being (the dignity of the woman and that of the child) has been violated appears excessive.⁵³

The case was recently examined by the United Divisions of the SC,⁵⁴ which established that granting legal effect to the foreign jurisdictional measure establishing the relationship between a child born abroad by surrogacy and the intended parent (who has, it bears underscoring, no genetic connection with the child) is impermissible, due to the prohibition of the surrogacy provided by Art 12, para 6 of legge no 40/2004. This Article is the expression of the public order principle that safeguards adoption and the fundamental values of the human dignity of pregnant women. The protection of these values, not unreasonably considered to prevail over the interests of the child, in the context of a balancing carried out directly by the legislator – and which courts cannot replace with their own evaluation – does not mean that the intended parent cannot be recognized through other legal instruments, such as adoption in particular cases, provided by Art 44, para 1, letter *d* of legge no 184/1983.

The third case concerned a child born abroad to two women through IVF, one of whom donated the egg and the other carried the pregnancy. The women requested that Italy register the foreign birth certificate, which listed them both

⁵⁰ P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 8 above, II, 780.

⁵¹ Corte di Cassazione 11 November 2014 no 24001, *Nuova giurisprudenza civile commentata*, 235 (2015).

⁵² Cf Eur. Court H.R. (GC), *Paradiso and Campanelli v Italia*, Judgment of 24 gennaio 2017, available at www.hudoc.echr.coe.int: G. Salvi, *Percorsi giurisprudenziali* n 42 above, 74. On this, see the Report of the European Parliament of 17 December 2015 no 115: 'The Union expressly condemns the practice of surrogacy of maternity', as well as the rejection of the 'De Sutter' Report of the Children's Rights related to surrogacy on 11 October 2016 by the Council of Europe (Doc. no 14140 of 26 September 2016), condemning the practice as detrimental to human dignity.

⁵³ It doesn't seem to be possible to argue otherwise, including in reference to what the Constitutional Court has laid down (Corte costituzionale 10 June 2014 no 162, *Corriere giuridico*, 1062 (2014) in order to consider the rules of legge no 40/2004 with its non-constitutionally bound content.

⁵⁴ Corte di Cassazione-Sezioni unite 8 May 2019 no 12193, available at www.italgiure.giustizia.it.

as mothers⁵⁵ (under Art 28, para 2, letter *b*) of Decreto del Presidente della Repubblica 3 November 2000 no 396). This case, again, differs from the previous one because of the genetic link between the women and the newborn.

The matter concerns the concept of public order again, and the distinction between internal⁵⁶ and international⁵⁷ public order, in cases involving parental relationships based on rules that do not exist under the Italian legal system.

According to the SC, courts have to evaluate the international public order on the bases of fundamental constitutional principles and,

‘where compatible, (of) those (...) inferable from the Treaties and from the Charter of Fundamental Rights of the European Union, as well as from the European Convention of Human Rights’.⁵⁸

So,

‘a contrast with the public order cannot be recognized merely for the fact that the foreign law is different from one or more provisions of the national law, because the standard of reference is not constituted by (...) rules by which the ordinary legislator exercises (or has exercised) its discretion in a determined area, but exclusively from the fundamental principles which are binding on the ordinary legislator’.⁵⁹

In this regard, the United Divisions of the SC, in the more recent ruling mentioned above,⁶⁰ has specified that, when it comes to recognition of the effectiveness of a provision from a foreign jurisdiction, the compatibility with the public order (required by Arts 64 *et seq* of legge 31 May 1995 no 218), must be assessed, not only in light of the fundamental principles of the Constitution and those enshrined in International and Supranational Sources, but also in light of how they have been adopted by the lawmaker in specific areas, as well as in the interpretations provided by the Constitutional and Supreme Courts. The work of synthesis and reconstruction of these Courts, indeed, gives shape to that ‘living law’ (as a sort of Italian law of precedent) which cannot be ignored in

⁵⁵ Cf Tribunale Torino 21 October 2013 and Corte d’Appello Torino 29 October 2014, *Nuova giurisprudenza civile commentata*, 441 (2015); then cf Corte di Cassazione 30 September 2016 no 19599 n 48 above; in the same sense, in reference to public order, Corte di Cassazione 15 June 2017 no 14878, *Foro italiano*, 2280 (2017).

⁵⁶ Which refers to mandatory internal rules as a limit on private autonomy: Corte di Cassazione 15 June 2017 no 14878 n 55 above, 2280, and Corte di Cassazione 30 September 2016 no 19599 n 48 above, 372.

⁵⁷ Cf G. Ferrando, ‘Ordine pubblico e interesse del minore nella circolazione degli *status filiationis*’ *Corriere Giuridico*, 190 (2017), and V. Barba, ‘L’ordine pubblico internazionale’ *Rassegna di diritto civile*, 403 (2018).

⁵⁸ Corte di Cassazione 30 September 2016 no 19599 n 48 above, 372.

⁵⁹ *ibid.*

⁶⁰ Corte di Cassazione-Sezioni unite 8 May 2019 no 12193 n 54 above.

the reconstruction of the notion of public order. All these standards as a whole express, in fact, the set of values forming the foundation of the system at a given historical moment.

Thus, in the case of a genetic link with the child, as established by the Supreme Court with the aforementioned judgment,⁶¹ the failure to register the foreign birth certificate in Italy would entail non-recognition of the parental relationship in Italy, resulting in prejudice to the child, both in terms of the right to personal identity, as well as in terms of heredity, and inflicting upon the child a

‘lame legal position (...) bestowed by the decision of those who have followed a reproductive procedure that is not allowed in Italy’.⁶²

In this context, the Supreme Court also invokes the child’s right to have two parents (‘bi-parenting’), the right to ‘affective continuity’, the right to the continuity of the child’s *status* (with an argument related to Arts 13, para 3, and 33, paras 1 and 2 of legge no 218/1995) and the right to personal identity. It failed to consider how this reproductive choice is, however, exactly contrary to the personal identity of the child himself.

Likewise, the Supreme Court held that Art 269 of the Civil Code, according to which a child’s mother is the person who gives birth to that child, is no longer a fundamental principle of the Italian legal system, now that the genetic motherhood can be separated from biological motherhood. It further held that the heterosexual paradigm of parenthood is, likewise, not based on a fundamental principle.⁶³

Some further reflection on the relationship between *favor veritatis*, *favor minoris*, and *favor affectionis* is necessary. A recent ruling by the Constitutional Court⁶⁴ on the constitutionality of Art 263 of the Civil Code, insofar as it failed to provide that challenging a person’s recognition of a child on falsehood grounds is only permissible when it is in line with the interest of the child, with reference to Arts 2, 3, 30, 31, 117 of the Constitution and Art 8 of the ECHR, is illustrative. The Court held that it was unconstitutional for the search for truth in the parent-child relationship to prevail automatically over the interest of the child. After all, the necessary balancing entailed a comparative judgment between the interests underlying the verification of the truth of the *status*, and the potential consequences

⁶¹ Corte di Cassazione 30 September 2016 no 19599 n 48 above.

⁶² *ibid*; G. Ferrando, ‘Ordine pubblico’ n 57 above, 193; M. Porcelli, ‘Il rapporto tra *favor veritatis* e *favor affectionis* nelle relazioni familiari’, in F. Dell’Anna Misurale and F.G. Viterbo eds, *Nuove sfide* n 31 above, 139; G. Salvi, *Percorsi giurisprudenziali* n 42 above, 67.

⁶³ Corte di Cassazione 30 September 2016 no 19599 n 48 above, 53, states that ‘It is not possible to support the existence of a fundamental constitutional principle - in the sense of public order and, therefore, unalterable by the ordinary legislator - that could prevent registration of the birth certificate in Italy (*omissis*) by reason of an alleged *ontological foreclosure* (my italics) for same sex couples (linked by a stable emotional relationship) to welcome, nurture and even generate children’.

⁶⁴ Corte costituzionale 18 December 2017 no 272, *Diritto & questioni pubbliche*, 191 (2018); see, also, Corte costituzionale 15 November 2019 no 237, available at www.cortecostituzionale.it.

of this verification for the legal position of the child.

The case concerned a married, heterosexual couple who resorts to a surrogacy practice abroad, by an hypothesis of so-called ‘total surrogacy of maternity’, in which the expectant mother has no biological connection with the child, while both clients are genetically linked to him or her. The Constitutional Court⁶⁵ initially gave precedence to *favor veritatis*, considering it essential for the identity of the child, and removed the *status* that did not correspond to the biological truth. Later, however, it took a different approach, taking into consideration the child’s interest in relation to parenting, in accordance with the positions of the European Court of Human Rights.⁶⁶ Under the latter view, the personal identity of the child must be connected to his or her growth, and so, if the criterion of biological truth is not an absolute guarantee of protection of identity,⁶⁷ the false *status filiationis* must prevail over *favor veritatis*, as it is less harmful to the interest of child. The Constitutional Court adopted this approach, noting that a comparative evaluation of the truth against the concrete interest of the child was necessary, and gave priority to the genetic link of the child with the presumptive parents given the total surrogacy, notwithstanding the

‘high degree of negative value that our legal system reconnects to the surrogacy, prohibited by a specific penal provision’.⁶⁸

On the basis of these considerations, the Constitutional Court rejected the question challenging the constitutionality of Art 263 of the Civil Code, and held that the truth principle must be reconciled with the principle of the concrete interest of the child; so that, given the superiority of the child’s interest, a pre-established bond of affection must be preserved. According to the Court, the case was similar to adoption in particular cases regulated by Art 44, letter *b* of legge no 184/1983, by reason of the marriage between the father of the child and the woman (in this case, only a genetic mother) and in accordance with the approach followed by the Supreme Court,⁶⁹ according to which Art 44 is

‘a system rule, which allows the adoption as often as it is necessary to

⁶⁵ Corte costituzionale 22 April 1997 no 112, *Giurisprudenza costituzionale*, 1073 (1997).

⁶⁶ Eur. Court H.R. (GC), *Paradiso and Campanelli v Italia* n 52 above; Eur. Court H.R., *Mennesson v Francia*, Judgment 26 June 2014, *Foro italiano*, 561 (2014); Eur. Court H.R., *Labassee v Francia*, Judgment 26 June 2014, *Responsabilità civile e previdenza*, 2041 (2014). The same Court, adhering to the European position contrary to surrogacy and the indiscriminate exercise of the right to become parents, considers the removal of the child from the family nucleus already constituted only against a non-genuine relationship (short-term cohabitation) legitimated either in the absence of formalized constraints, or to avoid a concrete risk of injury to the physical or moral integrity of the child (instability of the relationship): Eur. Court H.R. (GC), *Paradiso and Campanelli v Italia* n 52 above, para 148.

⁶⁷ Cf Corte di Cassazione 31 July 2015 no 16222, *Diritto di famiglia e delle persone*, 119 (2016).

⁶⁸ Corte costituzionale 18 December 2017 no 272 n 64 above, 191.

⁶⁹ Corte di cassazione 22 June 2016 no 12962 n 44 above, 1218.

safeguard the affective and educational continuity of the relationship between the adopter and the child'.⁷⁰

VI. The Same-Sex Parenting Option in the Regulatory Context: What Rights Are Denied to the Child?

With reference to court rulings, it seems evident that the problem does not arise from the individualistic (ie non-solidaristic) desires of adults who resort to reproductive techniques prohibited in our legal system, but rather from the tenor of the answer provided by the interpreter in relation to the effects that these rulings produce on the interest (or, more properly, on the rights) of the child and on the desires of the adults. The question is resolved, in fact, in the answer provided by the interpreter: accepting requests for parental recognition from people 'forced' to resort to reproductive practices abroad that are prohibited in Italy means granting *ex post* legitimisation of an unlawful action in a regulatory context that is markedly contrary.

However, in order to correctly classify the problem, two phases need to be distinguished in the comparison between the interest of the child and the free reproductive determination of adults: the first is linked to the pre-reproductive choice as a couple's elaboration; the second is linked to the effects of a court's acceptance of this choice in relation to the child.

The first phase, in which there is a desire for a future life, seems to fall into a (apparent) normative grey area, in which a sort of 'pre-reproductive responsibility' cannot be identified due to the absence of the individual bearing potentially opposing interests. In the Italian constitutional system, the protection of the person starts with conception,⁷¹ and so, before conception has occurred, it seems, *prima facie*, that there are no obstacles to any particular reproductive determination. Thus, to see whether the Italian legal system prevents some choices of adult parenting projects, if we consider Art 1, para 20 of legge 20 May 2016 no 76,⁷² and Arts 5⁷³ and 12, para 6⁷⁴ of legge no 40/2004, a statutory pattern is revealed:

⁷⁰ Cf L. Cucinotta, 'La difficile ricerca dell'identità per i nati da maternità surrogata. Brevi riflessioni sulla sentenza della Corte Costituzionale del 18 Dicembre 2017, n. 272' *Diritto & questioni pubbliche*, 191 (2018).

⁷¹ See, among many, Corte costituzionale 18 February 1975 no 27, *Foro italiano*, I, 515 (1975); Corte costituzionale 10 February 1997 no 35, *ex pluribus* in *Giurisprudenza costituzionale*, I, 281 (1997). Cf G. Ballarani, 'Nascituro (soggettività del)', *Enciclopedia di bioetica e scienza giuridica* (Napoli: Edizioni Scientifiche Italiane, 2015), IX, 136.

⁷² Para 20 of the Art 1, legge no 76/2016 excludes access to legitimizing adoption (legge no 184/1983) to same-sex couples: cf G. Ballarani, 'La legge sulle unioni civili' n 36 above, 638.

⁷³ In establishing the requirements for access the IVF, the law establishes that 'Without prejudice to the provisions of Article 4, paragraph 1, couples of adults of different sex, married or cohabiting, potentially of legal age, may have access to medically assisted reproduction techniques if fertile and both living'.

one that (at the moment) prevents any same-sex parenting option, deeming it contrary to the interest of the child and aiming at preventing injury to born child.

With reference to the second phase, during which attention shifts to the born child, the couple's request to be considered a parental couple is highlighted. Such requests, made by couples in the interest of the child, need to be considered in light of the provisions indicated above, in order to verify whether the legal system's traditional child-centric approach is being maintained unaltered by the courts *vis-à-vis* the reproductive self-determination of adults, or whether it is, rather, being sacrificed on the altar of the adult's utilitarianism.⁷⁵ This creates a need to evaluate the validity of the reasoning adopted by courts in effecting their balancing

⁷⁴ This article establishes that 'Anyone, in any form, who realizes, organizes or advertises the marketing of gametes or embryos or maternity surrogacy is punished with imprisonment from three months to two years and with a fine from 600,000 to one million euros'. Cf. E. Giacobbe, 'Dell'insensata aspirazione umana al dominio volontaristico sul corso della vita' *Diritto di famiglia e delle persone*, 590 (2016).

⁷⁵ In this sense, cf. G. Ballarani, *Il matrimonio concordatario* n 21 above, 79; Id., *La responsabilità genitoriale* n 3 above, 317. Recently similar considerations were followed by the Corte costituzionale 23 October 2019 no 221, available at www.cortecostituzionale.it, which rejected the question of constitutional legitimacy of some provisions of legge no 40 of 2004 which limit access to PMA procedures to different-sex couples (including, especially, Arts 4, 5 and 12), stating that those limitations do not represent a sort of discrimination on the basis of sexual orientation. According to the Court, this Law is based on two fundamental ideas. The first is expressed by Art 1 which, in addition to providing that the law must 'assure the rights of all the subjects involved, including the conceived', stipulates that 'recourse to PMA is permitted for purposes of favouring a solution to reproductive problems stemming from human sterility or infertility' (para 1) and provided that 'there are no other treatment options that can effectively eliminate the cause of the sterility or infertility' (para 2). 'The second concept concerns the structure of the family unit that stems from the techniques in question. Indeed, the law stipulates a series of subjective limitations on access to PMA, rooted in the transparent intent to ensure that the family unit in question follows the family model characterized by the presence of a mother and father (Art 4, para 3, which, in order to ensure the existence of a biological link between the would-be parents and their offspring, stipulates a ban (which was, originally, absolute) on accessing heterologous PMA methods (that is, techniques that use one or more gametes from an "external" donor); Article 5 of Law no 40 of 2004 establishes, in particular, that only "couples of persons over the age of eighteen, of opposite sex, who are married or cohabiting, of potentially fertile age, (and who are) both living" may have access to PMA'. In the interpretation offered by the Court, those limitations do not represent a sort of discrimination on the basis of sexual orientation: 'In general terms, legislative concern for guaranteeing respect for the conditions considered best for the development of the child's personality certainly may not be considered irrational or unjustified. In light of this, the idea underlying the provisions under review, that a family *ad instar naturae* (with two parents, of different sexes, who are both living and of potentially childbearing age) represents, as a matter of principle, the most suitable "place" to welcome and raise the newborn, cannot be considered, in turn, to be arbitrary or irrational *per se*. And this has nothing to do with the capacities of a single woman, a homosexual couple, or a heterosexual couple advanced in age to effectively perform parental functions, if need be. By, in particular, requiring sexual diversity of the members of the couple, in order to have access to PMA – a condition that is, moreover, clearly an underlying assumption of the constitutional provisions on the family – the legislator also took stock of the level of acceptance of the phenomenon of so-called "omogenitorialità" (same-sex parenting) within the societal community, and concluded that, at the time the law was passed, there was no sufficient consensus on the matter'.

operations, as well as the conformity of the judgments to the concrete, existential interest of the child, who is endowed with the same dignity and the same personal rights of those who desire to be parents.

Since balancing always leads to a loss, it is necessary to identify which existential rights of the child are being sacrificed:

- the right to the certainty of maternity established by Art 269, para 3 of the Italian Civil Code and the right to search for paternity, established by Art 30, para 4 of the Constitution. Although it is possible to renounce one's parenthood or claim to be a parent, it is not possible to prevent the child from searching for the missing or effective parent (Arts 269 and 279 of the Civil Code), and maternal anonymity may also yield under certain conditions;⁷⁶

- consequently, the child's right to know his or her origins as an essential trait of his or her personal identity,⁷⁷ guaranteed by Art 28 of legge no 184/1983;⁷⁸

- the child's right to grow up in his or her own family, established by Art 1 of legge no 184/1983, and the resulting conclusion that adoption is an extreme measure to resort to only after having ascertained that a child has been definitively abandoned;⁷⁹ and,

- the right to have two parents ('bi-parenting'), guaranteed by Art 337-ter of the Civil Code, in terms of the opposite genders of the parents.⁸⁰

VII. Problematic Issues Concerning the Misalignment Between the Legislative and Judicial Approach

To evaluate the conformity of the same-sex parenting option with the child's interest, as well as the validity of the arguments used in the case law, investigating

⁷⁶ Eur. Court H.R., *Godelli v Italia*, Judgment of 25 September 2012 n 9 above; Corte costituzionale 18 November 2013 no 278 n 9 above, 11; Corte di Cassazione 21 July 2016 no 15024 n 9 above, 21 and Corte di Cassazione 9 November 2016 no 22838 n 9 above, 19; Corte di Cassazione-Sezioni unite, 25 January 2017 no 1946 n 9 above.

⁷⁷ M. Bianca, 'La buona fede nei rapporti familiari', in P. Sirena and A. Zoppini eds, *I poteri privati e il diritto della regolazione, I poteri privati e il diritto della regolazione. A quarant'anni da 'Le autorità private' di C.M. Bianca. Atti del Convegno Roma Tre (27 October 2017) – Bocconi (9 November 2017)* (Roma: Romatre Press, 2018), 159.

⁷⁸ Corte costituzionale 18 November 2013 no 278 n 9 above, 11; Corte costituzionale 18 dicembre 2017 no 272 n 64 above; Corte di Cassazione 21 luglio 2016 no 15024 n 9 above, 21; Corte di Cassazione 9 novembre 2016 no 22838 n 9 above, 19; Corte di Cassazione-Sezioni unite 25 gennaio 2017 no 1946 n 9 above; Cf G. Ballarani, 'Modifiche all'articolo 28 della legge 4 maggio 1983, n. 184 e altre disposizioni in materia di accesso alle informazioni sulle origini del figlio non riconosciuto alla nascita (ddl n. 1978)' *Diritto di famiglia e delle persone*, 965 (2017).

⁷⁹ Corte costituzionale 6 July 1994 no 281 n 39 above, 2706; G. Ballarani, *Il matrimonio concordatario nella metamorfosi della famiglia* n 21 above, 100.

⁸⁰ As a parameter expressed by the law states on the shared custody of children in case of crisis of parental cohabitation, the right of the child to 'bi-parenting' reflects implicitly the need for the child to have two parental referents of different sex because of the different contribution to the growth of a child in relation to his healthy and harmonious mental and physical development (Arts 30, 31 and 37 Cost.): G. Ballarani, 'Sub art. 155 c.c.' n 24 above, 28.

the balancing operation is of major importance. In order to establish the prevalence of one interest over another, this operation is done by resorting to interpretative criteria based on axiological principles,⁸¹ interpreted according to the changeable indicia of the historical and social context.

However, to evaluate instances of recognition of same-sex parenting, balancing operations may have opposite results depending on whether an adult-centric or child-centric criterion is given precedence, although the same interpretative criteria based on the same axiological principles is used. This shows that the contrast between the legislative prohibition of same-sex parenting and the judicial tendency to allow it is explained by the contrast between the traditional child-centric orientation of the legislator and the adult-centric perspective of some judges who, in balancing operations, detach from or disregard the statutory provisions.

VIII. A More Systemic Problem: Antithetical Results, Recursive Balancing, and the Risk of ‘Positivization’ of the Precedent in a Civil Law Context

The statutory framework described above reveals a clear misalignment between the legislative and judicial tendencies in this area. In the framework of the *Drittwirkung* of constitutional and European principles, this misalignment is justified by the fact that the written law is only one of the standards⁸² that courts must evaluate, consider, and analyse in terms of reasonableness⁸³ to provide a ‘socially acceptable’⁸⁴ ruling.

However, in these cases, in which the rulings justify openly unlawful actions by considering them compliant with the interest of the child, the hermeneutical investigation appears fragile, especially in light of the fact that the opposite conclusion could easily be reached on the basis of the selfsame principles.⁸⁵

In general, the cases in this area all reach nearly identical conclusions, despite the fact that balancing operations often naturally give rise to different outcomes.

⁸¹ V. Scalisi, ‘Assiologia’ n 10 above, 6; Id, ‘Ermeneutica dei diritti fondamentali’ n 18 above, 147; P. Perlingieri, ‘La «grande dicotomia»’ n 34 above, 92.

⁸² N. Lipari, ‘Costituzione e diritto civile’ n 1 above, 1264.

⁸³ The principle of reasonableness is understood as ‘a criterion of argumentation inherent in the «very idea of law», which operates (...) regardless of an express reference by the legislator’ and also ‘in the absence of a specific provision that contemplates for the case itself or that solves it’: G. Perlingieri, *Profili applicativi della ragionevolezza* n 34 above, 15, 96.

⁸⁴ N. Lipari, ‘Costituzione’ n 1 above, 1271; Id, ‘Il diritto civile’ n 1 above, 24; *contra*, G. Perlingieri, *Profili applicativi della ragionevolezza* n 34 above, 22; for a different perspective, cf P. Perlingieri, ‘*Ius positum o ius in fieri*: una falsa alternativa’ *Rassegna di diritto civile*, 1039 (2019).

⁸⁵ This demonstrates how the relationship between rule and principle, even if alternative, is not exclusive (nor dichotomous), being able to converge in the solution of the concrete case, guaranteeing the coherence of the system considered as a whole, as well as legal certainty: P. Perlingieri, ‘Il diritto come discorso?’ n 1 above, 777; A. Gentili, *Il diritto come discorso* (Milano: Giuffrè, 2013), 374; N. Lipari, ‘Il diritto civile dalle fonti ai principi’ n 1 above, 28.

Although these cases can be read as the guarantee of a new legal certainty, they highlight the risk of ‘positivization’ of judicial precedent, and of the interpretative procedure with which it is reached,⁸⁶ replacing the rigidity of the law with the rigidity of interpretative argumentation by principles and turning precedent into a new, judicial source of law,⁸⁷ even in a civil law context.

IX. The Particular System Problem: *Contra Legem* Actions, *Ex Post* Evaluation of the Child’s Interest, and Legitimation of Expectations

After having analysed the results of the case law from the perspective of the relationship between the self-determination of adults and the child’s best interest, it is necessary to take into account the compact statutory system which, from a child-centric perspective, currently prohibits any technique to prospectively achieve a same-sex parenting option.

With the birth of the child, however, according to the current legislative provisions, the prejudice to the child has already been produced. This reveals how, in the case law, the interest of the child is considered through an intrinsically secondary perspective, with a decidedly remedial nature. The courts evaluate this interest exclusively *ex post*, after the conduct has taken place. In this regard, it is necessary to consider how:

- on a legislative basis, the conduct of adults is prohibited because it is detrimental to the child;
- the case law moves from the need to resolve a conflict between divergent interests initially assumed to be equal (those of the adults and that of the child) and reaches the point of affirming the definitive prevalence of one person’s interest (the adult’s) over that of another (the child’s); and,
- any outcome of the judgment (whether granting victory to one party or to the other), and of the balancing operation (giving precedence to the adult’s interest or to the child’s) fails to resolve the injury effected *ab initio* by the conduct of the adults to the detriment of the child (under current Italian law).

Although the need to adopt a ruling according to justice must be oriented towards the concrete protection of the superior interest of a specific child in a given

⁸⁶ The risk is far from uncertain if we consider, on the one hand, the binding force of the precedent expressed by the United Divisions of the Court of Cassation for Simple Divisions (decreto legislativo 2 February 2006 no 40, and Art 374 of Code of Civil Procedure) and, on the other hand, the exclusionary force on the right of action of the art 366 of Code of Civil Procedure: in legal scholarship it is not lacking to observe, in fact, how ‘the precedent adopted by the Constitutional Court or by the Supreme Court of Cassation, in their respective functions of centralized control of constitutional legitimacy and *nomofilachia*, have a persuasive value, due to the authority of the Courts and (...) a preclusive value for the purposes of the exercise of the right of action’: P. Perlingieri, ‘I principi giuridici’ n 1 above, 23. Not by chance, ‘living law assumes the outcome of precedents as a presupposition of its analysis’: N. Lipari, ‘Il diritto civile’ n 1 above, 29.

⁸⁷ *ibid* 3, 28.

situation, the need to provide an answer (even a coherent and reasonable one) highlights a problem: in these cases, it seems that the preventive protection of the child's interest (guaranteed by specific regulatory prohibitions applicable to adults), is not taken into primary consideration. In these cases, the child's interest is invoked in a secondary way as a specific remedy for unlawful behaviour by adults.

Therefore, if the *cause* is forbidden (because the legislator wants to prevent it from having any effect) but the judge legitimises the *effect*, the cause itself is also, implicitly, legitimised, generating expectations which are deemed legitimate, in the hope of being able to legalise them *ex post* through the work of the judge.

In this way, attention is shifted from the conduct of the adults to the need to protect the interest of the child, at the same time downgrading that interest to the level of a mere tool, which may be used to legalise the conduct itself.

In the context of same-sex parenting, making the self-determination of adults prevail over the interest of the child, the latter returns to a state of subjection, passively and irreversibly suffering the choice of adults and being injured in some of his or her existential rights, which are inviolable by definition. This injury takes place with the endorsement, not of the legal system as a whole, but of part of it: that part which is entrusted with the function of guaranteeing protection in concrete cases and which, regardless of being detached from the regulatory context and operating by principles, proceeds by implicitly adhering to an adult-centric reading of fundamental principles.

Thus, the misalignment described is not between the law as rule and the principle as instrument, but rather between the ordering function of the law and the servant function of the interpreter which, in these cases, seems to swap the end with the means. The initial end was, is, and must remain the need to protect and guarantee the assumed superiority of the child's interest in a healthy and harmonious mental and physical development; and the means to ensure its effectiveness were, are, and must remain the entire legal system, made up of rules based on principles, and of the axiological interpretation of the one through the other.

X. Conclusion

In light of these considerations, it is finally necessary to observe that, when the story ends with the choice to deprive a child of a parental figure (replacing them surreptitiously with the partner of the parent) and of the contribution (mental and emotional) of a parent of the opposite sex, the object of verification cannot be the parenting ability or the suitability of a given adult or couple, but rather the conduct of the adults in relation to the interest of a specific child. This requires considering how, when court's acquiesce to the requests of the adults, an injury to the child, beyond that predetermined by the choice of the adults, is produced in terms of the denial rights. The child is, in fact, in all such cases, deprived of the

possibility of having two parental references of opposite sex (a mother and a father).

Moreover, it is clear that refusal by a court may *appear*, in the concrete, to be contrary to the specific interest of that child; but the injury to the child is not determined by the court with its decision, but rather by the prior, unlawful conduct of the adults.

The arduous task that falls to judges is not that of being *kind*, but that of being *just* in applying the law, and to distribute justice also through judgments that, paradoxically, today tend to go against the child, who is deprived of existential rights and of fundamental contributions to his or her healthy and harmonious development.

Moreover, when debating the legitimisation of an adult or adult couple's choice to irreversibly deprive a child, *ab initio*, of a parenting figure of one of the two sexes (a mother or a father), deeming the 'figure' superfluous, or irrelevant, or in any case replaceable indifferently with a father-mother (parent 1) or with a mother-father (parent 2), and presuming that this corresponds to the child's interest, a final thought emerges: would it be *licit* to acknowledge (beyond the political correctness, but within the bounds common sense) that the achieved results, even though rationally reasoned, appear substantially unfair? Have we not perhaps exceeded that invisible boundary line beyond which the right, however well reasoned, and founded, and placed, becomes unreasonable?⁸⁸

⁸⁸ Moreover, the task of a system of regulation (both on the normative and on the interpretative front) must remain, at the same time, serving the value of the human person in a solidarity manner and ordering the conduct of people, marking a boundary between the lawful and the illicit, between the allowed and the interdict, even over what science and technology can allow: cf G. Ballarani, 'Nascituro' n 71 above, 136; so that a recovery of convergence between lawmakers and judges would be necessary, as long as the normative datum is so connoted, without prejudice to the due solicitation by the interpreter to the legislator.

Essays

Italian Constitutionalism and Its Origins

Steven G. Calabresi and Matteo Godi*

Abstract

Focusing on the evolution of constitutional thought in Italy is key to understand not only Italy's current legal order, but also constitutionalism more generally. In Italy, there has not been a true rupture point between the pre-unitary legal systems and the new constitutional order; a comprehensive study of Italian constitutional law, then, cannot do away with the preceding legal orders as modern textbooks do. And a study of modern constitutionalism cannot ignore Italy's contribution: centuries of attempts at constitutionalizing, detached from any meaningful revolutionary vacuum. This Article sets out to fill that gap by focusing on the little known, three-centuries-long history of Italian constitutionalism, and it does so by offering many previously unpublished English translations of Italian constitutions. Part II discusses the genesis of modern constitutional thought in Italy. It focuses, in particular, on the Draft Constitution of Tuscany (1787); the Second Constitution of the Cisalpine Republic (1798); and the Constitution of the Kingdom of Italy (1802). Part III analyzes the Albertine Statute, the most famous pre-modern Italian constitution, first enacted in 1848 by the Kingdom of Piedmont and Sardinia and later extended to the entire nation following the unification of Italy in 1861. Part IV briefly focuses on the 1948 Constitution of the Italian Republic – Italy's current constitutional document. Part V extrapolates from this history in order to make a few normative claims. A brief conclusion follows.

'If you want to go on a pilgrimage to the birthplace of our Constitution, go to the mountains where the Partisans died, go to the prisons where they were jailed, go to the fields where they were hung. Wherever an Italian died to redeem freedom and dignity, you should travel there with your mind, young souls, because it is there that our Constitution was born'

Piero Calamandrei¹

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I. Introduction

In 1948, as a result of the state of general devastation that World War II left behind, the Italian Constitution created a unitary parliamentary republic in Italy. But the history of a ‘unitary’ Italy is a short one, dating back only to the 1860s. Up until then, Italy had been nothing more than ‘a geographical expression’.² Written constitutionalism itself, just as Italy, is a relatively recent phenomenon; it arguably began with the writing of the great European codes, including the Code Napoleon, and it found its full form in the entrenched Constitution of the United States, ratified in 1788. The current Italian Constitution entered into force on the 160th anniversary of the ratification of the US Constitution. That year, 1948, also coincided with the 100th anniversary of Italy’s previous and first nationwide constitution – the Albertine Statute of 1848. But the Albertine Statute was the product of a legislature, not a constituent assembly, and it was thus not entrenched. Italian constitutionalism is therefore a very recent example of a relatively recent development in world history. Yet, over the course of the last seventy years, the text of the Italian Constitution has remained substantially unaltered.

Since 1870, Italy has had four governing regimes. *First*, from 1861 until the rise to power of the fascist dictator Benito Mussolini in 1922, Italy had a classical liberal regime under a constitutional monarch who governed the country along with a two-house Parliament (the upper house of which was appointed by the King). *Second*, from 1922 to 1943, Italy was a fascist dictatorship under Mussolini, and then, from 1943 to 1945, the country was a puppet state under the German and American occupations. *Third*, on 2 June 1946, Italians voted to abolish their monarchy and to become a republic – and, notably, for the first time, women were allowed to vote in a national election. The ensuing Italian Constitution, which was ratified at the end of 1947, created the First Republic, which used an extreme system of proportional representation, and which lasted until the early 1990s. *Fourth*, in 1993, Italy changed its electoral law to move dramatically away from proportional representation, with the result that it now has a bipolar center-right and center-left coalition party system.³

Scholars generally believe that there is nothing more to be said about constitutionalism in Italy. For instance, Dieter Grimm’s recent book on *Constitutionalism: Past, Present, and Future* offers a remarkable perspective on the evolution of modern constitutions all over the world.⁴ But Grimm’s working assumption – that is, that constitutionalism only emerges from the ‘necessity to

¹ P. Calamandrei, ‘La Costituzione e la gioventù’ Discorso pronunciato da Piero Calamandrei nel gennaio 1955 a Milano’ *Ufficio stampa dell’amministrazione provinciale di Livorno* (1975), 8.

² E. Lipson, *Europe in the Nineteenth & Twentieth Centuries: 1815-1939* (London: Adam & Charles Black, 1940), 159.

³ See generally J.L. Newell, *The Politics of Italy: Governance in a Normal Country* (Cambridge: Cambridge University Press, 2010).

⁴ See generally D. Grimm, *Constitutionalism: Past, Present, and Future* (Oxford: Oxford University Press, 2016).

reconstitute legitimate state power,’ which results from ‘a revolutionary break’ – is too limiting.⁵ To wit, most relevantly for the purpose of this Article, it completely excludes Italy from the picture. But the entire history of written constitutionalism – from the 1780s to the present day – is marked by Italian attempts to adopt constitutions. Italy has had at least *fifty* modern constitutions, all predating the 1848 Albertine Statute. Yet, Italian and international scholars alike tend to overlook that notable history – including Grimm.

Why is it important to discuss attempts at constitutionalization prior to the unification of Italy, since the Republican Constitution of 1948 replaced all of the preexisting legal systems? One cannot begin to understand Italy’s current legal order, or constitutionalism more generally, without an understanding of constitutional thought in Italy. There has not been a true rupture point between the pre-unitary legal systems and the new constitutional order. Indeed, modern Italian courts, when applying today’s laws, do not appear to assume that the post-World War II constituent assembly started from a blank slate: preexisting legal orders have continued to be respected so long as they do not conflict with the present constitution. Examples abound.⁶ A comprehensive study of Italian constitutional law, then, cannot do away with the preceding legal orders as modern textbooks do. And a study of modern constitutionalism cannot ignore Italy’s contribution: centuries of attempts at constitutionalizing, detached from any meaningful revolutionary vacuum.

This Article sets out to fill that gap by focusing on the little known, three-centuries-long history of Italian constitutionalism. It does so by offering many previously unpublished English translations of Italian constitutions not discussed in Grimm’s *Constitutionalism: Past, Present, and Future*, and often overlooked in modern textbooks. Part II discusses the genesis of modern constitutional thought in Italy. It focuses, in particular, on the Draft Constitution of Tuscany (1787); the Second Constitution of the Cisalpine Republic (1798); and the Constitution of the Kingdom of Italy (1802). In fact, though the Albertine Statute became the most famous pre-modern Italian constitution, it was not an isolated attempt at written constitutionalism. Far from it. Part III analyzes the Albertine Statute, first enacted in 1848 by the Kingdom of Piedmont and Sardinia, and later extended to the entire nation following the unification of Italy in 1861. Part IV briefly focuses on the 1948 Constitution of the Italian Republic – Italy’s current constitutional document. Part V extrapolates from this history and makes some normative claims. A brief conclusion follows.

⁵ *ibid* 11; see also *ibid* 9 (‘It was only the revolutionary situation that provided the opportunity to implement the ideas of social philosophy in positive law’).

⁶ See, eg. Corte di Cassazione 7 June 1971 no 1693, *Il Foro*, 2228 (1971) (enforcing a concession made in 1809 by the Kingdom of Sicily, turning a property into a prison); Corte di Cassazione 24 November 1962 no 3197, *Il Foro*, 556 (1963) (applying a 1771 law to a real estate controversy between the Church and a tenant); see also A. Cerri, *Istituzioni di diritto pubblico nel contesto europeo* (Milano: Giuffrè, 2015), 38-39.

II. The Historical Foundations of the Italian State

For a large part of the eighteenth and nineteenth centuries, Italy was splintered into a number of smaller states and city-states. In the years preceding the Napoleonic invasion of 1796, the current territory of Italy was divided into ten nations: the Kingdom of Piedmont and Sardinia, the Bishopric of Trent, the Republic of Venice, the Republic of Genoa, the Duchy of Parma, the Duchy of Modena, the Republic of Lucca, the Grand Duchy of Tuscany, the Papal States, and the Kingdom of Sicily.⁷ Moreover, Austria controlled some areas in the northern part of Italy.⁸ But this was not a temporary condition: Italy had been deeply fragmented ever since the fall of the Western Roman Empire in 476 CE.⁹

For many years, it was believed that the Napoleonic invasion triggered the first constitutional movement toward the unification of Italy. Before the French Revolution, scholars believed, constitutional principles were simply not present in Italy.¹⁰ But if that were truly the case, it would be impossible to understand the formation of constitutional systems in Italy and the quick diffusion of constitutional principles. As an early scholar noted,

‘(t)he customs and the laws of France imported through the (Napoleonic) war in Italy did not mark, did not define the constitutional dawn of Italy’.¹¹

Indeed, had the French Revolution marked the beginning of constitutional thought in Italy, it would also be hard to account for the earliest example of constitutionalization in Italy, which *predated* the French Revolution: the 1787 Draft Constitution of the Grand Duchy of Tuscany. Nonetheless, the traditional position in legal scholarship generally is that Italy was first introduced to the idea of written constitutionalism following the French Revolution. In fact, Grimm’s book overlooks Italian constitutionalism precisely for this reason.¹²

But some lone scholars, over sixty years ago, questioned this interpretation. Carlo Ghisalberti, for example, advanced the thesis that,

‘(i)n Italy, even before Montesquieu and Rousseau, (there) were present the seeds of the revolutionary philosophy and the new European public law’.¹³

According to Ghisalberti, Italian legal thought recognized from early on the

⁷ H.M. Vernon and K.D. Ewart, *Italy from 1494 to 1790* (Cambridge: Cambridge University Press, 1909), 520.

⁸ *ibid.*

⁹ H. Hearder, *Italy in the Age of the Risorgimento: 1790 – 1870* (London & New York: Longman, 1983), 156.

¹⁰ See, eg. A. Ferrari, *La preparazione intellettuale del Risorgimento italiano, 1748-1789* (Milano: Fratelli Treves Editori, 1923).

¹¹ S. Pivano, *Albori costituzionali d’Italia* (1796) (Torino: Fratelli Bocca, 1913), 131.

¹² D. Grimm, n 4 above, 13.

¹³ C. Ghisalberti, *Le costituzioni “giacobine” (1796-1798)* (Milano: Giuffrè, 1957), 31.

contrast between positive law and natural law, and the subordination of the former to the latter.¹⁴ Ghisalberti developed his argument by first focusing on the works of Gian Vincenzo Gravina (1664–1718), who he identified as the father of the Italian legal enlightenment. In his *De Imperio et Iurisdictione*, Gravina spoke of the foundation of sovereignty in rational rather than purely contractual terms; he outlined the idea of the separation of powers, of a sovereign subject to the law formulated by a legislative body and impartially applied by magistrates.¹⁵ Ghisalberti then looked at Domenico Bandini's *Il Governante Politico Cristiano*, published in 1699. There, Bandini laid out the foundations for the 18th century theories of the state,

‘a juridical and political organization of society in which the progress and the well-being of the citizens are the fulcrum of the legislative, administrative, and jurisdictional activity, in one word, of the life of the State’.¹⁶

Departing from these assumptions, in the second half of the 1700s, Italian constitutional thinkers took the position that the laws of their time were unjust under natural law. As a result, they argued, a new system of public law was necessary. Isidoro Bianchi refused to

‘honor with the sacred name of law those constitutions that do not have any relationship with the natural laws and the laws of the enlightened reason’.¹⁷

Giuseppe Maria Galanti, instead, lamented that ‘few have been the governments that have respected the rights of humankind’.¹⁸ In sum, the Italian legal enlightenment saw the law as a powerful tool to reform the status quo: the idea of ‘reform legislation’ was exalted.

There is at least one other key figure of the Italian legal enlightenment that played an important role in shaping constitutional thought in Italy and abroad: Cesare Beccaria. Beccaria grounded his calls for legal reform not in natural law but rather in rationality. Beccaria wrote his treatise on *Dei Delitti e Delle Pene* as a member of a short-lived group of intellectuals known as the *Accademia dei Pugni* (Academy of Fists).¹⁹ Their discussions had the reputation of becoming so heated that they escalated into fistfights. One of the goals of the *Accademia dei Pugni* was to convince the Austrian rulers of Lombardy to undertake a program of legal reform. With his treatise,

¹⁴ *ibid* 38.

¹⁵ *ibid* 30.

¹⁶ *ibid* 33.

¹⁷ *ibid* 39.

¹⁸ *ibid*.

¹⁹ See C. Beccaria, *On Crimes and Punishments and Other Writings* (Cambridge: Cambridge University Press, 1995).

‘Beccaria sought to establish a legal framework that reflected the general programme of the reformers to replace the existing system of semi-feudal privileges, customs and honours with a new conception of social organisation, based on a regular system of justice involving equal laws for all’.²⁰

In his famous *Dei Delitti e Delle Pene*, Beccaria criticized torture and capital punishment on utilitarian and rational terms. Beccaria called for the abolition of torture because it undermines the deterrent effect of punishment: the weak, he thought, would have no incentive not to commit crimes, since they would know that they could not withstand the pain of torture and would confess to *any* crime; the strong, instead, would continue to break the law, reasoning that their strength in tolerating torture would lead to impunity.²¹ ‘This is a sure route for the acquittal of robust ruffians and the conviction of weak innocents’.²² In addition, Beccaria believed that capital punishment – ‘an act of war on the part of society against the citizen’ – could never be deemed useful or necessary to the protection of public interests.²³ ‘(I)f I can go on to prove that such a death is neither necessary nor useful, I shall have won the cause of humanity’.²⁴ Through the death penalty, Beccaria thought, the state would lose a potentially useful citizen who could have repaid his debt to society, and incite people to violence through a paradoxical use of state power.

‘It seems absurd to me that the laws, which are the expression of the public will, and which hate and punish murder, should themselves commit one, and that to deter citizens from murder, they should decree a public murder’.²⁵

In other words, the building blocks of constitutionalism existed in Italy long before the ideas of the French Revolution crossed the Alps with Napoleon’s armies in the 1790s. And the currency of these ideas reached far beyond the Italian peninsula. Beccaria’s writings shaped American history. There is no need to stress Beccaria’s influence on the US Constitution: many of America’s founders studied Italian, purchased copies of his treatise, and were greatly inspired it. As John Bessler recently wrote,

‘Beccaria’s views shaped the founders’ understanding of the Declaration of Independence, the U.S. Constitution’s First, Second, and Fifth Amendments,

²⁰ *ibid* xv.

²¹ *ibid* 43.

²² *ibid* 39.

²³ *ibid* 66.

²⁴ *ibid*.

²⁵ *ibid* 70.

and the Eighth Amendment bar against “cruel and unusual punishment”’.²⁶

At the Boston Massacre trial in 1770, John Adams forcefully quoted Beccaria’s words in defending British soldiers accused of murder.²⁷ George Washington bought a copy of the treatise in 1769 and, during the Revolutionary War, wrote to Congress lamenting ‘(t)he frequent condemnations to capital punishments’ and noting the need for some intermediate and proportionate forms of punishment.²⁸ And, more generally, Beccaria’s concepts of proportionality and cruelty were embedded in the US Constitution’s Eighth Amendment.²⁹

It is for these reasons that it is important to recognize the early attempts at constitutionalization across the Italian territory. And it is especially important to note the 1787 Draft Constitution of the Grand Duchy of Tuscany, evidently influenced by Beccaria’s thought. But this draft should not be dismissed as a purely intellectual exercise of an enlightened monarch under Beccaria’s influence. Nor should it be downplayed and skipped over as a ‘solitary phenomenon,’ as Grimm does in one sentence of his book on *Constitutionalism*.³⁰ This document, which predates the US Constitution, was revolutionary on its own terms – even in the absence of a truly revolutionary break.

1. Draft Constitution of the Grand Duchy of Tuscany (1787)

It did not take long for the new Enlightenment ideas about public law to give birth to their first, concrete attempt at constitutionalization in Italy. As early as 1779, the Grand Duchy of Tuscany moved toward the codification of its laws;³¹ as part of those efforts, the Grand Duke Leopold II entrusted his vision to his prime minister, Francesco Maria Gianni, and gave him the power to draft a constitution.³² The Grand Duchy’s Draft Constitution was first completed in 1782, just one year after the ratification of the Articles of Confederation (the first constitution of the United States), and its latest iteration dates back to 1787.³³ The Draft Constitution represents perhaps the earliest modern and concrete example of Italian constitutional thought. The Draft Constitution was divided into three parts: a Preamble, a Constitution, and Consecutive Ordinances.³⁴ But a reader should not be confused by the titles of these sections. The three sections taken together – each focusing on different aspects of the envisioned legal order

²⁶ See J.D. Bessler, *The Birth of American Law: An Italian Philosopher and the American Revolution* (Durham, NC: Carolina Academic Press, 2014), 20.

²⁷ *ibid* 174.

²⁸ *ibid* 151.

²⁹ *ibid* 20-22.

³⁰ D. Grimm, n 4 above, 46.

³¹ G. Manetti, *La Costituzione inattuata. Pietro Leopoldo Granduca di Toscana: dalla riforma comunicativa al progetto di Costituzione* (Firenze: Centro editoriale toscano, 1991), 77.

³² *ibid*.

³³ *ibid*.

³⁴ A. Aquarone et al, *Le Costituzioni italiane* (Milano: Edizioni di Comunità, 1958), 632.

– form the body of the Draft Constitution.

The Preamble made clear the truly revolutionary nature of the document. The motivating force behind the Constitution was identified in the realization that

‘a Government had risen with no fundamental law whatsoever, and entirely arbitrary and unjust, because founded on violence, and not on a consensus of the people, who alone can legitimize its institution’.³⁵

The Preamble continued:

‘A Nation cannot easily subsist, nor be governed justly, without a primordial and fundamental law, solemnly accepted by the nation itself, a law that invests the Sovereign with legitimate authority, and that limits its usage and exercise, a law that determines the Sovereign’s and the people’s reciprocal duties and respective rights, reserving to the public, that is, to the body of the nation legitimately represented, those faculties which it cannot renounce, not even voluntarily. These faculties are to freely represent, and to propose what is convenient to, the public and to reject everything that might cause detriment to it, freely releasing to the Sovereign the highest executive power’.³⁶

Leopold II intended the constitution to be binding ‘both for Us and for Our successors’.³⁷ And his vision was quite extraordinary. The Constitution was meant

‘to return to all of the subjects of Our Grand Duchy of Tuscany their full national freedom to validly intervene to accept and to celebrate this present act in all of its parts’.³⁸

The Constitution explicitly voided any previous document, however official, that limited the citizens’ rights. That was done for a simple reason:

‘we declare that neither Our living subjects nor their predecessors could have ever been stripped, or could have legitimately stripped themselves, of those inalienable rights with which they were invested by nature at birth, (both) in the political society and in the Nation that was their homeland’.³⁹

The Draft Constitution would have created a seemingly independent legislative body. The Grand Duchy would have been divided into a number of municipalities and provinces,⁴⁰ and there would be three levels of representative elected bodies –

³⁵ *ibid* (translated by Matteo Godi).

³⁶ *ibid* 633 (translated by Matteo Godi).

³⁷ *ibid*.

³⁸ *ibid* 635 (translated by Matteo Godi).

³⁹ *ibid*.

⁴⁰ *ibid*.

at the municipal level, at the provincial level, and at the state level.⁴¹ Members elected in the provinces through a popular vote would form the representative body of the State,⁴² which limited the powers of the Grand Duke. Without

‘the vote of the body representing the universality of the State’, ‘no ordinance (...) could come into being, and if it had it would be null and invalid, even if published with the orders, rescripts, and edicts of the Sovereign’.⁴³

To be sure, the executive power remained in the hands of Leopold II and his heirs – with some checks from the legislature. Indeed, ‘the sovereignty’ continued to be represented ‘by the person of the Grand Duke’.⁴⁴ Leopold II believed that the monarch should have the power to decide alone on matters of the fundamental laws of the state, including succession, territorial integrity, peace and war treaties, legislation, and finances.⁴⁵ Yet, Leopold II stripped himself of some fundamental powers, such as the power to declare war: ‘war with any other nation will be neither declared or commenced’.⁴⁶ Moreover, the Constitution created some degree of checks and balances. According to the Constitution,

‘the voice of the public and the will of the Sovereign will agree upon the most useful resolutions to form a healthy and just Government without allowing the one to be validly contradicted by the other, but both will be contained in the limits that are prescribed in the following Constitution’.⁴⁷

It is not clear, then, whether the legislative power was completely protected from the influence of Leopold II, nor whether Leopold II would remain an absolute monarch.

When it came to the judiciary, however, the separation of powers was undeniable – and the Grand Duke’s visionary ideas were truly remarkable. ‘In the civil judgments the sovereign authority will not be allowed to intervene in any way’.⁴⁸ Similarly,

‘in criminal proceedings and in the judgment of crimes and in the conviction of the guilty, the aforementioned authority will not intervene in any way’.⁴⁹

There was one important caveat, though. The criminal justice system was

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ *ibid* 636 (translated by Matteo Godi).

⁴⁴ *ibid.*

⁴⁵ G. Manetti, n 31 above, 78.

⁴⁶ *ibid* 368 (translated by Matteo Godi).

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ *ibid.*

required to ‘observe, with sane and constant intelligence, the laws and especially the reform, in all of its parts, and the criminal law promulgated in Pisa on 30 November 1786’ by the Leopold II.⁵⁰ Although, at first, a constitutional reference to a piece of legislation that the monarch himself unilaterally promulgated might appear troubling, that cross-reference actually made the constitutional text even more extraordinary.

The criminal reform of 1786 is worth a brief detour. The Penal Code of 1786 is a remarkable and visionary text for its time. The Penal Code was the result of reforms that lead to the professionalization of the judicial careers and increased equality of citizens in front of the law. The Code was inspired by rule of law ideals and the publicity of trials, as well as themes of proportionality and humanity. Most notably, the Code endorsed Beccaria’s critique of the death penalty in his *Dei Delitti e Delle Pene*:

‘We have seen with horror the easiness with which in the previous Legislation the Death penalty was decreed even for Crimes that were not serious. We have considered that the objectives of the Criminal Penalty must be the satisfaction of the private and public damage done by the criminal, the correction of the Guilty, who is also a son of Society and of the State, ... the guarantee that (persons) Guilty of the most serious and atrocious Crimes will not remain free to commit other crimes, and lastly the necessity of making a Public example – in the name of which the Government, in punishing the Crimes and in serving the objectives to which punishment is direct, always has to resort to the most efficient means with the least damage to the Guilty. We have considered that such efficacy and moderation are obtained together not through the Death Penalty but rather through the Penalty to Public Work, which serves as a continued example, and not an example of an instantaneous terror that often degenerates in compassion, and which takes away the ability to commit new Crimes and not the possible hope to see an eventual return to Society of a useful and corrected Citizen. We have otherwise considered that a truly different Legislation would be most convenient to increase the sweetness and docility of the customs of the present century, and especially of the Tuscan people. We have thus come to the determination to forever abolish, as we have abolished with the present Law, the Death Penalty against all Guilty – those presently convicted, those who are fugitives, and those who have not yet confessed – and for all of those convicted of whatever Crime declared Capital by the Laws promulgated up to this day, which are in that respect void and abolished’.⁵¹

The 1786 Penal Code thus represents the first codified abolition of the death

⁵⁰ *ibid.*

⁵¹ G. Ricuperati, 1786. *La riforma criminale di Pietro Leopoldo* (Roma-Bari: Laterza, 2013), 4 (translated by Matteo Godi).

penalty in the Western world, three years *before* the signing of the US Constitution.

The meaning of the section titled Constitution is perplexing. According to Franz Pesendorfer,

‘(i)t seems as though, at the end of a long period of peace and intense reforming activity, Leopold believed that everything ought to continue forever in the same fashion’.⁵²

In fact, the Draft Constitution is filled with statements hinting just as much. For instance: ‘The present state of neutrality generally present in the Grand Duchy of Tuscany will not be altered in any way’.⁵³ Under this light, the Constitution would not be a revolutionary document but rather one that eternally crystallizes the *status quo*. Giorgio la Rosa compared the Draft Constitution to the famous testament of Louis XIV, who wished to constraint his successors from radically changing the established order.⁵⁴ But it is not clear who would be protecting the immutability of the Grand Duchy’s constitutional order. It is true that

‘(a)ll of the successors to the Throne of Tuscany will have to entirely ratify the present act in the presence of the body representing the State, and pledge through an oath observance of the present Constitution’.⁵⁵

But how this could be squared with the hereditary and divine nature of the throne – and the apparent ability of any successor to refuse to abide by the Constitution – is not clear.⁵⁶

At the end of the drafting process, Prime Minister Gianni wrote to Leopold II, expressing his belief that

‘the mediations and the considerations necessary to the publication of the Constitution in this country are not over yet – a country that is not yet disposed toward receiving it well and usefully, but that is rather full of acts, customs, and opinions incompatible with such a new and big step, which might even become pernicious in the absence of the proper preparations to execute it’.⁵⁷

In 1790, however, Gianni moved past his original reservations. After Leopold II relocated to Austria to be crowned Holy Roman Emperor, Gianni exhorted him to publish the Draft Constitution as a way of settling the revolts that followed the

⁵² F. Pesendorfer, ‘Ferdinando III (1791-1824): Una battaglia per la Toscana’, in C. Rotondi ed, *I Lorena in Toscana: Atti del Convegno Internazionale di Studi* (Firenze: Olschki, 1989), 72.

⁵³ A. Aquarone et al, n 34 above, 635.

⁵⁴ G. La Rosa, *Il sigillo delle riforme: La “Costituzione” di Pietro Leopoldo di Toscana* (Milano: Vita e pensiero, 1997), 78.

⁵⁵ A. Aquarone et al, n 34 above, 635.

⁵⁶ G. La Rosa, n 54 above, 80.

⁵⁷ G. Manetti, n 31 above, 91.

departure of the monarch and ensuring the preservation of Leopold II's numerous reforms over the previous decades.⁵⁸ But Leopold II decided that Tuscany was not ready to accept the Constitution – partly because of the opposition of the governing administrative body, the *Cosiglio di Reggenza* – and so he decided against its promulgation before abdicating in favor of his son, Ferdinando, in 1791.⁵⁹

In conclusion, the first serious attempt to write and put into effect a constitution in the Italian territory came to an unfortunate end. This is not surprising. Constitutionalism went through many fits and starts in the United States – first in American colonies prior to independence, and then in the American states from 1776 to 1791 – and was not finally accomplished until 1870, after the end of the American Civil War. At the same time, the Grand Duchy of Tuscany's constitutional reforms meant that the idea of a constitutional government in Italy was now at least conceivable, in a way that it had not been before.

2. The Jacobin Constitutions (1796–1798)

Once the French Revolution began, just a few years after Leopold II's Draft Constitution, Italy was an especially fertile ground for the Revolution's democratic ideals. Italian legal thought, which had been tinkering with the possibility of constitutionalism for decades, saw a drastic shift towards an open criticism of contemporary legislators. In particular, Italy embarked in an intellectual revolution of its own, with an eye on the prize: a constitution. In 1790, at a time when France was still a monarchy, Pietro Verri explicitly asked for a constitution during an assembly in Lombardy with local delegates and the Holy Roman Emperor Leopold II.⁶⁰ The following year Nicola Spedalieri, a catholic priest, published a book on *Human Rights*, stressing the importance of popular sovereignty and the role of the Church as a safeguard to the social contract – something that was not well received by the monarchists.⁶¹ But Verri's and Spedalieri's hopes died young, and the only solution left for Italy was to follow France's revolutionary path.

The influence of the French Revolution put the newborn ideas of popular constitutionalism into motion. The three French constitutions of 1791, 1793, and 1795 reached Italy even before the Napoleonic invasions: the French Directory translated them into Italian and clandestinely brought them across the Alps.⁶² Eventually, in 1796, Napoleon invaded northern Italy; with the occupation of Emilia Romagna, the first experiments with modern constitutionalism emerged.

⁵⁸ *ibid.*

⁵⁹ *ibid.* 92.

⁶⁰ C. Morandi, *Idee e formazioni politiche in Lombardia dal 1748 al 1814* (Torino: Fratelli Bocca, 1927), 172.

⁶¹ C. Ghisalberti, n 13 above, 76.

⁶² G. La Rosa, n 54 above, 90.

The movements framed their efforts as a centuries-long fight against the power of the Church and the Papal State.⁶³ In July of 1796, the Republic of Bologna established a constituent assembly, which over the following months produced a constitution. Though democratic in nature and largely modeled after the 1795 French Constitution, the 1796 Constitution of Bologna was municipal in aspirations.⁶⁴

When the Austrians were defeated and Lombardy conquered, Napoleon formally transferred sovereignty in this part of Italy back to the people and established the Cisalpine Republic. During those years, France often claimed to return sovereignty to the people. Yet in every city or region that he conquered, Napoleon's first moves were always authoritarian: he would establish a temporary order, directly subordinated to the French military, and all acts under the temporary governments bore the name of the French Republic. For example, in the case of the Cisalpine Republic, the temporary government lasted only about six months, but the 'people' were not truly free to mold the new constitutional order. Napoleon and the French Directory had a strong hand in the drafting process of the 1796 Cisalpine Constitution. The 1796 Constitution of the Cisalpine Republic, while in small parts modeled after the Constitution of Bologna, was an entirely new document – the product of a new constituent assembly, strongly inspired by the 1795 French Constitution.⁶⁵ The French Directory imposed on the representatives of the Cisalpine Republic a treaty that would have de facto subordinated the newly created government to the French Republic. As the Cisalpine Republic abolished the Napoleonic laws and opposed the treaty, the French rule turned authoritarian. The dissident representatives were removed from the legislative body, the opposition was arrested and prosecuted until the representatives approved the treaty.

Two years later, the Constitution of the Cisalpine Republic was amended, and the 1798 Constitution was forced onto the Cisalpine Republic by France.⁶⁶ In light of the protests that ensued after the proposed treaty, it appeared clear to the French Directory that a more authoritarian constitution than the 1797 document was needed. French emissaries met in Milan with representatives of the Cisalpine Republic. Although the French led the conversation on the required constitutional amendments, some of the Cisalpine representatives strongly opposed the proposal.⁶⁷ And there was no agreement on the French front either: the leader of the constituent assembly was replaced three times. Eventually, the 1798 Constitution was approved without a popular vote and with key changes over the 1797 document.

To be sure, the Second Constitution of the Cisalpine Republic was, in many

⁶³ *ibid* 106.

⁶⁴ A. Aquarone et al, n 34 above, 8.

⁶⁵ *ibid* 110.

⁶⁶ *ibid* 83-86.

⁶⁷ *ibid*.

respect, very ordinary. It invoked the sentiments that animated the French Revolution: ‘Sovereignty essentially resides in the universality of the citizens’.⁶⁸

‘All of the duties of man and of the citizen derive from these two principles sculpted by nature in all hearts: “Do not do to others what you would not want to be done to yourself. Do for others the good that you would wish to receive”’.⁶⁹

The first four articles included a list of four fundamental rights: liberty, equality, security, and property. ‘Liberty consists in being able to do whatever does not harm the rights of others’.⁷⁰ ‘Equality consists in the law being the same for all, both when it protects and when it punishes’.⁷¹ ‘Security results in the collaboration of all in assurance of the rights of each person’.⁷² And ‘Property is the right to enjoy and to dispose of one’s goods, income, product of his labor, and industriousness’.⁷³ The Constitution also enshrined additional fundamental rights, such as the right not to be forced to do something the law does not require, and the right to be free from unlawful prosecution.⁷⁴ Moreover, the document embraced fundamental concepts of criminal procedure – proportionality between the penalty and the crime, no *ex post facto* laws, and so on.⁷⁵

But the Second Constitution was also revolutionary for its time. For instance, the very first paragraph of the Constitution, which ‘is from this moment onwards the only fundamental law of the republic,’ guaranteed ‘to all citizens, with no distinction based on gender, primary education (and) a paid job with a minimum wage sufficient to survive’.⁷⁶ Moreover, in the criminal justice context, ‘(a)ny bodily constraint not necessary to ensure the appearance of the accused must be severely prohibited by law’.⁷⁷ And, importantly, the Constitution also recognized the central role of a system of checks and balances:

‘The social guarantee cannot exist if the separation of powers is not established, if their limits are not fixed, if the accountability of the public functionaries is not assured’.⁷⁸

At the same time, the 1798 Constitution was authoritarian. In particular, compared to the 1797 document, the freedom of press was diminished. Compare

⁶⁸ *ibid* 110 (translated by Matteo Godi).

⁶⁹ *ibid*.

⁷⁰ *ibid* 111 (translated by Matteo Godi).

⁷¹ *ibid*.

⁷² *ibid*.

⁷³ *ibid*.

⁷⁴ *ibid* 113 (translated by Matteo Godi).

⁷⁵ *ibid*.

⁷⁶ *ibid*.

⁷⁷ *ibid* 115 (translated by Matteo Godi).

⁷⁸ *ibid*.

the following provisions:

‘No one may be denied the right to say, write, and print his thoughts. The writings cannot be subject to any censorship before their publication. No one may be held accountable for what he has written or published if not under the specific instances provided by the law’. (Art 354 of the 1797 Constitution)

‘No one may be denied the right to say, write, and print his thoughts. The writings cannot be subject to any censorship before their publication, *but everyone will be held accountable for what he has published. As long as the law has not determined the specific instances of such accountability, the Directory is charged with proceeding against slanderous and seditious writings*’. (Art 348 of the 1798 Constitution)

This second, more authoritarian constitution remained in effect only a few months. With the return of the Austrian rule in April of 1799, the 1798 Constitution of the Cisalpine Republic lost all powers. Its founding principles would resurface a year later, when Napoleon returned to Milan after his defeat of the Austrians in the Battle of Marengo.

2. The Constitution of the Italian Republic (1802)

With an eye towards true independence, Italian patriots had already set out to amend the Cisalpine Constitution notwithstanding the brief Austrian comeback. With Napoleon’s victory in Marengo, ‘it was necessary to swiftly begin a reconstruction’ and to ‘raise a flag that would rally the uncertain, the lost, the believers: any hesitation would be fatal’.⁷⁹ Two competing visions emerged. Francesco Melzi d’Eril, an Italian politician, wanted a monarchical constitution because the Italian people were at the time intrinsically suspicious of the revolution, which had been externally imposed.⁸⁰ Instead, Charles Maurice de Talleyrand–Périgord, a French diplomat, argued for a weak central state – a federation led by Napoleon’s brother.⁸¹ These two visions resulted in two separate constitutional projects, which were presented to Italian representatives in Paris in 1801. After a few amendments, a committee of 454 deputies was invited to Lyon to discuss the new constitution.⁸² The delegation’s two chief goals were freedom and stability.⁸³ Napoleon was elected President of the Republic, now officially referred to as *Italian* and not *Cisalpine*. The text of the Constitution

⁷⁹ U. Da Como, *I Comizi nazionali di Lione per la costituzione della repubblica italiana* (Bologna: Zanichelli, 1938), 3.

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² A. Aquarone et al, n 34 above, 308.

⁸³ *ibid.*

that was later on approved, however, was much different from the one discussed by the committee. Napoleon, Talleyrand, and Melzi amended the text of the 1802 Constitution of the Italian Republic so as to concentrate all powers in the person of the President. Some of the Italian representatives futilely protested.⁸⁴

At the end of the day, what is remarkable about this Constitution is that, though strongly influenced by France, it represents a partially conscientious and voluntary decision of *national* servitude, in the hopes of creating – as indeed was the case – a stronger movement that would lead to true independence. Napoleon treated Italy as a laboratory for his hopes to establish a French Empire in Europe. But he soon realized the need to give something to the Italian patriots, hence the change in name from Cisalpine to Italian Republic. Nonetheless, Napoleon was not willing to make any other concessions: he all too well realized the dangers of letting Italy rule itself as a truly independent nation from France. So this was a bittersweet compromise for the Italian patriots, who were pushing for true independence. In earlier years, Melzi had written that ‘liberty could not sustain itself if it were not born from the people’ and ‘liberty planted through a foreign hand is and will be tough and of uncertain duration’.⁸⁵ And yet, Melzi cooperated with Napoleon and opposed secret societies created to resist the French hegemony.⁸⁶

The 1802 Constitution of the Italian Republic was significantly shorter than its predecessor, the Cisalpine Constitution. In many ways, it was modeled after it. For instance, the 1802 Constitution took the familiar position that ‘Sovereignty resides in the universality of the citizens’.⁸⁷ But if it did not fail to introduce novel ideas – from the very first article, which established Catholicism as the religion of the state.⁸⁸ Yet, at the same time, the Constitution declared that ‘(a)ny inhabitant of the territory of the republic is free to practice his own religion’.⁸⁹ This was the result of Napoleon’s realization that, without the support of local parishes, he would not be able to remain in power.⁹⁰

Moreover, the Constitution was novel in its creation, under Title III, of the electoral councils.⁹¹ The Republic was founded on a system of three electoral councils: the council of the *landowners*, the council of the *wise*, and the council of the *merchants*.

‘Upon the invitation of the governments, the councils meet at least once every two years to fill their ranks, and nominate the members of the council of state, of the legislative body, of the tribunals of revision and of

⁸⁴ U. Da Como, n 79 above, 244.

⁸⁵ *ibid* 248.

⁸⁶ *ibid*.

⁸⁷ A. Aquarone et al, n 34 above, 312 (translated by Matteo Godi).

⁸⁸ *ibid*.

⁸⁹ *ibid* 315 (translated by Matteo Godi).

⁹⁰ U. da Como, n 79 above, 233.

⁹¹ A. Aquarone et al, n 34 above, 317 (translated by Matteo Godi).

cassation, and the commissaries of finance. Their sessions will not last longer than fifteen days'.⁹²

The council of landowners was composed by three hundred citizens chosen among the landowners of the republic who met a certain income threshold.⁹³ The council of the wise was composed by two hundred citizens chosen among the most well-known men

'in any kind of science, liberal or mechanical arts, and also among the most distinct in the ecclesiastical subjects, or for moral, legal, political, and administrative knowledge'.⁹⁴

The council of merchants was composed of two hundred citizens chosen 'from among the most accredited traders and those makers most distinct for the importance of their commerce'.⁹⁵ Each electoral council resided in a different city: Milan, Bologna, and Brescia.⁹⁶ The councils' main purpose was to elect the members of the Censura. The Censura, which sat in Cremona, was a commission of 21 members entrusted with electing from the members of the three councils those who will cover the constitutional roles: a president,⁹⁷ a vice president,⁹⁸ the council of state,⁹⁹ the ministers,¹⁰⁰ and a legislative council.¹⁰¹

Whether the Constitution of the Italian Republic was actually a meaningful reform or a mere imposition of France is debated. Scholars have contrasting views. Antonio Zanolini wrote:

'But the Constitution, which was supposed to be the product of the

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ *ibid* 320 (translated by Matteo Godi).

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ The president holds a term of ten years and he can be indefinitely reelected. He is in charge of all diplomatic negotiations and is the sole holder of the executive power, which he exercises through the ministers. The president nominates the ministers, the civil and diplomatic agents, the heads and generals of the army.

⁹⁸ The vice-president will take the president's seat in the legislative council in the president's absence, and who represents the president in all manners which the president may delegate. Nominated only once, the vice president may not be removed during the term of the president who elected him.

⁹⁹ The council of state is composed of eight citizens above forty years of age, elected for life by the councils and distinct for their recognized services to the republic. The council of state is especially entrusted with the examination of all diplomatic treaties and everything that has to do with the foreign relations of the state.

¹⁰⁰ The Constitution recognized at least three ministers: the minister of justice (also chief judge); the minister of foreign relations; and the minister of the treasury.

¹⁰¹ The legislative council is composed of at least ten citizens above thirty years of age, elected by the president and revocable by him after three years. The councilmen give their deliberative vote on the legislative projects proposed by the president, which are not approved if not by an absolute majority of the votes.

Italian representatives – for that reason, in fact, they had undertaken such a burdensome trip in the middle of the winter – was actually delivered, already finalized, by the First Consul (Napoleon). He, however, summoned the presidents of the committees, reexamined the document with them and made some additional changes. Once presented to the Consulta, it faced little oppositions and a short discussion'.¹⁰²

Ugo da Como, instead, argued:

'What was created (by the Constitution) nonetheless represents progress; even during the brief lives of the new constitutions some conclusions may be drawn. Through the Constitution of the Italian Republic, we witnessed the formation of the beautiful Italian Kingdom: the appearance of Napoleon's Italy shows a movement towards the rise of the Italian ideal'.¹⁰³

At the very least, though, the Constitution of the Italian Republic had positive externalities on the growth of Italy. There was an increase in public projects, including the creation of the Postal System.¹⁰⁴ The public debt decreased and, starting in 1802, its liquidation was underway.¹⁰⁵ And a national pension fund was also established.¹⁰⁶

The Italian Republic as set out in 1802 Constitution was short-lived. As he did in France, Napoleon soon moved to create a system which only gave the people the impression that the freedoms they obtained through the revolution continued to be protected. By 1804, Napoleon set in motion the transformation of the republic into a monarchy. The republican government began the discussion of a new constitution, but the project never saw the light of day.¹⁰⁷ Napoleon wanted a monarchy governed by the French Constitution. In March 1805, a statute recognized that

'the time has come ... to declare the government of the Italian Republic to be an hereditary, monarchical one, following the same principles that constitute the French Empire. ... Napoleon I, founder of the Republic, shall be declared first King of Italy'.¹⁰⁸

Its preamble also announced that the new constitution would recognize a number of civil and political freedoms. Eight statutes followed, outlining the competencies of the courts, the position of Viceroy, the succession to the throne,

¹⁰² A. Zanolini, *Antonio Aldini ed i suoi tempi: Narrazione storica con documenti inediti o poco* (Firenze: Le Monnier, 1869), 198.

¹⁰³ U. da Como, n 79 above, 253.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.* 267.

¹⁰⁷ *ibid.*

¹⁰⁸ A. Aquarone et al, n 34 above, 324.

and so on. The Constitution of the Italian Republic was never abolished, but it was effectively turned into a monarchic constitution with some aristocratic touches. The direct governance of Italy was entrusted by Napoleon to his 24-year-old stepson, Eugène de Beauharnais, who served as Viceroy. By the end of the year, Napoleon had also defeated the Bourbons and seated his older brother, Joseph Bonaparte, on the throne of the Kingdom of Naples. When Joseph moved from southern Italy to Spain in 1808, Joachim Murat succeeded him. In 1808, Napoleon also annexed Marche and Tuscany to the Kingdom of Italy. In 1809, Bonaparte occupied Rome, exiling the Pope to France and moving the Papal States' art collections to the Louvre.

But even the life of the Kingdom of Italy turned out to be rather short. The story of the fall of Napoleon is a rather familiar one. Napoleon's fortunes changed dramatically in 1812 after his failed invasion of Russia. The European powers, including Austria, resumed hostilities towards France in the War of the Sixth Coalition. After the Battle of Leipzig, the Italian Napoleonic states (spearheaded by Murat) abandoned Napoleon to ally with Austria. On 11 April 1814, Napoleon abdicated the thrones of France and Italy and was exiled to Elba. With the German and Austrian invasions looming and riots in many Italian cities, Eugène de Beauharnais's hopes to be crowned King by the Senate vanished and he surrendered.

With the defeat of Napoleon, the Treaty of Paris and the ensuing Congress of Vienna restored the geopolitical situation that had been present in 1795, dividing Italy between Austria (in the north-east and Lombardy), the Kingdom of Sardinia, the Kingdom of the Two Sicilies (in the south and in Sicily), Tuscany, the Papal States, and other minor states. Napoleon's escape from Elba and his failed Hundred Days led to the fall of the Italian kingdoms and the beginning of Italy's Restoration period, with many pre-Napoleonic sovereigns returning to their thrones. Piedmont, Genoa, and Sardinia were united under the rule of the Savoy; Lombardy, Veneto, Istria, and Dalmatia were reannexed to Austria. The Pope came back to Rome, and the Kingdom of Naples returned to the Bourbons.

Because the Napoleonic years had brought to life Italian nationalism, the Restoration was followed by popular uprisings. Secret societies proliferated all over Italy to counteract the post-Napoleonic restoration years.¹⁰⁹ In the South, these societies focused their energies in the 1848 unrest, and on obtaining a constitution from the Bourbon king.¹¹⁰ In the North, instead, they focused on a quite distinct interest: a unified nation. Giuseppe Mazzini's Young Italy resembled a modern political party, and had an entire recruitment program in place. Mazzini's movement was very successful in recruiting members in the Northern regions, but less so in central and southern Italy: some revolts were occurring, but energies were pulled in different directions and towards different visions.

¹⁰⁹ E. Holt, *The Making of Italy 1815-1870* (New York: Atheneum, 1971), 44.

¹¹⁰ *ibid* 49.

III. The First Constitution: The Albertine Statute of 1848

The Revolutions of 1848 swept through Italy like a storm and stirred long nascent desires both to unify Italy and to give it a constitution. The storm was felt throughout the country and marked the apex of 60 years of Italian constitutional thought as well as a fond remembrance of Napoleon's centralized and efficient government.¹¹¹ The Revolutions of 1848 began the work of creating the Italian constitutional state, but Italian liberals could not agree on the forms that the unified government would take. Followers of Giuseppe Mazzini envisioned a unitary republic, while others argued for a federal system headed by the Pope.¹¹² As various liberal movements and revolts developed all over Italy – from Sicily to Lombardy by way of the Papal States – the Kingdom of Sardinia and Piedmont was forced to make some concessions too. This was significant because the Kingdom of Sardinia and Piedmont was the largest, best educated, and wealthiest regime within the territory that would become the nation of Italy.

In order to avoid a democratic revolt that could have led to the creation of a constituent assembly, King Carlo Alberto of Savoy, the King of Sardinia and Piedmont, followed the examples of the Kingdom of Two Sicilies and of the Grand Duchy of Tuscany. On 4 March 1848, he promulgated the Albertine Statute.¹¹³ This document is in relation to the modern Italian Constitution akin to what the Articles of Confederation are for the US Constitution. The Albertine Statute was presented to the people of Sardinia and Piedmont as a constitution that established a representative system of government. Over its first decade, the Albertine Statute only applied to the Kingdom of Sardinia and Piedmont. But the Statute would soon go on to become the longest serving constitution of Italy, replaced in 1948 by the Republican Constitution.

In 1848, King Carlo Alberto decided to exploit the moment of general confusion across Europe: in alliance with the Papal States and the Kingdom of Sicily, he declared war against Austria and unsuccessfully invaded Austria's Italian possessions. When he failed to overcome the Austrian dominion, King Carlo Alberto abdicated in favor of his son, Vittorio Emanuele II. In a little over a decade, Vittorio Emanuele II succeeded where his father had failed. Between 1859, when Lombardy was annexed to the Kingdom of Piedmont, and 1860, when the territories of central Italy joined Piedmont by plebiscite, Italy was unified under the rule of Vittorio Emanuele II. Giuseppe Garibaldi led the Kingdom of the two Sicilies and all of southern Italy to join Piedmont in 1860. With the Law no 4761 of 17 March 1861, the Kingdom of Italy was proclaimed.¹¹⁴ A war in 1866 led to the acquisition of Venice and the Veneto, and in 1870 Rome and the Papal State

¹¹¹ P. Casana, *Le Costituzioni Italiane del 1848-49* (Torino: G. Giappichelli, 2001), 6.

¹¹² V. Onida et al, *Constitutional Law in Italy* (Alphen aan den Rijn: Kluwer Law International, 2013), 23.

¹¹³ P. Casana, n 111 above, 18-19.

¹¹⁴ A. Cerri, n 6 above, 30.

were also annexed. Italy, as we know it today, was for the most part (with the exception of the northeastern regions, which would join only after World War I) unified under the Albertine Statute – a law that had originally been written by King Carlo Alberto to establish a representative system of government only for Sardinia and Piedmont.

The juridical meaning of the unification of Italy is debated in the literature. The acquisition of the entire peninsula by the Kingdom of Sardinia and Piedmont, and the application of Piedmont's laws to the whole of the new nation,

‘explains how a State born from the unification of many different territories and States, each with its own traditions and institutions, managed to become a centralized unitary State with total uniformity as to legislations and administration’.¹¹⁵

Some scholars, like Dionisio Anzilotti, argued that the unification of Italy was a ‘fusion’ bringing to life a ‘new’ state.¹¹⁶ Others, such as Augusto Barbera, believe that the unification of Italy did not mark the creation of a new legal order but rather the expansion of the juridical order of the Kingdom of Piedmont and Sardinia to the remaining Italian territories.¹¹⁷ Vittorio Emanuele II retained his official name, without becoming the ‘first’ King of Italy; the customary numbering of the Parliamentary session continued into the Kingdom of Italy with no interruption; and the Albertine Statute was imposed onto the new national territory with no amendments.¹¹⁸

The Albertine Statute's eighty-four articles were inspired by the 1830 French Constitution and the 1831 Belgian Constitution.¹¹⁹

‘The (unification of the Italian) State was ... perceived, at least by the cultural and political élites, as the historical realization of their aspirations for the freedom and unity of the country’.¹²⁰

The text of the Albertine Statute is undeniably that of a monarchical constitution and not that of a democratic republic. ‘The state is governed by a representative monarchical government. The throne is hereditary according to the Salic law’.¹²¹ The King retained the executive power, and he shared in the legislative power as well. ‘The King alone has the power to sanction and promulgate laws’, but ‘(t)he

¹¹⁵ V. Onida et al, n 112 above, 25.

¹¹⁶ D. Anzilotti, ‘La Formazione del Regno d'Italia nei riguardi del Diritto Internazionale’ 6 *Rivista di diritto internazionale*, I, 1-33 (1912).

¹¹⁷ A. Barbera, *Corso di diritto pubblico* (Bologna: il Mulino, 2014), 456-457.

¹¹⁸ A. Cerri, n 6 above, 30.

¹¹⁹ V. Barsotti et al, *Italian Constitutional Justice in Global Context* (Oxford: Oxford University Press, 2016), 4.

¹²⁰ V. Onida et al, n 112 above, 25.

¹²¹ P. Casana, *Le Costituzioni italiane del 1848-49* (Torino: Giappichelli, 2001), 126 (translated by Matteo Godi).

King and the two Chambers have the right to propose legislation'.¹²² Career magistrates exercised the judicial power, but they were not completely independent from the executive and had no powers to annul administrative acts.¹²³ In addition, the King chose the members of the upper house of the legislature, while the people chose the members of the lower house.¹²⁴

The Statute was, for most intents and purposes, a constitution. It had 'the force of Constitution and Fundamental Law, perpetual and irrevocable by the Monarchy'.¹²⁵ It set out three branches of government, but without much separation of powers. 'The legislative power shall be exercised collectively by the King and two Chambers, the Senate and the Chamber of Deputies' – all nominated by the King.¹²⁶ 'The executive power is reserved to the King alone. He is the supreme head of the state'.¹²⁷ And 'Justice emanates from the King and is administered in his name by such judges as he shall appoint'.¹²⁸ Most importantly, with promulgation, '(a)ll laws contrary to the present Statute are abrogated'.¹²⁹

The Statute had quite a few remarkable provisions. For instance, it included a progressive taxation clause. 'All shall contribute without distinction to the burdens of the state, in proportion to their assets'.¹³⁰ It recognized the inviolability of the home, 'except in cases and in the manner prescribed by law'.¹³¹ It recognized, to a degree, the freedom of the press – which 'shall be free, but the law may suppress abuses of this freedom'.¹³² It included an equal protection clause: 'All subjects of the Kingdom are equal before the law, regardless of their rank or title. All shall equally enjoy civil and political rights and shall be eligible to civil and military offices'.¹³³ The Statute also recognized parliamentary immunity:

'Unless caught while committing a crime, no Senator can be arrested except by an order of the Senate. The Senate alone is competent to judge crimes of which its members are accused'.¹³⁴

And the Chamber of Deputies had 'the right to impeach the King's Ministers and bring them to trial before the High Court of Justice'.¹³⁵ Interestingly, there was also some degree of political accountability: 'Senators and Deputies shall not be

¹²² *ibid* 127 (translated by Matteo Godi).

¹²³ V. Onida et al, n 112 above, 25-26.

¹²⁴ P. Casana, n 111 above, 129 (translated by Matteo Godi).

¹²⁵ *ibid*.

¹²⁶ *ibid* 130 (translated by Matteo Godi).

¹²⁷ *ibid*.

¹²⁸ *ibid*.

¹²⁹ *ibid* 131 (translated by Matteo Godi).

¹³⁰ *ibid* 133 (translated by Matteo Godi).

¹³¹ *ibid*.

¹³² *ibid*.

¹³³ *ibid* 134 (translated by Matteo Godi).

¹³⁴ *ibid*.

¹³⁵ *ibid* 135 (translated by Matteo Godi).

held accountable for opinions expressed and votes given in the Chambers,’ yet ‘Ministers are accountable’.¹³⁶

It is important to note the very undemocratic nature of the Albertine Statute. At first, the right to vote was recognized only for male citizens who were at least 25 years old and who met certain income and tax requirements. In 1848, only 1.57 percent of the population were registered voters.¹³⁷ In 1882, the right to vote was extended to all male citizens above twenty-one years of age, who knew how to read and write; 6 percent of the population met this requirement.¹³⁸ In 1912, the inclusion of all illiterates who had turned thirty and fulfilled their military duties extended the right to vote to 25 percent of the population. Women were not allowed to vote until 1946.¹³⁹

Soon after its promulgation, due to the influence of Prime Minister Cavour,¹⁴⁰ the Albertine Statute began to operate following the model of a parliamentary government: though the King still appointed the representatives, the practice of asking for the Parliament’s continued support of the government became the norm.¹⁴¹ If a majority was lost, or if the King disagreed with the parliamentary majority, the Chamber of Deputies could be dissolved.¹⁴²

Though the Albertine Statute was presented as an ‘order with the force of Constitution and Fundamental Law, perpetual and irrevocable by the Monarchy’ and ‘All laws contrary to the present Statute are abrogated’, there was no means of reviewing the constitutionality of an act of Parliament.¹⁴³ Originally, it has been argued, the Albertine Statute was meant to be – just as any other constitution granted by a monarch in the wake of liberal protests – a rigid constitution.¹⁴⁴ Only a formal process of amendment could have derogated from the Statute’s provision, though no amendment process was outlined in the Statute itself.

But the traditional wisdom is that the Albertine Statute was a flexible constitution. As Vittoria Barsotti et al discussed,

‘lacking an amendment clause, assuming that the Statute could not be thought of as forever unchanging, and recognizing that the King had “irrevocably” ceded his own lawmaking power, the only body capable of modifying it would be the holder of the legislative power’.¹⁴⁵

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ G. de Vergottini, *Diritto Costituzionale* (Padova: CEDAM, 2012), 117-118.

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.* 117.

¹⁴² V. Onida et al, n 112 above, 25-26.

¹⁴³ P. Casana, n 111 above, 127-29 (translated by Matteo Godi).

¹⁴⁴ See, eg, A. Pace, ‘La “naturale” rigidità delle costituzioni scritte’ *Giurisprudenza costituzionale*, 4085-4134, 4085 (1993).

¹⁴⁵ V. Barsotti et al, n 119 above, 6.

That is to say, any law passed by Parliament and signed by the King became the supreme law of the land. Indeed, just a few days after the promulgation of the Statute, Prime Minister Cavour defined as absurd the idea that the Statute could not be modified through the consent of both the King and the legislature.¹⁴⁶ Barsotti et al identify in the idea of parliamentary omnipotence and the lack of an independent judiciary the two main forces that for all purposes turned the Albertine Statute into a flexible constitution.¹⁴⁷

Indeed, there was no judicial review mechanism in place under the Albertine Statute. In its opinion dated 15 June 1880, the Court of Cassation held that ‘the fundamental laws of the state do not give to the judicial authority the power to assess the constitutionality of the laws, but only to ensure that everyone abides by them and to justly apply them to concrete cases’.¹⁴⁸ Behind the Albertine Statute lay the fear not of the future but of the past: it was an ‘irrevocable barrier against the past rather than a juridical regulation of the future acts of the public organs’.¹⁴⁹ Two decisions by the Court of Cassation in the 1880s are indicative of the meaning of judicial review under the Albertine Statute. In a nutshell, although there was no power to investigate the substantive constitutionality of a law, the courts could invalidate legislation that was passed through a flawed procedure, and the judges had the power to review the constitutionality and legality of administrative regulations.

On 11 March 1885, the Court of Cassation decided the scope of judicial review of regulations.¹⁵⁰ In January of 1883, Carmela Vicedomini rented a property in Naples for 490 Liras. Vicedomini refused to pay a tax that was being imposed on her rental property because her rent was below the minimum taxable amount (500 Liras). Vicedomini failed to timely file a complaint over the tax with the competent administrative agency. The lower court ruled against Vicedomini. The Court of Appeals denied jurisdiction because the dispute does

‘concern a tax exemption but the necessary means to answer that question is by assessing whether the rental income is actually below five hundred Liras; and this second question, prejudicial to the first, dictates whether this court has competency; and answering that question is a purely administrative matter’.¹⁵¹

Although the Court of Cassation affirmed the ruling of the Court of Appeals, it held that courts possess

¹⁴⁶ R. Bin and G. Pitruzzella, n 167 above, 125.

¹⁴⁷ V. Barsotti et al, n 119 above, 7-8.

¹⁴⁸ 19 *Annali della Giurisprudenza Italiana: Raccolta Generale delle Decisioni delle Corti di Cassazione e di Appello* (1885), 37-39 (translated by Matteo Godi).

¹⁴⁹ F. Racioppi and I. Brunelli, *Commento allo Statuto del Regno* (Torino: Unione tipografico-editrice, 1909), 194.

¹⁵⁰ *Annali*, n 148 above, 37.

¹⁵¹ *ibid* 38 (translated by Matteo Godi).

‘the authority to ascertain the constitutionality of a regulation, . . . that is, whether the regulation corresponds to the law to which it refers or if the agency that has promulgated it has introduced new dispositions without being empowered to do so’.¹⁵²

The Court provided two rationales for this holding:

‘because the law is evident only through its forms and otherwise there is no way to dispute what a law is, and because the law cannot invade the executive power but the executive power can invade the legal sphere’.¹⁵³

On 28 June 1886, the Court of Cassation decided a rather unique case.¹⁵⁴ On 30 May 1878, both the Senate and the Chamber of Deputies passed the same bill. The King subsequently signed the act into law. The bill contained a provision, Art 96, regulating the customs tariff imposed on bleached cotton textiles. The text approved by the Senate increased the old tariff by twenty percent; that of the Chamber of Deputies by fifteen percent. The Senate text was published in the collection of the acts of Parliament, but the text of the Chamber of Deputies was published in the Official Gazette. After the mistake was noticed and fixed, numerous merchants brought suit against the Government to obtain a reimbursement for the higher tariffs they had paid between 1878 and 1883 – claiming that, in those years, Art 96 was invalid. The Court portrayed the case as raising two possible questions. On the one hand,

‘(i)t could be said that the question that surfaces in similar cases – that is, when the approval of one or more of the bodies that have to exercise collectively the legislative power under the Albertine Statute is absent – may not consist in the examination of the constitutionality of the content or the form of the law’.¹⁵⁵

On the other hand,

‘the question presented may amount to the assessment of whether the word sanctioning and promulgating the law is indeed the word of the legislator – that is to say, the collective word of the King, the Senate, and the Chamber of Deputies’.¹⁵⁶

The Court ultimately punted the issue, justifying its holding on narrow grounds that avoided the constitutional review question.

¹⁵² *ibid.*

¹⁵³ *ibid* 39 (translated by Matteo Godi).

¹⁵⁴ Corte di Cassazione 28 June 1886 no 11, *Il Foro*, 705 (1886).

¹⁵⁵ *ibid* 706 (translated by Matteo Godi).

¹⁵⁶ *ibid.*

This opinion was reported with the accompanying thoughts of a commentator, Carlo Francesco Gabba – a renowned Italian jurist who taught at the University of Pisa. Gabba, while not openly opposing the decision of the court, took this opportunity to discuss (in the abstract) the constitutionality of a law affected by the same vice as the 1878 legislation. Gabba believed that the Court of Cassation was well suited to answer the question it first frames but then avoids deciding, because the challenged law simply never existed.

‘Truly, the first thing to settle in the application of a law is most certainly its very existence. ... If one is ready to admit that judges cannot investigate if the parliamentary vote reported in the royal promulgation of a law were truthful or not, accurate or not, neither could it be admitted that the judges may refuse to apply a law that the tyrant King promulgated by himself, without bothering to call upon the Chambers, let alone mention them (in his promulgation)’.¹⁵⁷

Gabba then went on to discuss, again in the abstract, whether the Court of Cassation could address the constitutionality of a law. He drew a distinction between formal unconstitutionality and inherent unconstitutionality. There is an evident distinction, he wrote,

‘between an unconstitutional law due to a defect in its necessary forms and a law truly unconstitutional because repugnant to some fundamental law of the State’.¹⁵⁸

He believed that

‘the judiciary may contest the external forms of the laws, given their own nature, without at all invading the field of the legislative power. The judiciary can do so because these are external forms and not the substance of the law; because they are determinate and, in their determinateness, they are not subject to interpretation’.¹⁵⁹

This is certainly very reminiscent of the line of reasoning proposed by Hans Linde, arguing for constitutional review of lawmaking under the Due Process Clause.¹⁶⁰

The next move towards judicial review occurred over thirty years later, in 1922, with respect to Royal Decrees that the King unilaterally promulgated with the force of law. This was thanks to Ludovico Mortara, a prominent jurist and President of the Court of Cassation. According to Giovanni Urtoller, a scholar of the time, the courts have no authority to review executive acts because the Executive

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid* 707 (translated by Matteo Godi).

¹⁵⁹ *ibid.*

¹⁶⁰ See H.A. Linde, ‘Due Process of Lawmaking’ 55 *Nebraska Law Review*, 235 (1976).

answers to the Parliament alone.¹⁶¹ Judge Mortara disagreed. In the decision of the Court of Cassation of 16 November 1922, Judge Mortara held that:

‘The Decree-Laws are arbitrary acts of the Government, exceeding the sphere of authority of the executive, and therefore unconstitutional. ... The judicial authority cannot ascertain the reasons of supreme necessity and urgency that led the government to usurp, in the name of the public good, the legislative power without exceeding the limits of its functions, because this is an eminently political question, which may be answered only by the Parliament. But the judicial authority may ascertain whether in fact the urgency existed from the external manifestations that are inherent to its nature, like the suspension of parliamentary sittings, the immediate execution given to the provision, the prompt publication and promulgation, etc. Similarly, the judicial authority may examine ... if the Government has fulfilled its promise to present the decree to the Parliament for its approval, or if due to particular facts and circumstances it fell short of obtaining the conversion of the decree into law. In the absence of the elements of urgency subject to the control of the judicial authority, or in the absence of the Government’s intention to promote the deliberation of Parliament, the legislative efficacy of the decree must be denied in relation to the individual right whose infringement is complained’.

Judge Mortara seemed to identify Art 3 of the Albertine Statute (on the shared legislative power of the King and the Parliament) as an intrinsically ‘rigid’ rather than ‘flexible’ constitutional provision. History did not tell whether Judge Mortara cogently addressed Urtoller’s concerns: the following year, the Fascist Regime forced Judge Mortara into early retirement.¹⁶²

The relationship between the Fascist Regime (1922–1943) and the Albertine Statute is rather complex. In 1922, when Benito Mussolini attempted a coup, the King of Italy was so intimidated that he invited Mussolini to form a government as Prime Minister. This development, which was accompanied by the growth all over Italy of violent fascist gangs, led to the Fascist dictatorship. In 1923, the so-called Acerbo Law was adopted, which

‘provided that the party obtaining the most votes in an election would be allocated two-thirds of the seats (in Parliament), as long as it obtained twenty five percent’

of the total vote.¹⁶³ In the election of 1924, Mussolini benefitted from this law and won a two-thirds majority in Parliament. He governed continuously as a

¹⁶¹ G. Urtoller, *La competenza legislativa ed i decreti-legge* (Roma: Elzeviriana, 1896), 23.

¹⁶² V. Barsotti et al, n 119 above, 10.

¹⁶³ See J.L. Newell, n 3 above, 19.

fascist dictator until he was overthrown in 1943. Though in its first couple of years the fascist regime generally preserved the structure of the Albertine Statute, the laws and politics of the regime soon de facto emptied the Statute of its meaning.¹⁶⁴ The Chamber of Deputies was dissolved and replaced with the Chamber of Fasci and Corporations; all parties other than the Fascist Party were outlawed; and, towards the end of its rule, the Party promulgated anti-Semitic laws.¹⁶⁵ More generally, individual freedoms and rights were severely suppressed.

In particular, the fascist laws seem to abrogate what had been considered the core of the Albertine Statute, Art 3: ‘The legislative power shall be exercised collectively by the King and two Chambers, the Senate and the Chamber of Deputies’.¹⁶⁶ This was supposed to be an irrevocable provision of the Statute.¹⁶⁷ But Law no 100 of 1926, passed four years into the fascist regime, provided that,

‘(f)ollowing deliberation of the Council of Ministers and the advice of the Council of State, Royal Decrees may be used to emanate juridical norms necessary to regulate the execution of the laws’

and that,

‘(f)ollowing deliberation of the Council of Ministers and the advice of the Council of State, Royal Decrees may be used to emanate norms having the force of law when the Government has been so delegated power by a law and within the limits of that delegation, (and) in extraordinary circumstances, in which reasons of urgent and absolute necessity may so require. The judgment over necessity and urgency is not subject to any other check beyond the political one of Parliament’.¹⁶⁸

In sum, what the fascist regime left behind was only a semblance of the ‘Constitution and Fundamental Law, perpetual and irrevocable’ that the Albertine Statute had embodied for much of the second half of the 19th century.¹⁶⁹

IV. The Second Constitution: The Constituent Assembly of 1946–1948

Fast forward twenty years and, in 1943, Mussolini’s rule was overthrown. This history is well known. With the Albertine Statute formally unchanged, and King Vittorio Emanuele III still formally in power, Italy was invaded by two foreign forces: the United States and Germany. Two legal orders resulted. In the northern

¹⁶⁴ V. Onida et al, n 112 above, 28.

¹⁶⁵ G. de Vergottini, n 139 above, 119.

¹⁶⁶ P. Casana, n 111 above, 129 (translated by Matteo Godi).

¹⁶⁷ R. Bin and G. Pitruzzella, *Diritto costituzionale* (Torino: Giappichelli, 2014), 126.

¹⁶⁸ *Gazzetta Ufficiale del Regno d’Italia* (1 February 1926), 426 (translated by Matteo Godi).

¹⁶⁹ P. Casana, n 111 above, 129 (translated by Matteo Godi).

and central regions, occupied by the Germans, the Italian Social Republic was established with the goal of continuing the fascist regime. Limited in its powers, as a subordinate of Germany, the Italian Social Republic was recognized as an independent sovereign only by Germany. The areas south of Rome, where the King found refuge from the German invasion, were occupied by the Allies and witnessed a return to the Albertine Statute's constitutional order.

But with the reestablishment of the political parties abolished by the fascist regime, united under the umbrella organization known as the anti-fascist National Liberation Committee, demands for a new constitution emerged – initially refused by the King, who declined to abdicate. For the National Liberation Committee, a return to the Albertine Statute – evidently impotent against the dictatorship – was unwise.¹⁷⁰ Eventually the National Liberation Committee and the King reached a truce: following the liberation of Rome (which eventually occurred on 22 January 1944, with the Battle of Anzio), the King abdicated and convened a constituent assembly entrusted with deciding over the monarchical or republican nature of the post-World War II Italian state. Accordingly, Vittorio Emanuele III withdrew to private life, and he appointed his son as a caretaker regent of the Kingdom. The pact was sealed with Law no 151 of 25 June 1944, which provided that,

‘until such time as a new Parliament is established, acts having the force of law shall be issued by the Council of Ministers through legislative decrees approved by the (regent) of the Kingdom’.¹⁷¹

Eventually, under the pressure of the supporters of the monarchy, the decision over whether to adopt a new constitution was left to a popular referendum.¹⁷² On the eve of the referendum, Vittorio Emanuele III abdicated in favor of his son, Umberto II.

On 2 June 1946, Italians voted to abolish the monarchy and to elect a constituent assembly. For the first time in Italian history, true universal suffrage was granted – and 89.1 percent of eligible voters cast their ballots.¹⁷³ On the one hand, the vote on Italy's new form of government was overall a close one: 12,717,923 (54.3 percent) voted for the republic and 10,719,284 (45.7 percent) for the monarchy, and 1,498,136 null votes were cast.¹⁷⁴ But Italy was divided in two: though 66.2 percent of the voters in the northern regions voted for the republican system, 63.8 percent in the south voted for the monarchy.¹⁷⁵ On the other hand, the election of the Constituent Assembly embodied the political

¹⁷⁰ V. Onida et al, n 112 above, 29.

¹⁷¹ V. Barsotti et al, n 119 above, 11.

¹⁷² *ibid.*

¹⁷³ G. Parlato and M. Zaganella, *Fare gli Italiani: dalla costituzione dello Stato nazionale alla promulgazione della Costituzione repubblicana, 1861-1948* (Roma: Nuova cultura, 2011), 140.

¹⁷⁴ G. de Vergottini, n 139 above, 124.

¹⁷⁵ G. Parlato and M. Zaganella, n 172 above, 140.

fragmentation that would characterize Italy for many decades to come.¹⁷⁶ Though the Constituent Assembly was formed by 556 representatives from numerous parties, three emerged as the leading political forces: the Christian Democrats (37 percent), the Socialist Party of Proletarian Unity (21 percent), and the Communist Party (19 percent).¹⁷⁷

The Constituent Assembly met for the first time on 25 June 1946, and worked on the constitutional text until 31 December 1947 – with the new constitution set to enter into force on 1 January 1948.¹⁷⁸ Only seventy-five members of the Assembly actively worked on the draft, which was then discussed with the entire body and approved by 453 of its members. Because of its internal fragmentation, the Constituent Assembly drafted the Italian Constitution behind a veil of ignorance. Since no one knew which party would win at the first free elections, each player aimed at ensuring a level playing field.¹⁷⁹ The text was a compromise of catholic, Marxist, and liberal views, and it included an ample Bill of Rights, enforced by a Constitutional Court entrusted with the power of judicial review. In other words, the Italian Constitution replaced the flexible Albertine Statute with a rigid constitution, one from which neither Parliament nor the Executive could deviate.

V. Lessons from the Italian Experience with Constitutionalism

Written constitutionalism was commonplace in Europe for much of the 19th century; yet, as of 1945, only three nations in the world – Australia, Canada, and the United States – had both judicial review of the constitutionality of executive and legislative actions, and a constitutional system of checks and balances.¹⁸⁰ One might wonder why judicial review and checks and balances became entrenched in Italy only *after* 1945, notwithstanding the centuries of experimentation with constitutionalism. One possible answer might be: indignation and anger over the terrible wrongs that the fascist regime committed under Mussolini and that the Albertine Statute utterly failed to preempt.¹⁸¹ In other words, the Italian Constitution might have emerged for *rights from wrongs* reasons: the Italian people realized that they could not always rely on elected legislative and executive officials to protect their fundamental rights, and so they turned to a rigid constitution.

As a result, the Italian Constitution checks and balances power among more entities than the Albertine Statute did: the two Houses of the legislature are made co-equal, unlike the situation in France, so that they may keep one another in

¹⁷⁶ G. de Vergottini, n 139 above, 124.

¹⁷⁷ R. Bin and G. Pitruzzella, n 167 above, 134.

¹⁷⁸ G. de Vergottini, n 139 above, 125.

¹⁷⁹ R. Bin and G. Pitruzzella, n 167 above, 135.

¹⁸⁰ See Steven G. Calabresi, *The Global Rise of Judicial Review Since 1945* (2018), at 2-3, available at tinyurl.com/y77bbyqy (last visited 7 July 2020).

¹⁸¹ See *ibid* 34; see also generally A. Dershowitz, *Rights from Wrongs: A Secular Theory of the Origin of Rights* (New York: Basic Books, 2004).

line;¹⁸² the Prime Minister and the Government are accountable to Parliament;¹⁸³ the President of the Republic, elected by the Parliament,¹⁸⁴ is more than merely a ceremonial figure, for the President appoints five of the fifteen judges on the Constitutional Court¹⁸⁵ and has the final say on the nomination of the Prime Minister and the Ministers;¹⁸⁶ and the Constitutional Court is all-powerful as to the meaning of the Constitution,¹⁸⁷ although it can only act if the Court of Cassation or the Council of State certifies a constitutional question to it.

It has now been seventy-five years since the end of World War II, and it is quite clear that the judicial review structure and checks and balances structure of the Italian Constitution work very well. There remain areas of constitutional law where reform is needed, of course, but the move from the flexible Albertine Statute to the current rigid Constitution has been an unqualified success. Reformers in newly emerging democracies should follow the model of the Italian Constitution and set up a rigid constitution, and they should reject the flexible constitutionalism of the Albertine Statute. This is our main normative recommendation in light of our discussion of the history of Italian constitutional theory.

VI. Conclusion

From 1776 until 1945, the western world was buzzing with discussions of, and admiration for, written constitutions. This movement began around the same years in various countries, including Italy, and it is a mistake to focus on France and the United States without discussing the Italian experience. This Article strived to fill a gap in the scholarship surrounding the genesis of Italian constitutionalism. It has done so by surveying some of the most emblematic examples of successful and failed Italian constitutions. Many of them were revolutionary documents for their times. And some continue to cast their shadows onto Italy's current legal system. Indeed, laws from these preexisting legal orders have continued to be respected so long as they do not conflict with the present constitution.¹⁸⁸ The history of Italian attempts at constitutionalization is a rich one. It dates back to the years *before* the signing of the US Constitution, and its numerous iterations have continued for centuries *after* the American Revolution. And this history also tells an unusual tale – one that is not necessarily tied to revolutionary movements, and yet also cannot be dismissed as just an emulation of those constitutional movements that arose out of revolutionary vacuums.¹⁸⁹

¹⁸² Italian Constitution, Art 70.

¹⁸³ *ibid* Arts 94, 95.

¹⁸⁴ *ibid* Arts 83.

¹⁸⁵ *ibid* Art 135.

¹⁸⁶ *ibid* Art 92.

¹⁸⁷ *ibid* Art 136.

¹⁸⁸ See n 6 above.

¹⁸⁹ D. Grimm, n 4 above, 13.

Algorithmic Security: Issues and Policy Outlook

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Abstract

The subject of the paper is security in the field of intelligent robotics and algorithms. As there is currently no already existing legal framework, this paper takes as its point of departure an examination of regulatory solutions and application experience gained in the areas of information society services and automated processing of personal data, marked by the steady introduction of an articulated set of obligations with regard to security and controls incumbent on the protagonists of technological innovation. From a policy standpoint, the paper proposes the adoption of a similar approach informed by the principles of prevention and precaution while ensuring that constitutional values and the protection of the human person always remain a priority.

I. Issues

The new digital economy¹ is marked by the spread of algorithmic processing of data, which is of key importance in three main contexts.

Firstly, in the provision of information society services: think, for example, of algorithmic data processing underlying search engine services or the automated computational analysis of information in digital format underlying online content sharing services.

The second context concerns the applications of new forms of artificial intelligence and robotic technology, more or less autonomous, in the processes of the production of goods and supply of services. This is a sector in constant growth and has assumed a significant social function, which is more visible when robotics and artificial intelligence (AI) affect constitutionally protected rights such as, for example, the right to life and health of individuals (think of the development of healthcare robots, cases of use of surgical robots and the spread of self-driving cars, which will lead to a reduction in the number of accidents and increased road traffic safety). But it is also a feature of applications that affect the functioning of government or developed for industrial use, if one considers just the impact on

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¹ Data is the resource of the new digital economy: see 'The world's most valuable resource is no longer oil, but data' *The Economist* (2017). In doctrine, for all, see, V. Ricciuto, 'La patrimonializzazione dei dati personali. Contract and market in the reconstruction of the phenomenon', in V. Cuffaro et al eds, *I dati personali nel diritto europeo* (Torino: Giappichelli, 2019), 23.

administration and working conditions.

Finally, technological innovation implies and implements continuous algorithmic processing of personal data that now permeate the lives of individuals: car robots that record data that allow one to reconstruct the behaviour of users, robot-assistants that detect the emotions of the elderly, children or patients and digital home assistants that listen to our most intimate conversations.

In this articulated scenario there comes a need to minimise the social (and hence not only economic) costs of the damage stemming from the algorithmic processing of data, adopting policies of prevention and security and that empower the persons involved. The relevance of the question is all the more evident when one reflects on the fact that it transcends the dimension of the economic interests tied to the algorithmic processing of data to extend to values more closely connected to the freedoms and fundamental rights of the person that can be harmed, such as the security of individuals, their health, private life and the protection of personal data, integrity, dignity, self-determination and non-discrimination.

From the perspective described just now of key importance is the issue of security obligations and controls on algorithmic data processing, internal to the system so to speak, ie incumbent on the actors involved in the process of technological innovation and informed by the principles of prevention and precaution.² In other words, obligations and controls are aimed at reducing the risks associated with algorithmic data processing and the dangers (not always foreseeable) of damage that can flow therefrom for the fundamental rights and freedoms of individuals, irrepressible in a society inspired by increasingly intense safeguards in terms of solidarity and personalism.³

² As is well known, the principle of prevention operates in the case of a concrete and imminent danger (in this case, for the rights and freedoms of the interested parties, consequent to the processing of personal data) and translates, among other things, into the obligation to adopt the security and caution measures necessary to avoid the occurrence of the damage. The precautionary principle, on the other hand, originates from the acquired awareness that scientific knowledge is not able to determine with certainty the harmful consequences and risks connected to the exercise of certain activities (for example, consider a processing of personal data in which a new technology is used on a large scale). The doctrine has revealed how the rule of precaution is already inherent in the private discipline of civil liability, being now identified, from time to time, in the discipline of damage from dangerous activities as per Art 2050 Civil Code (U. Izzo, *La precauzione nella responsabilità civile: analisi di un concetto sul tema del danno da contagio per via trasfusionale* (Padova: CEDAM, 2007), 642; F. Santonastaso, 'Principio di «precauzione» e responsabilità d'impresa: rischio tecnologico e attività pericolosa «per sua natura». Prime riflessioni su un tema di ricerca' *Contratto e impresa/Europa*, 21 (2001)); now in the institution of culpability, understood, in particular, as qualified fault in relation to the conditions and capacity of the person acting as agent (C. Castronovo, 'Sentieri di responsabilità civile europea' *Europa e diritto privato*, 787 (2008). More generally, see the observations of E. Del Prato, 'Il principio di precauzione nel diritto privato: spunti' *Rassegna di diritto civile*, 634 (2009); L. Rossano, 'Principio di precauzione e attività d'impresa' *Rivista critica del diritto privato*, 65 (2016)).

³ On this point, see, for all, P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 433; Id, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1972), 133; Id, *La persona e i suoi diritti. Problemi del diritto civile* (Napoli: Edizioni

The study of the subject will start from a brief examination of the current Italian-European regulatory framework, in the specific sectors of the provision of information society services and automated processing of personal data which are – at present – those among the three mentioned above to have received express consideration by lawmakers. In those contexts, the attention paid to the particular impact of new technologies and their damaging potential has led to the creation of a solid network of internal controls, ie entrusted, respectively, to Internet service providers and those who engage in processing (data controllers and – in some limited cases – data processors). With regard to the still unregulated area of the artificial intelligence systems, it will be intended, subsequently, to verify, in a perspective *de iure condendo*, the practicability of an analogous approach inspired by the principles of prevention and precaution, always assuming as priority the constitutional values and the protection of the human person.

II. Controls and Security in Electronic Commerce Law

In Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, transposed in Italy with decreto legislativo 9 April 2003 no 70, the issue of security and internal controls is only marginally addressed and is connected to that of the civil liability of Internet service providers. In fact, the rules clearly exempt service providers from a general obligation to monitor the information which they transmit or store on the network and from a general obligation to actively seek facts or circumstances indicating the presence of illegal activities (Arts 15 of Directive 2000/31/EC – Art 17 of decreto legislativo no 70/2003),⁴ as such obligations are considered as imposing

Scientifiche Italiane, 2005); F. Parente, 'La persona e l'assetto delle tutele costituzionali', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2012), 14; according to Corte di Cassazione 16 October 2007 no 21748, *Diritto di famiglia e delle persone*, I, 107 (2008), with commentary by F. Gazzoni, 'Sancho Panza in Cassazione (come si riscrive la norma dell'eutanasia, in spregio al principio di divisione dei poteri)', the personalistic principle 'animates our Constitution, which sees in the human person an ethical value in itself, prohibits any exploitation of the same for any purpose heteronomous and absorbing, conceives the solidarity and social intervention in function of the person and his development and not vice versa, and looks to the limit of "respect for the human person" '; P. Perlingieri and P. Femia, 'Nozioni introduttive e principi fondamentali', in P. Perlingieri ed, *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2017), 14, 18, recognize that the hierarchy of values does not contain the a priori solution of any possible conflict of interest, but it is certain that 'a balance that damages health to the benefit of the wealth of others is incorrect, because the situations of the person prevail over those of the heritage'.

⁴ Art 15(1) of Directive 2000/31/EC (No general obligation to monitor) provides that: '1. Member States shall not impose a general obligation on providers, when providing the services covered by Arts 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. 2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their

an unrealistic burden from a technical and legal standpoint. This position was also formally confirmed recently by Directive 2019/790/EU on copyright and related rights in the single digital market, which specifies that the obligations imposed by the new legislation on providers of online content sharing services do not entail any general obligation to monitor the information stored.

The special rules on the civil liability of Internet service providers (Arts 12-14 of Directive 2000/31/EC – Arts 14-16 of decreto legislativo no 70/2003) are based on the principle of negligence⁵ and call the various providers to account for the failure to comply with the duty of care⁶ incumbent on them as professional operators. A duty that is shaped and calibrated by law on the basis of the activity carried out (*mere conduit*,⁷ *caching*⁸ and *hosting*).⁹ This has resulted in stringent

request, information enabling the identification of recipients of their service with whom they have storage agreements’.

⁵ For a subjective type of connection criterion, the first commentators expressed as follows: among others, G. Ponzanelli, ‘Verso un diritto uniforme per la responsabilità degli internet service providers’ *Danno e responsabilità*, 10 (2002); 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), 195, 140; G.M. Riccio, *La responsabilità civile degli internet providers* (Torino: Giappichelli, 2002), 57; Id, ‘La responsabilità civile degli Internet Providers alla luce della direttiva n. 2000/31/CE’, in S. Sica and P. Stanzone eds, *Commercio elettronico e categorie civilistiche* (Milano: Giappichelli, 2002), 391; G. Giacobbe, ‘La responsabilità civile per l’uso di Internet’, in V. Ricciuto and N. Zorzi eds, *Il contratto telematico* (Padova: CEDAM, 2002), 222; F. Signorelli, ‘Profili di responsabilità del provider nell’e-commerce’, in V. Franceschelli ed, *Commercio elettronico* (Milano: Giuffrè, 2001), 570, 571; M. Astone, ‘La responsabilità del prestatore di servizi della società di informazione nella direttiva 2000/31/CE’ *Europa e diritto privato*, 446 (2002); A. Piazza, ‘La responsabilità civile dell’Internet Provider’ *Contratto e impresa*, 147 (2004). They speak of specific fault of the intermediary and that is of fault for violation of the law R. Bocchini, *La responsabilità civile degli intermediari del commercio elettronico. Contributo allo studio dell’illecito plurisoggettivo permanente* (Napoli: Edizioni Scientifiche Italiane, 2003), 13, 14; F. Di Ciommo, ‘La responsabilità civile in Internet: prove di governo dell’anarchia tecnocratica’ *Responsabilità civile*, 562 (2006); Id, *Evoluzione tecnologica e regole di responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 294, 295; L. Bugiolacchi, ‘La responsabilità dell’host provider alla luce del d.lgs. n. 70/2003: esegesi di una disciplina “dimezzata”’ *Responsabilità civile e previdenza*, 193 (2005). For the reference to the concept of professional negligence with particular regard to the provider’s non-contractual liability, see M. Franzoni, ‘Fatti illeciti. Art 2043, 2056-2059’, in F. Galgano ed, *Commentario al codice civile Scialoja-Branca* (Bologna-Roma: Zanichelli, 2004), 169; M. Gambini, *Le responsabilità civili dell’Internet service provider* (Napoli: Edizioni Scientifiche Italiane, 2006), 333.

⁶ For the extensive application of Art 1176 of the Civil Code also in matters of non-contractual offences: see L. Mengoni, ‘Obbligazioni “di risultato” e obbligazioni “di mezzi” Studio critico’ *Rivista di diritto commerciale*, I, 205 (1954); L. Corsaro, ‘Colpa e responsabilità civile: l’evoluzione del sistema italiano’ *Rassegna di diritto civile*, 298 (2000); A. Ravazzoni, ‘Diligenza’ *Enciclopedia giuridica Treccani* (Roma: Treccani, 1989), XI, 1; M. Bussani, *La colpa soggettiva. Modelli di valutazione della condotta nella responsabilità extracontrattuale* (Padova: CEDAM, 1991).

⁷ Art 12 of Directive 2000/31/EC (Responsibility in the activity of simple transport – Mere conduit): ‘1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

obligations to take action and cooperate with the courts or administrative supervisory authorities in tackling offences committed on the network.

These obligations imply a limited form of monitoring by the Internet operators on the information transmitted or stored, which are referred exclusively to the phase following the commission of the offences, ie when a violation is ascertained or at least presumed. This was stated in the first Supreme Court judgment in

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement'. On the differences between the liability regime of the e-commerce directive for access providers and hosting providers, see European Court of Justice 15 September 2016, C-484/2014, *Repertorio del Foro italiano*, 2016, under voice *Unione europea*, no 1441).

⁸ Art 13 of Directive 2000/31/EC (Responsibility for temporary storage activities – Caching): '1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement'.

⁹ Art 14 of Directive 2000/31/EC (Responsibility for information storage activities – Hosting): '1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information'.

Italy¹⁰ on the liability of hosting providers.

Since 2000 the rightholders of infringed rights have encountered practical difficulties in making Internet service providers liable for infringements carried out through the new services offered to users on the Internet.¹¹ That situation and the necessity to give an adequate response to the requirement for greater security of the Internet advocated by civil society have given rise in various respects to a need to bring forward the protection against online offences to a time preceding actual commission of those offences. This naturally implies more monitoring of the contents present on the web.

In response to this need, the most recent legislative and case law developments – at domestic and European level¹² – would seem to tend towards entrusting Internet service providers with broad prevention and monitoring functions, requiring them to adopt new filtering measures and specific obligations to block, remove and disable access to illegal information in order to prevent or end its further circulation.

III. Security of Internet Services: a) Online Content Filtering

From this perspective, it is a matter of verifying the feasibility and reasonable limits of general filtering and blocking obligations incumbent on Internet service providers, whereby it would be expected that the providers – normally involved when a violation is ascertained or at least presumed – would take action at a stage prior to the infringement itself, ie not only to put an end to it but also to prevent its actual commission in the future. The issue is of key importance and not easy to resolve.

¹⁰ Corte di Cassazione 19 March 2019 no 7708, *Foro italiano*, I, 2045 (2019), with commentary by F. Di Ciommo, 'Oltre la direttiva 2000/31/Cee, o forse no. La responsabilità dei provider di Internet nell'incerta giurisprudenza europea', which considers the concept of 'active hosting provider' to be a port of call now established at Community level: (European Court of Justice 7 August 2018, Case C-521/17, *Coöperatieve Vereniging SNB-REACT UA v Deepak Mehta*, *Diritto e giustizia*, 2018; European Court of Justice 14 June 2017, Case C-610/15, *Stichting Brein*, *Repertorio del Foro italiano*, 2017, voce *Unione europea*, no 1247); European Court of Justice 11 September 2014, Case C-291/13, *Sotiris v Papasavvas*, available pluris-cedam.utetgiuridica.it; European Court of Justice 12 July 2011, Case C-324/09, *L'Oreal v Ebay International*, in *Annali italiani del diritto d'autore* (Milano: Giuffrè, 2011), 480; European Court of Justice 23 March 2010, Case C-236/08-C-238/08, *GOOGLE France*, *Foro italiano*, IV, 458 (2010).

¹¹ The reference is to the huge digital platforms constantly fed by materials uploaded by users and therefore qualified as UGC – User Generated Content, including for example Google video and YouTube, but also the same social networks); the services of indexing, cataloguing, selecting and organizing information carried out by search engines, which are also commercially exploited for the placement of advertising messages or for connecting to content that responds to searches made by the user, and the spread of new technologies for sharing online and cloud services provided by online intermediaries, which significantly change the way of access and use of content.

¹² On which see, *infra* and para 4.

As regards filtering obligations,¹³ the main legal obstacle to their general applicability is Art 15 of the e-commerce directive, which as stated above prohibits the imposition on intermediary service providers of measures which constitute an obligation to actively and generally monitor the information transmitted or stored.

Neither can any support for imposing generalised filtering obligations on Internet service providers be gleaned from the fact that the most recent specific legislation¹⁴ on combating the sexual exploitation of children and child pornography, including on the Internet, and on online gambling and betting has imposed on intermediary service providers an obligation to adopt appropriate filtering tools (in addition to a series of information obligations). Leaving aside the fact that those provisions cover just some specific sectors, they are postulated on definite and objective parameters in the shape of a legal prohibition on the sexual exploitation of minors and unauthorised gambling, which facilitate the detection of violations committed. Definite and objective parameters that on the other hand are lacking with regard to other types of violations such as, for example, those relating to intellectual property rights. In addition to being capable of referring across the board to every product or service offered on the web, infringements of that type require an assessment whose boundaries are uncertain and variable boundaries. Furthermore, there is a need to proceed each time to compare the product or service against those protected by the intellectual property rights of others and to separate infringements from lawful uses associated with, for example, exercise of the right of criticism,¹⁵ and from cases of works in the public domain or made available to the public by their author.¹⁶

Moreover, leaving aside the technical difficulty of adopting effective and flawless filtering systems (given the fact that it is impossible to monitor all existing servers, to monitor systematically all content and to safely distinguish between lawful and unlawful material), the European Court of Justice has repeatedly pointed

¹³ On filtering systems, see F. Merla, 'Attività di "filtraggio" dei contenuti on-line, diritti di privativa e libertà di impresa' *Diritto e informatica*, 462, 475 (2012); V. Raggi, 'Brevi note sull'attività di filtraggio dei contenuti informativi veicolati in rete' *Diritto e informatica*, 292, 293 (2011); G. Finocchiaro, 'Filtering e responsabilità del provider' *Annali italiani del diritto d'autore, della cultura e dello spettacolo* (Milano: Giuffrè, 2010), 340; F. Di Ciommo, 'Programmi-filtro e criteri di imputazione/esonero della responsabilità on-line. A proposito della sentenza Google/Vivi Down' *Diritto e informatica*, 829 (2010).

¹⁴ See legge 6 February 2006 no 38, containing 'Provisions on the fight against the sexual exploitation of children and child pornography, including via the Internet'; and legge 23 December 2005 no 266 ('2006 Finance Law', on online gambling and betting and the related implementing ministerial decree (decreto ministeriale 7 febbraio 2006 of Italian Economy and Finance Ministry-AAMS), in particular, Arts 3 and 4.

¹⁵ On the difficulties encountered by the service provider called upon to assess the lawfulness/illicitness of the content submitted by users, see, lastly, Tribunale di Roma ordinanza 1 February 2019, *Foro italiano*, I, 2065 (2019), which excluded the filtering role of the caching provider, which manages an automatic service (Google My Business) consisting in the creation of a card on the activity of a professional.

¹⁶ As you can read in the remittance ordinances Tribunale Amministrativo Regionale Lazio-Roma ordinanza 26 September 2014 no 10016 and no 10020, both in www.federalismi.it.

out that such systems involve complex and costly burdens to the detriment of the freedom to conduct a business of intermediary service providers. Worth citing in this regard are the *Sabam* cases, where a copyright collection society representing authors, composers and publishers of musical works was pitted against an access and a hosting provider respectively.¹⁷ The Court has also highlighted that, from a legal point of view, these filtering technologies can affect the right to secrecy in communications and the protection of personal data of users as well as violate users' freedom of information since they are not able to adequately distinguish between illegal content and legal content. Furthermore, it has been sanctioned the incompatibility of preventive filtering systems against copyright infringement on the Internet with the principle that there is no general monitoring obligation to monitor. In other words, systems which apply without distinction to all users and without time limits at the sole expense of the service provider (access or hosting). In so doing the Court offers a useful interpretation of the principles of proportionality, reasonableness and appropriateness,¹⁸ which must inform any measures to prevent infringements of intellectual property rights, having regard to Art 3 of Directive 2004/48/EC.

However, in addition to the business advantage of enjoying greater 'credibility' among users for Internet service providers that undertake some form of filtering of content and/or users, it is arguable that providers, in particular hosting providers who in the conduct of their business fail to adopt generally used and currently technically feasible filtering systems, should be held liable for a failure to comply with the duty of care¹⁹ incumbent on them as professional operators. The rules governing the civil liability of Internet service providers can be considered as underpinned by the overriding principle that in situations that are potentially harmful to users, the operator is required to take steps to prevent the occurrence (and/or continuation) of the harmful event. This because he is the only person

¹⁷ See European Court of Justice 16 February 2012, Case C-360/10, *Netlog NV v Sabam* and European Court of Justice 24 November 2011, Case C-70/10, *Scarlet Extended SA v Sabam*, *Foro italiano*, IV, 297 (2012), with commentary by M. Granieri, 'La fine è nota: diritto d'autore, evolucionismo giuridico e i meccanismi spontanei di aggiustamento del mercato'; in argomento anche G. Colangelo, 'Internet e sistemi di filtraggio tra enforcement del diritto d'autore e tutela dei diritti fondamentali: un commento ai casi Scarlet e Netlog' *Nuova giurisprudenza civile commentata*, II, 580 (2012).

¹⁸ With regard to the principle of proportionality, which has become part of our system mainly through the elaboration by the European Court of Justice, see P. Perlingieri, *Il diritto civile* n 3 above, 379. On the selective and guiding function of the principle of reasonableness in the balancing of interests operations, see P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 158, 516; for a reconstruction of the balancing technique according to reasonableness, see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 102.

¹⁹ For a reference to average or professional diligence with specific regard to the filtering obligations of Internet service providers, see the observations di A. Musso, 'La proprietà intellettuale nel futuro della responsabilità sulla rete: un regime speciale?' *Diritto e informatica*, 800 (2010).

able to take appropriate action or in any case the one best placed to do so.²⁰

Of note in this regard is the recent directive on copyright protection in the digital market, Art 17 of which provides that providers of online content sharing services are to be held liable if, in the absence of the authorisations provided for, they fail to demonstrate that they have made the best efforts in accordance with high industry standards of professional diligence to ensure that their services do not contain works and other specific material protected by copyright uploaded by users. One would suppose *inter alia* that this can be pursued through the adoption of filtering measures identified and specifically calibrated in the light of the principles of proportionality and reasonableness.

From this standpoint one can therefore only welcome the voluntary initiatives, increasingly taken by online platforms, in the form of the advance adoption or provision to users of content filtering systems to increase the level of security of their services.²¹

However, at the same time, one must agree with the recent statement in Commission Communication COM(2017)555 of 28 September 2017 that – after noting that

‘in the light of technological progress in information processing and artificial intelligence, the use of automatic detection and filtering technologies is becoming an even more important tool in the fight against illegal content online’

– has rightly ruled out ‘that this may in itself imply by contrast losing the benefit of the liability exemption’ enshrined in the legislation on electronic commerce.²² Arguing to the contrary would give rise to the paradoxical situation in which the adoption of a filtering system, instead of demonstrating the care exercised by the hosting provider, would on the contrary entail liability for having interfered with the contents. That could encourage hosting providers not to equip themselves with any tool to monitor or filter the contents that they store and, consequently, not to invest in the research and development of safe systems out of the fear that

²⁰ For the general configurability of such liability on the part of the person who fails to perform an activity that is not risky for him and not binding enough to avoid damage to third parties, cf P. Trimarchi, ‘Illecito (diritto privato)’ *Enciclopedia del diritto* (Milano: Giuffrè, 1970), XX, 100. It bases its redefinition, in a functional key, of the civil responsibility on the recall to the imperative duties of solidarity of which to the Art 2 Italian Constitution, S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffrè, 1964), 89. For a fair balance between social solidarity and individual freedom, see L. Bigliazzi Geri, U. Breccia, F.D. Busnelli and U. Natoli, *Diritto civile*, III, *Obbligazioni e contratti* (Torino: Giappichelli, 1989), 705.

²¹ On voluntary practices, see M.L. Montagnani, *Internet, contenuti illeciti e responsabilità degli intermediari* (Milano: Giuffrè, 2018), 159.

²² *Contra* Tribunale di Roma 16 December 2009, *Annali italiani del diritto d'autore, della cultura e dello spettacolo* (Milano: Giuffrè, 2010), 1372.

‘they will be blamed for their active participation in the offence and will therefore be charged with full legal liability for the damage caused’.²³

Thereby sacrificing of the general need for prevention and security on the Internet.

IV. *Continued.* b) Blocking Systems

The use of systems for blocking intermediated content and/or websites, particularly in the area of copyright protection in the digital marketplace,²⁴ is increasingly gaining ground in our legal system (national and European), both at the legislative and caselaw level, although it is not easy to place it within the broader framework of protecting the other interests involved falling outside the realm of intellectual property law itself.²⁵ In fact, the threats that can be posed by those systems to online freedom and the ease with which they can be abused are all too evident whenever, due to their wide pervasive effect, they go beyond the purpose that they are intended for and end up preventing access to or

²³ So, textually, F. Di Ciommo, ‘Programmi-filtro’ n 13 above, 829, to the detriment of the general requirements of prevention and security on the Internet. See also, Tribunale di Roma 13 December 2011, *Diritto e informatica*, 462 (2012), with commentary by F. Merla, ‘Attività di “filtraggio”’ n 13 above, 475.

²⁴ On intellectual property in the information society, see M.L. Montagnani, *Il diritto d'autore nell'era digitale. La distribuzione online delle opere dell'ingegno* (Milano: Giuffrè, 2012); V. Allotti, ‘Il diritto d'autore di fronte alle nuove tecnologie’ *Rivista di diritto commerciale*, I, 817 (1996); A. Fragola, ‘Sui (non facili) rapporti tra Internet e diritto d'autore’ *Il diritto di autore*, 12 (1999); M. Fabiani, ‘Diritto d'autore e accesso a Internet’ *Rivista di diritto commerciale*, 267 (2001); S. Ercolani, ‘Il diritto d'autore: la legge italiana e le linee di evoluzione nella società dell'informazione’ *Rivista di diritto commerciale*, I, 19 (2001); P.A.E. Frassi, ‘Riflessioni sul diritto d'autore. Problemi e prospettive nel mondo digitale’ *Rivista di diritto industriale*, 370 (2002); P. Autieri, ‘Il paradigma tradizionale del diritto d'autore e le nuove tecnologie’, in M. Borghi and M.L. Montagnani eds, *Proprietà digitale. Diritto d'autore, nuove tecnologie e digital rights management* (Milano: Giuffrè, 2006), 23; S. Lavagnini, ‘La proprietà intellettuale in Internet’ *Annali italiani del diritto d'autore*, 220 (2009); D. Mula, ‘La responsabilità e gli obblighi degli Internet provider per violazione del diritto d'autore’ *Rivista di diritto industriale*, 252 (2010); N. Bottero, ‘Le nuove prerogative d'autore nell'era di Internet’ *Giurisprudenza italiana*, 1953 (2011); M. Ricolfi, ‘Diritto della proprietà intellettuale e WEB 2.0’ *Giurisprudenza italiana*, 1943, 1944 (2011). On the crisis of the traditional system of copyright protection as a result of the generalised ease of dissemination and reproduction of protected works, see M. Libertini, ‘Contraffazione e pirateria’ *Annali italiani del diritto d'autore*, 215 (2007); V. Zeno-Zencovich, ‘Diritto d'autore e libertà di espressione: una relazione ambigua’ *Annali italiani del diritto d'autore*, 152 (2005); A. Musso, n 19 above, 797; M. Gambini, ‘Diritti di proprietà intellettuale in Rete: criticità e prospettive degli strumenti di tutela nei confronti dei prestatori di servizi Internet’ *Rassegna di diritto civile*, 135 (2016).

²⁵ A. Bertoni and M.L. Montagnani, ‘Il ruolo degli intermediari internet tra tutela del diritto d'autore e valorizzazione della creatività in rete’ *Giurisprudenza commerciale*, I, 451, 1452 (2013) highlights that these inhibitory means, in addition to clashing with fundamental rights, such as freedom of expression and confidentiality of users and economic initiative of operators, ‘do not even appear to be able to implement concepts proper to the discipline of copyright such as private use and fair use’.

circulation of content, including lawful material, that has nothing to do with the alleged infringement.

For some time now in Italy the courts, even if with little success in practice, have intervened – for the most part through measures taken in interim proceedings and hence with only summary reasons given – by ordering, depending on the case, the disabling of access links as well as the seizure and blocking from time to time of content, websites, IP addresses and domain names.²⁶

On several occasions the European Court of Justice has ruled in favour of the possibility for rightholders to obtain injunctive relief against Internet service providers aimed at blocking intermediated content and/or sites, in order not only to remove infringements of intellectual property rights already committed but also to prevent new infringements from being committed.²⁷

The core issue is compliance with the principles of proportionality, appropriateness and reasonableness of the blocking remedies to protect the rights of inventors and creators *vis-à-vis* the other fundamental rights at stake: the provider's own freedom to conduct a business, freedom of expression and information, and Internet users' right to the protection of their personal data.

In that regard the Court of Justice has recognised the lawfulness, in principle, of an injunction (provided that it is issued by a court) prohibiting the service provider from granting its subscribers access to a website which posts online material protected by copyright without the consent of the rightholders. This is, however, subject to the condition that such an injunction does not specify the measures to be taken in practice to prevent or at least, make it difficult and discourage unauthorised access to the protected material but leaves it up to the supplier to decide what to do and allow the latter to escape liability by demonstrating that it has taken all reasonable measures, which in any event do not unnecessarily deprive users of the possibility of lawful access to the

²⁶ Tribunale di Teramo ordinanza 11 December 1997, *Rivista di diritto privato*, 637 (1998), with commentary by M. De Mari, *Diffusione di notizie lesive tramite Internet: profili di responsabilità e legge applicabile*; Pretura di Vicenza 23 June 1998, *Diritto e informatica*, 821 (1998); Tribunale di Verona 18 December 2000, *Foro italiano*, I, 2032 (2001) with commentary by F. Di Ciommo, 'Dispute sui domain names, fatti illeciti compiuti via Internet ed inadeguatezza del criterio del locus commissi delicti'; Corte di Cassazione 29 September 2009 no 49437, *Diritto e informatica*, 437 (2010), with commentary by F. Merla, 'Diffusione abusiva di opere in Internet e sequestro preventivo del sito web: il caso «the Pirate Bay»'; Tribunale di Roma 16 December 2009 n 22 above; Tribunale di Roma 11 February 2010, *Diritto e informatica*, 273 (2010), with commentary by L. Guidibaldi, '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'; Tribunale di Roma 22 March 2011, *Diritto e informatica*, 532 (2011); Tribunale di Roma 20 October 2011, *Guida al diritto*, 5, 2 (2013). *Contra*, Tribunale di Milano 3 June 2006, *Diritto dell'internet*, 557 (2006), with commentary of G. Dalia, 'Quando lo streaming di calcio non è illegale'; Tribunale di Roma 11 July 2011, *Rivista di diritto industriale*, II, 19 (2012).

²⁷ European Court of Justice 12 July 2011, Case C-324/09, available at tinyurl.com/y9v5lfdv (last visited 7 July 2020); European Court of Justice 27 March 2014, Case C-314/12, *UPC Telekabel v Constantin Film*, *Foro italiano*, IV, 363 (2014), with commentary of G. Dorè, 'In tema di diritti d'autore', on which see, *infra*, in the text.

information available. In this way, the Court offers domestic courts – called upon to make a considerable interpretative effort in determining the content of the specific injunctions to be issued in the individual case – the interpretative key to the correct implementation of the principles of proportionality, appropriateness and reasonableness to which the blocking remedies designed to protect intellectual property protection in the digital field must be subject. Additionally, the Court has set the degree of professional care that the service provider is called upon to exercise in furtherance of the injunction issued against it. In short, the latter has the power to adopt the measures that best suit its resources and abilities and that are strictly justified in the light of the objective pursued, without however unnecessarily and unjustifiably sacrificing the other two conflicting fundamental freedoms: the provider's own freedom to conduct a business and Internet users' freedom of expression and information, which must be guaranteed to the maximum.

On the regulatory level Art 17 of the recent Directive 2019/790/EU calls on online content-sharing service providers to cooperate with rightholders to avoid that their services include works and other copyright-protected material uploaded by users of those services, in the absence of the required authorisations, expressly providing that such cooperation may lead to the disabling of access or removal of content. It provides that the providers will be held liable if they fail to demonstrate that they have made their best efforts in accordance with high industry standards of professional diligence to ensure that works and other specific materials for which they have received the relevant and necessary information from rightholders are not available. In any event the providers will be liable if they do not prove that they acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads.

Moreover, Italian lawmakers – exercising the discretion granted to individual legal systems by Arts 12 to 14 of the directive on electronic commerce – had already provided in Arts 14, para 3, 15, para 2 and 16, para 3 of decreto legislativo no 70/2003 that

‘a court or administrative authority with supervisory functions may require, including as a matter of urgency, that the provider ... prevent or terminate the infringements committed’.²⁸

²⁸ With regard to the exemption from liability of intermediary service providers provided for in Directive 2000/31/EC, recital 45 states that such limitations should leave ‘without prejudice to the possibility of inhibitory actions’ which ‘may, in particular, be orders from courts or administrative authorities requiring an infringement to be brought to an end or prevented, including by removing or disabling access to unlawful information’. In doctrine, see U. Ruffolo, ‘Nuove tecnologie: questioni antiche e nuove tutele’, in A. Palazzo and U. Ruffolo eds, *La tutela del navigatore in Internet* n 5 above, 286.

Therefore, injured parties are afforded the opportunity to obtain injunctions against network operators even though the latter could well not be held liable for the harmful conduct of users where the conditions exempting them from liability under the aforementioned legislation are fulfilled.²⁹ This is because they are in the best position not only to put an end to the infringements already committed by users through the Internet services provided to them but also to prevent new infringements (in terms of preventive action and advance safeguards).³⁰

V. Security of Data and Systems in Automated Processing of Personal Data

Moving on to the automated processing of personal data, EU law (in the shape of Regulation (EU) 2016/679/EU – General Data Protection Regulation, hereinafter the ‘Regulation’) addresses the harm that may result from the processing of personal data in violation of regulatory provisions, primarily in terms of prevention by providing for the allocation of the related risks and only as an alternative in terms of remedying the harm caused. The model of protection adopted is based on the principle of liability³¹ of those who are involved in the processing of personal data in connection with a commercial or professional activity,³² principally the data controller and to a limited extent the data processor.

²⁹ As recital 40 of Directive 2000/31/EC recognises, it is in the interest of all parties active in the provision of information society services – and therefore also of Internet service providers, by virtue of their technical and economic position – to establish and implement rapid and reliable systems capable of removing unlawful information and disabling access to it and in the interest of all concerned, to develop and make effective use of ‘technical protection and identification systems and technical monitoring tools made possible by digital technology, within the limits set by Directives 97/46/EC and 97/66/EC’, on the subject of confidentiality. For the connection of the provisions of the regulation of electronic commerce with the regulations (national and European) on copyright and with the code of industrial property that, in the digital field, identify the Internet service providers – whose services are used by third parties to violate an intellectual or industrial property right – as possible addressees of injunctions, it is allowed to refer to M. Gambini, ‘Diritti di proprietà intellettuale’ n 24 above, 169.

³⁰ However, they express doubts about the effectiveness of copyright protection in the information society, P. Sirena, ‘L’efficienza dei rimedi civilistici a tutela del diritto d’autore: prospettive di una ridefinizione sistematica’ *Annali italiani del diritto d’autore*, 527 (2003); A. Musso, ‘La proprietà intellettuale’ n 19 above, 815.

³¹ On the principle of accountability, see G. Finocchiaro, *Privacy e protezione dei dati personali. Disciplina e strumenti operativi* (Bologna: Zanichelli, 2012), 289; Id, ‘Introduzione al regolamento europeo sulla protezione dei dati’ *Nuove leggi civili commentate*, 10 (2017); C. Bistolfi, ‘Le obbligazioni di compliance in materia di protezione dei dati personali’, in L. Bolognini et al eds, *Il regolamento privacy europeo, Commentario alla nuova disciplina sulla protezione dei dati personali* (Milano: Giuffrè, 2016), 321; see also F. Di Cionno, ‘Civiltà tecnologica, mercato e insicurezza: la responsabilità del diritto’ *Rivista critica di diritto privato*, 590 (2010); M. D’Ambrosio, *Progresso tecnologico, “responsabilizzazione” dell’impresa ed educazione dell’utente* (Napoli: Edizioni Scientifiche Italiane, 2017), 17. See also European Commission opinion 3/2010 WP-173 of 13 July 2010, available at tinyurl.com/yb2xdfz2 (last visited 10 July 2020).

³² Art 2, para 2, letter c) of the Regulation expressly excludes from its scope processing

The risks that arise from automated processing and the costs of mitigating, as a preventive measure, harm to the fundamental rights and freedoms of the individual are transferred to those persons.

This dual approach consisting of making those who process data accountable to the maximum and at the same time emphasising prevention of possible harm encompasses a number of precise obligations as to security³³ and controls under EU law, incumbent mainly on the data controller, in order to safeguard the rights of data subjects and the free movement of data.³⁴ The Regulation significantly extends the scope of those obligations and specifies the professional diligence that those involved in the processing of data must display so as to ensure the protection of the rights and freedoms of individuals and the full attainment of the purposes pursued by the law.³⁵

The security rules are set out initially in Art 24 of the Regulation, which requires the data controller to implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with the provisions of the Regulation.

Art 25 of the Regulation, building upon what is stated in Art 24 and in implementation of the principle of data protection by design, extends that data controller's obligation to the initial design phase, requiring the integration of the measures themselves into the very structure of the computerised service it is intended to achieve. In addition, the data controller is required to adopt suitable default settings to limit processing to necessary data only, reducing the storage time and access by third parties, according to the principle of privacy by default. This, depending on the security of personal data and systems used in processing.³⁶

operations carried out in the exercise of activities which are exclusively personal or domestic in nature and therefore have no connection with the commercial or professional activity pursued by the person concerned (see recital 18 of the Regulation).

³³ V.F. Bravo, 'L'«architettura» del trattamento e la sicurezza dei dati e dei sistemi', in V. Cuffaro et al eds, *I dati personali nel diritto europeo* (Torino: Giappichelli, 2019), 775.

³⁴ The combination of the two objectives – one of a non-asset nature: the protection of individuals with regard to the processing of personal data; and the other, more markedly mercantile: the free movement of personal data – already set out in Directive 95/46/EC – is an unavoidable feature of the new rules (see Art 1 of the Regulation, on the subject matter and purpose of the new legislative intervention). In this respect, see G. Finocchiaro, 'Quadro d'insieme sul regolamento europeo sulla protezione dei dati personali', in G. Finocchiaro ed, *Il nuovo regolamento europeo sulla privacy e sulla protezione dei dati personali* (Bologna: Zanichelli, 2017), 1; V. Ricciuto, 'La patrimonializzazione dei dati personali. Contratto e mercato nella ricostruzione del fenomeno', in V. Cuffaro et al eds, *I dati personali* n 33 above, 23.

³⁵ V.F. Bravo, n 33 above, 785, on the use of security regulations to protect the market, also in the light of Directive 2016/1148/EU (Networking and Information Security Directive, NIS Directive), implemented by decreto legislativo 18 May 2018 no 65, which, in Art 14, imposes on digital service providers the obligation to adopt technical and organizational measures adequate and proportionate to the management of risks relating to the security of the network and information systems they use in the context of the supply of services in the online market; to the online search engine, to cloud computing services.

³⁶ Cf F. Piraino, 'Il Regolamento generale sulla protezione dei dati personali e i diritti dell'interessato' *Nuova giurisprudenza civile commentata*, 388 (2017).

The foregoing obligations can be viewed in the wider context of the more general security obligation enshrined in Art 32 of the Regulation: in order to ensure a level of security appropriate to the risk to the rights and freedoms of individuals, the data controller is obliged to select and adopt appropriate technical and organisational measures, in order to prevent loss, destruction and accidental or illegal disclosure or access to the personal data processed. The Regulation itself indicates certain technical and organisational security measures, for example, in Art 32(1) where (in subpara a)) pseudonymisation and encryption are mentioned and likewise (in subpara b)) confidentiality, integrity, availability and resilience of processing systems and services. However, on the whole, European lawmakers have chosen not to set out a list of typical measures to be implemented.

Moreover, there is no longer any reference in the Regulation to minimum security measures, unlike in decreto legislativo 30 June 2003 no 196 (Data Protection Code), replaced by a reference to the appropriateness of the measures themselves. This is an indicator of the clear choice made by EU law to avoid a situation where the measures in concrete terms adopted must meet predetermined canons and correspond to a predefined list. By contrast measures are concretely identified and modulated in accordance with the principles of proportionality and reasonableness.

Additionally, the Regulation imposes an analogous security obligation also on the persons in charge of the activities carried out on behalf of the data controller in cases where the organisational measures adopted envisage such an appointment. With reference to the security measures, therefore, the responsibilities can be divided between the data controller and the data processor.

Once the technical and organisational security measures to be adopted have been established, the data controller is obliged to review and update them, if necessary in response to the increasingly pressing demands of technological development, and to test, verify and regularly evaluate their effectiveness (recital 74 of the Regulation) with particular regard to the security measures adopted (Art 32(d) of the Regulation itself). In this context, the Regulation (Art 28(3)(h)) provides that the data controller may carry out audits, including inspections, either itself or on through another person, since those activities are in fact the only ones that the data controller may delegate.

Furthermore, when the type of processing is likely to result in a high risk for the rights and freedoms of natural persons, as happens in the case in question due to the use of new technologies, Art 35 of the Regulation requires the data controller to undertake a prior assessment of the impact of processing on data protection.³⁷ It must indicate the nature, object, context and purpose of processing (subparas a) and b)); the identification and assessment of risks (subpara c)); all the measures envisaged to deal with the identified risk, including the security

³⁷ On which see R. Torino, 'La valutazione d'impatto (Data Protection Impact Assessment)', in V. Cuffaro et al eds, *I dati personali nel diritto europeo* n 33 above, 855.

measures (technical and organisational) to be implemented; and it must meet the requirements of the Regulation and demonstrate its compliance therewith (subpara d)). The impact assessment is identified by the law as a fundamental tool available to the data controller to enable it to assess the necessity, proportionality and risks of the processing and to proceed to devise appropriate measures and adequate safeguards for the data subjects.³⁸

If the impact assessment shows a high risk for the rights and freedoms of natural persons, in the absence of the adoption of appropriate measures to mitigate it, the data controller is required, before processing, to consult the supervisory authority in advance, pursuant to Art 36(1) of the Regulation.

All the activities described above must then be properly formalised since the data controller (and, where obliged, the data processor) is required not only to comply with the provisions of the Regulation but must also be able to demonstrate, in a documented manner – hence retaining the relevant evidence – the conformity of the processing carried out with the Regulation itself (Arts 24(1), 32(3) and 35(7)(d) of the Regulation), including the effectiveness of the measures adopted (according to recital 74 of the Regulation).

Finally, with a view as aforesaid to making the data controller more accountable in relation to the security of the processing and the protection of the fundamental rights and freedoms of data subjects, it should be noted that Art 17(2) of the Regulation imposes a further obligation on the data controller that first makes personal data public: the latter must take reasonable measures, including technical one, to inform third parties, who are processing the same personal data further that the data subject has requested the erasure of any links to the personal data in question, or copy or replication thereof.

Overall, the system of controls devised by EU law through the establishment of technical, organisational and security measures to be implemented by the data controller (and to a limited extent also the data processor) reveals a strong focus on the profile of the analysis and management of risks related³⁹ to the automated processing of personal data, which embodies the principles of prevention and precaution. The nature of the activity carried out and the means used entail, in fact, an intrinsic damaging potential since they create a not-always-foreseeable risk of harm to the rights and freedoms of natural persons that can be avoided or at least curbed, precisely, by adopting appropriate preventive and precautionary measures.

The concept of appropriateness embraced by Arts 24, 25 and 32 of the Regulation – interpreted in the light of the extension by EU law of the duty of

³⁸ On which see the Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is 'likely to result in a high risk' for the purposes of Regulation 2016/679, adopted in April 2017 by Art 29 Working Group, available at tinyurl.com/mhprzt5 (last visited 7 July 2020).

³⁹ V.A. Mantelero, 'Responsabilità e rischio nel Regolamento UE n. 2016/679' *Nuova giurisprudenza civile commentata*, 144 (2017).

care incumbent on those involved in the processing – makes it *per se* insufficient that the technical and organisational security measures actually adopted will ensure compliance with the requirements of the laws and regulations on the subject, and hence binding on all operators in a given sector and in relation to all personal data processing carried out in that area. In fact, those measures must be strengthened further (on a voluntary basis) in order to ensure maximum practical effectiveness (see, for example, recital 74 of the Regulation) and must be devised and modulated in practice by the data controller (and possibly also the data processor) on the basis of an assessment of what is best in terms of available technology and implementation costs (see for example, recital 84 of the Regulation) and having regard to proportionality and reasonableness. Those measures must be implemented on a case-by-case basis, taking into account the nature, context, scope and purpose of the single processing and the various and likely risks to the rights and freedoms of natural persons (see recitals 74, 83 and 84 of the Regulation).

An interpretative reading of this type seems moreover to be even more justified today in the light of the principle of liability on which the new protection of personal data is based. That principle requires that the data controller be given an incentive not only to refrain from processing of a type that is detrimental to the rights of data subjects but also to take preventive and precautionary measures aimed at averting the risks and avoiding the damage that may stem from the very processing of data. Without prejudice to the obligation to demonstrate that the processing is performed in accordance with law (Arts 24(1), 32(3) and 35(7)(d) of the Regulation), including as regards the effectiveness of the measures adopted.

Leaving aside for the moment the substantial administrative fines and penalties under Arts 83 and 84 of the Regulation that flow from a failure to adopt the aforementioned technical and organisational security measures, infringement of the relevant implementing measures that the professional operator could and/or should have taken in the knowledge of the risks and dangers involved – which (although not always foreseeable) are typologically connected with its activity – entails aggravated liability on grounds of presumed negligence of the data controller and (to a limited extent) the data processor. Consequently, the latter are obliged to pay compensation in respect of the damage (material and non-material) suffered by the data subject in accordance with Art 82 of the Regulation.⁴⁰ This paves the way – from the perspective of this work – to an evaluation of the diligence exhibited by the data controller (and to a limited extent by the data processor) in implementing the system of controls and security measures required by the legislation.

⁴⁰ For the examination of liability and compensation in the processing of personal data, M. Gambini, *Principio di responsabilità e tutela aquiliana dei dati personali* (Napoli: Edizioni Scientifiche Italiane, 2018).

VI. The Security of Artificial Intelligence Systems

In addition to the matters previously considered and somehow already ‘known’, these past years we have been witnessing the full flourishing of the ‘Internet of Things’ and the growth of the area of service robotics, which exploit intelligent devices able to communicate with each other or interface with humans, to collect data, analyse and process data autonomously and interactively (consider, for example, self-driving vehicles and robots used in the medical field or in healthcare services), increasingly based on deep learning algorithms regulating self-learning and programmed to decide autonomously the conduct to be adopted.

There is also the rapid spread of big data, systems that are based on huge amounts of digital data, collected through the Internet and from the many technological devices in common use. Those data are often analysed and processed in a way unknown to the data subjects, ie through employing secret algorithms, increasingly used to make decisions, engage in profiling or predictive analysis and that mark a radical change in services related to information.

It follows from these phenomena that the daily life of individuals is permeated by a continuous flow of data (including personal data) that can result in forms of illicit algorithmic manipulation thereof arising out of the fact that the source data used in algorithmic processing may be incorrect, inaccurate or incomplete. This is even more worryingly, since the algorithms are created by human decision-makers who, already at the design stage, can influence the analysis and distort the processing, leading to results that are detrimental to individual rights and freedoms.

The spread of algorithmic processing not only means the loss of control over personal data⁴¹ but it can also affect other aspects which, by overcoming the problem of confidentiality, affect human dignity, freedom, autonomy, personal development and individuals’ health and safety and involve clear risks of stigmatisation and discrimination of individuals.⁴² Think, for example, of the scope of algorithmic decisions that prevent a person from entering a country, benefitting from a subsidy or even obtaining an essential service.

Therefore, in the ‘algorithm society’ there is an urgent need to implement appropriate mechanisms to protect privacy and more in general to safeguard the rights and freedoms of the individuals against unlawful algorithmic data processing. In particular, for the purposes of our analysis here of the security of data and algorithmic systems, it is necessary to establish the measures required to minimise risks, prevent dangers and avoid damage associated with the use of

⁴¹ On the privacy in the age of the Internet of Things and big data: F. Giovannella, ‘Le persone e le cose: la tutela dei dati personali nell’ambito dell’*Internet of Things*’, in V. Cuffaro et al eds, *I dati personali* n 33 above; A. Mantelero, *La privacy all’epoca dei big data*, ibid, 1181.

⁴² S. Rodotà, *Il mondo della rete. Quali i diritti, quali i vincoli* (Roma-Bari: Laterza, 2014), 37. According to the aforementioned ‘Ethical Guidelines on AI’, the principles of respect for freedom and autonomy of human beings must be defended and guaranteed also in the development and then in the use of artificial intelligence systems.

robotics and AI to build the ‘architecture’ of their processing.

Since there are no existing rules already in place it is necessary to ascertain, including from a policy perspective, the approach that it would be best to adopt in the regulation of security in the field of intelligent robotics and algorithms, possibly referring to regulatory solutions and application experience gained in the areas of technological innovation, verifying their transponibility to new scenarios while still prioritising constitutional values and the protection of human beings.

As we have seen, the models proposed by EU and national law in the sectors examined for the provision of information society services and automated personal data processing are marked by the progressive transition to a concept based mainly on internal controls, ie entrusted to professional operators, aimed at increasing the security of algorithmic systems, minimising risks, preventing dangers and avoiding harmful events. One must take note of the progressive introduction (through legislation and caselaw) of an articulated series of obligations in relation to security and controls incumbent on the protagonists of technological innovation. Such obligations operate as internal limits to the business that those protagonists conduct and end up shaping it to take account of the needs of protection to be achieved: protection of the rights and freedoms of the natural persons but also safeguarding of the market for new technologies.

Now, in order to guarantee the security of the ‘algorithm society’, it is desirable to adopt an analogous approach, inspired by the principles of prevention and precaution, which – to an even more incisive extent – focuses attention on the provision for an articulated system of controls incumbent on those responsible for the design, programming and implementation of the algorithms, aimed at reducing the risks and avoiding damaging events for the rights and freedoms of individuals in the first place, failing which compensation would be due. The foregoing with a view to ensuring maximum accountability for the design and development phases of algorithmic applications.

However, the overlapping of roles and responsibilities of many of the actors involved in the whole process of the conception, development, dissemination and use of complex and varied forms of AI makes it necessary to encourage all of the actors in question to minimise risks at the very outset before tackling the possible adverse consequences of their work.⁴³

This issue is particularly relevant with reference to deep learning algorithms that regulate self-learning and are programmed to decide autonomously the conduct to be adopted. In this regard, however, the European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on

⁴³ In addition to what will be said in the text regarding the creators and developers of algorithmic systems – consider the producers of goods and service providers who incorporate and implement algorithms, better equipped to affect the level of risk associated with the use of their goods and services. And the user community is called upon to pay a high level of attention to the use of different IA applications, for example, to update and monitor the software and to avoid its anomalous use.

Civil Law Rules on Robotics⁴⁴ reiterates the key point – already embraced by in Art 22 of the Regulation dealing with automated individual decision-making, including profiling –⁴⁵ that is it vital to respect the principle of the supervised autonomy of intelligent robots. In fact, it is provided that the possibility for human control must be integrated in the algorithmic processes, thus confirming the central role played by the person who supervises the activity of the algorithm and even before that its very programming. Today one cannot maintain that also systems endowed with the capacity of self-learning and decision-making autonomy can be programmed and operate independently of choices, criteria and algorithms set by man. That is consistent with the ‘Ethics Guidelines for Trustworthy AI’ presented on 9 April 2019 at Digital Day 2019 by the high-level group of experts appointed by the European Commission,⁴⁶ according to which AI systems must adhere to principles of human-centric design and development and leave significant scope for human choice, ie ensuring human oversight of operational processes in AI systems.

Therefore, in the field of robotics and AI one can only hope that the expected steps taken by hetero and self-regulation aimed at ensuring the security of the algorithms that underlie and govern them will translate into the establishment of a set of obligations as to conduct imposed on operators. Marking an increase in the standard of professional diligence required in the performance of their activities, those obligations will ensure the adoption of all security measures (technical and organisational) and controls in practice suitable to minimise risks, prevent dangers and avoid damage by algorithmic data processing.

With regard to their contents, these obligations should, first of all, provide for the adoption of privacy by design and privacy by default functionality, ie technical and organisational measures suited to guaranteeing compliance with

⁴⁴ Available at tinyurl.com/y8z4vamw (last visited 7 July 2020).

⁴⁵ Art 22 of the Rules of Procedure – Automated decision-making process concerning natural persons, including profiling – : ‘1. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

Paragraph 1 shall not apply if the decision:

is necessary for entering into, or performance of, a contract between the data subject and a data controller;

is authorized by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests; or

is based on the data subject’s explicit consent.

3. In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.

Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Art 9(1), unless point (a) or (g) of Art 9(2) applies and suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests are in place’.

⁴⁶ Available at tinyurl.com/y8ph3aka (last visited 7 July 2020).

the regulatory principles in force governing the personal data processing involved; and this from the initial phase of the design of the algorithms and subsequently by default too.

In addition, algorithm designers and developers should be required to establish a complex network of system security protection obligations, aimed not only at ensuring but also at demonstrating the correct implementation of appropriate and effective technical and organisational measures: consider, for example, the risks to human health and life stemming from the possibility of deactivation or deletion of the memory of cyber-physical systems integrated in the human body.

Algorithmic data processing should be preceded by rigorous impact assessment and early risk analysis, which should guide the selection and implementation of risk management measures as they are identified.

These activities should moreover be carried out on a continuous basis, ensuring that the measures taken are strengthened as a result of new technological developments or events that have demonstrated their inadequacy. Periodic maintenance, revision and updating obligations should therefore be imposed on the algorithms and the software into which they are incorporated, taking into account both the speed of progress in this area and the need to monitor over time the evolution of the learning of smart robots.

Furthermore, there should be an obligation to adopt monitoring and compliance procedures on algorithmic applications, in order to increase their compliance and prevent the violation of ethical and regulatory principles in force.

Further preventive protection tools should also include the construction of forms of control based on the maximum transparency of algorithmic systems. In this direction, it is worth citing a very recent judgment of the Italian Council of State,⁴⁷ which held an automated decision-making process adopted by a public authority would be lawful only if the associated

‘algorithm is built in a manner that embodies a reinforcement of the principle of transparency, which also implies that it is fully knowable’

– both for citizens and for the courts – in every aspect:

‘its authors, the procedure used for its elaboration, the decision mechanism, including the priorities assigned in the evaluation and decision-making procedure and the data entered and selected as relevant because that very same logic and reasonableness of the robotised administrative decision, or rather the ‘rule’ that governs the algorithm, must be ‘readable’ and comprehensible’.

Finally, the configurability of further controls on algorithms aimed at gaining

⁴⁷ Consiglio di Stato 8 April 2019 no 2270, *Guida al diritto*, 19, 16 (2019).

the trust of users could be evaluated, which could force the creators and developers of such technologies, for example, to adopt mechanisms for certifying the quality of the algorithms or to adopt specific guarantees of reliability, with effects on a reputational level. This is also confirmed by the 'Ethical Guidelines for Trustworthy AI' recently adopted by the European Commission's high-level expert group.

We are still a long way from translating these guidelines into a system of governance of internal controls that is required by law and which operators are called upon to comply with.

It is therefore hoped, first of all, that there will be an increase in intervention by non-authoritative sources of standardisation, providing for an increase in the level of professional diligence of those who design and develop algorithms and software and a valuing of the expertise required in the performance of their activities: technical rules, sector guidelines and protocols, codes of ethics and conduct, security standards, capable of constantly adapting to technological changes. This trend is confirmed by the 'Charter on Robotics', the 'Code of Ethical Conduct for Robotics Engineers' and the 'Licence for Designers', annexed to the European Parliament's resolution of 16 February 2017; and the recent 'Ethical Guidelines on Trustworthy AI'.

However, soft law does not appear to be sufficient since its effectiveness depends, as is well known, on voluntary adherence by operators, which cannot be taken for granted in the new technologies sector, where – as we have seen – there are many different players. It is therefore necessary that authoritative rules be laid down by national and supranational lawmakers that supplement those taken by competent authorities or technical bodies, as reflected in the proposal to establish a European Agency for Robotics and Artificial Intelligence referred to in the aforementioned Resolution.

In a desirable composite regulatory framework deriving from the interaction and combination of rules from different sources,⁴⁸ the obligations as to security and controls imposed on operators who design and develop algorithms will serve as parameters to inform their conduct regarding technological innovation. These obligations will encourage (by guiding) the adoption of virtuous models of behaviour and strategies as regards prevention and precautionary measures and that will act as an incentive for security and controls in connection with the algorithmic data processing that they perform and for promoting the constant improvement of new technologies (for the benefit of the community).

These obligations, if fulfilled, will play an active role in protecting the rights and freedoms of individuals against threats to which algorithmic data processing

⁴⁸ On the problem of the identification of the source – negotiated or authoritative – of the discipline of the telematic reality, see G. Alpa, 'Le "fonti" del diritto civile: policentrismo normativo e controllo sociale', in G. Alpa et al eds, *Il diritto civile oggi. Compiti scientifici e didattici del civilista, Atti del 1° Convegno Nazionale S.I.S.Di.C., Capri 7-9 aprile 2005* (Napoli: Edizioni Scientifiche Italiane, 2006), 107. According to C. Rossello, *Commercio elettronico. La governance di Internet, tra diritto statuale, autodisciplina, soft law e lex mercatoria* (Milano: Giuffrè, 2006), 21.

may expose them. This, in addition to, or rather, before being used by the courts as parameters to evaluate *a posteriori* the lawfulness/unlawfulness of the processing carried out. In this regard, it is desirable that the ‘centre of gravity’ so to speak of algorithmic liability should⁴⁹ be more about prevention rather than cure, ie shift the focus from compensation to that of actually avoiding harm being caused by robotics and AI in the first place.⁵⁰ Moreover, the ethical guidelines on AI referred to above seem to express such an orientation, placing damage prevention among the four fundamental ethical principles that should inspire and permeate any future application of AI, at least in Europe, where it is stated that ‘AI systems and the environments in which they operate must be safe and secure’ and technically robust and it should be ensured that they are not open to malicious use. The guidelines further warn as follows:

‘Particular attention must also be paid to situations where AI systems can cause or exacerbate adverse impacts due to asymmetries of power or information, such as between employers and employees, businesses and consumers or governments and citizens. Preventing harm also entails consideration of the natural environment and all living beings’.

⁴⁹ However, there is no doubt that, at the current stage of development of the various algorithmic applications, the fear of damage is still high. So much so that the policy statements expressed in the European context, in particular, in the Parliament Resolution of February 2017, still focus on civil liability, making it a common denominator for all the issues dealt with. On the subject, which acquires particular importance with regard to deep learning algorithms, see U. Ruffolo, ‘Per i fondamenti di un diritto della robotica *self-learning*, dalla *machinery* produttiva all’auto *driverless*: verso una “responsabilità da algoritmo”?’ in U. Ruffolo ed, *Intelligenza artificiale e responsabilità* (Milano: Giuffrè, 2017), 1; A. Amidei, ‘Robotica intelligente e responsabilità: profili e prospettive evolutive del quadro normativo europeo’, *ibid*, 63; E. Palmerini, ‘Robotica e diritto: suggestioni, intersezioni, sviluppi a margine di una ricerca europea’ *Responsabilità civile e previdenza*, 1816 (2016).

⁵⁰ On the multi-functional character of the institute of civil liability, see P. Perlingeri, ‘La responsabilità civile tra indennizzo e risarcimento’ *Rassegna di diritto civile*, 1061 (2004); Id, ‘Le funzioni della responsabilità civile’ *Rassegna di diritto civile*, 115 (2011) and confirmed by recent jurisprudential developments (Corte di Cassazione-Sezioni unite 5 July 2017 no 16601, *La Nuova Procedura Civile*, 4 (2017)). For a teleological-functional reading of the rules on civil liability, see, *ex multis*, likewise, S. Rodotà, *Il problema della responsabilità civile* n 7 above; G. Calabresi, *Costo degli incidenti stradali e responsabilità civile. Analisi economico-giuridica*, in A. De Vita et al eds (Milano: Giuffrè, 1975); P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961); G. Ponzanelli, *La responsabilità civile. Profili di diritto comparato* (Bologna: Zanichelli, 1992).

Towards a Unitary and Consistent System of Informational Defects in Consent and Pre-Contractual Liability Under Italian Law

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Abstract

Over the last few decades, various attempts have been made to hermeneutically update the regulation of defects in consent (mistake, fraud, duress, incapacity), and above all of those defects in consent which we might call ‘informational’ (mistake and fraud). After having broadened the scope of mistake and fraud, Italian scholarship, followed by case law, has proposed the application of pre-contractual liability in cases in which a person causes the conclusion of a valid, but disadvantageous contract, failing to correct an error or to provide relevant information, or providing wrong information.

However, the modern way of understanding informational defects of consent – not as contractual pathologies deriving from the lack of a constituent element of the contract such as the will, but as remedies in favour of one party – suggests a hermeneutical revision (or, at least, legislative reform), leading to the construction of a unitary and consistent system of pre-contractual liability and defects of consent based on a pre-contractual distribution of risks in accordance with good faith.

Analytically, this requires that the scope of application of defects in consent provided for by the Civil Code (typical mistake and fraud) be restricted rather than broadened, creating space between them for the introduction of a series of ‘atypical’ informational defects in consent: recognised atypical mistake, induced atypical mistake, and mutual mistake.

I. Introduction

Since the entry into force of the new Italian Civil Code in 1942, the regulation of defects in consent (mistake, fraud, duress, incapacity), and above all of those defects in consent which we might call ‘informational’ (mistake and fraud), has represented one of the most controversial topics in the Italian legal system, although the Civil Code was very modern by the standards of its days.

Scholars and judges, in fact, have endeavoured to broaden the scope of defects in consent in order to respond to a demand for justice perceived differently over

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the decades.¹ In recent years this hermeneutical modernization has been linked to pre-contractual liability, which has taken on a supplementary role wherever it was not possible to broaden the scope of defects in consent by interpretation (a path that had already been fruitfully followed in Germany).²

These changes, however, are not completely satisfactory, mainly because the resulting system appears in some respects intrinsically incongruous, and to some extent to lack correspondence to the demands of justice.³ For this reason, it is necessary to verify whether, by construing in a different and innovative way the relationship between defects in consent and pre-contractual liability, it would be possible to give intrinsic (internal) and extrinsic (with respect to questions of justice) congruity to the system of defects in consent.

The discussion will be articulated as follows: first, we shall talk about the development of pre-contractual liability and its supplementing function with regard to defects in consent in Germany, where *culpa in contrahendo* was 'discovered'. Then we shall look into these same issues from the point of view of the Italian system, also describing its current state. Finally, we shall ask ourselves if it is possible to propose a new construction of defects in consent, considering whether their regulation, as well as that of pre-contractual liability, derives from a distribution of pre-contractual risks according to good faith.

This last question will be answered not only synthetically, but also analytically, verifying whether an interpretative revision of the defects in consent that goes in the indicated direction can be sufficiently faithful to the texts of the statutory provisions and to the political and technical choices of the current legal system.

In this way, it will be ascertained whether, through a hermeneutic revision, it is possible to modernise the Italian system of defects in consent, and whether or not, at the same time, an updated regulation will be close to the regime provided for by European soft law instruments and in particular by the Principles of European Contract Law (PECL). If this hermeneutic revision does not appear convincing, the national legislature, which is about to reform the Civil Code, will have to intervene in the modernisation of defects in consent.

The subject matter of the present paper will be limited in two different respects. Our attention will turn to 'informational' defects in consent, ie those that are related to uncorrected mistakes, to disclosure duties, or to misrepresentation, and not to other defects in consent, such as duress or incapacity (nor to the other even more severe deficiencies of will, which can lead to nullity of the contract

¹ See, among others, G. Visintini, *La reticenza nella formazione dei contratti* (Padova: CEDAM, 1972), 98-112.

² See, for example, M. Mantovani, 'Vizi incompleti' del contratto e rimedio risarcitorio (Torino: Giappichelli, 1995), 187-292.

³ See A.M. Musy, 'Informazioni e responsabilità precontrattuale' *Rivista critica del diritto privato*, 611, 618 (1998) and, more recently and from a European perspective, F.P. Patti, '“Fraud” and “Misleading Commercial Practices”: Modernising the Law of Defects in Consent' *European Review of Contract Law*, 307, 310 (2016).

under Italian law). The reason for this constrained focus is that these are the central defects in consent and those whose provisions are most affected by the time elapsed since the entry into force of the Civil Code. Moreover, it is these defects in consent that pose the greatest problems from the point of view of remedies.

Furthermore, we shall essentially deal with contracts between equal parties, and not with consumer contracts or so-called ‘contracts of the third kind’, ie contracts concluded between businesses that do not have comparable negotiating power.

Of course, however, the considerations that will be undertaken may also be applied, where compatible, outside the present area of interest.

II. *Culpa in Contrahendo* and Defects in Consent: From Rudolf von Jhering’s ‘Discovery’ to Possible Future Italian Evolutions

As mentioned, our analysis must consider informational defects in consent and pre-contractual liability, especially in its (variable) relationship with the former.

It is not possible to examine this issue without briefly sketching out developments in the German legal system from the middle of the 19th century to the present day (para II.1). Later, we shall deal with the Italian legal system: first, in the state in which it was when the Civil Code came into force (para II.2); then, in its evolution from the middle of the 20th century until today (para II.3). Finally, we shall pinpoint whether the current state of the Italian system makes possible, and indeed necessary, a hermeneutical revision that modernises the system of informational defects in consent, as well as in (and by virtue of) their relationship to pre-contractual liability (para II.4).

1. The ‘Discovery’ of *Culpa in Contrahendo* by Rudolf von Jhering, Its Developments and Evolutions in Germany and Its Relationship with Defects in Consent

Let us first analyse developments in pre-contractual liability in Germany, both in itself and in its relationship to the informational defects in consent, from its ‘discovery’ to the present day.

a) Rudolf von Jhering and the *Culpa in Contrahendo*

As is well known, pre-contractual liability is an ‘invention’⁴ of Rudolf von Jhering.⁵ He elaborated this theory in order to mitigate some outcomes of the *Willenstheorie*,⁶ which seemed to him unjustified from the point of view of justice.⁷

⁴ H. Dölle, ‘Juristische Entdeckungen’, in Ständige Deputation des Deutschen Juristentages ed, *Verhandlungen des 42. Deutschen Juristentages 1957* (Tübingen: Mohr Siebeck, 1958), II, B, 7.

⁵ R. von Jhering, ‘*Culpa in contrahendo* oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen’ 4 *Jherings Jahrbücher*, 1, 23-56 (1861).

⁶ F.C. von Savigny, *System des heutigen Römischen Rechts* (Berlin: Veit, 1840), III, 5-7.

In the famous telegraph case,⁸ the declaration of one party was wrongly transmitted by the telegraph office and, due to this fact, the party was able to revoke the declaration, although the other party relied on it without any fault or negligence. In this case, according to Jhering, the revoking party had to pay compensation to the other party. The amount of compensation should correspond to the *negatives Interesse* of the counterparty: that is, everything he or she had lost by relying on a declaration that later would have been revoked (this 'reliance interest' consists mainly of wasted expenses and lost opportunities).

Jhering found a trace of *culpa in contrahendo* in the Roman sources: for example, in cases where a party had sold a *res sacra*, and so had concluded a null contract, without disclosing this relevant information to the counterparty (that in turn was unaware).

Consequently, Jhering argued that a pre-contractual liability based on fault, and therefore an action arising from the contract despite its voidness or failed conclusion, had to be recognised in cases in which a party negligently created the impression of the existence of a valid contract, and precisely when: (i) there was a declaration, but it did not correspond to the will of the party (as in the telegraph case, in which fault had to be found in the use of an unreliable means of communication); (ii) the object was not 'suitable' (eg because of its loss or its inalienability) or the subject lacked capacity; (iii) the proposal had been revoked or the offeror had died.

b) The German Civil Code and the Problem of Pre-Contractual Liability

Jhering's theory gave rise to a great debate,⁹ which resulted in some very important provisions of the BGB.

With regard to the first group of cases (i), we must mention in particular §§ 119 and 122 BGB, which stated – and still now state – that the mistaken party may revoke (*anfechten*) his or her declaration of will when the mistake is as to the declaration (as to its content or as to the declaration itself) and it can be assumed that he or she would not have made the same declaration if he or she had known the facts of the case and had made a reasonable assessment of them.

⁷ H.P. Haferkamp, 'Pandektistik und Gerichtspraxis' *Quaderni fiorentini per la Storia del Pensiero Giuridico Moderno*, I, 177, 204-205 (2011).

⁸ See, among others, see M. Schermaier, *Die Bestimmung des wesentlichen Irrtums von den Glossatoren bis zum BGB* (Wien-Köln-Weimar: Böhlau, 2000), 540-541.

⁹ Analytically reconstructed by F. Procchi, *Licet emptio non teneat. Alle origini delle moderne teorie sulla cd. culpa in contrahendo* (Padova: CEDAM, 2012), 189-361. See also D. Medicus, 'Zur Entdeckungsgeschichte der *culpa in contrahendo*', in H.P. Benöhr et al eds, *Iuris professio. Festgabe für Max Kaser zum 80. Geburtstag* (Wien-Köln-Graz: Böhlau, 1986), 169, 169-178, and J.D. Harke, '§ 311 II, III BGB. Rechtsgeschäftsähnliche Schuldverhältnisse', in M. Schmoeckel et al eds, *Historisch-kritischer Kommentar zum BGB* (Tübingen: Mohr Siebeck, 2007), II, 1536, 1541-1545.

Errors concerning such characteristics of the person or object which are considered essential in trade are included in this category of mistake. In cases of revocation (*Anfechtung*), the mistaken party must pay compensation to his or her counterparty for the loss suffered by it as a result of its legitimate reliance on the validity of the declaration, but not in excess of the interest which the other party had in the validity of the declaration.

The German Civil Code did not rigidly embrace the *Willenstheorie*:¹⁰ in fact, it has sweetened it by accepting to some extent also the opposite *Erklärungstheorie*.¹¹ As is evident from §§ 119 and 122, in cases of mistake the contract is not null and void, but valid; nevertheless, the drafters argued that it was necessary to protect the mistaken party, entitling him or her to revoke his or her declaration, and to safeguard the interests of the counterparty through compensation, regardless of the excusability of the error, whenever he or she could not and should not have noticed the error.

This compensation had – and has – little or nothing to do with fault. The party who revokes must pay compensation, even if he or she was not in any way negligent (as in cases of excusable mistake): from this perspective, § 122 BGB appears to be closer to the concept of warranty than to that of *culpa*.¹² In the same sense, we could read § 179, which stated – and states – that a person who has entered into a contract as an agent, without the power of agency and without being aware of this, is obliged to compensate the counterparty for the loss which he or she suffers as a result of legitimately relying on the power of agency, but not in excess of the interest which the counterparty had in the contract.

Two other provisions, repealed by the recent *Schuldrechtsmodernisierung*, were closer to the concept of *culpa*, ie §§ 307 and 309 BGB, which refer to the second group of cases mentioned above (ii). According to these provisions, if a contract is void (eg due to the impossibility of its object), and one party knows or ought to know of this voidness, he or she must disclose this information to the other party or must pay him or her compensation, where he or she relied upon the validity of the contract. It is not difficult to note that these two provisions required the compensating party to be at fault.

As far as the third group of cases is concerned (iii), §§ 145 and 153 BGB stated – and state – that the offeror is always bound to the offer, even if he or she dies, unless (in the case of revocation) he or she has excluded being bound by it or (in the case of death) a different intention can be presumed. In other words, the offer is not revocable and does not expire if the offeror dies, unless it has been

¹⁰ W. Flume, *Allgemeiner Teil des Bürgerlichen Rechts* (Berlin-Heidelberg-New York: Springer, 3rd ed, 1979), II, 55-56.

¹¹ O. Bähr, 'Ueber Irrungen im Contrahiren' 14 *Jherings Jahrbücher*, 393, 401 (1875).

¹² R. Ehrlich, *Die Entwicklung der Lehre von der Haftung für Verschulden beim Vertragsschluß im spätgemeinen und im bürgerlichen Recht* (Berlin-Neukölln: Biegner, 1933), 12-13.

explicitly or implicitly qualified as such.¹³ Protection of the counterparty's rights was – and is – therefore guaranteed by a property rule.¹⁴

c) The XX Century's Theories About *Culpa in Contrahendo* and Its Relationship with Defects in Consent

In the decades after the promulgation of the German Civil Code, German scholars and judges construed a complete theory of fault-based pre-contractual liability, first building upon §§ 122, 307 and 309 BGB,¹⁵ and then asserting the existence of a customary rule in the legal system.¹⁶

These evolutions and developments were due in part to an in-depth study of the doctrine of *culpa in contrahendo* and in part to new demands for justice that, over time, emerged and gained strength. New cases arose that in the past had never – or had only infrequently – occurred; gaps in protection, caused by the entry into force of the BGB, appeared, and had to be filled in; a trend towards greater solidarity, aimed at making parties more responsible during negotiations, developed. For the sake of simplicity, we can distinguish three fronts of development, with regard to which all three of these factors played a role.

First of all, the German Civil Code did not provide for a special remedy for cases of breaking off negotiations not covered by the irrevocability of the contractual offer. Moreover, tort law could not be utilised, because § 823 BGB severely limited its scope of application. Under German law, non-contractual liability was – and still is – typical, ie was – and is – based on a statutory catalogue of protected interests (although in the last few decades, scholars and judges have greatly broadened its scope by way of interpretation).¹⁷ The need for a remedy could be satisfied only by recognising pre-contractual liability of significant scope, subject to the rules of contractual liability. Furthermore, in the meanwhile even Italian and French authors were moving in a similar direction, transposing and integrating Jhering's theory into their legal systems.¹⁸

The second realm is the most relevant for us. In cases where a disadvantageous contract has been concluded on the basis of misinformation or lack of information, the party could have availed itself of relief for defects in

¹³ This topic has recently been discussed in A.M. Benedetti and F.P. Patti, 'La revoca della proposta: atto finale? La regola migliore, tra storia e comparazione' *Rivista di diritto civile*, 1293, 1308-1314 (2017).

¹⁴ For the distinction between property and liability rules see the well-known study by G. Calabresi and A.D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' 85 *Harvard Law Review*, 1089 (1972).

¹⁵ See, for example, H. Hildebrandt, *Erklärungshaftung, ein Beitrag zu, System des bürgerlichen Rechtes* (Berlin-Leipzig: De Gruyter, 1931), 118-135.

¹⁶ See, among others, K. Larenz, *Methodenlehre der Rechtswissenschaft* (Berlin-Heidelberg: Springer, 6th ed, 1991), 433.

¹⁷ See, today, H. Kötz and G. Wagner, *Deliktsrecht* (München: Franz Vahlen, 12th ed, 2013), 45-49.

¹⁸ See n 36 below.

consent: namely, revocation for mistake and, especially, for fraud (*Arglistige Täuschung*, § 123 BGB). However, this would have failed to account for a large number of potential situations, since not every *Motivirrtum* could – and can – result in a mistake and lead to this remedy¹⁹ and fraud only covered – and covers – those cases in which the counterparty acts intentionally (and not cases in which he or she acts negligently).²⁰ Moreover, in such situations, the party could not demand compensation under the law of tort, because tort law did not – and does not – allow for compensation in cases of pure patrimonial losses (for example, caused by a breach of the duty of information). Once again, it was necessary to find a way to overcome the narrow limits of non-contractual liability.

Third, the regulation of non-contractual liability allowed – and allows – the employer of a person who has caused a loss to avoid liability by simply proving that he or she had taken reasonable care in choosing him or her as an employee or in supervising him or her (§ 831 BGB).²¹ This provision gave rise to problems for cases in which a client who had entered a shop suffered injuries due to the conduct of an employee (as in the famous *Linoleumfall*).²² Once again, this need to protect clients entailed that they were provided with a contractual right of action whose regulation did not contain any provision similar to § 831 BGB and thus did not allow the employer to avoid liability by means of the aforementioned defence. This right of action could not be based on the yet-to-be-concluded contract, but rather had to be based on the pre-contractual relationship.

In response to these urgencies, German scholars and judges argued that a special relationship arose between parties during negotiations. Following the thinking of Stoll, according to which, in the normal obligatory relationship, there are both obligations to perform and obligations to protect,²³ scholars and judges maintained that, before the conclusion of a contract, a special obligatory relationship, consisting merely of obligations to protect the counterparty, arose.²⁴

¹⁹ R. Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* (Tübingen: Mohr Siebeck, 4th ed, 2016), 325-326. § 119 II BGB gives relevance to a mistake as to motive, but requires particular conditions be met: see W. Hefermehl, '§ 119', in *Soergel Kommentar* (Stuttgart: Kohlhammer, 13th ed, 1999), 64, 78-79, and, more in detail, n 156 below.

²⁰ H.C. Grigoleit, *Vorvertragliche Informationshaftung. Vorsatzdogma, Rechtsfolgen, Schranken* (München: Beck, 1997), 16-19.

²¹ See D. Medicus, 'Culpa in contrahendo' *Rivista critica del diritto privato*, 573, 575 (1984).

²² Reichsgericht 7 December 1911, 78 *Entscheidungen des Reichsgerichts in Zivilsachen*, 239-241. There are also other *Warenhausfälle*: among them, the *Gemüseblattfall* and *Bananenschalenfall* are worth mentioning.

²³ About the obligatory relationship as *Organismus*, see above all H. Stoll, 'Haftung für das Verhalten während der Vertragsverhandlungen' *Leipziger Zeitschrift für Deutsches Recht*, 532, 544 (1923), and in the modern German literature K. Larenz, *Lehrbuch des Schuldrechts* (München: Beck, 14th ed, 1987), I, 26-72. About the obligations to protect (*Schutzpflichten*) see H. Stoll, 'Abschied von der Lehre von der positiven Vertragsverletzung' *Archiv für die civilistische Praxis*, 257, 258 (1932) and now G. Bachmann, '§ 241 BGB. Pflichten aus dem Schuldverhältnis', in *Münchener Kommentar* (München: Beck, 8th ed, 2019), paras 2 and 114-120.

²⁴ A *Schutzverhältnis*: see, from partially different points of view, Hein Stoll, *ibid* 543-544, and L. Enneccerus and H. Lehmann, *Recht der Schuldverhältnisse* (Marburg: Elwert, 11th ed,

This peculiar relationship, called in the most complete theory *Schuldverhältnis ohne primäre Leistungspflichten* (obligatory relationship without primary performance obligation),²⁵ results from the trust that one party gives rise to in the other and from the reliance the other party grants (effective reliance).²⁶ The protection obligations consist mainly in duties of disclosure and duties of care, whose violation gives rise to compensation according to the principles of contractual liability.²⁷

d) *Culpa in Contrahendo* and Defects in Consent After the *Schuldrechtsmodernisierung*

The doctrine of *Schuldverhältnis ohne primäre Leistungspflichten*, which had already become dominant among German scholars and judges in the second half of the 20th century, has been mostly transposed into the German Civil Code by means of the recent reform of the law of obligations.²⁸

The new § 311 BGB, in fact, expressly states that an obligatory relationship, with duties to take account of the rights and legal interests of the counterparty, comes into existence as a result of the beginning of contractual negotiations.

As far as defects in consent and disadvantageous contracts are concerned, pre-contractual liability now enables a party to claim compensation whenever a disadvantageous contract has been concluded because of a breach of the duty of information, regardless of whether the party is protected or not by the regulation of defects in consent.²⁹ Compensation may be monetary or may, under particular circumstances, involve restitution in kind, ie cancellation of the contract.³⁰

1930), 169. In case law see Reichsgericht 1 March 1928, 120 Entscheidungen des Reichsgerichts in Zivilsachen, 249-251.

²⁵ K. Larenz, see n 23 above, 106.

²⁶ See firstly K. Ballerstedt, 'Zur Haftung für *culpa in contrahendo* bei Geschäftsabschluss durch Stellvertreter' *Archiv für die civilistische Praxis* 501, 507-508 (1950-1951) (the relationship arises due to the 'Gewährung in Anspruch genommenen Vertrauens'), and then, more completely, C.W. Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (München: Beck, 1971), 503-517.

²⁷ K. Larenz, 'Bemerkungen zur Haftung für *culpa in contrahendo*', in W. Flume et al eds, *Festschrift für Kurt Ballerstedt zum 70. Geburtstag* (Berlin: Dunker & Humblot, 1975), 397, 400-414.

²⁸ About the new regulation of *culpa in contrahendo* see H. Heinrichs, 'Bemerkungen zur *culpa in contrahendo* nach der Reform - Die Tatbestände des § 311 Abs. 2 BGB', in A. Heldrich et al eds, *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag* (München: Beck, 2007), I, 421, 428-442.

²⁹ V. Emmerich '§ 311 BGB. Rechtsgeschäftliche und rechtsgeschäftsähnliche Schuldverhältnisse', in *Münchener Kommentar* (München: Beck, 8th ed, 2019), paras 211-215.

³⁰ In particular, it is required that the contract objectively causes losses, having a negative market value. If one of the parties can prove that, without the pre-contractual misconduct, the parties would have concluded the contract with different content, it is also possible to demand an adaptation (*Anpassung*) of the contract (different from the *Vertragsanpassung* provided for by § 313 BGB). Among others, see R. Schwarze, *Das Recht der Leistungsstörungen* (Berlin: De Gruyter, 2008), 403-404.

2. The First Italian Phase (or: The Fear of a General Clause)

The 1942 Italian Civil Code, overcoming the silence of the 1865 Civil Code, has expressly regulated pre-contractual liability, including its relationship to defects in consent. However, the Code's provisions were initially construed in a very restrictive way.

a) Mistake and Pre-Contractual Liability in the Statutory Provisions of the 1942 Italian Civil Code

The Italian Civil Code,³¹ which entered into force in 1942, was more inclined towards the protection of reliance than the BGB.³² This emerged – and emerges – particularly from the regulation of mistake, according to which a mistake is relevant when it is 'essential' (Art 1429 Civil Code) and when it is 'recognisable' by the other party (Art 1431 Civil Code). Errors are essential when they concern the nature or the object of the contract, the identity of the object or a quality thereof that is considered determinative of consent, the identity of the counterparty, or its qualities – if they are determinative of consent – or when there is a mistake of law and it was the only or principal reason for the contract. Errors are recognisable when, with regard to the content, circumstances, and qualities of the contracting parties, a person of normal diligence would have detected it. A mistake that is not recognisable by a party does not allow that party to avoid the declaration of will (even if paying compensation for breach of the reliance interest, as in the German legal system); on the contrary, in this case the contract is unassailable.³³ Briefly, the protection of the interests of the counterparty of a mistaken party was – and is – ensured by a property rule, and not only by a liability rule.

Nevertheless, the Italian Civil Code stated – and states – with a very broad provision that, during negotiations and the formation of contracts, the parties shall act according to good faith (Art 1337 Civil Code). It might seem, therefore, that the Italian positive regulation reflected and transposed the developments of the German legal system on pre-contractual liability and in some way anticipated the modern § 311 BGB, accepting the idea of a pre-contractual relationship based on reliance. However, this conjecture would be wrong. This is because, in that cultural milieu, it was obvious that Art 1337 was intended to have quite a different effect than might be expected, as is demonstrated by the analysis of the academic works and of the judicial decisions that appeared immediately after

³¹ Translation into English of the Italian Civil Code provisions is here inspired by that of S. Beltramo, *The Italian Civil Code and Complementary Legislation* (New York: Thomson Reuters, 2012), which is based on the work of M. Beltramo, G.E. Longo and J.H. Merryman.

³² See V. Pietrobon, *Errore, volontà e affidamento nel negozio giuridico* (Padova: CEDAM, 1990), 9-11; R. Sacco, 'Affidamento' *Enciclopedia del diritto* (Milano: Giuffrè, 1958), I, 666.

³³ See V. Pietrobon, 'Affidamento' *Enciclopedia giuridica* (Roma: Treccani, 1989), I, 4-5.

the entry into force of the Civil Code.³⁴

b) The First Restrictive Applications of Pre-Contractual Liability

First of all, it should be noted that, under Italian law, there was no problem – and still there is no problem – to apply tort law in the case of loss caused by employees and, therefore, there was no need to broaden the scope of pre-contractual liability. This is because the Italian tort law stated – and continues to state – that an employer is vicariously liable for the actions of its employees, and that it cannot avoid this liability by means of a defence similar to the one provided for in § 831 BGB (absence of *culpa in eligendo* or *in vigilando*).³⁵

As far as breaking off negotiations is concerned, the most rigorous position, developed under the Italian Civil Code of 1865, argued that a liability could only arise once the contract proposal had been sent and if its revocation had reached the other party after it had started to perform the service. This form of liability was also expressly provided for in Art 36, para 3, of the 1882 Commercial Code and, then, in Art 1328 of the new Italian Civil Code. Under the 1865 Italian Civil Code, for several scholars it was not necessary, from a functional point of view (ie from the point of view of justice), to envisage a form of pre-contractual liability for other cases. On the contrary, some authors assumed that even at an earlier stage pre-contractual liability for breaking off negotiations could arise.³⁶ Even though this idea became over time more and more influential in the literature and popular in case law, after the promulgation of the new Civil Code there were still some authors who continued to maintain restrictive opinions.³⁷

Let us now consider the problems posed by defects in consent and disadvantageous contracts, which for us represent the most important issue.

³⁴ Nevertheless, the Italian regulation must, in any case, be considered very advanced given the period of time of its approval. Even though Art 1337 was not originally intended to introduce a pre-contractual liability construction similar to that developed in Germany, its vagueness gave ample space to the doctrinal and judicial construction and foresaw future changes. See R. Di Raimo, 'Dichiarazione, ricezione e consenso', in F. Macario and M.N. Miletto eds, *Tradizione civilistica e complessità del sistema. Valutazioni storiche e prospettive della parte generale del contratto* (Milano: Giuffrè, 2006), 179.

³⁵ M. Maggiolo, *Il risarcimento della pura perdita patrimoniale* (Milano: Giuffrè, 2003), 104-105.

³⁶ See C. Faggella, 'Dei periodi contrattuali e della loro vera ed esatta costruzione scientifica', in *Studi giuridici in onore di Carlo Fadda per XXV anno del suo insegnamento* (Napoli: Luigi Pierro, 1906), II, 269. For a similar evolution in France, see R. Saleilles, 'De la responsabilité précontractuelle. A propos d'une étude nouvelle sur la matière' *Revue trimestrielle de droit civil*, 697 (1907). About this topic see U. Babusiaux, 'Introduction before Art 2:301', in R. Zimmermann and N. Jansen eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), 348, 351-352. For the dominant view, see among others L. Coviello, 'Della cosiddetta *culpa in contrahendo*' *Filangieri*, 728 (1900), and after Faggella's work G. Segrè, 'Sulla responsabilità precontrattuale e sui punti riservati' *Rivista del diritto commerciale*, II, 633 (1925).

³⁷ See for example M. Jannuzzi, 'Buona fede e recesso dalle trattative contrattuali' *Foro italiano*, I, 667-670 (1948).

The new Italian Civil Code stated – and states – that a party who knows or ought to know the existence of a ground of invalidity of the contract, and does not disclose it to the other party, must compensate that party for the loss suffered by the latter for having relied, without fault, on the validity of the contract (Art 1338).

This provision was read by scholars and judges to mean that, when a party knows or ought to know that the contract is void but does not disclose it to the other party, the former party must compensate the latter party, provided that this party was unaware of the contract's voidness and was under no duty to make itself aware of it.³⁸ In this regard, the provision traces back to Jhering's sell of *res sacrae* and to §§ 307 and 309 BGB a.F (old version). Similarly, Art 1398 stated – and states – that a person who enters into contracts as an agent without having the powers to do so, or does so in excess of the powers conferred on them is liable for the loss that a third person suffers as a result of having relied, without fault, on the validity of the contract.³⁹ This provision was largely based on § 179 BGB, except for the fact that it required the fault of the agent for liability to be made out.⁴⁰

However, Art 1338 was also construed to mean that a party who knows or ought to know that the contract is voidable, but does not disclose it to the other party, must compensate the party that was unaware of the voidability and that was under no duty to make itself aware of the contract's voidability.⁴¹ This interpretation, apparently modelled on Jhering's theory and on § 122 BGB, in fact ran counter to it: the party that claimed compensation was not that which had fallen into an unrecognisable error, but that which claimed avoidance because of mistake, fraud, duress or incapacity, when certain other requirements that made the other party's conduct unfair had been met.⁴²

To understand this interpretation, it must be borne in mind that the regulation of mistake requires that, in addition to being essential (ie in respect of certain elements), it must be recognisable by the other party; otherwise, the contract cannot be avoided on the ground of mistake. For this reason, Art 1338 could not be understood in the sense of § 122 BGB: under Italian law there is no need to provide for a rule of liability similar to the German one, since the party that is not mistaken is already protected by a proprietary rule (as the contract cannot be annulled if the error is not recognisable).⁴³ Furthermore, it must be

³⁸ See, for example, F. Messineo, *Dottrina generale del contratto (artt. 1321-1469 cod. civ.)* (Milano: Giuffrè, 1948), 452, and Corte di Cassazione 18 May 1954 no 1731, *Giustizia civile*, 1269 (1954).

³⁹ See E. Betti, *Teoria generale del negozio giuridico* (Torino: UTET, 1st ed, 1943), 382-383.

⁴⁰ See L. Mengoni, 'Sulla natura della responsabilità precontrattuale', in Id, *Scritti* (Milano: Giuffrè, 2011), II, 280.

⁴¹ For quotations see n 38 above.

⁴² Nevertheless, in twentieth-century literature there was a widespread misunderstanding that Art 1338 was the transposition in Italy of the theories of Jhering. See M.L. Loi and F. Tessitore, *Buona fede e responsabilità precontrattuale* (Milano: Giuffrè, 1975), 51.

⁴³ See C. Turco, 'L'interesse negativo nella *culpa in contrahendo*' *Rivista di diritto civile*, I,

taken into account that, under Italian law, defects in consent (mistake, fraud, duress or incapacity) result in avoidability, which is considered to be a form of invalidity (although the contract produces effects – *Rechtsfolgen* – until it is avoided). This allowed scholars and judges to interpret Art 1338 extensively, even if in some cases such construction was a bit forced: it is obvious, for example, that a person who is threatened does not want to be informed of the invalidity, but rather wants there to be no threat.

These hermeneutical choices, which led to the exclusive application of Arts 1328, 1338 and 1398 to cases of breaking off negotiations and of pre-contractual information to the contract to be concluded, had a justification.⁴⁴ Scholars and, above all, judges of the time looked with suspicion at the general clause of Art 1337: therefore, as far as possible, they tried to limit its scope, preferring to apply specific provisions, even at times reaching interpretations that were not present on the face of the texts,⁴⁵ or ignoring the need for protection that formed its very basis.⁴⁶ On the other hand, the formalistic and literal argument had an easy time prevailing over the functional one, because the need for protection was felt less strongly than now and in this narrower scope of protection could often match to the text of the aforementioned specific provisions.

Therefore, following the previously-discussed opinions, Art 1337, far from creating a relationship consisting of obligations to protect (as § 311 in the modern German legal system), was intended as an empty rule, which merely referred to other more specific rules provided for by other provisions:⁴⁷ Art 1328 for the revocation of the offer, and Arts 1338 and 1398 for those cases of conclusion of a null contract, of an ineffective contract due to the lack of representative powers, or of a voidable contract due to a defect in consent. Thus, ultimately, under Italian law, pre-contractual liability could be governed by a series of specific provisions.⁴⁸

165, 189-190 (2007); P. Sirena, 'Responsabilità precontrattuale e obblighi informativi', in L. Frediani e V. Santoro eds, *L'attuazione della direttiva Mifid* (Milano: Giuffrè, 2009), 101, 102.

⁴⁴ About the 'fear for general clauses' see J.W. Hedemann, *Die Flucht in die Generalklauseln. Eine Gefahr für Recht und Staat* (Tübingen: J.C.B. Mohr, 1933), 66-73; for the Italian case law see L. Bigliazzi Geri, 'Note in margine alla rilevanza dell'art. 1337 c.c.', in *Scritti in memoria di Domenico Barillaro* (Milano: Giuffrè, 1982), 136-137.

⁴⁵ Extending the scope of application of Art 1338, therefore, was intended to attract all the regulation of pre-contractual liability in the event of failure to disclose relevant information to Art 1338, so as to completely diminish the scope of Art 1337.

⁴⁶ As in the case of breaking off negotiations, whose liability was evidently required by the interests at stake, but was denied by a minority of authors even after the promulgation of the new Civil Code. As we shall see below, although under the new Civil Code the assertion of this liability immediately became the prevalent opinion and then the unanimously accepted opinion, case law tended nevertheless to apply it strictly.

⁴⁷ In this direction: Corte di Cassazione 9 October 1956 no 3414, *Vita notarile*, 423 (1957); Corte di Cassazione 16 February 1963 no 357, *Foro italiano*, I, 1769 (1963).

⁴⁸ According to the *Relazione al codice civile*, para 612, the duty of good faith during negotiations 'sbocca in una responsabilità in *contrahendo* quando una parte conosca e non riveli all'altra l'esistenza di una causa di invalidità del contratto' (results in liability in *contrahendo* when one party knows and does not disclose to the other the existence of a cause of invalidity of

As far as the dogmatic reconstruction is concerned, it was not considered that pre-contractual liability, fragmented in particular provisions, constituted a form of contractual liability, ie the breach of a pre-contractual relationship based on trust, which led to contractual liability. Scholars and judges looked at these rules in isolation and, if necessary, assigned them to the realm of non-contractual liability.⁴⁹

3. The Second Italian Phase (or: The Need for a General Clause)

It goes without saying that, as time goes by, legal systems change. After the entry into force of the Italian Civil Code, some scholars proposed innovative constructions of the regulation of pre-contractual liability, which became dominant over time, including in case law.

a) Breaking off Negotiations

With regard to breaking off negotiations, we have already pointed out that, under the old Civil Code, a new approach developed and became more and more popular: more precisely, it had been argued that breaking off negotiations could give rise to pre-contractual liability in cases other than those in which revocation of the proposal had been received by a party who had in good faith begun to perform the contract. In addition, under the new Civil Code there were further reasons to accept this construction.⁵⁰

Literally, Art 1328 provided – and provides – that an offeror who revokes his or her offer must ‘indemnify’ (and not compensate) the other party. The term ‘indemnification’ was – and is – normally used in the Italian Civil Code to refer to liability for a lawful, non-infringing act. Consequently, Art 1328 of the Italian Civil Code did not appear to refer to the problem of pre-contractual liability for breaking off negotiations (or at least did not seem to exhaust its potential scope of application).⁵¹

From a justice point of view, it was becoming increasingly urgent to provide for a form of liability in cases in which negotiations had been broken off contrary to good faith (for example, if the other party had legitimate grounds to believe that a contract would be concluded and there was no serious and legitimate reason to break off the negotiations) and for cases of negotiations into which a party had

the contract); no other concretizations of this duty were mentioned.

⁴⁹ This was the prevalent opinion: see, for example, L. Barassi, *La teoria generale delle obbligazioni. La struttura* (Milano: Giuffrè, 2nd ed, 1948), I, 117. Some authors asserted that the wording of Arts 1337 and 1338 led to pre-contractual liability of a contractual nature, which derived from the breach of specific obligations created by law: see G. Stolfi, ‘In tema di responsabilità precontrattuale’ *Foro italiano*, I, 1108-1110 (1954).

⁵⁰ Besides, of course, the existence of a provision such as Art 1337, which at least required the building of the regulation of pre-contractual liability in a less and less formalistic sense.

⁵¹ See, among others, G. Patti and S. Patti, ‘Responsabilità precontrattuale e contratti standard’, in P. Schlesinger ed, *Il codice civile. Commentario* (Milano: Giuffrè, 1993), 85.

entered or continued without any real intention of reaching agreement (and, for example, only to waste the other party's time or to obtain confidential information).⁵²

Under the new Civil Code, the idea of pre-contractual liability for breaking off negotiations became immediately dominant in literature and case law, which directly applied Art 1337 to these cases, ie the general clause of pre-contractual good faith.⁵³ Nowadays, this construction is unanimously accepted,⁵⁴ even though there is no consensus on the exact scope of this liability. According to the dominant conception, both (i) the breaking-off of negotiations without legitimate grounds in circumstances in which the other party can rely, and effectively does rely, on the conclusion of the contract, and (ii) the entrance into negotiations without the intention to conclude a contract, constitute misconduct, and thus oblige the party that has acted unfairly to compensate the other party.⁵⁵

As a result, scholars and judges have acknowledged that Art 1337 has its own regulatory scope. Nevertheless, for a long time, case law stated that Art 1337 dealt only with breaking off negotiations (moreover, strictly interpreted).⁵⁶ However, some scholars asserted that it gave also rise to other duties, such as the duty to care for the other party's goods (where delivered and to be returned), and to duties of confidentiality.⁵⁷ As far as duties of information are concerned, Art

⁵² These needs arose already in the first half of the last century: see G. Meruzzi, 'La responsabilità per rottura di trattative', in G. Visintini ed, *Trattato della responsabilità contrattuale* (Padova: CEDAM, 2009), I, 781.

⁵³ See Corte di Cassazione 7 May 1952 no 1279, *Foro italiano*, I, 1638 (1952), and F. Messineo, n 38 above, 174-175.

⁵⁴ See, for example, Corte di Cassazione 14 February 2000 no 1632, *Danno e responsabilità*, 982 (2000); C.M. Bianca, *Il contratto* (Milano: Giuffrè, 2nd ed, 2000), 167-170; V. Roppo, *Il contratto* (Milano: Giuffrè, 2nd ed, 2011), 173-174.

⁵⁵ About this difference see G. Meruzzi, *La trattativa maliziosa* (Padova: CEDAM, 2000), *passim*.

⁵⁶ In case law, where this thesis remained dominant for a long time, see Corte di Cassazione 11 December 1954 no 4426, *Giurisprudenza completa della Cassazione, Sezioni civili*, VI, 489 (1954); Corte di Cassazione 18 October 1980 no 5610, *Rivista del diritto commerciale*, II, 167 (1982), and also the review of L. Nanni, 'La buona fede contrattuale nella giurisprudenza' *Contratto e impresa*, 501, 501-502 (1986). In the literature see, among others, G. Stolfi, 'Il principio di buona fede' *Rivista del diritto commerciale*, I, 162, 164-165, 168 and 172 (1964). In the same way, Art 2:301 PECL, regulating the matter of 'Negotiations Contrary to Good Faith', refers only to breaking off negotiations: see U. Babusiaux, 'Art 2:301: Negotiations Contrary to Good Faith', in R. Zimmermann and N. Jansen eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), 359, 364-370 (and, in addition to this provision, in the Section 'Liability for negotiations' there is only Art 2:302, which is dedicated to 'Breach of confidentiality'). In the PECL system the reason lies above all in the fact that, already within the system of defects of consent, pre-contractual liability finds full expression: the defects themselves are provided for in a manner that is, at the same time, wide, based on a pre-contractual balancing of risks and linked to compensatory remedies (see Arts 4:106 and 4:117). This choice of legal policy, moreover, is not considered merely to be more modern, but also more in line with common law legal systems, which had some difficulties in accepting a provision stating a good-faith duty during negotiations (as § 311 II BGB and Art 1337 Civil Code).

⁵⁷ This idea was clearly pointed out above all by F. Benatti, *La responsabilità precontrattuale* (Milano: Giuffrè, 1963), and soon became widespread in the literature: see, among others, F.

1337 has continued to be intended by the majority of scholarship, and obviously by case law, to be a mere link to Art 1338 (or to other more specific provisions).⁵⁸

b) Informational Defects in Consent, Duty of Disclosure and Misrepresentation

Nonetheless, further interpretative changes were also afoot with regard to the relationship between informational defects in consent and pre-contractual liability, even if these came to be realised only more recently, and are still today accompanied by very strong criticism and resistance.

Facing the increasing need to ensure wider protection of the interests of a party that had concluded a disadvantageous contract due to the non-disclosure of essential information or to misrepresentation, scholars and judges at first did not recur to pre-contractual liability, but preferred to broaden the scope of informational defects in consent: mistake and, above all, fraud.

As anticipated, Arts 1429 and 1431, whose texts have not been changed since the entry into force of the Civil Code, stated that a mistake was relevant only if it was essential and recognisable.

In order to enlarge the scope of application of mistake, Italian scholars and judges have understood the catalogue of essential errors only as providing examples,⁵⁹ and have considered that recognisability could be replaced by concrete and effective recognition,⁶⁰ and moreover that there was no need for this requirement to be met in cases of mutual mistake.⁶¹ Even following the broadening of the scope of mistake, however, many areas remained uncovered, including, above all, those of mistake as to a simple motive (on a subjective reason, which did not enter into the contract). These errors could not be included, even in a properly and appropriately expanded catalogue of essential mistakes.

With reference to fraud, Art 1439, whose text is still in force without modification, stated that fraud is relevant if it causes a mistake, even as to motives. This, however, requires that the other party put in place real ‘artifices’ to deceive

Carresi, ‘In tema di responsabilità precontrattuale’ *Temì*, 440 (1965).

⁵⁸ This was the traditional opinion until the end of the last century, even though some important scholars did not accept it (see n 69 below). See G. D’Amico, ‘La responsabilità precontrattuale’, in V. Roppo ed, *Trattato del contratto* (Milano: Giuffrè, 2006), V, 2, 1108.

⁵⁹ See, among others, M. Allara, *La teoria generale del contratto* (Torino: Giappichelli, 2nd ed, 1955), 144; Corte di Cassazione 17 January 1953 no 124, *Giurisprudenza italiana*, I, 1, 918. Other scholars argue that the catalogue cannot be expanded by interpretation; nonetheless, their purpose is to avoid the consequence, accepted by no one, of the relevance of error as to motive. See, for example, F. Carresi, *Il contratto* (Milano: Giuffrè, 1987), I, 443.

⁶⁰ See F. Santoro-Passarelli, *Dottrine generali del diritto civile* (Napoli: Jovene, 9th ed, 1966), 165; more cautiously V. Pietrobon, *Errore* n 32 above, 116 and 237-240; in the opposite direction a minority view, for which see P. Barcellona, ‘In tema di errore riconosciuto e di errore bilaterale’ *Rivista di diritto civile*, I, 57, 76-78 (1961).

⁶¹ See F. Messineo, n 38 above, 90; distinguishing between ‘mutual mistake’ and ‘bilateral mistake’ V. Pietrobon, see *Errore* n 32 above; asserting an opposite opinion P. Barcellona, n 60 above, 78-79.

the defrauded party.⁶²

Over time, Italian scholars⁶³ and judges⁶⁴ have considerably extended the scope of the application of fraud. Artifices have been understood, despite the use of a plural form, in a singular sense, so that even a simple intentional lie – a misrepresentation intended to deceive – has been considered sufficient (*dolo commissivo*).⁶⁵ Moreover, an intentional non-disclosure of information which should have been disclosed in accordance with good faith has been considered sufficient (*dolo omissivo*).⁶⁶ Finally, some scholars have gone even further, proposing to recognise ‘negligent fraud’, ie misrepresentation or non-disclosure due to negligence, even in the absence of intentional deceit (*dolo colposo*).⁶⁷ This last outcome, however, does not appear to be entirely persuasive, as it strongly departs from the recent tradition of fraud and from the expressed tenor of Art 1439. In addition, this enlargement did not succeed in embracing within the scope of fraud those spontaneous errors (ie not caused by an omission or a false information by the other party) that are not essential but are concretely recognised.

To sum up, there has been a tendency in the Italian legal system to broaden the scope of mistake and, primarily, fraud, including by means of an increasing freedom of interpretation of certain legal provisions. This development, however, has left many open problems of coordination of these different defects in consent and, in any case, has left uncovered a vast gap between mistake and fraud.

Moreover, the need for protection in this no-man’s-land between mistake and fraud has been felt more and more deeply due to changes in society and in the legal system.⁶⁸ In order to respond to this need, the most recent Italian

⁶² The wording of this provision was probably influenced by the work of A. Trabucchi, *Il dolo nella teoria dei vizi del volere* (Padova: CEDAM, 1937), 523 and 530.

⁶³ Most of them, but there is no lack of exceptions. See, for today’s prevailing position, P. Trimarchi, *Istituzioni di diritto privato* (Giuffrè: Milano, 22nd ed, 2018), 186-187; for the opposite opinion M. De Poli, ‘I mezzi dell’attività ingannatoria e la reticenza da Alberto Trabucchi alla stagione della “trasparenza contrattuale”’ *Rivista di diritto civile*, I, 647, 694 (2011).

⁶⁴ To be honest, the texts of the judicial decisions are often ambiguous and sometimes seem to follow a different *ratio decidendi*: see F. Galgano, *Trattato di diritto civile* (Padova: CEDAM, 2nd ed, 2010), II, 364, and, recently, Corte di Cassazione 8 May 2018 no 11009, *Immobili & proprietà*, 393 (2018). Nevertheless, a certain trend towards an extension of the scope of fraud can be identified, which follows the proposals of the majority of scholars, as highlighted by A. Gentili, ‘Dolo - I Diritto civile’ *Enciclopedia giuridica* (Roma: Treccani, 1989), XII, 1, 2.

⁶⁵ See, among others, M. Lobbuono, ‘Art. 1439’, in E. Gabrielli ed, *Commentario del codice civile* (Torino: UTET, 2011), 171, 173-174; Corte di Cassazione 28 October 1993 no 10718, *Foro italiano*, I, 423 (1994).

⁶⁶ See, among others, G. Grisi, *L’obbligo precontrattuale di informazione* (Napoli: Jovene, 1990), 283; Corte di Cassazione 7 August 2002 no 11896, *Rivista di diritto civile*, II, 911 (2004).

⁶⁷ See, also for quotations, P. Lambrini, ‘Dolo colposo: una figura della scienza giuridica romana’, in Id, *Dolo generale e regole di correttezza* (Padova: CEDAM, 2010), 117, 117-121. For the opposite (and traditional) opinion see C.A. Funaioli, ‘Dolo’ *Enciclopedia del diritto* (Milano: Giuffrè), XIII, 1964, 738, 746, and A. Trabucchi, ‘Dolo (diritto civile)’ *Novissimo Digesto Italiano* (Torino: UTET, 1960), VI, 149, 151.

⁶⁸ And, of course, this need has been felt even more deeply by those who did not accept the broadening of the scope of informational defects in consent.

literature has referred to pre-contractual liability.⁶⁹ Therefore, it has been proposed that a pre-contractual compensatory remedy be granted wherever the party who has fallen into a mistake or who has been defrauded cannot find protection on the basis of defects in consent. In particular, it has been noted that the regulation of fraud also provides for, in addition to ‘decisive fraud’ (*dolus causam dans*), which leads to avoidability, ‘incidental fraud’ (*dolus incidens*), which leads only to compensation (and this occurs when the party would have concluded the contract in the absence of fraud, even if under different conditions). Moving from incidental fraud (Art 1440), some scholars have further argued that, in the other cases in which there is no defect in consent, the mistaken or defrauded party should be able to claim compensation under Art 1337 of the Italian Civil Code, insofar as there is an error on the part of one party and misconduct on the part of the other: or, in other words, if there is an ‘incomplete defect in consent’ (which does not represent a full defect in consent).

According to its academic proponents, this theory is essentially based on the distinction between validity rules and liability rules, which under Italian law are supposed to follow two totally different tracks.⁷⁰ Consequently, even where a contract is valid, its conclusion can be a source of liability for damages. Some scholars, however, considers the doctrine of incomplete defects in consent to be unpersuasive, asserting that the very distinction between rules of validity and rules of liability implies that there cannot be liability (and, *a fortiori*, a violation of good faith) where there is no invalidity, adding that, in order to be relevant, every atypical (not expressly regulated by statute law) duty of disclosure must fall within the scope of the application of Art 1338.⁷¹

Nonetheless, despite this criticism, the majority of scholars⁷² and the most relevant judicial decisions⁷³ today accept, as has been said, the doctrine of incomplete defects in consent. Consequently, where there is no defect in consent, it

⁶⁹ M. Mantovani, n 2 above, 187-292. The assertion of pre-contractual liability even in cases of conclusion of a valid contract can be found also in some important works about pre-contractual liability and defects in consent of the Sixties and Seventies. Nevertheless, in these works, such a thesis was only hinted at and, for this reason, did not affect the dominant opinion, which denied the presence of pre-contractual liability in the event of the conclusion of a valid contract. See in particular F. Benatti, n 57 above, 13 and 67; L. Mengoni, n 40 above, 273; V. Pietrobon, n 32 above, 105, and already Id, *L'errore nella dottrina del negozio giuridico* (Padova: CEDAM, 1963), 118.

⁷⁰ On this topic see, among others, V. Pietrobon, n 32 above, 105-106, and already Id, *Il dovere generale di buona fede* (Padova: CEDAM, 1969), 73. More recently, see G. Perlingieri, *Regole e comportamenti nella formazione del contratto. Una rilettura dell'art. 1337 codice civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 50-82, and Id, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo* (Napoli: Edizioni Scientifiche Italiane, 2013), 9-31.

⁷¹ See G. D'Amico, *'Regole di validità' e principio di correttezza nella formazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 1996), 101-159.

⁷² See G. Afferni, *Il quantum del danno nella responsabilità precontrattuale* (Torino: Giappichelli, 2008), 182.

⁷³ Corte di Cassazione 29 September 2005 no 19024, *Foro italiano*, I, 1105 (2006).

is argued that there may be pre-contractual liability so long as there is misconduct. This solution applies not only to cases of mistake and fraud, but also to cases of duress and incapacity.

In any case, it is almost unanimously held that the rules of liability can give rise to invalidity only if the legislature provides for it; for this reason, it is asserted: (i) that the violation of pre-contractual good faith cannot give rise to nullity of a contract for violation of an imperative rule under Art 1418, para 1, of the Civil Code (also because, if this were the case, the entire system of avoidability for defects of consent would be overwhelmed by the provision of an extremely wide ground of voidness);⁷⁴ (ii) that new defects of consent cannot be forged by analogy where a disadvantageous contract is concluded because of pre-contractual misrepresentation or non-disclosure of relevant information;⁷⁵ (iii) that compensation for damages for breach of an obligation to provide information cannot lead to a restitution in kind under Art 2058 of the Italian Civil Code and, through it, to the total or partial cancellation of the contract (otherwise it would be possible to elude the system of defects in consent).⁷⁶

Many works of scholarship and many jurisprudential decisions continue, however, to apply Art 1338 in cases in which pre-contractual liability is associated with a defect in consent, and to apply Art 1337 in other cases.⁷⁷ Some scholars, on the other hand, consider it preferable to always directly apply Art 1337 of the Civil Code,⁷⁸ or to apply it directly, at least in cases of fraud and violence (which can be included in the provision of Art 1338 of the Civil Code only by liberally interpreting its text).⁷⁹ The question has no practical importance, but has an

⁷⁴ See Corte di Cassazione 19 December 2007 nos 26724 and 26725, *Foro italiano*, I, 784 (2008), and G. Vettori, 'Regole di validità e di responsabilità di fronte alle Sezioni Unite. La buona fede come rimedio risarcitorio' *Obbligazioni e Contratti*, 104, 107 (2008).

⁷⁵ See L. Cariota-Ferrara, *Il negozio giuridico nel diritto privato italiano* (Napoli: Morano, 1949), 336, and now V. Roppo, n 54 above, 713.

⁷⁶ In other words, restitution in kind would substantially correspond to a new defect in consent while, on the contrary, the legal interpreter cannot create new defects in consent: see G. Iorio, *Struttura e funzioni delle clausole di garanzia nella vendita di partecipazioni sociali* (Giuffrè: Milano, 2006), 89-90 (this solution is opposite to the German one, as has been already mentioned). An opposite opinion is famously argued by Rodolfo Sacco – see now R. Sacco and G. De Nova, *Il contratto* (Torino: UTET, 2016), 611, and about this well-known opinion also G. Vettori, 'Buona fede e diritto europeo dei contratti' *Europa e diritto privato*, 2002, 915, 922-925 (2002) – who moreover asserts this restitution in kind without applying its natural limits, provided for by Art 2058, para 2, Italian Civil Code (according to which the restitution in kind must be not too expensive for the debtor), nor seems to consider this cancellation unenforceable against the third parties involved (as it should be for a mere judicial cancellation, differently from a true avoidance of the contract). In fact, Sacco goes further than mere restitution in kind and ends up speaking, on this basis, of a form of atypical avoidance.

⁷⁷ See for example R. Scognamiglio, 'Dei contratti in generale', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1970), 221; L. Rovelli, 'La responsabilità precontrattuale', in M. Bessone ed, *Trattato di diritto privato* (Torino: Giappichelli, 2000), XIII, 2, 312, 315 and 332-337.

⁷⁸ R. Sacco and G. De Nova, n 76 above, 1572.

⁷⁹ See, for example, C. Castronovo, 'Vaga culpa in contrahendo: invalidità e responsabilità

important systematic relevance, as we shall see later.

c) Dogmatic Construction of Pre-Contractual Liability: From Non-Contractual Liability to the Idea of ‘Obligation Without Performance’

As is evident, all the developments thus far described have led to the bestowing of a high degree of importance upon Art 1337. At the same time, these changes have led to a new perspective: the specific rules of Arts 1338 and 1398 have been seen as simple implementations, already provided for in legislation, of a unitary and general principle, ie that of good faith in negotiations.⁸⁰ This outcome, in turn, has itself contributed to the aforementioned development.

Parallel to these transformations, the dogmatic construction of pre-contractual liability has also changed. The Italian legal system did not necessarily require that this liability have a contractual nature: non-contractual liability under Italian law is, in fact, atypical, and has been over the decades interpreted in an increasingly broad way, both by the scholarship and case law.⁸¹ However, several authors have considered that it would be preferable to adopt a construction similar to the German one to describe pre-contractual relationships, as this would be more faithful to the reality of things.⁸²

As a result, more and more scholars have asserted that an obligatory relationship including duties to protect the counterparty arises between the parties to negotiations. This relationship, later called ‘obligation without performance’,⁸³ stems from the particular reliance of each party on the other, which has as its object the compliance with the requirements of good faith.⁸⁴ This relationship embraces different duties to protect, which can be classified as duties of disclosure and confidentiality, and to take care of goods. Breach of these obligations gives rise to contractual liability.

e la ricerca della *chance* perduta’ *Europa e diritto privato*, 2010, 1, 8 (he proposes the direct application of Art 1337 in cases of duress and of recognisable, but inexcusable, mistake); G. Patti and S. Patti, n 51 above, 203 (according to which liability in cases of fraud or duress is based on Art 1337).

⁸⁰ As we have seen, for some authors this means also that Art 1337 can found an atypical duty of disclosure broader than the one provided for in Art 1338; for other scholars this conclusion is unconvincing.

⁸¹ The debate on this subject is enormous. Here it is sufficient to mention, in literature, E. Navarretta, ‘L’evoluzione storica dell’ingiustizia del danno e i suoi lineamenti essenziali’, in N. Lipari et al eds, *Diritto civile* (Milano: Giuffrè, 2009), IV, 3, 137-161, and, in case law, Corte di Cassazione 22 July 1999 no 500, *Foro italiano*, I, 2487 (1999).

⁸² L. Mengoni, n 40 above, 267-282.

⁸³ See C. Castronovo, ‘L’obbligazione senza prestazione ai confini tra contratto e torto’, in G. Alpa and F. Benvenuti eds, *Le ragioni del diritto. Scritti in onore di L. Mengoni* (Milano: Giuffrè, 1995), I, 147, 160-165.

⁸⁴ For the idea that the object of reliance is the respect of good faith see also Salv. Romano, ‘Buona fede (dir. priv.)’ *Enciclopedia del diritto* (Milano: Giuffrè, 1959), V, 677, 684, and V. Cuffaro, ‘Responsabilità precontrattuale’ *Enciclopedia del diritto* (Milano: Giuffrè, 1988), XXXIX, 1265, 1269-1270.

Today, the majority of scholars (perhaps not the most numerous, but certainly the most attentive and influential) consider that pre-contractual liability derives from the violation of those duties to protect that arise in the context of the pre-contractual protection relationship.⁸⁵ Case law has long disregarded this thesis, at the same time, paradoxically, making use of other doctrines that had been developed as corollaries (for example, that concerning the contractual nature of liability of a doctor dependent on a nursing home for breach of the obligation without performance that arises from social contact with a patient).⁸⁶ Recently, however, in an important decision, the Court of Cassation changed its opinion, accepting the aforementioned thesis.⁸⁷ Shortly thereafter, the legislature promulgated a law in order to imperatively attribute a non-contractual nature to the liability of the doctor in the aforementioned situation.⁸⁸

4. Is a Third Phase Coming? Future Evolutions, Towards a Consistent System of Informational Defects in Consent and Pre-Contractual Liability

The evolution described above has led to a present situation which, insofar as the regulation of informational defects in consent and their relationship with pre-contractual liability are concerned, is not entirely persuasive. We shall now focus on why this is not convincing, and how (or even if) it is possible to improve the situation in a hermeneutic way (ie without legislative reform).

a) Inconsistency Aspects of the Current Italian System of Informational Defects in Consent and Pre-Contractual Liability

There are many reasons why the current state of the system of informational defects in consent and pre-contractual liability, which we can draw from literature and case law, seem incongruous.

With regard to mistake, apart from the usual anti-literal interpretations of the provisions in cases of mutual mistake (for which the requirement of recognition is held as not necessary) and recognised mistake (relevant even if not recognisable), many authors tend to believe that mistake may overlap with contractual warranties⁸⁹ and that, in any case, there may be an error even if the other party breaches its duty of disclosure.⁹⁰ These outcomes are not convincing, as there is no

⁸⁵ See C. Castronovo, *Responsabilità civile* (Milano: Giuffrè, 4th ed, 2018), 539.

⁸⁶ See Corte di Cassazione 11 January 2008 no 577, *Foro italiano*, I, 455 (2008).

⁸⁷ See Corte di Cassazione 12 July 2016 no 14188, *Giurisprudenza italiana*, 2565 (2016); already in this direction Corte di Cassazione 20 December 2011 no 27648, *Giurisprudenza italiana*, 2547 (2012), and Corte di Cassazione 21 November 2011 no 24438, *Giurisprudenza italiana*, 2662 (2012).

⁸⁸ See Art 7, para 3, legge 8 March 2007 no 24.

⁸⁹ See R. Sacco and G. De Nova, n 76 above, 528. A different opinion can be found in C.M. Bianca, n 54 above, 653-654.

⁹⁰ See, for example, C. Colombo, 'Il dolo nei contratti: idoneità del mezzo fraudolento e

place for mistake when contractual warranties are provided for⁹¹ and, above all, because mistake should not apply when the counterparty violates its obligations to provide information (the mistake ruled by the Civil Code is not an ‘induced’ mistake, ie a mistake caused by the other party breaching its duties of disclosure or providing incorrect information, but a spontaneous one, as Art 1431 implicitly states, providing that the error ‘can’ – and not ‘must’ – be recognised by the counterparty).⁹² Moreover, it is not clear to what extent the catalogue of essential errors, even though considered open, can be extended in a hermeneutic way.⁹³

With regard to fraud, the concept of ‘negligent fraud’, as already argued, is not persuasive, although it does seem necessary in order to respond to questions of justice.⁹⁴ Furthermore, nor is the differentiation between decisive and incidental fraud clear, being sometimes linked to objective indices, and sometimes to subjective indices or the mere will of the deceived person.⁹⁵

Despite this lack of clarity, the theory of incomplete defects in consent as a whole is based on the existence of incidental fraud, as we have seen. Moreover, the practical outcomes of this doctrine are sometimes difficult to tolerate, particularly when they lead only to compensation (and not to the cancellation of the contract) in cases which seem to be no different from those of ‘full’ defects of consent.⁹⁶ And this is especially because not every incomplete defect in consent is an incidental one.⁹⁷ It would be even less persuasive, however, to reject this theory and leave without legal protection a number of cases falling into the no-man’s-land between mistake and fraud.

rilevanza dell’errore del *deceptus*’ *Rivista del diritto commerciale*, I, 347, 386 (1993).

⁹¹ As in the German legal system it is correctly pinpointed: among others, see R. Singer, ‘§ 119’, in *Staudinger Kommentar* (Berlin: Sellier-de Gruyter, 2016), 514, 592-593.

⁹² When the parties are in the same position with regard to the piece of information, the mistake ‘can’ be recognised in some situations (when it is readily apparent). When two parties are in different positions, the mistake ‘must’ be recognised in some situations, because a duty of disclosure exists even before the mistake. The contrast is identical to that between spontaneous and caused error: see A. Gianola, *L’integrità del consenso dai diritti nazionali al diritto europeo. Immaginando i vizi del XXI secolo* (Milano: Giuffrè, 2008), 642.

⁹³ See, also for quotations, C. Rossello, ‘L’errore nel contratto’, in P. Schlesinger and F.D. Busnelli eds, *Il codice civile. Commentario* (Milano: Giuffrè, 2nd ed, 2019), 83-85.

⁹⁴ See E. del Prato, ‘Le annullabilità’, in V. Roppo ed, *Trattato del contratto* (Milano: Giuffrè, 2006), V, 1, 271.

⁹⁵ See, for different points of views, C.A. Funaioli, n 67 above, 747; F. Lucarelli, *Lesione di interesse e annullamento del contratto* (Milano: Giuffrè, 1964), 99; A. Checchini, *Rapporti non vincolanti e regola di correttezza* (Padova: CEDAM, 1977), 317, fn 173; G. D’Amico, n 71 above, 122-123.

⁹⁶ In Germany, as we have seen, it is possible to fully or partially cancel the contract in cases of failure of disclosure or misrepresentation through a restitution in kind (*Naturalrestitution*). This outcome is more persuasive than the Italian one, even though the restitution in kind requires the existence of damages, and not only the conclusion of a valid contract as a result of the misconduct.

⁹⁷ From the traditional perspective, it is worth mentioning the decisive negligent fraud that that does not coincide with an essential mistake: this error, if we do not grant avoidance in cases of ‘*dolo colposo*’ (negligent fraud), does not result in a defect in consent.

Furthermore, it is not clear whether the right of a party to avoid the contract is also a burden, in the sense that it is not possible to waive the right to avoid the contract and at the same time to demand full compensation.⁹⁸ Similarly, it is not clear what should be the quantum of damages resulting from pre-contractual unfairness in cases where the contract cannot be avoided or is not actually avoided.⁹⁹ These doubts make it even more difficult to coordinate the defects of consent and the remedies for breach of pre-contractual duties.

b) Arguments For and Against a Hermeneutical Revision

In fact, all these doubts derive from a larger question. The current system was formed by successive stratifications, by accumulation, until it reached the current situation. As we have seen, all the importance of pre-contractual information was first enclosed in Art 1338. Then, the scope of application of informational defects of consent was broadened. Only recently a pre-contractual liability for breach of duties of disclosure was recognised even where a contract cannot be avoided, attributing to it a sort of 'stop-gap' function.

All these stratified choices had, at the time they were made, their own logic, and were supported by arguments, sometimes textual, sometimes systematic, sometimes practical. The same idea of proceeding by stratification, moreover, is completely legitimate, since the interpreter always has to deal with a 'formed system' that has a resistance force and cannot easily be subverted, except in the presence of sufficiently strong arguments.¹⁰⁰ These arguments induced scholarship and case law to adopt corrective measures, but not to radically change the pre-

⁹⁸ As far as fraud is concerned, a negative answer is given by F. Benatti, see n 57 above, 68 (the author proposes to recognise a claim for compensation even if the party does not intend to avoid the contract) and under the previous Civil Code by A. Trabucchi, n 62 above, 331. A different opinion can be found in S. Pagliantini, 'Il danno (da reato) ed il concetto di differenza patrimoniale nel caso Cir-Fininvest: una prima lettura di Cass. 21255/2013' *Contratti*, 113 and 119 (2014); according to this scholar the party that confirms the contract cannot demand compensation. As is apparent, there is no agreement in the literature (even though most of the scholars deny any form of prejudiciality, at least for fraud). Moreover, there are no studies that analyse this topic in-depth, and even the ones that deal with it often take into consideration different situations (for example, claims for compensation without claims for avoidance, or claims for compensation after expiration of avoidability, or claims for compensation after confirmation of contract).

⁹⁹ Normally, the quantum of the compensation is assessed on the difference between the value of the concluded contract and the value of the contract that would have been concluded in the absence of the error: see, for example, A. Ravazzoni, *La formazione del contratto* (Milano: Giuffrè, 1966), II, 65. However, it is not clear whether 'the contract that would have been concluded' is the contract that the mistaken or defrauded party relied upon or the contract that the party would have effectively concluded in the absence of a mistake. Following the first solution, it not clear what happens when the other party objects that it would not have concluded the contract under these different conditions; following the second one, the protection of the mistaken or defrauded party may be very restricted.

¹⁰⁰ In this light we could recall some passages from the works of Tullio Ascarelli, in which the author builds a historicist theory of law: see, for example, T. Ascarelli, 'Antigone e Porzia' *Rivista internazionale di filosofia del diritto*, 756, 766 (1955).

contractual information system. The last and most conspicuous corrective is precisely that of the ‘stop-gap’ function of pre-contractual liability.

This outcome does not exclude, however, that, today, in the face of a certain state of the system and of the society in which it subsists, there are other even stronger arguments, which require this stratification to be overcome, restoring on new bases the construction of defects in consent.

The revision that can be imagined, to be more precise, would lead to abandoning the current constructions of mistake and fraud, re-interpreting informational defects in consent in an innovative way and with full attention to the interests of the parties. At the same time, however, this revision could recover the text of the provisions relating to mistake and fraud, coming back to an interpretation closer to the first sense of these provisions and creating through analogy new atypical defects in consent (ie atypical mistakes) with regard to the no-man’s-land between mistake and fraud, which would be much wider than it is now, on the basis of the current state of the system.

In order to assess this hermeneutical proposal, we need to see what arguments support it, as well as how it can work.

Accepting this proposal involves: (i) creating an axiological gap¹⁰¹ between mistake and fraud, rather than simply adopting an extensive interpretation of informational defects in consent; (ii) largely overcoming the current interpretation and application of the system.

Against this, therefore, there are obviously arguments linked to the text (to a textual interpretation of the Civil Code) and to the current interpretation and application of the system: (i) creating an axiological gap is not possible, if there is no urgent need; (ii) overcoming what is widely accepted is not possible, if there is no urgent need.

These arguments traditionally emerge in the face of any analogical or innovative construction. For this reason, we have to verify if the functional argument is stronger or weaker than the other arguments. In doing so, we have to remember that the current Italian legal system is nowadays less formalistic than in the past, and that because of this it easily, from a general point of view, welcomes legal analogies and innovations.¹⁰²

More precisely, we must consider whether all the successive stratifications have led to a system that, because of the demand for justice, claim a totally new

¹⁰¹ Regarding the axiological gaps, see R. Guastini, ‘Defettibilità, lacune assiologiche, e interpretazione’ *Revus*, 57 (2010). More generally, on legal gaps in civil law systems, see C. Irti, ‘A Short Introduction to ‘The Problem of Legal Gaps’ 29 *Tulane European & Civil Law Forum*, 1 (2014).

¹⁰² In fact, the modern conception of private autonomy does not sit very comfortably with arguments that sound too formalistic and that lead to results which are functionally unjustified. On the *Materialisierung* of private autonomy see C.W. Canaris, ‘Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner “Materialisierung” ’ 200 *Archiv für die civilistische Praxis*, 273 (2000), and A. di Majo, ‘Giustizia e ‘materializzazione’ nel diritto delle obbligazioni e dei contratti tra (regole di) fattispecie e (regole di) procedura’ *Europa e diritto privato*, 797 (2013).

conformation, based entirely on a rational and reasonable assessment of the interests of the parties, even at the cost of creating an axiological gap, and overcoming what is widely accepted. It has to be proved that this construction, which is directly based on interests, would be simpler, more coherent with the legal system and its political and technical choices, and more reasonable with regard to the interests of the parties. At the same time, it must be verified whether the statutory texts that remain in force would be interpreted in a faithful or even more faithful way to the text (thanks to its open nature)¹⁰³ and whether the new construction could still be systematically and functionally close (or close enough) to the recent tradition (avoiding all unnecessary or excessive overruns).

We shall discuss now the first point, while the other point will be dealt with below, as we try to analytically build a new system of informational defects in consent and pre-contractual liability.

c) Functional Arguments: A New Way of Looking at Informational Defects in Consent

If we want to prove that a totally new construction, directly based on interests, would be simpler, more coherent, and more reasonable, we must take into account the fact that the current strength of the functional argument does not depend so much on the need to broaden the scope of mistake or fraud, but above all on a radically different way of understanding these defects in consent, and thus on a Copernican revolution in the way we identify the interests at stake.¹⁰⁴

The Italian legal system traditionally regulated informational defects in consent, and above all mistake,¹⁰⁵ merely from the point of view of the mistaken person, looking at these defects in consent as contractual pathologies. The regime of informational defects in consent entailed a distribution of pre-contractual risks, but they presented themselves and were primarily understood in a different way, as contractual pathologies deriving from a defect in the intent of the party.¹⁰⁶

This view, typical of continental systems and closely linked to the role of the will as a constituent element of the contract,¹⁰⁷ led to the conclusion that

¹⁰³ About the 'open texture' of the legal provisions, see, of course, H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2nd ed, 1994), 127-128.

¹⁰⁴ About paradigm shifts and revolutions, in the Kuhnian sense, in law, see S. Worthington, A. Robertson and G. Virgo, *Revolution and Evolution in Private Law* (Oxford-Portland, Oregon: Hart, 2018).

¹⁰⁵ The following considerations refer mostly to mistake. However, the normal classification of both mistake and fraud as defects in consent and the greater importance of mistake usually have led scholars and judges to conceptualize fraud in the same way as mistake.

¹⁰⁶ This is evident above all for mistake: see, for example, L. Cariota-Ferrara, n 75 above, 477-581. The need for a change of perspective was already underlined by P. Barcellona, 'Errore (dir. priv.)' *Enciclopedia del diritto* (Milano: Giuffrè, 1966), XV, 246, 250-253.

¹⁰⁷ See, with regard to mistake, F.C. von Savigny, n 6 above, 263-276. See also M.J. Schermaier, 'L'errore nella storia del diritto' *Roma e America. Diritto romano comune*, 185, 241-242 (2007).

informational defects in consent should be understood as pathologies of the will and thus of the contract.¹⁰⁸ This idea placed defects in consent on a different level from a form of pre-contractual liability directly based on good faith, because the regulation of defects dealt more with the question of the contract's validity than with the question of good faith.

Proof of this, moreover, is the traditional interpretation of Art 1338,¹⁰⁹ according to which not only could pre-contractual liability be imagined exclusively in the case of defects in consent, but also and above all could pre-contractual liability be derived only from the existence of an undeclared (or unprevented) invalidity. It was considered, in fact, that in the event of a defect in consent, the protected party could also claim damages if the other party was or should have been aware of the invalidity and had not informed the other party of it (or, in cases of duress and incapacity, had not prevented the invalidity), and not that the very misconduct of the other party gave rise to a remedy in a specific form (cancellation of the contract) and a compensatory remedy (liability for damages). The core of the regulation was, in short, validity and invalidity; and this appeared clear above all for cases of mistake (even more so than for cases of fraud). Further proof is the fact that, when pre-contractual liability has also been recognised in cases of disadvantageous but valid contracts, the direct application of the principles of good faith provided for by Art 1337 has given rise to the abovementioned inconsistencies with (and in) the system of defects in consent.

In light of modern sensibilities, it would seem simpler and more correct to construe defects in consent differently.¹¹⁰

The reasons that led to the formation of this sensibility are many. The role of the will in the conception of contract has been diminished, partly because of a deeper study and clarification of this topic, and partly because of changes in society (ie of its cultural horizon). Today, the contract is seen as an act of voluntary self-regulation of interests, at the basis of which there is a normal intent, which in practice can also be missing or deformed.¹¹¹ Where there is no intent or there is

¹⁰⁸ This outcome was, however, true not only for those scholars which adhered to the 'will' theories, but even for those authors who followed the opposite 'declaration' or 'expression' theories: in fact, they too were shaped by the dominant idea of mistake as contractual pathology resulting from lack of will (intended or as always relevant, unless the law did not recognise this relevance, or as relevant only where the law recognised this relevance). See, with regard to mistake, A. Verga, *Errore e responsabilità nei contratti* (Padova: CEDAM, 1941), 223-285. Nonetheless, the importance that the 1942 Italian Civil Code placed upon reliance has contributed to the development of new perspectives, as we shall see in the text.

¹⁰⁹ See n 77 above.

¹¹⁰ This development is only the last step in a process that, with respect to mistake, has spanned more than two thousand years: see R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996), 600-602. On the history of mistake see M.J. Schermaier, *Die Bestimmung des wesentlichen Irrtums von den Glossatoren bis zum BGB* (Wien: Böhlau Verlag, 2000).

¹¹¹ See K. Larenz, *Die Methode der Auslegung des Rechtsgeschäfts. Zugleich ein Beitrag zur Theorie der Willenserklärung* (Leipzig: A. Deichertsche Verlagsbuchhandlung, 1930), 34-

a deformed intent, there will be a consequent defect in consent, but the contract will still exist (the two concepts, existence and validity, ie voidness and avoidability, are distinct under Italian law).

The regulation of defects in consent, which has always implied a distribution of pre-contractual risks, has accentuated the focus on the balance of the parties' interests.¹¹² After all, already with the entry into force of the new Italian Civil Code in 1942, the legislature abandoned the requirement of excusability of mistake provided for by the previous Civil Code, replacing it with that of recognisability, which in turn placed more importance upon the interests of both parties.¹¹³ Moreover, in the same vein, scholars and judges have argued that an unrecognisable error is to be regarded as a mistake, if recognised.¹¹⁴

Over time, therefore, the pre-contractual distribution of risk has come to be the core of the system. Consequently, at the bottom of the system of defects of consent there is no longer (only or above all) the idea of contractual pathology, but that of remedy:¹¹⁵ defects of consent do not represent vices of the contract due to a pathology of a constituent element, the regulation of which also takes into account the reciprocal position of the parties in the negotiations, but rather remedies available to a party directly based on a distribution of pre-contractual risk, and which can involve a pathology of the contract.

Therefore, if, at the centre of the system, there is a distribution of risks, and defects of consent are manifestations of this distribution, it is unreasonable to interpret these autonomously with respect to a form of pre-contractual liability directly based on good faith. On the contrary, it is necessary to build a unitary system of pre-contractual liability and defects of consent based on a pre-contractual distribution of risks that cancels precisely those critical points mentioned in the opening of the section. This will allow for the simplification of the system, making it more coherent and avoiding gaps in protection. In fact, the full connection between pre-contractual liability and defects of consent from the perspective of the same distribution of risks, on the one hand, makes the inconsistencies between remedies intolerable and unjustified. On the other hand, it allows these inconsistencies to be overcome, better delimiting and defining the

53 and E. Betti, *Teoria generale del negozio giuridico* (Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2002), 54-74.

¹¹² In particular, by giving more importance, as far as mistake is concerned, to the 'other party's behaviour', than to 'the subject matter of the mistake'. See S. Lohsse, 'Art 4:103: Fundamental Mistake as to Facts or Law', in R. Zimmermann and N. Jansen eds, *Commentaries on European Contract Law* (Oxford: Oxford University Press, 2018), 657, 660-662. See also, for an interpretative revision of the German *Eigenschaftsirrtum*, Armbrüster, '§ 119. Anfechtbarkeit wegen Irrtums', in *Münchener Kommentar* (München: Beck, 8th ed, 2018), paras 116-118.

¹¹³ A. Cataudella, *I contratti. Parte generale* (Torino: Giappichelli, 4th ed, 2014), 93.

¹¹⁴ On the relevance of 'concrete reliance' of the non-mistaken party, see n 94 above.

¹¹⁵ The idea of remedy is necessarily relational, different from the idea of pathology deriving from the discrepancy between the will of the party and the contract. About legal remedies see, among others, Y. Adar and P. Sirena, 'La prospettiva dei rimedi nel diritto privato europeo' *Rivista di diritto civile*, I, 359 (2012).

various remedies.

d) Construing a New Unitary and Consistent System

The need to build a unitary system represents a very strong practical argument. However, this argument must, as we attempt to do next, be put into practice.

aa) A Copernican Revolution in the Relationship Between Informational Defects in Consent and Pre-Contractual Liability: An Example

Once this re-orientation is completed, the whole traditional construction falls apart. The textual and traditional arguments that support it clearly diminish their persuasive strength and become simple obstacles to a revision of the system. This is the case, for example, for the traditional interpretation of Art 1338.¹¹⁶

Considering that, in our (new) system, defects in consent must be primarily seen as remedies, and only through this prism as pathologies, it is absurd to assert that, in cases of defects in consent, a party can ask for compensation under Art 1338.

Indeed, as far as duress and incapacity are concerned, even the traditional interpretation of this provision was not very convincing and needed a textual correction: as we have seen, in these cases it cannot be considered that the protected party had trusted in the validity of the contract and that the other party had been under an obligation to inform it of the invalidity. However, this construction could be accepted for mistake and fraud, so that it was also adopted in cases of violence and incapacity.

Today, even with respect to mistake and fraud, it is necessary to re-interpret the provision: it cannot be considered that the mistaken or defrauded party relies on the validity of the contract and that the other party must warn it of the invalidity. Invalidity is not the cause of a breach of reliance, but rather a remedy. The other party must, rather than informing the party of the invalidity, correct the error and avoid deception.¹¹⁷

The re-interpretation of Art 1338 of the Italian Civil Code does not imply that the protected party cannot be asked for compensation, but only that it must claim it under Art 1337. From a practical point of view, it does not change much. From the systematic point of view, however, the result is remarkable, because it attests a new way of understanding defects in consent (primarily understood as remedies and not as pathologies), and confirms the necessity of reorganizing the entire system of pre-contractual liability and informational defects in consent,

¹¹⁶ It is no coincidence that a different interpretation of Art 1338 is proposed by Rodolfo Sacco, who sees in defects in consent, rather than contractual pathologies, remedies. See, respectively, R. Sacco and G. De Nova, n 76 above, 611 and 1572.

¹¹⁷ In other words, it is not the very existence of the defect that could give rise to a compensatory claim, but it is the misconduct in itself.

directly balancing the interests of the parties, in accordance with the general clause of good faith (Art 1337 Civil Code).

bb) Informational Defects in Consent and Pre-Contractual Liability as Epiphenomena of the Same Pre-Contractual Risks Distribution

As we have seen, informational defects in consent were in the past understood as totally heterogeneous from a form of *culpa in contrahendo* directly based on good faith. This idea led at first to the assertion that pre-contractual liability was only available in the presence of mistake and fraud (Art 1338), and then to the assertion of compensation claims for pre-contractual liability, even in the absence of mistake and fraud (Art 1337).

Nowadays informational defects in consent and *culpa in contrahendo* must be understood as two epiphenomena of the same pre-contractual risks distribution. Nonetheless, this new assumption opens a choice similar to the past one (even if in a totally new light): as it was asserted (first) that pre-contractual liability existed in the case of defects in consent and (then) that it could cover a larger area, nowadays (i) it is possible to argue that, through the system of informational defects in consent, the Civil Code has regulated the distribution of pre-contractual risks, so that liability for compensation can be asserted only taking into account the construction of the informational defects in consent offered by the legislator; (ii) in the abstract, it is also possible to assert that the system of informational defects in consent provided for by the Civil Code is only illustrative and regulates only partially the distribution of pre-contractual risks, primarily assigned, together with pre-contractual liability, to the general clause of good faith and, therefore, to the interpreter.

With regard to the current Italian legal system, the first option is unacceptable, precisely because the regime of defects in consent appears to be deficient and in need of revision.¹¹⁸ All that remains, therefore, is to follow the second path.¹¹⁹ This leads precisely to a less extensive interpretation of typical informational defects in consent, opening up the possibility of an ‘atypical mistake’ (or, better, of many ‘atypical mistakes’) in the middle zone between mistake and fraud.¹²⁰

¹¹⁸ This is the case, on the other hand, with the PECL, whose regime of defects of consent makes it possible to create a unitary system of pre-contractual distribution of risks, primarily regulated by law through the regime of the defects of consent. See below, in the last paragraph.

¹¹⁹ From this, it follows that, even if the law had always accepted the idea of defects of consent as remedies, it would be necessary today to update the traditional system through recourse to the general clause of good faith to review the whole unitary system of defects of consent and of the pre-contractual liability. Simply, this process would have long since led to the outcomes that now will be proposed, without the need to go through the idea of incomplete defects in consent, which give rise only to liability for damages.

¹²⁰ As far as duress and incapacity are concerned (ie defects with which we do not deal), no analogy is needed, because duress and incapacity are not regulated in such a limited way that an axiological gap need be opened. Nonetheless, an extensive interpretation is necessary; to be more precise, the interpreter must construe these defects in consent according to the idea

cc) Analogy, Special and Exceptional Provisions, Legal Certainty and Protection of *Bona Fide* Purchasers

We must take on, and respond to, a possible criticism. It could be argued that the Italian system does not allow analogy for defects in consent and in general for exceptional rules (Art 14 preliminary provisions to the Civil Code).¹²¹

This argument is unconvincing: the exceptional nature of a rule should not be confused with its special nature, which indicates the existence of a subsystem within which analogy is certainly allowed, and the difference between the special rule and the exceptional rule itself depends on a functional reasoning, similar to that which has just been completed.¹²² Nor can the principle of legal certainty nor that of the protection of third parties be invoked in the opposite direction: legal certainty is weakened as much by a system of vices of consent, interpreted extensively, as by one that allows an analogical interpretation of their statutory provisions; the protection of third parties is not undermined if avoidability is extended, simply because under Italian law avoidability has effects vis-à-vis third parties only if they are not *bona fide* purchasers or if the purchase is free of charge, ie in cases in which their reasons are of less merit than the reasons of the protected party.¹²³

dd) The Need for an Analytical Construction of the System of Informational Defects in Consent

We have now to pinpoint whether and how a new construction directly based on a good-faith oriented balance of parties' interests can also take account to some extent of those legal categories and concepts already developed by scholars and judges that are not outdated, as well as of the texts of the provisions that come to light. If this were not the case, that is to say, if this new construction forced the interpreter to arrive at excessive hermeneutical twists, it would not be acceptable, and progress in the system could only be made through legislative reform.

We shall see, however, that the interpretative revision proposed not only avoids hermeneutical stretches, but also fully respects the other legal categories which were already in use and are now not outdated, while, moreover, allowing the provisions of the Civil Code on mistake and fraud to be read in a plain and simple way.

of the 'mobile system', and therefore considering that the requirements established by the statutory law regard only some typified situations and may be lacking in others that are equally relevant.

¹²¹ See M. De Poli, *Asimmetrie informative e rapporti contrattuali* (Padova: CEDAM, 2002), 106.

¹²² See L. Gianformaggio, 'Analogia' *Digesto delle discipline privatistiche - Sezione civile* (Torino: UTET, 1987), I, 320, 328-329, and F. Gallo, 'Norme penali e norme eccezionali nell'art. 14 delle "disposizioni sulla legge in generale"' *Rivista di diritto civile*, I, 1 (2001). See also P. Perlingieri, *Il diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 1984), 202-203.

¹²³ See R. Sacco and G. De Nova, n 76 above, 612.

III. A System of Informational Defects in Consent Based on Pre-contractual Good Faith

In the following paragraphs, we shall consider how it is possible to create an orderly and coherent system of pre-contractual good faith and defects in consent: that is, a system of defects in consent directly based on the balancing of pre-contractual risks.

This will require (para III.1) a functional evaluation of the reciprocal position of the parties during the negotiations (para III.1.a); an analysis of how the pre-contractual protection offered by the law works in general (para III.1.b); and a more specific examination of the types of informational defects in consent (para III.2.a) and their remedies (para III.2.b).

1. The Pre-Contractual Relationship Based on Reliance

It is not necessary to reprise here the long-standing debate on the nature of pre-contractual liability.¹²⁴ On the contrary, it is important to say a few words about the object of pre-contractual protection. These remarks can be modulated according to the preferred theory on the nature of pre-contractual liability (contractual, non-contractual, or of a third genus).

Here we shall limit ourselves to what is strictly necessary to establish a suitable framework for the study of defects in consent.¹²⁵

a. The Role of Pre-Contractual Reliance

As soon as two parties come into contact for the purpose of forming a future contract, the conduct of each gives rise to reliance on the part of the other party. However, this 'reliance' is not to be understood, as the Italian literature usually understands it, as reliance on the fair conduct of the other party.¹²⁶ Reliance, on the contrary, is on the fact that the other party has a certain propensity (gradually changing) to make a future contract (whose content is gradually defined during the negotiations).¹²⁷

The fact that this reliance can and does arise with a certain content, directly derives, on the one hand, from the fact that, objectively, the situation can give rise to it according to good faith and, on the other hand, from the fact that the concrete situation coincides with the abstract one that enables it. As soon as

¹²⁴ See A. Albanese, 'La lunga marcia della responsabilità precontrattuale: dalla *culpa in contrahendo* alla violazione di obblighi di protezione' *Europa e diritto privato*, 1129 (2017).

¹²⁵ More widely in A.M. Garofalo, 'Il ruolo dell'affidamento nella responsabilità precontrattuale' *Teoria e storia del diritto privato*, 1 (2018), also with regard to the nature of pre-contractual liability.

¹²⁶ See, lastly, C. Castronovo, *Eclissi del diritto civile* (Milano: Giuffrè, 2015), 127 and 129, and C. Amato, *Affidamento e responsabilità* (Milano: Giuffrè, 2012), 125.

¹²⁷ This idea is closer to the German thesis of Kurt Ballersted and Claus-Wilhelm Canaris: see n 26 above.

there is such a situation and a party activates this reliance or intentionally gives the impression of doing so, a pre-contractual relationship is created in its favour.¹²⁸ As soon as the other party becomes aware of an objective activation of reliance, a pre-contractual relationship is also created in its favour.¹²⁹

This does not exclude the fact that reliance, although it is regulated by the legal system in its objective reasonableness and in its specific and ever-changing content, must also be subjectively activated by the party. Therefore, reliance is protected within the limits of what is objectively reasonable and what is subjectively supposed. In that instance, the relevant reliance is the one that offers the narrower protection for the party, between reliance on what is objectively reasonable and reliance on what is subjectively supposed.

The core of this relationship (of these two relationships: one for each party) is the tension towards a certain future contract, the content of which is specified during the negotiations. This tension is protected not by a right of performance, but in the negative.¹³⁰

The legal system foremost protects the party from erroneous reliance when this is due to misconduct on the part of the other party, allowing it to claim damages related to this reliance (reliance – or negative – interest).¹³¹ It must be assumed, however, that this compensation cannot exceed the limits of the satisfaction of its positive interest, since the party could not be protected more and better than if it had concluded the contract (where it would have been able, in the event that failure of performance is imputable to the other party, to claim the expectation – or positive – interest).¹³²

Moreover, the legal system protects a party from erroneous reliance deriving from the misconduct of the other party or even from an exceptional situation in some way imputable to the other party, allowing the party to break off at no cost the negotiations or to cancel the contract already concluded without cost.

Alongside this nucleus of reliance, which we can call ‘pretensive’,¹³³ the pre-

¹²⁸ Except for the case of *falsa demonstratio*, ie when the parties explicitly or implicitly agree to give another meaning to their words or conducts.

¹²⁹ Again, except for the case of *falsa demonstratio*.

¹³⁰ V. Emmerich, see n 29 above, para 201.

¹³¹ Regarding the *negatives Interesse*, see H. Dedek, *Negative Haftung aus Vertrag* (Tübingen: Mohr Siebeck, 2007).

¹³² About these expressions (positive, negative, expectation, reliance interest) see R. Zimmermann, ‘Art 9:502. General Measure of Damages’ in R. Zimmermann and N. Jansen eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), 1455, 1458, and, in the common law literature, the well-known study of L.L. Fuller and W.R. Perdue, ‘The reliance interest in contract damages’ 46 *Yale Law Journal*, 52 and 373 (1937).

¹³³ It is worth explaining the meaning of ‘pretensive’, which derives from the Italian term ‘*pretensivo*’. According to Italian law, in any obligatory relationship, two parts can be distinguished: (i) the debtor must perform the obligation (ii) without damaging the creditor. While the second part refers to protection of the pre-existing interests of the creditor, the first part refers to the obligatory conduct that the debtor is obliged to maintain (to give or to do or not do something), so that the creditor can force him or her to maintain this conduct by demanding performance

contractual relationship also consists of a 'protective' part, which ensures that each party is always protected from damage caused by the other party acting against good faith and related to the negotiations.¹³⁴

Let us see better how pre-contractual legal protection works.

b. Pre-Contractual Protection in General (Breaking Off Negotiations, Defects in Consent, Other Damages)

An analysis of the legal protection offered by pre-contractual liability requires a separate examination of the pretensive and protective cores of the pre-contractual relationship.

aa. Pretensive Core of Pre-Contractual Relationship

The pre-contractual relationship can be infringed both in its pretensive and in its protective core.

Pretensive-core infringement concerns the problems of breaking off negotiations and defects in consent that we consider here (mistake and fraud).

The object of reliance of each party is, as has already been said, the fact that the other party has a certain degree of propensity to make a contract having a certain object that gradually becomes more specific. The discrepancy between this reliance and the reality of things is legally protected.

It can happen, first of all, that a party believes – because the other party induces it to believe or because it spontaneously believes something wrong, in a way recognised or recognisable by the other party – that the other party has stronger intentions to conclude the contract than it actually does. This discrepancy is relevant if the gap between what is supposed and what is real is sufficiently wide. In such a case, the protected reliance does not overlap with the reality and has an autonomous content.

As soon as the discrepancy emerges, the party may abandon the negotiations at no cost and, if there has been misconduct by the other party, charge it for the incurred costs.

To be precise, there is misconduct where the other party has given rise to the erroneous reliance or has acknowledged it and this conduct was imputable

through a claim that in Italy is called '*pretesa*' (literally 'pretension'). In the pre-contractual relationship, two components can be distinguished: besides the protective one, which is deputed to protect the pre-existing interests of the party, there is a 'pretensive' part, that is characterized by the aspiration of the party to satisfy further interests through conduct of the other party (ie through its consent to the conclusion of the contract). Unlike the obligatory relationship, in this case the party cannot demand performance (cannot demand the conclusion of the contract): its expectation is not protected by a demand for performance, but only through a demand for compensation, which moreover is limited to its reliance interest, in the event of misconduct on the part of the other party.

¹³⁴ In this sense Claus-Wilhelm Canaris spoke of '*Anvertrauenshaftung*': see C.W. Canaris, n 26 above, 539-540.

to it. Imputability here lies in the fact that there were no exceptional circumstances justifying this conduct: for example, a third party who by means of duress had forced the other party to give rise to this erroneous reliance.¹³⁵ If the other party breaks off negotiations without a reason that, with regard to the stage of the negotiations, can be considered legitimate, the reliance will be retroactively considered erroneous from the moment when the party could no longer withdraw on the basis of that reason (or without any reason).¹³⁶ If the negotiations are entirely false as the other party entered into them without any intention of concluding a contract, the reliance will be considered wholly erroneous from the very beginning of negotiations.¹³⁷

In such cases, the compensation will concern the wasted expenses and lost opportunities, the latter within the limits of the positive interest.¹³⁸ Positive interest is to be understood in its continuous mutability, starting from the moment in which the discrepancy between reliance and reality occurred; therefore, the maximum limit must be assessed with reference to the opportunities lost at each moment. However, it is not possible to duplicate lost opportunities if they are incompatible with each other.

As far as mistake and fraud are concerned, however, it must be borne in mind that reliance relates to a contract which is gradually changing. Problems will arise here where a party considers the negotiations to concern a contract different than the one about which the parties are negotiating or that which is in fact concluded.

The relevant discrepancy here, in the case of conclusion of a contract, is the one between the content (largely intended) of the contract that is in fact concluded and the one which the party intended to conclude. This relevance is based on the rules (referred to below) of mistake and fraud, inspired by a balance of pre-contractual risks between the parties.

The remedies that may be granted in these circumstances can be restitutory or compensatory, ie can lead to the avoidance of the contract and, where appropriate, to compensation. With regard to their nature, avoidance will cancel the contract; compensation will be assessed on the loss resulting from the unnecessary

¹³⁵ In other words, it is necessary to distinguish fault (or intentionality) as an element of the state of affairs of the duty and the element which renders its breach imputable to the party and gives rise to compensation. More precisely, as far as imputability is concerned, this liability tends to be a strict liability.

¹³⁶ See also Art 2:301(2) PECL.

¹³⁷ See also Art 2:301(3) PECL.

¹³⁸ This limitation is normally not accepted by the Italian scholars: see for example V. Pietrobon, n 32 above, 118, and F. Benatti, n 57 above, 151; for a different opinion, see C. Scognamiglio, 'La conclusione e la rappresentanza', in N. Lipari et al eds, *Diritto civile* (Milano: Giuffrè, 2009), III, 2, 195, 239. On the contrary, however, German scholars usually accept this limitation: see Ha. Stoll, 'Tatbestände und Funktionen der Haftung für *culpa in contrahendo*', in H.C. Ficker et al eds, *Festschrift für Ernst von Caemmerer zum 70. Geburtstag* (Tübingen: Mohr-Siebeck, 1978), 435-436.

negotiation within the limits – for the lost opportunities – of the positive interest. The question of possible compensation without avoidance involves the problem of prejudiciality, which shall be discussed later. After the conclusion of the contract, the discovery of a defect in consent may lead to damages that also take into account the loss resulting from having relied on being bound by a different contract. Before the conclusion of the contract, the detection of the error may lead to breaking off negotiations. This breaking-off may be imputable to the party who did not inform the other party of the error from the moment that it was compulsory according to good faith.

A different type of error is that concerning the validity of the contract that is concluded (as opposed to its content); it is this error that is referred to in Art 1338 of the Italian Civil Code.

This error is relevant whenever an invalid contract is concluded (for the sake of simplicity, we consider only the case of nullity)¹³⁹ and the other party had noticed or could have noticed that the party was not aware of this invalidity (nullity).¹⁴⁰

The remedy in this case is a compensatory one. The other party will be liable for the discrepancy between the (valid) contract that the party supposed had been concluded and the (invalid) contract that was concluded if: (i) both parties could have been aware of the nullity, but in fact only one party was so aware and did not communicate it to the other party,¹⁴¹ excluding exceptional cases in which the other party seemed to be aware of the nullity; or (ii) only one party ought to have been aware of the nullity or did actually notice it, being closer to the source of information or simply becoming close to a source of information that was distant to both parties, and did not inform the other party, excluding exceptional cases in which the other party seemed to be aware of the nullity.

Here too, compensation consists in what was lost during the negotiations, within the maximum limit of the positive interest (in its continuous mutability) for the lost opportunities. Before the conclusion of the contract, the same items of losses are compensated and, even in the absence of liability and compensation, each of the parties may abandon the negotiation (unless the other party, only negligently unaware of the ground of invalidity, offers to continue it

¹³⁹ In very particular cases, avoidability or inexistence of the contract may also lead to compensation according to Art 1338 (for example, when a threatened party does not promptly inform the other party about its intent to avoid the contract, even though the threats have ceased). See, for example, G. Patti and S. Patti, n 51 above, 204.

¹⁴⁰ Also in such cases fault (or intentionality) are elements of the state of affairs of the duty of information. Nevertheless, breach of the information duty must be imputable to the party: for example, there is no imputability if a party informs the other party of the nullity, but this information is not received for reasons of force majeure (L. Mengoni, see n 40 above, 271). As before, also in such cases this liability tends to be, as far as imputability is concerned, a strict liability.

¹⁴¹ According to one traditional opinion, if a party is at fault, it cannot demand compensation, even in cases of intentionality on the part of the other party: see, for example, R. Scognamiglio, n 77 above, 223. This opinion is not persuasive, because intentionality is always considered to be more serious than negligence.

by overcoming the cause of invalidity). After the conclusion of the null contract, compensation will also account for subsequent losses, due to the fact that the party trusted that it had concluded a valid contract.

bb. Protective Core of Pre-Contractual Relationship

The other side of the pre-contractual relationship is the protective one, which protects the pre-existing interests of the party who takes part in the negotiations (while the pretensive part protects, in the negative, the expectation of satisfying further interests through the conclusion of a certain contract).

The other defects in consent (duress and incapacity) are related to this protective part. In these cases, the protected party did not rely on a different contract, but simply did not want to, nor have to, conclude any contract (or any contract like the one concluded). Breaches of duties of confidentiality¹⁴² and to take care of goods also belong to this protective part.

In such cases, the remedies offered by the law will be compensatory and, sometimes, restitutory (allowing for the avoidance of the contract). In cases of duress, it is also possible that the cancellation of the contract does not give rise to a right to compensation. This is for instance in cases where the threats are exercised by a third party, without the other party being aware of it.

2. Informational Defects in Consent: Types and Remedies for Mistake and Fraud

The demonstration of the proposed thesis now requires an analytical indication as to what the typical and atypical informational defects of consent are in a system revised by interpretation, as well as what the related remedies are.¹⁴³

The following construction will be inspired by a political choice that balances solidarity and freedom; it will be aimed at the creation of concepts and rules that reflect the statutory texts, that respond to the interests at stake, while also ensuring certainty.

a) Types of Informational Defects in Consent

The new construction requires an explication of typical and atypical informational defects in consent.

For every defect in consent the corresponding legal provisions will be cited, specifying what new interpretation is proposed. We shall see that, even if all the informational defects in consent are based on a distribution of pre-contractual risks, the typical mistake does not coincide with misconduct, while fraud coincides with the most serious misconduct. Between these two typical defects there is a

¹⁴² See Art 2:302 PECL.

¹⁴³ More widely in A.M. Garofalo, *Informazione precontrattuale e vizi del volere. Contributo allo studio dei vizi atipici*, currently being completed.

large grey area, in which the atypical informational defects in consent are located. Some of these are suitable grounds for the avoidability of the contract, while others justify only a pecuniary remedy, namely damages.

aa) Classical (Typical) Mistake

Following the proposed thesis, the types of mistake expressly regulated by the Civil Code (typical mistake) must be suitably reduced in breadth. It is appropriate to first discuss the two subtypes of typical error (1 and 2), and then their regulation (which is based on the requirements of recognisability and essentiality: 3 and 4).

1) The first subtype of typical mistake corresponds to *mistake as to the declaration or its content* (Arts 1429, 1430 and 1433). Italian scholars usually distinguish between ‘*errore motivo*’ (error that leads to the conclusion of the contract; Arts 1429 and 1430) and ‘*errore ostativo*’ (error that affects the enunciation or the transmission of the declaration; Art 1433),¹⁴⁴ while German scholars distinguish between mistake as to the declaration or as to its content (§ 119 I BGB) on one hand, and mistake in its transmission on the other (§ 120 BGB).¹⁴⁵ This German classification appears to be more fruitful, both because it is more precise than the often-uncertain Italian distinction, and because it is easily adaptable to the text of the Italian Civil Code. For these reasons, we shall use the German classification.¹⁴⁶

Mistake as to the declaration (or in its transmission) occurs when a party unintentionally says something it does not mean (for example, due to a slip of the tongue).

Mistake as to the content of the declaration occurs when a party says what it means, but does not understand the meaning of its words. For example, when it answers ‘yes’ to a proposal, without having understood it well, or when it orders a piece of furniture calling it ‘drawer unit’ instead of ‘wardrobe’ because it does not know the correct meaning.

In both cases, this is a spontaneous error, ie not caused intentionally by the other party, nor negligently through the breach of its obligation to provide information (which may occur when the other party is required to explain the content of the contracts terms) or through undue, but false and misleading, information (which can induce reliance).

2) Typical mistake can then be a *mistake as to the motives* (again, Arts 1429 and 1430).

By ‘motive’ we mean everything that pushes a party to contract, including

¹⁴⁴ See V. Pietrobon, n 32 above, 321-328.

¹⁴⁵ See R. Singer, n 91 above, 536-546.

¹⁴⁶ See, recently, Ph. Ziegler, *Der subjektive Parteiwille. Ein Vergleich des deutschen und englischen Vertragsrechts* (Tübingen: Mohr Siebeck, 2018), 213-216. However, Art 4:104 PECL is more similar to Art 1433 Civil Code, than to § 120 BGB.

both qualities of the good or service¹⁴⁷ and subjective circumstances.¹⁴⁸

Mistake as to the motives, however, opens up many problems, not only because not every motive here is relevant (as we shall see), but also, and above all, because it can easily be confused with other errors and other remedies.¹⁴⁹ For this reason, it is necessary to distinguish several concepts, which we shall also need to do in the following paragraphs.¹⁵⁰

The first is that of '*contract planned by the parties*' (not coincident, as we shall see, with that concluded). It covers all the motives that have legal relevance and enter the pre-contractual sphere (according to all that we shall say in the following pages). Briefly, these motives normally push an ideal contractor to conclude a certain specific contract under concrete circumstances (normal motives) or become in practice relevant (abnormal motives). In both cases, the conformity to the truth of these motives appears in those circumstances to an ideal contractor modelled on the parties or on the party further from the source of information.

The second concept we encounter is the one of '*contract consented-to by the parties*' (ie concluded). This notion does not always overlap with the concept of contract planned by the parties. In fact, contracts consented-to by the parties legally coincide with reality, even when there is a discrepancy between reality and supposition. However, exceptionally, the consented-to contract coincides with the supposition (and therefore with the planned contract). More precisely, this happens if: (i) the parties are both wrong about a motive which, because of its normality or the way in which the contract is concluded, is consented to, without misconduct of any party;¹⁵¹ or (ii) there is a warranty, which requires verification of whether the legal regulation of the contract provide for it (with an express statutory provision or not), or whether the parties have consented to this term (expressly or not).¹⁵²

¹⁴⁷ Qualities are, in fact, motives in a broad sense (see n 169 below).

¹⁴⁸ For example, when a person buys a house because he needs to move to another city. See L. Cariota-Ferrara, n 75 above, 557.

¹⁴⁹ As mentioned, Italian scholars and judges often assert that avoidability and warranties are not mutually exclusive (see, for example, V. Pietrobon, n 32 above, 412-413; other opinion in C.M. Bianca, n 54 above, 653-654). In the German legal system, the opposite opinion is dominant: see R. Singer, n 91 above, 592.

¹⁵⁰ When we talk about 'planned' or 'consented-to' contracts, we do not strictly refer to the very content of the contract. In fact, motives can enter the 'planned' or 'consented-to' contract without having any relevance during the performance of the contract. Rather, under Italian law, a motive is effectively embraced by the contract (in a strict sense), thus having relevance also during its performance, where it enters its purpose (ie its cause).

¹⁵¹ Cases of mutual mistake: see below, para III.2.a.ee.

¹⁵² Whatever the dogmatic conceptualization of warranty, there is no doubt that, if it is applicable, the consented-to contract extends to a certain quality of the good or the service. This is also true in the case of traditional sales (Art 1470 Civil Code), where the seller undertakes to deliver not a conforming good, but rather to deliver the sold good in the state in which it is (Art 1477 Civil Code), and therefore the quality cannot be the object of an obligation, but only of a warranty, as highlighted by L. Mengoni, 'Profili di una revisione della teoria sulla garanzia per i vizi nella vendita' *Rivista del diritto commerciale*, I, 4 and 15 (1953). At most, following a certain

The third concept is that of ‘*object of reliance*’. The reliance of each party is shaped on the contract planned by the parties, except in two cases: (i) where one party spontaneously makes a mistake concerning the planned contract,¹⁵³ and the mistake is recognisable or recognised (but does not shape or modify the contract planned by the parties), in which case its reliance is based on its own mistake;¹⁵⁴ or (ii) where one party knows or ought to know that the reality is different from that conveyed by the contract planned by the parties, and is obliged in good faith to warn the other party, in which case its reliance is based on the reality.¹⁵⁵

Once we have made these distinctions, we can go back to typical mistake as to the motives.

In general, informational defects in consent (mistake or fraud) always imply that reliance and the concluded contract do not overlap. The discrepancy, however, may result from a gap between the planned contract and the consented-to contract, which occurs in the case of an error caused intentionally or negligently, or from a gap between reliance and the planned contract. The typical error as to the motives is to be understood as a spontaneous error, ie as a gap between what the mistaken party believes and what is evident: therefore, this is a gap between reliance and the planned contract.¹⁵⁶

There are not many typical errors as to the motives that are relevant as such:¹⁵⁷ this happens, for example, if a party sells a work of art for a very low price, thus showing that it has not realized that the work of art is authentic, even

thesis, it must be considered that in this case the lack of the obligatory effect allows the pre-contractual discrepancy to survive for the party not covered by the warranty: that is, for compensation of the further loss due to the (negligent or intentional) lack of information about the presence of defects on the part of the seller (Art 1494, para 1). On this point see C. Castronovo, *Problema e sistema nel danno da prodotti* (Milano: Giuffrè, 1979), 468.

¹⁵³ This will be a spontaneous mistake, in the sense that a person of equal diligence would normally not have made the same mistake.

¹⁵⁴ For cases of typical mistake see n 156 below.

¹⁵⁵ In fact, it does not deserve any protection.

¹⁵⁶ In this sense, typical mistake as to motive is again a mistake as to the content of the declaration. Nonetheless, the mistake does not result in a linguistic error, but in an error as to the qualities of the good, which represent motives in a broad sense. Under this light we can easily understand why German literature is divided about the *Eigenschaftsirrtum* (§ 119 II), ie mistake as to qualities (material or immaterial), which is always relevant if qualities are customarily regarded as essential. Some scholars, in fact, assert that this kind of mistake is in any case an error as to the declaration (so that § 119 II, stating that this mistake must be regarded as a mistake about the content of the declaration, would be wrong, simply because this mistake is a mistake as to the content of the declaration); other scholars, on the other hand, argue that this kind of mistake concerns motives and, for this reason, is a *Motivirrtum* that is exceptionally relevant. Both of these views seem to be right, from different perspectives. See, respectively, H. Brauer, *Der Eigenschaftsirrtum* (Hamburg: Friederichsen, de Gruyter & Company, 1941), 33-34, and W. Flume, n 10 above, 462-463; more recently, R. Singer, *Selbstbestimmung und Verkehrsschutz im Recht der Willenserklärungen* (München: Beck, 1995), 213-219, and W. Hefermehl, n 19 above, 73-74.

¹⁵⁷ Because, by narrowing the scope of typical mistake, we assign the whole matter of disclosure duties to a different mistake (induced mistake).

though this clearly emerges, and the other party does not recognise this error, even though it is readily apparent, and believes that the low price results from other reasons.

3) Both typical mistakes must also be *essential*.

Under Arts 1429 and 1430, a mistake is essential if it relates to: the nature or the object of the contract; the identity or a quality of the object itself which determines the consent;¹⁵⁸ the identity or a quality of the other party to the contract if it determines the consent; any error in law if it was the sole or main reason for the contract; error in the quantity which determines the consent.

As can be seen, the abovementioned catalogue always requires the error to be the determining factor of consent. For some types of mistake this is expressly stated; for others it is implicit in their nature. However, in general, what does it mean that an error is ‘determinative’ or ‘decisive’?

The defect is decisive when it ‘determines consent’,¹⁵⁹ ie it is such that without it ‘the other party would not have contracted’, and would not have been satisfied with concluding the contract ‘under different conditions’.¹⁶⁰

In order to understand these formulations, it is necessary, first of all, to understand the correct point of view. The question is not whether the party who concluded a certain contract would have concluded the same contract on any different terms,¹⁶¹ but whether there is an appreciable difference or not between the contract concluded and the contract supposed, in light of the protected party’s interest that has projected itself and has made itself an objective part of the contract relied upon.¹⁶²

¹⁵⁸ Here ‘consent’ is used in the sense of ‘consent to the agreement on the part of each party (both the offeror and the offeree)’.

¹⁵⁹ Something similar is provided for in the PECL, where it is stated that the mistake must be ‘fundamental’: see Art 4:103(1)(b), according to which the contract is avoidable if and only if ‘the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms’. However, unlike the Italian regulation, the same requirement does not apply for fraud and does not exclude the possibility of partial avoidance. Moreover, scholars seem to intend ‘fundamentality’ to mean ‘causation’ or ‘causality’ (*Kausalität, Erheblichkeit*), which in the German system distinguishes errors which have no causal relevance and errors which have it (in this system the ‘causal’ nature of an error is understood in a stricter way than in the Italian legal system, but in a narrower way than, in Italy, the ‘incidental’ nature of an error): see S. Lohsse, n 112 above, 670–671 and, for the German system, R. Singer, n 91 above, 585.

¹⁶⁰ The decisive character of mistake must be intended in the same sense of the decisive character of fraud (Art 1439), both for textual arguments (the Civil Code uses similar expressions) and for systematic arguments (it would be not only difficult, but also incongruent, intending in two different ways the same ‘decisiveness’). Therefore, there is only one category of ‘incidental error’.

¹⁶¹ Titius bought goods for one hundred, believing he was paying one; Titius bought goods X for one hundred, believing he was buying goods Y for one hundred and, in any case, he would have bought goods X for one.

¹⁶² In fact, by making use only of subjective assessments, the realm of incidental error would be too wide: on the other hand, the interests of the party that is not mistaken must also be taken into account. Moreover, in that way it would be quite impossible to find a suitable criterion to quantify the damage suffered.

It is necessary to verify whether the concluded contract more or less satisfies the interest of the protected party, ie whether the difference with respect to the supposed contract resulting from an error as to the terms or as to an external fact is such that the interest is substantially satisfied in any case, even if not perfectly. Obviously, a wide difference does not exclude that the party could have concluded that contract anyway; however, it would have been a different contract, with its own negotiation and its own agreement on price.¹⁶³

To go into further detail here, the interest is still satisfied if the terms in fact differ only on secondary profiles. A discrepancy can normally be wide, according to an evaluation based on an objective-concrete criterion.¹⁶⁴ Nonetheless, a discrepancy that is not so wide can become such if a person has its own reasons and has made this assessment known in a serious, appreciable and recognisable or recognised way.¹⁶⁵ Similarly, a discrepancy that is normally wide can cease to be such if it is objectively deprived of its importance in the economy of a certain contract.¹⁶⁶

At this point, however, now that the requirements for the mistake to be decisive have been laid out, the question arises as to whether the list of essential errors in Arts 1429 and 1430 is illustrative or exhaustive. In other words, is the essential error a particular decisive error, or is it any error so long as it is a decisive one?

A strict interpretation of the legal provisions would tend toward the former interpretation. However, a different interpretation seems to be more persuasive: the catalogue in Arts 1429 and 1430 refers to those errors which are usually decisive, but nothing excludes that in practice other errors may be so, and may therefore be essential. Again, here the functional argument leads to the overturning of the literal interpretation and imposes an interpretation of the ‘system’ as ‘mobile’ or ‘flexible’:¹⁶⁷ the understanding of ‘essential’ in the sense of ‘decisive’ is imposed by an evaluation of the parties’ interests, and the mere textual argument cannot lead to a different solution, so that the (more) literal interpretation must be

¹⁶³ In this way, the evaluation becomes more objective, without losing its concrete character.

¹⁶⁴ See Art 1429, para 1, no 2, Civil Code.

¹⁶⁵ Following an approach less informed by the principle of solidarity, only recognition would have relevance. As far as recognised (and not recognisable) and induced mistakes are concerned, only recognition has relevance in order to differentiate decisive and incidental mistakes.

¹⁶⁶ These results are confirmed by the historical origin of the (modern) incidental fraud; see R.J. Pothier, *Traité des obligations* (Paris-Orléans: Rouzeau-Montaut, 1761), 42. The incidental fraud – as has traditionally been the case for legal doctrines and statutory provisions in French law: see P.G. Monateri, *La sineddoche. Formule e regole nel diritto delle obbligazioni e dei contratti* (Milano: Giuffrè, 1984), 421-434 – was built by generalizing concrete cases, often in very broad terms, which required a reduction in hermeneutics. This is also the case for incidental fraud: and for this reason Art 1440, which derives from the French law and which in its formulation risks covering too wide a range, must be hermeneutically limited. The same applies, therefore, to all incidental errors. These considerations also help us to clarify the amount of compensation in cases of fraud (see para III.2.b.dd).

¹⁶⁷ W. Wilburg, *Entwicklung eines beweglichen Systems im Bürgerlichen Recht* (Graz: Kienreich, 1950).

revised in light of the parties' interests. As we shall see when talking about remedies, this essentiality allows here and elsewhere for the avoidance of the contract, that is to say, the cancellation of it entirely.

To the proposed construction, it cannot be replied that usually the other party does not recognise the mistake when this does not fall on one of the elements mentioned in Arts 1429 and 1430 of the Civil Code (so that, following the proposed construction, the mistaken party would be too protected). This outcome is not achieved, because the relevant error always must be recognisable (see in this para, no 4 below).

In any case, even in opening the catalogue provided for in Arts 1429 and 1430, not every essential mistake can be considered relevant.

As far as typical mistake as to the motives is concerned, in fact, the motive has legal relevance where it corresponds both to a material or an immaterial quality of a person, good, or service, intended in the broadest sense, and this quality is objectively relevant in the concrete circumstances or has been declared as subjectively relevant by the errant party in a serious, appreciable and recognised or recognisable way¹⁶⁸ (whereas in cases of recognised or induced mistakes, which we will discuss later, any motive may be relevant, as long as it is relevant according to a concrete-objective evaluation, or the errant party has declared its subjective relevance in a serious, appreciable and recognised way).¹⁶⁹ To sum up, the motive must result in a material or immaterial quality of the person, good, or service.¹⁷⁰

¹⁶⁸ On the contrary, German scholars and judges, who deal with a wide provision such as § 119 II BGB, tend to further limit its scope, arguing that not every error as to qualities is relevant: for example, errors which do not result in errors as to actual and permanent qualities according to a *konkret-objektiver Maßstab* are not relevant (see, among others, R. Singer, n 91 above, 568-569; R. Bork, n 19 above, 335-337). On the other hand, in the Italian legal system, even subjective relevance is sufficient, under the conditions mentioned in the text. The reason is that the Italian typical mistake must be seen as a spontaneous error which is readily apparent (the reality must be well known by every ideal contractor and the party makes a mistake about this reality in a recognisable way) and which refers to a (normally or even abnormally) relevant quality, while the German *Eigenschaftsirrtum* is an error which is relevant if it has a causal influence and which may also not be apparent, because the other party knew the reality, but could not recognise the error, or did not know the reality and did not have to know it (unless the error is as to circumstances important for both parties, since in that case § 313 II is applicable).

¹⁶⁹ We can call motives in a strict sense all those subjective projections of the qualities of the good or service which are not 'qualities' in the broadest sense. On these 'motives in a strict sense', it is normal that the level of attention of the counterparty is lower: for this reason it is correct that the mistaken party assumes the risk of an error, if not recognised or caused.

¹⁷⁰ Some scholars argued that errors in law (Art 1429, para 1, no 4) must be considered to be errors as to mere motives (in a stricte sense): see, on this debate, U. Mattei, 'Errore nel diritto civile' *Digesto delle discipline privatistiche - Sezione civile* (Torino: UTET, 1991), VII, 510, 517. However, errors in law must be considered to be errors as to legal qualities (as argued *ibid*, 517). As far as errors in quantity are concerned, they can result in: (i) a matter of interpretation (the parties say 100 instead of 10); (ii) an error as to a quality (the content of a warehouse is sold, but the buyer thinks that it is larger than it is in reality); or (iii) an error in the quantity (a party determines its consent on a price that is erroneous). See V. Pietrobon, n 32 above, 416-439, and V. Roppo, n 54 above, 749-750.

Moreover, the error must refer to an assumption which is in the reality false. It would not be sufficient that the assumption may fall apart or may be fulfilled in the future (this requirement does not apply in cases of recognised or induced mistakes).¹⁷¹

Finally, there is no duty or burden to correct the mistake whenever there is a 'right to remain silent', ie where the mistake concerns not an element of objective reality, but a subjective assessment (a personal opinion),¹⁷² or involves the incurring of expenses on research and relates to elements that appear to be uncertain to both parties,¹⁷³ or concerns a piece of information to be kept confidential.¹⁷⁴ Subjective evaluation can also affect the economic balance of the contract, on which there is therefore no need to correct any mistake unless it results rather in a mistake as to the quality of the person, good, or service.¹⁷⁵

In conclusion, typical mistake as to declaration or as to the content of the declaration is always relevant as long as it is a determining factor of consent. Conversely, typical mistake as to motive concerns all the above-mentioned determining reasons for consent. Normally, errors as to the nature of the contract or as to the object of the contract are errors of the first subtype. Errors as to the qualities of the object or of the other person are errors of the second subtype, unless indication of the qualities is included in the declaration and serves to identify the object or the person. In the latter case the error is a mistake as to the identity of the object or the person.¹⁷⁶

4) Typical mistakes must also be *recognisable* by the other party, whose reliance must correspond to the planned contract (otherwise, there would be a mutual mistake).

Since typical mistake corresponds to a spontaneous error, the real factual or legal situation must be clear to any ideal party that is normally diligent. The

¹⁷¹ See, in Italy, U. Mattei, n 170 above, 514, and, for the German *Eigenschaftsirrtum* (§ 119 II BGB), R. Singer, n 91 above, 573. We could say that future events represent motives in a strict sense; and in this sense motives are not relevant (except in cases of misconduct). Nonetheless, at least in the Italian legal system (where the error must be recognisable), it seems possible – even if not normal – that the probability of a future event, evaluated with a certain degree of accuracy and on the basis of certain actual facts, objectively represents an actual assumption.

¹⁷² See n 188 below.

¹⁷³ See n 189 below. Something similar happens in the cases of conscious ignorance, where there is no mistake at all (see S. Lohsse, n 112 above, 671).

¹⁷⁴ See n 190 below.

¹⁷⁵ In the PECL, the concept of mistake is wide (every 'mistake of fact or law existing when the contract was concluded', also deriving from an inaccuracy in the expression or transmission of a statement), but is limited by Art 4:103(2), according to which 'a party may not avoid the contract if: (a) in the circumstances its mistake was inexcusable, or (b) the risk of the mistake was assumed, or in the circumstances should be borne, by it'. Nonetheless, it is not easy to understand what Art 4:103(2)(a) refers to: perhaps the recognisability of the mistake, but this is already reflected in Art 4:103(1)(a)(ii); perhaps the exclusion of protection in cases of fault on the part of the mistaken party, which, however, recalls old opinions, not suited to modern (Italian) society. In this regard, see S. Lohsse, n 112 above, 671–673.

¹⁷⁶ See W. Flume, n 10 above, 458–460.

mistake of the protected party, in turn, must be readily apparent to the other party, who is not obliged to discover the error, but normally notices it. In fact, Art 1431 of the Italian Civil Code states that, ‘in relation to the content, the circumstances of the contract or the quality of the contracting parties, a person of normal diligence *could* have detected’, and not ‘*should* have detected’ the mistake. The other party, in other words, inevitably discovers the error, paying normal attention.¹⁷⁷

This applies both to the mistake as to the declaration or as to the content of the declaration, and to the mistake as to motive.

The requirement of recognisability limits the scope of typical mistake, avoiding the negative consequences of the broadening of essentiality. Indeed, in fact, recognisability will be more frequent for mistakes relating to central elements of the contract, and vice versa.

bb) Recognised Mistake

The recognised mistake may be, alternatively, 1) a typical mistake that is also concretely recognised; 2) a typical mistake that lacks concrete recognisability and that nevertheless is recognised; 3) a mistake similar to the typical one, recognisable or even merely recognised, but not essential.¹⁷⁸

1) A *typical mistake that is concretely recognised* does not pose particular problems.

Recognition of the mistake means that the distribution of pre-contractual risk assumes particular forms. While a typical mistake that was only recognisable entitles one party to cancel the contract despite the other party’s reliance on its validity, a typical mistake that was recognised corresponds to true misconduct on the part of the other party that did not correct the mistake.¹⁷⁹

¹⁷⁷ This outcome implies the fact that typical mistake refers to a discrepancy between reliance and planned contract, so that the error is recognisable by a person who knows the (evident) truth. However, this restrictive construction is different from the traditional Italian one, in which mistakes recognisable but not correct and mistakes caused by a lack of information overlap. A construction similar to the traditional Italian one is, to be sincere, followed not only in Germany, but also in the PECL: see 4:103(1)(a)(ii). This latter provision, however, states that the contract may be avoided when ‘the other party *knew* or *ought to have known* of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error’, which is rather different from providing that ‘the other party *could* have detected the mistake’. In any case, this PECL provision implicitly means that it is contrary to good faith to leave the mistaken party in error when the mistake was spontaneous and recognisable, but not recognised (otherwise in this case the contract could not be avoided). This result is clearly not persuasive for the Italian sensibility.

¹⁷⁸ As said, the recognised mistake can concern also a ‘motive in a strict sense’ and also (the probability of) a future event, with the usual exception of the grounds for exclusion (subjective appreciations, agreed uncertainty, confidentiality). Of course, there must be a knowledge of the real factual or legal situation on the part of the party that is not mistaken: it is not sufficient, for example, to have a mere doubt as to the probability of the future event, if it results in a subjective assessment.

¹⁷⁹ Since recognised mistake must be... recognised, it must be added that the abnormal

From this, two corollaries derive: (i) first of all, the mistaken party also has at its disposal a remedy for damages, as we shall see below; (ii) secondly, the mistake is not relevant when the erroneous assumption of the other party has already entered the content of the contract by way of construction. This occurs in those cases where the party that is not mistaken explicitly or implicitly allows it to happen, adhering – so to speak – to the mistake of the other party.¹⁸⁰

2) A typical mistake that is not recognisable, but actually recognised, does not fall within typical mistake, because Art 1431 of the Italian Civil Code cannot be applied to it.¹⁸¹ Likewise, a typical mistake that is not essential, but is determining and recognised, does not fall within the scope of typical mistake.¹⁸²

These are cases of an atypical mistake, which we could call '*recognised decisive mistake*'. In any case, the relevance of this error does not pose particular problems: it derives from the fact that this mistake corresponds in all respects to pre-contractual misconduct.

3) A typical mistake, besides being recognisable, must be decisive. If there were a similar, and therefore spontaneous, mistake, recognisable and recognised, or even simply recognised, but not decisive, this could be relevant as an atypical mistake. We could call this category '*recognised incidental mistake*'.

If such a mistake were only recognisable, it would have no legal relevance. Conversely, if it were recognised, it would have legal relevance, coinciding with misconduct, and giving rise only to compensation, as we shall see below.

Such a mistake, even though not decisive, must nevertheless have causal relevance (normal in the circumstances, or declared by the mistaken party in a serious, appreciable and recognised way).¹⁸³ In order to verify such causal relevance, it is not correct to ask whether the party, or an ideal party, would have concluded the contract under those conditions even after the error had been discovered; it is necessary to ask whether the concluded contract and the assumed contract do not entirely correspond, so that, even if the former substantially satisfies the interest of the party, it differs from the latter in certain elements concerning price or other contractual terms, or does not correspond to the motives of the party, and this discrepancy is relevant either normally or subjectively (ie

motive must also be declared causally relevant in a way that is not only serious and appreciable, but also recognised (and not only recognisable or recognised).

¹⁸⁰ See P. Barcellona, *Profili della teoria dell'errore nel negozio giuridico* (Milano: Giuffrè, 1962), 55-86. In Germany, scholars refer to this priority as '*Auslegung vor Anfechtung*': see R. Bork, n 19 above, 322. Nonetheless, in Germany the realm of interpretation is much wider than in Italy, because every recognised mistake as to the declaration or its content, and indeed, according to some scholars, every recognisable mistake, changes the content of the contract (where the party that is not mistaken could understand what the other party meant).

¹⁸¹ In this sense we follow the well-known thesis of Pietro Barcellona (n 60 above). However, we have to grant avoidance in these cases also, differently from that asserted by the author.

¹⁸² In particular, when the mistake is as to motive in a strict sense, as already pointed out.

¹⁸³ In addition, and with regard to any kind of error, if the non-mistaken party or the defrauding party can prove that it was not materially relevant causally, the error has no relevance.

declared by the mistaken party in a serious, appreciable and recognised way).

cc) Induced Mistake (by an Informed Party or by an Uninformed Party)

An ‘induced’ mistake – ie a mistake which is ‘caused’ by the other party, in the forms that we shall see – is an atypical mistake, because it does not find any express regulation in the Civil Code. We shall call the correspondent category simply ‘*induced mistake*’.

This kind of mistake occurs when the error is not spontaneous, but negligently caused by one party, which leads the other party to legitimately rely on an erroneous factual or legal situation. The induced mistake may be decisive or incidental; in any case, it must be causally relevant, either normally under the circumstances, or by virtue of subjective idiosyncrasies of the party, declared in a serious and appreciable way, and recognised by the other party.¹⁸⁴ The relevance of this mistake implies that the other party actually relies (more or less knowingly) on the erroneous factual or legal situation.

The induced mistake may be an error as to contractual terms or, as happens commonly, as to motive. No use may be made here of the recognition requirement provided for by Art 1431 of the Civil Code, which concerns a very different situation (that of spontaneous error).

Induced mistake as to the contractual terms or as to the motives brings us to consider the topic of *duty of disclosure* and that of *misrepresentation*, the two of which must be discussed separately.¹⁸⁵

¹⁸⁴ If declared merely in a recognisable way, we could ask ourselves whether there is a typical mistake, even though the real factual or legal situation is not readily apparent to both of the parties, as normally happens with regard to this kind of mistake. The negative answer is more persuasive, because otherwise the position of the party that is not mistaken would be too burdensome. In any case, ‘recognised’ here means ‘that it has been recognised or that the other party, by virtue of its conduct, gives the clear appearance of having recognised’.

¹⁸⁵ The duty of disclosure has been the subject of a wide doctrinal debate in the last few years. See, in Italy, G. Grisi, n 66 above; A.M. Musy, *Il dovere di informazione. Saggio di diritto comparato* (Trento: Università degli Studi di Trento, 1999); S. Grundmann, ‘L’autonomia privata nel mercato interno: le regole d’informazione come strumento’ *Europa e diritto privato*, 257 (2001); G. Vettori, ‘Le asimmetrie informative tra regole di validità e regole di responsabilità’ *Rivista di diritto privato*, 241 (2009); P. Gallo, ‘Asimmetrie informative e doveri di informazione’ *Rivista di diritto civile*, I, 641 (2007); C. Camardi, ‘Contratti di consumo e contratti tra imprese. Riflessioni sull’asimmetria contrattuale nei rapporti di scambio e nei rapporti “reticolari”’ *Rivista critica del diritto privato*, 549 (2005); R. Senigaglia, *Accesso alle informazioni e trasparenza. Profili della conoscenza nel diritto dei contratti* (Padova: CEDAM, 2007), 1-68; in Germany, see R. Schwarze, *Vorvertragliche Verständigungspflichten* (Tübingen: Mohr Siebeck, 2001); S. Breidenbach, *Die Voraussetzungen von Informationspflichten beim Vertragsschluß* (München: Beck, 1989); H. Fleischer, *Informationsasymmetrie im Vertragsrecht. Eine rechtsvergleichende und interdisziplinäre Abhandlung zu Reichweite und Grenzen vertragsschlußbezogener Aufklärungspflichten* (München: Beck, 2001); in European law, see C. Castronovo, ‘Information Duties and Precontractual Good Faith’ *European Review of Private Law*, 560 (2009); D. Kästle-Lamarter, ‘2:401: Duty to Disclose Information’, in R. Zimmermann and N. Jansen eds,

1) A duty of disclosure¹⁸⁶ arises when a party is visibly closer to a source of information and, for this reason, is in a visibly asymmetrical position with respect to it.¹⁸⁷ In this case, the party may be obliged already to disclose this information during the negotiations, in two different cases: (i) if the party is aware of this information of which the counterparty does not seem to be aware, and if this information does not concern subjective opinions, including those relating to economic equilibrium,¹⁸⁸ does not involve expensive research foreseeable in their importance to both parties,¹⁸⁹ or does not concern data on which there is a right or even an obligation of confidentiality¹⁹⁰ (as in cases of typical mistake). In this case, lack of information or erroneous information can never be intentional, but

Commentaries on European Contract Laws n 36 above, 411, 415-419; from a comparative perspective, see also R. Sefton-Green ed, *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge: Cambridge University Press, 2005); with regard to law and economics, see A.T. Kronman, 'Mistake, Disclosure, Information, and the Law of Contracts' 7 *Journal of Legal Studies*, 1 (1978).

¹⁸⁶ With regard to disclosure duties and the situations in which they arise, see the criteria in Art 4:107(2) PECL, ie the cost of the information, the distance of one party and the proximity of the other to the source of the information, the relevance of the information. These criteria, to tell the truth, are set for fraud (and, therefore, for intentional non-disclosure); conversely, for error negligently caused by failure of the duty of disclosure, Art 4:103(1)(a)(ii) should apply, according to which the contract can be avoided in the case of misrepresentation or non-disclosure contrary to good faith, provided that the further conditions of point (b) are met and that the exclusions of point (2) are not met. In any case, in order to understand when the non-disclosure is contrary to good faith, criteria similar to those of Art 4:107(2) must be used.

¹⁸⁷ This is the case not only if (i) one of the parties is in a particular contractual position with respect to the source of the information, but also if (ii) it is simply aware of the information (of course, provided that the information is not easily accessible and obvious).

¹⁸⁸ Within the subjective opinions, assessments related to the convenience of the contract should be included (in particular, judgments of the price, high and low, on the existence of similar and better products, and also all subjective judgments of a good or a service that may derive from third parties for whom the good or the service is addressed). See R. Schwarze, n 30 above, 378-379.

¹⁸⁹ This occurs first of all in the case of studies which entail costs and which both parties, in view of their position, could have foreseen as necessary and normal and could therefore carry out. This information relates to aspects which the contract leaves, by its very nature, uncertain and of which each party bears the risk. On this point, see R. Singer, n 91 above, 526 and 581. This exception to the general rule of information (information that has entailed costs) can include all information that has been acquired by virtue of the position of a party and that has an economic value closely linked to the same position, so that, if obliged to disclose the information, the party would lose its role in the market. For example, a person who buys a painting considered a worthless copy by a non-professional seller and who is very familiar with works of art must disclose that the picture is authentic, because his knowledge may be used for various purposes, including economic ones, other than the conclusion of contracts relating to falsely attributed works of art; on the other hand, a person who sells a good that is about to be superseded by a new product is not obliged to disclose this information, because, if it did so, it would risk leaving its stocks unsold and losing its role in the market. On this point, see R. Schwarze, n 30 above, 379-380.

¹⁹⁰ For example, if a person buys a ring for his girlfriend, the other party has no duty to inform him that she has fled to another country with a new partner, when this party knows this information thanks to his friendship with the (now) previous girlfriend. See R. Schwarze, n 30 above, 377.

must always be negligent (otherwise there would be a fraud);¹⁹¹ or (ii) if, even though the party is not aware of this information, it is obliged to find (and share) it, because the information does not concern subjective opinions, does not involve expensive and foreseeable research, or does not concern confidential data (again, as in cases of typical mistake), and the party, due to its contractual position, is (visibly) close to the source of information and it would be absolutely disproportionate to require the other party to inform itself.¹⁹² Where it is not obliged to find the information, there may be a mutual mistake.

The induced mistake (caused by a lack of information) may concern the contractual terms or the motives.

An induced mistake as to the terms occurs when a party, due to its standing, is obliged to explain the content of the terms. This is the case whenever a person is in a position that makes it technically more competent and can imagine that the other party does not understand the meaning of certain terms or supposes to conclude a contract under a different regulatory regime. Such a situation does not normally arise in a contract between equal parties. Lack of information, however, may not give rise to a defect in consent if the question is already resolved by interpretation or supplementation of the contract (ie if the concluded contract corresponds to that which the protected party relied upon).

An induced mistake as to motive, which is much more frequent, concerns a normal or abnormal motive which a person declares as essential in a serious, appreciable and recognised way.

If a contract is concluded, the breach of this duty to provide information may give rise to a warranty or may give rise to a defect in consent depending on whether or not there is a discrepancy between the planned contract and the concluded contract. Where there is no contractual warranty, reliance will be breached unless, of course, the party to be informed knew the relevant facts anyway. In this case the error is caused, and not spontaneous, precisely because the duty of disclosure exists before the error. Otherwise, we would speak of a duty to correct the spontaneous mistake.

For example, this occurs when a person buys a property considering it quiet

¹⁹¹ Art 1112-1 French Civil Code deals (only) with pre-contractual situations in which a party has information that the other party does not have, and states that this information be disclosed whenever the other party's ignorance is legitimate or results from a legitimate expectation on the part of the other party. This criterion, like the one that excludes disclosure duties in relation to information that does not have a '*importance déterminante*' or that relates to the '*valeur*', is similar to that proposed in the text (although there are some differences in detail). See G. Chantepie and M. Latina, *Le nouveau droit des obligations. Commentaire théorique et pratique dans l'ordre du Code civil* (Paris: Dalloz, 2nd ed, 2018), paras 180-190; F. Terré et al, *Droit civil. Les obligations* (Paris: Dalloz, 2nd ed, 2019), 367-375.

¹⁹² These are exceptional cases, in which one party, due to its distance from the source of the information, cannot acquire it or can acquire it only with a considerable effort, while the other party, due to its position, contractually relevant, is (visibly) close to it, so much so that it would be absolutely normal for it to know the information. In most cases, the legislator dictates an express rule in such cases, but sometimes this is not so. See D. Kästle-Lamparter, n 185 above, 418-419.

because of the context of open country in which it is located, and the seller: (i) is aware that the property is noisy for some exceptional reason, but negligently believes that the buyer is already aware of it and does not inform him or her, or simply forgets to let him or her know it through the agent who conducts the negotiations; or (ii) is not aware that the property is noisy for exceptional reasons, and does not inform the buyer.

2) An obligation to provide (correct and proper) information also emerges where a party voluntarily provides information.¹⁹³

A simple declaration can put one party in an asymmetrical position and can lead the other party to trust this party,¹⁹⁴ other than in cases in which: (i) the declaration is a statement concerning a subjective opinion also inherent to the economic equilibrium of the contract, unless the party seriously¹⁹⁵ exempts the mistaken party from carrying out certain checks, for example, on the normal amount of the price; (ii) the declaration is a statement concerning an element that does not have causal relevance (already) recognised with respect to the conclusion of the contract; or (iii) the declaration is a simple exaltation of a product (mere puffery), which does not give rise to reliance because it is unreal, exaggerated, vague, not serious, or joking.¹⁹⁶ In the event that causal relevance is recognised later than the declaration, or the exaltation of the good or service in practice (even though not in the abstract) has a deceptive significance and later than the declaration this is recognised or is otherwise recognisable by the party, the mistake of the other party may be relevant as a recognisable or recognised mistake.

The false and deceptive statement gives rise to a distorted reliance and, alternatively, to a warranty or to a defect in consent (unless the matter can be resolved by interpretation or supplementation of the contract). If the declaration is negligent, it will be an atypical induced mistake; if it is intentional, it will be a fraud. Otherwise, the error may result in a mutual mistake, under conditions which will be discussed below.¹⁹⁷

¹⁹³ See R. Schwarze, n 30 above, 375-376. The same applies if the party takes on the task of informing itself in order to inform the other party (ibid 382-383).

¹⁹⁴ In such a case, asymmetry therefore results from the declaration itself. It can also happen that the information is initially correct, but becomes erroneous later. In this case, the informing party is obliged to correct it if it, with diligence, could have known the correct information. See R. Schwarze, n 30 above, 383.

¹⁹⁵ For example, the seller can exempt the buyer from a market investigation by seriously reassuring him about the value of the good, or by providing him with an expert opinion, or informing him of other proposals that have been received. See also, on this point, V. Roppo, n 54 above, 762-763.

¹⁹⁶ In the PECL system, see Art 4:103(1)(a)(i), together with point (b) and paragraph (2), about which we have already spoken, and which here must be adapted to the particular ground for avoidability.

¹⁹⁷ According to S. Lohsse, see n 112 above, 664, under the PECL, avoidability would be allowed in any case of misrepresentation, even if not negligent. This interpretation is not persuasive; in this case avoidability is allowed if the requirement of point 4:103(1)(a)(iii) (mutual mistake), with its own grounds of exclusion, is met. However, such a hermeneutical choice suffers from

An example may be that of the party who acquires a painting and, although not having a particular position with respect to the seller and to the good, declares that he knows the painting well and negligently, rather than fraudulently, adds that he is certain that it is a copy, seriously exempting the other party, who is selling inherited goods and is not acting as an expert, from any control.

dd) Fraud

Fraud always requires a caused error, be it as to the terms or as to the motives. The error must be causally relevant, either normally under the circumstances, or by virtue of subjective idiosyncrasies of the party, declared in a serious and appreciable way and recognised by the other party.

In the case of fraud, the lack of information or the misrepresentation is intentional (an oblique intent – ‘*dolo eventuale*’ – would not be enough; a direct intent – ‘*dolo diretto*’ – is necessary).¹⁹⁸ In this sense, the expression ‘artifices’ contained in Art 1439 of the Italian Civil Code can be revisited, without moving too far from its first meaning.¹⁹⁹

A fraud can occur either by omitting due information, or by providing incorrect information, where there is an intentional breach of a duty to provide information or intentional misrepresentation.²⁰⁰

Intentional non-disclosure is not relevant if there was no obligation to provide information, already known to the party, by virtue of its object and content. With regard to this duty we can recall what has already been said, above.

Intentional misrepresentation is not relevant if it has no deceptive effect, ie if: (i) it concerns a subjective opinion, including all that concerns the economic balance of the contract; (ii) it has no normal or subjective causal relevance from the mistaken party’s perspective, on the basis of elements known to the person making the statement; or (iii) it is mere puffery.²⁰¹ Deceptive capacity must be verified in practice from the point of view of the deceiver, ie by assessing whether the deceptive capacity, even if apparently absent, actually existed and the deceiver

the difficulties of interpreting a text which is not based on a certain degree of cohesion in the society for which it is intended, nor on a set of shared legal doctrines, nor on a political choice.

¹⁹⁸ For there to be a ‘*dolo eventuale*’ it is necessary that a person fails to inform or provides incorrect information knowing that it is creating an error or at least knowingly accepting this risk, or provides information that it knows not to be, or doubts to be, correct. In this case, no fraud can be assumed.

¹⁹⁹ Therefore, a *dolo colposo* has no place in the Italian legal system.

²⁰⁰ See in Germany C. Armbrüster, ‘§ 123 BGB. Anfechtbarkeit wegen Täuschung oder Drohung’, in *Münchener Kommentar* (München: Beck, 8th ed, 2018), paras 14-17; in France F. Terré et al, n 191 above, 336-338; for the PECL regulation of fraud, which can be found in Art 4:107, see S. Lohsse, ‘Art 4:107: Fraud’, in R. Zimmermann and N. Jansen eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), 689, 693-694.

²⁰¹ The unsuccessful joke gives rise to a caused error or malice depending on whether the deceiver notices it before the conclusion of the contract (as long as the joke could not succeed according to a normal evaluation; if, on the other hand, the joke could succeed, it falls within the *dolus bonus* and at most there may be a recognisable or recognised error).

was aware of this.

The fraud may be decisive or incidental. There is a peculiarity here: since it is a case of fraud, the distinction in question can depend on subjective elements of the deceived party, even if they were not made known to the deceiver, as long as they appear to be serious and appreciable. In fact, the existence of direct intent shifts certain risks, even if unforeseeable, to the party in the wrong (see also Art 1225 Civil Code).

ee) Mutual Mistake

The *mutual mistake* is not a typical mistake.²⁰² It is not regulated by the Civil Code, since Art 1431 on the requirement of recognisability (which places a prerequisite that has nothing to do, precisely, with mutual mistake) does not apply.

Mutual mistake never relates to the contractual terms.²⁰³ In such a case, the mutual mistake would result in a *false demonstratio* and, therefore, into a problem of interpretation. Moreover, if a term cannot be applied due to an extrinsic reason not known to the parties (for example: a price revision clause refers to a statistical index no longer recorded), the contract requires an *ex fide bona* supplementation, possibly through a duty of the parties to renegotiate; in this case, there is no mutual mistake.

A mutual mistake, rather, is related to the motives, and occurs when both parties made the same error, without the lack of information or the misrepresentation being against good faith in respect of one of the parties and without one of the parties (the one who complains of the error) being closer to the source of the information and thus being obliged to inform itself, or having to bear the correspondent risk.²⁰⁴ A mutual mistake can occur either when the reality is unknown to an ideal contractor under the specific circumstances, or when the reality is readily apparent, but both parties nevertheless make the same error.²⁰⁵

A mutual mistake is relevant if it concerns material or immaterial qualities, intended in the broadest sense, which are normally relevant for one party in those circumstances, or correspond to seriously and appreciably declared and recognisable or recognised subjective idiosyncrasies in respect of whose satisfiability the other party has expressly or implicitly shared the risk, or which

²⁰² See, from a particular perspective, V. Pietrobon, n 32 above, 491.

²⁰³ See R. Sacco and G. De Nova, n 76 above, 522.

²⁰⁴ It is worth reading the German literature on the *beiderseitiger Motivirrtum*, whose regulation can be found in § 313 II (*subjektive Geschäftsgrundlage*): see, among others, M. Schollmeyer, *Selbstverantwortung und Geschäftsgrundlage* (Tübingen: Mohr Siebeck, 2014), 32-39, and T. Finkenauer, '§ 313 BGB. Störung der Geschäftsgrundlage', in *Münchener Kommentar* (München: Beck, 8th ed, 2019), paras 273-275. On mutual mistake see also Art 4:103(1)(a)(iii) PECL and S. Lohsse, n 112 above, 668-670.

²⁰⁵ In this last case, it could be argued that the application of the typical mistake's regulation is preferable. This opinion, however, contrasts with the systematic harmony of these remedies.

are evidently not satisfiable.²⁰⁶ Furthermore, these motives should not concern subjective assessments (including economic equilibrium), nor information that could foreseeably be discovered through an investigation or that correspond to duties of confidentiality. Finally, the erroneous motive must be an actual assumption on which the parties concluded the contract (without resulting in the ‘purpose of the contract’).²⁰⁷

There is a mutual mistake, for example, when an ideal contractor, such as the seller or buyer in a sale (that does not take place in a shop, or in a flea market, but between individuals), does not know – as no one at that time knows – that the painting the subject of the sale is not a copy, but a true masterpiece, and the real (and certain) author is discovered only a few months later.²⁰⁸

b) Remedies

Each defect in consent corresponds to specific remedies, which we shall deal with in turn.

aa) Mere Avoidance

Avoidance is the only remedy available in cases of typical (unrecognised) mistake. Simple recognisability does not give rise, in fact, to misconduct on the part of the party who does not correct the error. Under Italian law, avoidance requires the filing of a judicial demand²⁰⁹ and is always conceived of as full avoidance.²¹⁰

²⁰⁶ These requirements are very important in mutual mistake and must be assessed with extreme care.

²⁰⁷ As for spontaneous mistake, here too it would not be sufficient that an error as to whether an assumption will fail or be fulfilled (except in the unusual case in which the very probability of the assumption, calculated with a certain accuracy and on the basis of certain actual facts, has itself become an assumption); conversely, the same circumstance could be the subject of an information duty. On the other hand, an error as to the assumption that it is also the determining common ground falls within the regime of the ‘*presupposizione*’, resulting in the nullity of the onerous contract (Arts 1325, 1345 and 1418, para 1, Civil Code) or avoidability where the contract is a donation (Art 787 Civil Code). See E. Navarretta, *La causa e le prestazioni isolate* (Milano: Giuffrè, 2000), 298-301.

²⁰⁸ This case cannot be confused with the one concerning the (always uncertain) attribution of the authorship of a work, where it can happen that a critical opinion is denied by a new critical study, the results of which may in turn be denied in the future. Here, the new attributions must be considered as new events that have occurred, which do not affect the sale. See R. Sacco and G. De Nova, n 76 above, 510-512.

²⁰⁹ See, on the other hand, Art 4:112 PECL.

²¹⁰ There is no statutory provision concerning partial avoidance, nor can a partial avoidance be recognised by means of interpretation. In fact, a system that involves the differentiation between decisive and incidental mistake probably does not require a partial avoidance (which, through a legislative reform, could indeed replace the abovementioned differentiation). On the other hand, see Art 4:116, which is provided for in a system where fundamentality is also posited as

If the error is discovered during negotiations, it allows the other party to walk away from the negotiations without consequence. If, however, the other party allows negotiations to continue on a contract analogous to the one on which the mistaken party thought it was negotiating, the latter cannot break off the negotiations on the basis of the mistake.

bb) Avoidance and Compensation

In any case of a decisive error corresponding to misconduct (typical or atypical recognised mistake, induced mistake, fraud), the remedy of avoidance is available together with the remedy of compensation.²¹¹

Avoidance is not intended here as restitution in kind (therefore it can be activated even in the absence of damages). In turn, compensation cannot replace avoidance; on the contrary, we shall soon see that it is subject to a form of prejudiciality.

In the simplest case, the mistaken or defrauded party can avoid the contract and claim compensation for damages equal to everything lost in the negotiations, within the limits of its positive interest (as already mentioned), and equal to what it has lost as a result of relying on having concluded a contract other than the supposed one (again, according to what has already been mentioned).

If such errors are discovered during the negotiations, they allow the parties to break off the negotiations and to charge part or all of the cost to the party that acted against good faith (depending on when the error occurs, ie when the error should have been corrected for the first time, or when the correct information should have been provided, or when the false information should not have been provided).

Breaking off negotiations is permitted even if the other party allows negotiations to continue on a contract analogous to the one on which the mistaken party thought it was negotiating, since the misconduct results in the mistaken or defrauded party losing confidence. In this case the mistaken or defrauded party cannot claim compensation for damages. However, breaking off and compensation for damages are permitted in the case of fraud, for the same reasons for which rectification is not provided for in the case of fraud, as we shall see below.

cc) Prejudiciality and Rectification

a requirement to avoid the contract. The reason probably lies in the difference between 'fundamentality' and 'decisiveness' of the error.

²¹¹ As we have seen, atypical recognised and induced mistakes always require misconduct, so it is inevitable that they also involve compensation. Only in rare cases do induced mistakes not give rise to compensation, because the duty imposed by good faith has been infringed in a way that is not imputable: for example, if a third party has threatened one party to deceive the other (see n 135 and n 140 above). In this case, only avoidability will be granted and the claim for compensation will be directed against the third party.

1) It is worth asking whether, even in the presence of avoidability and where there is misconduct, the protected party can confirm the contract (according to Art 1444 Civil Code) or can simply omit to avoid the contract and also demand compensation for loss resulting from the missed opportunity to cancel the contract.²¹² Likewise, it is worth asking whether, after the expiry of the limitation period for avoidance, the protected party can claim the same compensation.

The issue that comes to light is that of prejudiciality between remedies: ie whether there is a need to claim avoidance (and compensation) instead of (mere) compensation, where both remedies are granted.

In the abstract, if the contract is not avoided, compensation should be assessed on the difference between the value of the concluded contract and the market value, even beyond the limits of the positive interest if the supposed contract and the contract that was in fact concluded were compatible and, on the other hand, within these limits, if the contracts were not compatible and therefore were in fact overlapping. Compatibility exists when the defect in consent is incidental or, even if it is decisive, if the supposed contract would have been substantially different from the concluded contract, but at the same time would have better satisfied the interest of the mistaken or defrauded party. This is for example where the price to be paid was significantly lower in the supposed contract.

In any case, the wasted costs should be compensated, in addition to the loss resulting from the reliance on having concluded a contract other than that which was supposed (including unforeseeable loss, if the misconduct amounts to fraud).²¹³ Finally, other lost opportunities should be compensated, always within the limits of the positive interest. If the positive interest is lower than the market value and there is compatibility between the assumed and the concluded contract, the missed opportunities would not be compensated.

Returning to the issue of prejudiciality, there are various indications in the Italian legal system that suggest the general existence of prejudiciality: in particular, Art 1227, para 2, of the Italian Civil Code, according to which compensation is not due for damages that the creditor could have avoided by using ordinary diligence, and Art 31, para 3, of the Code of Administrative Procedure, which provides that the administrative judge shall exclude compensation for damages that could have been avoided by using ordinary diligence, including by using the appropriate means of protection provided for. Moreover, without prejudiciality, there is a risk of encouraging opportunistic conduct and of imposing

²¹² Likewise, a party can demand compensation without claiming avoidance. This processual strategy does not involve confirmation of contract, but can be treated as a case of confirmation and claim for compensation.

²¹³ Coincidence between misconduct and fraud is needed; it would be not enough if misconduct had an element of intentionality in itself (as in recognised mistake), because the behaviour of the party that is not mistaken would still not be sufficiently serious (on the basis of the assessments made by the legal system).

a disproportionate remedy on the party that acted against good faith.²¹⁴

Only in the case of fraud can a different solution be accepted, for the fact that *fraus omnia corrumpit* and that the intentional misconduct leads to compensation for losses that were also unforeseeable (Art 1225 Civil Code). The most serious misconduct exposes the party who acted against good faith to a more severe remedy in favour of the other party.

Consequently, where prejudiciality exists, the claim for mere compensation allows compensation only for expenses incurred during the negotiation and missed opportunities (within the limits of positive interest) or the difference between missed opportunities and the market value of the contract (within the limits of positive interest), depending on the compatibility or otherwise of the contract concluded and other missed opportunities, as well as for damages arising from having relied upon a contract other than the one supposedly concluded. No other loss can be compensated; these give rise only to a claim for avoidance, if still available.

2) Rectification (ie adaptation) is the power of one party to adjust and modify the contract, offering to perform the contract as it was supposed by the protected party (Art 1432 Civil Code).²¹⁵ Rectification causes the protected party to lose its rights to all other remedies, because it fully satisfies the interest of the person who participated in the negotiation and concluded the contract.

For this reason, rectification is only available before the party is prejudiced in its interest, ie before it is too late.²¹⁶ This does not mean that, if damages result from the assumption that the contract is different from what was concluded, rectification is not available. On the contrary, rectification is no longer available if the contract was concluded for a subjective reason which has been exhausted, because, having discovered the error, the party has redirected itself (and can prove it).²¹⁷ For example, this is the case if the party buys the good that it was

²¹⁴ Art 4:117(2) PECL states that 'If a party has the right to avoid a contract under this Chapter, but does not exercise its right or has lost its right under the provisions of Arts 4:113 or 4:114, it may recover, subject to paragraph (1), damages limited to the loss caused to it by the mistake, fraud, threat or taking of excessive benefit or unfair advantage. The same measure of damages shall apply when the party was misled by incorrect information in the sense of Art 4:106' (paragraph (1) states that 'A party who avoids a contract under this Chapter may recover from the other party damages so as to put the avoiding party as nearly as possible into the same position as if it had not concluded the contract, provided that the other party knew or ought to have known of the mistake, fraud, threat or taking of excessive benefit or unfair advantage'). This provision, as is easy to imagine, 'has caused difficulties in interpretation': see S. Lohsse, 'Art 4:117: Damages', in R. Zimmermann and N. Jansen eds, *Commentaries* n 36 above, 730, 732.

²¹⁵ See E. Quadri, *La rettifica del contratto* (Milano: Giuffrè, 1973), 16-110; in the PECL, see Art 4:105(1) and (2), on the 'adaptation of contracts'.

²¹⁶ See Art 4:105(1) PECL, according to which, 'The other party must indicate its willingness to perform, or render such performance, promptly after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance'.

²¹⁷ In a similar sense, Italian scholars and judges read Art 1432 Civil Code: see R. di Raimo, 'Art. 1432', in E. Gabrielli ed, *Commentario del codice civile* (Torino: UTET, 2011), 130, 133, and G.

supposed to buy elsewhere.

Rectification is a legal power (in a technical sense). The rationale of rectification is that of full satisfaction of the interest and of the *exceptio doli generalis*.

For this reason, rectification is not available in cases in which the defect in consent is so serious that one party loses all confidence in the other party, even if the other party is willing to perform the contract as supposed by the protected party and intends to modify the contract concluded to that extent. These are the cases in which the error amounts to fraud (and, in fact, the Civil Code provides for rectification only with regard to typical mistake, and not to fraud).²¹⁸ Obviously, in the same circumstances, an agreement between the parties with content similar to rectification is allowed.

On the other hand, rectification is at least available in cases of typical mistake (to which Art 1432 Civil Code expressly refers) and atypical decisive (and not mutual) mistake. The fact that Article 1432 of the Italian Civil Code states that the party must offer to perform the contract ‘in a manner consistent with the content and terms of the contract supposed by the other party’ does not allow us to conclude that a mistake which gives rise to avoidability of the contract can also be incidental,²¹⁹ since even a decisive mistake, as we have seen, can refer to the content and terms of the contract.

dd) Compensation of the Differential Interest

Where the defect in consent is only incidental, and not decisive, the contract cannot be avoided. The only remedy available is compensation.²²⁰

Compensation in this case must take into account, in its quantum, the fact that a contract has been concluded, even if it does not fully correspond to the supposed

Marini, ‘Il contratto annullabile’, in V. Roppo ed, *Trattato del contratto* (Milano: Giuffrè, 2006), IV, 1, 309, 424.

²¹⁸ It may, however, be assumed that, in cases where fraud is not incidental due to a subjective reason of the defrauded party, not known to the other party, a rectification is exceptionally available, in view of the lesser seriousness of this kind of fraud. Furthermore, the same solution can be applied in cases where fraud is decisive because the contract concluded would have satisfied the interest of the errant party in a qualitatively different way than the supposed contract, but the whole difference resulted in favour of the defrauded party (for example: if the price to be paid was significantly lower in the supposed contract).

²¹⁹ In this sense, see M. Allara, *La teoria generale del contratto* (Torino: Giappichelli, 2nd ed, 1955), 188-189. Of course, every remark on this topic assumes a different sense, depending on how ‘incidental’ and ‘decisiveness’ are understood.

²²⁰ Something similar is provided for in the PECL, although this regulation distinguishes between fundamental and non-fundamental mistakes, and not between decisive and incidental errors (see n 159 above). The relevant provision can be found in Art 4:106, which, however, is surely incomplete from an Italian point of view (it refers only to ‘information given’, and not to failure of disclosure, probably to get closer to common law legal systems, and it does not provide for sufficient grounds for exclusion) and is not totally clear in assessing the quantum of damages. On this point see S. Lohsse, ‘Art 4:106: Incorrect Information’, in R. Zimmermann and N. Jansen eds, *Commentaries on European Contract Laws* n 36 above, 685, 686-688.

one. For this reason, the party that suffered loss must be put in the position in which it would have been if the supposed contract had been concluded²²¹ (by calculating the difference between this and the concluded contract).²²²

In the event that the error relates to the price or other terms, this does not pose a problem (it should only be added that the value of the terms will have to be considered not in itself, but by verifying the pecuniary losses to which their insertion actually gave rise). In the event of an error as to motive, compensation must be equal to the value that the subject matter of the mistake proportionally had in the economy of the contract within the limits of the market value of this element, and not directly to its market value (the two values coincide only when the contract is concluded at market values). Where there is fraud, it is possible to imagine that the deceiving party ought to be treated more seriously: compensation will be at least equal to the market value of the subject matter of the mistake, even when the contract is concluded, as a whole, on terms worse than market terms, and may exceed this market value if the contract is concluded on terms better for the deceiver than market terms.

The differential interest that is compensated, as can be seen, is similar to the positive interest, rather than the negative interest, precisely because the contract remains valid. In the case of fraud, the identity is total; in the cases of mistake, the methods of quantification distinguish differential interest from full positive interest.

Even in the case of an incidental defect in consent, rectification is available, and even if there is a fraud, since in this case the contract would be unavoidable in any case. In addition, a claim for compensation pursuant to Art 2058 of the Italian Civil Code is also granted (for example, by modifying the clauses of the contract through a judicial decision). This does not actually shift the discretionary line between decisive defects and incidental defects, which must be traced on the basis of the fact that simple pecuniary compensation satisfies the injured party.

If discovered before the conclusion of the contract, incidental defects allow for breaking off negotiations and the charging of costs to the other party, unless

²²¹ It is not convincing to assess the difference between the contract value and the market values (it could be zero or negative). It is also not convincing to calculate the amount of compensation determining 'what the negotiation would have led to in the absence of misconduct': the other party could in fact prove that it would not have concluded the contract. The 'presumptive' logic must be replaced by a 'differential' logic: the part of the value attributable to the misconduct must be compensated (which coincides with the other two methods of evaluation only in an ideal market, characterised by perfect competition).

²²² In addition, compensation must also be paid for damages resulting from the erroneous assumption of having concluded a contract other than the one assumed. Such damages are usually unforeseeable and, therefore, non-refundable; in the case of fraud, where they are refundable, they normally make the defect decisive and allow avoidance of the contract. Consequently, compensation can normally be envisaged if losses resulting from erroneous reliance are situated at a later stage after the conclusion of a contract, vitiated by non-decisive fraud.

the latter ‘rectifies’ the negotiation. In the case of fraud, even facing this ‘rectification’, the defrauded party may leave the negotiation, but will have no right to compensation for the loss.

ee) Renegotiation

In the event of a mutual mistake, the parties will be obliged to renegotiate the terms of the contract in accordance with good faith.

This remedy can be traced back to the one provided for in § 313 II BGB²²³ and to the doctrinal debate on good faith renegotiation,²²⁴ which it is not possible to discuss here. If one of the parties refuses to renegotiate according to good faith, the judge will be able to force this renegotiation through the *astreintes*, ie fines for failure to comply with a judicial order.

Renegotiation has a limit, because it cannot be ordered when disproportionate or oversized; in this case, each of the parties may terminate the contract by means of a specific judicial request, modelled on that provided for by Art 1467 of the Italian Civil Code. Renegotiation also concerns contracts that are not long-term ones and that have already been performed, with the ten-year limitation period since the error was discovered being the only limiting factor (or, perhaps, since the conclusion or the full performance of the contract).²²⁵

IV. Conclusion

The previous analytical construction of informational defects in consent shows that, by reversing the traditional point of view, a new system can be created, based on the interests at stake, but also sufficiently faithful to the statutory texts and to the technical and political choices of the current legal system.

Moreover, the fundamental lines of this analytical construction reproduce those of the recent European soft law instruments.

The PECL, for example, regulates mistake and fraud from the point of view of a distribution of pre-contractual risks.²²⁶ Their system of informational defects

²²³ In Germany, see T. Finkenauer, n 204 above, paras 85-109. See also Art 4:105 PECL, according to which ‘Where both parties have made the same mistake, the court may at the request of either party bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred’.

²²⁴ See, in Italy and among others, F. Macario, *Adeguamento e rinegoziazione dei contratti a lungo termine* (Napoli, Jovene, 1996), 309-440; F.P. Patti, ‘Obbligo di rinegoziare, tutela in forma specifica e penale giudiziale’ *Contratti*, 571 (2012).

²²⁵ About termination of *Anpassungsanspruch* (adjustment claim) in Germany see T. Finkenauer, n 204 above, para 109.

²²⁶ See N. Jansen and R. Zimmermann, ‘Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules’ 31 *Oxford Journal of Legal Studies*, 625, 647-650 (2011); N. Jansen, ‘Irrtumsanfechtung im Vorschlag für ein Gemeinsames Europäisches Kaufrecht’, in H. Schulte-Nölke et al eds, *Der Entwurf für ein optionales europäisches Kaufrecht* (München: Sellier, 2012), 169, 172-177.

in consent is thus based on pre-contractual good faith and on the balancing of the parties' risks.²²⁷ The difference between this and the proposed Italian system is that the PECL, in regulating the vices, in fact also delineates the boundaries of pre-contractual liability. On the other hand, in the revised Italian system, it is on the distribution of pre-contractual risks that both the identification of the defects in consent and the boundaries of the pre-contractual liability are based.²²⁸

Moreover, in the detailed regulation – on which it is not possible to dwell extensively here – many points in common can be found, even if there are obvious differences. Of course, the revised Italian system must deal with a certain tradition and with certain statutory texts; on the other hand, certain concepts and rules of soft law instruments do not appear to be completely convincing or, in any case, not entirely congruent with respect to the cultural (social) horizon in which the Italian interpreter operates.

In conclusion, it seems that, even in the absence of reform of the Civil Code, Italian scholars and judges are now in a position to update the system of informational defects in consent.

Of course, it may be argued that such a revision is too imposing and broad, such that it would produce considerable uncertainty if it were carried out in a hermeneutic way, moreover because it would require much time and effort to crystallize into shared solutions.²²⁹ As a consequence, it may be considered preferable to wait for a legislative intervention.

Nevertheless, even if this more cautious, legislative approach were adopted, the legislature too would do well to proceed along the lines that have been proposed. Whether by way of case law or statutory law, the proposed regime we have outlined here makes a strong candidate for any new update or reform in the field of informational defects in consent.

²²⁷ See Arts 4:103-4:107, 4:106 and 4:117 PECL. These provide that, even in the absence of avoidability, compensation may be sought under certain conditions. Moreover, the regulation of mistake and fraud is perfectly consistent with a pre-contractual balancing of risks based on good faith and focused on the conduct of the party that is not mistaken, so that we can argue that this regulation encompasses that of the pre-contractual information duties, leaving out only cases of non-essential error for which it would not be appropriate to have a restitutory remedy (ie avoidance).

²²⁸ The PECL system follows the 'first choice' and not the 'second choice', which were identified in para II.4.d.bb.

²²⁹ Another critical point could be seen in the regime of *bona fide* purchasers that buy goods gratuitously, although it could be argued that they do not deserve protection through a property rule.

The Insurance Perspective on Prevention and Compensation Issues Relating to Damage Caused by Machines

Sara Landini*

Abstract

This paper addresses the issue of automation coverage for costs in the event of damage caused by an automated decision-making process. It will consider civil liability and insurance from the point of view of problems related to the proof of a causal nexus between wrongdoing and losses. Starting from a study on causation, this paper focuses on liability and insurance in case of automation: their changing role in an automated world and various perspectives taking also into account recent European perspectives and developments.

The thesis that the paper proposes is that legal liability is not a sufficient instrument to permit effective prevention and compensation in the case of damage caused by full algorithmic automation. This is particularly so because it could be not always possible to trace back to a specific human actor, as the European Commission underscored in its recommendation on civil law rules on robotics (2015/2103(INL)). Of course, legislators can intervene by reshaping the civil liability, for instance, by eliminating the proof of causal link or introducing new forms of strict liability. We intend to propose an alternative/complementary way considering the role of insurance system, particularly liability insurance, which is generally intended as instrument to manage and transfer risks (both private companies and public funds) in compensating victims but also in preventing losses by educating the insured machines thanks to the data acquired.

‘I, on the other hand, am a finished product. I absorb electrical energy directly and utilize it with an almost one hundred percent efficiency. I am composed of strong metal, am continuously conscious, and can stand extremes of environment easily. These are facts which, with the self-evident proposition that no being can create another being superior to itself, smashes your silly hypothesis to nothing’.

Isaac Asimov, *I, Robot*

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I. Introduction

Automation is considered as a technique for reducing human error and damage.¹ We are usually oriented to consider automation only in terms of development of autonomous vehicles, but the phenomenon is much more widespread. Consider, for example: the use of automation in medicine, in particular in surgery; automation in smart contracts, (in which the parties agree the adoption of models for the adaptation of contractual contents to contingencies); smart agriculture, where the agricultural activity is guided by choices based on models capable of planning with respect to climate changeability and other occurrences; smart cities or cities that are able to direct traffic and provide information to users to improve the traffic, and quality of users' life, etc.

Automation can reduce human errors, and also damages, but cannot exclude the latter, especially when they cannot be eliminated. The question then becomes choosing which target is best to hit. The classic example is that of the autonomous vehicle that has provided a dramatic, but not avoidable alternative between killing the driver or a pedestrian walking across the street. Some countries try to find an answer by creating guidelines for these 'dilemma situations'.² This could be an ethical solution, but what is the consequence if the software is programmed according to these guidelines? What is the impact of that on liability? The

¹ C.-Y. Chan, 'Advancements, prospects, and impacts of automated driving systems' 6 *International Journal of Transportation Science and Technology*, 206 (2017). Among the first contributions, Id, 'Hearings on automation and technological change' *Subcommittee on Economic Stabilization of the Joint Committee on the Economic Report*, 14-28 (US Congress, October 1955); W.S. Buckingham, *Automation: Its Impact on Business and People* (New York: Harper & Brothers, 1961).

² In Germany an Ethics Commission on automated driving set up by Federal Minister A. Dobrindt. The Federal Ministry of Transport and Digital Infrastructure's Ethics Commission comprises fourteen academics and experts from the disciplines of ethics, law and technology. Among these are transport experts, legal experts, information scientists, engineers, philosophers, theologians, consumer protection representatives as well as representatives of associations and companies. The Ethics Commission's report comprises twenty propositions. The key elements are:

- Automated and connected driving is an ethical imperative if the systems cause fewer accidents than human drivers (positive balance of risk);
- Damage to property must take precedence over personal injury. In hazardous situations, the protection of human life must always have top priority;
- In the event of unavoidable accident situations, any distinction between individuals based on personal features (age, gender, physical or mental constitution) is impermissible;
- In every driving situation, it must be clearly regulated and apparent who is responsible for the driving task: the human or the computer; and
- It must be documented and stored who is driving (to resolve possible issues of liability, among other things).

Drivers must always be able to decide themselves whether their vehicle data are to be forwarded and used (data sovereignty).

The Ethics Commission's complete report can be found at tinyurl.com/ydc42f5a (last visited 7 July 2020).

Moreover, we have to investigate what law shall regulate AI. The national legislator even if it concerns a transnational phenomenon collecting data from a transnational network of machines? See E. Giorgini, 'Algorithms and Law' 5 *Italian Law Journal*, 135 (2019).

guidelines issued by the German Transport Ministry try to find solutions with regard to the issues of liability. In a report published in 2017 it stressed that, in every driving situation, it must be clearly regulated and apparent who is responsible for the driving task: the human or the computer. This information must be documented and stored who is driving in order to facilitate the victim in the proof of the dynamic of the accident.³

Starting from these premises, we intend to answer to a fundamental question: how to prevent and compensate damage caused autonomously by a machine? Civil liability is the basic instrument to prevent and compensate damage also with the help of liability insurance, but damage that is not referable to a person who can be considered responsible for the wrongful act complicates this paradigm.

The above question is fundamental because effective instruments of compensation and prevention of damage caused by automation can reduce threats related to the use of automation and will permit the development of automated machines that will be safer, considering all the benefits arising from their use. Research based on SWOT (Strengths, Weaknesses, Opportunities, Threats) analysis demonstrates the benefits of adopting automation systems in transport. The SWOT analysis (also known as the SWOT matrix) is a strategic planning tool used to evaluate strengths, weaknesses (Weaknesses), opportunities (Opportunities) and threats of a project or in a company. Regulators and policymakers are increasingly involved in making important decisions about the governance of automated vehicles (AVs). Policymakers need to design comprehensive policies to deliver the benefits of AVs and to foresee and address potential unintended consequences; however, this is not an easy task. Especially given the complexity of the technology, AVs require a sophisticated analysis: beyond the apparent safety and security issues, AVs have significant potential to impact issues related to privacy, accessibility, the environment, and land management.

The opportunities include increased road safety and lowered social costs.

³ See point 8, at 11 of the *Report of Ethics Commission Automated and Connected Driving*, available at tinyurl.com/y9wezt45 (last visited 7 July 2020).

At the end, the report affirms that ‘genuine dilemmatic decisions, such as a decision between one human life and another, depend on the actual specific situation, incorporating ‘unpredictable’ behavior by parties affected. They can thus not be clearly standardized, nor can they be programmed such that they are ethically unquestionable. Technological systems must be designed to avoid accidents. However, they cannot be standardized to a complex or intuitive assessment of the impacts of an accident in such a way that they can replace or anticipate the decision of a responsible driver with the moral capacity to make correct judgements. It is true that a human driver would be acting unlawfully if he killed a person in an emergency to save the lives of one or more other persons, but he would not necessarily be acting culpably. Such legal judgements, made in retrospect and taking special circumstances into account, cannot readily be transformed into abstract/general *ex ante* appraisals and thus also not into corresponding programming activities. For this reason, perhaps more than any other, it would be desirable for an independent public sector agency (for instance a Federal Bureau for the investigation of accidents involving automated transport systems or a Federal Office for safety in automated and connected transport) to systematically process the lessons learned’.

As is well known, human errors, primarily due to causes like distracted driving, speeding, reckless driving, and driving under the influence, among others are believed to be responsible for over ninety per cent of these accidents. Increased mobility and accessibility is another such opportunity, considering the fact that AVs can serve as a more convenient mode of transportation point-to-point, especially for people unable to operate a vehicle manually (including youth, people with certain disabilities, and the elderly). A third opportunity involves environmental sustainability. AVs can help to improve environmental sustainability and could reduce CO₂ emissions by three hundred million tons per year also because AVs will reduce traffic congestion. Researchers have suggested that AVs may increase worker productivity by ten-fifteen per cent and save around one billion hours every day. Currently available technologies, such as Event Data Recorders (EDR), are being used by the NHTSA to investigate crashes and clarify civil liabilities earlier, which may reduce litigation costs.

In the next sections, we will try to answer the following questions, trying to find a solution to the issues of prevention and compensation in case of damage caused by machines acting autonomously with the use of algorithms. What do we mean with the term ‘automated choice’? Who is liable in case of damage caused by IA autonomously? Is it civil liability the most effective solution to compensation and prevention in case of damage caused by IA? In which way can insurance represent a solution?⁴

II. What is an Automated Choice?

Before considering the above-mentioned juridical issues, it is important to define the object of our considerations.

With the use of the term ‘automated choice’, what is actually meant is a choice made using an algorithm? It is a choice without human factors normally influencing a choice. The Oxford English Dictionary (1989) defines automation as:

- ‘1) Automatic control of the manufacture of a product through a number of successive stages;
- 2) the application of automatic control to any branch of industry or science;
- 3) by extension, the use of electronic or mechanical devices to replace human labor’.

This definition needs to be read together with definition of Artificial Intelligence

⁴ European Parliament and Council Directive 2009/103/EC of the relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (2009) OJ L263/11 (Directive on motor insurance).

(AI), as proposed within the European Commission's Communication on AI1:

‘Artificial intelligence (AI) refers to systems that display intelligent behavior by analyzing their environment and taking actions – with some degree of autonomy – to achieve specific goals.

AI-based systems can be purely software-based, acting in the virtual world (eg voice assistants, image analysis software, search engines, speech and face recognition systems). AI can also be embedded in hardware devices (eg advanced robots, autonomous cars, drones or Internet of Things applications)’.

Nobel Prize winner Herbert Simon affirmed that it is not possible to predict choices through models of optimal choice, arguing that any human decision making enters necessarily in contact with psychological processes. There is no human decision only where there is a full-automated choice.

We have a case of a real automated choice in case of full automation. This involves is the technology by which a process or procedure is performed without human assistance. Automation usually implies the use of various control systems for operating with minimal or reduced human intervention, but some processes have been completely automated. As multiple examples, we can cite steering and stabilization of ships, aircraft and other applications and vehicles where different levels of automation are possible.

The above table illustrates that the SAE (Society of Automobile Engineers) international's on-road automated vehicle standards committee, along with experts from industry and government, the information report defining key concepts related to the increasing automation of on-road vehicles. Central to this report are six levels of driving automation: 0 (no automation), 1 (driver assistance), 2 (partial automation), 3 (conditional automation), 4 (high automation), and 5 (full automation).

In order to define the cause of action in case of an automated choice, it is important to consider the above-mentioned levels of automation. Generally speaking and not only with regard to vehicles we can distinguish, the levels of automation as following:

- at level one the human operator acts and turns to the computer to implement her actions;
- at level two the computer helps the human operator by determining the options;
- at level three the computer suggests options and the human operator can choose to follow the recommendation;
- at level four the computer selects the action and the human operator decides if it should be done or not;
- at level five the computer selects the action and implements it if the human

operator approves the selected action;

- at level six the computer selects the action and informs the human operator who can cancel the action;
- at level seven the computer does the action and inform the human operator;
- at level eight the computer does the action and inform the human only if the human operator asks;
- at level nine the computer does the action and informs the human operator only if the computer decides the operator should be told; and
- at level ten the computer does the action if it decides it should be done. The computer informs the human operator only if it decides the operator should be told.

Parasuraman, Sheridan, and Wickens also distinguish four models of human information processing:

1. Sensory processing, which refers to the acquisition and registration of multiple sources of information and includes the positioning and orienting of sensory receptors, sensory processing, initial pre-processing of data prior to full perception, and selective attention. This model can be translated in the function of information acquisition;
2. Perception and/or working memory, which regards conscious perception and manipulation of processed and retrieved information in working memory. It includes cognitive operations such as rehearsal, integration and inference, but these operations occur prior to the point of decision. This model can be translated in the function of information analysis;
3. Decision making, which means that a decision is based on such cognitive processing. This model can be translated in the function of decision and action selection; and
4. Response selection, which involves the implementation of a response or action consistent with the decision choice. This model can be translated in the function of decision and action implementation.

With regard to the four functions discussed above, it is possible to provide an initial categorization for types of tasks in which automation can support the human operator:

1. Information acquisition: the automation of information acquisition can be applied to the sensing and registration of input data;
2. Information analysis: the automation in this function involves cognitive functions such as working memory and inferential processes;
3. Decision and action selection. The decision and action selection involve selection from among decision alternatives; and
4. Action implementation, which refers to the actual execution of the action choice.

In accordance with the opinion of some scholars: automation should be human-centered; automation systems should be comprehensible; it should ensure

operators are not removed from command role; it should support situation awareness; it should never perform or fail silently; management automation should improve system management; designers should assume that operators will become reliant on reliable automation.

III. Civil Liability, Automation and Self-Learning Machine. Who is Liable?

As previously explained, automation can reduce human errors, but not damage, especially when damage cannot be avoided. A proper management of these problems typically requires funds to compensate victims, the implementation of effective strategies and a plan for prevention of damage. Fund-raising and prevention strategies are, therefore, key aspects.

The economic analysis of tort law assumes that a legal rule of liability will give incentives to potential parties in an accident setting for careful behavior. Thus economists tend to stress the deterrent function of tort law. On the other hand, lawyers tend to stress the ‘*ex post* accident’ problems, where there is a victim that needs to be compensated. Lawyers focus their attention on the importance of fund raising to compensate losses. Actually, these two approaches are not that ‘black and white’. Lawyers also stress the deterrent function of tort law and economists pay attention to compensation issues. It is important to find the way to deter and compensate at the same time.

It is clear that liability will give incentives for efficient prevention and will ensure compensation of damages. At the same time, civil liability aims at providing a compensation mechanism for those who have suffered harm caused by the actions of others. Terminology and the actual principles may differ between distinct jurisdictions, but the core of functions remains common: deterrence and a fair distribution of historic costs and risks. In order to cover both functions, it is important that the civil sanction is going to punish the wrongdoer, the person who takes the harmful action, intentionally or with gross negligence.

Most of the literature, and the European Institutions norms dealing with compensation for damage caused in the event of automation, have raised the question of the possible responsibility or co-responsibility of the producer and/or programmer.⁵ So, most of the efforts are on the reform of the directive on manufacturer liability and on cybersecurity. Scholars have also been concerned

⁵ Many authors wrote on the new challenges posed by AI in Tort law matters. See eg F.P. Hubbard, ‘Sophisticated Robots: Balancing Liability, Regulation, and Innovation’ 66 *Florida Law Review*, 1803 (2015); S. Chopra and L.F. White, *A Legal Theory for Autonomous Artificial Agents* (Ann Arbor: University of Michigan Press, 2011); S. Gless and K. Seelmann eds, *Intelligente Agenten und das Recht* (Baden-Baden: Nomos, 2016).

In particular, these authors have rightly placed the attention on the concept of defect in view of what may be the ‘defects’ in the case of artificial intelligence and of a reasonable duty of safety and care.

with reviewing the concept of guilt of the owner and/or user of the automated product, but, for example, raising the level of diligence required.⁶

Without wanting to raise any criticism to the theories that surely have seized central aspects of this theme, we intend to draw attention to aspects linked to the problem of man-machine interaction and the so-called self-learning of the machine in the case of losses highlighting how civil liability is perhaps not sufficient to compensate and above all to prevent damages.

The recommendations to the European Commission on civil law rules on robotics (2015/2103(INL)) stressed this point, noting that robots are not simple toys.⁷

Our considerations become particularly current and important if we move from the field in which the attention of the doctrine is normally focused: automated vehicles, to consider other areas in which the problem of compensation and prevention of damage caused by automated machines arises, such as, medicine and agriculture. In these areas the interaction between machines and men (owner, user, producer, programmer, machine's manager, etc) are so many and complex that it becomes difficult to identify the person (s) responsible.

The recourse to solidarity between co-responsible parties, in the legal systems which know to the institute of the so-called passive solidarity, also fails to resolve the difficulties for the victim to identify the person responsible. If it is true that, in the case of solidarity between the responsible persons, the victim can recut against each of them for the entire damage, it is also true that, in a civil proceeding each potentially responsible person will try to prove that the action of the others has excluded the own responsibility. There could also be a real risk of extending the time needed to compensate the damage. Moreover, the damage is usually so huge and with domino effects that prevention, rather than compensation, becomes

⁶ D.C. Vladeck, 'Machines Without Principals: Liability Rules and Artificial Intelligence' 89 *Washington Law Review*, 117, 130 (2014): 'it is useful to pause to consider whether the standard of care to be applied to driver-less cars will be different than the standard applied to cars driven by humans. There is every reason to think that the answer will be 'yes', and that fact may bear on the analysis that follows'. With regard to industry the Author consider the role played by Industry with regard to consumers expectations. 'Manufacturers, through advertising and other communications with consumers, play a key role in shaping consumer expectations. Unless the manufacturer makes inflated and unjustified representations about its product's performance, consumers are likely to expect that their products will perform in a way that is consistent with prevailing standards as articulated by the products' manufacturers, even if better and safer products are achievable at a nominal cost' (at 137).

⁷ 'The more autonomous robots are, the less they can be considered to be simple tools in the hands of other actors (such as the manufacturer, the operator, the owner, the user, etc); whereas this, in turn, questions whether the ordinary rules on liability are sufficient or whether it calls for new principles and rules to provide clarity on the legal liability of various actors concerning responsibility for the acts and omissions of robots where the cause cannot be traced back to a specific human actor and whether the acts or omissions of robots which have caused harm could have been avoided': Report 27 January 2017 with recommendations to the Commission on civil law rules on robotics (2015/2103(INL)), Committee on Legal Affairs, Rapporteur: M. Delvaux, available at tinyurl.com/y4gjaunj (last visited 7 July 2020).

fundamental.

One solution can be found in special legal provisions about joint liability. This issue of the presence of a plurality of actors in the wrongdoing does not emerge if we say that all subjects involved are automatically joint tortfeasors. In this case, they are jointly liable and then it is their task to find out internally (ie within their internal relations) who owes to whom, what amount as far as internal recourse, (ie the restitution of the part of the damage paid on behalf of the other tortfeasors).⁸ This solution needs legislative intervention to assign liability to all actors independently of the proof of their culpability and of the causal chain in the determination of the wrongdoing. The problem is to determine, in abstract, all the possible actors. It is possible to place objectively joint liability on the main actors (ie the actors bearing the risk of automation like the owner, the user, the manufacturer, the programmer of the automated machine/s involved). The victim could sue one of them, and, as said, they have to find out within their internal relations who owes what amount to whom, as far as internal recourse is concerned. In this case, there could also be a problem of costs sustainability, especially if we consider that insurance contracts usually don't cover joint liability. Accordingly, the actor who paid to the victim the full amount of damage will be covered by his/her insurer only with regard to his/her part of liability. Although we could discuss the unfairness of such an exclusion, insurers, however, justify it because, at the time of the conclusion of the contract, (and for the purpose of determining the premium) they assessed the risk of the insured person alone and not also of a possible co-responsible party.

Moreover, another question that arises is whether we are sure that damage in automation, cases is always caused by the owner and/or the manufacturer and/or the user?

In case of full automation, special problems regard the proof of damage causation arise. The causal link is a problem of knowledge of the origin of things and phenomena, which has accompanied the development of philosophical and scientific thought since its origins starting from the Aristotelian vision of science and principles,⁹ up to a more recent period in which knowledge of the causation

⁸ I've to thank Professor Á. Fuglinszky, full professor at Elte University in Budapest about these considerations.

⁹ See Aristotele, *Fisica, libro I* (Milano: Mondadori, 1996), 134, at 10; F. Laudisa, *Causalità, Storia di un modello di conoscenza* (Roma: Carocci, 1999). In natural sciences, the causal nexus is considered to infer the events of the unknown future from the present ones that can be immediately perceived. In legal studies, the causal nexus is considered to identify among a plurality of events, that are potentially the efficient cause of a given phenomenon already realized, the legally relevant circumstance for the determination of the phenomenon. Accordingly, it seems that, in civil liability judgments, the decisions on the causal nexus must take place through cognitive processes of an inferential-inductive type, articulated according to counterfactual conditions. 'The process of counterfactual reasoning has three stages. The first two of these are somewhat counterintuitive and are easily ignored by analysts. But, they are essential to structuring one's counterfactual reasoning properly. First, one must establish the particular way in which the alternate possibility comes to be (ie, develop its 'back-story'). Second, one must evaluate the events that occur between

laws is due to a mediation of the empirical data.¹⁰ The recent skepticism regarding the possibility to understand the real causation of events has not stopped scientific interest in the causal processes. New probabilistic theories postulate the possibility of replacing the search for the truth by looking for what is highly probable.¹¹

The application of probabilistic judgments with regard to the identification of causal links finds a particular application in ascertaining causality in law. There, the *favor veritatis* is limited to instances of economics of judgments and legal limits to the proof of the facts that require the achievement of compromises suitable to satisfy the plurality of ends that the order intends to reach with the verification of the causal link between legally relevant facts.

In this paper we will consider only the causality in civil liability where causality could be considered, in the different legal system, as a 'variable factor'.¹²

There are many different causal theories, however, and here we will recall the ones most important. A first theory is the so-called theory of the *condicio sine qua non*: the cause of an event will be the one that constitutes the condition without which the fact would not be determined, considering the chain of antecedents that have contributed to produce the result having legal significance. This criterion has been criticized for its excessive width. The investigation should have as its object every event that even in a small part may have contributed to the cause of the fact.¹³

A second theory focuses on relevant conditions according to probabilistic criteria. Scholars have hypothesized that the adoption of a criterion that seeks

the time of the alternate possibility and the time for which one is considering its consequences. And third, one must examine the possible consequences of the alternate possibility's back-story and the events that follow it. In doing so, an analyst must connect their conclusion to the specific type of strategic assessment the counterfactual will be used to support: decision making under risk or decision making under uncertainty', see further N. Hendrickson, *Counterfactual Reasoning: a Basic Guide for Analysts, Strategists and Decision Makers* (Plymouth: Proteus Monographs, 2008), 1-2. The counterfactual reasoning represents the way to analyze possibilities, considering what would or might happen if one of the possibilities were to occur.

¹⁰ B. Russell, 'On the Notion of Cause' 13 *Proceedings of the Aristotelian Society*, 1 (1912).

¹¹ P. Suppes, *A Probabilistic Theory of Causality* (Amsterdam: North-Holland Publishing Company, 1970) 41; W.C. Salmon, 'Probabilistic Causality' 61 *Pacific Philosophical Quarterly*, 50 (1980), claiming that events in the causal chain need to be considered not individually but considering their connections.

¹² V. Zeno Zencovich, 'Il nesso causale profili di diritto comparato' *Persona & Danno* (8 January 2009). He observes that the causal element is a function of three other aspects: the fault of the agent, the nature of the injured interests, the extent of the damage caused. Simplifying, we can say that the rigor in the causal rule will be inversely proportional to the gravity of the fault (or even the intent), to the hierarchical location of the protected interest (first of all, life) and to the dimensions of the damaging event. When the value attributed to one of these elements is particularly high, the judge will tend to reduce the importance of the causal rules, or to easily consider the connection.

¹³ N. Godmann, 'The problem of Counterfactual Conditional' 44 *Journal of Philosophy*, 113 (1947); J.L. Mackie 'Counterfactuals and Causal Laws', in R.J. Butler ed, 1 *Analytical Philosophy: First Series*, 66 (Oxford: Oxford University Press, 1962); E. Nagel, *La struttura della Scienza* (Milano: Feltrinelli, 1968), 76.

the cause of a given event according to a judgment of a prognostic type based on probabilistic laws. A judgment, therefore, should not stop at the empirical perception of the plurality of existing conditions, but identifies the efficient cause of the phenomenon by placing as the object of the cognitive act not only what occurred, but rather what should have occurred according to a probabilistic prognosis.¹⁴

The use of the criterion of probability moves from the assumption that the legal causal assessment is represented by an ex post judgment given in the mind of the interpreter. If this premise is true, then the objective of the cognitive act of the jurist cannot be the identification of the true cause, but the determination of the event that turns out to be the appropriate cause of a given fact according to probabilistic laws.¹⁵ The probabilistic theory has been developed by German scholars with some correction considering the adequate cause according to the best scientific knowledge.¹⁶

Considering the role of causation in civil liability and the above-mentioned theories, we must conclude that the question ‘who is liable?’ depends to the answer to another question ‘who caused the damage?’

IV. Who Caused the Damage?

The presence of an automated choice affects the process of determining the event and the effect of the choice. As we have seen, the interaction between algorithms and human action may be present at different levels. According to the theory of probability, the human agent can be held responsible for the action if it is proved that the action was caused with high probability by the human agent. The problem is that such a vision does not take into account the interaction between man and machine in causing the event.

Let us hypothesize that a subject is acting using a semi-automated mechanism where the computer selects the action and informs the human operator, who can cancel the action, and also that the computer chooses an incorrect option and

¹⁴ G.O. Robinson, ‘Probabilistic Causation and Compensation for Tortious Risk’ 14 *The Journal of Legal Studies*, 779 (1985).

¹⁵ Probability should be considered according to the scientific evolution. See further G. Ponzanelli, ‘Scienza, verità e diritto: il caso Bendectin. Nota a Corte Suprema USA 28 giugno 1993’ *Foro italiano*, 184 (1994).

¹⁶ See K. Engish, *Die Kausalität als Merkmal der strafrechtlichen Tatbestände* (Tuebingen: Mohr Siebeck, 1931), 41. German scholars focus also on the necessity to consider the scope of the liability rule. See P. Sourlas, *Adäquanztheorie und Normzwecklehre bei der Begründung der Haftung nach Paragraph 823 Abs. 1 BGB* (Berlin: Duncker & Humblot, 1974). See also F. Realmondo, *Il problema del rapporto di causalità nel risarcimento del danno* (Milano: Giuffrè, 1967), 1-44; A.D. Candian, *Responsabilità civile e assicurazione* (Milano: Giuffrè, 1993), 25; G. Alpa, ‘I fatti illeciti’, in Pietro Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1995), 1-63; G. Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale, CT: Yale University Press, 1970).

does not warn the person in time for her to be, able to intervene and avoid damage to third parties. It will not be enough to consider the probability that the computer error has caused the damage, but it will also be necessary to verify that the user, in case of correct warning from the computer, would have acted differently.

Therefore, we have a double counterfactual judgement: one with regard to the human choice and another with regard to the automated choice. If it has been proved that the cause of the accident is the automated choice, it will still be necessary to consider whether the computer error is a production error or if the option chosen by the computer is linked to the combination of algorithms and to an evolution of such a combination in a way that is autonomous from its own manufacturer. If the action or omission of the machine does not refer to a human action or omission, we must say that, regarding the causation proceeding, we are in the presence of an irresistible force that is not imputable to the user nor to the manufacturer.¹⁷

This is perfectly in line with the recommendations to the European Commission on civil law rules on robotics (2015/2103(INL)) saying that: ‘the more autonomous robots are, the less they can be considered to be simple tools in the hands of other actors’. Thus, it is important to reshape civil liability and/or find other mechanisms to prevent and compensate losses when

‘the cause cannot be traced back to a specific human actor and (when)

¹⁷ A problem correlated to the present is the possibility to recognize subjectivity to automated machine. See European Parliament resolution of 16 February 2017 with recommendations to the Commission on civil law rules on robotics (2015/2103(INL)):

‘T. whereas Asimov’s Laws must be regarded as being directed at the designers, producers and operators of robots, including robots assigned with built-in autonomy and self-learning, since those laws cannot be converted into machine code;

U. whereas a series of rules, governing in particular liability, transparency and accountability, are useful, reflecting the intrinsically European and universal humanistic values that characterise Europe’s contribution to society, are necessary; whereas those rules must not affect the process of research, innovation and development in robotics;

V. whereas the Union could play an essential role in establishing basic ethical principles to be respected in the development, programming and use of robots and AI and in the incorporation of such principles into Union regulations and codes of conduct, with the aim of shaping the technological revolution so that it serves humanity and so that the benefits of advanced robotics and AI are broadly shared, while as far as possible avoiding potential pitfalls; (...)

Z. whereas, thanks to the impressive technological advances of the last decade, not only are today’s robots able to perform activities which used to be typically and exclusively human, but the development of certain autonomous and cognitive features – eg the ability to learn from experience and take quasi-independent decisions – has made them more and more similar to agents that interact with their environment and are able to alter it significantly; whereas, in such a context, the legal responsibility arising through a robot’s harmful action becomes a crucial issue;

AA. whereas a robot’s autonomy can be defined as the ability to take decisions and implement them in the outside world, independently of external control or influence; whereas this autonomy is of a purely technological nature and its degree depends on how sophisticated a robot’s interaction with its environment has been designed to be’. See G. Borges, ‘Rechtliche Rahmenbedingungen für autonome Systeme’ 71 *Neue Juristische Wochenschrift*, 977 (2018); S. Beck, ‘Der Richtliche Status autonomer Maschinen’ *Aktuelle Juristische Praxis*, 183 (2017).

the acts or omissions of robots which have caused harm could have been avoided'.¹⁸

The term 'force majeure' is frequently used to indicate causes that are outside the control of the parties, such as natural disasters, that could not be evaded through the exercise of due care. Force majeure is a circumstance that no human foresight could anticipate or which, if anticipated, is too strong to be controlled.¹⁹ Depending on the legal system, such an event may relieve the parties from the obligation to compensate damage. The term 'force majeure' comes from French but with regard to the present meaning it is important to remember the German concept of '*höhere Gewalt*'. According to German jurisprudence, there is a *höhere Gewalt* if the event causing the damage has an external effect and the harm caused cannot be averted or rendered harmless by the extremely reasonable care.²⁰ However, it must be noted that the French force majeure is not identical with the German *höhere Gewalt*.²¹ The French legal term 'force majeure' is in the narrowest sense limited to natural events, but in the broadest sense it is synonymous with the German term.

Regarding the case of automation, with the term force majeure we mean a force that is external to the actors (owner, user, manufacturer, programmer and, way not the public administration approving guidelines and conditions for the use of automation)²² and irresistible, ie any actors cannot prevent or avoid the

¹⁸ B. Russell, n 10 above.

¹⁹ C. Plinii, 'Quae quum acciderint, vis major appellatur' *Secundi Historiae mundi*. Libri XXXVII, LXIX.

²⁰ RG VI 455/20, RGZ 101, 94, 95; RG IV 745/26, RGZ 117, 12, 13; BGH VII ZR 172/86, BGHZ 100, 185, 188.

²¹ A. Blaschczok, *Gefährdungshaftung und Risikozuweisung* (Köln: C. Heymann, 1993); N. Jansen, *Die Struktur des Haftungsrechts* (Tuebingen: Mohr Siebeck, 2003). See also: BGH X ZR 146/11; LG Frankfurt am Mein, [lexetius.com/2012, 4178](http://lexetius.com/2012/4178) – which took into account also EU law. The European Union legislature has therefore chosen a term which, in the starting point, is similar to the criterion of force majeure (as used in Common Position (EC) no 27/2003 of 18 March 2003 OJ C 125 E/63). The legislator's consideration of the concept of force majeure, inherent in the concept of force majeure, is such that exceptional circumstances do not per se eliminate the obligation to compensate. This is only the case if the exceptional circumstances could not have been avoided even if all reasonable measures had been taken.

About the new risks related to automation H. Zech, 'Zivilrechtliche Haftung für den Einsatz von Robotern', in S. Gless and K. Seelmann eds, *Intelligente Agenten und das Recht* n 5 above, fn 163.

²² For instance, in Italy on 28 February 2018, the Minister of Transport and Infrastructure (MIT) issued a decree which permits road testing of automatic guided vehicles.

The decreto legislativo of 28 February 2018 was implemented taking into account Regulation (EC) 377/2014 of the Parliament and of the European Council of 3 April 2014, establishing the program Copernicus and repealing Regulation (EU) 911/2010; and having regard to European Parliament and Council Directive 2010/40/EU of the of 7 July 2010, on the general framework for dissemination intelligent transport systems in the transport sector and interfaces with other modes of transport

The Act of Italian Minister of Transport reports interventions, times and types of roads involved.

automated choice, for instance because, thanks to self-learning, the machine is acting in an unpredictable way respect to the preprogrammed choice.²³

In case of the intervention of force majeure, there is an interruption of the causal chain. So, in case of an automated choice acting like a force majeure it is not possible, according to the ordinary rules of civil liability, to put the liability

The Decree identifies functional standards to create more connected and safer roads that, thanks to new technologies introduced in road infrastructures, can dialogue with users on board vehicles, in order to provide real-time information on traffic, accidents, weather conditions, up to tourist news that characterize the different routes. They will cover newly constructed or governmental motorways or governmental sections. In particular, in a first phase, by 2025, action is taken on the Italian infrastructures belonging to the European TEN-T network, Trans European Network - Transport, and on the entire motorway and state network. Progressively, the services will be extended to the entire network of the national integrated transport system, as identified by the annex to DEF Decree 17 April 2017 'Connecting Italy'.

By 2030, we expect that further services will be activated: diversion of flows, intervention on average speeds to avoid congestion, suggestion of trajectories, dynamic management of access, parking and refueling, even electric; the installation of devices for the structural monitoring of the static nature of road works.

The interventions for the transformation in smart road have been identified after a comparison with the sector and taking into account what has already been achieved by some motorway concessionaires and by Anas (the company that manages the Italian roads).

At the same time, the decree draws the path towards the experimentation of innovative driver assistance systems on new connected infrastructures.

The Ministry of Infrastructure and Transport can authorize, on request and after a specific investigation, the testing of automatically guided vehicles on certain stretches of road, according to specific procedures and controls during the experimentation, with the aim of ensuring that it takes place in conditions of absolute security. University institutes, public and private research institutes, vehicle manufacturers equipped with automatic driving technologies may apply for authorization.

²³ Cour de Cassation, Chambre civile 2, 8 February 2018, no 16-26.198, P+B+I, 'le tiers avait poussé la victime sur les rails alors que le train redémarrait. La Haute juridiction affirme que "le comportement du tiers qui pousse un usager contre une rame alors que celle-ci redémarre n'est nullement irrésistible pour la RATP, qui dispose de moyens modernes adaptés permettant de prévenir ce type d'accident, de sorte que le fait du tiers ne présentait pas les caractéristiques de la force majeure exonératoire de la responsabilité pesant sur elle"'; Cour de Cassation, Chambre civile 2, 8 February 2018, no 17-10.516, P+B+I 'le tiers, souffrant de schizophrénie, avait ceinturé et entraîné la victime sur les rails, et l'enquête avait conclu à un homicide volontaire et un suicide. Le Fonds de garantie des victimes d'actes de terrorisme a indemnisé les ayants droit de la victime et s'est par la suite retourné contre la SNCF. Pour exonérer cette dernière de toute responsabilité, la Cour de cassation relève que "aucune altercation n'avait opposé les deux hommes qui ne se connaissaient pas, qu'un laps de temps très court s'était écoulé entre le début de l'agression et la collision avec le train (...) et qu'aucune mesure de surveillance ni aucune installation n'aurait permis de prévenir ou d'empêcher une telle agression, sauf à installer des façades de quai dans toutes les stations ce qui, compte tenu de l'ampleur des travaux et du fait que la SNCF n'était pas propriétaire des quais, ne pouvait être exigé de celle-ci à ce jour". Elle en déduit que c'est à bon droit que la cour d'appel a conclu à la caractérisation d'un cas de force majeure. La solution sur ce second point semble mettre un point final à la rigueur d'appréciation de la force majeure exonératoire de la responsabilité du transporteur (par exemple, Cass. 1re civ., 21 nov. 2006, n° 05-10.783, Bull. civ. I, n° 511 ; pour une appréciation de la faute de la victime non constitutive de la force majeure: Cass. ch. mixte, 28 nov. 2008, n° 06-12.307, Bull. civ. ch. mixte, n° 3), courant qui avait été amorcé en 2011 (Cass. 1re civ., 23 juin 2011, n° 10-15.811, Bull. civ. I, n° 123)'.

on the owner/user of the machine (the owner/user of the automated vehicle, the hospital that is the owner/user of the automated machine for surgery, etc).

The term *force majeure*, in case of civil liability, indicates a cause of break of the causation chain such as the case of an act of God and other natural events. The defendant's liability ceases at the moment in time when the supervening inevitable condition occurs.²⁴ Rather than referring to contractual liability, *force majeure* is instead a cause justifying the breach of contract as it determines the impossibility of fulfilling the performance requested by the contract.

We must also reflect on the possibility of eliminating the relevance to the causal link in some cases through legislative provisions. The problem is that, by eliminating the relevance of the causal link, the deterrent function of civil liability would also be eliminated, or at least strongly reduced. If no liability can operate in this case, no liability insurance can operate at the same time. Civil liability is the object of coverage in case of liability insurance.

It could be possible to provide for other forms of compensation, such as the establishment of public funds financed through a specific tax paid by the owners or by the users of automated machines. Those funds would cover damage caused by totally automated machines that can give rise to cases of damage where no one claims responsibility. In European Union member states and not only with regard to vehicles, a public fund for victims of car accidents already exists.²⁵

With regard to the liability in case of automated choice, we have to remember the premises of the European Parliament's Resolution on robotics.²⁶ There, the

²⁴ See, in common law, *Carslogie Steamship Co Ltd v Royal Norwegian Government* (1952) AC 292. The complaint's vessel was damaged by a collision with the defendant. After the collision the complaint repaired the vessel that was certified to sail for NY. On the way the vessel suffered other damage from stormy weather at sea. The Court held that the defendant from the collision, not for further damage sustained by the natural events at the sea.

²⁵ European Parliament and Council Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (2009) OJ L 263/11: According to the Directive 2009/103/EC, point 53: 'Where it is impossible to identify the insurer of a vehicle, it should be provided that the ultimate debtor in respect of the damages to be paid to the injured party is the guarantee fund provided for this purpose situated in the Member State where the uninsured vehicle, the use of which has caused the accident, is normally based. Where it is impossible to identify the vehicle, it should be provided that the ultimate debtor is the guarantee fund provided for this purpose situated in the Member State in which the accident occurred.'

²⁶ European Parliament, Resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)), available at tinyurl.com/t5zrewh (last visited 7 July 2020): 'whereas the more autonomous robots are, the less they can be considered to be simple tools in the hands of other actors (such as the manufacturer, the operator, the owner, the user, etc); whereas this, in turn, questions whether the ordinary rules on liability are sufficient or whether it calls for new principles and rules to provide clarity on the legal liability of various actors concerning responsibility for the acts and omissions of robots where the cause cannot be traced back to a specific human actor and whether the acts or omissions of robots which have caused harm could have been avoided;

AC. whereas, ultimately, the autonomy of robots raises the question of their nature in the light of the existing legal categories or whether a new category should be created, with its own

European Parliament seems to propose a form of strict liability for users or owners of robots and does not consider the causal nexus. In the case of strict liability, the fault or the negligence of the person held responsible by the law is not relevant, but causality is a different condition in civil liability from the proof of fault or of negligence of the actors.

Moreover, even if a special normative intervention eliminates the proof of a causal link, victims, who sue for compensation of losses caused by automated choice have to face the problem of the interconnected responsibilities usually present in case of automation. Machines utilize information to make elaborate choices from different sources. Some of these sources are automated machines themselves. Automation operates in a cyberspace that is

‘a time-dependent set of interconnected information systems and the human users that interact with these systems’.²⁷

It means that it is difficult to determine who is liable in such cases.

It could be possible to anticipate liability at the moment of the ‘choice on automation’ putting liability not on the cause/s of the damage, but on who bears the risk of automation the manufacturer, the owner and/or the user.

V. Reshaping the Manufacturer Liability, Motor Liability and Motor Insurance

Particular attempts to find solutions to compensation issues can be found in some interventions at level of national law and of European legislation trying to reshape liability in case of motor liability and in case of manufacturer liability.

In the United States, different statutes have been enacted about the use of automated vehicles. Some States (California, Florida and Nevada) provide that

specific features and implications;

AD. whereas under the current legal framework robots cannot be held liable per se for acts or omissions that cause damage to third parties; whereas the existing rules on liability cover cases where the cause of the robot’s act or omission can be traced back to a specific human agent such as the manufacturer, the operator, the owner or the user and where that agent could have foreseen and avoided the robot’s harmful behavior; whereas, in addition, manufacturers, operators, owners or users could be held strictly liable for acts or omissions of a robot;

AE. whereas according to the current legal framework for product liability - where the producer of a product is liable for a malfunction- and rules governing liability for harmful actions -where the user of a product is liable for a behavior that leads to harm- apply to damages caused by robots or AI;

AF. whereas in the scenario where a robot can take autonomous decisions, the traditional rules will not suffice to give rise to legal liability for damage caused by a robot, since they would not make it possible to identify the party responsible for providing compensation and to require that party to make good the damage it has caused’.

²⁷ See the definition proposed by NATO Cooperative Cyber Defense Centre, available at tinyurl.com/v8cex2b (last visited 7 July 2020).

it is mandatory for drivers of automated vehicles to submit an insurance or a surety bond or to give proof of a self-insurance.²⁸ Moreover, Nevada's legislation does not require a licensed operator for a 'fully autonomous vehicle' if the vehicle can achieve 'a minimal risk condition' in the event of a failure.²⁹ A different solution has been proposed by other States, which require a human operator to be present and capable of taking over in an emergency.³⁰ In German law, a new § 1a StVG (the German law on motor liability) on 'Motor vehicles with highly or fully automated driving function'³¹ has been introduced on 16 June 2017. Under German law, the liability of the car owner as in § 7 StVG, in the case of an autonomous vehicle, remains unaffected anyway, since the owner is liable for all damage that can be referred to the 'operation of a motor vehicle'. So it is just an additional liability of the motor vehicle driver. For this purpose, the new

²⁸ See Cal Veh Code § 38750(b) (3) (2015); Fla Stat Ann § 316.86 (2016); Nev Rev Stat Ann § 482.060 (2015).

²⁹ See Nev Rev Stat Ann § 482A.200.

A deep analysis of worldwide legislation on automated cars has been made by Aida Joaquin Acosta, 'What Governments Across the Globe Are Doing to Seize the Benefits of Autonomous Vehicles' available at tinyurl.com/tb2w56p (last visited 10 January 2020).

³⁰ B.A. Browne, 'Self-Driving Cars: On The Road to a New Regulatory Era' 8 *Journal of Law, Technology and the Internet* 1, 12 (2017).

³¹ Straßenverkehrsgesetz (5 March 2003) BGBl. I S. 310, 919 (StVG):

§ 1a Kraftfahrzeuge mit hoch- oder vollautomatisierter Fahrfunktion

(1) The operation of a motor vehicle by means of highly or fully automated driving function is permitted if the function is used as intended.

(2) Motor vehicles with highly or fully automated driving function within the meaning of this Act are those which have technical equipment,

1. To control the driving task - including longitudinal and transverse guidance - the respective motor vehicle after activation control (vehicle control),

2. which is able to comply with traffic regulations directed at vehicle guidance during highly or fully automated vehicle control,

3. which can be manually overridden or deactivated by the driver at any time,

4. can recognize the necessity of the vehicle hand control by the driver,

5. the driver can visually, acoustically, tactually or otherwise perceptibly display the requirement of the autograph vehicle control with sufficient reserve of time before the vehicle control is delivered to the driver, and

6. indicates use contrary to one of the system descriptions.

The manufacturer of such a motor vehicle must declare in the system description that the vehicle complies with the requirements of sentence 1.

(3) The preceding paragraphs shall only be applied to vehicles which are approved in accordance with § 1 (1), which comply with the requirements of paragraph 2 sentence 1 and whose highly or fully automated driving functions

1. are described in, and comply with, international regulations applicable in the scope of this Act; or

2. A type-approval pursuant to Article 20 of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ L 263, 9.10.2007, p.

(4) Driver is also the one who activates a highly or fully automated driving function referred to in paragraph 2 and used for vehicle control, even if he does not control the vehicle in the context of the intended use of this function by hand'.

norm contained in § 1a StVG says that the user must remain receptive to be able to take control immediately.³²

In fact, under § 1a StVG, an automated vehicle: must be able to be manually overridden or deactivated by the driver at any time; shall recognize the necessity of the vehicle hand control by the driver; and shall visually, acoustically, tactually or otherwise discernibly indicate to the vehicle driver the requirement of the vehicle hand control with sufficient time reserve before the vehicle control is delivered to the vehicle driver.

In Italy, the Minister of Transport and Infrastructure (MIT) issued a decree on February 28, 2018 which permits road testing of automatic guided vehicles. It was implemented taking into account Regulation (EU) 377/2014 of the Parliament and of the European Council of 3 April 2014, establishing the program Copernicus and repealing regulation (EU) 911/2010; and having regard to directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010, on the general framework for dissemination intelligent transport systems in the transport sector and interfaces with other modes of transport. Regarding liability in case of accidents, Art 1 letter J of the Decree says that

‘the occupant of the vehicle, who must be always able to take control of the vehicle regardless of the degree of automation of the same, in any moment the need arises, acting on the vehicle controls with absolute precedence over automated systems and which, therefore, is the person responsible for the circulation of the vehicle’.

Insurance issues also take a relevant role in these cases.

In May 2018, the European Commission presented a proposal to amend the motor insurance directive.³³ Under these revamped rules, once adopted by the European Parliament and the Council: victims of motor vehicle accidents will be able to receive the full compensation they are due, even when the insurer is insolvent; drivers who have a previous claims history in another EU country will be treated equally to domestic policyholders, and will potentially benefit from better insurance conditions.³⁴ There is no special provision on automated

³² See R. Greger, ‘Haftungsfragen beim automatisierten Fahren. Zum Arbeitskreis II des Verkehrsgerichtstags’ 31 *Neue Zeitschrift fuer Verkehrsrecht*, 1-5 (2018).

³³ European Commission, n 37 below.

³⁴ At point 7 the proposal for the Directive says that: ‘Effective and efficient protection of victims of traffic accidents requires that those victims are always reimbursed for their personal injuries or for damage to their property, irrespective of whether the insurance undertaking of the party liable is solvent or not. Member States should therefore set up or appoint a body that provides initial compensation for injured parties habitually residing within their territory, and which has the right to reclaim that compensation from the body set up or appointed for the same purpose in the Member State of establishment of the insurance undertaking which issued the policy of the vehicle of the liable party. However, to avoid parallel claims being introduced, victims of traffic incidents should not be allowed to present a claim for compensation with that

car is included in the text. We also have to consider and consider the fact that, at the end of 2017, Insurance Europe (the European insurance and reinsurance federation)³⁵ has responded to the European Commission's REFIT consultation on the Motor Insurance Directive (MID), which should be an essential tool in the protection of road traffic accident victims and should be preserved.³⁶

On 17 May 2018, the European Commission published a new communication,³⁷ in which it focuses on the importance of non-personal data sharing while protecting cybersecurity and on the importance of fostering vehicle connectivity for automation.³⁸ With regard to the safety on the roads and victims' compensation, the European Commission affirms that the motor insurer can take actions against the manufacturer.³⁹

Automation also imposes the reshaping of rules on manufacturers' liability, especially with regard to the concepts both of defect and of product.⁴⁰ In 2018, the European Commission submitted the fifth report on the application of

body if they have already presented their claim or have taken legal action with the insurance undertaking concerned and that claim is still under consideration and that action is still pending'.

³⁵ See insuranceeurope.eu (last visited 7 July 2020).

³⁶ See tinyurl.com/ut3p37t (last visited 7 July 2020): Insurance Europe stressed that: 'the MID is also fit for purpose for connected and autonomous vehicles. It added that these must not be excluded from the MID's scope, as this would undermine the protection of road users. Insurance Europe noted that the success of the MID in achieving its goals is dependent on an open and competitive motor third party liability (MTPL) insurance market. As such, MTPL insurers must be able to exercise their commercial judgement freely. However, interferences - such as the standardization of claims history statements - would complicate MTPL insurers' business without bringing real added value to European drivers. Given the increasing connectivity of vehicles, an open and competitive MTPL insurance market also requires rules to be in place at European level to ensure access to in-vehicle data is independent from vehicle manufacturers. This would ensure it is European drivers that decide who can access their data, and for what purposes'.

³⁷ European Commission, Communication On the Road to Automated Mobility: an EU Strategy for Mobility of the Future, COM(2018)283 final, available at tinyurl.com/v7y732r (last visited 7 July 2020).

³⁸ See A.C. Nazzaro, 'Macchine intelligenti (*smart cars*): assicurazione e tutela della *privacy*' *Diritto del mercato assicurativo e finanziario*, 60 (2018).

³⁹ European Commission, n 37 above: 'On the compensation of victims, the Motor Insurance Directive already provides for a quick compensation of victims including where an automated vehicle is involved. The insurer can then take legal action against a vehicle manufacturer under the Product Liability Directive if there is a malfunction/defect of the automated driving system. The European Commission just evaluated the Product Liability Directive and as a follow-up, it will issue an interpretative guidance clarifying important concepts in the Directive including in the light of technological developments'.

⁴⁰ See tinyurl.com/wku9brt (last visited 7 July 2020).

See K. Chagal, 'Am I an Algorithm or a Product? When Products Liability Should Apply to Algorithmic Decision-Makers' (2018), 27, available at tinyurl.com/vcx7qrdb (last visited 7 July 2020). He proposes a new approach to distinguishing traditional products from 'thinking algorithms' for the determining whether products liability should apply. Instead of examining the vague concept of 'autonomy', the article analyzes the system's specific features and examines whether they promote or hinder the rationales behind the products liability legal framework. An algorithm that replaces human discretion cannot be considered a product, as information and services are not considered as to be products. At the same time damage caused by automation cannot be considered as to be 'defect of the production' when they are caused by a probability-based prediction.

Directive on product liability. The Commission carried out a formal evaluation of the Directive, assessing whether the Directive continues to be an adequate tool and continues to meet its objectives today in the light of new technological developments. The Commission launched a public consultation on the evaluation of Directive on product liability in order to collect stakeholders' feedback on the application and performance of the Directive, including considerations on challenges raised by new technological developments.

As a result of this process, the Commission issued in 2019 guidance on the Directive on product liability, as well as a report on the broader implications for, potential gaps in and orientations for, the liability and safety frameworks for artificial intelligence, the Internet of Things and robotics. With regard to new technological challenges, the European Commission's Report considers the following questions: Does the Directive adequately address the challenges of increasingly autonomous devices and cybersecurity? What about sustainability and reaching a circular economy? Does the Directive unnecessarily discourage producers from placing innovative products on the market? Or conversely, does it deter manufacturers from placing faulty and unsafe products on the market? Does it still protect injured persons in a changing world?⁴¹

Some gaps of the Directive on product liability are underlined by this evaluation:⁴²

- The application of the Directive is problematic for products in which software and applications from different sources can be installed after purchase, that are connected to the Internet and can perform automated tasks based on algorithms and data analysis, automated tasks based on self-learning algorithms or shared

⁴¹ European Commission, n 37 above. The Commission concluded affirming that: 'The Directive has until now covered a broad range of products and technological developments. In principle, it is a useful tool for protecting injured persons and ensuring competition in the single market, by harmonizing rules for injured persons and businesses in the aspects that it covers. It is an area where EU level rules provide a clear added value. Having EU level rules for product liability is uncontested. This does not mean that the Directive is perfect. Its effectiveness is hampered by concepts (such as 'product', 'producer', 'defect', 'damage', or the burden of proof) that could be more effective in practice. As the evaluation has also shown, there are cases where costs are not equally distributed between consumers and producers. This is especially true when the burden of proof is complex, as may be the case with some emerging digital technologies or pharmaceutical products'. Technology is going to change the concept of a defective product but also the concept of production. As correctly underlined by the Commission: 'Some of the concepts that were clear-cut in 1985, such as 'product' and 'producer' or 'defect' and 'damage' are less so today. Industry is increasingly integrated into dispersed multi-actor and global value chains with strong service components. Products can increasingly be changed, adapted and refurbished beyond the producer's control. They will also have increasing degrees of autonomy. Emerging business models disrupt traditional markets. The impact of these developments on product liability needs further reflection. At the end of the day, a producer is and needs to be responsible for the product it puts into circulation, while injured persons need to be able to prove that damage has been caused by a defect. Both producers and consumers need to know what to expect from products in terms of safety through a clear safety Framework'.

⁴² See tinyurl.com/u9p8qo4 (last visited 7 July 2020).

with other users through collaborative platforms;

- In case of damage caused by software, there could be a problem of proof. In case of open-source software used, for instance, in the medical field, it could be difficult to prove the damage resulting from a misdiagnosis due to a failure in the software;

- In case of interconnected products correctly attributing liability for defects can be difficult;

- A new concept of production is emerging. New technological developments such as 3D printers, which enable consumers to become manufacturers, could potentially undermine the attribution of the product that caused the damage; and

- Typical technological damage also needs to be compensated. Let us think to service failures such as downtime or loss of data.

This last point underscores the importance of considering product liability together with cybersecurity.

The European Commission considers Artificial intelligence (AI) an area of strategic importance and a key driver of economic development. At the same time, the EC addressed socio-economic, legal and ethical impacts of the AI. It expressed in all its communication a European approach to Artificial Intelligence based on three pillars:⁴³

1. Being ahead of technological developments and encouraging uptake by the public and private sectors. The European Commission is increasing its annual investments ordered to connect and strengthen AI research centers across Europe. The European Commission supports the development of an 'AI-on-demand platform' that will provide access to relevant AI resources in the EU for all users and supports the development of AI applications in key sectors. On 10 April 2018, 25 European countries signed a Declaration of cooperation on Artificial Intelligence. It builds further on the achievements and investments of the European research and business community in AI;⁴⁴

2. Preparing for socio-economic changes brought about by AI. The European Commission will support business-education partnerships to attract and keep more AI talent in Europe; it will set up dedicated training and retraining schemes for professionals; it will foresee changes in the labor market and skills mismatch; it will support digital skills and competences in science, technology, engineering, mathematics (STEM), entrepreneurship and creativity; and

3. Ensuring an appropriate ethical and legal framework, the final ethics guidelines for trustworthy artificial intelligence prepared by the High-Level European Group on artificial intelligence were published on 8 April 2019. The

⁴³ See tinyurl.com/y7to5ws4 (last visited 7 July 2020). See also Report of the Committee on Industry, Research and Energy of 30 January 2019 on a comprehensive European Industrial Policy on Artificial Intelligence and Robotics (2018/2088(INI), available at tinyurl.com/sufqlac (last visited 7 July 2020).

⁴⁴ See tinyurl.com/y6wd9sud (last visited 7 July 2020).

European Commission will also develop and make available guidance on the interpretation of the product liability directive.

These documents focus on new useful kinds of machine learning approach like the so called ‘reinforcement learning’. In this approach, the AI system is free to make its decisions over time, and at each decision point, we provide it with a reward signal that tells it whether it was a good or a bad decision. The goal of the system is to maximize the positive reward received. This approach is used, for example, in recommender system (such as the several online recommender systems that suggest users what they might like to buy), or also in marketing.

Accordingly, at the end the group proposes a new definition of AI, which could improve the task and the liability of the manufacturer:

‘Artificial intelligence (AI) systems are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behavior by analyzing how the environment is affected by their previous actions.

As a scientific discipline, AI includes several approaches and techniques, such as machine learning (of which deep learning and reinforcement learning are specific examples), machine reasoning (which includes planning, scheduling, knowledge representation and reasoning, search, and optimization), and robotics (which includes control, perception, sensors and actuators, as well as the integration of all other techniques into cyber-physical systems)’.

The Commission’s Communication of 8 April 2019 sets out a human-centric approach. AI is seen as a tool operating in the service of humanity and the public good, which aims to increase individual and collective human well-being. Since people will only be able to confidently and fully reap the benefits of a technology that they can trust, AI’s trustworthiness must be ensured. With this Communication, the European Commission welcomes the publication of guidelines on AI.

As noted above, AI HLEG presented a first draft of the guidelines in December of 2018. Following further deliberations by the group in light of discussions on the European AI alliance, a stakeholder consultation and meetings with representatives from Member States, the guidelines were revised and published in April 2019.

Based on fundamental rights and ethical principles, the guidelines published in 2019 list seven key requirements that AI systems should meet in order to be

trustworthy:

- Human agency and oversight;
- Technical robustness and safety;
- Privacy and Data governance;
- Transparency;
- Diversity, non-discrimination and fairness;
- Societal and environmental well-being; and
- Accountability.

VI. The Alternative Role of Insurance in Compensation and Prevention of Damage Caused by Automated Vehicles

Even if the use of automated machines can cause damage, it represents an important risk reduction tool.⁴⁵ At the same time, it is important to respond to the issue of compensation and prevention of damage caused by machines autonomously.

Civil liability could be considered the basic instrument to prevent and compensate damage, but may not always be appropriate in cases of damage caused by AI if it is not possible to trace back damage to a responsible person. Scholars and legislators propose to reshape civil liability in case of intervention of automation. It is possible to propose a regulatory intervention that introduces strict liability of the user and/or of the owner of automated machines, where strict liability means a responsibility that does not give relevance neither to the guilt nor to the causal link between wrongdoing and losses, but such solution risks discouraging the use of automation. This consideration is valid not only with respect to road accidents where automation can reduce human errors. Many environments exist where automated work, also increasing quality and productivity, can be the solution to operations under hazardous conditions. Moreover, such solutions seem to not play any role in preventing damage caused by machines because the only way the owner and/or the user can reduce the risk of damage caused by machines operating in full automation is to not use the full automation. Civil liability therefore needs to be reshaped together with insurance.

For example, the owner could be stimulated, from the fear of incurring responsibility, to subject the machine to an update and revision so that it is adequate to the best standards in terms of safety. However, we believe that it is preferable for the owner to be guided in the maintenance of the machine in order to make its operation as safe as possible. Moreover, the introduction of strict liability rule on the owner or on the user could discourage the use of AI in contrast with the common idea that AI represents an important instrument to reduce risks.

⁴⁵ R. Eastwood, T.P. Kelly, R.D. Alexander and E. Landre, 'Towards a Safety Case for Runtime Risk and Uncertainty Management in Safety-Critical Systems' *System Safety Conference incorporating the Cyber Security Conference*, 1–6 (2013).

In seeking a solution, perhaps we need to focus attention on the importance of compensation and prevention, which usually finds a solution in civil legal liability.

We must say that, in the event of damage that can be referred to an automated machine, prevention will be more easily guaranteed by the collection of additional data relating to cases, in which defaults of the machine have been determined, in order to improve the state of knowledge and reduce damage for the future also thanks to the 'reinforcement learning'.⁴⁶

It therefore appears that the goals of compensation and prevention are better achieved by a system that allows the compensation of the victim and at the same time the acquisition of data relating to the claims, their processing to provide new knowledge, manage the risks of defaults in the future and prevent damage. These functions can be performed by insurance companies that could, at the time of settlement of the claim, compensate the damage, acquire data and process them. These are activities that companies have already been carrying out creating knowledge in risk management. The insurers can use the knowledge acquired to give instructions to the insured in order to make safer and safer the insured automated systems. Insurance contracts can create and update standards and guidelines, and include special conditions providing the exclusion of coverage if the insured automated system is not compliant with the standards and the guidelines. All this does not mean completely overcoming the hypotheses of civil liability and creating a completely no-fault system.⁴⁷ We believe that civil

⁴⁶ N. Bostrom, 'When Machines Outsmart Humans' 35 *Futures*, 759, 763 (2003). Artificial intelligence theorists use the term 'singularity' or 'technical singularity' to describe the moment in time, purely hypothetical at this point, when machines exceed human intelligence. He noted that it is not essential that the machine has the capacity to actually choose to break a 'rule'; it is enough that the machine's programming does not necessarily determine how the machine will act in all situations, leaving the machine to 'learn' how to make decisions when confronted with a situation not within the contemplation of the machine's programmers. See B. Rossington, 'Robots Smarter Than Humans Within 15 Years. Predicts Google's Artificial Intelligence Chief' *Mirror News* (2 February 2014), available at tinyurl.com/w8ympsq (last visited 7 July 2020). See Recommendations to the European Commission on Civil Law Rules on Robotics (2015/2103(INL)). As said, the Commission stressed on this point: 'the more autonomous robots are, the less they can be considered to be simple tools in the hands of other actors (such as the manufacturer, the operator, the owner, the user, etc); whereas this, in turn, questions whether the ordinary rules on liability are sufficient or whether it calls for new principles and rules to provide clarity on the legal liability of various actors concerning responsibility for the acts and omissions of robots where the cause cannot be traced back to a specific human actor and whether the acts or omissions of robots which have caused harm could have been avoided'.

⁴⁷ On strict liability, D.C. Vladeck, 'Machines Without Principals: Liability Rules and Artificial Intelligence', 89 *Washington Law Review*, 117, 146 (2014): 'My proposal is to construct a system of strict liability, completely uncoupled from notions of fault for this select group of cases. A strict liability regime cannot be based here on the argument that the vehicles are 'ultra-hazardous' or 'unreasonably risky' for the simple reason that driver-less vehicles are likely to be far less hazardous or risky than the products they replace. Indeed, it is precisely because these machines are so technologically advanced that we expect them not to fail. For these reasons, a true strict liability regime will be needed; one that does not resort to a risk-utility test or the re-institution of a negligence standard for the simple fact that those tests will be difficult, if not impossible,

liability can still play a relevant role in the artificial intelligence system, provided that, as noted by the doctrine,⁴⁸ the concepts on which the cases of civil responsibility are based are innovated: negligence, the defect in production, the duty not to harm.

As noted above, a first solution could be to establish by law that the owner is always liable if he/she accepts to use automation losing the control of the machine. The legislator should also provide for a mandatory insurance for the owner, in all cases of automation and not only in case of automated cars.

Moreover, the additional value of insurance in case of risks related to automation is that the insurer can create and update standards and guidelines and include in insurance contracts special conditions providing the exclusion of coverage if the automated system is not compliant with those standards and the guidelines that are under the control of the owner. It is also possible, in order to preserve the interest of the victims to be compensated, to provide for the indemnification of the victim. Even in case of damage caused by the automated machines that is working in a way that is not compliant with the standards and the guidelines imposed by contract by the insurers who, will have the right to subrogation/regress against the owner/insured). This means that the exclusion by contract will operate against the insured and not against the victim. In these terms, insurance can represent a level and a guide to the correct maintenance of the machine according to the best safety conditions. In this way, however, we create a disincentive to the use of automation, which will be burdened by insurance premium. While the automation, as said, can contribute significantly in reducing accidents.

Another solution could be the creation of a public fund to compensate victims of full automation like in case of guarantee funds for road accidents victims introduced by the Directive 84/5/CEE Art 1 para 4. The public fund could delegate to insurance companies the management of accidents (assessment and compensation). The designated insurance company would compensate the victim and it will be reimbursed by the public fund that could be financed by the producers, assuming that they are receiving the most part of economic advantages from production of automated machines. Moreover, we have to point out the role that producer can play in achieving high standard of products' safety and in maintaining such level of safety by recalling back products that need to be updated.

for the injured party to overcome'. The Author says also that: 'Lest there be any doubt, my argument is not based on notions of a 'no-fault' liability system, that is, a system that substitutes mandatory insurance and eliminates access to the judicial system. My proposal is a strict liability regime implemented by the courts. Although the idea of 'no fault' systems took hold in the 1970s and 1980s, and was expected to drive down insurance costs by limiting the transaction costs related to litigation, it is by now apparent that those systems have not worked as envisioned. It is likely, however, that the introduction of driverless cars will shift liability from the 'driver' to the manufacturer, and that shift may trigger a resurgence of interest in 'no fault' insurance regimes' (fn 91). See, eg, J.M. Anderson et al, *The US Experience with No Fault Automobile Insurance: A Retrospective* (Santa Monica: The RAND Corporation, 2010).

⁴⁸ See nn 8-9 above.

In this case, the task to create and update standards and guidelines could be over the Fund together with the delegated insurance companies. The machine algorithms will need to be updated to those standards and guidelines. In order to leave the liability on the wrongdoer and compensate the victim, it could be possible to establish, in the statute regulating the fund, that the victim, after being compensated will subrogate the fund in her/his rights against the wrongdoer who could be the producer, the owner, the user also in case of omission in updating the machine.

In this way the goals of compensation and prevention are reached without discouraging the full automation.

The interaction between human beings and machines with regard to automation of course will not only reshape civil liability but also insurance. As noted above

‘we soon realize, however, that the insurance of the civil liability can play much broader functions than those limited to the interest of any responsible person. We soon realize that if the concept of liability has led and developed the liability insurance, this has certainly contributed to the further opening of the first, so as to represent more than a vicious circle, an upward spiral in the progress of the law. And we realize also that the function cannot be limited to the protection of the tortfeasor’s exclusive interest, but it is necessary to expand the protection of the real victim, the injured third party’.⁴⁹

VII. Conclusions

Automated choices, as discussed throughout this paper, can reduce the risk of accidents, but some damages are not avoidable. As stressed in some cases the cause of damage cannot be traced back to a specific human actor.

Given such a scenario, it is important to compensate the victims. So far, the European Commission has focused particularly on driving automated vehicles and underlined the importance of coordinating the responsibility of the user, of the owner and of the manufacturer. However, it is absolutely imperative that we also consider the different levels of automation and human-machine interaction for the purpose of proof of causal link. In case of automation, the network of actors in the process determining the damage is so complex that it could be difficult to determine what’s the cause of the damage. Could it be the use of the machine? A defect of the machine? A defect of the algorithms? When putting strict liability

⁴⁹ A. Donati, *Trattato del diritto delle assicurazioni private. Il diritto del contratto di assicurazione. La disciplina delle singole specie (rami) di assicurazione* (Milano: Giuffrè, 1956), III, II, 329.

on the owner of the machine or on the producer and improving the level of diligence on the actors, it is important to determine causation that is something different from the guilt in the wrongdoing.⁵⁰

In case of full automation, if the action or omission of the machine does not refer to any human actions or omissions we conclude that, with regards to the proceeding of causation, we are in the presence of an irresistible force that is neither imputable to the user, the owner, or the manufacturer. We have therefore evaluated two possible solutions: a) either an attempt to find another way to compensate victims, ie a way different from civil liability (eg through public funds),⁵¹ or via a specific mandatory insurance for owners of automated machines); or b) the regulation of the use of full automated choices leaving always the final choice, and together with it the liability, to the user who must maintain the control.

As noted above, the EU Law considers automation under different perspectives. First, in May 2018, the European Commission presented a proposal to amend the motor insurance directive. That proposal stressed the importance of victims' compensation, but it does not contain any specific norms regarding automated vehicles.⁵² Secondly, some gaps in EU law have been underscored by the evaluation of the directive on product liability, which considers the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products. The evaluation report also considers typical technological damage that needs to be compensated, for instance service failures such as downtime or loss of data. Thirdly, on 17 May 2018 the European

⁵⁰ See V. Tadros, 'Causation, Culpability, and Liability', in C. Coons and M. Weber eds, *Ethics of self-defense* (Oxford: Oxford University Press, 2016), chapter 6. About the problem of 'multi-agents' in case of automation, see G. Teubner, 'Digitale Rechtssubjekte? Zum privatrechtlichen Status autonomer Softwareagenten' 218 *Archiv fuer die civilistische Praxis*, 155 (2018) and Id, *Soggetti giuridici digitali? Sullo status privatistico degli agenti software autonomi* (Napoli: Edizioni Scientifiche Italiane, 2019), 120, stressing the importance to determine a financial entity able to compensate victims.

⁵¹ As said (n 44 above), also in this case thanks to a fruitful discussion with Professor Fuglinzky, the State could be considered liable as it approved guidelines and conditions for the use of automation. Professor Fuglinzski stressed on the following points with regard to automated cars: administrative law allows AVs to take part in normal traffic, so there is an explicit permission given by administrative law; the software is preprogrammed according to the applicable ethical guidelines in the country.

⁵² M. Channon, 'Autonomous Vehicles and Legal Effects: Some Considerations on Liability Issues' (according to my research: Conference: AIDA Motor Insurance Working Party Paris (instead of DIMAF), 33 (2015)). He underlines regarding EU law that: 'It is submitted that an overall EU wide approach is needed for autonomous vehicles and this should be considered as soon as possible. The Motor Insurance Directives have sought to remove any barriers to trade by harmonizing key aspects of the law of Motor Insurance to protect free movement. Differing laws on autonomous insurance and liability will almost certainly constitute a significant barrier to movement as Member States will almost certainly introduce differing laws and regulations and will almost certainly answer the above questions in relation to liability in different ways'. See also N. Bevan et al, 'University of Exeter – Written evidence (AUV0044), Driverless vehicles – where are we going wrong?' *Connected and Autonomous Vehicles: The Future?* (2017) House of Lords Report, available at tinyurl.com/s27e8lu (last visited 7 July 2020).

Commission published a communication where connections between product liability and cyber liability are underlined. Fourthly, the European Parliament's resolution of 16 February 2017 proposes a form of strict liability of users or owners of robots. We can underline three different objectives in the above-mentioned interventions: i) the protection of road victims in general; ii) the protection of consumers in case of defective product; and iii) cybersecurity.

We also note the existence of different interventions regarding different matters. The complexity of reality imposes a greater dialogue between different normative areas and a greater need for an interdisciplinary approach, even in the production of norms. Hence, only by considering the different disciplinary fields, it will be possible to arrive at regulatory innovations that reflect the multiformity of reality and contain tools to respond to the problems that such a complex reality poses.

From the analysis of the interventions at the level of EU legislation, there is a certain lack of communication between the various regulatory areas. Protection of road victims, data protection in cyberspace and producer responsibility are strongly correlated in reality. These are regulations that must be constructed as 'communicating vessels' and not as closed and self-referential areas. The national legislator and the community legislator must recover a vision that is close to the problem and at the same time coherent with the general framework of value, principles and social instances.

While we are analyzing in-depth the individual problems that the topic poses, we must not lose sight of the general framework of the principles that inform civil liability. The compensation of victims cannot be solved by eliminating obstacles to the operation of civil liability without considering the repercussions that such solutions can have on the functions of compensation and prevention of damages. Moreover, are we sure that in case of damage caused by a machine running in full automation civil liability can prevent damage thanks its deterrence function?

The insurers, covering the liability of the owner or of the producer or acting as delegate of public funds in compensating damages to victims of AI can create and update standards and guidelines in order to 'educate' machines with a relevant role in prevention of damage caused by AI thanks to tools like the 'reinforcement learning' concerning with how software agents can take actions in an environment so as to maximize some forms of cumulative reward.

Punitive Damages Under the Lens of Constitutionality: The Role of the Hierarchy of Values

Filippo Maisto*

Abstract

To award punitive damages in the absence of a specific statutory provision is incompatible with the provisions of Art 23 and Art 25, para 2, of the Italian Constitution. Nevertheless, the precept 'according to the hierarchy of values of the legal system' legitimates the use of this judicial technique to punish both torts and breaches of contract (thus also in cases concerning contractual liability) if the interest of the aggrieved party or debtor converges with the satisfaction of public policy goals.

I. Introduction

This paper addresses the issue of the compliance of punitive damages with the Italian Constitution.

In the next para, I will discuss the extra-compensation as a defining characteristic of punitive damages.

In para 3, I will turn to the potential conflict between the award of punitive damages and the provisions of Art 23 and Art 25, para 2, of the Italian Constitution.

In the following para, I will verify that the precept 'according to the hierarchy of values of the legal system' is able to legitimate directly (ie in the absence of any statutory provision) the use of extra-compensation to punish torts when the interest of the aggrieved party converges with the satisfaction of fundamental public policy goals.

In para 5, I will explain the reasons for applying these operational solutions to cases of contractual liability by distinguishing between contractual punitive damages and the penalty clause.

In the following para, I will specify the circumstances under which the principle of proportionality can justify a reduction in the amount of extra-compensatory damages.

In para 7, I will disprove the theory of the 'publicisation of private law'.

The paper will end with some remarks on the method used to legitimate rulings granting extra-compensatory benefits to the aggrieved party or debtor for the purpose of upholding a general interest.

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II. The Structure of Punitive Damages: Extra-Compensation as a Defining Characteristic

The expression ‘punitive damages’ refers to enforceable pecuniary performance with the following characteristics: it is a burden on the tortfeasor,¹ it benefits the aggrieved party,² it exceeds the ontological maximum limit on compensation (ie extra-compensation), and it is determined in relation to the wrongful conduct of the tortfeasor.³ More specifically, the core of the concept is the element of extra-compensation.⁴ For this reason, performance plays a punitive role.

The element of extra-compensation distinguishes the punitive damages from the penalty clause (Art 1382 of the Civil Code),⁵ invoked to trigger punitive performance in cases of contractual liability. From this perspective, the standard upholding the ‘creditor’s interest’ (Art 1384 of the Civil Code) justifies the decision to extend the amount of the penalty – albeit only in relation to non-patrimonial damage – even beyond the limits established by the Italian Supreme Court (*Corte di Cassazione*):⁶ this is also true of consequential damage under the provisions of Art 1223 of the Italian Civil Code. Thus, the amount payable as a penalty is greater than the amount (normally) awarded in recoverable damages,⁷ but it is limited to the measure of loss actually suffered. For this reason, pecuniary performance fulfils a compensatory (and not a punitive) role.⁸

The above analysis confirms that the category of punitive damages is alien to Italian law. The reasons for this are not theoretical but historical. It should be recalled that a fundamental step in the evolution of civil society was the abolition of

¹ See C. De Menech, *Le prestazioni pecuniarie sanzionatorie. Studio per una teoria dei «danni punitivi»* (Padova: CEDAM, 2019), 65; Id, ‘Il problema della riconoscibilità di sentenze comminatorie di punitive damages: alcuni spunti ricostruttivi’ *Rivista di diritto civile*, 1662 (2016).

² L.E. Perriello, ‘Polifunzionalità della responsabilità civile e atipicità dei danni punitivi’ *Contratto e impresa/Europa*, 444 (2018), notes that in some American jurisdictions a percentage of punitive damages goes to the State (seventy-five per cent in Indiana, for example). This cannot be classified as a private law claim, being configurable rather as an administrative penalty (for a similar consideration, see G. Spoto, ‘Risarcimento e sanzione’ *Europa e diritto privato*, 515 (2018)).

³ Regarding this standard, F. Benatti, *Correggere e punire. Dalla Law of Torts all’inadempimento del contratto* (Milano: Giuffrè, 2008), 121 and 350; L.E. Perriello, n 2 above, 434.

⁴ In this sense, see F. Quarta, *Risarcimento e sanzione nell’illecito civile* (Napoli: Edizioni Scientifiche Italiane, 2013), 210; A. Montanari, ‘Del “risarcimento punitivo” ovvero dell’ossimoro’ *Europa e diritto privato*, 386 (2019); C. Castronovo, ‘Del non risarcibile aquilano: danno meramente patrimoniale, c.d. perdita di chance, danni punitivi, danno c.d. esistenziale’ *Europa e diritto privato*, 329 (2008). Taking a different approach, G. Spoto, n 2 above, 501, distinguishes between ‘punitive damages’ and ‘extra-compensatory damages’.

⁵ The same conclusion is found in G. Spoto, n 2 above, 496.

⁶ The Court limits compensation for non-pecuniary damage to situations in which an ‘inviolable right of the person’ has been infringed (Corte di Cassazione-Sezioni unite 11 November 2008 no 26972, *Il Foro Italiano*, I, 120 (2009)). For an analysis, see G. Anzani, ‘Danno non patrimoniale e responsabilità da inadempimento’ *Studium Iuris*, 402 (2017)).

⁷ The aggrieved party also has an advantage with regard to the burden of proof, which lies with the tortfeasor, who must prove the extent of the damage.

⁸ For a similar view, see A. di Majo, ‘Rileggendo Augusto Thon, in merito ai c.d. danni punitivi dei nostri giorni’ *Europa e diritto privato*, 1313 (2018).

‘prison for debts’ (law 6 December 1877 no 4166). From the ideological point of view, a general condemnation regarding the use of punishment to discipline relationships between individuals is beginning to emerge.

Nevertheless, the ‘living law’ has often favoured a positive assessment of punitive damages. This trend has recently been confirmed in private international law, which would indicate that these judicial techniques are appropriate to the aims of public policy, which, in turn, converge with the implied individual interest. From an evolutionary perspective, it is necessary to ascertain whether punitive damages are not incompatible with the fundamental principles of the Italian legal system or not. Following the ‘ethical positivism’ approach,⁹ the characterisation of damages as having a single social function (compensatory) or, alternatively, a multiplicity of social functions (compensatory, punitive, deterrent, etc) is a useful reconstruction for Scholars in creating categories rather than an argument apt to guide the decision making of Courts.¹⁰

III. The Conflict Between ‘Atypical’ Punitive Damages and the Constitutional Provisions that Guarantee the Principle of Protection of the Individual from Abuses by the Public Authorities

In 2017, the Joint Sections of the Italian Supreme Court (*Corte di Cassazione*) stated that the award of foreign punitive damages is not incompatible with ‘public policy’ (Arts 16, 64 para *g*), and 65 of Law 31 May 1995 no 218).¹¹ This positive assessment is subject to the condition that

‘the *a quo* Court’s decision must bear an adequate legal basis, satisfying the requirements of subject-specificity (*tipicità*) and predictability (*prevedibilità*)’.¹²

These kinds of remedies therefore have characteristics that derive, in the context of Italian law, from statutory provisions structured as ‘specific and detailed rules’.¹³

⁹ On this methodological approach, see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), *passim*, especially 122.

¹⁰ The ‘methodological issue’ has been raised by P. Perlingieri, ‘Le funzioni della responsabilità civile’ *Rassegna di diritto civile*, 119 (2011). From a different scientific perspective, A. Montanari, n 4 above, 443, considers that the punitive nature of compensation conflicts with the dogmatic system of tort law. In particular, he excludes the application of extreme solutions to ensure legal certainty.

¹¹ Corte di Cassazione-Sezioni unite 5 July 2017 no 16601, *Danno e responsabilità*, 419 (2017).

¹² Translation by F. Quarta, ‘Italian Corte di Cassazione 5 July 2017 no 16601’ 2 *The Italian Law Journal*, 287 (2017).

¹³ On the distinction between ‘(specific and detailed) rules’ and ‘principles’: P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 9 above, 225; Id, ‘Legal principles and values’ 1 *The Italian Law Journal*, 135 (2017); Id, ‘Il diritto civile tra regole di dettaglio e principi fondamentali. Dall’interpretazione esegetica all’interpretazione sistematica’ *Il Foro napoletano*, 379 (2019).

However, this doctrine does not necessarily mean that punitive damages comply with constitutional values. Private international law uses the following artifices to allow the enforcement of foreign judicial orders in conflict with Italian constitutional principles: the distinction between ‘international public policy’ and ‘domestic public policy’,¹⁴ the distinction between ‘main issues’ and ‘preliminary issues’,¹⁵ and the doctrine of the ‘attenuated public policy effect’.¹⁶ Against these theories – in addition to specific technical reasons¹⁷ – is the argument that their opposition to the construct of the unity of the legal system is to be taken into consideration.¹⁸ At this point, it may be concluded that the Supreme Court has indirectly established the doctrine of the compatibility – within the limits of case specificity – between punitive damages and constitutionality (supplemented by supranational principles, pursuant to Arts 11 and 117 of the Italian Constitution).

The aforementioned conclusions are correct only when supported by a detailed study to ensure that the technique of punitive damages is not in conflict with constitutional principles. In this regard, potential conflict with the provisions of Arts 23 and 25, para 2, of the Italian Constitution must be examined.¹⁹

¹⁴ For arguments in favour of the distinction between ‘international public policy’ and ‘domestic public policy’, see G. Barile, *I principi fondamentali della comunità statale ed il coordinamento fra sistemi (l'ordine pubblico internazionale)* (Padova: CEDAM, 1969); Id, ‘Ordine pubblico (diritto internazionale privato)’ *Enciclopedia del diritto* (Milano: Giuffrè, 1980), XXX, 110; N. Palaja, *L'ordine pubblico internazionale: problemi interpretativi sull'art. 31 delle disposizioni preliminari al codice civile* (Padova: CEDAM, 1974).

¹⁵ Regarding the distinction between ‘main issues’ and ‘preliminary issues’: P. Lagarde, *Recherches sur l'ordre public en droit International privé* (Paris: Librairie générale de droit et de jurisprudence, 1959), 73; P. Picone, *Saggio sulla struttura formale del problema delle questioni preliminari nel diritto internazionale privato* (Napoli: Jovene, 1971). In Italian case law, see Corte di Cassazione, 2 May 1999 no 1739, *Il Foro Italiano*, I, 1458 (1999).

¹⁶ On the application of the doctrine of the ‘attenuated public policy effect’: S. Tonolo, *Le unioni civili nel diritto internazionale privato* (Milano: Giuffrè, 2007), 174; G. Pastina, ‘La nozione di famiglia nella giurisprudenza della Corte europea dei diritti dell'uomo e gli obblighi alimentari derivanti da unioni personali’, in G. Carella ed, *La Convenzione europea dei diritti dell'uomo e il diritto internazionale privato* (Torino: Giappichelli, 2009), 171. This doctrine has its roots in the French category of ‘ordre public de proximité’: P. Courbe, ‘L'ordre public de proximité’, in *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, (Paris: Dalloz, 2005), 227; G. Carella, ‘Diritto di famiglia islamico, conflitti di civilizzazione e Convenzione europea dei diritti dell'uomo’, in G. Carella ed, *La Convenzione europea dei diritti dell'uomo e il diritto internazionale privato* (Torino: Giappichelli, 2009), 69.

¹⁷ Cf F. Maisto, *Personalismo e solidarismo familiare nel diritto internazionale privato* (Napoli: Edizioni Scientifiche Italiane, 2011), 31.

¹⁸ For a thorough discussion, G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019), 15.

¹⁹ The conflict between the award of punitive damages and Arts 23 and 25, para 2, of the Constitution is raised by C. Castronovo, n 4 above, 331. This reasoning is accepted, but only when a specific statutory provision is lacking, in G. Ponzanelli, ‘Novità per i danni esemplari’ *Contratto e impresa*, 1023 (2015); only pursuant to Art 23 of the Constitution, C. De Menech, ‘Il problema della riconoscibilità’ n 1 above, 1669 and 1673, and (most recently) Id, *Le prestazioni pecuniarie sanzionatorie* n 1 above, 263; P.G. Monateri, ‘I danni punitivi al vaglio delle sezioni unite’ *Il Foro Italiano*, I, 2648 (2017); only if there is the ‘need to protect Constitutional interests’, A. Ciatti Càimi,

Art 23 of the Constitution states that ‘No obligations of a personal or a financial nature may be imposed on any person except by law’.²⁰ Regarding the cooperative relationships between persons (ie of a more strictly civil law nature), this provision plays a key ideological role. In combination with Art 3 of the Constitution, it conveys the idea that the individual parties are holders of rights and duties because they have agreed on them (‘retributive justice’). Only if there are goals related to social/economic policy (Art 3, para 2, of the Constitution) statute law can attribute to individuals or categories of individuals sacrifice or usefulness in relation to the Community (administrative law relationships) or other individuals (civil law relationships) irrespective of their will (‘distributive justice’). Within this framework, Art 23 of the Constitution prescribes the choice to adopt ‘retributive justice’ as a basic model for the allocation of available resources. This legitimates the determination that in intersubjective cooperation certain conduct is binding under two circumstances: when the interested parties have expressed their agreement and if a law imposes it to fulfil the higher goals of civil society. In relation to afflictive (ie punitive) phenomena, Art 23 of the Constitution fulfils the additional ideological role of protecting the freedom and property of individuals from abuses by the public Authorities (ie an extension of *habeas corpus* established by Art 13 of the Constitution). In any case, the assessment is that penalties (in particular, punitive damages) can be enforced only if two alternative conditions are met: either the interested parties have previously expressed their agreement, or a provision imposes them to satisfy the higher goals of civil society.

Art 25, para 2, of the Constitution states that

‘No one may be punished except on the basis of a law in force prior to the time when the offence was committed’.²¹

This provision makes positive assessment of sanctions contingent on the existence of a remedy expressly established in statute law that is structured as a ‘specific and detailed rule’. In particular, a negative judgment will arise under two circumstances: when the interested parties have agreed on punitive damages in the absence of a statutory provision, or the said discipline can be deduced from a statutory provision laid down in the form of a ‘general clause’ (for example, Art 2043 of the Civil Code)²² or a ‘principle’ (for example, Art 2 of the Constitution). The political reason for this is to strengthen, from two points of view, the

‘I danni punitivi e quello che non vorremmo sentirci dire dalle corti di *common law*’ *Contratto e impresa/Europa*, 9 (2017); G. Spoto, n 2 above, 497; A. Montanari, n 4 above, 390. The opposing view that punitive damages conflict with no article of the Italian Constitution is supported in A. di Majo, n 8 above, 1313; and, from a different methodological perspective, L.E. Perriello, n 2 above, 449.

²⁰ Translation by the Italian Ministry of the Interior.

²¹ Translation by the Italian Ministry of the Interior.

²² See P. Perlingieri, ‘Legal principles and values’ n 13 above, 141.

guarantee provided by *habeas corpus* pursuant to Art 13 of the Constitution: the extension of the subject-specificity requirement to all sanctions, including in relation to individual property; and the legitimacy of the argument concerning the non-retroactivity of punitive statute laws.

IV. The Role of the Hierarchy of Values: Judicial Solutions Balancing Opposing Interests. Examples of ‘Atypical’ Punitive Damages Approved in Judicial Practice

The above analysis demonstrates that the technique of punitive damages conflicts with certain constitutional provisions when no such a remedy is established by statute law. This reconstruction does not, however, automatically preclude their lawfulness. Nevertheless, an examination of interests from the point of view of the hierarchy of values may lead to a different conclusion when the interest of the aggrieved party converges with the satisfaction of fundamental public policy goals. From this perspective, it is not important to verify that certain remedies expressly established in statutory law have the specific characteristics of punitive damages.²³ As stated above, Arts 23 and 25, para 2, of the Constitution express a negative assessment only if the availability of punitive damages is not established by statute law.

Italian case law includes certain judicial decisions that shape punitive damages in the absence of a statutory provision, namely, in fields (strictly) pertinent to the person, compensation for loss of life (*jure hereditatis*),²⁴ cumulation of compensation and indemnity for loss of psychological and physical wellbeing, and, with regard also to property, punitive damages awarded by common law Courts.

Compensation for loss of life (*jure hereditatis*) calls upon tort law to enforce the payment of a sum of money for the death of another by the person responsible. In this case, there is a dichotomy between the aggrieved party and the recipient of the benefit. The deceased person is in no position to benefit from pecuniary performance. Thus, the relative/heir is the real recipient of the money. For this reason, payment for the harm suffered is unable to perform a compensatory

²³ However, A. Montanari, n 4 above, 404, analyses the following statute law provisions: the rules of libel in the press; the rules concerning insider trading and market manipulation; Art 709 *ter*, paras 2 and 3, of the Code of Civil Procedure introduced by legge 8 February 2006 no 54, for breach of the obligations related to child custody; Art 614-*bis* of the Code of Civil Procedure on *astreinte*; Art 96, para 3, of the Code of Civil Procedure concerning vexatious complaint; the rules on the exploitation of intellectual property covered by copyright. The same analysis has been conducted, with different results, by A. Malomo, *Responsabilità civile e funzione punitiva* (Napoli: Edizioni Scientifiche Italiane, 2017), 25.

²⁴ In Italian case law, see: Corte di Cassazione 23 January 2014 no 1361, *Il Foro Italiano*, I, 719 (2014), favourable to the rule of compensation for loss of life; taking an opposing view, Corte di Cassazione-Sezioni unite 22 July 2015 no 15350, *Il Foro Italiano*, I, 2690 (2015).

function.²⁵ In such cases, payment of a sum of money by the tortfeasor acts as a punishment. This conclusion is confirmed from the sociological and anthropological perspective. Depriving the tortfeasor of his patrimony to the benefit of the relatives of the deceased assumes a symbolic value in relation to the social requirement that killing should not go unpunished. In such cases, in fact, the technical impossibility of compensation for damage is contrary to the common perception that negligent conduct in relation to the lives of others is antisocial. Lastly, these solutions are not excessively onerous on the tortfeasor since the benefit is normally paid by the insurer, which means that the person responsible suffers nothing more than higher insurance premiums.

Considering that compensation for loss of life is a punishment, it is worth examining the standard of lawfulness used to bind judges to these operational solutions. Decisions refer to Art 2 of the Constitution in conjunction with Art 2043 of the Civil Code,²⁶ which are structured as a principle and a general clause. For this reason, a ruling to award punitive damages is incompatible with Arts 23 and 25, para 2, of the Constitution where they establish the requirements concerning the provision under statute law. Such a decision, however, is able to achieve greater social utility complying with ‘the fundamental duties of social solidarity’ (Art 2 of the Constitution). From this perspective, the hierarchy of values in the Italian legal system allows the principle of the protection of property from abuses of authority (Arts 23 and 25, para 2, of the Constitution) to be mitigated. This balance legitimates the Courts ordering the payment of compensation for loss of life (*jure hereditatis*).

A similar reconstruction is also possible in connection with the doctrine of the cumulation of compensation and indemnity for loss of physical and psychological wellbeing. In such cases, a decision to award damages can be grounded in the general clause on non-contractual liability (Art 2043 of the Civil Code) combined with the absence of the ‘*compensatio lucri cum damno*’ criterion.²⁷ Payment for damages cannot serve as compensation when the aggrieved party also receives an indemnity (social security²⁸ or private insurance without right of subrogation).²⁹ Under these circumstances, the pecuniary performance of the tortfeasor has a

²⁵ See A. Viglianisi Ferraro, ‘È risarcibile *iure hereditario* il danno da morte o il danno (‘biologico irreversibile’) da lesioni mortali?’ *Rassegna di diritto civile*, 623 (2017).

²⁶ The reference to Art 2059 of the Civil Code, however, is superfluous (see P. Perlingieri, ‘L’onnipotente art. 2059 c.c. e la «tipicità» del danno alla persona’ *Rassegna di diritto civile*, 523 (2009)).

²⁷ The reasons for cumulation (under certain conditions) are amply analysed by A. Lasso, *Riparazione e punizione nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 2018), 190. Expression in opposing opinion, in favour of the rule of *compensatio lucri cum damno*, Corte di Cassazione 22 May 2018 nos 12564, 12565, 12566 and 12567, *Il Foro italiano*, I, 1900 (2018).

²⁸ U. Izzo, *La «giustizia» del beneficio. Fra responsabilità civile e welfare del danneggiato* (Napoli: Editoriale Scientifica, 2018), 137, considers different types of indemnities.

²⁹ On the point that the right of subrogation established by Art 1916 of the Civil Code can be waived, see A. Donati and G. Volpe Putzolu, *Manuale di diritto delle assicurazioni* (Milano: Giuffrè, 2016), 161.

punitive function. For this reason, a ruling of compensation for damages conflicts with the requirement of legal subject-specificity laid down by Arts 23 and 25, para 2, of the Constitution. From this perspective, the '*compensatio lucri cum damno*' doctrine actually complies with the Constitution. A different way of reasoning emerges, however, if the interests at stake are analysed in the light of the hierarchy of values within the Italian legal system. Against this background too, the payment of a sum of money to the aggrieved party by the wrongdoer is required to prevent the spread of a sentiment in society that the two parties are in the same position before the law.³⁰

With regard (also) to property, punitive damages awarded by common law Courts and enforced in Italy represent the main situation where Italian Courts have expressed a positive opinion concerning the compensation having a punitive aspect, but only in relation to private international law. The *BMW of North America v Gore* case highlights that these techniques are also applicable to offences against property.³¹ In this case, the Court awarded punitive damages for fraudulent conduct by a car dealer who concealed the fact that an accident had occurred during the transportation of the vehicle. In view of the transnational nature of the decision, the principles of subject-specificity and predictability laid down by Arts 23 and 25, para 2, of the Italian Constitution were upheld by means of equivalent methods used in a foreign legal system. From an ideological point of view, the ruling does not appear to go against the principle of protection of property from abuses of authority.³² Given that, in private international law, the of extra-compensatory pecuniary benefits requires the Courts to exercise creative power, events such as this do not apply to domestic law cases.

V. Punitive Damages in Cases of Contractual Liability. Practical Consequences Arising from the Distinction Between Contractual Punitive Damages and the Penalty Clause

In Italian case law, when seized with matters of non-contractual liability, the reasoning that Courts infer from principles, general clauses, or judicial precedents

³⁰ U. Izzo, n 28 above, 390, outlines the need to preserve the community's sense of justice.

³¹ Supreme Court of the United States 20 May 1996, *BMW of North America v Gore* 517 US 559 (1996), *Il Foro Italiano*, IV, 421 (1996), annotated by G. Ponzanelli, 'L'incostituzionalità dei danni punitivi «grossly excessive»'. However, the case assessed by Corte di Cassazione-Sezioni unite n 11 above, is in the field of fundamental rights protection: the punitive damages have been awarded to a motorcyclist who had suffered personal injuries in an accident which occurred during a motocross race as a consequence of an alleged defect of the helmet manufactured by an Italian company.

³² For the Constitutionalisation of this principle pursuant to the Eighth Amendment to the United States Constitution, see Supreme Court of the United States 7 April 2003, *Farm Mutual Automobile Insurance Co. v Inez Preece Campbell* 538 US 408 (2003), *Il Foro Italiano*, IV, 355 (2003), annotated by G. Ponzanelli, 'La «costituzionalizzazione» dei danni punitivi: tempi duri per gli avvocati nordamericani'.

(ie in the absence of any statutory provision) to rule in favour of punitive damages is applied only to exceptional cases. The conflict that arises with the scholarly tradition explains the difficulty of creating a theoretical framework. The reason associated with social alarm, however, remains latent. It must probably be understood that the award of punitive damages to sanction offences concerning property runs complementary to the idea of using extra-compensatory benefits to punish breach of contract.

The solution of enforcing punitive damages for contractual liability in the absence of a specific statutory provision raises some major objections.³³ It is necessary to distinguish between two circumstances, namely when the punitive damages are awarded directly by the Courts, and when they are previously agreed upon by the interested parties. In the first case, a decision to order punitive damages conflicts with the provisions of Arts 1223 to 1229 of the Civil Code, which limit the amount of money that can be awarded to the equivalent of the harm typically suffered by the injured party. If a prior agreement has been reached, however, the award of extra-compensatory benefits conflicts with Art 1384 of the Civil Code, which implicitly quantifies the amount of money awarded as the equivalent of the actual harm caused (ie also covering non-financial losses and indirect consequences). These problems add to the general argument concerning the lack of subject-specificity and predictability required by Arts 23 and 25, para 2, of the Constitution.³⁴ From the perspective of constitutionality, it must be considered that, unconsciously, techniques of this kind evoke associations with ‘prison for debt’.

It must be pointed out that when a prior agreement has been reached between the interested parties, ‘atypical’ (ie not established by statute law) punitive damages only conflict with Art 25, para 2, of the Constitution but not also with Art 23, which allows for ‘unimposed’ performance agreed upon by the interested parties. For this reason, the question at hand is the enforceability of rulings granting extra-compensatory benefits when a prior agreement has been reached.

From this standpoint, a solution allowing punitive damages cannot be deemed lawful on the basis that it aims to reinforce the position of the creditor. In reality, an adequate balance with the need to safeguard the patrimony of the debtor is reached by means of the technique invoking the penalty clause: Art 1384 of the Civil Code allows for benefit greater than the normal damage (known as ‘*danno risarcibile*’), but within the limit of the interest of the creditor (known as ‘*danno effettivo*’).³⁵

In certain cases, the award of punitive damages is able to fulfil important

³³ Differently, C. De Menech, *Le prestazioni pecuniarie sanzionatorie* n 1 above, 98, considers that there is no systemic reason to exclude statutory provisions of punitive damages for breaches of contract (ie ‘atypical’ punitive damages, instead, are excluded *a priori*).

³⁴ From law and economics perspective, however, the main argument against the enforceability of punitive damages for breaches of contract is the doctrine of ‘efficient breach’. For more details, see C. De Menech, *Le prestazioni pecuniarie sanzionatorie* n 1 above, 80.

³⁵ See notes 5 and 8 (for bibliography) and the next section.

public policy goals, as the wrongdoing of the debtor goes against the principles of civil society as well as the creditor's interest. A good example is default due to discrimination,³⁶ or incompatible with the need to protect human health or political freedom. Adapting a famous case:³⁷ a cake designer agrees to provide a cake to celebrate a same-sex marriage, a Jewish or Muslim festival, or the birthday of a person belonging to an ethnic minority; however, he breaks his pledge for discriminatory reasons, actually preferring to suffer a loss incurred by paying compensation (anyway reduced if adequate notice has been given). In a second case, an employer promises to adopt extraordinary measures to protect his workers' health, but when he receives the estimate of costs, he deems it more profitable to break the promise. Lastly: a publisher makes an agreement with a political organisation to publish anti-government papers; he later changes his mind and prefers not to go against the opinion of the government majority. In circumstances like this, the threat of an extra-compensatory benefits to the creditor is a useful way of preventing prejudice to general interests.

Essentially, when a default by a debtor affects a general interest and not only the interest of a creditor, the relaxation of the principle of the lawfulness of penalties (Art 25, para 2 of the Constitution) is justified. Thus, a ruling that extra-compensatory benefits are binding can be enforced if agreed upon by the interested parties.

Considerations of this kind have precise operational consequences. In view of the difference in nature *vis-à-vis* the 'penalty clause', the 'conventional punitive damages' doctrine is able to justify the exclusion of a reduction of the amount payable based on the 'interest of the creditor' under Art 1384 of the Civil Code. A reduction may in fact be sought, albeit on the basis of other constitutional provisions (see the next section).

The need to protect a general interest also justifies the possibility of Courts acting *ex officio*. Thus, Courts may award punitive damages even in the absence of any claim brought by the injured party.

VI. The Limit Posed by Proportionality (the Risk of Overdeterrence)

Certain restrictions on ordering punitive damages in relation to both torts and breaches of contract can be adduced from scholarly arguments. In this respect, when the extra-compensation is excessive, a reduction in the amount of damages is justified by reference to the principle of proportionality (Art 49, para

³⁶ For the opportunity to use punitive damages to prevent discriminatory conduct, see F. Quarta, n 4 above, 385.

³⁷ *Lee v Ashers Baking Company Ltd and others* [2018] UKSC, analysed in depth by L.E. Perriello, 'Discrimination Based on Sexual Orientation and Religious Freedom in European Contract Law' 2 *The Italian Law Journal*, 639 (2018).

3, Charter of Fundamental Rights of the European Union).³⁸ Any such assessment must not, however, be calibrated according to the interest of the injured party but on the extent of the tortfeasor's/debtor's wrongdoing³⁹ and, largely, on the importance of the general interest that is compromised by his or her conduct. The compensation may be higher than the damage ('extra-compensation') only within the limits of these constraints.

The reduction of benefits is a given, but the means usable by the Courts to rule vary depending on whether the punitive damages are awarded directly by a Court or were agreed upon in advance by the interested parties.

In the sphere of non-contractual liability (ie in the absence of prior agreement), any reduction can be obtained through the system of appeals.

In the context of contractual liability (ie when there is an agreement between the interested parties), any reduction depends on the existence of a contractual 'pathology'. Under these circumstances, the defect only affects the part of the contractual pecuniary performance that exceeds what is necessary to fulfil the requirements of proportionality. Thus, the concept of 'the partial nullity of a contract or the nullity of single clause' (Art 1419 of the Civil Code) allows the enforcement of the part of the agreed pecuniary benefits that are consonant with the principle of proportionality. Otherwise, the notion of 'noncompliance with mandatory rules' (Art 1418 para 1 of the Civil Code) would justify the total nullity of the agreed punitive damages. The second solution, however, appears to go against the public policy goal (*ratio*) of the extra-compensation.

In systemic terms, the reduction of disproportionate punitive damages has an important role in public policy. The risk of paying an injured party excessive sums in damages may lead a potential tortfeasor to refrain from conduct that is useful (or necessary) to society. For this reason, the requirement that the compensation awarded must be proportionate prevents the social phenomenon of 'overdeterrence'.⁴⁰

VII. Systemic Aspects: From the "Publicisation" of Private Law to the "Civilisation" of the Protection of General Interests'

On the ideological level, methods of assessment such as these attest to an evolutionary trend in the legal system: an occurrence disciplined in private law (the attribution of property in a relationship between parties) is used to uphold a general interest able to balance the principle of protection of property from abuses of authority, which is diminished.

³⁸ On the application of the principle of proportionality, but with (partially) different operating rules, A. Malomo, n 24 above, 48, especially 56.

³⁹ Some Scholars emphasise the role of this standard. In this sense, see F. Benatti, n 3 above, 121 and 350; L.E. Perriello, n 2 above, 452.

⁴⁰ On the risk of overdeterrence, see A. Montanari, n 4 above, 447.

This phenomenon has been criticised as it expresses a generalised move towards the ‘“publicisation” of private law’.⁴¹ This interpretation depends on a hypostatisation of legal categories. A different conclusion, instead, may be reached by looking at the question from a historical perspective. Empirically, the division between private and public law corresponds to the need to guarantee the autonomy of the interested parties in the distribution and management of resources.⁴² Accordingly, it must be considered that a positive assessment of punitive damages extends (rather than limits) the area of contractual validity.⁴³ For this reason, the metaphor of the ‘“publicisation” of private law’ is misleading.

From an evolutionary perspective, the use of private law techniques to satisfy public policy goals has been normalised by the principle of ‘horizontal’ subsidiarity. Thus, an order to pay punitive damages concerning a contractual relationship takes on the positive appearance of ‘“civilisation” with regard to the protection of general interests’.⁴⁴

On a critical note, the objection has been raised that the protection of general interests under private law increases the difficulty facing Courts in analysing cost-benefit of their decisions.⁴⁵ This is because it is argued that Courts would have to calculate the ‘overall social cost’ of individual conduct. Thus, in the absence of a hierarchy regarding the private and public costs arising from the decision, the discretion of the Courts would become arbitrary. This argument runs counter to the theory that there is a clear hierarchy of values in a ‘multilevel’ legal system. The interests of the community do not necessarily prevail over the interests of the individual. In particular, the values relating to human rights are given priority over the property of public bodies: for example, human health may justify public losses. The hierarchy of values in the current legal system is not based on a distinction between public and private but on the primacy of ‘the inviolable rights of the person’ and ‘the fundamental duties of social solidarity’ (Art 2 of the Constitution).⁴⁶ All judicial decisions may be assessed in the light of this balance of interests. Thus, it is not true that the protection of general interests in private law comes into conflict with the principle of legal certainty.

In sum, the lawfulness of punitive damages as a punishment for breaches

⁴¹ *ibid* 380.

⁴² A. Gambaro, ‘Interessi diffusi, interessi collettivi e gli incerti confini tra diritto pubblico e diritto privato’ *Rivista trimestrale di diritto e procedura civile*, 785 and 792 (2019).

⁴³ Similarly, for M. Grondona, *La responsabilità civile tra libertà individuale e responsabilità sociale. Contributo al dibattito sui «risarcimenti punitivi»* (Napoli: Edizioni Scientifiche Italiane, 2017), 149, the sanctioning function of civil liability reflects the contemporary tendency to expand individual freedom.

⁴⁴ The reasons for moving beyond ‘private law/public law’ distinction are examined amply in P. Perlingieri, *Il diritto civile* n 9 above, 138; C. Mazzù, *La logica inclusiva dell’interesse legittimo nel rapporto tra autonomia e sussidiarietà* (Torino: Giappichelli, 2014), 16.

⁴⁵ A. Gambaro, n 43 above, 792, especially 793.

⁴⁶ On the primacy of the values concerning constitutional personalism and solidarity, P. Perlingieri, *La personalità umana nell’ordinamento giuridico* (Napoli: Jovene, 1972), *passim*, especially 161.

of contract is not at odds with the Italian legal system as a whole. This conclusion, however, rests on the methodological premise that the categories within the system are historical – rather than self-referential – concepts.

VIII. Concluding Remarks

In summary, the precept ‘according to the hierarchy of values of the legal system’ is able to justify the award of punitive damages in the absence of a specific statutory provision. This operational solution can be used to punish both torts and breaches of contract if the interest of the aggrieved party or debtor converges with the satisfaction of public policy goals. The judicial order to pay extra-compensatory damages for breaches of contract also requires that they are previously agreed upon by the interested parties.

On the methodological level, a final consideration is appropriate: these operating rules are not legitimated by the argument concerning the ‘multi-functional nature of civil liability’, but rather they are laid down by the reasoning focused on their constitutionality.

Agriculture, Sustainability and Climate Change. A Study on the Possible Role of Agricultural Cooperatives Recognised as Producer Organizations

Georg Miribung*

Abstract

Since modern agro-food producing systems strongly support climate change, I raise the question of whether this proved connection can be integrated into Italian private law. Frankly speaking, as agro-food producers contribute to climate change, why not make them responsible – that is, liable – for its consequences, that is to say, responsible for damage because of climate change? For this discussion, I consider a production chain constituted by a group of small farmers and a PO (using the legal form of agricultural cooperative) coordinating this chain's activities.

I stress that the question concerning agro-food production systems is of special relevance as the current legal framework (internal market of the EU) strongly subsidises farming and, thus, food production, arguing that agriculture is sustainable. But, as sustainable behaviour is also considered behaviour that mitigates climate change, and as modern food production and agriculture strongly contribute to climate change, one can doubt the logic of this approach.

Considering private law, my analysis has shown that the role and responsibility of modern (agro-)food production in relation to climate change – which would require specific sustainable behaviour to mitigate – is weakly accentuated at present. Of particular relevance is the fact that it is currently not possible, especially with lack of proof of a causal link, to charge the actor (who has caused environmental damage with a certain influence on climate change) with the damage that third parties have suffered, such as due to a tornado, whirlwind or extremely long drought.

Trying to make agro-food producers more responsible for climate change would necessitate more clearly defining the purpose of the companies and the duty of care of the administrators charged with putting the purpose into practice. To help boards in making decisions, it is proposed to develop an external mechanism that supervises the sustainable behaviour of companies (ie rating or certification systems), including verifiable indicators to make the whole system less vulnerable to abuse.

Moreover, to grasp the problem at its roots, it is necessary to extend liability to the whole production chain. These observations are based on network theory, which, as the example of product liability shows, is already part of the Italian legal thinking and structure.

I. Introduction

Although scientists cannot accurately predict the effect of anthropogenic

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climate change, threat scenarios are becoming increasingly clear. Global warming of two degrees Celsius is seen as a potentially irreversible turning point¹ and a serious threat to food supplies in many parts of the world.² 'Modern' food production is not only particularly affected by climate change, as increasing extreme weather events such as droughts or floods show, but it is also one of its main causes. There are various reasons for this. One key driver of anthropogenic climate change is the burning of fossil fuels, constituting a precondition of the predominant form of food production in industrialised countries. It applies to all stages of the conventional food system, from the provision of mineral fertilisers, fuels, machinery and other inputs through distribution systems to storage, packaging and waste disposal. Other key sources of greenhouse gas (GHG) emissions are the agricultural processing of the soil, the clearing of forests for food production and animal husbandry.³ This shows that agro-food production must be an essential focus of climate policy.

Mostly, standards of production are influenced by public law and especially public authorization. Here, significant legal research has already been done.⁴

¹ The implementation of the political decisions is modest. In fact, it is already focussed on reducing the consequences and no longer on preventing global warming. IPCC, *Global warming of 1.5°C: Summary for Policymakers* (2018) Earth League and Future Earth, 'The 10 Science 'Must Knows' on Climate Change' (2017), available at tinyurl.com/ycogm2y3 (last visited 7 July 2020).

² See IPCC, *Global warming of 1.5°C*, U. Ermann et al, *Agro-food studies: Eine Einführung* (Köln, Weimar, Wien: Böhlau Verlag, 2018), 81. Also consider WMO, 'Greenhouse Gas Bulletin' (2017), available at tinyurl.com/ycevxew9 (last visited 7 July 2020), or W.J. Ripple et al, 'World Scientists Warning to Humanity: A Second Notice' 12 *BioScience*, 1026-1028 (2017). Some even think that there are global effects on the security of supply due to climate change, as the food industry has become more susceptible to disruption because of its complexity and global connectivity. M.E. Brown and V. Kshirsagar, 'Weather and international price shocks on food prices in the developing world' 35 *Global Environmental Change*, 31-40 (2015).

³ See U. Ermann et al, n 2 above; M.E. Brown and V. Kshirsagar, n 2 above; C. Schmitz et al, 'Trading more food: Implications for land use, greenhouse gas emissions, and the food system' 1 *Global Environmental Change*, 189-209 (2012); N. Adler et al, *Umweltschutz in der Landwirtschaft* (Dessau: Roßlau, 2017); I. Härtel, 'Vom Klimawandel bis zur Welternährung – zentrale Weltprobleme' *Rechtsintegration und Zukunftsgesellschaft Nachhaltigkeit, Energiewende, Klimawandel, Welternährung: Politische und rechtliche Herausforderungen des 21. Jahrhunderts*; I. Härtel (Baden-Baden: Nomos, 1st ed, 2014), 13-70; FAO, *Climate change, agriculture and food security* (Roma: FAO, 2016). Also consider T. Garnett, 'Food sustainability: problems, perspectives and solutions' 72 *The Proceedings of the Nutrition Society*, 29-39 (2013) and H. Steinfeld, *Livestock's long shadow: Environmental issues and options* (Roma: Food and Agriculture Organization of the United Nations, 2006). Also consider L. Paoloni, *Politiche di forestazione ed emissioni climateranti* (Roma: Tellus, 2009), F. Ekardt et al, 'Agriculture-related Climate Policies - Law and Governance Issues on the European and Global Level' 12 *Carbon & Climate Law Review*, 316-331 (2018) and A.M. Loboguerrero et al, 'Food and Earth Systems: Priorities for Climate Change Adaptation and Mitigation for Agriculture and Food Systems' 11 *Sustainability*, 1-26 (2019). See also n 91.

⁴ See K. Hart, *Research for AGRI Committee, the consequences of climate change for EU agriculture: Follow-up to the COP21-UN Paris climate change conference study* (Brussels: Policy Department B. Structural and Cohesion Policies, European Parliament, 2017); D. Blandford and K. Hassapoyannes, 'The Common Agricultural Policy in 2020: Responding to climate change', in J. McMahon and M.N. Cardwell eds, *Research Handbook on EU Agriculture Law* (Cheltenham,

Less – but with important indications for this study – has been said about the role of businesses and their responsibilities towards sustainable management to mitigate climate change.⁵ Little has been said on the issue of whether agro-food producers – which can usually be held liable for the damage they cause as legal entities⁶ – should also specifically be held responsible for damage caused to third parties due to their role in climate change. This essay deals with this question from an Italian perspective; it is of legal relevance because, for example, damage to the property of third parties can be caused by extreme weather events resulting from climate change. It is also relevant because modern agro-food producers are supported not only financially by public administrations but also by a specific legal framework which gives them specific competitive advantages over other market participants. So, should agro-food producers be held liable for climate change damage? Would this be legally possible at all, or are there insurmountable limits? Such thinking requires consideration of how the Italian legal order deals with the responsibility for agro-food business. The responsibility, or better, the liability of legal entities is primarily an issue of Italian tort law and of business law. Thus, the present analysis concentrates on these branches of law.

For this investigation, it is first necessary to determine more precisely whose roles are being investigated. For the sake of simplicity (the reasons for this are explained in more detail in Chapter II, Section 2), I consider, with reference to the plaintiff, Mrs Rossi, whose property (forest) was destroyed by windthrow. It is argued that windthrow is a phenomenon that has been intensified by climate change.⁷ Concerning the defendant, I refer to an *agricultural cooperative*

Gloucestershire, United Kingdom: Edward Elgar Publishing, Incorporated, 2015), 170-202; M.N. Cardwell and J. McMahon, 'Looking back to look forward', in J. McMahon and M.N. Cardwell eds, *Research Handbook on EU Agriculture Law* (Cheltenham, Gloucestershire, United Kingdom: Edward Elgar Publishing, Incorporated, 2015), 531-539. Also consider N. Adler et al, n 3 above.

⁵ On this issue, M. Spitzer and B. Bartscher, 'Liability for Climate Change: Cases, Challenges and Concepts' 2 *Journal of European Tort Law*, 137 (2017); F. Ekardt, 'Umweltschutz und Zivilrecht: Nachhaltigkeit durch Kapitalgesellschaftsrecht' 9 *Zeitschrift für Umweltrecht*, 463-472 (2016); J. Dine, 'Corporate Regulation, Climate Change and Corporate Law: Challenges and Balance in an International and Global World' *European Business Law Review*, 173-202 (2015); B. Sjaafjell and B.J. Richardson eds, *Company Law and Sustainability Legal Barriers and Opportunities* (Cambridge, United Kingdom: Cambridge University Press, 2015); P. Kara, 'The Role of Corporate Social Responsibility in Corporate Accountability of Multinationals: Is It Ever Enough Without Hard Law?' *European Company Law*, 118-125 (2018); B. Sjaafjell, 'Why Law Matters: Corporate Social Irresponsibility and the Futility of Voluntary Climate Change Mitigation' *European Company Law*, 56-64 (2011); T. Lambooy, 'Reforming Company Law for Sustainable Companies' *European Company Law*, 54-57 (2014).

⁶ On this issue, see, eg, P.M. Sanfilippo, 'Gli amministratori', in M. Cian ed, *Diritto commerciale - Vol. III: Diritto delle società*, (Torino: Giappichelli, 2017), 461-537, 527. See also *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: In ricordo di Pier Giusto Jaeger atti del convegno, Milano, 9 ottobre 2009* (Milano: Giuffrè, 2010).

⁷ One example is the destruction caused by Hurricane Vaia, which in 2018 destroyed large areas of forest in Val di Fiemme is argued that the unusual severity of the storm is probably due to climate change. See R. Motta et al, 'Silviculture and wind damages. The storm Vaia' 15 *Forest@ - Rivista di Selvicoltura ed Ecologia Forestale*, 96 (2018). On this issue, see Chapter V.

recognised as a producer organization.⁸ This approach requires determining what the notions of agricultural cooperative and producer organization (PO) imply.

Under Italian law, the term *agricultural cooperative* means that a cooperative meets specific requirements, and, thus, it is to be regarded as an agricultural entrepreneur.⁹ Basically, the cooperative conducts an agricultural activity as determined by Art 2135 Civil Code¹⁰ – either directly or indirectly. More specifically, the term agricultural cooperative implies that the cooperative is based on the joint cultivation of the members' land or the joint rearing of the members' animals (workers' cooperative).¹¹ In other types of agricultural cooperatives, members use the services offered by the cooperative or buy goods from it (consumer cooperative), which they also sell to non-members. Finally, a service cooperative processes the products of its members, as in the cases of social cellars, social oil mills and social cheese factories.¹²

⁸ This form of cooperation between farmers is typical for the modern agro-food producing system and results from increased competition, due to the market liberalisation that has put pressure on single farmers, thereby fostering horizontal (ie, cooperation between producers) and vertical integration (ie, cooperation between producers and industrial entrepreneurs through, eg, agro-industrial contracts). The increased role of large distribution chains reflects these changes, leading to a more stringent coordination between production, processing and distribution and fostering the establishment of common trademarks, brand-based development strategies and – as is especially true for European (agro-)food producers – the adoption of geographical indications.

⁹ On this issue, see A. Germanò, *Manuale di diritto agrario* (Torino: Giappichelli, 2016), 118, and L. Costato and L. Russo, *Corso di diritto agrario italiano e comunitario* (Milano: Giuffrè, 2015), 374.

¹⁰ See also Chapter III, Section 1.

¹¹ Under Italian law, these activities comprise an agricultural enterprise by meeting the requirements of Art 2135 of the Italian Civil Code. See Chapter III Section 1.

¹² The activities carried out in the latter two cases correspond to those referred to in Art 2135, para 3, Civil Code. See also Chapter III.1. In this context, it is useful to recall that the requirement of *unisoggettività*, as laid down in Art 2135 of the Italian Civil Code, requires both activities – the cooperative activity (ie, the processing service) and the activity of its members (ie, the production of grapes, olives or milk) – to be carried out by the same subject. Although these last two types of cooperatives (the agricultural consumer and agricultural service cooperative) may lack this requirement, their qualification as agricultural entrepreneurs is expressly recognised by the legislature on the basis of Art 1, para 2, decreto legislativo 18 May 2001 no 228. It thus accounts for the fact that the agricultural cooperative is constituted and functions as a common body for individual farmers. (See M. Cavanna, 'Le cooperative agricole' in G. Bonfante ed, *La società cooperativa* (Padova: CEDAM, 2014), 641-649, 645; S. Carmignani, '2135 (L'imprenditore agricolo cooperativa)' in O. Gagnasso ed, *Dell'impresa e del lavoro: Artt. 2118-2187* (Torino: UTET, 2013), 858; S. Carmignani, 'Le società agricole', in L. Costato et al eds, *Trattato di diritto agrario: I* (Torino: UTET, 2011), 231-262, 259. See also E. Casadei, 'La nozione di impresa agricola dopo la riforma del 2001' *Rivista di diritto agrario*, 309-358 (2009); E. Rook Basile, *La coltivazione dei terreni in società nell'esperienza giuridica italiana e francese* (Milano: Giuffrè, 1981), G. Giuffrida, *Le cooperative agricole* (Milano: Giuffrè, 1981) and R. Alessi, 'L'impresa agricola' *Impresa e società nel diritto comunitario: Estratto da Il diritto privato dell'Unione europea, Trattato di diritto privato diretto da Mario Bessone* (Torino: G. Giappichelli, 2006), 1234-1274, 1248, and G. Miribung, *Agricultural Cooperative in the Framework of the European Cooperative Society: Discussing and Comparing Issues of Cooperative Governance and Fin* ([sl]: springer nature, 2020), 97. In fact, cooperatives are membership-based; as a rule, the legal personality of the cooperative cannot 'hide' the persons of its members who join together to carry out the last phase of their

By fulfilling specific requirements, which basically implies that an agricultural cooperative cooperates primarily with its members, a cooperative is eligible for various supporting legal regimes (eg, a favourable tax regime). Furthermore, under Italian law, financial aid is not only granted to single farmers but also to the coordinating entity – the agricultural cooperative – if it meets specific criteria, and thus, it is assigned the status of a professional agricultural entrepreneur (PAE).¹³

Basically, a PO is a legal entity that is voluntarily set up by agro-food producers.¹⁴ It provides for the aggregation of several producers in a single-sector organization with the aim of achieving an economic rebalancing of the agro-food chain via the reduction and regularization of production prices. In general terms, the objective of the PO is to bring together the economic forces of the producers of various agro-food categories and, through the provision of EU co-financing, encourage a process of dissemination of new cultivation practices and advanced production techniques with reduced environmental impact. In fact, POs are financially supported by EU policies as these policies allow participating single entities (farmers) to reduce costs by means of economies of scale.¹⁵ A further aim is to provide aid in the planning of production that is calculated based on an analysis of supply and demand to prevent the product from remaining unsold.¹⁶

Thus, I am dealing with a particular type agro-food producer, whose activity is – through the granting of the status of agricultural cooperative, PAE and PO – supported by various means and regulated, by various legal sources, in a favourable

business activity (this is called the principle of transparency). See also L. Costato and L. Russo, n 9 above, 383, G. Galloni, *Lezioni sul diritto dell'impresa agricola e dell'ambiente* (Napoli: Liguori, 1999), 465. See also A. Vecchione, 'L'imprenditore agricolo nelle fonti speciali e figure professionali ad esso equiparate', in A. Iannarelli and A. Vecchione eds, *L'impresa agricola* (Torino: Giappichelli, 2009), 353-386, 367. In addition, the legislature requires the agricultural cooperative to predominantly engage with its members by using members' products or offering members services and/or goods. This, however, also implies that an agricultural cooperative can process or transform products (eg, turn olives into oil) supplied by non-members, albeit to a limited extent.

¹³ As a result, single farmers and companies – personal companies, capital companies and cooperatives – which meet specific conditions may be eligible for further subsidies and tax relief. The Italian Legislation has introduced the figure of the 'professional agricultural entrepreneur' (PAE), who has replaced the former figure of 'main agricultural entrepreneur' for applying the legislation to the agricultural sector. The PAE is the person who, in possession of professional knowledge and skills in accordance with Art 5 of Council Regulation (EC) 1257/1999 of 17 May 1999, dedicates to the agricultural activities referred to in Art 2135 of the Civil Code, directly or as a member of society, at least fifty percent of their total working time and earns from those activities at least fifty percent of their total income from work. For the entrepreneur operating in the disadvantaged areas provided for by Art 17 of Council Regulation (EU) 1257/1999, the requirements listed are reduced by twenty-five percent. For details, L. Costato and L. Russo, n 9 above, 374, A. Germanò, n 9 above, 118.

¹⁴ In the PO, the decision of 'what, how and how much to produce' results from the sum of multiple free individual decisions, which are not shattered into disjointed entrepreneurial behaviours but contained in a collective will capable of orienting those behaviours.

¹⁵ See Chapter V.

¹⁶ For details, A. Germanò, n 9 above, 129, L. Costato and L. Russo, n 9 above, 386, and G. Holzer, *Agrarrecht*, (Wien: NWV, 4th ed, 2018), 191.

way. In order to simplify the discussion here, I generally refer to agricultural cooperatives founded as POs (abbreviated as agricultural cooperative/PO).¹⁷

Focussing on ‘agricultural cooperatives recognised as POs’ is expedient since various studies have revealed that POs are mostly organized by means of cooperatives even though there is no legal obligation to do so.¹⁸ Another argument in favour of a PO in the form of a cooperative is the fact that although a PO can be seen as a type of organization to make farmers competitive,¹⁹ it is not a legal form such as a corporation, partnership or cooperative.²⁰ Yet, as I am considering liability issues, which are first of all a matter of national jurisdictions and linked to natural or legal persons, it is necessary to determine the legal subject, whose liability must be assessed, in other words, the cooperative.

What is important for my study is that the regulation establishing the PO requires that the associated producers must adhere to a statute that also regulates placing the products on the market. Except for possible derogations, this must be done through the PO; non-compliance with the related obligations may lead to sanctions.²¹ Thus, the PO coordinates, monitors and leads the activities in the production chain and is able to channel information from customers (distribution) versus single farmers (production) and vice versa. In our case, this implies that an agricultural cooperative, acknowledged as a PO, is, compared to the farmers, in a stronger position due to the given information asymmetries. Moreover, if economically successful, the cooperative constitutes a value *per se*, to be separated from the individual entrepreneurial purposes of the single farmers. In fact, cooperatives are also considered as having a double nature – their aim is to support the individual interests of the members but, at the same time, act successfully in the market.²²

¹⁷ On this issue, see G. Miribung, *Agricultural Cooperative in the Framework of the European Eooperative Society*, in particular Chapter 3.3.4.

¹⁸ Studies have revealed that POs are mostly organised by means of cooperatives. See J. Bijman et al, *Support for Farmers’ Cooperatives: Final Report* (2012) and M. Hanisch and J. Rommel, ‘Support for Farmers’ Cooperatives. Producers Organizations in European Dairy Farming’ Case Study Report (2012), available at tinyurl.com/ydcfg57c (last visited 7 July 2020). Also consider A. Ecorys and C. Wageningen, *Economic Research, Study on Producer Organisations and their activities in the olive oil, beef and veal and arable crops sectors* (Brussels: European Union, 2018), 12.

¹⁹ A PO is a strategic tool developed by the European Commission, and this is fully in line with the broader objective of reforming the Common Agricultural Policy (introduced by Art 11 of Council Regulation (EC) 2200/96 of 28 October 1996 and confirmed by Council Regulation (EC) 1234/2007 of 22 October 2007 and European Parliament and Council Regulation (EU) 1308/2013.

²⁰ Under Italian law, they may be set up either as capital companies, as agricultural cooperatives or as their consortia, as consortia with external activities with asset autonomy and as consortia under Art 2615 *ter* of Civil Code. The common features are that they must all be legal persons and have a perfect/complete asset autonomy. This requires that they have specific bodies acting on their behalf. See Art 3, para 1, decreto legislativo 27 May 2005 no 102.

²¹ See Artt 152 et seq of European Parliament and Council Regulation (EU) 1308/2013.

²² See J.W. Kramer, ‘Was kennzeichnet eine erfolgreiche Genossenschaft?’, in H.-H. Münkner ed, *Zukunftsperspektiven für Genossenschaften: Bausteine für typgerechte Weiterentwicklung*

All these aspects lead to standardised production systems in which the interaction between distribution and production is assigned to what is called a hub firm (*impresa guida*) in network theory.²³ To put it simply, a network represents some type of collaborative pattern between so-called knots. It is generally understood to be an order of cooperation between autonomous actors regulated in a decentralised way.²⁴

A network can either be loose or formalised (eg, it can be established by creating a new legal entity).²⁵ Here, I consider the second, formalized type, namely,

(Bern: Haupt, 1st ed, 2006), 125-151, A. Fici, 'Definition and objectives of cooperatives', in G. Fajardo et al eds, *Principles of European Cooperative Law: Principles, commentaries and national reports* (Cambridge: Intersentia, 2017), 23, and Id, 'An introduction to cooperative law', in D. Cracogna et al eds, *International Handbook of Cooperative Law* (Berlin-Heidelberg: Springer Berlin Heidelberg, 2013), 3-64, 21.

²³ Networks exert a special fascination in many different scientific disciplines. Initially, organizational sociology was concerned with the investigation of inter-organizational relations, the organization set. This covered relationships between organizations that were not primarily based on competition, but instead, on cooperation. The term found its way into group sociology via personnel networks, which characterise loose forms of cooperation that lack both the intensity and bureaucratic disadvantages of formal organizations. Policy networks in political science describe a decentrally-organized order of political actors that especially play a role in the analysis of neo-corporatist phenomena. On this issue, see, among many others, W.M. Evan, 'Toward a Theory of Inter-Organizational Relations' 11 *Management Science*, 10 (1965); Id, 'The Organization Set', in J.D. Thompson ed, *Approaches to organizational design* (Pittsburgh: University of Pittsburgh Press, 1966); N.M. Tichy, 'Networks in Organizations', in P.C. Nystrom and W.H. Starbuck eds, *Handbook of organizational design* (Oxford, New York: Oxford University Press, 1981). For the legal approach, consider, among many others, G. Teubner and H. Collins, *Networks as connected contracts* (Oxford and Portland: Hart Publishing, 2011), T. Raiser, *Grundlagen der Rechtssoziologie* (Stuttgart: UTB GmbH, 5th ed, 2009) 274, S. Baer, *Rechtssoziologie: Eine Einführung in die interdisziplinäre Rechtsforschung* (Baden-Baden: Nomos-Verl.-Ges, 1st ed, 2011) 204, R.M. Buxbaum, 'Is Network a Legal Concept?' 4 *Journal of Institutional and Theoretical Economics*, 149 (1993), available at tinyurl.com/y9u3orxj (last visited 7 July 2020), and G. Miribung, 'Genossenschaftliche Netzwerk in Südtirol. Versuch einer rechtssoziologischen Betrachtung', in M. Ganner et al eds, *Rechtstatsachenforschung - heute: Tagungsband 2016 Recht & Gesellschaft: Forschungsstand, Perspektiven, Zukunft* (Innsbruck: Innsbruck University Press, 1st ed, 2016), 179-218.

²⁴ Economists like to use suggestive modes like something between markets and hierarchies, managed economic systems and complex arrays of relationships among firms. The theory of hybrid arrangements by Oliver Williamson may be representative of this. Williamson conceives of a sliding scale of economic institutions of capitalism, from spot-market transactions to long-term contracts and integrated unit companies, which differ only in the intensities of their governance structures. Franchising and other hybrid arrangements then settle on this scale on a point between the market and the organization, resulting concretely from the transaction cost considerations of the resource owners involved. On this issue, see, among many others, H.B. Thorelli, 'Networks: Between markets and hierarchies' 7 *Strategic Management Journal*, 37-51 (1986), J. Johanson and L.G. Mattsson, 'Interorganizational Relations in Industrial Systems: A Network Approach Compared with the Transaction-Cost Approach' 17 *International Studies of Management & Organization*, 34-48 (1987) and O.E. Williamson, *The economic institutions of capitalism: Firms, markets, relational contracting* (New York: Free Press, 1985).

²⁵ On this issue, see, among many, S. Chetty and H. Agndal, 'Role of Inter-organizational Networks and Interpersonal Networks in an Industrial District' 42 *Regional Studies*, 175-187 (2008), P. Dubini and H. Aldrich, 'Personal and extended networks are central to the entrepreneurial

an agricultural cooperative fulfilling the requirements for a PO and set up by single farmers; according to network theory, this can thus be considered as a collaborative structure, governed by a new legal entity. In this case, and in opposition to a capital company, the members of the production chain – that is, the single farmers – are not incorporated into the legal entity, but instead they at least formally remain autonomous actors, who – again, at least formally – are the dominant/prevaling actors.²⁶

In the case examined here, the hub (PO) channels information from the market versus single farmers (and vice versa). In other words, it leads the activities in the production chain. For example, by adhering to a production system based on denominations of origins, single farmers are obliged to adopt specific production and safety requirements. This standardisation is linked to a strict monitoring process that is necessary for protecting the collective reputation. In fact, if one farmer violates the requirements, the others will also suffer damage. In Chapter V, I argue that these dynamics are an important aspect for holding the PO, which governs the agricultural activities of its farmer-members, liable for climate damage.

Thus, by using network theory, we can uncover a common pattern with a common goal, where the activity of single farmers is coordinated (by the hub firm – agricultural cooperative/PO) to pursue this aim (for example, conducting projects of common interest and sharing strategic objectives and resources).²⁷

After having determined the role of the defendant under investigation, it is equally important to determine what type of behaviour is to be studied. As this essay deals with liability for climate change, it is, to begin with, necessary to

process' 6 *Journal of Business Venturing*, 305-313 (1991), available at tinyurl.com/ycty793j (last visited 7 July 2020); M. Holmlund and S. Kock, 'Relationships and the Internationalisation of Finnish Small and Medium-Sized Companies' 16 *International Small Business Journal: Researching Entrepreneurship*, 46-63 (1998), K. Hutchinson et al, 'The role of management characteristics in the internationalisation of SMEs' 13 *Journal of Small Business and Enterprise Development*, 513-534 (2006) and B. Johannisson, 'Network Strategies: Management Technology for Entrepreneurship and Change' 5 *International Small Business Journal: Researching Entrepreneurship*, 19-30 (1986). See also G. Teubner and H. Collins, n 23 above, 87, T. Raiser, *Grundlagen der Rechtssoziologie* (Stuttgart: UTB GmbH, 6th ed, 2013), 276 and S. Grundmann et al, 'The contractual basis of long-term organization. The overall architecture', in S.A. Grundmann et al eds, *The organizational contract: From exchange to long-term network cooperation in European contract law/edited by Stefan Grundmann, Fabrizio Cafaggi, Giuseppe Vettori* (London: Routledge, 2016), 3-38

²⁶ From economic theory we know that networks, under certain conditions, have a clear competitive advantage over both contractual relationships and integrated organizations. In fact, with networks, the involved parties can gain advantages of internal specialization and simultaneously gain advantages from the external production of other components at low transaction costs. On this issue, see G. Teubner and H. Collins, n 23 above, 87.

²⁷ In practice, modern agro-food-producing systems are normally formed by a so-called network of different producers (and single farmers) that are coordinated and/or governed by a bigger legal entity. See P. Dicken, *Global shift: Mapping the changing contours of the world economy* (New York, NY: Guilford Press, 7th ed, 2015), 424. Also consider A. Bijman et al, *Support for Farmers' Cooperatives* n 18 above. In general J. Clapp, 'The trade-ification of the food sustainability agenda' 44 *The Journal of Peasant Studies*, 335-353 (2017).

question how climate change – which is not a legal category but a natural phenomenon – can be grasped by legal thinking and then be integrated into law. This is important because in order to be effective and efficient, law requires well-defined notions.²⁸

Various studies have shown that, as a global phenomenon, climate change, from a legal perspective,²⁹ is often connected to issues of sustainability and especially environmental sustainability.³⁰ As will be seen, the proposed solutions discussed in Chapter VI link climate change to issues of sustainability. But why is the term ‘sustainability’ used? One reason is that the notion of sustainability determines specific behaviours, and in general, one can affirm that climate change is a consequence of non-sustainable actions.

At a global level, the term ‘sustainability’³¹ was first discussed extensively in 1972 as part of the United Nations Conference on the Human Environment in Stockholm.³² Then, the commonly, so-called *Brundtland* (‘Our Common Future’) Report from 1987, introduced a more detailed concept for sustainable development.

²⁸ See C.M. Bianca, *Diritto civile* (Milano: Giuffrè, 2nd ed, 2002), 8, A. Liserre and F. Rocchio, *Lezioni di diritto privato* (Milano: Giuffrè, 2nd ed, 2009), 9, A. Torrente and P. Schlesinger, *Manuale di diritto privato* (Milano: Giuffrè, 17th ed, 2004), 6, In general, F. Bydlinski and P. Bydlinski, *Grundzüge der juristischen Methodenlehre* (Wien: Facultas.wuv, 2nd ed, 2012). Also consider European Group on Tort Law ed, *Principles of European Tort Law: Text and Commentary* (Vienna: Springer-Verlag/Wien, 2005) 75.

²⁹ Consider in this context the discussions regarding the Paris Agreement, or how World Trade Organization (WTO) and United Nations (UN) norms deal with this issue (eg, tinyurl.com/ycktmphj (last visited 7 July 2020)). Also consider D. Blandford and K. Hassapoyannes, n 4 above.

³⁰ See M. Pennasilico, ‘Sviluppo sostenibile, legalità costituzionale e analisi ecologica del contratto’ *Persona e Mercato*, 37-50 (2015); J.C. Dernbach and J.A. Mintz, ‘Environmental Laws and Sustainability: An Introduction’ 3 *Sustainability*, 531-540 (2011), H. Härtel, ‘Vom Klimawandel bis zur Welternährung - zentrale Weltprobleme, Rechtsintegration und Zukunftsgesellschaft’, FAO, *Climate change, agriculture and food security*, N. Adler et al, n 3 above. Also consider A. Jannarelli, ‘Il divenire del diritto agrario italiano ed europeo tra sviluppi tecnologici e sostenibilità’ *Rivista di diritto agrario*, 11-35 (2013).

³¹ On this issue, J. Monien, *Prinzipien als Wegbereiter eines globalen Umweltrechts?: Das Nachhaltigkeits-, Vorsorge-und Verursacherprinzip im Mehrebenensystem* (Baden-Baden: Nomos, 2014), K.E. Portney, *Sustainability* (Cambridge, Massachusetts: MIT Press, 2015), G. Guido and S. Massari eds, *Lo sviluppo sostenibile: Ambiente, risorse, innovazione, qualità; scritti in memoria di Michela Specchiarello* (Milano: F. Angeli, 2013), H. Härtel, ‘Vom Klimawandel bis zur Welternährung’ n 30 above, S. Manservigi, ‘Il principio dello sviluppo sostenibile: da Rio+20 al diritto dell’Unione Europea e il suo fondamentale ruolo nel diritto agrario’, in P. Borghi et al eds, *Il divenire del diritto agrario italiano ed europeo tra sviluppi tecnologici e sostenibilità: Convegno organizzato in onore del prof. Ettore Casadei, in occasione del suo settantesimo compleanno. Atti del Convegno IDAIC, Bologna-Rovigo, 25-26 ottobre 2012* (Milano: Giuffrè, 2014), 175-224. The German term *Nachhaltigkeit* (sustainability) is almost two hundred years old. Hans Carl von Carlowitz introduced the idea for proper forestry management in 1713, requiring that only as many trees might be cut as could grow naturally. One can also refer to the German scientists Wilhelm and Alexander Humboldt, who developed a comprehensive system of science and education. They highlighted that Earth is a complete system with interacting parts. Also, consider the Bavarian law of forestry from the 1850s.

³² See tinyurl.com/ya7nze9v (last visited 7 July 2020).

Accordingly, sustainable development is development that

‘meets the need of the present without compromising the ability of future generations to meet their own need’.³³

This concept points to three facets of sustainability considering the following: (a) social sustainability, which refers to standard of living, education, jobs or equal opportunities; (b) environmental sustainability, referring to the use of natural resources, the prevention of pollution and bio-diversity; and finally (c) economic sustainability, which refers, for example, to economic growth, the creation of profits or the saving of costs.³⁴

Although the three-pillar concept is currently widely accepted, there is disagreement over its implementation.³⁵ Above all, the fact that all three pillars must be applied in a balanced manner is criticized. It has been thoroughly argued that in the event of a conflict between these pillars and their contents, prioritization may be required.³⁶ This is especially true if one considers ecological sustainability, which, due to its link to the environment, constitutes the basis for all human action. Given the danger that climate change will lead to an enormous if not catastrophic change in the environment and thus in the basis of all human activity,

³³ See tinyurl.com/mtpt4pu (last visited 7 July 2020).

³⁴ The concepts described in the report formed the basis for the development of a comprehensive, and at least an attempt at a global, political strategy. The discussion on it continued to 1992. The Conference in Rio de Janeiro organised in this regard ended with the following five documents, all dealing with sustainability, to a greater or lesser extent: the Rio Declaration on Environment and Development (See tinyurl.com/y9vwabh2 (last visited 7 July 2020)), United Nations Framework Convention on Climate Change (UNFCCC) (See tinyurl.com/zf4mggo (last visited 7 July 2020)), Convention on Biological Diversity (CBD) (See tinyurl.com/yaroyhej (last visited 7 July 2020)), Forest Principles (See urly.it/372d9 (last visited 7 July 2020)) and Agenda 21 (tinyurl.com/yaxfkumf (last visited 7 July 2020)).

³⁵ On this issue see, among many others, M. Pennasilico, ‘Sviluppo sostenibile’ n 30 above; G. Guido and S. Massari, ‘Introduzione’, in G. Guido and S. Massari eds, *Lo sviluppo sostenibile: Ambiente, risorse, innovazione, qualità; scritti in memoria di Michela Specchiarello* (Milano: F. Angeli, 2013), 3-10; K.E. Portney, n 31 above, 1; S. Landini, ‘Clausole di sostenibilità nei contratti tra privati. Problemi e riflessioni’ *Diritto Pubblico*, 611-636, 614 (2015); K. Gehne, *Nachhaltige Entwicklung als Rechtsprinzip: Normativer Aussagegehalt, rechtstheoretische Einordnung, Funktionen im Recht* (Tübingen: Mohr Siebeck, 2011), 11. Also consider K. Mathis, ‘Sustainable Development, Economic Growth and Environmental Regulation’ in K. Mathis and B.R. Huber eds, *Environmental Law and Economics* (Cham: Springer International Publishing, 2017), 3-42; R. Norer, *Lebendiges Agrarrecht: Entwicklungslinien und Perspektiven des Rechts im ländlichen Raum* (Vienna: Springer-Verlag/Wien, 2005), 469; D. Monien, *Prinzipien* n 31 above, 150; S. Landini, n 35 above, 614; S. Manservigi, n 31 above; L. Bodiguel, ‘Agricoltura sostenibile: il sogno di un diritto’ in P. Nappi et al eds, *Studi in onore di Luigi Costato* (Napoli: Jovene, 2014), 191-198, 196; A. Jannarelli, n 30 above, 35.

³⁶ Depending on the political view, the content of the notion of sustainability can vary to a certain degree, or specific criteria or facets can be prioritised, thereby disavowing other criteria. See n 35 above. Also consider L.P. Thiele, *Sustainability* (New York, NY: John Wiley & Sons, 1st ed, 2013) and E. Giovannoni and G. Fabietti, ‘What Is Sustainability? A Review of the Concept and Its Applications’, in C. Busco et al eds, *Integrated Reporting*, (Cham: Springer International Publishing, 2013), 21-40.

there are good reasons to prioritize environmental sustainability in the context of climate change issues. However, as is currently apparent, sustainability issues must be weighed against each other and placed on an equal footing. Thus, we are dealing with a not-so-clear concept linked to the environment and consequently often – but not exclusively – to agro-food production.³⁷

It is, therefore, difficult to implement the concept of sustainability from a legal perspective as sustainability is a legal principle – and not a legal norm;³⁸ and typically, a clearly defined notion is therefore missing. Apart from some specific exceptions, which incorporate sustainability criteria into more concrete legal provisions, such as those contained in Title IV of European Parliament and Council Regulation (EU) 2013/1306 of 17 December 2013 on cross-compliance – linking direct payments to environmental, health, animal welfare and land use conditions³⁹

³⁷ The discussion on sustainability as a topic of private law, especially business law, has intensified following the 2008 financial crisis. Basically, the various discussions have concentrated on the economic dimension of sustainability. In this context, there has also been growing interest in issues related to sustainable behaviour and the associated potential responsibilities of companies. Until then, this was not a central topic in the theoretical discussion/debate. If anything, it has been discussed in the context of corporate social responsibility (CSR). In addition, the role of companies in the context of pollution, environmental degradation and climate change is increasingly being discussed. Here, sustainability is discussed following a broader, more holistic approach that takes equal account of the three dimensions. In general, European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility’ (2011) and European Commission, ‘The EU Corporate Governance Framework: Green Paper’ (2011). Alarming, tinyurl.com/t25et52 (last visited 7 July 2020). Also consider European Parliament and Council Directive 2014/95/EU of 22 October 2014.

The causes of the financial crisis were problems with incentives, shortcomings in techniques for measuring and monitoring risks and limits of risk-adequate pricing. It was acknowledged that the compensation schemes used fostered the focus on short-term returns rather than providing incentives for managers to pursue long-term prospects. Weaknesses and shortcomings in risk management practices and monitoring systems contributed to the aggravation of the crises. Therefore, it is argued that policymakers should take action to make enterprises more sustainable, especially in the economic sense, thereby preventing a future collapse of the economic system. In this context, consider the amended § 87, para 1, of the German AktG. On this issue, see G. Deipenbrock, ‘Sustainable Development, the Interest(s) of the Company and the Role of the Board from the Perspective of a German Aktiengesellschaft’ 8 *International and Comparative Corporate Law Journal*, 8 (2011), and in general, J.L. Campbell, ‘2017 Decade Award Invited Article Reflections on the 2017 Decade Award: Corporate Social Responsibility and the Financial Crisis’ 43 *Academy of Management Review*, 546 (2018), and S.O. Idowu et al eds, *Encyclopedia of Corporate Social Responsibility: With 227 Figures and 119 Tables* (Berlin, Heidelberg: Springer, 2013) Business law cannot be considered a specific field of sustainability policy, and in general, companies are confronted only with non-binding requirements, such as appeals to members of the board, consumers or investors.

³⁸ In general D. Monien, *Prinzipien* n 31 above. Also consider R.E. Kim and K. Bosselmann, ‘Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law’ 24 *Review of European, Comparative & International Environmental Law*, 194-208 (2015) and K. Gehne, *Nachhaltige Entwicklung als Rechtsprinzip* n 35 above.

³⁹ Art 93 of European Parliament and Council Regulation (EU) 2013/1306 states: ‘The rules on cross-compliance shall consist of the statutory management requirements under Union law and the standards for good agricultural and environmental condition of land established at national

– the notion of sustainability essentially refers to the abovementioned three different and sometimes conflicting aspects. Discussing sustainability and climate change together with the responsibilities of agro-food producers makes the situation even more complex, not least because liability – as the legal category of responsibility – requires identifiable duties and obligations.⁴⁰

At this point, it is important to recall that subsidies for agricultural activities (including outside the European Union) are often justified by emphasizing that financial support is given on the condition that production corresponds to sustainability requirements, including environmental sustainability. It is this very characteristic that has become increasingly important in the context of the Common Agricultural Policy (CAP) regime over the last two decades. However, this seems somehow contradictory, considering the relationship between agro-food production and climate change. In general, the climate liability of corporations is taken quite seriously in the international literature,⁴¹ and it has already triggered a wave of ‘climate action lawsuits’ in the United States.⁴² While the peculiarities of the US legal system preclude further complaints,⁴³ the ‘climate plaintiffs’ are now reaching Europe.⁴⁴

level as listed in Annex II, relating to the following areas: (a) environment, climate change and good agricultural condition of land; (b) public, animal and plant health; (c) animal welfare’.

⁴⁰ See A. Torrente and P. Schlesinger, *Manuale di diritto privato* n 28 above, 34 and 434; D. Carusi and N. Lipari, *Diritto civile* (Milano: Giuffrè, 2009), 4; A. Liserre and F. Rocchio, *Lezioni di diritto privato* n 28 above, 316. Also consider European Group on Tort Law, *Principles of European Tort Law* 75; and C.M. Bianca, *Diritto civile* n 28 above, 8.

⁴¹ Consider for example R.F. Blomquist, ‘Comparative Climate Change Torts’ 46 *Valparaiso University Law Review*, 1053-1075, available at tinyurl.com/y8ozwzhr (last visited 7 July 2020) or M. Spitzer and B. Burtscher, n 5 above.

⁴² See tinyurl.com/y2nrru5u (last visited 7 July 2020).

⁴³ See M. Spitzer and B. Burtscher, n 5 above, 143.

⁴⁴ For example, a Peruvian farmer recently sued the German energy utility RWE in front of the regional court Essen because his property was threatened with flooding due to the glacier melt: One of the factors responsible for the glacier melt would be RWE’s CO₂ emissions. Consider *Lliuya v RWE* (see tinyurl.com/ycczxmzmu (last visited 7 July 2020)). The jurisdiction for such actions in Europe arises from Art 4, para 1, in conjunction with Art 63, para 1, European Parliament and Council Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Thus, the place of jurisdiction is the country of domicile of the defendant. It is true that, according to Art 4, para 1, of the Rome II Regulation (European Parliament and Council Regulation (EU) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations. The law of the place applies, where the damage arose (and in many cases the law of a third state). However, under Art 7 Rome II Regulation, the plaintiff can also choose the law of the place where the act has been performed. This can be in Europe. It therefore makes sense to consider whether – at least in theory – Italian food producers could be held liable for damage occurring due to climate change.

Art 4, para 1, European Parliament and Council Regulation (EU) 1215/2012 states: ‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State’. Art 63, para 1, European Parliament and Council Regulation (EU) 1215/2012 states: ‘For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; (c) principal place of business’. Art 7 Rome II Regulation states: ‘The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained

Taken together, I consider a situation where a specific activity (agro-food production) significantly contributes to climate change, whereby third parties can (also) be damaged (here, the forest of Mrs Rossi). The complexity of this research is enhanced by the fact that the scrutinized activity is conducted in a network of agro-food producers, that is, through different autonomous legal entities with a coordinating centre at their top, all of which may also be subsidized or supported by other fiscal means. In my opinion, this means that we should also think about whether the network manager – the PO⁴⁵ (using the legal form of a cooperative) – may also be held responsible for climate change and thus whether it is liable under Italian tort law. As the ‘main actor’ is an (agricultural) cooperative, it is necessary to specifically consider the civil obligations and responsibilities of its representatives, or better, managers (administrators/*amministratori*). At this point, it is also important to stress that I do not consider penal liability.⁴⁶

I have chosen to specifically focus on agro-food producers as many legal norms concerning the sector of agriculture normally require that this activity should or even must be conducted in a sustainable way. However, the aim of this essay is *not to find a solid solution*, as more research is needed for this, but rather, to elaborate specific thoughts that will help in reconsidering agricultural activities in the light of climate change. Although I focus on a specific branch of business, the thoughts expressed here are very theoretical in nature, and they *do not* cover the complete dynamics of the producer networks or chains. A specific limitation emerges in that the Italian legal order considers network liability only to a limited extent, with the result that liability regarding a third party is primarily linked to a single entity and not the network itself. A further limitation of this study arises because it does not consider the extent of the damage that could possibly be caused by the behaviour of an agro-food producer.

But before going into further detail, we must first analyse how the Italian legal framework regulates the relationship between a damaging subject and third parties (ie, non-contractual liability). Here, the basic norm is Art 2043 Civil Code. The analysis of this norm is also a useful tool for determining the course of the examination. Thus, in Chapter III I consider whether it is possible within the current legal order to find features which help to construct a(n) (enforceable) duty which forces agricultural cooperatives/POs to produce agricultural products in an environmentally sustainable way, with the consequence that damage to

by persons or property as a result of such damage shall be the law determined pursuant to Art 4, para 1, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred’.

⁴⁵ For a concise analysis and evaluation of Italian agro-food cooperatives, consider P. Bono, ‘Support for Farmers’ Cooperatives. Country Report Italy’ (2012), available at tinyurl.com/ydcmovtd (last visited 7 July 2020).

⁴⁶ In this context, Art 25 *undecies* decreto legislativo 8 June 2001 no 231 providing for a specific criminal liability of the legal person for environmental crimes committed by its officers and employees.

the climate is reduced.

Chapter IV discusses aspects concerning the role of the defendant. These include, firstly, the PO's duty of care and, secondly, its role in production chains and, in this context, the question of whether there could be a civil liability for climate-damaging acts resulting from the emissions produced along the whole production chain. To this end, I use observations taken from network theory to capture the dynamics of a production chain and link these to legal thought. This analysis is also important for the last step of my investigation: Chapter V addresses a central issue when applying Art 2043 Civil Code, which is the legal perspective on the connection between agro-food-producing entities and climate change. Providing evidence in this regard will of course be easier with large emitters than with smaller ones. This means, concerning my discussion, that the contribution of an individual farmer (or even fifty of them) will – I assume/for sure – be too tiny of a portion of any damage. This situation, however, might change if we consider a necessary number of farmers whose behaviour is connected to each other or, in other words, whose behaviour is uniformly controlled by a central unit, which, I argue in Chapter IV, Section 2, is actually happening in the case of a PO which steers the behaviour of its farmer-members.

After that, we can think about how to improve the legal framework (Chapter VI). Finally, the conclusion is set out in Chapter VII.

II. Explaining the Step-by-Step Analysis

1. Fundamentals on Act and Causality, Illegality and Fault

According to Art 2043 Civil Code, any intentional or culpable act that causes unlawful damage to someone else will oblige the person who committed the act to pay compensation. This general clause defines all the elements of liability, namely, act and causality, illegality and fault.

The basic prerequisite for liability is a human act. This refers to attributable human behaviour.⁴⁷ An action is attributable when it is performed consciously and intentionally, that is, it is controllable by the person concerned. It is sufficient if the injuring party can understand and want the unlawful act.⁴⁸ A precondition is that this party has caused the interference by a breach of duty contrary to due diligence. In other words, the party is liable only if it is guilty of misconduct.⁴⁹

⁴⁷ This includes attributable human behaviour in the broadest sense, that is, both active deeds and omissions. See M. Sella, 'Art 2043', in A. Diurni and P. Cendon eds, *Artt. 2043-2053: Fatti illeciti* (Milano: Giuffrè, 2008), 24. In general G. Alpa, *La responsabilità civile: Principi* (Torino: UTET, 2nd ed, 2018).

⁴⁸ According to Art 2046, only the person who, at the time of the act, was not capable of reasoning through no fault of his own is exempt from liability. It follows from this that for liability under Art 2043 no special capacity to act on the part of the injuring party is required. Rather, it is sufficient if the injuring party was able to understand and could have wanted the tort.

⁴⁹ See M. Sella, n 47 above, 117, G. Alpa, *Manuale di diritto privato* (Padova: CEDAM, 7th

Taken together, these considerations show that the injuring party is only liable if its culpable act violates a legally protected interest of another party. This is to be understood as the violation of a subjective legal position in the broadest sense that is adequately causally attributable to the offender's act (so-called causal link).⁵⁰ This causal link performs several functions. It serves not only to reconstruct the events and the link between the damage and the liable party but also to select the area of compensable damages.⁵¹

Adequate for success are those causal factors which, based on general experience or objective predictability at the time of the action, were suitable for bringing about the harmful result. In other words, in the legal sense, there is always no legally relevant causal connection if a causal factor would not have led to harmful results after the regular course of events.⁵² Here one can think of the example of a traffic accident caused negligently by A. B must therefore be hospitalised. However, B dies not because of the accident but because the doctor on duty is grossly negligent.

But it is also possible that it cannot be established whether the damage was caused by the independent actions of A or B. In this case, one speaks of alternative causality, provided that each event alone is sufficient to cause the entirety of the damage.⁵³ A school case of alternative causality is the so-called hunters' gall: two hunters shoot simultaneously in the same direction at an animal. One shot hits a passer-by. Which hunter shot the passer-by cannot be determined. In this case, Italian law excludes liability for the lack of identification of the real culprit. Joint liability under Art 2055 is also out of the question. This presupposes that all persons were actually (and not merely potentially) responsible for the damage.⁵⁴ Thus, in the case of the hunters, it is not possible to determine who has taken the hit. The mere potential causality due to the joint presence of several persons in question cannot, in principle, lead to liability. The principle of the exclusion

ed, 2011), 805.

⁵⁰ See M. Sella, n 47 above, 187. In general, G. Alpa, *La responsabilità civile* n 47 above, 201. Such a causal connection is always present if the action is a necessary condition for the occurrence of a certain result (injury). If the act in breach of duty cannot be thought away without the harmful result also being absent, a natural causal connection exists. See M. Capecchi, *Il nesso di causalità: Dalla condicio sine qua non alla responsabilità proporzionale* (Padova: CEDAM, 2012), 3. Within the framework of the doctrine of the *conditio sine qua non*, or equivalence theory (*teoria dell'equivalenza causale*), all conditions necessary for an outcome are to be regarded as basically equivalent. Indeed, the omission of a single condition would be sufficient to exclude the damage. See *ibid* 157. To avoid a disproportionate extension of liability, the theory of equivalence is limited by the theory of adequacy on the basis of Art 41 para 2 of the Italian Penal Code. In the sense of the theory of adequacy, an action is only to be assessed as causal in the legal sense if it is adequate for the outcome/event. See M. Capecchi, *Il nesso di causalità* (Padova: CEDAM, 2008), 68. See also P. Trimarchi, *Causalità e danno* (Milano: Giuffrè, 1967) and, in general, G. Alpa, *La responsabilità civile* n 47 above, 201.

⁵¹ See G. Alpa, *La responsabilità civile* n 47 above, 199.

⁵² See C. Salvi, *La responsabilità civile* (Milano: Giuffrè, 2nd ed, 2005), 226.

⁵³ On this issue, see, M. Capecchi, n 50 above, 159. See also P. Trimarchi, n 50 above, 5.

⁵⁴ On this issue, see M. Capecchi, n 50 above, 121.

of liability in cases of alternative causality is, however, overcome when an event has been caused intentionally. If, for example, A and B have mixed poison into a drink with the intent to kill C, and it is not possible to determine by which poison C died, A and B are jointly and severally liable pursuant to Art 2055 Civil Code. The weaker (because potential) causal link is thus compensated by a particular degree of fault. Finally, joint and several liability also exists in cases in which a joint and deliberate act has caused a particular risk of damage to more people (eg, participation in a brawl).⁵⁵

As explained, the damaging party is only liable if his culpable act violates a legally protected interest of someone else (illegal damage, *danno ingiusto*).⁵⁶ The term *danno ingiusto* means the violation of a subjective legal position in the broadest sense; this raises the question as to which interests are relevant in law and are thus protected under tort law. Traditional doctrine and jurisprudence have held that in tort law protection is granted exclusively to absolute subjective rights (for example, the right to health, life, freedom and property).⁵⁷ This was also the main difference between non-contractual liability and contractual liability. While relative subjective rights are affected in the case of breaches of contract, tort law should only apply where absolutely protected legal positions are infringed. This view is now outdated. As early as the 1960s, jurisdiction in the area of subjective legal positions protected by tort law began to expand increasingly more in order to include in its scope interests that cannot be qualified as subjective rights. The development towards the typological freedom of injustice (*atipicità dell'illecito*) led to the recognition of claims for damages for the violation of completely diverging interests. These now include, firstly, the interests of a person (personal rights, the right to physical integrity and health, the right to an intact family relationship of the survivors in the event of death, etc) and, secondly, patrimonial interests (property rights, the right to undisturbed use of property, protection against emissions, the right to an intact nature, possession, legitimate

⁵⁵ This all-or-nothing principle was strongly criticised, and it was therefore proposed to introduce a partial liability which would lead to compensation for the part of the damage corresponding to the probability of an actual causal contribution. On this issue, see *ibid*, 205. In contrast, in the context of a very detailed discussion of the problem of mass damage/poisoning damage, it was suggested that in cases of alternative causality, where it is not possible or considerably more difficult to determine the actual injuring party, the so-called dual causation test should be applied. Accordingly, the injured party only has to prove the potential (abstract) causality, whereas the defendant is free to provide counterevidence in order to free himself from liability. See G. Baldini, *Il danno da fumo: Il problema della responsabilità nel danno da sostanze tossiche* (Napoli: Edizioni Scientifiche Italiane, 2008), 155. On this issue, see also G. Alpa, *La responsabilità civile* n 47 above, 207 and 419.

⁵⁶ On this issue, see M. Franzoni, *L'illecito* (Milano: Giuffrè, 2nd ed, 2010), 867. For basic debates, see also P. Schlesinger, 'La ingiustizia del danno nell'illecito civile', *JUS* (1960), available at tinyurl.com/y789kyjg (last visited 7 July 2020); R. Sacco, 'L'ingiustizia del danno di cui all'art. 2043' *Il Foro padano*, I, 1420 (1960); S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffrè, 1964).

⁵⁷ See C. Salvi, *La responsabilità civile* n 52 above, 82.

interests and pure patrimonial interests).⁵⁸ The expansion of the field of interests protected in tort reached a climax with a judgement of the court of cassation in 1999.⁵⁹ Since then, even the violation of merely legally relevant interests (*interessi giuridicamente rilevanti*) is sufficient to satisfy the requirement of illegality (*danno ingiusto*).⁶⁰

Another element of liability under Civil Code Art 2043 is fault. To have fault, it is sufficient/necessary that the injuring party was capable of controlling his will and consciousness at the time of the unlawful act.⁶¹ This includes intent and negligence. Intention is present if the damage was consciously and wilfully caused,⁶² while in the case of negligence, the offender unintentionally causes the damage by his carelessness (*negligenza*), inattentiveness (*imprudenza*), inexperience (*imperizia*) or violation of the legal obligations imposed on him.⁶³ To ascertain the violation of obligations (specific fault, *colpa specifica*), it is sufficient to ascertain the violence of the offence, whereas in other cases (generic fault, *colpa generica*), fault is established in accordance with the criteria of foreseeability. The judge takes into account the conditions in which the event could have been foreseen or prevented and the effort of the average man to achieve the result of

⁵⁸ See *ibid*, 91. The liability for damages due to the violation of rights to claims also gained great importance in the discussion about typological freedom of tortious injustice. This concerns the question of whether the frustration of the performance of the obligation to perform due to the tort of a third party constitutes a tortious claim for damages by the creditor if the creditor does not obtain adequate protection of his interest for performance by way of contractual liability (Art 1218 Civil Code). See M. Franzoni, n 56 above, 989.

⁵⁹ See Corte di Cassazione 22 July 1999 n 500.

⁶⁰ See A. Virgilio, 'Il danno ingiusto', in P. Stanzione ed, *Trattato della responsabilità civile* (Padova: CEDAM, 2012), 85-118. Illegality in its meaning of *non iure* means that there is no justification (*causa di giustificazione*) recognised by the legal system for the harm suffered by the injured party. The Civil Code mentions self-defence and necessity as justification grounds that exclude illegality. Self-defence (*legittima difesa*) is the defence of one's own right or the right of another (emergency aid) to defend against the present and unavoidable danger of an illegal attack. The defence, which is properly directed against the aggressor, has to be in reasonable proportion to the attack. In this case, the aggressor who has suffered damage is not entitled to compensation. In the case of a state of emergency (*stato di necessità*), however, there is no illegal attack. The aggrieved party attacks the legal interests of someone else because he feels compelled to save himself or a third party from the current danger of serious damage to the person. The unlawfulness of this intervention is only excluded if the damaging party has not deliberately caused the danger and if this danger could not be averted in any other way. In cases of necessity, the injuring party does not owe full compensation but rather compensation assessed by the court according to equity. While the Civil Code only provides for self-defence and necessity as grounds for justification, jurisprudence has also recognised the exercise of a right (*esercizio di un diritto*) or the fulfilment of an obligation (*adempimento di un dovere*) and the consent of the person concerned (*consenso dell'avente diritto*) as further grounds for justification. On these issues, see M. Franzoni, n 56 above, Chapter IX. See also G. Alpa, *La responsabilità civile* n 47 above, 212, and A. Virgilio, n 60 above.

⁶¹ It is sufficient if, due to his mental maturity, he had to be aware of acting negligently or intentionally.

⁶² On this issue, see M. Franzoni, n 56 above, 350.

⁶³ See also C. Salvi, *La responsabilità civile* n 52 above, 160.

avoiding the damage.⁶⁴ Moreover, fault in most cases is accompanied by other factors, such as the exercise of a profession, the keeping of things or animals or the exercise of dangerous activities.⁶⁵

The legal norm analysed here is of a general nature and refers not only to natural persons but also, among other things, partnerships or corporations – in the latter case, considering the behaviour of its organs.⁶⁶ This results from the legal personality of the company and, thus, the ensuing special relationship between the administrators and company. Consequently, the company (here, an agricultural cooperative recognised as PO) is primarily liable, directly and exclusively, *vis-à-vis* third parties, for the damages covered by Art 2043 Civil Code and caused by the administrators/managers (who acted in the company's name and on its behalf).⁶⁷

2. Defining Suitable Contours for Our Example: Whose Damage and Which Damage

Generally speaking, if all the conditions⁶⁸ described above are fulfilled, the liability of the person causing the damage⁶⁹ is justified. However, the injured party is only entitled to damages if she (here, Mrs Rossi) can prove that he has suffered real damage as a result of the tort.⁷⁰ In this sense, therefore, damage does not mean the violation of a protected legal position (*danno ingiusto*) but loss or impairment of the property or person of the injured party (*danno pregiudizio*). Therefore, despite the existence of all liability conditions, a compensation claim is only justified if the (culpable) violation of the protected legal position has also caused damage in its natural sense.⁷¹ This damage can be either financial loss or non-pecuniary loss.⁷² This distinction is very important because the Italian legislature has very restrictively regulated the compensation of non-pecuniary damage and, in principle, only allows it in cases prescribed by law.⁷³ In order not to lead the discussion in this article into the bottomless depths, I only consider

⁶⁴ See G. Alpa, *La responsabilità civile* n 47 above, 155.

⁶⁵ *ibid* 156.

⁶⁶ In fact, while damage caused by employees of a company must be regulated in accordance with Art 2049, damage caused by the actions of the company's organs must be regulated in accordance with Art 2043.

⁶⁷ See G. Alpa, *La responsabilità civile* n 47 above, 119. With regard to the liability of employees, Art 2049 is applicable. In addition, the law regulates other aspects, especially the personal liability of the administrators (see Art 2392 Civil Code).

⁶⁸ That is, causal link, illegality and fault due to Art 2043 Civil Code.

⁶⁹ Or the person responsible for it. See Art 2049 Civil Code.

⁷⁰ See G. Alpa, *Manuale di diritto privato* n 49 above, 813, M. Sella, n 47 above, 45.

⁷¹ See M. Franzoni, n 56 above, 82 and 56. The dual role of the causal link must be borne in mind: the imputation of liability, the demarcation of the area of compensable damage. See Alpa, *La responsabilità civile* n 47 above, 200.

⁷² See M. Franzoni, n 56 above, 56.

⁷³ See Art 2059 Civil Code. On this issue, see above 59.

the financial damage/loss.⁷⁴

In the context of pecuniary loss, a basic distinction is made between positive loss (losses suffered) and loss of prospective profits.⁷⁵ Positive damage results from all material losses suffered by the injured party in his existing assets. The lost profit, however, consists of the impediment of the acquisition of assets that were not yet acquired at the time of the occurrence of the loss but were expected to be acquired. The loss of profit is measured on an equitable basis.⁷⁶

For my discussion, a starting point shall be the fact that the worst effects of greenhouse gas emissions are not expected until later in this century or thereafter. I stress that considering future damages leads to a number of obstacles for plaintiffs for various reasons, and I argue that plaintiffs are definitely better advised to identify the damages currently realized and link them to the ongoing damage caused by climate change instead. This shall be explained by an example.

The plaintiffs could try to allege that anthropogenic greenhouse gas emissions have created the need for adaptation planning in order to prepare for the worst impacts of climate change.⁷⁷ Yet, here the question arises as to the extent to which such precautionary measures should differ from normal good corporate governance.⁷⁸ Moreover, one may also ask whether the compensation of expected climate change expenditures eventually might not lead to an excessive – that is, disproportional and unfair – financial burden the defendant has to bear (regardless of which industries are held responsible for the costs of adaptation planning). These observations underpin that property infringement is a logical – because well presentable – *starting point* for climate liability suits.^{79, 80}

⁷⁴ For example, one could examine the non-pecuniary damage that would be caused if certain cultural objects, territories or other localities were to be destroyed due to climate change.

⁷⁵ See Art 1223 Civil Code.

⁷⁶ See M. Franzoni, n 56 above, 56; see also 931. Special characteristics of the financial loss are the loss of use in the event of damage to a motor vehicle and the loss of an opportunity.

⁷⁷ Individual assessments of climate change vulnerability and the need for mitigation measures are now being undertaken throughout all levels of government and to a growing extent by the private sector, in many cases at the insurer's request. Such expenditure could be characterised as a reasonable and predictable consequence of the risk-increasing activities of (potential) defendants in connection with climate change.

⁷⁸ In this sense, D.A. Kysar, 'What Climate Change Can Do About Tort Law' 41 *Environmental Law*, 43 (2011).

⁷⁹ For example, the Peruvian farmer in *Lluya v RWE* (see no 44) had to protect his property from flooding by a dammed glacial lake. In the United States, there were complaints from an Inuit community where the village had become uninhabitable due to erosion of the permafrost soil and from homeowners whose homes had fallen victim to Hurricane Katrina, which was presumed to have been exacerbated by climate change.

⁸⁰ After all, property rights are not only protected under constitutional law; rather, they also enjoy special protection under tort law: Art 2043 ZGB, with its broad general clause, counts property rights among the absolutely protected goods. Of course, life and health enjoy even greater protection among the absolutely protected goods. Thus, killings and bodily injury could also form starting points for climate liability in the future. Clearly, the damage potential extends far beyond the traditionally absolutely protected goods. The first thing to consider is consequential damage to property, such as loss of profit. In addition, genuine financial losses can also be

The damage will be manifold. In brief, climate change will irrevocably damage resources, such as traditional or customary fisheries and landing sites will be damaged. Next, climate change will also result in ocean warming and acidification, and this will impact specific coastal and fresh water fisheries. Then, climate change will result in the irrevocable and irreplaceable loss of land, resources and species with severe economic consequences. Moreover, the release of greenhouse gases results in increased temperatures, leads to a loss of biodiversity and biomass and a loss of land (including as a result of sea level rise) and brings about risks to food and water security, increasing extreme weather events; it will also lead to a loss of sites of cultural and historical significance.⁸¹

As known, in Italy, there are various sites of customary, cultural and historical significance not only to Italy, meaning the Italian people, but to mankind in general. Think of the Colosseum in Rome or the City of Venice. It is this town which is particularly endangered by climate change due to its close proximity to the sea – actually, it is partially built on it. In these cases, however, the actual damage is not yet deliverable, and this leads us to the abovementioned obstacles in the quantification of the damage.

Moreover, if we stay with the example of Venice, the question also arises as to who is the injured party (and therefore the plaintiff, according to Art 2043 Civil Code), only the owner of a property in Venice or at least all Italians whose cultural property and legacy is destroyed? And who, in this second case, would represent the injured parties? The complexity of the issues thus forces us to simplify. In this respect, my considerations therefore remain modest, and I sketch, as the injured party, a Mrs Rossi, whose forest was destroyed by windthrow, as mentioned in Chapter I. Just to remind the reader, I assume that windthrow is a phenomenon that has been intensified by climate change.⁸²

But we need to be clear that, when viewed as a whole, our defendant's emissions might certainly be tiny in the context of global greenhouse gas emissions;⁸³ it will therefore be crucial to provide clear evidence not only of the damage caused but, in particular, of the defendant's contribution to the damage. As a matter of fact, the anthropogenic greenhouse effect is devastating only because

considered. In the context of climate liability suits, for example, one could think of a ski lift operator who can only offer customers green meadows instead of snow-covered slopes. However, even in the case of climate damage that could potentially occur anywhere in the world, there must be an end to it at some point, so that mere financial losses will generally not be able to recover. Ecological damage is also conceivable, such as the extinction of rare animal species, coral bleaching or the drying up of water bodies. However, if such ecological damage is not accompanied by damage to personal or property rights, compensation for it is unlikely. Of course, the mere intervention in an absolutely protected good only indicates illegality. A precondition for liability is that the defendant has caused the interference by a breach of duty contrary to due diligence. In other words, the aggrieved party is liable only if he is guilty of misconduct.

⁸¹ See IPCC, *Global warming of 1.5°C*, see also S. Rahmstorf and H.J. Schellnhuber, *Der Klimawandel: Diagnose, Prognose, Therapie* (München: C.H.Beck, 9th ed, 2019), 55.

⁸² See n 7 above

⁸³ Some kind of de minimis threshold seems necessary as a minimum requirement.

there are millions of emitters whose combined emissions cause the harmful effect. This seems to lead to joint and several liability. Yet, as will be explained in Chapter V, there are methods for determining the warming potential of the various greenhouse gases, and there are also methods for quantifying the contribution of a particular emitter to climate change. This means that as long as the emissions of a particular emitter can be measured, it is also possible to calculate that emitter's contribution to climate change. This is important because otherwise we would be referring to some kind of indeterminate liability.

So far, these are the theoretical assumptions, the key points for my case study, I use to discuss a possible non-contractual liability of POs for climate damage; they relate to the interests of the plaintiff and the harm she alleges. Based on the other elements contained in Art 2043 Civil Code – act and causality, illegality and fault – in Chapters III to V, I address the following three questions:

1. Are there obligations requiring agricultural cooperatives organised as a PO to conduct their business in an ecologically sustainable manner?
2. How should a PO deal with the issue of climate change, and which specific responsibilities might be relevant in this regard? This includes, on one hand, considering its duties of care to be observed in the performance of its activities and, on the other hand, the question as to whether it is possible to hold the agricultural cooperative/PO liable for damage to third parties because of its specific role as a network hub.
3. And lastly: Can a causal link be substantiated between the activities of the agricultural cooperative/PO and damage to third parties (eg, Mrs Rossi's destroyed property) caused by climate change?

All three of these questions concern, in one way or another, the abstract behaviour of the agricultural cooperative and the concrete behaviour of its managers and stem from the fact that, as mentioned in Section 1 of this chapter, when legal persons act, the conduct of its organ members must be taken into account. This aspect will be analyzed in particular in Chapter IV, that is, the second step, of this investigation.

III. First Step: Examining the Possibility of Developing a Duty to Do Agricultural Business in an Eco-Sustainable Manner Within the Framework of the Existing Legal Order

The question of the extent to which agro-food producers can be held responsible for climate change is linked to the legal framework within which an Italian agricultural cooperative, recognised as a PO, conducts its business. The question is whether obligations can be derived from this, according to which a PO must produce in an ecologically sustainable manner.

The starting point in this discussion is the concept of agricultural activity as defined in Art 2135 Civil Code. This is in fact the basic norm that determines

what an agricultural cooperative may ultimately do. Maybe the idea of (ecological) sustainability is directly linked to agricultural activity, as defined by Art 2135 Civil Code, and thus represents a substantial part of the activity itself.

The next aspect concerns the question of the extent to which, at present, companies overall, including agricultural cooperatives recognised as POs, specifically must operate their businesses in an ecologically sustainable manner. This also requires estimating the extent to which board members are free to pursue a climate-friendly strategy. Such assessments require examining what, according to the law, the purpose of business is or may be.

Then, an assessment of whether producers of agricultural products could be urged to reduce their harmful behaviour with respect to the climate must also include an analysis of whether specific requirements arise from the overall framework, that is, the EU law governing these companies and Italian constitutional and environmental law. The question of sustainable agricultural production leads us, as a final step, to the analysis of voluntarily entered production specifications or production standards, such as the use of ecolabels.

1. Environmental Sustainability and Agricultural Activities as Determined by Art 2135 of Civil Code

Art 2135 Civil Code defines agricultural activities in a rather open way. According to the article, these activities can be divided into two main categories, namely core activities and connected/related activities.⁸⁴ Of importance for this discussion is the first category, under which a legislator specifically subsumes cultivation of the land, forestry and animal husbandry.⁸⁵ To qualify as a farmer, it is necessary that these activities aim at the care and development of a biological cycle (or a necessary phase of the cycle), where land, forest or fresh, brackish or marine waters may⁸⁶ be used.⁸⁷ It should also be noted here that not only natural persons but also – under certain conditions – legal entities (eg, a cooperative)⁸⁸

⁸⁴ For details L. Costato and L. Russo, n 9 above, 82.

⁸⁵ The mentioned openness of the norm can be shown via the example of animal husbandry: The introduction of the criterion of the biological cycle allowed inclusion of activities carried out not directly on the soil (ie battery farms) under the notion of animal husbandry. Moreover, animal breeding is not to be understood exclusively as direct breeding to obtain typical agricultural products, such as meat, milk, wool and working animals. Today, the notion of animal breeding also includes breeding of race horses or fur animals and cinotechnical activity, that is, activity aimed at breeding. Moreover, it comprises farmyard animals, that is, chickens and rabbits, as well as aquaculture, fish and mussels and also horticulture, greenhouse cultivation, nursery cultivation or floriculture. For details, A. Germanò, *Manuale di diritto agrario* n 9 above, 72, L. Costato and L. Russo, n 9 above, 331.

⁸⁶ May and not must. Thus, this is not necessarily obligatory.

⁸⁷ For details A. Germanò, *Manuale di diritto agrario* n 9 above, 65, L. Costato and L. Russo, n 9 above, 324.

⁸⁸ Cooperatives are basically divided into workers' cooperatives, consumer cooperatives and service cooperatives. In the agricultural sector, a workers' cooperative is formed by the hypothesis of the joint cultivation of the members' land and the joint breeding of the members' animals: In Italian law, this is an *agricultural enterprise* due to the meeting of all the requirements set out

can be qualified as farmers,⁸⁹ with the consequence that they are eligible for subsidies and tax relief.

The concept of the biological cycle contains aspects that link agricultural activities to environmental sustainability considerations, which is conclusive, since agriculture directly depends on a 'healthy' environment. This is most easily illustrated by the example of forestry, but it should also apply to the other two main activities. The special feature results from the object, that is, the forest. This not only enables the production of specific things (wood) in tune with the natural capacities of restoring the resource used but, due to its importance for soil strength, air purity and landscape conformity, can also be said to produce the environment.⁹⁰ The legislator especially safeguards this environmental aspect via specific legal norms (eg, by determining rules of good practice and forest management plans).

Looking at the relationship between climate change and animal husbandry, and implicitly, at the extent to which animal husbandry is (or can/must be) ecologically sustainable, it can be seen that, unlike forestry, the relationship between the production of economic value and the destruction of the environment cannot be directly captured. While the biological cycle in animal husbandry is shorter, and the possibility of earning money is improved, the consequence of unsustainable behaviour – and in particular in the context of climate change⁹¹ –

in Art 2135 of the Italian Civil Code. The consumer cooperatives are based on the hypothesis that the agricultural products are supplied by the members, but at the same time, sold to non-members. The service cooperative consists, for example, in the processing of the members' products, as in the case of social cellars, social oil mills and social cheese factories. See also n 12 above.

⁸⁹ The service cooperative referred to in the previous note, in Italian law, is an agricultural enterprise by virtue of Art 1, para 2, decreto legislativo 18 May 2001 no 228, although, for the purposes of the connection between the cooperative's activity (the 'service' of processing) and the activity of its members (the production of grapes to be vinified, olives to be pressed and milk to be processed into cheese), the requirement of '*unisoggettività*' (that is both activities conducted by the same subject) in Art 2135 of the Italian Civil Code is lacking. The principle of transparency, in which the legal personality of the cooperative cannot veil the personalities of the members who join together to carry out the last phase of their business, means that the cooperative constitutes and functions as a common body for individual farmers.

⁹⁰ These functions have always been considered as the most important ones. In this regard, see A. Germanò, *Manuale di diritto agrario* n 9 above, 70. See also A. Sciaudone, 'L'azienda agricola tra esigenze della proprietà e sviluppo dell'impresa. (Il potenziamento delle strutture agricole e la promozione dell'azienda tra politiche europee e dinamiche interne)' *Rivista di diritto agrario*, 421 (2016).

⁹¹ The production and consumption of meat leads to significant animal methane emissions. Furthermore, animal husbandry, which is spatially decoupled from forage areas, largely depends on the importation of cheap fodder for intensive fattening (eg soya imports from South America), and it leads to additional emissions due to expenditure on animal feed and manure management (fertiliser balance, disposal or energy recovery in biogas plants). In addition, the processing and storage, transport and preparation of food show climatic and environmental influences. See U. Ermann et al, n 2 above, 82. In contrast, organic farming, which does without synthetic fertilisers, is considered to be much more climate friendly than conventional agricultural production is. For example, a school canteen could reduce its carbon footprint by fifteen twenty percent by switching from conventional to organic food. A.K. Cerutti et al, 'Carbon footprint in green public procurement: Policy evaluation from a case study in the food sector' 58 *Food Policy*, 82-93 (2016). Globalised

is still only felt in the long term (by the next generation).⁹² As the consequences are only felt in the long term, it seems rather unlikely that, in this specific case and example, people will move towards more environmentally sustainable behaviour. There is a missing link between the present actions and future consequences; in other words, there are asymmetries in feeling the consequences (damage) between market participants who do not play on the same stage but instead appear on stages that are strongly separated in time. In fact, the damage caused by one generation is not felt by that generation but instead by the next generation.

This raises the question of why the former should voluntarily change their behaviour at all. In contrast, it seems more likely that market participants would switch to environmentally friendly behaviour if they feel the negative consequences personally. No doubt, this can work in forestry or other activities that depend on the usage of a biologically healthy soil – as a production factor⁹³ – for creating economic prosperity.⁹⁴ Thus, as long as the environmental consequences of agricultural activities more or less directly correlate with the biological cycle – that being the period during which a farmer carries out the activity – it can be assumed that farmers will, voluntarily, pay special attention to environmental sustainability; however, if there is a time gap in this respect, and if it becomes larger and larger, environmentally sustainable behaviour on a voluntary basis is likely to be weakened.

The importance of agricultural activity – and implicitly, its effects on and importance for food production and on/for its environmental functions (the

food production requires complex transport systems. However, the transport of food is an especially tricky issue. At first glance, one might question the transportation of food over thousands of kilometres for environmental reasons. However, studies have revealed that one has to be careful about these assessments. Various calculations have shown that CO₂ emissions from imported fruit from overseas can be lower than that from fruits from domestic glasshouse production, while large, centralised bakeries and their transport logistics supply the population with bread and biscuits in a much more energy-efficient manner than small, decentralised bakeries do. This raises the question of energy efficiency and emissions along the entire value chain, with transport often only contributing to a small proportion of emissions compared with production and processing processes. Especially energy efficient, and thus, climate friendly, are transports with ocean-going vessels, followed by rail and large trucks; air transport is notably inefficient. However, consumers also contribute to emissions. Due to the low transport volume, transport in private cars is especially unfavourable. Also consider M. Schönhart et al, 'Sustainable Local Food Production and Consumption' 38 *Outlook on Agriculture*, 175-182 (2009), E.H. Schlich and U. Fleissner, 'The ecology of scale: assessment of regional energy turnover and comparison with global food' 10 *International Journal of Life Cycle Assessment*, 219-223 (2005).

⁹² It is also important to note that intensive livestock farming, especially cattle and pigs, requires huge amounts of water and includes large areas of land for cereals. Water consumption and the increase in the land used exclusively for cereals have serious effects on the environment. As for the marketing of agricultural products, it should be noted that the focus on so-called zero-kilometre agriculture favours the reduction of transport, and therefore, leads to a significant reduction in CO₂ emissions.

⁹³ Not merely by constructing a building on it.

⁹⁴ One is soil erosion due to climate change, while the other is the destruction of the soil due to inappropriate cultivation methods.

production of non-tradable goods)⁹⁵ – has pushed the Italian legislator to adopt a rather open approach that allows not only considering traditional⁹⁶ agro-food producing activities and techniques (family farms) but also aligning the requirements of the classical agricultural entrepreneur with the necessities of globalized food production systems. This is shown, for example, by the abovementioned connected/related activities,⁹⁷ which will help to generate further income and other rules aimed to foster cooperation and, thus, produce economies of scale (including by using company forms).⁹⁸ As mentioned in Chapter I, this approach is then supported by other legal rules, including a favourable tax regime⁹⁹ or by granting the qualification of PAE.¹⁰⁰

⁹⁵ On this issue, A. Germanò, *Manuale di diritto agrario* n 9 above, 295, A. Germanò and E. Rook Basile, *Manuale di diritto agrario comunitario* (Torino: Giappichelli, 3rd ed, 2014), 423.

⁹⁶ It seems useful to remember that traditional food-producing activities can be granted specific safeguards (ie protection of geographical indications).

⁹⁷ These law govern working, preserving, processing, marketing and refining products. It is required that these activities are carried out mainly from an essential agricultural activity by the same agricultural operator (through the predominant use of equipment and means of production that is normally used). The notion of related activities also refers to supply of goods or services if carried out through the predominant use of equipment and means of production commonly used in the agricultural activity (including activities for improving the soil and the agricultural and forestry heritage or connected with the accommodation and hospitality of guests in the manner laid down by law). The legal rule contains a subjective condition – the same agricultural operator – and an objective one. Regarding the first, one can conclude that an entrepreneur who processes or markets the agricultural products of others is not an agricultural entrepreneur. The qualification of agricultural entrepreneurs, however, is extended to cooperatives of agricultural entrepreneurs and their consortia when they mainly use the products of their members or mainly provide their members with goods or network services for the care and development of the biological cycle. In these cases, there is no subjective identity between those who produce grapes or olives – the members of the cooperative – and those who produce wine or oil – the company. From the point of view of objective connection, the current notion innovates with respect to the previous one. For this reason, it no longer requires that the activities of alienation processing of agricultural products are part of the normal exercise of agriculture, and it does not require that related activities other than these have an ancillary character. These criteria have been replaced by the criterion of predominance. They should be limited to activities involving products obtained mainly from the exercise of the essential agricultural activity or to goods or services provided through the predominant use of farm equipment or resources. It is sufficient that the related activities do not take precedence over the essential agricultural activity from the point of view of economic importance. For details, L. Costato and L. Russo, n 9 above, 353, A. Germanò, *Manuale di diritto agrario* n 9 above, 82. See also A. Sciaudone, 'La specialità dell'azienda agricola' *Rivista di diritto agrario*, 309-352, 335 (2019).

⁹⁸ The most common company forms used in the agricultural sector are the simple company (*società semplice*) and cooperative. In addition, it is also possible for farming activities to be conducted by means of capital companies (*società per azioni*, spa). Even though in practice this option has not yet been fully exploited. See A. Germanò, *Manuale di diritto agrario* n 9 above, 118, L. Costato and L. Russo, n 9 above, 374.

⁹⁹ Moreover, the farmer enjoys preferential treatment over the commercial entrepreneur. He is subject only to the rules laid down for the entrepreneur in general and exempted from the application of the rules of the commercial entrepreneur; that is, he or she is not required to keep accounts or subject to bankruptcy and other insolvency procedures.

Specific tools for fostering cooperation between farmers and within the agro-food producing value chain include agro-industrial contracts (its object is regulating the contractual relations

All these tools help make small producers competitive by reducing specific costs, thus safeguarding agro-food production along with its effects and importance regarding environmental sustainability. But again, if subsidies, special tax benefits and specific organizational instruments are granted, especially because agriculture performs certain functions – both in terms of efficient food production and in relation to non-tradable goods – it indeed seems legitimate to ask how this can be reconciled with the influence of modern agricultural and food production systems with respect to climate change. The answer that Art 2135 can give in this regard is modest, but perhaps clearer guidelines will emerge from those norms that generally regulate the business purpose of a cooperative.

2. Evaluation of the Requirements Concerning the Business Purpose of an Agricultural Cooperative Recognised as a PO

According to Italian law, an agricultural cooperative, – like any other company,¹⁰¹ apart from some specific exemptions (ie social cooperatives) – pursues an egoistic purpose. This not only refers to maximizing profits but also, primarily, enables the pursuit of mutualistic scopes.¹⁰² This implies granting services, such as the processing of members' products at a cost that – at least in theory – is more convenient than offered on the market.¹⁰³ Here, we see the double characteristic of the cooperative as follows: a) making profits so that the cooperative can successfully fulfil its purpose and b) offering services to the members at a favourable price.¹⁰⁴

Within the criteria outlined above, shareholders – in our case, farmers as members of the PO/agricultural cooperative – determine the cooperative's purpose, thereby defining the abstract egoistic purpose according to their ideas. This aim is put into practice by the board members, who must observe the given

between farmers, processors, distributors and traders. On these issues, see A. Germanò, *Manuale di diritto agrario* n 9 above, 306), agro-food districts, productive districts (see A. Germanò, *Manuale di diritto agrario* n 9 above, 303) or POs (for details, L. Costato and L. Russo, n 9 above, 386, A. Germanò, *Manuale di diritto agrario* n 9 above, 129), which are also the linchpin of this discussion.

¹⁰⁰ See n 13 above.

¹⁰¹ Art 2247 Civil Code defines the purpose of a company contract. Accordingly, two or more persons shall provide goods or services for the joint pursuit of an economic activity for the purpose of sharing profits. From this, it follows that the shareholders conduct the activity to realise profits to be assigned to the single shareholders. For details, among many others, M. Cian, 'L'organizzazione produttiva: elementi costitutivi' in M. Cian ed, *Diritto commerciale, Volume III: Diritto delle società*, (Torino: Giappichelli, 2017), 1-51, 46, D.U. Santosuosso and M. Avagliano, 'Art 2247', in M. Cian ed, *Artt 2247 - 2378* (2015) 13.

¹⁰² For examples relating to agricultural consumers, workers and producer cooperatives, see Chapter I.

¹⁰³ See R. Santagata, 'Le società cooperative', in M. Cian ed, *Diritto commerciale. Volume III: Diritto delle società*, (Torino: Giappichelli, 2017), 807-843, 809. Also consider, among many others, L.F. Paolucci, 'Definizione e aspetti caratterizzanti', in L.F. Paolucci ed, *Le società cooperative*, (2012), 1-24, 3.

¹⁰⁴ In this sense, J.M. Kramer, n 22 above, 126.

limits according to the mutualistic (but still egoistic) scope. This concept grants them wide-ranging discretion. In fact, they can develop strategies that not only put the classical interest of shareholders/members – which is favourable prices – in the middle, but rather, they may, in addition, consider the interests of other stakeholders. In this context, it is argued that, in the long run, a pluralistic approach may also lead to a concrete economic advantage for a company.¹⁰⁵

Even though the board members have to deal with the modalities of implementing the mutualistic scope,¹⁰⁶ there is ultimately no specific mandate between the board and the shareholders/members; the law empowers the members of the board to weigh the different interests of the various stakeholders involved (ie, employees, creditors, shareholders/members, other interests) when making decisions for the cooperative. In practice, this is done on a case-by-case basis. It follows that this pluralistic approach makes it possible to increase ‘member value’ but that there is no strict obligation to do so. This discretion, however, is definitely limited by the duty to safeguard the continued existence of the cooperative, requiring *lasting profitability*.¹⁰⁷ Therefore, as long as a strategy focussing on environmental sustainability does not reduce the profitability of the company/cooperative but includes aspects that eventually even improve profitability, a specific provision allowing such decisions seems unnecessary. In other words, in line with the object¹⁰⁸ of a PO – here, using the legal form of a cooperative – its board members are free to make such decisions without the explicit decision of the shareholders/members, nor are they bound by instructions from third parties.¹⁰⁹

It is true, cooperatives are often described as sustainable enterprises, but the idea of sustainability is only vaguely contained in the norms considered here.¹¹⁰ This shows the typical approach to questions such as how to implement the principle of sustainability into a legal norm, namely, that the legislature adopts legal norms with vague content.¹¹¹

¹⁰⁵ See M. Cian, ‘L’organizzazione produttiva: elementi costitutivi’ n 102 above, 48; D.U. Santosuosso and M. Avaglione, ‘Art 2247’ n 101 above, 13.

¹⁰⁶ The specifications of Art 2545 Civil Code are a good example for this.

¹⁰⁷ See R. Santagata, n 103 above, 809. Also consider M. Cian, ‘L’organizzazione produttiva’ n 102 above, 48.

¹⁰⁸ As laid down by the statutes (articles of association).

¹⁰⁹ See R. Santagata, n 103 above, 832, P.M. Sanfilippo, ‘Gli amministratori’ n 6 above, 462.

¹¹⁰ However, if a cooperative is predominantly mutual (according to Art 2512 Civil Code), a relatively sustainable orientation results from the conditions deriving from the earmarking of the cooperative’s assets. On this issue, see, H. Henry, *Guidelines for Cooperative Legislation* (Geneva: International Labour Organization, 2012), 18. See also G. Miribung, ‘Thinking beyond the principle – from an attempt to legally substantiate the principle of sustainability using the example of agricultural cooperatives’ *Cooperative Law, in Honor of Hagen Henry* (tribute book) and G. Miribung, ‘Riserve indivisibili nelle cooperative e patrimonio separato: spunti di riflessione’ *www.giustiziacivile.com* (2015)

¹¹¹ This approach is even more true for capital companies in terms of the shareholder value concept (see P.M. Sanfilippo, ‘Gli amministratori’ n 6 above, 462), which is also contained in

The rules relating to the business purpose of a cooperative establish the general framework, but specific details must be added based on the specific criteria established for a PO. As regards the production of the producers concerned, European Parliament and Council Regulation (EU) 1308/2013 of 17 December 2013 proposes specific objectives, at least one of which can be pursued. Most of them have a clear focus on economic sustainability, for example (a) ‘ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity’ or (b) ‘concentration of supply and the placing on the market of the products produced by its members, including through direct marketing’. Others combine aspects of economic and environmental sustainability, for example (c) ‘optimising production costs and returns on investments in response to environmental and animal welfare standards and stabilising producer prices’; (d) ‘promoting, and providing technical assistance for the use of environmentally sound cultivation practices and production techniques and sound animal welfare practices and techniques’; (e) ‘carrying out research and developing initiatives on sustainable production methods, innovative practices, economic competitiveness and market developments’ or (f) ‘the management of by-products and of waste in particular to protect the quality of the water, soil and landscape and preserving or encouraging biodiversity’. But the regulation also mentions an objective specifically aimed at combatting climate change. It explicitly provides for the contribution ‘to a sustainable use of natural resources and to climate change mitigation’. Interestingly, regarding the objectives of POs operating in the milk sector, the regulation completely ignores any reference to environmental sustainability since it only refers specifically to points (a), (b) and, in part, (c). The latter, however, omits the reference to ‘returns on investments in response to environmental and animal welfare standards’ and only mentions ‘optimising production costs and stabilising producer prices’.¹¹²

the Corporate Governance Code. See tinyurl.com/y3z9f2u3 (last visited 7 July 2020). This may also be mentioned here, as POs may also be organized by using the legal form of a company. By defining standards for listed companies, it explicitly determines the creation of value for the shareholders over a medium- to long-term period as their object (see Principles 1.P.2 and 6.P.2.). Based on this, the board must consider any risk that may affect the sustainability of the business in a medium- to long-term perspective (see Art 1, comment, Corporate Governance Code). In addition, the reference to other stakeholders in connection with the supervision of sustainability issues also reflects the pluralistic approach of company purpose (see Art 4, comment, Corporate Governance Code), thereby rejecting, at least indirectly, the pure shareholder perspective. It is worth recalling the debates in which it was stressed that companies must assume their responsibilities in society, and therefore, they cannot be seen in isolation (see n 257). Although the Corporate Governance Code is not legally binding, what this implies is that its recommendations have to be explicitly inserted into the articles of association, it gains legal relevance due to the main principle n. IV of the Corporate Governance Code. Accordingly, listed companies must explain which recommendations have been inserted (and why) and which have not (and why). Yet, not only does the Corporate Governance Code not contain any obligation to adopt such provisions, but it does not even define, in a precise manner, what sustainability ultimately implies. In addition, it does not refer to further clarifications.

¹¹² See Art 152, para 3, European Parliament and Council Regulation (EU) 1308/2013.

From these observations, I conclude that, considering the concept of the business purpose of an agricultural cooperative, organised as a PO, 'our' PO must not conduct its agro-food business in a climate-friendly manner. Interestingly, however, the legal framework regulating the agricultural sector strongly emphasises the link between environmental sustainability and agro-food production. The next section explains how this is done. Perhaps this can lead to clearer guidelines.

3. Assessment of the Framework for the Production of Agro-Food Products

The behaviour of agro-food businesses – and thus of agro-food producers (POs) – in Europe is first determined by EU law and the various mechanisms that determine the functioning of the internal market. Thus, it is necessary to consider whether the internal market and, especially, the agricultural sector are linked to the idea of sustainability.

Art 39, para 1, of the Treaty on the Functioning of the European Union (TFEU)¹¹³ contains five objectives of the CAP, thereby concretising the general objectives of the European Union as set out in Art 3 of the Treaty on the European Union (TEU).¹¹⁴ They are exhaustive, and in principle, they take precedence over the general objectives of the Treaties. For the internal market and competition, this priority is expressly derived from Art 38, para 2, and Art 42 TFEU. This implies that a measure that does not pursue at least one of the five objectives does not fall within the scope of application of the CAP and, therefore, does not fall under the authorization basis of Art 43, para 2, TFEU.¹¹⁵ While Art 3 TEU explicitly refers to sustainable development, Art 38 TFEU does not. A less vague reference to sustainability could, where appropriate, be established based on the wording 'ensuring the rational development of agricultural production and the optimum utilization of the factors of production', as contained in point (a) of Art 39 TFEU.¹¹⁶

¹¹³ It states: 'The objectives of the common agricultural policy shall be: (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour; (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; (c) to stabilise markets; (d) to assure the availability of supplies; (e) to ensure that supplies reach consumers at reasonable prices'.

¹¹⁴ Regarding sustainability, this specifically states that 'the Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance'. For details, see, eg, C. Calliess, 'Art 3 EUV', in C. Calliess and M. Ruffert eds, *EUV - AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta Kommentar* (München: C.H. Beck, 5th ed, 2016), 124-154.

¹¹⁵ See W. Frenz, *Europarecht* (Berlin, Heidelberg: Springer-Verlag, 2011), 223.

¹¹⁶ Also consider D. Blandford and K. Hassapoyannes, n 4 above; in general, J. Martinez, 'Art 39 AEUV' in C. Calliess and M. Ruffert eds, *EUV-AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta Kommentar* (München: C.H. Beck, 2016), 770 and

The criteria set for the protection of the environment are more precise. Art 3, para 3, subpara 1, sent 2 TEU calls for a high degree of environmental protection and improvement of the quality of the environment. According to Art 11 TFEU,¹¹⁷ these environmental protection requirements must also be included in the definition and implementation of all EU policies and measures, and thus, they also refer to agriculture.¹¹⁸

Art 191 TFEU further concretises these rules and refers to climate change. It requires the EU to establish an environmental policy ‘promoting measures at the international level to deal with regional or worldwide environmental problems, and in particular combating climate change’.¹¹⁹ Nevertheless, an EU-internal obligation to mitigate climate change is less clear as according to the cited rule the EU shall promote this at the international level rather than acting internally, that is, within its borders.

These rules do not refer to the principle of sustainable development, nor is there conformance between the explicitly mentioned precautionary principle and the principle of sustainable development. An overall view with the preamble to the TEU (recital 9),¹²⁰ Art 3, para 3, subpara 1, sent 2 TEU and Art 11 TFEU, however, shows that the scope of environmental policy indeed refers to the promotion of sustainable development: Improving people’s economic and social living conditions must be reconciled with the long-term safeguarding of natural resources. Thus, the principle of sustainable development aims to ensure development for future generations without destroying the natural basis of life. For environmental protection, it follows that it must necessarily be an integral part of every development. It becomes an intrinsic factor of economic and social development. By applying the principle of sustainable development to safeguarding

R. Norer, ‘Art 39 AEUV’, in M. Pechstein et al eds, *Frankfurter Kommentar zu EUV, GRC und AEUV* (Tübingen: Mohr Siebeck, 2017), 652. In this context also see the various Community legal acts (for example, Council Regulation (EC) n 1782/2003 and Council Regulation (EU) n 1305/2013) which refer to the sustainable management of natural resources and the mitigation of climate change as objectives of agriculture. Also the recent European Parliament and Council Regulation (EU) 2018/848 of 30 May 2018 on organic production and labelling of organic products states that this way of practising agriculture contributes to protecting the environment and the climate. See also European Parliament and Council Directive 2001/81/EC of 23 October 2001 on national emission ceilings for certain atmospheric pollutants.

¹¹⁷ It states: ‘Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development’.

¹¹⁸ Art 3, para 3, subpara 1, sent 3 TEU. See W. Frenz, n 115 above, 246. Also consider L. Costato and L. Russo, n 9 above, 275.

¹¹⁹ Art 191, para 1, TFEU. See W. Frenz, n 115 above. On this issue, also see A. Germanò and E. Rook Basile, *Manuale di diritto agrario comunitario* n 12 above, 405.

¹²⁰ It states that the signatory parties are ‘determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields’.

the use of the environment by future generations as well, it especially covers actions aimed at safeguarding the natural foundations of life in the long term.¹²¹

Based on these general requirements, the European legislator has adopted various legal acts that stress the importance that agricultural activity is conducted sustainably. A good example is given by European Parliament and Council Regulation (EU) 1305/2013 of 17 December 2013 on support for rural development,¹²² which includes the terms ‘sustainability’ and ‘sustainable’ 52 times, stressing the necessity, among other things, of improving sustainable management,¹²³ promoting sustainable tourism,¹²⁴ supporting sustainable and climate-friendly land use,¹²⁵ promoting sustainable farming and food production systems¹²⁶ and, in general, contributing to sustainable growth.¹²⁷ Another example to be mentioned here is the concept of *greening* in European Parliament and Council Regulation (EU) 1307/2013 of 17 December 2013, which involves support payments for climate and environment-friendly agricultural practices. Specifically supported are crop diversification and the maintenance of existing permanent grassland and areas with an ecological focus. Further specific rules are contained in European Parliament and Council Directive 2011/92/EU of 13 December 2011, which provides for procedures for assessing the environmental impact of certain public and private projects. These also concern projects in the fields of agriculture, forestry and aquaculture, such as projects for the restructuring of rural land holdings; the use of uncultivated land or semi-natural areas for intensive agricultural purposes; and water management for agriculture, including irrigation and land drainage projects or intensive livestock installations.¹²⁸

Ultimately, however, the legislator does not clarify what may be the (precise) content of sustainability. If anything, it becomes clear that sustainability has more dimensions, and therefore, the understanding of the term should be in line with the general acknowledged definition. Nor is the sustainability concept used here constructed as a strict obligation but as an obligation under a specific contract, where the EU legislator provides incentives in return for environmental sustainability. Considering that European agro-food producers still contribute considerably to climate change shows that this approach currently fails with respect to achieving behaviour that mitigates climate change. The new CAP seems

¹²¹ See W. Frenz, n 115 above. See also C. Calliess, ‘Art 3 EUV’ n 114 above.

¹²² Also consider L. Costato and L. Russo, n 9 above, 278.

¹²³ That is, recitals 13 and 16.

¹²⁴ That is, recital 18.

¹²⁵ That is, recital 20.

¹²⁶ That is, recital 25, Art 4 lett c), Art 35, para 1, lett c and h), Art 55, para 1, lett b).

¹²⁷ That is, recital 41 and Art 5.

¹²⁸ For further information, see M.M. Benozzo and F. Bruno, *La valutazione di incidenza: La tutela della biodiversità tra diritto comunitario, nazionale e regionale* (Milano: Giuffrè, 2009) and V. Cicchiello, ‘La VAS, la VIA e l’IPCC nel d.lgs. 3 aprile 2006, n. 152: quando la fretta eccessiva produce una riforma problematica’ *Diritto e giurisprudenza agraria, alimentare e dell’ambiente*, 355-367 (2006).

to be more promising in this regard.¹²⁹

At the national level it is similar: In Italy, an analysis that examines whether environmental sustainability is anchored in the legal framework leads to similarly unclear results. The Constitution does not contain any specific norm in this regard. One reason for this can be that, when the Constitution was drafted, issues such as environmental protection did not have the importance they do now.¹³⁰ Yet, the Italian Constitutional Court has elaborated this aspect with the help of Art 9 of the Constitution, which deals with landscape and cultural heritage.¹³¹

Moreover, also relevant in this regard are Art 32,¹³² dealing with people's health, and Art 44,¹³³ dealing with rational exploitation of the soil.¹³⁴

¹²⁹ In this regard, see, for example, G. Holzer, 'Die neue Ökoarchitektur der GAP und ihr Beitrag zum Klimaschutz', in R. Norer and G. Holzer eds, *Agrarrecht: Jahrbuch 2019* (Wien: NWV Verlag, 2019), 171-204; J. Martinez, 'Klimaschutz und nachhaltige Landwirtschaft. Rechtliche Herausforderungen', in X. Fang et al eds, *Nachhaltigkeit und Landwirtschaft in China und Deutschland: Eine rechtsvergleichende Perspektive* (Baden-Baden: Nomos, 2019), 101-114, G. Miribung, 'Lo sviluppo rurale nell'ambito della nuova Politica Agricola Comune (PAC): una prima analisi' *Atti dei georgofili 2019*, and G. Miribung, 'Agro-food production and climate change: Some reflections on the new CAP' *EFFL*, 126-137 (2020).

¹³⁰ See L. Costato and L. Russo, n 9 above, 275.

¹³¹ On this issue, see M. Cecchetti, '9' *Commentario alla Costituzione: Artt. 1 - 54* (Torino: UTET, 2006), 217-241.

¹³² It states: 'The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one shall be obliged to undergo particular health treatment except under the provisions of the law. The law cannot under any circumstances violate the limits imposed by respect for the human person'. On this issue, see, for example, A. Simoncini, 'Art 32' *Commentario alla Costituzione: Artt. 1 - 54* (Torino: UTET, 2006), 655-674.

¹³³ It states: 'For the purpose of securing the rational exploitation of the soil and to establish equity in social relationships, the law imposes obligations and constraints on private ownership of land, fixes limitations to the extension thereof according to region and agricultural zone, encourages and imposes land reclamation, the transformation of large estates and the re-organization of productive units; it assists small and medium-sized holdings'. On this issue, see, for example, F. Angelini, 'Art 44' *Commentario alla Costituzione: Artt. 1 - 54* (Torino: UTET, 2006), 902-914.

¹³⁴ On these issues, M. Pennasilico, 'Sviluppo sostenibile' n 30 above, 39; also consider A. Nervi, 'Beni comuni, ambiente e funzione del contratto' in M. Pennasilico et al eds, *Contratto e ambiente: L'analisi ecologica nel diritto contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2016), 35-60, 56. One can also argue from a general perspective that constitutionally protected and universally acknowledged freedom rights require sustainable behaviour. In this regard, it is highlighted that a 'just' basic order must be based on maximum equal freedom for individuals. This does not imply that all individuals can decide how they want to live with impunity. Such a universally justified claim to freedom also applies to future generations: They are holders of human rights, and thus, have a right to freedom. However, what if the foundations of life are currently damaged in such a way that our action no longer guarantees freedom from impairments to the minimum subsistence level, life and health of future human beings? What if our generation causes irreversible damage? As a consequence, freedom rights could no longer do what they are supposed to do, that is, guarantee secure protection against impairment. Accordingly, it is also argued that the elementary physical preconditions of freedom should be included when interpreting freedom rights. This should involve the existence of a reasonably stable resource base and a corresponding global climate. In fact, without this, there is no freedom. See F. Ekardt, 'Klimawandel, Menschenrechte und neues Freiheitsverständnis – Herausforderungen der politischen Ethik' 19 *Jahrbuch für Recht und Ethik/Annual Review of Law and Ethics*, 107-144 (2011). In general,

What about the Italian environmental act of 2006?¹³⁵ Here, Art 3 *quarter*, para 3, of the environment act determines only that

‘the principle of sustainable development must make it possible to identify a balanced relationship, within the inherited resources, between those to be saved and those to be transmitted, so that the dynamics of production and consumption also include the principle of solidarity to safeguard and improve the quality of the environment in the future’.

It adds that

‘the resolution of environmental issues must be sought and found in the perspective of ensuring sustainable development, so as to safeguard the proper functioning and evolution of natural ecosystems from the negative changes that can be produced by human activities’.

Still, how this should ultimately happen is not quite clear as the conflict between the various aspects of sustainability has not yet been resolved. One may argue that it is better to use a case-by-case approach instead of explicitly prioritizing environmental sustainability. This is correct; however, in the case of climate change, it does not seem helpful, especially as climate change appears to be occurring faster than expected.¹³⁶

Although the various norms, as considered above, do not exhaustively clarify what is ultimately meant by sustainability, they show that sustainability – and the idea of a long-term perspective – is a codified term and, as such, is of particular importance for agricultural activities and agro-food production. Moreover, if specific sustainability requirements are met, the activity is supported by different measures (eg subsidies). This supporting approach is followed by the Italian legislature, who not only must adhere to the European criteria in terms of

F. Ekardt, *Das Prinzip Nachhaltigkeit: Generationengerechtigkeit und globale Gerechtigkeit* (München: Verlag C.H. Beck, 3rd ed, 2014). Also consider *Urgenda v Netherlands*, where it states: “Urgenda and the State both agree that the emission of greenhouse gases, such as CO₂, entails serious risks for life on earth. Urgenda therefore wants the State to take action to achieve lower emissions sooner than within the time frame currently envisaged by the State. The Hague Court of Appeal shares Urgenda’s view on this matter. Considering the great dangers that are likely to occur, more ambitious measures have to be taken in the short term to reduce greenhouse gas emissions in order to protect the life and family life of citizens in the Netherlands. The Court of Appeal has based its ruling on the State’s legal duty to ensure the protection of the life and family life of citizens, also in the long term. This legal duty is enshrined in the European Convention of Human Rights (ECHR). The Court disagrees with the State that courts have no right to take decisions in this area. The Court has to apply directly effective provisions of treaties to which the Netherlands is party. These provisions form part of the Dutch legal order and even take precedence over deviating Dutch laws.

¹³⁵ See, in this context, A. Germanò et al, *Commento al Codice dell’ambiente* (Torino: Giappichelli, 2nd ed, 2013); also consider A. Germanò, ‘L’agricoltura nel codice alimentare’ *Diritto e giurisprudenza agraria, alimentare e dell’ambiente*, 349-354 (2006).

¹³⁶ See n 1 above.

agriculture and sustainability but also has determined, as explained in Chapter III Section 1, clear but still rather open criteria outlining what agricultural activities are and who can conduct them. The aim is to combine the necessities of agro-food production, environmental protection and globalised markets.¹³⁷ This approach shall contribute to making agro-food production durable in the long run and thus facilitate its sustainability, at least in its economic sense.

All these approaches and thoughts seem to acknowledge the undeniable, but they are not rigorous or – given the potential problems of climate change – courageous enough to really focus on what is necessary. Although there are no mandatory requirements/obligations, production standards, compliance with which is voluntary, can lead to ecologically sustainable food production. This is nowadays not unusual in practice and will now be discussed in Section 4 of this chapter.

4. Certification Schemes

The question as to whether agriculture is environmentally sustainable is not only a question of the specific legal framework but can also be a question of the voluntarily chosen quality standards of the products, compliance with which should help towards remaining competitive in the highly competitive market for agricultural products.¹³⁸ There are specifications defined by the legislature and specifications defined by other, usually private, organizations. One of the former is

¹³⁷ See L. Costato and L. Russo, n 9 above, 275, A. Germanò, *Manuale di diritto agrario* n 9 above, 281, A. Germanò and E. Rook Basile, *Manuale di diritto agrario comunitario* n 95 above, 405.

¹³⁸ See A. Germanò et al, *Diritto agroalimentare: Le regole del mercato degli alimenti e dell'informazione alimentare* (Torino: Giappichelli, 2nd ed, 2019), 127, and 167; see also A. Di Lauro, 'Labels, names and trade Marks', in L. Costato and F. Albinini eds, *European and global food law* (Milano: Wolters Kluwer, 2nd ed, 2016), 369-386 and L. Leone, *Organic regulation: A legal and policy journey between Europe and the United States* (Tricase: Libellula, 2019), A. Meisterernst, *Lebensmittelrecht* (München: C.H.Beck, 2019), 206. In general, A. Banterle et al, 'Environmental sustainability and the food system', in H. Bremmers and K. Purnhagen eds, *Regulating and managing food safety in the EU: A legal-economic perspective* (Cham: Springer, 2018), 57-88.

Anyone who puts effort into sustainability programmes will want to use their efforts to their own promotional advantage and inform the consumer about this. Any entity which wants to advertise its sustainability work should therefore plan its advertising with consideration of the legal framework. In this context, see, for example, Art 8 of the General Food Law Regulation (European Parliament and Council Regulation (EU) 2002/178 of 28 January 2002): It stipulates that food law aims to protect consumer interests and must offer consumers the opportunity to make an informed choice with regard to the food they consume. The following must be prevented: firstly, practices of fraud or deception; secondly, the adulteration of foodstuffs; and thirdly, all other practices which could mislead the consumer. In addition, the rules on presentation (Art 16) require that the labelling, advertising and presentation of foods or feeds, as regards their shape, appearance or packaging; the packaging materials used; the way they are arranged and in the context of their presentation and the information they disseminate, by whatever medium, must not mislead consumers. Similar rules can be found, for example, in the European Parliament and Council Regulation (EU) 2007/824 of 10 July 2007 (see Art 23) or European Parliament and Council Regulation (EU) 2018/848 (Art 30). On these issues, see A. Germanò, M.P. Ragionieri, and E. Rook Basile, n 138 above; F. Albinini, *Strumentario di diritto alimentare europea* (Milano: Wolters Kluwer, 4th ed, 2020), 229; A. Meisterernst, n 138 above, 208.

organic farming as defined by European law.¹³⁹ This is a system of sustainable food production that takes account of ecosystems. The production of food should therefore be carried out using production methods that are as gentle as possible, taking into account ecological considerations and the objectives of environmental protection and animal welfare.¹⁴⁰

The use of synthetic pesticides, mineral fertilisers, genetic engineering and hormones is strictly limited or prohibited. No flavour enhancers, artificial flavourings, sweeteners, colourings or preservatives may be added to organic products before they are sold.¹⁴¹ Organic farming is legally standardized; participating farms must be certified and externally controlled.¹⁴² Compared to conventional agriculture, the biodiversity in agriculture is on average one-third higher. Organic farming scores with a far more favourable nitrate balance, phosphate balance and pesticide balance. It leads to better soil quality but also requires more land to produce the same amount of food as conventional agriculture. The indirect effects of organic farming can be found in the containment of the excessive use of hormones and antibiotics in animal husbandry, which have negative effects on soil and water systems and the animals living there and which are also held responsible for antibiotic resistance in humans.¹⁴³

This legally protected, externally certified, controlled ecolabel is complemented by many other – voluntarily applied – ecolabels, such as those of the Rainforest Alliance (eg, sustainable coffee) or the Marine Stewardship Council (MSC; sustainable fishing). Some of these labels should also help to preserve ecologically valuable or identity-creating landscapes.¹⁴⁴ For example, the MSC has set itself the task of certifying sustainable fishing with its blue label, which provides consumers with information that the fish product comes from a responsibly

¹³⁹ On this issue, see, among others, A. Germanò and E. Rook Basile, *Manuale di diritto agrario comunitario* n 95 above, 299; A. Germanò, M.P. Ragionieri, and E. Rook Basile, n 138 above, 168; I. Canfora, *L'agricoltura biologica nel sistema agroalimentare: Profili giuridici* (Bari: Cacucci, 2002); E. Cristiani, 'Il metodo di produzione biologico', in L. Costato, A. Germanò and E. Rook Basile eds, *Trattato di diritto agrario: III*, (Torino: UTET, 2011), 81-102; I. Canfora, 'Organic foods', in L. Costato and F. Albinetti eds, n 138 above, 463-478; E. Cristiani, *La disciplina dell'agricoltura biologica fra tutela dell'ambiente e sicurezza alimentare* (Torino: Giappichelli, 2004); N. Lucifero, 'Il regolamento (Ue) 2018/848 sulla produzione biologica. Principi e regole del nuovo regime nel sistema del diritto agroalimentare europeo' *Rivista di diritto agrario*, I, 477-508 (2018).

¹⁴⁰ See recital 1 European Parliament and Council Regulation (EU) 834/2007.

¹⁴¹ See Arts 5 et seq. European Parliament and Council Regulation (EU) 834/2007. For references see n 139 above.

¹⁴² See recital 7 and Art 1 European Parliament and Council Regulation (EU) 834/2007. For details, see A. Germanò, M.P. Ragionieri and E. Rook Basile, n 138 above, 168.

¹⁴³ See tinyurl.com/chbfzbr (last visited 7 July 2020) and tinyurl.com/y4po8owr (last visited 7 July 2020). See also Art 3 European Parliament and Council Regulation (EU) 834/2007. For references, see n 139 above.

¹⁴⁴ See A. Germanò, M.P. Ragionieri and E. Rook Basile, n 138 above, 127 and 133, and 136. See also E. Cristiani and G. Strambi, 'Public and private standards. Official control', in L. Costato and F. Albinetti eds, n 138 above, 323-342, and U. Ermann et al, n 2 above, 90.

managed fishery and does not contribute to the problem of overfishing.¹⁴⁵

What the environmental labels have in common is that they promise or guarantee consumers high biological and, in some cases, also social production standards.¹⁴⁶ Yet, these specifications may vary. For example, compared to the requirements as determined by European Parliament and Council Regulation (EU) 2007/834 of 28 June 2007, the German label *Bioland*¹⁴⁷ has higher standards regarding, for example, the use of nitrogen fertilizer, maximum livestock numbers (and in this context maximum values for nitrogen arising) and the utilisation of copper.¹⁴⁸ Taken together, this may also lead to higher costs for the farmer.

We conclude that the possibilities provided for in the legal system to encourage POs to produce in an ecologically sustainable manner, currently, are based on voluntarism. In this context, however, the question can be raised as to whether an agricultural cooperative organised as a PO, by virtue of the activity carried out, is not obliged to view this activity in the context of climate change. This question is conclusive, especially since, as the analyses in Chapter III, Section 1 have shown, the activity is directly related to the environment and thus also to climatic conditions. As will be explained in the following section, this duty relates to the managers' duty of care. These analyses are relevant because, as mentioned,¹⁴⁹ agriculture is not only a perpetrator but also a victim of climate change. Thus, to what extent should the managers of an agricultural cooperative consider climate change when making their decisions? As seen, taking decisions requires considering all possible risks that may affect the business of the agricultural cooperative.

This is one of the issues that relates to the role of the defendant and that is dealt with in the next chapter. The other issue concerns the role of the PO as manager of the agro-food production chain (network manager). In my case study, this aspect is of importance because I stress that the contribution of an individual farmer will be too tiny of a portion of any damage. Yet, considering a necessary number of farmers whose behaviour is uniformly controlled by a central unit, as in the case of a PO, might lead to a correspondingly large scale of emissions. It is, therefore, a question of whether the network manager could be held responsible for the entirety of the damage.

Both questions refer to the role of the defendant and are examined in the next chapter; the analyses begin with the managers' duty of care.

¹⁴⁵ See tinyurl.com/yyew9erf (last visited 7 July 2020).

¹⁴⁶ However, not all of them are externally controlled. Some are even discredited for whitewashing or misleading and fraudulent advertising statements that suggest an eco-bonus but do not correspond to actual production methods (greenwashing).

¹⁴⁷ See tinyurl.com/y3qw53lm (last visited 7 July 2020).

¹⁴⁸ For a detailed comparison, see tinyurl.com/yyk8fz4e and tinyurl.com/y3rfd8zs (last visited 7 July 2020).

¹⁴⁹ See Chapter I.

IV. Second Step: Specific Issues Concerning the Defendant

1. On the Role of the Board: Climate Change Risks and Their Relevance for the Fulfilment of the Duty of Care

In order to answer the question of the role that climate change can or should play in the decision-making process of a PO, it is first necessary to determine who can take such action. In principle, this would be the board of directors in accordance with Art 2380 *bis* Civil Code. However, these are bound by the provisions of the statutes defined by the shareholders (farmer-members). If the statutes lead to a production method that is extremely harmful to the climate, the role of the general meeting of shareholders should also be considered. As will be mentioned in Section 2 of this chapter, in practice, there are various models of influence that can give members less or more say. In many cases, this concerns strategic decisions in which the members are also asked to exert influence. Yet, to simplify the discussion here, it is assumed here that the most significant actions are taken by the board of directors, in accordance with Art 2380 *bis* Civil Code, which contains a catch-all clause.¹⁵⁰ This raises the question as to how the PO shall be governed in order to avoid fault. As mentioned, this does not necessarily depend exclusively on the behaviour of the board members. However, we can conclude from the concept of the duty of care imposed on the board of directors which forms of conduct *should* not be culpable.

As explained in Chapter III, it is not mandatory for an agricultural cooperative, organized as a PO, to conduct its agro-food business in a climate-friendly manner; such obligations must be determined by the statutory mandate or other contracts. In this context, however, the question can be raised as to whether managers of an agricultural cooperative organised as a PO, by virtue of the activity they carry out and the diligence linked to it, are not obliged to view this activity in the context of climate change. This question is conclusive, especially since, as the analyses in Chapter III Section 1 have shown, the activity is directly related to the environment and thus also to climatic conditions. Thus, to what extent should the managers of an agricultural cooperative consider climate change when making their decisions? As seen, taking decisions requires considering all possible risks that may affect the business of the agricultural cooperative. The next section deals with this issue.

Art 2392 para 1 Civil Code regulates the liability of the members of the management organ (in regard to their company)¹⁵¹ and determines, for the

¹⁵⁰ Accordingly, the statutes explicitly define the competence of the general meeting and assign the remaining decisions to the organs. Art 2380 *bis* Civil Code states: 'The management of the company shall be carried out in compliance with the provision set forth in art 2086, second para, and shall be the exclusive responsibility of the directors, who shall carry out the operations necessary for the implementation of the corporate purpose'.

¹⁵¹ *In primis*, it refers to a behaviour that puts the cooperative/company as such in danger (because profits or the patrimony is diminished). This liability has a contractual nature.

applicable standard of due diligence, a qualified duty of due diligence.¹⁵² According to this rule, the members of the board must fulfil the duties required by law and statutes; in addition, the rule states that they are jointly liable for damages due to non-observance of these duties.¹⁵³ According to the law, the members of the board must fulfil their duties with the diligence required by the nature of their appointment and their specified tasks.¹⁵⁴ This implies that diligence relates to the level of care one may expect from a reasonable manager in a similar position. This does not imply that standardised criteria can be applied. Rather, one has to consider how diligence is related to the position assigned.¹⁵⁵

The duty of care established in this way requires board members to make decisions on a well-informed and reasoned basis (from their specific knowledge), considering all the risks involved.¹⁵⁶ This obligation is violated when decisions are made which are irrational and incompatible with entrepreneurial logic/thinking. In other words, managers may be held responsible for their decisions

¹⁵² See G. Alpa, *La responsabilità civile* n 47 above, 155.

¹⁵³ The law contains specific provisions that refer to self-dealing, corporate opportunities and prohibition of competition. In this context, one has to consider Art 2391 para 5 Civil Code, according to which a member of the organ is also liable for damages arising from the use of data, information or business opportunities in connection with his or her office. It is important to stress that this use must be made for his or her benefit or the benefit of third parties. However, the Italian Civil Code does not explicitly address duties of confidentiality. It is argued that they form part of the general duty of loyalty as determined by law. Regarding the duties of confidentiality, specific limits can be found in the law. For example, it is possible to refer to the competence of auditors in requiring specific information necessary to fulfil their tasks. For details, P.M. Sanfilippo, 'Gli amministratori' n 6 above, 515; R. Ricci, 'Art 2392', in P. Cendon ed, *Commentario al codice civile artt. 2363-2396. Società per azioni. Assemblea, amministratori* (Milano: Giuffrè, 2010), 691-705, 691; L. Sambucci, 'Art 2392', in D.U. Santosuosso ed, *Artt. 2379-2451* (Torino: UTET, 2015), 361-383, 361.

¹⁵⁴ Here, diligence does not refer to the medium or generic diligence, but rather, to diligence required by the nature of the task. As determined according to Art 1176 para 2 Civil Code. P.M. Sanfilippo, 'Gli amministratori' n 6 above, 516.

The duty of care obliges the members of the board to act in a diligent way. Italian law distinguishes between a general duty of care and specific duties of care. In the latter case, the required behaviour is determined by law, whereas in the former case, it is general in nature. P.M. Sanfilippo, 'Gli amministratori' n 6 above, 516; L. Sambucci, n 153 above, 361.

¹⁵⁵ For instance, one can consider the reasons for appointing a specific member, his competences, or the fact that a member is assisted by a general manager. P.M. Sanfilippo, 'Gli amministratori' n 6 above, 516; L. Sambucci, n 153 above, 366. Diligence is considered a subjective duty, and it is necessary to consider how a member of the board conceives the interests of a company when he makes a specific decision. Therefore, a court cannot conduct a review of the decision on different grounds, and it must also consider the time and circumstances when a decision has been made. See P.M. Sanfilippo, 'Gli amministratori' n 6 above, 517; L. Sambucci, n 153 above, 366.

¹⁵⁶ According to Art 2381 para 6 Civil Code, members are required to act in an informed way. In addition, one can mention Art 2392 para 2 Civil Code. It requires members to do everything in their power to prevent harmful acts or eliminate or reduce harmful consequences. Members of the organ are jointly liable. Exemptions are given if the functions are assigned exclusively to one or more members of the organ. However, they are jointly liable in any case, if they were aware of harmful acts but did not do everything in their power to prevent them or did not try to eliminate or reduce the harmful consequences. Then, the law provides for rules excluding personal liability.

if those decisions were absolutely irrational, the managers did not carry out suitable preliminary investigations or conflicts of interest arose.¹⁵⁷ Concerning my investigation, this implies, in short, that the members of the board¹⁵⁸ of the agricultural cooperative must be aware of the risks to which the PO might be exposed. This includes information on whether these risks can have a negative or positive effect on the business.¹⁵⁹ Therefore, board members need to think about whether something needs to be done to reduce this risk or, alternatively, how to gain from its consequences.

Diligent decision making requires contrasting the foreseeable risk of damage with the potential benefit that could result from a non-modified activity. Such an assessment may include factors such as the extent of the risk, the degree of likelihood of its occurrence, the costs involved or the difficulty/inconvenience of taking measures. Considering climate change risks, this should be a complex task requiring profound expertise.¹⁶⁰

A weighty argument against the violation of due diligence is that, normally, emitters of GHGs have an authorisation issued by a public body. For example, in the EU, projects with severe consequences for the environment are subject to an environmental impact assessment.¹⁶¹ This includes the consideration of possible consequences for the climate. Considering that the issuer complies with the requirements set out in the authorisation, it seems difficult to prove the breach of duty of care. Here, one could argue that the circumstances of a specific case, which must be assessed by a judge on a case-by-case basis, may require a higher and more specific duty of care. This could mean that the public permit/ approval of operating facilities does not automatically exempt the manager from civil liability. For example, it is possible that scientific knowledge may have changed and come to point to new risks, with the consequence that the agency, at the moment of the authorisation, was simply unable to foresee specific risks. Thus, it seems

¹⁵⁷ The concept of diligence is the instrument for determining whether the duties have been fulfilled. The standard used is gross negligence. In the event of legal proceedings, the plaintiff – here, the PO/agricultural cooperative – must prove the circumstances, which, in a given situation, determine the content of the duty of care. See P.M. Sanfilippo, 'Gli amministratori' n 6 above, 517; L. Sambucci, n 153 above, 373. Also consider F. Vassalli, 'L'art. 2392 novellato e la valutazione della diligenza degli amministratori', in G. Scognamiglio ed, *Profili e problemi dell'amministrazione nella riforma delle società* (Milano: Giuffrè, 2003), 23-39, 34; A. Tina, *L'esonero da responsabilità degli amministratori di s.p.a* (Milano: Giuffrè, 2008), 53 and 72, and G. Miribung, 'Quale Business Judgment Rule? Osservazioni dall'ordinamento giuridico italiano e austriaco', in F.A. Schurr and M. Umlauf eds, *Festschrift für Bernhard Eccher* (Wien: Verlag Österreich, 2017), 709-722.

¹⁵⁸ Both dependent and independent ones. Even though to a different extent: all of them, however, must be combined to safeguard the interests of the company.

¹⁵⁹ See also Art 2428 para 3 no 6 Civil Code.

¹⁶⁰ See M. Faure and M. Peeters, 'Liability and Climate Change', in M. Faure and M. Peeters eds, *Oxford Research Encyclopedia of Climate Science* (Oxford: Oxford University Press, 2019), 1-30, 14.

¹⁶¹ In application of Council Directive 85/337/EEC of 27 June 1985 as amended European Parliament and Council Directive 2011/92/EU of 13 December 2011.

legitimate to ask whether the authorisation can completely exclude due diligence. However, this should be the case if the facilities produce their typical known effects.¹⁶²

To mitigate the effects of GHG emissions, the EU legislator has implemented a cap-and-trade regime. Accordingly, issuers that possess the necessary pollution rights¹⁶³ clearly act in accordance with their obligations as otherwise these rights would be of little use. With this, a higher level of duty of care seems precluded. The EU emission trading system, however, does not apply to agriculture and covers ‘only’ power plants and factories, which together account for almost half of all GHG emissions, whereas in transport and agriculture, where CO₂ emissions are also high, there is no need to buy certificates.¹⁶⁴ Thus, is it possible that a higher level of duty of care applies here? Not necessarily.

As mentioned, the law requires that the members of the board must use a standard of diligence that corresponds to the nature of the task. In other words, how would a reasonable board member in a similar position – in our case, a manager of an agro-food-producing cooperative/company – decide? At this point, it is helpful to recall that the European Commission, in the Italian Version of the Commission Regulation (EC) 1750/1999 defining Good Agriculture/Farming Practices (Art 28), expressly refers to diligence, determining that this concept refers to ‘the standard of farming which a reasonable (*diligente*)¹⁶⁵ farmer would follow in the region concerned’. Thus, could this concept have some relevance for the diligence as determined by Art 2392 Civil Code, especially as POs organised as cooperatives could also be considered as farmers? More generally, can good agricultural practice be an example of how food production can be linked to

¹⁶² Yet, these the typical effects – rising sea levels, glacier melt – cause the current climate change lawsuits. In this regard, B. Burtscher and M. Spitzer, ‘Haftung für Klimaschäden’ 21 *Österreichische Juristenzeitschrift*, 945-953 (2017).

¹⁶³ Pollution rights (or emission permits) include companies’ right to emit a certain amount of carbon dioxide (per year). If the concerned company produces fewer emissions, it can sell its permits to other companies. However, if it pollutes more, it must buy permits from other companies (or the government). This leads to a pollution permit market where the price is determined by supply and demand. The aim is creating market incentives for companies to pollute less, resulting in lower external costs. For further information, see, among many others, D.A. Starrett, ‘Property Rights, Public Goods and the Environment’, in K.G. Mäler and J.R. Vincent eds, *Handbook of Environmental Economics: Volume 1: Environmental degradation and institutional responses* (Burlington: Elsevier, 2003) 97-125.

¹⁶⁴ Although including agriculture in a cap-and-trade regime would be possible. For the various solutions, consider Bundesministerium für Ernährung und Landwirtschaft, *Klimaschutz in der Land- und Forstwirtschaft sowie den nachgelagerten Bereichen Ernährung und Holzverwendung: Gutachten des Wissenschaftlichen Beirats für Agrarpolitik, Ernährung und gesundheitlichen Verbraucherschutz und des Wissenschaftlichen Beirats für Waldpolitik beim Bundesministerium für Ernährung und Landwirtschaft* (Berlin: 2016), 81. Also consider B. Lünenbürger, ‘Klimaschutz und Emissionshandel in der Landwirtschaft’, available at tinyurl.com/y386m522 (last visited 7 July 2020).

¹⁶⁵ The Italian Version is ‘*l’insieme dei metodi culturali che un agricoltore diligente impiegherebbe nella regione interessata*’. The German Version uses the term *verantwortungsbewußt*.

sustainability? Here, it seems worthwhile to briefly consider the debates about the meaning of this notion conducted in Germany,¹⁶⁶ especially as there was no similar discussion in Italy. In Germany, good agricultural practice is also referred to as *ordnungsgemäße Landwirtschaft*.

The debate essentially revolved around the question of whether (and to what extent) ecological requirements are to be included in the definition or whether (and to what extent) they are already inherent in the term. The position that accommodated farmers' interests most subsumed the *status quo* under this notion. However, this was not correct. In fact, it was not just the misconduct of a few 'black environmental sheep' among farmers; it was precisely the farmers' practice – and thus, the *status quo* – that contributed to the known problems in the environment.¹⁶⁷ In other words, it was the cause for the adaptation of the law.

It is clear nowadays that good agricultural practice requires the observance of scientifically proven and field-proven agricultural and economic knowledge. With this observation, however, the content of this concept is not fully explained. Like any other activity, agricultural activity must also be integrated into the legal system. Thus, good practice must also mean 'according to the legal order'. It would not make sense to assume that the legislature wishes to classify an act as good practice although contrary to its own standards. From this, it follows that environmental elements must be included in the term – if they are determined by the law.¹⁶⁸ Thus, good agricultural practice requires compliance with law as well as the observance of scientific evidence proven in practice (*art rules*) or, in other words, the technically correct execution of the activities. Therefore, the concept as such is flexible, inasmuch as not only can new legal rules develop its content but also in that new scientific evidence can lead to better techniques.¹⁶⁹

Basically, this outcome also applies to the Italian norm. In fact, the word 'diligence' as used by the concept of Good Agricultural Practices¹⁷⁰ is in line with the criteria as determined by Art 2392 Civil Code. The discretion contained therein takes place in a framework determined by the observance of law and techniques that other board members would also apply. The main difference is that diligence linked to good agriculture practice specifically requires techniques

¹⁶⁶ For the various debates, consider F. Paul, 'Ordnungsgemäße Landwirtschaft - Stand der Diskussion' *Berichte über die Landwirtschaft* 75, 4, 539-561 (1997) and C. Grimm and R. Norer, *Agrarrecht* (München: C.H. Beck, 4th ed, 2015), 11.

¹⁶⁷ Especially water pollution.

¹⁶⁸ These include, for example, the provisions of the waste, water, phytosanitary and nature conservation laws, regardless of whether they are contained in laws, regulations or statutes.

¹⁶⁹ This is the typical consequence and often even the reason for the use of indefinite legal concepts/terms. Legislators are increasingly resorting to this method, especially in areas with strong development, so that they do not have to keep up with rapid changes, for example, in the field of technology or even in the area of environmental protection. In this regard, C. Grimm and R. Norer, n 166 above, 13.

¹⁷⁰ Also consider the Italian Code of Good Agricultural Practices (decreto ministeriale 19 April 1999). See tinyurl.com/y64f6dv5 (last visited 7 July 2020).

developed in line with scientific evidence. This means that scientific evidence alone is not enough; it is necessary that new scientific evidence and the consequences for production are tested in practice. It seems reasonable that a board member of an agro-food cooperative would consider this knowledge because modern food production is strongly driven by new scientific evidence. This concerns new production systems and techniques as well as new types of food.

In terms of a commitment to climate-friendly action, this is ultimately of no legal value. Even if one could argue that a diligent or responsible farmer should especially use climate-friendly techniques, the legal term 'business purpose', which must be observed in this context, is too vague and openly formulated to ensure that an agricultural cooperative/PO, or better its managers, ultimately behave/s responsibly enough. Nor should it be forgotten that climate change can also create new business opportunities, which as such can be covered by the business purpose of a PO according to its statutes. In fact, it has been shown that due diligence serves as a means of determining whether certain duties have been fulfilled (as a reference, gross negligence is used).¹⁷¹ In our example, this implies that, first of all, the board members must be aware of the risks to which a PO may be exposed. In this regard, a crucial question is whether specific risks are sufficiently predictable and what this could imply¹⁷² – and this opens the door to the question of the extent to which climate change risks could be relevant to the fulfilment of the duty of care.

Now, as already indicated, the members of the board are not legally prohibited from considering climate change and their risks related to it in terms of economic, environmental and social issues as these risks can be material to the interests of the cooperative/company. They may, indeed, be not only foreseeable risks for the cooperative/company and its business model but also specific corporate opportunities. Thus, there could be good arguments that members of the board should not only consider the effect of these risks on the business of the cooperative/company but that they also must do so.

The way in which risk assessment must be performed strongly depends on the business model. Here, I consider the example of a PO using the legal form of an agricultural cooperative and leading an organised agro-food production chain. Given the recent scientific developments providing clear evidence that climate change is taking place, it could be difficult for members of the board to neglect risks that could significantly affect their companies' business as a result of climate change. As they must make their decisions on a well-informed basis, they should ask how to exercise their due diligence on risks related to climate change. This means that they must assess what the effect of such decisions on the business of the company may be. In other words, well-informed decision making implies thinking about how they should exercise their discretion (especially with regard to

¹⁷¹ See Chapter II.

¹⁷² See P.M. Sanfilippo, 'Gli amministratori' n 6 above, 516.

external stakeholders) and, then, which measures are necessary. This can be done by conducting a specific risk analysis¹⁷³ that first reviews how climate change affects the company's business. The crucial question is as follows: How will the business develop considering the two degree Celsius scenario (in the given timeframe). This also requires evaluating which costs occur if no action is taken.

With regard to the information process that management must direct, reference must be made to Art 2428 Civil Code; according to Art 2428 para 2 Civil Code,¹⁷⁴ the annual report of the management organ must contain a faithful, balanced and comprehensive analysis of the company's situation and of its operating performance and results.¹⁷⁵ The analysis must be consistent with the size and complexity of the cooperative/company's business and must contain (to the extent necessary for an understanding of the company's position and the performance and result of its operations) financial and, where appropriate, nonfinancial performance indicators. This depends on the specific business activity of the company and may include relevant environmental information.¹⁷⁶ Thus, one can argue that the disclosure requirements/obligations should also include information on risks arising from climate change, including information on when and how these risks can occur.

Even though this norm solely installs a reporting system that, ultimately, will not be especially relevant regarding environmental issues and climate change,¹⁷⁷ based on this reporting system, it might be possible to find a hook to indicate that the managers of the PO have understood the connection between the agricultural activity carried out and anthropogenic climate change. But at the same time it must be recalled that, currently, under Italian tort/business law, there is no clear obligation for an agricultural cooperative (organised as a PO), and here, for its managers, to establish a climate-friendly business strategy.

One explanation for this may be that food security is given special attention in the context of climate change.¹⁷⁸ I refer to Art 2 of the Paris Agreement,

¹⁷³ Including scenario analysis.

¹⁷⁴ It contains disclosure requirements for capital societies, and in general, requires description of a company's main risks and uncertainties. In addition, it calls for the description of non-financial performance indicators – for example, information on the environment or workers, insofar as they are important to understanding business development – without, however, requiring integration of environmental concerns into business decisions. For details, see L. de Angelis, 'Art 2428', in D.U. Santosuosso ed, *Artt. 2379-2451* n 153 above, 1050-1056 and P. Balzarini, 'Art 2428', in P. Cendon ed, *Commentario al codice civile. Artt. 2421-2451. Società per azioni. Libri sociali, bilancio, modificazioni dello statuto. Società con partecipazione* (Milano: Giuffrè, 2010), 239-256.

¹⁷⁵ As a whole and in the various sectors in which it has operated, including through subsidiaries.

¹⁷⁶ Where appropriate, the analysis should include references to and additional clarifications of the amounts disclosed in the financial statements. Art 2428 para 2, last sent. Civil Code.

¹⁷⁷ See B. Sjaafjell, n 5 above, 61.

¹⁷⁸ On this issue, see S. Rahmstorf and H.J. Schellnhuber, *Der Klimawandel* n 81 above, 74; G. Miribung, *Agro-food production and climate change: Some reflections on the new CAP* n 129 above; FAO, *Climate change, agriculture and food security* (Roma: FAO, 2016). For

which states that the measures to be taken regarding climate change adaptation must not endanger food production. No reference is made to the way in which food is produced. If we now consider that in the year 2050 there will be about 9.7 billion people living on Earth,¹⁷⁹ all of whom will want to be fed, then all food producers will have to supply more products than at present – unless we, as humanity, substantially change our consumption of food (and with it the waste of food; at present about 30% of food is thrown away¹⁸⁰).¹⁸¹ This consumption behaviour will presumably lead to higher resource utilisation and probably also to higher emissions. A similar conclusion is reached when analysing Art 5 of the new CAP Strategic Plan Regulation. Its requirements also demand that food production be secured. In view of this necessity, only farmer-members (by a specific statutory amendment) can urge their PO (and its managers) to make more than the legally required contribution to climate change control. From this follows that a specific duty of care in line with environmental sustainability exists only within the given legal conditions (as demonstrated, there are many elements in the existing legal framework that obligates consideration of this aspect, yet, none of them establishes a concrete duty to conduct business in a climate-friendly manner). Thus, if one asks whether a PO would not have to produce more eco-sustainably on its own initiative, that is, voluntarily (on one's own authority/responsibility), in order to make an – appropriate – contribution as an emitter to mitigating climate change, and if it does not do so, whether it could then be held liable for climate damage, then the answer is that the only obligation to do so can be imposed by the drafters of the PO's statutes, that is, the farmer-members.

2. Could the Producer Organization Be Blamed? Some Suggestions from Network Theory

As this study specifically addresses the liability of a PO, which, as mentioned in Chapter I, can be considered as a network where the hub strongly influences the behaviour of the participating network partners, it can also be questioned whether this constellation gives rise to some kind of network liability. This question is salient because the hub firm – the cooperative acknowledged as a PO – could potentially influence the production process.¹⁸² Regarding tightly

specific information on food security, see, eg, A. Germanò and E. Rook Basile, *Manuale di diritto agrario comunitario* n 95 above, 105; F. Albinetti, *Strumentario di diritto alimentare europea* n 138 above, chapter 16; see also FAO, *The state of food security and nutrition in the world: Safeguarding against economic slowdowns and downturns* (Roma: FAO, 2019).

¹⁷⁹ See tinyurl.com/yytfyqhx (last visited 7 July 2020).

¹⁸⁰ See tinyurl.com/kthb5ws (last visited 7 July 2020).

¹⁸¹ On these issues, see FAO, *Climate change, agriculture and food security*

¹⁸² In (interdisciplinary) legal thinking, network theory is used for analysing, among other things, the dynamics of franchise systems and virtual enterprises (see, for example, G. Teubner, 'Verbund', 'Verband' oder 'Verkehr'? Zur Außenhaftung von Franchise-Systemen' *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht*, 154, 295-324 (1990); G. Teubner and K. Aedtner, 'Virtuelle Unternehmen: Haftungsprobleme in ein- und mehrstufigen Netzwerken' 6 *Kölner Schrift*

organised sales systems,¹⁸³ it is thoroughly argued that, in practice, they are often conceived as a unit of action and, simultaneously, a variety of actions. Such networks cannot be accommodated on the traditional scale between contract and organization because, in practice, individual and collective elements can gain in importance simultaneously.¹⁸⁴

From an economic point of view, all transactions are simultaneously oriented towards profits for both the network and individual actors (profit sharing). The result of the combination of these apparently opposing aspects is self-regulation based on a double orientation of action.¹⁸⁵ This double orientation acts as a constraint – insofar as all transactions have to meet the double test – and at the same time, an incentive – insofar as network advantages are linked with individual advantages. Thus, networks should be conceived as institutions ‘beyond’ contract and organization. With this view, the logic of networks becomes apparent and reflects a public debate that often claims to attribute the responsibility for one action to the organization and individual unit at the same time.¹⁸⁶

In my opinion, these observations on network dynamics are in line with the basic orientation of POs. They not only highlight the importance of the principle

zum Wirtschaftsrecht, 1-9 (2015), as well as regarding production chains (see, for example, F. Cafaggi and P. Iamiceli eds, *Inter-firm networks in the European wine industry* (European University Institute, 2010); F. Cafaggi and P. Iamiceli, ‘Supply chains, contractual governance and certification regimes’ *European Journal of Law and Economics*, 37, 1, 131-173 (2014) and F. Cafaggi and P. Iamiceli, ‘Contracting in global supply chains and cooperative remedies’ *Uniform Law Review* 20, 2-3 135-179 (2015)); moreover, in contract law, it is employed to designate contractual associations in bank payment transactions (see W. Möschel, ‘Dogmatische Strukturen des bargeldlosen Zahlungsverkehrs’ *Archiv für civilistische Praxis*, 186, 187-236 (1986).

¹⁸³ For example, franchise systems. See n 149 above.

¹⁸⁴ See G. Teubner and H. Collins, n 23 above, 77. On this issue, see also M. Cian, ‘La nuova legge sull’affiliazione commerciale (l. 6 maggio 2004, n. 129)’ *Le nuove leggi civili commentate*, V, 1153-1182, 1157 (2004).

¹⁸⁵ As mentioned above, this double nature is also discussed in cooperative theory.

¹⁸⁶ See G. Teubner, n 182 above, 309; G. Teubner and H. Collins, n 23 above, 241. In legal theory, we are commonly accustomed to seeing the relationship between contractual and corporate elements as a zero-sum game in which one part always wins at the expense of the other. In the transition from the short-term exchange contract to the long-term relational contract and private-law cooperation, we regularly observe that collective elements increase in weight precisely to the extent that individual elements lose weight. Networks are characterised by a fixed institutionalised difference between market mechanisms and organizational mechanisms, making it possible to strengthen contractual and organizational elements simultaneously. It can be said that market principles penetrate into the firm’s resource allocation and organizational principles creep into the market allocation. Interpenetration occurs to remedy the failure of pure principles in the market or organization. Thus, it is necessary to firmly recognise this aspect, which provides the key for a legal definition adequate for the concept of a network. What has been said about purpose orientation is also discussed concerning the attribution of action, or in legal terms, liability. Should this double attribution also provide the model for a network-compatible liability? It seems that indirect behaviour control by means of deterrence (through liability law) can only affect the centre in the network - which must consider the interests of both the chain and single farmer - if it can affect the double orientation of network action. See G. Teubner, n 182 above, 309; G. Teubner and H. Collins, n 23 above, 241.

of solidarity but also refer to persons responsible for the damage – instead of using a narrower concept, such as producers. As mentioned, the ‘hub’ can have different means of influencing the production; due to the aforementioned information asymmetry, it may control what is produced as well as the quality of the products. This strong position is reinforced by the legal obligation to belong to only one PO and the possibility of imposing sanctions for non-compliance with the statutes or other rules. It may also limit/make the PO refrain from adopting new production processes because it possesses the mark or geographic indications that label the products. These signs, especially if they are strong and are, therefore, of economic value, may favour entrepreneurial decisions pushing towards conservation instead of innovation.

Studies show that strong integration of farmer-members within a PO enhances the efficiency and effectiveness of the whole production stage and leads to improved competitiveness.¹⁸⁷ Particular drivers are, specifically, delivery contracts, operational programmes and supply contracts. By means of these instruments, farmer-members are urged to observe rules about what shall be produced and with what kind of quality. This strongly interferes with their own entrepreneurial discretion, that is, this strongly limits their entrepreneurial discretion.

An example to illustrate these possible dynamics is Art 170 European Parliament and Council Regulation (EU) 2013/1308 of 17 December 2013, which allows a PO in the beef sector to negotiate contracts on behalf of its members. These negotiations may include all relevant conditions – price, quantities, quality, payment deadlines and agreements on the collection and delivery of products.¹⁸⁸ This can have a significant impact on sustainable production. In fact, in order for Art 170 to apply, a PO must have been formally recognized in accordance with Art 152 para 1 European Parliament and Council Regulation (EU) 1308/2013. A prerequisite for this recognition may be that the PO has the objective of promoting environmentally sound cultivation and production methods and provides technical assistance in this respect. More generally, the aim of the PO may also be to contribute to the sustainable use of natural resources and to combating climate change. In our example, the PO (and its farmer-members) should thus produce ecologically sustainable.

¹⁸⁷ See Ecorys and Wageningen Economic Research, ‘Study on Producer Organisations and their activities in the olive oil, beef and veal and arable crops sectors’ and J. Bijman et al, *Support for Farmers’ Cooperatives* n 18 above, 56 and 110; see also K. van Herck, *Assessing efficiencies generated by agricultural producer organisations* (Luxembourg: Publications Office, 2014) and F. Montanari et al, *Study of the best ways for producer organisations to be formed, carry out their activities and be supported* (Brussels, 2019). On this issue, see also M.E. Koopmans et al, ‘The role of multi-actor governance in aligning farm modernization and sustainable rural development’ *Journal of Rural Studies*, 59, 252–262 (2018).

¹⁸⁸ On this issue, see European Commission, ‘Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors’ (2015), available at urly.it/371_s.

For Art 170 to be applicable to a PO, the objectives shall be (a) the concentration of supply, (b) the marketing of members' production or (c) the optimisation of production costs.¹⁸⁹ These objectives specify the possibilities in contract negotiations for products – which, as explained above, in our example are to be made in accordance with ecological sustainability criteria – and are met if the resulting integration of activities leads to significant efficiency gains. This is possible, for example, through joint advertising and can be illustrated by the example of the development and marketing of a higher value – that is to say biological – product. If a higher value product (for example, organically produced beef) is to be produced, joint advertising is part of the marketing of this integrated sales strategy. In other words, joint advertising is one of several activities for implementing this integrated sales strategy.¹⁹⁰

Thus, it seems possible for the PO to differentiate the product¹⁹¹ from competitors' products according to, for example, feed, production system, place of origin or breed. This makes it possible for the PO to define the specifications for the product and also to ensure compliance with them.¹⁹² In order to do this, it is likely that appropriate specifications will be developed, but it will also be necessary to plan the production process and quality controls in relation to these specifications. Similarly, the necessary equipment must be procured to ensure that these specifications are complied with along the whole production chain.¹⁹³

As a first interim result, it can therefore be stated that the PO – in its function as a network hub – has considerable influence in the actual design of the entire production chain. Yet, such a concerted action is only allowed if the organization meets certain democratic requirements.¹⁹⁴ For this reason it can be argued that the farmers' members are involved in the decision-making process and are not ultimately pushed to take measures that run counter to their own convictions and values. Such concerted behaviour leads to economies of scale, which in turn translate into cost and risk reduction. If, however, in this particular case, the application of the network liability perspective is denied, risk reduction also implies a *risk splitting* with the consequence that not the total volume of emissions and thus not the total extent of damage has to be taken into account but only

¹⁸⁹ The difference between the activities referred to in Arts 152 para 1 letter c (ii) and 170 European Parliament and Council Regulation (EU) 1308/2013, both of which aim to concentrate supply and market the production of their members, is probably that in the second case the products do not have to be transferred to the ownership of the PO.

¹⁹⁰ See European Commission, 'Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors' 19 and 22.

¹⁹¹ Their members products. See L. Costato and L. Russo, n 9 above, 163.

¹⁹² Due to Arts 170 and 152 para 1 letter c (ii) and (v) European Parliament and Council Regulation (EU) 1308/2013.

¹⁹³ See European Commission, 'Guidelines' n 190 above, 22.

¹⁹⁴ According to Art 153 para 2 letter c, European Parliament and Council Regulation (EU) 1308/2013, 'the statutes of a producer organisation shall also provide for rules enabling the producer members to scrutinise democratically their organisation and its decisions'.

that extent of damage which is related to the activity of the individual farmer member.¹⁹⁵ This illustrates the complexity of governance and the resulting responsibility. Due to the legal requirements, there is thus influence from above, that is, from the managers who negotiate contracts within the framework of the strategic requirements, as well as influence from below due to the democratically oriented co-determination rights. This relationship will now be further analyzed.

In general, it has been observed that there has been a gradual process of delegation of operational decisions to cooperative management or the management of subsidiaries that focus on processing and marketing of final consumer products. Moreover, it is highlighted that members have delegated decision rights to a Board of Directors, which is the primary body to decide on the strategy and policies of the cooperative. In fact, in most cooperatives the actual management of the cooperative firm is left to professional managers.¹⁹⁶ The way decision rights are allocated between the board and the managers is thus of crucial relevance also because managers normally require enough room for entrepreneurial decisions.¹⁹⁷ This is necessary to foster competitiveness and to evaluate new strategic directions. Moreover, farmer-members delegate decision making to the Board of Directors, but still participate – by delegation – in the decision making process.¹⁹⁸ Limiting the entrepreneurial discretion of the farmer-members is further incentivised because strong leadership decreases coordination costs. In other words,

‘a strong central coordinator enables the group to save on both total transaction information transmission and decision-making costs. The leader contributes to saving on internal transaction and coordination costs and thus is expected to have a positive impact on the likelihood of the formation of successful POs’.¹⁹⁹

I assume that the more competitive the POs, the more farmers are – probably – willing to limit their entrepreneurial discretion.

This willingness for self-restraint is also influenced by consumer expectations. In this regard, too, the PO may be in a strong/dominant position in relation to the farmers because it is the former that is in touch with retailers and consumers

¹⁹⁵ In extreme cases, one could – perhaps – also argue that in doing so the disclosure of the cause of the damage is knowingly distorted.

¹⁹⁶ See C. Iliopoulos, ‘Ownership, Governance and Related Trade-Offs in Agricultural Cooperatives’ 2(4) *The Dovenschmidt Quarterly*, 159-167, 161 (2014). See also M.L. Cook and C. Iliopoulos, ‘Generic solutions to coordination and organizational costs: informing cooperative longevity’ *Journal on Chain and Network Science* 16, 1, 19-27 (2016) and F. Chaddad and C. Iliopoulos, ‘Control Rights, Governance, and the Costs of Ownership in Agricultural Cooperatives’ *Agribusiness* 29, 1, 3-22 (2013).

¹⁹⁷ See Chapter III Section 2 and Chapter IV, Section 1.

¹⁹⁸ Thus, decisions are shared between the PO and the farmer-members. Should not the same approach also be applied to liability?

¹⁹⁹ See F. Montanari et al, *Study* n 187 above 115.

and thus possesses a valuable information advantage, allowing it to determine the farmers' behaviour.²⁰⁰ In other words,

‘the monitoring of accurate, timely and relevant information allows a PO to continually enhance its competitiveness not only through improving its interaction with its members but also with suppliers and buyers when individual producers, often, do not have time to perform such monitoring’.²⁰¹

The practical importance of this position is very well demonstrated in the above example, and all these observations and comments clearly show that the PO, in its two essential functions as (a) information provider (and let it be remembered: he/she who advises, leads) and (b) decision maker, is therefore of central importance for the smooth functioning of the entire production chain and for the behaviour of the individual farmer. This also shows the complexity of the application of Art 2428 para 2 Civil Code, which, as seen, requires the managers of an agricultural cooperative/PO to conduct a risk analysis consistent with the size and complexity of the business.²⁰² Are they not in a position of superiority – here in particular in respect to the farmer-members – because they are in possession of privileged information? Are they not the persons who can foresee or prevent damage due to environmental circumstances?²⁰³

Yet, if one really wants to demonstrate network liability in a given case, it will be inevitable to show how, in practice, decisions are ultimately made and how orders trickle down from the top to the bottom.²⁰⁴ To discuss this by way of example, I refer to the dairy sector. Even if in this case the Regulation does not specifically mention sustainability aspects as specific objectives that a PO operating in the dairy sector has to meet in order to be recognised (as explained in Chapter III, Section 2), in practice the production of organic milk is often part of the business strategy of a PO. This is in line with the objectives mentioned in Art 152 para 2 European Parliament and Council Regulation (EU) 1308/2013. In these cases, specific labels are often used to demonstrate the high quality of the product.

Let us assume that an Italian dairy cooperative (recognised as a PO) produces a certain amount of organic milk in accordance with the relevant European legal requirements; part of the milk is also exported to Germany. This ensures that the milk produced can be sold on the market at a certain price. In addition, ‘our’ PO also processes milk produced according to the traditional production method (conventional production). This can also be sold on the market at a certain price, which is however considerably less than the price paid for organic milk.

²⁰⁰ See Chapter I.

²⁰¹ See F. Montanari et al, *Study* n 187 above, 117.

²⁰² See Chapter III Section 3.

²⁰³ See G. Alpa, *La responsabilità civile* n 47 above, 163.

²⁰⁴ Studies show that in practice there are many deviations from the basic internal governance structure as determined by law using non-mandatory clauses. See n 196 above.

Then I assume that, for strategic reasons (eg, to remain competitive), the managers of the PO decide – due to their competencies in line with the business purpose of the PO – that the production of organic milk shall comply with the specifications developed by the organization *Bioland*, which go (as mentioned in Chapter III, Section IV) beyond those developed by the European legislature. This could be necessary to be able to continue to sell organic milk successfully in this increasingly competitive organic milk market. The managers argue convincingly that the EU requirements are no longer sufficient to defend the market position.

Such far-reaching sales strategies are, in my opinion, covered by the European law, which defines objectives that are rather wide in content. As explained in Chapter III, Section 2, a PO working in the milk sector shall pursue one or more of the following objectives: (a) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity; and/or (b) concentrating the supply and placing on the market the products produced by its members; and/or (c) optimising production costs and stabilizing producer prices. I argue that due to the far-reaching competencies provided by Art 2380 bis of the Italian Civil Code, it seems quite possible that the managers of the cooperative/PO decide to apply the more stringent requirements according to *Bioland* and consequently ask their members to produce according to these criteria. As they are stricter, costs will presumably rise (eg, higher concentrated feed costs). Furthermore, it is possible that the changeover may also require constructional measures which could entail specific investment costs for the farmers. Alternatively, the PO will bring their milk – which still complies with the European requirements regarding organic production – to the market as conventional milk instead, with the consequence that the price which can be paid to the members is considerably lower. Although in this example the concerned member can decide for himself how he wants to produce, *de facto* the freedom of choice is significantly limited. This is also important because in many cases small farmers supply only that dairy cooperative which is relatively close to their own production facilities.

Moreover, if the board of directors of the cooperative/PO, due to its competencies, has to (significantly) reduce the price of conventional milk due to market developments, this will steer members more towards organic milk production. Again, formally, they are free to decide, but in practice they are not, as often the only alternative is to close down the agricultural business.

Studies have shown that the influence of farmer-members on management depends on various factors. In principle, the more homogeneous the membership base, the better the will of the members can be manifested and thus influence strategic development. The larger a cooperative or PO becomes, the greater the actual influence of the management is on the strategic direction. This is also related to the fact that large cooperatives (have to) operate in large markets, which means that the individual members are in a correspondingly dependent relationship due to the given information asymmetries (to their disadvantage

and to the advantage of the management).²⁰⁵

Taken together, the ‘hub’ *may have* such a far-reaching influence that the liability arising during the production process *must* affect the hub firm. This is especially true regarding agro-food producing systems because the single farmer, as a member of an agricultural cooperative organised as a PO, is subject to situation-dependent production, inspection or information obligations, depending on how concretely the farmer is involved in the production and distribution process.²⁰⁶ This statement is important from the point of view of the PO’s liability as it briefly and concisely describes a particular aspect of the dilemma to be resolved. However, the Italian legal system does not currently provide a satisfactory solution to this problem. While there are two specific sets of rules which can be mentioned in relation to such network dynamics, none of them is legally relevant if a PO manages an agro-food production chain.

In Italy, the term ‘network’ is associated with the network contract (*contratto di rete*). Legge 9 April 2009 no 33²⁰⁷ offers the possibility for concluding a multi-party agreement (including, if necessary, the establishment of a separate legal entity) in which the parties can implement common objectives of various types. Still, the term is vague, and there have been discussions on whether and how it can be integrated into legal doctrinal thinking.²⁰⁸ This type of contract, however, cannot be used to set up a PO.

The second approach is product liability.²⁰⁹ Art 121 of the Italian Consumer Act states, ‘if more than one person is responsible for the same damage, they are all jointly and severally liable for compensation’. This rule is applicable not only to producers but rather it applies to all members of the production chain if they can influence the production process. Product liability seems to have some network-adequate features. It allows considering the top of the production chain with specific obligations and may justify its liability for the entire organizational area insofar as the network is subject to the possible control of the hub firm.²¹⁰ At the same time, however, the concept as delineated in the Consumer Act is

²⁰⁵ See G. Miribung, *Agricultural cooperative in the framework of the european cooperative society: Discussing and comparing issues of cooperative governance and fin* (New York: Springer Nature, 2020) 167, 172 and 173; M.L. Cook and C. Iliopoulos, ‘Generic solutions to coordination and organizational costs: informing cooperative longevity’ n 196 above, 22; C. Iliopoulos and V. Valentinov, ‘Member Heterogeneity in Agricultural Cooperatives: A Systems-Theoretic Perspective’ *Sustainability* 10, 4, 1271 (2018); C. Iliopoulos, ‘Ownership’ n 196 above; and H. Hansmann, *The ownership of enterprise*, (Cambridge, Massachusetts: Belknap Press of Harvard Univ. Press, 1st ed, 1996), 134.

²⁰⁶ See F. Cafaggi and P. Iamiceli, *Inter-firm networks* n 182 above. Also consider F. Cafaggi and P. Iamiceli, ‘Contracting in global supply chains and cooperative remedies’ n 182 above.

²⁰⁷ Legge no 33 of 2009 was amended by legge 7 July 2011 no 122, legge 7 August 2012 no 134, legge 17 December 2012 no 221 and legge 28 July 2016 no 154.

²⁰⁸ For details see, for example, G. Spoto, *I contratti di rete tra imprese* (Torino: Giappichelli, 2017). See also n 23 above.

²⁰⁹ In this sense, G. Teubner, n 182 above, 312.

²¹⁰ See Art 121 para 2 Italian Consumer Act.

decentralised because it allows the assigning of complementary duties of conduct to the network and nodes according to the internal task distribution. In fact, Art 121, para 2 of the Consumer Act provides for the division of tortious contractual duties; it aims at reflecting the contractually committed division of labour in the network and allocates responsibilities accordingly. Product liability, as determined by Art 121 of the Consumer Act, should thus enable self-control of the network with sufficient precision.²¹¹ I conclude that legal network thinking also exists in Italian legislation.²¹²

²¹¹ For details, see V. Carfi, 'Art 121', in V. Cuffaro, A. Barba and A. Barengi eds, *Codice del consumo e norme collegate*, (Milano: Giuffrè, 4th ed, 2015), 756-759. As it imposes behavioral duties on the actors in accordance with their actual competence to act, irrespective of whether the distribution-chain is governed by contract law or company law it thus internalises negative external effects and is neutral in terms of its legal form. In this context is suggested that tort obligations should be concentrated on compensating the production risks in the broader sense, ie the technical risks, the operational dangers of the traffic of production and distribution regardless of the chosen legal form. Transaction risks, on the other hand, ie those that arise precisely from the chosen legal form of the transaction - contract, partnership, corporation, group - cannot be treated as legally neutral. Rather, they should be dealt with in the factual context of the respective legal field, taking into account the specific advantages and disadvantages of the parties involved. See G. Teubner, n 182 above, 315.

²¹² This network perspective can also be applied to a legal structure as regulated by Art 2497 Civil Code. In this context, the Italian legal framework contains specific rules that provide some answers to these questions, although they are not exhaustive. Arts 2497 et seq Civil Code were introduced by decreto legislativo 17 January 2003 no 6 and apply to all types of companies, both partnerships and companies with shared capital. The rules refer to networks where a company or another body/entity exercises management and coordination activities toward companies that are part of the network (these are the participating companies). This network leader is directly liable to the shareholders of the network members as well as to specific creditors, if he or she acts in personal or other business interests (conflict of interests) and in breach of the principles of proper (societal and entrepreneurial) management of the participating companies. Responsibility exists *vis-à-vis* the shareholders if there is a prejudice to the profitability and value of the shareholding and *vis-à-vis* the company's creditors in the event of an injury to the integrity of the company's assets. Thus, only shareholders and creditors are actively legitimated. Moreover, according to Art 2497 para 3 Civil Code, this liability claim can only be asserted in a subsidiary manner (on the condition that the claims have not been met by the company, which is subject to management and coordination). The law also provides for joint and several liability of those who have taken part in the damaging act and those (with limits. See Art 2497 para 2 Civil Code) who have consciously benefited from it. With this provision, it is possible to extend the liability to a multiplicity of subjects, even those not belonging to the group of companies, including natural persons (The liability of such persons, however, is limited by law to the advantage gained. See Art 2497 para 2 Civil Code). The extent to which these norms can be applied in individual cases must be specifically assessed and will not be investigated further here. The object of the liability claim is the management and coordination activities and the damage incurred must be their direct consequence. There are debates about the legal nature of this type of liability. According to case law and part of the doctrine, it is a non-contractual liability. According to another part of the doctrine, it is contractual liability. Regarding the protected damage, liability refers to prejudice caused to the profitability and value of the shares and covers the (network) company's creditors for the damage caused to the integrity of the company's assets (Art 2497 para 1 Civil Code). This means that third parties can only sue the individual (network) companies or network manager/leader for damages caused by activities in connection with the respective business purpose (based on Art 2395 Civil Code); they cannot claim damages caused by the management and coordination of the network. However, if they win,

However, this approach is not applicable here since, according to Art 117 of the Consumer Act, liability only arises if the product is defective. This is not the situation considered here because I am looking at the damage caused by a production process and not by the product itself (eg, the milk or steak offered to consumers).²¹³ Nevertheless, it gives some insight into how network accountability could be constructed; these results could then be used to explain how the rules are to be changed.

The investigation conducted so far is not yet complete, but what we can now recommend to ‘our’ Mrs Rossi so far is that she has to find a PO that has a correspondingly dominant position in the production chain and which is also obliged under its statutes to make a significant contribution to combating climate change. So, if a PO (by means of its managers) does not take the necessary strategic steps and does not direct (or influence) accordingly the production activities of its members, could it be liable? At the very least, there would be cause for a more detailed investigation.

One aspect for establishing liability according to Art 2043 has, however, not yet been discussed. As indicated in Chapter II, Section 1, the application of 2043 Civil Code requires proof that there is a link between the damage and a specific behaviour (here, the agricultural activity). The next chapter deals with this issue.

V. Third Step: Trying to Disclose the (Possible) Causal Link Between Agro-Food Production and Climate Change

Apart from the internal dynamics of liability explained above, which focus on the behaviour of the damaging party, non-sustainable action in the context of climate damage necessarily has an external dimension – it is the damage of third parties. Could Mrs. Rossi file a claim, for example, against a PO because her property (forest) has been damaged by a tornado (or some other extreme weather) by arguing that the concerned agro-food producer fosters climate change due to its production systems? Regarding this topic, further observations must be made. It has to be clarified whether a legal entity may be responsible for the

it is conceivable that, in a later step, the shareholders of the losing company may take legal action against the network manager. For details, F. Giannandrea, ‘Artt. 2497-2497 septies’, in P. Cendon ed, *Commentario al codice civile. Artt. 2484-2510. Scioglimento e liquidazione; trasformazione, fusione e scissione*, 217-290, 217. Also consider P. Montalenti, ‘Organismo di vigilanza 231 e gruppi di società’ *Analisi Giuridica dell’Economia*, 2, 383-395 (2009), and A. Daccò, ‘I gruppi di società’ in M. Cian ed, *Diritto commerciale-Vol. III: Diritto delle società* (Torino: Giappichelli, 2017), 773-806, 773. Also consider G. Teubner and H. Collins, n 23 above, 133, and in particular S. Giovannini, *La responsabilità per attività di direzione e coordinamento nei gruppi di società* (Milano: Giuffrè, 2007).

²¹³ For details, see V. Carfi, ‘Art 117’, in V. Cuffaro, A. Barba and A. Barengi eds, *Codice del consumo* n 211 above, 739-743. See also M. Mazzo, *La responsabilità del produttore agricolo* (Milano: Giuffrè, 2007), 155, and M. Giuffrida, ‘Dalla responsabilità dell’imprenditore all’imprenditore responsabile’ *Rivista di diritto agrario*, 4, 545-567 (2007).

damage occurring due to climate change. This implies judging whether there is a causal relationship or, in other words, whether the behaviour of the polluter is linked – due to a causal relationship – to the sustained damage.²¹⁴ Basically, this implies that there is a link on the condition that, without the specific behaviour of the polluter, no damage would have occurred. It is important to emphasise that the burden of proving the causal link lies with the plaintiff,²¹⁵ which raises a significant problem. In climate change litigations, the plaintiff (here, Mrs Rossi) must prove that there is indeed a causal link between the emissions of the sued company and the damage that has occurred.

Considering scientific evidence and the possibilities of scientific methods, this is far from easy, and this can be shown if we consider what science actually knows about climate change. What is known is that climate change is a consequence of many factors. In addition to numerous natural influences, there are also so-called anthropogenic factors, that is, climatic influences to which humankind contributes. The most well-known of these is the emission of GHGs, which alter the world's climate by locking up the sun's energy reflected by the Earth and sending it back to Earth (the greenhouse effect). The most important GHG is water vapour, which accounts for 50–85% of global warming.²¹⁶

In the public debate, CO₂ and methane play an important role.²¹⁷ This is because they are part of a vicious circle: On one hand, they are GHGs and heat the climate; on the other, a heated climate also generates more water vapour, which further fuels the climate.²¹⁸ According to the UN Intergovernmental Panel on Climate Change,

‘it is extremely likely that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in greenhouse gas concentrations and other anthropogenic forcings together’.²¹⁹

This will not change that rapidly as, for example, the lifetime of CO₂ is between

²¹⁴ In this regard, see P.M. Sanfilippo, ‘Gli amministratori’ n 6 above, 532.

²¹⁵ See Chapter II.

²¹⁶ Consider, among many others, S. Solomon et al eds, *Climate change 2007: The physical science basis; contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (New York: UNEP, 1st ed, 2007), 661; IPCC, *Global warming of 1.5°C* n 81 above; Z. Hausfather, ‘The Water Vapor Feedback’ (2008), available at tinyurl.com/w9ny364 (last visited 7 July 2020).

²¹⁷ The contribution of CO₂ to global warming should be 9-26%, while that of methane should be 4-9%. See J.K. Choi and B.R. Bakshi, ‘Attribution of Global Warming’, in S.G. Philander ed, *Encyclopedia of global warming and climate changer* (Los Angeles: Sage, 2008), 95-99.

²¹⁸ It is little reassurance that the concentration of CO₂ and methane in the atmosphere - depending on the source of information - is either at an 800 000 year high or has even reached a level that has not been reached in the past 15 million years. See M. Inman, ‘Carbon is forever’ *Nature Reports Climate Change*, 156-158 (2008).

²¹⁹ See IPCC, *Climate Change 2014 - Synthesis Report: Summary for Policymakers* (2015), 5.

twenty and two hundred years on average.²²⁰

For law, the complex mix of causes, effects and interactions is not a good starting point. Simply consider CO₂. If more than half of climate change is caused by humans, and the contribution of CO₂ varies between nine and twenty-six percent, and, moreover, if the lifetime of CO₂ molecules is twenty – two hundred years, then the (classic) attribution of damages to the likely polluter will ‘not be easy’.²²¹ Therefore, it is difficult to determine who is responsible for the damage and what actually happens between the moment of emission and the occurrence of the damage.

But maybe more precise statements can be made by approaching the question (yet, still in general and abstract terms) as to which agricultural products contribute to climate change to what extent. For example, studies calculate the emission of CO₂ gases in relation to the production of one litre of milk, one kg of beef or on kg of cheese.²²² In the actual application of these calculations, however, again caution is called for, and one should not do the calculation without the host. For instance, the latest studies look at an extended value chain and argue that the CO₂ removed from the atmosphere by the plants grown to feed livestock is greater than the sum of CO₂ equivalent emitted by agricultural processing emitted by physiological ruminal fermentation and caused by the manure management.²²³

To complicate matters further, it is important to be aware that most climate-related damage is caused by phenomena (eg, hurricanes) that occur in principle independently of climate change. So, to what extent does anthropogenic climate change cause damage? This seems to be explainable when analysing sea-level rise with the help of climate models.²²⁴ However, this also seems possible for other

²²⁰ See *The Guardian* ‘How long do greenhouse gases stay in the air?’, available at tinyurl.com/krmertk (last visited 7 July 2020).

²²¹ See *ibid.* See also IPCC, ‘Climate Change 2001: The Scientific Basis’ 2001, available at tinyurl.com/yxnt3ywp, 38 (last visited 7 July 2020).

²²² In general, one can observe that ‘the sector’s GHG emissions have increased by eighteen percent between 2005 and 2015 because overall milk production has grown substantially by thirty percent, in response to increased consumer demand. The trends in absolute emissions reflect changes in animal numbers as well as changes in the production efficiency within the sector. Between 2005 and 2015, the global dairy herd increased eleven percent. At the same time, average global milk yield increased by fifteen percent. Increased production efficiency is typically associated with a higher level of absolute emissions (unless animal numbers are decreasing). Yet without efficiency improvements, total GHG emissions from the dairy sector would have increased by thirty-eight percent. So while total emissions have increased, dairy farming has become more efficient resulting in declining emission intensities per unit of product.’ See FAO, *Climate Change and the global dairy cattle sector: The role of the dairy sector in a low-carbon future* (Roma, 2019), 7.

²²³ See R. de Vivo and L. Zicarelli, ‘Relationship between the emissions of farmed animals and the contribution of cultivated plants to feed them’ 11 *International Journal of Current Research*, 4772-4774 (2019). On these issues, see also, eg, E. Sabia et al, ‘Dairy sheep carbon footprint and ReCiPe end-point study’ 185 *Small Ruminant Research* 185, 106085 (2020), and E. Sabia et al, ‘Effect of Feed Concentrate Intake on the Environmental Impact of Dairy Cows in an Alpine Mountain Region Including Soil Carbon Sequestration and Effect on Biodiversity’ *Sustainability*, 12/5, 1-15 (2020).

²²⁴ See tinyurl.com/ze7wwhb (last visited 7 July 2020). For general information, IPCC,

phenomena, such as heat waves. For example, one study shows that the 2003 heat wave in Europe was very likely caused by climate change.²²⁵ It is also worth noting the link between climate change and windthrow, which in 2018 caused great damage to forests in the Italian region of Trentino Alto Adige/Südtirol.²²⁶ Thus, there should indeed be credible scientific evidence helping to *generally* establish a causal link between weather phenomena and climate change. Generally speaking, this seems possible. But does this also apply to a specific case of damage, such as Mrs Rossi's destroyed forest?

The concrete attribution of a single sequence of damage to global climate change is definitely only possible through complex models that depend not only on a large number of comprehensively documented facts but also on assumptions which are the result of scientifically modelling the causal link. If liability claims are justified on this basis, this would inevitably open up new perspectives for law. As these models are based on probabilities, their acceptance will not be that easy but – *maybe* – not impossible. For instance, the Italian legal system has already acknowledged that the causal link can also be demonstrated if it is based on high probability.²²⁷ For example, in sentence n. 13530 from 11 June 2009 the Court of Cassation argued that for the purposes of the configurability of the causal link between an illegal act and a damage, it is not necessary that the latter be a certain and unequivocal consequence of the event, but it is sufficient that the causal derivation of the former from the latter can be established on the basis of a criterion of high probability and that the intervention of a subsequent factor such as to disconnect the causal sequence thus established has not been proved. Moreover, it has been stressed that the ascertainment of the civil law causality link between the illegal act and the damage must be conducted on the basis of a probabilistic assessment according to the rules of the prevalence of probabilities (more likely than not) compared to the stricter rules of the penal causality assessment.²²⁸

Global warming of 1.5°C n 81 above.

²²⁵ See P.A. Stott, D.A. Stone, and M.R. Allen, 'Human contribution to the European heatwave of 2003' *Nature* 432, 7017, 610-614 (2004).

²²⁶ See R. Motta et al, n 7 above. For general information R. Seidl and W. Rammer, 'Climate change amplifies the interactions between wind and bark beetle disturbances in forest landscapes' *Landscape ecology* 32, 7, 1485-1498 (2017) and R. Seidl et al, 'Forest disturbances under climate change' *Nature climate change*, 7, 395-402 (2017). Much will depend on the damage that will be caused. For example, determining the causal link between climate change and health impacts is complicated because of the lack of long-term data.

²²⁷ On this issue see also G. Alpa, *La responsabilità civile* n 47 above, 208.

²²⁸ See G. Alpa, *La responsabilità civile* n 47 above 210. Moreover, it is also stressed that the non-application of a so-called threshold liability rule (obliging the plaintiff to prove that the defendant's conduct caused the damage with a probability of more than fifty percent), coupled with the move to a so-called proportional approach, could significantly increase the possibilities for applying tort law to climate change. See M. Faure and M. Peeters, n 160 above, 18. On this issue, see also M. Duffy, 'Climate Change Causation: Harmonizing Tort Law and Scientific Probability' 28

But could this approach really be helpful in the scenario examined here? The probalistic rule is definitely helpful in cases where the last fact connected with the event appears not to be the only one in the causal chain to have caused it, and it is not easy to see any regularity in the event that would allow the qualification of the last fact as the sole and exclusive cause of the event. It is clear that if other conditions influence the way in which the event occurred, the judge will have to take them into account in determining the damage, but he cannot ignore the causal relevance of the last event. This is precisely the case when a person with serious health conditions is hit by another person and dies after the impact. If the accident had affected a person of sound and robust constitution, it is very likely that this person would have remained alive. By using the probalistic principle, an appropriate solution is obtained because the person liable is identified, but account is taken of the specific circumstances that mitigate the amount of damage claimed by the relatives of the deceased victim.²²⁹

So, what might this mean for my study? If it is indeed possible to convincingly model a causal relationship based on the principle of proportionality between climate-damaging actions and damage to property, then only one aspect, albeit not an unimportant one, of the causal relationship has been clarified, but we still do not know who caused a specific form of damage due to a specific episode of windthrow. In other words, the actual damaging party cannot be determined. Or, to be more precise, although we indeed can rather *adequately*²³⁰ calculate that much of the emissions of a specific agricultural activity foster climate change, which then leads to damage due to windthrow, we cannot say who – among the many polluters – exactly can be blamed for ‘our’ specific instance of windthrow harming Mrs Rossi’s property. If we consider ‘our’ PO as one polluter out of many and try to develop an *alternative* causality, then we know that in such cases liability can only be established on the condition that the event has been caused *intentionally*. As explained in Chapter II, Section 1, this may lead to *joint and several liability* and includes situations in which the joint and deliberate act caused a particular risk.²³¹

I assume that in our case the managers of the PO know – also because of

Temple Journal of Science, Technology & Environmental Law, 185-242, 206 (2009), and D.A. Kysar, n 78 above, 62.

²²⁹ See G. Alpa, *La responsabilità civile* n 47 above, 210. See also M. Capecchi, n 50 above, 250 and Chapter VIII.

²³⁰ That is, based on general experience or objective predictability at the time of the action. See Chapter II, Section 1.

²³¹ Joint and several liability does not derive from the combination of behaviours connected with a voluntaristic psychological link, being that an objective link is sufficient, provided that there is the unicity of the damaging fact. The causes can be autonomous. Joint and several liability is a hypothesis attributable to subjectively complex obligations. The injured party can claim from each person jointly and severally liable the integrity of the compensation except for the right of recess. See G. Alpa, *La responsabilità civile* n 47 above, 211. On these issues, see also M. Capecchi, n 50 above, 121.

the obligations contained in Art 2428 Civil Code – that (a) agro-food production leads to climate change and – and this should not only be known by the managers of a PO – that (b) climate change leads to severe damage. Here, however, one can object that it is also necessary to determine the exact point in time when exactly an obligation to reduce emissions could exist and when a polluter could have reasonably foreseen that his emissions would cause damage. These points are necessary to determine when culpable action began and are therefore essential to determine the causal link.²³² This concerns the foreseeability of the damage: from what point on can it be assumed that this was the case?

Even if we now briefly hide this aspect, and therefore, assume a judge would accept the outlined (somewhat daring) explanation of this link (ie, of what happens in reality),²³³ then he would probably open the door at the same time for a series of further actions against the same defendant, and this because it is not possible – due to the abovementioned complex mix of causes – to model whether the defendant's emissions are only responsible for this specific property damage or not also for a series of other damages, together with other polluters. As a very large number of people will be harmed in one way or another by climate change, defendants could potentially be held liable by anyone who is able to claim damages from climate change. This would be, to put it modestly, probably not very proportionate,²³⁴ and this is, in my view, the main problem in assessing the causal link. In fact, with our current tools (be they mathematical models, be it legal thinking²³⁵) one can only (at least theoretically) scientifically model whose actions contribute to a certain damage without determining, however, where and when exactly the damage has occurred. Whether there will be suitable solutions in the future remains to be seen.

VI. Trying to Tackle the Problem – Some General Observations on how to Do so (Remaining Defiant)

²³² Such assumptions must also be based on scientific considerations.

²³³ The distinction between factual, or physical, causality and legal causality is abstractly clear: the former is the reconstruction of all the causes that can be identified with scientific criteria, while the latter is only the causes selected on the basis of those identified with scientific criteria. The selection criteria are created by jurisprudence and doctrine. See G. Alpa, *La responsabilità civile* n 47 above, 203.

²³⁴ See *ibid*, 201.

²³⁵ In some jurisdictions (eg, the USA), the imputation of liability, exceptionally, is made without regard to the causal link. This is the case of so-called toxic torts, where the effects of asbestosis; tobacco smoke; factors of water, air, soil pollution, etc, are not easily attributable to an act or activity of the person or persons who could be held liable. Jurisprudence shows that in cases such as these, the courts have not followed uniform guidelines but have referred to different theories from time to time, with more subjects considered stochastically responsible. It is stressed that each of these theories is susceptible to verification in the light of the economic analysis of the law in order to ascertain which of them is more efficient, that is, more appropriate to the distribution and bearing of costs. See F. Parisi and G. Frezza, 'La responsabilità stocastica' *Responsabilità civile e previdenza*, 3, 824-847 (1998). See also G. Alpa, *La responsabilità civile* n 47 above, 419.

In Chapter III we saw that the legal rules deal with (environmental) sustainability to varying degrees. Some rules address it more directly,²³⁶ others more indirectly.²³⁷ What clearly emerges is that agro-food production, especially if subsidised (due to cross-compliance), is linked to sustainability requirements not only from a social science perspective but also a legal one. The concept of cross-compliance also provides for the possibility of imposing administrative penalties on beneficiaries for noncompliance with the relevant rules.²³⁸ Yet, no mandatory provision based on private law exists; and although indications of sustainable (in the sense of climate-friendly) agriculture can be found, these are not sufficient to prove a corresponding obligation – neither based on the notion of agricultural activities nor linkable to the business purpose of an agricultural cooperative/PO and neither enshrined in the general legal framework regulating agricultural activities nor due to potential damage to third parties. Clear obligations arise only on the basis of voluntary commitments, such as by laying down a corresponding obligation in the statutes or by producers – voluntarily – agreeing to comply with certain production standards (eg, *Bioland*).

But specific approaches developed by scholars may be helpful. In particular, I am looking for approaches that help to better substantiate sustainable behaviour, also in the context of the network dynamics mentioned; however, I am not further investigating whether there are concrete models that help to prove the causal link between action and damage (as required by Art 2043 Civil Code).²³⁹ Currently, this kind of ex-post evaluation does not work; the solutions discussed below have an ex-ante approach.

The question therefore concerns the content of a possible norm which requires a certain conduct. Generally, it is argued that despite better knowledge, voluntary behaviour does not promote real sustainability, especially since short-term perspectives have a stronger influence.²⁴⁰ However, in principle, this should not apply to farmers, who will always bear in mind that if, for example, they pollute the soil or groundwater, they are directly harming themselves because they are destroying their production factors. At least this should be the case when the consequences are felt in the near future.²⁴¹ Legislators need to be aware of these circumstances, and therefore, they should better establish specific rules that

²³⁶ For example, provisions of the TFEU, the Italian environmental act or the Civil Code.

²³⁷ Consider the mentioned examples from the Italian constitutions. Also consider F. Ekardt, 'Klimawandel' n 134 above; F. Ekardt, 'Recht, Gerechtigkeit, Abwägung und Steuerung im Klimaschutz – Ein 10-Punkte-Plan für den globalen und europäischen Klimaschutz' in M. Voss ed, *Der Klimawandel: Sozialwissenschaftliche Perspektiven*, (Wiesbaden: VS Verlag für Sozialwiss, 1st ed, 2010), 227-244.

²³⁸ See Art 91 European Parliament and Council Regulation (EU) 1308/2013.

²³⁹ See Chapter V.

²⁴⁰ See F. Ekardt, 'Umweltschutz und Zivilrecht' n 5 above, 463; B. Sjafell, n 5 above; P. Kara, n 5 above. Also consider S. Landini, n 35 above.

²⁴¹ See Chapter III Section 1.

commit to change, not only in the long term but especially in that timeframe.²⁴²

This raises the question of which requirements such private law provisions should satisfy to align a cooperative towards sustainability. It should be remembered that, in general, sustainability is still regarded as a principle in legal theory, often without clear content. It frequently refers to rather trivial claims that need to be weighed against each other and relate to different life circumstances rather than calling for a long-term economic lifestyle.²⁴³ Due to this inaccuracy, this concept is not easy to enforce under private law. In fact, one has to bear in mind that private law, as opposed to 'classical' environmental policy – and the corresponding laws of public law – does not use (public law) regulations enforced by national authorities or supranational authorities. Instead, the sustainability approach serves to influence or change the relationship between different (natural and legal) persons, and typically, companies – and cooperatives.²⁴⁴ To this end, it is necessary to concretize the concept of sustainability. The necessity for this becomes clear when one considers that, under certain circumstances, a business entity's (eg, company, cooperative) concrete actions must be identified as sustainable or non-sustainable. Otherwise, the concerned persons can hardly draw the line between permissible and inadmissible behaviour. Thus, the clear definition of this limit is a fundamental task of law.

Defining the content is challenging and fundamental, including because environmental protection often conflicts with other social demands. For example, we may ask the following: To limit climate change, is it necessary to limit the production of meat? Or even more drastically, is it necessary not only to completely forbid the consumption of meat but also the consumption of any animal products because the use of land/soil always produces emissions (including without the use of mineral fertilisers)? At least in theory, one could argue that human beings' lives are endangered even in cases of modest climate change.²⁴⁵ Even more complex to respond to is the question of how to look at the intricate interactions of different sustainability issues, such as climate, energy, biodiversity, soil and water conservation. From these rather brief observations and questions, it becomes clear that it is important to weigh and find compromises.

This is even more true if one considers that the purpose of companies is primarily to generate profits;²⁴⁶ defining a rule that seeks to reconcile different

²⁴² Although things have seemed to change lately. It is increasingly required that binding rules (laws) be adopted. Consider F. Ekardt, 'Umweltschutz und Zivilrecht' n 5 above; P. Kara, n 5 above; B. Sjaffell and J. Mähönen, 'Upgrading the Nordic Corporate Governance Model for Sustainable Companies' 2 *European Company Law*, 58-62 (2014); B. Sjaffell, n 5 above.

²⁴³ See F. Ekardt, 'Umweltschutz und Zivilrecht' n 5 above, 466. Also consider, for example, C. Felber, *Die Gemeinwohl-Ökonomie: Eine demokratische Alternative wächst* (Wien: Deuticke, 2012) and F. Ekardt, *Das Prinzip Nachhaltigkeit* n 134 above, 27.

²⁴⁴ See C.M. Bianca, *Diritto civile* n 28 above, 36; A. Torrente and P. Schlesinger, *Manuale di diritto privato* n 28 above, 16.

²⁴⁵ In this context, F. Ekardt, 'Umweltschutz und Zivilrecht' n 5 above.

²⁴⁶ See M. Cian, 'L'organizzazione produttiva: elementi costitutivi' n 101 above, 48.

social goals with expected shareholder returns should not be that easy. In fact, such a solution would imply that board members, when making business decisions, must be able to determine when these different goals are equally met; however, while profits are expressed in money, this is not easily possible for the various aspects that characterise the concept of sustainability. Indeed, it seems difficult to compare the distinct goals, which is a necessary exercise for determining when equality exists.

In comparison with the purpose of the company, the purpose of the (agricultural) cooperative (here used to form a PO) – which on one hand is to provide benefits for its members and on the other to ensure the profitability of the cooperative – appears more open.²⁴⁷ However, here, the members of the board face the same dilemma if they have to reconcile climate-friendly action with the goal of their cooperative. It is useful to be reminded at this point that POs may specifically determine climate change mitigation amongst their objectives. But as mentioned, this is at the discretion of the drafters of the statute and does not constitute an obligation. Thus, instruments must be found that not only help balance the various aspects but also prioritise one – maybe toward environmental sustainability – which will serve as a cornerstone for mitigating climate change.

As it would not be easy for a single enterprise (ie, a company or cooperative) to correctly determine which measure corresponds to climate protection and which does not, it has been rightly argued that the legislature should determine the appropriate balance between these different interests.²⁴⁸ As this issue is of general interest, only parliament or some type of neutral institution/(scientific) agency should determine what is needed to protect the climate and how the different interests can be appropriately balanced.

Furthermore, reference can be made in this connection to framework legge 28 december 2015 no 208, which also regulates benefit companies and contains a special mechanism for monitoring sustainability criteria. It is worthwhile to consider this example because the benefit company explicitly moves the purpose of companies towards sustainability requirements.²⁴⁹ This implies that business should be conducted with responsibility, sustainability and transparency towards people, communities, territories and the environment.²⁵⁰ In addition, specific

²⁴⁷ See Chapter III Section 2.

²⁴⁸ F. Ekardt, 'Umweltschutz und Zivilrecht' n 5 above, 468.

²⁴⁹ It is, however, not a new type of company, but rather, *explicitly allows* the 'traditional' companies to add to the profit-generating purpose the purpose of creating general public benefit. See M. Cian, 'L'organizzazione produttiva: elementi costitutivi' n 101 above, 50.

²⁵⁰ Art 1, para 376, legge no 208 of 2015. Thus, benefit corporation's managers operate the business with the same authority as in a traditional company, but they are required to consider the effects of their decisions, not only on shareholders, but also on society and the environment. Here, shareholders judge performance based on the company's social, environmental and financial performance.

According to legge no 208 of 2015, this concept shall lead to positive and/or restrict negative externalities. This term refers to the effects that arise through the production process

transparency provisions require the publishing of annual benefit reports of the company's social and environmental performance by using a comprehensive, credible, independent and transparent third-party standard. For my discussion, this rule is fundamental as it not only obliges the disclosure of the internal dynamic of the company, but in addition, it requires assessing and evaluating the success of the company by means of independent (third-party) standards. Here, success has been explicitly linked to sustainability targets,²⁵¹ without excluding the need to make profits.²⁵²

On the contrary, if sustainability clauses followed a more general approach – here, I refer to clauses without specified content²⁵³ and thus no guideline on how to solve conflicts between the various issues – many questions arising from their implementation would have to be answered by a court ruling. Presumably, this would often not be that easy,²⁵⁴ considering that modern production chains are complex, including because of globalisation. To arrive at a fair verdict, they must be fully assessed and understood. This issue of transparency, however, is not easy to solve when it comes to implementation and requires an international approach.²⁵⁵

to the advantage (positive external effects) or disadvantages (negative external effects) of third parties. In other words, 'an externality is the cost or benefit that affects a party who did not choose to incur that cost or benefit. Economists often urge governments to adopt policies that "internalise" an externality, so that costs and benefits will affect mainly parties who choose to incur them'. For example, the manufacture of certain products may pollute the air, but the resulting costs (for example, for health or repairing the damage) must be borne by society, not the polluter. A similar situation arises when a person decides to make his or her house fireproof. Here, third parties can benefit from the reduced risk of fire. When external costs arise, such as in the case of air pollution, the producer may decide to produce more products without incurring higher costs than under conditions where he would have to bear all the associated environmental costs. Thus, some consequences for self-directed action are outside the actor, that is, they are externalised. Conversely, if there are external benefits, such as public safety, less may be produced than under conditions where the external services provided were paid. Now, if unregulated markets (for goods or services) have significant externalities, prices are generated that do not reflect the full social costs or benefits of the transactions. Therefore, these markets are not efficient. On these issues, J.C.J.M. van den Bergh, 'Externality or sustainability economics?' *Ecological Economics* 69, 11, 2047-2052 (2010).

²⁵¹ For tax purposes, however, benefit companies are treated like all other companies.

²⁵² In fact, economic sustainability and economic success cannot be separated from entrepreneurship. See M. Cian, 'L'organizzazione produttiva' n 101 above, 50. As a matter of fact, what is common to all types of companies is not the idea of profit maximisation but the feature of efficiency. This is one of the essential features characterising the professionalism of an entrepreneur. It has been argued that this company type may be a valuable instrument because enlarging the scope of business ensures that, in case of doubt, the board members still act in observance of their duty of care; it is also important in case the adopted business strategy does not lead - not even in the long run - to a pure economic competitive advantage. See M. Cian, 'L'organizzazione produttiva' n 101 above, 51. For details, see, among others, S. Ronco, *La società benefit tra profit e non profit* (Napoli: Editoriale Scientifica, 2018).

²⁵³ For example, by merely requiring that 'companies must be sustainable'.

²⁵⁴ These problems, either from a normative or empirical point of view, become even more severe if one refers to abstract formulated social belongings, like fair distribution of income or equal distribution of education chances. F. Ekdardt, 'Umweltschutz und Zivilrecht' n 5 above, 467.

²⁵⁵ This does not mean that legislators can decide on sustainability at their own discretion,

The aspect of globalised production chains is also important from another perspective. Given these possibilities, it is understandable that the businesses (ie companies and also cooperatives) would seek the optimal legal framework for their business, not only within the Member State where the business was initiated or the EU but also outside its territory. This helps in avoiding specific national or supranational rules. Entrepreneurs will tend to relocate their headquarters to jurisdictions where sustainability requirements are less stringent (forum shopping). The same is true for making investments. From an economic point of view, forum shopping may even be more attractive than fulfilling environmental requirements based on stricter law requirements.²⁵⁶

The discussion above leads to a further observation: One can correctly argue that, due to their influence on the development of society, companies, as well as cooperatives, must help to make the transition to a more sustainable economy. A key question is how to achieve this without threatening the role of companies as they are essential to wealth creation.²⁵⁷ Therefore, the existing system should not be *per se* endangered but gradually changed, with appropriate sanctions defined.

Thus, it can be said that for sustainability rules to have an effect on combatting or mitigating climate change, enforcement problems and shifting effects should be avoided.²⁵⁸ Law sustainability approaches (which are not based on voluntariness) must have the following characteristics: (1) they must be sufficiently concrete, (2) implemented step by step, (3) contain appropriate sanctions and (4) probably be raised to at least a supranational level so that the abovementioned shift effects can be avoided to a large extent.²⁵⁹

The mentioned accuracy should also consider network dynamics. In fact, considering climate change, an approach based on network liability would not only be more effective if one considers what has been affirmed in Chapter V but also more appropriate if one considers the general interest in climate protection. Whereas the network (ie, PO that cooperates, for example, with research centres)

as they must comply with specific constitutional requirements. These include not only those rules that guarantee the freedom of individuals and protection of life and health but also those that set minimum requirements for water, safety, food and so on. The protection of these interests requires sustainability in the sense of a long-term and global protection of natural resources. B. and J. Mähönen, 'Upgrading the Nordic Corporate Governance Model' n 242 above, 58; F. Ekardt, 'Umweltschutz und Zivilrecht' n 5 above, 466. See also J. Martinez, 'Klimaschutz und nachhaltige Landwirtschaft' n 129 above, 108.

²⁵⁶ See F. Ekardt, 'Umweltschutz und Zivilrecht' n 5 above; B. Sjaafjell and J. Mähönen, n 242 above. See also J. Martinez, 'Klimaschutz und nachhaltige Landwirtschaft' n 129 above, 108.

²⁵⁷ See F. Ekardt, 'Umweltschutz und Zivilrecht' n 5 above, 463 and B. Sjaafjell and J. Mähönen, n 242 above.

²⁵⁸ In addition, the so-called rebound effect should be considered in this context. This refers to the fact that the beneficial effects (ie increased efficiency of resource use) of new technologies are often offset by behavioural responses. Therefore, the expected advantages are reduced. Known instruments to mitigate or avoid this problem are cap and trade regimes or specific taxes. On these issue, K. Mathis, 'Sustainable Development' n 35 above.

²⁵⁹ On this issue, see J. Martinez, 'Klimaschutz' n 129 above, 108.

produces all the information (based on scientific evidence) and thus should take responsibility for information acquisition, single decisions are made at the grassroots level when implementing the measures defined by the hub. Seemingly, individual agro-food producers often act as a type of informal *longa manus*; at the same time, they must assume full responsibility for individual, but coordinated, decisions. Thus, are there not inconsistencies between real behaviour and legal perception?

Without going into too much detail, I will try to give some general responses to these issues by briefly discussing some of the legal solutions that could prompt companies, but also cooperatives, to act more sustainably.

A first proposal complements the existing obligations and states that there is no breach of due diligence even if the board makes a business decision based on standards that comply with human rights or social or environmental requirements of international treaties signed by the home state. Here it is emphasised that the obligation of the managers of the cooperative/company to comply with the law, at least indirectly, should also require compliance with international treaties.²⁶⁰ Indeed, these contracts do not directly bind the members of the board as the norms set out in these treaties refer primarily to nation states.²⁶¹ However, if the board currently adheres voluntarily to such standards and this would lead to higher costs, one could argue that due diligence has been broken, with the consequence that board members could be held liable for damages. The solution presented here should help avoid such consequences.

Another (again open) proposal allows the board to prioritise long-term viability (or efficiency) in relation to short-term profit maximisation. This solution does not specify a certain behaviour; therefore, one can ask how such an assessment should be implemented. Although, in terms of mitigating climate change, the consequences of such an open provision may therefore be rather limited, it could help restrain specific excesses of (transnational) corporations. At the same time, such a provision would ensure that shareholders pursuing a short-term perspective cannot exert too much pressure on the members of the management organ that plans and acts longer term.²⁶² Thus, like that of the first proposal, the consequence of this rule is limited, and it primarily leads to a reduction of liability.

As a corollary to more stringent duties, it also seems necessary to re-address the audit tasks of a company/cooperative regarding the supply chain. To date, due to the mentioned vague network liability, their effect is relatively modest. It is proposed to clearly define the corresponding audit obligation and especially define the corresponding responsibilities.²⁶³ Such obligations could also extend to

²⁶⁰ See F. Ekardt, 'Umweltschutz und Zivilrecht' n 5 above, 470.

²⁶¹ See E. Cannizzaro, *Diritto internazionale* (Torino: Giappichelli, 3rd ed, 2016), 6; M. Herdegen, *Völkerrecht* (München: C.H. Beck, 15th ed, 2016), 1.

²⁶² See F. Ekardt, 'Umweltschutz und Zivilrecht' n 5 above, 470.

²⁶³ See B. Sjaafjell and J. Mähönen, n 242 above, 60.

long-term business risks, such as the ‘carbon bubble’.²⁶⁴ Here, it is stressed that such phenomena are often neglected when making business decisions. However, the effectiveness of such a provision will again be limited due to evidence issues. These, as explained above,²⁶⁵ result from the complex empirical relationships. In practice, the management organ would be required to assess (*elusive*) long-term risks²⁶⁶ in combination with clear short-term profit expectations. Such difficult assessments cannot be solved without giving broad discretion.²⁶⁷

If one considers the possible effect of these proposals on mitigating climate change, one must state that they are rather vague and grant a wide range of discretion to the management organ. Are solutions that focus on duties prohibiting climate damaging behaviour – and thus limit the discretion granted to the management organ – more promising?

A first example requires avoiding *excessive* emissions. Here, one can observe that, whereas from a global perspective, the effect of climate change (ie the resulting/emerging damage) can be mitigated through the use of (financial) means/funds, from an individual point of view (and this is the perspective taken in private law), however, measures to reduce GHG emissions could put the existence of a business model in danger. For instance, from an overall societal standpoint, it would be reasonable to stop the production of SUVs (sport utility vehicles), whereas it is probable that the single car producer cannot afford such measures as long as the demand for these products is significantly high.²⁶⁸ As a result, it is not easily possible to require car manufacturers to shut down entire production facilities, but it should be possible to require them to avoid excessive emissions.²⁶⁹ These are those that can be efficiently reduced compared with the costs of the potential damage. However, it is not clear how a judge should rate and compare social costs and benefits. For example, is it better – more sustainable – to use air conditioning in summer or import strawberries in winter?²⁷⁰

Another approach re-determines the notion of the purpose of the company/cooperative by specifically integrating sustainability into it.²⁷¹ Thus, similar to the

²⁶⁴ See tinyurl.com/y2ldlrxs (last visited 7 July 2020).

²⁶⁵ See Chapter IV.

²⁶⁶ Eg, the the actual consequences of climate change.

²⁶⁷ See F. Ekardt, ‘Umweltschutz und Zivilrecht’ n 5 above, 471.

²⁶⁸ See B. Burtscher and M. Spitzer, ‘Haftung für Klimaschäden’ n 162 above, 948.

²⁶⁹ This approach has been proposed by a group of experts that have elaborated the ‘Oslo Principles on Global Climate Change Obligations’: tinyurl.com/yy6hnggw (last visited 7 July 2020).

²⁷⁰ See B. Burtscher and M. Spitzer, ‘Haftung für Klimaschäden’ n 162 above, 948. One can also discuss whether and how small businesses should be delimited/separated from private persons. Why should a small business owner be held responsible for excessive GHG emissions while private individuals cannot be held accountable? It is argued that, if there is a duty to reduce GHG emissions, this duty should be borne by all persons. B. Burtscher and M. Spitzer, ‘Haftung für Klimaschäden’ n 162 above, 948. Consider, in this context, Ekardt on cap-and-trade regimes and the necessity to distribute pollution rights equally. F. Ekardt, ‘Klimawandel’ n 134 above, 107 and F. Ekardt, ‘Recht’ n 237 above.

²⁷¹ Amending the purpose inevitably affects the rights and duties of the board.

approach adopted to benefit companies, the purpose is realigned. For instance,²⁷² it is proposed to link the purpose to the concept of planetary boundaries. Accordingly,

‘the purpose of a company is to create sustainable value through the balancing of the interests of its investors²⁷³ and other involved parties within the planetary boundaries’.

Here, the term *sustainable value* is used to codify the long-term perspective.²⁷⁴ This concept builds on the state-of-the-art²⁷⁵ of natural science and considers different aspects to shape the content of sustainability.²⁷⁶ In addition, it is proposed

²⁷² Another proposal that leaves aside voluntarism obliges companies to observe specific and essential standards. For example, the legislator could reframe the purpose of a company/cooperative by requiring that they must be neutral regarding GHG emissions. Regarding national producers, this should not provide further problems. However, if such a duty has to be observed along the complete production chain, then the aforementioned problems of transparency still have to be solved. F. Ekardt, ‘Umweltschutz und Zivilrecht’ n 5 above, 469. It is positive that such solutions seem to be concrete enough and allow the required step-by-step approach, for instance, by explicitly allowing a timeframe. The legislator could also determine specific interim/ intermediate goals. Sanctions could refer to high fines; injunctive reliefs due to unfair competition also seem useful. Despite this, such an approach has deficits. Compared with cap-and-trade regimes, such clauses probably work in a suboptimal way. In fact, whereas both systems require reduction of GHG emissions, only the latter uses the trade mechanism, making it extremely efficient. Here, companies buy or obtain rights for pollution. As these rights are tradeable, the companies can decide to shift to less polluting production systems and sell the excessive pollution rights or not. As this is also a question of efficiency, cap-and-trade systems create monetary-based incentives. On this issue, M. Betsill and M.J. Hoffmann, ‘The Contours of “Cap and Trade”: The Evolution of Emissions Trading Systems for Greenhouse Gases’ *Review of Policy Research* 28, 1, 83-106 (2011) and L. Wicke, J. Knebel, and H. Dalton-Stein, *Beyond Kyoto - a new global climate certificate system: Continuing Kyoto commitments or a global ‘cap and trade’ scheme for a sustainable climate policy?* (Berlin: Springer, 2005). There is also no specific answer to the problem of displacement effects. For example, a company/cooperative may move the parts of the production chain that are most polluting to another jurisdiction, thereby circumventing legal requirements. Eventually, such an approach may rather be an incentive to shifting production systems, implying economic disadvantages for the affected legal system, but without reducing emissions. This also illustrates the importance of network thinking. See F. Ekardt, ‘Umweltschutz’ n 5 above, 469.

²⁷³ It is stressed that using investors instead of shareholders helps to better outline the complex structure of finance by means of debt, equity and grants.

²⁷⁴ See B. Sjaafjell and J. Mähönen, n 242 above, 59.

²⁷⁵ The boundaries may be revised through new scientific evidence; of course, scientific uncertainty is unavoidable.

²⁷⁶ This approach is very detailed and not only refers to climate change but also includes other aspects significant for environmental protection. Such a broad approach requires a detailed – and perhaps cost-intensive – reporting system to ensure that the required balancing of interests is properly conducted. The boundaries are as follows: (1) Stratospheric ozone depletion, (2) Loss of biosphere integrity (biodiversity loss and extinctions), (3) Chemical pollution and the release of novel entities, (4) Climate Change, (5) Ocean acidification, (6) Freshwater consumption and the global hydrological cycle, (7) Land system change, (8) Nitrogen and phosphorus flows to the biosphere and oceans and (9) Atmospheric aerosol loading. Basically, these boundaries define some kind of ‘safe haven for humanity’. According to the paradigm, ‘transgressing one or more planetary boundaries may be deleterious or even catastrophic due to the risk of crossing thresholds

to define due care as including ‘a duty to implement a life cycle analysis of the business of the company and an integrated internal control and risk management system’.²⁷⁷ With this solution, the management organ would be especially obliged to act if the company/cooperative is unsustainable in both ecological and economic terms. This means that due diligence and proper risk management functions must be in place. Such tools should consider network dynamics, and therefore, they must not only focus on producers (farmers) controlled by the *network hub* (PO/agricultural cooperative). Instead, preferably, they should also consider other contracting parties.²⁷⁸

All these duties of the board must be fulfilled in accordance with the criteria of planetary boundaries. Because of the described problems in properly determining the causal link between agricultural activities and damage to third parties, this can, in the first place, only be achieved by an *ex ante* evaluation of which activities are permitted and which are not. In other words, this approach requires analysing in advance – that is, before agro-food is introduced into markets – the climate-damaging effects of the various agro-food products. Such an assessment is, as seen, already possible to a certain extent. A scientifically based assessment system (eg conducted by an autonomous authority) could, for example, determine whether products are climate-neutral or harmful to the climate. The concept of planetary boundaries could prove helpful as it uses a science-based – and therefore, neutral – guiding mechanism, offering a certain clarity and traceability. Thus, in its approach, this concept is similar to the one used by benefit companies: in both, the environmental sustainability aspects are removed from the management’s discretionary scope. Yet, such systems should allow compensation mechanisms. If a certain product has a climate-damaging effect, the damaging

that will trigger non-linear, abrupt environmental change within continental-to planetary-scale systems’. Regarding the concept of planetary boundaries, consider, for example, F. Biermann, ‘Planetary boundaries and earth system governance: Exploring the links’ *Ecological Economics* 81, 4-9 (2012) and J. Rockström et al, ‘Planetary Boundaries: Exploring the Safe Operating Space for Humanity’ *Ecology and Society*, 2 (2009).

²⁷⁷ See B. Sjafell and J. Mähönen, n 242 above, 61. In the event that the company/cooperative conducts activities in host countries with less stringent environmental regulations, it is necessary to require compliance with the home state’s standards; otherwise, significant adverse effects may not be adequately addressed.

²⁷⁸ *ibid* 60. Based on the environmental chapter of the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, it is proposed to formulate the duties as follows: ‘The duties of the board include setting the strategy for the company and supervising the management of the company implementing it. The supervisory role of the board shall encompass the establishment, implementation and maintenance of: (a) Life-cycle based analysis of the components of the core business of the company to identify and mitigate material negative environmental impacts so as to remain safely within the planetary boundaries; (b) Systems for internal control and risk management appropriate to the extent and nature of the company’s business including that which is conducted through entities and activities which it controls; (c) Due diligence systems throughout the company and any entities and activities it controls and its regular suppliers and supply chains to ensure that the business of the company remains safely within the planetary boundaries’. See B. Sjafell and J. Mähönen, n 242 above, 61.

party can compensate for this effect with other activities.²⁷⁹ Thus, the entrepreneurial issue would be: innovate and save costs or pollute and pay for it. Whether such an approach can ultimately work also depends on specific and appropriate reporting systems that can identify and classify the concerned risks throughout the production chain. *I admit that, considering the global dimension of modern agro-food production, this should be relatively difficult.*

VII. What Can Be Learned?

Since modern agro-food producing systems strongly support climate change, I have raised the question of whether this proved connection can be integrated into Italian private law. Frankly speaking, as agro-food producers contribute to climate change, why not make them responsible – that is, liable – for its consequences, that is to say, responsible for damage because of climate change?²⁸⁰ For this discussion, I consider a production chain constituted by a group of small farmers and a PO (using the legal form of agricultural cooperative) coordinating this chain's activities. As a fictitious plaintiff, I referred to a Mrs Rossi, whose forest was destroyed by a whirlwind (windthrow) caused by climate change. From the outset, it was clear that the observations and comments made were very selective and limited as the current legal framework does not adequately consider the liability (and thus, the responsibility) of supply chains or producer networks. Conversely, however, in debates on modern agro-food production systems, often headed by a *hub firm*, climate-damaging effects are generally considered and discussed in relation to the whole production chain. Both the EU and Italy recognise the necessity to cooperate and have adopted specific legal instruments to foster cooperation along the agro-food production chain. At the EU level, one may think about POs and specific subsidies for cooperation; at the national level, one may consider the specific rules for cooperatives and supply chain contracts but also consider the openness and flexibility in Art 2135 of the Civil Code.

In my view, the question concerning agro-food production systems is of special relevance as the current legal framework (internal market of the EU) strongly subsidises farming and, thus, food production, arguing that agriculture is sustainable. But, as sustainable behaviour is also considered behaviour that mitigates climate change, and as modern food production and agriculture strongly

²⁷⁹ For example, by planting trees or buying 'pollution'-certificates, like in a cap-and-trade regime.

²⁸⁰ It has been coherently observed that, in general, preventing climate change is not yet a high priority if one considers norms and rules that influence the activities of food producers. According to a recent study, within the three-dimensional concept of sustainability, the social aspect indeed seems more prioritized. Nor do national rules seem adequate. The fact that the implementation of the CAP has been devolved to member states makes a coordinated approach concerning climate change issues more difficult. This is problematic, as this issue – due to its complexity – requires a coordinated approach. See D. Blandford and K. Hassapoyannes, n 4 above, 202.

contribute to climate change, one can doubt the logic of this approach – but it is possible that, from a European perspective, one may have overlooked that measures to mitigate climate change must be consistent with the postulate of food security.

In the various (legal) debates, climate change is often associated with issues of sustainability or sustainable behaviour. It has been found that this notion is a codified (and therefore legal) term that has some significance in relation to agro-food production. Basically, more sustainable acting implies better public funding. Considering private law, however, my analysis has shown that the role and responsibility of modern (agro-)food production in relation to climate change – which would require specific sustainable behaviour to mitigate – is weakly accentuated at present. Of particular relevance is the fact that it is currently not possible, especially with lack of proof of a causal link, to charge the actor (who has caused environmental damage with a certain influence on climate change) with the damage that third parties have suffered, such as due to a tornado, whirlwind or extremely long drought (in my example I referred to a windthrow). In other words, Art 2043 of the Italian Civil Code is not applicable.²⁸¹ It is important to stress that there is a developing international debate on these issues, focussing on solutions which seek to close this gap using scientifically tested models.

Trying to make agro-food producers more responsible for climate change would necessitate more clearly defining the purpose of the companies and the duty of care of the administrators charged with putting the purpose into practice. However, redesigning the rules regarding purpose and duties should inhibit entrepreneurial discretion only to the extent necessary to mitigate climate change. To help boards in making decisions, it is proposed to develop an external mechanism that supervises the sustainable behaviour of companies (ie rating or certification systems), including verifiable indicators to make the whole system less vulnerable to abuse. A well-elaborated example²⁸² in this regard, at least in theory, can be found in the concept that links both purpose and due diligence to the concept of planetary boundaries. This would also fulfil the requirement of clear content, which – as has been seen – is necessary if the notion of sustainability should be made applicable as a legal norm under private law. Here, it is argued that the environmental aspect of sustainability should be prioritised.

Moreover, to grasp the problem at its roots, it is necessary to extend liability to the whole production chain. These observations are based on network theory, which, as the example of product liability shows, is already part of the Italian

²⁸¹ Private law on civil liability, as expressed in Art 2043 of the Civil Code, does not appear to be applicable in this case because of the need to prove a causal link between the specific act of the agent and the specific damage suffered by the third party. In contrast, public law provides for penalties, including criminal penalties, to be imposed on the person who causes environmental damage by his conduct, such as in the event that a forest owner proceeds in the reckless felling of an ample forest, which most likely, will lead to climate change.

²⁸² Some good attempts can also be found in benefit companies; the Italian law contains some features that can serve as a blueprint.

legal thinking and structure. Regarding this aspect, one must be aware that the harmful effects on the climate could be significant due to the combination of incorrect behaviours (from an environmental point of view) of all the entrepreneurs working together in the agricultural network. Yet, the (substantially) illegal ‘instructions’ of the board of the network hub would ultimately end up having to be judged in terms of their harmful consequence for third parties according to the yardstick of civil liability under Art 2043 of the Civil Code. As mentioned above, this norm cannot be applied here, and therefore, this kind of *ex-post* evaluation currently does not work. This problem could be addressed by an *ex-ante* evaluation based on the mentioned external mechanism that supervises the sustainable behaviour of companies.

To sum up, it is correct to affirm that modern agro-food production strongly contributes to climate change. However, the legal instruments to be found in (Italian) private law do not provide for a proper solution.²⁸³ Thus, currently, only public law remains, which sanctions the behaviour of everyone and not just that of a farmer causing environmental damage. The contribution of the new CAP, which is supposed to be specifically geared to climate protection, remains to be seen. But here, too, climate-friendliness is a matter of payment (subsidies) rather than individual responsibility. Probably the most coherent alternative would be to set a suitable CO₂ price as this, in my opinion, makes it possible to reconcile the functioning of the market with environmental needs and, as a consequence, to include individual consumers in the framework for action.²⁸⁴ Measures based on voluntary action (eg, measures based on corporate social responsibility²⁸⁵) have proved to have too little effect at present.²⁸⁶

²⁸³ Admittedly, if companies were sanctioned, they would try to pass on the costs to their customers. Thus, consumers are on board anyway. Moreover, even a discussion as to whether state liability would not be more appropriate than corporate liability, if politicians have not yet resolutely combated climate change, would only make limited sense. After all, state liability claims would also have to serve the entire population – through higher tax burdens.

²⁸⁴ See M. Grubb, *Planetary Economics: Energy, climate change and the three domains of sustainable development* (New York: Routledge, 2013), 207.

²⁸⁵ For some critical observations, see D. Whyte, ‘The Autonomous Corporation: The Acceptable Mask of Capitalism’ *King’s Law Journal* 29, 1, 88-110 (2018).

²⁸⁶ See Ekardt, F. Ekardt, ‘Umweltschutz’ n 5 above, 464; see also D. Mottershead et al, *Evaluation study of the impact of the CAP on climate change and greenhouse gas emissions: Final report* (Luxembourg: Publications Office of the European Union, 2018).

5G Authorization Auctions in the European Union: A Comparison Between Italy and France

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Abstract

This article focuses on the role and significance of the 5G tendering system in contemporary comparative law, taking the cases of Italy and France as an illustration. While the first part of the article explains the concepts and purposes of 5G Technology in science and comparative methodology, the second part explores and examines the reasons behind Italy and France's decisions to adopt EU regulations and, hence, to amend their domestic laws regarding auctions for the Multi-Band Spectrum. The final part of the article reviews the latest trends in the law relating to 5G project management authorization from a comparative perspective and offers legal diversity as an approach to mitigating the problems related to conflicting laws within the European Union.

I. Introduction

Fifth Generation Wireless Networks (5G) are the next generation of mobile Internet connection, offering faster speeds and more reliable connections for smartphones and other devices than ever before. The networks will help achieve significant improvement in Internet of Things technology, providing the infrastructure needed to carry large amounts of data, allowing for a smarter and more connected world.

The European Union has strongly supported the deployment and introduction of 5G networks, notably with regard to the assignment of portions of radio spectrum, investment incentives and favourable operating framework conditions. Some countries are more advanced than others. For instance, the Italian regulator, AGCOM, has already launched public consultation on assignment procedures and frequency usage rules and has also announced the 5G multi-band spectrum.¹ In France, to prepare for the arrival of 5G, the French regulator, *Autorité de Régulation des Communications Électroniques et des Postes* (ARCEP), has started work on defining the allocation procedures.

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¹ *Autorità per le Garanzie nelle Comunicazioni* (AGCOM) (in English: Authority for Communications Guarantees).

Since there are plenty of European marketplaces for 5G networks, each EU country prefers to address the various legal provisions and instruments for managing the network effectively in its own way. However, this raises the question as to the best way to ensure consistency among legal approaches across Europe with regard to the 5G and Internet of Things tendering processes, given that each jurisdiction wishes to pass the best possible law.

This article focuses on the legal systems regulating 5G networks and to what extent it is possible for these systems to respect the rights and freedoms of all the Member States. One method to solve the legal gap fairly is to amend EU regulations or adopt new laws on 5G and IoT tendering activities.² This paper explores and analyzes the legal perspectives on this problematic issue, focusing on Italian and French law and how they comply with EU regulations.

II. The 5G Vision

The Internet of Things (IoT) has been defined in many different ways. Generally, it describes the revolution led by internet-enabled devices that are capable of sensing or acting on their environment and are able to communicate with each other, other machines, or computers.³ Many personal IoT devices send data to a smartphone or tablet via Bluetooth and then use a fixed or cellular network to send the data to a cloud-based server. Such smart objects rely on vast quantities of data. They are able to communicate, supporting real-time control or data analysis that can reveal new insights, all of which have opened up new opportunities for mobile networks. This rapid growth in the field of IoT will bring opportunities for new products and services to businesses and consumers.⁴

This 5G network enables customers to connect more than one smart application at a time. This will enable greater efficiency across a variety of industries, leading to better management of agriculture, electricity grids, and supply chains. Naturally, 4G technology will not be replaced by 5G immediately, but in the transition phase, the joint use of 4G and 5G together will mean that devices will be equipped for dual use combining the two technologies until 5G becomes the norm.

In the IoT industry, Telecommunication laws constitute a key element in the business strategy for a digital single market in Europe. It relies on establishing a standard for machine-to-machine (M2M) communications over mobile cellular-based networks under the European Telecommunications Standards Institute (ETSI). The 5G system supports the development of connections between devices.

² H. Chris, 'What is 5G, and how fast will it be?' *How-To Geek*, available at tinyurl.com/y7z47apx (last visited 7 July 2020).

³ C. Perera et al, *The Emerging Internet of Things Marketplace From an Industrial Perspective: A Survey* (New York: Institute of Electrical and Electronics Engineers, 2015).

⁴ P. Magrassi and T. Berg, 'A World of Smart Objects' *Gartner research report R-17-2243* (12 August 2002); S. Vongsingthong and S. Smachit, 'Internet of Things: A Review of Applications & Technologies' *Suranaree Journal of Science and Technology*, 359-374 (2014).

The European Union will work to encourage the next stage and the introduction of such networks through the assignment of radio spectrums, investment incentives, and favorable framework conditions. These processes rely on the results of research, work groups, and stakeholders. In order to reach the most effective worldwide harmonization, designation of new frequency bands above 6 GHz has been placed on the World Radio Conference 2019 (WRC-19) agenda, starting from a list of candidate bands identified at WRC-15.⁵ One core objective concerning 5G networks in the EU is to have at least one major city in every European country ready for this new technology by 2020, and also to have coverage for every city, motorway, and high-speed railway line by 2025. Nevertheless, some countries have made more progress than others. The Italian regulator, AGCOM, has already launched a public consultation on assignment procedures and frequency usage rules for numerous frequencies. In May 2018, AGCOM announced that 5G multi-band spectrum tender procedures (for 700 MHz, 3.6-3.8 GHz and 26 GHz) would be held in September 2018. Seven operators qualified to apply, and the auction process ended on 2 October 2018.⁶ Intense bidding pushed the prices far above expectations, reaching a total of six point fifty-five billion euros, of which four billion euros went towards the highly-coveted mid-frequencies. In France, the regulator, ARCEP, began work on defining allocation procedures in 2017.⁷ These procedures will be available in the course of 2019. ARCEP has engaged with industrial stakeholders to identify new uses for these frequencies and drive market players to create open-trial platforms using small-scale 5G networks. These stakeholders include companies operating in the fields of technology, health, energy, smart cities, and others.

Figure 1. 5G driving industrial and societal changes⁸



⁵ A. Ometov et al, 'Facilitating the Delegation of Use for Private Devices in the Era of the Internet of Wearable Things' *IEEE Internet of Things Journal*, 843-854 (2017).

⁶ G. Samuel, *The Internet of Things* (Cambridge, MA: MIT Press, 2015).

⁷ S. Segal, 'What is 5G?' *PC Magazine online* (14 December 2018).

⁸ '5G Empowering Vertical Industries. White Paper 2016', available at tinyurl.com/h8bcx9u (last visited 7 July 2020).

As technology improves and 5G connectivity becomes more widespread, business processes will undergo major changes. The manufacturing industry will evolve towards a distributed production organization, with connected goods, low energy processes and collaborative robots working across integrated manufacturing and logistics systems.⁹ The automotive and transportation sectors will introduce autonomous and cooperative vehicles within the next decade, with enhanced safety and security standards. Entertainment and digital media sectors will unlock new opportunities for integrating broadcast TV and digital media. E-health will also see new changes.¹⁰ Examples include concepts such as European ‘Personalized or Individualized Healthcare’ and the transition from hospital and specialist-centered care models towards distributed patient-centered models.¹¹ 5G technology will unlock new value propositions and business models to improve cost structures to ultimately benefit consumers.

1. The Technical Specifications of 5G

The ITU (International Telecommunication Union)¹² and 3GPP (Third Generation Partnership Project)¹³ are drivers of the new form of electronic devices. When a new standard is being defined by the ITU, the 3GPP works in parallel on the technical solutions. The 3GPP is responsible for development and ensuring agreement on definitions relating to digital data in a proper way.

However, 5G standards are still being debated today, with more changes coming in the future. The draft release of the first 5G standard by the 3GPP is still in the works.¹⁴ The first launch of the standard was validated in September 2018, and a second release by 3GPP will be underway in March 2020.

⁹ M. Hermann et al, ‘Design Principles for Industry 4.0 Scenarios: A Literature Review’, Working Paper 01/2015 available at tinyurl.com/rkzmuxy (last visited 7 July 2020).

¹⁰ See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – E-Health Action Plan 2012-2020 – Innovative healthcare for the 21st Century, available at tinyurl.com/yx6gl262 (last visited 7 July 2020).

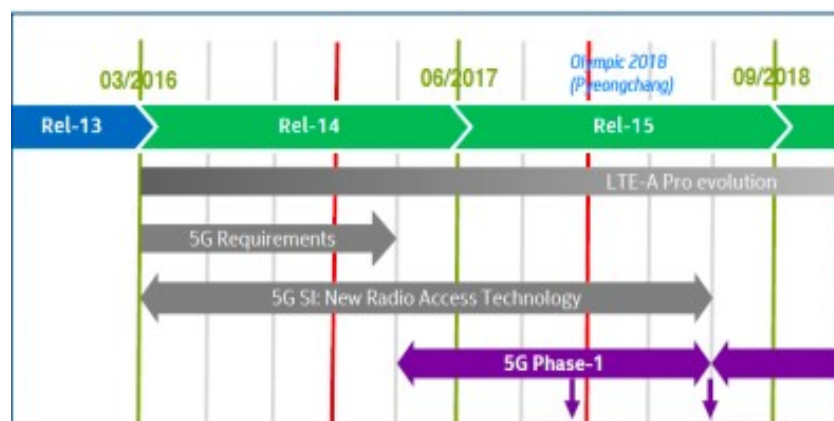
¹¹ ‘The Future of Health Care: Deep Data, Smart Sensors, Virtual Patients and the Internet-of-Humans’, available at tinyurl.com/v452zyp (last visited 7 July 2020).

¹² ITU is the United Nations agency devoted to information and communications technologies. It carries out research and studies through its Working Party 5D, the sub-group responsible for the overall radio system aspects of international mobile telecommunications (IMT).

¹³ The Third Generation Partnership Project (3GPP) is a standards organization that develops protocols for mobile telephony. Its best-known work is the development and maintenance of:

- GSM and related 2G and 2.5G standards, including GPRS and EDGE
- UMTS and related 3G standards, including HSPA
- LTE and related 4G standards, including LTE Advanced and LTE Advanced Pro
- Next generation and related 5G standards
- An evolved IP Multimedia Subsystem (IMS) developed in an access-independent manner.

¹⁴ Definition of the new architecture began in December 2016 and work on the New Radio (NR) interface is set to begin in March 2017.

Figure 2. 3GPP timeline for 5G¹⁵

2. 5G Development Milestone

A number of initiatives are currently in progress around the world to promote 5G development. 5G technology will produce significant socio-economic repercussions, and many countries express their wish to contribute as technological leaders.¹⁶

In Europe, the 5G Public Private Partnership (5G-PPP), dedicated to 5G research and development, was created as one of the European Commission's initiatives in 2013. The main objectives set by 5G-PPP are to create stronger ties between the economic players and academic bodies dedicated to forming more robust connections between the telecommunications sector along the entire project value chain, to encourage the United States of America, Asia and Europe to be independent players on technology market, to regain technological leadership, notably in disruptive technologies by promoting standards through international bodies, to allow innovative business infrastructures to emerge, and to facilitate large-scale experimentation.¹⁷

To achieve its objectives, 5G-PPP set up an ambitious agenda: systems optimizations from the end of 2017 to mid-2019, and a full-size trial stage from 2019 to 2020.¹⁸ The European Union's regulatory framework for electronic communications has recently been reviewed and the new European Electronic Communications Code (EECC) entered into force on 21 December 2018. Member States will have two years to transpose it into national law, which will give a strong push to 5G and high-speed broadband networks as a whole. All Member

¹⁵ See tinyurl.com/vnffbvo (last visited 7 July 2020).

¹⁶ J. Dolcourt, 'Testing Verizon's Early 5G Speeds was a Mess, but I'm still Excited about our Data Future' *CNET*, available at tinyurl.com/yy7a5vqy (last visited 7 July 2020).

¹⁷ See tinyurl.com/sjcwuo5 (last visited 7 July 2020).

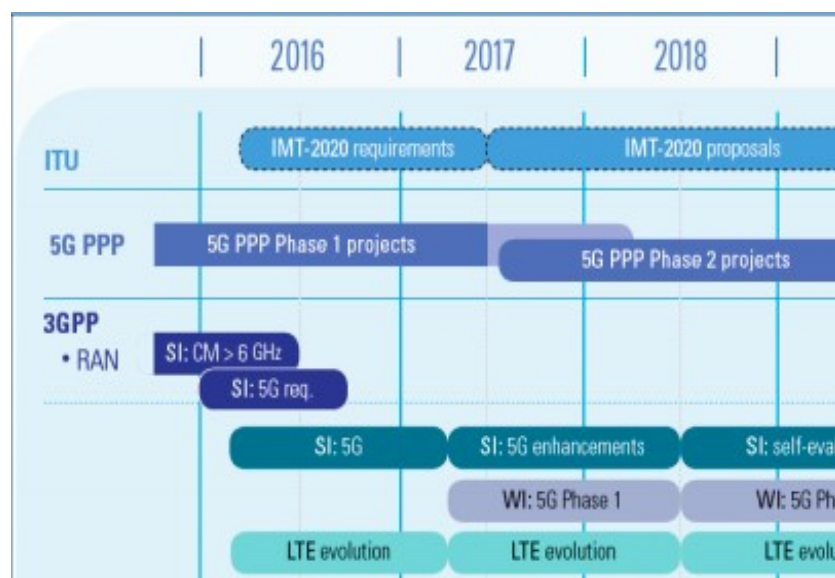
¹⁸ Ch. Gartenberg, 'The First Real 5G Specification has Officially Been Completed' *The Verge*, available at tinyurl.com/yar5cuns (last visited 7 July 2020).

States are required to adopt 5G roadmaps regarding the licensing of the 700 MHz band.¹⁹ With the adoption of the EECC, a connectivity objective has been added to the regulatory framework, which includes the availability of uninterrupted 5G coverage for urban areas and major terrestrial transport paths. All Member States must now clear the 5G ‘pioneer’ frequency bands (700 MHz, 3.5 GHz and 26 GHz) and reassign them by the end of 2020. However, it is unlikely that all countries will meet this target. This will depend on two factors. The first concerns the driving forces behind the 5G campaign. The level of marketing activity is fundamental, as are intense lobbying activities on governments by equipment suppliers and operators and 5G advertising by governments. A second factor is the size of the home market, which needs to be suitable to support the first versions of local 5G products and their improvement through national market testing before global promotional launches.

III. Latest Trends in the Law Relating to 5G Project Management Tendering

Acceleration towards 5G by 2020 will require European countries to develop leading-edge technologies, synchronize with globally accepted standards, acquire consensus over the most suitable frequency bands, and determine auction processes.

Figure 3. 5G PPP v 3GPP and ITU roadmaps²⁰



¹⁹ See the 5G Observatory Quarterly Report 3, 10 (available at tinyurl.com/wcsexma (last visited 7 July 2020)).

²⁰ See tinyurl.com/h8bcx9u (last visited 7 July 2020).

1. 5G European Action Plan

The European Commission has provided a number of targets for each EU member. The main goal of the 5G project is to reach the latest mobility standard in at least one main city for each country by 2025. As a recommendatory measure, in September 2016 the European Commission released the 5G Action Plan to bolster infrastructure and service investments in the Digital Single Market. This plan also clarified the roadmap for public and private 5G investments inside the European Union, including the regulatory framework for those preparing for auctions.

To achieve this plan, the Commission proposed that all EU Member States adopt roadmaps and priorities for coordinated 5G deployment, targeting early introduction of the network by 2018 and moving towards commercial large-scale introduction by the end of 2020 at the latest.²¹

Furthermore, the EU Member States will issue laws to manage the spectrum bands available for 5G ahead of the 2019 World Radio Communication Conference (WRC-19), to be complemented by additional bands as soon as possible and will work towards a recommended approach for the authorization of the specific 5G spectrum bands above 6GHz.²² The Member States will introduce legal measures to promote 5G in major urban areas and on the main transportation lines, also promoting Pan-European multi-stakeholder trials as catalysts to turn technological innovation into full legal solutions.²³ The Member States will facilitate the implementation of an industry-led venture fund to support 5G-based legal innovation, and involve front-role EU States to lead the promotion of legal regulation.

2. 5G in France

In a context of strong industrial, legal and political debate around 5G in France, the regulator, ARCEP, has been preparing for this new generation of technologies over the last few years. 5G requires the use of new frequencies, particularly on high-frequency bands, to increase the capacity of mobile networks. This is the setting for the plan that ARCEP has developed to prepare for the arrival of 5G, namely the creation of legislation to support the allocation of frequency bands for 5G.²⁴

To enable all players, such as operators, industrialists, start-ups, and lawyers, to prepare for the arrival of 5G, ARCEP launched a 5G pilot project in early 2018,

²¹ See 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 5G for Europe an action plan', available at tinyurl.com/v5xya43 (last visited 7 July 2020).

²² 'Factcheck: Large Increase of Capacity Going from LTE to 5G Low and Mid-Band' *Wirelessone.news*, available at tinyurl.com/setbumz (last visited 7 July 2020).

²³ Available at tinyurl.com/ya9hooep (last visited 7 July 2020).

²⁴ Available at tinyurl.com/y7vof6ev (last visited 7 July 2020).

which allowed ARCEP to issue authorizations for the use of new 5G frequency bands, ie 3.5 GHz (3.4-3.8 GHz) and 26 GHz (24.25-27.5 GHz), which are the frequencies for 5G technology. ARCEP is working to free these bands by migrating current users to other bands.²⁵

After 2026, a guard band requirement will be identified to avoid interference from the Ministry of Armed Forces radars below 3.4 GHz. It will also ensure power limitation, as recommended by the European Conference of Postal and Telecommunications Administrations (CEPT) in this part of the spectrum. This guard band is currently estimated at between 10 to 20 MHz, but it could potentially be reduced with improved radio equipment performance. 5G will use new frequencies much higher than those being used today in civil telecommunications, ie those within the 'millimetre' bands above 24 GHz.²⁶ These new frequency bands will allow very high networking speeds in order to meet the localized needs of mobile networks in very dense areas, and to develop new 5G services dedicated to industry. Today, only the 26.5-27.5 GHz band is free and can be used by 2020. Subsequently, the entire 5G spectrum should gradually be made available, subject to conditions of coexistence and the improvement of legal rules to control the spectrum. In view of radio astronomy and earth exploration services, work is in progress to evaluate the shared use of the 26 GHz spectrum between 5G systems and satellite earth stations.

In preparing for the EU's 5G technology, ARCEP intends to define the technical conditions for the use of bands to avoid interference between neighbouring countries' 5G networks or with existing users of 5G bands or adjacent bands.²⁷ These conditions will be: firstly, to specify the allocation schedule so as to allow the opening up of 5G services by 2020; secondly, to examine the conditions under which operators can activate a network. In particular, ARCEP has already adopted regulations to enable an operator who has contributed to investment in a network to use supernumerary fibre for the collection of its mobile base stations.²⁸ However, the situation of multi-band infringement is unavoidable.

Furthermore, the 5G provider has to address the legal challenges regarding 5G mobilization through a group of technical experts and to evaluate the feasibility of a legal framework for network sharing, such as the use of microcells, active antennas, macro-cells and microcellular articulation. In addition, it is essential to assess the feasibility and constraints associated with the provision of specialized mobile services on public networks, also promoting 5G enhancement, small cells,

²⁵ 'Tableau de bord des expérimentations 5G en France', available at tinyurl.com/y8qr2lwd (last visited 7 July 2020).

²⁶ Y.C. Foo, 'EU countries, lawmakers strike deal to open up spectrum for 5G' *Reuters*, available at tinyurl.com/y8m2jcmb (last visited 7 July 2020).

²⁷ 'Updated: Spectrum for Terrestrial 5G Networks: Licensing Developments' GSA, available at tinyurl.com/y9r2cy3a (last visited 7 July 2020).

²⁸ *Autorité de Régulation des Communications Électroniques et des Postes* 17 May 2018 no 0569-RDPI, available at tinyurl.com/y8getvuw (last visited 7 July 2020).

and generalized best practices, and to set up a working group bringing together best practices for public infrastructure access rules and establishing legal guidance on the best measures to deploy where necessary.

The envisaged use to which 5G will be put requires the mobilization of actors from different perspectives in order to test and create new partnerships within economic and legal frameworks. As a result, pilot 5G started mobilizing actors and identifying new legal issues early last year.²⁹ The twenty-two authorized parties conducted experiments in the 3.4-3.8 GHz band.³⁰ This work will bring about improvements to the format and provisions of future laws relating to frequency allocation.

As mentioned earlier, 4G will not be abruptly replaced by 5G. In France, devices will undoubtedly be multi-modal, initially connecting to the 4G network before transitioning to the 5G network when it becomes available. Upcoming track management is permitted thanks to the introduction of this new technology. The new regulations undeniably support 5G technology. There has been pre-stage testing arranged in order to support the efforts to combine frequency bands that are governed by exclusive licenses. The example is the combination of bands allocated exclusively to a mobile operator, while unlicensed frequency bands are to be regulated by a general authorization.³¹

In France, the regulator has already awarded licenses to use the 700 MHz band for mobile services³² and intends to award spectrum licenses for the 3.4-3.8 GHz band during 2018. It has also held consultations on the future award of the 26 GHz band, but no explicit 5G roadmap has yet been published. The French government has not announced specific government funding for 5G technological development or trials but has invested in improving fibre coverage, which it hopes will stimulate 5G development and infrastructure development in the longer term. The regulator, ARCEP, is actively encouraging 5G trials by offering test licenses for spectrums in the 3.4-3.8 GHz and 26 GHz bands.

3. A Difficult Balance

‘Auctions need to be designed to balance fiscal requirements with the need for investment to enable economic development (...) it is critical that European governments avoid artificial auction constructs which fail to strike a healthy balance for the industry’.³³

²⁹ See tinyurl.com/y7vof6ev (last visited 7 July 2020).

³⁰ ‘GSA launches first global database of commercial 5G devices’, available at tinyurl.com/y8fhda7e (last visited 7 July 2020).

³¹ ARCEP, *la 5G*, mai 2017.

³² ARCEP has actively encouraged industrial players to conduct 5G (and LTE) testing. After awarding licenses for the use of the 700MHz band in 2015, the regulator invited 176 stakeholders to request spectrums for experimentation within the 2.6GHz and 3.4-3.6GHz bands.

³³ W. Rush, ‘IT Needs to Start Thinking About 5G and Edge Cloud Computing’ *PcMag.com*,

ARCEP plans to use the 3.5 GHz band for the next spectrum auction. However, there might not be enough airwaves for all bidders, and this scarcity could eventually drive up auction prices, which results in high prices that may hurt the industry and consumers.

Italy's antitrust authority has also pointed out legal obstacles for 5G deployment in Italy.³⁴ The Italian government has received criticism for the way it set up the auction. The government offered two larger blocks of spectrum in the 3.7 GHz band along with two smaller ones, which pitted bidders in a fight for the bigger blocks. Although European regulators have adopted a consistent approach in attempting to provide legal certainty and incentivize investments for the deployment of 5G networks, there are still obstacles in the way of its mass roll out. The Italian Competition Authority (AGCM) recently issued a report highlighting the obstacles to the installation of mobile telecommunications and broadband wireless access facilities due to municipal, regional and national regulations, which could cause a significant slowdown in the transition to 5G technologies in Italy.

Notably, the AGCM identifies a list of critical issues, such as national electromagnetic emissions and power limits, municipal restrictions on the installation of telecommunications facilities, and the lack of legislative uniformity and a standard authorization process.³⁵ After the record seven point six billion dollars sale in the 5G auction, there is no doubt that telecommunications companies aim to take advantage of this new cutting-edge technology to fight fierce competition and slowing subscriber growth. In order to fully exploit the potential of 5G, a comprehensive compliance strategy needs to be designed carefully.

Having reviewed the differences between Italian law and French law on the subject, this section explores EU regulations and acknowledges the need for a coordinated approach. The European commission, addressing 5G- PPP seeks to ensure that each EU country abides by the regulations and enacts domestic laws and policy to be applied in their States. The results of this work will assist clarification of 5G procedure, and the standardization of work, which is currently ongoing.

Against this backdrop, the overhaul of telecom rules was announced in the digital single market strategy. The purpose of the telecom framework review is to consolidate the single market in telecommunications, supported by infrastructure investments, and to reform the regulatory framework for electronic communications starting from 2009.³⁶ As stipulated in the overarching communication 'Towards

available at tinyurl.com/ycpqedrb (last visited 7 July 2020).

³⁴ L. Gupta et al, 'Mobile Edge Computing - An Important Ingredient of 5G Networks' *IEEE Softwarization*, available at tinyurl.com/yylfyxns (last visited 7 July 2020).

³⁵ R. Maunder, 'A Vision for 5G Channel Coding' (September 2016), available at tinyurl.com/y9fqzk62 (last visited 7 July 2020).

³⁶ *ibid.*

a European Gigabit Society', the European Commission has proposed three new legislative proposals and one non-legislative measure.³⁷ The three legislative proposals include: first, a new European electronic communications code to increase investments in infrastructure; second, a legislative proposal (Wifi4EU), to increase free Wi-Fi access points for citizens; and third, a legislative proposal to reinforce the role of national regulators and the BEREC agency.³⁸

Each of these legislative proposals has been addressed in a separate department. In addition, the European Commission also presented a non-legislative measure in its Communication '5G for Europe': an action plan that foresees a common EU calendar for a coordinated 5G commercial launch next year, as well as joint work with Member States and industry stakeholders in order to identify and allocate spectrum bands for 5G. The EU also organized pan-European 5G trials last year to promote common global 5G standards and encourage the adoption of national 5G deployment roadmaps across all EU Member States. Furthermore, the European Commission has set three related strategic connectivity objectives for 2025.³⁹

The European Parliament, in its resolution 'Towards a Digital Single Market Act', asked the Commission to propose rules fit for the digital age, which would boost investments, competitions, and innovations for over-the-top services and telecom operators, in order to benefit consumers. Besides, the European Parliament adopted the resolution 'Internet connectivity for growth, competitiveness, and cohesion: European gigabit society and 5G'.⁴⁰ This resolution welcomes the Commission's strategy and supports its targets, while calling for an explicit 5G deployment timetable, including a technology-neutral approach to tackle the digital divide, and an ambitious 5G financing strategy, including potential and existing EU funds. It also calls for an investment-friendly regulatory environment for fair competition, a coherent European spectrum strategy with improved coordination in the allocation of spectrums, and the acceleration of the EU's 5G standardization efforts.⁴¹ It also highlights the positive societal impacts that 5G would bring to Europe for improved learning, health, culture, cohesion, and new job opportunities. To this end, it also calls for the development and improvement of digital skills. Finally, the resolution asks the Commission to provide the

³⁷ EP Legislative Observatory, Procedure file on the European Commission, 2016/2305(INI).

³⁸ Body of European Regulators for Electronic Communications.

³⁹ 'A Common EU Approach to the Security of 5G Networks' - Following the support from Heads of State or Government expressed at the European Council on 22 March for a concerted approach to the security of 5G networks, the European Commission recommended a set of concrete actions to assess cybersecurity risks of 5G networks and to strengthen preventive measures.

⁴⁰ European Parliament resolution of 1 June 2017 on internet connectivity for growth, competitiveness and cohesion: European gigabit society and 5G (2018/C 307/23).

⁴¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 14 September 2016 on connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society (COM (2016) 587- COM (2016) 58).

Parliament with an annual review of the 5G action plan, indicating progress made and any recommendations. On 28 June 2016, the European Council adopted an agenda advocating deployment of very high-capacity fixed and wireless broadband connectivity across Europe to boost future competitiveness. On 2 December 2016, at the Transport, Telecommunications, and Energy Council, ministers expressed their support for the connectivity objectives in the telecom framework overhaul proposals and agreed on the need to work together to achieve them, including on 5G.⁴² On 4-5 December 2017, the Transport, Telecommunications, and Energy Council (under the Estonian Presidency) signed a 5G roadmap setting out precise deadlines for the harmonization of the spectrum necessary for the rollout of 5G. On 1 March 2018, an agreement on a spectrum for 5G was reached between the European Parliament and the Council negotiation teams as part of the Electronic Communications Code trialogue discussions.⁴³ In this agreement, MEPs called on the Commission and the Member States to provide guidelines on how to tackle cyber threats and vulnerabilities when procuring 5G equipment and to establish a strategy to reduce Europe's dependence on foreign cybersecurity technology,⁴⁴ also requesting the Commission to mandate ENISA (the EU Cybersecurity Agency) and to work on a certification scheme ensuring that the rollout of 5G in the EU meets the highest security standards.⁴⁵

IV. Problematic Issues

As this technology is developing globally, it is necessary to ensure the compatibility of 5G and the associated legislation among the different regions. The EU, alone, may be able to draw worldwide agreement regarding spectrum bands and the legal framework for 5G legal for all through some form of international cooperation. The launch of 5G services will also require substantial investment and close collaboration between players in the world of telecom and the key industries. Network operators will not invest in new infrastructure if they do not see clear prospects for solid demand, combined with clear regulatory conditions that make the investment worthwhile.⁴⁶ Equally, industrial sectors interested in 5G for their digitization process may want to wait until the 5G infrastructure is tested and legal regulations have been issued.

⁴² European Council meeting (28 June 2016) – Conclusions (EUCO 26/16), available at tinyurl.com/y7pvy3wt (last visited 7 July 2020).

⁴³ European Parliament, EPRS, at a glance, May 2017.

⁴⁴ Members of the European Parliament: The European Parliament is made up of seven hundred fifty-one members elected in the twenty-eight Member States of the enlarged European Union. Since 1979, MEPs have been elected by direct universal suffrage for a five-year period.

⁴⁵ 'Breaking News, World News & Multimedia' *Les Echos*, available at tinyurl.com/y6eq7p5t (last visited 7 July 2020).

⁴⁶ N.S. Gawai, 'Key Concept of 5G: Future Mobile Technology' 2 *International Journal of Engineering Sciences & Research Technology*, 12 (2013).

The lack of coordination among Member States during the roll-out of 5G networks would create a significant risk that spectrum availability and the implementation of legal standards will become fragmented. As a result, the creation of a critical mass for 5G-based innovation in the Digital Single Market would be delayed. Forty-eight delays have accumulated to hold back the introduction of 5G. Although the legal gap is narrowing down, the various Member States still show significant difference, so the Commission is proposing an action plan as a means of fostering adequate coordination. The plan aims for the vast majority of investors to participate in the 5G ecosystem, while levelling out competition and profits across the EU.⁴⁷

A set of pioneer spectrum bands need to be identified to reflect 5G spectrum requirements in the longer term. WRC-19 focuses on band allocation and increasing the market scale toward the international forum. The ability to share spectrum under license, for instance, should be widely encouraged as a condition for entering the market, in parallel with meeting the legislative goals set out in the EEC Code. This challenge will predict the variety of 5G usage most likely to satisfy all the key legal requirements.

V. Conclusion and Recommendations

1. Conclusion

The success of compulsory 5G investment relies greatly on the cooperation of relevant parties such as network developers, investors, policy makers, and regulators, etc as it will encourage national support.⁴⁸ All the players involved, not only the provider but also the users of this technology, are called upon to support and abide by the common legal framework for the advancement of this project. In the hope of developing the legal framework for 5G in the EU Region, the Commission has requested the public and private sectors to ensure readiness and compatibility between 5G infrastructures and legal regulations. To support investment in 5G network as such, it is also necessary to reduce installation costs. Yet to do so, this latest technology must be upgraded to be more consistent, in terms of administrative conditions and time line, with the provision of the EEC Code and other legal tools.⁴⁹

The European Union is at the starting point of an important journey to develop the backbone of a digital infrastructure that will foster future competitiveness. It has already taken bold steps to develop world-class 5G technological know-how. It is now time to move up a notch and reap the benefits

⁴⁷ See tinyurl.com/y9c9o8v3 (last visited 7 July 2020).

⁴⁸ 'Press release: EU Negotiators Agree on Strengthening Europe's Cybersecurity', 10 December 2018, available at tinyurl.com/y87mb3rz (last visited 7 July 2020).

⁴⁹ European Parliament, EPRS Briefing, January 2016 at tinyurl.com/y87mb3rz (last visited 7 July 2020).

of public and private investment for the economy and society. The 5G installation plan adopts an ambitious approach and requires the united and sustained commitment of all the parties involved: the EU institutions, the Member States, industry, and the law. It also means achieving the ‘connectivity’ targets set out in the EU ‘Connectivity Toward Social Cohesion’ communication. The proposed legal measures in this region must fit the plan.

2. Recommendations

Recommendations are a combination of legislative and policy instruments meant to protect the EU economies, societies, and democratic systems. With worldwide 5G revenues estimated at two hundred twenty-five billion euros for 2025, 5G is a key asset for Europe to compete in the global market, and its cybersecurity is crucial to ensure the strategic autonomy of the Union.⁵⁰ Each Member State should complete a national risk assessment for 5G network infrastructures. On this basis, Member States should update existing legal measures, which must include reinforced legal obligations on suppliers and operators to ensure the security of the networks. The national risk assessments and measures should consider various risk factors, such as technical risks and those linked to the behaviour of suppliers or operators, including those from third countries. National risk assessments will be a central element in building a coordinated EU risk assessment. EU Member States have the right to exclude companies from their markets for national security reasons if they do not comply with the country’s standards and legal framework.⁵¹

These guidelines are merely regulations without legal enforcement, including unified telecommunication rules, the EEC Rule, and the law on 5G activities and their auction. The recommendation will help Member States to implement these new instruments in a coherent manner when it comes to 5G security.⁵² Moreover, the updated guidance which was mere soft law (without legal binding force on Member States), intending to encourage not only 5G legislation but also the reinforcement of cooperation to protect the security of 5G networks, such as the prevention of cyber-attacks. The legislation would definitely, at least, assist EU Region to achieve good quality 5G network services at a reasonable price. Furthermore, the network operators and providers should not encounter high prices at general auctions.

The most important aspect that the regulator should keep in mind is to assign a sufficient amount of spectrum and to publish future legal roadmaps to support high quality mobile service governance, as well as to allocate sufficient

⁵⁰ P. Teffer, ‘Suddenly, digital single market doesn’t ‘need’ EU agency’ *EU observer*, 5 December 2017.

⁵¹ Commission Recommendation of 26 March 2019 on Cybersecurity of 5G Networks, C (2019) 2335 final, available at tinyurl.com/ybaj7lee (last visited 7 July 2020).

⁵² ‘Press release’ n 49 above, 50.

frequencies and support high-quality network services. Frequency breaks for the same industry or new operators may allow operators to access fewer waves, and even lead to the risk of higher-frequency bands. Also, auction design should not create unnecessary risks and uncertainties for bidders. Lastly, the selection of frequency bands for inappropriate auctions or a frequency provider group that is not flexible and may cause inefficient frequency distribution should be eliminated. When the European Union Region is fully able to manage the legal measures for 5G technology in terms of spectrum auction and regulations to support the connectivity system itself, the EU 5G cyber network will definitely be able to contribute to social and economic growth in the near future.

The Effectiveness of the Law and Consistent Interpretation

Gennaro Santorelli*

Abstract

The subject of the value of judicial precedent appears to have assumed a central role in current scholarly debate. Although the principle of binding precedent is not applied in the Italian legal system, the gradual strengthening of the Court of Cassation's function as guarantor of the uniform interpretation of the law raises important questions regarding the current basis of legal effectiveness.

Through a critical re-reading of the traditional doctrine of the so-called 'living law', it may come to take on a meaning that falls in line with the duty of ordinary judges to interpret it in a way that is compatible with the Constitution, a duty long upheld in constitutional case law. Once the ontological basis for the effectiveness of the law has been discerned, the so-called 'living law' is no longer a restriction on the interpretative freedom of the Constitutional Court but rather a hermeneutical/argumentative standard, serving to suggest the meaning of the provision whose constitutionality is at issue.

I. The Value of Judicial Precedent in the Constitutional Order. The Current Dimension of the So-Called 'Living Law'

The *creative* role of judicial interpretation has once more become very topical of late.¹

Contemporary scholarship speaks of an Age of the Judiciary, where the conceptual boundary between the function of the courts and that of the legislator appears less clear cut than in the past.

At times, the Court of Cassation (Corte di Cassazione) itself defines its decisively describes its decisions as being 'normative case law'. Scholars are focusing once again on the creation of law through consolidated models of decision making and therefore on the question of the binding force of applying the rules of precedent, for which the expression 'living law' was coined.² This issue is

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¹ Most recently on the subject, S. Patti, 'L'interpretazione, la giurisprudenza e le fonti del diritto privato' *Il Foro Italiano*, 114 (2014); N. Lipari, 'L'uso alternativo del diritto, oggi' *Rivista di diritto civile*, 144 (2018); Id, *Il diritto civile tra legge e giudizio* (Milano: Giuffrè, 2017); G. Zagrebelsky, *Diritto allo specchio* (Torino: Einaudi, 2018); P. Grossi, *L'invenzione del diritto*, (Roma-Bari: Laterza, 2017).

² N. Lipari, *Il diritto civile tra legge e giudizio* (Milano: Giuffrè, 2017), 20. Observing that the expression 'living law' has recently come back into vogue, and questions surrounding the

particularly important at a time when written law originates from sources coming from a plurality of legal orders, and case law stems from the concrete applications of different courts at domestic and supranational level.

For several reasons, the topic is linked to that of what is now a strongly felt need for legal certainty:³ the inclusion of safeguards in a multi-level system of sources of law, the multiplicity of supreme courts, the fragmentary nature of legislation, and rapid social change. Today, the interpreter of the law is called upon to provide solutions to emerging concrete problems but also to ensure the certainty and stability of the legal system. The changing stance of case law is, in reality, a physiological fact,⁴ and it leaves ample room for judicial discretion, making the judge's decisions less predictable.

The regulatory indications of the Italian legal system do not envisage the binding value of precedents. Nevertheless, the gradual acceptance and recognition of the Court of Cassation's function as guarantor of the uniform interpretation of the law implies the need to take previous decisions into account and to state the reasons for any differing interpretation.

The principles of legal certainty and the fair trial – Art 6 of the European Convention on Human Rights (ECHR) – require the adoption of appropriate measures to avoid conflicting case law, as far as this is possible. In this respect, Italian procedural law appears to comply with the indications of the Strasbourg Court: it provides, in fact, for certain instruments whose purpose is to avoid conflicts between laws. This objective has been achieved, for example, by putting procedures in place to ensure the stability of the case law by encouraging courts to abide by precedents or advising against deviation from them without directly affecting the value of the precedent.⁵

Of importance in this regard is the introduction of a horizontal restriction relating to the precedent of the Joint Sections or the Plenary Session: in order to disregard a position held by these bodies, the Single Section is now obliged to refer the matter once again to the Supreme Court⁶ or, if it considers their position

notion and its current scope are being raised again, S. Sica, 'Il valore del precedente: attuale dimensione del "diritto vivente"' *federalismi.it*, 3 (2018).

³ P. Grossi, 'Sull'odierna incertezza del diritto' *Giustizia civile*, 935 (2014).

⁴ M.R. Morelli, 'L'overruling giurisprudenziale in materia di processo civile', Report no 31 of 2011, Ufficio del Massimario e del Ruolo della Corte Suprema di Cassazione, 21, available at www.cortedicassazione.it.

⁵ F. Patroni Griffi, 'Valore del precedente e nomofilachia', 16 October 2017, available at tinyurl.com/y7glt6nq (last visited 7 July 2020); G. Severini, 'La sicurezza giuridica e le nuove implicazioni della nomofilachia' *federalismi.it*, 2018, 9; S. Sica, n 2 above, 3.

⁶ R. Rordorf, 'Stare decisis. Osservazioni sul valore del precedente giudiziario nell'ordinamento italiano' *Il Foro Italiano*, 284 (2006). In case law, Corte di Cassazione 18 May 2011 no 10864, available at www.cortedicassazione.it (2011), affirms the need for courts to be cautious in changing a consolidated position in order not to compromise a party's legitimate expectations; Corte di Cassazione-Sezione lavoro 15 October 2007 no 21553, *Giustizia civile - massimario*, 10 (2007), states that even if there is no rule in the Italian procedural system imposing *stare decisis*, one

to be in conflict with European Union law, to the Court of Justice of the European Union (Art 374 of the Code of Civil Procedure, introduced by legge 2 February 2006 no 40).

The growing value of precedents in our system can also be seen in Art 118 of the implementing provisions of the Code of Civil Procedure, as reformed by legge 18 June 2009 no 69, which expressly authorises courts to refer to analogous precedents to justify the legal reasons for a judgment.

In addition to these are the provisions of the Code of Civil Procedure that allow the reasoning section of judgments to be simplified by referring directly to analogous precedents or, conversely, those that permit an appeal, including before the Court of Cassation, to be declared inadmissible if the impugned decisions are in accordance with established case law, and no element pointing to a need to change it emerges.

In the light of the question of the value to be attributed to precedent in today's legal system, the second section examines the issue of the sudden change in direction in the consolidated case law of the Court of Cassation. Considering the differing opinions on the binding nature of precedent, the third section attempts to identify the basis for the effectiveness of the law.

We propose a critical analysis of the traditional doctrine of the 'living law', particularly in relation to the duty – now affirmed in constitutional case law – of the ordinary judge to interpret in a way that is compliant with the Constitution provisions whose lawfulness may be in doubt. The fourth paragraph shows the incompatibility between the official doctrine of 'living law' and the so-called consistent interpretation.

Having highlighted the problems in the original formulation of 'living law', the fifth section gives it a different meaning: seen from an ontological standpoint – in the light of recent rulings of the Court of Cassation and the Constitutional Court – we conclude (Section VI) that, today, the 'living law' can be seen not as an historical given that cannot be changed – binding, as such, the Constitutional Court to a specific interpretation – but as a hermeneutical criterion.

II. The Predictability of Decisions, Overruling, Prospective Overruling

The growing importance given to 'living law' has led to an interest in the phenomenon of overruling in both scholarship and case law.⁷

cannot deviate from the consolidated interpretation of the Court of Cassation, which plays a nomophylactic role.

⁷ R. Rolli, 'Overruling del diritto vivente vs *ius superveniens*' *Contratto e impresa*, 591 (2013); M. Gaboardi, 'Mutamento del precedente giudiziario e tutela dell'affidamento della parte' *Rivista di diritto processuale*, 435 (2017); A. Proto Pisani, 'Un nuovo principio generale del processo' *Il Foro Italiano*, 117 (2011); R. Caponi, 'Il mutamento di giurisprudenza costante in materia di interpretazione di norme processuali come *ius superveniens* irretroattivo' *Il Foro Italiano*, 311 (2010); S. Turatto, 'Overruling in materia processuale e principio del giusto processo' *Le nuove leggi civili commentate*,

The changing interpretation of a legal provision in case law is a natural phenomenon. However, if it is sudden and innovative, it may run counter to the protection of legitimate expectations, especially with regard to any legal relationships that arose before the new interpretation.

According to the principle of the declarative nature of judicial decisions, the new interpretation should normally have retroactive effect. The question concerns the limits that distinguish, in the building of 'living law', the function of those who make the laws from that of those who are called to apply them, namely, how to do define the role of the judge in the constitutional system of the separation of powers.

Constitutional and Convention rules, such as the ECHR and the Nice-Strasbourg Charter (Art 6 of the Treaty on the Functioning of the European Union - TFEU), place limits on the legislator's power of authentic interpretation. These limits must also be considered to operate in relation to judicial interpretation: the normal retroactivity of the rule created by the new legal position is restricted by the protection of the legitimate expectations built up on the basis of the original judicial precedent, if retroactive application of the new position leads to the forfeiture or preclusion of proceedings that could not have been envisaged previously.

In the Italian legal order, the question concerns the role attributed to case law in the hierarchy of sources. The principle of *stare decisis* has no relevance in the Italian legal system: under Art 101 of the Constitution, judges are subject only to the law. Nor does the provision of Art 374, para 3, of the Code of Civil Procedure, mentioned above, appear to introduce the principle of binding precedent. Case law has a merely declaratory function, serving to identify the scope of the law and with no creative function within it.

The declaratory function of case law does not, however, rule out the need to identify suitable remedies to protect the legitimate expectations that have been created with regard to the interpretation that is later overruled. The question relates to the effectiveness in time (operating only in the future or even retroactively) of an innovative ruling with regard to previously settled case law in the field of procedural law, leading to forfeiture or preclusion to the detriment of a party to the proceedings.

In the Italian legal system, although prospective overruling is known in civil law and recent judgments of the Constitutional Court, it had never been adopted

1151 (2015); G. Ruffini, 'Mutamenti di giurisprudenza nell'interpretazione delle norme processuali e «giusto processo»' *Rivista di diritto processuale*, 1390 (2011). In case law, Corte di Cassazione-Sezioni unite 11 April 2011 no 8127, *Il Foro Italiano*, 1386 (2011), with a commentary by G. Costantino; Corte di Cassazione-Sezione lavoro 25 February 2011 no 4687, *Il Foro Italiano*, 1074 (2011); Corte di Cassazione 7 February 2011 no 3030, *Il Foro Italiano*, 1075 (2011); Corte di Cassazione 2 July 2010 no 15809, *Il Foro Italiano*, 144 (2010); Corte di Cassazione 2 July 2010 no 14627, *Il Foro Italiano*, 3050 (2010); Corte di Cassazione 17 June 2010 no 15811, *Il Foro Italiano*, 3050 (2010).

by the Civil Division of the Court of Cassation. This decision-making power, in fact, brings the judiciary closer to the power traditionally attributed to the legislature alone. The question, therefore, concerns the value of the precedent and whether the function attributed to case law is merely declaratory or creative, as well as the possibility of including it among the sources of the Italian legal order.

The case law of the Court of Cassation answers the question of the effectiveness of changes in case law regarding consistent rules of a procedural nature⁸ by specifying the limits within which the 'living law' can become a source of law, and therefore the question of the relationship between the function of the judge and that of the legislator.

In the event of an *unforeseeable* ruling – based on a principle of law different from the consolidated one on which the party had relied – the alternative is whether to treat as standard (ie, valid) the act carried out in connection with and compliant with the previous case law, or to consider it invalid, as it does not comply with the provision of reference as subsequently reinterpreted. In this case, mechanisms would be put in place to protect the party who had trusted in a previous 'living law'.

The Court of Cassation reiterates that the judiciary cannot make provision for the temporal effects of the decision since this power belongs to the legislature alone.

The Court also states that case law retains its retroactive effect as it does not *create* but *interprets* the law. The judgment therefore normally has retroactive effect. The fundamental precept that the judge is subject only to the law (Art 101 of the Constitution) prevents the interpretation of case law from being equated to a source of law.⁹

The change to the previous interpretation of procedural law on the part of the Court of Cassation constitutes a corrective interpretation that retroactively affects the provision of procedural law. The act performed or the conduct of the party on the basis of the previous position is not therefore in accordance with the provision. The new construal applies to the cases covered by the rule to be

⁸ In the same vein, Corte di Cassazione 27 December 2011 no 28967; Corte di Cassazione 4 May 2012 no 6801; Corte di Cassazione 17 May 2012 no 7755; Corte di Cassazione 1 March 2013 no 5962; Corte di Cassazione 19 January 2016 no 819; Corte di Cassazione 15 February 2018 no 3782, all available at www.cortedicassazione.it.

⁹ This position has recently been restated by the Joint Sections of the Court of Cassation, called upon to rule again on the issue, in particular with regard to the effectiveness of prospective overruling of substantive rules. The Court reiterated that prospective overruling exists when there is a change in the Court of Cassation's case law with regard to provisions regulating trial procedure but not to provisions of a substantive nature and when the change was unforeseeable due to the consolidation over time of the previous policy, which has become 'living law' and thus likely to induce a party to reasonably rely on it. According to the Court, the interpretation of a procedural rule that is stated at a later stage does not represent a necessarily non-retroactive *jus superveniens*, since it simply reinterprets the wording and is, as such, meant to apply from the outset. However, the original misreading of the case law created (or may have created) 'the appearance of a rule' on which the party relied.

interpreted, even if it arose at a time before the *revirement* of the case law.

However, given the need to protect legitimate expectations, by virtue of the higher value of due process, the Court of Cassation introduces an institution to protect the legitimate expectations of a party who has carried out specific acts relying on future alignment with previously made decisions.¹⁰

The retroactivity of sudden and unforeseeable changes in case law, which have the effect of precluding the right of action and defence of the party who innocently relied on the consolidated position, is therefore ruled out. Uncertainty regarding the value of case law raises the need to identify systems to prevent values such as legal certainty and the predictability of outcome from being undermined. Nevertheless, it is clear that 'judge-made law' is increasingly relevant to our legal system.

On the one hand, there are those who strongly affirm the value of the precedent as a remedy to the increasing unpredictability of judicial decisions and the consequent crisis of legal certainty, warning, among other things, of the risk of breaching the principle of equality. In scholarship it has been observed that although precedent has no binding value in our legal system, the strengthening of the unifying function may not be impeded. It is therefore necessary to give courts strict criteria for deviating from precedent, notwithstanding their subjection to the law alone. This would safeguard important values such as equality before the law and the predictability of decisions.¹¹

Others claim that the basis of positive law is not effectiveness alone: the 'living law' cannot be synonymous with mere judicial practice.¹² The proliferation of rules alone cannot be the answer to the diminishing mandatory and effective nature of the order: what is needed are fewer rules and a return to *law*, understood as a synthesis of interests analysed in the light of choices inspired by values.¹³

III. The Effectiveness of Law. Fundamentals and Limits. The Traditional Doctrine of 'Living Law'

In light of the above considerations, it is clear why scholarship¹⁴ again poses the question of what the object of the study of law is: the provisions of the law or what can be identified with the reality of the application of the law, the regulation of relationships, ie, the law as it is accepted in its application by society.

Case law acts in reaction to needs as they emerge in society. The court

¹⁰ On this subject, F. Santangeli, 'La tutela del legittimo affidamento', available at www.diritto.it (2017).

¹¹ F. Patroni Griffi, n 5 above.

¹² C.M. Bianca, *Realtà sociale ed effettività della norma. Scritti giuridici* (Milano: Giuffrè, 2002), I, 35.

¹³ S. Sica, n 2 above, 4.

¹⁴ C.M. Bianca, 'Diritto vivente, coscienza sociale e principio di effettività' Relazione al Convegno 'Il Diritto Vivente', Roma, 12 April 2018, available at www.magistraturaindipendente.it.

becomes the interpreter of the social conscience, proposing new interpretations and new content when the written law is no longer adequate.

The court thus proposes a new reading of the provision on the basis of the needs and ethical values perceived by society. The legal principles set out in case law become 'living' because they are applied and shared in society. How is this effectiveness justified? Where does effective law come from? What is – if any – the basis for the effectiveness of the law, of the gradual transition from written law to applied law?

It is generally acknowledged that the first elaboration of the doctrine of 'living law' – as the theory of the object of constitutional judicial review – is attributed to Tullio Ascarelli.¹⁵ The reflections of this illustrious scholar rest on the conception of hermeneutical activity as creative: interpretation is not a mathematical and mechanical operation. The interpreter of the law does not merely reveal the meaning of a provision: he creates it. The law lives, therefore, in its concrete application: the text becomes *law* subsequent to its interpretation.

The interpretative process is circular in nature:¹⁶ a law lives only at the moment of its application¹⁷ and then becomes text once again,¹⁸ becoming, therefore, the starting point for the declaration of a new law.¹⁹ If the law²⁰ exists only when it is applied, when deciding on its lawfulness, the Court has to consider the applications of the text in practice²¹ and, therefore, its prevalent interpretation in case law.²²

According to the official theory of 'living law', therefore, while the interpretation of the ordinary court has an applicative purpose and is not subject to any constraint,²³ the object of the interpretation of the Constitutional Court is the disputed provision as a historical fact. Consequently, the ambiguity of the wording of the law must be overcome by referring to the applications that have actually been made.²⁴

For constitutional judges, therefore, there is no question of choosing between the various possible interpretations of the text, because 'living law' is binding and cannot be amended.²⁵ In this respect, the theory shows its logical limitations: the

¹⁵ T. Ascarelli, 'Giurisprudenza costituzionale e teoria dell'interpretazione giuridica' *Rivista di diritto processuale*, 351 (1957), and also in Id, *Problemi giuridici* (Milano: Giuffrè, 1959), I, 139.

¹⁶ A. Pugiotto, *Sindacato di costituzionalità e «Diritto vivente»*. *Genesi, uso, implicazioni* (Milano: Giuffrè, 1994), 36.

¹⁷ T. Ascarelli, 'Giurisprudenza costituzionale' n 15 above, 140.

¹⁸ *ibid* 145.

¹⁹ T. Ascarelli, 'In tema di interpretazione ed applicazione della legge' ('Lettera al Prof. Carnelutti') *Rivista di diritto processuale* (1958), also in Id, *Problemi giuridici* n 15 above, 154.

²⁰ T. Ascarelli, 'Giurisprudenza costituzionale' n 15 above, 145.

²¹ *ibid* 151.

²² *ibid* 151.

²³ *ibid* 151.

²⁴ *ibid* 152.

²⁵ See A. Pugiotto, n 16 above, 77; V. Accattatis, 'Conflitti interpretativi' *Rivista penale*, 510 (1966).

central problem consists, in fact, precisely in the assumption that the Constitutional Court carries out a purely historiographical investigation, which is not creative but declarative and therefore not an interpretation of law.²⁶

From a logical perspective, it is possible to raise two objections against the theory: on the one hand, if the 'living law' is 'living' solely at the moment of application²⁷ – only to revert to being a mere text destined to become the expression of new laws²⁸ – one cannot logically claim that the Constitutional Court is bound to a previous and concluded judicial interpretation. Consequently, the Constitutional Court too, like the ordinary court, will be able to deduce new principles from that text, and these will be different from those established in previous interpretations that have identified provisions that no longer exist. The Constitutional Court cannot grasp the 'living' provision, which is such only at the moment of judicial application to the concrete case.²⁹ The very circularity³⁰ of the process described by Tullio Ascarelli is incompatible with the survival of the provision beyond its life cycle.³¹

The second logical contradiction in this theory consists in the fact that if the power of the Constitutional Court to interpret the disputed provision is denied, it becomes impossible to explain from what sources the Court itself derives its interpretative power in the absence of a dominant judicial interpretation. The Constitutional Court's review would have no object³² in the absence of an established interpretation in case law to which it could refer (eg in the case of a

²⁶ A. Pugiotto, n 16 above, 68.

²⁷ T. Ascarelli, 'Giurisprudenza costituzionale' n 15 above, 140.

²⁸ T. Ascarelli, 'In tema di interpretazione' n 19 above, 145-154.

²⁹ G. Maranini, 'La posizione della Corte e dell'autorità giudiziaria in confronto all'indirizzo politico di regime (o costituzionale) e all'indirizzo politico di maggioranza', in G. Manarini ed, *La giustizia costituzionale* (Firenze: Vallecchi, 1966), 140. An opposing opinion A. Pugiotto, n 16 above, 95.

³⁰ A. Pugiotto, n 16 above, 36.

³¹ V. Crisafulli, 'Ancora delle sentenze interpretative di rigetto della Corte costituzionale', commentary on the Constitutional Court 19 February 1965 no 11, *Giurisprudenza costituzionale*, 99 (1965); M. Mazziotti, 'Osservazioni all'ordinanza n. 128 del 1957 of 1957' *Giurisprudenza costituzionale*, 1227 (1957); N. Assini, *L'oggetto del giudizio di costituzionalità e la 'guerra delle due corti'* (Milano: Giuffrè, 1973), 36; A. Spadaro, *Limiti del giudizio costituzionale in via incidentale e ruolo dei giudici* (Napoli: Edizioni Scientifiche Italiane, 1990), 262. Again, an opposing opinion A. Pugiotto, n 16 above, 158. On this subject, please refer to G. Santorelli, 'Il c.d. diritto vivente tra giudizio di costituzionalità e nomofilachia', in P. Femia ed, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 545-546.

³² F. Cernelutti, 'Poteri della Corte costituzionale in tema di interpretazione della legge' *Rivista di diritto processuale*, 349 (1962); G. Marzano, 'La Corte costituzionale e l'interpretazione delle leggi ordinarie' *Foro padano* (1963); M.S. Bigi, 'Natura dei poteri e limiti del sindacato della Corte costituzionale nel giudizio incidentale di legittimità delle leggi' *Rassegna di diritto pubblico*, 904 (1965); G. Conso and E. Fazzalari, 'Appunti per una discussione sui problemi attuali della Cassazione' *Rivista di diritto processuale*, 77 (1965); G.U. Rescigno, 'Per la distinzione tra questione di costituzionalità e argomentazioni del giudice *a quo*. Sul potere del prefetto di respingere la domanda di oblazione' *Giurisprudenza costituzionale*, 1063 (1967); N. Assini, n 31 above, 28, 69 and 73. For further bibliographical reference, see A. Pugiotto, n 16 above, fn 15.

recently issued provision, or which has not often been applied in the courts, or else a provision subject to unresolved conflicts of interpretation).³³ The theory therefore leads to a logical paradox. The Court must therefore be considered to be endowed with autonomous power of interpretation: the 'living law' cannot cancel out or even limit the exercise of this power.

Notwithstanding the efforts of theorists of the 'living law' to reduce the importance of these objections,³⁴ the theory is obviously inadequate to govern and regulate the interpretative activity of the Constitutional Court. The official doctrine of 'living law' is based, as mentioned above, on the assumption that the interpretation of a provision falls to ordinary courts, while the Constitutional Court is entrusted with comparing it, as interpreted by the referring court, with the provisions of the Constitution.³⁵ The Court expressly states, in its rulings, that it refers to 'living law' (meaning the law as applied by the ordinary courts) in its deliberations.

The constraint of the Constitutional Court with regard to the settled interpretation of case law is thus affirmed, regardless of the correctness of the interpretative proceeding.³⁶ In compliance with the 'living law', the Court could declare a provision unlawful even though it is possible to read it in conformity with the Constitution.³⁷ Moreover, in the absence of an unambiguous or settled judicial interpretation of the provision enshrined in the disputed law, the Constitutional Court enjoys total freedom of interpretation; in such cases, it may attribute new or different legal significance to the legislative provision with respect to the order for reference presented by the referring court and the positions that have emerged in case law.³⁸

Where there is settled 'living law', the task of the Constitutional Court comes down to the alternative between ('mere', ie non-interpretative) rejection of the question or the conclusion that the question is well founded. The additional model of the so-called 'interpretative judgement of rejection' could be adopted only where the referring court has suggested a different interpretation of the provision with respect to the Court of Cassation's settled interpretation: in this

³³ M. Mazziotti, n 31 above, 1226; G. Marzano, 'La Corte costituzionale e l'interpretazione delle leggi ordinarie' *Foro padano* (1963); V. Crisafulli, n 31 above, 99; N. Assini, n 31 above, 37. Cf. also, F. Modugno and A.S. Agrò, *Il principio di unità del controllo sulle leggi nella giurisprudenza della Corte costituzionale* (Torino: Giappichelli, 1991), 207; A. Spadaro, n 31 above, 263.

³⁴ A. Pugiotto, n 16 above, 197.

³⁵ Corte costituzionale 17 June 1992 no 280, *Giurisprudenza costituzionale*, 2139 (1992); Corte costituzionale 30 November 1982 no 204, *Giurisprudenza costituzionale*, 2157 (1982); Corte costituzionale 10 October 1990 no 435, *Giurisprudenza costituzionale*, 2597 (1990); Corte costituzionale 30 December 1985 no 369, *Giurisprudenza costituzionale*, 2570 (1985).

³⁶ G. Zagrebelsky, 'La dottrina del diritto vivente' *Giurisprudenza costituzionale*, 1149 (1986); E. Cheli, 'La Corte costituzionale nella forma di governo italiano' *Quaderni dell'Associazione per gli studi e le ricerche parlamentari*, Seminari 1989-90, 1, 132 (Milano: Giuffrè, 1991).

³⁷ L. Elia, 'La giustizia costituzionale nel 1984' *Giurisprudenza costituzionale*, 394 (1985).

³⁸ See, for example, Corte costituzionale 20 March 1985 no 73, *Giurisprudenza costituzionale*, 539 (1985); A. Pugiotto, n 16 above, 360.

case, the Constitutional Court finds the question unfounded, referring to the prevalent interpretation itself.³⁹

If, on the other hand, the disputed provision has not been ascribed a stable position in case law, the Constitutional Court acts autonomously and is not prevented from reaching new hermeneutical conclusions. Consequently, the Constitutional Court hands down its decision on the basis of its own independent interpretation. In this case, the function and role of interpretative rejection is different: it is not used to challenge interpretations of the disputed provision that differ from those imposed by the highest courts but to introduce new legal meanings into the circuit of judicial interpretation – as a ‘living law’ in the process of becoming – capable of removing the contested provision from the alleged claims of illegality (the so-called adjustment interpretation).⁴⁰

The establishment of a constraint of the Constitutional Court with respect to the dominant positions held by the Court of Cassation look, therefore, like an attempt to reinforce the doctrine of judicial precedent in the relations between the two Courts.⁴¹ A precedent, as a rule for a specific and concrete case, consumed and impossible to reproduce due its uniqueness, cannot have a binding force autonomous and superior to that of the rules and principles of which it constitutes the application.⁴²

IV. ‘Living Law’ and Interpretation Compliant with the Constitution

The traditional doctrine of ‘living law’, which affirms the submission of the Constitutional Court to the settled interpretation of the Court of Cassation, has

³⁹ See, for example, Corte costituzionale 11 April 1984 no 104, *Giurisprudenza costituzionale*, 576 (1984), where it is stated that a question of constitutionality raised on the basis of an interpretation contrary to the ‘living law’ must be rejected even where that ‘living law’ was consolidated after the referral order, taken up by G. Zagrebelsky, ‘La dottrina’ n 36 above, 1151. On the subject, moreover, see A. Pugiotto, n 16 above, 40.

⁴⁰ On this, see L. Elia, ‘La giustizia costituzionale nel 1985’ *Giurisprudenza costituzionale*, 295 (1986).

⁴¹ On judicial precedent, see G. Gorla, ‘Precedente giudiziale’ *Enciclopedia giuridica* (Roma: Treccani, 1990), XXIII, 1. On the role of precedent in decisions of the Constitutional Court, see A. Anzon, *Il valore del precedente nel giudizio sulle leggi* (Milano: Giuffrè, 1985), 65; G. Treves, ‘Il valore del precedente nella giustizia costituzionale italiana’, in G. Treves ed, *La dottrina del precedente nella giurisprudenza della Corte Costituzionale* (Torino: UTET, 1971), 3; A. Pizzorusso, ‘Effetto di ‘giudicato’ e effetto di ‘precedente’ nella sentenza della Corte Costituzionale’ *Giurisprudenza costituzionale*, 1976 (1966); Id, ‘La Corte Costituzionale’, in G. Piva ed, *Potere, poteri, poteri emergenti e loro vicissitudini nell’esperienza giuridica italiana* (Padova: CEDAM, 1986), 370; A. Gardino Carli, ‘Il principio del precedente e la sua applicazione nella giurisprudenza della Corte costituzionale sulle Regioni a statuto ordinario’ *Quaderni regionali*, 602 (1985).

⁴² P. Perlingieri, *Diritto comunitario e legalità costituzionale. Per un sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 1992), 28. See also A. Pizzorusso, ‘Delle fonti del diritto’, in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1977), 525, and B.N. Cardozo, ‘La natura dell’attività giudiziale’, in Id ed, *Il giudice e il diritto*, Italian translation of V. Gueli (Firenze: La Nuova Italia, 1961), 71.

no basis in positive law, still less at the constitutional level.⁴³ The Constitution actually hints at quite the opposite. Art 101(2) of the Constitution establishes that all judges, and therefore also constitutional ones, are subject only to the law.⁴⁴

Nor can a different conclusion be reached even by referring to the constitutional relevance (under Art 111, para 7 Constitution) of the Court of Cassation's function as guarantor of the uniform interpretation of the law.⁴⁵ It is a known fact that the principle of law expressed by the Court of Cassation entails a duty of uniformity exclusively with respect to the referring court (pursuant to Art 384, para 1 of the Italian Criminal Code).

The distinction between an individual decision and a legal provision must therefore be stressed once again. Over and beyond the case for which it is handed down, the value of a judgment lies purely in what it may suggest from the point of view of interpretation, which may be subject to critical review and academic debate:⁴⁶ the interpretation of case law is not, in the Italian legal system, a source of law.⁴⁷ As precedents have no law-making value,⁴⁸ a judicial decision, even if handed down by the Court of Cassation, is only persuasive and, therefore, non-binding.⁴⁹

The ordinary court, therefore, is not obliged to abide by the position of the Court of Cassation⁵⁰ but must become aware of its role of responsibility in the implementation of constitutional lawfulness and not give way to judicial

⁴³ This basis is rejected by G.A. Micheli, 'Osservazioni sulla natura giuridica delle Commissioni tributarie (dopo le sentenze nn. 6 e 10 della Corte costituzionale)' *Giurisprudenza costituzionale*, 314 (1969); G. Vassalli, 'Interpretazione giudiziale e Corte costituzionale (a proposito di un recente progetto legislativo)' *Giustizia penale*, 130 (1966); G. Laserra, 'La Corte costituzionale e l'interpretazione della legge' *Giurisprudenza italiana*, 192 (1961).

⁴⁴ Cf A.M. Sandulli, 'Atto legislativo, statuizione legislativa e giudizio di legittimità costituzionale' *Rivista trimestrale di diritto e procedura civile*, 162 (1961).

⁴⁵ See Art 65, decreto reale 30 January 1941 no 12, for which the Court of Cassation ensures the precise observance and uniform interpretation of the law. This is also recognised in constitutional case law: see, for example, Corte costituzionale 4 February 1982 no 21, *Giurisprudenza costituzionale*, 206 (1982); Corte costituzionale 5 July 1995 no 294, *Giurisprudenza costituzionale*, 2293 (1995).

⁴⁶ E. Betti, *Interpretazione della legge e degli atti giuridici (teoria generale e dogmatica)* (Milano: Giuffrè, 2nd ed, 1971), 228 and 327; see, on this point, also P. Perlingieri, *Il diritto civile nella legalità costituzionale* (Naples: Edizioni Scientifiche Italiane, 2nd ed, 1991), 92.

⁴⁷ E. Betti, n 46 above, 228.; P. Perlingieri, 'Prassi, principio di legalità e scuole civilistiche' *Rassegna di diritto civile*, 956 (1984), now in Id ed, *Scuole tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1989), 217; P. Perlingieri and P. Femia, *Nozioni introduttive e principi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2004), 66. In this regard, see also S. Bartholini, 'Di un caso di rilevanza dinanzi alla Corte costituzionale dell'esecuzione della disposizione impugnata', in Id, *Spunti di diritto costituzionale* (Padova: CEDAM, 1962), 23.

⁴⁸ See, exhaustively, G. Gorla, 'Les sections réunies de la Cour de Cassation en droit italien: Comparaison avec le droit français' *Il Foro italiano*, 116 (1976).

⁴⁹ Also L. Mengoni, 'Diritto vivente' *Jus*, 20 (1988). On the same lines, E. Betti, n 46 above, 228.

⁵⁰ L. Mengoni, 'Diritto vivente' n 49 above, 66.

conformity.⁵¹ The theory whereby the Constitutional Court is allegedly subject to the judicial choices of the Court of Cassation is unfounded.⁵²

The interpretative activity of the Constitutional Court, like that of any other court, has to take into account the evolution and changes that have taken place in the legal system and in society. It follows that the Constitutional Court, while being obliged to consider the prevalent positions, may, however, legitimately disregard them if necessary to carry out its tasks correctly. The so-called 'living law' is not, therefore, grounded in the current legal order,⁵³ especially because it is contrary to the values of constitutionality.⁵⁴ In the years immediately following Ascarelli's work of theorisation, the systematic unity of the legal system⁵⁵ was in fact acknowledged, and so the doctrine of 'compatible' interpretation came to be legitimated.

From the nineties onwards, the Constitutional Court has directly involved the ordinary courts in the interpretation of legislation in compliance with the Constitution. The ordinary courts are therefore endowed with the power to, and duty of, verifying in advance whether the legislative text can be given a meaning compatible with the Constitutional standard.

Constitutional case law therefore declares the inadmissibility, without deciding on the merits, of questions of legitimacy raised with regard to provisions interpreted incorrectly by the referring court. In these cases, in fact, the principle identified by the referring court stems from a hermeneutical procedure that does not respect axiological and systematic interpretation. In other words, the principle thus identified cannot represent a term of reference for a judgment on constitutionality because it does not exist in the legal system, from the ontological point of view.⁵⁶

The effectiveness of constitutional principles, in fact, does not end with the duty to interpret provisions in a way that is compliant with the Constitution: in conforming the principle to Constitutional precepts, the interpreting court has to eliminate unconstitutional normative meanings.

The growing affirmation of the duty of the referring court to interpret in compliance with the constitution as a necessary condition for raising a question

⁵¹ *ibid.*

⁵² In this vein, see V. Crisafulli, n 31 above, 100; V. Andrioli, 'Motivazione e dispositivo nelle sentenze della Corte costituzionale' *Rivista trimestrale di diritto e procedura civile*, 546 (1962); A. Spadaro, n 31 above, 261. See also, A. Pizzorusso, 'La Corte costituzionale', in G. Piva ed, *Potere, poteri emergenti e loro vicissitudini nell'esperienza giuridica italiana* (Padova: CEDAM, 1986), 371.

⁵³ See S. Bartholini, n 47 above, 27.

⁵⁴ Cf P. Perlingieri and P. Femia, n 47 above, 162.

⁵⁵ The unity of the legal system was already observed by the first judges of the Court: see, for example, F. Bonifacio, 'La Corte costituzionale e l'autorità giudiziaria', in G. Maranini ed, *La giustizia costituzionale* (Firenze: Vallecchi, 1966), 54. On the view of the legal system as various and complex unit, see P. Perlingieri, 'Complessità e unitarietà dell'ordinamento e unitarietà dell'ordinamento giuridico vigente' *Rassegna di diritto civile*, 188 (2005).

⁵⁶ In this vein S. Bartholini, n 47 above, 15.

of constitutionality appears to be radically opposed to the theory of 'living law'.⁵⁷

The conflict also concerns the problem of delineating the hermeneutical work of the Constitutional Court. The majority opinion affirms the primacy of the constitutionally compliant interpretation: the annulment of an unconstitutional 'living' provision should be avoided whenever the disputed provision can be interpreted in accordance with the Constitution.⁵⁸ The question as to constitutionality should be upheld, in fact, only when both the referring court and the Constitutional Court have established that a constitutionally correct interpretation is impossible.⁵⁹ According to another view, the adapted interpretation allegedly has a subsidiary and subordinate role with respect to the canon of jurisprudential effectiveness.⁶⁰

According to the doctrine of the 'living law', the principles enshrined in the Constitution only apply to interpretation in the ordinary courts; the Constitutional Court could always disregard them in favour of the criterion of historical concreteness.

The recognition of the Constitutional Court's autonomy of interpretation does not mean, however, that it is free to attribute to the disputed provision a normative significance in contrast with constitutional principles, which holds a position of supremacy among the sources of Italian law.⁶¹ Like all courts, the Constitutional Court is also subject to the principle of constitutional legality: this principle ensures that the autonomy with which it is endowed does not exceed its function. Both the Constitutional Court and the Ordinary Courts use interpretative instruments such as the balance of values, regulatory consistency and reasonableness.⁶² The 'living law' cannot, therefore, come between who is called upon to interpret and the normative signifier of the provision.

⁵⁷ P. Perlingieri, 'Giustizia secondo Costituzione ed ermeneutica. L'interpretazione c.d. adeguatrice', in P. Femia ed, *Interpretazione* n 31 above, fn 55.

⁵⁸ V. Crisafulli, 'Il ritorno dell'art. 2 della legge di pubblica sicurezza davanti alla Corte costituzionale' *Giurisprudenza costituzionale*, 895 (1961); G. Vassalli, 'Interpretazione giudiziale e Corte costituzionale (a proposito di un recente progetto legislativo)' *Giustizia penale*, 130 (1966); F. Bonifacio, n 55 above, 53; F. Bonifacio, 'La magistratura e gli altri poteri dello Stato' *Rassegna di diritto pubblico*, 5 (1968); S. Bartholini, n 47 above, *passim*; G. Franchi, 'Certeza del diritto e legittimità costituzionale. (Sintesi storica del problema)' *Giurisprudenza italiana*, 9 (1970).

⁵⁹ P. Perlingieri, 'Giustizia' n 57 above, fn 55.

⁶⁰ A. Pugiotto, n 16 above, 157 (italics original), but see also 175. In a similar vein, see C. Lavagna, 'Considerazioni sulla inesistenza di questioni di legittimità costituzionale e sulla interpretazione adeguatrice' *Il Foro italiano*, 15 (1959), now in C. Lavagna, *Ricerche sul sistema normativo* (Milano: Giuffrè, 1984), 604; C. Lavagna, 'Sull'illegittimità dell'art. 2 del testo unico delle leggi di pubblica sicurezza come testo legislativo' *Giurisprudenza costituzionale*, 902 (1961); A. Pizzorusso, 'La motivazione delle decisioni della Corte Costituzionale: comandi o consigli?' *Rivista trimestrale di diritto pubblico*, 385, (1963); V. Onida, 'L'attuazione della Costituzione fra magistratura e Corte costituzionale', in Aa.Vv., *Scritti in onore di C. Mortati* (Milano: Giuffrè, 1977), 535.

⁶¹ See, on this point, S. Bartholini, n 47 above, 11.

⁶² In this vein, see P. Perlingieri, 'Giustizia' n 57 above, text to ns 154 and 160. Similarly, A. Pace, 'I limiti dell'interpretazione adeguatrice' *Giurisprudenza costituzionale*, 1073 (1963).

Contrary to the traditional understanding of the theory of 'living law', it has been observed⁶³ that it is not equated with simple judicial practice but is an operation that impacts on the law itself; thus, the incidence of case law is grounded in the acceptance of the provision as applied by the society to which the interpreting court belongs. Effectiveness is not to be sought in the application of case law without considering the appropriacy of the hermeneutical procedure.

V. The Ontological Foundation of 'Living Law'

Not only can the term 'living law' be understood in a variety of ways, it can take on different meanings over time. The expression 'living law' can also have an *ontological* meaning.⁶⁴

According to this view, 'living law' is not equated with mere judicial practice: the judge becomes the interpreter of social conscience; however, even this notion is relative if it is not anchored to a foundation. Authoritatively, this foundation lies in the justice of the decision.⁶⁵

The 'living law' is, in this sense, the only *true*,⁶⁶ or effective, one, not because it conforms to the interpretations and applications that one or many courts⁶⁷ have made of it, but because it results from systematic interpretation consistent with the entire legal order⁶⁸ as a unitary system.⁶⁹

A principle that comes into being due to an error of interpretation by a judge, perhaps because it is not in line with constitutional standards or because it has been tacitly annulled by a later source, albeit fixed in the principles underlying the judgments of the highest courts – can never obscure the different 'living law', which draws its current meaning from the entire normative system.⁷⁰

⁶³ C.M. Bianca, *Realtà sociale* n 12 above, *passim*.

⁶⁴ In this sense, M.R. Morelli, 'Il 'diritto vivente' nella giurisprudenza della Corte costituzionale' *Giustizia civile*, 173 (1995). Id., 'Ancora una nuova tipologia di decisione costituzionale: la 'interpretativa di inammissibilità'', commentary on the Corte costituzionale 26 September 1998 no 347, *Giustizia civile*, 2414 (1998), which recalls the studies on the concept of norms conducted by V. Crisafulli, 'Disposizione (e norma)' *Enciclopedia del diritto* (Milano: Giuffrè, 1964), XIII, 207.

⁶⁵ C.M. Bianca, 'Diritto vivente' n 14 above.

⁶⁶ V. Crisafulli, 'Disposizione' n 64 above, 208.

⁶⁷ Also S. Bartholini, n 47 above, 8.

⁶⁸ See, exhaustively, P. Perlingieri, 'L'interpretazione della legge come sistematica ed assiologica. Il broccardo *in claris non fit interpretatio*, il ruolo dell'art. 12 dis prel. c.c. e la nuova Scuola dell'esegesi' *Rassegna di diritto civile*, 990 (1985), and now in Id., *Scuole* n. 47 above.

⁶⁹ See V. Crisafulli, n 64 above, 207; P. Perlingieri, 'Complessità' n 55 above, 188-202; F. Sorrentino, 'L'abrogazione nel quadro dell'unità dell'ordinamento giuridico' *Rivista trimestrale di diritto pubblico*, 3 (1972). Taking a different view, N. Irti, 'Leggi speciali - dal monosistema al polisistema e I frantumi del mondo' (sull'interpretazione sistematica delle leggi speciali), in Id., *L'età della decodificazione* (Milano: Giuffrè, 1999), 113 and 151 respectively; A. Falzea, 'La Costituzione e l'ordinamento' *Rivista di diritto civile*, 261 (1998), now in Id., *Ricerche di teoria generale del diritto e di dogmatica giuridica, I, Teoria generale del diritto* (Milano: Giuffrè, 1999), 456.

⁷⁰ Così V. Crisafulli, n 64 above, 207.

In this sense, therefore, the living norm is the only *true* one in a given temporal dimension of the legal order.⁷¹ It follows, moreover, that a principle inevitably suffers from the constant historical development of the legal system.⁷² The continuous evolution of the legal system and the reciprocal interactions among its sources⁷³ generate new and different principles based on the same provision. There is no contradiction, therefore, in the many cases where the principle has changed over time.⁷⁴ The meaning of legislative texts is not, in fact, determined once and for all at the moment of their production but is ever changing.⁷⁵

The ontological notion of 'living law' therefore implies the necessarily evolutionary character of interpretation. The interpreter of law must grasp any changes to the norm, as evolution is a matter inherent to the legal order and not to the procedure of interpretation.⁷⁶ Legislative provisions can thus take on new and different meanings with respect to those stemming from previous interpretations.

In this respect, evolutionary and compatible interpretation is identified with systematic interpretation, respecting the unity of the legal order.⁷⁷ The great difference between the official doctrine of 'living law' and the ontological notion is evident. According to the scholarship around Ascarelli, the 'living law' is what results from the applications made in case law.

In ontological terms, a norm is 'living' when it derives from a methodologically correct interpretation procedure: this only happens when interpretation is systematic, axiological, and respects the complexity of the legal order. There can only be one norm resulting from a correct interpretation; the living law is the only 'true' law in a given temporal dimension within the legal order.⁷⁸

With regard to the interpretative powers of the Constitutional Court, according to the official doctrine relating to the 'living law', assessment of constitutionality concerns the rule that results from the prevalent interpretation and application. In ontological terms, on the other hand, the assessment concerns the norm that

⁷¹ In this sense, S. Bartholini, n 47 above, 15, fn 11, observes that if two or more principles can be derived from the same provision, this excludes the possibility of both of them coexisting in the system. Also G. Silvestri, 'Le sentenze normative della Corte costituzionale' *Giurisprudenza costituzionale*, 1702, (1981), observes that each legal provision contains only one rule.

⁷² Again, V. Crisafulli, n 64 above, 208.

⁷³ On this subject, see P. Perlingieri and P. Femia, n 47 above, 22.

⁷⁴ V. Crisafulli, n 64 above, 207; M.S. Giannini, 'L'illegittimità degli atti normativi e delle norme' *Rivista italiana di scienze giuridiche*, 50 (1954). In a critical sense, R. Guastini, 'Soluzioni dubbie. Lacune e interpretazione secondo Dworkin' *Rivista italiana di scienze giuridiche*, 454 (1983).

⁷⁵ R. Dworkin, 'Non c'è soluzione corretta?', Italian translation by R. Guastini, in *Materiali per una storia della cultura giuridica*, 469 (1983); in senso critico R. Guastini, n 74 above, 454.

⁷⁶ S. Romano, 'Interpretazione evolutiva', in Id, *Frammenti di un dizionario giuridico* (Milano: Giuffrè, 1983), 119. In the same vein, P. Perlingieri, 'Giustizia' n 57 above, fn 190. See also N. Lipari, 'Valori costituzionali e procedimento interpretativo' *Rivista trimestrale di diritto e procedura civile*, 876 (2003).

⁷⁷ P. Perlingieri, 'Giustizia' n 57 above, fn 185.

⁷⁸ V. Crisafulli, n 64 above, 208.

results from following a correct interpretation procedure, ie one that is complete from the systematic point of view and adequate from an axiological one.⁷⁹ In these terms, it is not sufficient for a law to be applied in an unconstitutional way for it to be declared unconstitutional,⁸⁰ as the Court has the power and duty to interpret the provision autonomously both from the point of view of the settled interpretation in the case law of the Court of Cassation and that of the interpretation of the referring judge.

In this regard, Constitutional Court rulings on inadmissibility are significant, even in cases where, with their referral order, referring courts have adopted an interpretation in accordance with the prevalent position in the case law.

In such cases, the Constitutional Court has observed that the referring court has doubts as to the constitutional legitimacy of the interpretation of the disputed provision in case law.⁸¹ It follows that the Constitutional Court, in issuing an order of inadmissibility, refuses to be bound to give a judgment on the contested provision according to the canon of the effectiveness of case law and invites the ordinary court to interpret the rule in a way that is in accordance with the constitution even given a uniform case law⁸² of the Court of Cassation,⁸³ the Council of State,⁸⁴ or any other adjudicating body⁸⁵ are unambiguous.

These inadmissibility orders have specific value when the referring court is the Court of Cassation,⁸⁶ and its Joint Sections in particular.⁸⁷ The idea of a

⁷⁹ V. Crisafulli, 'Ancora delle sentenze' n 31 above, 99.

⁸⁰ V. Crisafulli, 'Una sentenza «difficile»' *Giurisprudenza costituzionale*, 1174 (1966).

⁸¹ In this sense, Corte costituzionale 6 March 1995 no 82, *Giurisprudenza costituzionale*, 740 (1995).

⁸² Corte costituzionale 30 January 2002 no 3, *Giurisprudenza costituzionale*, 31 (2002). In the same vein, Corte costituzionale ordinanza 24 May 2000 no 158, *Giurisprudenza costituzionale*, 1425 (2000); Corte costituzionale ordinanza 16 November 2001 no 367, *Giurisprudenza costituzionale*, 3693 (2001).

⁸³ For example, see Corte costituzionale ordinanza 30 December 1987 no 636, *Giurisprudenza costituzionale*, 3775 (1987); Corte costituzionale ordinanza 12 May no 548, *Giurisprudenza costituzionale*, 192 (2000), with a commentary by F. Gambini, 'Un' ipotesi di conflitto fra Corte e giudice sull'esistenza del diritto vivente'; Corte costituzionale ordinanza 22 June 2000 no 233, *Giurisprudenza costituzionale*, 1804 (2000); Corte costituzionale ordinanza 1 April 2003 no 109, all available at www.cortecostituzionale.it.

⁸⁴ Corte costituzionale ordinanza 3 November 2000 no 466, *Giurisprudenza costituzionale*, 3659 (2000), with commentary by A. Sandulli, 'La motivazione del provvedimento nei pubblici concorsi ed il sindacato di costituzionalità del diritto vivente'; Corte costituzionale ordinanza 6 July 2001 no 233, *Giurisprudenza costituzionale*, 2078 (2001); Corte costituzionale 4 July 2003 no 229, *Giurisprudenza costituzionale*, 1958 (2003).

⁸⁵ Concerning the 'living law' of the Council of Administrative Justice for the Sicilian Region, see Corte costituzionale ordinanza 20 March 1998 no 70, *Giurisprudenza costituzionale*, 724 (1998). With regard to the position of the military judiciary, see Corte costituzionale ordinanza 17 May 2001 no 141, *Giurisprudenza costituzionale*, 1163 (2001), with an editorial by R. D'Alessio.

⁸⁶ For example, Corte costituzionale 27 July 2001 no 322, *Giurisprudenza costituzionale*, 2595 (2001), and also *Il Foro italiano*, 302 (2001), with a commentary by R. Caponi, 'Interpretazione conforme a Costituzione e diritto vivente nelle notizioni postali'.

⁸⁷ Corte costituzionale ordinanza 19 October 2001 no 338, *Giurisprudenza costituzionale*, 2884 (2001), with a commentary by A. Cardone, 'Nomofilachia Funzione di nomofilachia della

Constitutional Court with no powers of interpretation therefore appears inconsistent and even perhaps goes beyond Ascarelli's actual intentions.

VI. Rereading Ascarelli's Theory: The 'Living Law' from Limitation to the Interpretative Power of the Constitutional Court to Hermeneutical Criterion

The theorisation of the 'living law' seems to reveal a contradiction with the theoretical premises of Ascarelli's conception of hermeneutical activity. He did not raise the question of what the best interpretative method might be but that of the nature of interpretation as an activity pertaining to the historical development of the law.⁸⁸

As already observed, Ascarelli envisaged a circular hermeneutical process. What is interpreted is not, therefore, a norm, but a text: it is through the interpretation of the text, ie, a given that can be considered past and historical, that the norm is formulated as present and indeed projected into the future.

Hermeneutics in Ascarelli's conception is not a merely deductive procedure: it has creative value. The law has a historical nature: interpretation is therefore necessarily evolutionary and represents a factor in the historical development of law. In this light, the text does not become positive law until society appropriates it and makes it an applied and accepted rule.⁸⁹ By shifting the focus from codified written law to the law that lives and develops in society, Ascarelli identified the *juridical dynamic*, ie 'socially animating' law, with interpretation in case law and contractual practice.⁹⁰

The activity of the interpreter of the law is therefore creative and must be evolutionary in its conception; it contributes to the development of law. It is not a mere reproduction of the given but implies assessment by the interpreter. The interpreter of the law is not an external but an internal element of the law. The activity of the interpreter is central to the development of the law.⁹¹ In this way, interpretation changes because the passage of time and the changing problems lead to the adjustment of patterns, to different constructions, and therefore to a continuous adaptation of the *corpus juris* given to changing reality.⁹²

Cassazione e pronunce della Corte Costituzionale'; Corte costituzionale ordinanza 12 July 2001 no 340, *Il Foro italiano*, 2552 (2002), with a commentary by A. Barone. See in particular, Corte costituzionale 27 July 2001 no 322, *Giurisprudenza costituzionale*, 2595 (2001).

⁸⁸ A. Asquini, 'Il pensiero giuridico di Tullio Ascarelli', in Id et al eds, *Studi in memoria di Tullio Ascarelli* (Milano: Giuffrè, 1969), LXXX.

⁸⁹ P. Grossi, 'Le aporie dell'assolutismo giuridico (Ripensare, oggi, la lezione metodologica di Tullio Ascarelli)', in Id et al eds, *Nobiltà del diritto. Profili di giuristi* (Milano: Giuffrè, 2008), 485.

⁹⁰ *ibid* 445.

⁹¹ T. Ascarelli, *Prefazione a Studi di diritto comparato e in tema di interpretazione* (Milano: Giuffrè, 1952), XXIV.

⁹² T. Ascarelli, 'Contrasto di soluzioni e divario di metodologie' *Banca borsa e titoli di credito*, 478 (1953).

In Ascarelli's work there is a recurrent dichotomy between the testimony of the creative and evolutionary character of hermeneutical activity and the need for certainty and stability in the legal system. The law is stable but not immobile; it adapts continuously while remaining certain.⁹³ Interpretation is the means to reconcile the static nature of the legal system and the dynamism of social life. Ascarelli's theory potentially appears, in other words, to allow for the idea of a possibly changing meaning of the phrase 'living law' over time, even if this is not fully expressed.⁹⁴

His idea probably did not aim to refute the Constitutional Court's power to interpret a provision but to suggest a hermeneutical instrument for it to resolve cases where the text of the legislation is equivocal.⁹⁵ 'Living law' is not therefore a given, historicized by consolidated interpretation and no longer surmountable. Rather, it constitutes a hermeneutical criterion that suggests one of the meanings that can be attributed to the provision.

The legal norm reveals, in its effectiveness, the link between norm and value. The norm does not remain fixed in itself but is subject to evolutionary dynamics and can thus take on a plurality of content over time. On a case-by-case basis, a norm adapts its content to conform to the new values and the dimension that the protected interest assumes over time in the social consciousness, also in relation to values of higher rank. The 'living law' represents, therefore, an objective phenomenon, linked to the axiological nature of the norm and the dynamics of the ordering system: the activity of the interpreter of the law does not create, but reveals the norm. The 'living law' exists *in the moment* but *not only* as a result of interpretation.⁹⁶ Hermeneutical activity is evolutionary in nature because it seeks to ascertain the meaning that principles assume at the moment of application.

This different conception of the theory of 'living law' is accepted by constitutional case law itself: the Constitutional Court, in fact, refers to 'living law' when rejecting questions raised on the basis of incorrect interpretations by the referring court. In such cases, this happens because the prevailing interpretation in case law is also constitutionally adequate.⁹⁷ An example of 'living law' in the

⁹³ T. Ascarelli, 'L'idea di codice nel diritto privato e la funzione dell'interpretazione', in Id., *Saggi giuridici* (Milano: Giuffrè, 1949), 189.

⁹⁴ On the difficulty of reconciling the need for certainty with the need to adapt and develop the law, P. Grossi, 'Le aporie' n 89 above, 486.

⁹⁵ In this vein, T. Ascarelli, 'Giurisprudenza costituzionale' n 15 above, 152. For F. Bonifacio, 'La magistratura e gli altri poteri dello Stato' *Rassegna di diritto pubblico*, 7 (1968), choosing to adhere to the prevailing interpretation is, however, a choice that presupposes that those who make it have the power to do so.

⁹⁶ M.R. Morelli, 'Il diritto vivente nei giudizi di costituzionalità', Relazione al Convegno 'Il diritto vivente', Rome, 12 April 2018, available at magistraturaindipendente.it; Id., 'Il «diritto vivente» nella giurisprudenza della Corte costituzionale' n 64 above, 173.

⁹⁷ In such cases, the living norm of official doctrine and the living norm in the ontological sense do not conflict. Cf A. Giuliani, 'Le disposizioni sulla legge in generale: gli articoli da 1 a 15', in P. Rescigno ed., *Trattato di diritto privato* (Torino: UTET, 1999), 446, which observes that if

ontological sense can be found in Constitutional Court ruling no 221 of 21 October 2015.⁹⁸

The Court was called upon to rule on the constitutional legitimacy of Art 1, para 1 of legge no 164 of 14 April 1982 (Rules on the rectification of gender attribution).⁹⁹ The case concerned an application for the rectification of anagraphic sex attribution in order to obtain recognition of a new gender identity without altering primary sexual characteristics.

The question of constitutional legitimacy had been raised by the magsistrate of the Court of Trento with regard to a conflict with Arts 2 and 117, para 1 of the Constitution, in relation to Art 8 of the European Convention on Human Rights. The law requires the modification of primary sexual characteristics in order to rectify the attribution of gender, which would seriously undermine the exercise of the fundamental right to gender identity.

In the opinion of the referring court, the disputed provision was allegedly in conflict with Arts 2 and 117, para 1 of the Constitution in relation to Art 8 of the ECHR, since the provision of the necessity, for the purposes of the rectification of gender attribution at the records office, for the subsequent modification of the primary sexual characteristics through highly invasive clinical treatment would seriously undermine the exercise of one's fundamental right to gender identity.

In its judgment of 20 July 2015 no 15138, the Court of Cassation had recognized that surgery altering primary anatomical sexual characteristics was not obligatory for the purposes of sex rectification in civil registries. The Supreme Court, also analyzing the case law of the European Court of Human Rights, provided an interpretation compliant with the Constitution of the laws suspected of unconstitutionality.

In the light of the previous Constitutional interpretation by the Supreme Court, the Constitutional Court declared the question of the constitutionality of Art 1, para 1 of legge no 164 of 1982 unfounded.¹⁰⁰

In the above-mentioned judgment of the Supreme Court, constitutional principles are applied directly; the court, therefore, not only has an exegetical role but interprets the values expressed by the evolving social conscience.¹⁰¹ The constitutional principle is a factor that has an effect on the meaning to be attributed to the silence of the legislator and makes it possible to uphold a new request before the court for a hypothesis not contemplated by the law.

the meaning of 'living law' is constitutionally correct, the Court will reject the question of constitutionality raised by the referring course based on a different, and incorrect, interpretation.

⁹⁸ Corte costituzionale 21 October 2015 no 221, available at www.cortecostituzionale.it.

⁹⁹ This provision establishes that 'rectification shall be made pursuant to a judgment of the court which has the force of *res judicata* attributing to a person a sex other than that stated in their birth certificate as a result of changes to his or her sexual characteristics'.

¹⁰⁰ Corte costituzionale, n 98 above.

¹⁰¹ A. Giusti, 'Tutela effettiva dei diritti, ordinamento vivente e coscienza sociale nelle sentenze della Corte di cassazione', Relazione al convegno 'Il diritto vivente', Roma, 12 aprile 2018, available at www.magistraturaindipendente.it.

It will be recalled that the Court of Cassation does not create the principle¹⁰² but grasps it in the potential of its *ratio*. The reference to 'living law', that is, to the interpretation of the Court of Cassation is not due, in this case, to the Court's subjection to 'living law' but to the consideration of the constitutionally appropriate interpretation.

The Constitutional Court, therefore, considers the law to be 'living' not because it results from its applicative practice, but because it stems from correct hermeneutical procedure. Hence the expression of positivism based on values. (Values-based positivism).¹⁰³ In this sense, 'living law' is not opposed to positive law: taking the text of the law as a starting point, the interpreter of the law looks at the context of values in the light of evolving society. The dynamic element of the principle, that is, the interest underlying it, takes on different meanings over time; the court interprets the social conscience at the moment of application.

When the evolution of this interest means that it becomes incompatible with the written law, it is necessary to declare it unconstitutional; however, if the signifier allows it, the new dimension of the protected interest can be brought back into its proper sphere by means of the evolutionary interpretation, corresponding to the overall system of values of the legal order.

¹⁰² *ibid.*

¹⁰³ *ibid.*

Transgenderism and Minor Age in Italy

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Abstract

In light of relevant rulings of the European Courts, this paper deals with the protection of the fundamental rights of individuals with gender dysphoria, with particular regard to the health and gender identity of the 'older minor', who only recently has drawn the attention of Italian case law.

The Author examines the major issues that affect adolescence and highlights the progress that the Italian legal system has made in recent years in relation to the needs of those teenagers who want to change their sex and name, at times without undergoing sex reassignment surgery. In line with the necessity of enhancing protection of rights of all transgender persons, the objective of this article is to promote anti-discrimination policies in Italy while respecting the fundamental guarantees of dignity and self-determination of these 'special minors'.

I. The Condition of Transgender Persons

The term transgenderism, which includes transsexualism in its sphere, came to prominence in Italy in the 1980s.¹ This political and cultural movement claimed the right for each individual to identify themselves at any position along a spectrum between the two categories of femininity or masculinity, and thus be free from discrimination on the basis of a discrepancy between the biologically defined body and the body that they identified as the correct one for them.

At a European level, an individual's need to recognise his or her gender identity is protected in some European Directives,² in some European

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¹ The Italian Constitutional Court first dealt with the issue of transsexualism in 1979 (Corte Costituzionale 1 August 1979 no 98, *Rassegna diritto civile*, 507 (1980), with comment of P. D'Addino Serravalle, 'Le trasformazioni chirurgiche del sesso nella sentenza n. 98 della Corte Costituzionale'), when a transsexual person was not granted the right to obtain recognition of a sex other than that assigned at birth.

² Equal Treatment Directives: Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L039; European Parliament and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of

Resolutions³ and in some rulings of the European Court of Justice,⁴ which has repeatedly stressed the close link between the right not to be discriminated against because of one's gender identity or sexual orientation and respect for the dignity of the human person. The Charter of Fundamental Rights of the European Union⁵ does not contain explicit references to gender identity or sex characteristics, but it establishes that

‘any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any

employment and occupation (recast) [2006] OJ L204/23. See, more recently, European Parliament and Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9. In Recital 30, the directive, referring to the fear that the asylum seeker may be subjected to persecution in his own country in relation to membership in a given social group, states that it is necessary to introduce a common definition of the reason for persecution of ‘membership of a particular social group’. Subsequently, Art 10 clarifies that, in order to determine membership of a particular social group, ‘gender considerations, including gender identity’ must be taken into account.

³ Reference is made to: European Parliament Resolution of 28 September 2011 on human rights, sexual orientation and gender identity at the United Nations; European Parliament Resolution of 12 March 2015 on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's policy on the matter; European Parliament Resolution of 12 December 2018 on the annual report on human rights and democracy in the world 2017 and the European Union's policy on the matter, which ‘acknowledges that sexual orientation and gender identity can increase the risks of discrimination, violence and persecution; European Parliament Resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones.

⁴ Case C-13/94 *P. v S. e Cornwall County Council*, Judgement of 30 April 1996, available at www.eur-lex.europa.eu. The case concerned an English transgender woman who was dismissed after informing her employers that she was undergoing gender reassignment. Here the Court ruled that the Council Directive 76/207/EEC of 9 February 1976, which was an expression of a fundamental principle of equality, precluded dismissal for a reason related to gender reassignment. This is the first piece of the Court of Luxembourg's case law that prevents discrimination in employment based on gender identity. More recently, see Case C-451/16 *MB v Secretary of State for Work and Pensions*, Judgement of 26 June 2018, available at www.curia.europa.eu. Here the Court, dealing with the issue of change of gender in relation to the right to pension treatment and to the right not to be discriminated against on grounds of sex, establishes that a person who has changed sex while remaining married to the previous partner, has the right to retirement at the age provided for people of the acquired sex. In fact, Council Directive 79/7/EEC of 19 December 1978, relating to equal treatment between men and women in social security [1979] OJ L 6/24, must be interpreted as not admitting national legislation which requires a transgender person not only to fulfil physical and psychological criteria, but also not to be married to a same sex person, to claim a State retirement pension. Among legal scholars, on this issue, see E. Longo, ‘La Corte di Giustizia, i diritti dei transessuali e la riduzione delle competenze statali’ *Quaderni costituzionali*, 581 (2006); M. De Salvia and V. Zagrebelsky, *Diritti dell'uomo e libertà fondamentali. La giurisprudenza della Corte europea dei diritti dell'uomo e della Corte di giustizia delle Comunità europee* (Milano: Giuffrè, 2007), III, 52.

⁵ The Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 by the European Parliament and European Commission, had full legal effect with the entry into force of the Treaty of Lisbon on 1 December 2009.

other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, shall be prohibited' (Art 21, para 1).

Similarly, the European General Data Protection Regulation of 2016⁶ does not refer to 'gender identity' in any way, although it lists information on sex life and sexual orientation as a 'special category of personal data' (Art 9, para 1).

At an international level, the United Nations Convention on the Rights of the Child⁷ states that States Party to the Convention shall respect and ensure the rights contained in the treaty, to each child within their jurisdiction without discrimination of any kind, in particular irrespective of the child's

'sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status' (Art 2, para 1).

Since 2002,⁸ the European Court of Human Rights has begun to provide protection for transgender persons, using the application of Art 8 (*right to private and family life*) and Art 12 (*right to marriage*) of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).⁹ Art 8 of the ECHR prohibits any restriction on the right to privacy and family life, unless that restriction is required by law and is necessary for national security, the economic well-being of the country, the prevention of crimes, the protection of

⁶ 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) [2016] OJ L 119/1.

⁷ The United Nations Convention on the Rights of the Child (signed in New York on 20 November 1989, entered into force on 2 September 1990 and ratified by Italy with legge 27 May 1991 no 176) is the first legally binding international instrument aimed at protecting children and recognizing their human rights. On the issue, see C. Focarelli, 'La Convenzione di New York sui diritti del fanciullo e il concetto di "best interest of the child"' *Rivista diritto internazionale*, 981 (2010); R. Virzo, 'La Convenzione delle Nazioni Unite sui diritti del fanciullo e l'orientamento sessuale del minore', in B.E. Hernández-Truyol and R. Virzo eds, *Orientamento sessuale, identità di genere e tutela dei minori* (Napoli: Edizioni Scientifiche Italiane, 2016), 108-130.

⁸ Eur. Court H.R. (GC), *Goodwin v United Kingdom*, Judgment of 11 July 2002, available at www.echr.coe.int, which condemned Britain for denying a transgender person the right to marry. Subsequently, in 2004, in the United Kingdom, the Gender Recognition Act was passed, allowing for gender reassignment. In literature, see L. Trucco, 'Il transessualismo nella giurisprudenza della Corte europea dei diritti dell'uomo alla luce del diritto comparato' *Diritto pubblico comparato europeo*, 371 (2003).

⁹ The European Convention on Human Rights and Fundamental Freedoms (Convention of Rome), signed by the member States of the Council of Europe in Rome on 4 November 1950, was ratified by the Italian State with a law enacted in 1955. See, on the Convention of Rome, V. Zagrebelsky, 'Corte, convenzione europea dei diritti dell'uomo e sistema europeo di protezione dei diritti fondamentali' *Foro italiano*, IV, 353 (2006); J. Long, 'La Convenzione europea dei diritti dell'uomo e il diritto italiano della famiglia', in P. Zatti ed, *Trattato di diritto di famiglia* (Milano: Giuffrè, 2006), VII, 1; L. Lenti, 'L'interesse del minore nella giurisprudenza della Corte europea dei diritti dell'uomo: espansione e trasformismo' *Nuova giurisprudenza civile commentata*, I, 148 (2016).

health or morality, or the protection of rights and freedom of others. According to the European Court of Human Rights, the right to private and family life must be understood in a wide sense, including the fundamental need to be able to express one's identity as a human being. Therefore, a norm of Italian law that prevents a transgender person from exercising any rights because of the non-recognition of the acquired gender would be incompatible with European law. Indeed, according to Art 14 of the ECHR, the enjoyment of the rights and freedoms recognized in the ECHR must be ensured without discrimination, in particular that based on sex, race, colour, language, religion, political views or those of other national or social origin, belonging to a national minority, wealth, birth or any other condition.

II. The Right of the Child to Be Educated and Heard

Gender dysphoria must not be confused with the condition of intersexuality,¹⁰ which indicates the coexistence of male and female sexual characteristics in the same individual. While intersex minors present, usually from birth, ambiguous genital organs, not definable with certainty as male or female, minors with gender dysphoria are characterized by a psychological perception of their gender as not corresponding to their own corporeality. This incongruity may give rise to an identity crisis and can lead individuals with gender dysphoria to adopt their identified gender, which is different from that which they were assigned at birth.

The topic of transgenderism must be addressed from a different legal standpoint than in the past, as it is no longer considered clinically a psychosis, but a form of psychological distress.¹¹ It is even more important to adopt a new

¹⁰ Intersexuality, defined in the past as hermaphroditism or androgyny, now defined as 'variation of sexual development', indicates the coexistence or lack, in the same individual, of male and female sex characteristics, due to a biological mutation of chromosomal, gonadic-hormonal and/or anatomical sex. In order to protect his/her legal position, an intersex person may ask a judge to order a public officer to rectify his/her sex in the civil status records under Art 95 of decreto del Presidente della Repubblica 3 November 2000 no 396. On this issue, however, there is a debate in jurisprudence that discusses the rules applicable to cases of intersexuality. According to some authors, the intersexual person could ask the civil officer directly to correct the sex indicated in the act of birth according to Art 98 of decreto del Presidente della Repubblica 3 November 2000 no 396, which allows the public officer to correct any writing errors that have been made. The thesis, however, is not convincing, as such a procedure is only possible where there has been an error of distraction in writing the act of birth, in presence of a certain and determined sex: consider the case where an act of birth formed abroad where a foreign name or a neutral name was indicated (eg Andrea), has been mistranslated or misinterpreted by the civil officer. In this sense, see G. Cardaci, 'Il processo di accertamento del genere del minore intersessuale' *Rivista diritto processuale*, 683 (2016).

¹¹ The name 'gender dysphoria' is included in the latest version of the Diagnostic Manual of Mental Disorders (DSM V, fifth edition of the Classification Manual of Mental Disorders, American Psychiatric Association, J. Morrison, *DSM - V Made Easy, Percorsi alla diagnosi*, in E. Sacchetti and C. Mencacci eds (Milano: Edizioni Edra, 2014), 370-375. On the legal notion of transexualism, see P. Perlingieri, 'Note introduttive ai problemi giuridici del mutamento di

approach when the individuals experiencing gender dysphoria are minors; indeed, it is necessary to guarantee their well-being and affirm their identity from an early age. For some, dysphoria in relation to one's gender identity may appear at a very early age (sometimes even between three and four), but the onset of the discomfort most commonly occurs in late adolescence or early adulthood.¹²

The problem must be tackled at the beginning of puberty through a hermeneutic method based on the central value of the human being, which allows adjudicators to focus not on the minor age as an abstract category of incompetence, but rather on the concrete situation of each minor. As inferred from various provisions of the Italian legal system,¹³ every child has the right to be educated, based on their requirements and necessities. From an international perspective, the above-mentioned Convention on the Rights of the Child recognizes this fundamental right to education (Art 28). Further, the Preamble of the Convention declares that

‘children’s rights require special protection and call for continuous improvement of the situation of children all over the world, as well as for their development and education in conditions of peace and security’.

Being educated means being guided in all aspects of development and growth: physical, psychological, cultural, spiritual, social. The duty of education must be fulfilled while respecting the abilities, inclinations and aspirations of the child. With reference to minors with gender dysphoria, this means accepting them for what they feel, observing their social behaviour, and understanding their reasons for rejecting their biological sex. Parental acceptance is a difficult but fundamental process: the goal is to understand the real needs of the child who does not

Sesso’ *Diritto e giurisprudenza*, XXVI, 830-843(1970); B. Pezzini, ‘Transessualismo, salute e identità sessuale’ *Rassegna di diritto civile*, II, 463 (1984); J. Baldaro Verde and A. Graziottin, *L'enigma dell'identità, Il transessualismo* (Torino: Gruppo Abele, 1991), 7; M. Iorio et al, *Sessualità e legge*, (Torino: Minerva Medica, 2000), 134; S. Patti, ‘Il transessualismo’, in S. Patti and M.G. Cubeddu eds, *Diritto della famiglia* (Milano: Giuffrè, 2011), 943-959.

¹² On the obstacles faced by transgender youth in the United States, with particular reference to the rights of those children living in a group foster home, see: C.L. Olson, ‘Transgender Foster Youth: A Forced Identity’ 19 *Texas Journal of Women and the Law*, 25-57 (2009). Regarding queer children harmed because of their gender non-conformity, see S.E. Valentine, ‘Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child’ 4 *Michigan State Law Review*, 1053-1113 (2008), who defines queer children as ‘children who either self-identify or are perceived by others as being a sexual minority or who do not conform to normative gender roles’ and focuses her article on the role of attorneys representing those children in their journey through the court system and beyond.

¹³ Art 30, para 1, of the Constitution proclaims that ‘it is the duty and right of parents to support, instruct and educate their children, even those born outside of matrimony’. Within the Civil Code, parental responsibility means obligation to educate a child (see Arts 315-*bis* and 316 of the Civil Code). The Italian Law on Immigration (decreto legislativo 7 July 1998 no 286) extends to foreign minors all the normative provisions regarding the children’s right to be educated and to access school (see Art 38).

respond to the standard of binarism that divides the world into males and females. This is also the content of a broader concept of ‘parental responsibility’¹⁴ that must always be exercised for the children’s benefit in accordance with their personalities.

To comprehend the real needs of the child, it is necessary to give him a voice, as many national and international legal instruments provide.¹⁵ Under Italian law, all children have the right to be heard at the age of twelve and even when they are younger – including in early childhood – if they have the capacity of understanding and willing:¹⁶ this right is applicable in all matters and judicial or administrative procedures concerning them (Art 315-*bis*, para 3, of the Civil Code). The goal of these laws is that children are the chief protagonists of their own interests and, even if they do not have full capacity until the age of eighteen, they enjoy a plethora of rights which demand respect and satisfaction. Consequently, also within the family home, children with sufficient awareness have to be heard before the family or parents take decisions which may affect them.

III. Flexible and Adaptable Protection for Adolescents with Gender Dysphoria

This section discusses the protection needs of adolescents with gender

¹⁴ The notion of parental responsibility is defined by Art 2, para 7, of the Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L1/338. After the Italian Reform 2012 on filiation (legge 10 December 2012 no 219, titled ‘Regulations Regarding the Recognition of Natural Children’), the concept of ‘parental authority’ has been completely left behind, opting for the broader concept of ‘parental responsibility’ that consists of a collection of duties and rights of parents, such as raising, taking care, education, maintenance, determination of residence, administration of properties and representation of the child in legal matters.

¹⁵ Art 12 of the United Nations Convention on the Rights of the Child (n 6 above) recognizes respect for children’s views, statuting that ‘children have the right to give their opinions freely on issues that affect them. Adults should listen and take children seriously’. According to Art 3 of the European Convention of Strasbourg on the Exercise of Children’s Rights (signed on the 25 January 1996, ratified by Italy with legge 20 March 2003 no 77), every child has the right to receive all relevant information, to be consulted and express his or her views in proceedings and to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

¹⁶ On the child’s right to be heard, see Corte di Cassazione 10 June 2011 no 12739, *Famiglia e diritto*, 37 (2012), with comment of F. Tommaseo, ‘Per una giustizia “a misura del minore”: la Cassazione ancora sull’ascolto del minore’. In jurisprudence, see, among others, P. Stanzione, ‘Potestà dei genitori e diritti fondamentali del minore’ *Rassegna di diritto civile*, 460 (1980); E. Quadri, ‘L’interesse del minore nel sistema della legge civile’ *Famiglia e diritto*, 80 (1999); F. Bocchini, ‘L’interesse del minore nei rapporti patrimoniali’ *Rivista di diritto civile*, I, 277 (2000); A. Palazzo, *Contributo alla ricostruzione della tutela del principio di vita*, in A. Palazzo and I. Ferranti eds, *Etica del diritto privato* (Padova: CEDAM, 2002), II, 96; F. Parente, ‘L’ascolto del minore: i principi, le assilogie e le fonti’ *Rassegna di diritto civile*, 459 (2012); C.M. Bianca, ‘Il diritto del minore all’ascolto’ *Nuove leggi civili commentate*, 592 (2013); F. Scaglione, *Ascolto, capacità e legittimazione del minore*, in R. Cippitani and S. Stefanelli eds, *La parificazione degli status di filiazione* (Roma-Perugia-Mexico: Iseg Gioacchino Scaduto, 2013), 271.

dysphoria. Their position in the legal system is influenced by the evolution of case law, which in recent years has focused on transgender adults and has sought to simplify the legal transition necessary for the fulfilment of their human rights.

To understand how this evolution has had an impact on the situation of these particular minors, it is necessary, first of all, to consider that the minor, traditionally incapable of entering a contract, is also considered by law incapable of acting autonomously within the personal sphere in general. Since there is no Italian legislation covering children's personal rights in general, in the specific field of gender identity, we may refer to some norms from which we can deduce an adolescent's autonomy in decision making when there is a minimum level of intellectual maturity.

To understand which decisions the child should be considered capable of making, it is appropriate to review the law with regard to consenting to medical treatment (legge 22 December 2017 no 219). Medical diagnoses of gender dysphoria can be treated only with the consent of a minor's parent or guardian, based on the principle established by Art 3 of legge no 219 of 2017. This law does not establish a minimum age when minors can express an autonomous decision. However, the law calls on doctors to enable minors' 'ability to understand and decide' (Art 1 and Art 3, para 1) with regard to their life and health. As a consequence, the minor must receive all the relevant information concerning his or her health choices according to his or her capabilities, so as to express his or her conscious adherence.

An axiological and systematic reading of the aforementioned provisions requires abandoning the idea that a child is a subject totally incapable of exercising his or her personal rights. Accordingly, adolescents who are close to the age of majority and with a certain level of maturity, should be granted even more agency in the execution of their rights and fundamental freedoms, because they have a 'decision-making capacity'. Consequently, in such cases, parents should not enforce their will on the child, but should acknowledge and support his or her medical choices, according to a principle that can derive not only from the Civil Code (see, eg, Art 316)¹⁷ and medical ethics (Art 37, para 1, medical deontology code), but also from numerous regulatory provisions existing both at a national (Art 3, paras 1 and 2, legge no 219 of 2017)¹⁸ and international level (see Art 6, para 2, of the Oviedo Convention).¹⁹ As a result, a modern meaning of the minor's

¹⁷ Art 316 of the Civil Code establishes that both parents have dual responsibility of their children, taking into consideration their capacity, natural inclination, desires and ambitions.

¹⁸ According to Art 3, paras 1 and 2, legge no 219 of 2017, the minor has the right to be informed about his medical choices in relation to his decision-making capacity (age and level of maturity) in order to express his will.

¹⁹ Art 6, para 2, of the Convention on the Protection of Human Rights and Human Dignity on the Applications of Biology and Medicine (approved by the European Council in 1996 and signed in Oviedo on 4 April 1997) states: 'Where, according to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by

competence is deduced from the legal system as a whole: it approaches the notion – typical of the common law tradition – of inability to consent to medical treatments.²⁰ It coincides with the capacity for rational choice, which allows enhancement of the autonomy of a person, as it is not absolute, unchangeable and necessarily tied to age, but relative, alterable and strictly related to individual maturity, skill and understanding.

On this basis, to resolve individual cases regarding physical and psychological treatment of a minor, a guide criterion could be useful to distinguish – not categorically, but concretely, with regard to specific situations – between the so called ‘small minor’, who is an infant, and the so called ‘older minor’, who is a mature adolescent.

IV. The Right of the Child to Gender Identity

The right to a different sex from the one originally indicated in the birth certificate was recognized by legge 14 April 1982 no 164 on Rectification of Sex Attribution, which overcame the conception that sexuality is only determined on the basis of physical traits. This is the fundamental right to sexual identity, which was defined by the Italian Constitutional Court²¹ as the right to having access to a legal and medical procedure to adapt one’s body to the psyche.

In recent decades, there has been a further refinement of the concept, moving from the need for sex change to the need to realize one’s gender identity, read as an essential aspect of mental and physical health and personal identity,²² interpreted also as a specific expression of the right to self-determination in achieving personal equilibrium.²³ This evolution implies, as recently underlined

law. The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity’.

²⁰ For the concept of incompetence in the *common law*, see E. Jackson, *Medical law, Text, Cases and materials* (Oxford: Oxford University Press, 2010), 216; A.E. Morris and M.A. Jones, *Medical Law* (Oxford: Oxford University Press, 2011), 203; F. Burton, *Family law* (Padstow, Cornwall: TJ International Ltd, 2012), 277; J. Fortin, ‘Accommodating Children’s Rights in a Post Human Rights Act Era’ 69 *The Modern Law Review*, 299 (2006).

²¹ On this point, see Corte Costituzionale 23 May 1985 no 161, *Giurisprudenza italiana*, I, 235 (1987).

²² P. Stanzione, ‘Transessualismo e sensibilità del giurista: una rilettura attuale della legge n. 164/82’ *Diritto di famiglia e delle persone*, 715 (2009); E. Pascolo-Fabrizi et al, *Identità di genere*, (Trieste: EUT, 2016), 27-29; M. Silvaggi, ‘Aspetti psicologici nell’adolescente omosessuale’, in B.E. Hernández-Truyol and R. Virzo eds, n 6 above, 15; M.C. De Cicco, ‘Il diritto alla diversità come espressione del diritto all’identità personale’, in E. Caterini et al eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo* (Napoli: Edizioni Scientifiche Italiane, 2017), II, 505.

²³ G. Palmeri and M.C. Venuti, ‘Il transessualismo tra autonomia privata ed indisponibilità del corpo’ *Diritto di famiglia e delle persone*, 1331 (1999); V. Lingiardi, ‘Orientamento sessuale e genere: declinazioni molteplici e ampie le intersezioni’ *Famiglia e minori Guida al diritto*, 7, 19-21 (2011); A. Lorenzetti, *Diritti in transito. La condizione giuridica delle persone transessuali*

by the Italian Constitutional Court,²⁴ the necessity to differentiate the terms ‘sex’ identity and ‘gender’ identity: while sex is an objective concept, which has a physical and biological definition, gender is a subjective, psychological and cultural notion, which indicates the perception of oneself as belonging to a male or female category. Facts, in reality, show that personal fulfilment is not necessarily achieved through the identification of an individual as belonging to a masculine or feminine category, but can also be found in an intermediate gender between man and woman. There is a wide range of gender identities and not all of them require a surgical solution which identifies them as socially accepted body archetypes.

Thus, the recent shifts in case law²⁵ have reflected an understanding that surgical intervention concerning primary sexual characteristics is not the only remedy for an ‘ambiguous’ person to become a ‘normal’ man or woman. Following the jurisprudence of the European Court of Human Rights,²⁶ the prevailing interpretative orientation in Italian case law is that transgender persons have the right to rectify their name and sex even without losing their reproductive capacity, simply by changing their secondary sexual characteristics;²⁷ it is their decision to determine if surgical intervention with regard to their reproductive organs is functional to their physical or psychic well-being.

The same rights to health, gender identity and human dignity that are accorded to adults in these contexts are essential needs that also cannot be denied to minors. Recognition of these rights, however, requires further reflection and

(Milano: Franco Angeli, 2013), 20; F. Bilotta, ‘Transessualismo’ *Digesto discipline privatistiche - Sezione Civile* (Torino: UTET, 2013), 715.

²⁴ In this regard, see Corte Costituzionale 13 July 2017 no 180, available at www.cortecostituzionale.it. Here the Corte Costituzionale clarified that surgical intervention in primary sex characteristics cannot be justified by a public interest in establishing certain genders and, consequently, it is not necessary for having one’s gender legally recognized.

²⁵ Corte di Cassazione 20 July 2015 no 15138, *Studium iuris*, 4, 400 (2016), with comment of V. Greco, ‘Mutamento di sesso senza costringimento al bisturi’. See, also, Tribunale di Rovereto 3 May 2013, *Nuova giurisprudenza civile commentata*, I, 1116 (2013), with comment of F. Bilotta, ‘Identità di genere e diritti fondamentali della persona’; Tribunale di Roma 14 April 2011 no 5896, *Guida al diritto - Famiglia e minori*, 7, 15-16 (2011), with comment of F. Bilotta, ‘Rettifica dell’atto di nascita anche senza l’intervento chirurgico del sesso. Decisione rispettosa delle garanzie fondamentali di dignità e autodeterminazione’.

²⁶ See the recent rulings by the Eur. Court H.R., *S.V. v Italy*, Judgment of 11 October 2018 and Eur. Court H.R., *Y.Y. v Turkey*, Judgment of 10 March 2015, both available at www.echr.coe.int. The first judgment focuses on the human rights to gender identity and to a name, clarifying that the Italian authorities’ refusal to authorise a transgender person with a female appearance to change her male first name prior to surgery, constitutes a violation of Art 8 (right to respect for private and family life) of the ECHR. The second ruling of the Court refers to self-determination regarding reproductive health, discussing reproductive capacity as a condition of access to surgical intervention; more specifically, it states that Turkey cannot refuse to authorise a transgender person, who had not been previously sterilised, to have access to sex reassignment, without breaching the right to respect for private life (Art 8 of the ECHR). See, among the Italian scholars, S. Patti, ‘Il transessualismo tra legge e giurisprudenza della Corte europea dei diritti dell’uomo (e delle Corti costituzionali)’ *Nuova giurisprudenza civile commentata*, I, 143 (2016).

²⁷ Secondary sexual characteristics are defined: distribution of muscle mass, fat, hairs, tone of the voice. Primary sexual characteristics are considered genital and reproductive organs.

discussion about the possibility of physicians and healthcare professionals prescribing drugs to stop puberty and postpone physical development of young children with symptoms of gender dysphoria. This issue will be discussed in the next section.

V. The Controversial Issue of the Use of Triptorelin Hormone in Adolescence

Italian medical science has raised the issue of the use of Triptorelin hormone in adolescents in the early phase of puberty (from ten to fourteen years old). This drug, taken for a prolonged period, slows down or suspends the development of naturally produced hormones; it is therefore evident that starting such treatment in early adolescence means starting a decisive path towards a new personal identity. This is a heated issue, which has been dealt with differently in European and non-European countries. The debate focuses on adolescents with severe dysphoria from childhood and their dramatic conditions that can lead to extreme gestures, such as suicide.

In the latest version of International Care Standards, the World Professional Association for Transgender Health emphasizes the importance of using Triptorelin therapy to give teenagers more time to explore their gender identity and, above all, to avoid development of sexual characteristics not corresponding to the perceived identity. This eases the subsequent transition, requiring a lower future dosage of hormones and reducing the need for medical and/or surgical intervention. As highlighted in the Commission Report to the European Parliament of 26 October 2017 regarding the current status of pediatric medicine in the European Union, the lack of specific pediatric clinical studies enabled the off-label use of Triptorelin in the past,²⁸ with dosages and indications not specifically tested for the pediatric age.

However, the treatment of gender dysphoria in pre-adolescence is highly controversial. The Italian Bioethics Committee recently expressed its position on the practice in the 'Opinion of 13 July 2018 on the request of the Italian Medicines Agency (AIFA) regarding the ethics of the use of the Triptorelin drug for the treatment of adolescents with gender dysphoria'.²⁹ This important document, while being substantially favorable, mandates an extremely conservative use of the

²⁸ The off-label use of Triptorelin means use outside of the recognized medical indications, with dosages not specifically tested for the paediatric age. The Commission's report to the European Parliament and the Council of 26 October 2017 on the current state of paediatric medicines in the EU underlines that the off-label use of adult medicines 'entails the risk of ineffectiveness and/or adverse reactions in children'. See also the National Reference Guidelines (Agency for Regional Health Services) on conducting clinical trials in basic paediatrics, available on the website of the Service of Epidemiology and Preventive Pharmacology: www.sefap.it

²⁹ The Opinion of the Italian Bioethics Committee of 13 July 2018 is available at www.bioetica.governo.it.

drug, limited to carefully selected cases. The Opinion's main recommendations include: the need for the involvement of a multidisciplinary and specialized team; the use of the treatment only when other medical interventions have been ineffective; the requirement of informed, express and unrestrained consent by the parents/guardian; adequate training of paediatricians and of health and social services and educational institutions; safety and follow-up studies on the treated cases; and a policy of fair and homogeneous access to the drug. Further, according to the Committee, a medical protocol including psychotherapeutic interventions should be available, in order to avoid damaging effects on mental and physical health and to eliminate the causes of suffering induced by stigmatization and social discrimination.

Taking into consideration the above opinion, on 25 February 2019, the Italian Medicines Agency decided to include Triptorelin in the list of medicines paid for by the National Health Service, authorizing its use in the treatment of adolescents with gender dysphoria.

Nevertheless, according to some scholars,³⁰ there are no sufficient paediatric clinical tests to determine the side effects of such therapies on children in the short and long term; in particular, there is no evidence of the possible recovery of physical and cognitive development and full restoration of fertility of those children who decide to stop the treatment. Consequently, the use of this drug should be limited for a predetermined period of time and in very select cases, with a case-by-case evaluation.

Indeed, the need to proceed to a careful assessment is inferred from the above-mentioned 'Opinion' of the Italian Bioethics Committee, which advocates adherence to the principles of responsibility, non-maleficence and precaution,³¹

³⁰ F. Signani, N. Natalini and C. Vagnini, 'Minori Gender Variant: il ruolo che un'Azienda Sanitaria può (deve?) svolgere' 2 *GenIUS*, 4-13 (2019); K. Varani and F. Signani, 'Benefici e Rischi nel Trattamento Farmacologico con Triptorelina nella Disforia di Genere' 2 *GenIUS* 67-73 (2019). These Authors emphasize problems and limits of a drug treatment with Triptorelin and highlight the importance of preparing safety studies on the short and long term efficacy, in order to regulate its correct use in puberty. Among the legal scholars, see the opinions expressed by M. Ronco et al, *Determina AIFA sulla Triptorelina: nota congiunta di Scienza & Vita e del Centro Studi Livatino*, 5 March 2019, available at tinyurl.com/y99ynfoc (last visited 7 July 2020). With regards to the foreign literature, see D. Chew et al, 'Hormonal Treatment in Young People with Gender Dysphoria: A Systematic Review' 4 *Pediatrics*, 141 (2018).

³¹ On the principles of responsibility and non-maleficence, see F. Bellino, *Trattato di Bioetica* (Bari: Levante, 1992), 325-326; E. Sgreccia, *Manuale di bioetica* (Milano: Vita e Pensiero, 1994), I, 175-184. With specific reference to the precautionary principle, see World Commission on the Ethics of Scientific Knowledge and Technology, *The precautionary principle* (Paris: UNESCO, 2005), 1-52, available at unesdoc.unesco.org. At a European level, Art 174, para 3, of the Treaty on the European Union [2012] OJ C 326/01 provides that 'in preparing its policy on the environment, the Community shall take into account (...) the potential benefits and costs of action or lack of action'. On the issue, on 29 January 1999, the Council of Europe adopted the Recommendation no 1399 on xeno trans-plantation. In the Italian literature, regarding the precautionary principle in the field of health, see M.G. Stanzione, 'Principio di precauzione, tutela della salute e responsabilità della P.A. Profili di diritto comparato' *Comparazione e diritto*

which are general criteria to be respected in every medical intervention and, even more important in interventions involving minors. Particularly, the precautionary principle takes into account the potentially harmful consequences of the use of a medical therapy and aims to prevent personal injury or personal damage; thus, this principle should be emphasized in order to determine the most reasonable solution to problems in this field, as the virtue of 'prudence' offers an answer to a question before scientific proof of harm is given.

VI. The Problem of Gender Identity at the Threshold of the Majority Age

In this section we will address the difficult question of whether it is legitimate to allow the rectification of sex and name at an earlier stage before the age of majority, without waiting for gender identity and personality of an individual to be completely defined. Pursuant to Art 1 of legge no 164 of 1982, the rectification is made by two sentences that give a person a different sex and name to those recorded on the birth certificate; consequently, this involves the change of sex and name in civil status records and on all identity documents.

Legge no 164 of 1982 does not refer to minors: it does not explicitly exclude them from accessing the transition procedure, but, at the same time, it does not allow them to pursue an autonomous exercise of a sex change. The debate on this issue is still open.

According to a ruling of Tribunale di Catania in 2004,³² an adolescent before the age of eighteen cannot obtain public recognition of his identity, because he is not considered capable of acting in the sphere of personality rights. In that case, a parent's request for gender reassignment surgery on behalf of a minor was rejected. Under this approach, it was not possible to derogate from the general principles on the legal incapacity of minors.

Several years later, the Tribunale di Roma arrived at a different conclusion in two conforming rulings.³³ According to these decisions, age does not preclude access to surgery for a minor with gender dysphoria, because, despite the lack of a regulatory provision, the need for effective protection of the rights of the child

civile, September 2016, 2-34; R. Adorno, 'The Precautionary Principle: a New Legal Standard for a Technological Age' 1 *Journal of International Biotechnology Law*, 11-19 (2004).

³² Tribunale di Catania 12 March 2004, *Giustizia civile*, I, 1107 (2005), with comment of L. Famularo, '*I minori e i diritti della personalità*'. Here the judges declared inadmissible the procedure of gender reassignment, brought before the courts by the parents, because of their lack of ability to sue, on the assumption that it was a strictly personal question, not exercisable through a judicial representative.

³³ Tribunale di Roma 11 March 2011 and Tribunale di Roma 22 March 2011, *Nuova giurisprudenza civile commentata*, I, 243 (2012), with comment of A. Schuster, '*Identità di genere: tutela della persona o difesa dell'ordinamento?*'. In this case, the tribunal authorizes surgery in favor of a minor, allowing the parents to submit an application for a sex change.

requires a parent's intervention to assert his or her rights in court. The Roman judges ruled that a change of gender by an adolescent close to the age of majority might be considered, in certain cases, beneficial to his/her interest.

In fact, an adolescent with gender dysphoria, like any adult, has not only the right to health, but also the right to be identified according to his or her desires, as an expression of the inviolable rights to personal identity and sexual freedom, protected by Art 2 of the Constitution. These rights can be exercised by a legal representative, which is one of the parents (or a guardian in their absence), after obtaining the judge's authorization. In order to grant the authorization, each case is assessed by the judge, who is called to ascertain the authentic will of the interested adolescent. This solution is consistent not only with the general principle that guarantees legal action to protect human rights and interests (Art 24 of the Constitution), but also with numerous sources of international law³⁴ that consider the 'best interest of the child' as the pre-eminent criterion for every decision taken.

The concept of 'best interest of the child' has become a binding principle in the Italian State with the ratification of the Convention on the Rights of the Child (Art 3), which emphasizes this concept as a core principle, in addition to the principles of non discrimination (Art 2) and respect for the views of the child (Art 6 and Art 12). As a basic criterion of interpretation of laws and dispute resolution rule, this principle implies that, in the decisions of public or private institutions involving a child, no 'higher' or 'superior' interest should be pursued, rather, the child's 'pre-eminent' interest must be carried out with priority, as children are weak and vulnerable persons in the family and in society and, therefore, they must be supported more widely than others.³⁵

The 'best interest of the child' must be given a 'primary' consideration in

³⁴ First, reference has to be made to the United Nations Declaration of the Rights of the Children, proclaimed on the 20 November 1959 by the General Assembly of the United Nations (see Art 2). Later, the European Convention on the Exercise of Children's Rights (Strasbourg 1996, n 15 above) provided that 'In proceedings affecting a child, the judicial authority, before taking a decision, shall: a) consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities; b) in a case where the child is considered by internal law as having sufficient understanding: – ensure that the child has received all relevant information; – consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child; – allow the child to express his or her views; c) give due weight to the views expressed by the child' (Art 6, *Decision-making process*). The principle of the 'best interest of the child' was implemented by Art 23 of the European Council Regulation no 2201 of 27 November 2003 concerning Parental Responsibility (n 14 above) and inserted in the Charter of Fundamental Rights of the European Union (Art 24).

³⁵ In the Italian literature, see, among others, L. Lenti, '“Best interest of the child” o “best interest of children”?' *Nuova giurisprudenza civile commentata*, II, 157 (2010); L. Paladini, 'Best interest del minore e obblighi internazionali nella recente giurisprudenza italiana' *Giurisprudenza italiana*, 2274 (2014); F. Giardina, 'Interesse del minore: gli aspetti identitari' *Nuova giurisprudenza civile commentata*, I, 159 (2016); G. Ferrando, 'Ordine pubblico e interesse del minore nella circolazione degli status filiationis' *Corriere giuridico*, 2, 181 (2017).

relation to individual cases, since the needs of the individual may vary during the process of development. The approach that focuses on the pre-eminent interest of the child has led to a significant emphasis on the role of case law and an increase in the power of judges to make laws adequate to the specificities of reality, adapting them to the multiplicity of cases.

VII. Conclusion: The Right of the Child to Live in an Inclusive Context

Currently, a double judicial procedure is not always necessary for the purposes of gender change. A prior authorization for surgery might not be requested in some cases: when the intervention has already been carried out or when the person asks to rectify their sex without undergoing an operation. Therefore, a single judicial procedure for the modification of sex and name is now permitted. In these situations the judge simply verifies that sufficient modifications have been made to confirm the successful transition, without the need of resorting to surgery.

Sometimes, gender dysphoria appears during childhood. This article has examined the concrete possibility that an adolescent under the age of eighteen could possess the necessary capacity of judgment to make decisions regarding his or her life and personal identity. Legge no 164 of 1982 does not prohibit minors from changing sex and name, nor does it exclude, in special cases, the authorization of a surgical gender reassignment procedure when a minor is close to the age of majority.

This article has highlighted the progressive increase in the protection of children with gender dysphoria, who deserve special legal protection. This result has been determined by a constitutional interpretation of the definition of minority, inspired by the objective of the Constitution to implement the principle of substantial equality (Art 3, para 2, and Art 2, of the Constitution). In particular, the importance given to the decision-making power of the minor regarding health and gender identity choices emerges when he or she reaches a maturity level suitable enough to express his or her opinion.

Considering that difficulties linked to gender identification often arise at the age of puberty, an appropriate intervention from childhood is essential to ensure tranquillity and stability during this phase. The need for identification in the opposite sex can also appear in the first years of life, even if the behaviour of small children related to sexuality tends to remain in the private sphere. Thus, in childhood, the role played by parents is more incisive with greater responsibility, as the child, although he has fundamental rights, cannot yet enact them.

Some critical elements persist with regard to the obstacles that children with gender dysphoria encounter in everyday life. It is of fundamental importance for society and culture to evolve, thus providing support to these minors and their families.

They should receive all necessary medical help to ensure a balanced

development of their identity. An inclusive context together with participation of social services and of all administrations is necessary to avoid social stigmatization.

In the field of education, the adoption of guidelines by schools and other educational institutions could be a good strategy to guarantee transgender adolescents the free development of their personality. Effective measures against prejudice and discrimination might be found in the organization of training courses that target not only students and teachers, but also social services, who should cooperate with judges and lawyers, in order to promote good practices in every sector of society.

Following this trend, some Italian universities³⁶ give their students the opportunity to obtain a temporary identity card (called 'Alias' Student Card), which is valid only within the university and indicates their chosen name. The so called 'Career Alias' represents an anticipation of the measures that could become necessary at the end of the gender transition process, when the person obtains new personal identity documents; indeed, it can be requested not only by those who have already undergone a gender change, but also by those who have started a psychotherapeutic and clinical program in a health center to undergo a possible gender change. The final objective of this interesting tool is to allow students to exercise, while in the delicate process of gender transition, the rights to personal identity and privacy at the same time.

³⁶ Reference is made to the Universities of Basilicata, Pisa, Verona, Torino, Bologna, Perugia, Bari, Urbino, Napoli, Catania, Padova, Milano (in this last regard, see F. Cavadini, *Milano, sì al doppio libretto per i transgender in Statale e Bicocca*, 28 January 2016, available at tinyurl.com/y59a5jn9 (last visited 7 July 2020)). On the issue, see E. Stradella, *Le discriminazioni fondate sull'orientamento sessuale e sull'identità di genere* (Pisa: Pisa University Press, 2019).

The Crisis of the Right to Informational Self-Determination

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Abstract

This paper focuses on changes in data protection regulation and especially on the risks concerning informational self-determination and privacy created by technologies. The analysis starts from the growing ability to control informational flows – the beating heart of the informational self-determination principal – and goes on to examine consent as a ‘tool’ for managing personal data. In reality, the evolution of information and communication technologies affects consent, which becomes an ‘instrument for building self-identity on the Internet’. There are several factors – with the advent of new technologies – that lead to the crisis of consent. The critical issues arise not only from the modern idea of privacy but also from current challenges to data protection regulation, such as the ‘privacy paradox’, ‘datafication’, profiling, and Big Data analytics. Starting from the impact these phenomena have on fundamental rights and freedoms, the research question is whether the GDPR’s ‘privacy by design’ offers a satisfying solution or whether a more complex and global reflection is required.

I. Introduction

Within a global landscape dominated by information technologies able to gather millions of personal data each day, reflection on new rules to protect people’s fundamental rights and freedoms (the protection of personal identity, freedom of expression, and pluralism of information) becomes a necessity. In such a scenario, observance of the informational self-determination principle requires not only a sufficiently broad ability to control the collection and use of personal data but also the conscious ability to give free, informed, specific, and unambiguous consent for data processing.

The obscure and intricate use of data, and the increasing use of automated decisions, typical of digital services and Big Data analytics, portend significant risks for the fundamental rights and freedoms of data subjects. The paper therefore also focuses on phenomena such as the ‘privacy paradox’, ‘datafication’, and profiling, which concretely undermine any guarantee of free and informed consent.

Taking these considerations as its starting point, the General Data Protection Regulation (GDPR)¹ tries to enhance data subject awareness through its

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¹ Regulation (EU) 2016/679 (GDPR) of the European Parliament and of the Council of 27

implementation in IT solutions and web architecture. Against such a background, this paper seeks to show that the GDPR's 'privacy by design' offers only a partially satisfactory solution. As will emerge below, a more complex and global reflection is called for considering that, although this innovative approach appears interesting, it nevertheless requires some adjustment along the lines of Stefano Rodotà's suggestion:

‘not everything technologically possible is also socially desirable, ethically acceptable, legally justified’.²

On the basis of these observations, Section 2 will address the transition from the right to informational self-determination to the new paradigm of ‘privacy self-management’. Section 3 will address the downward spiral of consent and its crisis caused by the advent of new technologies. Sections 4, 5, and 6 will illustrate some of the current challenges in the field of data protection regulation (such as the ‘privacy paradox’, ‘datafication’, profiling, and Big Data analytics). Specifically, they will focus on the impact of these phenomena on fundamental rights and freedoms. Lastly, there are some concluding remarks on the GDPR’s ‘privacy by design’ solution, evaluating the degree of protection it affords the human person.

II. From ‘Informational Self-Determination’ to ‘Privacy Self-Management’

Informational self-determination became recognized as a right through the decision handed down by the German Constitutional Court in 1983, stating that each person has the right to decide on the transfer, circulation, and use of his or her personal data (*das information Selbstbestimmungsrecht*).³

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. On the GDPR see, *inter alia*, M. Maglio et al, *Manuale di diritto alla protezione dei dati personali. La privacy dopo il Regolamento UE 2016/679* (Santarcangelo di Romagna: Maggioli Editore, 2017); G. Buttarelli, ‘The EU GDPR as a clarion call for a new global digital gold standard’ 2 *International Data Privacy Law*, 77 (2016); G. Finocchiaro, *Il nuovo regolamento europeo sulla privacy e sulla protezione dei dati personali* (Bologna-Roma: Zanichelli, 2017); F. Pizzetti, *Privacy e il diritto europeo alla protezione dei dati personali. Il Regolamento europeo 2016/679* (Torino: Giappichelli, 2016); F. Di Resta, *La nuova ‘Privacy europea’: I principali adempimenti del regolamento UE 2016 e profili risarcitori* (Torino: Giappichelli, 2018); C. Kuner et al, *Commentary on the EU General Data Protection Regulation* (Oxford: Oxford University Press, 2018); G.M. Riccio et al, *Gdpr e normativa privacy. Commentario* (Assago: Wolters Kluwer, 2018); M. Soffientini, *Protezione e trattamento dei dati* (Assago: Wolters Kluwer, 2018).

² S. Rodotà, Discorso del Presidente del Garante, Relation 2003.

³ *Volkszählungsurteil*, Bundesverfassungsgericht 15 December 1983, 1 BvR 209/83, *Neue juristische Wochenschrift*, 419 (1984) with comment of S. Simitis, ‘Die informationelle Selbstbestimmung – Grundbedingungen einer verfassungskonformen Informationsordnung’ *Neue juristische Wochenschrift*, 398 (1984). W. Steinmüller, ‘Das informationelle Selbstbestimmungsrecht: wie es entstand und was man daraus lernen kann’ *Recht der Datenverarbeitung*, 158 (2007); G.

Modern technologies and the automated processing of personal data allow operations that were almost unimaginable in the past, but they can have an adverse effect on the dignity and free development of individuals' personalities. On these grounds, the German Court identified two fundamental freedoms: the right to the free development of one's personality (Art 2, para 1, of the German Constitution), and the unviolability of human dignity (Art 1, para 1, of the German Constitution). From these norms a fundamental right emerges that envisages the right of individuals to self-determination and to establish, autonomously and without interference, when self-disclosure is lawful and fair.

In its original formulation, the right to informational self-determination is the result of a biphasic protection mechanism. In the passive phase, the controller (or processor) informs the data subject regarding the characteristics of the processing (purposes, methods, limits, etc). The right to informational self-determination is then expressed in the active phase, when the data subject can influence the communication flows relating to his or her personal data.⁴

In Italy, the first ruling of the Italian Data Protection Authority (the BNL case) recognizes the right to informational self-determination in its statement:

‘consent can be effectively considered free only if it appears as a manifestation of the right to informational self-determination, therefore shielded from any pressure, and if it is not conditional upon accepting clauses that bring about any significant imbalance relating to the rights and obligations arising from the contract’.⁵

From this perspective, an individual not only decides if and how to disclose personal information; s/he also has the power to control its subsequent dissemination. This result definitively marks the transition from a static view of privacy to a dynamic one known as ‘informational privacy’.⁶ This is defined in scholarship as the transition from the ‘person-information-secrecy’ trinomial to

Sartor, ‘Tutela della personalità e normativa per la protezione dei dati. La sentenza della corte costituzionale tedesca sul censimento del 1983 nel dibattito dottrinale sui profili costituzionalistici del Datenschutz’ *Informatica e diritto*, 95 (1986). For a broad overview, P. Schwartz, ‘The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination’ 38 *American Journal of Comparative Law*, 686 (1989).

⁴ See, for all, A. Mantelero, ‘Privacy’ *Contratto e impresa*, 757 (2008).

⁵ The Italian Data Protection ruling of 28 May 1997, Bollettino ‘Cittadini e Società dell’Informazione’, Anno I – May/July 1997 – *Il Foro italiano*, 3 (1997). For a comment, cf V. Zeno-Zencovich, ‘Il “consenso informato” e la “autodeterminazione informativa” nella prima decisione del Garante’ *Corriere giuridico*, 915 (1997).

⁶ S. Rodotà, *Il diritto di avere diritti* (Roma-Bari: Edizioni Laterza), 319, discussed about a ‘reinvention of the privacy’. S. Warren and L. Brandeis, ‘The Right to Privacy’ 5 *Harvard Law Review*, 193-220 (1890), signed the passage from the ‘privacy-property’ to the ‘privacy-dignity’. See also G.B. Ferri, ‘Persona e privacy’, in Id et al, *Il riserbo e la notizia. Atti del Convegno di Studio. Macerata, 5-6 marzo 1982* (Napoli: Edizioni Scientifiche Italiane, 1983), 61 and G. Buttarelli, *Banche dati e tutela della riservatezza: la privacy nella società dell’informazione* (Milano: Giuffrè, 1997), 3.

the ‘person-information-circulation-control’ quadrinomial.⁷

A data subject’s self-disclosure choice is significantly aided by consent, through which data subjects authorize (or deny) third parties to use their personal information.⁸ In general terms, according to the regulation, consent forms one of the legal bases for lawful and fair data processing (in EU law, Art 7, Directive 95/46/CE; in Italian law, Art 23 of the Privacy Code) and is considered an instrument for monitoring personal informational flows. Consent means any freely given, specific, informed, and unambiguous indication on the part of the data subject that s/he agrees, through a statement or clear affirmative action, to his or her personal data being processed. These basic requirements for effective and legally valid consent allow people to know the identity of the controller or the processor, and the purposes and limits of use, as well as their rights. Consent re-emerges in a stronger form in the new regulatory framework:⁹ Arts 6 and 7 and Recital 32 GDPR state that not only must it be freely given, informed, and specific, but also unambiguous (Art 4, lett 11) GDPR), expressed through clear affirmative action as a guarantee that the data subject fully agrees to make personal data available. On the basis of these provisions therefore, silence, pre-ticked boxes, or inactivity cannot constitute consent. Thanks to innovations and

⁷ S. Rodotà, *Tecnologie e diritti* (Bologna: il Mulino, 1995), 102; S. Sica, Sub artt. 1-6. *Principi generali*, in Id and P. Stanzione eds, *La nuova disciplina della privacy. Commento al d.lgs. 30 giugno 2003, n. 196* (Bologna: Zanichelli, 2004), 4. In such way, Corte di Cassazione 5 April 2012 no 5525, *Danno e Responsabilità*, 747 (2012); *Il diritto dell’informazione e dell’informatica*, 10 (2012); with commentary of G. Citarella, ‘Aggiornamento degli archivi online, tra diritto all’oblio e rettifica «atipica»’ *Responsabilità civile e previdenza*, 1147 (2014), in which the Supreme Court states ‘il D.Lgs. 196 del 2003 ha (...) sancito il passaggio da una concezione statica a una concezione dinamica della tutela della riservatezza, tesa al controllo dell’utilizzo e del destino dei dati. L’interessato è divenuto compartecipe nell’utilizzazione dei propri dati personali’.

⁸ See V. Carbone, ‘Il consenso, anzi i consensi, nel trattamento informatico dei dati personali’ *Danno e responsabilità*, 23 (1998); D. Messinetti, ‘Circolazione dei dati personali e dispositivi di regolazione dei poteri individuali’ *Rivista critica di diritto privato*, 350 (1998); F. Cafaggi, ‘Qualche appunto su circolazione, appartenenza e riappropriazione nella disciplina dei dati personali’ *Danno e responsabilità*, 615 (1998); S. Sica, ‘Il consenso al trattamento dei dati: metodi e modelli di qualificazione giuridica’ *Rivista di diritto civile*, 612 (2001).; S. Niger, ‘Il «mito» del consenso alla luce del codice in materia di protezione dei dati personali’ *Cyberspazio e diritto*, 499 (2005); A. Fici and E. Pellecchia, ‘Il consenso al trattamento’, in R. Padoleski ed, *Diritto alla riservatezza e circolazione dei dati personali* (Milano: Giuffrè, 2003), I, 504; S. Mazzamuto, ‘Il principio del consenso e il problema della revoca’, in R. Panetta ed, *Libera circolazione e protezione dei dati personali* (Milano: Giuffrè, 2006), 996; G. Oppo, ‘Sul consenso dell’interessato’, in V. Cuffaro et al eds, *Trattamento dei dati e tutela della persona* (Milano: Giuffrè, 1998), 124. In the recent literature, E. Kosta, *Consent in European Data Protection Law* (Leiden-Boston: Martinus Nijhoff Publisher, 2013), 51; F. Bravo, ‘Il consenso e le altre condizioni di liceità del trattamento di dati personali’, in G. Finocchiaro ed, *Il nuovo Regolamento europeo sulla privacy* n 1 above, 101; S. Thobani, *I requisiti del consenso al trattamento dei dati personali* (Sant’Arcangelo di Romagna: Maggioli Editore, 2016), 84. The Working Group Art 29 published the *Guidelines on Consent under Regulation 2016/679*, 28 November 2017, 18-19, available at tinyurl.com/y9bpzs66 (last visited 7 July 2020); before, see the *Opinion on Consent* 15/2011.

⁹ According to the GDPR, suitable articles are; while suitable recitals are (32-33-38-40-42-43-50-51-54-71-111-155-161-171).

developments in communication technology, the user's consent becomes a tool for regulating information flows, and the advent of social networks and sharing online platforms make consent an 'instrument for building self-identity on the Internet'.¹⁰ In this vein, users play an active role by managing their own data flows, protected by transparent rules on collection and processing. The aim is to enable data subjects to make informed decisions regarding the circulation of their data in a specific context at a specific time. This approach should be a source of empowerment for users and, at the same time, ensure the right to informational self-determination.

In North American literature, this approach is summed up in the formula 'privacy self-management',¹¹ based on the 'notice and choice' mechanism.¹² This expression refers to a means through which users give free, informed, and specific consent to processing their personal data and can control how their own identity is constructed in the online environment.

III. From Physiology to Pathology: The Downward Spiral of Consent

Behind the allure of 'privacy self-management' lurks the failure of the edifice itself.¹³ The freedom and informed nature of consent are undermined by the processing of data that bypass the data subject's approval. In reality, they favour the commercial exploitation of personal data, jeopardizing users' privacy, personal

¹⁰ On this point, D. Messinetti, *Circolazione dei dati* n 8 above, 348-349, underlines 'l'identità personale viene considerata come un corpo che dà luogo ad un dispositivo di socializzazione. Un dispositivo, cioè, che ha la sua ragione d'essere nel fatto che l'informazione crea conoscenza intorno all'identità personale; esso ha tra i suoi obiettivi principali quello di riprodurre il gioco delle relazioni nella quali la persona può rientrare. Il dispositivo di tutela, perciò, tende in questa prospettiva, a estendere le forme di controllo e a mantenere la legge che le governa nella forma della riservatezza'.

¹¹ For an explanation of this mechanism, see D. Solove, 'Privacy Self-Management and the Consent Dilemma' *Harvard Law Review*, 1880 (2013).

¹² P. Schwartz and D. Solove, 'Notice and Choice: Implications for Digital Marketing to Youth', available at tinyurl.com/ybun5ps3 (last visited 7 July 2020) highlight 'the idea behind notice and choice can be summarized in this fashion: as long as a company provides notice of its privacy practices, and people have some kind of choice about whether to provide the data or not, then privacy is sufficiently protected'; R. Warner and R. Sloan, 'Beyond Notice and Choice: Privacy, Norms and Consent' *Journal of High Technology Law*, 6 (2014); S. Fischer-Hübner et al, 'Online Privacy: Towards Informational Self-Determination on the Internet, Manifesto from Dagstuhl Perspectives Workshop' 1106 (2011), available at tinyurl.com/y72tt59c (last visited 7 July 2020) underlined 'user-centric identity management allows users to detect any linkages to third parties created from the primary relationship. Enterprise policies and procedures should support user-centric identity management as well, to prevent unwanted linkages and inadvertent disclosures of personal data'.

¹³ R. Warner and R. Sloan, 'Beyond Notice and Choice' n 12 above, six point out as the consent, only apparently, ensures a free and informed choice. F. Cate, 'The Failure of Fair Information Practice Principles', in J. Winn ed, *Consumer Protection in the Age of the Information Economy* (Burlington: Ashgate Publishing Company, 2006), 342, observes 'it is common for proponents of Notice and Choice to over-emphasize consent and ignore important tradeoff issues'.

identity, and dignity.

In theory, the process of collection and processing data is lawful and fair if consent is given after receiving exhaustive information and when it is expressed freely and in specific terms. The reality, however, reveals a significant divergence from the legal provisions, and very often the data subject's intentions are not truly ascertained, as users often appear disoriented and unaware when expressing their consent. These conditions undermine the safeguards underlying the rule of consent, marking its downward spiral.¹⁴ The user's vulnerability depends on the asymmetry that arises in relation to internet service providers, principally due to a technical information deficit on the data subject's side. In effect, users frequently do not understand the terms and conditions surrounding the use of their data because they are written in unclear and incomprehensible language, or else they are difficult to find on websites, or again, users may not have a sufficient level of technological literacy.

These problems compromise the 'notice and choice' profiles in terms of both information (notice) and consent (choice).¹⁵ With regard to this form of approval, online service providers ought to offer navigators specific information regarding the collection and processing of their personal data by publishing the terms and conditions of data use in dedicated areas of their websites. Users can refuse to allow this, for example, by changing their privacy settings. Under this scheme, known as 'opt-out', the mere publication of terms and conditions authorizes data controllers to process users' personal data, unless they explicitly deny their consent. This model is disconcerting, considering that it is often even quite difficult to understand one's rights and give informed consent in online environments due

¹⁴ Cf S. Rodotà, 'Persona, riservatezza, identità. Prime note sistematiche sulla protezione dei dati personali' *Rivista critica di diritto privato*, 583 (1997); G. Mirabelli, 'Le posizioni soggettive nell'elaborazione elettronica dei dati personali' *Il diritto dell'informazione e dell'informatica*, 324 (1993); S. Rodotà, 'Protezione dei dati e circolazione della informazioni' *Rivista critica di diritto privato*, 600 (1997); F.G. Viterbo, *Protezione dei dati personali e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2008), 207.

¹⁵ A. Mantelero, 'The Future Of Consumer Data Protection In The E.U.' 30(6) *Computer Law and Security Review*, 643 (2014); P. Schwartz, 'Internet Privacy and the State' *Connecticut Law Review*, 815 (2000) pointed out 'Notice and Choice does not ensure free choice because of information asymmetries, collective action problems, limited rationality, and a lack of market options'; M.J. Radin, *Boilerplate: The Fine Print, Vanishing Rights, And The Rule Of Law* (New Jersey: Princeton University Press, 2013), 19 observes 'notice and choice as implemented is inconsistent with the requirements of free choice'; H. Nissenbaum, 'A Contextual Approach to Privacy Online' *Daedalus*, 32, 36 (2011) underlined 'achieving transparency means conveying information handling practices (however) If notice...finely details every (relevant fact)... we know that it is unlikely to be understood, let alone read. But summarizing practices in the style of, say, nutrition labels is no more helpful because it drains away important details, ones that are likely to make a difference, and arguing for a much greater reliance on context'; Id., 'Privacy as contextual integrity' *Washington Law Review*, 119 (2004); J.H. Beales and T.J. Muris, 'Choice or Consequences: Protecting Privacy in Commercial Information' *University of Chicago Law Review*, 114 (2008) underlined 'the reality that decisions about information sharing are not worth thinking about for the vast majority of consumers contradicts the fundamental premise of the notice approach to privacy'.

to the opacity of privacy policies.¹⁶

In the notice and choice model, the ‘opt-in’ scheme – adopted by the current data protection regulation (eg, Recital 32 GDPR) – also creates some concern.¹⁷ This model allows information storage or access (ie, stored on the terminal of a subscriber or user) only if the subscriber or the user have given prior consent after being presented with clear and full information. Despite the good intentions, this mechanism too shows some structural deficiencies. The technological processes regarding personal data cause them to be dispersed and place them beyond the control of the data subject. For example, browser settings are often set by default to collect data and thus include one that looks like an option to accept default cookies. This common practice clashes with the provisions of the GDPR, which require explicit consent for the automated processing of personal data (Art 9, Regulation 679/2016). The use of browser settings without changing the default option – set to accept cookies automatically – creates in fact an inability to express free, informed, aware, and unambiguous consent. It is not clear whether keeping this option is the result of informed choice or is only a sign of indifference or lack of awareness. This leads to ‘inertia by default’,¹⁸ namely the passivity of users on line, which in turn leads to the ‘privacy paradox’.

IV. The Privacy Paradox and Modifications to the Decision-Making Process

The ‘privacy paradox’ is a phenomenon that arises from the use that individuals make of communication technologies as a result of limited knowledge of their rights and freedoms in the digital era. The latest developments in the field of communication together with the massive use of social media highlight the occasional need for individuals to share personal information, with a significant tendency to self-disclosure.¹⁹

Although the need to share personal information causes concern among users regarding their privacy, people’s behaviour online does not actually reflect this fear.²⁰ This dichotomy is called the ‘privacy paradox’. More specifically, the paradoxical situation emerges from a divergence between thought and action.

¹⁶ R. Warner and R. Sloan, ‘Beyond Notice and Choice’ n 12 above, 8.

¹⁷ F.H. Cate and V. Mayer-Schönberger, ‘Notice and consent in a world of Big Data’ *International Data Privacy Law*, 67-73 (2013).

¹⁸ D. De Lima and A. Legge, ‘The European Union’s approach to online behavioural advertising: Protecting individuals or restricting business?’ *Computer Law and Security Review*, 67, 73 (2014).

¹⁹ A.R. Popoli, ‘Social Network e concreta protezione dei dati sensibili: luci ed ombre di una difficile convivenza’ *Il diritto dell’informazione e dell’informatica*, 981 (2014).

²⁰ S. Kokolais, ‘Privacy attitudes and privacy behaviour: a review of current research on the privacy paradox phenomenon’ *Computer and Security*, 122 (2017) and M. Vassallo, *Achilles’ paradigm and the so-called ‘privacy paradox’ in the era of Big Data, Paper for the X ESPAnet Italy Conference “The Welfare and the losers of globalization: social policies facing old and new inequalities”*, September 2017, available at tinyurl.com/y7abfd4y (last visited 7 July 2020).

When people take part in interviews and/or surveys, they appear to be very aware of privacy issues. In these situations, their answers to questionnaires show particular sensitivity towards preserving their privacy from undue invasion or maintaining constant control over information flows regarding them. At the same time, in contrast with these abstract worries, behavioural analysis reveals particular nonchalance when it comes to sharing personal information. Systemic factors, such as the graphic appearance of a website, the type of information involved, the use of default options and so on are factors that influence data subjects.²¹

At the root of this paradox, the gap between users' thoughts and actions depends on the relationship between users' cognitive inadequacy and the uncontrolled sharing of personal data in online environments.²² Sharing personal information highlights critical aspects regarding self-regulation skills and the ability to contain one's impulses, so the emotional matrix overrides rationality. These results compromise some of the classic solutions to the problem of online privacy, such as prior, free, informed, and unambiguous consent.²³

Behavioural science literature shows that approval for processing personal data is based on heuristics and bias, both of which condition action irrationally.²⁴ Thus,

‘reaching a decision regarding processing is conditioned by an individual’s general perception of his or her ability to control it at a given time (the control paradox) or the type of service to which the information applies and, broadly, the incapacity of the human mind to fully evaluate all the costs and benefits of a given action (limited rationality)’.²⁵

Furthermore, giving people more information on how their data are used can, paradoxically, increase the cognitive load of the choice and cause dysfunctions

²¹ G.A. Veltri and A. Ivchenko, ‘The impact of different forms of cognitive scarcity on online privacy disclosure’ *Computers in human behaviour*, 238-246 (2017).

²² *ibid* 239. See, also, A. Acquisti et al, ‘Privacy and human behavior in the age of information’ *Science*, 509-514 (2015).

²³ L. Gatt et al, ‘Consenso al trattamento dei dati personali e analisi giuridico-comportamentale. Spunti di riflessione sull’effettività della tutela dei dati personali’ *Politica del diritto*, 339 (2017).

²⁴ Our innate bounded rationality limits our ability to acquire, memorize, and process all relevant information, and it makes us rely on simplified mental models, approximate strategies, and heuristics. Risk assessment is also skewed by the availability heuristic where people assess familiar dangers as riskier than unfamiliar ones. Privacy decisions are affected by cognitive biases and heuristics (eg, optimism bias, overconfidence, affect bias, fuzzy-boundary and benefit heuristics, hyperbolic discounting. Privacy decisions are affected by bounded rationality, incomplete information and information asymmetries. Cf A. Acquisti and J. Grossklags, ‘Privacy and Rationality: A Survey’, in K.J. Strandburg and D. Raicu eds, *Privacy and technologies of identity* (New York: Springer US, 2006), 25-26; Y.M. Baek, ‘Solving the privacy paradox: a counter-argument experimental approach’ *Computer and Human Behaviour*, 33-42 (2014).

²⁵ I.A. Caggiano, ‘Il consenso al trattamento dei dati personali nel nuovo Regolamento europeo. Analisi giuridica e studi comportamentali’ *Osservatorio del diritto civile e commerciale*, 94 (2018).

in relation to how they manage their privacy.²⁶

On the cognitive level, there are two other conditioning factors: the abstract concept of data processing and the ‘routine character’ of consent. Regarding the first, abstraction is a problem of communication, as it does not enable correct understanding by users. On the other hand, in terms of the second factor, the enormous number of digital services means that there is a continuous demand for consent, which contributes to diminished attention levels among data subjects. The decision-making process thus often becomes nothing more than an instinctive behaviour in relation to specific suggestions and is not the result of informed choice.²⁷

V. Datafication, Profiling, and Risks for Fundamental Rights

In the current socio-economic context, data has become a key asset in the economy of our society.²⁸ ‘The problem with information is that it is a means by which a good meets – and most often clashes – with personal data’.²⁹ Potential conflict is caused not only by the economic importance of personal data but also by the influence that technology has on the phenomenon of ‘datafication’.³⁰

²⁶ B. Bergemann, ‘The Consent Paradox: Accounting for the Prominent Role of Consent in Data Protection’, in M. Hansen et al eds, *Privacy and Identity Management. The Smart Revolution* (New York City: Springer International Publishing, 2018), 111-131.

²⁷ E. Carolan, ‘The continuing problems with online consent under the EU’s emerging data protection principles’ 3 *Computer Law and Security Report*, 471-472 (2016): ‘there are arguably two main lessons from this brief overview of the influence of psychological characteristics on user consent online. The first is the general point that the giving of consent by an individual cannot – from a psychological perspective – be definitely regarded as a rational articulation of the individual’s views. These various heuristics and biases demonstrate that decision-making is often, if not more, as much a matter of largely intuitive responses to particular prompts as it is a process of reasoned or deliberative reflection’.

²⁸ P. Perlingieri, ‘L’informazione come bene giuridico’ *Rassegna di diritto civile*, 326 (1990). On this point, cf S. Schaff, ‘La nozione di informazione e la sua rilevanza giuridica’ *Il diritto dell’informazione e dell’informatica*, 445 (1987); R. Padolesi and C. Motti, ‘L’informazione come bene’, in G. De Nova et al eds, *Dalle res alle new properties* (Milano: FrancoAngeli Editore, 1991), 37; P. D’Addino Serravalle, *I nuovi beni e il processo di oggettivazione giuridica. Profili sistematici* (Napoli: Edizioni Scientifiche Italiane, 1999), 92.

²⁹ V. Zeno-Zencovich, ‘Informazione’ *Digesto delle discipline Privatistiche* (Torino: UTET giuridica, 1993), 13.

³⁰ B. Bates, ‘Information as an economic good: a re-evaluation of theoretical approaches’, in B.D. Ruben and L.A. Lievrouw eds, *Mediation, information and communication. Information and behaviour* (New Brunswick: Transaction books, 1990), 3, 379-394; P.M. Schwartz, ‘Property, Privacy and Personal Data’ 7 *Harvard Law Review*, 2056 (2004), according to whom ‘personal information is an important currency in the new millennium. The monetary value of personal data is large and still growing’. Recently, V. Ricciuto, ‘La patrimonializzazione dei dati personali. Contratto e mercato nella ricostruzione del fenomeno’ *Il diritto dell’informazione e dell’informatica*, 689 (2018). On the commercial value of personal data, see F.G. Viterbo, ‘Freedom of contract and the commercial value of personal data’ *Contratto e impresa/Europa*, 593-622 (2016), who points out ‘personal data are not simply pieces of information. They refer to a particular, identified or identifiable natural person and can be capable of revealing some of the most intimate

In the area of information, the traditional proprietary paradigm (based on the *ius excludendi alios* of the owner) is considered inadequate to represent the concept of property.³¹ The general process of ‘functionalization’ that involves this right³² attracts personal data within its range of action.³³

Therefore, information moves away from being a simple functional element to become part of a process of particular economic and strategic value. This change causes the gradual *patrimonialization* of personal information in commercial exchanges. From this perspective, consumer habits represent an economic resource for online operators:³⁴ indeed, various digital services, apparently offered free of charge, are financed by the use of personal data.³⁵

In such cases, while users are surfing the web, their data can be collected in one of two ways: a) ‘clear data collection’, when users intentionally and actively reveal their information, and b) ‘hidden data collection’, when network operators store users’ data without their knowledge or involvement.³⁶

The former category includes data that the user voluntarily delivers to the service provider, search engines, e-mail services, websites, information sites, etc. In these cases, there is generally an exchange between the Internet service offered

and delicate aspects of that individual’s personality, such as his/her state of health or sex life, for example. Their significance is not linked to the economic and quantitative criterion of marketability, but rather, to a rationale based on the protection of human rights and values’.

³¹ A. Mantelero, ‘Si rafforza la tutela dei dati personali: data breach notification e limiti alla profilazione mediante i cookies’ *Il diritto dell’informazione e dell’informatica*, 781, 785 (2012); L. Mormile, ‘Lo statuto giuridico dei dati personali’, in R. Panetta ed, *Libera circolazione e protezione dei dati personali* (Milano: Giuffrè, 2006), 536.

³² P. Perlingieri, *Introduzione alla problematica della «proprietà»* (Napoli: Edizioni Scientifiche Italiane, 1970), 65 highlights ‘in forza di un’interpretazione sistematica ed unitaria dell’ordinamento, dove il dato costituzionale è parte integrante e dominante, si debba accogliere una concezione unitaria della proprietà, che non può considerarsi un diritto soggettivo tout-court, piuttosto una situazione giuridica soggettiva complessa, comprensiva di situazioni attive di vantaggio – serie di facoltà nell’interesse del proprietario – e di situazioni passive per lo stesso proprietario – cioè limiti, limitazioni, vincoli, obblighi’.

³³ F.G. Viterbo, *Freedom of contract* n 30 above, 607, according to whom ‘the problem is not how to establish when a person owns personal data and when (s)he does not. The real crux of the question is establishing whether and how personal data can circulate, that is to say, whether and how they may be processed. Although not all the processing rules have the same scope of application, separating the rules governing circulation from those governing the processing of personal data does not seem possible in any case’.

³⁴ M. Viggiani, ‘«Navigazione» in Internet e acquisizione occulta dei dati’ *Il diritto dell’informazione e dell’informatica*, 365 (2007) underlines ‘Internet si trasforma (...) in un vero e proprio “mercato” di dati personali dalle caratteristiche però del tutto anomale perché ad una “domanda” non corrisponde una “offerta” veramente consapevole’.

³⁵ V. Caridi, ‘La tutela dei dati personali in internet: la questione dei logs e dei cookies alla luce delle dinamiche economiche dei dati personali’ *Il diritto dell’informazione e dell’informatica*, 768 (2001); M. Viggiani, ‘«Navigazione» in internet’ n 34 above, 365 observes ‘nella maggior parte dei casi, l’utente non sa di stare cedendo un prodotto avente valore economico’. In the past, this evidence was pointed out by S. Rodotà, *Tecnologie e diritti* (Bologna: il Mulino, 1995), 82-83.

³⁶ On the lack of transparency in the ‘hidden data collection’, see M. Viggiani, ‘«Navigazione» in internet’ n 34 above, 371-372.

and the personal data.³⁷ This exchange appears to be free of charge³⁸ and, even if there is no fee for the use of the service, a legal transaction takes place. In this case, consent takes the form of a counter-performance and is a legal basis for the processing of personal data. Its function is to protect the user's informational self-determination and the inviolability of his or her identity from possible intrusions and/or alterations. However, this personal data collection model is problematic.³⁹ The expression of consent is given unconsciously for other purposes that are not necessary for the provision of the service (for example, online behavioural advertising, web marketing, trading online).

More problematic is the case of personal information collected invisibly during navigation through 'hidden data collection'. This process uses spy programs, invisible bugs ('web bugs'), hidden identifiers and other similar devices, such as 'web cookies'. Network operators enter the users' personal devices unawares to access information and track them.⁴⁰

While surfing the web, users leave 'digital traces'. Everyone constantly leaves behind a large amount of personal data that can be collected, processed and matched, creating new information that can be used to violate users' privacy. Some of these are intentional, visible, and potentially harmless, while others are invisible and often unintentional. Examples are traffic data, relating to the transmission of communication, static and dynamic IP addresses, the time and duration of the connection, or the websites visited. Although such information does not

³⁷ 'Nella prassi, (...), sempre più spesso accade che la stessa prestazione principale è offerta gratuitamente al consumatore a condizione che questi acconsenta alla raccolta e al trattamento dei dati personali per le finalità indicate dal titolare (solitamente di profilazione o di marketing). In questi casi sembrerebbe che i dati personali conferiti siano il «corrispettivo» della prestazione offerta, in luogo della controprestazione economica non richiesta, e che il carattere necessario del trattamento rispetto alla conclusione o esecuzione del contratto (ipotesi nella quale il trattamento può essere effettuato senza il consenso) ben possa essere, oltre che di natura funzionale (in relazione alla fattispecie negoziale), anche di fonte volontaria, legato a un particolare interesse di uno dei contraenti': these remarks belong to F.G. Viterbo, *Protezione dei dati personali* n 14 above, 223-224.

³⁸ Cf M. Atelli, *Il Diritto alla tranquillità individuale. Dalla rete internet al «door to door»* (Napoli: Edizioni Scientifiche Italiane, 2001), 234; S.F. Bonetti, 'La tutela dei consumatori nei contratti gratuiti di accesso ad internet: i contratti dei consumatori e la privacy tra fattispecie giuridiche e modelli contrattuali italiani e statunitensi' *Il diritto dell'informazione e dell'informatica*, 1093 (2002). Counterwise, F. Astone, 'Il rapporto tra gestore e singolo utente: questioni generali' *Annali italiani del diritto d'autore*, 114 (2011); R. Caterina, 'Cyberspazio, social network e teoria generale del contratto' *AIDA*, 96 (2011) and G. Sartor, 'Social networks e responsabilità del provider' *AIDA*, 42 (2011). This dichotomy is surpassed by C. Perlingieri, *Social networks and private law* (Napoli: Edizioni Scientifiche Italiane, 2017), 61-62. On the lack of awareness of the data subject about the value of his or her data, see V. Caridi, *La tutela dei dati personali in internet* n 35 above, 768 and F.G. Viterbo, *Protezione dei dati personali* n 14 above, 201.

³⁹ Cf S. Patti, 'Il consenso dell'interessato al trattamento dei dati personali' *Rivista di diritto civile*, 455, 461 (1999). In the recent literature S. Thobani, *I requisiti del consenso* n 8 above. See the Italian Data Protection Authority ruling, 15 July 2010, *Raccolta di dati via Internet per finalità promozionali: sempre necessario il consenso degli interessati*, doc. web n. 1741998.

⁴⁰ M. Viggiani, '«Navigazione» in internet' n 34 above, 371.

appear to identify the user, it can reveal social habits and preferences, the websites visited, and the number of connections.⁴¹

The concentration of large amounts of personal data implies the relative centralization of profiling onto one or, at any rate, just a few operators. This allows the transition from an initial model focusing on individual profiling to a model of mass analysis.⁴² Profiling has always been the beating heart of marketing activities, focusing on the analysis of consumers' behaviour and their psychological profiles in order to classify customers according to their interests and preferences. For example, eating habits

‘can betray religious beliefs, the presence of certain medical conditions (the use of food not containing substances that give rise to dietary intolerance), the possible composition of the family unit (including whether the household includes animals) and, above all, spending power’.⁴³

This type of information, in combination with other data, contributes to the ‘hetero-construction’ of identities.

Therefore, when people visit e-commerce sites, search engines, or social media, profiling or data mining processes can penetrate deeply into users' lives and to dangerous levels.⁴⁴ By subscribing to social media or using cloud computing services, users supply large amounts of personal data about their age, gender, residence, profession, and family unit that make it easy to identify and profile them. They also provide ideal conditions for discrimination and stigmatization.⁴⁵ Empowered by the extraordinary development of technological tools, data analysis and data mining are well equipped to exacerbate pre-existing discrimination or stereotypes.

Until only a few years ago, scholars were divided as to how to regulate these technologies. Some played down the damaging effect of ‘hidden data collection’ mechanisms. In their view, it was impossible to identify the owner of the

⁴¹ J. Rifkin, *L'era dell'accesso*, trad. it. P. Canton (Milano: Mondadori, 2001), 131. S. Rodotà, *Una scommessa impegnativa sul terreno dei diritti*, 18 May 2001, Relation 2001; Id, *Elaboratori elettronici e controllo sociale* (Bologna: il Mulino, 1973).

⁴² A. Mantelero, ‘Big Data: i rischi della concentrazione del potere informativo digitale e gli strumenti di controllo’ *Il diritto dell'informazione e dell'informatica*, 135 (2012).

⁴³ R. De Meo, ‘Autodeterminazione e consenso nella profilazione dei dati personali’ *Il diritto dell'informazione e dell'informatica*, 588 (2013).

⁴⁴ A. Mantelero, ‘Si rafforza la tutela dei dati personali: data breach notification e limiti alla profilazione mediante i cookies’ *Il diritto dell'informazione e dell'informatica*, 781 (2012).

⁴⁵ Case 524/06, *Huber v Bundesrepublik Deutschland*, Judgment of 16 December 2008, available at www.eur-lex.europa.eu; Case 236/09, *Test-Achats et al v Conseils des Ministres*, Judgment of 1 March 2011, available at www.eur-lex.europa.eu. On this point, see the significant considerations by P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 540, fn 843, points out ‘la decisione di aggregare individui per una loro caratteristica rilevante deve essere controllata, come giudizio di valore, nella sua congruenza con l'intreccio di valori costituzionali richiamati nella fattispecie’.

information as the data are anonymous.⁴⁶ However, in only a short space of time, thanks to the evolution of technology, apparently neutral data – such as dynamic IP addresses – can now be linked to the user, adding them to other information.⁴⁷

The most recent approach supersedes both of the above positions in accordance with European case law and the rulings of the Italian Data Protection Authority.⁴⁸ Firstly, all the information – IP addresses, traffic data, navigation data and others – is classified as personal data from which it is possible to draw a precise personal profile detailing habits and preferences using algorithmic technologies. Secondly, the potential identifiability of the user is a sufficient condition to put protective measures such as notice, consent, prohibition of transfer to third parties, the right to access, and the right to portability in place.⁴⁹

On the legal front, Art 22 of the GDPR requires the explicit consent of the user for automated data processing (including profiling) to be considered lawful. In this way, Art 122 of the Italian Privacy Code requires express consent from users before information-gathering programs are installed on their devices. So, for consent to be ‘express’, data controllers must provide clear and complete information on profiling to ensure that users understand what they are consenting to; thus, they must provide for a ‘granular consent’ (also called ‘stratified consent’) where users can give their approval in a simple and intelligible form. They must actively seek the user’s consent before any new and further processing, and finally, they must inform the data subject that they may revoke their consent at any time.⁵⁰

In brief, even if profiling and segmentation help companies gain a better understanding of their customers’ characteristics and communicate with them more effectively, it is lawful only in direct relation to the exact knowledge – in terms of transparency – and to

⁴⁶ G. Ciacci, ‘La tutela dei dati personali su Internet’, in A. Loiodice and G. Santaniello eds, *La tutela della riservatezza, Trattato di diritto amministrativo* (Padova: CEDAM, 2000), 380.

⁴⁷ Case 582/14, *Patrick Breyer v Bundesrepublik Deutschland*, Judgment 19 October 2016, with commentary of A. Vivarelli, ‘Privacy digitale e Corte di Giustizia’ *Il Foro Napoletano*, 797 (2017).

⁴⁸ See, for all, the following Italian Data Protection rulings: 15 March 2012, Arricchimento dei dati personali della clientela nell’ambito dell’attività di profilazione (doc. web 1903026); 7 November 2013, Conservazione dei dati personali riguardanti la clientela per attività di profilazione e marketing. Verifica preliminare richiesta da Tod’s S.p.A. (doc. web n. 2920245); 17 dicembre 2015, Verifica preliminare. Trattamenti di dati personali aggregati della clientela nell’ambito di una più complessa ed articolata attività di profilazione (doc. web 4698620); 11 May 2017, Verifica preliminare. Trattamento dei dati personali riguardanti la clientela per attività di profilazione e promozionali (doc. web n. 6495144); 5 July 2017, Verifica preliminare. Trattamento di dati personali riferiti alla clientela per finalità di profilazione e promozionale (doc. web n. 6844421).

⁴⁹ M. Viggiani, ‘«Navigazione» in internet’ n 34 above, 387.

⁵⁰ See *Guidelines on Consent under Regulation 2016/679* of the Working Group Art 29, 28 November 2017: ‘if the controller has conflated several purposes for processing and has not attempted to seek separate consent for each purpose, there is a lack of freedom. This granularity is closely related to the need of consent to be specific (...). When data processing is done in pursuit of several purposes, the solution to comply with the conditions for valid consent lies in granularity, i.e. the separation of these purposes and obtaining consent for each purpose’. Cf recitals 43 e 32 GDPR.

‘the “profiling” intention of the person who collects the data and clearly declares the purposes that s/he intends to pursue through profiling’.⁵¹

Making decisions based on sophisticated profiling activities, often without human involvement, risks leading to the extreme consequence of inhibiting the exercise of fundamental freedoms or limiting the provision of essential services. Full knowledge, freedom and specificity of consent are fundamental rules to which profiling practices must be subordinated. The protection of personal identity and privacy means that people are not ‘built’ by others, because the development of the human person presupposes not only the recognition of the ‘*habeas corpus*’ but also of the ‘*habeas data*’.⁵²

VI. Big Data Analytics and the ‘Transformative Use’ of Personal Data

Big Data analytics represents the latest challenge to personal data protection. The propulsive force of modern technologies, artificial intelligence, and algorithms finds in Big Data a unique expressive ability that is difficult to understand through the lens of human capabilities. Indeed it represents

‘sets of data whose size is not compatible with the capacity for collection, management, archiving and analysis of the software commonly used to manage the databases’.⁵³

Big Data means huge amounts of data held by companies, governments or other organizations, to be examined using powerful algorithms in order to

‘extrapolate new indications or create new forms of value in ways that change markets, organizations and relationships between citizens and governments, and more’.⁵⁴

Big Data consists of high-volume, high-velocity and high-variety information assets that demand cost-effective, innovative forms of information processing for enhanced insight and decision making.⁵⁵

The large scale of Big Data collection and analysis operations corresponds to the limited number of players evaluating them.⁵⁶ For some operators, the

⁵¹ R. Di Meo, ‘Autodeterminazione e consenso nella profilazione di dati personali’ *Il diritto dell’informazione e dell’informatica*, 593 (2013).

⁵² M. Viggiani, ‘«Navigazione» in internet’ n 34 above, 356-357.

⁵³ N. Lettieri and M. Faro, ‘Big Data e Internet delle cose: opportunità, rischi e nuove esigenze di tutela per gli utenti della Rete’, in C. Perlingieri and L. Ruggeri eds, *Internet e Diritto Civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 282.

⁵⁴ V. Mayer-Schoenberger and K. Cukier, *Big Data. Una rivoluzione che trasformerà il nostro modo di vivere – e già minaccia la nostra libertà* (Milano: Garzanti Editore, 2013), 17.

⁵⁵ Gartner IT glossary.

⁵⁶ A. Mantelero, ‘Big Data: i rischi della concentrazione del potere informativo digitale e

concentration of this immense amount of information is not new, but their scale and the global nature of the growing phenomenon generate concerns over their impact on people's rights and freedoms.⁵⁷

Moreover, predictive analysis capability and data inferences mean that the power of Big Data analytics is entirely different from mere profiling or data mining. Consequently, the transition from a static to a dynamic view of personal data shifts the focus from the collection and storage phases to those where a deep and obscure analysis of data takes place, culminating in the so-called 'transformative use' of personal data.⁵⁸ This shift means that the data are not used quantitatively but qualitatively. In effect, these processes make it possible to extract new knowledge, to identify personal profiles, and to make predictive hypotheses from the data.

While Big Data analytics now makes projects of the utmost importance possible, its impact on privacy and personal identity is, at the same time, highly dangerous.⁵⁹ First of all, the traditional distinction between personal and non-personal data disappears, because analysis, inferences, and neutral information combinations can point to the user's identity as well as to his or her personal and sensitive data. Thanks to 'granularity', the value of the data no longer lies simply in the purpose for which they were originally collected but in the multiplicity of other potential uses later on. This is, in effect, one of the peculiarities of the new digital landscape: data mining and data analysis techniques make it possible to obtain a multiplicity of data from a single piece of information.⁶⁰

The use of Big Data Analytics contrasts with some of the fundamental principles of the European legal framework on the protection of personal data, such as the principles of purpose limitation and informed and unambiguous consent. In fact, according to European and national law,⁶¹ data must be collected for specific, explicit and legitimate purposes and then processed in a compatible way. Conversely, the ontological nature of Big Data analytics clashes with this legal provision because the analysis leads to results produced from obscure and

gli strumenti di controllo' *Il diritto dell'informazione e dell'informatica*, 135-136 (2012).

⁵⁷ A.C. Nazzaro, 'L'utilizzo dei Big Data e i problemi di tutela della persona' *Rassegna di diritto civile*, 1261 (2018); Id, 'Privacy e Big Data' *Le corti fiorentine*, 13-25 (2018).

⁵⁸ On the 'transformative use' of Big Data see O. Tene and J. Polonetsky, 'Privacy in the Age of Big Data: A Time for Big Decisions' *Stanford Law Review Online*, 64 (2012) according to whose 'the uses of big data can be transformative, and the possible uses of the data can be difficult to anticipate at the time of initial collection'; in the Italian scholarship, see di G. d'Ippolito, 'Il principio di limitazione della finalità del trattamento tra data protection e antitrust. Il caso dell'uso secondario di big data' *Il diritto dell'informazione e dell'informatica*, 943 (2018).

⁵⁹ I. Rubinstein, 'Big Data: The End of Privacy or a New Beginning?' *International Data Privacy Law*, 74-87 (2013).

⁶⁰ D. Messina, 'Online platforms, profiling, and artificial intelligence: new challenges for the GDPR and, in particular, for the informed and unambiguous data subject's consent' *Media Laws*, 159, 170 (2019).

⁶¹ Convention no 108, Art 9 and Directive 95/46/CE Art 6, lett b). Working Group Art 29, on the *Opinion on purpose limitation*, 2 aprile 2003, no 3. Cf G. d'Ippolito, 'Il principio di limitazione della finalità del trattamento' n 58 above, 943.

unexpected inferences and connections. It is therefore impossible for users to know the precise purposes to which the processing will be put from the moment the data are collected.

The ‘transformative use’ of Big Data analytics leads to a result that differentiates itself from individual data. This process is summarized in Aristotle’s principle: ‘the whole is greater than the sum of its parts’.⁶² This is a critical issue and impinges on freely given, informed, and unambiguous consent. In fact, the difficulty of understanding the results of Big Data analytics implies that information regarding the purposes of the processing is vague and generic or may not even exist; the impact of their results on peoples’ rights and freedoms is unexpected.

In conclusion, Big Data analytics techniques lead to risks for people, such as misuse of data, monitoring, or stalking.⁶³ In the worst case scenario, these risky operations may lead to erroneous conclusions about a person who becomes the product of an automated decision where human evaluation is ruled out altogether.⁶⁴

VII. The GDPR’s Privacy by Design Solution: Is It Enough?

The GDPR solution to the consent crisis is the gradual empowerment of the data subjects’ decision-making process through a user-centred approach. This new paradigm allows

‘a more correct and modern way of incorporating personal data protection into IT products. This is because in the development of such products, the possibilities of choice regarding online privacy would be made more accessible and comprehensible, also paying attention (...) to those social dynamics that lead to a voluntary and sometimes irresponsible sharing of information on the Internet, characterized by the fact that the information is shared by the user himself in the unfaithful replication of the same social relations that characterize life outside the Internet’.⁶⁵

From the perspective of a ‘shared web’, privacy-by-design tools (provided for under Art 25 GDPR) enhance the ‘front-end moment’ of protection, when the user interfaces with the service offered.⁶⁶ These tools promote the so-called

⁶² V. Mayer-Schönberger and K. Cukier, *Big Data* n 54 above, 108 observe ‘the sum is more valuable than its parts, and when we recombine the sums of multiple datasets together, that sum too is worth more than its individual ingredients’.

⁶³ N. Lettieri and M. Faro, ‘Big Data e Internet delle cose’ n 53 above, 299-300.

⁶⁴ On the algorithm tyranny, see for all S. Rodotà, *Il mondo della rete. Quali i diritti, quali i vincoli* (Roma-Bari: Edizioni Laterza, 2014), 38.

⁶⁵ A. Principato, ‘Verso nuovi approcci alla tutela della privacy: privacy by design e privacy by default settings’ *Contratto e impresa/Europa*, 199, 209 (2015).

⁶⁶ See I.A. Rubisten, ‘Privacy by design: a counterfactual analysis of Google and Facebook

‘user-experience design’ and take their cue from the development of web architecture.⁶⁷ Thus, interaction between users and the computer system needs to be user-friendly for better and safer Internet navigation. This model promotes user empowerment, making informational flows more transparent in addition to increasing users’ awareness and ability to control what they share and in which contexts.⁶⁸

It is a solution that satisfies the regulatory provisions of the GDPR, which moves the protection forward to system design level (in line with privacy by design and privacy by default criteria) and, at the same time, emphasizes the precautionary element. From this perspective, users can set privacy settings designed and implemented with the aim of a conscious approach to the management of their personal data in mind.⁶⁹

Furthermore, the solution safeguards consent and self-determination. Indeed,

‘if – in theory – the so-called technical standards for system design or architectural configuration appear neutral, they lose this characteristic when they become the logical structure of personal interconnections’.⁷⁰

Ensuring the expression of consent and its implementation in the architectural structures of websites means not disrupting the functional relationship between the person and his or her informational flows on the one hand and his or her virtual and social projection on the other. It follows, therefore, that the total denial of consent entails a human being giving up his or her right to informational self-determination and dynamic identity.

Consequently, when data processing is under the control of the data subject, who is able to control personal data, this protection paradigm loses its sole purpose and becomes a private self-protection device. According to this hypothesis, consent implemented in architectural configuration is a mechanism of self-defence and has a precautionary and inhibitory function.

Including consent in privacy-by-design structures is a projection of personal

privacy incidents’ *Berkeley Technology Law Journal*, 1333 (2003).

⁶⁷ See the *Opinion 9/2016 European Data Protection Supervisor* (EDPS), in which the new concept of a ‘personal information management system’ (‘PIMS’) creates a paradigm shift in personal data management and processing, with social and economic consequences. The core idea behind the PIMS concept is to create a new digital ecosystem where individuals can manage and control their on line identity, transforming the current provider-centric system into a human-centric system where individuals are able to manage their on line identity and are protected against unlawful processing of their data. PIMS can be considered intermediaries within the online market.

⁶⁸ Cf H.V. Lipford, ‘Visible Flows: Contextual Integrity and the Design of Privacy Mechanisms on Social Network Sites’ *International Conference on Computational Science and Engineering* (2009), available at tinyurl.com/yd3947oy (last visited 7 July 2020).

⁶⁹ See L. Belli et al, ‘Selling your soul while negotiating the conditions: from notice and consent to data control by design’ *Health Technology*, 459 (2017).

⁷⁰ C. Perlingieri, ‘La tutela dei minori di età nei social networks’ *Rassegna di diritto civile*, 1330-1331 (2016); Id, *Profili civilistici dei social networks* n 38 above, 23.

autonomy for the realization of interests worthy of protection and is in line with the principles of transparency and lawfulness.⁷¹ Autonomy is thus conceived as a functional aspect of self-protection, serving above all to set up tools for the protection and preventive defence of legally significant interests. The data subject exercises his or her power of self-protection to safeguard a certain legal asset, which is the set of his or her existential situations: dynamic identity, privacy, and intimacy.⁷²

VIII. Final Remarks

The user-centred approach shows that, despite an awareness of the crisis of consent, the human person cannot be deprived of the ability to make his or her own decisions in terms of informational power. Users cannot be abandoned to the autocratic power of private powers or public institutions. The centrality of human persons, their free development, and their fundamental rights must be guaranteed at all times.

‘Right now that processing of personal data are becoming more complex and obscure, with the risk of excluding from the decision-making process the majority of those concerned in favour of technological elites holding power over the data, it is necessary to reaffirm the central role of individuals’.⁷³

In any case, as mentioned above, the question of consent presents several critical issues. The downward spiral towards ‘informational hetero-determination’,⁷⁴ the failure of the ‘notice and choice’ paradigm, and the spread of the ‘privacy paradox’ are all problematic aspects in the data protection scenario, especially for people’s fundamental rights and freedoms. For these reasons, a fair compromise is one that can ensure the self-determination of the human person – incorporating consent in website architectures – but, at the same time, one that will make users aware of the insufficiency of this principle in all types of processing, including the uncertainty of transparency.

From this standpoint, privacy-by-design models are not enough to offer

⁷¹ N. Bobbio, ‘Sulla funzione promozionale del diritto’ *Rivista trimestrale di diritto e procedura civile*, 1313 (1969).

⁷² See A. Dagnino, *Contributo allo studio dell'autotutela private* (Milano: Giuffrè, 1983), 65-66.

⁷³ See A. Mantelero, ‘Responsabilità e rischio nel Regolamento 679/2016’ *Nuove leggi civili commentate*, 147, 149 (2017), according to whom ‘the question of how to advance the development of digital services, particularly considering the rise of the Internet’ of Things and of Big Data analytics, without compromising individual freedoms, privacy, and autonomy has spurred a movement toward a new kind of data control that empowers individuals. See L. Belli et al, ‘Selling your soul while negotiating the conditions: from notice and consent to data control by design’ *Health Technology*, 459 (2017).

⁷⁴ F.G. Viterbo, *Protezione dei dati personali e autonomia negoziale* n 14 above, 215.

protection on their own, so architectural web design⁷⁵ should be able to influence users' behaviour.⁷⁶ Data Protection Authority control thus becomes a necessity, hand in hand with that of the Courts, to verify whether a given web architecture (ie, check-boxes) makes the act of giving consent user friendly or whether the font and the positioning of the information appear 'intelligible'.⁷⁷

The obscurity of the current inferential and algorithmic processes relating to personal data is an issue that cannot be solved by simply guaranteeing informed and preventive consent. However, making users aware of how their personal data serves the market's interests is important for the preservation of their right to informational self-determination. From this perspective, self-determination (consent implemented in privacy-by-design paradigms) together with the profiles of control and compliance must be combined with the principles and values of the legal framework (the Data Protection Authority and Courts) in order to promote a critical review process for algorithms and transparency in the way they work.⁷⁸

⁷⁵ A.E. Waldman, 'Privacy, Notice and Design' *Stanford Technological Law Review*, 134 (2018) underlines 'policy design can manipulate users into handing over personal information, policy design requirements, including mandating a notice designed specifically to convey information to ordinary users, should be included in state and federal statutes that mandate privacy policies. The FTC should also investigate internet companies that design their privacy policies to deceive users. With respect to the practical implementation of notice and choice, this research recommends several strategies for online platforms, including increasing collaboration between privacy counsel and technologists and committing to embedding privacy protection into the corporate ethos'.

⁷⁶ *ibid* 155.

⁷⁷ See *Guidelines on transparency under Regulation 2016/679*, available at tinyurl.com/ydz52dmk (last visited 7 July 2020).

⁷⁸ E. Giorgini, 'Algorithms and Law' *The Italian Law Journal*, 131 (2019). See, also, P. Perlingieri, 'Privacy digitale e protezione dei dati personali tra persona e mercato' *Il Foro napoletano*, 481 (2018).

Hard Cases

Big Red v Gabibbo. Fake Plagiarism, Fictional Characters and Derivative Work in Copyrights

Giuseppe Cassano and Antonio Davola*

Abstract

Moving from the longlasting copyright controversy between the American Western Kentucky University and an Italian private television station, the article investigates the grounding elements for the protection of fictional characters, with a particular focus on the aspects qualifying a 'distinguishing personality' according to Italian courts.

I. Preliminary Remarks and Facts of the Case

For many years, a long (and extenuating) copyright controversy has been persisting between the American Western Kentucky University (WKU) mascot 'Big Red' and the Italian satiric reporter 'Gabibbo'. Big Red was allegedly created in 1979 by the – at the time – student Ralph Carey,¹ while Gabibbo was created by the Italian TV author Antonio Ricci, and first appeared on the national television in 1990.²

Particularly, it has been debated whether Gabibbo could be considered a form of plagiarism or derivative work of expression, given the significant similarities existing between the two characters.

Since the first subpoena was emitted on 16-17 December 2002 by the Italian

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¹ It should be observed that, at the time of its creation, Big Red was the mere preliminary sketch of a red, Kentuckian puppet wearing gym shoes. Therefore, it was reasonably devoid of any protection as a copyright work. Lately, Big Red officially became the university basketball team mascot and appeared in minor TV advertising campaigns.

² As a TV character, Gabibbo screened in multiple Italian shows as guest and presenter; it had been originally performed by Gero Caldarelli and then by Rocco Gaudimonte, while its voice belongs to Lorenzo Beccati. Gabibbo is strongly characterized by its Genoese slang and accent (its name comes from a Genoese word as well) and it appears as a red humanoid figure with no hair, wide mouth, and a minimal outfit (shirt, papillon and cufflinks). Its red colour is connected to its provocative attitude: in its TV shows, it acts as the protector of Italian citizens against abuses and unlawful conducts by public authorities. For a critic overview on the Gabibbo and its public function, see N.J. Molé, 'Trusted Puppets, Tarnished Politicians: Humor and Cynicism in Berlusconi's Italy' 40 *American Ethnologist*, 288-299 (2013).

Tribunal of Ravenna,³ the dispute has not found any conclusive solution yet, in spite of two judgments issued by the Italian Court of Cassation. In reason of the uncertainty of the issue, relevant elements arise for legal scholars to investigate the legal framework of copyright protection for fictional characters.⁴

As a consequence, the article will be structured as follows: first, an investigation of the main elements emerging from the Italian proceedings – in which the ‘*Big Red v Gabibbo*’ problem was addressed – will be conducted (paras 1 and 2). Indeed, an overview of the elements that courts took into account in order to settle the dispute (which provided the main grounds for their decision) is essential to underline the most disputed aspects in the debate on the protection of fictional characters and the distinguishing ‘personality’ aspects between two apparently similar ones.

Subsequently, some general questions pertaining to copyright law will be addressed (paras II and III): in particular, we will focus on whether Big Red (as a fictional character) should be worthy of protection under copyright law in the first place and, depending on the outcome of this question, we will investigate whether Gabibbo’s characteristics are sufficient to mark its ‘distinctive nature’ from the American figure. Lastly (paras IV and V), the evaluation of these elements will be applied to provide a prospective evaluation on the current state of the art in the protection of fictional characters in Italy after Corte di Cassazione 6 June 2018 no 14635,⁵ which allegedly provided a first clear solution to the dispute between Gabibbo and Big Red’s creators.

Therefore, before focusing on the underlying theoretical problems, the next sections will provide a brief overview of the main facts of the proceeding that has taken place in Italy, in order to clarify the nature of the main disputed aspects between Big Red and Gabibbo.

³ See the statement of facts provided in Tribunale di Ravenna 11 December 2007 no 129, available at www.dejure.it.

⁴ For many years, Italian case law has been granting protection of a fictional character under copyright law every time originality and creativity elements are present. In particular, fictional characters are protected under Art 2, no 4, legge 22 April 1941 no 633, under the general provision securing artworks created through paint, sculpture, drawing, carving, and similar forms of figurative art techniques, including scenography (literally ‘*le opere della scultura, della pittura, dell’arte del disegno, della incisione e delle arti figurative similari, compresa la scenografia*’). Under this notion of work of art, notorious comic books characters such as Donald Duck, Gyro Gearloose and Pinocchio were granted copyright protection by the Corte di Cassazione with the decision 20 February 1978 no 810, *Giustizia civile*, I, 1108 (1978), while the Italian Tribunale di Verona, 17 June 1993, *Rivista di diritto industriale*, II, 399 (1993), attributed copyrights to the Italian character ‘Topo Gigio’ as an original humanized foam mouse puppet. Furthermore, even before the controversy between Big Red and Gabibbo arose, the latest had been already recognized as a ‘character provided with original expression and creative identity, acting as protagonist of different stories in which its nature had been kept unchanged’ (Tribunale di Savona 16 February 1999, *Diritto industriale*, 387 (2000)).

⁵ Corte di Cassazione 6 June 2018 no 14635, *Diritto industriale*, 564 (2019).

1. The First Strand of Judgments: Tribunal of Ravenna, Court of Appeal of Bologna, and Corte di Cassazione 11 January 2017 no 503

In 2002 Ralph Carey, the Italian company ADFRA SRL (operating as licensee of CEI Crossland Enterprises Inc), the Western Kentucky University and Crossland Enterprises Inc itself accused (amongst others) the Italian companies RTI, Mediaset and Fininvest of counterfeiting due to their use of the Gabibbo character on Italian television. According to the claimants' positions, such conduct would violate Big Red's copyright.

Against this claim, the Tribunal of Ravenna declared in a 2007 judgment (Tribunale di Ravenna 11 December 2007 no 129) that the two characters were to be considered radically different, and that Gabibbo did not imitate Big Red.

After a thoughtful comparative evaluation, the Tribunal underlined that, in the case at stake, any possibility of counterfeit had to be excluded based on the profound creative differences existing between the two characters. In particular, Gabibbo showed a significant originality due to its functional role as a TV character. Due to its ontological purpose, Gabibbo's creative process showed individualized aspects and characteristics that were not present in Big Red. More precisely, according to the Tribunal Big Red does not have any personality at all, being its very own identity circumscribed to the role of WKU mascot. On the contrary, Gabibbo's attitude and behavior could be diversified and adapted to heterogeneous roles and styles during its public appearances.

In other words, the Tribunal appreciated a substantive difference between Big Red and Gabibbo's 'personality': whereas the first character had no (or a weak) identity, the second one's was well-portrayed and defined. According to the Tribunal, the sole connection between the two characters was their external resemblance (humanoid form and red colour); nevertheless, this aspect was insufficient to establish copyright protection in favor of Big Red, as both elements were not original in nature, instead recurring in other existing figurative works.

In addition, Gabibbo was deemed to present an original creative contribution by its authors, expressed in terms of an innovative reorganization of existing (graphical) elements into a new work of art provided with an original personality. This was – indirectly – demonstrated by the appreciation that Gabibbo enjoys from the general public.

The Tribunal conclusions were confirmed by the Court of Appeal of Bologna.⁶ According to the appeal judgment, Big Red's features were in no way dissimilar from other existing mascot and moppets; besides, Big Red did not present any original characteristics in its representation, as it was constituted by ordinary lines and non-original graphical solutions. As a consequence, and even before addressing the allegedly derivative nature of the Gabibbo, the Court of Appeal

⁶ Corte d'Appello di Bologna 13 May 2011 no 609, available at www.dejure.it.

questioned whether Big Red could enjoy copyright protection in the first place.

In its judgment, the Court maintained that fictional characters shall be afforded copyright protection as long as they can be qualified in terms of complex and autonomous works of human intellect. In order for this requirement to be fulfilled, their personality must present original features, even beyond their external appearance: name, qualities, habits, ways of speaking and behaving in a social context are all relevant elements to appreciate a character's personality.⁷ Considering the comprehensive relevance of these aspects, the Court of Appeal excluded once again the plagiarist nature of Gabibbo, acclaiming its original personality as emerging from its way of acting and behaving.

Lastly, the first series of lawsuits involving the '*Big Red v Gabibbo*' case ended with the intervention of the Court of Cassation. Upon request, the Court qualified the claimants' inquiry for review inadmissible: in the judges' opinion, once the Bologna Court declared that Big Red was devoid of creative nature (and consequently of protection under copyright law), any additional examination of the counterfeit claim should have been omitted. It should be noted that, in addition to this statement, the Court of Cassation further noted that

‘even if Big Red was afforded copyright protection, no counterfeit would have been present, considering the elements of diversification qualifying the Gabibbo character’.⁸

2. *Big Red v Gabibbo* ‘Round 2’: Tribunal of Milan, Court of Appeal of Milan, and Corte di Cassazione 6 June 2018 no 14635

After the 2017 decision, the counterfeit lawsuit received a first – partial – response, yet the dispute with regards to the plagiarism claim, brought by Ralph Carey in front of the Tribunal of Milan in 2012, was far from being solved: Carey claimed that the creation of Gabibbo constituted a violation of his moral rights as author of Big Red and asked for compensation. In plain contrast with the grounds set for the decision in front of the Tribunal of Ravenna, the Milanese Tribunal qualified Gabibbo's creation as a form of ‘derivative plagiarism’ (lit '*plagio evolutivo*'), as Art 18 of the Italian Copyright law protects both the work contemporary fashion and its incremental modifications, adaptations, and innovations that does not constitute original activity on their own. As a consequence, the respondents were condemned to provide Carey compensatory damages and to give notice of the plagiarism to the general public.⁹

⁷ In addition, the Court noted that the imitative nature between two characters shall be evaluated considering the overall impression that they cause to an average observer; yet, the comprehensive sum of individual formal elements (such as the shape of the figure) are sufficient to exclude any plagiarism.

⁸ Corte di Cassazione 11 January 2017 no 503, *Foro italiano*, I, 530 (2017).

⁹ In particular, in its judgement the Tribunale di Milano 16 February 2012 no 4145,

According to the Tribunal of Milan, a comprehensive overview of the external characteristics of the two characters was sufficient to appreciate their identical origin, given the common presence of all the most prominent features of their appearance: in the Tribunal view, the two figures were to be considered essentially identical, considering the size proportion of the body and the head, and the length of the limbs. In addition, the two characters' facial expression – with its wide-eyes and the enormous mouth – was corresponding, further stressing the similarity between the two characters. According to the judgment, any impartial observers (seeing and knowing both the characters) could indeed appreciate the presence and influence of Big Red in the Gabibbo's figure.

Nevertheless, in its decision the Tribunal conceded that fictional characters can still be considered as novel products of inventive activities – despite their physical appearance – due to their original and detailed psychological characteristics that contribute to create a distinguishable and autonomous personality.

In light of these considerations, we shall observe first and foremost that such significant differences are indeed present between Big Red and Gabibbo: whereas the former behaves as (and actually is) a mere mascot – cheering for its team, and suffering in case of loss – Gabibbo was created as an extremist and crude commentator, arguing on the latest news, unveiling public figures' bad habits and protecting citizens' rights. As a direct consequence of these features, Gabibbo emerges as a profoundly autonomous character despite its external appearance and essentially due to its communicative attitude, which is widely acknowledged as original and creative by the general public.

Therefore (despite its similar appearance), Gabibbo should have been considered worthy of autonomous protection under the abovementioned Art 4 of the Italian copyright law, based on those same requirements that the Tribunal of

available at www.dejure.it,

'Ascertain that the creation of the character Gabibbo is a form of evolutionary plagiarism of Big Red, created by Ralph Carey;

Establishes the subsequent violation of Carey's moral rights and its co-paternity over Gabibbo;

Issues an injunction to RTI, Ricci and Copy against any perpetuation of the conducts that constitute violation of Carey's rights;

Mandates RTI, Ricci and Copy to give public notice of Carey's co-paternity of Gabibbo for one month, at the beginning of each episode of the TV show *Striscia la Notizia*;

Commands for the co-paternity of the Gabibbo to be communicated in any commercial product reproducing its resemblances (photographs, puppets, etc.) and, in any case, anytime the Ricci-Copy paternity is mentioned;

Adjudges that plaintiff recovers from RTI, Antonio Ricci and Copy SPA an amount of two hundred thousand euros;

Commands for the judgement to be published on *Il Corriere della Sera*, *La Repubblica*, *Il Quotidiano nazionale* and *Il Giornale* (the major Italian journals) at the expenses of the respondents, and on their personal web-pages;

Condemns RTI, Antonio Ricci and Copy SPA to refund the claimant of all the expenses related to the judgment, in a maximum amount of nineteen thousand three hundred and forty-eight euros'.

Milan considered as pivotal in order to qualify it as a form of derivative plagiarism.

In line with this position, the judgment of the Tribunal of Milan was then reversed by the city Court of Appeal:¹⁰ in the view of the appellate Court, the Tribunal decision did not acknowledge the fact that Big Red was, in itself, lacking any creative nature, and therefore should have been deprived of any copyright protection.

In addition, the Court considered any claim of ‘derivative plagiarism’ to be inexistent as well: Big Red and Gabibbo are, in the Court’s view, overall different. On the basis of such diversity, the creation of Gabibbo does not constitute neither a form of ‘traditional’ plagiarism (ie the mere reproduction of an already existing work) nor a ‘derivative’ one: the degree of originality that Gabibbo represents is sufficient to establish it as an autonomous work of art. According to the Court, the peculiar personality of Gabibbo, and the distinctive role it has in its shows, are so representative of an original identity that they compensate for the external resemblance between the character and Big Red, underlining a profound difference in the ‘spirit’ that prompted the creation of the two characters.

Thus, the Court of Appeal decision established the highly creative nature of Gabibbo, which represents an essential condition to consider the character worthy of copyright protection on its own.

Against this background, during the last stage of the trial, the Court of Cassation intervened again and reverted the Court of Appeal’s decision regarding derivative plagiarism: despite excluding the presence of a traditional plagiarism and of a counterfeiting conduct, the Court stated that Gabibbo’s creation constituted a derivative plagiarism activity, violating Big Red’s copyright. Therefore, it ascertained a violation of Carey’s moral and patrimonial rights.¹¹ According to the highest Court, the Court of Appeal merely excluded the ‘traditional’ plagiarism and qualified Gabibbo as an autonomous work, without properly engaging with the ‘derivative plagiarism’ assessment.

In the view of the Court of Cassation, when copyright is involved it is not

¹⁰ Corte d’Appello di Milano 9 January 2004 no 525, available at www.dejure.it.

¹¹ The Supreme Court underlined that the engagement of the authors in a creative elaboration of a work protected by copyrights, even resulting in an original work – that can enjoy copyright protection as an autonomous product – may integrate a violation of copyright law whether it is conducted without any consent from the author of the original work, therefore violating their rights (Corte di Cassazione 5 September 1990 no 9193, *Repertorio del Foro italiano*, 1990; Corte di Cassazione, 27 October 2005 no 20925, *Foro italiano*, I, 2080 (2006)). When such an event occurs, the outcome constitutes the by-product of a derivative work: it enjoys autonomous protection under Art 4 of legge no 633/1941, but it is a non-authorized, re-elaborated, version of the original piece. Consequently, its creation does not constitute a counterfeit – which requires a substantive reproduction, with minor details, of any relevant characteristics of the original piece without any original contributions.

As a derivative work, any unauthorized use of the product – meaning, without the consent of the creator of the original one – entitles the author of the original work to claim compensation in terms of a fixed percentage of any profit arising from the derivative’s work commercialization or usage (Corte di Cassazione 3 June 2015 no 11464, *Diritto industriale*, 556 (2015)).

sufficient to evaluate plagiarism and counterfeiting in a literal fashion to exclude any form of unlawful influence between two works. In particular, the original product enjoys specific protection also against any re-interpretations: a derivative plagiarism is integrated if a new product, despite modifying and re-elaborating the original one does not show a sufficient degree of creative and individual activity. In such cases, the new product is in violation of the original's author copyright under the Italian law.¹²

As a consequence of the Court of Cassation decision, the Court of Appeal of Milan has been mandated to revise its judgment and to consider whether, in the case at stake, Gabibbo constituted a re-elaborated or rather an inspired-version of Big Red. In both cases counterfeit, or 'traditional' plagiarism (since they are both based on the mere reproduction of the original) is already excluded.

It must be noted, though, that the Court of Cassation – in operating such assessment – did not consider that the derivative plagiarism issue had already been addressed by the Court of Appeal in its previous decision: in radically excluding the existence of a plagiarism (both in its traditional and 'derivative' nature), the Court underlined the presence of a high-degree of originality in the creation of the Italian Gabibbo. As a result, the Court noted that it could have been argued – at most – that Gabibbo was inspired by Big Red, but this would not have been sufficient to deprive it of its uniqueness.

After providing a general overview of the main history behind the case, it is now possible to indulge on the theoretical issues these facts pose for legal professionals. Due to the geographical and jurisdictional aspects of the case, the Italian law will represent our primary benchmark in conducting this analysis; still, a major role in envisaging the true meaning of some notions is played by US courts decisions, which will be referred as interpretative proxies.

II. Determining Counterfeit and Plagiarism Between Regulation and Case Law

On a preliminary note, it should be observed that – according to Italian legge 22 April 1941 no 633 – any work of art that can be traced to the fields of literature, music, figurative arts, architecture, drama and cinematography, is susceptible to copyright protection (regardless of its mode of expression).¹³ In addition, national case law has stressed that any work shall be creative, original and novel

¹² Corte di Cassazione 6 June 2018 no 14635 n 5 above.

¹³ In accordance with such a broad view, the Italian Council of State ('Consiglio di Stato') affirmed that there is no 'free zone' in the realm of copyright, in which authors and their works are devoid of protection. In the Italian legal framework, the protection of copyright has an inner-expansive capacity, and it dynamically expands according to the characteristics of the modes of expression encompassing art in every form (Consiglio di Stato 15 July 2019 no 4993, available at www.dejure.it).

in order to be protected by copyright.¹⁴ Therefore, any judges investigating a potential plagiarism case shall, first and foremost, verify if the allegedly plagiarized work presents proper originality and novelty (Corte di Cassazione 12 March 2004 no 5089).¹⁵

The notion of ‘creativity’ mentioned by Art 1 of Italian copyright law does not coincide with an ideal concept of creation in terms of absolute novelty and originality. On the contrary, it refers to a personal and individual expression of a work that pertains to the abovementioned arts. A creative effort – even a minimal one – is enough to legitimize copyright protection as long as it comes with a clear manifestation in the exterior world. In addition, creativity does not refer to the abstract idea behind protected work, but rather to the concrete form of the idea’s expression: this way, the same idea can constitute the basis of many works which are distinguished from one another in light of the authors’ creative effort.¹⁶

Such an approach is consistent with the necessary balance that copyright law entails between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society competing interest in the free flow of ideas, information, and commerce. This complex balance has been thoughtfully addressed under the EU and US legal framework. The US Supreme Court has noted on a number of occasions that while copyright aims to give authors an incentive to create and share their

¹⁴ According to most judgments issued on the topic, the threshold to establish creativity is quite low: it is sufficient to verify the existence of any original work of authorship. This is true with particular reference to creative works displaying a significant technical nature: since the vast majority of choices is indeed dictated by the existent realm of technical solutions that might lead to the desired outcome, in such cases the author has just a minor discretion on the modes of expression of their work (Tribunale Bologna 14 October 2013 no 12773, *Repertorio Foro italiano*, 12 (2013)). This position has been further specified by clarifying that creative and original nature are present also in those works that are created from simple ideas and notions already present in the general knowledge of those who are experts operating in a certain field. In such cases, though, these ideas and notions shall be formulated and organized in a personal way, making them autonomous from what it is already existing. The concrete relevance of such autonomising effort must be ascertained by evaluating the facts, which are susceptible to be challenged in court exclusively on the basis of lack of rightful grounding and motivation (Corte di Cassazione 12 January 2007 no 581, *Foro italiano*, I, 3167 (2007)). In addition, the Italian Court of Cassation further observed that even an incomplete work (or a work that did not reach its complete form, as envisaged by its author) might present creativity and subjectivity (Corte di Cassazione 19 October 2012 no 18037, *Massimario Foro italiano*, 12 (2012)).

¹⁵ Corte di Cassazione 12 March 2004 no 5089, *Foro italiano*, I, 2441 (2004). In stressing the pivotal character of this preliminary evaluation, Italian judges also underlined that the evaluation of the judge on this aspect cannot be appealed as long as it offers reasonable grounding and motivations, without presenting any logic or legal errors (Corte di Cassazione 8 September 2015 no 17795, *Diritto industriale*, 33 (2016)).

¹⁶ Accordingly, Art 9.2 of the TRIPS states that ‘Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such’. See also Art 1 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122 17 May 1991, and Art 2 no 8 and 9 of the Italian copyright law. See also Tribunale di Bologna 24 February 2015 no 2463, available at www.dejure.it.

works, it also strives to provide subsequent authors with sufficient ‘breathing space’ to make their own additive contributions. The copyright system is predicated both on the existence of certain rights to protect authors from unfair competition, and on significant gaps in those rights that give other authors freedom to ‘breath’ and develop their creativity.¹⁷

The reasoning of various Italian judges followed this approach, underlining *ex multis* that it is possible for a new work to be inspired by another existing one, as long as its mode of expression is sufficiently diverse and creative to exclude any counterfeiting activity. Similarly to different paintings portraying the same subject with artists using different modes of expression that provide each work with an autonomous character and creativity, so it might happen for works protected by copyright law. An original work could also be crafted by moving from a minor, secondary aspect of an already existing one, when such feature is transformed and developed in a distinct and original new context; in such cases, the new original manifestation of the (already existing) idea is sufficient to entitle its creator of the authorship and qualify their work as original in nature.¹⁸

Lastly, Italian judges clarified that it constitutes a violation of the author’s copyright when the original work is copied or reproduced in its entirety (abusive reproduction) and when a counterfeit – presenting both differences and similarities – is realized.¹⁹ As for cases concerning partial reproductions, then context and expressivity – in line with an aspect that has been widely stressed by American legal and liberal arts scholars²⁰ – have the lion’s share, since meaning is strictly derived from context (eg sampling an existing segment of music might change what that music expresses, making the end product expressive in the general sense nonetheless).²¹

With regards to the *Big Red v Gabibbo* case, the essential topic to be considered pertains to the notion of plagiarism, which is not expressly defined

¹⁷ See M.A. Lemley, ‘The Economics of Improvement in Intellectual Property Law’ 75 *Texas Law Review*, 989 (1997). In case law, see *MGM Studios INC v Grokster LTD* 545 US 913, 933 (2005); *Sony Corp. of Am. v Universal City Studios INC* 464 US 417, 479 (1984). On the issues arising from the lack of harmonization in the early days copyright protection for fictional characters – with a particular focus on the US system – see D. Feldman ‘Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection’ 78 *California Law Review*, 687 (1990).

¹⁸ Corte di Cassazione 28 November 2011 no 25173, *Annali italiani del diritto d'autore*, 589 (2012).

¹⁹ Corte di Cassazione 28 October 2015 no 22010, *Annali italiani del diritto d'autore*, 736 (2016); Corte di Cassazione 5 July 1990 no 7077, *Corriere giuridico*, 931 (1990). In these judgements, the Court clarified that no counterfeit is present when the resemblance between two works is due to their common inspiration by a third, original previously existing work. Recently, see also Corte di Cassazione 2 March 2015 no 4216, *Annali italiani del diritto d'autore*, 678 (2016).

²⁰ *Ex multis*, S. Fish, ‘Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases’, in S. Fish ed, *Is There A Text In This Class?* (Cambridge Mass.: Harvard UP, 1980), 268-292.

²¹ T.G. Schumacher, ‘This Is a Sampling Sport: Digital Sampling, Rap Music and the Law in Cultural Production’ 17 *Media, Culture And Society*, 253-268 (1995); D. Hesmondhalgh, ‘Digital Sampling and Social Inequality’ 15 *Social & Legal Studies*, 53 (2006).

under Italian copyright law, being merely qualified under Art 171 legge no 633/1941 as the activity of ‘reproducing someone else’s work for any purpose or in any way, without having the proper rights to do so’.²² It can be deduced, therefore, that a plagiarizing activity is always based on the unlawful reproduction – *rectius*, appropriation – of the creative aspects of another work (considering the work in its entirety or its specific parts) by means of a ‘parasitic’ conduct.

In order to distinguish between (lawful) inspiration from an existing work and (illegal) appropriation in terms of plagiarism, case law and legal scholars developed a set of guiding principles to be used in the comparison between two pieces. Primarily, it is widely acknowledged that a preliminary evaluation of the characteristics of the plagiarized work is necessary: the ‘original’ piece shall be, in fact, creative and original on its own. This aspect shall be determined particularly in relation to the original work exterior appearance – since, as we already underlined, the idea is not, *per se*, worthy of protection under copyright law.²³

Concerning the ‘plagiarizing’ assessment, Italian scholars and case law stressed some pivotal aspects in order for plagiarism to be ascertained:

a) The two pieces shall not present any significant ‘semantic divide’: the author of the plagiarizing work must have reproduced the original work creative elements, replicating its exterior form and characteristics. If, on the contrary, the new work is inspired by the same idea/concept as the old one, but the essential elements characterizing its exterior manifestation are different, then plagiarism should be excluded.²⁴

²² ‘è punito (...) chiunque, senza averne diritto, a qualsiasi scopo e in qualsiasi forma (...) riproduce, trascrive, recita in pubblico, diffonde, vende o mette in vendita o pone altrimenti in commercio un’opera altrui’.

²³ Copyright law does not protect ideas – given that similar or identical ideas can emerge from independent activities and individuals’ work – but, rather, the expression of an idea, ie the physical manifestation of a specific idea that is susceptible to be evaluated in its originality, creativity, and form.

²⁴ This aspect has been stressed by Italian case law analysing the problem of plagiarism in the area of musical works: in case a fragment of poetry is present and used in different songs, plagiarism is not present as long as the fragment presents a different ontological significance in terms of ‘semantic divide’ between the two tracks. According to theories of aesthetics, a major characteristics of poetry consists of using typical elements from the ‘vulgar’, popular language and enriching them by adding contextual and rhetorical meanings. Even the same words and text, therefore, are susceptible to assume different meanings given their use in a particular context; similarly, any artistic work can produce and offer a new perspective on the world and society by using already existing (reinterpreted) elements and signs. This aspect marks a major divide between art and science (Corte di Cassazione 19 February 2015 no 3340, *Rivista di diritto industriale*, II, 263 (2015)).

The capacity of using the same system of words and signs with different meanings is well expressed by the studies conducted on parodies and satirical works: even by referring to the same register, characters and (sometimes) story of an existing work, satirical pieces revert and modify their meaning in such a profound way, that they emerge as autonomous creative activities (Tribunale di Milano 15 November 1995, *Giurisprudenza italiana*, I, 2, 749 (1996)). As the US case law has underlined, it would be unfairly reductive to qualify a satirical work as a mere derivative reproduction of the original piece: the diversity of the artistic message is sufficiently

b) The investigation concerning plagiarism shall take into account any differences existing between the two works concerning their essential characteristics: minor details are not sufficient to qualify the plagiarizing work as original (Corte di Cassazione 15 June 2012 no 9854; Corte di Cassazione 10 March 1994 no 2345; Corte di Cassazione 10 May 1993 no 5346).²⁵ In other terms, plagiarism cannot be excluded based on minor, ostensible and illusory differences between two pieces of art.

c) The existence of a potential risk of confusing the two works does not constitute *per se* an essential element in order to ascertain a plagiarism case.²⁶

d) The plagiarism assessment shall be the result of a general, synthetic, evaluation: the overall impression that two works create on spectators – and not their analytic similarities or differences – constitutes the benchmark to evaluate whether plagiarism is present.

e) The judicial assessment regarding the plagiaristic nature of a work of art cannot be challenged in court as a ‘point of law’, as long as the assessing judge provides any rationale for their decision (Corte di Cassazione 26 January 2018 no 2039).²⁷

On the basis of these general proxies, legal scholars and case law further defined the difference existing between what constitutes plagiarism and what shall be qualified as a counterfeit. It shall be noted that such difference is particularly significant also in other jurisdictions: for example, in the United States counterfeiting

characterizing to establish the original nature of the parodistic work. Considering any parody as a ‘literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule’ (*Campbell v Acuff-Rose Music INC* 510 US 583 (1994) – quoting *The American Heritage Dictionary* (Boston: Houghton Mifflin, 3rd ed, 1992) 1317), the US Supreme Court acknowledged that ‘parodic works, like other works that comment and criticize, are by their nature often sufficiently transformative to fit clearly under the fair use exception’. Id (recognizing that parody ‘has an obvious claim to transformative value’ (*Mattel INC v Walking Mountain Productions* 353 F.3d 792 (9th Cir 2003)). Given that, under the US fair use doctrine, copies made for commercial or profit-making purposes are presumptively unfair (*Sony Corp. of America v Universal City Studios INC* 464 US 417, 449 (1984)), a parody or satire is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original (*Rogers v Koons* 960 F.2d 301 (2nd Cir 1992)). This sort of criticism itself fosters the creativity protected by the copyright law (*Warner Bros INC v. American Broadcasting Cos. INC* 720 F.2d 231 (2nd Cir 1983)); still, in order for a work to be qualified as parodistic, its audience must be aware that there is an original and separate expression underlying the parody, attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody (*Harper & Row Publishers INC v Nation Enterprises*, 471 US 562 (1985)).

²⁵ Corte di Cassazione 15 June 2012 no 9854, *Diritto industriale*, 459 (2013); Corte di Cassazione 10 March 1994 no 2345, *Foro italiano*, I, 2415 (1994); Corte di Cassazione 10 May 1993 no 5346, *Rivista di diritto industriale*, II, 296 (1993).

²⁶ Corte di Cassazione 27 October 2005 no 20925 n 11 above, embracing an approach developed in the field of trademarks regulation.

²⁷ Corte di Cassazione 26 January 2018 no 2039, *Nuova giurisprudenza civile commentata*, 983 (2018).

is considered a form of industrial property infringement, whereas plagiarism does not necessarily implies a breach of copyright and its related rights.²⁸

In assessing the distinction between the two notions, it has been clarified that a counterfeiting conduct is present whenever someone unlawfully exploits the author's original work for economic purposes: this might happen by abusively reproducing the piece – and eventually selling the copies – in its identical fashion or including minor differences from the protected work. Therefore, the focus of counterfeit is the violation of the creator's economic right.

On the other hand, plagiarism is integrated when authorship is violated, since the plagiarist qualifies themselves as the author of a work created by someone else. Plagiarism constitutes an unlawful appropriation and attribution of both the creative elements and the authorship of a piece of work. The violation it creates is twofold, impacting both on the author's economic and moral rights.

Operating in an intermediate role between these two poles, the Italian case law has developed a notion of 'counterfeiting plagiarism' (lit '*plagio-contraffazione*'). Such concept is used to define those situations in which an original work is both reproduced for economic purposes and the reproducer contextually qualifies themselves as the original creator of the new piece.²⁹

Lastly, derivative plagiarism is present when an original work is developed and modified without the author's consent, and then the result of such elaboration embeds a creative element qualifying it as worth of copyright protection³⁰ while still maintaining some characteristic elements essential to the originality of the plagiarized work.³¹

Derivative plagiarism creates harm to the exclusive right – enjoyed by every author – of developing one's work (granted by Art 18 of the Italian copyright law): therefore, any third party's elaborations and modifications of a piece of work shall be authorized by the author of the original piece.

However, a thin line exists between derivative plagiarism and creative development of existing works: as already highlighted, copyright law is meant to protect the expressive elements of the author's piece while guaranteeing subsequent authors the necessary discretion and space to make their own contributions by adding to, re-using, or re-interpreting the facts and ideas embodied in the original work. Even if subsequent authors may not compete with the copyright owner by offering their original expression to the public in terms of a substitute for the copyright owner's work, they are still free – and fostered – to compete with their own expression of the same facts, concepts,

²⁸ B.L. Frye 'Plagiarism is Not a Crime' 54 *Duquesne University Law Review*, 133 (2016).

²⁹ See Corte di Cassazione 5 July 1990 no 7077 n 19 above; Tribunale di Milano 4 July 2017, no 7480, available at www.dejure.it.

³⁰ See Art 4 Italian copyright law, legge no 633/1941.

³¹ See Corte di Cassazione 17 January 2001 no 559, *Foro italiano*, I, 1182 (2001), and Corte di Cassazione 10 March 1994 no 2345 n 25 above, considering the specific case of the elaboration of a literary work in order to develop a theatrical script as a form of derivative art.

and ideas.³²

Accordingly, expressive distinction is the central element in the complex balance between the authors' interest in preventing the exploitation of their writings and society competing interest in the free flow of ideas, information, and commerce.³³

Despite the (virtual) clarity of these concepts, in practice it is arduous for judges to mark a clear divide between counterfeiting conducts and creative elaborations, and it is not by chance that a Tribunal discretionary evaluation can be challenged in court only on the basis of a lack of motivation.³⁴

III. Is Big Red Worthy of Protection Under Italian Copyright Law?

In light of the different elements emerging from the abovementioned legislation and case law, it is now possible to investigate and compare the two figures of Big Red and Gabibbo in order to make some considerations regarding the validity of the plagiarism claim. In conducting this analysis, we deem a statement of the Bologna Court of Appeal³⁵ worthy of particular attention: the Court underlined that Big Red could not be qualified as a creative work in the very first place, since its essential characteristics (red humanoid shape, disproportionate enormous head and wide mouth) are shared amongst other – already existing – figures and puppets.

Despite the existence of similarities in their outward appearance, Big Red and Gabibbo are also very different as Big Red usually displays the letters 'WKU' (that is the acronym for the Western Kentucky University) on its chest, wears trainers or other sorts of gymnastic shoes and acts as the mascot of the basketball

³² R.A. Reese 'Transformativeness and the Derivative Work Right' 31 *Columbia Journal of Law & the Arts*, 101 (2008).

³³ *Warner Bros. INC v American Broadcasting Cos. INC* n 24 above, 240, qualifying the idea-expression distinction as 'an effort to enable courts to adjust the tension between these competing effects of copyright protection'.

³⁴ Corte di Cassazione 10 March 1994 no 2345 n 25 above. It should be noted that some critical advancements emerged in the field of criminal law as well: the Italian court underlined that the protection of authors' rights shall be granted only when a physical manifestation of an idea (so-called *corpus mechanicum*) is present in the external world, and that the requirements of originality and creativity shall be evaluated with regards to such *corpus*, both in cases of original and derivative plagiarism (Corte di Cassazione 24 October 2016 no 44587, *Rivista trimestrale di diritto penale dell'economia*, 674 (2017)). In addition, and with regards to the distinction between protecting economic and moral rights involved in practice, the Court of Cassation explained that the joint safeguard that these two different types of rights enjoy stems from the inner characteristics of copyright law: since copyright law aims at protecting an author's creation as a good, its scope of action cannot be constrained to the commercial exploitation of such creation; an original work shall be protected even if its outside the market (eg an unpublished manuscript), as long as it is a concrete form of original expression (Corte di Cassazione 19 October 2012 no 18037 n 14 above).

³⁵ Corte d'Appello di Bologna 13 May 2011 no 609 n 6 above.

team of the university, cheering for its team and interacting with the public of the university events (mainly students and teenagers) without speaking. On the contrary, Gabibbo wears a papillon and wristbands and acts as reporter and presenter in TV shows; consistently with its role, it frequently interacts with the general public – which is constituted both by adults and teenagers.

The Court of Appeal of Milan underlined in its decision that many fictional characters in the entertainment, advertisement, and television industries are visually similar to Big Red: consider, among others, the Looney Tunes Gossamer (ever since 1946), Barbapapa's characters, and even Pacman. The affinities amongst these characters are essential to exclude that a plagiarism evaluation could be based exclusively on their mere external appearance.

As it should logically follow from such consideration, the mascot originality should be appreciated on the basis of its psychological characteristics. Accordingly, Big Red appears devoid of any creative nature, since its silent and joyful attitude is not different from many existing figures. Against this background, the Court deemed Big Red's way of interacting with the spectators (with gestures and cheering) original and different from other, already existing, similar characters – without providing, though, a solid comparative evaluation – and therefore accorded its creator moral rights and copyrights over its 'creation'.

The Court of Cassation, in its decision Corte di Cassazione 11 January 2017 no 503,³⁶ expressed a much more robust perspective, stressing the absence of a significant difference between Big Red and similar, previous, works, in line with the first reconstruction operated by the Tribunal. Furthermore, the Court observed that, since the multiplicity of akin characters is sufficient to categorize the field as a 'crowded art',³⁷ resemblance amongst them is physiological; as a consequence, details play a pivotal role in defining their individual and original nature. Even a minor detachment from what already exists might be deemed sufficient to establish copyrights in favor of the author.

If this approach is embraced, then both Big Red and Gabibbo should be considered worthy of copyright protection: Big Red does present original aspects as compared to its predecessors, while Gabibbo is different from Big Red. Therefore, there is neither plagiarism nor counterfeiting between the two characters, or between Big Red and other existing figures.

³⁶ n 8 above.

³⁷ The notion was developed particularly by the United States Patent and Trademark Office to pinpoint those fields, where many different patents are present. In particular, the US Manual of Patent Examining Procedure, §904.02 states: 'in crowded, highly developed arts where most claimed inventions are directed to improvements, patent documents, including patent application publications, may serve as the primary reference source. Search tool selection in such arts may focus heavily on those providing patent document coverage'. The 'Crowded Art Theory' has been lately embraced by the EU Court of Justice (see Case T-80/10 *Bell & Ross v OHIM – KIN*, Judgment of 25 April 2013, available at www.eur-lex.europa.eu) and by Member States legal scholars (see eg C. Balboni, 'Un saluto alla Crowded Art' *Notiziario Ordine dei consulenti in proprietà industriale*, 12 (2010)).

However, it should be noted that a similar (but not identical) result would be achieved even if a more rigorous notion of copyright were to be accepted, in clear opposition to the Court statement. In this case, both Big Red and Gabibbo would be unworthy of protection, thus there could not be any plagiarism between Big Red and Gabibbo either.

After the Court of Cassation judgment, the Court of Appeal of Milan has been requested to evaluate whether a specific form of derivative plagiarism is present in the case at stake. Therefore, the Court does not have to investigate anymore the absence of a ‘traditional’ plagiarism or of a counterfeit conduct.

IV. What Has yet to Come After Judgment no 14635/2018?

We already mentioned that the Court of Cassation, with its 2018 judgment, took a clear stand on the inexistence of a ‘traditional’ form of plagiarism, as well as with regards to the absence of a counterfeiting conduct. After doing so, the litigation was referred back to the Court of Appeal of Milan, in order for the judge *a quo* to explore a potential issue of derivative plagiarism (that is, to verify if the new piece is a creative re-elaboration of the original work, therefore lacking originality).

The Court of Appeal will be in charge of evaluating whether relevant differences are present between Big Red and Gabibbo, considering both their external appearance and their artistic and semantic identity.

With regards to the expected outcome of this assessment, an analysis of the previous set of judgments on the case (eg the one issued by the Bologna Court of Appeal) seems to offer relevant elements in favor of the absence of a case of derivative plagiarism, given the psychological and attitudinal differences between the two figures. It should be further noted that the arguments set by the Bologna Court of Appeal are significant in term of judicial precedent and statement of facts (investing also Mr Ralph Carey as respondent in both controversies) concerning common aspects that are present in the case at stake. The Court of Milan has, therefore, the duty to harmonize its evaluation with the already decided (uncontested) aspects that the Court of Bologna in order to avoid any judicial conflicts.

Taking into due account the Court of Bologna reasoning, the Court of Milan must consider, first and foremost, how Big Red has been deemed radically devoid of any creativity and originality, and how such factor was confirmed by Corte di Cassazione 11 January 2017 no 503,³⁸ thus constituting *res iudicata*.

On a minor note, it is worth observing (for a purely intellectual purpose) that the 2018 ordinance emitted by the Court of Cassation was based, amongst other elements, on two interviews rendered by Gero Cardarelli (who impersonated

³⁸ n 8 above.

the character of Gabibbo for many years) and Antonio Ricci. In particular, the Court held that these two interviews should be examined by the Court of Appeal as extrajudicial confessions when assessing a potential derivative plagiarism.

Concerning this, it is above all clear that any declarations rendered by Mr Cardarelli are not susceptible to constitute a confession according to Art 2730 of the Italian Civil Code. He was indeed a third party not involved in the litigation, therefore ontologically unable to operate a confession. In relation to the Antonio Ricci's interview, Art 2730 requires specific conditions to be met in order for a confession to be valid under Italian law; particularly, the confession shall be the result of a so-called *animus confitendi*: the confessed person must be declaring the existence of a fact that is unfavorable to their position, and they must willingly and consciously express such declaration. If these conditions are missing (eg the confession is operated as result of a provocation, or unconsciously), the confession has no probative value in court.

Regardless of any investigation concerning this aspect, it is reasonable to ascertain that the interviews will not play an essential role in the case at stake, since the essential comparison to assess the existence of a derivative plagiarism involves the characteristics of the two works.

V. Conclusions

On the basis of the different aspects highlighted throughout our analysis, it is now possible to operate a concise overview of the state of the art regarding the '*Big Red v Gabibbo*' saga.

Corte di Cassazione 11 January 2017 no 503, clearly stated that Big Red is devoid of any copyright protection;³⁹ on the contrary, the Court of Appeal of Milan⁴⁰ qualifies it as a complex piece, to be accorded protection within the 'crowded art' framework of existing – similar – characters.

Regardless of the acceptance of one of these two alternatives, a careful examination of the relevant case law on this topic unveils that the hypothesis of derivative plagiarism – when the position of Gabibbo is considered - should be excluded in both cases. In particular:

- Both Big Red and Gabibbo resemble previously existing characters;
- Gabibbo is radically different from Big Red: the psychological and attitudinal features of the former are sufficient to ground a 'semantic divide' between its character and the WKU mascot;
- The Italian legal system (in accordance with positions embraced also in other jurisdictions, such as the US) acknowledges that a transformative activity, moving from an established background of existing characters, can be worthy of copyright

³⁹ It is relevant to pinpoint that the Court of Cassation has expressly precluded any re-assessment of this aspect to the Court of Appeal.

⁴⁰ Corte d'Appello di Milano 9 January 2004 no 525 n 10 above.

protection as long as its ultimate outcome is original and creative.

With regards to the latter, the boundaries and limits set by the US ‘fair use’ doctrine come into relevance. Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances without permission from the author or owner. In particular, these circumstances are related to limited and ‘transformative’ purposes, such as commenting upon, criticizing, or parodying a copyrighted work. Section 107 of the 1976 Copyright Act provides the statutory framework for determining whether the use made of a work represents a fair use and identifies certain practices or activities that may qualify as fair use, clarifying that such list should be interpreted as merely exemplificative: they do not constitute a *numerous clausus*.⁴¹

According to the fair use doctrine, to determine whether a specific use under one of these categories is ‘fair’ courts are required to consider the following factors: a) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;⁴² b) the nature of the copyrighted work;⁴³ c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;⁴⁴ and d) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁵ In addition, a court may also consider other unnamed factors in weighing a fair use question: the evaluation of a fair use claim operates on a case-by-case basis, and the outcome

⁴¹ For an empirical analysis of how fairness has been assessed by US courts, see B. Beebe, ‘An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005’ 156 *University of Pennsylvania Law Review*, 549 (2008).

⁴² Courts look at how the party claiming fair use is using the copyrighted work and are more likely to find that non-profit educational and non-commercial uses are fair. This does not mean, however, that all non-profit education and non-commercial uses are fair and all commercial uses are not fair; instead, courts will balance the purpose and character of the use against the other factors below. Additionally, ‘transformative’ uses are more likely to be considered fair. Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work.

⁴³ This factor analyses the degree to which the work that was used relates to copyright’s purpose of encouraging creative expression. Thus, using a more creative or imaginative work (such as a novel, movie, or song) is less likely to support a claim of a fair use than using a factual work (such as a technical article or news item). In addition, the use of an unpublished work is less likely to be considered fair.

⁴⁴ Under this factor, courts look at both the quantity and quality of the copyrighted material used. If the use includes a large portion of the copyrighted work, fair use is less likely to be found; if the use employs only a small amount of copyrighted material, fair use is more likely. That said, some courts have found the use of an entire work to be fair under certain circumstances, whereas in other contexts, using even a small amount of a copyrighted work was determined to be not fair because the selection was an important part – or the ‘heart’ – of the work.

⁴⁵ Courts review whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner’s original work. In assessing this factor, courts consider whether the use is hurting the current market for the original work (for example, by displacing sales of the original) and/or whether the use could cause substantial harm if it were to become widespread.

of any given case depends on a fact-specific inquiry. The flexible consideration of such elements is necessary to balance the original author's profit with the consumers' interest for new contents to be developed and diffused on the market, even if they are built – up to a legitimate extent – on previous ideas and concepts.⁴⁶

It should be noted that some of the requirements mentioned by the US Copyright Act present relevant similarities with the Italian copyright regulation; therefore, they could be considered as conceptual proxies in determining how to interpret them. In particular, the nature of the copyrighted piece shall be assessed by considering first and foremost the originality of the allegedly plagiarized work: it is pivotal, to evaluate how much and to which extent the existing copyrighted work has been exploited to create the new one. Moreover, the effect of the use upon the 'original' work potential market shall be determined by specifically verifying if the existence of the new piece reduces the original one's market or, on the contrary, if it fosters it by disseminating information about its existence to a new, wider public (Tribunale di Milano 13 July 2011).⁴⁷

Still, a wide range of differences between the two rules exist, such as, *ex multis*, the exhaustive list of exceptions and factors that US courts are supposed to take into account in providing a 'fair use' evaluation, which are not present in the Italian regulation. Consequently, it is disputable whether the use of this tool in the Italian context *via* analogy is actually appropriate.⁴⁸

Furthermore, previous US case law has often underlined that even if a character appears in different versions overtime – eg due to the evolution of its design – it will be still worthy of copyright protection as long as its essential and 'unique' aspects are maintained.⁴⁹ New elements shall be provided to further specify the so-called 'character-delimitation test',⁵⁰ which appears to be more rigorous than the current Italian approach.

Lastly, considering the Italian courts perspective, the fact that the fair use assessment should operate on a case-by-case basis is particularly relevant, since it makes it clear that – under specific conditions – even the creation of an opera, which is profoundly similar to an already existing one, might be considered

⁴⁶ On this specific aspect, see J.P. Liu, 'Copyright Law's Theory Of The Consumer' 44 *Boston College Law Review*, 397 (2003). Regarding the EU framework, see L. Guibalut and N. Helberger 'Copyright Law and Consumer Protection' *Report for the European Consumer Law Group* (February 2005).

⁴⁷ Tribunale di Milano 13 July 2011, *Aida*, 1541/1 (2013).

⁴⁸ Cf R.L. Okedi, *Copyright Law in an Age of Limitations and Exceptions* (Cambridge: Cambridge University Press, 2017), 235.

⁴⁹ *DC Comics v Towle* 802 F.3d 1012 (9th Cir 2015); cfr. T.P. Lim 'Beyond Copyright: Applying a Radical Idea-Expression Dichotomy to the Ownership of Fictional Characters' 21 *Vanderbilt Journal of Entertainment & Technology Law*, 95 (2018); K. Alphonso 'DC Comics v. Towle: To the Batmobile!: Which Fictional Characters Deserve Protection Under Copyright Law' 47 *Golden Gate University Law Review*, 5 (2017).

⁵⁰ For an overview of the US debate on the topic, see A.J. Thomas and J.D. Weiss 'Evolving Standards in Copyright Protection for Dynamic Fictional Characters' *Communications Lawyer*, 9 (2013).

original and creative. For instance, this might happen if a new piece created in order to pay homage, or to refer to, the author's original piece ultimately develops into something different. In the field of visual arts, a concrete example of this process is represented by the so-called 'appropriation art', that is the use of pre-existing objects or images with little or no transformation applied to works of art. This has been permitted under copyright law as long as the new work re-contextualizes whatever it borrows to create the new piece (see Tribunale di Milano 28 November 2017).⁵¹

This topic proves to be particularly significant with an eye to the future, since the problem of setting clear boundaries between plagiarism and creative incremental elaboration is susceptible to reach an even higher degree of relevance with the spread of emerging technologies for copying and distributing existing contents on the Internet. For instance, peer-to-peer file sharing technologies, coupled with audio and video editing systems, constitute a clear example of how digital technology and online distribution allow users developing their ideas over existing works at virtually no cost and with a major creative outcome. These technological changes are significant for copyright because they enable more people to produce a new range of copyrighted material, and to develop original, creative ideas moving from existing frames or pieces of copyrighted work.⁵² It is not coincidental that this issue has been at the centre of the scholarly and professional debate in recent times, particularly regarding the role that the European Parliament and Council Directive (EU) 2019/790 of the 17 April 2019⁵³ must play in striking the balance between internet users and content creators' rights in the digital environment.⁵⁴ In light of the advent of discussion boards, blogs, social networking sites, photo-sharing sites, and other user-generated content, the fair use doctrine – and, more generally, an evolutionary interpretation of the copyright legal framework, is nowadays more important than ever. New ways to interact with copyrighted material – often by copying portions of it – make it pivotal for courts to be able to properly highlight the major differences (even) between apparently look-a-like product, in order not to curb innovation and properly reward authors' creative effort,⁵⁵ such as in the case of the creation

⁵¹ Tribunale di Milano 28 November 2017, no 11942, available at www.dejure.it.

⁵² See Peter S. Menell, 'An Analysis of the Scope of Copyright Protection for Application Programs' 41 *Stanford Law Review*, 1045 (1989); see also M. Sag, 'Copyright And Copy-Reliant Technology' 103 *Northwestern University Law Review*, 1607 (2009).

⁵³ European Parliament and Council Directive (EU) 2019/790 of the of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92.

⁵⁴ See *ex multis* M. Senfleben et al, 'The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform' 40 *European Intellectual Property Review*, 149 (2018).

⁵⁵ See F. Shaheed, Report of the Special Rapporteur in the Field of Cultural Rights Farida Shaheed, Copyright policy and the Right to Science and Culture, United Nations General Assembly 24 December 2014.

of a new fictional character with original personality, identity, psyche, and role in the entertainment industry.

Considering these numerous and significant factors, as well as the new dimension of copyright in the contemporary age, it is reasonable to assume that the Court of Appeal of Milan, in light of the decision of the Court of Cassation, will eventually exclude – as it happened with the ‘traditional’ plagiarism hypothesis – the occurrence of an incremental plagiarism: this endless saga of *Big Red v Gabibbo* might finally be on the verge of its conclusion.

Hard Cases

Post-Mortem Homologous Fertilization: Parental Patterns in the Dialectical Comparison Between the Constraints of Biology and Rules on Consent

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*La vie est un mouvement inégal,
irrégulière et multiforme*

Michel De Montaigne

Abstract

Starting from a judgment by the Italian Supreme Court (Corte di Cassazione), the present work seeks to analyse the multifaceted and intricate system of assisted reproduction and new parenting models within the framework of Italian law; the Italian Civil Code is structurally unfit to regulate these contemporary phenomena. The rules on biological parenthood (largely found in the Civil Code) and social parenthood (for which some principles are enshrined in legge 19 February 2004 no 40) have a complex relationship, requiring fair balance in the protection of the interests involved, including those of minors. After outlining the regulatory system of social parenting, this study also attempts to tackle tomorrow's challenges, including some critical issues which are likely to emerge.

I. Introduction: The Case Law

The question on which the Italian Supreme Court (Suprema Corte di Cassazione) ruled with judgment no 13000 on 3 May 2019 arose from a case of *post-mortem* fertilization with the late husband's cryopreserved gametes, pursuant to Art 8 of legge 19 February 2004 no 40.¹

The minor, L., who was born in Italy, was conceived by the *post-mortem* in

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¹ Corte di Cassazione 3 May 2019 no 13000, *Giurisprudenza italiana*, 1506 (2019).

On the judgment, see the comments of A. Morace Pinelli, 'La filiazione da p.m.a. e gli spinosi problemi della maternità surrogata e della procreazione *post mortem* (Nota a Trib. Agrigento, decr. 15 maggio 2019)' *Foro italiano*, I, 3359 (2019); E. Bilotti, 'La fecondazione artificiale *post mortem* nella sentenza della I sezione civile della Cassazione n. 13000/2019' (2019), available at www.centrostudiliviatino.it; M. Faccioli, 'La condizione giuridica del soggetto nato da procreazione assistita *post mortem*' *Nuova giurisprudenza civile commentata*, I, 1282 (2019).

vitro fertilization technique (IVF). In fact, the mother, R.C. (an Italian citizen), had resorted to this technique in Spain, after the death of her husband G.A.; the latter had agreed to the use of his cryopreserved gametes. When the child's birth report was filed, R.C. had requested the registration of the girl using the paternal surname, submitting her husband's consent both to medically assisted procreation and to a *post-mortem* IVF.

The civil registrar had refused and therefore R.C. had appealed to the Tribunale di Ancona, on her own behalf and on behalf of the daughter, requesting the latter's registration with the paternal surname and the certification of the paternity of the deceased husband.

By a judgment issued on 19 July 2017, the Tribunale di Ancona had rejected the appeal and upheld the registrar's decision.

Another appeal had been rejected by the Corte d'Appello di Ancona. The Court of Appeals ruled that: the legge no 40 of 2004 allows *in vitro* fertilization (IVF) only if both parents (married or not) are alive; the civil registrar, being unable to assess the validity and enforceability of foreign acts, had correctly applied the general rules of the Civil Code on personal *status* (Arts 231-232 of the Civil Code); the rules on birth registration, the establishment of paternity and the attribution of the paternal surname are established in the pre-eminent interests of the minor.

The Corte d'Appello had also ruled that the conditions to raise an issue of constitutionality (*questione di legittimità costituzionale*) of Art 232 of the Civil Code and of Art 5, 12 and 8 of legge no 40 of 2004 were not fulfilled, since the lack of recognition in Italian law of *post-mortem* IVF was aimed at protecting the child's right to mental and physical well-being and his right to be raised by two parents.

The Corte di Cassazione, instead, established the following rule (*principio di diritto*), that the consent of the husband or partner to a procreation technique, if not withdrawn, is an adequate basis to attribute to the child the legal status of legitimate or recognized child, even if the husband or partner has died and more than three hundred days have passed since his death. According to the Supreme Court, Art 8 of legge no 40 of 2004. 40 applies, instead of Art 232 of the Civil Code.

II. The Legal Background to the Decision

After R.C.'s appeal was denied by the Corte d'Appello di Ancona, she appealed to the Corte di Cassazione, on the grounds that: the Corte d'Appello had incorrectly attributed to the civil registrar a discretionary power to evaluate the authenticity of a statement, thus allowing the registrar to deny the registration of the paternal surname in the child's birth certificate; the Corte d'Appello had applied Arts 5 and 12 (para 2) of legge no 40 of 2004, instead of Art 8 of the same Law, in order to establish the possibility of recognizing post-mortem IVF in Italy; the Court of

Appeals had wrongfully applied Art 232 of the Civil Code. R.C. also argued that the judgement was contrary to constitutional, European and international principles on child protection.²

While the first ground of appeal was not accepted, the Corte di Cassazione found that the matter of the case was the possibility of amending a birth certificate which had already been issued in Italian territory, under Arts 95 and 96 of decreto del Presidente della Repubblica 3 November 2000 no 396. According to the Supreme Court, when R.C. declared the birth of her daughter to the civil registrar of her municipality and applied for a registration of the deceased husband's fatherhood and for the attribution of the paternal surname to the child, she made two different declarations, one for the birth, the other for the attribution of paternity and of the paternal surname. By filing the documentation related to the procreation procedure which she had undergone in Spain, R.C. had proven the consent of her deceased husband, as well as the use of his gametes after death.

The Court stressed that the civil registrar, in receiving the documentation, was not entitled to issue any decision on R.C.'s requests or to establish whether or not the event described was compatible with Italian law. In other words, the civil registrar was not entitled to rule on the *trascrivibilità* in Italy of a birth certificate issued by a country allowing artificial fertilization techniques (such as the one used by R.C.). The registrar was only entitled to rule on the possibility, or not, of amending a birth certificate which had already been issued on Italian territory.

Therefore, the lawfulness of *post-mortem* IVF in Italy was not relevant; the correlation between R.C.'s statements and the content of the birth certificate was the only issue to be considered.

According to the Supreme Court, any consideration – whether or not based on legge no 40 of 2004 – on the lawfulness of a homologous post-mortem fertilization technique in Italy was irrelevant. Once the child was born, it was necessary to determine if the presumptive mechanisms established in Arts 231 and 233 of the Civil Code were to be applied in order to prove paternity, or if it was also necessary to take into account the provisions of legge no 40 of 2004 on the role of consent in artificial procreation.

As the mother – the person declaring the birth to the civil registrar – was

² For previous cases which rejected the application for access to post-mortem procreation with a husband's cryopreserved gametes, Tribunale di Bologna 31 May 2012, *Foro italiano*, I, 3349 (2012); Tribunale di Bologna 21 May 2014, *Corriere giuridico*, 933 (2015); Tribunale di Roma 19 November 2018, *Foro italiano*, I, 692 (2019), dismissed the urgent appeal (Art 700 of Code of Civil Procedure) brought by a widow to obtain the cryopreserved gametes of her deceased husband from a medical centre in order to have access to procreation abroad. Otherwise, in contrast, Tribunale di Palermo 8 January 1999, *Foro italiano*, I, 1653 (1999), with commentary by L. Nivarra, 'Fecondazione artificiale: un caso recente e un'opinione dissenziente (ma solo sul metodo)'; and *Famiglia e diritto*, 384 (1999), with commentary by G. Cassano, 'Diritto di procreare e diritto del figlio alla doppia figura genitoriale nella inseminazione artificiale post morte'; Tribunale di Bologna 16 January 2015, *Foro italiano*, I, 1101 (2015), with note by G. Casaburi; Tribunale di Roma 8 May 2019, *Foro italiano*, I, 1952.

certainly no longer married, the marriage having being dissolved by the death of her husband, and since she had undergone an artificial procreation treatment with her husband's gametes, which had been collected prior to his death, it was necessary to verify whether or not the presumption established by Art 232 of the Civil Code impacts on the correspondence of the content of the certificate to the factual truth, ie, the paternity of the mother's ex-spouse.

De iure condito, in this case, the presumption of conception during the marriage, does not apply when three hundred days have passed since the date of the dissolution of the marriage. Hence, if the presumption did not apply, there could be no correlation between the facts as declared to the civil registrar and the content of the birth certificate.

On the other hand, it is likewise indisputable that, pursuant to Art 250, para 1, of the Civil Code, a child born out of marriage can be recognized, as provided by Art 254 of the Italian Civil Code. The recognition can come from the mother or the father, even if they were married to a third person at the time of conception, since recognition can take place both jointly and separately. Obviously, a separate recognition can only have effect with regard to the author; for example, only a recognition by the father can attribute the paternal surname.³

The Court further noted that, under legge no 40 of 2004, a child born after an assisted procreation technique is legally a legitimate or recognized child of the couple (Art 8); pursuant to Art 9, if heterologous assisted procreation techniques are used, the spouse or partner whose consent to the usage of the said techniques has been given cannot challenge his paternity or her maternity.

According to the Court, the R.C. case is not about the lawfulness of assisted procreation – in particular, a technique of homologous *post-mortem* fertilization – in Italy. The case must be resolved by merely applying the rules of filiation to a child born in the national territory as a result of artificial procreation – whether the latter is lawful or not.

Any consideration of the lawfulness or not of the procreation technique in Italy cannot have an adverse impact on the child or his legal *status*. Even if a birth comes after the use of techniques which are not regulated, or even forbidden, it nonetheless triggers, in the pre-eminent interest of the child, the application of all the provisions concerning his legal *status*, as clearly stated by the Eur. Court H.R. in the *Menesson v France* and *Labassee v France* cases.⁴

³ Regarding the differences still existing between filiation inside and outside marriage, see M. Sesta, 'Famiglia e figli a quarant'anni dalla riforma' *Famiglia e diritto*, 1012-1013 (2015); M. Dogliotti, 'La nuova filiazione fuori dal matrimonio: molte luci e qualche ombra' *Famiglia e diritto*, 480 (2014); P. Schlesinger, 'Il D.Lgs. n.154 del 2013 completa la riforma della filiazione' *Famiglia e diritto*, 443 (2014); M. Mantovani, 'Questioni di accertamento della maternità e sistema dello stato civile' *Nuova giurisprudenza civile commentata*, II, 323 (2013).

⁴ Eur. Court H.R., *Menesson v Francia* and *Labassee v Francia*, Judgment of 26 June 2014, *Nuova giurisprudenza civile commentata*, I, 1122 (2014), with note by C. Campiglio 'Il diritto all'identità personale del figlio nato all'estero da una madre surrogata (ovvero, la lenta agonia del limite dell'ordine pubblico)'. See also H. Fulchiron-C. Bidaud-Garon, 'Reconnaissance ou

The Corte Costituzionale, well before 2004, in judgement no 347 of 1998 had stressed the need to keep the regulation of procreation techniques separate from the dutiful and pre-eminent legal protection of the child and his or her dignity.⁵ The Corte di Cassazione takes a similar stance in its landmark judgement no 19599 of 30 September 2016, according to which

‘the consequences of the violation of the prescriptions and prohibitions set by legge no 40 of 2004, as attributable to adults, who have resorted to a fertilization practice which is illegal in Italy, cannot fall on the child’.⁶

This was also taken into consideration by the Italian lawmakers in drafting Art 9, para 1. According to the said paragraph, which was adopted when any technique of heterologous assisted reproduction was still forbidden in Italy, a spouse or cohabiting partner who has agreed to the use of the technique cannot challenge his paternity or her maternity.⁷

In assessing the relationship between the provisions of the Civil Code and those of legge no 40 of 2004 (in particular its Arts 8 and 9), it is necessary to verify if the discipline of filiation in assisted reproduction cases is an alternative system to that of the Civil Code, in line with the peculiarities of that technique or if it remains within the boundaries of the Civil Code system, regulating filiation by natural procreation through the provision of specific exceptions. In consequence of the outcome chosen, the principles and criteria for the attribution of a legal *status* to the child will be applicable, or not, to assisted procreation filiation.

reconstruction? À propos de la filiation des enfants nés par GPA, au lendemain des arrêts Labassée, Mennesson et Campanelli-Paradiso de la Cour européenne des droits de l’homme’ *Revue critique de droit international privé*, 1 (2015); A. Renda, ‘La surrogazione di maternità tra principi costituzionali ed interesse del minore’ *Corriere giuridico*, 4, 479 (2015); 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 (2014); A. Vesto, ‘La maternità surrogata: Cassazione e Cedu a confronto’ *Famiglia e diritto*, 306 (2015); C. Danisi, ‘Superiore interesse del fanciullo, vita familiare o diritto all’identità personale per il figlio nato da una gestazione per altri all’estero? L’arte del compromesso a Strasburgo’, available at www.articolo29.it; D. Rosani, ‘The best interest of the parents. La maternità surrogata in Europa tra interessi del bambino, Corti supreme e silenzio dei legislatori’ *BioLaw Journal*, 1, 24 (2017); I. Anrò, ‘Surrogacy from the Luxembourg and Strasbourg Perspectives: Divergence, Convergence and the Chance for a Future Dialogue’ *Il diritto dell’Unione Europea*, 3, 465 (2016).

⁵ Corte costituzionale 26 September 1998 no 347, *Nuova giurisprudenza civile commentata*, I, 51 (1999), with note by E. Palmerini, ‘Il disconoscimento di paternità del minore nato da fecondazione eterologa’; L. Balestra, ‘Inseminazione eterologa e status del nato’, and F. Uccella, ‘Consenso revocato, dopo la nascita del figlio, all’inseminazione eterologa e azione di disconoscimento: ciò che suggerisce la Corte costituzionale’ *Giurisprudenza italiana*, 461 (1999); G. Ferrando, ‘Inseminazione eterologa e disconoscimento di paternità tra Corte costituzionale e Corte di cassazione’ *Nuova giurisprudenza civile commentata*, II, 223 (1999).

⁶ Corte di Cassazione 30 September 2016 no 19599, *Nuova giurisprudenza civile commentata*, 362 (2017), with commentary by G. Palmieri, ‘Le ragioni della trascrivibilità del certificato di nascita redatto all’estero a favore di una coppia same sex’.

⁷ A. Cordiano, ‘Alcune riflessioni a margine di un caso di surrogacy colposa. Il concetto di genitorialità sociale e le regole vigenti’ *Il diritto della famiglia e delle persone*, 473 (2017).

Since the said *status* stems from the birth certificate, the rules on the drafting of the said document also depend on the aforesaid solution, as those rules are applied to verify whether or not the facts declared to the registrar correspond to the content of the birth certificate drafted by the said registrar.

According to the Court, in this assessment many factors must be evaluated, such as: the importance attributed in the contemporary society to previously unknown and unpredictable needs; the constant dialogue among national Supreme Courts, the ECHR and the EU Court of Justice, establishing a *circularity of interpretative solutions*; the consideration of procreative techniques as an alternative method to natural conception, or rather as a health treatment aimed at overcoming a medical problem affecting one or both members of a couple.⁸

In light of these factors, it can be concluded that procreation in a globalized society has a *particular dynamism*, related to the concrete interests that it is aimed at satisfying; through the application of procreative techniques after the death of a partner, it is possible to overcome the ‘material’ limit of the *marital (or partner)* relationship, thus switching from the exercising of a right to procreation to the performance of a parental ‘function’.

In such a scenario, in which parenting is declined in a multitude of unprecedented contexts, it is necessary to understand if the limits to parenting in Italian law can act as ‘counter-limits’ (*controlimiti*)⁹ for the protection of the rights of the child, or if it is necessary to overcome the boundaries of tradition, accepting and regulating the new paths to parenting.

It is therefore difficult to balance the need for a clear and stable state of filiation and the correlation of the said *status* to the truth, since nowadays a child may be not just someone who was born from a natural act of conception; filiation can also be the result of assisted fertilization (homologous or heterologous).

In light of this, some scholars believe that the regulation of *status* in the legge no 40 of 2004 is a completely alternative system to the Civil Code rules. The *status* of a child born from artificial procreation is not attributed under the rules applicable to natural biological generation, which are different for matrimonial and non-matrimonial generation, but is attributed directly by the law, with respect to the couple who agreed to use the artificial techniques. The consent given by the spouse or cohabiting partner to artificial fertilization (if not revoked before fertilization) is not merely an ‘informed consent’ but an attribution of *status*, by a legal declaration of maternity and paternity which is public and certain, without

⁸ Corte di Cassazione 6 June 2013 no 14329, *Nuova giurisprudenza civile commentata*, I, 21 (2014), with commentary by A. Schuster, ‘Quid est matrimonium’, talking of a ‘felice contaminazione di fonti’. See also Corte costituzionale 24 October 2007, nos 348 and 349, *Giurisprudenza costituzionale*, 3475 (2007); and Corte costituzionale 7 April 2011 no 113, *Giurisprudenza costituzionale*, 1523 (2011).

⁹ See, recently, S. Polimeni, *Controlimiti e identità costituzionale nazionale* (Napoli: Editoriale scientifica, 2018), passim.

the need for any further manifestation of will.¹⁰

Other scholars, however, hold that the same principles on natural filiation apply to children born from artificial procreation. For them, the consent given by the spouse or partner to the technique does not directly attribute any *status* to the child but will only allow the latter to identify his/her parent on the basis of the said consent.

This interpretative dilemma also impacts on the *status* of the child in the case of *post-mortem* fertilization, a technique which follows a sequence of steps, *viz*: 1) the extraction of the seed from the man's corpse; 2) the artificial insemination of the woman with cryopreserved seed, taken from her partner before death; and 3) the implantation, in the woman's body, of the embryo which came into existence when both members of the couple were alive.¹¹

Art 5 of the legge no 40 of 2004 allows access to procreation only to couples whose members are both living, thus excluding a widowed woman (under penalty of sanction – Art 12).¹² The provision, however, does not specify *at which point* of the complex procedure of fertilization both members of the couple need to be alive. It is up to the interpreter, in light of the legal principles applicable, to determine whether or not each of the three different hypotheses outlined above should be considered illegal.¹³

Furthermore, putting aside the issue of the lawfulness of a *post-mortem* fertilization technique, it must also be established whether or not Art 8 of legge no 40 of 2004, regulating the legal *status* of the child, can also be applied when the said child was born (as in the case in point) more than three hundred days after the death of the father.

Those who believe that, even in the case of assisted procreation, the general principles of the Civil Code regarding natural filiation apply, are divided between, 1) those who assert that the birth of a child from homologous *post-mortem* fertilization after the period of time in which the presumption of conception in marriage operates can only lead to a judicial claim of paternity;¹⁴ and 2) those who believe that, even in this case, the presumption of paternity operates whenever conception in marriage can be proven, under Art 234 of the Civil Code, ie when the fertilization and the creation of the embryo took place during

¹⁰ A. Ricci, 'La disciplina del consenso informato all'accesso alle tecniche di procreazione medicalmente assistita. Il d.m. 28 dicembre 2016, n. 265: novità e vecchi problemi' *Nuove leggi civili commentate*, I, 40 (2018).

¹¹ S. Rodotà, 'Repertorio di fine secolo' (Roma-Bari: Laterza, 1992), 230.

¹² See G. Recinto, 'La legittimità del divieto per le coppie same sex di accedere alla PMA: la Consulta tra qualche *chiarimento* ed alcuni *revirement*' *Corriere giuridico*, 1466 (2019), about Corte costituzionale 23 October 2019 no 221.

¹³ About Art 5, F. Naddeo, 'Accesso alle tecniche', in P. Stanzione and G. Sciancalepore eds, *Commento alla legge 19 febbraio 2004, n. 40* (Milano: Giuffrè, 2004), 79.

¹⁴ *Contra* M. Sesta, 'Procreazione medicalmente assistita' *Enciclopedia giuridica* (Roma: Treccani, 2004), XXVIII, 9.

the period of the marriage.¹⁵

The latter thesis, however, will lead to a different legal *status* of the child, according to the procreation technique used, since it is possible to freeze and conserve for a long time not only the embryo but also the seminal fluid; the fertilization of the ovule, therefore, can take place even after the death of the husband or partner (as in the present case).

Those scholars who are favourable to the application of legge no 40 of 2004 believe that the provision of Art 8 (on the legal *status* of the child) is not limited to the hypotheses of 'lawful' assisted reproduction, but, on the contrary, applies also in the case of heterologous assisted procreation (which was prohibited in 2004);¹⁶ since the law forbids any challenge to the child's *status* after a consent to the technique has been given, this means that consent alone attributes a legal *status* to the child.¹⁷

Therefore, if after the death of the husband who had given his consent, the formation and implantation of embryos with cryopreserved seed and the oocytes of the wife took place, the legal protection granted to the child should not cease; the genetic link would be enough to establish a relationship of filiation with both parents, in spite of any other national rule.¹⁸

By this perspective, the provision of Art 9 on heterologous procreation could well extend to homologous procreation cases.

Similarly, the undoubted pre-eminence of the need to protect the child by granting him a definite *status filiationis*, as stipulated by Art 8, should not be limited by the subjective boundaries of Arts 4 and 5.¹⁹

The Court ruled that the provisions of legge no 40 of 2004, in particular Art 8, apply to the case under scrutiny. It is reasonable to conclude that, when the partner dies after giving his consent to assisted procreation and before the formation of the embryo with the previously cryopreserved seed, the child is to be considered born during the marriage of the couple. Therefore, although the requirement for the existence of all subjects at the time of fertilization of the ovule is lacking, once the birth has taken place, fatherhood must be attributed to the husband or partner who expressed his consent, thus setting in time his decision to assume parenthood.

In the specific case, Art 8 of legge no 40 of 2004 applies, rather than the

¹⁵ See A. Natale, 'I diritti del soggetto procreato *post mortem*' *Famiglia, persone e successioni*, 529 (2009); M. Faccioli, n 1 above, 1284.

¹⁶ A. Cordiano, 'C'era una volta e una volta non c'era...: l'interesse del minore nella pronuncia delle sezioni unite in tema di maternità surrogata', (2020) forthcoming.

¹⁷ G. Oppo, 'Procreazione assistita e sorte del nascituro' *Rivista di diritto civile*, I, 105 (2005); and T. Auletta, *Diritto di famiglia* (Torino: Giappichelli, 2018), 326.

¹⁸ Regarding which, see, A. Valongo, 'Profili evolutivi della procreazione assistita *post mortem*' *Diritto delle successioni e della famiglia*, 538 (2019); *contra* A. Morace Pinelli, n 1 above, 3360; F. Naddeo, n 13 above, 79; C. Cirao, 'Brevi note in tema di procreazione medicalmente assistita e regole determinative della genitorialità' *Jus civile*, 485 (2014).

¹⁹ A. Valongo, n 18 above, 538.

presumption established by Art 232 of the Civil Code, which cannot be construed so as to impede the attribution of a *status* of filiation from the deceased husband to a child born from homologous fertilization performed *post-mortem*, even if the birth occurred after the expiration of the term of three hundred days from the dissolution of the marriage for reason of death.²⁰

Therefore, according to this interpretation of Art 8, the birth, taken as a factual element, should have led to the formation of the corresponding civil *status* document, indicating the paternity of G.A. and the attribution of the paternal surname to the child. In doing so, the registrar would not have attributed to the daughter a *status* in violation of Art 232 of the Civil Code, but only amended an incorrectly drafted document, putting it in line with the facts as evaluated under the legislation in force.

III. Phenomenology of Filiation and the Dilemma of Two Alternative Systems

In today's substantial diversification of family models, it is clear that the phenomenon of social parenting is closely connected to the progress of science and technology, and their ability to manipulate and dispose of one's body; the expansion of scientific techniques can, in fact, have a strong impact on motherhood and parenting, and even on our identity.²¹

This incessant progression began with the introduction of legge 22 May 1978 no 194 on the voluntary termination of pregnancy and continued with contraceptive methods and with pre-natal and pre-implantation diagnoses. Nowadays, in the field of assisted reproductive techniques and of surrogacy, it is creating extremely complex cases, impacting on the relationship of the individual with his or her own body and identity; this is also true within a more general perspective, on an anthropological level of 'gender beings' (*esseri di genere*).²² These techniques also challenge the dominant and traditionally structured paradigm of biological parenting, based on heterosexuality, genetic derivation, gestation and childbirth.²³

Assisted reproductive techniques have seen the liberalization of heterologous procreation and now they highlight the split between the constitutive elements of the procreative process; alongside the traditional and more well-known forms of

²⁰ G. Oppo, n 17 above, 105.

²¹ See A. Cordiano, *Identità della persona e disposizioni del corpo* (Roma: Aracne, 2011), 235-246. On the relevance of social parenthood, A. Gorgoni, 'La rilevanza della filiazione non genetica' *Persona e mercato*, 153 (2017).

²² These are the words of J. Habermas, *Il futuro della genetica umana. I rischi di una eugenetica liberale* (Torino: Einaudi, 2001), 31.

²³ I. Corti, *La maternità per sostituzione* (Milano: Giuffrè, 2000), passim; L. Rossi Carleo, 'Maternità surrogata e status del nato' *Famiglia*, 377 (2002); P. Zatti, 'Maternità e surrogazione' *Nuova giurisprudenza civile commentata*, II, 193 (2000).

homologous and heterologous procreation, the lesser known hypothesis of entirely heterologous fertilization (with donation of gametes on both germ lines) exists.

Procreation can also occur as between a lesbian couple, where the genetic mother, ie the ovule donor, is the partner of the woman who is biologically pregnant. The latter is often the legal mother, while a symbolic link is created with the social mother on the basis of biological descent.

Surrogacy is even more disruptive towards the naturalistic elements of maternity, ie gestation and childbirth, insofar as it splits the voluntarist element, related to the creation of a family project and of an engaging bond, as well as the identity one, from the organic element, which may be missing in whole or in part.²⁴

As the Court correctly suggests, today, in the case of *post-mortem* fertilization different situations arise, *viz*: 1) the extraction of the seed from the man's corpse; 2) the artificial insemination of the woman with cryopreserved seed, taken from the partner before death; and 3) the implantation, in the woman's body, of the embryo formed when both members of the couple were alive.²⁵

The first case raises issues which will not be explored in this work, while the other two are problematic on a different level.

It is clear, in fact, that the element of genetic derivation between the child and the parents is present. So is the voluntary profile, given the building of a shared parenting project, merged in the applicants' consent to the technique and culminating in the use of gametes or embryos after the death of one of the couple's partners.²⁶

However, a profile worthy of analysis remains, which is typical of this particular case, *viz*, the temporal split between the expression of the will and the birth of the subject. This does not impede in any way the possibility of detecting the genetic link between the child and the parents, but it is nonetheless a challenge in respect of the legal *status* of the former, since conditions, requirements and effects of the establishment of the filiation bond inside and outside marriage are regulated differently.

In fact, the Court had to decide whether to apply the provisions of the Civil Code (and therefore the presumption established by Art 232 of the Civil Code) or the rules found in the 2004 legislation on assisted procreation (particularly Arts 8 and 9).

This is a most interesting profile of the long judgement which is under analysis in this work: the possible existence of two separate and parallel systems that regulate filiation in different ways, the system of biological parenting in the

²⁴ Tribunale di Monza 17 October 1989, *Il diritto della famiglia e delle persone*, 173 (1989), commented by M. Ventura; *Giurisprudenza italiana*, I, 2, 72 (1992), commented by M. Dogliotti; and also, Corte d'Appello di Salerno 25 February 1992, *Nuova giurisprudenza civile commentata*, I, 177 (1994).

²⁵ See A. Valongo, n 18 above, 525; A. Natale, n 15 above, 523; in the opposite direction for all scenarios, F. Naddeo, n 13 above, 79.

²⁶ See A. Valongo, n 18 above, 528. *Contra* A. Morace Pinelli, n 1 above, 3360.

Civil Code and that of social parenting in legge no 40 of 2004, with their respective rules for establishing and challenging the filiation bond.²⁷

IV. Patterns of Legal Parenthood and the Bio-Paradigm

The phenomenon of social parenting does not end with assisted procreation, but is much broader:²⁸ the temporary foster care by homosexual couples²⁹ and the *sine die* adoptions transformed into ‘mild’³⁰ or ‘open’ ones;³¹ the new cases based on legge 19 October 2015 no 173 on the minor’s right to affective continuity (continuità degli affetti);³² the special adoptions by homosexual partners³³ and the ordinary adoptions granted abroad;³⁴ the transcriptions of the birth certificates of minors born abroad to homosexual couples through access to heterologous assisted procreation³⁵ or through surrogacy.³⁶

²⁷ *Contra* M. Faccioli, n 1 above, 1286.

²⁸ A. D’Angelo, ‘La famiglia nel XX secolo: il fenomeno delle famiglie ricomposte’ *Rivista di diritto civile*, 13 (2011).

²⁹ Tribunale per i minorenni di Bologna 31 October 2013, *Famiglia e diritto*, 273 (2014), with commentary by F. Tommaseo, ‘Sull’affidamento familiare di un minore a una coppia omosessuale’; and Tribunale per i minorenni di Palermo 4 December 2013, *Famiglia e diritto*, 351 (2014), with note by G. Mastrangelo, ‘L’affidamento, anche eterofamiliare, di minori ad omosessuali. Spunti per una riflessione a più voci’.

³⁰ Tribunale per i minorenni di Bari 7 May 2008, *Famiglia e diritto*, 393 (2009).

³¹ Tribunale per i minorenni di Brescia 21 December 2010, *Repertorio Foro italiano*, voce *Adozione ordinaria e in casi particolari*, no 57 (2011); Tribunale per i minorenni di Roma 8 January 2003, *Giurisprudenza di merito*, 1122 (2003); Tribunale per i minorenni di Napoli 24 November 2007, *Famiglia e diritto*, 80 (2008).

³² See M. Dogliotti, ‘Modifiche alla disciplina dell’affidamento familiare, positive e condivisibili, nell’interesse del minore’ *Famiglia e diritto*, 1107 (2015).

³³ Tribunale per i minorenni di Roma 30 July 2014, *Nuova giurisprudenza civile commentata*, I, 109 (2015), with note by J. Long, ‘L’adozione in casi particolari del figlio del partner dello stesso sesso’.

³⁴ Corte d’Appello di Milano 16 October 2015, available at www.articolo29.it; *contra* Tribunale per i minorenni di Bologna 10 November 2014, *Guida al diritto*, 5, 15 (2015), with note by G. Buffone; in mid position, see Corte di Cassazione 14 February 2011 no 3572, *Famiglia e diritto*, 697 (2011), with note by M.A. Astone, ‘La deliberazione del provvedimento di adozione internazionale di minore a favore di persona singola’.

³⁵ In favour of the recognition of the birth certificate established abroad, Corte d’Appello di Torino 29 October 2014, *Famiglia e diritto*, 822 (2015), with note by M. Farina, ‘Il riconoscimento di status tra limite dell’ordine pubblico e best interest del minore’.

³⁶ In favour of the recognition of the legal status of the born from surrogate motherhood, Tribunale di Milano 1 August 2012 and Tribunale di Milano 6 September 2012, *Nuova giurisprudenza civile commentata*, I, 712 (2013), with note by F. Turlon, ‘Nuovi scenari procreativi: rilevanza della maternità sociale, interesse del minore e favor veritatis; contra, Corte di Cassazione 26 September 2014 no 24001, *Nuova giurisprudenza civile commentata*, I, 235 (2015), with note by C. Benanti, ‘La maternità è della donna che ha partorito: contrarietà dell’ordine pubblico della surrogazione di maternità e conseguente adottabilità del minore’; *Corriere giuridico*, 417 (2015), with note by A. Renda, ‘La surrogazione di maternità tra principi costituzionali ed interesse del minore’. Lastly, on Corte di Cassazione-Sezioni unite 8 May 2019 no 12193, see G. Ferrando, ‘Maternità per sostituzione all’estero: le Sezioni Unite dichiarano

However, parenthood connected with technical-scientific practices is a more complex phenomenon; the said complexity once again highlights the aforementioned split between the naturalistic bond of motherhood by childbirth and gestation, the identity bond based on the transmission of genetic heritage and the voluntary, intentional link. The latter stems from the will to create a relationship, as is the case with adoption; such a relationship is both an aspiration of the parents and an assumption of parental responsibility, as it may be with the step-parents in an extended family.

Although historical studies show the past existence of forms of social parenting,³⁷ the dominant paradigm since the nineteenth-century codifications was biological parenting within the conjugal bond; everything that emerged beyond that model has always undergone some sort of assimilation process. However, that dominant paradigm (composed of gestation and childbirth, genetics and parental aspiration) is narrower than the complex existing phenomenology and this causes much perplexity as well as the need to re-discuss the regulatory devices in existence, which partly adhere to the biological model and partly deviate from it.

However, the need to protect minors who were born through assisted reproduction techniques, under a system of protective rules established in the paramount interest of the minor, still remains.

Among the rules inspired by the dominant paradigm of biological parenting, there was Art 4, para 3, of the legge no 40 of 2004, which prohibited access to heterologous assisted technique. Currently, only the Art 12, para 6, remains in force, criminally sanctioning the realization, organization, publication and marketing of surrogacy; a couple found in breach of this rule will be punished with imprisonment for a period of from three months to two years, together with a fine of from six hundred thousand to one million Euros.

Even in the rules on the establishment of filiation relationship, the tendency to adhere to the dominant paradigm is confirmed. Art 269, para 3, of the Civil Code, equates birth to motherhood for the purposes of the action aimed at certifying it; it is evident that, for the Code, motherhood remains connected to the gestational profile and is associated with both the genetic derivation and the voluntarist element. Therefore, the rule permitting proof of motherhood and consequently assigning the *status* of child applies uniformly to all cases, after the adoption of Art 30 of decreto del Presidente della Repubblica 3 November 2000 no 396; the rule operates via the birth certification, which is drafted by the witnesses to the birth.

On the mother's side, the attribution of parenting can only take place on a

inammissibile la trascrizione dell'atto di nascita. Un primo commento' *Famiglia e diritto*, 677 (2019); M. Dogliotti, 'Le Sezioni Unite condanno i due padri e assolvono le due madri' *Famiglia e diritto*, 667 (2019).

³⁷ I. Corti, n 23 above, 41.

'biological' basis, connected to the event of the birth, even if the pregnant woman is not necessarily the genetic mother; this happens when the liberalized practices of heterologous fertilization are used, but also in surrogacy, when the pregnant-surrogate is not the genetic mother.

For paternity, instead, a distinction must be drawn. For the establishment of the paternal bond, Art 231 of the Civil Code assumes the paternity of the husband of a woman giving birth to a child during a marriage, while Art 250 of the Civil Code requires an unilateral act of recognition by the father for filiation out of marriage. The attribution of the paternity to the husband is automatic and presumptive; outside the marriage, a voluntary act of recognition is needed, normally without any further verification. The automatic attribution rule of Art 231, however, applies also if the surrogate mother is married, unless she exercises her right not to be named (Art 30, para 1, of decreto del Presidente della Repubblica 3 November 2000 no 396) or recognizes the child as having been born out of marriage. On the paternal side, therefore, two deeply distinct kinds of filiation still exist, one regulated by automatic presumptions, the other remaining a 'private (confidential) affair'. It is evident that the attribution of paternity can take place, in good or in bad faith, even with a lack of genetic connection with the social father (also in case of surrogacy).

In order to challenge the filiation bond, Art 240 of the Civil Code allows, with no statute of limitations, both the parents and anyone having an interest in it (Art 248) to challenge motherhood, in case of supposition of childbirth or replacement of the new-born.³⁸

Arts 243 *bis* and 263 admit challenges to paternity and recognition, respectively, if the lack of genetic relationship with the social father is proven; the action must be brought within the short-term and no later than five years from the birth; only the offspring, for whom the action is imprescriptible is exempt from the statute of limitation. It is significant, however, that recognition can only be challenged by any person having an interest in it.

Therefore, motherhood, differently than fatherhood, can be challenged without any legitimation or time limit, but only on the basis of a supposition of childbirth. Thus, the social parent, and the social mother in particular, even when she is also the genetic mother, is not entitled to challenge the *status* of the surrogate mother and have her own *status* recognized.

This applies to heterologous fertilization, despite the fact that the voluntary element of parental consent is present, but also to surrogacy, where the social and even the genetic mother succumbs to the parturient, despite the fact that the latter is a non-genetic and non-social (ie, without any aspiration of parenthood) mother.³⁹ Therefore, the surrogate mother can only exercise her right not to be

³⁸ See the critical analysis of M. Sesta, 'L'accertamento dello stato di figlio dopo il decreto legislativo n. 154/2013' *Famiglia e diritto*, 454 (2014).

³⁹ See L. Lenti, 'La sedicente riforma della filiazione' *Nuova giurisprudenza civile commentata*,

named, under Art 30 of decreto del Presidente della Repubblica 3 November 2000 no 396.

V. Challenging the Bio-Paradigm and Social Parenthood

The system outlined by legge no 40 of 2004 does not appear compatible with the rules of the Civil Code on filiation, based on the coincidence of gestation, genetic profile and family project. It should be noted that Art 9 of legge no 40 of 2004, dictating some limits which are only partially related to the prohibition of heterologous procreation formerly in force, is still valid.⁴⁰

Art 9, para 1, still regulates access to heterologous fertilization and prevents a man who had agreed to the technique to challenge his paternity (Art 243 *bis* of the Civil Code) or his recognition (Art 263 of the Civil Code). The same applies to the spouse or cohabiting partner, who agreed to heterologous procreation, to the mother and to the child; finally, since this is an *actio populi* under Art 263 of the Civil Code, it applies to anyone attempting to challenge paternity or recognition.⁴¹

From the impossibility of challenging the paternal relationship (a bond which is not based on a biological derivation but only on the creation of a family, the implementation of a parenting project and an assumption of parental responsibility), derives a second prohibition, as stated in Art 9, para 2. This applies to any type of procreative technique and prevents the woman from exercising her right not to be named in the birth certificate, under Art 30, para 1, of decreto del Presidente della Repubblica 3 November 2000 no 396. The prohibition of the use of so-called anonymous childbirth is aimed at protecting the child, forbidding a relinquishment of the motherhood role – on the basis of a biological identification with the foetus, similarly to the voluntary interruption of pregnancy – and allowing a greater use of adoption tools. Leaving aside the critical issues raised by the anonymous childbirth system, and by a rule which – somehow paradoxically – denies anonymous childbirth specifically to women who have had access to procreative techniques,⁴² it should be noted that the prohibition applies to all types of homologous and heterologous procreation and aims at protecting the social, even if not genetic, maternity of the person who intentionally carried out the parental project.⁴³

II, 201 (2013).

⁴⁰ See A. Cordiano, 'Alcune riflessioni a margine di un caso di surrogacy colposa. Il concetto di genitorialità sociale e le regole vigenti' n 7 above, 473.

⁴¹ The prohibition provided for by Art 263 of the Civil Code also exists, in fact, for the mother and child, as well as for third parties. See Corte d'Appello di Milano 10 August 2015, available at tinyurl.com/ybf2z9gp (last visited 7 July 2020); F. Borrello, 'Alcune riflessioni sulla disciplina della procreazione eterologa' *Famiglia e diritto*, 947 (2010).

⁴² G. Ferrando, 'La nuova legge in materia di procreazione medicalmente assistita: perplessità e critiche' *Corriere giuridico*, 816 (2004).

⁴³ U. Salanitro, 'La disciplina della filiazione da procreazione medicalmente assistita' *Famiglia*,

Finally, the Art 9, para 3, states that the gamete donor does not acquire any legally recognized parental *status* and thus cannot exercise any right or assume any obligation in consequence. The rule, different from than that enshrined in Art 28, para 8, of the Adoption Law, provides that, even in the presence of a genetic link, no parental relationship can be recognized, since the gamete donation is construed as a (simple) act of solidarity, with no the desire to become a parent or any willingness to take on parental responsibility.⁴⁴

Art 8 of the same Law, under the heading ‘Legal *status* of the child’, prescribes:

‘Those who were born as a result of procedures of assisted procreation techniques have the *status* of children born in marriage or recognised children of the couple who agreed to use the same techniques pursuant to Art 6’.

Art 8 clearly assumes consent as prevailing and as the determining factor of parenting, for children who are born after the use of assisted procreation techniques.⁴⁵

From this perspective, the law strongly asserts self-responsibility in procreation, requiring subjects to abide by their voluntary and informed consent to carry out a parenting project.⁴⁶

Furthermore, in strictly subjective terms, the rule does not contain any reference to Arts 4 and 5, defining the subjective requirement to access to assisted procreation techniques, which confirms the protection of the child (by the attribution of a clear and stable *status filiationis*), as prevalent over a rigid regulation of this particular procreative technique.⁴⁷

The lawmakers did not expressly limit the applicability of the rule to lawful assisted procreation; rather, it can undoubtedly apply to heterologous procreation. In relation to the latter, the impossibility of challenging paternity implies that, even in such cases, a consent to medically-assisted procreation techniques is enough to attribute a *status filiationis*.

The rules of legge no 40 of 2004 in general, do not rigidly attach to the so-called *favor veritatis*, by accepting a split – even a temporal split – between the naturalistic element of gestation and childbirth, the identity and genetic connection

(2004), I, 502.

⁴⁴ See R. Villani, ‘La nuova procreazione medicalmente assistita’, in P. Zatti ed, *Trattato di diritto di famiglia, Le riforme* (Milano: Giuffrè, 2019), II, 328.

⁴⁵ G. Oppo, n 17 above, 105; and T. Auletta, n 17 above, 326; V. Lojacono, ‘Inseminazione artificiale (diritto civile)’ *Enciclopedia del diritto* (Milano: Giuffrè, 1971), XXI, 759.

⁴⁶ See V. Caredda, ‘Scambio di embrioni e titolo di paternità e maternità’ available at www.giustiziacivile.com; A. Thiene, ‘Figli, finzioni e responsabilità civile’ *Il diritto della famiglia e delle persone*, 244 (2016); G. Ferrando, ‘Il caso Cremona: autonomia e responsabilità nella procreazione’ *Giurisprudenza italiana*, I, 996 (1994). *Contra*, P. Virgadamo, ‘Falso e consapevole riconoscimento del figlio naturale o vero atto (illecito) comportante l’assunzione della responsabilità genitoriale? Per un’interpretazione non formalistica dell’atto privato’ *Rassegna di diritto civile*, 943 (2013).

⁴⁷ M. Faccioli, n 1 above, 1285.

and the affective and intentional element. In particular, the discipline of legge no 40 of 2004 overcomes the traditional conflict between *favor legitimitatis* and *favor veritatis*, and introduces a different *favor*; a *favor* for the formal and stable attribution of the parental bond, regardless of the genetic basis of the relationship (so-called *favor stabilitatis*), as well as a *favor* for the volitional and affective element (*favor affectionis*), ie the intention not only to carry out a procreative project but also to build an engaging parental relationship.

Finally, these norms may be extended to all reproductive techniques, thereby establishing an organic system alternative to that of the Civil Code and applicable thus: to surrogate motherhood and fertilization *post-mortem*; to children who were born after a violation of the rules forbidding reproductive cloning (Art 12, para 7); to ectogenesis (artificial uterus); to the production of hybrids or human chimeric beings; to eugenic manipulations on embryos (Art 13).⁴⁸

In all these cases, Arts 8 and 9 of legge no 40 of 2004 should apply, in order to safeguard the interest of the minor to a preservation of his *status* and to a bond with his or her parents, even if the latter generated him or her with eugenic manipulative techniques or with the help of an artificial uterus. This would crystallize a model of non-genetic filiation and social parenting, which balances opposing interests and gives priority to the pre-eminent one, that of the minor.⁴⁹

VI. *Post-mortem* Procreation: Challenges and Boundaries of Social Parenthood in the Near Future

Having set the broad range of ‘new’ parenting cases in context, a number of observations can be made.

Primarily, as to the case submitted to the Corte di Cassazione, its ruling must be fully endorsed.

In fact, the application of Art 8 of legge no 40 of 2004 (in addition) to the specific and quite peculiar hypothesis of homologous *post-mortem* fertilization, appears entirely reasonable. When the husband (or the partner) dies after giving his consent to assisted reproductive techniques, under Art 6 of the Law and the said consent is given before the formation of the embryo, using his previously cryopreserved seed (the use of which he had duly authorized),⁵⁰ the child is to be considered born during the marriage of the couple, insofar as the consent was granted before the dissolution of the marriage due to the death of the husband.⁵¹

⁴⁸ F.D. Busnelli, ‘Il problema della soggettività del concepito a cinque anni dalla legge sulla procreazione medicalmente assistita’ *Nuova giurisprudenza civile commentata*, II, 185 (2010).

⁴⁹ Regarding the prudent (but effective) balance of interests, see the perspective adopted by G. Perlingieri, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo* (Napoli: Edizioni Scientifiche Italiane, 2013), 111.

⁵⁰ G. Ferrando, ‘Orientamenti e tendenze in tema di filiazione’ *Rassegna di diritto civile*, 308 (1991).

⁵¹ See I. Corti, n 23 above, 60; A. Valongo, n 18 above, 528; G. Baldini, ‘La legge sulla

In this case, even if the requirement for the existence of all elements at the time of fertilization of the ovule are lacking, the child must be attributed with the paternity of the man who had expressed his consent under Art 6, without ever revoking it; the willing choice of parenting must be considered relevant. Therefore, and despite the wording of Arts 5 and 6, para 1, of legge no 40 of 2004, even if the birth occurs after the death of the husband and the granting of his consent, the child born from homologous fertilization must be protected.⁵²

The said technique can defer the birth after the consent but in doing so does not impair the certainty of biological paternity. A certain genetic derivation allows the establishment of the parenting relationship with both genetic parents, even if the rules on access to the technique established in Italian law are violated.

This solution recognizes the biological link between a man who has given his consent to assisted procreation and to the utilization of his collected and cryopreserved seed, and a child. By this perspective, the moment at which conception and birth took place (and their lawfulness or otherwise) assume no relevance, since medical techniques allow the delay of birth, without compromising the certainty of biological paternity.

The assumption that the legal system should protect children by granting each the right to a family made up of two parental figures, does not prevent the adoption of such a solution, because the protection of the child prevails even over his or her right to parenting.

It is the case that the legal limits for access to assisted procreation seek to grant the child the right to a family of two parents but the alternative offered to the child is not to come into existence at all. As observed by the Italian Supreme Court, the assumption that being born and growing up with a single parent is a negative existential condition cannot be emphasized to the point of preferring non-life.⁵³ The principle of double parenthood, despite being a guiding criterion in many situations, is not a rule without exceptions or temperaments.⁵⁴ On the contrary, the interests of the child to be quickly granted the certainty of his or her parenting derivation is of primary importance in the construction of his or her identity.⁵⁵

procreazione medicalmente assistita: profili problematici, prime esperienze applicative e prospettive' *Rassegna di diritto civile*, 350 (2006).

⁵² A. Valongo, n 18 above, 538.

⁵³ G. Cassano, 'Diritto di procreare e diritto del figlio alla doppia figura genitoriale nella inseminazione artificiale *post mortem*' *Famiglia e diritto*, 390 (1999).

⁵⁴ P. Perlingieri, 'L'inseminazione artificiale tra principi costituzionali e riforme legislative', in G. Ferrando ed, *La procreazione artificiale tra etica e diritto* (Padova: CEDAM, 1989), 145; F.D. Busnelli, 'Procreazione artificiale e filiazione adottiva' *Famiglia*, 23 (2003); M. Gorgoni, 'Rilevanza giuridica dell'embrione e procreazione di un solo genitore' *Rivista critica di diritto privato*, 402 (2002); A. Valongo, n 18 above, 529. See also, Corte costituzionale 16 May 1994 no 183, *Famiglia e diritto*, 245 (1994). *Contra* A. Morace Pinelli, n 1 above, 3360; also F. Santosuosso, *La procreazione medicalmente assistita. Commento alla Legge 19 febbraio 2004, n. 40* (Milano: Giuffrè: 2004), 50.

⁵⁵ About the double parenthood principle, *ex multis*, F. Ruscello, *La tutela del minore*

The Civil Code rules (Arts 232 e 234, but also Art 462, para 2) are not an obstacle to this solution. They are indeed presumptions which are functional to the establishment of filiation but which are inapplicable to the case under scrutiny.⁵⁶

A second reflection derives from this, on the existence of a system of filiation rules in legge no 40 of 2004, which runs in parallel and is alternative to the Civil Code system.

The Court rightfully noticed that parenthood is becoming detached from marriage and a traditional concept of family, being influenced by a multitude of new contexts. It is necessary to establish a new perspective, wherein family relationships and the new inter-subjective relationships are alternative to the traditional family model. Indeed, the traditional family and parenting model can no longer be solely those which are described in a Civil Code dating from 1942. The obsolescence of the traditional, 'Mediterranean'⁵⁷ family model is evident from a significant breakdown of this dogmatic category, by which 'family' metaphorically passed from being an 'island' to becoming an 'archipelago'.⁵⁸

If *de facto* unions have long been the aggregative concept of several instances of protection and affective needs, today, while the problem of protecting and balancing interests remains essential, the *more uxorio* union has lost its evocative and synthetic value. The reality has become so complex that the study of family law now refers to a composite and articulated multiplicity of interpersonal situations, which are indefinable, subject to constant changes and sometimes even evanescent.⁵⁹ These unprecedented family dynamics, by which individuals manifest their personalities, transcend both the typical family model and the *more uxorio* partnership model; in some cases, the threshold of legal relevance is not reached.

The evolution of traditional cultural models has been strongly influenced not only by globalization but also by the evolution of society as a whole. A contemporary jurist is confronted with some sort of 'axiological relativism'⁶⁰ and with the unfolding of these phenomena within an open,⁶¹ liquid society.⁶² Reassuring affective and family models disappear through an incessant formation and disintegration of liquid relationships, sometimes evanescent and legally irrelevant,

nella crisi familiare (Milano: Giuffrè, 2002), passim.

⁵⁶ L. Lenti, *La procreazione artificiale. Genoma della persona e attribuzione della paternità* (Padova: CEDAM, 1993), 261.

⁵⁷ Those are the words of D. Messinetti, 'Diritti della famiglia e identità della persona' *Rivista di diritto civile*, I, 137 (2005).

⁵⁸ See F.D. Busnelli, 'L'isola e l'arcipelago familiare' *Rivista di diritto civile*, 510 (2002); see also P. Zatti, 'Familia, familiae - Declinazione di un'idea. II. Valore e figure della convivenza e della filiazione' *Familia*, 353 (2002)

⁵⁹ P. Perlingieri, *Diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 1991), 490.

⁶⁰ C. Salvi, 'La famiglia tra giusnaturalismo e positivismo giuridico', in F. Ruscello ed, *Studi in onore di Davide Messinetti* (Napoli: Edizioni Scientifiche Italiane, 2008), I, 883.

⁶¹ K.R. Popper, *La società aperta e i suoi nemici* (Roma: Armando, 1973), I, 179.

⁶² Z. Bauman, *Modernità liquida* (Roma-Bari: Laterza, 2000), 72.

but able nonetheless to impact on the social framework.⁶³ Thus, alongside the nuclear family (based or not on a marital bond and regardless of sexual characterization), there are single adults, who often evolve into single parent families.⁶⁴ The liquidity of relationships shapes a recomposed⁶⁵ and enlarged family.⁶⁶ These relations come into existence regardless of biological links and legal reference models and they require a legal recognition which is distant from traditional categories but that is legitimised by social and affective relations anyway.

However, the emergence of different inter-subjective relations based on affection is constantly evolving, so that it also requires systematic (and no longer occasional) protection of phenomena which were previously unknown or considered as minority cases and need to emancipate themselves from those traditional models, which are no longer appropriate.

By this perspective, the inapplicability of the Civil Code rules, based on a system of norms and assumptions aimed at giving legal certainty to procreation are confirmed. In the Civil Code system, the traditionally dominant paradigm of biological parenthood applies, in which heterosexuality, genetic derivation, gestation and childbirth coincide. Exceptions are strictly limited, as happens with actions to challenge parental relationship (Arts 243-*bis* and 263).

On the one hand, this system outlined by legge no 40, protects the child born from procreative techniques, granting him or her a precise legal *status* and extending such protection not only to 'lawful' assisted procreation (Art 8) but also to cases of heterologous assisted procreation (which was forbidden in 2004). In the latter case, the denial of actions challenging the parental relationship implies that the consent to assisted procreation techniques is sufficient to grant the child a legal *status*. Similarly, the paramount interests of the child to be granted a *status filiationis*, as provided by Art 8, is not subject to the limits set in Arts 4 and 5, as the said paramount interests must receive horizontal protection.

On the other hand, the rule set in Art 9 on heterologous procreation and, more generally, the limits on the possibility of challenging the parental bond, reveal a similar tension.

The prohibition on maternal anonymity, which deviates from the general principles and applies to all types of assisted procreation, highlights the differences between natural and medically assisted procreation with reference to the *status* of the child, since in the latter case, the consent given to the practice of medically-

⁶³ D. Messinetti, n 57 above, 145.

⁶⁴ M. Mantovani, 'Le famiglie monoparentali', in G. Castellani and A. Cordiano eds, *La famiglia nella società contemporanea* (Roma: Aracne, 2016), 25.

⁶⁵ M.T. Meulders-Klein-I. Théry, *Quels repères pour les familles recomposées?* (Parigi: Nathan, 1995); see also, S. Mazzoni, *Nuove costellazioni familiari: le famiglie ricomposte* (Milano: Giuffrè, 2002); and Id, 'Le famiglie ricomposte: dall'arrivo dei nuovi partners alla costellazione familiare ricomposta' *Il diritto delle persone e della famiglia*, 369 (1999).

⁶⁶ A. Oliviero Ferraris, *Il terzo genitore. Vivere con i figli dell'altro* (Milano: Raffaello Cortina, 1997); A.L. Zanatta, *Le nuove famiglie* (Bologna: il Mulino, 2008), *passim*.

assisted procreation indicates a strong awareness by the perspective parent, who takes upon himself or herself a responsibility with regard to filiation, such as to exclude the right of the woman not to be registered as the mother.

Having the same purpose of protecting the child, lawmakers linked the establishment of the filiation relationship to the consent given by parents to procreation techniques, marking yet again a difference between the rules regulating assisted procreation and those issued for natural procreation. This is also evident in Art 9 of the Law, wherein, in the case of heterologous fertilization, the child's interests become a constraint on the principle of biological fact. Again, the consent given by spouses or cohabitating partners to the use of assisted reproduction techniques prevails. Therefore, for the mother as well as for the father, voluntary and informed engagement in the parental bond are constitutive elements of the parental relationship (and of social parenthood), which become impossible to remove. Therefore, a person who, after having been given appropriate information, has given his or her consent to a procedure of heterologous artificial insemination, cannot challenge the child's *status* under Arts 243-bis and 263 of the Civil Code, or (in the case of the mother) exercise the right not to be named on the birth certificate, under Art 30 of decreto del Presidente della Repubblica 3 November 2000 no 396. These rules are established in order to 'prevent the parent from being able to make up for the consent he or she had already given' and oblige him or her to 'assume the responsibilities arising from the parent-child relationship'.⁶⁷

This is confirmed by the fact that under Art 9 of the Law, the donor of gametes does not acquire any legal parental relationship with the child and cannot assert any right or assume any obligation in consequence. Furthermore, in the presence of a genetic derivation, the parental relationship with the child cannot be established because it is implicit that, at the basis of the gametes donation, there was a (mere) act of solidarity, not accompanied by any aspiration to become a parent or the will to assume parental responsibility.⁶⁸

The principle of self-responsibility in procreation, as set out in the said provisions, is similar to the, albeit different, principle of responsibility for procreation.⁶⁹ Self-responsibility in procreation expresses a conscious project of shared parenting. For this reason, admitting a disavowal due to a subsequent reconsideration by the parent would allow that parent to betray his or her free and informed assumption of parental responsibility, despite the lack of a biological relationship; at the same time, it would be a violation of the rights and expectations of the child, by an adult who had freely and consciously assumed the obligation to accept him or her as an offspring.⁷⁰

⁶⁷ See U. Salanitro, n 43 above, 502.

⁶⁸ Again, critically, *ibid* 495.

⁶⁹ A. Thiene, n 46 above, 243.

⁷⁰ R. Villani, n 44 above, 688, fn 295.

The freely adopted decision to assume parental responsibility and create a significant tie with the child triggers a *favor minoris*, under which the formal attestation and maintenance of the *status* acquired and the preservation of existing parental ties, ie the right to stability in a family relationship, are safeguarded.⁷¹ These conclusions, which were reached well before the enactment of the legge of 2004, enshrine a principle of self-responsibility in procreation, that might also be extended to other contexts,⁷² at least tentatively.⁷³

This complex alternative system stands even in the case of homologous *post-mortem* fertilization, for which no conflict between *favor veritatis* and *favor minoris* is conceivable, since the latter includes the child's right to his or her own identity. The consent given by the spouses or partners is thus a qualifying and decisive element in order to establish parenthood or paternity, in order effectively to protect the minor's personality.

On the contrary, the Civil Code rules are not adequate to regulate *post-mortem* procreation, wherein procreation took place after the death of the subject who had, however, given his consent to the use of his gametes; the genetic link, which is the foundation of the Civil Code rules on filiation, will be present. In this case, although the requirement of the existence of all the subjects at the moment of the fertilization of the ovum is missing, once the birth has taken place, the child will be entitled to have, as a father, the person who had consented to that, thus making a conscious choice of parenthood.

It might be also said with a degree of confidence that, in the context of assisted reproduction, three guiding criteria apply. They are: the child's entitlement to the timely and stable establishment of parenthood and to enjoy the benefits of parenthood, in terms of care and affection; the consent to use artificial fecundation techniques does not cover just a health treatment but is also, as an essential component, a willingly assumed and informed parental project; the consent must be recognized both as the basis of the filiation bond and as a limit to the possibility of challenging the same bond.

However, the picture is still broader than that. It is unclear as to whether or not the Supreme Court would have ruled in the same way, if *post-mortem* fertilization had been carried out with embryos of the couple and the genetic contribution of a foreign donor (heterologous procreation). Would consent, in such a case, still be considered a sufficient basis in order legally to establish paternity, or, if so, would social filiation (and consent) be able to overcome a complete lack of biological derivation?

The norms of legge no 40 of 2004 are indeed able to protect the 'traditional' homologous and heterologous procreation, including perhaps *post-mortem*

⁷¹ See also M. Sesta, 'Venire contra factum proprium, finzione di paternità e consenso nella fecondazione assistita eterologa' *Nuova giurisprudenza civile commentata*, II, 350 (2000).

⁷² See V. Caredda, n 46 above.

⁷³ A. Thiene, n 46 above, 244. *Contra* P. Virgadamo, n 46 above, 943.

fertilization but the same rules might prove insufficient to address, for example, surrogacy.

In the future, the Italian Supreme Court may face a case of *post-mortem* fertilization of embryos with a surrogate mother.⁷⁴ In other cases, the Italian Courts failed to protect social parenthood and the minor's paramount interests; this occurred in the unique case of crossed embryos between two couples who had undergone homologous fertilization.⁷⁵

Some final notes should be added. When the material conduct is carried out beyond Italy, imposing sanctions and prohibitions only shows the fragility of the system, since, in addition to critical profiles related to the extraterritorial effect of internal rules, the forbidden material conduct leads to the birth of human beings, who are generated without fault of their own, as a result of the actions (sometimes illegal) of other persons. Whatever legislation is deemed applicable, it will not be able to address, in the medium term, the infinite possibilities which science is able to offer to people who are willing to realize their parental aspirations.

Legal scholars and lawmakers should instead start from definitive abandonment of any distinction between filiation inside and outside marriage, in order to create a complex system of filiation that is able to integrate the rules of the Code, based on the biological paradigm, with those on biological parenting.⁷⁶ Such a system would not be always based on biological derivation only, or on the naturalistic element of gestation and childbirth but would put greater emphasis on informed and voluntary consent, to be guided and regulated, as well as to be limited but not devalued.

⁷⁴ A. Valongo, n 18 above, 532, excluding this possibility, but also see S. Simana, 'Creating life after death: should posthumous reproduction be legally permissible without the deceased's prior consent?' 5(2) *Journal of Law and the Biosciences*, 329 (2018), about use gametes of a deceased person, thereby creating a child after the death of a genetic parent.

⁷⁵ Tribunale di Roma 8 August 2014 with note by A. Renda, 'Lo scambio di embrioni e il dilemma della maternità divisa (nota a Trib. Roma, ord. 8.8.2014)' *Diritto delle successioni e della famiglia*, 230 (2015); A. Gorgoni, 'La rilevanza della filiazione non genetica' no 21 above, 175; A. Mendola, 'Scambio di embrioni tra verità genetica e genitorialità biologica' *Giurisprudenza italiana*, 319 (2015); M.N. Bugetti, 'Scambio di embrioni e attribuzione di paternità' *Famiglia e diritto*, 934 (2014).

⁷⁶ A. Valongo, n 18 above, 533, about succession rights; but see also, M.C. Venuti, 'Atti di disposizione del corpo e principio di gratuità' *Diritto della famiglia e delle persone*, I, 827 (2001).

Blockchain and Smart Contracts: Legal Issues and Regulatory Responses Between Public and Private Economic Law

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Abstract

The article investigates some of the most relevant legal issues that emerge in connection with blockchain technology and smart contracts by addressing them from a public policy perspective. In particular, it focuses on some under-investigated problems connected to some possible legal hurdles to their widespread adoption in the legal practice of business at the national and international levels.

The legal analysis of blockchain and smart contracts is then employed to explore the more general question of how much the law needs to change in order to accommodate new technologies, or how much it is instead preferable to believe that the existing law is already capable of accommodating innovation, however radical it may be.

I. General Framework and Premise of Legal Policy

This work aims to take stock of the main legal issues that have emerged and are emerging in connection with blockchain technology and smart contracts. While giving account, at a *descriptive* level, of the laws that have already been approved, the focus will be mostly on the *prescriptive* level, ie, on how the legislature should arguably best tackle this novelty. I will thus question the appropriateness of the choices made so far by the Italian legislature, in the wake of a series of other legal systems which have introduced new specific rules in this field. On this basis, I will reflect on the direction that would be more appropriate for legislators to follow in the future.

I will, therefore, give an account of the recent legislation introduced by the Italian legislature. I shall not, however, dwell particularly on these aspects, nor on the data that emerge from a comparative analysis. This is partly because other works already exist which are dedicated to them,¹ and in general because

* Assistant Professor of Comparative Public Law, University of Turin. I would like to express my debt to the participants at the conference on *Blockchain e diritto (Blockchain and Law)*, held in Turin on 30 May 2019, for their precious reflections, which have been of great help in drafting these pages. The following references to the Turin conference are to be understood as referring to this initiative. I also wish to thank Angelo Rainone for his bibliographical help.

¹ Cf in particular within R. Battaglini and M.T. Giordano eds, *Blockchain e smart contract* (Milano: Giuffrè, 2019).

on the subject, however new it may be, there already exists a relatively large amount of literature.² Above all, I would instead devote myself to some considerations of legislative policy, in order to frame the subject within the more general framework of Italian private and public law, with particular reference to the private and public law of the economy.

As I will say more extensively in the final paragraph, these considerations have to do with the more general question of how much the law needs to change in order to accommodate new technologies. The underlying hypothesis is that it is preferable to consider that the existing law is perfectly capable of accepting innovation, however radical that may be, without having to frantically try to catch-up with the novelty, an effort that even appears to be poised to fail.³

The theoretical questions appear fundamental, especially in a new context such as the one under examination, and need to be properly addressed to endow also practicing lawyers with a sufficiently clear legal framework in their daily application of the existing rules to the matter under consideration. In other words, it does not seem possible to deal profitably with the issue of the law applicable to blockchain and smart contracts, for example,⁴ without posing the question: what is the legal context in which these innovations take place?

In other words, despite certain positions to the contrary,⁵ it seems that this technological innovation is no exception, and just as any other innovation it does not actually take place in a vacuum.⁶ To speak of a 'regulatory vacuum', as sometimes is done regarding these areas,⁷ therefore seems improper.⁸ The idea

² Cf, for instance, A. Alù, 'Blockchain, le principali normative nazionali al mondo' *Agenda Digitale* (19 February 2019), available at tinyurl.com/yae4cell (last visited 7 July 2020); within the legal scholarship, cf, for instance, S. Blemus, 'Law and Blockchain: A Legal Perspective on Current Regulatory Trends Worldwide' *Revue Trimestrielle de Droit Financier* N°4-2017 (December 2017).

³ I will also not deal, if not accidentally, with cryptocurrencies and ICOs, a subject difficult to separate, for which many of the considerations that I will make here are, however, equally valid, *mutatis mutandis*.

⁴ On which cf, for instance, C. Poncibò, 'Smart Contract: profili di legge applicabile e scelta del foro', in R. Battaglini and M.T. Giordano eds, n 1 above, 347; the Authors rightly speaks of a 'false problem' in this regard.

⁵ Cf, for instance, D. Mimran, 'Spanning the Chasm: The Missing Link in Tech Regulation Part 1' *OECD Forum Network series on Digitalisation* (26 April 2019), available at tinyurl.com/ya5ybf6 (last visited 7 July 2020): 'For three decades governments across the globe have created an enormous regulatory vacuum due to a profound misunderstanding of the magnitude of technology on society. As a result, they neglected their duty to protect society in the mixed reality of technology and humanity'.

⁶ Cf S. Deakin and C. Markou, 'The Law-Technology Cycle and the Future of Work' *Centre for Business Research, University of Cambridge Working Paper*, 504 (2018): 'technology never operates in a legal vacuum'.

⁷ Cf eg D. Heller, 'Initial Coin Offerings: Crowdfunding in a regulatory vacuum' *Peterson Institute for International Economics, Realtime Economic Issues Watch* (25 August 2017), available at tinyurl.com/y8exjxov (last visited 7 July 2020).

⁸ This seems to have been the conclusion shared by the participants at the EU Blockchain Observatory and Forum workshop, held in Paris on 12 December 2018 on *Legal Recognition*

of a 'lacuna' in the law, criticized here, inevitably implies that innovation can develop adequately only in the presence of *ad hoc* regulation: until this comes around, the law is unequipped. Indeed, from this perspective, existing law, which was thought of and written long before the emergence of the so-called new technologies, and especially blockchain technology, cannot be deemed capable of making room for innovations like these.

In the following pages, I will first deal briefly with the question of the legal nature of the blockchain and smart contract, logically a priority to all the other ones that emerge when one reflects on the innovation in question and considers its main practical applications (§ II). Then, I will deal in-depth with those issues that, at least at the present time, appear to be the most current and most relevant on a systematic level concerning blockchain and smart contracts.⁹ Both of them, in fact, pose many problems of a theoretical and practical nature. Some of them have already found fairly precise and consolidated answers, such as those on applicable law and the competent court;¹⁰ others are the subject of extensive reflections in the world literature, such as those relating to intellectual property law,¹¹ and the protection of the confidentiality of personal data.¹²

In my opinion, however, there are still several aspects, to a certain extent lying in between blockchain and smart contracts, on which it does not appear that the scholarship has yet reached sufficiently consolidated conclusions, such as effectiveness and remedies (§ III). In some other cases, the legal scholarship has formulated considerations of *law and public policy* that lend themselves, in my opinion, to wide margins of criticism (§ IV). I will then deal with a series of still largely under-investigated problems arising in the interaction between blockchain and smart contracts, on the one hand, and existing law, on the other (§ V). Finally, I will focus on an aspect that seems to have been the subject of insufficient reflection so far, and therefore deserving of further investigation, namely the question of the practical usability of smart contracts in the legal practice of business at national and international levels (§ VI). Then, I will make some concluding remarks in the field of *policy* (§ VII).

of Blockchains and Smart Contracts: cf its report, in particular 7, available at tinyurl.com/yc8kbtc4 (last visited 7 July 2020).

⁹ On the subject, among others, cf L. Parola et al, 'Blockchain and smart contract: open legal questions' *I contratti*, 681 (2018).

¹⁰ On which cf C. Poncibò, n 4 above.

¹¹ Cf, for instance, G. Noto La Diega and J. Stacey, 'Can Permissionless Blockchains be Regulated and Resolve Some of the Problems of Copyright Law?', in M. Ragnedda and G. Destefanis eds, *Blockchain and Web 3.0: Social, Economic, and Technological Challenges* (Abingdon: Routledge, 2019), forthcoming; G. Gurkaynak et al, 'Intellectual Property Law and Practice in the Blockchain Realm' 34(4) *Computer Law & Security Review*, 847 (2018).

¹² Cf for instance, among many, T. Buocz et al, 'Bitcoin and the GDPR: Allocating Responsibility in Distributed Networks' 35(2) *Computer Law & Security Review*, 182 (2019); L. Mörel, 'Blockchain & Data Protection ... and Why They Are Not on a Collision Course' 26(6) *European Review of Private Law*, 825 (2018).

II. Brief Notes on the Legal and Economic Framework of Blockchains and Smart Contracts

The response to all the theoretical and practical questions that arise concerning blockchain technologies and smart contracts depends on how the law qualifies these innovations and on the resulting general framework under which they are construed.

As a first approximation, the blockchains are registers, which contain data, and therefore immediately raise the issue of their possible qualification or not as a database. Depending on whether the blockchains are public or private, the legal relations that one can establish with them will also change. Public blockchains, starting with the one par excellence, or the Bitcoin blockchain, are not owned by anyone. They result from the joint but uncoordinated work, on the one hand, of all those who use them and, on the other hand, of the nodes that validate the transactions, and in doing so, keep the infrastructure operating. The code of public blockchains is by definition open source, and the chain of blocks is continuously changing automatically. A forced change can only occur with an agreement of fifty percent plus one of the nodes, which could give rise to a new blockchain, but it would not change in itself the nature of a good over which no one can individually claim ownership titles or other rights in the broad sense.

From this point of view, the public blockchain appears classifiable, according to the categories of economic theory and economic analysis of law, as a public good,¹³ being endowed with the two characters of non-rivalry and non-excludability. Respectively, in fact, the use of a public blockchain by one subject does not affect the use by others, and no one can prevent others from using it, so much so that they are usually *permissionless*.

The issue is different concerning the so-called private blockchains (typically *permissioned*). In this case, the source code and the resulting database are indeed objects of intellectual property by those who are the authors and hold the keys, and therefore they appear subjectable to intellectual property rules regarding databases.¹⁴

As far as smart contracts are concerned, without dwelling here on the definition issues,¹⁵ I will only highlight what is most relevant from a private law perspective, namely that, according to the approach that seems preferable, the

¹³ Cf T. Cowen, 'Public Goods (entry)' *The Library of Economics and Liberty*, available at tinyurl.com/yb5z683d (last visited 15 October 2019).

¹⁴ On which cf eg M.J. Davison, *The Legal Protection of Databases* (Cambridge: Cambridge University Press, 2009).

¹⁵ On which I have had the opportunity to dwell extensively in other works: cf in particular R. de Caria, 'Definitions of Smart Contracts. Between Law and Code', in M. Cannarsa et al eds, *The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms* (Cambridge: Cambridge University Press, 2019). Here, in line with the definition given by the Italian legislator, on which cf in a moment in the text, I will refer to smart contracts only in the narrow sense, or referring to the so-called decentralized ones, based on distributed registers.

agreement that actually qualifies as a contract in legal terms is typically one that is perfected upstream of the smart contract. From this perspective, the smart contract is only an instrument of (self-)execution of the contract, not a contract *per se*: the actual contract is something different, that was concluded before, even though maybe only a fraction of a second earlier.¹⁶

This distinction is perhaps more difficult in the case of smart contracts concluded by adhesion, or even automatically by machines, but it is still conceptually valid even in these cases where a minimal amount of time passes between the formation of the will and the conclusion of the smart contract.¹⁷

The smart contract consists in fact of software, object in turn of intellectual property,¹⁸ and a source of potential liability for the authors in case of malfunctioning. The software is intended to perform certain operations without the possibility of altering or stopping its operation if the conditions on which it depends have occurred.¹⁹

Therefore, it seems right to argue that a smart contract is a source of contractual obligations, as legally valid agreements.²⁰ However, I believe this is true as long as we qualify the ‘smart contract’ as a ‘synecdoche’:²¹ conceptually speaking, the smart contract does not correspond to the agreement, but presupposes it and constitutes a written translation of it (in computer code language).²² Smart contracts will be referred to as the source of the obligations between the parties, but these obligations arise from a will previously formed, which is received and formalized with the smart contract.

Both the blockchain and the smart contracts have today received a sort of normative definition in the Italian legal system by Art 8-ter of the *decreto*

¹⁶ Cf R. de Caria, ‘The Legal Meaning of Smart Contracts’ 26(6) *European Review of Private Law*, 731, 745-750 (2018).

¹⁷ *ibid*; the inventor of the expression himself has publicly voiced his regret on the use of this expression: cf ‘Vitalin Buterik: I quite regret adopting the term ‘smart contracts’ for Ethereum’ *Bitcoinist* (14 October 2018), available at tinyurl.com/ybwtrguf (last visited 7 July 2020).

¹⁸ Cf, for instance, the well-known provision in the UK Copyright, Designs and Patents Act related to computer-generated works, whose author ‘shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken’ (s. 9(3)).

¹⁹ Cf A.J. Kolber, ‘Not-So-Smart Blockchain Contracts and Artificial Responsibility’ 21 *Stanford Technology Law Review*, 198 (2018), for some reflections on the issue of artificial responsibility. Similar considerations can also be found in P. Cuccuru, ‘Blockchain ed automazione contrattuale. Riflessioni sugli smart contract’ *La Nuova Giurisprudenza Civile Commentata*, 107-119 (2017).

²⁰ R. de Caria, ‘The Legal Meaning’ n 16 above, 746.

²¹ Cf P.G. Monateri, *La sinecdoche. Formule e regole nel diritto delle obbligazioni e dei contratti* (Milano: Giuffrè, 1984).

²² Cf, well before the rise of blockchain, T. Allen and R. Widdison, ‘Can Computers Make Contracts?’ 9(1) *Harvard Journal of Law and Technology*, 25 (1996), that dealt with the issue from a distance, attempting to articulate the requisites that a digital contract needs to meet in order to be deemed an actual agreement, in the sense of ‘meeting of the minds’. Much more recently, specifically on smart contracts, see, for instance, M.L. Perugini and P. Dal Checco, ‘Introduzione agli Smart Contract’, available at tinyurl.com/yxd2ybto (last visited 7 July 2020).

semplificazioni.²³ However, without prejudice to the general criticism of this regulatory choice, both in general and in its particular modalities of implementation, on which I will return in the concluding paragraph, such definitions do not appear able to give new answers to the issues of systematic framing that have confronted the interpreters. In fact, the Italian legislature, in its haste to regulate the new cases in an operation that has been appropriately defined as ‘regulatory marketing’²⁴ seems to have intended to create new, standalone categories. In my opinion, this does not make at all irrelevant the linking of these innovations to existing legal categories, and therefore the considerations made above remain applicable.

III. Effectiveness and Remedies with Regard to Smart Contracts

A first aspect to consider concerns the technical quasi-impossibility of stopping the self-execution of a smart contract, or in any case transferring data or wealth on a blockchain. In fact, even where the law prescribes them, and even where there is a judge who orders them, these actions require the spontaneous collaboration of those who hold the private keys of the wallet that contains the relevant data or digital wealth. The command of the judge, it is said, risks being blunt and ineffective.²⁵ From a technical point of view, unless one puts in place a *hard fork*, which would compromise the underlying assumption of immutability of the blockchain, it is not possible to transfer Bitcoins to someone without the collaboration of the current owner (to be sure, of the person who currently holds the keys of the wallet that ‘contains’ them).²⁶ From this perspective, if the keys are only available in the mind of their holder, and the holder does not cooperate, no seizure or bailiff will ever be possible.²⁷

²³ Decreto legge 14 December 2018 no 135, converted into legge 11 February 2019 no 12.

²⁴ For instance, by G. Finocchiaro at the conference mentioned above in Turin.

²⁵ See, for example, the decree by the Tribunale di Brescia, sezione specializzata imprese 18 July 2018 no 7556, available at www.dejure.it, rejecting a company’s appeal against a notary’s refusal to record in the commercial register a resolution to increase capital employing the contribution in kind of a crypto-currency unit (in this case, of one being ‘still at an embryonic stage’). Making a consideration which appears extendable to any crypto-currency unit, the decree finds that, in this case, there is a lack of ‘suitability of the asset to be the object of aggression by creditors’: in fact, it is necessary to ask oneself the question of the ‘modalities of execution of a hypothetical attachment of the crypto-currency object of assignment, (...) in the light of the well-known existence of security devices with a high technological content which could make it impossible to expropriate them without the consent and spontaneous collaboration of the debtor’; for a comment in a critical sense, see. M. Bellino, ‘Società - Conferimenti in criptovalute: condizioni e limiti’ *La Nuova Giurisprudenza Civile Commentata*, 54 (2019).

²⁶ The issue of immutability has some apparent repercussions in the field of personal data protection, a widely-debated topic on which see, among many, A. Giannopoulou and V. Ferrari, ‘Distributed Data Protection and Liability on Blockchains’ *Amsterdam Law School Research Paper*, 6 (2019), available at tinyurl.com/y6qnkpdv (last visited 7 July 2020).

²⁷ To be sure, cases of seizure have taken place, even if they were brought against intermediaries or exchanges: some instances date back already to 2015 (cf ‘Pedopornografia, indagine sul Deep Web: sequestrata criptomoneta’ *Il Corriere della Sera*, available at

Similarly, if it is established, possibly even by a judge, that a smart contract contains a programming error that produces results contrary to justice, or that the contractual agreement on the basis of which it was written was based on an error or anyway on a faulty assumption,²⁸ there is no way to stop the self-execution of the smart contract. For the reasons set out above, it may then be technically impossible to remedy, with the consequence that the remedies offered abstractly by the law are, in fact, ineffective. If we imagine a debtor who has tokenized all his wealth, there are no assets on which the creditor can satisfy himself with the ordinary enforcement procedures, and therefore his rights end up being frustrated.

This situation would be one of the many examples in which computer code is about to replace the law, with a whole series of relevant implications. In this case, computer code would even neutralize the practical effects of the Weberian monopoly on the legitimate use of force. At least today, the force of cryptography would be more potent than what, for some centuries, has been one of the cornerstones of sovereignty. This would open a possible attack on sovereignty of a scope unknown until now.²⁹

To be sure, it must be recognized that the practical ineffectiveness of the remedies is a fact already quite common today, which in itself does not undermine the theoretical structure of the system.³⁰ Already today it is possible that the debtors are destitute, either because they have squandered the assets constituting their guarantee, or because they have transferred them to third parties which are not possible to track or through operations that are not possible to trace, or for other reasons still. However, this is a matter of fact and does not in itself call into question the theoretical construction of law as we know it.

Unquestionably, even the fact acquires its capacity to undermine the theoretical foundations where the exception is more frequent than the rule.³¹ In this case, if the problem of scalability finds a full solution and these practices reach massive adoption, then a theoretical rethinking could be necessary, but until then, the construction can withstand.

This consideration also makes it possible to respond to the issue raised by some authors concerning particularly damaging provisions for one of the parties, contained in a smart contract. In itself, the law does not give up on the protection of the consumers, for example, through the recognition of the unfairness of specific

tinyurl.com/ya2j4lx8 (last visited 7 July 2020); more recently, cf. an order of seizure by the Tribunale di Firenze in June 2018.

²⁸ This generally refers to the theme of interpretation, on which cf. M. Cannarsa, 'Interpretation of Contracts and Smart Contracts: Smart Interpretation or Interpretation of Smart Contracts?' 26(6) *European Review of Private Law*, 773 (2018).

²⁹ On this subject, cf. R. de Caria, 'Blockchain-Based Money as the Ultimate Challenge to Sovereignty. Reflections from a Public Economic Law Perspective' 6(2) *European Journal of Comparative Law and Governance*, 131 (2019).

³⁰ On the remedial use of coding, see L. Lessig, *The Future of Ideas: the Fate of the Commons in a Connected World* (New York: Random House, 2002).

³¹ Cf. Caterina's speech at the conference in Turin.

clauses that may feature in (the contractual agreement upstream of) the smart contract. Of course, there may be a problem of effectiveness here too, due to particular practical difficulty in benefiting from a court ruling establishing such unfairness. However, the reasoning just expressed remains firm.³²

IV. Economic and Social Considerations

In this paragraph, I would like to make some reflections on a public policy level, because some regulatory choices may depend on this. Firstly, a common criticism of these technologies is that of their energy-environmental impact.³³ The interesting fact is that it does not appear to be an incidental feature of theirs, but rather, in some way, it was programmatically inscribed in their original design. In fact, the incentive mechanism created, in line with game theory, through the *proof of work*, is built specifically on extremely complex mathematical problems, which require significant computing power to be solved and, therefore, inevitably involve a high expenditure of energy resources. To be sure, the high cost serves precisely to discourage the so-called fifty one percent attacks (ie attempts to gain control of more than half of a network's hash rate), making them more expensive than the gain that can be made.³⁴

I believe, however, that we can and must overcome this objection if we consider the issue from a market perspective, which would provide for a reallocation of the negative externalities. The market will be very effective in finding a balance between the value of Bitcoin and energy costs, or better in factoring the latter into the former. When the fundamental activity of providing computational power to validate blocks of transactions (ie mining) should become economically inconvenient, this will create the incentive to find new technological solutions. Therefore, it appears to be a hardly unresolvable problem.

Similar considerations apply concerning the question of the computing power used precisely for mining. In essence, it has been observed that, regardless of energy costs, this computing power could be used in a much more socially sustainable way, for example, in the service of research in the medical-scientific field.³⁵ Also in this case, however, it does not seem that the legislature or the

³² P. De Filippi and A. Wright express a different position in 'Decentralized Blockchain Technology and the Rise of Lex Cryptographia', 26 (2015), available at tinyurl.com/yyom5eth (last visited 7 July 2020).

³³ Cf, among many, J. Truby, 'Decarbonizing Bitcoin: Law and policy choices for reducing the energy consumption of Blockchain technologies and digital currencies' 44 *Energy Research and Social Science*, 399 (2018).

³⁴ Cf S. Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System', 3 (2008), available at tinyurl.com/kkxbyss (last visited 7 July 2020): 'To compensate for increasing hardware speed and varying interest in running nodes over time, the proof-of-work difficulty is determined by a moving average targeting an average number of blocks per hour. If they're generated too fast, the difficulty increases'.

³⁵ Cf G. Boella at the Turin conference.

regulator can have the ‘fatal conceit’³⁶ of knowing what is the preferable use of an economic resource. The Coase theorem³⁷ remains a useful policy caveat against coercive reallocation of property titles or wealth, being it preferable to rely, for socially desirable outcomes, on the free negotiation of operators.

The discussion is different (although the conclusion is similar) with regard to the problems posed by the self-executing nature of smart contracts in relation to the protection of the weaker party.³⁸ Indeed smart contracts allow the stronger party to exercise extensive self-protection in the face of counterparty default, something that the law tends to look at with suspicion.³⁹ Let us think of the fact, criticized by many,⁴⁰ whereby car companies can automatically suspend the operation of a vehicle remotely if the person who bought it in installments is late for even a single day in settling even one installment.

This action has been technically possible for several years now,⁴¹ and could be achieved even more efficiently by resorting to smart contracts. The danger feared is that this will end up giving the stronger parties even more effective weapons for the protection of their contractual interests. In essence, this perspective feeds the paradigm of Marxist reminiscence of the law of the strongest, or rather of the law as an instrument of the economically stronger classes.⁴²

However, I repeat here the considerations made in the previous paragraph concerning effectiveness. In essence, the law today in many jurisdictions provides for particular sets of rules to protect subjects or groups of subjects placed in a disadvantaged position, as is typically the case for laws to protect consumers. These new instruments could indeed lead to an increase in the number of breaches of such laws, and in many cases, it might be challenging to obtain adequate remedies in practice. However, in theory, consumer law, as well as other laws protecting the weak parties, would remain in place, so even this criticism does not seem to be acceptable. This seems to be true in general for all areas in which the law does not allow something that new technologies make it

³⁶ F. von Hayek, *The Fatal Conceit: The Errors of Socialism* (Chicago: Chicago University Press, 1988).

³⁷ According to which, as is well known, in the absence of transaction costs, in order to reach an economically efficient solution, the original allocation of property titles is indifferent.

³⁸ In this regard, it is worth mentioning J. Fairfield, ‘Smart Contracts, Bitcoin Bots, and Consumer Protection’ 71(2) *Washington and Lee Law Review*, 35 (2014), who expresses his favour for the use of smart contracts for consumer protection (in his view, the greatest obstacle to consumer protection is the need to go to court).

³⁹ On the subject, see, among many: A. Rappazzo, *L'autotutela della parte nel contratto* (Padova: CEDAM, 1999); A. Dagnino, *Contributo allo studio dell'autotutela privata* (Milano: Giuffrè, 1983).

⁴⁰ Cf E. Stucchi at the conference in Turin. Cf also P. de Filippi and A. Wright, n 32 above, whereby the authors express skepticism about this possibility.

⁴¹ Cf M. Corkery and J. Silver-Greenberg, ‘Miss a Payment? Good Luck Moving That Car’ *The New York Times*, available at tinyurl.com/y3r6yyax (last visited 7 July 2020).

⁴² Cf, among many others, E. Ripepe, *Alla ricerca della concezione marxista del diritto: con un'appendice in tema di crisi nel e del marxismo* (Torino: Giappichelli, 1987).

particularly easy to implement, such as in the case of so-called *smart wills*. At least in the Italian legal system, such forms of wills clash with the apparently insurmountable prohibition of agreements as to future successions.⁴³

Finally, a remark that some authors make relates to the possible weakening of the solidarity obligation that would characterize the insurance contract in particular. This evolution would be an expression of a general tendency of the *insurtech* business to individualize risk assessment and consequently policies,⁴⁴ a trend that would be further increased by distributed ledger technologies. The result would amount to a sort of demutualization of insurance,⁴⁵ to the detriment of policyholders who are less attractive to companies, and whose insurance costs are currently split, through a statistical-actuarial procedure, among the community of policyholders at lower risk, but who may be denied coverage in the future.⁴⁶

However, it is questionable that the insurance contract must necessarily be vested with this redistributive socio-economic function.⁴⁷ As the best literature on health reform in the United States has shown,⁴⁸ the most efficient solution from a *policy* perspective is not to force companies to insure non-insurable subjects. Therefore, the concern about the increased level of individualization of policies does not seem to be justified. If anything, the legislature will always be in a position to decide to take charge, not of the cost of the policy (through the general taxation, or with indirect taxation on the companies), but of the service (in this case, of health care) requested explicitly by its citizens, in one of the various forms in which this social right can be provided.⁴⁹

⁴³ Cf. M. Minelli, 'Blockchain, smart contract e successioni (testamentarie): profili problematici e possibili soluzioni', in R. Battaglini and M.T. Giordano eds, n 1 above.

⁴⁴ Cf. D. Poletti at the Turin conference. Cf. also the EIOPA study *EIOPA InsurTech Roundtable – How technology and data are reshaping the insurance landscape*, 2017, available at tinyurl.com/yxlsx7ox (last visited 7 July 2020).

⁴⁵ Cf., for instance, G. Boella at the conference in Turin.

⁴⁶ On the role of big data in the insurance sector, with regard to the blockchain technology, cf. M. Mainelli and C. von Gunten, *Chain Of A Lifetime: How Blockchain Technology Might Transform Personal Insurance* (London: Z/Yen Group, 2014).

⁴⁷ For a reflection on this point, T. Baker and K.D. Logue, *Insurance Law and Policy: Cases and Materials* (Alphen aan den Rijn: Wolters Kluwer, 2017), 14-15.

⁴⁸ Cf., among many, The Council of Economic Advisers, 'Deregulating Health Insurance Markets: Value to Market Participants', available at tinyurl.com/y7vzbzorb (last visited 7 July 2020); A. Monahan, 'On Subsidies and Mandates: A Regulatory Critique of ACA' 36 *Journal of Corporation Law*, 781 (2011).

⁴⁹ Cf. R. Caterina at the Turin seminar. Other considerations that scholars brought forward (eg, Paolo Gallo at the same conference) about the links between blockchain and insurance law, concern the possible moral hazard that would result from the fact that the insured party is sure to obtain satisfaction when certain conditions occur. However, even in this case, it seems instead that the reduction of transaction costs that these technologies involve deserves a positive assessment, and that this risk is not so serious, given that in general the events from which the payment of a sum in favor of the insured derives are negative for them.

On the other hand, the application of the blockchain technologies to insurance brings to our attention the complex issue of the lawfulness of insurance contracts on events involving third parties that do not have and impact on the life or property of the policyholder. Also this

Therefore, in conclusion, there do not appear to be well-founded arguments of public policy to limit, let alone prohibit the use of promising technologies such as those at the base of the blockchain and smart contracts. First, despite the possible practical difficulties that I have mentioned, the legislation already existing allows to satisfy all the public policy needs that the legislator wants to protect. Secondly, the protection of specific categories of subjects can more efficiently take place on the level of public welfare than on that of the ‘conformation’ of contractual relations.⁵⁰

V. Interaction with Existing Public and Private Law of the Economy

In this paragraph, I will briefly consider some issues that are particularly worthy of reflection for lawyers, raised by the innovations under consideration.

A first question concerns the issue of the so called ‘heterointegration’ of the contract.⁵¹ By definition, the smart contract must be or for that matter is presumed to be complete, or at least as complete as possible, and especially on a technical level it does not allow room for external additions. However, the reader should again remember that the contractual agreement upstream of the smart contract will be subject to integration by the judge. The smart contract latter will be executed in any case upon the occurrence of certain conditions, but the judges will always be able – if one generally admits their heterointegrative powers – to review the outcome in terms of justice, and possibly to order a readjustment of the contractual obligations for the sake of equity or fairness.⁵² Once again, there may be a problem in terms of the effectiveness of the remedies, but on a theoretical level, the use of smart contracts does not appear to imply any conceptual revolution. In essence, already today, in the field of contracts, the law regulates much less than what it is recounted on the ground of ‘declamations’.⁵³ The scenario would not change with this new way of executing contracts.

practice is made more accessible by the new technologies in question (and here too, it seems possible to observe that the general principles governing insurance contracts will not cease to apply solely because of the emergence of these disruptive technologies).

⁵⁰ On the subject, cf the recent study by C. Solinas, *Il contratto amministrato: la conformazione dell'operazione economica privata agli interessi generali* (Napoli: Edizioni Scientifiche Italiane, 2018); for considerations similar to those expressed in the text, about a well-known case of abuse of contract law, cf R. de Caria, ‘La nuova fortuna dell’abuso del diritto nella giurisprudenza di legittimità: la Cassazione sta “abusando dell’abuso”? Una riflessione sul piano costituzionale e della politica del diritto’ *Giurisprudenza costituzionale*, 815 (2010).

⁵¹ On the subject, see, among many, the work of C.M. Nanna, *Eterointegrazione del contratto e potere correttivo del giudice* (Padova: CEDAM, 2010).

⁵² For some considerations along these lines, see M. Verstraete, ‘The Stakes of Smart Contracts’ 50 *Loyola University Chicago Law Journal*, 743 (2019).

⁵³ On the subject of the essays by M. Graziadei, ‘La legge, la consuetudine, il diritto tacito, le circostanze’, and D. Francavilla, ‘Diritto e conoscenza non linguistica. Osservazioni su origine, trasmissione e diffusione delle regole’, both in R. Caterina ed, *La dimensione tacita del diritto* (Napoli: Edizioni Scientifiche Italiane, 2009), 49 and 65 respectively.

The question of whether the complexity of the law, with its nuances and general clauses, can be reduced to the binary logic that governs information technology appears to be more insidious. The issue is, as is well known, the subject of very broad reflection,⁵⁴ and there are some interesting attempts to reduce the regulation of financial markets to the blunt yes/no alternative, for example.⁵⁵ For contract law, this seems more difficult. However, it seems that the consideration repeatedly made here is once again valid. In essence, one thing is the method of execution, automated by smart contracts, another one is the contractual agreement itself, where the judge will have the opportunity to highlight all the possible nuances of human action, including through the general clauses.

Once again, considerations in line with what I have already reiterated should arguably be reached by looking at the applicability in these areas of other areas of the law, such as competition law.⁵⁶ What is decisive for *permissionless* public blockchains is that no one controls fifty percent plus one of the nodes. Already today, however, since *mining* has become expensive, there are, as is well known, pools of miners, so there is a well-founded risk that an agreement of very few subjects that control the handful of dominant pools could compromise the system.⁵⁷ Undoubtedly, in this scenario, competition law regulates the behavior of such subjects in a particularly cogent way.⁵⁸

A related issue, more fascinating but also more difficult, which can only be mentioned here, is what legal treatment should a so-called fifty one percent attack receive: is it an unlawful act, as such subject to sanctions, or not? In other words, is this type of attack, which is lethal to the credibility of the system, prevented only by technical protections geared on incentives for the participants (*proof of work*, *proof of stake*) which as such can change or even be violated in the case of 'players' who do not behave like a rational agent (think of the hypothetical work of a government that decides to do 'whatever it takes' to knock down the Bitcoin blockchain, at any cost, for political reasons). Or does a fifty-one percent attack also violate rules of a legal nature, and if so, which ones?

This question seems, as I said, to be more challenging to answer, which brings me to the last question.

⁵⁴ Among many, cf C. Markou, *Lex Ex Machina: The Rule of Technology in the Post-Human Future*, forthcoming 2020; with specific reference to the contractual scope, cf H. Surden, 'Computable Contracts' 46 *UC Davis Law Review*, 629 (2012).

⁵⁵ This is what the Swiss startup Apiax (www.apiax.com) is committed to.

⁵⁶ Cf the writings of T. Schrepel, 'Collusion by Blockchain and Smart Contracts' 33 *Harvard Journal of Law & Technology*, 118-166 (2019); and Id, 'Is Blockchain the Death of Antitrust Law? The Blockchain Antitrust Paradox' 3 *Georgetown Law Technology Review*, 281 (2019).

⁵⁷ Cf G. Boella at the Turin conference.

⁵⁸ More generally, the issue of how decisions are taken within the community also deserves a great deal of attention from scholars, on the one hand, of public decision-making processes and, on the other, again of competition law, since these are clearly concerted decisions by operators at the same level of the market. Therefore, in my view, it is possible to categorize them as horizontal agreements.

VI. Applicability in the Light of the Current Paradigm of Business Law and Practice

The last point I would like to make is one that appears to have emerged to a lesser extent in the technical and legal literature on the subject, but which I believe deserves close attention.

One of the most commonly referenced potential fields of application of smart contracts is international trade.⁵⁹ In fact, Uncitral and Unidroit have so far been quite active in promoting reflections and studies on the subject.⁶⁰

However, the aspect that I believe has received insufficient attention is that smart contracts are effective in removing the risk of non-execution by one party. They make it virtually impossible if the established conditions are met, that they might end up driving the parties to give up on a series of contracts that both parties would have an interest in concluding anyway. I am referring to all those contracts whereby, at the time of stipulation, one of the two parties does not have the money that they will have to pay when the condition upon which their payment is contingent actually occurs. In other words, it is quite common for economic operators, and certainly not in breach of any law, to simultaneously take on monetary obligations the total amount of which goes well beyond their total net worth.

The total assets guaranteeing the debtors, based on the general rule of liability pursuant established by Art 2740 of the Italian civil code, may remain the same and even be limited, but the subject may use them as collateral for a potentially infinite series of different obligations, which together lead to a much higher capital exposure than the assets themselves.

This scenario is perfectly physiological, especially in typical cases where the *maturities* of such obligations are different and distributed over time so that the debtor can count on future revenues to meet them. This mechanism performs a precise economic function, because it allows to multiply in some way the value of one's assets, and so to succeed in assuming an extensive series of obligations, and so to increase the commercial traffic. In the practice of trading, companies every day assume payment obligations of sums that they do not own at the moment but trust that they will, in fact, own on maturity as a result of their *cash flow*.

Parties can always establish that the debtor, when taking up the obligation, must already dispose of the amount that they will have to pay and keep it frozen at the disposal of the creditor, so that the latter can 'automatically' receive their payment upon the occurrence of the relevant conditions. Such an agreement

⁵⁹ Cf R. de Caria, 'A Digital Revolution in International Trade? The International Legal Framework for Blockchain Technologies, Virtual Currencies and Smart Contracts: Challenges and Opportunities', in *Modernizing International Trade Law to Support Innovation and Sustainable Development. Proceedings of the Congress of the United Nations Commission on International Trade Law, Vienna, 4-6 July 2017. Vol 4: Papers presented at the Congress*, 105 (2017).

⁶⁰ Concerning the former, cf, eg, the volume referred to in the previous fn; concerning the latter, cf, eg, the Colloquium on Financial Markets Law held in Beijing on 29-30 March 2017.

can already be achieved by using a third-party trustee to act as an escrow. Smart contracts reproduce this mechanism, achieving the same result in practice, but making the intermediation of the escrow redundant, or at least partially replacing its role with that of the oracles.⁶¹

The problem is that such practice leads to the immobilization of much more wealth and for much longer than is necessary in itself. It will, therefore, be essential to pay close attention, in the drafting of the smart contract, to ensure that a time limit is well defined within which the condition can be said to have been certainly fulfilled or not. Otherwise, there is the risk that the immobilization will last for a potentially indefinite time, ending up generating uncertainty about the actual owners of a significant amount of wealth (here, Ethers or Bitcoin, in the most typical cases), reproducing some unfortunate outcomes of the past that the commercial practice has had to overcome.

Admittedly, smart contracts respond to a precise economic function, in some way attributable to the lack of trust on the one hand in the creditor, on the other hand, in the ability to obtain satisfaction for one's claim through the ordinary remedies offered by the law. In some way, therefore, the smart contracts, realizing that 'trustless trust' mentioned by many⁶² (even if the parties must place considerable trust in the authors of the smart contract and possibly in some auditors), could actually make viable some economic transactions that otherwise would not be concluded, or that would be concluded only at a higher cost, including the cost of intermediation of trusted subjects of both parties. Nevertheless, it seems that there are still many cases in which the parties prefer to do without such guarantees, in order to reduce transaction costs, and where therefore the mechanism of smart contracts does not currently appear the preferable solution, at least in its most commonly described version.

Moreover, similar considerations can arguably be made with reference to an extensive range of other contracts or contractual clauses: how to reconcile the automatic execution and predetermination of a payment obligation with all the cases in which its amount is not known at the outset? Just to give a few examples, let us think of non-life insurance, or of a penalty clause providing an increasing amount over time, or a short sale, all agreements that provide for a payment dependent on a particular result. In all these cases, resorting to a smart contract, in order to be a coherent choice, would require to block extremely

⁶¹ Cf. A. Egberts, 'The Oracle Problem - An Analysis of how Blockchain Oracles Undermine the Advantages of Decentralized Ledger Systems', available at tinyurl.com/y3br5lgt (last visited 7 July 2020). In this respect, the practice of multi-sig contracts also seems to introduce the intervention of a third party, which at least in part mitigates the automatic character of smart contracts.

⁶² Cf., eg. H. Eenmaa-Dimitrieva and M.J. Schmidt-Kessen, 'Creating Markets in No-Trust Environments: The Law and Economics of Smart Contracts' 35(1) *Computer Law & Security Review: The International Journal of Technology Law and Practice*, 69 (2019); M. Zou et al, 'In Code We Trust? Trustlessness and Smart Contracts in Computers and Law' *Society for Computers and Law Journal*, 39-43 (2019).

high sums,⁶³ corresponding to the *worst-case scenario*, but this seems utterly unsustainable economic-wise.

In a hypothetical, futuristic economic scenario where Bitcoins, Ether, and other cryptocurrencies replace *fiat* coins, and where all wealth is somehow tokenized, I think the need would arise, in order for smart contracts to be applied outside a limited range of hypotheses, to find a way of allowing the same cryptocurrency units to be used several times, in a sort of practical alternative to ‘double spending’, which would, however, risk contradicting one of the fundamental principles of the blockchain environment. One way could be the stipulation of contractual agreements linked one to the other, in which the very creation of an obligation is subordinated to the actual arrival of the supply as a result of another contractual agreement, but at least to date, they appear rather complicated and cumbersome. Therefore this appears to be a problem that will require computer scientists and lawyers to think widely, in search of possible solutions.⁶⁴

Indeed, from the point of view taken in this paragraph, smart contracts appear to represent a glaring example of an attempt to ‘escape from the law’,⁶⁵ in the name of its already well-known, and already mentioned above, replacement with computer code.⁶⁶ However, difficulties and challenges as the one now exposed are at the same time proof that the transition is not necessarily so easy or, in any case, of such generalized potential application, as many authoritative scholars foretell.⁶⁷

⁶³ With regard to insurance, this is confirmed by an example made by K. Werbach and N. Cornell, ‘Contracts *Ex Machina*’ 67 *Duke Law Journal*, 101, 119 (2017): ‘Consider a simple insurance contract under which Abby promises farmer Bob, in return for a monthly payment, a lump sum in the event the temperature exceeds 100 degrees for more than five straight days during the term of the agreement. In a traditional contracting arrangement, the parties would likely reduce that agreement to a writing, signed to memorialize mutual intent. If the temperature exceeded the threshold for six straight days and Abby failed to pay, Bob could file suit for breach, and present the contract as evidence. To implement a smart contract with the same terms, Abby and Bob would translate the provisions into software code. *Each would make available sufficient funds to fulfill his or her side of the agreement*’ (emphasis added).

⁶⁴ Technically, a solution already fully feasible today is to admit that the smart contract can be concluded even in the absence of funding in the wallet of the person who assumes the obligation to pay, and that this payment has to occur only when the condition occurs. However, either the main smart contract provides that the main obligation is not executed until the funding is found in the hands of the counterparty (and then you return to the starting point), or the obligation is still executed automatically, and then the smart contract loses one of its primary functions, namely the guarantee of certainty and automaticity of payment and the resulting disintermediation. From the opposite point of view, smart contracts also make the operation of the exception of non-compliance problematic. If automated, the payment will still take place even in the presence of defects in the counter-performance, at least not adequately detected by an oracle. If instead, the payment is subject to prior verification of the absence of defects, in this case, the primary advantage of the mechanism of smart contracts appears again frustrated.

⁶⁵ Cf in this respect the reflections by P. De Filippi and A. Wright, n 32 above, later collected in their book *Blockchain and the Law. The Rule of Code* (Cambridge: Harvard University Press, 2018).

⁶⁶ The classic reference is to L. Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

⁶⁷ Cf eg H. Eenmaa-Dimitrieva and M.J. Schmidt-Kessen, n 62 above, and already the previous version of their work, ‘Creating Markets in No-Trust Environments Implementing Smart Contracts

VII. Concluding Remarks: A Technological Revolution but not a Legal One

The analysis carried out leads me to some more general considerations, applicable in principle in every area of the law of new technologies, and in my opinion, also to blockchain and smart contracts.

Firstly, when dealing with any innovation, technological or otherwise, the lawyer should arguably always move from a general principle that is too often neglected, namely the principle of freedom or presumption of liberty.⁶⁸ This principle, as is well known codified, with a rather questionable choice, by the Italian legislature in 2011,⁶⁹ should always guide the interpretation of existing law, and should advise against considering that legislative or regulatory intervention is necessary to allow the operation of something that should already be perfectly legal in itself, until any rule to the contrary.

From this point of view, it appears to be entirely open to criticism the choice of by the Italian legislature to rush to legislate in this matter. Furthermore, as has been correctly observed,⁷⁰ in an imprecise manner, and above all by having the opposite effect, of paralyzing, at least temporarily, an innovation which previously could have been freely carried out. Now, it has been made dependent on the adoption of technical standards by the Agency for Digital Italy (AgID) (under para 4 of Art 8-ter of the above-mentioned *decreto semplificazioni*).

In addition, two further severe problems can be identified: on the one hand, there is a significant constitutional law problem, namely that such important rules are entrusted to an entity removed from the circuit of democratic legitimacy, whose acts are difficult to frame in the sources of law system. On the other hand, as has rightly been said,⁷¹ the Italian legislation has violated the principle of technological neutrality,⁷² thus exposing itself to almost inevitable ageing, which can happen even very quickly.

This is arguably all the more reason to rule out the need to call for a regulatory revolution. It has been very opportunely suggested that, at most, we

in No-Trust Environments', published as EUI Department of Law Research Paper No. 2017/13, available at tinyurl.com/yxgxy37l (last visited 7 July 2020). Very interesting considerations more in line with what I have expressed in the text are read in R. Pardolesi and A. Davola, '«Smart contract»: lusinghe ed equivoci dell'innovazione purchase' *Foro italiano*, V, 195 (2019).

⁶⁸ On the subject, cf Sir J. Laws, 'The Rule of Law: The Presumption of Liberty and Justice' 22(4) *Judicial Review*, 365 (2017); R.E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2003).

⁶⁹ Art 3 of decreto legge 13 August 2011 no 138, converted with amendments into legge 14 September 2011 no 148.

⁷⁰ Eg by G. Finocchiaro at the Turin conference.

⁷¹ Eg by G. Finocchiaro, F. Delfini and E. Stucchi at the Turin conference.

⁷² On the subject, cf for instance W. Maxwell and M. Bourreau, 'Technology Neutrality in Internet, Telecoms and Data Protection Regulation' 21(1) *Computer and Telecommunications Law Review*, 1 (2015); I.M. van der Haar, 'Technological Neutrality; What Does it Entail?' *TILEC Discussion Paper* (2007-2009).

need to reflect on the paradigm of responsibility.⁷³ Our liability law is built around an always possible imputation at least by fault, while in the matter that we deal with, in many cases, it is not necessarily possible to find the author of an error (think of a bug in open source code). In any case, it will not necessarily be a solvent subject, against which it is therefore efficient to go.

In any case, as I believe the analysis carried out in the previous paragraph shows, however revolutionary the technologies under consideration and their practical applications may be, the law must not be revolutionized as well. The more general private law categories are perfectly applicable to blockchain and smart contracts. In fact, they appear much more reliable and durable than the latest legislation because they do not violate the principle of technological neutrality.⁷⁴

As I have had the opportunity to illustrate, some typical operations made technically possible by blockchain and smart contracts, such as smart wills, appear very difficult to reconcile with the existing law, at least in Italy. Similarly, some clauses might be considered unfair, as well as in general, there could be a problem of defective formation of one party's will, to name but a few examples of possible invalidity. As was said, it may be difficult, in practice, to obtain an effective remedy, but this also applies to many cases that have nothing to do with the new technologies. It does not cancel the fact that, in the abstract, the remedy in the legal system exists, which is what ultimately matters the most at a theoretical level.

To conclude, the blockchain and smart contracts certainly seem to represent a promising field of investigation for lawyers. In particular, for those who study the interactions between law and the economic phenomenon, who will have the task of bringing out the various issues that they raise, of which I have tried here briefly to summarize the main ones, at least at present. However, I believe that the technological and economic revolution that they involve does not necessarily go hand in hand with a revolution in or of the law. The escape from the law, and its replacement by computer code, for better or for worse seems to be a long time coming. Or at least it does not seem that distributed ledger technologies and their applications will be the ones to accomplish it, because they can easily develop within the existing legal framework.⁷⁵

⁷³ Eg G. Finocchiaro at the Turin conference.

⁷⁴ F. Delfini at the conference Turin; by this Author, cf also '*Blockchain, Smart Contracts e innovazione tecnologica: l'informatica e il diritto dei contratti*' *Rivista di diritto privato*, 2, 167-178 (2019).

⁷⁵ According to K. Werbach and N. Cornell, n 63 above, 148, new legal answers are warranted, but contract law will not change substantially: 'We believe that smart contracts are not, even theoretically, a substitute for contract law. Consequently, we believe that the above views about contract law's function, which appear to suggest that smart contracts could replace contract law, are unsatisfactory'. Cf also É. Théocharidi, 'La conclusion des smart contracts: révolution ou simple adaptation?' *Revue Lamy droit des affaires*, 138, 28-38 (2018), who expresses a similar view. A different opinion can instead be found in S. Loignon, *Big Bang Blockchain. La seconde révolution d'Internet* (Paris: Tallandier, 2017), 15, or in C. Zolynski, 'Blockchain et smart contracts: premiers regards sur une technologie disruptive' *Revue de Droit Bancaire et Financier*, 4 (2017).