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Gender equality in the European Union and Japan

A comparative case law analysis

Emma Raucent*

Abstract

The Japanese political discourse has shifted toward a gender-friendly strategy under the economic recovery programme of the Prime Minister, Shinzo Abe. But is this discourse echoed in the case law of Japanese courts? This paper explores the position of the Japanese judiciary with regard to gender equality at work and compares it with that of the European Court of Justice. Applying the European conceptual framework to the Japanese case law suffers several limitations. As a matter of fact, if Japan formally embraces certain European legal concepts pertaining to gender equality, such as direct and indirect discrimination, confronting the Japanese case law with such concepts allows the present analysis to shed light on their relative incompatibility with the particularism of the Japanese judicial approach to labour relations and labour issues. Fundamentally this comparison is meant to highlight the extent to which Japan's ranking as the 114th country that best achieves "gender equal economic participation and opportunity"[1] is not reducible to mere neglect or bias from the legislature and judiciary, so that the temptation to invite the latter to simply endorse a more aggressive approach in favour of gender equality, identical to that of other legal orders, such as the EU, can be resisted and questioned. This paper rather suggests that Japan should develop its own legal tools that would respond to the current issue of gender equality in a more integrated and effective manner.

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[1] World Economic Forum, "Global Gender Gap Report 2017" < http://reports.weforum.org/global-gender-gap-report-2017/dataexplorer/#economy=JPN > accessed on 4 November 2018.

Keywords

Gender equality – Case Law – Japan – European Union – Comparison – Direct/Indirect Discrimination

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1. Introduction

1.1. Defining the issue beyond the political and economic context

The Japanese Government has since 2013 endorsed the vision of a society "in which all women can shine"[2]. Prime Minister Shinzo Abe instituted the principle of gender equality as one of the cornerstones of his economic recovery policy[3]. Under the term "womenomics", this program envisions women as pool of talent to be leveraged for the sake of the economy[4]. Nonetheless, increasing female labour participation in both quantity and quality as part of a broader economic recovery policy does not seem to elicit unanimity. Recently the management of the Tokyo Medical University, one of the most renowned medical schools in Japan, acknowledged that the results of their entry exams have been systematically altered (at least) since 2006 in order to prevent female candidates from accessing education in the school[5]. This scandal is entwined in the broader context of the deeply rooted gender roles prevailing in Japan, according to which women are expected to be the sole caregivers of children and the elderly[6]. Interestingly, one could argue that the Japanese Government is now endeavouring to set aside the family model and work structures that it had in the past contributed to put into place. As a matter of fact, the full-time housewife model took its roots in the good wife and wise mother ideology of the Meiji Restoration (1868-1912)[7], which was originally an attempt of the Japanese government to instil a strong nationalist feeling among female citizens – giving them a common role to play at the service of the nation[8]. This was maintained, if not reinforced, after the Second World War for economic purposes[9]. Accordingly, we can expect the current "shin-

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[2] Ministry of Foreign Affairs of Japan, *Women's empowerment and gender equality* (last update, 10 May 2018) < https://www.mofa.go.jp/fp/pc/page23e_000181.html > accessed on 12 August 2018.

[3] Prime Minister of Japan and His Cabinet, "Speech by Prime Minister Shinzo Abe at Global Leaders Meeting on Gender Equality and Women's Empowerment" *Speeches and Statements by the Prime Minister* (September 27, 2015) < https://japan.kantei.go.jp/97_abe/statement/201509/1213045_9928.html > accessed 7 August 2018.

[4] CNN, "The Women Behind Japan's Womenomic" *Leading Women – Japan* < https://edition.cnn.com/videos/tv/2017/11/06/leading-women.cnn > accessed on 12 August 2018.

[5] Justin MacCurry, "Tokyo medical school admits changing results to exclude women" *The Guardian* (8 August 2018) < https://www.theguardian.com/world/2018/aug/08/tokyo-medical-school-admits-changing-results-to-exclude-women > accessed on 12 August 2018.

[6] S. Ikeda, "Childcare Leave System and Women's Job Continuity – Comparative Analysis by Company Size – Summary" *JILPT Research Report* n°109 (2009) (see also: M. Ishii-Kuntz, "Sharing of Housework and Childcare in Contemporary Japan" *United Nations – Division for the Advancement of Women* EGM/ESOR/2008/EP.4 (2008) < http://www.un.org/womenwatch/daw/egm/equalsharing/EGM-ESOR-2008-EP4Masako%20Ishii%20Kuntz.pdf > accessed on 12 August 2018).

[7] N. Akiko rightly points out that promoting the idea of an active woman at the service of the nation "contrasts with Confucian female attributes like passivity and submission" [N. Akiko and T. Yoda, "The Formation of the Myth of Motherhood in Japan" *U.S.-Japan Women's Journal* 4 (1993) p. 75].

[8] N. Akiko and T. Yoda, *ibidem*, pp. 75-76.

[9] A. S. Aronsson, *Career Women in Contemporary Japan: Pursuing Identities, Fashioning Lives* (London: Routledge, 2014) [see also: C. Ueno, "The Position of Japanese Women Reconsidered" *Current Anthropology* 28:4 (August-October 1987) 80].

ing women" policy to still sputter for a long time, just as the good wife and wise mother ideology took decades to leak into the Japanese collective sub-conscience. Whilst new and diversified lifestyles can be observed today among young Japanese women, as many seem to shy away from the traditional gender roles by delaying marriage and childbirth in order to focus on their personal wellbeing or career[10], this does not necessarily mean that Japanese men and women benefit from equal opportunities at work and strike a healthier balance between their professional and personal aspirations[11].

By comparison, the European Union has since 1970 strived to foster gender equality within the labour markets of all European Member States. The principle became a predominant social policy regarding which the Union achieved a far-reaching level of political integration. This undoubtedly represented (and still represents) a considerable task in view of the significant disparities in gender social roles, family models and labour markets structures of the Union's Member states. Whilst one cannot deny that there still remain various degrees of compliance with the European standards[12], concrete efforts have been made to align national policies with the European requirement[13]. Furthermore, the generalised entry of women into the labour market in the 90s marked the end of the male breadwinner model[14] and prompted further discussions with regard to gender equality, such as work/life balance issues. More interestingly, these years were also marked by the promotion of gender equality as a tool to trigger economic growth and higher fertility rates[15]. If it has been argued that this European liberal discourse contrasts with Japan's stance on gender equality[16], the previous comments on Japan's "womenomics" suggest the opposite, as a current shift toward a similar policy can be observed in the archipelago. But it is also gen-

[10] R. L. Miller, "The Quiet Revolution: Japanese Women Working Around the Law" *Harvard Women's Law Journal* 26 (2003).

[11] C. Steinberg and M. Nakane, "Can Women Save Japan?" *IMF Working Paper* 12/248 (October 2012) pp. 1-50.

[12] See the statistical analysis in further paragraphs [see also: N. Countouris and M. Freedland, "Labour Regulation and the Economic Crisis in Europe: Challenges, Responses and Prospects", in J. Heyes, J. and L. Rychly (eds.), *Labour Administration in Uncertain Times: Policy, Practice and Institutions* (Cheltenham: Edward Elgar/ILO, 2013)].

[13] S. Berghahn, "The Influence of European Union Legislation on Labour Market Equality For Women", in J. Z. Giele and E. Holst (eds.) *Changing life patterns in Western Industrial Societies* (vol. 8 of *Advances in Life course research*) (London: Elsevier Science, 2003) 211-230.

[14] M. Karamessini and J. Rubery, "The Challenge of Austerity or Equality, a consideration of eight European countires in the crisis" *Revue de l'OFCE* 133:2 (2014) 15-39.

[15] Commission of the European Communities, "European social policy: a way forward for the union" White Paper Part A COM(94) 333 final (July 1994) < http://aei.pitt.edu/1118/1/social_policy_white_paper_COM_94_333_A.pdf > accessed on 12 August 2018 (see also: A. Elomäki, "The economic case for gender equality in the European Union: Selling gender equality to decision-makers and neoliberalism to women's organizations" *European Journal of Women's Studies* 22:3 (2015) 288-302; G. Perrier, "La politique d'égalité des sexes de l'Union européenne. Portée et limites de l'égalité pour le marché" *Revue des Politiques Sociales et Familiales* 126 (2018); S. Jacquot, *L'égalité au nom du marché? Emergence et démantèlement de la politique européenne d'égalité entre les hommes et les femmes* (Berne: Peter Lang, 2014).

[16] J. Repo, "The governance of fertility through gender equality in the EU and Japan" *Asia Eur J* 10 (2012).

erally argued that in the EU gender equality is (disputably)[17] no longer encapsulated in a self-serving market-oriented logic but now constitutes an end in itself articulated in the human rights discourse of the European Court of Justice[18]. While major progress in favour of gender equality has been achieved under this 'social integration' approach, more recent critical views highlight that the Union's commitment to gender equality currently runs out of momentum[19], as "real equality" now requires challenging private and family-related social norms[20].

The European Union and Japan record significantly different degrees of achievement in the protection against gender discrimination at work. Beyond the political discourse, one might discover the reality on the ground with fundamental disparities between their legislative strategies and judicial practices. Hence, the purpose of this paper is to highlight the key elements that differentiate (or not) the Japanese and European legal systems in the field of gender equality in the workplace. Namely, it focuses on the development of their case law pertaining to the matter. The reason for this case law-oriented approach is that the legal protection provided against gender discrimination has first been initiated and articulated by the judiciary both in the EU and Japan. This paper explores the Japanese case law on gender equality in the workplace through the conceptual lens of the European legal framework elaborated by the ECJ in the area. Applying the European conceptual framework to the Japanese case law suffers several limitations. If Japan formally embraces certain European legal concepts with regard to gender equality, such as direct and indirect discrimination, confronting the Japanese case law with such concepts allows the present analysis to shed light on their relative incompatibility with the particularism of the Japanese judicial approach to labour relations and labour issues. This comparison is meant to highlight the extent to which Japan's ranking as the 114th country that best achieves "gender equal economic participation and opportunity"[21] is not reducible to mere neglect or bias from the legislature and judiciary, so that the temptation to invite the latter to simply endorse a more aggressive approach in favour of gender equality, identical to that of other

[17] For recent opposing views, see: J. Rubery, "Austerity and the Future for Gender Equality in Europe" *ILR Review* 68:4 (August 2015); A. Elomäki, "The economic case for gender equality in the European Union: Selling gender equality to decision-makers and neoliberalism to women's organisations" *European Journal of Women's Studies* 22:3 (2015).

[18] S. Prechal, "Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes", *Common Market Law Review* 41:2 (2004) 533; A. Masselot, "The State of Gender Equality Law in the European Union" *European Law Journal* 13:2 (March 2007) 153.

[19] M. Smith and P. Villa, "The ever-declining role of gender equality in the European Employment Strategy" *Industrial Relations Journal* 41:6 (2010).

[20] C. McGlynn "Ideologies of motherhood in European community sex equality law" *European Law Jounal* 6:1 (March 2000); E. Caracciolo di Torella and P. Foubert, "Surrogacy, pregnancy and maternity rights: a missed opportunity for a more coherent regime of parental rights in the EU" *European Law Review* 40:1 (2015); E. Caracciolo di Torella and A. Masselot, "Work and Family Life Balance in EU law and Policy 40 Years on: Still Balancing, Still Struggling" *European Gender Equality Law Review* 2 (2013).

[21] World Economic Forum, "Global Gender Gap Report 2017" < http://reports.weforum.org/global-gender-gap-report-2017/dataexplorer/#economy=JPN > accessed on 4 November 2018.

legal orders, such as the EU, can be resisted and questioned. This paper rather suggests that Japan should develop its own legal tools that would respond to the current issue of gender equality in a more integrated and effective manner.

1.2. Key legislation in Japan: a brief historical overview

In Japan, legal protection against gender discrimination in the workplace is regulated under the Equal Employment Opportunity Law (hereinafter EEOL), in addition to the Child Care and Family Care Leave Law[22] and the Basic Act for a Gender Equal Society[23]. A brief historical overview of the EEOL is first necessary, starting with the adoption of the Labour Standards Act[24] (hereinafter, LSA) in 1947. Under this legislation, several 'protective' but discriminatory labour practices were imposed upon female workers, such as prohibition from overtime work or late night work, general prohibition from manual work etc. Nevertheless, the first pragmatic gender equality rule[25] was enshrined in the Act: the prohibition of wage discrimination (art. 4)[26].

This legal insufficiency received fierce criticism from the international community, and it is believed that this international pressure, mainly coming from the United Nations, is the main incentive[27] that pushed Japan to adopt the Equal Employment Opportunity Law (hereinafter, EEOL)[28]. Japan ratified the UN Convention on the Elimination of All Forms of Discrimination Against Women[29] in 1980, and complied with its commitments with the adoption of the EEOL in 1985. It should be incidentally noted that the adoption (and the two main subsequent amendments) of this law were accompanied by the abolishment of most of the special protections guaranteed under the LSA[30].

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[22] Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members [Act no. 76] 15 May 1991 < https://www.mhlw.go.jp/english/policy/children/work-family/index.html > accessed on 21 October 2018.

[23] Basic Act for Gender Equal Society [Act no. 78] 23 June 1999 < http://www.gender.go.jp/english_contents/about_danjo/lbp/laws/pdf/laws_01.pdf > accessed on 21 October 2018.

[24] Japanese Labour Standards Act [Act no. 49] 4 April 1947 < https://www.ilo.org/dyn/natlex/docs/WEBTEXT/277/6484676/E95JPN01.htm > accessed on 9 August 2018.

[25] S. Yamada, "Equal Employment Opportunity Act, Having Passed the Quarter-Century Milestone", *Japan Labour Review* 10:2 (Spring 2013) 6-7.

[26] "A woman may be paid differently for performing the same tasks as a make employee so long as the employer can provide some real justification other than the employee's gender or gender stereotypes" [K. Sugeno, "Japanese employment and labour law (*translated*)" *Carolina Academic Press* 161 (2002) 161-162].

[27] K. T. Geraghty, "Taming the Paper Tiger: A Comparative Approach to Reforming Japanese Gender Equality Laws", *Cornell Int'l L.J.* 41:503 (2008) 508.

[28] Japanese Equal Employment Opportunity Law [Act n° 113] 1st July 1972 < https://www.ilo.org/dyn/travail/docs/2010/Act%20on%20Securing%20etc%20of%20Equal%20Opportunity%20and%20Treatment%20between%20Men%20and%20Women%20in%20Employment%201972.pdf > accessed on 9 August 2018.

[29] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, 13, < http://www.refworld.org/docid/3ae6b3970.html > accessed on 18 October 2018.

[30] For further information, see: K. T. Geraghty, *ibidem*, 510.

In its original content, the Equal Employment Opportunity Law[31] was an attempt to discourage gender discrimination in five areas[32]: recruitment and hiring, job assignment and promotion, vocational training, employee benefits and retirement and dismissal[33]. Even though the introduction of this reform represented an important change in the Japanese legal landscape[34], the act did not enshrine any strong obligation upon employers, as these were only required to "endeavour to treat men and women equally in the recruiting and hiring processes"[35]. It must also be highlighted that the initial law is to be considered as an employment protection measure and not as a human rights-related measure, as only women were subject to protection under the act[36]. Furthermore, it was accompanied by an ineffective enforcement mechanism, consisting mainly in non-binding administrative recommendations and mediation without the guarantee of neither any private right of action nor any civil or criminal sanction[37].

In addition to the shortcomings of the law, the decreasing birth rate of Japan, together with the increase in complaints challenging gender discriminatory treatments in the workplace[38] were at the origin of the 1997 reform of the EEOL[39].

The first and most important element of this reform is that it transformed the employers' mere obligation to endeavour to implement gender equality into the strict prohibition of gender discrimination in recruiting and hiring, promotion, training and job assignment[40]. Secondly, the act introduced the notion of positive action[41] (former Art. 9). This article was labelled only as enabling companies to "take measures in connection with women workers with the purpose of improving circumstances that impede securing of equal opportunity

[31] The act actually already existed under the title "Act to promote the welfare of working women" which was adopted in 1972. The introduction of the Equal Employment Opportunity Law in 1985 consists in a reform of this act [H. Nakakubo, "'Phase III' of the Japanese Equal Employment Opportunity Act" *Japan Labour Review* 4:3 (2007) 9].

[32] This is particularity of the law: to identify the specific matters where discrimination is to be avoided (as opposed to a general prohibition of discrimination in the employment relationship) (H. Nakakubo, *ibidem* 13).

[33] K. T. Geraghty, *ibidem* 510 (see also: S. Yamada, *op. cit.* 8).

[34] S. Yamada, *ibidem* 8.

[35] H. Nakakubo, *ibidem* 11.

[36] R. Sakuraba, "Employment Discrimination Law in Japan: Human Rights or Employment Policy?", *Bulletin of Comparative Labour Relations* n. 68/2008, 233. This aspect of the law had adverse effects on the consequent treatments of men and women (*see also*: S. Yamada, *ibidem* 8 and 9).

[37] K. T. Geraghty, *ibidem* 510 and 511. Only 106 employees applied for mediation and the responsible Commission mediated only *one* of these cases (J. S. Fan, "From Office Ladies to Women Warriors?: The Effect of the EEOL on Japanese Women", *10 UCLA Women's L.J.* 103:111 (1999) 122).

[38] K. T. Geraghty, *ibidem* 515.

[39] Under the impulse of the 1996 Report drafter by the Japanese Office of gender equality, and the UN's 4th World Conference on Women in 1995 (K. T. Geraghty, *ibidem* 515).

[40] M. L. Starich, "The 2006 revisions to Japan's equal opportunity employment law: a narrow approach to a pervasive problem", *Pacific Rim Law and Policy Journal* 16:2 (March 2007) 559.

[41] H. Nakakubo, *op. cit.* 12.

and treatment between men and women in employment"[42]. Thirdly, the revision introduced the notion of sexual harassment within the law, and included it in the category of gender discrimination occurring in the workplace[43] (Art. 21), as it was then only enshrined in the Civil Code and had no correlation to gender discrimination. Fourthly, procedural reforms were introduced in order to reinforce the mechanisms through which employees could find remedies to their claims[44]. Two main elements are to be highlighted. The first one concerns the new possibility for employees to force their employer into mediation with the Ministry of Health, Labour and Welfare[45] (while mediation had initially to be agreed upon by the two parties, i.e. the employee and the employer). The second element relates to the sanction chosen by the legislator in case of non-compliance with the recommendations resulting from the mediation, i.e. the public announcement to the media of the name of the concerned company[46].

By 2005, the situation of women in the workplace had not improved tremendously. But also, the persisting recession and the ever-declining birth rate (1.26 in 2005, the lowest ever reached)[47] were the first concerns of the Japanese Government[48]. These elements help understand the reasons why a second reform was introduced in 2006 and entered into force in 2007. Most importantly, under this reform the scope of protection provided by the law was extended to men[49]. This change affected the nature of the law, as it became an equal rights-related measure, as opposed to a protective measure destined only to women[50].

In addition to this major change, four elements of the reforms should be highlighted. First of all, the reform extended the protection against discrimination to additional matters[51]. Not only would the notion of placement then include allocation of duties and grant of authority (Art. 6, item 1), but demotion of workers, change in job type or employment status, encouragement of retirement, and renewal of labour contract were added to the list of protected matters (Art. 6, items 1, 3 and 4)[52]. Secondly, the reform introduced the notion of indirect discrimination (Art. 7). Interestingly, the Labour Policy Council issued a bill containing only three work practices that would officially consist in indirect discrimination: "(i) applying criterion concerning body height, weight or physical capacity when

[42] H. Nakakubo, *ibidem* 12.

[43] K. T. Geraghty, *op. cit.* 516.

[44] K. T. Geraghty, *ibidem* 516 and 517.

[45] K. T. Geraghty, *ibidem* 516.

[46] K. T. Geraghty, *ibidem* 516 (see also: M. L. Starich, *ibidem* 560).

[47] Fertility rate of Japan (births per woman), The World Bank Data, < http://data.worldbank.org/indicator/SP.DYN.TFRT.IN?locations=JP&name_desc=false > page accessed on July 29, 2017.

[48] K. T. Geraghty, *ibidem* 504 and 505.

[49] As to the textual changes, see H. Nakakubo, *ibidem* 11-13 (see also: S. Yamada, *op. cit.* 12).

[50] For further comments, see R. Sakuraba, *op. cit.* 233.

[51] M. L. Starich, *ibidem* 562.

[52] H. Nakakubo, *ibidem* 11 and 14.

recruiting or hiring workers, (ii) in case the employer adopts dual career ladder system, requiring workers to be able to accept future transfers with a change of residence when recruiting of hiring workers for main positions of the core career course, and (iii) requiring workers to have experiences of jobs relocation when deciding their promotion"[53]. These were incorporated in a new ordinance issued by the Ministry of Health, Labour and Welfare (Art. 2 of EEOL Enforcement Ordinance[54]). Thirdly, special provisions have been reframed and also added as regards the prohibition of disadvantageous treatment of female workers by reason of pregnancy and childbirth[55]. The revision mainly strengthened this specific protection provided to women by an independent article (Article 9)[56]. Fourthly, procedural reforms have been introduced as a result of the critiques on the weaknesses of the Act's enforcement mechanisms[57]. In sum, the revision expands the cases relating to gender discrimination that can be subject to the procedural mechanisms provided by the act, i.e. essentially mediation and publication of names. Also, the Commission in charge of the mediation procedures has seen its powers of investigation increase in order to make the resolution process more efficient. Finally, assistance for companies is also provided in their attempt to implement positive action measures.

2. Direct and indirect discrimination: two different approaches

2.1. Direct and indirect gender discrimination in the EU, a judicial bottom-up approach

In the European legal framework, the distinction between direct and indirect discrimination emerged as a key notion through the development of the European normative system pertaining to employment discrimination based on sex. This development stems from the interaction of the ever-increasing European legislative instruments regulating the subject with the European Court of Justice's interpretation of these instruments and its initial judicial activism in the field[58]. One must note that this proactive commitment to gender

[53] H. Nakakubo, *op. cit.* 15 and 16.

[54] Japanese Ordinance for Enforcement of the Act on Ensuring Equal Opportunity for and Treatment of Men and Women in Employment [Ordinance n° 2] 2 January 1986 < http://www.japaneselawtranslation.go.jp/law/detail_download/?ff=09&id=2318 > accessed on 15 August 2018.

[55] H. Nakakubo, *ibidem* 17 and following.

[56] H. Nakakubo, *ibidem* 19.

[57] H. Nakakubo, *ibidem* 23 and following.

[58] D. Schiek, L. Waddington and M. Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007) 187.

equality was initially based on pure economic considerations[59]. The Court had first to delineate the principle of equal pay for equal work originally enshrined in Article 119 of the 1957 Treaty establishing the European Economic Community[60]. Although this paper has no pretention to address the specific issue of equal pay[61], it is important to highlight that the equal pay principle was the starting point of both the European[62] and the Japanese[63] legal framework for gender equality at work. As for the European Union, *Defrenne II*[64] was a landmark decision in which the European Court of Justice held that the right to equal pay has direct effect, meaning individuals can avail themselves of this right directly before national courts. This has the effect of allowing a large stream of equal pay cases to be brought before the European courts through the preliminary reference procedure[65]. The Recast Gender Employment Directive[66] encapsulates the definition of direct and indirect discrimination that the Court has articulated throughout its case law[67]. The ECJ has adopted an Aristotelian understanding of the concept of direct discrimination[68], meaning that "persons in a similar situation must be treated in an equal manner, but also that persons whose situations are significantly different must be treated differently"[69], i.e. a formal approach to equality. In this regard, important questions arise with respect to the complexity in judging whether situations are similar and are therefore to be treated alike and vice

[59] C. Barnard, "The Economic Objectives of Article 119", in T. Hervey and D. O'Keeffe (eds.), *Sex Equality Law in the European Union* (Wiley, 1996).

[60] Now Article 157(1) TFEU.

[61] M. Smith, "Social Regulation of the Gender Pay Gap in the EU" *European Journal of Industrial Relations* 18:4 (2012) 365-380; Directorate-General for Justice (European Commission), *Tackling the Gender Pay Gap in the European Union* (Luxembourg: Publications Office of the European Union, 2011); Directorate-General for Justice (European Commission), "European added value of applying the principle of Equal Pay for men and women for equal work or work of equal value" (research paper on economic aspects) *European Added Value Assessment on the Application of the Principle of Equal Pay* (Brussels: European Parliament, 2013).

[62] S. Haverkort-Speekenbrink, *European Non-Discrimination Law – a Comparison of EU law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Intersentia, 2012) 33 (see also: H. Meenan, *Equality Law in an Enlarged European Union* [Cambridge University Press, (2007) 147].

[63] S. Yamada, *op. cit.* 6 (see also: H. Nakakubo, *ibidem* 10).

[64] Case 43/75 *Defrenne v Sabena SA* [1976] ECR 00455, 24.

[65] For further comments see: C. Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* [Antwerp, *Intersentia* 2005) 116-122].

[66] "'[D]irect discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation" (Council Directive 2006/54/CE on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] *O.J. L* 204 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006L0054 > accessed on 9 August 2018).

[67] The process of incorporating the notion direct discrimination in European legal provisions began with the Burden of Proof Directive. But an express definition was first included in the Employment Equality Directive as amended in 2002 and was retained in the Recast Directive as amended in 2006 (see D. Schiek, L. Waddington and M. Bell, *op. cit.* 193).

[68] D. Schiek, L. Waddington and M. Bell, *ibidem* 191 and 205.

[69] S. Besson, "Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?" *Human Rights Law Review* 8:4 (2008) 661 (see*:* Case 251/83 *Eberhard Haug-Adrion v Frankfurt Versicherungs-AG* [1984] ECR 04277, 14; Case 148/02 *Garcia Avello v Belgium* [2003] ECR 11613, 31).

versa[70]. Under EU law, direct discrimination can only be observed when the ground on which the differential treatment is applied, is expressly prescribed by law[71]. Considerations over sex and "characteristics indissociable from sex"[72] constitute the ground on which no differential treatment is allowed "when making decisions on whom to hire, promote or dismiss"[73], because it is deemed irrelevant, thus illegitimate[74]. In this respect, it must be noted that the ECJ tends to interpret broadly the notion of sex[75]. Besides pay discrimination, the Court has also undertaken to protect gender equality regarding access to employment and working conditions, to which it has generally given a large meaning[76]. Notably, the Court has shown most sympathy for dismissal cases[77].

Criticism addressed to the alleged insufficiency and barrenness of Aristotle's postulate has guided the formulation of a substantive conception of equality that is meant to tackle the discriminatory treatments that fall between the cracks of formal equality. Substantive equality is said to address the unjust imbalances derived from socio-economic and cultural factors that have contributed to place a specific group at a systematic disadvantage[78]. It is often argued that a legal system based on formal equality is not sufficient to achieve by itself "genuine equality" because "treating people in a consistent fashion merely leads to a perpetuation of inequality"[79]. In this respect, if the notion of direct discrimination could either embrace a formal or substantive take on equality[80], the substantive approach to equality requires, at any rate, the implementation of an additional concept, that is, indirect discrimination.

Indirect sex discrimination arises from the employment of an apparently neutral criterion of differentiation between individuals, which produces a disparate effect among male and

[70] L. Betten, "New Equality provisions in European Law: some thoughts on the fundamental value of equality as a principle", in K. Economides, L. Betten, J. Bridge, A. Tettenborn and V. Shrubsall (eds.), *Fundamental Values* (Oxford, Hart Publishing, 2000) 73; J.H. Gerards, *Judicial Review in Equal Treatment cases* (Martinus Nijhoff 2005) 566-567.

[71] M.H.S. Gijzen, *Selected Issues in Equal Treatment Law: A Multi-layered Comparison of European, English and Dutch Law* (Intersentia Antwerpen – Oxford, 2006) 54 (see also: S. Besson, *ibidem* 665-666).

[72] Case 79/99 *Schnorbus v Land Hessen* [2000] ECR 10997, Opinion of AG Jacobs 11008

[73] D. Schiek, L. Waddington and M. Bell, *ibidem*. 205 (save for exceptions and justifications)

[74] M.H.S. Gijzen, *ibidem* 53. This ground is enshrined in primary and secondary law provisions (S. Besson, *ibidem* 666).

[75] Case 13/94 *P v S an Cornwall County Council* [1996] ECR I-02143, 19-21.

[76] E. Ellis and P. Watson, *EU Anti-Discrimination Law* (2nd ed., Oxford EU Law Library, 2012) 287 and 288.

[77] E. Ellis and P. Watson, *ibidem* 288 and following.

[78] See N. E. Romas Martìn, "Positive Action in EU Gender Equality Law: Promoting Women in Corporate Decision-Making Positions" *Spanish Labour Law and Employment Relations Journal* 3:1 (November 2014) 20-33.

[79] M.H.S. Gijzen, *op. cit*. 61 subs. (see also: S. Fredman, "Less Equal than Others – Equality and Women's Rights" in C. Gearty, A. Tomkins (A.) (eds.) *Understanding Human Rights* (London/New-York, Mansell 1996); C. E. Baker, "Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection" *University of Pennsylvania Law Review* 131:4 (March 1983)). For an opposite view, see: R. A Epstein, "Standing Firm, on Forbidden Grounds" *San Diego L. Rev.* 31:1 (1994) 1-56.

[80] C. Tobler, "Limits and Potential of the Concept of Indirect Discrimination" Paper for the European network of legal experts in the non-discrimination field (European Commission 2008) 49.

female individuals to which this criterion is applied[81]. The purpose of this concept is twofold. First of all, it enables the principle of equality to reach situations that are not formally discriminatory toward one sex but which end up in practice being indirectly disadvantageous for one over the other[82]. Precisely, what fails to be addressed are the attempts made to circumvent the prohibition of discrimination on one of the listed grounds by the use of seemingly neutral requirements that end up having a similar impact to that of a blatant direct discrimination practice[83]. Second, indirect sex discrimination is meant to tackle the more insidious forms of discrimination, which are to be found in the very structures of the labour market and society at large[84]. In this respect, the ban on indirect sex discrimination addresses the disparities in the historically rooted distribution of power and goods between men and women[85], thus taking into account material differences between men and women[86].

The ECJ has recognised and constructed the notion of indirect discrimination[87], which has later on been enacted in the Recast Directive[88]. Three of the most important ECJ cases with regard to the matter are to be highlighted. In 1972, the ECJ first recognised substantially though not formally the unlawfulness of indirect sex discrimination in the *Sabbatini* case[89] under the general principle of equality and under what is today Article 157 of the TFEU[90]. The *Jenkins* case[91] was the first implementation of the prohibition of indirect sex discrimination against the practice of an employer[92]. This case was delivered as the European

[81] M.H.S. Gijzen, *ibidem* 57.

[82] C. Tobler, "Limits and potential," *ibidem* 24.

[83] This is specifically relevant for Japan even though Japanese law, just as EU law, does not formally take account for the intent of the perpetrator as a relevant factor for establishing indirect sex discrimination (see Section II. of this part).

[84] C. Tobler, *Indirect Discrimination, op. cit.* 145 (see also: T. K. Hervey, "Thirty years of EU sex equality law: looking backwards, looking forwards" *Maastricht J. Eur. & Comp. L.* 12 (2005) 311.

[85] R. Townshend-Smith, "Justifying Indirect Discrimination in England and American Law: How Stringent Should the Test Be?" *IJDL* 1 (1995) 105 (see also: C. Tobler, *Indirect discrimination, ibidem* 58; D. Schiek, L. Waddington and M. Bell, *op. cit.* 327).

[86] M.H.S. Gijzen, *ibidem* 62.

[87] Y. Sui and L. Zhu, "Law of the European Union on Indirect Discrimination against Women in Working Life: From a Perspective of Improving the Law of China on Non-Sex Discrimination against Women in Working Life" *Frontiers L. China* 8 (2013) 783 (for an account of the different stages of this development, see: C. Tobler *Indirect discrimination, ibidem*).

[88] "'[I]ndirect Discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary" (Council Directive 2006/54/CE on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] *O.J. L* 204 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006L0054 > accessed on 9 August 2018).

[89] Case 20/71 *Sabbatini* [1972] ECR 00345.

[90] This case concerned a woman who had seen her application for expatriation allowance being refused under national legislation on the ground that she was no longer the head of her household thenceforth her marriage. See C. Tobler, *Indirect discrimination*, *op. cit.* 108-109

[91] Case 96/80 *Jenkins* [1981] ECR 911.

[92] See M.H.S. Gijzen, *op. cit.* 69-70 (see also: C. Tobler, *Indirect discrimination, ibidem* 142).

Council had just adopted the 1976 Equal Treatment Directive[93] that expressly enshrined the distinction between direct and indirect discrimination without defining the two[94]. The *Bilka* case[95] brought further details as to the factors to be taken into account in the identification of indirect discrimination. Particularly, under EU law, as opposed to Japan, the intent of the perpetrator is irrelevant in assessing whether the differential treatment amounts to unlawful indirect discrimination[96].

As it currently stands under EU law, the identification of indirect discrimination requires examining three demonstration stages: i) "does the case fall within the field of application of the non-discrimination law that is to be applied in the relevant EC MS (i.e. national law as seen against the background of EC law)?; ii) can the victim of the alleged discrimination prove that there is apparent indirect discrimination on a particular ground?; iii) can the perpetrator prove that there is objective justification that will prevent a finding of indirect discrimination?"[97]. As regards the second stage, one must note that the burden of proof lies with the claimant, and the ECJ requires two conditions to be met. It must be established that there exists a *neutral* criterion, provision or practice that is not based on the prohibited ground, but that triggers a *disproportionate disadvantage* for the protected group[98]. Nevertheless, in *Danfoss* the Court held that "where an undertaking applies a system of pay which is totally lacking in transparency, *it is for the employer to prove* that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men"[99].

The fact that the ECJ had been confronted with an ever-increasing number of indirect sex discrimination cases and that it derived the notion of indirect discrimination from the common law tradition explains the broad approach it eventually implemented regarding the matter. Precisely, "the development of indirect discrimination was purely a matter for the ECJ in interaction with domestic courts (notably German and English)" which fostered "the bottom up shaping of community law, given that the latter is moulded on the basis of a factual scenario that occurs at the municipal level which raises questions of the correct interpretation of community sex equality law"[100]. This is where the main difference between

[93] Council Directive 76/207/EEC 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 L* 39.

[94] C. Tobler, *Indirect discrimination, ibidem* 145.

[95] Case 170/84 *Bilka v von Hartz* [1986] ECR 01607.

[96] D. Schiek, L. Waddington and M. Bell, *op. cit.* 356 subs. (see also: Tobler, *Indirect discrimination, ibidem* 148).

[97] C. Tobler, "Limits and potential," *op. cit.* 38.

[98] C-A. Ivanus, "Justification for Indirect Discrimination in EU" *Persp. Bus. L.J.* 3 (2014) 155 (see also: Case 109/88 *Danfoss* [1989] ECR 03199, 10-11; Case 381/99 *Brunnhofer* [2001] ECR I-04961, 1-52).

[99] Case 109/88 *Danfoss* [1989] ECR 03199, 16 (emphasis added).

[100] M.H.S. Gijzen, *ibidem* 69.

the European and the Japanese systems with regard to indirect discrimination lies, as it will be explained in the next section.

Thus, in the EU if gender equality was initially framed within a market-oriented discourse, it has rapidly turned into a social goal and has become an integral part of the human rights logic under the Court's case law[101]. What is more, the adoption of Article 13 of the TEU[102] under the Amsterdam Treaty and the enactment of the EU Charter of Fundamental Rights[103] have entrenched the Union's intent to endorse a substantive conception of equality[104] and to foster equal rights among individuals beyond the working sphere[105]. Be that as it may, compelling strategies have recently given way to softer implementation means such as gender mainstreaming[106], as today's issues on gender equality in the EU relate more and more to private sphere-related and work/life balance concerns rather than overtly discriminatory employment practices[107]. Specifically, it is argued that what has slowed down (but not stopped) the Union's commitment to substantive gender equality is associated with the arguable non-economic character of the current challenges relating to gender discrimination[108]. On the one hand, it is contended that the ECJ and the EU in general lack control over these issues[109], which would prevent further integration in the field. On the other hand, critiques have also been put forward against the court's (and the EU's

[101] S. Prechal, "Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes", *Common Market Law Review* 41:2 (2004) 533.

[102] Consolidated version of the Treaty on European Union, art. 13 [2012] *OJ. C* 326 < https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT > accessed on 19 October 2018 (this article grounds the Union's competence to undertake actions against discriminatory treatments outside the field of employment) (for further comments, see: A. Masselot, "The State of Gender Equality Law," *op. cit.* 153).

[103] Charter of Fundamental Rights of the European Union [2012] *OJ C* 326 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012P/TXT > accessed on 19 October 2018.

[104] J. Bain and A. Masselot, "Gender Equality Law and Identity Building for Europe" *Canterbury Law Review* 18 (2012) 107.

[105] A. Masselot, "The State of Gender Equality Law," *ibidem* (see for comments on the court's recent judicial activism: K. Koldinska, "Case law of the European Court of Justice on Sex Discrimination 2006-2011" *Common Market Law Review* 48:5 (2011).

[106] Gender mainstreaming consists in screening all political or legislative initiatives of any kind with gender equality considerations in order to prevent discrimination at source (see: European Institute for Gender Equality, "What is Gender Mainstreaming?" < http://eige.europa.eu/gender-mainstreaming/what-is-gender-mainstreaming > accessed on 22 July 2018; S. Jacquot, "The Paradox of Gender Mainstreaming: Unanticipated Effects of New Modes of Governance in the Gender Equality Domain" *West European Politics* 33:1 (2010) 118-135; E. Lombardo and P. Meier, "Framing Gender Equality in the European Union Political Discourse" *Social Politics: International Studies in Gender, State and Society* 15:1 (2008) 101-125).

[107] S. Jacquot, "The Paradox of Gender Mainstreaming," *ibidem*.

[108] S. Walby, "The European Union and Gender Equality: Emergent Varieties of Gender Regime" *Social Politics* 11:1 (Oxford University Press: 2004).

[109] S. Mazey, "L'Union européenne et les droits des femmes: de l'européanisation des agendas nationaux à la nationalisation d'un agenda européen?", in R. Balme, R. Chabanet, V. Wright (eds.), *L'action collective en Europe* (Paris: Presses de Science Po, 2002) 405-432; E. Lombardo and P. Meier, "Framing Gender Equality in the European Union Political Discourse" Social Politics: International Studies in Gender, State & Society 15:1 (March 2008).

at large[110]) development of a "dominant ideology of family and motherhood which privileges heterosexual marriage and legitimates the sexual division of labour in the home"[111]. Finally, the extent to which the ECJ commits to substantive equality is not always quite clear in view its persisting endorsement of the formal "fault model" which ignores that "inequality is frequently a consequence of institutional arrangements for which no single actor is 'to blame'"[112].

2.2. Direct and indirect gender discrimination in Japan, an artificial legal artefact?

Just as in the EU, in Japan gender equality at work finds its origins in the equal pay for equal work principle. Articles 3 and 4 of the 1947 Labour Standards Law[113] lay down the equal pay principle with an explicit emphasis placed upon the protected category of women. Article 4 has been construed so as to mean that a woman who holds identical work responsibilities as a male colleague's, can be discriminated against with regard to her salary if her employer provides for a "real justification other than the employee's gender or gender stereotypes"[114], making the issue of justification crucial in the Japanese courts' case law on equal pay[115]. Interestingly, the European Court of Justice allows for discrimination in salary treatment between men and women under a limited set of exceptions[116].
Unlike the EU, the courts did not rely on a general principle of non-discrimination despite the fact that the Japanese Constitution expressly enshrines the fundamental right to gender equality. As a matter of fact, Article 14 of the Constitution[117], known as the equity clause,

[110] E. Lombardo, "EU Gender Policy, Trapped in the 'Wollstonecraft Dilemma'?" *The European Journal of Women's Studies* 10:2 (2003); R. Guerrina, "Mothering in Europe: Feminist Critique of European Policies on Motherhood and Employment" *The European Journal of Women's Studies* 9:1 (2002).

[111] C. McGlynn, "European Union Family Values: Ideologies of 'Family' and 'Motherhood' in European Union law" *Social Politics: International studies in Gender, State & Society* 8:3 (October 2001) 343

[112] Case 256/01 *Allonby v Accrington & Rossendale College* [2004] IRLR 224; Case 320/00 *Lawrence v Regent office Care* [2002] ECR I-7325 [S. Fredman, "Changing the Norm, Positive Duties in Equal Treatment Legislation" *MJ* 12:4 (2005) 390].

[113] Japanese Labour Standards Act [Act no. 49] 4 April 1947 < https://www.ilo.org/dyn/natlex/docs/WEBTEXT/27776/64846/E95JPN01.htm > accessed on 9 August 2018 (respectively, "Employers shall not discrimination among workers in respect to wages, working hours, or other labour conditions on the basis of nationality, creed, or social status", and "Employers shall not discriminate against female employees in respect to wages").

[114] Judgment of Dec. 4, 1986, 37-6 *Rōdō Kankei Minji Saibanreishū* 512 (the Court endeavoured to define the meaning of equal work) (see also: M. L. Starich, *op. cit.* 554; K. Sugeno, *op. cit.*).

[115] Akita D. Ct., Apr. 10, 1975, 778 *Hanrei Jihō* 27 (*Akita Sōgo Bank* case: discriminatory wage structure against women declared unlawful under Article 4 of the LSA); Morioka D. Ct., Mar. 28, 1985, 1149 *Hanrei Jihō* 79 (*Iwate Bank* case: discrimination in payment of allowance for dependents declared unlawful under Article 4 of the LSA) (for further comments on equal pay in Japan see: T. Kato and N. Kodama, "Work-Life Balance Practices, Performance-Related Pay, and Gender Equality in the Workplace: Evidence from Japan" *IZA Discussion Paper* No. 9379 (September 2015).

[116] E. Ellis and P. Watson, *op. cit.* 143-144 (see also: J. Tudor, "Closing the Gender Pay Gap in the European Union: the Equal Pay Guarantee Across the Member-States" *North Dakota Law Review* 92:2 (2017) 424-427).

[117] Constitution of Japan, 3 November 1946 < http://www.refworld.org/docid/3ae6b4ee38.htm > accessed on 30 July 2018

has been interpreted restrictively by courts[118], so as to exclude relationships between private parties from its scope of application[119]. Instead, the judiciary has systematically challenged discriminatory labour practices against women on the basis of two articles of the Japanese Civil Code. On the one hand, Article 90 of the Civil Code[120] protecting public order and good morals is applied to declare null and void *legal* acts[121] that the courts find to be discriminatory on the ground of gender[122] and to which no objective justification has been found[123]. This provision, better known as the public order doctrine[124], has been applied by Japanese courts against an important number of discriminatory practices perpetrated against women[125] such as the requirement to resign upon marriage[126] and/or pregnancy[127], as well as mandatory early retirement[128]. Like the ECJ, courts have specifically been active in protecting job security for women[129] under this legal basis, and this, even after the enactment of the Equal Employment Opportunity Law (EEOL). As a matter of fact, the Japanese labour law system including the EEOL is subordinate to and thus governed by the private law system, and precisely by Article 90 of the Japanese Civil Code[130]. On the other hand, Article 709 of the Japanese Civil Code[131] serves as a legal basis for the development of tort law regarding discriminatory factual acts, being referred to in order to compensate the damage suffered by the discriminated victim[132]. For example, a District Court held that encouraging female employees to retire at a younger age than their male

[118] Tokyo D. Ct., Dec. 4, 1986, *The Japan Iron and Steel Federation* case, 37-6 *Rōdō Kankei Minji Saibanreishū* 512 (for further comments on the case see: C. J. Milhaupt, J. M. Ramseyer and M. D. West, *The Japanese Legal System: Cases, Codes and Commentary* (Foundation Press 2006) 587.

[119] H. Nakakubo, *op. cit.* 10 (see also: M. D. Helweg, "Japan's Equal Employment Opportunity Act: A Five-Year Look at Its Effectiveness", *B.U. Int'l L.J.* 9 (1991) 297)

[120] "A juristic act with any purpose which is against public policy is void" (Japanese Civil Code [Act n° 89] 27 April 1896 < http://www.moj.go.jp/content/000056024.pdf > accessed on 3 November 2018).

[121] I.e. "acts with legal force such as a transfer, a suspension, termination by agreement or a firing" [L. Parkinson, "Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change", *Columbia Law Review* 604 (1989) 657].

[122] H. Nakakubo, *op. cit.* 10 (see also: M. L. Starich, *op. cit.* 555).

[123] L. Parkinson, *op. cit.* 657.

[124] M. L. Starich, *ibidem* 555 [see also: D. H. Foote, "Judicial Creation of Norms in Japanese Labour Law: Activism in the Service of Stability?", in *UCLA Law Review* 635 (1996) 672 and following].

[125] For further comments on this case law, see K. Nemoto, *Too Few Women at the Top: the Persistent of Inequality in Japan* (Ithaca: Cornell University Press, 2016) 56 and following.

[126] Tokyo D. Ct., Dec. 20, 1966, *Sumitomo Cement* case, 17-6 *Rōdō Kankei Minji Saibanreishū* 1407.

[127] Osaka D. Ct., Dec 10, 1971, *Mitsui Engineering and Shipbuilding* case, 22-6 *Rōdō Kankei Minji Saibanreishū* 1163.

[128] Supreme Court (3rd Petty Bench), Mar. 24, 1981, *Nissan Motor* case, 35-2 *Saikōsaibansho Minji Hanreishū* 300; Tokyo D. Ct., Jul. 1, 1969, *Tōkyū Machinery Industries* case, 20-4 *Rōdō Kankei Minji Saibanreishū* 715.

[129] D. H. Foote, *ibidem* 672.

[130] K. Minamino, "Reappearing Gender Bias in the Employment Discrimination Cases – a cause for gender training for the judiciary in Japan", *JSPS Grants-in-Aid for Scientific Research* 24330033 (2012-2016) 57.

[131] "A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence" (Japanese Civil Code [Act n° 89] 27 April 1896).

[132] S. Yamada, *op. cit.* 7.

counterparts constituted a tort[133]. Thus unlike the ECJ, Japanese courts did not take the initiative to create a system of law that would protect women's equal rights at work on the ground of a constitutional provision. Interestingly enough, the actual protection found its original foundation in civil law provisions, thus placing this system of protection initially far from the human right-related and far-reaching approach adopted under EU law.

If Japanese courts have been active in protecting job security by recognising directly discriminatory treatments, for example, in dismissal cases and retirement cases (and equal pay cases for that matter), they have generally shown much more reluctance to extend the public order doctrine to discriminatory treatment in hiring[134] and promotions[135]. On the basis of the freedom of contract principle, Japanese courts have shown significant deference to employers, which they have best expressed in the *Mitsubishi Plastics* case[136]. Under this case, some argue that, if wage differences are ensued by different hiring categorisations between male and female employees (even though they engage in equivalent work), this does not necessarily amount to unlawful discrimination under Article 4 of the Labour Standards Act (LSA)[137], since the latter is not a "specific statutory ban"[138]. Nevertheless, the EEOL, that expressly prohibits gender discrimination in hiring and promotion[139], had a relative influence on the courts' later interpretation of Article 4 of the LSA and the public order doctrine[140], as it will be highlighted further.

Most importantly, the EEOL introduced the distinction between direct and indirect discrimination in the 2006 reform. The act does not provide for a definition of these two concepts. Nevertheless, it contains two provisions devoted to the protection against discrimination "on the basis of sex" (Articles 5 and 6)[141], i.e. the legal ground for direct discrimination disputes. These Articles are followed by another provision dealing with discrimination "on the basis of conditions other than sex" (Article 7)[142]. This dichotomy outlined from the dif-

[133] Tottori D. Ct., Dec. 4, 1986, *Tottori Prefecture Board of Education* case, 486 *Rōdō Hanrei* 53.

[134] Tokyo D. Ct., Dec. 4, 1986, *The Japan Iron and Steel Federation* case, 37-6 *Rōdō Kankei Minji Saibanreishū* 512 *translated in* C. J. Milhaupt et al., *op. cit.* 587 ("the failure of an employer to grant an equal opportunity in recruitment and hiring [is] not a violation of public order").

[135] Tokyo D. Ct., Dec. 4, 1986 *The Japan Iron and Steel Federation* case 37-6 *Rōdō Kankei Minji Saibanreishū* 512.

[136] Supreme Court, Dec. 12, 1973, *Mitsubishi Plastics* case, 27-11 *Saikōsaibansho Minji Hanreishū* 1536.

[137] R. Sakuraba, *op. cit.* 185.

[138] H. Nakakubo, *op. cit.* 10 [for further critiques, Y. Yunoki, "From the Court: Showa Shell Co. Wage Discrimination case", *Bulletin of the society for the study of working women* [Josei Rōdō Kenkyū Zasshi] 54 (2010) 160-162].

[139] For further comments see: H. Nakakubo, *ibidem* 13-14.

[140] L. Parkinson, *op. cit.* 656-657.

[141] These two articles forbid gender discrimination with regard to recruitment, assignment, loans for housing, transfer, status and retirement (Japanese Equal Employment Opportunity Law [Act n° 113] 1st July 1972).

[142] The article reads as follows: "An employer shall not take measures which concern the recruitment and employment of workers, or any of the matters listed in the items of the preceding Article and apply a criterion concerning a person's condition other than the person's sex, and which is specified by Ordinance of the Ministry of Health, Labour and Welfare as measures that may cause a virtual discrimination by reason of a person's sex, considering the proportion of men and women who satisfy the criterion and other matters, except in a case where there is a legitimate reason to take such

ferent wording of these articles draws a line between direct and indirect discrimination, as understood under EU law.

According to Article 7 of the EEOL, it is for the Ministry of Health, Labour and Welfare to produce a list of supposedly neutral criteria of employment whose use would constitute, except under justified circumstances, indirect discrimination under the law. In order to do so, the Equal Employment Opportunity Policy Meeting had already released a report in 2004 that shed light on numerous job requirements likely to trigger indirect discrimination[143]. Among these requirements, only three were embedded in the Ministry Ordinance, namely "the condition for recruitment relating to a worker's height, weight and physical strength, the condition for recruitment for the main career track requiring a worker's availability for nationwide transfer, and the condition for promotion requiring the worker to have the experience of a transfer"[144]. The Ministry has provided for guidelines in order for the courts to interpret the provision[145].

Critiques have been addressed to this narrowly drafted legal framework on indirect discrimination[146], as it does not comply satisfactorily with the goals set under the EEOL and the Japanese Constitution[147]. The strategy consisting in enumerating the specific circumstances under which unlawful indirect discrimination occurs will undoubtedly fall short both in practice and in view of the theoretical purposes of indirect discrimination. As a matter of fact, a "closed" list of conditions rather than a generic definition for coping with indirect sex discrimination is tantamount to a toothless tiger, as companies generally develop alternative practices to circumvent the ban. Including additional job conditions in the Ordinance, such as "being the head of the household" or "graduating from a prestigious university when it appeared not to be necessary for the position" is thus the least that is expected from the Japanese legislature according to some academics[148]. Japanese courts had already recognised its potential discriminatory impact, at least in wage discrimi-

measures, such as a case where such measures are specifically required for the purpose of performing the relevant job in the light of the nature of that job; or a case where such measures are specifically required for the purpose of employment management in the light of the circumstances of the conduct of the employer's business" (Japanese Equal Employment Opportunity Law [Act n° 113] 1st July 1972).

[143] "Requiring a standard height, weight and physical strength as a condition for recruitment; requiring the availability for nationwide transfer as a condition for recruitment for the main career track; requiring a standard academic level (including the major subject) as a condition for recruitment; requiring the experience of a transfer that required relocation of residence as a condition for promotion; requiring the status of the head of a household recorded in the residence certificate (e.g. being the primary breadwinner or having dependents) as a condition for receiving fringe benefits or family allowances, etc.; treating full-time workers more favourably than part-time workers; etc." (S. Yamada, *op. cit.* 13-14).

[144] Article 2 of the Ordinance for Enforcement of the Equal Employment Opportunity Act (see also: S. Yamada, *ibidem* 14).

[145] R. Sakuraba, *op. cit.* 190.

[146] H. Nakakubo, *ibidem* 16 (see also: K. Nemoto, *Too few Women*, *op. cit.* 54; M.L. Starich, *op. cit.* 566).

[147] Article 1 of the EEOL lays down as follows: "promote securing equal opportunity and treatment between men and women in employment in accordance with the principle in the Constitution of Japan of ensuring equality under law".

[148] H. Nakakubo, *op. cit.* 16 (see also: M.L. Starich, *op. cit.* 566).

nation under Article 4 of the LSA[149], just as the ECJ originally did in the *Sabbatini* case. Second, it is hard to see how the dismantling of the structural inequalities rooted in the employment system could find any effectiveness with such rigid legal tool, as it lacks a systemic approach[150]. These arguments were arguably taken into account by the Ministry, who included in the Ordinance the possibility for courts to recognise other job requirements as amounting to indirect discrimination under the law[151]. In that respect, it should be highlighted that Japanese courts tend to apply strictly the principle of non-retroactivity of laws[152]. This implies that they prefer applying the public order doctrine as explained above, rather than directly relying on the EEOL when adjudicating sex discrimination cases since they usually consider the discriminatory treatments to have occurred before the enactment of the law despite the continuance of their effects. This further hinders the efficacy of this already restricted provision, as courts are not likely to construct their approach to gender equality according to its wording.
Indirect discrimination remains a fundamental issue to be addressed in the context of gender equality at work. As it will be further argued in the next part, Japanese companies have been known to adapt their employment strategies in order to circumvent the ban on gender discrimination. This generally implied the use of indirect discrimination practices. This first materialised with the reworking of the dual track hiring system as a reaction to the adoption of the EEOL. This system distinguishes between a management track (*sōgōshoku*) and a general track (*ippanshoku*)[153]. The first one was exclusively destined to men and implies management responsibilities in planning, development and negotiations, overseas assignment, and frequent transfers[154]. The second one was originally reserved to women and involves clerical duties such as photocopying, serving tea and basic office work[155]. The general track does not offer lifetime employment guarantees and provides for fewer benefits than the management track[156]. In its original form, the system was explicitly meant to divide female and male office workers and companies made it harder if not forbidden for women to access the managerial track[157]. While one might argue that the dual-track hiring system lost its predominant place in the employment practices of most Japanese com-

[149] R. Sakuraba, *op. cit.* 184 subs. (H. Nakakubo, *ibidem* 17).

[150] S. Yamada, *op. cit.* 14.

[151] M. L. Starich, *ibidem* 567.

[152] C. F. Goodman, *The Rule of Law in Japan: A Comparative Analysis* (Kluwer Law International, 2008) 144.

[153] K. Sugeno, *op. cit.* 132.

[154] K. Kamio Knapp, [Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law", *18 Harv. Women's L.J.* 83,87:18 (1995) 123.

[155] M. L. Starich, *ibidem* 558 (see also: G. T. Shimoda, "Japan's New EEOL: Combating Sexual Harassment in the Workplace", *The Transnational Lawyer* 16:215 (2002) 224].

[156] H. A. Goff, "Glass Ceiling in the Land of the Rising Sun", *Law and Policy in International Business* 26 (1995) 1153.

[157] K. Kamio Knapp, *op. cit.* 123.

panies, others contend that it persisted in other forms[158]. For example, many employers tend to now outsource the clerical work[159]. However, one thing is certain: the dual-track system remains legal if it is accessible to both men and women, which led some to argue that "only those few women who could afford to choose the career track were blessed with equal employment opportunities and treatment"[160]. Yet, Japanese courts have shown reluctance in applying the public order doctrine to discriminatory treatments in hiring and recruiting that most likely consist in indirect discrimination[161]. Notably, it has been argued that some seemingly neutral job requirements for the managerial track tend to exclude most women from the competition, such as long working hours and frequent transfer to distant locations[162]. This is due to the deeply rooted tradition according to which women alone are to take care of their family, an idea that is being relatively challenged today.

Despite its overtly discriminatory nature, the track hiring system has generally been regarded by Japanese courts as a fair use of the businesses' right to freedom of association[163]. Interestingly enough, in rare cases Japanese courts would hold indirect discrimination practices unlawful, but only when they consist in blatant attempts on the part the employer to exclude women from certain positions or benefits[164]. In these cases, Japanese courts did not highlight the difference between direct and indirect discrimination. This is why it has been argued by Japanese scholars that these borderline cases are straddling both notions of direct and indirect discrimination[165]. In other words, even if formally speaking these cases were falling with the realm of indirect discrimination, they did not consist in landmark cases with regard to the notion. For example, the *San'yō Bussan* case[166] concerned an employer's practice excluding from the seniority-based wage system employees

[158] K. Nemoto, *Too Few Women*, *op. cit.* 55-64; J. Benson, M. Yuasa and P. Debroux, "The Prospect for Gender Diversity in Japanese Employment" *Int. J. Human Resource Management* 18:5 (May 2007); U. Frey, "Towards Gender Equality at the Work Place: Women's Work Opportunities versus Life Style Preferences – Changes in Selected Japanese Legislation during the Last Quarter of the 20th Century" *Social Systems: Political, legal and economic studies* 18 (2015) 67.

[159] E. Mun, "Negative Compliance as an organisational response to legal pressures: the case of Japanese Equal Employment Opportunity Law" *Social Forces* 94:4 (2016) 1418.

[160] M. Ikuko, "Promoting Gender Equality in Japan: An Examination of Labour Law" *Osaka University Law Review* 64 (February 2017) 163 [see also: Y. Abe, "The Equal Employment Opportunity Law and Labor Behaviour of Women in Japan" *International Economies* 25:1 (2011) 39-55].

[161] M. L. Starich, *op. cit.* 567 (see also: D. H. Foote, *op. cit.* 672).

[162] C. Weathers, "In Search of Strategic Partners: Japan's Campaign for Equal Opportunity" *Social Science Japan Journal* 8:1 (2005) 71.

[163] K. Nemoto, "When culture resists progress: masculine culture and its impacts on the vertical segregation of women in Japanese companies" *Work, employment and society* 27:1 (2013) 156.

[164] Tokyo High Ct., Jan. 31, 2008, *Kanematsu* case, 959 *Rōdō Hanrei* 85 (for further comments see: Asia-Japan Women's Resource Center, "Kanematsu Sex Discrimination Case" [Kanematsu danjo sabetsu chingin saiban], 2012, < http://ajwrc.org/jp/modules/bulletin/index.php?page=article&storyid=500 > accessed on February 23, 2018).

[165] H. Nakakubo, *op. cit.* 17 (see also: K. Minamino, *op. cit.* 64).

[166] Tokyo D. Ct., June 16, 1994, 651 *Rōdō Hanrei* 15.

who were not the head of their households and of employees with limited work areas[167]. The court recognised that this practice adversely affected female employees, as they were far less likely to comply with these two requirements[168]. But as already mentioned, this isolated case did not set a 'precedent' with regard to indirect discrimination as the court did not formally recognise the relevance of the principle and rather focused on the intention of the employer[169]. Therefore, despite the official recognition of indirect discrimination by the law, it does not seem to have fundamentally shaped the judicial discourse on gender discrimination at work in Japan.

3. The comparability issue in gender discrimination cases

3.1. Comparability in the EU: officially recognised but not always relied upon

Under EU law, direct discrimination is confined by the following conditions. From the wording of Article 2.1 (a) of the Recast Directive, unlawful direct discrimination requires four conditions to be established: a less favourable treatment on a forbidden ground compared to a present/past/hypothetical comparator who is *similarly situated* as the plaintiff[170]. A challenging issue in this sense is the comparability of situations, especially in gender discrimination cases[171]. Although the ECJ recognises the importance of the comparability test, it finds it difficult in practice to draw its objective contours[172]. Sometimes this has even led the Court to elude the question altogether[173]. What is more, the presupposition of inherent neutrality in the standard of treatment that serves as comparator may hide "organisational culture or behaviour that runs counter to a substantive notion of equality"[174]. This may be even truer for Japan, as it will be suggested in the last part of this paper. Put shortly, behind the idealised image of the standard male worker may stand structural working conditions that are objectionable from many viewpoints and thus undesirable for any person, be that person a man or a woman. On the other hand, the same uncertainty

[167] R. Sakuraba, *op. cit.* 184.

[168] R. Sakuraba, *ibidem* 184 subs.

[169] H. Nakakubo, *ibidem* 17.

[170] M.H.S. Gijzen, *op. cit.* 53 [see further: S. Fredman, *Discrimination Law* (Oxf. Univ. Press, 2002) 93-102].

[171] D. Martin, *Egalité et Non-Discrimination dans la Jurisprudence Communautaire* (Bruylant, 2006) 151-153 (see for example: Case 356/09 *Pensionsversicherungsanstalt v Christine Kleist* [2010] ECR 11939).

[172] Case 256/01 *Allonby v Accrington & Rossendale College* [2004] IRLR 224.

[173] S. Besson, *op. cit.* 664.

[174] D. Schiek, L. Waddington and M. Bell, *op. cit.* 206 (for further comments see: N. Lacey, *Unspeakable subjects – feminist essay in legal and social theory* (Hart Publishing 1998) 24)

is seen by others as the sign that there isn't always a need for a comparator for a directly discriminatory treatment to be established. From their perspective, this is because the need for a comparator might in some cases be seen as superfluous[175] or because direct discrimination can simply be the result of roles ascribed by society to the discriminated group[176].
There is one specific case in which the Court has incontestably recognised the existence of direct discrimination without the need for a comparator to exist[177]. In the *Dekker* case[178], the ECJ held that discriminatory treatment on the ground of pregnancy amounts to direct discrimination. Since there is no relevant comparator to a pregnant woman[179], the Court somewhat circumvents this problem by extending the legal discrimination ground of sex to characteristics "indissociable from sex"[180].
As regards indirect discrimination, it is argued that it consists in a "hidden kind of different treatment of comparable cases"[181]. This is the reasoning that the ECJ seems to have adopted[182], making the issue of comparability more complex but as fundamental as for direct discrimination. Thus in indirect sex discrimination cases, even if two situations are factually different, taking into account these differences would be irrelevant for the concerned treatment[183]. Under such reasoning, the ECJ has recognised that equality cannot be achieved without taking into account the socio-economic positions of members of the disadvantaged group. Precisely the fact that women, more than men, are under pressure to reconcile their professional lives with their domestic duties put them at a disadvantage in the job market[184]. This socio-economic disadvantage exerts an influence on how the detrimental effects of a seemingly neutral employment criterion are allocated among male and female workers. The main argument for this pertains to the early cases of the ECJ in

[175]This is when "the less favourable treatment is overtly based on a suspect characteristic" (D. Schiek, L. Waddington and M. Bell, *ibidem* 206-207).

[176]N. Bamforth, "The Changing Concept of Sex Discrimination" *The Modern Law Review* 56:6 (1993) 880.

[177]For further critiques, see: S. Fredman, "European Community Discrimination Law: A Critique" *Industrial Law Journal* 21:2 (June 1992).

[178]Case 177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* [1990] ECR I-03941, 10-12; Case C-32/93 *Webb v EMO* [1994] ECR I-1963; Case C-421/92 *Habermann-Beltermann v Arbeiterwohl- fahrt* [1994] ECRI-1657.

[179]M.H.S. Gijzen, *ibidem* 54.

[180]Case 79/99 *Schnorbus v Land Hessen* [2000] ECR 10997, Opinion of AG Jacobs 11008 (see also: Case C-506/06, *Sabine Mayr* v. *Bäckerei und Konditorei Gerhard Flöckner OHG*, [2008] ECR I-1017; Case C-116/06, *Sari Kiiski* v *Tampereen kaupunki*, [2007] ECR I-7643; Case *460/06 Paquay v Societé d'Architectes Hoet and Minne SPRL* [2007] *ECR I-8511*) (for further comments, see: K. Koldinska, "Case law of the European Court of Justice on Sex Discrimination 2006-2011" *Common Market Law Review* 48:5 (2011) 1620-1628) [for critiques of the Court's case law in this specific field, see: E. Caracciolo di Torella and P. Foubert, "Surrogacy, pregnancy and maternity rights: a missed opportunity for a more coherent regime of parental rights in the EU" *European Law Review* 40:1 (2015)].

[181]C. Tobler, *Indirect discrimination, op. cit.* 218 [see specifically: S. Burri, "Annex I legal aspects and direct and indirect discrimination", Research Paper for Gender in equality in employment and occupation – European Implementation Assessment (March 2015) 29].

[182]Joint cases 4/02 and 5/02 *Hilde Schönheit and Becker* [2003] ECR I-12575, 67.

[183]S. Fredman, *Discrimination Law* (Oxford: OUP Oxford, 2011) 177.

[184]M.H.S. Gijzen, *op. cit.* 57-58 (see also: C. Tobler, *Indirect discrimination, ibidem* 58 subs.).

which the court protected female part-time workers on the ground of indirect sex discrimination[185]. In practice the question whether the differentiation criterion between part-timers and full-timers triggers unlawful indirect discrimination is never simple[186].
In the *Seymour-Smith* case[187] the ECJ laid down two alternative tests in order for the national court to determine whether the disparate effect of the challenged measure amounts to indirect discrimination under EU law[188]. Either "the statistics available" should "indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years' employment required by the disputed rule", or they should reveal "a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement of two years' employment"[189]. Moreover, a comparison between male and female employees who do not comply with the criterion *as well as* a comparison between male and female employees who do comply with the criterion should be undertaken[190]. Nevertheless the Court did not apply this principle in this very same case[191]. At any rate, only focusing on whether the criterion disadvantages more women and favours more men[192] seems like an over-simplified solution[193].

3.2. The intent of the employer or the prevailing criterion under Japanese case law

As for Japan's case law on gender equality, the issue of comparability is as crucial as in the EU. Since the development of the 1947 Labour Standards Act (LSA), Japanese companies have carefully organised their employment strategy in order to circumvent legal progress made in the field of gender equality at work[194]. Most notably the dual-track hiring system has institutionalised differential treatments between men and women in all stages

[185] Case 170/84 *Bilka v von Hartz* [1986] ECR 01607; Case 285/02 *Elsner-Lakeberg v Land Nordrhein-Westfalen* [2004] ECR I-05861; Case 96/80 *Jenkins* [1981] ECR 911; Case 300/06 *Voß v Land Berlin* [2007] ECR I-10573.

[186] See for example: Case 189/91 *Kirsammner-Hack* [1993] ECR I-06185, 24 (for an analysis of indirect sex discrimination cases relating to the treatment of part-time workers, see E. Ellis and P. Watson, *op. cit.* 149 subs.).

[187] Case 176/97 *Seymour-Smith* [1999] ECR I-00623 (C. Tobler, *Indirect discrimination*, *ibidem* 229).

[188] For comments on this case see: D. W. Vick, "Disparate Effects and Objective Justifications in Sex Discrimination Law" *Int. J. of Discrimination and the Law* 5:1 (2001) < http://journals.sagepub.com/doi/pdf/10.1177/135822910100500102 > accessed on March 25, 2018 [see also: C. Barnard and B. Hepple, "Indirect Discrimination: Interpreting *Seymour-Smith*" *The Cambridge Law Journal* 58:2 (1999)].

[189] Case 176/97 *Seymour-Smith* [1999] ECR I-00623, 60-61 (for comments on this test, see: C. Tobler, *Indirect discrimination*, *ibidem* 230 subs.).

[190] M.H.S. Gijzen, *ibidem* 81 (see also: C. Barnard & B. Hepple, "Substantive Equality" *The Cambridge Law Journal* 59:3 (2000) 571) Case 176/97 *Seymour-Smith* [1999] ECR I-00623 (see: C. Tobler, *Indirect discrimination*, *ibidem* 233).

[191] It only compared the pools of workers comp.lying with the criterion (Case 176/97 *Seymour-Smith* [1999] ECR I-00623, 63)

[192] C. Tobler, *Indirect discrimination*, *op. cit.* 233.

[193] Case 249/97 *Gruber v Silhouette International Schmied* [1999] ECR I-05295 (see also: Case 313/02 *Wippel* [2004] I-09483, 61-62).

[194] M. L. Starich, *op. cit.* 554.

of employment, and primarily in promotions, vocational training, and wages[195]. When sufficiently sophisticated and apparently neutral, this system prevents comparison between the situation of female employees and that of their male counterparts. With the enactment of the EEOL in 1985, some argue that the system has not been reduced but was actually reinforced and adapted to the new legal framework[196]. Most large companies would make both tracks available for men and women[197], but make the management track conditional to outwardly neutral conditions with which most Japanese women would not be likely to comply, i.e. overtime work and transfer requirements[198]. Besides this type of indirect discrimination case, the dual-track hiring system has also been a source of direct discrimination which Japanese courts seeks to set aside. For example, in the *Kanematsu* case, the dual track hiring system put into place by the company was an artificial artefact hiding discriminatory treatment in pay and promotions between male and female employees performing the same work. This concealed direct discrimination was declared unlawful by the Tokyo High Court and this was upheld by the Japanese Supreme Court[199]. Nonetheless, Japanese courts have usually legitimised the dual-track hiring system on the ground that it has generally been established before the enactment of the EEOL and that workers from the clerical track are given opportunities to change track by acquiring experience[200]. In Japan, discrimination on the ground of pregnancy and maternity has been regarded as a distinct issue from the other grounds of discrimination. The inherent insolubility of the comparability issue for these cases justified the adoption of a distinct article devoted to discriminatory treatments on the ground of marriage, pregnancy or childbirth (Article 9)[201]. Article 9[202] focuses on dismissal but prevents also employers from giving "disadvantageous treatment by reason of pregnancy, childbirth" or maternity leave (essentially) to their fe-

[195] K. Kamio Knapp, *op. cit.* 123.

[196] C. F. Goodman, *op. cit.* 146.

[197] For detailed statistics and comments see: L. Parkinson, *op. cit.* 625 and 646-647.

[198] C. F. Goodman, *ibidem* 146.

[199] Tokyo High Ct., Jan. 31, 2008, 959 *Rōdō Hanrei* 85 < http://ajwrc.org/jp/modules/bulletin/index.php?page=article&storyid=500 > accessed on 4 November 2018 [K. Minamino, *op. cit.* 68: "The Court scrutinized the wage table, labour management practices, and the comparative worth of the work of the women and men, and concluded the wage gap and the management practice constituted unlawful discrimination based on gender, thus violating the public order and good morals requirement of the Civil Code article 90") 2009].

[200] K. Nemoto, "When culture resists progress," *op. cit.* 156.

[201] H. Nakakubo, *op. cit.* 14. It is argued that the *Tōhō Gakuen* Case (Supreme Court (1st petty bench) Dec. 4, 2003, 862 *Rōdō Hanrei* 14) was the leading case from which this reform was inspired (S. Yamada, *op. cit.* 14).

[202] Article 9: "(1) Employers shall not stipulate marriage, pregnancy or childbirth as a reason for retirement of women workers.
(2) Employers shall not dismiss women workers for marriage.
(3) Employers shall not dismiss or give disadvantageous treatment to women workers by reason of pregnancy, childbirth, or for requesting absence from work as prescribed in Article 65, paragraph 1, of the Labour Standards Act (Act No. 49 of 1947) or having taken absence from work as prescribed in the same Article, paragraph 1 or 2, of the same act, or by other reasons relating to pregnancy, childbirth as provided by Ordinance of the Ministry of Health, Labour and Welfare"

male employees. This entails that this type of discriminatory treatment is to be considered as a separate issue from the case of direct discrimination on the ground of sex prohibited under Articles 5 and 6. Interestingly, a 2006 statistical study of the Equal Employment Opportunity Offices of Prefectural Labour Bureaus revealed that 90,8% of cases relating to dismissal and retirement were by reason of pregnancy or childbirth[203]. While this may reveal the Japanese companies' lack of commitment to respect the rights of their employees in relation to pregnancy and childbirth, it might also indicate that these are issues regarding which Japanese female workers are most aware of being entitled to protection. Even though discrimination upon marriage can occur against men too, the article only provides women with this protection, which expresses the legislature's attempt to acknowledge what it recognised as the historically discriminated group.

When it comes to indirect discrimination, as the Japanese legislature adopted a practical approach under which a listed number of criteria are susceptible to trigger discrimination, one could expect that the Japanese courts would presume the use of these criteria to be unlawfully discriminatory without regard for the intent of the employer. That, however, would mean forgetting the general reluctance of Japanese courts to address the core issue of indirect sex discrimination, that is, the strict *social* segregation between male and female workers. Accordingly, the courts have generally recognised the existence of unlawful indirect discrimination when it constituted a rather blatant attempt of the employer to discriminate their female employees. In this regard, the EEOL and its enforcement Ordinance do not seem to bring about any substantial change. This could pertain to the very inadequacy of the EEOL's narrow approach. With regard to the formulation of the different provisions, there are two specific hurdles to be highlighted. Primarily the absence of a generic definition of indirect discrimination represents a fundamental obstacle to the judicial expansion of the list of indirectly discriminatory criteria. As Japanese law currently stands, the courts are not provided with any legal marker in order to distinguish what constitutes indirect discrimination from what does not[204]. However a definition had emerged from the discussions of the labour policy council's subcommittee on equal employment[205] according to which indirect discrimination occurs "when rules, standards[,] and customs appear facially to be gender neutral but one sex is receiving substantially disadvantageous treatment, and

(4) Dismissal of women workers who are pregnant or in the first year after childbirth shall be void. However, this shall not apply in the event that the employers prove that dismissals are not by reasons prescribed in the preceding paragraph".

[203] H. Nakakubo, *op. cit.* 18.

[204] K. T. Geraghty, *op. cit.* 522-523.

[205] This governmental body is in charge of investigating and deliberating on the enforcement and required amendments of Japanese law on gender equality [see: K. Nakamura, "The Process of Formulating Policy in Labor Matters: Derailment? Or Transformation?" *Japan Labor Review* 6:2 (Spring, 2009)].

that treatment has no relationship to job duties and no legal or rational basis"[206]. This definition was rejected under the pressure exercised by companies that deemed the general concept of indirect discrimination to entail too much legal uncertainty[207]. This being said, it has also been argued that Japanese courts only regard the EEOL "as merely a statement of policy that illustrates the current social trends"[208] with the fundamental legal tools being instead Articles 90 and 709 of the Civil Code[209]. Thus there can still be expectations that the courts will extend the scope of application of the latter articles in the light of the new legal trend instigated under the EEOL[210].

The second semantic critique is addressed to the enforcing Ordinance[211]. Under Article 2, the second criterion represents a limit to the manner in which the dual track hiring system can be put into place while it actually legitimises the system itself. It is probably an important disappointment for those who expected the system to be regarded as unlawful altogether. As a matter of fact, not only are there other indirectly discriminatory criteria at the basis of the system[212], but it is also particularly difficult for an employee to change track in practice even though they are formally allowed to do so by their employer[213]. Specifically, in light of the guidelines provided by the Ministry, the system put into place with regard to indirect discrimination provides for protection only to those cases where it is obvious that the employer established a "meaningless category to disguise sex discrimination"[214]. It does not seem to address the inherent discriminatory nature of the dual track system when the separation of tracks is "genuine"[215].

One could argue that this reform only consisted in the endorsement of a strict interpretation of the Japanese courts case law with regard to the dual track hiring system. Two important cases are to be highlighted in this regard. First of all, the *Nomura* case[216] is considered to be the earliest attempt of the Japanese judiciary to defy the dual track hiring system. This 2002 case concerned female employees who had been discriminated against

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[206] Rōdō Seisaku Shingikai Koyō Kintō Bunkakai [Labor Policy Council's Subcommittee on Equal Employment], Order of Proceedings of the 52nd Session (October 7, 2005) 1 < http://www.mhlw.go.jp/shingi/2005/10/s1007-5.html > accessed on 21 March 2018

[207] H. Nakakubo, *op. cit.* 15.

[208] M. L. Starich, *op. cit.* 567 (see specifically: Tokyo D. Ct., Dec. 4, 1986, *The Japan Iron and Steel Federation* case, 37-6 *Rōdō Kankei Minji Saibanreishū* 512, *translated in* C. J. Milhaupt, et al., *op. cit.*).

[209] See footnotes 123 and 134.

[210] R. Sakuraba, *op. cit.* 190 and 200.

[211] Japanese Ordinance for Enforcement of the Act on Ensuring Equal Opportunity for and Treatment of Men and Women in Employment [Ordinance n° 2] 2 January 1986 < http://www.japaneselawtranslation.go.jp/law/detail_download/?ff=09&id=2318 > accessed on 15 August 2018.

[212] S. Yamada, *op. cit.* 13-14.

[213] K. Nemoto, "When culture resists progress," *op. cit.* 162.

[214] R. Sakuraba, *ibidem* 190.

[215] R. Sakuraba, *ibidem* 190.

[216] Tokyo D. Ct., Feb. 20, 2002, 822 *Rōdō Hanrei* 13.

in the original hiring process under the dual track hiring system, which entailed discriminatory treatments in promotion and wage throughout their career[217]. Importantly, one must note that the first reform of the EEOL (1997) transformed the employers' mere invitation not to discriminate on the ground of sex into a legally binding obligation[218]. But whilst this reform instigated a relative shift in the Japanese case law regarding the matter, it did not trigger any significant progress in indirect discrimination cases. The *Nomura* case perfectly exemplifies the mixed picture of this reform. In this case, even though the plaintiffs had been hired in the 1950s and 1960s under the dual track hiring system, thus before the 1997 amendment entered into force (i.e. on April 1, 1999), the Court held that the discriminatory effects of the hiring process persisted hitherto. The plaintiffs were thus to be compensated for the discriminatory treatment in wages and promotion suffered after April 1, 1999. It has been advanced that this date constitutes a pivotal event with regard to the legality of the dual-track hiring system[219]. However, when interpreted strictly, the judgment reveals that the court exclusively targets the situation where the employer uses the dual track hiring system in order to purposely discriminate their female employees[220]. This strict interpretation, which avoids jeopardising the whole dual-track hiring system itself only sanctioning its blatant abuses, has been confirmed in the *Sumitomo Metal* case[221]. In this 2005 case, the court recognised the track-transfer policy of the company to be indirectly discriminatory as the unclear promotion requirements had a disproportionately detrimental effect on female employees[222]. The court was provided with clear proof and again focused on the treatment in promotion but not on the hiring process itself. Essentially, despite the fact the notion of intent was not included as a determinant factor for the identification of indirect discrimination in the 2006 reform, it is expected to remain a fundamental element of the courts' considerations regarding the matter, as opposed to EU indirect discrimination law.

[217] S. Yamada, *ibidem* 11.

[218] S. Yamada, *ibidem* 10

[219] S. Yamada, *ibidem* 11 (for critical details see: K. Nemoto, *Too Few Women*, *op. cit.* 59-60).

[220] K. T. Geraghty, *op. cit.* 519.

[221] Osaka D. Ct., Mar. 28, 2005, *Sumitomo Metal Industries* case, 898 *Rōdō Hanrei* 40.

[222] M. L. Starich, *op. cit.* 567.

4. The necessary limitations to the prohibition of gender discrimination

4.1. Direct discrimination: EU law exceptions and Japanese judicial conservatism

Under EU law, a specific system of exceptions and justification to gender equality has been construed on the basis of the dichotomy made between direct and indirect discrimination. While indirect discrimination is open to justification on a case-by-case analysis, direct discrimination can only be regarded as justified when it falls within one exception expressly provided by EU legislation[223]. Despite the fact that there is no clear-cut distinction between justification and exceptions, the former "can be defined as the open-ended possibility for a perpetrator of direct discrimination to propose a good reason why their actions should not be treated as unlawful", while the latter "are specific circumstances identified in law where acts that would otherwise be unlawful direct discrimination will not be so treated"[224]. The reason why gender equality law does not allow for direct discrimination to be justified on a case-by-case analysis but only on the ground of express exceptions is best explained as follows: "[i]f justifications of direct discrimination is permitted, then courts will be drawn into the thorny task of deciding when stereotypes should be upheld. By excluding the justification of direct discrimination, the law becomes a potent weapon to deconstruct such stereotypes"[225] [226].

Drawing an accurate picture of the Japanese legal framework that delineates the prohibition of direct discrimination reveals to be a much more complex enterprise. The reason for this can be found in the Japanese case law. While the ECJ envisages gender equality as a system based on a permanent and universal principle to which it attaches exceptions, Japanese courts tend to adopt a sociological approach for determining what it means to be equal according to society at a given time, without substantiating the equality principle with any permanent nature. As already explained, this latter approach leads Japanese courts to focus heavily on the time at which the differential treatment occurred in order to determine whether it is tantamount to unlawful discrimination. Despite this important conceptual difference, two general fields of exceptions can be highlighted in both the European and the Japanese legal frameworks devoted to gender equality. First, both recognise that the particular characteristics of an occupation can justify that a man or a woman is to be preferred in the hiring process. Second, the EU and Japan tend to allow for differen-

[223] M.H.S. Gijzen, *op. cit.* 54 (see Case 147/95 *Dimossia Epicheirissi v Efthimios Evrenopoulos* [1997] ECR I-02057, 25-9).

[224] D. Schiek, L. Waddington and M. Bell, *op. cit.* 270.

[225] D. Schiek, L. Waddington and M. Bell, *ibidem* 270.

[226] See for example: Case 273/97 *Sirdar v Army Board and Secretary of State for Defence* [1999] ECR I-07403 (see: E. Ellis and P. Watson, *op. cit.* 389-390).

tial treatment between men and women when it is justified by characteristics specific to women, precisely and essentially on the ground of pregnancy and maternity. Nevertheless, the important conceptual difference between both judicial approaches overshadows these common characteristics, as it will be detailed in the following paragraphs.

First of all, under EU law the exception of 'genuine and determining occupational requirement' included in the Recast Directive under Article 14(2)[227] enables Member States to justify situations in which it is deemed necessary for the job to be performed by a man rather than a woman (and vice versa). One must note that this exception only holds for the hiring and training processes, as expressed in the article. National courts and the ECJ have a central role to play in determining the practical boundaries of this exception[228]. In this regard, there are three yardsticks on which the ECJ has put emphasis through its case law. Primarily, the Court has screened out national measures adopted under the exception rule that did not comply with the proportionality test. As a matter of fact, it is apparent from the wording and spirit of Article 14(2) that categories encompassing a broad number of occupations cannot fall within the scope of the exception[229] and that a case-by-case analysis must be preferred[230]. For example, in *Commission v UK* the ECJ held that excluding from the field of application of the then Equal Treatment Directive private households and enterprises counting no more than five employees from the gender equality rule went "beyond the objective which may be lawfully pursued within the framework of Article 2(2) [now Article 14(2)] of directive"[231]. But Member States are given a certain room of manoeuvre, especially when the genuine and determining occupation requirement is related to public safety[232]. Secondly, the ECJ assesses whether the national exception has been instituted with enough transparency[233]. The principle of transparency goes hand in hand with gender equality in hiring since the person who has been refused the position must be informed of the reasons for this refusal in order to guarantee an effective protection against discrimination[234]. Thirdly, the ECJ also stresses the important role that the "social

[227] Council Directive 2006/54/CE on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] *OJL 204*.

[228] D. Schiek, L. Waddington and M. Bell, *op. cit.* 283.

[229] D. Schiek, L. Waddington and M. Bell, *ibidem* 276-278.

[230] E. Ellis and P. Watson, *op. cit.* 382-383.

[231] Case 165/82 *Commission v UK* [1983] ECR 3431, 3448 (See also: Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651).

[232] Where the ECJ recognised this degree of discretion: Case 273/97 *Sirdar v Army Board and Secretary of State for defence* [1999] ECR I-07403, 7442; Where the court did not recognise it: Case 285/98 *Kreil v Bundesrepublik Deutschland* [2000] ECR I-00069, 27.

[233] Case 318/86 *Commission v France* [1988] ECR 3559, 21 (where the Court refused the French argument according to which the national police force was only to be composed of men since its members were at any time to be able to use force in order to deter potential troublemakers, for further comments see E. Ellis and P. Watson, *ibidem* 388 and D. Schiek, L. Waddington and M. Bell, *ibidem* 285).

[234] E. Ellis and P. Watson, *ibidem* 389.

developments" play in the assessment of the disputed exception[235]. Interestingly, it will be seen that Japanese courts heavily rely on such type of argument in order to justify derogation from the gender equality principle.

As for Japan, the EEOL does not provide for such kind of provision on which Japanese courts could ground the appropriate limits to the ban on direct discrimination. Nevertheless, relying on Article 90 of the Japanese Civil Code in order to address direct discrimination has had a tremendous impact on how would the courts welcome justification to discriminatory treatment. This is best explained by K. Minamino, who argues that Japanese courts, when adjudicating gender equality cases, have considered working women not as individuals but through the prism of their *social* role for which they are responsible as a group[236]. Specifically, the practice of employment tracks that finds deep roots in the Japanese labour culture has most of the time been held lawful on the ground that it was part of what constituted public order and good morals at the time the practice was put into place. The *Mitsubishi Plastics* case best expressed this judicial trend under which differential treatment was held to be lawful when consistent with the then existing social consensus[237]. The *Sumitomo Electric Industries* case[238] is a more recent but as emblematic illustration of how Japanese courts tend to excuse the dual track hiring system on the very same legal ground with which they tackle discriminatory treatment. In this case, the Osaka District Court recognised that the female and male job applicants originally had the same qualifications but received differential treatment in hiring, training, transfers, promotions, meeting participation and business travel[239], but did not sanction this discrimination on the ground that this unconstitutionality was not a violation Article 90 of the Japanese Civil Code[240]. Even though a compromise was reached in December 2003 under the recommendation of the Osaka Court of Appeal, and despite the fact that other similar cases have subsequently been adjudicated in favour of the claimants[241], these cases do not seem

[235]See for example: Case 165/82 *Commission v UK* [1983] ECR 03431, 3449.

[236]K. Minamino, *op. cit.* 54-55.

[237]L. Parkinson, *op. cit.* 657-658 (Supreme Court, Dec. 12, 1973, *Mitsubishi Plastics Case*, 27-11 *Saikōsaibansho Minji Hanreishū* 1536).

[238]Osaka D. Ct., Jul. 31, 2000, *Sumitomo Electric Industries* case, 792 *Rōdō Hanrei* 48.

[239]K. Nemoto, *Too Few Women*, *op. cit.* 58.

[240]In 2000, the Osaka District Court held: "In the period between 1965 and 1974, Japanese society still had a *strong consciousness of separate roles of men and women in the family context.* Men were supposed to be economic providers, while their wives were supposed to stay at home and devote themselves to caring for their children. (…) [W]omen (…) tended to set a limit of working until marriage or childbirth and quit after a short time of employment. (…) During this period it was held that the defendant company had no choice but to manage personnel in the most effective way based on the premise of the *prevailing social consciousness* and women's then usual period of employment. Therefore, the company was not found to have violated public order and good morals when they allocated only routine and supplemental labours to women high-school graduates (emphasis added)" (Osaka D. Ct. Jul. 31, 2000, 792 *Rōdō Hanrei* 48).

[241]Tokyo D. Ct., Feb. 20, 2002, *Nomura* case, 822 *Rōdō Hanrei* 13; Osaka D. Ct., Mar. 28, 2005, *Sumitomo Metal Industries* case, 898 *Rōdō Hanrei* 40 (as far as it concerned promotions) (for comments see: M. L. Starich, *op. cit.* 555); Tokyo High Ct., Jan. 31, 2008, *Kanematsu* case, 959 *Rōdō Hanrei* 85.

to have set a "precedent"[242]. In 2015 the Japanese Supreme Court rejected the appeal formulated by a woman whose case[243] concerned direct discrimination in upgrading and promotion[244]. In this case, the claimant argued that her employer had held a biased judgment in assessing her performance in team working which prevented her from accessing management positions[245]. But her accusations were held to be unfounded despite statistics supporting her claim[246].

Thus, just as the ECJ, Japanese courts take into account the social consensus in order to determine whether is it justifiable that the occupation is given to a man rather than a woman (and vice versa) but the extent to which they do so bears no relation with that of the European judicial practice. Japanese courts are less restrictive and consider the social consensus to encompass more factors than those taken into account by the ECJ. There are three elements that seem to exert most influence on what the courts consider to be the social consensus. First of all, Japanese courts focus essentially on the usual hiring practices of companies[247] and thereby exempt themselves, on the ground of freedom of contract, from reviewing these practices[248]. Secondly, the legislative progress made in the field has pushed Japanese courts to adapt their case law that could no longer be legally sustained, especially in the light of the EEOL[249] with the best illustration of this being the *Nomura* case as explained in the next part. Finally, one cannot deny that the international community has always played a fundamental role in the matter. As a matter of fact, K. Nemoto argues that several cases have been settled in favour of the claimants thanks to the pressure of severe international criticism[250].

Second, Article 28(1) of the Recast Directive[251] contains a specific provision allowing for differential treatment to be applied to protect women in relation to pregnancy and maternity. As already mentioned, the ECJ has generally provided for a broad interpretation

[242]The Japanese judiciary is not bound by the principle of *stare decisis* [see: C. Martin, "Glimmers of Hope: The Evolution of Equality Rights Doctrine in Japanese Courts from a Comparative Perspective", *Duke J. Comp. & Int'l L.* 20 (2010) 219].

[243]Hiroshima High Ct., July 18, 2013, 2188 *Rōdō Keizai Hanrei Sokuhō* 3.

[244]It was rejected on March 11, 2015 [T. Kanno, "Study on Legal Issues Involving Intermediate Age Brackets: Aiming to Facilitate Work-Life Balance", *Japan Labour Review* 13:1 (2016) 81].

[245]T. Kanno, *ibidem* 81-82.

[246]K. Minamino, *op. cit.* 68-71 (see also: T. Kanno, *ibidem* note 18).

[247]For commentaries on the change in employment practices of the Japanese companies, see: T. Hamada, "Japanese Company's Cultural Shift for Gender Equality at Work" *Global Economic Review* 47:1 (2018) (for another standpoint, see: K. Nemoto "When culture resists progress*," op. cit.*).

[248]Tokyo D. Ct., Dec. 4, 1986, *The Japan Iron and Steel Federation* case, 37-6 *Rōdō Kankei Minji Saibanreishū* 512, *translated in* C. J. Milhaupt et al., *op. cit.* (as for the EU, for the question whether fundamental rights such as freedom of association or the right privacy can also constitute valid grounds of exception to the ban on direct discrimination, see D. Schiek, L. Waddington and M. Bell, *op. cit.* 289-294).

[249]S. Yamada, *op. cit.* 18-19 (see also: L. Parkinson, *op. cit.* 660) (but see another view point: E. Mun, *op. cit.* 1409-1437).

[250]N. Nemoto, *Too Few Women*, *op. cit.* 58-60.

[251]Council Directive 2006/54/CE on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] *OJL 204.*

of this provision. In *Commission v Italy*[252] the Court did not censure an Italian legislation granting to certain adoptive mothers specific maternity rights that were not equally open to adoptive men[253]. Specifically, in the *Johnson* case the Court defines Article 28(1) as to protect both women's biological conditions related to pregnancy and maternity, and the special relationship between the mother and her child[254]. In the same vein, in the *Hofmann* case[255] the Court added the term motherhood to its semantic field regarding the interpretation of this provision that, let us remember, employs the word 'maternity'. An excessive emphasis on women's rights on the ground of motherhood might sideline fathers who have an equally important role to play in parenting[256]. Notably, the Court mitigated its case law on the matter in the *Lommers* case[257] where it held that preferential treatment in favour of women with regard to parental leave should not be absolute and automatic. One must also remember that a national act that seeks to protect women from risks to which both men and women were exposed cannot be tolerated[258]. In other words, the Court is required to grant this protection when necessary, i.e. when the case is connected "in some fairly close but unspecified way with the process of childbearing"[259]. Despite this latter remark, one could still follow the viewpoint that the ECJ case law still promotes a traditional and restrictive conception of motherhood under which women are considered the primary caregivers of new-borns[260], thereby not only relegating women's career prospects but also discriminating male workers[261].

When dealing with gender equality, the Japanese legislature seems to implement a more prudent approach as it generally lists specific hypothesises that fall within the scope of a rule rather than enacting a general provision left to the discretion of the courts. Not only is it the case for indirect discrimination, but it was also the approach adopted for regulating specific protection owed to workingwomen specifically. As one might guess, this led the legislature to adapt the provisions of the LSA throughout the changes in political,

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[252] Case 163/82 *Commission v Italy* [1983] ECR 03273, 3288.

[253] Case 163/82 *Commission v Italy* [1983] ECR 03273.

[254] Case 410/92 *Johnson v Chief Adjudication Officer* [1994] ECR I-05483, 44 and 45.

[255] Case 184/83 *Hofmann v barmer* [1984] ECR 03047, 26.

[256] C. McGlynn "Ideologies of motherhood," *op. cit.* 29 [for further comments, see: T. Harvey, "EC law on justifications for sex discrimination in working life", in R. Blanpain (ed.) *Collective Bargaining, Discrimination, Social Security and European Integration* (Kluwer 2003) 123].

[257] Case 476/99 *Lommers* [2002] ECR I-02891, 47.

[258] Case 312/86 *Commission v France* [1988] ECR 6315, 6336 (see also: Case 366/99 *Griesmar* [2001] ECR I-9383; Case 218/98 *Abdoulaye v Renault SA* [1999] ECR I-5723).

[259] Ellis and P. Watson, *op. cit.* 399.

[260] A. Forna, *Mother of all Myths – How Society Moulds and Constrains Mothers* (London: Harper Collins, 1998).

[261] C. McGlynn, "European Union Family Values," *op. cit.*; A. Glasner, "Gender and Europe: Cultural and Structural Impediments to Change" in J. Bailey (ed.) *Social Europe* 2nd ed. (London: Longman, 1998); J. Millar and A. Warman, *Family Obligations in Europe* (London: Routledge, 1996).

social and economic considerations regarding the role of women in the labour force[262]. Originally, the provisions of the LSA concerning women at work were overly protective as they excluded women from night and overtime work, and from positions that were considered "dangerous or injurious"[263]. Throughout the subsequent amendment of the EEOL, the legislature modified these provisions for finally limiting them to the protection of "expectant or nursing mothers"[264] with an additional provision regarding "work during menstrual periods"[265]. With regard to childbirth and childcare leave, the challenge is different than that dealt with by the ECJ. In overall, Japanese law does not enshrine exceptionally larger advantages to women than to men in the matter. Notably Article 65 of the LSA *compels* female workers to take a childbirth leave of minimum 8 weeks, or 6 weeks under their request and the approval of a doctor. Interestingly enough, under Japan's Childcare and Family Care Leave Act employers cannot reject an application for childcare leave duly formulated by their employees and this right is the same for both men and women[266]. Nevertheless, the real hurdle in the matter lays in the fact that despite a relatively fair and protective legal framework, the significant gender wage gap almost always leads women to make the rational choice to take the childcare leave instead of their male partner[267]. This has given rise to the important issue of discriminatory reassignment that Japanese courts have addressed to a certain extent[268]. For example, the Supreme Court held in 2014 that "demotion accompanying a transfer to lighter work during pregnancy under Article 65, §3 of the Labor Standards Act in principle violated [Article 9, §3 of the EEOL] [269]"[270].

4.2. Indirect discrimination: justification under EU law and externalisation in Japanese employment practices

The ECJ has gone relatively far in the implementation of the indirect discrimination principle, and this necessarily required the elaboration of legal barriers to prevent the principle from producing abusive effects. Once the claimant has proven the existence of indirect

[262] For an evolution of the provision, see J. S. Fan, "From Office Ladies to Women Warriors?: The Effect of the EEOL on Japanese Women", *10 UCLA Women's L.J.* 103:111 (1999) 134 (see also: H. Nakakubo, op. cit. 25-26).

[263] H. Nakakubo, *ibidem* 25.

[264] Articles 64.2 – 67 LSA [1947].

[265] Article 68 [1947].

[266] Childcare and Family Care Leave Act [1991].

[267] A. Okuyama, H. Ikezoe, T. Kawada, et al., "Comparative Law Study on Work-Life Balance <Final Report> Summary", *JILPT Research* 151 (2011) 7.

[268] For details and commentaries, see: T. Kanno, *op. cit.* 74-82 [see also: M. Okutsu, "Women's Reemployment after the Period of their Child Rearing – Issues and Solutions (Summary)" *JIPLT Research Report* 96 (2007-2008)].

[269] "Employers shall not dismiss or give disadvantageous treatment to women workers by reason of pregnancy, childbirth, or for requesting absence from work as prescribed in Article 65, paragraph 1, of the Labor Standards Act (Act No. 49 of 1947) or having taken absence from work as prescribed in the same Article, paragraph 1 or 2, of the same act, or by other reasons relating to pregnancy, childbirth as provided by Ordinance of the Ministry of Health, Labor and Welfare".

[270] T. Kanno, *ibidem* 76.

discrimination, the defendant Member States or company is given the possibility to objectively justify its discriminatory practices under certain conditions first developed under the ECJ case law then summarised in Article 2.1(b) of the Recast Directive[271]. The ECJ developed important legal parameters based on which national courts assess the alleged justification claimed before them. In the *Bilka* case[272], the ECJ set a strict standard of scrutiny according to which the employer has to ground their justification on a legitimate aim unrelated to sex[273]. This aim must consist in a "real need on the part of the undertaking"[274]. Under the test, the measure pursuing this aim has to be "necessary", that is, the measure has to achieve the aim in question. Finally, the measure must be "proportionate" which implied that there cannot exist another means as efficient but less detrimental to the rights of the disadvantaged sex[275].

In the *Rinner-Kühne* case[276], the ECJ articulated a similar test to that of *Bilka* for the assessment of the Member States' justification to their discriminatory measures. Nevertheless, the Court subsequently softened the stringency of the test compared to that applied to employers[277]. Specifically, in the *Seymour-Smith* case[278] the ECJ changed its habitual formula and referred to a test of reasonableness[279]. This can be explained by the fact that in order to achieve "the aims of their employment and social policy" Members States are granted a relatively large margin of discretion[280].

When the piece of legislation being challenged relates to social security policy, some argue that the ECJ tends to relax even more the scrutiny test. As a matter of fact, with regard to this area of competence the Court blurs the three-step analysis of the proportionality test and summarises the assessment as follow: "in exercising its competence, the national legislature was *reasonably* entitled to consider that the legislation in question was necessary in order to achieve that aim (emphasis added)"[281]. Social security falls within the

[271] "[U]nless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary" (Council Directive 2006/54/CE on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] *OJL 204*).

[272] Case 170/84 *Bilka v von Hartz* [1986] ECR 01607.

[273] Case 170/84 *Bilka v von Hartz* [1986] ECR 01607, 30.

[274] Case 170/84 *Bilka*, 36.

[275] Case 170/84 *Bilka*, 35-37 (see also: Case 196/02 *Nikoloudi* [2005] ECR I-01789, 47-48).

[276] Case 171/88 *Rinner-Kühne* [1989] ECR 02743, 14.

[277] C. Tobler, *Indirect discrimination*, *op. cit.* 209; D. Schiek, L. Waddington and M. Bell, *op. cit.* 444; T. K. Hervey, "Thirty years," *op. cit.* 409-410.

[278] Case 176/97 *Seymour-Smith* [1999] ECR I-00623.

[279] Case 176/97 *Seymour-Smith* [1999] ECR I-00623, 77.

[280] Unlike Member States, employers cannot ground the justification for their discriminatory practices on social policy concerns (Case 281/97 *Krüger* [1999] ECR I-05127, 28-29) (see also: Case 317/93 *Nolte* [1995] ECR I-04625, 33).

[281] Case 317/93 *Nolte* [1995] ECR I-04625, 34 and 36.

well-guarded purview of Member States' competences, which the Court has recognised by leaving to Member States a larger degree of freedom[282].

While some see in this irregular case law a lack of consistency in the Court's commitment to protect gender equality[283], it could be said that the logic of the assessment remains the same[284] but that the stringency of the test is necessarily adapted to the different levels of legal integration under EU law. In any event, the ultimate decision with regard to the admissibility of the justification lies in national courts[285]. But this did not prevent the ECJ from addressing judicial comments to specific types of justification. For example, "budgetary considerations […] cannot themselves constitute the aim pursued by that policy and therefore justify discrimination against one of the sexes"[286].

Under the Japanese case law, the intention of the employer remains a key factor in determining whether his practice consists in unlawful indirect discrimination. Given this observation, it could be argued that where it is not clear whether the employer *sought* to discriminate their employees on the ground of sex by using one of the Ordinance's criteria, they will succeed in justifying their practice with economic- or managerial-based arguments as provided under Article 7 of EEOL. Nothing indicates that courts will change the low level of scrutiny that they had initially implemented with regard to indirect discrimination practices. Fundamentally, the impact of the Ordinance is highly dependent on the courts' willingness to strengthen this level of scrutiny[287]. Furthermore, given that the ban on indirect discrimination is limited to specific cases listed under the law, companies tend to develop different stratagems in order to fall outside its scope of ambit.

In Japan, the use of the dual track hiring system is in decline[288], or at least is not rising as much as during the years following the enactment of the EEOL[289], specifically in the Japanese corporation world[290]. Also the number of female workers entering the managerial track has slightly but continually increased[291]. This might be a sign that the Japanese legal reforms and case law regarding the dual track hiring system is paying off and curbing the companies' likelihood to rely on such employment practice. But it might also be the

[282] Case 187/00 *Helga Kutz-Bauer v Freie und Hansestadt Hamburg* [2003] ECR I-02741, 49 (see also: Case 196/98 *Hepple* [2000] ECR I-03701, 26-29).

[283] C. Barnard, B. Hepple, "Indirect discrimination," *op. cit.* 409 [see also: K. Hervey, "EC Law on Justification for Sex Discrimination in Working Life" Paper for the VII European Regional Congress of Labour Law and Social Security (Stokholm University, 2002), 122].

[284] C. Tobler, *Indirect discrimination*, *op. cit.* 210-211.

[285] Case 170/84 *Bilka v von Hartz* [1986] ECR 01607, 36.

[286] Case 343/92 *Roks* [1994] ECR I-00571, 35-36 (see also: Case 226/98 *Jørgensen* [2000] ECR I-02447, 39).

[287] R. Sakuraba, *op. cit.* 190.

[288] C. Weathers "In search of Strategic Partners" *op. cit.* 82.

[289] A. Gordon, "New and Enduring Dual Structures of Employment in Japan: The Rise of Non-Regular Labor, 1980s–2010s" *Social Science Japan Journal* 20:1 (2017) 26.

[290] C. Weathers, "Equal Opportunity for Japanese Women – What Progress?" *The Asia-Pacific Journal* 3:10 (2005) 4.

[291] A. Gordon, *ibidem* 28.

sign that companies develop alternative means to outsource the problem and avoid the risk of prosecution. The main substitute to the dual track hiring system is the employment of non-regular workers, which has noticeably risen throughout the lifespan of the EEOL and its subsequent amendments[292]. It is argued that the rise in both male and female non-regular workers finds its origins in the liberalisation of the Japanese employment market in the years 1980s[293]. If the unstable and disadvantageous work conditions of Japanese non-regular workers constitute a specific issue to be addressed as a whole, the fact they may trigger indirect discrimination against women falls into the scope of this paper. In this regard, one must note the odd timing correlation between the enactment of both the 1985 EEOL and the 1985 worker-dispatching law[294] that "authorised private temporary employment agencies for the first time in the post-war era and enabled their use for hiring women for clerical positions while providing little job security"[295]. According to some, it is no mere coincidence, as the Dispatching-worker Law enabled companies to circumvent the protection against discriminatory dismissals and reassignment under the EEOL[296]. Additionally, 1998 is also seen as a landmark year for companies' widespread and increasing employment of female non-regular workers, "as an intensified cost-cutting and the liberalisation of temporary worker and other labour regulations brought increased use of non-regular workers"[297].

One third of Japanese workers officially employed under part-time contracts work the same number of working hours as full-timers[298]. If part-time workers formally benefit from the same job security rights as full-time workers[299], Japanese courts tend to protect more

[292] A. Gordon, *ibidem* 15 subs. (see also: C. Weathers "In search of Strategic Partners" *ibidem*, 82).

[293] It has been argued that this liberalisation ensuing the employment of non-regular workers constituted a viable solution for coping with the then economic recession (G. D. Blind and S. Lottantivon Mandach "Decades not Lost, but Won: Increased Employment, Higher Wages, and More Equal Opportunities in the Japanese Labour Market" *Social Science Japan Journal* 18:1 (2015) 63–88).

[294] Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers [Act n°88] 5th July 1985 < http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=04&re=01 > accessed on 8 Sept. 2018.

[295] D. H. Foote, *op. cit.* 674 (see also: T. Ishii, "Employment conditions and emerging labour movements of non-regular workers in Japan" *Asia Pacific Journal of Human Resources* (March 16, 2018 4).

[296] D. H. Foote, *ibidem* 675 [see also: R. Yamakawa, "Labour law Reform in Japan: a response to recent socio-economic changes", in *The American Journal of Comparative Law* 49:4 (autumn 2001), 641: "Although the former Worker Dispatching Law limited worker dispatching businesses to professional jobs, employers demanded the relaxation of this limitation. However, there was a strong concern from the labor side that worker dispatching may erode the employment of regular workers. In order to avoid such erosion, the amendment specified that worker dispatching should only be available as a temporary measure"]. From another standpoint, the employment of dispatched workers enabled companies to preserve their regular employees as non-regular workers are usually seen as a buffer against financial and economic fluctuations (see: T. Ishii, *ibidem* 3; K. Nemoto, *Too Few Women*, *op. cit.* 36).

[297] C. Weathers "In search of Strategic Partners" *op. cit.* 83 (see also: C. Weathers, "Equal Opportunity" *op. cit.* 4.

[298] M. Osawa, M. J. Kim and J. Kingston, "Precarious Work in Japan" *American Behavioral Scientist* 57:3 (2013) 314.

[299] C. Weathers, "Equal Opportunity", *ibidem* 4 [for more details with regard to the regulation of non-regular work in Japan, see: F.L. Cooke and R. Brown, *The regulation of non-standard forms of employment in China, Japan and the Republic of Korea* (Geneva ILO 2015)].

forcefully the rights of full-time workers[300]. Yet the courts' readiness to judicial activism represents the only chance for indirect sex discrimination to be recognised behind the hiring and employment treatments of female part-time workers[301]. This problematic, already visible in other legal orders such as that of the EU, is considered in Japan as a, if not the, current crucial issue for the regulation on sex discrimination in the employment field[302]. Under the pressure of the EEOL, many companies outsourced the female workforce previously employed with part-time contracts, even if it is also recognised that the law and its 1997 revision fostered initially compliant companies to hire even more women[303].

5. Institutional settings, judicial strategies and limits to the action of the judiciaries

5.1. The judiciaries' strategies: European constitutional doctrines v Japanese labour market protectionism

With regard to the specific strategies put in place by courts, fundamental differences can be highlighted between the ECJ and Japanese courts. The ECJ has authoritatively held that individuals can directly avail themselves of Article 157 TFEU before national courts. They can even do so against their employer in their private disputes, which means that Article 157 also has a "horizontal effect"[304]. Regarding the Gender Equality Directive, there are still controversies as to whether it produces a direct horizontal effect. It should be recalled that directives are not considered to have a horizontal effect[305] but can be given vertical direct effect when they include sufficiently clear, unconditional and unreserved provisions and when the concerned Member State has failed to implement it within the set deadline[306].

[300] A. Gordon, *op. cit.* 9. In addition, companies have adopted the habit to include to the part-timers' employment contracts clauses that prevent employment renewal (*yatoidome*), so that they do not need to dismiss them. Additionally, some authors point out the employees' common lack of knowledge of their own social rights (C. Weathers, "Equal Opportunity", *ibidem* 4).

[301] R. Sakuraba, *op. cit.* 191 and 200.

[302] C. Weathers, "Temporary workers, women and labour policy-making in Japan" *Japan Forum* 16:3 (2004) 424.

[303] E. Mun, *op. cit.* 1428 subs.

[304] J. Kantola and K. Nousiainen, "Institutionalizing Intersectionality in Europe" *International Feminist Journal of Politics* 11:4 (2009) 464.

[305] Case 148/78 *Ratti* [1979] ECR 01629.

[306] Case 41/74 *Van Duyn v Home Office* [1974] ECR 01337.

More recent cases[307] and certain opinions of Advocate Generals[308] suggest that the ECJ is on the track to recognise a right to individuals to directly avail themselves of the general principle of equal treatment against their employers before national courts, indirectly acknowledging a horizontal direct effect to the Directive[309]. This would deprive Member States from an ever-increasing part of their sovereignty in favour of the European judiciary, as individuals will be expected to rely on the European interpretation of the general principle of equality.

By developing such constitutional doctrine, the ECJ gives individuals access to systematic and relatively harmonised judicial protection against gender discrimination. By contrast, in Japan an unequal treatment would amount to a violation of the public order doctrine if it were deemed "unreasonably discriminatory" [310] in light of the social consensus prevailing at the time of the treatment itself. This led to a rather rigid but somewhat weak Japanese case law on gender equality. As to the reason for this lack of commitment to the construction of an objective method of scrutiny, several factors have been put forward by researchers. As S. E. Merry points out, the legal culture of a country also concerns its judicial culture, which is expressed through the institutional setting of the judiciary and its judicial philosophy[311]. Without entering the debate on whether the culturalist paradigm is pertinently used to analyse the Japanese legal system[312], one cannot deny that researchers tend to draw different archetypes of the Japanese judge. On the one hand, the Japanese judiciary is described as being conservative[313], exercising a high degree of judicial restraint and as being under administrative control[314]. On the other hand, it is also argued that Japa-

[307] Case 144/04 *Mangold* [2005] ECR I-09981, 74-77 (see also: Case 555/07 *Kücükdeveci v Swedex GmbH* [2010] ECR I-00365, 21; Case C-471/08, *Sanna Maria Parviainen* v *Finnair Oyj*, judgment [2010], nyr, and Case C-116/08, *Christel Meerts* v. *Proost NV*, [2009] ECR I-10063) (for further comments, see: K. Koldinska, "Case law of the European Court of Justice on Sex Discrimination 2006-2011" *Common Market Law Review* 48:5 (2011) 1601-1607).

[308] Case 236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others* [2011] ECR I-00773, Opinion AG Kokott, 38; Case 45/09 *Gisela Rosenbladt v. Oellerking GmbH* [2010] ECR I-09391, Opinion AG Trstenjak, footnote 27.

[309] See for more details: E. Howard, "ECJ Advances Equality in Europe by Giving Horizontal Direct Effect to Directives", *European Public Law* 17:4 (2011).

[310] C. Martin, "Glimmers of Hope," *op. cit.* 216.

[311] S. E. Merry, "What is Legal Culture? An Anthropological Perspective", *Department of Anthropology* 5:2 (2010) 43-44.

[312] See: F. Von Benda-Beckmann and K. Von Benda-Beckmann, "Why Not Legal Culture?", D. Nelken (ed.), *Using Legal Culture* (London: Wildy, Simmonds & Hill, 2012); I. Ozaki, "Law, Culture and Society in Modernizing Japan," Dimitri Vanoverbeke et al. (eds.), *The Changing Role of Law in Japan: Empirical Studies in Culture, Society and Policy Making* (Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, 2014); E. Feldman, "Law, culture and conflict: Dispute Resolution in Postwar Japan" *Faculty Scholarship*, Paper 148 (2007).

[313] For the reasons of this conservatism, see: D. S. Law, "The Anatomy of a Conservative Court: Judicial Review in Japan", *Texas Law Review* 87 (2009) 1545-1593.

[314] For example, lower courts are under the control of the General Secretariat of the Supreme Court. For the explanation of this administrative control, see: M. Setsuo, "Administrative Control of Japanese Judges", *Kobe University Law Review* 25 (1991) 45-61.

nese judges count among the most independent and impartial judiciaries in the world[315] and demonstrate a certain level of judicial activism in private litigations[316], with employment litigation being often taken as an example for this claim[317].

The question as to how these conflicting views can be reconciled is best answered through the words of Daniel H. Foote: "judicial creation of norms in Japanese labour law: activism in the service of stability?"[318]. Precisely, rather than being driven by the implementation of equality rights *per se*, Japanese courts have sought to protect women's employment in order to secure the traditional life-long employment system[319]. For example, it extended the scope of its abusive dismissal doctrine in order to thwart the employers' avoidance strategies[320]. Under the logic of the courts, the fact that businesses have to face a profoundly protective case law in dismissal cases acts as a counter-balance for the wide freedom they benefit from in the recruitment and promotion processes. This rigid jurisprudence is the price to pay for the cost-saving benefits that businesses enjoy from the lack of labour market mobility[321].

5.2. Political and conceptual factors: gender equality in the bigger picture

The Japanese judiciary's stubbornness led some academics to conclude that its case law is gender-biased[322]. This serious allegation needs to be nuanced. Most importantly, it can be argued that, just as the ECJ with its own doctrines, Japanese courts have adopted such a conservative course of action for the sake of institutional and ideological coherence, and ultimately, for the sake of legitimacy. Accordingly two different arguments can be highlighted to explain the judiciary's judicial restraint in the matter.

[315] J. O. Haley, "The Japanese Judiciary, Maintaining Integrity, Autonomy and the Public Trust", in D. J. Foote (ed.) *Law in Japan: A Turning Point* (University of Washington Press, Seattle 2007) 1.

[316] N. Kadomatsu, "Judicial Governance through Resolution of Legal Disputes – A Japanese Perspective", *NTU L. Rev.* 4 (2009) 152 (see also: D. H. Foote, *op. cit* 637-638).

[317] F. K. Upham, "Stealth Activism: Norm Formation by Japanese Courts", *Washington University Law Review* 88:6 (2011) 1495.

[318] D. H. Foote, *op. cit.* 637-638.

[319] For details on the impact of such system on women's employment, see: D. H. Foote, *ibidem* 651-654.

[320] D. H. Foote, *ibidem* 637-638.

[321] L. Wolff argues that "employers' preference for at-will hiring and hiring will replace lifelong employment once regulatory barriers to market-based employment practices are dismantled" (L. Wolff, "The Death of Lifelong Employment in Japan?" in L. Nottage, L. Wolff and A. Kent (eds.) *Corporate Governance in the 21st Century Japan's Gradual Transformation* (Cheltenham: Edward Elgar Publishing, 2009) 66 (see also: T. Kato, "The End of Lifetime Employment in Japan?: Evidence from National Surveys and Field Research" *Journal of the Japanese and International Economies* 15 (2001) 489-514; P. Matanle and K. Matsui, "Lifetime Employment in the 21st Century: Stability and Resilience Under Pressure in the Japanese Management System" in S.A. Hoen (ed.) *Emerging Perspectives in Japanese Human Resource Management* (Berlin and New York: Peter Lang, 2011 15-44).

[322] K. Minamino, *op. cit.* 51; C. Watanabe, "Japanese Judicial Education: working toward gender equality in the judiciary", *Int. J. of the legal profession* 21:3 (2014).

First of all, structural features of the judiciary can be put forward as a factor that hinders judicial activism. A fundamental institution within the Japanese judicial system is the General Secretariat of the Supreme Court (GS). Lower courts are expected to abide by the guidelines of this powerful body[323] and are not given much room of manoeuvre with regard to controversial legal issues[324]. Academic research exerts a very limited influence on the courts' views[325], as most judges ground the legitimacy of their case law on their obedience to internal standards. These standards are set during conferences of judges whose prime objective is to preserve the homogeneity of the judicial outcome[326]. These conferences have been found to be a mean for the GS to diffuse its own views[327]. When it comes to gender equality, it is contended that judges still follow the conservative conclusion of the 1998 judges conference[328]. As the GS decides for the transfer, salary and promotion of judges[329], it also exerts extended powers on the very bureaucratic career path of judges, which might ultimately jeopardise their individual judicial independence[330]. But is this tight control politically driven? One could argue that the alleged neutrality of the Japanese judiciary merely amounts to fundamentally conservative ideas[331] under the dominance of the Liberal Democratic Party[332]. On the other hand, it could also be contended that the apparent conservative judicial restraint of courts is a pledge of independence and is what grounds its very legitimacy in the eyes of the public[333]. Contrary to what Y. Taniguchi had expected[334], the Japanese judiciary did not become an instrument of social change, but rather protects "basic civil liberties guaranteed by the Constitution and recognised by the Diet and a majority of the Japanese population"[335].

Secondly, it is also argued that Japanese judges are influenced by their own professional experience where career path and professional structure bear resemblance to that of the

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[323] I. Sonobe, "Structure and Roles of the Supreme Court", *Hōgaku Kyōshitsu* 67 (1986) 42.

[324] M. Setsuo, "Administrative Control," *op. cit.* 54.

[325] I. Sonobe, *Gendai gyōsei to gyōsei soshō* [Contemporary Administration and Administrative Litigation] (Kōbundō, Tokyo 1987) 302.

[326] J. O. Haley, "Judicial Independence in Japan Revisited", *Japan Law* 25:1 (1995) 14.

[327] M. Setsuo, "Administrative Control," *ibidem* 55.

[328] K. Minamino, *op. cit.* 71.

[329] M. Setsuo, "Administrative Control," *ibidem* 55.

[330] P. R. Luney, "The Judiciary: its Organisation and Status in the Parliament System" *Law and Contemporary Problems* 53:1 (1990) 153 [for further comments on the independence of Japanese judges, see: F. K. Upham, "Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary", *Law and Social Inquiry* 30:2 (2006)].

[331] M. Setsuo, "Administrative Control," *ibidem* 55.

[332] J. M. Ramseyer and E. B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (University of Chicago Press, New-York and London, 2003) 9-10.

[333] J. O. Haley, "The Japanese Judiciary," *op. cit.* 29 [see also: M. A. Srour, "Restrained Judicial Constitutionalism in Japan: A Reflection of Judicial Culture Rather than Political Interests" *ZJapanR/J. Japan. L* 33 (2012) 178].

[334] Y. Taniguchi, "The Post-War Court System as Instrument for Social Change", in G. DeVos (ed.) *Institutions for change in Japanese Society* (Institute of Asian Studies, University of California 1984) 20-39.

[335] P. R. Luney, "The Judiciary," *ibidem* 162 (for an opposite view, see: F. K. Upham, "Stealth Activism," *op. cit.* 1498-1502).

Japanese world of work[336]. Accordingly, their life-long position is ensured by re-appointment that counts almost no exception and "low performances" can lead to downgrading of one's position under the supervision of the GS (which enjoys a large zone of discretion)[337]. Likewise, K. Minamino ascertains that judges are themselves embedded in the very same structure that exacerbates "cultural attitudes and beliefs about 'proper' roles for women"[338]. For example, D. H. Foote sees in the public order doctrine the judicial translation of Confucian values in which Japanese judges have themselves always been immersed:

"In the Confucian tradition, the subordinate owes a duty of obedience (viewed in the employment context, this would embrace the duty to obey overtime and transfer requests), but the superior owes a concomitant duty of benevolence (the obligation to support a faithful worker, even one who is not very skilled)"[339].

In the same vein, M. Srour contends that the Japanese Supreme Court has endeavoured to protect traditional values, which can be explained by the persisting influence of the pre-war judicial education on contemporary judges[340]. It is thus no surprise that the reception of the notion of gender equality in Japan after the WWII constitutional reform "was interpreted as equivalent to the traditional Japanese idea of aristocratic honour in society, which is consistent with the original western notion"[341]. This cultural approach adopted to explain the practices of the judiciary has been challenged by authors who believe institutional and procedural hurdles to be the instrumental factor hindering individual claims to be appropriately adjudicated, deterring a litigious predisposition within the Japanese population[342], and therefore obstructing the development of a comprehensive and effective approach to the issue of gender inequality by courts. If the necessary limits of this paper do not allow for further discussion regarding this critique, one could argue that the judicial ethos of a system and its institutional setting are entwined in a complex interplay where they necessarily exert reciprocal influence on one another[343].

[336] D. H. Foote, *op. cit.* 689-690.

[337] D. H. Foote, *ibidem* 689.

[338] K. Minamino, *ibidem* 73.

[339] D. H. Foote, *op. cit.* 693 ("Yet, at another level, these decisions represent the antithesis of Confucian traditions–for, in the pure version of those traditions, benevolence by the superior is not something that can be demanded or commanded; it must spring up spontaneously and voluntarily").

[340] M. A. Srour, "Restrained Judicial Constitutionalism in Japan," *op. cit.* 177 ("As at 1995, no judge born after 1929 had ever served on the Supreme Court, and until 1990, no Justice of the Court had received his or her legal education in postwar Japan") (see specifically: J. Haley, "Judicial Independence," *op. cit.* 14).

[341] M. A. Srour, "Restrained Judicial Constitutionalism in Japan," *ibidem* 178.

[342] T. Ginsburg and G. Hoetker, "The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation" *Law and Economics Working Papers* 14 (University of Illinois College of Law, 2004); M. Muryama, "Culture, situation and behavior" in D. Vanoverbeke et al. (eds.) *The Changing Role of Law in Japan: Empirical Studies in Culture, Society and Policy Making* (Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, 2014).

[343] For further discussion, see: E. Feldman, "Law, Culture and Conflict: Dispute Resolution in Postwar Japan" *Faculty Scholarship*, Paper 148 (2007).

As regards the EU, the course of action of the European Court of Justice is also framed by intergovernmental and ideological constraints, which, interestingly, set the limits to its judicial activism in the field of gender equality.

First of all, the question whether the ECJ is influenced by the overall political position of Member States in its decision-making has been subject to important debates[344]. In this regard, the scope of enforcement and the substantive standards set by European court in the field of gender equality are much more constraining than what the Member States originally expected[345]. Also, Member States have come to indirectly accept the ECJ's jurisdiction over this field of law, as national courts have progressively made a significant use of the preliminary reference procedure[346]. In this view, the opposition expressed by Member States do not represent a concrete obstacle to the course of action of the ECJ[347]. On the other hand, it is contended that the ECJ always seeks to strike a balance between its objectives and the interests of Member States in order to preserve a necessary degree of legitimacy[348]. This might explain why the Court has scarcely been confronted to fierce opposition from Member States. For example in the *Barber* case[349], the ECJ held that pension age was to be the same for men and women under all occupational pension schemes. Member States subsequently enacted a protocol to the Maastricht Treaty in order to set aside the Court's ruling[350]. But this is a rather unique case, as Member States usually accept

[344] See for example: F. Wasserfallen, "The Judiciary as a Legislator? How the European Court of Justice Shapes Policy-making in the European Union" *Journal of European Public Polics* 17:8 (2010); J. C. Carrubba, M. Gabel and C. Hankla, "Judicial Behaviour under Political Constraints: Evidence from the European Court of Justice" *The American Political Science Review* 102:4 (2008); K. J. Alter, "Who Are the 'Masters of the Treaty'? European Governments and the European Court of Justice," *International Organization* 52 (1998) 121-147; A. Stone Sweet and T. Brunell, "The European Court of Justice, State Noncompliance, and the Politics of Override" *The American Political Science Review* 106:1 (2012) 204-213; C. J. Carrubba, M. Gabel and C. Hankla, "Understanding the Role of the European Court of Justice in European Integration" *The American Political Science Review* 106:1 (February 2012) 214-223.

[345] A. van der Vleuten, *The price of Gender equality: Member States and Governance in the European Union* (Aldershot, Hampshire: Ashgate, 2007) 9 [see also: R. A. Cichowki, "Women's Rights, the European Court, and Supranational Constitutionalism", *Law & Society Review* 38:3 (Sept. 2004) 496].

[346] "Few preliminary rulings do not necessarily indicate that implementation has been successful but rather that the national legal system is not easily accessible" (A. van der Vleuten, *ibidem* 173). For more details on the national courts' propensity to refer their case before the ECJ, see: R. A. Cichowki, "Women's Rights," *ibidem* 497-498 [see for an opposite point of view: A. Hofmann, "Resistance Against the Court of Justice of the European Union" *iCourts Working Paper Series* 121 (2018)].

[347] See for example: K. Alter, "The European Court's Political Power" *West European Politics* 19:3 (1996); W. Mattli and A-M. Slaughter, "Law and Politics in the European Union: A Reply to Garrett" *International Organization* 49:1 (1995) 183–90; R. A. Cichowski, "Integrating the Environment: The European Court and the Construction of Supranational Policy", *J. of European Public Policy* 5 (1998) 387-405; R. A. Cichowski, "Women's Rights", *ibidem* 493-500.

[348] S. Pager, "Strictness vs. Discretion: The European Court of Justice's Variable Vision of Gender Equality" *The American Journal of Comparative Law* 51:3 (Summer 2003) 555.

[349] Case 262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-01889.

[350] G. Garrett, R. D. Kelemen and H. Schulz, "The European Court of Justice, National Governments, and Legal Integration in the European Union" *International Organisation* 52:1 (Winter 1998) 166-174.

the costs of integration as a lesser evil[351]. However, financial bargaining is not the only constraining factor faced by the ECJ. Jo Shaw goes as far as to say that the Court "cloaked itself in something akin to a feminist cloak almost always only where some gain can be obtained in terms of reinforcing its own legitimacy within the system"[352]. Accordingly, being now faced with much more controversial facets of gender equality, the ECJ does not seem to be willing to show the same degree of judicial activism over fundamentally political issues[353].

In addition to the intergovernmental constraint, another element that might currently restrain the ECJ in its attempt to further foster gender equality is the definition it gives to gender equality itself, and hence, the conceptual framework it puts itself into. The following and conclusive paragraphs explore how the conceptual barriers in which the ECJ (and Japanese courts) are embedded necessarily shape the limits of their case law on gender equality.

The conceptual framework of a court includes the values and socio-political goals that it purports to protect[354]. As it has been argued in the previous part, the European Court has passed from a formal to a more substantive understanding of gender equality[355]. More importantly it has always promoted a certain conception of equality, that is, equality of opportunity[356]. Its cases on positive action have induced the Court to challenge such ideological background and illustrate its attempt to preserve the coherence of its entire case law on gender equality.

In *Marschall*, the Court argued that such preferential treatment is only admissible "when the challenged provision contain[s] a saving clause to the effect that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour" [357]. With this reasoning, the Court did not modify its conceptual framework as it considers positive action as an *exception* to the principle of equality. In that sense, positive action is "not conceived as a means to achieve equality among groups or equality of results but, instead, as an instrument to bring about effective equality of

[351] B. Werner, "Why is the Court of Justice of the European Union not more Contested? Three Mechanisms of Opposition Abatement" *Journal of Common Market Studies* 54:6 (2016) 1449-164.

[352] J. Shaw, "Gender and the Court of Justice", in G. De Burca and J.H.H. Weiler (eds.) *The Court of Justice* (Oxford: Oxford University Press, 2000) 142.

[353] See specifically: M. Shapiro, "The European Court of Justice: of Institutions and Democracy" *Isr. L. Rev.* 32:3 (1998) 3-50.

[354] See for example: S. E. Merry, *op. cit.* 43 and 48.

[355] N. De Charilaos, *The Right to Equality in European Human Rights Law: the Quest for Substance in the Jurisprudence of the European Courts* (London and New York: Routledge, 2014) 114 (see for example: Case 136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés v Thibault* [1998] ECRI-2011, 24-26; Case 158/97, *Badeck's Application* [2000] ECR I-1875, 32; Case 407/98, *Abrahamsson and Anderson v Fogelqvist* [2000] ECR I-5539, 48; Case 319/03, *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Education Nationale and Ministre de la Justice* [2004] ECR I-08807, 25).

[356] Case 319/03 *Briheche v Ministre de l'Intérieur* [2004] ECR I-08807, opinion of Advocate General Poiares Maduro, 42.

[357] Case 409/95 *Marschall* [1997] ECR I-06363, 24.

opportunities"[358]. But the fact that the Court endorses positive discrimination as a means to trigger equality of opportunity may indicate that it takes for granted the idea that inequality of opportunity on the ground of gender represents the only factor preventing women from being more and better represented in the workplace[359]. In fact, recent psychological researches shed doubt on the assumption that equality of outcome would necessarily be the result in a society where equality of opportunity is best achieved[360]. This opens the question as to whether putting positive action at the service of equality of opportunity would not ultimately prove to be contradictory[361]. Aside from these considerations, these remarks illustrate the fact that further steps toward equality of opportunity as understood by the Court, would require the latter to admit additional exceptions to its current ideological basis in order for its overall case law to remain coherent.

This last remark might help consider the stagnant case law of Japanese courts on gender equality in the bigger picture. As it has been argued in earlier paragraphs, Japanese courts have sought to protect employment practices and specifically lifelong employment[362],

[358] Case 319/03 *Briheche v Ministre de l'Intérieur* [2004] ECR I-08807, opinion of Advocate General Poiares Maduro, 50. For critiques and comments of this reasoning, see: E. Holzleithner, "Subversion from within. Opposition to gender Equality in the Court of Justice of the European Union" in M. Verloo (ed.) *Varieties of Opposition to Gender Equality in Europe* (New York: Routledge, 2018); A. van der Vleuten, *op. cit.* 107-178; A. Timmer, "Gender Stereotyping in the case law of the EU Court of Justice" *European Equality Law Review* 1 (2016) 40; N. E. Ramos, Martin, "Positive action in the EU gender equality law: promoting women in corporate decision-making positions" *Spanish Labour La wand Employment Relations Journal* 3:1-2 (2014) 20-33.

[359] "In my view any temptation to distinguish *Kalanke* on *narrow technical grounds* should be resisted. (…) It is unquestionable that – as submitted by the United Kingdom in *Kalanke* – unequal representation of women is the result of a cocktail of factors, and it may be that such preferential treatment of women is a method of improving one of the ingredients" (Case 409/95 *Marschall* [1997] ECR I-06363, Opinion of Mr Advocate General Jacobs, 37 and 46)

[360] R. Su, J. Rounds and Pl. Armstrong, "Men and things, women and people: a meta-analysis of sex differences in interests" *Psychol Bull.* 135:6 (2009) 859-884; S. Baron-Cohen, "The Essential Differences: Men, Women and the Extreme Male Brain" *British Medical Journal* 327:7405 (2003); R. A. Lippa, "Sex Differences in Personality Traits and Gender-Related Occupational Preferences across 53 Nations: Testing Evolutionary and Social-Environmental Theories" *Archives of Sexual Behavior* 39:3 (2008) 619-636 [for an alternative perspective, see: E. M. Trauth, J. L. Quesenberry and A. J. Morgan, "Understanding the under representation of women in IT: toward a theory of individual differences" *SIGMIS CPR '04* (April 22-24, 2004)].

[361] See for example: E. S. Anderson, "What is the Point of Equality?" in A. Mancilla (ed.) *Theories of Justice* (London: Routledge, 2012). For an opposing view, see: H. Collins, "Discrimination, Equality and Social Inclusion" *The Modern Law Review* 66:1 (2003) 40-43. For further discussion, see: J. Rawls, "Equality of Opportunity or Equal Social Outcome?" *Economics and Philosophy* 11:1 (1995) 25-55; R. Dworkin, "What is equality? Parts 1 and 2: equality of welfare" *Philosophy and Public Affairs* 10:3 (1981) 185-246 and 283-345

[362] N. Nagase and M. C. Brinton, "The gender division of labor and second births market institutions and fertility in Japan" *Demographic Research* 36:11 (2017) 348-349; T. Araki, "Changing Employment Practices, Corporate Governance and the Role of Labor Law in Japan" *Comp. Lab. L. & Pol'Y J.* 28 (2007) 253; R. Kambayashi, "Dismissal regulation in Japan" in K. Hamada, K. Otsuka, G. Ranis and K. Togo (eds.) *Miraculous Growth and Stagnation in Post-War Japan* (London: Routledge, 2011); N. Yashiro, "Myths about Japanese employment practices: An increasing insider-outsider conflict of interests" *Journal of the German Institute for Japanese* 23:2 (2011) 143 ("dismissal of employees due to a lack of job capability is not admitted, in principle, by Japanese courts. The logic of the court is that the firm plays a crucial role in the skill formation of its employees and has to share responsibility for the alleged incapability").

which is deeply embedded in a Confucian conception of work[363]. Therefore, courts did not hesitate to enforce the principle of gender equality as long as it could reinforce this conceptual framework. On the other hand, they have promoted gender equality much more sparingly in hiring-, promotion- and transfer-related cases, as these employment aspects have traditionally been left to the discretion of Japanese companies[364]. For example, if the judiciary decided to deny the possibility for employers to require nationwide transfer from job applicants as a hiring condition on the ground that it indirectly discriminates female workers[365], it would set aside one the most important trade-off from which employers benefit in exchange of the life-long employment custom. Therefore, one could argue that Japanese courts sparingly enforce gender anti-discrimination laws, not necessarily because of a gender-biased stance in labour disputes, but because it would fundamentally contradict the Japanese employment structure. On the other hand, a more optimistic view suggests that courts become more and more concerned not only about gender inequality in the workplace, but also about the abuses that the Japanese employment system can bring about in general. For instance, it has been argued that while Japanese courts have traditionally legitimised the practice of overtime work, they now seem to have become more willing to hold employers liable for unreasonable overworking[366]. Therefore, a shift toward more gender equality in the workplace may need to be understood as part of this larger movement in favour of better working conditions for both male and female workers. This way, instead of being perceived as an isolated issue ruled by way of exception, gender equality would arguably find a more fertile soil for growing coherently within a Japanese case law oriented towards the amelioration of the rights of workers in general. With this in mind, one might conclude that the core issue in Japan is not so much that Japanese women need and should have the opportunity to reach the same level of financial independence and career prospects as that of Japanese men[367], but that Japan's current work culture and its subsequent work practices[368] need to be seriously regulated so that both

[363] T. Hanami and F. Komiya, *Labour Law in Japan* (Kluwer Law International, 2011) 29; C. Moruguchi and H. Ono, "Japanese lifetime employment – A century's perspective" in M. Blomström and S. La Croix (eds.) *Institutional Changes in Japan* (London: Routledge, 2006) 161-164.

[364] H. Kano, *Japanese Labor & Employment Law and Practice* (3rd ed.) (CCH Japan, 2014) 212 [see also: K. Koshiro, "Labour Market Flexibility in Japan" in A. Gladstone, H. Wheeler, J. Rojot, F. Eyraud and R. Ben-Israel (eds.) *Labour Relations in a Changing Environment* (Berlin: Walter de Gruyter & Co., 2015) 126-12].

[365] Article 2 of the Ordinance for Enforcement of the Equal Employment Opportunity Act.

[366] K. E. S. Kidani, "Japanese Corporate Warriors in Pursuit of a Legal Remedy: The Story of Karoshi, or Death from Overwork in Japan", *U. Haw. L. Rev.* 21 (1999); C. Weathers and S. North, "Overtime Activists Take on Corporate Titans: Toyota, McDonald's and Japan's Work Hour Controversy" *Pacific Affairs* 82:4 (Winter 2009); S. North and R. Morioka, "Hope found in lives lost: karoshi and the pursuit of worker rights in Japan" *Journal of the German Institute for Japanese Studies* 28:1 (2016).

[367] K. T. Geraghty, *op. cit.* 543.

[368] These labour practices are essentially seniority-based promotion and benefits, life-long employment, and more importantly long working hours. It should be born in mind that these aspects of the Japanese work culture become less and less dominant, as they are being challenged by market-based strategies and public health concerns [see: L. Wolff, *op.*

men and women can adopt a more balanced life-style. This perspective emphasises the fact that, if it is necessary to offer men and women identical work opportunities, this necessity loses its very relevance when these opportunities, which men supposedly benefit from, are not desirable for anyone.

6. Conclusion

Throughout this paper, key features of the Japanese and European case law on gender equality have been highlighted. By focusing on direct and indirect discrimination, there has also been an attempt to define the strategies adopted by the Japanese courts regarding gender equality in the light of the European legal framework. As it has often been highlighted, the latter does not generally fit the Japanese judicial stance on the matter. In that sense, this paper could not have reasonably been an attempt to enjoin Japanese courts to simply follow the European steps with regard to gender equality. On the contrary, it rather emphasises how each system deals with its own issues and controversies.

As regards direct discrimination, a fundamental difference had to be emphasised from the outset. Unlike Japanese courts, the ECJ has always attempted to ground its case law on gender discrimination on a fundamental right basis. But as economic considerations were at the origin of the development of EU law on gender equality, it is also rightfully contended that "the essence of the principle of gender equality lies in the complex balance between human rights and market oriented concerns"[369]. Moreover, the constitutional doctrines[370] of the European Court have been pointed out as a key factor in the development of its gender-friendly case law. By comparison, Japanese courts do not see in the Constitution a source of individual rights to be enforced in private disputes such as those against one's employer[371]. Nevertheless, they have been proactive in developing an important doctrine under Article 90 of the Japanese Civil Code, the public order doctrine, which they have put at the service of certain gender discrimination cases, and specifically those with job security at stake[372]. This was concomitant to the enactment of the major piece of legislation on gender equality, the 1985 Equal Employment Opportunity Law. However, whilst the act and its subsequent amendments were meant to prohibit other employment practices such as discriminatory categorisations in the hiring and promotion

cit. 53-80; Y. Namie, *Long Working Hours, Happiness, and Quality of Democracy With the Case Studies of Japan and Denmark* (San Francisco: University of San Francisco, 2016)].

369 J. Bain and A. Masselot, "Gender Equality," *op. cit.* 103.

370 J. H. H. Weiler, "The Transformation of Europe" *Yale Law J.* 100:8 (1991).

371 H. Nakakubo, *op. cit.* 10 (see also: M. D. Helweg, *op. cit.* 297).

372 Precisely, Japanese courts demonstrated judicial activism in securing women's job, setting aside the common practice consisting in requiring female workers to quit their job upon marriage or childbirth.

process, Japanese courts showed much more reluctance in these areas[373] and have not necessarily constructed any systematic interpretation of the EEOL, as they still rely much on the public order doctrine. By comparison, the ECJ has had to directly rely on the TFEU and did so in order to develop an extensive case law on gender equality. In fact, it ended up giving an unexpected scope of application to Article 157 of the TFEU, which triggered the enactment of the then Gender Equality Directive and its subsequent amendments[374]. Interestingly, while the ECJ envisages gender equality as a system based on a permanent and universal principle to which it attaches exceptions, Japanese courts tend to adopt a sociological approach for determining what it means to be equal according to society at a given time without substantiating the equality principle with any permanent nature.
When it comes to indirect discrimination, the differences between the case law of the ECJ and of the Japanese courts are even more striking. The ECJ initiated a shift toward a substantive understanding of equality by recognising the unlawfulness of indirect forms of discrimination[375]. By comparison, it has been argued that Japanese courts did not demonstrate a similar level of judicial activism in the field. The starting point of the comparison lies in the distinction between the European and Japanese legislative approach to indirect discrimination. Whilst the 2006 Directive on gender equality provides for a generic definition of indirect discrimination whose interpretation is entirely left to the European Court, the Japanese EEOL and its ordinance expressly enunciates the criteria susceptible to trigger indirect discrimination, which perfectly illustrates the cautious and gradual approach the Japanese legislature adopts with regard to social and labour issues[376]. Furthermore, Japanese courts are given the possibility to introduce additional criteria as relevant factors indirectly leading to discrimination. If they have not formally done so, it has been pointed out that courts have partially evinced an important discriminatory practice, that is, the dual track hiring system. As a matter of fact, it is said that this rigid job categorisation is at the origin of strong sex segregation in the workplace[377]. Whilst job categories are formally open to all candidates, women have often been discarded from the management track as they are usually not able nor willing to abide by the required conditions (regional transfer, long working hours, etc.). Interestingly, courts have had to deal with this issue before the enactment of the EEOL, and they have usually set aside this practice when it consisted in a blatant attempt from the employer to discriminate female workers. Most importantly,

[373] Tokyo D. Ct., Dec. 4, 1986, *The Japan Iron and Steel Federation* case, 37-6 *Rōdō Kankei Minji Saibanreishū* 512, *translated in* C. J. Milhaupt et al., *op. cit.* 587 ("the failure of an employer to grant an equal opportunity in recruitment and hiring [is] not a violation of public order").

[374] A. van der Vleuten, *op. cit.* 9.

[375] M.H.S. Gijzen, *op. cit.* 69.

[376] K. Kamio Knapp, "Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism", *Colum. J. Gender & L.* 8 (1999).

[377] M. L. Starich, *op. cit.* 558 (see also: G. T. Shimoda, *op. cit.* 224; K. Sugeno, *op. cit.* 132; K. Kamio Knapp, "Still Office Flowers," *op. cit.* 123).

it can be argued that they have preserved such case law – even after the introduction of the notion of indirect discrimination in the EEOL – by focusing on the intent of the employer[378]. Thereby, Japanese courts pursue the first objective of indirect discrimination, that is, striking down the attempts of employers to circumvent the prohibition of direct discrimination through seemingly neutral job criteria. Unlike the Court of Justice[379], the Japanese judiciary does not seem to consider itself as entrusted with the second objective of purpose of indirect discrimination, that is, promoting social change by tackling the social roles and structures of the labour market[380]. This is reflected in the strategies adopted by Japanese courts, and more specifically in the public order doctrine whose key feature is the social consensus. The different approaches of the Japanese and European judiciaries might reflect the fact that they tend to focus on a different understanding of the social norm. This latter is multi-faceted, in that its structural and normative nature is understood both as triggering a sense of belonging in society and as a threat to individual choice and freedom. One could argue that whilst the European case law on gender equality reflects a clear focus on the latter, Japanese courts tend to tip the balance in favour of the former in borderline cases.

The ECJ has had the opportunity to directly foster a far-reaching enforcement of the gender equality principle within national courts[381]. This was made possible by the constitutional doctrines by which the Court proclaimed the supremacy over national law[382] and direct effect of Article 157 TFEU[383]. The relatively (and arguably)[384] harmonised European case law on gender equality contrasts with that of Japanese courts. In fact, rather than being driven by the implementation of equality rights *per se*, Japanese courts only seem to seek to protect women's employment in order to secure the traditional life-long employment system[385], from which resulted a somewhat distorted case law on gender equality.

By way of explanation for the reluctance of Japanese courts pertaining to gender equality, different arguments have been put forward and discussed. Most importantly, the role of the General Secretariat of the Supreme Court should be highlighted. As a matter of fact,

[378] K. T. Geraghty, *op. cit.* 519.

[379] R. Holtmaat and C. Tobler "CEDAW and the EU's Policy in the Field of Combatting Gender Discrimination" *Maastricht J. Eur. & Comp. L* 12 (2005) 411.

[380] P. R. Luney, "The Judiciary," *op. cit.* 162.

[381] D. Ghailani, "Gender Equality, from the Treaty of Rome to the Quota Debate: between Myth and Reality" *Social Development in the European Union* (2013) 168.

[382] The ECJ has held that EU law prevails over national law: case 6/64 *Costa v Enel* [1964] ECR 1141 (see: N. Fennelly "The European Court of Justice and the Doctrine of Supremacy: Van Gend en Loos; Costa v ENEL; Simmethal" in Miguel P Maduro, and Loic Azoulai (eds.) *The Past and Future of EU Law* (Oxford: Hart Publishing, 2010) 39-46; A. Stone Sweet and T. L. Brunell, "The European Court of Justice, State Noncompliance, and the Politics of Override" *The American Political Science Review* 106:1 (2012) 66-97).

[383] Case 43/75 *Defrenne v Sabena SA* [1976] ECR 00455, 24.

[384] C. Barnard, B. Hepple, "Indirect discrimination," *op. cit.* 409 (see also: K. Hervey, "EC Law on Justification," *op. cit.* 122).

[385] For details on the impact of such system on women's employment, see: D. H. Foote, *op. cit.* 651-654.

it holds tight control over most controversial issues, over the bureaucratic career path of judges and over their training[386], by which it is said to promote a conservative judicial course of action. Thereby the Japanese judiciary does not seem to have become an instrument of social change, but rather protects "basic civil liberties guaranteed by the Constitution and recognised by the Diet and a majority of the Japanese population"[387]. Interestingly, judicial restraint is the strategy by which courts preserve their legitimacy, as it is a proof of independence in the eyes of the Japanese public. Similarly, it is contended that the ECJ always seeks to strike a balance between its objectives and the interests of Member States in order to preserve a necessary degree of legitimacy[388].

Most importantly, it has been observed that the conceptual framework that the judiciaries adopt to preserve the coherence of their case law is also an important factor that frames their decision in gender equality cases. In the EU, this has been illustrated in the ECJ case law on positive action. The Court allows for positive discrimination as an exception to equality as it embraced a liberal conception of the principle of equality of opportunity. By doing so the Court sought to preserve the coherence of its conceptual framework with regard to equality, although, as some may argue, only in appearance. Concerning Japan, Confucian precepts are the underlying values on which the judiciary bases its case law, as the career structure of judges is itself imbued with this logic[389]. Just like most Japanese employees to their employers, Japanese judges abide to a duty of obedience to the General Secretariat of the Supreme Court, as they can generally expect a lifelong career policy from the latter[390]. This Confucian conception of work is still part of the so-called social consensus that courts have sought to safeguard in their case law, even though the judiciary starts to challenge such logic in certain areas such as overtime. This observation might still explain why Japanese courts do not enforce gender equality with the same proactivity as that of the ECJ, as it would fundamentally contradict the very logic they have purported to protect in their case law. Therefore, as long as courts strictly protect lifelong employment, gender equality, that is, equal opportunities in hiring, training and promotion, can only be enforced by way of exception. The promotion of gender equality should preferably be addressed in the broader context of the amelioration of working conditions in Japan, as *both* men and women suffer from a serious lack of freedom of choice in the professional world.

To conclude, while it can be argued that the European Union's commitment to gender equality has functioned as a trigger for the amelioration of all European workers' working

[386] M. Setsuo, "Administrative Control," *op. cit.* 55; K. Minamino, *op. cit.* 73.

[387] P. R. Luney, "The Judiciary," *op. cit.* 162 (for an opposite view, see: F. K. Upham, "Stealth Activism," *op. cit.* 1498-1502).

[388] S. Pager, *op. cit.* 555.

[389] K. Minamino, *ibidem* 73.

[390] D. H. Foote, *ibidem* 693.

conditions[391], conversely, in Japan a broader legal and judicial undertaking in favour of the advancement of all workers' social and labour rights may be the necessary approach for Japanese labour law to coherently and effectively embrace female workers' interests.

[391] See for example: A. Sørensen, "Economic Relations between Women and Men: New Realities and the Re-Interpretation of Dependance" in J.Z. Giele and E. Holst (eds.) *Changing Life Patterns in Western Industrial Societies* (Oxford: Elsevier, 2004).

Articles

Searching for a common core of family law in Europe

Methods and goals

Alessandra Pera*

Abstract

In this Article the Author, a member of the group of European investigators involved in the searching process for a Common Core of Family Law in Europe, does not want to present the results of the project, that will be published in a forthcoming volume, but, instead, seeks to distinguish the FLCCP (Family Law Common Core Project) from similar research experiences, such as the CEFL (Commission of European Family Law) one.

In order to highlight these differences, in the first part (paragraphs 1,2,3) the paper describes the goals of the Common Core Project and the methodology it employs, making references to the Cornell's Studies, the Schlesinger's factual approach and the Sacco's formants theory.

In the second part the analysis pinpoints the peculiarities of functionalism and the way the Common Core method re-interprets it on a large scale as a collaborative effort, because of the synergy between the work of the national rapporteurs, the answers obtained through the questionnaires and the group sessions and reports (par. 4).

Further, the Article stresses the different goals of CEFL and FLCCP and argues how these differences concerning also their respective goals and methods affect the research's results and the idea of what the harmonization of family law (if any and possible) might be expression of (par. 5).

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In the last part the Author maps an alternative route to the harmonization of European family law, which combines the use of European international private law regulations on family matters, the concepts of private autonomy and Courts rulings, together with doctrine efforts (par. 6).

Keywords

Common Core - Family Law - Method - Factual Approach - International Private Law - Better Rule - Harmonization

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1. Introduction

More than other areas of private law, family law is generally considered to be the expression of social, cultural, ethical and, sometimes, religious models typical of a specific People, of a particular historical and juridical tradition, often associated with a well-defined geographical-territorial basis[1].

This is relevant when discussing the harmonization and standardization[2] of legal rules with regard to the relationship between single national systems and supranational systems, es-

[1] See, H. Kahn Freund, *Book Review, Legal Transplants*, in *L.Q.R.,* 91, 1975, pp. 292 *et seq.*; for a slightly different approach, see the studies by A. Watson, *Legal Transplants and Law Reform*, in *L.Q.R.*, 92, 1972, pp. 79 *et seq.*; Id., *Comparative Law and Legal Change*, in *Camb. L. J.*, 38, 1978, pp. 313 *et seq.*; Id., *Two-Tier Law, An approach to law making*, in *Int. & Comp. L. Q.,* 27, 1978, pp. 552 *et seq.* For a critical approach to Watson's theories, see R.L. Abel, *Law as lag: Inertia as social theory of law*, in *Mich. L. Rev.*, 80, 1981-2, pp. 785 *et seq.* Among the Italian authors, see R. Sacco, *Introduzione al diritto comparato*, Utet, Turin, 1992, pp. 136 *et seq.*; Id., *Circolazione e mutazione dei modelli giuridici*, in *Digesto delle discipline privatistiche*, Utet, Turin, 1988, n. 6; U. Mattei - P.G. Monateri, *Brief introduction to comparative law*, Cedam, Padova, 1997, p. 38; S. Ferreri, *Assonanze transoceaniche. Tendenze a confronto*, in *Quadrimestre, rivista di diritto privato*, 1993, pp. 179 *et seq.*; M. Lupoi, *Sistemi giuridici comparati. Traccia di un corso*, Esi, Naples, 2001, p. 78.

[2] In the doctrine, an analysis of the concepts of harmonization, standardization and unification and of the instruments serving the implementation of these processes can be found in G. Benacchio, *Diritto privato della Unione Europea. Fonti, modelli, regole*, Cedam, Padua, 2010, pp. 18-26; S. Ferreri, see the voice *Unificazione, uniformazione*, in *Digesto civ.*, vol. XIX, Utet, Turin, 1999, p. 504; M Serio, *Sistemi di integrazione giuridica e tecniche di armonizzazione, uniformazione ed unificazione per influenza del diritto comunitario*, in *Contratto e Impresa/Europa*, 2006, pp. 162-176.

pecially in so far as national systems provide for instruments that differ from each other to achieve interests and protect rights that they consider to be worthwhile, in the light of the reference values, which are relative.

The issue of the regime applicable to the family is, today more than ever, connected to the various combinations of personal and patrimonial relationships between subjects of different nationalities or who, in any case, identify the center of their interests in a country other than the one of common citizenship. In these hypotheses, the family nucleus presents elements of connection with more than one legal system, which determines the necessity of providing suitable instruments to solve the issues that can derive from the transnational dimension of the family itself.

Looking at such transnational dimension, the last part of this article maps an alternative route to the harmonization of European family law, which combines the use of European international private law regulations on family matters, the concepts of private autonomy and Courts rulings, together with doctrine efforts.

Over the last twenty years, the EU's legislative activity on family matters has focused on private international law and procedural law. This is due to the developments in the process of the European integration and to the elements of internationality that the relations between private individuals are to assume also within the family.

These are legislative sectorial interventions, channeled through the form of regulations, directly applicable and binding on all the Member States and citizens[3].

The choice of using regulation is appropriate, since, given the problems connected with the solution of conflicts of rules, the intervention, in accordance with the principles of subsidiarity and proportionality, can undoubtedly be more effectively if achieved by an EU act, which excludes further State intervention, at the time of implementation.

The aim is to reach the result that the rules laid down in a supranational source of law can be uniformly interpreted and applied at national level[4]. This is functional to the objective of judicial cooperation in civil matters, already enshrined in the Treaty of Amsterdam and in the Lisbon one and directed to the creation of a common European legal framework.

Therefore, in order to guarantee the free movement of persons in this area of freedom, security and justice, it is essential to adopt measures aimed at improving and simplifying certain procedural instruments, the recognition of judicial and extrajudicial decisions in

[3] See Article 288(2) TFEU. For the recognition of the direct applicability, please refer to the leading case ECJ, *Orsolina Leonesio v. Ministero dell'Agricoltura e Foreste della Repubblica italiana*, C-93/71, commented by J.A. Winter, in *Common Market Law Review*, 1973, pp. 327-332.

[4] The Member States, in fact, are all recipients of a single legal rule, which is guaranteed uniform interpretation and application through the work of the European Court of Justice and the awareness of national judges and interpreters, and through the principles of supremacy of EU law and interpretation in conformity. On the concepts of unification, harmonization and standardization, see R. Sacco, *Introduzione al diritto comparato*, in *Trattato di Diritto Comparato*, Utet, Turin, 1992, 5 ed., p. 167; Id., *Il problema dell'uniformazione del diritto privato europeo*, in *Quaderni Acc. Sc. Torino*, 1996, pp. 3 *et seq*.

civil and commercial matters, the promotion of the compatibility of the rules applicable in the Member States to conflicts of law and jurisdiction[5].

In this regard, questions that emerge may be represented as concentric circles, which start from an almost ontological plan, linked to the definition of the concept of family, which varies from State to State, and are reduced when, depending on the different assumptions and the different fundamental elements of the concept under consideration, each system outlines and regulates family relations.

The heterogeneity of the European systems in the field of family law and the transnational nature of the social phenomenon of the family recently emerged, however, have raised the issue of the necessity, usefulness or opportunity of approximating national legislations.

The literature on the subject has been fundamentally structured along two directions: part of the scholarship shows enthusiastic support for regulatory unification as a functional objective of the European integration[6]; other part of the scholars shows several doubts about the phenomenon, in respect of the preservation of diversity and legal plurality, as a founding value[7].

There are tensions, indeed, between: the general principles contained in the national Constitutions, formal or material, which guide the rules of domestic law; the general principles of non-constitutional source, which however contribute to shaping the systems; the principles of transnational source enshrined in the agreements between States[8].

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5 See Article 81(1) and (2) TFEU. For an analysis of the limits of the EU competence in this area, see C. Kohler, *Lo spazio giudiziario europeo in materia civile e il diritto internazionale privato comunitario*, in P. Picone (ed.), *Diritto internazionale e diritto comunitario*, Cedam, Padua, 2004, pp. 65 *et seq.*

6 For an approach that is not maximalist, but in favor of the Europeanization of private law, see E. Stein, *Un nuovo diritto per l'Europa. Uno sguardo d'oltre oceano*, Giuffrè, Milan, 1991.

7 Among the most critical, see D. Bradley, *A family law for Europe? Sovereignty, political, economy and legitimation*, in K. Boele Woelky (ed.), *Perspective for the unification and harmonization of family law in Europe,* Intersentia, Oxford-New York, 2003, pp. 65-104; M. Antokolskaia*, The better law approach and the harmonization of family law*, in K. Boele Woelki (ed.), *cit.*, Intersentia, Oxford-New York, 2003, pp. 159-183; M. Jantera-Jareborg, *Unification of international family law in Europe – A critical perspective*, always in K. Boele Woelki (ed.), c*it*., Intersentia, Oxford-New York, 2003, pp. 194-216; C. McGlynn, *A family law for the European Union*, in J. Shaw (ed.), *Social law and policy*, Oxford University Press, Oxford, 2000, pp. 223 *et seq.*; Id., *The Europeization of family law*, in *CFLQ*, 2001, pp. 35 *et seq.*; S. Ninatti - A. Rovagnati (eds.), *Verso un diritto europeo delle relazioni familiari*, in *Quaderni costituzionali*, 2007, pp. 425-428; S. Patti, *Il "principio famiglia" e la formazione del diritto europeo della famiglia,* in *Familia*, 2006, pp. 529-544; Id., *Diritto privato e codificazioni europee*, Giuffrè, Milan, 2007, pp. 231 *et seq.*; Id., *Il diritto di famiglia nei paesi dell'Unione Europea: prospettive di armonizzazione*, in T. Auletta (ed.), *Bilanci e prospettive del diritto di famiglia a trent'anni dalla riforma*, Giuffrè, Milan, 2007, pp. 15 *et seq.*

8 On the tension between principles arising from sources of law at different level, see A. Zoppini (ed.), *La concorrenza tra ordinamenti giuridici*, Laterza, Bari-Rome, 2004; A. Plaia (ed.), *La competizione tra ordinamenti giuridici*, Giuffrè, Milan, 2007. On the competition and circulation of models through international private law, in particular in family matters, see M. Tenreiro - D. Ekström, *Unification of private international law of family law matters within the European Union*, in K. Boele Woelki (ed.), *Perspective for the unification and harmonisation of family law in Europe*, Intersentia, Oxford-New York, 2003, pp. 364 *et seq.* Having regard to the judicial formant, there are both a HCHR's and a ECJ's huge relevant case law, mainly but not only, on the right to respect for private and family life under art. 7 and the right to marry and found a family under art. 9 of the Charter of Fundamental Rights of the European Union. In particular, on the impact of art. 9 on national legal systems, the tensions between national and super-national levels and the ways in which such rights can be enforced and protected at a municipal level according to the Convention, see, for all, C. McGlynn,

These are sometimes heterogeneous principles, signs of the evolution of family law, which confront legal systems and jurists with the need to identify parameters for re-arranging the traditional dogmatic categories[9].

Principles can actually be understood as flexible rules, as opposed to rules containing "strict" rules, which can allow the courts to find a more proper solution to the specific case[10].

Constitutional principles, which have had a profound impact on the development of family law in many European systems, are high-ranking rules that express the founding values of a community and are intended to be implemented and protected by lower-ranking rules.

The tensions are associated with issues of legal policy and the assessment of the various possible options, but also with questions of interpretation and application connected with the creation of sector-specific rules.

With the idea of investigating such issues, in the last six years the Common Core of European Private Law Project has expanded its field of research also to the area of family law, trying to explore and represent the state of the art of the knowledge reached by scholars with regard to the "duties of care" and "contribution to family needs" in family law.

The cited phrases are the titles of the questionnaires developed by the Family Law Common Core's group of research. However, it is worth mentioning that the group, under the coordination of Prof. A. Miranda, has decided to start its experience referring to the "contribution to family needs" as its first step and, further, eventually to continue with "duties of care".

In the first part of this contribution, with the approval of the Coordinator of the Unit, being no possible to present the results of the research conducted (as it is not feasible yet), it will

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Families and the european Union charter of fundamental rights: progressive change or entrenching the status quo*?,* in *Eur. Law Rev.*, 2001, pp. 582 *et seq.*; H. Stalford, *EU family law: a human rights perspective*, in J. Meeusen - M. Pertegás - G. Straetmans - F. Swennen, (eds.), *International family law for the European Union*, Intersentia, Antwerpen-Oxford, 2007, pp. 101-128; G. Straetmans, *Non economic free movement of european Union citizens and family law matters*, in J. Meeusen - M. Pertegás - G. Straetmans - F. Swennen, (eds.), cited above, pp. 183-238.

[9] S. Patti, *Il principio famiglia e la formazione del diritto europeo della famiglia*, in *Familia*, 2006, p. 531. More generally, on the opportunity to rethink and re-found some "traditional" dogmatic categories, the debate in doctrine has its roots far away, but more recently, P. Legrand, *The same and the different, in Comparative legal studies: traditions and transitions*, Cambridge University Press, Cambridge, 2003, pp. 240 *et seq.*; K. Zweigert - H. Kotz, *Introduzione al diritto comparato*, I, Giuffrè, Milan, 1992, p. 37; R.B. Schlesinger, *Comparative law, cases texts, materials*, Mineola, New York, 1998, p. 42. In particular, with reference to human rights and to the rights of the personality, which mostly concern the object of our analysis, see N. Lipari, *Diritti fondamentali e categorie civilistiche*, in *Riv. dir. civ.*, 1996, p. 417; P. Perlingeri, *La personalità umana nell'ordinamento giuridico*, University of Camerino, Scuola di perfezionamento in diritto civile, Camerino-Naples, 1972, p. 175; Id., *Il diritto civile nel diritto costituzionale*, Esi, Naples, 1991, spec. pp. 12 *et seq.*, 137 *et seq.*, 175 and 189 *et seq.*

[10] In particular P. Perlingieri, *Valori normativi e loro gerarchia. Una precisazione dovuta a Natalino Irti*, in *Rass. Dir. Civ.*, 1999, p. 805, where the Author stresses the importance of principles and values, expressed by norms, as they are able to go through and pervade all the private law institutions. See also, M. Manetti, *Famiglia e Costituzione: le nuove sfide del pluralism morale*, in *Rivista dell'associazione italiana dei costituzionalisti,* 2010, pp. 5-7; V. Tondi delle Mura - M. Carducci - R.G. Rodio (eds.), *Corte Costituzionale e processi di decisione politica*, Giappichelli, Turin, 2005, pp. 139 *et seq.*, pp. 502 *et seq.*, pp. 632 *et seq.*

be, instead, distinguished the FLCCP (Family Law Common Core Project) approach from similar research ones, such as the CEFL (Commission of European Family Law). Indeed, the doctrine has been committed to identifying the principles of a European family law, understood as basic rules, without a high degree of specificity, common to all or most of the European legal systems.

Moreover, pursuing a different objective, other scholars have tried to identify the so-called "better rule", to regulate family relations, or rather the rule that, in a perspective of social engineering and policy of the law in the future, can represent the "best model", even if currently widespread only in a few European systems.

In order to make the differences mentioned above as clear as possible, it is then necessary to proceed with the description of the aims of the Common Core Project and the methodology it employs.

2. Common Core Family Law group goals

The research group has investigated the Common Core of European Family Law and, in particular, in this initial phase, limited its work to the duties of maintenance among family members, trying to find out what is already common, if anything, among the different legal systems of the European Union member states. Such systems are different, not only if we think in terms of the contrast between the civil law and the common law experiences, but also if we look among civil law western legal traditions (or sub-traditions), according to the taxonomy one wishes to adopt.

The methodological premises to the FLCC project have been – as well as for the other groups that started working before the family law one (contract, tort, property) – the ones that Schlesinger had identified in the Cornell report[11].

All the participants to the Family Law Group agreed on the idea that the common core research is a very promising tool for uncovering deeper analogies hidden by formal differences, in order to trace the mainlines of a reliable map of family law in the European countries. While being aware of the circumstance that this map could be of no meaning for those who are looking forward to a sort of restatement and/or codification of family law (not desirable), at the same time the FLCC group believe that, if reliable, it could be useful for European legislation drafters, for scholars, judges and lawyers, contributing to build a common European legal culture.

[11] On Schlesinger project see, R. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, in 51 *Am. J. Int. L.* , 1957, p. 734; A. Farnsworth, *Book Review: Formation of Contracts: A Study of the Common Core of Legal Systems*, in *Columbia L R*, 69, 1969, p. 339; A. Ehrenzweig, *Book Review: Formation of Contracts: A Study of the Common Core of Legal Systems,* in *Cal L R,* 56, 1968, p. 1514; R. Braucher, *Book Review: Formation of Contracts: A Study of the Common Core of Legal Systems*, in *Harvard L R.,* 83, 1970, p. 957.

Using the Common Core's factual approach means starting the analysis from a case study, describing a factual situation and asking for answers by different national rapporteurs. Before answering, sometimes it is needed to re-formulate the questionnaire as long as the question, as expressed at first, does not consider some (factual) points, which are crucial in a certain legal system and not in another: autonomous incomes by each of the parties (personal or coming from a work); the presence of children; the children's age; the situation of the family house... To be clearer, below part of the questionnaire's section on family assets, together with the instructions for the respondent (see footnotes 12-13 is cited).

FAMILY ASSETS12
1) Nino and Francesca live together.
Do their own assets remain several of each of them or become joint?
(assets means, for instance, goods, personal property, real property, land, a car, a motorbike, a share, etc.)
1a) Would your answer be different if Nino and Francesca were married?
1b) Are their personal incomes and returns on respective assets included in the personal or in the joint assets?
1c) Would your answers be different if Nino and Francesca were married?
2) Nino and Francesca live together.
Nino buys a set of very expensive golf clubs, but he can't pay the bill and the seller sues him. Can Francesca be required to pay the cohabitant's debt13 ?
If yes, why?
If not, why?
2a) Would your answer be different if the money were necessary for medical needs? If yes, why?
2b) Would your answer be different if Nino and Francesca were married? If yes, why?
3) Francesca's father dies and she inherits lots of money and a building in the centre of Palermo. Is the inherited patrimony separate from Nino's assets, or is Nino entitled to claim a right on the estate inherited by Francesca?
(patrimony is not different from "assets" here they are used like a synonymous; means "the sum or/ and the properties or (and the "substances" and/or the activities, obligations, etc. that may be transmitted to an heir or bequeathed by the law or by last will and testament)
3a) Would your answer be different if Nino and Francesca were married? If yes, why?
4) Nino's mother donates him a house. Is the house considered part of Francesca's assets or not? Is Francesca entitled to claim a right on this house? Can she sell the house?
4a) Would your answer be different if Nino and Francesca were married? If yes, why?
5) Nino is the owner of a company. Can Francesca sell the company?
5a) Would your answer be different if Nino and Francesca were married? If yes, why?

[12] In the asset of the family you may consider: – well-being; – heredity; – succession; – donations; – bank; income/stock option (investments); – pension; – insurance; – personal injury compensation; – compensation of tort.

[13] Your answer has to consider the following different possibilities: 1) Nino and Francesca both work; 2) Only one of them works; 3) They have similar incomes; 4) They have different incomes. (kind of income, level of income etc…) For example you have to consider if the income is earned or unearned, etc; 5) None of them work; 6) One of them is not able to work; 7) One of them doesn't want to work.

6) Francesca buys an "Armani" dress; can Nino sell the dress or destroy it?
6a) Would your answer be different if Nino and Francesca were married? If yes, why?
7) Francesca has a car accident after which she is injured. The person who caused the accident is condemned to pay € 50.000,00 of compensation for damages. Does the compensation form part of Francesca's own assets or of the joint assets?
7a) Would your answer be different if Nino and Francesca were married? If yes, why?
8) Nino, factory worker, has an accident at work and he loses his right hand. He obtains a compensation of € 500.000,00. Does the compensation form part of Nino's personal assets or of the joint assets? Is Francesca entitled to claim a right on the compensation?
8a) Would your answer be different if Nino and Francesca were married? If yes, why?
9) Francesca sells the diamond necklace inherited from her mother and she buys a "Picasso" painting. Does the painting form part of Francesca's own assets or of the joint assets? Can Nino sell the picture?
9a) Would your answer be different if Francesca had inherited the necklace before their relationship?
10) Can Nino and Francesca conclude an agreement in which their joint assets are frozen and can therefore only be used for the family's needs? Is a particular form of agreement necessary?
("frozen joint assets" means that a part or the whole of assets is not more freely disposable and their use is strictly limited to support the family expenses –like an English "trust for family" for instance)
10a) Should this patrimony be considered separate and independent from the joint one and from their own assets?
("separated and independent patrimony" may be a trust like instrument or similar or alternative instrument)
10b) Nino and Francesca have agreed that the rent of their joint house in London should be used to the payment of the family's ordinary living costs. Nino, meanwhile, has taken out a mortgage with a bank. Nino does not pay the instalments anymore. Can the bank retaliate by using the income from the joint house?
10c) Would your answers (9-9a-10-10a-10b) be different if Nino and Francesca were married? If yes, please explain why.

Such approach would not hide in any way the existence of different patrimonial regimes on family assets in each legal system, but will also map eventual common practical solutions, despite the letter of a civil code or statute's rule could provide differently.
In the Common Core perspective, the scenario for the transnational lawyer, who approaches family law of different European legal systems, is the one of a traveler compelled to use a number of different State's maps, each one containing (quite often) misleading information. The CC method tries to correct those misleading pieces of information, not forcing the actual diverse reality of the law within one single map to attain uniformity, but presenting a complex situation in a reliable way[14].

[14] M. Bussani - U. Mattei, *The Common Core Approach to European Private Law*, in *The Columbia Journal of European Law*, 3, 1997-1998, p. 341.

This approach marks the difference between the FLCC work and other research experiences, which are (expressly or not) pushing in the direction of uniformity or unification of family law. Such attitude distinguishes the FLCC cultural mission from another remarkable attempt, as the CEFL's one, which is devoted to the idea of the *better rule* with an approach of "social and law engineering", that will be explained in the next few pages.
In the CEFL work, each national rapporteur is not guided by the questionnaires factual approach, so she/he is free to analyze the law, resulting from the legislation and/or the case law and scholarly writings. The questionnaire is quite different from the Common Core's one: the questions are general and they never refer to a case, but explicitly mentions dogmatic categories, assuming they are common, as demonstrated by the section of the questionnaire on property regimes between spouses, quoted below[15].

C. MATRIMONIAL PROPERTY REGIMES
C.1. General issues
15. Are spouses entitled to make a contract regarding their matrimonial property regime?
Table of contents
16. What regime is applicable, using the list below, if spouses have not made a contract (default regime) or are not allowed to make a contract or are not allowed to make a contract with binding effect?
17. Are there other alternative matrimonial property regimes regulated by statute for which spouses can opt besides the default regime (where applicable)?
18. Briefly describe the regimes indicated in the answers to:
1. Question 16
2. Question 17
19. Indicate the frequency of the use made of the regimes (where possible by reference to statistical data) referred to in Questions 16 and 17
C.2. Specific regimes
I. Community of property
I.1. Categories of assets
20. Describe the system. Indicate the different categories of assets involved.
21. What is the legal nature of the different categories of assets, in particular the community?
22. What do the personal assets of each spouse comprise?
23. Is substitution of personal assets (e.g. barter agreement) governed by specific rules? Distinguish where necessary between movables and immovables.
24. Is investment of personal assets governed by specific rules? Distinguish where necessary between movables and immovables
25. What assets does the community comprise? Are there special rules governing the spouses earnings?
26. To which category of assets do pension rights and claims and insurance rights belong?
27. Can a third party stipulate in e.g. a gift or a will to what category of assets a gift or bequest will belong?

[15] The complete text of the questionnaire is available on line at https://ceflonline.net.

28. How is the categorisation of personal or community assets proved as between the spouses? Are there rebuttable presumptions of community property?
Table of contents
29. How is the categorisation of personal or community assets proved as against third parties? Are there rebuttable presumptions of community property? Which debts are personal debts?
30. Which debts are community debts?
31. On which assets can the creditor recover personal debts?
32. On which assets can the creditor recover community debts?
I.2. Administration of assets
33. How are personal assets administered?
34. How are the community assets administered?
35. Can one spouse mandate the other to administer the community assets and/or his or her personal assets? Are there important acts concerning personal assets or community assets (e.g. significant gifts, disposal of the matrimonial/family home or other immovable property) that require the consent of the other spouse?
36. Are there special rules for the administration of professional assets?
37. Is there a duty for one spouse to provide information to the other about the administration of the community assets?
38. How are disputes between spouses concerning the administration of personal or community assets resolved?
39. What are the possible consequences when a spouse violates the rules governing the administration of personal and community assets? What are the possible consequences in other cases of maladministration of the assets?
40. What are the possible consequences if a spouse is incapable of administering
1. his or her personal assets
2. community assets

After the single respondent answered the questionnaire, the group, through a comparative effort, search for the *better model*, in terms of general principles, thought to be used at a super-national level in the attempt of harmonizing family law in Europe. Such approach has been strongly criticized by David Bradley, who has stressed that "*behind the rhetoric of the better law and an area of freedom, security and justice, harmonization of family law is a political exercise and should be recognized as such*"[16] and that quite often this exercise has been translated in the election of a national model (mainly the Netherlands and the Scandinavian ones) as the best among the others, to be implemented at a super-national level[17].

[16] Cfr. D. Bradley, *A family law for Europe? Sovereignty, political, economy and legitimation*, in K. Boele Woelki (ed.), *Perspective for the unification and harmonisation of family law in Europe*, Intersentia, Oxford-New York, 2003, p. 103.

[17] Such approach has been justified, according to CEFL's line, under the argument that "*differences that colour the map of the current European family laws are directly linked to the difference in the timing of this modernisation of family law (…) the infamous diversity of family laws within Europe is mainly a difference in the level of modernity of the family laws in various countries in Europe*". See M. Antoloskaia, *The better law approach and the harmonisation of family law*, in K. Boele Woelki (ed.), *cited above*, Intersentia, Oxford-New York, 2003, p. 160.

Whereas, the Common core attitude is to look at cultural diversity in the law as a value itself, even though it does not have to be necessary translated into a preservationist approach[18].
The FLCC group tried to flyover the rhetoric of a municipal formulation of the legal rule, quite often based on unexplained assumptions, which could be misleading in catching the real state of the art, as a result that overplays the differences may suggested. At the same time, the comparative analysis has shown that, both the rhetoric and the actual results must be considered in order to draft a reliable map as, sometimes, rhetorical differences may end up affecting the applied dimension of the law.
For example, for many decades the art. 5, para. 6, of the Italian Divorce Act (L. 898/1970) has been interpreted in the sense that the *quantum* of the maintenance obligation should be parameterized according to the couple's life style during marriage, in the sense that the weak spouse, after the divorce would have been beneficiary of money or of other benefits that should guaranty her/him the life style enjoyed during the marriage. In 2015 a decision of the Constitutional Court[19] has stated that the letter of the article is coherent with the Constitution, but, in its legal reasoning and arguing, has stressed the importance of other elements previously ignored by the interpreters. The previous legal reasoning was built on a sort of synecdoche[20], as the interpreter used only one of the elements resulting from the letter of the provision to decide the *an* and the *quantum* of the maintenance obligation.
According to the social and economic changes in society, but in presence of the same letter of the article, the Court decided that the matrimonial life style should be considered together with other elements. In other words, the different economic condition between the obliged person and the beneficiary, is not any more the necessary and sufficient prerequisite to create a maintenance obligation. The circumstances that must be considered in order to decide on the *an* and the *quantum* are: the different capacity of perceiving independent incomes from work or from personal property (movable or immovable goods for rent); the ability and capability of the beneficiary to work and to find a work; and many others. This more complex evaluation has been shaped by the Constitutional

[18] See again M. Bussani - U. Mattei, *The Common Core Approach to European Private Law*, in 3 *The Columbia Journal of European Law*, 1997-1998, p. 341. For a preservationist approach, see D. Bradley, cited above, in K. Boele Woelki (ed.), *Perspective for the unification and harmonisation of family law in Europe*, Intersentia, Oxford-New York, 2003; and M. Martiny, *Is Unification of family law feasible or even desirable?*, in AA. VV., *Towards a European Civil Code*, The Hague, London-Boston, 1998, pp. 150 *et seq.*

[19] Corte Cost., 11 February 2015, n. 11, in *Famiglia e diritto*, 2015, pp. 537 *et seq.*, with a comment by E. Al Mureden, *Assegno divorzile, parametro del tenore di vita e principio di autoresponsabilità*. The Constitutional Court agreed with a position already expressed in few decisions by Cass. SS.UU., 29 November 1990, n. 11490, in *Foro It.*, 1991, c. 67, with a comment by R. Quadri, *Assegno di divorzio: la mediazione delle sezioni unite*; Cass. Civ., 27 September 2002, n. 14004, in *Famiglia e diritto*, 2003, p. 14.

[20] On the use of synecdoche by legislators and judges, on the misleading effects of such rhetorical figure, see P.G. Monateri, *La sineddoche. Formule e regole nel diritto delle obbligazioni e dei contratti,* Giuffrè, Milan, 1984. On legal narrative and on the use of figure of speech in judicial interpretation, see J. Gaakeer, *Iudex translator: the reign of finitude*, in P.G. Monateri (ed.), *Methods of comparative law*, Edward Elgar Pub., Cheltenham-Northampton, 2013, pp. 252-269.

Court in order to enforce the general principle of self-responsibility of the parties (new jurisprudential doctrine), according to which every member of the couple (during and after marriage) should do as much as possible to be independent and responsible. Such rhetoric has been used in order to avoid the unfair behavior, wide spread in the praxis, of some "weak parties" who count on high-maintenance benefits, deliberately living on the counterpart shoulders with a parasitic attitude.

3. Common Core Family Law group method

Generally speaking, the Common Core Project moves from two methodological premises: the Cornell Studies directed by Rudolf Schlesinger and the legal formant's theory by Rodolfo Sacco.

The innovative tool introduced by Schlesinger in the 1960s was the "factual approach questionnaire": the instrument through which Schlesinger formulated questions that should be intended in the same way by each respondent from every different legal system and, through which he obtained comparable answers, that were considered to be self-sufficient and able to describe the most detailed rules.

To ensure reliability, the questionnaire was formulated by presenting a case, asking the respondents about the results that would be reached, without referring to dogmatic taxonomies and doctrinal systems. The questions were prepared and modified many times according to the respondents' indications, as the CCFLP ones, in order to take into account any significant circumstance in each legal system analyzed, to be sure that these circumstances would be considered in - and therefore comparable with - the analysis of every other system.

This method, quite often, gave rise to a highly different image of the law circulating in every single country, sometimes overpassing, sometimes diverging from the models coming out from scholarly writings (monographs, handbooks or casebooks). Thus, the special feature of the tool, as conceived, drove participants to think explicitly about the circumstances that matter, by forcing them to answer identically formulated questions[21]. By this way, it is possible to answer without referring necessarily to a dogmatic category or a peculiar institution proper of a single legal system.

Having regard to the questions presented in the previous paragraph, what comes out from the answers, is the way in which – in each legal system – people manage "the duties of cash" inside the family. In the subsequent and more specific questions, the respondent goes through the detailed solution, that could vary in the presence or absence of certain circumstances: the parties were both economically autonomous or not, they have personal

[21] M. Bussani - U. Mattei, *The Common Core Approach to European Private Law,* cit. above, p. 344.

income or not, the children were living with them or not, and so on… In fact, the questionnaire contains many sub-questions, such as, for example, "would your first answer be different if Nino and Francesca are, respectively, a doctor working at the hospital and a housewife with no personal income"?

What can be learned from Schlesinger's experience, as from the CCFLP's work, is that often the circumstances that operate explicitly and officially in one system might be officially ignored or considered as irrelevant in another one. And yet, in that other system, they work secretly, so that there could be gaps between the formulation of the rule and its application by the courts.

This last issue drives the analysis to the second methodological premise: Sacco's theory[22], which suggests that in order to know what the law is, it is necessary to analyze the complex relationship between the "legal formants" of a system. Those are all the formative components that make any given rule of law: statutes (acts), general propositions, particular definitions, reasons, holdings, etc. They are not necessarily consistent with each other within every system. Quite often, in fact, they are conflicting and competing with each other.

In order to trace a reliable map, it is important to find out all these formants, understanding how courts have decided, but also grasping the influences the judges are subject to.

For example, in the Italian legal system, for many decades pre-matrimonial agreements had been forbidden, because, under art. 160 cod. civ., the spouses cannot disregard or waive rights and duties coming from marriage. Among these rights and duties, also maintenance obligations after divorce (art. 5, L. 898/1970 – Divorce Act) can be included, which are not at the parties' disposal and cannot be the object of a pre-matrimonial agreement, as they affect also personal statuses[23].

But the *Corte di Cassazione*, in 2012[24], with an innovative interpretation of the rules concerned, has recognized the validity of a pre-matrimonial agreement, where parties have conveyed that, in the event of a future failure of marriage, the wife will have transferred to the husband the property of one of her immovable goods, as the reimbursement of the money payed by him, during the marriage, in order to refurbish the family house, which was also property of the wife. The Court has resorted to the use of general principles such as the parties' private autonomy, under art. 1322 cod. civ., and other contractual law rules

[22] R. Sacco, *Legal formants. A dynamic approach to comparative law*, in 39 *American Journal of Comparative Law*, 1991, I, pp. 1-34; R. Sacco, *Legal formants. A dynamic approach to comparative law*, in 39 *American Journal of Comparative Law*, 1991, II, pp. 343-401.

[23] *Ex multis*, Cass. Civ., 11 June 1981, n. 3777, in *Foro it.*, 1982, I, c. 184; Cass. Civ., 5 December 1981, n. 6461, in *Rep. Giu. It.*, 1081, under *Matrimonio*, n. 196; Cass. Civ., 4 June 1992, n. 6857, in *Corr. Giur.*, 1992, p. 866, with a comment by V. Carbone, *Assegno di divorzio dall'invalidità della rinuncia preventive all'indisponibilità assoluta*. All these decisions and many others have stated that all pre-nuptial agreements are void and unenforceable because illegal by statute and/or on grounds of public policy, such as art. 160 cod. civ. and art. 5 of the Divorce Act.

[24] Cfr. Cass. Civ., 21 December 2012, n. 23713, commented by A. Pera, *Il rapporto coniugale tra status e contratto negli ordinamenti italiano ed inglese*, in *Rivista critica di diritto privato*, 2, 2014, pp. 251-272.

to overpass the above mentioned prohibition. Grasping the influences, the Court is subject to, it could be find out that the judge, who materially had written the decision was an academic, before becoming a judge, who had studied and researched on pre-matrimonial agreement in common law systems and who had already expressed the need for a systematic interpretation of such family law rules in the light of the contractual law ones [25]. So the education, personal skills and career of the judge have affected patently the way to interpret the law and to give concrete shape to the legal system.

These phenomena could have various routes: they may occur because scholars have given broad support to a doctrinal innovation, but they can also depend on the selective procedure of judges or on their education and traineeship. For example, a judge appointed from an academic position will tend to put more stress on scholars' opinions than a judge who has always practiced law as an old barrister.

The Sacco's theory on legal formants goes beyond the traditional distinction between enacted law (statutes, codes, legislation), case law (jurisprudence), and scholarly writings (doctrine).

As demonstrated by the Italian case law on adoption by homosexual couples, the text of a statute (L. 120/2016 on "unioni civili") can influence decisions, even when judicial precedents have disregarded it, because there is always the possibility that courts will reconsider the literal interpretation of the statutory provision[26].

In the CCFLP meetings it has merged also that statutes or code provisions in a legal system can be literally the same in another system, but can be applied differently (for example,

[25] In particular, see the judge studies, when he was an academic, M. Dogliotti, *Separazione e divorzio. Il dato normativo: I problemi interpretativi*, Giappichelli, Turin, 1995, p. 234.

[26] The judges' law making has been evident before the entering into force of the Act on *Unioni civili* (2016), as demonstrated by Cass. civ., 22 June 2016, n. 12962, in *Dir. Fam. Pers.*, 4, 2016, p. 1014; Trib. Min. Roma, 30 July 2014 n. 299, in *Nuova Giur. Civ. Comm.*, I, 2015, pp. 109 *et seq.*, with a note by J. Long, *L'adozione in casi particolari del figlio del partner dello stesso sesso*; for a different opinion, see the comments by R. Carrano - M. Ponzani, *L'adozione del minore da parte del convivente omosessuale tra interesse del minore e riconoscimento giuridico di famiglie omogenitoriali*, in *Dir. Fam.*, 2014, pp. 1550 *et seq.* The decision has been confirmed by App. Roma, Sez. Min., 23 December 2015, in *Dir Fam. Pers.*, 3, 2016, p. 806, with a note by S. Menichetti. On the crossing adoption by each single member of the homosexual couple, who applies for the adoption of their respective children, see App. Napoli, 30 March 2016, in www.dirittoegiustizia.it, which has recognised legal effects in Italy to a French court decisions on *plena* adoption. Against these solutions and with a restrictive interpretative attitude, see Trib. Min. Piemonte e Valle d'Aosta, 11 September 2015, n. 258 e n. 259, in *Nuova Giur. Civ. Comm.*, I, 2016, pp. 205 *et seq.*, with a note by A. Nocco, *L'adozione del figlio di convivente dello stesso sesso: due sentenze contro una lettura "eversiva" dell'art. 44, let. d), L. n. 184/1983*. After the enactment of the 2016's statute, the Courts have, in some cases, overpassed or set aside the provision, which excludes the applicability of the norms on (full) adoption to homosexual couples, interpreting in a creative way the rules on adoption in particular cases. In a case of a homosexual couple married abroad, in particular cases the eligibility for the adoption has been recognized to the spouse of the biological parent. The reasoning of the court was based on and referred to the social relevance of the parenthood by "habits and repute", as perceived for years by the minor child and both the spouses, which is a "doctrinal creature"; see Tribunale di Bologna, 4 January 2018, reported in *Guida al Diritto*, 18, 2018, pp. 60-65. See also Corte Cost., 7 April 2016, n. 76, on the compatibility of a judgement of the Spanish Court – concerning a stepchild adoption by the female partner of the child's mother – with the Italian legal system, commented by E. Billotti, *Riconoscimento in Italia di un provvedimento di stepchild adoption: la Corte Costituzionale ritiene inammissibile la questione di legittimità costituzionale degli art 35 e 36 della legge 184/1983*, in *Dir. civ. contemporaneo*, 2016.

having regard to the personal capacity of the conceived child, but not born, in France, Germany and in Italy). On the other hand, provisions or general definitions in two systems can differ, while operative rules are the same, so that there are gaps between the rule as enunciated and the rule as applied (a good example is that of statutory providing legal patrimonial regimes between the spouses in Germany, the Netherlands, France and Italy). The CCFL experience was oriented in order to find out a meaningful understanding of what the legal formants are and how they relate to each other through a continuous dialogue, in order to ascertain the factors that affect those solutions and to trace a reliable map. The attempt was to find out the weight that interpretative practices (grounded on scholarly writings, on legal debates stirred by previous judicial decisions, etc.) have in shaping the actual outcomes of *family needs* in family law, taking in mind that scholarly writings sometimes can be rhetorical, especially when values and fundamental rights are involved in (as in family law matters). In some civil law countries, for example, general statements insist that marriage is funded on consent, while the operative rules require not only consent but also a celebration with peculiar formal elements, agreements on the patrimonial regime and many other features pertaining the object of the agreement and the parties' requisites (for example, somewhere the different sex of the spouses)[27]. Hence, there are gaps between the law in the books and the law in action.

Such methodological approach helps in discovering and underlining the differences between the rule stated by the court and the one that is actually applied, between the judge's statement of the rule and the holding of the case, identifying the relevant facts, which lead the court to a certain outcome.

Within a single legal system, the legal rule is not unique and univocal, because courts can find a certain legal rule, different in part or at all from the scholar's one or from the literal meaning of the statutes. Going deeper in the analysis, each formant itself can be dystonic, so that the rule described in the headnotes of a court's ruling can be inconsistent with the actual *rationale* of the decision, or the definition given by an article of a code can be incoherent with the detailed rules contained in the code itself.

[27] Sometimes such differences are the result of ancient heritages and in some others are the product of different and more recent policy's choices. For an historical perspective and overview, see J. Goody, *The development of the family and marriage in Europe*, Cambridge University Press, London, 1983; Id., *The European Family*, Wiley-Blackwell, Oxford, 2000. For a comparative synchronic overview, see P. Vlaardingerbroek, *Trends in the development of family law in Europe. Comparative perspectives*, in F.X. Kaufmann et al (eds.), *Family life and family policies in Europe: Problems and issues in comparative perspective*, vol. II, Oxford University Press, 2002, pp. 120-148; F.X. Kaufmann, *Politics and policies towards the family in Europe: a framework and an inquiry into their differences and convergences*, in F.X. Kaufmann et al. (eds.), above cited, vol. II, Oxford University Press, London-New York, 2002, pp. 419-488; J.M. Scherpe (ed.), *European family law, vol. III, Family law in a European perspective*, E. Elgar Pubbl., Cheltenham-Northampton, 2016. In this last volume, in particular, see the contributions by C. Sorgejerd, *Marriage in a European perspective*, pp. 3-40; and by M. Antokolskaia, *Divorce law in a European perspective*, pp. 41-81.

In such circumstances the factual approach has become essential in order to understand how formants do work[28], not only, in order to organize a case law analysis, but with the thicker goal of considering each formant a source of the law, competing with all the other sources to catch and detect the effective and practiced rule, that we want to describe in our map.

4. The Common Core method and functionalism

In order to address the issue regarding the CEFL method and work as clearly as possible, it is appropriate to dwell briefly on the distinction between the notion of functionalism and the methodology of the common core.

Functionalism is funded on the premise that legal systems face similar problems for which they may take different measures yet to reach similar results in the end. The common core method suggests that legal systems despite their *prima facie* diversity share a common core. So, both methods are based on the idea that legal systems are not entirely unique but have their elements of sharing.

If we look at the way comparative studies are performed, both methods are quite similar. At a first step, a functionalist approach starts from the statement of the problem in functional terms; while the Common Core one starts with questionnaires, so with questions and hypotheticals. At a second step, functionalism requires an objective presentation of solution by each legal system examined; while common core's participants work on individual reports by country experts (national rapporteurs), answering questions. At a third step functionalism asks for comparison, while the common core approach looks forward to the discussion of the individual reports, sometimes modifying or adjusting the questionnaires, requiring new answers. At a forth step the functionalist approach evaluates the results from a strict functional perspective; whereas the common core method asks for a general report, pointing out differences and commonalities[29].

[28] R. Sacco, *Legal formants: A dynamic approach to comparative law*, *The American Journal of Comparative Law,* II, 39, 1991, pp. 343-401; Id., *Circolazione e mutazione dei modelli giuridici*, *Digesto civ.* II, Turin, 365 *et seq.*; Id., *Formante, Digesto civ.* IV, Turin, 438 *et seq.*; A. Watson, *From legal transplants to legal formants*, in *American Law Journal of Comparative Law*, 43, 1995, pp. 469 *et seq.*; P.G. Monateri - R. Sacco, *Legal formants*, in P. Newman (ed.), *The new Pelgrave dictionary of economics and the law*, vol. 2, MacMillan, London, 1998, pp. 531 et seq.; P.G. Monateri, *Legal formants and competitive models: understanding comparative law from legal process to critique in cross-system legal analysis*, University of Turin, School of law, Papers, 2008, electronic copy available at http://ssrn.com/abstract=1317302, 5.

[29] On functionalism and comparative law, see R. Michaels, *The Functional method of comparative law*, in *Duke Law School Legal Studies*, research paper n. 87, November 2005, available on line at http://ssrn.com/abstract=939826; J. Husa - J. Smits, *A dialogue on comparative functionalism*, in *Maastricht Journal of European and Comparative Law*, 18, 2011, electronic copy available at http://ssrn.com/abstract=1965933; P.G. Monateri, *Methods in comparative law: an intellectual overview*, in P.G. Monateri (ed.), *Methods of comparative law*, Edward Elgar Pub., Cheltenham-Northampton, 2013, pp. 7-24, an electronic version is available at http://papers.ssrn.com/sol3/paper.cfm?abstract_id=2151819; J. Gordley, *The functional method*, in P.G. Monateri (ed.), cited above, Edward Elgar Pub., Cheltenham-Northampton, 2013, pp. 107-

We can say that these approaches have many common premises and goals, even though the common core method has its specificities in the questionnaires and the seminar discussion. Generally speaking, we can say that the Common Core of European Private Law can be considered an experience, where a functional analysis is performed on a large scale as a collaborative effort.

5. The Commission of European family law

The goals and the methodological approach of the Commission on European Family Law (CEFL) are to some extents far from what it has been exposed above.

The Commission, established in September 2001 in Utrecht[30], is made up of experts in family law and comparative law, from all the Member States of the European Union and other European countries.

The primary objective of the CEFL is to provide, on a theoretical and practical level, for the harmonization of family law in Europe. The objective should be achieved in the following way:

- Preparation of a report on the current state of comparative research concerning the harmonization of family law in the individual European States;
- mutual exchange of experiences and coordination of future research activities;
- identification of a common basis for the resolution of the different legal problems, through a comparative analysis of the European legal systems;
- determination of the role played by (potential) future EU Member States in the process of harmonizing family law.

119. On functionalism and on the way in which it has been reconsidered throught the factual approach, see M. Graziadei, *The functionalism Heritage*, in P. Legrand - R. Munday (eds.), *Comparative legal studies: Traditions and transitions*, Cambridge, 2003, pp. 100 *et seq*. On the necessity to over pass the formula of the *praesumpio similitudinis*, which is not enough to ensure a reliable map of similarities and divergences, as, instead, thought by K. Zweigert-H. Kotz, *Introduzione al diritto comparato*, vol. I, Giuffrè, Milan, 1988, p. 44, see U. Mattei - T. Ruskola -A. Gidi, *Schlesinger's comparative law*, VIII ed., New York, 2009, p. 70. For an analysis on the links between the textual approach and the functional approach, see V. Curran, *Cultural immersion, difference and categories in U.S. Comparative Law*, in *Am. J. Comp. L.*, 46, 1998, pp. 43 and 60. On the Common Core approach's peculiarities, see M. Bussani - U. Mattei, *Making European Law. Essay on the "Common Core"*, Trento, 2000; M. Bussani - U. Mattei, *The Common Core Approach to European Private Law*, in *The Columbia Journal of European Law*, 3, 1997-1998, pp. 338 *et seq*.; V. Grosswald, *On the shoulders of Schlesinger: The Trento Common Core of European Private Law*, in *European Review of Private Law*, 1, 2003, pp. 66-88. On the differences and commonalities between functionalism and common core approach, see A. Frohlich, *Is the Common Core Method a Variation of Functionalism*?, available at *https://comparelex.org/2014/10/24/is-the-common-core-method-a-variation-of-functionalism/*; with a critical position on the common core's experience, see G. Frankenberg, *How to do projects with comparative law: notes of an expedition to the Common Core*, in P.G. Monateri (ed.), cit., Edward Elgar Pub., Cheltenham-Northampton, 2013, pp. 120-143.

[30] The manifesto is represented by the collective volume, K. Boele Woelki (ed.), *Perspective for the unification and harmonization of family law in Europe*, Intersentia, Oxford-New York, 2003.

The main outcome expected from the Commission is the formulation of principles of European family law, which seems particularly appropriate for the harmonization of family law in Europe, especially (but not only) when international, transnational elements are involved in the relationships under consideration.
«*General principles of European family law are being considered for various purposes. Firstly, they may function as a source of inspiration for national and international legislators. A second function is for a European family law to act as an alternative/subsidiary law, which is applicable in the case of a legal relationship having foreign elements and where the national law indicated by the conflict law cannot be discovered by the court. A third function is that suggested by De Groot: the use of an optional European family law in international legal relationships instead of resorting to national law. Alongside national legal systems there could be, as it were, a transnational family law system that parties could specifically declare to be applicable to their legal relationship. This vision presupposes the fact that the conflict law of the applicable court allows for a legal choice in all the fields of persons and family law. Although party autonomy is gaining ground in international family law, it still does not specifically lead, in contrast to international property law, to its predominance in the private international law systems of Europe*».[31]
Actually, searching for the "better rule", as intended by the CEFL, implies comparative efforts, even if the goal is finding the applicable law through the private international law framework or general principles in order to harmonize national legislations[32]. In fact, a mapping effort is needed anyway, but the *discrimen* can be caught trying to understand if the comparative investigations and insights affect only different national legislations or go through other legal formants, as the Common Core approach suggests.
The CEFL's comparative work might also be realized through the use of functionalism, but, since the author of this article is not a member of the Commission, it is impossible to state with certainty if functionalist approaches have been considered or not in CEFL's work.
The Commission applies the method of US restatements[33] in order to extrapolate the aforementioned principles, which are the expression of the synthesis of the different legal systems and inspiration for national legislators.

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[31] Cfr. K. Boele Woelki, *The road towards a European family law*, in *Electronic Journal of Comparative Law,* November, 1997, in *http://www.ejcl.org/ejcl/11/art11-1.html*.

[32] These differences between the CCFL and the CEFL methodology are stressed also by K. Boele Woelki, *Common Core and Better Rule in European Family Law*, Intersentia, Antwerp, 2005.

[33] On the US restatement's nature, aims and methodology, see R. Bauman*, Ideology and Community in the First Wave of Critical Legal Studies,* University of Toronto Press, Toronto, 2002, p. 365-370; R. Braucher, *Interpretation and Legal Effect in the Second "Restatement of Contracts"*, in *Columbia Law Review*, 1, 1981, pp. 13-18; L. Jacobs, *Legal Realism or Legal Fiction? Impracticability Under the Restatement (Second) of Contracts*, in *Com. L.J.*, 87, 1982, pp. 289 *et seq.*; J. Kelly, *The Codification of Contract Law in the Twentieth Century*, in *Dick. L. Rev.,* 88, 1989, p. 289. In Italian, see R. David - C. Jauffret Spinosi, *I grandi sistemi giuridici comparati*, Cedam, Padua, 2004, pp. 363-354; A. Gambaro - R. Sacco, *Sistemi giuridici comparati*, Utet, Turin, 1996, pp. 210-215; with new considerations on the nature, the last edition by A. Gambaro - R. Sacco, *Sistemi giuridici comparati*, Utet, Turin, 2018, pp. 158-159. U. Mattei - E. Ariano, *Il modello di common law*, Giappichelli, Turin, 2018, p. 323; T.M. Jagear Fine, *Il diritto americano*, XL Edizioni, Rome, 2011, pp. 93-96. The CEFL's

It has been noted, however, that this method may prove to be inadequate, as the differences between the legal systems may be to such an extent that it may not be possible to identify common principles[34].

The Commission is convinced that a certain degree of harmonization of family law is necessary to facilitate the free movement of persons and to strengthen the European identity, in the wake of what has been done in the past by the Scandinavian countries and the United States through the so-called uniform laws[35].

In fact, the harmonization of family law in Europe is a difficult task[36], given that in the United States, despite the unity of culture and language, as well as of legal substratum, this branch is strictly competence of each State and that the Uniform Laws have achieved results that are not exciting.

Consistently, it has been pointed out that in the construction of a European common family law what is at stake is the denial of a "vital" aspect of the nation state.

There have been many criticisms of both the method and the objectives of this project[37], which, on the one hand, evokes broad and general formulations and, on the other hand, aims at identifying detailed prescriptions, which could find their typical dimension in a European civil code.

This is a position that it could be defined as "maximalist", which aims at developing a body of legislation that immediately contains choices regarding the rules of detail.

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aims at finding out a set of principles common to the European legal systems in a certain subject matter, as proved also by some book's titles, which are the final product of the research group, *id est* for example the one by K. Boele Woelki - F. Ferrand (eds), *Principles of European family law regarding divorce and maintenance between former spouses*, Intersentia, Anwerp-Oxford, 2004; K. Boele Woelki - F. Ferrand (eds), *Principles of European family law regarding parental responsibility,* Intersentia, Anwerp-Oxford, 2007; K. Boele Woelki - F. Ferrand (eds), *Principles of European family law regarding property relations between spouses,* Intersentia, Anwerp-Oxford, 2013. The collection contains many other titles. This short list is just to clarify the method oriented towards the research for "common principles". In particular, the 2004 book on divorce and maintenance contains ten principles, listed and explained in part II of the volume and across three chapter, which are supposed to be used and followed by EU legislator or national ones to produce new norms and reforms on such subject matter. A sort of legal framework built through principles. For a deeper analysis of these principles and more in general of the methodology, see K. Boele Woelki, *The principles of European family law: its aims and prospects*, in *Utrecht law review*, 1, 2013, available on line at https://www.utrechtlawreview.org/articles/10.../ulr.../download/.

[34] W. Pintens, *Europeanisation of Family Law*, in K. Boele Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, Oxford-New York, 2003, p. 31.

[35] W. Pintens, cit. above, pp. 29 *et seq.*

[36] D. Martiny*, Is Unification of Family Law Feasible or Even Desirable?*, in AA.VV., *Towards a European Civil Code*, The Hague, London-Boston, 1998, p. 151. More generally, not with reference to family law, but to the possible methodological approaches and objectives of the harmonization of European private law, R. David (ed.), *International Encyclopedia of Comparative Law*, vol. II, cap. V, *International Unification of Private Law*, The Hague, Tübingen-New York, 1971; M. Bussani - U. Mattei, *Making European Law. Essay on the "Common Core"*, Trento, 2000; M. Cappelletti (ed.), *New perspective for a common law of Europe*, Leyden, Stuttgart, 1978.

[37] For a critique on the projects of harmonization of family law, see D. Bradley, *op. cit.*, in K. Boele Woelki (ed.), *Perspectives for the unification and harmonization of family law in Europe*, Intersentia, Oxford-New York, 2003, pp. 65-104; M. Antoloskaia, *The harmonization of family law: old and new dilemmas*, in *ERPL*, 2003, pp. 30 *et seq.*

This solution, however, takes for granted the possibility of finding specific common solutions regardless of the existence of a nucleus of common principles and values, from which, instead, it seems necessary to start if we want to ensure that legislative uniformity corresponds to uniformity also at the operational level.
It seems that the attempt to harmonize European family law through the work of a group of academics from all European countries can contribute partly to the circulation of models and to the search for the common roots of this branch of law. However, it is not possible to always find such roots. It is then necessary an open-minded attitude to the chance of being able to obtain results only with reference to certain principles and certain institutes.
It is also necessary to consider the expansion of the competences of the European Union: the legislator has intervened by influencing European private international law[38], in a sectorial and not always systematic way, but pursuing a plan of modernization and challenge to established and traditional categories of domestic private law. This is done in an attempt to bring out different and alternative principles without formally affecting the values that constitute the heritage – often interfering with its cultural settlements and legal thinking – of individual local systems.
Probably, this could be less problematic, in terms of policy of law, given the weakening of the ethical-social weight of legislative rules and the strengthening of general principles, especially in relations of international law, i.e. in the wider legal space of human relations. In this sense, the tendency towards the construction of the European unity by principles and through the so-called soft law[39] is undeniable, in contrast to the hard one of the legislative unification, *i.e.*, imposed from above through a binding normative corpus.
Such an approach has its strength precisely in its weakness, meaning that the elaboration of guiding principles, without the authority of the law, allows those same principles to circulate, be recalled and used, as long as they are able to meet the real needs of the international community they are addressed to. In this way they are effectively competitive with respect to other regulatory systems, so as to be accepted and integrated gradually but steadily in their context of reference[40].

[38] The reference is to the so-called Brussels I, Brussels II and II-*bis* regulations on the circulation of judgments in matters of separation and divorce and parental responsibility; to the Regulation No 4/2009 on maintenance obligations; to the Regulation No 1259/2010 on enhanced cooperation in the area of the law applicable to disputes in matters of separation and divorce and parental responsibility; to the Regulation No 1103/2016 on matrimonial property regimes and No 1104/2016 on property consequences of registered partnerships .

[39] G. Zagreblesky, *Il diritto mite*, Einaudi, Turin, 1992, *passim*; A. Di Robilant, *Genealogies of Soft Law*, in *Am. J. Comp. Law*, 54, 2006, pp. 499 *et seq.* In particular, with regard to the activity of the Court of Justice in the sector that we deal with and with specific reference to the preliminary ruling on the subject of free movement of persons, which affects family relations, see S. Peers, *Who's judging the watchmen? The judicial system of the "area of freedom security and justice"*, in *Year book Eur. Law*, 1998, pp. 365 *et seq.*; H. Labayle, *Les nouveaux domaines d'intervention de la Cour de justice: l'espace de liberté, de sécurité et de justice*, in M. Dony - E. Briobosia (eds.), *L'avenir du système jurisdictionnel de l'Union européenne*, Éditions de l'Université de Bruxelles, Brussels, 2002, pp. 73 *et seq.*

[40] On the circulation and imitation of different models through legal transplants, see A. Watson, *Legal Transplants and law reform*, in *L.Q.R.*, 92, 1972, pp. 79 *et seq.*; Id., *Law and legal change*, in *Camb. L. J.*, 38, 1978, pp. 313 *et seq.*; Id., *Two-*

6. The role of international private law in harmonizing family law in Europe

A further relevant approach in this comparison of methods is that of private international law. The path retraced, during this analysis, is gradual and limited to the instruments of private and procedural international law[41] and, therefore, to the relations that are characterized by an element of trans-nationality. It started from an initial intervention in the field of jurisdiction and recognition of decisions in matrimonial matters and parental responsibility and continued with the regulation UE/1259/2010 for an enhanced cooperation on the law applicable to divorce and legal separation, and with the two recent 2016' regulations on matrimonial property regime and on registered partnerships' property regimes (EU/1103/2016 e EU/1104/2016). All these pieces of legislation are characterized by the intention of harmonizing the rules of conflict.

This is a long process, where the harmonization of conflict rules would appear to be only an intermediate stage, a first way of simplifying the discipline, which could be followed by a further stage.

Tier Law, an approach to law making, in *Int. & Comp. L. Q.*, 1978, pp. 552 *et seq.*; Id., *Legal change: sources of law and legal culture*, in *Un. Of Pennsylvania L. Rev.*, 131, 1983, pp. 1121 *et seq.* With some criticisms on Watson theory, see H. Kahn-Freund, *Book Review, Legal Transplants*, in *L.Q.R.*, 91, 1975, pp. 292 *et seq.*; W. Twining, *Diffusion of law: a global perspective*, in *Journal of Legal Pluralism*, 49, 1, 2004, pp. 34-35; Id., *General jurisprudence: understanding law from a global perspective*, Cambridge University Press, London, 2009; P.G. Monateri, *The 'Weak Law': Contaminations and Legal Cultures (Borrowing of Legal and Political Forms)*, 2008, available on line at the Alan Watson Foundation website: www.alanwatson.org. On legal formants and circulation of models, see again R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, in *The American Journal of Comparative Law*, 39, I, 1991, pp. 1-34 and II, pp. 343-402; R. Sacco - A. Gambaro, *Sistemi Giuridici Comparati*, Utet, Torino, 1996, pp. 4-7; R. Sacco, *Introduzione al diritto comparato*, Utet, Turin, 1992, p. 43; Id., voce *Circolazione e mutazione dei modelli giuridici*, in *Digesto civ.*, II, Utet, Turin, pp. 365 ss. For the dialogue between the Rodolfo Sacco's and Alan Watson's theories see S. Ferreri, *Assonanze transoceaniche. Tendenze a confronto*, in *Quadrimestre, rivista di diritto privato*, 1, 1993, p. pp. 179 *et seq*; U. Mattei, *Why the wind changed. Intellectual leadership in western law*, in *Am. J. Comp. Law*, 42, 1994, pp. 195 *et seq.*; A. Watson, *From legal transplants to legal formants*, in *American Law Journal of Comparative Law*, 43, 3, 1995, pp. 469 *et seq.*; P.G. Monateri, *Black Gaius*, in *Hastings L.J.*, 51, 2000, pp. 510-513.

[41] For an overview regarding this line of intervention, please refer to A. Anceschi, *La famiglia nel diritto internazionale privato,* Giappichelli, Turin, 2010; S. Bariatti, *La famiglia nel diritto internazionale privato*, Giuffrè, Milan, 2007; S. Bariatti - G. Danovi (eds.), *The family without frontiers. Proceedings of the conference held at the Faculty of Law of the University of Milan on 25 May 2007*, Cedam, Padua, 2008. For foreign doctrine, see K. Boele Woelki, *Unification and harmonization of private international law*, in AA. VV., *Private law in the international arena. Liber amicorum Kurt Siehr*, The Hague, Asser Press, 2000, pp. 61-77; J. Meeusen - M. Pertegás-G. Straetmans - F. Swennen, (eds.), *International family law for the European Union*, Intersentia, Antwerpen-Oxford, 2007; there, but with a different approach, more oriented towards the perspective of private international law as an instrument of harmonization, D. Martiny, *Objectives and values of private international law in family law,* pp. 69-99.

The next step would be the harmonization and alignment of the national legislations, limited to matters having a direct impact on the functioning of the market[42], i.e. the matrimonial property regime of married or unmarried couple[43].
However, this path always leaves the parties the power to choose whether to use the matrimonial property regime drawn up at the supranational level.
Therefore, it will be the private autonomy that determines the applicable regime and it will be the choice of the persons involved in the relationship, which will determine the withdrawal of a detailed rule of national law in favor of another rule developed at another level.
In other words, private autonomy - in family relations - becomes a function and measure of the principle of subsidiarity[44], as parties will choose the law they feel more closed to them, the model that better fit their situations. Private autonomy, therefore, will contribute to the competition between models and different systems. In fact, the rule governing the relationship can be identified directly by the parties. Only if this choice is not made or is inefficient or even contrary to fundamental values and principles (for example, in contrast with the limit of public policy), a national or supranational intervention is justified.
Otherwise, even if the elimination of regulatory differences would solve at the origin every problem with regard to the rules applicable to the transnational relations and would remove the differences between the Member States of the Union, it is not a desirable solution.
In the area of family law, it is not useful to go back over the long and complex road that has characterized the harmonization of contract law, both because family relations do not directly affect trade and the market, but only in a mediated way, so that the path would probably be much longer, and also because this is not an aim of the Union at all, since the Union's aim is to respect national identities in such subject matter.

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[42] M. Fallon, *Constraints of internal market law on family law*, in J. Meeusen - M. Pertegás-G. Straetmans - F. Swennen, (eds.), *International family law for the European Union*, Intersentia, Antwerpen-Oxford, 2007, pp. 149-233.

[43] On specific nature of the issues involved in family relations, references should be made to D. Martiny, *Is unification of family law feasible or even desiderable?*, in A.S. Hartkamp (ed.), *Towards a European Civil Code, Kluwer Law International*, Nijmegen, 2004, pp. 307-333; M. Costa, *L'intervento dell'Unione Europea per l'armonizzazione del diritto di famiglia*, in *Famili*a, 2006, pp. 125-153; F.R. Fanetti, *Codificazione europea per l'unificazione dei procedimenti di separazione e di divorzio*, in *Famiglia, Persone e Successioni*, 2008, pp. 346-360; F. Moro, *Observations sur la communautarisation du droit de la famille*, in *Riv. dir. intern. priv. e proc.,* 2007, pp. 675-712; M.C. Andrini (ed.), *Un nuovo diritto di famiglia europeo,* Cedam, Padova, 2007.

[44] On such principle, see G. Berman, *Taking subsidiarity seriously. Federalism in the European Community and the United States*, in *94 Columbia Law Review*, 1994, 331; R. Van Den Bergh, *The subsidiarity principle in European Community Law. Some insights from law and economics*, in *I Maastricht Journal of European and Comparative Law*, 1994, p. 337; H. Siebert - M.J. Koop, *Institutional competition. A concept for Europe?*, The Free Press, New York, 1990. For an analysis linked to the issues of models' competition through the tools of international private family law, see M. Tenreiro - D. Ekström, *Unification of private international law of family law matters within the European Union*, in K. Boele Woelki (ed.), *Perspective for the unification and harmonisation of family law in Europe*, Intersentia, Oxford-New York, 2003, pp. 364 *et seq.*

Without any attempt at reducing the scope of the problem or minimizing the impact of the matrimonial property regime on commercial transactions within the single market, the question to be asked is: why do almost all the disputes brought to the attention of the European Courts concern violations of fundamental rights (as enshrined in the ECHR or the Nice Charter), gender discrimination and discrimination on grounds of sexual or religious orientation, family reunification, the best interests of the child and parental responsibility? Why has it been so rare that disputes over the different matrimonial property regimes in the various Member States of the Union have been brought before the European courts?
And this, also in consideration of the fact that property can be considered at many extents a fundamental right, because it is mentioned as such in many Constitutions of the member States and in the Nice Charter (art. 17), which is an essential part of the TFEU.
The questions are rhetorical, given that, as it is well known, according to a "general declamation" the European Union has no competence in family matters[45].
From this point of view, new synergies would be created between policies related to the protection of human rights, those related to the cooperation area and those more closely linked to the issues of the market, so that we have indirect effects of market rules on family law ones.
The Court of Justice, for example, in the case *Garcia Avello*[46], has stigmatized the behavior of the Belgian authority, which had denied the attribution of the double surname (paternal and maternal) to the children of a Spanish citizen and a Belgian citizen, residing in Belgium.
The European judges reaffirmed the importance of the principle of loyal cooperation between States (international private law principle), making it clear that they must take actions in order to achieve the aims set at EU level and to promote the free movement of persons in the common market.

[45] That is true, even though the Union has laid down the legal basis for the adoption of acts able to affect the family, as also noted by C. Honorati, *Verso una competenza della Comunità europea in materia di diritto di famiglia*, in S. Bariatti (ed.), *La famiglia nel diritto internazionale privato*, Giuffrè, Milan, 2007, pp. 3-45.

[46] ECJ, 2 October 2003, C-148-02, in *Europa e dir. priv.*, 2004, pp. 3 *et seq.*; in *Dir. comunitario e scambi internaz.*, 2004, pp. 59 *et seq.*; in *Nuova giur. civ. commentata*, 2004, pp. 461 *et seq.* For the indirect effects of EU rules on market and human rights into family law matters and personal statuses, see A. Iannello Saliceti, *La cittadinanza dell'Unione Europea*, in P. De Cesari (ed.), *Persone e famiglia, Trattato di diritto private dell'Unione Europea*, vol. II, Utet, Turin, 2008, pp. 90 *et seq.*, available on line at https://www.lider-lab.sssup.it/lider/pubb/la-cittadinanza-dellunione-europea. On the indirect effects of the ECJ's and of the ECHR's case law in harmonizing family law, see K. Lenaerts, *Interlockin legal orders or the European Union variant of "E pluribus unum"*, in A.R. Nafzinger-S.C. Symeonides (eds), *Law and justice in a multi state world. Essay in honour of Arthur T. von Mehren*, Transnational Publisher, New York, 2002, pp. 751 *et seq*; G. Ferrando, *Il contributo della Corte Europea dei diritti dell'uomo all'evoluzione del diritto di famiglia*, in M.C. Andriani (ed), *Un Nuovo diritto di famiglia europeo*, Cedam, Padua, 2007, pp. 136 *et seq.*; *Il diritto di famiglia oggi: c'è qualcosa di nuovo, anzi d'antico*, in *Politica del diritto*, 2008, pp. 30 *et seq.*; E. Caracciolo di Torella - E. Reid, *The changing shape of the "European family" and fundamental rights*, in *European Law Review*, 2002, pp. 80-90.

The "free circulation of *statuses*" is not, however, a foregone or already achieved goal, since it does not find unconditional recognition in every state[47].
However, it is important to point out that it seems difficult to highlight a contrast between detailed rules on family property regimes and the principles and rights enshrined in the above-mentioned Charters, or between the local rules themselves and the rules of the Treaties governing the single market[48].
As a matter of fact, the question of patrimonial relations affects the regime of circulation of goods, but it seems that to ensure the correct functioning of the single market, in this ambit, the approach already used at European level with the Regulations of private international law can be adequate.
That is to say, the recognition and circulation of judicial and non-judicial decisions, the harmonization of conflict-of-law rules and the publication of foreign property regimes are adequate instruments for ensuring the proper functioning of the market, so that the harmonization of rules of substantive law would appear to be an abnormal means for this purpose[49].
The method of dialogue, cooperation and normative differentiation, introduced with the season of regulations of private and procedural international law, as mentioned above, seems to be a winning one[50], since, by allowing the parties to choose the applicable law

[47] A clear reference is made here to the extremely heterogeneous solutions at the level of national laws concerning registered unions, homosexual marriages and consequent personal *statuses*. In this regard, there are scholars who point out the danger that a model of relations between individual States and EU excessively marked by the principle of recognition of family pluralities runs the risk of falling into a too neutral attitude of the EU legislator and reveals the existence of a European law that refuses to be the bearer of its own values. F. Sweinnen, *Atypical families in EU (private international) family law*, in J. Meeusen - M. Pertegàs et al. (eds), *Internationl family law for the European Union*, Intersentia, Antwerp, 2006, pp. 289-424; D. Bradley, *op. cit*., in K. Boele Woelki (ed.), *Perspectives for the unification and harmonization of family law in Europe*, Intersentia, Oxford-New York, 2003, pp. 65-104.

[48] M. Antokolskaia, *Objectives and values of substantive family law*, in J. Meeusen - M. Pertegás -G. Straetmans - F. Swennen, (eds.), *International family law for the European Union*, Intersentia, Antwerpen-Oxford, 2007, pp. 49-76.

[49] The innovative character of this approach has been emphasized by scholars such as S. Poillot Peruzzetto - A. Marmisse, *Le droit international privé communautaire de la famille*, in *Revue des affaires européennes*, 2001-2002, pp. 460-468; F. Davì, *Il diritto internazionale privato italiano della famiglia e le fonti di origine internazionale o comunitaria*, in *Riv. dir. internaz.*, 2002, pp. 861-902; S. Tonolo, *Le nuove fonti comunitarie del diritto internazionale privato e processuale*, in *Studium iuris*, 2002, pp. 1048-1052; J. Sedlmeier, *Diritto processuale internazionale ed europeo. Recenti sviluppi concernenti il reciproco riconoscimento delle decisioni giudiziarie in Europa e nel mondo*, in *European Legal Forum*, 2000, pp. 34-45; P. McEleavy, *The Bruxelles II Regulation: How the European Community has moved into family law*, in *Int. Comp. Law Quarterly*, 2002, pp. 883-908.

[50] Although there have been some critical comments on some of the interventions, see B. Ancel - H. Muir Watt, *La désunion européenne: le Réglement dit Bruxelles II*, in *Revue critique de droit international privé*, 2001, pp. 403-457; Id., *Aliments sans frontiéres. Le réglement CE n. 4/2009 du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matiére d'obligations alimentaires*, in *Revue critique de droit international privé*, 2010, pp. 457-484. Indeed, although they cannot be considered the expression of a genuine family policy, the regulations of international law represent a core of the European private international law, Union-driven and highly innovative. See, F. Pocar, *La comunitarizzazione del diritto internazionale privato: una "European Conflict of Law Revolution"?*, in *Riv. dir. int. priv. proc*., 2000, pp. 873 *et seq.*; J. Basedow, *The communitarization of the conflict of laws under the Treaty of Amsterdam*, in *Common law market review*, 2000, pp. 687 *et seq.*; R. Jessurun d'Oliveira, *The EU and the metamorphosis of private international law*, in *Reform and development of private international law. Essays*

and the competent court in the regulation of their relations, it could lead to the identification of the models and solutions that are the "most chosen", as they are the most efficient and functional to the needs and interests of the subjects involved.
This would determine the identification of a *better rule* that comes from practice and case law[51], formed on the basis of the choices made by the parties, and not from an academic legal elite, which moves like an obscure legislator[52].
Is not possible, and neither desirable, denying here the central role of the comparative doctrine and method, nor specifically the contribution made by the CEFL, considering that the comparison serves mainly to better know other legal models different from one's own, to the measurement of differences, rather than for practical purposes[53].
In order to achieve the objectives pursued by the Union in the field of family law, a model allowing dialogue between national laws, cooperation between States but regulatory differentiation seems sufficient.
Combining the model, already described, of the Regulations of private international law and procedural law, with the enhancement of private autonomy and the free will of the parties in the choice of the rules that will govern their relationship, it could be shaped a system in which, as mentioned, the *better rule* will be identified by the parties, without prejudice to the protection of fundamental rights[54].
Moreover, when the parties themselves choose the discipline to be applied to the legal relationship and, therefore, the regime that will govern it, the agreement on this point should at least ideally reduce pathological moments and the possibility of disputes.
If these solutions, which have been identified by consensus, should nevertheless lead to disputes, the interpretative activity of the national courts, also chosen by the parties, or

in honour of Sir Peter North, Oxford University Press, Oxford, 2002, pp. 111-136; L.S. Rossi, *L'incidenza dei principi del diritto comunitario sul diritto internazionale privato: dalla "comunitarizzazione" alla "costituzionalizzazione"*, in *Riv. dir. int. priv. proc.*, 2004, pp. 63 *et seq.*

[51] On the circulation of models from formant to formant, see again R. Sacco, *cit.*, in *American Journal of Comparative Law*, 39, 1991, I, pp. 1-34; Id., *cit.*, in *American Journal of Comparative Law*, 39, 1991, II, pp. 343-401; P.G. Monateri - R. Sacco, *Legal formants*, in P. Newman (ed.) *The New Palgrave. A dictionary of economics and the law*, Mc Millan, London-New York, 1998, p. 531 *et seq.*

[52] See again, U. Mattei, *cit.*, in *Diritto e Impresa/Europa*, 1998, p. 216 e A. Gambaro, *cit.*, in *Foro it.*, 1983, 106, V, coll. 85-93.

[53] G. Gorla, voce *Diritto comparato*, in *Enciclopedia del diritto*, 1964, XII, p. 928 e R. Sacco, *Introduzione al diritto comparato*, Utet, Turin, 1992, pp. 3 *et seq.*; P.G. Monateri, *Pensare il diritto civile*, Giappichelli, Turin, 1995, pp. 89-153; H.M. Hart - A.M. Sacks (eds.), *The legal process: basic problems in the making and application of law*, Westbury, New York, 1994.

[54] See G. Zagrebelsky, *Corte, Convenzione europea dei diritti dell'uomo e sistema europeo di protezione dei diritti fondamentali*, in *Foro it.*, 2006, pp. 353 *et seq.* For an interesting approach to the system of fundamental guarantees as a limit not only to the action of public authorities, but also to the private autonomy and action of the individual, please refer to P. Alston, *L'era della globalizzazione e la sfida di espandere la responsabilità per i diritti umani*, in P. Alston - A. Cassese (eds.), *Ripensare i diritti umani nel XXI secolo*, EGA, Turin, 2003, pp. 55-56; V. Coussirat Coustère, *Famille et Convention eurpéenne des Droit de l'Homme*, in AA. VV., *Protection des droit de l'homme: la perspective eurpéenne. Mélanges à la mémoire de Rolv Ryssdall*, Köln-Berlin-Bonn-München, 2000, pp. 281-307.

of the European Courts, in the event of a conflict between the rules identified by the parties and the European rules contained in the Treaties and in the Charters of Fundamental Rights, will lead to the "cassation" of models which do not conform to the principle of free movement of persons[55], to the fundamental freedoms and to the common area of freedom, security and justice[56].

Such an approach would guarantee a certain level of diversity in the rules of detail[57] and, therefore, of competition at institutional level, but also a common interpretation of the limits to private autonomy and, thus, a certain level of uniformity in the solutions that must remain within the boundaries of the common general principles[58].

In the area of family relations, indeed, the hypothesis – of those who point out that when moving on to technical details, the music changes and the difficulties of finding a common nucleus could become paralyzing – seems well founded[59].

The model established with the Regulations of private international law could convey decisions and solutions that could become shared and constitute a common future substratum, over which the hermeneutical activity of the European Courts and national judges could be grafted.

The activity of the Courts would function as an instrument of integration and interpretation of the rules and choices made by the parties, and at the same time it serves as a tool for

[55] See, for example, ECJ, 13 July, 1983, C-152/82, *Forcheri e Marino c. Stato Belga e a.*, in *Racc.*, 1983 p. 2323, with a comment by G. Druesne, in *Revue trim. droit. eur.*, 1984, pp. 294 *et seq.*; commented also by G. Starkle, in *Cahiers droit eur.*, 1984, pp. 672 *et seq.*

[56] In this sense, even before the Lisbon Treaty, E.M. Honnerlein, *Profili di un diritto europeo della famiglia e della filiazione – il ruolo della Convenzione Europea dei diritti dell'Uomo*, in *The European Legal Forum*, 2000, pp. 252-260; P. De Cesari, *Principi e valori alla base della disciplina comunitaria in materia di diritto di famiglia*, in G. Pascuzzi (ed.), *La famiglia senza frontiere*, University of Trento, Trento, 2006, p. 9 and pp. 23-26.

[57] The importance of competition and legal pluralism as a heritage to be preserved is supported, among others, also by R. Sacco, *The system of European private law. Premises for a European code*, in A. Pizzorusso (ed), *Italian Studies in law. A review of legal problems*, Nijhoff, Dordrecht, 1992; L. Antoniolli Deflorian, *La struttura istituzionale del nuovo diritto comune europeo: competizione e circolazione di modelli*, Università di Trento, Trento, 1996; N. Reich, *Competition between legal orders. A new paradigm of EC law*, in *Common Market Law Review*, 29, 1992, p. 862.

[58] The relevance of the principles of law, which are common to the Member States as far as we are concerned, in the reconstruction of the EU notions of family law, is clear from the examination of the case law. For all of them, see EC J, 17 April 1987, C-59/85, *Reed*, in *Racc.*, 1986, p. 1283. In the doctrine, see K. Lenaerts, *Le droit comparé dans le travail du juge communautaire*, in F.R. Van der Menshbrugghe (ed.), *L'utilisation de la méthode comparative en droit européen*, Presse Universitaires de Namur, Namur, 2003, pp. 111-168. For a different approach, A. Rottola, *La valutazione internazional-privatistica dei presupposti giuridici di norme materiali comunitarie*, in *Diritto dell'Unione Europea*, 2004, pp. 329-346.

[59] U. Mattei, cited above, in *Contratto e impresa/Europa*, 1998, p. 226. The author, with reference to the idea of the European code, proposed a systematic and meticulous use of the factual approach, discussing the common practical problems and looking for their effective solutions in all the national legal systems, through the use of advanced tools, such as the dissociated analysis of formants, with the objective of identifying the common core, but with the awareness that this could also lead to discover that simply there is no common core. With a critical attitude towards comparative efforts in family law, because of the values involved, see F. Nicola, *Family Law Exceptionalism in Comparative Law,* in *Am. J. Comp. L.*, 58, 2010, p. 777; M. Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, in *La. L. Rev.*, 62, 2002, pp. 773-782.

the evaluation of the legitimacy (in sense of compatibility with the legal system) of such choices[60].

In this way, a model identified in the practice of family relations, reinterpreted by a national court, passed through the European courts, is formalized in decisions and, subsequently, enters through the doors of the courts of the other Member States or is chosen again in practice, without any legislative mediation[61].

Therefore, for some institutions and areas, these shared models could constitute an essential nucleus of solutions, which, together with the common fundamental principles and the further decisions of the Courts, could work to regulate family relations within the Union.

For some time now, the Court of Justice and the European Court of Human Rights have played a crucial role in expressing and clarifying the fundamental principles[62], the aims and also the limits of the European system, through a process of constitutionalizing the European Union law, ensuring its uniform application and effectiveness[63].

The double sense of circulation of models – from practice, governed by private autonomy, to national courts, from national courts to European courts and from these again to national courts[64] and to the practice of legal systems that do not know the models in question – represents a path of harmonization of legal systems that in many ways is more significant than the one promoted by institutional-legislative or doctrinal-legislative means alone.

As a matter of fact, here, the legal solution adopted is not determined by the imposition, conveyed through the Regulation or the Directive, but by the choice of the parties and then, in the case of disputes, by the interpretation of the judge, who uses the principle or the rule formulated by the European Court or endorsed by the Court after having im-

[60] T. Koopmans, *European law and the role of the Courts*, Butterworths, London-Dublin-Edinburgh, 1993; A. Adinolfi, *I principi generali nella giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli Stati membri*, in *Riv. it. dir. pubbl. com.*, 1994, pp. 521 *et seq.*; D. Liakopoulos - M. Romani, *Il ruolo della Corte di Giustizia delle Comunità Europee. Tra integrazione comunitaria ed efficacia del diritto internazionale privato e processuale*, Cedam, Padua, 2009; G. Martinico, *L'integrazione silente: la funzione interpretativa della Corte di Giustizia e il diritto costituzionale europeo*, Esi, Naples, 2008; T. Giovanetti, *L'Europa dei giudici: la funzione giurisdizionale nell'integrazione comunitaria*, Giappichelli, Turin, 2009.

[61] Many scholars have pointed out that the circulation of models takes place, more often than one can imagine, through formants other than the legislative one. For everyone, see Z. Zencovich, *Il modo di formazione della legislazione europea di diritto privato: un laboratorio comparatistico*, in R. Pardolesi (edited by), *Saggi di diritto privato europeo: persona, proprietà, contratto, responsabilità civile, privative,* Esi, Naples, 1995, p. 124.

[62] For example, L. Tomasi, *Le coppie non tradizionali (nuovamente) alla prova del diritto comunitario*, in *Riv. dir. int. priv. proc.*, 2004, p. 977, highlights the crucial role played by the Court of Justice in defining a broad concept of marriage. On these issues, see also N. Reich - S. Harbacevica, *Citizenship and family on trial: a fairly optimistic overview of recent Court practice with regard to free movement of persons*, in *Common Law Market Review*, 2003, pp. 615-638.

[63] See, P. Mengozzi, *I problemi giuridici della famiglia a fronte del processo di integrazione europea*, in *Famiglia e Diritto*, 2004, pp. 643-647.

[64] On the wide use of the comparative method by national and supranational courts, see G. Smorto, *L'uso giurisprudenziale della comparazione*, in *Europa e diritto privato*, 2010, pp. 223-241; Id., *Il giudice ed il diritto straniero*, in L. Vacca (edited by) *Scienza giuridica e prassi*, Jovene, Naples, 2011, pp. 291-308. See also, J. Bengoetxea, *The legal reasoning of the European Court of Justice: towards a european jurisprudence*, Claredon Press, Oxford, 1993, p. 256; K. Lenaerts, *Le droit comparé dans le travail du juge communautaire*, in F.R. Van der Menshbrugghe (ed.), *cited above.*, pp. 111 *et seq.*

plemented them by other countries. Mapping all these routes is the fundamental goal that should be reached through the use of the Common Core's Method in family law.

As far as family law is concerned, it seems that competition between solutions offered at the level of single legal systems can represent a valid alternative to the process of harmonization.

The doubts expressed by the doctrine and also by the Member States about the idea of uniform legal models and the increasingly minimal objective that characterizes harmonization are signs that should lead to the idea of abandoning imposed solutions, in favor of a greater development of competitive techniques between models, which are also encouraged by the (hopefully) ever-increasing legal, economic, social and cultural integration between the Member States.

Articles

Stampa 3d e proprietà intellettuale

Il caso dei *Fab Lab* tra economia collaborativa e nuova "rivoluzione industriale"

Silvia Scalzini e Giovanni Comandé*

Abstract

L'articolo analizza i profili di proprietà intellettuale emergenti nei Fab Lab, officine comunitarie e collaborative che offrono agli utenti (inventori della domenica, studenti o anche artigiani e piccole e medie imprese) strutture, macchinari e servizi di stampa 3d. Questi spazi si pongono al crocevia tra innovazione aperta ed economia collaborativa, potendo contribuire significativamente allo sviluppo cittadino e delle comunità locali.

L'interrogativo principale consiste nel comprendere come la crescita di queste realtà possa conciliarsi con il rispetto della vigente disciplina nazionale e sovranazionale della proprietà intellettuale, messa alla prova dall'avvento della stampa 3d. In tale ambito, infatti, la comparazione con soluzioni adottate in altri ordinamenti mostra come siano state avanzate anche proposte interpretative e di

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Il presente articolo è stato sviluppato elaborando i risultati di una ricerca svolta nel 2016 rientrante nella Convenzione Quadro per Attività di Formazione Universitaria, Alta Formazione e Ricerca stipulata tra l'Associazione per l'Istituzione della Libera Università Nuorese (AILUN) e la Scuola Superiore Sant'Anna – Istituto Dirpolis, che gli autori ringraziano per il sostegno. Un ringraziamento va al *Fab Lab* nuorese *MakeInNuoro*, il laboratorio di fabbricazione digitale a disposizione del territorio della Sardegna Centrale realizzato dalla Camera di Commercio di Nuoro in collaborazione con l'Ailun, e ad Andrea Parziale, dottorando della Scuola Superiore Sant'Anna, che ha curato in tale ricerca la parte relativa alla responsabilità da prodotti difettosi. Benché il lavoro sia frutto di una riflessione comune, Silvia Scalzini ha redatto i paragrafi 2.1., 3.1, 3.2., 3.3., 3.4., 3.5., 4.1., 4.2., 4.3., 4.4., 4.5., 5. e 6. mentre Giovanni Comandé ha redatto i paragrafi 1, 2.2. e 2.3.

modifica della disciplina per rispondere alle sfide di tale nuovo contesto tecnologico. Costruendo su questi tentativi, il presente contributo pone in evidenza i profili critici proponendo letture utili a "districare" i profili di titolarità e sussistenza dei diritti di proprietà intellettuale di opere dell'ingegno e invenzioni poste in essere nei *Fab Lab*, così come le possibili violazioni di diritti di proprietà intellettuale altrui.

Keywords
3d printing – Fab Lab – Intellectual Property Law – Sharing Economy – Private Autonomy

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1. Introduzione. La stampa 3d e la "democratizzazione" e "capillarizzazione" della produzione

L'emersione della tecnologia di stampa tridimensionale (c.d. "3d *printing*" o "Additive Manufacturing") si pone nell'ambito di quella che è stata descritta come una nuova "rivoluzione industriale", capace di modificare radicalmente i tradizionali processi di produzione e consumo con profonde ricadute anche per lo sviluppo locale. "*Manufacturing is going digital*" è ciò che si legge nell'articolo del *The Economist*[1] che descrive la terza rivoluzione industriale come un nuovo scenario di digitalizzazione e automazione della produzione industriale, basato essenzialmente sull'uso diffuso di tecnologie digitali, di *big data analysis* e su una nuova e diversa organizzazione del lavoro.
Utilizzata inizialmente per realizzare rapidamente prototipi industriali, la stampa 3d ha finito per avere anche un ampio impiego nella produzione di prodotti destinati direttamente al consumo da parte dei consumatori finali. La novità da un punto di vista tecnico è il carattere "additivo" invece che per sottrazione. Il processo di stampa avviene, infatti, tramite l'aggiunta di materiale (normalmente "a strati") e si differenzia dal modo tradizionale di costruire e produrre oggetti, cd "subtractive manufacturing", che muove da un materiale grezzo e procede invece tramite sottrazione delle parti in eccesso per arrivare alla forma finale voluta[2]. Con la stampa 3d vi è, inoltre, un rilevante risparmio di tempi e di costi rispetto alla produzione tradizionalmente intesa[3]. I prodotti realizzabili dalle stampanti 3d possono essere i più vari: parti di ricambio, oggetti decorativi, giocattoli, gioielli, *device* medici, e finanche organi e tessuti.
Dal momento che i costi delle stampanti sono divenuti più sostenibili, è aumentata esponenzialmente la disponibilità e la diffusione di tale tecnologia. Ciò è avvenuto essenzialmente per due ragioni: anzitutto, a seguito della scadenza dei brevetti sui tre principali meccanismi di fabbricazione 3d rispettivamente nel 2004, nel 2009 e nel 2014[4] ed alla conseguente aper-

[1] A Third Industrial Revolution, 21 aprile 2012, www.economist.com/the-third-industrial-revolution.

[2] Per una breve ricognizione storica e socio-economica della stampa 3D *cfr.* A. Daly, *Socio-Legal Aspects of the 3D Printing Revolution*, Palgrave Macmillan UK, 2016, 4 ss.

[3] *Cfr.* la presentazione di Van Steenbergen in occasione dell' ALAI Congress 2016, "*Applied Arts under IP Law: The Uncertain Border between Beauty and Usefulness*" disponibile all'indirizzo http://www.alai2016.org/.

[4] *Cfr.* Conseil Supérieur de la Propriété Littéraire et Artistique, *Rapport de la Commission de Reflexion sur l'Impression 3D, L'impression 3D et le Droit d'Auteur: des menaces a prevenir, des opportunites à saisir*, giugno 2016, accessibile all'indi-

tura della concorrenza nel settore della stampa 3d, sia per la produzione e commercializzazione di stampanti 3d per piccole imprese e individui a costi più contenuti[5] sia per l'offerta di servizi di stampa 3d su domanda[6]; in secondo luogo, grazie all'emersione di nuovi movimenti "*open*" tesi a proporre modelli alternativi a quelli proprietari per la diffusione e lo sviluppo di tali tecnologie. L'esempio principale di tale paradigma è il *RepRap Project*[7], iniziato dall'allora ricercatore dell'Università di Bath, Adrian Bowyer, che ha ideato una stampante capace di autoreplicarsi, la cui fruizione e modifica sono state rese accessibili a consumatori e piccole comunità mediante licenze *open*, trasmettendo così i principi dell'*open source* agli *hardware* e creando "un movimento *open hardware*" per la produzione di componenti di stampanti 3d. Nell'ottica di tale progetto, gli utenti sono liberi di usare e modificare i *design* di RepRap, a patto di condividere i miglioramenti e le modifiche apportati con RepRap e di consentirne la fruizione agli altri membri della comunità.
L'evoluzione di tale paradigma, che continua ovviamente a coesistere (e talvolta ad innestarsi) con altri modelli commerciali e industriali di sviluppo della stampa 3d, costituisce uno dei profili decisivi della "capillarizzazione" e "democratizzazione" della produzione industriale che stanno avvenendo grazie a tale processo tecnologico, economico e sociale, e che si accompagnano ad un nuovo modo di produrre e di creare[8].
Si assiste, infatti, ad una radicale modifica della catena produttiva, nell'ottica di una crescente disintermediazione (o, come si vedrà, di una nuova intermediazione).
La peculiarità di questa tecnologia consiste nella possibilità di fabbricare oggetti tridimensionali a partire da informazioni contenute in progetti digitali creati tramite *design software* ("CAD *file*") o tramite scansioni 3d di oggetti preesistenti[9]. La catena di valore coinvolge a vario titolo una pluralità di soggetti portatori di interessi differenti (individui, *Fabrication Laboratory – Fab Lab* –, Imprese, Piattaforme digitali, *designer* dei progetti digitali, produttori e fornitori delle stampanti e delle materie prime…) e, ai fini di questo lavoro, può

rizzo http://www.culturecommunication.gouv.fr/Thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Commissions-specialisees/Commission-du-CSPLA-sur-l-impression-3D.

[5] Un esempio è *MakerBot*, a seguito acquisita da *Stratasys*.

[6] Si pensi alle piattaforme *Shapeway* (https://www.shapeways.com/) e *Sculpteo* (https://www.sculpteo.com/en/).

[7] http://reprap.org/wiki/RepRap.

[8] Si pensi, ad esempio, alla nascita dei molti movimenti dei "*makers*" e dei "*do – it – yourself*" la cui evoluzione è testimoniata da A. Gibb, *Building Open Source Hardware: DIY Manufacturing for Hackers and Makers. Boston*, 2014, MA: Addison- Wesley Professional. Come evidenzia A. Daly, *Socio-Legal Aspects of the 3D Printing Revolution*, cit.: "*A strong current running through discussion of 3D printing is that it is socially transformative in a way which will ensure we have an abundance of information about how to make complicated objects as well as the means of production being within reach of many more people than previously*". *Cfr.* per una ricostruzione dall'evoluzione della storia delle idee in materia di proprietà intellettuale, in particolare, M. Libertini, *Tutela promozione delle creazioni intellettuali e limiti funzionali la proprietà intellettuale*, in A.I.D.A., 2014, 299 ss., p. 307. Per una descrizione della nascita e dello sviluppo di movimenti Open *cfr.* altresì T. Margoni; R. Caso; R. Ducato; P. Guarda; V. Moscon, *Open Access, Open Science, Open Society - (Trento law and technology research group research paper series)*, 2016.

[9] In tema cfr. anche il *report* della Commissione europea *The disruptive nature of 3D printing*, gennaio 2017, disponibile al seguente *link* https://ec.europa.eu/growth/tools-databases/dem/monitor/sites/default/files/DTM_The%20disruptive%20nature%20of%203D%20printing%20v1.pdf.

essere segmentata schematicamente in alcuni tratti: la progettazione digitale dell'oggetto/prodotto finale (tramite *design* creativo o scannerizzazione di un oggetto preesistente e successiva digitalizzazione del modello corrispondente), la diffusione o distribuzione del modello digitale (normalmente tramite piattaforme *online*), la stampa dell'oggetto tridimensionale (direttamente dall'impresa o dal consumatore con una stampante 3d a casa o in spazi come *Fab Lab*, oppure attraverso servizi di stampa *on demand)* e la fase ulteriore eventuale di successiva distribuzione dell'oggetto ottenuto.

Come tutte le innovazioni tecnologiche con forte impatto socio-economico anche la stampa 3d comporta, dunque, la necessità di testare la tenuta della disciplina giuridica applicabile alle nuove realtà. Tra i profili giuridici di maggiore interesse e che necessitano un più urgente approfondimento vi sono sicuramente gli aspetti legati al diritto della proprietà intellettuale ed alla disciplina in tema di responsabilità per danni da prodotti difettosi, in quanto maggiormente rispondenti ad esigenze socio-economiche legate ad una logica "industriale" di tipo tradizionale. L'urgenza di una tale riflessione è stata recentemente riconosciuta anche dal *legal affairs committee* del Parlamento europeo, che ha recentemente votato una mozione per una risoluzione del PE sul tema[10].

Partendo da tali premesse, la nostra ricerca si è concentrata sullo studio dei modelli di "produzione collaborativa" e di condivisione dell'informazione, prendendo ad esempio la realtà dei *Fab Lab* (*fabrication laboratories*), che mettono a disposizione del pubblico stampanti 3d, materie prime, progetti digitali e offrono servizi connessi. Il ruolo positivo che queste realtà possono svolgere nel tessuto socio-produttivo locale è stato particolarmente sottolineato[11], in quanto la "democratizzazione" della produzione promessa dalla rivoluzione della stampa 3d può contribuire sia allo sviluppo della competitività delle PMI sia, più in generale, ad avvicinare la produzione al consumo e consentire la "personalizzazione" di massa dei prodotti.

Una volta individuati gli sviluppi tecnici, sociali ed economici di tali realtà ed isolati gli interessi rilevanti, l'attività di ricerca condotta ha contribuito a *(i)* valutare la liceità della fabbricazione di oggetti tridimensionali dal punto di vista dell'ordinamento italiano, con particolare riferimento ai problemi emergenti in materia di proprietà intellettuale e danno da prodotti difettosi; *(ii)* valutare l'adeguatezza della disciplina applicabile *de jure condito* e l'eventuale opportunità di adeguamenti normativi, considerando anche spunti comparatistici con altri ordinamenti e *(iii)* studiarne le prospettive *de jure condendo.*

Uno dei risultati di un siffatto studio è la consapevolezza di dover considerare i benefici in termini di sviluppo delle comunità locali nel bilanciamento di interessi che deve guidare le soluzioni ai problemi interpretativi che la stampa 3d e la conseguente democratizzazione della produzione pongono agli operatori del diritto. La ricerca ha analizzato, dunque, l'or-

[10] PE 618.019v03-00 A8-0223/2018 on three-dimensional printing, a challenge in the fields of intellectual property rights and civil liability [2017/2007(INI)].

[11] *Cfr. infra* § 2.1.

ganizzazione, la filosofia, i modelli di *business*, la sostenibilità e le prassi dei *Fab Lab* al fine di studiare la disciplina normativa applicabile ed i relativi limiti con riferimento a tali realtà, nonché di esaminare eventuali modelli alternativi che riescano a bilanciare le esigenze di apertura e condivisione, da un lato, e rispetto dei diritti altrui e della normativa cogente a tutela dei consumatori, dall'altro, nell'ottica di potenziamento e sviluppo delle comunità locali. Il presente contributo si sofferma sui profili della disciplina della proprietà intellettuale.

2. La realtà dei *Fab Lab* dal punto di vista socio-economico: "*evolving inventory of core capabilities to make (almost) anything, allowing people and projects to be shared*"[12]

2.1. *Fab lab* e sviluppo delle comunità locali. L'esempio delle "*smart cities*"

Come premesso lo studio si concentra sui *Fab Lab*s: "officine" che offrono gli strumenti per la fabbricazione digitale rivolti ad imprese, consumatori ed in generale alle comunità locali. Questa realtà, nata dall'idea di un Professore del *Massachusetts Institute of Technology*, Neil Gershenfeld, e codificata nella *Fab Charter*, permette la condivisione di conoscenze, mezzi, strumenti e macchinari all'interno del tessuto sociale ed imprenditoriale di un territorio, favorendo lo sviluppo di progetti innovativi, la collaborazione, la formazione, la partecipazione e l'accesso alle tecnologie digitali. La nascita dei *Fab Lab* è dunque legata alla condivisione di regole etiche e sociali, prima ancora che giuridiche.

I *Fab Lab* sono per definizione aperti alle comunità locali, ma la natura delle attività che ivi si compiono non è omogenea. Lo spettro di utilizzatori che li frequentano ricomprende una serie di soggetti che vanno dagli studenti, ai cd "inventori della domenica", ad artigiani e piccole imprese. Mentre l'attività di soggetti come studenti e "*makers*" non ha normalmente finalità commerciali, in quanto il fine della produzione di oggetti attraverso la stampa 3d è essenzialmente educativo o comunque rientra nelle logiche aperte di condivisione di idee e conoscenze, piccole imprese e/o artigiani possono utilizzare questi luoghi anche per finalità commerciali, collocando i *Fab Lab* al crocevia tra "*sharing economy*" e innovazione aperta. Proprio per la loro versatilità e la capacità di fungere allo stesso tempo da piattaforme tecniche di innovazione per la valorizzazione e lo sviluppo delle imprese locali e da piattaforme sociali di innovazione con finalità educative e collaborative, i *Fab*

[12] *Cfr. Fab Lab Charter*, consultabile all'indirizzo http://fab.cba.mit.edu/about/charter/.

Lab sono stati indicati come "*local collective goods*", in grado di generare "*external economies useful for development*"[13].
Altra caratteristica fondamentale dei *Fab Lab* è quella di far parte di una rete collaborativa globale che riesce, dunque, a connettere le comunità locali a livello globale[14]. Ogni *Fab Lab* ha la capacità di valorizzare l'innovazione in un determinato territorio[15]. Un simile percorso si pone evidentemente nel solco del pensiero economico che evidenzia l'importanza di uno stretto collegamento tra territorio e processi innovativi, osservando come si sia progressivamente sviluppata la necessità di "*dare una nuova dimensione sociale, etica e ambientale allo sviluppo e alla crescita economica*"[16]. Tramite la digitalizzazione, le tecniche innovative della stampa 3d, la condivisione di conoscenze diverse, il supporto dei *Fab Lab* ed il loro collegamento internazionale è possibile affrancare un territorio dall'isolamento geografico e valorizzarne creatività ed innovazione tramite l'innesto con l'arte ed i saperi artigianali antichi. Una delle potenzialità di queste realtà è, infatti, quella di connettere la domanda internazionale con l'offerta locale, aprendo così nuovi mercati. Nel tessuto cittadino[17] iniziative come i *Fab Lab* hanno la capacità di favorire modelli di innovazione sociale decentralizzata, in grado di affrancarsi da una logica strettamente mercantile e lucrativa e di favorire (potenzialmente) uno sviluppo maggiormente equilibrato delle comunità locali. Se nell'attuale panorama economico il controllo di infrastrutture e servizi rischia di rinchiudere e dirigere dati, informazione e conoscenza, i modelli comunitari qui descritti potrebbero avere la capacità di controbilanciare questa tendenziale concentrazione di potere privato sull'informazione e fungere da stimolo per un'innovazione aperta, collaborativa, valorizzando in modo efficiente le risorse delle città[18]. Tale fenomeno presenta, infatti, una convergenza finalistica con la realizzazione delle *smart cities*, in quanto mira all'ottimizzazione dell'uso delle risorse guidata dai bisogni dei cittadini in una logica che parte "dal basso", e trova in esse il proprio luogo di elezione.
L'interrogativo risiede nel se e come questi modelli possano davvero funzionare.

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[13] Si veda in particolare l'interessante studio sulla diffusione dei *Fab Lab* in Italia condotto da C. Manzo e F. Ramella, *Fab Labs in Italy: Collective Goods in the Sharing Economy*, in *Stato e Mercato*, fasc. 3, 2015, 379 ss., 381-382. Data la varietà di situazioni che allo stato caratterizzano i *Fab Lab*, ai fini del presente lavoro si è ritenuto non necessario indagarne la natura giuridica. La questione è, tuttavia, accennata laddove rilevante

[14] Per avere un'idea della dislocazione dei *Fab Lab* nel mondo è possibile consultare la mappa al seguente link https://www.fablabs.io/labs/map.

[15] La ricerca in origine ha avuto ad oggetto, ad esempio, *MakeInNuoro*, il *Fab Lab* nuorese nato per volontà della CCIAA Nuoro "*per rivitalizzare e sostenere la tradizione manifatturiera ed artigiana del territorio sardo agendo direttamente dall'interno del sistema*". Si veda https://www.fablabs.io/labs/makeinnuoro.

[16] R. De Santis, A. Fasano, N. Mignolli, A. Villa, *Il Fenomeno Smart Cities*, in *Rivista Italiana di Economia Demografia e Statistica*, Volume LXVIII, n. 1, Gennaio-Marzo 2014.

[17] In materia di rapporto tra *Smart Cities* e diritto dell'innovazione cfr., in particolare, G. Olivieri, V. Falce (a cura di) *Smart Cities e Diritto dell'innovazione*, Giuffrè, Milano, 2016.

[18] In letteratura *cfr.,* in particolare, I. Capdevila, *Knowing communities and the innovative capacity of cities*, in *City,* C*ulture and Society*, 13, 2018, 8-12; T. Diez, *Personal Fabrication: Fab Labs as Platforms for Citizen-Based Innovation, from Microcontrollers to Cities,* in *Nexus Netw J* (2012) 14: 457-468.

Come tutte le innovazioni portate dai mutamenti tecnologici e guidate in gran parte dall'autonomia privata, è necessaria una riflessione sull'adeguatezza delle regole applicabili affinché non si creino situazioni di conflitto di interessi e violazione e compressione di diritti e libertà.

2.2. Le regole che governano i *Fab Lab*: un tentativo di qualificazione

Quali sono le regole che "governano" i *Fab Lab* e quali problemi interpretativi si pongono con riferimento alle norme che disciplinano le varie attività che vi vengono intraprese?
Il manifesto dei *Fab Lab*, la *Fab Charter*, si limita ad elencare un decalogo di autoregolazione, che potrebbe essere considerato alla stregua di un codice etico applicabile ai frequentatori del laboratorio come agli organizzatori del laboratorio stesso[19]. Non appare rinvenibile, tuttavia, alcuna sanzione in caso di violazione di tali regole – tranne forse l'esclusione del *Fab Lab* da parte della suddetta rete, nel caso di inosservanza delle norme ad esso espressamente indirizzate[20] –, mentre è forse ardita la qualificazione del decalogo quale regolamento contrattuale tra *Fab Lab* e *Fab Lab Community* e tra *Fab Lab* e suoi utilizzatori. La "sanzione" in caso di inosservanza delle regole da parte degli utilizzatori potrebbe tradursi in uno stigma reputazionale davanti alla comunità – locale – di riferimento o finanche arrivare ad una interdizione dall'accesso al *Fab Lab* ed all'uso dei relativi strumenti. Non si vede, ad esempio, come il non lasciare a disposizione un'invenzione per la fruizione degli altri utenti del *Fab Lab* (regola numero 6) potrebbe essere coercibile o comportare un qualche tipo di responsabilità dal punto di vista giuridico. In caso di danno

[19] *What is a fab lab?*
Fab labs are a global network of local labs, enabling invention by providing access to tools for digital fabrication.
What's in a fab lab?
Fab labs share an evolving inventory of core capabilities to make (almost) anything, allowing people and projects to be shared.
What does the fab lab network provide?
Operational, educational, technical, financial, and logistical assistance beyond what's available within one lab.
Who can use a fab lab?
Fab labs are available as a community resource, offering open access for individuals as well as scheduled access for programs.
What are your responsibilities?
Safety: not hurting people or machines.
Operations: assisting with cleaning, maintaining, and improving the lab.
Knowledge: contributing to documentation and instruction.
Who owns fab lab inventions?
Designs and processes developed in fab labs can be protected and sold however an inventor chooses, but should remain available for individuals to use and learn from.
How can businesses use a fab lab?
Commercial activities can be prototyped and incubated in a fab lab, but they must not conflict with other uses, they should grow beyond rather than within the lab, and they are expected to benefit the inventors, labs, and networks that contribute to their success.

[20] "*Launching a new fab lab requires assembling enough of the hardware and software inventory to be able to share people and projects with other fab labs, posting the Fab Charter to provide context for doing that, and contacting fab-info@cba.mit.edu to be added to the fab lab network*". In questo senso "Fab Lab" potrebbe essere forse considerato come un marchio di certificazione.

a cose o persone si applicheranno le comuni regole di responsabilità civile, il cui tenore varierà ovviamente a seconda delle scelte del singolo *Fab Lab* in termini di eventuali regolamenti contrattuali aggiuntivi e in termini assicurativi. Da una ricerca comparativa tra *Fab Labs* è, infatti, emerso come alcune di queste officine si siano già dotate di contratti[21] per la regolazione dell'uso degli spazi fisici e virtuali, dando veste giuridica certa al decalogo della *Fab Lab Charter*.

Come premesso l'analisi prenderà ora in considerazione alcuni aspetti giuridici particolarmente rilevanti in termini di proprietà intellettuale, per analizzare le istanze applicative ed interpretative di tali regole nel particolare contesto dei *Fab Lab*. La nobile e originale idea della loro costituzione potrebbe, infatti, scontrarsi nella realtà quotidiana con rischi e responsabilità la cui conoscenza e prevenzione è essenziale alla realizzazione, al funzionamento, alla sostenibilità ed all'esistenza stessa dei *Fab Lab*. Allo stesso tempo, l'interpretazione di tali norme e l'eventuale introduzione di discipline *ad hoc* dovranno tenere in considerazione i benefici che tali realtà sono in grado di portare in termini di valorizzazione dell'interesse pubblico.

1.3. Stampa 3d, *Fab Lab* e proprietà intellettuale

La stampa 3d sta ponendo una riflessione importante sulla tenuta della disciplina della proprietà intellettuale e sull'opportunità di una sua modifica.

Il tema principale è che la "democratizzazione della produzione" avvenuta grazie alla stampa 3d, rendendo la "copia" molto più semplice e la repressione dei contraffattori sempre meno controllabile, facilita la violazione di una serie di diritti di proprietà intellettuale (brevetti, marchi, *design* e modelli industriali e diritto d'autore) e pone problemi in termini di *enforcement*. La filiera ed i modelli di *business* che ivi si stanno sviluppando, accompagnati dal ricorso sempre più frequente a modelli di diffusione e distribuzione "*open*" delle opere dell'ingegno, inoltre, rendono più difficile l'identificazione della titolarità dei diritti sulle creazioni e sulle invenzioni che si originano durante il processo. Il presente lavoro è volto a ricostruire l'interpretazione e l'applicazione di tali regole, anche attraverso la comparazione con ordinamenti diversi, nella specifica realtà dei *Fab Lab*, esperienze al crocevia tra *open innovation* ed economia collaborativa.

Se è vero, infatti, che la filosofia su cui si basa la nascita e lo sviluppo dei *Fab Lab* è imperniata sulla condivisione e collaborazione di saperi e tecniche (umane ed artificiali), è innegabile come sia necessario identificare i profili giuridici correlati, con la finalità, da un lato, di attribuire correttamente la titolarità dei diritti morali e patrimoniali sulle opere e invenzioni create nel contesto *Fab Lab* e, conseguentemente, di consentire il corretto

[21] Si veda, ad esempio, il *Fab Lab* di Catania: https://www.fablabcatania.eu/#!/it/terminiecondizioni.

funzionamento dei meccanismi contrattuali di condivisione[22] e, dall'altro lato, di consentire che tali realtà si realizzino nel rispetto dei diritti altrui.

3. Processi di stampa 3d, sussistenza e titolarità dei diritti di proprietà intellettuale

3.1. Innovazione e creatività nei *Fab Lab*. A chi appartiene ciò che viene creato nei (o attraverso i) Fab *Lab*?

Uno dei profili di maggiore interesse consiste nel definire la titolarità ed i margini di sfruttamento delle invenzioni e degli altri beni immateriali sviluppati nei processi di stampa 3d e, in particolare, nei *Fab Lab*. I profili normativi tradizionali di appropriabilità delle opere dell'ingegno e delle invenzioni industriali si intrecciano con un modo differente di divisione del lavoro in un contesto che è stato definito di "*common-based peer-production approach*"[23] che implica la collaborazione di una pluralità di soggetti diversi nella produzione di beni e servizi e la condivisione di conoscenze e informazioni. Una delle peculiarità di queste realtà è, infatti, la possibilità di permettere di collaborare all'attuazione e concretizzazione di idee e progetti senza la necessità di ingenti investimenti infrastrutturali, con ovvie ripercussioni anche sulla riflessione in tema di incentivi a creare e ad innovare. La *Fab Charter* in tema afferma, infatti, che "*designs and processes developed in fab Labs can be protected and sold however an inventor chooses, but should remain available for individuals to use and learn from*".

L'identificazione della sussistenza e titolarità dei diritti di proprietà intellettuale non può prescindere da un'indagine circa il concreto funzionamento dei *Fab Lab* e le interazioni tra diversi soggetti e tra uomo e macchina che ivi si sviluppano. Ciò darà occasione anche per riflettere sul tema della titolarità dei diritti di proprietà intellettuale in caso di opere create da intelligenze artificiali, sia in termini generali sia in un contesto specifico concreto come è quello della stampa 3d nei *Fab Lab*.

3.2. Prima ipotesi: il *maker* autonomo

L' ipotesi dell'utente del *Fab Lab* che, dopo un corso di formazione sull'utilizzo delle stampanti, crea il proprio CAD *file* e stampa il proprio oggetto 3d è la più "semplice". Se

[22] Non obliterando completamente la componente economica, tenuto specialmente conto dei nuovi mercati che la stampa 3D è potenzialmente in grado di aprire. Si pensi al mercato dei progetti digitali di oggetti, che si affianca al tradizionale mercato degli oggetti fisici.

[23] P. Troxler, *Commons-based Peer-Production of Physical Goods: Is there Room for a Hybrid Innovation Ecology?*, (October 8, 2010). Paper presented at the 3rd Free Culture Research Conference, Berlin, October 8-9, 2010. Disponibile all'indirizzo https://ssrn.com/abstract=1692617 o http://dx.doi.org/10.2139/ssrn.1692617.

tramite tale processo è originata una opera dell'ingegno di carattere creativo[24] l'utente/autore godrà della protezione garantita dal diritto d'autore sulle opere d'arte figurativa[25] o sulle opere del disegno industriale aventi carattere creativo e valore artistico[26], così come i loro progetti[27]; se l'invenzione avrà i requisiti dell'art. 45 ss. del codice della proprietà industriale (di seguito, c.p.i.) l'inventore potrà brevettarla[28]; se l'aspetto del prodotto sarà nuovo ed avrà carattere individuale esso potrà costituire oggetto di registrazione come disegno o modello ai sensi dell'art. 31 c.p.i; inoltre, se il *software* che impartisce le istruzioni alla stampante potrà anch'esso essere considerato una creazione intellettuale suscettibile di tutela[29], sarà anch'esso tutelabile tramite il diritto d'autore o, entro alcuni limiti, tramite il diritto di brevetto. A monte dell'attribuzione di tali diritti, vi è la annosa questione di come qualificare il *file* CAD, ovvero la rappresentazione digitale dell'oggetto fisico e le istruzioni da impartire alla macchina per fabbricarlo. Esso contiene, infatti, sia il *software* che fornisce le istruzioni alla stampante 3d, sia la rappresentazione digitale di quella che può essere un'opera dell'ingegno, un'invenzione e così via (e, dunque, una sorta di *corpus mechanicum* digitale). Se la questione della tutelabilità del *software* non si discosta dai criteri interpretativi ed applicativi tradizionali, la questione è invece dibattuta sui profili di tutela del *file* CAD in sé, in particolare per quanto riguarda la sua assimilabilità o meno ad un oggetto fisico[30]. La distinzione è rilevante perché la corretta identificazione dei diritti si ripercuote sulle licenze che i rispettivi titolari potranno concedere, in particolare perché

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[24] Ai sensi dell'articolo 6 della legge n. 633/1941 (di seguito, l.d.a.), "*il titolo originario dell'acquisto del diritto di autore è costituito dalla creazione dell'opera, quale particolare espressione del lavoro intellettuale*".

[25] *Cfr.* ad esempio art. 2 comma 10 l.d.a.

[26] Art. 2 comma 10 l.d.a.

[27] In questo caso, secondo C. Galli e A. Contini, S*tampanti 3D e Proprietà intellettuale: Opportunità e Problemi*, in *Rivista di Diritto Industriale*, fasc. 3, 2015, 115 ss., 143 potrebbe essere ipotizzabile una tutela tramite il diritto connesso sui progetti dei lavori di ingegneria o di altri lavori analoghi di cui all'art. 99 l.d.a., il quale attribuisce, oltre al diritto esclusivo di riproduzione dei piani e disegni dei progetti medesimi, un diritto ad equo compenso a carico di coloro che "realizzino" il progetto tecnico a scopo di lucro senza autorizzazione. D'altra parte, il progetto potrebbe essere anche considerato esso stesso opera d'ingegno, cosicché l'autore potrebbe vietarne la riproduzione non autorizzata secondo le norme sul diritto d'autore.

[28] In tema di brevettabilità e stampa 3D cfr. G. Van Overwalle e R. Leys, *3D Printing and Patent Law: A Disruptive Technology Disrupting Patent Law?*, IIC (2017) 48:504-537, i quali analizzano i seguenti casi: (i) brevettabilità dei componenti della stampante 3D o scanner, (ii) brevettabilità di invenzioni su nuovi materiali, (iii) creazione di file CAD (anche da oggetti preesistenti); (iv) invenzioni di software; (v) brevettabilità di oggetti fisici. Per questi ultimi si considerino le seguenti ipotesi: stampa di un oggetto completamente nuovo, stampa di un oggetto che esisteva già prima ma è stampato con diversa forma o materiale tanto da renderlo innovativo, stampa di un oggetto che esisteva già prima con gli stessi materiali.

[29] Tale profilo è attualmente oggetto di discussione; si veda in proposito V. Elam, *CAD Files and European Design Law*, JIPITEC (2016) 7, 146, para 1.

[30] Per una sintetica illustrazione del dibattito in corso cfr. G. Van Overwalle e R. Leys, *3D Printing and Patent Law: A Disruptive Technology Disrupting Patent Law?*, cit., 513.

le licenze "standard" utilizzate (come FLOSS o *Creative Commons*) potrebbero non essere adeguate ai casi di autorizzazione all'uso di *CAD files*[31] .

Una volta acquisiti tali diritti, infatti, il titolare godrà delle relative facoltà riservate e potrà disporne a suo gradimento (anche concedendole in licenza), salvo eventualmente (e correttamente) rispettare la regola di lasciare le proprie opere "*available for individuals to use and learn from*", il cui carattere coercibile o meno ha un'influenza diretta sull'uso del *Fab Lab* da parte dei vari utenti[32] e rappresenta un nodo cruciale per la funzionalità stessa di queste realtà. Si pensi, ad esempio, ad un artigiano che produca tradizionalmente monili e che, grazie alle tecniche apprese nel *Fab Lab*, riesca a creare un file digitale delle proprie creazioni che possa diffondere tramite le piattaforme *online* ed incontrare la domanda di consumatori di altri Paesi interessati alle forme dei monili da poter stampare comodamente a casa (con materiali ovviamente compatibili). L'artigiano avrà il vantaggio di ampliare la propria offerta ed entrare in nuovi mercati. Avrà la scelta di diversi modelli di *business* per valorizzare le proprie creazioni[33] e dovrà eventualmente difendersi – contrattualmente o anche attraverso misure tecnologiche di protezione – da appropriazioni indebite a seguito della diffusione delle proprie creazioni. Ma come riuscirà a garantire la disponibilità delle proprie creazioni per la comunità del *Fab Lab*, portando avanti al contempo un progetto commerciale? Quale sarà la "soglia di condivisione" ammissibile? Questi sono alcuni degli interrogativi che lo sviluppo del *Fab Lab* pone e che è legato, ovviamente, alla struttura, al finanziamento, alle norme etiche e sociali ed al modello di funzionamento delle singole realtà.

Un altro tema di discussione a proposito della stampa 3d è la possibile protezione delle invenzioni dei *maker*, dal momento che molti di essi potrebbero trovare il meccanismo di registrazione del brevetto (pensato evidentemente per un diverso contesto industriale) eccessivamente lungo e costoso. Negli Stati Uniti è stata proposta l'istituzione di un meccanismo di tutela che potrebbe maggiormente adattarsi a tale realtà: un sistema di "micropatents", dove la protezione sarebbe più semplice da ottenere, perché meno costosa, più immediata e, specularmente, molto più breve[34]. Tale suggestiva idea è stata, tuttavia, criticata da parte di alcune comunità di 3d *printing maker*, in quanto ritenuta non necessaria ai

[31] *Cfr.* R.M. Ballardini, J. Lindman, I. Flores Ituarte, *Co- creation, commercialization and intellectual property – challenges with 3d printing*, in *European Journal of Law and Technology*, Vol 7, No 3, (2016).

[32] La norma potrebbe, infatti, disincentivare l'uso del *Fab Lab* per la fabbricazione di prodotti per finalità commerciali in quanto gli utenti potrebbero non essere inclini alla condivisione degli oggetti con alcuni concorrenti frequentatori del *Fab Lab*. A tal proposito, specularmente l'ultima norma della *Fab Lab Charter* dispone che "*commercial activities can be prototyped and incubated in a fab lab, but they must not conflict with other uses, they should grow beyond rather than within the lab, and they are expected to benefit the inventors, labs, and networks that contribute to their success*".

[33] Potrebbe, infatti, scegliere di diffondere modelli semplici delle proprie creazioni tramite licenze "open", anche aventi clausole che ne autorizzino la modifica, al fine di avere maggiore visibilità, oppure potrebbe decidere di vendere i propri modelli come se fossero oggetti digitalizzati.

[34] *Cfr.* H. Lipson, M. Kurm, *Fabricated: the new world of 3D printing*, Indianapolis, Ind.: John Wiley and Sons, 2013, 237 ss.

fini di incentivazione dell'innovazione. L'ampliamento dei diritti di proprietà intellettuale, inoltre, potrebbe sempre portare a questioni e problemi di iper-protezione[35]. Forse i tempi non sono ancora maturi, né le istanze del settore ancora ben chiare, per riflettere su simili possibilità di regolazione.

3.3. Seconda ipotesi: la collaborazione tra più soggetti (e tra intelligenze umane ed artificiali)

3.3.1. Premessa

Tornando all'identificazione della titolarità dei diritti sulle opere concepite all'interno dei *Fab Lab*, oltre questa prima ipotesi, normalmente il processo di stampa 3d nei *Fab Lab* vede il coinvolgimento e la partecipazione di una pluralità di soggetti per cui potrebbero venire in rilevo ulteriori profili relativi alla titolarità dei diritti sui beni immateriali.
Il procedimento di digitalizzazione e progettazione, adattamento o personalizzazione di un oggetto pre-esistente, ad esempio, potrebbe condurre anch'esso alla rivendicazione di diritti per il soggetto che vi provvede. Persino la scannerizzazione, infatti, potrebbe necessitare di un intervento umano e la appropriabilità degli eventuali risultati creativi di un tale adattamento potrebbe per analogia seguire la disciplina prevista per le fotografie[36].
Prendendo l'esempio del diritto d'autore, nel caso di trasformazione di un'opera bi-dimensionale (come un dipinto) in opera tridimensionale, se le istruzioni contenute nel *CAD* sono sufficientemente creative, il soggetto che scrive tali istruzioni può essere considerato autore del *software* e dell'opera derivata ai sensi della disciplina sul diritto d'autore. Contrariamente se il *software* procede automaticamente a tale trasformazione, si discute se (e a chi) possano essere riconosciuti diritti di proprietà intellettuale[37]. Se l'oggetto bidimensionale digitalizzato e trasformato in oggetto tridimensionale è protetto come opera dell'ingegno, l'elaborazione creativa compiuta tramite il *file CAD* suddetto, nonostante la necessaria autorizzazione del titolare dei diritti sull'oggetto originale[38], sarà protetta indipendentemente ed autonomamente rispetto alla fonte originaria, ai sensi dell'art. 4 l.d.a. e l'autore potrà rivendicare anch'egli il proprio diritto sull'oggetto 3d e sulle sue copie. Ciò significa che se un collaboratore del *Fab Lab* aiuta l'utente nella digitalizzazione creativa di un'opera potrà vantare diritti sull'oggetto finale e sul *software*, salvi ovviamente gli ac-

[35] In tema *cfr.* M.A. Susson, *Watch the World "Burn": Copyright, Micropatent and the Emergence of 3D Printing*, April 2013, <http://ssrn.com/abstract=2253109>.

[36] Di questa opinione H. Dasari, A*ssessing copyright protection and Infringement Isseus Involved in 3D Printing and Scanning*, AIPLA Quarterly journal 2013, 298. Si veda anche il *Report* belga preparato per ALAI Congress 2016 *Applied Arts under IP Law: the uncertain border between beauty and usefulness*.

[37] Così S. Ercolani, *Report* italiano preparato per ALAI Congress 2016 *Applied Arts under IP Law: the uncertain border between beauty and usefulness*, 3 Su proprietà intellettuale ed Intelligenza Artificiale *cfr.* J. Ginsburg, *People Not Machines: Authorship and What It Means in the Berne Convention*, IIC (2018) 49:131-135.

[38] Se il dipinto è protetto da diritto d'autore sarà necessaria l'autorizzazione per la riproduzione e per l'adattamento del *file* originario.

cordi contrattuali con il *Fab Lab* stesso circa la titolarità e l'eventuale sfruttamento della proprietà intellettuale.
Lo stesso si potrà dire se l'oggetto originale non sia protetto da nessun diritto di proprietà intellettuale, perché non avente i requisiti di protezione o perché in pubblico dominio: nel caso di elaborazione creativa e aggiunta di variazioni creative o che ne modifichino e valorizzino le funzionalità, durante la digitalizzazione potranno essere acquistati diritti sull'opera o sul lavoro così rimodellato.
Diversamente, se la digitalizzazione e la progettazione digitale si limiteranno ad un *know-how* tecnico e non vi sarà alcun apporto creativo[39] ed originale, non sarà possibile riconoscere alcun diritto di proprietà intellettuale al soggetto che compie tali operazioni. La progettazione di *medical device*, ad esempio, essendo volta alla realizzazione di una copia perfetta della fonte originale e che si adatti perfettamente all'organo su cui dovranno essere impiantati non porterà all'attribuzione del diritto d'autore sulle istruzioni di adattamento in quanto "la forma dell'oggetto finale sarà necessitata dalla sua funzione"[40]. In questo paragrafo è stato preso ad esempio principalmente il diritto d'autore per illustrare le possibili collaborazioni nella creazione di opere dell'ingegno. Si consideri, tuttavia, che per quanto riguarda l'ultimo esempio, un *medical device* potrebbe essere brevettabile se i requisiti di protezione sono soddisfatti[41].

3.3.2. I margini dell'elaborazione creativa nella stampa 3d: spunti da TinTin e Star Wars

L'apporto del lavoro intellettuale e personale del soggetto che compie l'adattamento è valutato caso per caso e servirebbe una trattazione a sé per ricostruire ed elencare i criteri sulla base dei quali è riconosciuta dai vari ordinamenti la creatività o l'originalità di un'opera[42].

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[39] P. Sirinelli e T. Maillard considerano, nel *Report* francese per ALAI Congress 2016, questa situazione la più diffusa.

[40] Così S. Ercolani, *Report* italiano ALAI, cit., 3

[41] Si pensi, ad esempio, al celebre brevetto di *Mobelife*, "Implantable bone augment and method for manufactoring an implantable bon eaugment" WIPO/PCT application WO20131170872 EP 2.849.682.

[42] Per l'interpretazione del concetto di creatività in Italia *cfr.* Commentario breve alle leggi su proprietà intellettuale e concorrenza, a cura di L.C. Ubertazzi, Cedam, 2016, *sub. Art. 2*. La Corte di Giustizia dell'Unione europea ha interpretato i criteri di creatività ed originalità in termini di necessario apporto creativo intellettuale dell'autore varie decisioni tra cui, in particolare, sentenza della Corte (Quarta Sezione) del 16 luglio 2009 (C-5/08) [2010] FSR 20 Infopaq International A/S v Danske Dagblades Forening; sentenza della Corte (Terza Sezione) del 1 dicembre 2011 (C-145/10) [2012] ECDR 6 Painer v StandardVerlags GmbH e sentenza della Corte (Terza Sezione) del 1 marzo 2012 (C-604/10) [2012] Bus. L.R. 1753, Football Dataco Ltd v Yahoo! UK Ltd. Per la creatività di un *software cfr.,* invece, sentenza della Corte (Terza Sezione) del 22 dicembre 2010 (C-393/09) [2011] ECDR 3 Bezpe nostní Softwarová Asociace – Svaz Softwarové Ochrany v Ministerstvo Kultury e sentenza della Corte (Grande Sezione) del 2 maggio 2012 (C-406/10) [2012] 3 CMLR 4 *SAS Institute Inc., v World Programming Ltd*. In dottrina *cfr. ex multis* D. Mendis, *"Clone Wars": Episode II – The Next Generation. The Copyright Implications relating to 3D Printing and Computer-Aided Design (CAD) Files*, in *Law, Innovation and Technology* in December 2014. Issue 6, Volume 2; pp. 265-281; E. Rosati, *Originality in EU Copyright: Full Harmonisation through Case Law*, Edward Elgar Publishing Ltd, 2013. Per una rilettura dei formanti europei in ottica funzionale, con specifico riferimento all'ammissibilità di un sensory copyright, *cfr.* C. Sganga, *Say Nay to a Tastier Copyright: Why the CJEU Should*

Sebbene in linea teorica possano intravedersi spazi per riconoscere l'impronta originale e personale dell'adattatore nelle varie ipotesi di elaborazione nella stampa 3d, un primo sguardo comparatistico alla giurisprudenza già formatasi sul punto mostra come, tuttavia, i giudici non sembrino particolarmente inclini ad accordare protezione come opera derivata alle elaborazioni in 3d.
In Belgio, ad esempio, la Corte di Appello di Bruxelles ha ritenuto che nella conversione dell'immagine bidimensionale dei personaggi Tintin e Tchang in statuette tridimensionali da parte di Monsieur R. non vi fosse sufficiente apporto creativo personale, negando la protezione autoriale come opera derivata della suddetta statuetta[43]. Secondo la Corte, la mera trasposizione di un'opera bidimensionale in tre dimensioni non implica espressione della personalità del soggetto.
Ad una conclusione non dissimile sono giunti i giudici inglesi con riferimento all'elmetto bianco di *Star Wars*. Il caso ruotava attorno alla qualificabilità del ben noto "*Imperial Stormtrooper helmet*" come scultura e quindi come opera dell'ingegno tutelabile ai sensi del diritto inglese, dal momento che Mr Ainsworth, il soggetto che aveva convertito l'idea degli elmetti bianchi di Lucas in 3d, aveva poi provveduto a commercializzare autonomamente al pubblico tali elmetti. Nella decisione della *Supreme Court Lucasfilm Ltd. & Others v Ainsworth and Another*[44], gli elmetti non sono stati riconosciuti come opera d'arte ma solo aventi una funzione utilitaristica nell'ambito del film Star Wars ("*But it was the Star Wars film that was the work of art that Mr Lucas and his companies created. The helmet was utilitarian in the sense that it was an element in the process of production of the film*"[45]). In questo caso, non riconoscendo all'oggetto natura di opera d'arte, non è stata riconosciuta sotto questo profilo alcuna violazione dei diritti di proprietà intellettuale in capo a Mr Ainsworth.
Da queste pronunce si desume come, nei casi in cui vi sia una mera trasformazione in 3d di un'opera dell'ingegno preesistente, gli interessi del titolare dei diritti sull'opera originaria (se sussistenti) sono riconosciuti prevalenti rispetto a quelli del soggetto che compie l'adattamento. Per ottenere tutela, occorre uno sforzo creativo intellettuale che vada oltre il mero adattamento in 3d e ciò, a maggior ragione, quando l'adattamento sia puramente automatico e mediato in minima parte da un intervento umano.

Deny Copyright Protection to Tastes (and Smells), in corso di pubblicazione su *Journal of Intellectual Property Law and Practice*, Forthcoming. Available at SSRN: https://ssrn.com/abstract=3270049.

[43] Corte di Appello di Bruxelles, 26 marzo, 2009, J.M.B. 2009, 1041.

[44] [2011] 3 WLR 487, la quale ha confermato la sentenza del 2009 della EWCA Civ 1328.

[45] Paragrafo 44 della decisione.

3.4. Diritti esclusivi e misure tecnologiche di protezione tra difesa e condivisione: quanto è opportuno lasciare la scelta alle macchine?

Come premesso, la corretta (sebbene non sempre semplice) identificazione dei diritti esistenti sulle opere e sugli oggetti creati e realizzati nei *Fab Lab* è utile per identificarne i margini di uso e sfruttamento. Una volta acquisiti i diritti esclusivi, i relativi titolari potranno decidere di consentire o meno ai terzi l'accesso alle proprie creazioni intellettuali e di sfruttare eventualmente il valore di quanto concepito. In particolare, potranno autorizzare o vietare determinati usi delle proprie opere ai fini della scannerizzazione o progettazione mediante CAD in 3d e potranno anche determinare l'uso da parte dei terzi dei *file* 3d da essi creati (nel rispetto dei diritti altrui preesistenti).

Anche nell'ottica di un *Fab Lab*, è necessario che i collaboratori e gli utenti siano adeguatamente informati sugli aspetti di titolarità delle opere, per poterne disporre, eventualmente autorizzarne l'uso e per evitare appropriazioni indebite da parte di terzi. Al fine di evitare tale ultimo problema, nella prassi sono sempre più diffuse misure tecnologiche di protezione (come, ad esempio, *Watermarking* e *Fingerprint*) al fine di escludere materialmente l'accesso e l'uso di un determinato bene[46]. Sebbene tali strumenti siano in contrasto con la filosofia aperta del *Fab Lab*, esse possono essere di qualche utilità nei casi in cui alcuni soggetti (come *designer* professionali, imprese…) preferiscano mantenere inaccessibili alcune fasi della prototipazione dei propri oggetti svolta nei *Fab Lab*, salvo poi garantire il rispetto della regola n. 6 del decalogo. L'uso di misure tecnologiche di protezione dovrà, tuttavia, tenere in considerazione gli eventuali problemi di interoperabilità tra misure tecnologiche di protezione e macchine che le dovranno leggere, specialmente se su di esse sono in uso *software open source*[47]. Oltre ad una corretta educazione sui profili di proprietà intellettuale, potrebbe essere auspicabile aggiungere nei *file* 3d degli elementi che ne permettano la tracciabilità, come l'identificabilità dell'autore.

Resta il dubbio di come tale automatizzazione della gestione dei diritti di proprietà intellettuale (per certi versi auspicata ed auspicabile) possa conciliarsi con la filosofia aperta di condivisione dei *Fab Lab*. Se *clearence* ed *enforcement* dei diritti appaiono certamente più semplici, una tale automazione potrebbe non tutelare adeguatamente le istanze contrapposte (come l'applicabilità nel caso concreto di eccezioni e limitazioni ai diritti esclusivi che nei *Fab Lab*, come si vedrà *infra,* potrebbe avere un ruolo non marginale) o potrebbero non essere in grado di tenere in debita considerazione la complessità delle scelte di autonomia privata del titolare dei diritti limitandosi a processare scelte *standard* uguali per ogni utente o situazione.

[46] Così come trasferimenti criptati dei dati contenenti le opere protette, l'utilizzo della tecnologia *blockchain* per la condivisione o, ancora, altri strumenti per la tracciabilità.

[47] Su questi profili *cfr.* Conseil Supérieure de la Propriété Littéraire et Artistique, *Rapport de la Commission de Réflexion sur l'Impression 3D, L'impression 3D et le Droit d'Auteur: des menaces a prévenir, des opportunités a saisir*, cit., 30, il quale auspica lo sviluppo di una standardizzazione tecnica per le MTP coinvolte nella stampa 3D.

3.5. Condivisione e ruolo delle piattaforme

A seconda dei diritti che vengono di volta in volta in gioco, diversi sono i modelli contrattuali utilizzabili per autorizzare le utilizzazioni dei beni immateriali. Nella prassi, accanto a licenze proprietarie più tradizionali, sono diffuse licenze *open* standardizzate, come le licenze *Creative Commons o* le licenze FLOSS per i *software,* che permettono ai terzi determinati usi secondo la formula "alcuni diritti riservati".

Molto spesso gli utenti dei *Fab Lab* prediligono l'uso di questi tipi di contratti di licenza, che si caratterizzano per essere semplici, popolari e standard. Un'altra ragione della scelta di tali licenze è che esse autorizzano le utilizzazioni consentite delle opere dell'ingegno, la cui tutela è gratuita (a differenza della registrazione di marchi e brevetti). Ciò che è autorizzato è, dunque, l'uso delle opere protette dal diritto d'autore (oggetti fisici e/o la loro rappresentazione digitale) o dei *software* protetti dal diritto d'autore nel caso delle licenze *FLOSS*[48].

Nella prassi si sono diffuse piattaforme di condivisione o di scambio di *file* digitali che consentono agli utenti sia di caricare le proprie opere per la digitalizzazione in 3d (ad esempio *Sculpteo*), sia di caricare direttamente i file CAD da essi creati (come *Thingiverse*) e, specularmente, di scaricare tali *file* del progetto 3d e stamparli con l'aiuto delle stampanti 3d in loro possesso. Alcune piattaforme, inoltre, consentono agli utenti la diretta modifica dei *file* con alcune *App*[49].

Uno studio molto interessante[50] ha messo in rilievo, inoltre, che se le relazioni orizzontali che si creano in queste piattaforme privilegiano (in gran parte, anche se non sempre) uno scambio di informazioni tra la comunità *online*, le relazioni verticali tra utenti e piattaforme tendono ad una appropriazione della creatività e dell'inventiva degli utenti da parte delle piattaforme (la cui natura è spesso ibrida) per inglobarne le opere nella propria offerta commerciale. Le condizioni generali di contratto di alcune di queste piattaforme impegnano, infatti, spesso gli utenti a concedere alla piattaforma una licenza globale, illimitata dei propri diritti, senza che l'utente che immetta il proprio contenuto nella piattaforma abbia la possibilità di negoziarne le clausole. Si determina, così, una sorta di appropriazione di tali "*user generated content*" – se così possono essere definiti – da parte delle piattaforme di condivisione.

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[48] Per queste considerazioni *cfr*. M. Weinberg, *3 steps for licensing your 3D printing stuff*, marzo 2015, in *Public Knowledge* (*www.publicknowledge.org*).

[49] Alcuni esempi sono rappresentati da Meshmixer, MakerBot Customizer, etc.

[50] J. Moilanen, A. Daly, R. Lobato, D. Allen, *Cultures of Sharing in 3D printing: what can we learn from the licence choices of Thingiverse users?*, in *Journal of Peer Production*, n. 6, 1-11; cfr. anche lo studio 2015/41 di D. Mendis e D. Secchi, *A Legal and Empirical Study of 3D Printing Online Platforms and an Analysis of User Behaviour*, commissionato dall'*Intellectual Property Office* britannico.

4. La possibile violazione dei diritti di proprietà intellettuale altrui (*de lege lata*)

Specularmente, sotto un diverso punto di vista, le attività condotte nei *Fab Lab* potrebbero violare diritti di proprietà intellettuale altrui, laddove l'uso delle opere e delle invenzioni sia avvenuto senza l'autorizzazione del relativo titolare[51]. Nel paragrafo precedente sono stati esaminati sinteticamente i diritti sui beni immateriali che potrebbero sorgere nel corso della stampa 3d, nonché si è accennato alle possibili modalità di circolazione. In questo paragrafo saranno trattati nello specifico le possibili violazioni dei diritti altrui e le conseguenti responsabilità nella specifica realtà dei *Fab Lab*.

4.1. Stampa 3d, diritto d'autore e *Fab Lab*: quali responsabilità?

La stampa 3d effettuata nell'ambito dei *Fab Lab* potrebbe, anzitutto, interferire con la protezione accordata dal diritto d'autore a determinate opere dell'ingegno come, ad esempio, opere d'arte figurativa, opere creative di *design* industriale, sculture.
Gli aspetti giuridici da indagare sono quelli della portata dei diritti d'autore eventualmente sussistenti e relative limitazioni ed eccezioni con riferimento alle specificità dei processi di stampa 3d.
Un altro profilo – spesso purtroppo sottovalutato – è la possibile violazione del diritto morale dell'autore nel corso del processo di stampa 3d. Le svariate possibilità di elaborazione e personalizzazione delle opere (come, banalmente, anche la scelta di un diverso materiale) possono violare il diritto di integrità dell'opera[52]. Nella digitalizzazione e diffusione dell'opera, inoltre, potrebbe essere omessa l'indicazione del nome dell'autore, pregiudicando così il diritto di paternità dell'autore, come anche il diritto di divulgazione laddove l'autore non vi abbia acconsentito[53].
Con riferimento alla scannerizzazione e alla progettazione di un oggetto 3d preesistente, ove questo sia protetto dal diritto d'autore, l'attività intrapresa sarà qualificabile come atto di riproduzione, che, se non autorizzato, violerà il diritto d'autore altrui. Parimenti protetti saranno i diritti esclusivi di elaborazione, rappresentazione e messa a disposizione del pubblico, ove l'utente del *Fab Lab* compia tali ulteriori operazioni (come la stampa 3d di un oggetto coperto da diritto d'autore, la cui riproduzione – con qualsiasi mezzo effettuata – dovrà in linea di principio essere autorizzata dal titolare dei diritti).

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[51] Ciò potrebbe avvenire nei casi in cui i beni realizzati attraverso le stampanti 3D rientrino nella protezione di diritti altrui e necessitino, dunque, dell'autorizzazione del titolare dei diritti ai fini della loro utilizzazione.

[52] Ai sensi dell'art. 20 l.d.a., infatti, l'autore opporsi a qualsiasi deformazione, mutilazione od altra modificazione, ed a ogni atto a danno dell'opera stessa, che possano essere di pregiudizio al suo onore o alla sua reputazione.

[53] Per una analisi più approfondita, si veda Conseil Supérieur de la Propriété Littéraire et Artistique, *Rapport de la Commission de Reflexion sur l'Impression 3D, L'impression 3D et le Droit d'Auteur: des menaces a prevenir, des opportunites a saisir*, cit., 18.

In caso di uso privato, e dunque per finalità personali e non commerciali – come può spesso avvenire nei *Fab Lab* – una eccezione astrattamente applicabile potrebbe essere quella di copia privata. Nell'ordinamento italiano[54], tuttavia, essa è riconosciuta solo per fonogrammi e videogrammi dagli artt. 71-*sexies*-71 *octies* l.d.a. e, in quanto eccezione, non è dunque suscettibile di interpretazione estensiva o applicazione analogica alle fattispecie di stampa 3d[55]. La sua eventuale estensione ad opera del legislatore anche alle attività della stampa 3d, come la sua applicazione, poi, è sottoposta al superamento del cd. *Three Step Test* per cui la copia privata di un'opera cui l'utente abbia avuto accesso legittimo non sia in contrasto con lo sfruttamento normale dell'opera o degli altri materiali e non arrechi ingiustificato pregiudizio ai titolari dei diritti. Il regime previsto per la riproduzione non autorizzata di opere protette dal diritto d'autore è, come si vedrà, nel caso di utilizzo per finalità personali e private, ancor più stringente rispetto alla disciplina relativa agli altri diritti di proprietà intellettuale, dove potrebbe ipotizzarsi un esonero per gli usi privati e non commerciali.

In altri ordinamenti, invece, dove le norme che prevedono l'eccezione per copia privata hanno una formulazione differente, si discute sulla applicabilità della suddetta eccezione, in particolare per quanto riguarda i casi in cui l'utilizzatore singolo, per realizzare la copia privata di un'opera protetta, si avvalga di macchinari e materiali messi a disposizione da un terzo, come potrebbe essere un *Fab Lab*. Allo stato attuale, tuttavia, (nonostante alcune aperture giurisprudenziali da parte della CGUE[56]) sembrano prevalere interpretazioni restrittive della disciplina degli usi privati. In Francia, ad esempio, un rapporto del 2016 sulla stampa 3d del *Conseil Supérieur de la Propriété Littéraire et Artistique*[57] ha ritenuto che alla luce della disciplina francese vigente, e della sua interpretazione ad opera della giurisprudenza, tale eccezione sia applicabile solo all'utilizzatore singolo che stampi in 3d con la propria stampante ed utilizzando materiali propri.

Altra eccezione che potrebbe venire in considerazione è l'eccezione di reprografia (art. 68 l.d.a.), il cui tenore letterale così specifico, tuttavia, la rende parimenti non applicabile alla digitalizzazione o riproduzione 3d[58].

Ancora, nei *Fab Lab* potrebbe venire in rilievo l'eccezione di citazione a fini di insegnamento o di ricerca scientifica di cui all'art. 70 l.d.a. (e art. 5.3 a Direttiva 2001/29), laddove siano ripresi alcuni elementi di un'opera protetta a condizione che l'utilizzo avvenga per finalità illustrative e per fini non commerciali e che via sia menzione del nome dell'autore.

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[54] Per le diverse condizioni di applicazione negli altri ordinamenti si vedano, ad esempio, Report francese per ALAI Congress 2016, cit., *passim* e *Report* tedesco per ALAI Congress 2016, *passim*.

[55] *Cfr.* S. Ercolani, Report italiano ALAI, cit.; C. Galli, A. Contini, S*tampanti 3D e Proprietà intellettuale: Opportunità e Problemi*, cit., p. 140. (e art. 5.3 a Direttiva 2001/29)

[56] *Cfr.* in particolare «Padawanc/SGAE» del 21 ottobre 2010, C-467/08, § 48.

[57] Conseil Supérieur de la Propriété Littéraire et Artistique*, Rapport de la Commission de Réflexion sur l'Impression 3D, L'impression 3D et le Droit d'Auteur: des menaces a prévenir*, 25.

[58] S. Ercolani, *Report italiano ALAI*, cit.

In questo senso la nuova proposta di direttiva sul diritto d'autore nel mercato unico digitale[59] potrebbe portare ad un ampliamento delle eccezioni per utilizzazioni per finalità di ricerca ed innovazione.
Recentemente il Parlamento europeo ha votato una mozione in cui riconosce che "*it would be wise to distinguish between home printing for private use and printing for commercial use, and between B2B services and B2C services*"[60]. Inutile dire come un tale chiarimento – ed una eventuale armonizzazione delle legislazioni nazionali – potrebbe essere di grande aiuto allo sviluppo di realtà come i *Fab Lab*.
Ove si ritenesse, inoltre, che il *software* che impartisce le istruzioni sia un'opera autonomamente proteggibile nei termini di cui *supra*, anche la sua riproduzione, elaborazione e messa a disposizione del pubblico non autorizzate sarebbero da ritenersi illecite, senza che nessuna delle eccezioni e limitazioni previste dalla l.d.a. per le finalità personali possa entrare in gioco, tranne le attività da ritenersi lecite sulla base di *reverse engineering,* copie di *back up* o l'ottenimento delle stesse funzioni con un codice espresso in una forma diversa.

4.1.1. *Fab lab* come piattaforme?

Data la limitatissima applicazione delle eccezioni suddette, è facile che si riscontrino utilizzazioni illecite delle opere altrui. Oltre alla responsabilità dell'utente che materialmente compie le suddette violazioni nell'ambito della stampa 3d, la diffusione e messa a disposizione di *file* che riproducono abusivamente opere protette da diritto d'autore di terzi coinvolge anche gli "intermediari", siano essi piattaforme *online* di condivisione delle opere o *Fab Lab*.
Come noto, la responsabilità "secondaria" degli operatori della società dell'informazione per gli illeciti compiuti dai propri utenti prevede i "safe harbours" decritti dalla Direttiva 2000/31/CE, recepita in Italia dal decreto legislativo 70/2003, ed interpretati dalla giurisprudenza soprattutto con riferimento alla violazione del diritto d'autore *online* (come musica o filmati). La puntuale analisi dei suddetti criteri interpretativi esulerebbe dall'oggetto della presente trattazione, anche se è opportuno menzionare come per il diritto d'autore *online* vi sia una progressiva tendenza alla responsabilizzazione di intermediari e piattaforme, attraverso la trasformazione della responsabilità secondaria (o per concorso) in responsabilità primaria diretta[61]. Così possono leggersi i recenti interventi giurispruden-

[59] Proposta di DIRETTIVA DEL PARLAMENTO EUROPEO E DEL CONSIGLIO sul diritto d'autore nel mercato unico digitale COM/2016/0593 final - 2016/0280 (COD)

[60] PE 618.019v03-00 A8-0223/2018 *on three-dimensional printing, a challenge in the fields of intellectual property rights and civil liability* (2017/2007(INI)).

[61] *Cfr.* in particolare G. Colangelo, *"Digital Single Market Strategy", diritto d'autore e responsabilità delle piattaforme online*, 603-639, e L. Mansani e M. Simoni, *Il danno arrecato dall'"internet Service Provider" al titolare del copyright su materiali caricati dagli utenti*, 565-591, entrambi in *Analisi Giuridica dell'Economia* 2/2017, *Il danno alla concorrenza e all'innovazione. Uno, nessuno o centomila?*, (a cura di V. Falce, F. Ghezzi e G. Olivieri).

ziali della CGUE in materia di comunicazione al pubblico delle opere protette attraverso *hyperlinking*[62], i quali hanno riconosciuto una responsabilità diretta a carico delle piattaforme di condivisione nei casi in cui si potesse ravvisare l'imprescindibilità dell'intervento dell'intermediario al fine di consentire o anche solo facilitare la fruizione di opere protette, la conoscenza o conoscibilità della mancanza di autorizzazione del titolare dei diritti ed il fine lucrativo dell'intermediario. E così può leggersi altresì l'art. 13 della nuova proposta di direttiva sul diritto d'autore nel mercato unico digitale[63], la cui applicazione, una volta entrata definitivamente in vigore[64], dovrà districarsi tra le nuove disposizioni che vedono gli intermediari direttamente responsabili per le opere condivise *online* e le esenzioni di responsabilità della Direttiva 2000/31/CE.

Per i fini che qui interessano è possibile domandarsi se i *Fab Lab*, luoghi fisici ma connessi via Internet ad una rete globale di condivisione e scambio, possano incorrere in tale responsabilità nei casi in cui mettano a disposizione degli utenti file CAD protetti da diritto d'autore o che rappresentino opere protette da diritto d'autore che gli utenti possano facilmente riprodurre. Allo stesso modo, si può discutere il caso in cui ad essere messa a disposizione dei singoli non sia l'opera non autorizzata, ma soltanto le macchine e gli strumenti per stampare. Certo per non incorrere in responsabilità potrebbero essere ipotizzati accordi con i titolari dei diritti o con le relative società di gestione collettiva, come la collaborazione con i titolari dei diritti per rimuovere le opere non autorizzate caricate dagli utenti e messe a disposizione dai *Fab Lab*, anche se resta ovviamente sullo sfondo la possibilità di "*chilling effects*" laddove la titolarità e la sussistenza del *diritto d'autore* non possa essere chiaramente dimostrabile.

La disciplina del diritto d'autore è quella che presenta i maggiori anticorpi contro le violazioni perpetrate grazie all'avanzamento della tecnologia e, in particolare, alla digitalizzazione. Non sorprende, dunque, come la casistica sia iniziata ad emergere proprio in questo ambito, dove i titolari dei diritti sono già a conoscenza degli strumenti per contrastare eventuali usi illeciti.

Negli Stati Uniti, ad esempio, si ha notizia di alcuni casi in cui è stata azionata più volte la procedura di "*notice and takedown*" prevista dal *Digital Millennium Copyright Act*[65], la quale, se messa in atto da parte degli intermediari (piattaforme *online* e *Internet Service*

[62] Si vedano, in particolare, sentenza della Corte (Seconda Sezione) dell'8 settembre 2016, *GS Media BV contro Sanoma Media Netherlands BV e a.*, Causa C-160/15 e sentenza della Corte (Seconda Sezione) del 14 giugno 2017, *Stichting Brein contro Ziggo BV e XS4All Internet BV*, Causa C-610/15, cd *Pirate Bay*. Per un commento S. Scalzini, *Hyperlinking e violazione del diritto d'autore nell'evoluzione giurisprudenziale europea*, in *Analisi Giuridica dell'Economia* 2/2017, 639-662*, Il danno alla concorrenza e all'innovazione. Uno, nessuno o centomila?*, (a cura di V. Falce, F. Ghezzi e G. Olivieri).

[63] Proposta di direttiva sul diritto d'autore nel mercato unico digitale COM(2016)0593.

[64] Al momento in cui si scrive la proposta di direttiva è stata approvata, sebbene con emendamenti dal Parlamento europeo. La votazione finale è prevista per dicembre 2018 o gennaio 2019.

[65] 17 U.S. Code § 512

Providers) fornisce un "*safe harbour*" dalla responsabilità per "*copyright infringement*" dei relativi utenti finali[66]. Il primo caso[67] in cui tale procedura è stata richiesta ha posto più interrogativi che risposte con riferimento all'operatività del rimedio alla stampa 3d, dove è difficile stabilire la titolarità e la sussistenza dei diritti di proprietà intellettuale. Ebbene, il *designer* Schwanitz ha messo in vendita su Shapeways il progetto di rappresentazione 3d del noto *Penrose Triangle* (la cd "figura impossibile"), mettendo a disposizione su *Youtube* un video che mostrava la sua impresa e descriveva come stampare la figura in 3d. Guardando il video, un altro soggetto ha capito come realizzare il *design* della figura impossibile (pratica comunemente indicata come *reverse engeenering*), caricando successivamente il *file* con le relative istruzioni sulla piattaforma *Thingiverse*, da cui ogni utente avrebbe potuto scaricarlo e stamparlo in 3d. Accortosi dell'accaduto, Schwanitz ha chiesto alla piattaforma di rimuovere la copia non autorizzata, ma, dopo le aspre critiche sollevate dalla comunità legata al 3d *printing*, ha finalmente deciso di ritirare la propria richiesta di *notice and take down* e rendere il *design* in pubblico dominio (se così non si potesse considerare già dal principio). Molti sono i dubbi sul caso: può ritenersi che Schwanitz fosse titolare del *copyright* sul progetto (o forse lo rivendicava proprio sulla struttura)? Ed il secondo progetto per come era stato posto in essere era tale da violare il *copyright* di Schwanitz?

Dopo tale caso, *notice and takedown* e *cease and desist* sono stati adoperati dalle piattaforme di stampa 3d, mentre pare che ad oggi ancora nessuna controversia in merito sia stata portata davanti ad una corte.

4.2. Responsabilità per violazione di marchi e segni distintivi altrui tra contraffazione diretta ed indiretta

La stampa di oggetti 3d potrebbe, inoltre, coinvolgere l'uso di marchi o segni distintivi altrui che, se non autorizzato e interferente con le funzioni giuridicamente tutelate dal segno[68] (*cfr.* art. 20 c.p.i., REG. Ue 2015/2424, art. 10 direttiva 2015/2436), è suscettibile di prospettare ulteriori profili di responsabilità. Nel contesto della stampa 3d tre potrebbero essere, in particolare, le utilizzazioni di marchi e segni distintivi: "*items being printed which incorporate a graphical 2D trade mark on their surface, 3d representations of 2D trade marks being printed, and 3d items which themselves constitute or replicate a 3d shape mark*"[69].

[66] *Cfr.* A. Daly, *Socio-Legal Aspects of the 3D Printing Revolution*, cit., 39 ss.

[67] Si veda la descrizione su https://arstechnica.com/tech-policy/2011/04/the-next-napster-copyright-questions-as-3d-printing-comes-of-age/.

[68] Gli atti di contraffazione del marchio, infatti, non si limitano semplicemente ai rischi di confusione relativi all'origine dei beni contrassegnati, ma si estendono anche ad altri valori, come nel caso di marchi che godono di rinomanza. Cfr. P. Auteri *et al.*, *Diritto industriale. Proprietà Intellettuale e Concorrenza*, IV ed., Giappichelli, Torino.

[69] A. Daly, *Socio-Legal Aspects of the 3D Printing Revolution, cit.* p. 37

Poiché l'art. 20 c.p.i. conferisce al titolare del marchio d'impresa registrato le facoltà di farne uso esclusivo e di vietare ai terzi, salvo proprio consenso, l'uso (del marchio o di segni distintivi similari) nell'attività economica, ci si può domandare quando possa considerarsi contraffazione di marchio nell'attività di stampa 3d svolta nei *Fab Lab*.
È discusso, in particolare, se la violazione si applichi anche nel caso di riproduzione privata del marchio, dal momento che l'art. 20 c.p.i. richiama specificamente l'uso "nell'attività economica"[70]. Certamente la contraffazione sarà da valutare caso per caso, ma vale la pena sin da ora segnalare che l'art. 11 della direttiva 2015/2436 sul ravvicinamento delle legislazioni degli Stati membri in materia di marchi d'impresa considera anche gli "atti preparatori in relazione all'uso di imballaggi o altri mezzi" ai fini della violazione del diritto di marchio, per cui la diffusione dei *file* che riproducono il marchio, così come – forse – anche la scannerizzazione e progettazione potrebbero rientrare nell'ambito di applicazione della norma. Parte della dottrina, inoltre, sostiene la configurabilità di contraffazione indiretta anche in questo ambito nell'ordinamento italiano[71].
Oltre alla violazione dei marchi e degli altri segni distintivi, inoltre, è possibile ipotizzare la responsabilità degli utenti dei *Fab Lab* per concorrenza sleale.

4.3. Stampa 3d e brevetti: la contraffazione è "*one click away*"

La portata più dirompente della stampa 3d per la possibile violazione di diritti di proprietà intellettuale è, tuttavia, rappresentata dal possibile *vulnus* alla protezione brevettuale, in quanto le norme dedicate all'*enforcement* certo non sono state pensate con riferimento ad una tale capillarizzazione della produzione. L'analisi che segue si concentra, in particolare, sui profili di contraffazione del brevetto di prodotto.
Il contenuto del diritto conferito dal brevetto (prevista in particolare per l'ordinamento italiano dagli artt. 66 e 67 del Codice della Proprietà Industriale Italiano, di seguito c.p.i.) attribuisce al titolare la facoltà esclusiva di attuare l'invenzione e di trarne profitto nel territorio in cui è chiesta e riconosciuta la protezione ed in particolare conferisce al titolare "*il diritto di vietare ai terzi, salvo consenso del titolare, di produrre, usare, mettere in commercio, vendere o importare a tali fini il prodotto in questione*" (se il brevetto è di prodotto). Secondo l'interpretazione maggioritaria, inoltre, la sussistenza della contraffazione non è esclusa nel caso in cui l'oggetto realizzato sia qualitativamente più scadente o migliore, come può certo avvenire con la stampa 3d, "*quando venga comunque attuato l'insegnamento oggetto della rivendicazione del brevetto*"[72] (cd contraffazione per equivalenti).
Si discute se il mero *reverse engeneering* di un oggetto protetto da brevetto attraverso la creazione di un *CAD file* possa essere considerata una diretta violazione del brevetto, in

[70] Per un'interpretazione da cui se ne potrebbe dedurre l'esclusione *cfr.* l'interpretazione di uso nel commercio fornita dalla CGUE, sentenza del 12 novembre 2012 (C-206/01), *Arsenal Football Club v. Matthew Reed*.

[71] *Cfr.* C. Galli e A. Contini, *Stampanti 3D e Proprietà intellettuale: Opportunità e Problemi*, cit., 138.

[72] C. Galli e A. Contini, *Stampanti 3D e Proprietà intellettuale: Opportunità e Problemi*, cit., 118

quanto tale attività, non costruendo materialmente né mettendo in funzione alcunché, non rientra letteralmente nel concetto di "produrre o usare" il prodotto in questione[73]. Con la stampa in 3d del prodotto brevettato, tuttavia, vi sono pochi dubbi sulla configurabilità di contraffazione.

Non vi sarà violazione, invece, se l'uso rientra nelle limitazioni al diritto di brevetto. In particolare, "*la facoltà esclusiva attribuita dal diritto di brevetto non si estende, quale che sia l'oggetto dell'invenzione: agli atti compiuti in ambito privato ed a fini non commerciali, ovvero in via sperimentale*" (art. 68, comma 1 let. a c.p.i., art. 27 UPCA).

Tali limitazioni potrebbero sovente essere applicabili in relazione alle attività concretamente espletabili nell'ambito dei *Fab Lab*: l'eccezione di uso domestico si applica a tutte le attività non commerciali né imprenditoriali, come quelle condotte durante i laboratori scolastici o da parte di utenti privati per il proprio uso e consumo; mentre l'eccezione di uso sperimentale si applica anche in caso di attività commerciali, quando la riproduzione abbia finalità di ricerca, come spesso avviene nei *Fab Lab* collegati al mondo universitario e della ricerca. Sulla portata e l'interpretazione di tali limitazioni, tuttavia, si è aperto un dibattito dottrinale. Anzitutto esse non sono riconosciute in tutti i Paesi. Negli Stati Uniti, ad esempio,[74] stampare in 3d un prodotto coperto da brevetto, anche se per uso personale o non commerciale può costituire contraffazione ai sensi dell'art. 35USC §271 (a) e, seppur alcuni autori sostengano che sussista una sorta di "*natural private use exception*", vi sono proposte di inserire *de lege ferenda* una espressa eccezione in tal senso per proteggere gli utenti non consapevoli di star commettendo una contraffazione[75].

In secondo luogo, ci si può interrogare se una interpretazione troppo ampia nei Paesi che riconoscono già tale limitazione potrebbe condurre a contraffazioni su larga scala, così come avvenuto nell'ambito del diritto d'autore a seguito della digitalizzazione. Nonostante tale preoccupazione, tuttavia, è auspicabile che nel contesto dei *Fab Labs*, le finalità didattiche, illustrative e di interesse pubblico perseguite siano valorizzate nell'interpretazione ed applicazione dell'eccezione.

4.4. Difficoltà di *enforcement* e responsabilizzazione delle piattaforme. Profili di convergenza con problemi e soluzioni del diritto d'autore digitale

Ove non siano applicabili le limitazioni, è indubbio come la capillarizzazione della produzione renda difficile la repressione di eventuali illeciti specialmente nei confronti degli utenti finali.

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[73] Per la ricostruzione delle posizioni dottrinali divergenti in merito *cfr.* Van Overwalle e R. Leys, *3D Printing and Patent Law: A Disruptive Technology Disrupting Patent Law?*, pp. 519-520.

[74] *Cfr.* S. Bechtold, *3D Printing, Intellectual Property and Innovation Policy*, in IIC (2016) 47:517-536, p. 528.

[75] D.R. Desai, G.N. Magliocca (2014), *Patents meet napster: 3D printing and the digitization of things*, in *GeorgetLaw J* 102(6):1691-1719, 1704.

A questo proposito, interessante risulta la riflessione sulla possibile violazione del brevetto da parte del soggetto che fornisce e mette a disposizione su Internet un *file* che riproduce il progetto di un prodotto brevettato al fine di consentirne la riproduzione attraverso la stampa 3d e, dunque, sulla possibile configurabilità di una "contraffazione indiretta" o "*contributory infringement*"[76] a carico dei soggetti che consentano lo scambio di tali *files* siano essi utenti che, a seguito di *reverse engeneering* mettano a disposizione di altri utenti i *files* per la stampa 3d o piattaforme che consentano tale scambio (per finalità più o meno commerciali). Ancora, ci si può interrogare se la fornitura di materiali e mezzi per attuare l'invenzione brevettata, come sovente avviene dei *Fab Lab*, possa determinare contraffazione indiretta. Gli interpreti si interrogano se la consapevolezza del soggetto fornitore della loro destinazione al compimento di un illecito (i.e. all'attuazione del brevetto senza il consenso del titolare) possa presupporre una responsabilità a titolo di contraffazione indiretta[77]. Sebbene il diritto brevettuale non sia ancora uniformemente armonizzato nell'ambito dell'Unione europea – specialmente per la fase cd "*post grant*" – la contraffazione indiretta è espressamente prevista dal "pacchetto sul brevetto unitario" (Art. 26 dell'Accordo sulla *Unitary Patent Court*[78]) e riconosciuta – seppur con differenti teorie e sfumature – dalla maggior parte degli ordinamenti nazionali[79]. Nell'ordinamento italiano, il contributo alla contraffazione è ora espressamente disciplinato dall'art. 66 c.p.i. a seguito della modifica legislativa ad opera della L. 3 novembre 2016, n. 214, che garantisce al titolare del diritto la facoltà di autorizzare o meno un terzo a "*fornire o offrire di fornire a soggetti diversi dagli aventi diritto all'utilizzazione dell'invenzione brevettata i mezzi relativi a un elemento indispensabile di tale invenzione e necessari per la sua attuazione nel territorio di uno Stato in cui la medesima sia protetta [a meno che i mezzi siano costituiti da prodotti che si trovano correntemente in commercio e il terzo non induca il soggetto a*

[76] R.M. Ballardini, M. Norrgard, and T. Minssen, *Enforcing patents in the era of 3D printing*, in *Journal of Intellectual Property Law & Practice*, 2015, Vol. 10, No. 11 suggeriscono che "*the frustrations of patent owners' resulting from their inability to pursue cost-effective direct patent infringement actions might lead them to concentrate their efforts towards indirect patent infringement strategies*". Sul riconoscimento della categoria nell'ordinamento italiano *cfr.* C. Galli, A. Contini, S*tampanti 3D e Proprietà intellettuale: Opportunità e Problemi*, in *Rivista di Diritto Industriale*, cit., p. 123.

[77] Per una rassegna delle posizioni in UK e USA si veda A. Daly, S*ocio-Legal Aspects of the 3D Printing Revolution, cit.* la quale, tuttavia, segnala come sul punto non sia ancora identificabile una giurisprudenza di riferimento. Sul punto, con specifico riferimento all'ordinamento statunitense cfr. anche L. Osborn, *3D printing and Intellectual Property*, in F.X. Olleros-M. Zhegu *Research Handbook of Digital Transformation*, Edward Elgar, 2016, 254-271.

[78] (1) *A patent shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from supplying or offering to supply, within the territory of the Contracting Member States in which that patent has effect, any person other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or should have known, that those means are suitable and intended for putting that invention into effect.*
(2) *Paragraph 1 shall not apply when the means are staple commercial products, except where the third party induces the person supplied to perform any of the acts prohibited by Article 25.*
(3) *Persons performing the acts referred to in Article 27(a) to (e) shall not be considered to be parties entitled to exploit the invention within the meaning of paragraph 1.*

[79] Per un'analisi comparatistica *cfr.* R.M. Ballardini, M. Norrgard, and T. Minssen, *Enforcing patents in the era of 3D printing*, cit., *passim*.

cui sono forniti a compiere gli atti vietati], qualora il terzo abbia conoscenza dell'idoneità e della destinazione di detti mezzi ad attuare l'invenzione o sia in grado di averla con l'ordinaria diligenza".

Si tratta a ben vedere di condotte in sé lecite ma che si che si trasformano in illecite laddove vi sia consapevolezza dell'autore delle medesime della loro destinazione al compimento di una fattispecie vietata. Sui margini di tale consapevolezza, la parola passerà alle corti, ma ci si può domandare se vi potranno o meno essere profili di convergenza con i criteri interpretativi utilizzati per il diritto d'autore, laddove in occasione della condivisione da parte di un utente su una piattaforma di file che consentano la stampa 3d non autorizzata di un prodotto coperto da brevetto, gli intermediari – ove chiamati in causa – invochino le esenzioni di responsabilità previste dalla direttiva sul commercio elettronico 2000/31/CE per gli illeciti compiuti dai propri utenti.

Come si è visto a proposito di violazione del diritto d'autore, si segnala una progressiva maggior responsabilizzazione delle stesse da parte di corti e legislatori.

Per non incorrere in una simile responsabilità, il *Fab Lab* dovrà aver cura di specificare nel contratto l'obbligo per l'utente di impiegare il prodotto eventualmente coperto da brevetto esclusivamente per usi leciti, oltre a concludere eventuali accordi con i titolari dei diritti per un'offerta legale dei prodotti. Entrerà ancora in gioco il contratto per regolare i rapporti tra *Fab Lab* e propri utenti.

4.5. Contraffazione di disegni e modelli

Ulteriori profili di interesse si prospettano, poi, in relazione alla disciplina dei diritti esclusivi derivanti dalla registrazione come disegno o modello[80]. Anzitutto si discute se la scannerizzazione o progettazione di un *file* che riproduca il disegno o il modello altrui possa costituire contraffazione[81]. In ogni caso, anche con riferimento ai disegni ed ai modelli, sono previste limitazioni con riferimento "(a) *agli atti compiuti in ambito privato e per fini non commerciali, (b) agli atti compiuti a fini di sperimentazione e (c) agli atti di riproduzione necessari per le citazioni o per fini didattici, purché siano compatibili con i principi della correttezza professionale, non pregiudichino indebitamente l'utilizzazione normale del disegno o modello e sia indicata la fonte*" (art. 42, comma 1 c.p.i.), pertanto ogni atto compiuto nel *Fab Lab* con tali finalità non è da considerare illecito. Diversamente

[80] Ai sensi dell'art. 41 c.p.i. "*La registrazione di un disegno o modello conferisce al titolare il diritto esclusivo di utilizzarlo e di vietare a terzi di utilizzarlo senza il suo consenso.*
2. Costituiscono in particolare atti di utilizzazione la fabbricazione, l'offerta, la commercializzazione, l'importazione, l'esportazione o l'impiego di un prodotto in cui il disegno o modello è incorporato o al quale è applicato, ovvero la detenzione di tale prodotto per tali fini.
3. I diritti esclusivi conferiti dalla registrazione di un disegno o modello si estendono a qualunque disegno o modello che non produca nell'utilizzatore informato una impressione generale diversa.
4. Nel determinare l'estensione della protezione si tiene conto del margine di libertà dell'autore nella realizzazione del disegno o modello".

[81] *Report* belga per ALAI Congress 2016, *cit.* p. 5.

la stampa 3d per finalità commerciali di un oggetto registrato come disegno o modello difficilmente potrà sfuggire a responsabilità per contraffazione.
Peculiare è, infine, la disciplina dei pezzi di ricambio ed i limiti di tali esclusive nei mercati "a valle" dei pezzi costruiti per la "riparazione di un prodotto complesso" (*cfr.* art. 241 c.p.i. e art. 14 Dir. n. 98/71/CE). Laddove nel *Fab Lab* siano realizzati "pezzi di ricambio", ovvero mere componenti di prodotti complessi utili alla riparazione dello stesso o al ripristino dell'oggetto originario, se ne potrà escludere l'illiceità. Ovviamente tali pezzi di ricambio dovranno essere destinati alla riparazione o al ripristino dell'oggetto originale, senza che ne sia permesso il riassemblamento con altri pezzi, o la scomposizione per poi ricomposizione in un oggetto contraffatto[82].

5. Le prospettive di *enforcement* (*de lege ferenda*) dei diritti di proprietà intellettuale ed il ruolo dell'autoregolazione. Come conciliare condivisione e rispetto dei diritti di proprietà intellettuale nella stampa 3d?

Le svariate possibilità di violazione di diritti altrui e la difficoltà di monitorare e reprimere gli illeciti che tale "capillarizzazione della produzione" porta con sé pongono problemi rilevanti in materia di *enforcement* dei diritti di proprietà intellettuale. In seno al parlamento europeo, come si è visto, si discute sulla possibile regolazione di questi fenomeni in particolare per quanto riguarda, da un lato, una eventuale revisione della c.d. direttiva "*enforcement*" (2004/48/EC) al fine di fornire una legislazione armonizzata sulla repressione di illeciti perpetrati attraverso la stampa 3d e, dall'altro, una chiara distinzione tra utilizzi commerciali e non commerciali, così come tra servizi B2B e B2C.
L'approfondimento di tali aspetti è importante al fine di riflettere sugli sviluppi (non solo nazionali) della disciplina applicabile ai processi di stampa 3d, intravedendo soluzioni che bilancino la tutela dei titolari dei diritti e le istanze di accesso della collettività, senza tuttavia limitare gli incentivi utili a creatività ed innovazione. Le risposte a tale esigenza, così come avvenuto con i problemi legati alla tutela del diritto d'autore nella società dell'informazione, potrebbero consistere sia in un irrigidimento dei meccanismi di protezione sia in un rinnovamento dei modelli di creazione e sfruttamento dei beni immateriali, nonché dei modelli di *business* dei titolari dei diritti.
Dal primo punto di vista, sono già in uso misure tecnologiche di protezione applicate ai *design files* o alle stesse stampanti 3d, la cui elusione comporta sanzioni, almeno dal

[82] Per un approfondimento della disciplina cfr. in dottrina G. Guglielmetti, *Pezzi di ricambio, interconnessioni e prodotti modulari nella nuova disciplina dei modelli*, in *Riv. Dir. Ind.*, 2002, I, p. 5 ss.

punto di vista della disciplina del diritto d'autore[83]. Queste tecniche, associate a contratti (standard) che prevedono ulteriori restrizioni a quelle consentite dall'esclusiva, se non adeguatamente bilanciate potrebbero comportare rischi di *over-protection* e dunque di frustrazione della filosofia che ha portato allo sviluppo della stampa 3d e dei *Fab Lab*.
L'analisi condotta nel paragrafo precedente, inoltre, mostra come una delle possibili modalità di repressione degli illeciti si basa sulla interpretazione che tende a responsabilizzare maggiormente gli intermediari che forniscono i mezzi per la violazione dei diritti di proprietà intellettuale di volta in volta coinvolti. Ciò potrebbe porre a rischio l'operatività dei *Fab Lab*, che, concepiti per dar vita a logiche comunitarie ed aperte, potrebbero spesso non essere preparati ad evitare tali rischi. A tal proposito sarebbe opportuna, prima di ogni altra misura, una piena consapevolezza ed educazione degli utenti dei *Fab Lab* sulle responsabilità che incontrano.
Ancora si discute sulla possibile implementazione di tecniche di protezione differenti dall'esclusiva e modellate sullo schema dei diritti ad equo compenso, le quali risolvono il problema della remunerazione dei titolari dei diritti nei casi in cui la repressione degli illeciti sia particolarmente difficoltosa[84] e ad un rinnovato ruolo della gestione collettiva dei diritti come efficace modalità di negoziazione dei diritti e monitoraggio del loro rispetto, alternativa o concorrente con la gestione individuale[85].
Un altro tema che emerge dall'analisi effettuata è la divergenza sistematica che sussiste nelle limitazioni ai vari diritti di proprietà intellettuale laddove l'uso sia non commerciale. Se per brevetti, disegni e modelli e marchi, infatti, possono essere riconosciute limitazioni ai diritti esclusivi quando l'uso dei beni immateriali avvenga per finalità non commerciali, così non è per il diritto d'autore le cui eccezioni e limitazioni non sono ritenute applicabili alla stampa 3d né possono essere interpretate estensivamente. È, pertanto, in discussione l'adeguamento della disciplina sulla copia privata o dell'eccezione di reprografia anche a questo ambito, se non altro per fini di certezza legislativa circa le condotte dei consumatori che attraverso la stampa 3d effettuino copie per un uso personale. Eventuali innovazioni legislative dovranno, tuttavia, tenere in considerazione i diversi interessi dei vari soggetti coinvolti e bilanciarne le varie istanze. Secondo la dottrina che si è occupata della questione, inoltre, allo stato soluzioni monolitiche che regolino trasversalmente tutti i diritti di proprietà intellettuale coinvolti nella stampa 3d non sarebbero, tuttavia, da adottare data la complessità che, come si è cercato di descrivere, ancora domina la relativa catena del

[83] Cfr., in particolare, artt. 6 e 7 Direttiva 2001/29/CE del Parlamento europeo e del Consiglio, del 22 maggio 2001, sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella società dell'informazione e artt. 102-*quater* e 102-*quinques* l.d.a.

[84] Sul punto è stato tuttavia ritenuto che il pregiudizio per i titolari dei diritti non abbia raggiunto un'entità tale da giustificare simili interventi legislativi.

[85] *Cfr.* T. Maillard, *Impression 3D, gestion collective et contrats*, in *Propriétés Intellectuelles*, n. 57/2015, 384 ss.

valore[86]. Si ritiene, tuttavia, che, seppur con le dovute differenziazioni dovute alle diverse giustificazioni dei diritti considerati, nell'ottica dello sviluppo dei *Fab Lab* come realtà educative e collaborative, sarebbe auspicabile una chiara (e per quanto possibile omogenea) indicazione circa le utilizzazioni personali, o comunque non commerciali, delle varie opere e invenzioni.

Sotto un'altra prospettiva è, invece, auspicata una revisione dei modelli di *business* e di sfruttamento contrattuale da parte dei titolari dei diritti, affinché possa esser metabolizzato il fatto che la stampa 3d riduce drasticamente i costi (ed i rischi) dell'innovazione e della successiva commercializzazione[87]. È innegabile, infatti, come la stampa 3d sia in grado di aprire nuovi mercati per i titolari dei diritti di proprietà intellettuale e come possa ben essere sviluppata un'offerta legale dei file di stampa 3d, attraverso appositi accordi con piattaforme di distribuzione. Anche i titolari dei diritti che non vogliano adottare soluzioni *open* di condivisione delle proprie opere e dei propri trovati possono, infatti, sperimentare soluzioni in grado di valorizzare la creatività degli utilizzatori dei propri contenuti, consentendo, ad esempio, di modificare e personalizzare i modelli licenziati. In questo caso, oggetto di discussione potrà poi presumibilmente essere la natura della controprestazione, ovvero l'appropriazione da parte del licenziante delle elaborazioni del licenziatario. È stata, infatti, già avvertita la prassi di alcune piattaforme di distribuzione di *file* per la stampa 3d prevedano nelle condizioni generali di contratto l'appropriazione delle elaborazioni creative dei propri utenti[88].

Da un altro punto di vista, una soluzione per consentire un'offerta legale dei contenuti è lo sviluppo di standard tecnologici che consentano alle macchine di leggere automaticamente il contenuto dei contratti di licenza (come già sono stati sviluppati per le licenze *creative commons*[89]) al fine di evitare indebite appropriazioni e delegando, per così dire, alle "macchine" le scelte etiche prima appannaggio esclusivo degli esseri umani.

Come è stato più volte rimarcato, nell'ambito della stampa 3d, ove lo sviluppo della disciplina normativa è ancora *in fieri*, peculiare è, infatti, il ruolo del contratto come strumento capace di assorbire e metabolizzare i fenomeni economici e sociali in mutamento e di fungere come motore dell'innovazione giuridica[90].

Tramite l'autonomia contrattuale sono, infatti, regolati i rapporti tra titolari dei diritti esclusivi ed utilizzatori che, come evidenziato si distribuiscono in uno spettro che va dall'aggiunta alla protezione tramite esclusiva di una ulteriore protezione contrattuale volta disciplinare i diritti e gli obblighi dei soggetti destinatari di beni e servizi in modo che questi

[86] *Cfr.* T. Maillard, *Impression 3D, gestion collective et contrats*, in *Propriétés Intellectuelles*, *cit., passim*.

[87] R.M. Ballardini, M. Norrgard, and T. Minssen, *Enforcing patents in the era of 3D printing*, cit., 185.

[88] Si veda, in particolare, lo studio condotto da J. Moilanen, A. Daly, R. Lobato, D. Allen, *Cultures of Sharing in 3D printing: what can we learn from the licence choices of Thingiverse users?*, cit., *passim*.

[89] https://creativecommons.org/licenses/?lang=it.

[90] In tema cfr. anche F. Galgano, *La globalizzazione nello specchio del diritto*, Il Mulino, Bologna, 2004.

non possano effettuare imitazioni o copie non autorizzate dei prodotti originali fino a consentire la riproduzione e la diffusione degli oggetti protetti da privativa attraverso modelli contrattuali "open" (come licenze Creative Commons o altre licenze FLOSS).

6. Osservazioni conclusive

Questo contributo si è concentrato sui profili di proprietà intellettuale emergenti nei *Fab Lab*, officine comunitarie e collaborative che offrono agli utenti (inventori della domenica, studenti o anche artigiani o piccole e medie imprese) strutture, macchinari e servizi di stampa 3d.
Questi spazi si pongono al crocevia tra innovazione aperta ed economia collaborativa, avendo un potenziale enorme per lo sviluppo cittadino e delle comunità locali.
Il filo rosso della ricerca da cui si sono tratte le mosse ha cercato di comprendere e illustrare come la crescita di queste realtà possa conciliarsi con il rispetto della vigente disciplina nazionale e sovranazionale della proprietà intellettuale, messa alla prova dall'avvento della stampa 3d. A livello nazionale e sovranazionale sono state già avanzate proposte interpretative e di modifica della disciplina dei diritti di proprietà intellettuale nel contesto della stampa 3d. Costruendo su questi tentativi, il presente contributo ha posto in evidenza i profili critici proponendo letture utili a "districare" i profili di titolarità e sussistenza dei diritti di proprietà intellettuale di opere dell'ingegno e invenzioni poste in essere nei *Fab Lab*, così come le possibili violazioni di diritti di proprietà intellettuale altrui. Sono risultate evidenti, anche attraverso la comparazione con soluzioni adottate in altri ordinamenti, quelle che sono le principali istanze interpretative ed applicative (nazionale e sovranazionale) nell'ottica dello sviluppo di simili realtà collaborative, le quali potrebbero partecipare all'interesse pubblico di sviluppo economico delle comunità locali. Infine, si è cercato di porre in evidenza, come sia una maggior educazione degli utenti dei *Fab Lab* sia lo sviluppo di strumenti di autoregolazione nella gestione dei rapporti tra *Fab Lab* e i vari soggetti coinvolti svolgano un ruolo programmatico ed operativo chiave al fine di consentire effettivamente la finalità di "*evolving inventory of core capabilities to make (almost) anything, allowing people and projects to be shared*".

Articles

Veicoli autonomi, sinistri stradali e nuovi modelli di responsabilità civile*

Antonio Davola**

Abstract

Lo sviluppo e la diffusione di sistemi di guida dotati di un (sempre) crescente livello di autonomia pone all'attenzione dell'interprete e del legislatore la necessità di interrogarsi sull'adeguatezza delle regole giuridiche esistenti a disciplinare i nuovi fenomeni tecnologici. In tale quadro, una sfida di particolare complessità giuridica è rappresentata dalla commercializzazione dei c.d. veicoli autonomi i quali, suscettibili di sostituirsi totalmente al guidatore "organico" tradizionale, mostrano con particolare evidenza come l'attuale normativa in materia di responsabilità civile non sia in grado di offrire risposte soddisfacenti al fine di assicurare l'adeguata allocazione dell'onere risarcitorio. Il presente contributo si propone di offrire una possibile soluzione a tale problematica, analizzando i principali nodi concettuali posti dalla diffusione dei veicoli autonomi e proponendo un modello di sistema normativo al fine disciplinare la responsabilità civile per sinistri stradali causati da *driverless car*.

Keywords

Regolazione – Veicoli Autonomi – Driverless Car– Sinistri – Responsabilità Civile – Risarcimento Del Danno

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* Il presente articolo sviluppa ed approfondisce – proponendo una soluzione innovativa rispetto al sistema della responsabilità civile per sinistri causati da veicoli autonomi – i temi trattati nell'elaborato A. Davola, R. Pardolesi, In viaggio col robot: verso nuovi orizzonti della r.c. auto ("driverless")?, in Danno e Responsabilità, 5/2017, 616-629, ed è confluito dopo l'accettazione per la pubblicazione su Opinio Juris in Comparatione, negli Studi in Onore di Roberto Pardolesi, a cura di F. Di Ciommo, V. Troiano, La Tribuna, Novembre 2018.

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1. Una breve premessa

Nell'estate 2017 ho avuto l'occasione di lavorare – a quattro mani con Roberto Pardolesi – sul tema dei veicoli autonomi, ponendo le basi per una riflessione che si sarebbe poi concretizzata nell'articolo "*In viaggio col robot: verso nuovi orizzonti della r.c. auto (driverless)?*"[1]. Il contributo indagava, ponendosi in una prospettiva di dialogo con il dibattito a livello europeo e globale, sul tema – le problematiche connesse all'introduzione delle c.d. *driverless car*

[1] Pubblicato in *Danno e Responsabilità* 5/2017, 616, 629.

(o, altrimenti definite, *Highly Autonomous Vehicles*, HAVs) sotto il profilo delle incertezze che tali prodotti sono suscettibili di determinare nel sistema della responsabilità civile. In tale ottica si evidenziava, da una parte, come i postulati tradizionali della responsabilità connessa alla circolazione di autoveicoli fossero inidonei a rispondere alle caratteristiche delle *automated car* e, dall'altra, si sviluppava un'analisi in ottica comparatistica dei risultati fino al momento raggiunti nei diversi ordinamenti europei impegnati nella definizione di regole atte a disciplinare il fenomeno (con particolare attenzione alla normativa inglese e tedesca), evidenziandone in ultima analisi una pari inadeguatezza, essenzialmente dovuta all'accettazione esclusiva di modelli basati su obblighi di *hand-over* in capo al guidatore[2].

L'ultima parte del lavoro racchiudeva, infine, quella definita al tempo una "modesta proposta" per disciplinare il regime di responsabilità per incidenti stradali causati da veicoli autonomi: si ipotizzava, in particolare, l'introduzione di un regime di responsabilità oggettiva limitata, a carico delle imprese produttrici di *driverless car* sull'esempio di quanto avvenuto nel settore della responsabilità della struttura sanitaria per infezioni nosocomiali nell'ordinamento francese e coerentemente con il modello delineato dalla Legge del 4 marzo 2002, n. 303 (*Loi Kouchner*); un tale sistema – mediante l'individuazione di *standard* di condotta predisposti *ex ante* e destinati ad operare quale elemento di attribuzione della responsabilità (oggettiva) connessa al mancato rispetto delle regole operative previste per l'attività condotta, ed il contestuale affiancamento di un fondo pubblico in via surrogata in caso di rispetto del protocollo operativo da parte dell'impresa – si presentava a nostro avviso come la soluzione più adeguata per bilanciare i configgenti interessi alla base della diffusione di una tecnologia dall'indubbio impatto economico e sociale. Il contributo, chiudendosi con tale suggestione, non si addentrava tuttavia nella formulazione esplicita di un modello, subordinandone la definizione al proseguimento di una necessaria e futura riflessione.

Il presente lavoro si propone di concludere l'elaborazione che con quell'articolo era iniziata, pervenendo alla definizione di un modello concreto da sottoporre al dibattito economico-giuridico: raccogliendo ed elaborando gli spunti presenti nell'articolo del 2017, è mio desiderio riflettere sulla fondatezza degli assunti sviluppati in tale occasione per trasporne i fondamenti teoretici in un modello effettivo di regolamentazione nel tentativo di proseguire nell'analisi di una tecnologia suscettibile di incidere in maniera essenziale sullo sviluppo futuro della società ma che al contempo continua a presentare un'irrisolta necessità di bilanciamento tra l'interesse a incentivare l'investimento in *R&D* nel settore della guida autonoma e la necessità di garantire la massima sicurezza nell'utilizzo di tali prodotti.

[2] Cfr. C. Gold, D. Damböck, L. Lorenz, K. Bengler, *Take over!' How long does it take to get the driver back into the loop?*, in *Proceedings of the Human Factors and Ergonomics Society 57th Annual Meeting*, 2013, http://journals.sagepub.com/doi/pdf/10.1177/1541931213571433; P. Morgan, C. Alford, G. Parkhurst *Handover issues in autonomous driving: A literature review. Project Report*. University of the West of England, Bristol, 2016, consultabile al link: http://eprints.uwe.ac.uk/29167.

2. Le coordinate concettuali del modello

Nel delineare le caratteristiche di un sistema dispositivo riconducibile all'area della responsabilità civile, idoneo a regolare le conseguenze di possibili eventi lesivi derivanti dalla circolazione dei veicoli *driverless*, il primo elemento da considerare è certamente la profonda incertezza che permea lo sviluppo tecnologico e, conseguentemente, le caratteristiche che tale tecnologia è suscettibile di assumere nel medio e nel lungo periodo: sebbene lo sviluppo dei mezzi di trasporto a guida autonoma stia, infatti, vivendo un periodo di rapida crescita[3], recenti avvenimenti hanno messo in dubbio la piena affidabilità e il grado di autonomia attualmente raggiunto da tali veicoli[4], tanto da spingere alcune realtà statali a porne in dubbio la commerciabilità e a sospendere i relativi test su strada[5].
Nonostante queste "sbavature" resta, invero, indiscutibile come la prospettiva di vedere i veicoli *driverless* a breve sul mercato acquisisca sempre maggiore consistenza, supportata dal crescente ammontare di evidenza scientifica relativa all'elevato livello di sicurezza che gli attuali prodotti possono garantire[6].
A fronte, tuttavia, della necessità di confrontarsi con una tecnologia ancora – almeno in parte – mutevole nelle sue caratteristiche, è opportuno e necessario operare delle scelte speculative di fondo che possano guidare la definizione di un sistema coerente con quella che si ritiene essere un'immagine verosimile delle dinamiche future. In tal senso è necessario evidenziare, in prima approssimazione, come la definizione di un modello di responsabilità civile da circolazione di veicoli autonomi non possa prescindere, per sua stessa

[3] Se nel 2007, agli albori della prima *DARPA Urban Challenge*, soltanto 11 università avevano presentato dei progetti di veicolo *driverless* qualificati per partecipare alla gara finale – dei quali solamente 6 erano giunti al termine del tracciato predisposto per l'evento – oggi i test su strada di questi prodotti si sono moltiplicati esponenzialmente, e (solo) in California vi sono attualmente 39 imprese impegnate nello sviluppo di veicoli automatizzati. V. S. Shead, *There are now 39 companies testing self-driving cars on Californian roads*, in *Business Insider,* 1 settembre 2017, http://www.businessinsider.com/dozens-of-companies-testing-self-driving-cars-on-californian-roads-2017-9?r=UK&IR=T; D. Silver, *California DMV Autonomous Vehicle List*, in *Medium,* 5 settembre 2017, https://medium.com/self-driving-cars/california-dmv-autonomous-vehicle-list-1e38be0fcd0b.

[4] Tali posizioni risultano acuite a seguito dei recenti fatti di cronaca relativi ad incidenti causati da veicoli autonomi: v. ad esempio D. Wakabayashi, *Self-Driving Uber Car Kills Pedestrian in Arizona, Where Robots Roam*, in *New York Times,* 19 marzo 2018, https://www.nytimes.com/2018/03/19/technology/uber-driverless-fatality.html; D. Yadron, D. Tynan, *Tesla driver dies in first fatal crash while using autopilot mode*, in *The Guardian,* 1 luglio 2016, https://www.theguardian.com/technology/2016/jun/30/tesla-autopilot-death-self-driving-car-elon-musk; D. Shepardson, *Tesla hits parked California police vehicle; driver blames 'Autopilot'*, in *Reuters,* 29 maggio 2018, https://www.reuters.com/article/us-tesla-autopilot/tesla-hits-parked-california-police-vehicle-driver-blames-autopilot-idUSKCN1IU2SZ.

[5] Cfr. D. Schwartz, *Arizona governor suspends Uber's ability to test self-driving cars*, in *Reuters,* 27 marzo 2018, https://www.reuters.com/article/us-autos-selfdriving-uber/arizona-governor-suspends-ubers-ability-to-test-self-driving-cars-idUSKBN1H303K.

[6] Cfr. Am. Ass'n for Justice, *Driven to Safety: Robot Cars and the Future of Liability* 34-35, 2017, consultabile al link https://www.justice.org/sites/default/files/Driven%20to%20Safety%202017%20Online.pdf.

natura, dall'idea che automobili completamente indipendenti dalla presenza del guidatore siano destinate, prima o poi, ad affermarsi sul mercato[7].
Di tale elemento sembrano aver preso coscienza sia le singole realtà nazionali[8], sia il legislatore comunitario, il quale ha già posto le basi per un percorso di ripensamento e revisione delle principali normative in vigore nell'Unione (*in primis*, la Direttiva sulla responsabilità da prodotto difettoso)[9] in conseguenza dell'affermarsi delle tecnologie connesse al fenomeno dell'intelligenza artificiale[10].
Se, da una parte, è, dunque, ragionevole operare una stima positiva di massima circa la futura presenza di veicoli autonomi sul mercato, dall'altra è altresì possibile assumere come verosimile una caratteristica essenziale che tali prodotti dovranno presentare al fine di consentirne la commercializzazione, ossia un grado di sicurezza (almeno) pari o superiore a quello delle loro controparti "organiche": non sorprende, infatti, l'idea che un sistema di guida affidato ad un *software,* strutturalmente immune dalle principali cause di fortuito stradale (stanchezza, disattenzione, ebbrezza), sia conseguentemente in grado di eliminare la possibilità del verificarsi di incidenti dovuti a tali circostanze[11]. Non solo: la presenza a bordo dei veicoli di avanzati strumenti di sensoristica appare sufficiente a garantire che il comportamento del mezzo – e i tempi di reazione dello stesso in caso di evento imprevisto – sia per sua natura più efficiente di quello umano, consentendo al prodotto di prevedere con maggiore anticipo il verificarsi di una situazione di rischio[12]. Di conseguenza, è ragionevole attendersi che l'introduzione dei veicoli automatizzati sul mercato porti ad una riduzione del tasso di sinistri stradali e che, conseguentemente, sia un evento auspicabile in termini di sicurezza della collettività[13].

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[7] Cfr. *ex multis* S.H. Duffy, J.P. Hopkins, *Sit, Stay, Drive: The Future of Autonomous Car Liability*, in 16 *Singapore Management University Sci.&Tech. Law Review,* 2013, 453, 454-55.

[8] In occasione dell'articolo A. Davola, R. Pardolesi, *In viaggio col robot: verso nuovi orizzonti della r.c. auto ("driverless")?,* in *Danno e Responsabilità,* 5/2017, 616-629, furono esaminate, ad esempio, le normative in via di approvazione in Inghilterra e in Germania: in particolare, si è condotta un'analisi delle caratteristiche del *Vehicle Technology and Aviation Bill 2016-17* (http://services.parliament.uk/bills/2016-17/vehicletechnologyandaviation.html) e della nuova *Straßenverkehrgesetz, StVG* (http://dipbt.bundestag.de/extrakt/ba/WP18/795/79579.html). Si veda, inoltre, J. De Bruyne, J.Tanghe, *Liability for Damage Caused by Autonomous Vehicles: a Belgian Perspective*, in *Journal of European Tort Law*, Vol. 8, n. 3, 2017, 324-371.

[9] Direttiva 85/374/CEE del Consiglio del 25 luglio 1985 relativa al *ravvicinamento delle disposizioni legislative, regolamentari ed amministrative degli Stati Membri in materia di responsabilità per danno da prodotti difettosi*.

[10] V., *ex multis*, la recente nomina da parte della Commissione europea di un *expert group* al fine di revisionare l'attuale normativa in materia di responsabilità civile e di responsabilità da prodotto difettoso in conformità alle caratteristiche delle nuove tecnologie basate sull'utilizzo di intelligenze artificiali: https://ec.europa.eu/digital-single-market/high-level-group-artificial-intelligence.

[11] Le quali determinano, secondo le stime condotte in occasione del Dekra *Road Safety Report* 2017 (disponibile al link http://www.dekra-vision-zero.com/downloads/dekra-roadsafety-report-2017-engl.pdf) circa il 90% degli incidenti che si verificano ogni anno.

[12] V. J. Arbib, T. Seba, *Rethinking Transportation* 2020-2030, consultabile al link https://static1.squarespace.com/static/585c3439be65942f022bbf9b/t/591a2e4be6f2e1c13df930c5/1494888038959/RethinkX+Report_051517.pdf.

[13] In termini generali, sui benefici derivanti dall'introduzione dei veicoli autonomi in termini di "risparmio sociale", v. D.J. Fagnant, K. Kockelman, *Preparing a nation for autonomous vehicles: opportunities, barriers and policy recommenda-*

Se, dunque, i primi due elementi menzionati (diffusione, presto o tardi, dei veicoli autonomi sul mercato e riduzione del numero di incidenti a seguito di tale fenomeno) hanno carattere, almeno in parte, necessariamente speculativo, in occasione del contributo scritto con Roberto Pardolesi individuammo un terzo elemento a carattere prescrittivo che a nostro avviso avrebbe dovuto caratterizzare il modello di responsabilità civile, ossia la sua riferibilità a (ed idoneità a disciplinare i) veicoli a carattere *totalmente* automatizzato, corrispondenti ai livelli 4 e 5 della classificazione operata dalla *National Highway Traffic Safety Authority* statunitense (NHTSA)[14]. Come noto, l'NHTSA, riconoscendo la necessaria modularità delle innovazioni intervenute nel settore *automotive*, ha operato una classificazione dei veicoli integranti sistemi di ausilio e sostituzione alla guida in cinque livelli essenziali: il Livello 0 ricomprende la maggior parte dei veicoli attualmente in commercio, nei quali il guidatore umano detiene il pieno controllo del mezzo in tutte le condizioni, mentre il Livello 5 individua il massimo grado di sofisticazione delle *driverless car*, facendo riferimento a prodotti in grado di operare senza alcun intervento da parte del guidatore (ormai passeggero). Il Livello 4, invece, identifica un grado di automazione avanzata, ma non completa: i veicoli appartenenti a questa categoria, pur essendo progettati per svolgere tutte le funzioni di guida, possono compiere tale attività soltanto all'interno del proprio dominio operativo, dopo aver operato un'analisi del percorso ed averne accertato l'idoneità; in pratica, i veicoli di Livello 4 si comporteranno esattamente come quelli di Livello 5, ma non saranno in grado di operare in qualsiasi scenario o condizione ambientale, dovendo conseguentemente svolgere una valutazione di fattibilità *ex ante* del percorso[15].
La scelta di sviluppare un modello riferito agli ultimi due livelli della classificazione è dovuta a due ragioni essenziali: innanzitutto, si pone in linea di continuità con le riflessioni condotte con quella parte della dottrina che ha evidenziato come – in presenza di veicoli che già adottano delle forme di ausilio alla guida dotate di diversi gradi di pervasività[16] – l'individuazione di un determinato livello (parziale) di automazione a partire dal quale introdurre un sistema di regole totalmente innovativo non sarebbe solamente una scelta incerta, ma, altresì, sostanzialmente arbitraria; conseguentemente, si è proposto di introdurre nuove regole solo in presenza di sistemi di guida totalmente automatizzati, ipotizzando – con riferimento al periodo di prima diffusione di tale tecnologia – l'opportunità del cam-

tions, in *Transportation Research Part A: Policy and Practice*, 77, 2015, 167 ss.

[14] V. P. Morgan, C. Alford, G. Parkhurst, *Handover Issues in Autonomous Driving: A Literature Review,* in *U. of the West of Eng., Bristol*, 2016, http://eprints.uwe.ac.uk/29167/1/Venturer_WP5.2Lit%20ReviewHandover.pdf. Per un'analisi dei caratteri della NHTSA, dei poteri attribuiti all'autorità e dei primi approcci assunti in materia di regolamentazione del settore *automotive*, cfr. altresì J.L. Mashaw, D.L. Harfst, From Command and Control to Collaboration and Deference: The Transformation of Auto Safety Regulation, in 34 *Yale Journal on Regulation* 167, 2017.

[15] D.A. Riehl, *Car Minus Driver. Autonomous Vehicle Regulation, Liability and Policy*, in *73-NOV Bench. & B. Minn*. 25, 2016.

[16] Si pensi, ad esempio, alle tecnologie di *Adaptive Cruise Control (ACC)* o ai *Predictive Efficiency Assistant* (PSA) già disponibili sulle vetture in commercio.

bio di regime solo al raggiungimento di una determinata percentuale di veicoli totalmente automatici sul mercato. Ciò al fine, da un lato, di evitare l'avvicendarsi di molteplici regimi normativi (con conseguente sovraccarico di attività amministrativa e di incertezza per gli attori in gioco) e, dall'altro, di fornire un criterio univoco per individuare il momento in cui sarà necessario passare dalla regolazione tradizionale a quella *driverless-based*[17].
In secondo luogo, giova rilevare ancora una volta come, sulla base di una sensibilità condivisa da parte degli esperti del settore[18], le *driverless car* sembrano inesorabilmente destinate ad entrare nel mercato: in conseguenza di ciò, appare opportuno e desiderabile concentrarsi "con anticipo" su quelli che saranno i possibili scenari normativi di riferimento, al fine di agevolare l'introduzione della tecnologia non appena questa avrà raggiunto un livello di affidabilità sufficiente alla commercializzazione; oltretutto, porre l'attenzione sui veicoli completamente autonomi – invece che lanciarsi in una speculazione circa i diversi livelli intermedi che potranno essere raggiunti dall'industria – consente di operare delle riflessioni anche sulla base di un concetto teorico di veicolo automatizzato prescindendo dalla verifica delle specifiche caratteristiche di ogni modello (cosa che invece sarebbe necessaria laddove ci si concentrasse sulla regolamentazione dei veicoli parzialmente automatizzati).

3. L'individuazione del "responsabile" più adeguato in caso di sinistro causato da veicoli autonomi

Una volta rimarcate le caratteristiche essenziali che ci hanno guidato nella definizione del modello di responsabilità, è opportuno richiamare brevemente la riflessione che mi condusse ad individuare nella figura del produttore il principale soggetto intorno al quale strutturare il sistema di obblighi risarcitori.
Il dibattito – accademico e non – in materia di veicoli autonomi (nonché gli sparuti interventi normativi atti a disciplinare il fenomeno)[19] si è concentrato su quattro figure

[17] K. Abraham, R. Rabin, *Automated Vehicles and Manufacturer Responsibility for Accidents: A New Legal Regime for a New Era*, in *Virginia Law Review*, Vol. 105, 2019; disponibile anche su SSRN: https://ssrn.com/abstract=3159525 or http://dx.doi.org/10.2139/ssrn.3159525. La numerazione delle pagine nelle successive note si riferisce all'articolo nella versione disponibile su SSRN.

[18] Cfr. J. Walker, *The Self-Driving Car Timeline – Predictions from the Top 11 Global Automakers*, in *Techmergence*, 29 Maggio 2018, consultabile al link: https://www.techemergence.com/self-driving-car-timeline-themselves-top-11-automakers/.

[19] G.E. Marchant, R.A. Lindor, *The Coming Collision Between Autonomous Vehicles And The Liability System*, in *Santa Clara Law Review*, 52, 2012. Cfr. anche i due progetti di legge elaborati in Inghilterra e in Germania menzionati *supra*, nota 8. In dottrina, v. S. Gless, E. Silverman, T. Weigend, *If Robots Cause Harm, Who Is to Blame: Self-Driving Cars and Criminal Liability*, in 19 *New Criminal Law Review*, 2016, 412; M. F. Lohmann, *Liability Issues concerning Self-Driving Vehicles,* in 7 *European Journal of Risk Regulation*, 2016, 335; J.R. Zohn, *When Robots Attack: How Should the Law Handle Self-Driving Cars That Cause Damages*, in 2 *University of Illinois Journal of Law,* Technology&Policy, 2015, 461; K. Colonna,

prototipiche, individuate quali potenziali destinatari degli oneri risarcitori causati dalla circolazione di *driverless car*: il guidatore del veicolo, il proprietario dello stesso, un sistema di supporto pubblico (ad esempio un fondo) e il produttore del mezzo. Naturalmente, bisogna sempre tenere presente come ognuno di questi soggetti possa “dirottare” il rischio su terzi attraverso la stipula di un contratto assicurativo; ciononostante, la presenza di un sistema di assicurazione (e lo sviluppo di quello attuale) a seguito dell’affermarsi delle *autonomous car* non può certamente darsi per scontata: in presenza di determinati fattori – *in primis*, un livello di sicurezza tale da ridurre significativamente il rischio di incidenti – non è, infatti, da escludersi l’emersione di regimi alternativi, quali un sistema di autoassicurazione ovvero (specialmente qualora il settore *automotive* sia oggetto di forte concentrazione) un fondo di risarcimento interno.[20] Di conseguenza, è opportuno considerare l’assicurazione quale un agente “neutrale”, suscettibile di operare a vantaggio di ognuno dei potenziali responsabili qualora l’evoluzione del mercato ne determini l’opportunità, ovvero destinata ad estinguersi in presenza di soluzioni più efficienti dal punto di vista economico.

3.1. Il Guidatore

Per quanto riguarda il ruolo del guidatore (supponendo che di “guidatore” si possa ancora parlare, in un sistema dove il veicolo è pienamente indipendente da alcuna attività di direzione), costui è – nell’attuale normativa nazionale ma, altresì, nella maggior parte dei sistemi giuridici vigenti – il principale responsabile per incidenti stradali avvenuti durante la circolazione del mezzo. La ragione dietro tale regola è intuitiva: pur contemplandosi variazioni in materia di onere della prova in merito all’allocazione di responsabilità in presenza di particolari condizioni (si pensi alla responsabilità concorrente di un terzo, ovvero al verificarsi di un guasto al veicolo), è generalmente accettato che il soggetto che detiene il pieno controllo del mezzo sia, in via primaria, responsabile per le azioni compiute alla guida dello stesso.

Appare di tutta evidenza come, tuttavia, una simile regola si riveli – in presenza di veicoli totalmente autonomi – profondamente minata nella propria *ratio* funzionale. Innanzitutto, non si può escludere che tali veicoli siano in grado di circolare anche senza alcun soggetto a bordo, (magari “recuperando” di volta in volta i propri passeggeri dove indicato): in tali casi, sarà necessario predisporre una regola che possa operare anche laddove nessuno sia nel veicolo al momento dell’incidente. In secondo luogo, l’attuale sistema di responsabilità del guidatore si basa sulla formulazione di un giudizio di riprovevolezza a suo carico, che

Autonomous Cars and Tort Liability, in 4 *Case Western Reserve Journal of Law, Technology and the Internet*, 2012, 81; B.W. Smith, *Automated Driving and Product Liability*, in 1 *Michigan State Law Review*, 2017, 1.

[20] In merito alle prospettive di sviluppo dei sistemi assicurativi in seguito all’affermarsi di tecnologie connesse alla robotica cfr. C. Perlingieri, *L’incidenza dell’utilizzazione della tecnologia robotica nei rapporti civilistici*, in *Rassegna di diritto civile*, 2015, 1241.

non può prescindere dall'individuazione *a priori* di doveri ai quali si presuppone il conducente debba attenersi nello svolgimento dell'attività di guida; è, dunque, chiaro come una simile operazione sia *de facto* inoperabile in uno scenario nel quale la circolazione di veicoli completamente automatizzati è la normalità. Lasciandosi da parte alcune ipotesi specifiche (qualora, ad esempio, il guidatore non si occupi di scaricare un aggiornamento necessario affinché il *software* del veicolo possa funzionare adeguatamente), il guidatore non avrà alcun ruolo attivo nel controllo del mezzo; di conseguenza, sarà difficoltoso persino ipotizzare il contenuto dei suddetti obblighi. Oltretutto, in assenza di una qualsiasi attività di guida, non si comprende come la regola tradizionale possa consentire al sistema di responsabilità civile di svolgere, in questo settore, la funzione deterrente che – al fianco di quella risarcitoria[21] – le è propria: l'attuale formula imporrebbe il costo di un eventuale incidente su un soggetto che non è incentivato (o in grado) di ridurre la probabilità circa il verificarsi dell'evento[22] ed è privo delle competenze specifiche necessarie per operare un miglioramento delle *performance* del veicolo (agendo, ad esempio, sulla configurazione del *software* dello stesso). Si potrebbe, al più, evidenziare come il guidatore rivesta un ruolo attivo in termini di controllo della frequenza di rischio relativo all'attività – potendo decidere se avvalersi del veicolo autonomo per spostarsi o se, piuttosto, di un altro mezzo; cionondimeno, non sembra che una simile posizione sia sufficiente a giustificare l'imposizione dell'obbligo risarcitorio a suo carico, anche considerando la "partecipazione" che altri soggetti (*in primis*, il produttore) hanno nel determinare il comportamento del veicolo. In ultima analisi, l'imposizione dell'obbligo risarcitorio sul guidatore (ove presente) non opererebbe alcun effetto in termine di promozione di condotte responsabili.

3.2. Il Proprietario del mezzo

Parimenti inadeguata – per motivi in gran parte simili a quelli richiamati per il guidatore – è l'opzione favorevole all'imposizione dell'obbligo risarcitorio in capo al proprietario del veicolo, specialmente considerando che tale figura – in quegli ordinamenti ove è presente un'espressa opzione in favore della sua responsabilità – è tradizionalmente deputata a svolgere un ruolo vicariale, qualora il conducente risulti per qualsivoglia ragione non responsabile, in virtù di una logica di *deep pocket*[23].

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[21] Cfr. *ex multis* P. Perlingeri, *Le funzioni della responsabilità civile,* in *Rass. dir. civ.,* 2011, 116; A. Di Majo, *Profili della responsabilità civile,* Torino, 2010; v. altresì V. Scalisi, *Illecito civile e responsabilità: fondamento e senso di una distinzione*, in *Rivista diritto civile*, 6, 2009; F.D. Busnelli, *Deterrenza, responsabilità civile, fatto illecito, danni punitivi*, *Europa e diritto privato,* 2009, 939 ss. e S. Rodotà, *Modelli e funzioni della responsabilità civile*, in *Rivista critica di diritto privato,* II, 3, 1984.

[22] G. Calabresi *The Cost of Accidents: A Legal and Economic Analysis,* Yale University Press, 1973; si veda, altresì, R. Cooter, U. Mattei, P. Monateri, R. Pardolesi, *Il mercato delle regole: analisi economica del diritto civile*, Il Mulino, ed. 2007 e la dottrina *ivi* menzionata.

[23] Cfr. le riflessioni operate da S. Rodotà nella sua *Introduzione* all'ed. 2015 di G. Calabresi, *Costo Degli Incidenti e Responsabilità Civile. Analisi Economico-Giuridica*, Giuffré, in particolare p. XXVI.

Innanzitutto, un simile sistema appare difficilmente replicabile in un contesto dove la responsabilità del guidatore sembra (sulla base delle considerazioni in precedenza formulate) destinata ad estinguersi in virtù dell'impossibilità di quest'ultimo di incidere sul comportamento dei veicoli autonomi; inoltre, vivendo il proprietario nella medesima condizione di impotenza nel controllo del mezzo, è arduo comprendere per quale motivo, venuta meno la responsabilità del guidatore, costui dovrebbe essere ritenuto in via principale responsabile per danni causati dal veicolo. A tale considerazione si aggiunge oltretutto una riflessione di carattere squisitamente sociologico, relativa allo sviluppo dei sistemi di *car-sharing* e agli impatti che simili servizi potrebbero avere, in futuro, sui paradigmi proprietari dei veicoli autonomi[24]: posto che il *car-sharing* presenta indubbie potenzialità in termini di riduzione dei costi sociali e ambientali connessi alla circolazione[25], un'opzione favorevole ad imporre la responsabilità per sinistro causato da *driverless car* in capo al proprietario del mezzo avrebbe quale effetto primario l'allocazione della stessa, in via alternativa, sulla compagnia che pone a disposizione i veicoli (in caso di servizio gestito attraverso un privato), con un conseguente incremento dei costi per la provvigione di un servizio dal positivo impatto sociale ovvero sulla pubblica amministrazione che si occupi dell'acquisto e della messa a disposizione dei veicoli (in caso di servizio gestito in maniera pubblica): in tale ultimo caso, tuttavia, varranno le stesse considerazioni che ci apprestiamo a compiere con riferimento all'idea di porre – direttamente o indirettamente – l'onere risarcitorio in capo alla comunità.

3.3. Misure di sostegno pubblico

Come per i casi precedentemente esaminati, neppure una soluzione volta a porre il costo degli incidenti totalmente in capo ad un attore pubblico appare soddisfacente: sebbene, infatti, da una parte, una simile strategia avrebbe un effetto incentivante per la diffusione dei veicoli autonomi – disperdendo il rischio da risarcimento sul grande pubblico – è di tutta evidenza come, dall'altra parte, la conseguente de-responsabilizzazione degli attori presenti nel mercato *automotive* favorisca condotte di *free riding* di fronte al quale l'operatore pubblico si troverebbe (in assenza delle garanzie offerte dalle regole di responsabilità civile) disarmato.

3.4. Il Produttore del veicolo

Escludendosi, dunque, l'idoneità (o quantomeno la preferibilità) di opzioni normative atte ad imporre la responsabilità per incidenti provocati da veicoli autonomi sul guidatore, il proprietario, o sulla comunità, in virtù dei diversi elementi critici che ciascuna di queste

[24] R. Zakharenko, *Self-driving cars will change cities*, in *Regional Science and Urban Economics*, 61, 2016, 26-37.

[25] V. le ricerche empiriche condotte in J. Jung, Y. Koo, *Analyzing the Effects of Car Sharing Services on the Reduction of Greenhouse Gas (GHG) Emissions*, in *Sustainability* 2018, 10, 53; N.T. Fellows, D.E. Pitfield, *An economic and operational evaluation of urban car-sharing*, in *Transportation Research Part D: Transport and Environment*, vol. 5, iss. 1, 2000, 1-10.

soluzioni presenta, non sorprende come la riflessione condotta insieme a Roberto Pardolesi ci abbia portato ad individuare – insieme a vasta maggioranza degli studiosi che del tema si sono occupati[26] – nel produttore del veicolo il soggetto più adeguato a sopportare l'onere risarcitorio.

La ragione in favore di siffatta scelta è intuitiva nei suoi presupposti: il produttore di un veicolo è la figura meglio in grado di incidere sulle caratteristiche tecniche dello stesso, in quanto principale attore dietro lo sviluppo della *driverless car*; dovrebbe conseguentemente essere considerato responsabile qualora questa si comporti in modo anomalo, analogamente a quanto avviene per qualsiasi prodotto difettoso[27].

A queste considerazioni si sono tuttavia opposti con veemenza i principali operatori nel settore automobilistico, adducendo una pluralità di argomenti suscettibili – a loro avviso – di giustificare soluzioni ad essi più favorevoli.

In primo luogo, coloro che si sono schierati a favore dell'esclusione di forme di responsabilità a carico dei produttori di veicoli autonomi hanno evidenziato come una simile scelta avrebbe un impatto diretto sul costo complessivo sostenuto da questi, e conseguentemente potrebbe ridurre le disponibilità per investimenti in *Research & Development* con il risultato ultimo di ritardare l'introduzione di una tecnologia che – pur non raggiungendo un livello assoluto di sicurezza – contribuirebbe comunque a ridurre il tasso di incidenti; nella sua forma più radicale, l'adesione a tale orientamento propugna l'idea di una completa immunità a favore dei produttori per tutto ciò che concerne il cosiddetto "rischio da sviluppo", da giustificarsi sulla base del beneficio che una rapida commercializzazione delle *driverless car* comporterebbe per la società.

In secondo luogo, è stato altresì evidenziato come, spesso, l'attività di sviluppo e di implementazione del *software* di circolazione dei veicoli autonomi non sia condotta internamente dalle case produttrici, essendo, invece, delegata a terze parti con competenze specifiche in materia[28]. Di conseguenza, il produttore non sarebbe in verità in una posizione di pieno controllo sul ciclo di sviluppo del prodotto tale da giustificarne la responsabilità.

Sebbene entrambe le posizioni evidenzino profili meritevoli di attenzione, nessuna delle due sembra di fatto in grado di confutare pienamene l'idea che il produttore di un veicolo

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[26] V. M. Geistfield, *A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation*, in 105 *California Law Reveview*, 2018, 1611; J.M. Anderson, N. Kalra, K. D. Stanley, P. Sorensen, C. Samaras, O.A. Oluwatola, *Autonomous Vehicle Technology: A Guide for Policymakers,* 2014, 111 ss.; K. Graham, *Of Frightened Horses and Autonomous Vehicles: Tort Law and its Assimilation of Innovations*, in *Santa Clara Law Review,* vol. 52, iss.. 4, 2012, 1242 ss.; G. Marchant, R. Lindor, *The Coming Collision Between Autonomous Vehicles and the Liability System*, *ivi,* 1322 ss.; B.W. Smith, *Proximity-Driven Liability*, in *The Georgetown Law Journal,* Vol. 102, 2014, 1777, e la dottrina *ivi* menzionata.

[27] B.W. Smith, Proximity-Driven Liability, in *The Georgetown Law Journal,* Vol. 102, 2014, 1779.

[28] S. Wittenberg, *Automated Vehicles: Strict Products Liability, Negligence Liability and Proliferation,* in *Illinois Business Law Journal* (online), 2016, *https://publish.illinois.edu/illinoisblj/2016/01/07/automated-vehicles-strict-products-liability-negligence-liability-and-proliferation/.*

autonomo sia il soggetto più adeguato a corrispondere il risarcimento per eventuali malfunzionamenti del mezzo.

Per quanto riguarda il primo argomento, giova evidenziare come questo appaia viziato – nei suoi connotati essenziali – da una sorta di paradosso di circolarità, secondo il quale la migliore strategia per indurre i produttori ad investire nella ricerca sui veicoli autonomi (*id est* sull'affinamento delle misure di sicurezza che gli stessi implementano) sarebbe ridurne l'esposizione risarcitoria, tuttavia, di fatto, eliminando principale incentivo allo sviluppo di prodotti più sicuri[29].

Per quanto riguarda, invece, la tesi basata sulla potenziale esternalizzazione dello sviluppo del *software* di circolazione presso terze parti, non si vede come la responsabilità del produttore non possa considerarsi comunque fondata su un dovere di *culpa in eligendo* nella scelta dei collaboratori, nonché – prendendosi in considerazioni profili di dialettica processuale – in virtù di un interesse a facilitare la rapida soddisfazione dell'onere risarcitorio a vantaggio del danneggiato, considerando come il produttore sia colui che con maggiore facilità potrà eventualmente addurre e dimostrare la responsabilità – in via generale, subordinata ovvero concorrente – del soggetto incaricato dello sviluppo del *software*, ed eventualmente ricorrere nei suoi confronti o coinvolgerlo nel contenzioso.

Sebbene entrambi gli argomenti non siano, dunque, sufficienti a respingere l'idea della responsabilità del produttore quale soluzione preferibile, è opportuno osservare come da entrambi emerga un elemento significativo e difficilmente ignorabile in un'ottica di politica del diritto: imporre in via principale la responsabilità per sinistri causati da veicoli autonomi in capo alle case produttrici degli stessi costituisce un – seppur giustificabile – costo aggiuntivo a carico di queste, il quale deve essere in qualche maniera internalizzato: ciò implica un intrinseco rischio di riduzione degli investimenti nel (o di aumento di prezzo di vendita del) prodotto, con possibile impatto sul benessere generale.

Il tema non può, tuttavia, essere affrontato tenendo solamente presente la prospettiva dell'allocazione soggettiva dell'onere risarcitorio: altrettanto significativo – al fine di valutare quale assetto possa rivelarsi ottimale – è, infatti, analizzare le principali regole in base alle quali la responsabilità possa essere attribuita, e valutare se eventuali profili relativi all'onere probatorio possano nei fatti "alleggerire" il costo sostenuto dai produttori.

[29] Il tema è toccato, in via generale, in G. Calabresi, A. Klevorick, *Four Tests for Liability in Torts,* in 14 *Journal of Legal Studies,* 1985, 585, 622 ss.

4. I modi di attribuzione della responsabilità: responsabilità da prodotto difettoso e responsabilità oggettiva

Nel condurre un'analisi sulle possibili opzioni regolamentari al fine di disciplinare la responsabilità del produttore nel settore delle *autonomous car* – considerando l'aspirazione del modello di operare quale soluzione teoricamente applicabile a diversi sistemi giuridici – ho ritenuto opportuno fare primario riferimento ai due istituti maggiormente richiamati nel dibattito sul tema ossia, da una parte, le regole riferibili in via generale alla responsabilità da prodotto difettoso e, dall'altra, le soluzioni riconducibili ad una logica di *strict liability*, accostabile alla nostra responsabilità oggettiva. Una volta conclusa la disamina dei principali vantaggi e dei problemi che entrambe le soluzioni presentano, sarà possibile presentare una soluzione originale, che potremmo in prima istanza definire un modello a "responsabilità oggettiva limitata".

4.1. La responsabilità da prodotto difettoso

Il primo elemento a porsi in evidenza nel valutare l'idoneità delle regole in materia di responsabilità da prodotto difettoso a governare le sfide introdotte dai veicoli autonomi è la profonda eterogeneità che caratterizza tali regole nelle diverse giurisdizioni, imponendo, di conseguenza, valutazioni necessariamente legate all'ordinamento di riferimento. Cionondimeno, è possibile operare almeno una distinzione di massima tra la normativa di matrice nordamericana e quella eurounitaria: da una parte, infatti, la disciplina statunitense – sebbene priva di leggi federali in materia, ed essendo, dunque, sottoposta alla valutazione dei singoli Stati – è, in via generale, orientata al rispetto dei principi delineati dal c.d. *Third Restatement*[30]; dall'altra parte, invece, la disciplina UE offre un corpo di regole generali in materia di prodotti difettosi, destinate ad applicarsi sul territorio degli Stati Membri[31], e si presta, di conseguenza, ad un'analisi unitaria.

Per quanto riguarda la disciplina vigente negli Stati Uniti, al fine di configurare la responsabilità del produttore per un sinistro causato da un veicolo autonomo il danneggiato è tenuto a provare – fermi gli ulteriori specifici requisiti eventualmente previsti dalla normativa dello Stato di riferimento – l'esistenza di un difetto riferibile al *design* del prodotto o alla processo produttivo dello stesso[32]; ciò vuol dire che l'attore sarà tenuto a dimostrare

[30] The American Law Institute, *Restatement of the Law, (Third), Torts: Products Liability,* 1998.

[31] Council Directive 85/374/EEC of 25 July 1985 *on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31985L0374.*

[32] Il *Third Restatement* contempla, in verità, altresì la terza categoria del danno causato in presenza di un *warning defect*; a tale previsione, tuttavia, non sembra necessario prestare particolare attenzione nel caso di *driverless car*, posto che – facendosi qui riferimento a situazioni di completa autonomia del veicolo – in queste situazioni il guidatore, anche avvisato, non dovrebbe essere in grado di intervenire attivamente.

che il prodotto *per se* non è adatto all'attività per la quale era stato asseritamente venduto (*design defect*) o alternativamente che, pur essendo astrattamente idoneo a svolgere la propria funzione, lo *specifico prodotto* venduto è difettoso, e, di conseguenza, ha tenuto una condotta anomala (*manufacturing defect*).

Come osservato dalla dottrina d'oltreoceano[33], entrambe queste ipotesi suscitano, in caso di applicazione al settore dei veicoli autonomi, significative perplessità con riferimento alla possibilità per il danneggiato di soddisfare fruttuosamente tali oneri probatori. Innanzitutto, per quanto riguarda la prova relativa al *design defect*, questa richiede la dimostrazione dell'astratta configurabilità di un *design* alternativo e ragionevolmente implementabile, il quale avrebbe evitato il verificarsi dell'evento lesivo[34]: è d'immediata evidenza come una simile prova sia estremamente ardua da soddisfare per il danneggiato, privo di competenze specifiche in materia (anche laddove questo sia assistito da un esperto nella predisposizione della causa); offrire la dimostrazione dell'esistenza di un *design* alternativo – idoneo a prevenire il verificarsi dell'incidente, e conseguentemente preferibile rispetto a quello effettivamente utilizzato dal produttore – avendo riguardo ai sofisticati algoritmi che regolano il comportamento dei veicoli autonomi è certamente complesso, come osservato da quell'ampia parte della dottrina che ha evidenziato come il requisito del c.d. *Reasonable Alternative Design* sia destinato a diventare un elemento indeterminato ogniqualvolta si prenda in considerazione una tecnologia innovativa, sottraendosi conseguentemente alle regole tradizionali di analisi[35].

La possibilità alternativamente offerta al danneggiato – ossia la prova di un difetto di produzione – è altrettanto complessa da soddisfare, dal momento che costui è tenuto a dimostrare l'esistenza di un difetto nel prodotto, di una connessione di tipo causale tra questo e l'evento dannoso, nonché il fatto che il difetto non abbia natura sopravvenuta, essendo presente al momento dell'acquisto (nel nostro caso) del veicolo[36]. Ancora una volta, sembra che la complessità tecnologica propria del settore dei veicoli autonomi possa determinare significative difficoltà per il danneggiato nella dimostrazione, da una parte, della chiara esistenza di un difetto nel prodotto e, dall'altra, nel fornire la prova del fatto che *quel* particolare difetto (e l'errore da esso provocato) si sia rivelato determinante per il verificarsi dell'incidente.

[33] *Ex multis* cfr. S. Wittemberg, *Automated Vehicles*, 14.

[34] Nel determinare la sussistenza del requisite di ragionevolezza ai sensi del *Third Restatement* la corte può considerare, tra gli altri fattori, gli effetti sui costi di produzione, l'affidabilità, i costi di manutenzione ed estetici. Per un commento alla disposizione v. V. S. Wilkov, E. Arko, *No Alternative Design. An Often-Overlooked Defense to Product Liability Claims*, in *For the defense*, 2017.

[35] In termini generali, cfr. S. Chopra, L.F. White, *A Legal Theory for Autonomous Artificial Agents,* University of Michigan Press, 2011, 139.

[36] Con riferimento a questi requisiti, è invero presente un sistema di presunzioni, volto ad agevolare la posizione del danneggiato qualora non siano presenti altre potenziali cause per il verificarsi del sinistro.

Se, dunque, la normativa declinata secondo i principi del diritto americano non offre un paradigma soddisfacente, il panorama del diritto eurounitario non sembra offrire soluzioni migliori: non solo gli oneri probatori principali richiesti dalla normativa UE sono, essenzialmente, analoghi a quelli previsti per la prova del *manufacturing defect,* ma, in aggiunta a ciò, la disciplina interna degli Stati Membri si presenta profondamente eterogenea, declinando in diverse maniere l'interpretazione degli elementi necessari a provare la causalità tra difetto del prodotto ed evento lesivo[37]. Gli approcci nazionali oscillano, di fatto, tra posizioni vicine a forme di responsabilità semi-oggettiva – invertendo l'onere della prova e ponendolo in capo al produttore – e visioni favorevoli all'idea che l'onere probatorio debba incombere interamente sull'attore[38]: conscia di queste profonde differenze, in tempi recenti la Commissione europea ha avuto modo di evidenziare come lo stato dell'arte della normativa sulla responsabilità da prodotto difettoso stia creando ostacoli sostanziali per l'effettivo accesso al risarcimento da parte delle vittime di illeciti[39], ed ha altresì proceduto alla designazione di un gruppo di esperti incaricato di operare una proposta di revisione del relativo *corpus* normativo[40].

In ultima analisi, la normativa sulla responsabilità da prodotto difettoso – sia essa declinata secondo il modello americano ovvero secondo quello dell'Unione – evidenzia nella sua forma attuale significative criticità nella disciplina dei settori altamente tecnologici; essa suscita, inoltre, dubbi in relazione al ruolo – e alla rilevanza – degli esperti tecnici (siano essi di parte, o nominati d'ufficio) chiamati a fornire pareri utili alla risoluzione della controversia: dal momento che il giudice è, infatti, privo delle competenze tecniche necessarie a valutare l'affidabilità delle valutazioni dei propri consulenti, sembra che in questi settori si possa ad oggi porre in questione l'effettivo ruolo del giudice quale *peritus peritorum*, con un sistema probatorio che sembra, invece, orientarsi verso configurazioni ove i consulenti tecnici operano in maniera oracolare, senza che le corti siano in grado di verificare la fondatezza delle loro assunzioni[41].

[37] *Ex multis* v. D. Fairgrieve (a cura di), *Product Liability in Comparative Perspective,* Cambridge University Press, 2005. cfr., altresì, Corte di Giustizia dell'Unione Europea 21 giugno 2017, caso C-621/15 *N. W e al.* c. *Sanofi Pasteur MSD SNC e al.*

[38] A. Palmieri, R. Pardolesi, *Difetti del prodotto e del diritto privato europeo,* in *Il Foro Italiano*, IV, 2002, c. 295.

[39] Cfr. European Commission, *Fourth report on the application of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999, 2011*, consultabile al link http://eur-lex.europa.eu.

[40] Si fa riferimento al già menzionato *Expert group* in materia di responsabilità civile e intelligenza artificiale (*supra,* nota 10). Cfr. altresì il Commission Staff Working Document su *Liability for emerging digital technologies* del 25 aprile 2018 (COM (2018) 237 final), consultabile al link http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=51633. In tema v., altresì, J. De Bruyne, J. Werbrouck, *Merging self-driving cars with the law*, in *Computer Law&Security Review*, 2018, 34, 1150-1153.

[41] Sul tema v., in generale, il noto lavoro di G. Comandé, G. Ponzanelli (a cura di), *Scienza e diritto nel prisma del diritto comparato*, Giappichelli, 2003.

4.2. La responsabilità oggettiva

In termini generali, possiamo ricondurre le soluzioni riferibili – con variazioni minori – all'alveo della *strict liability* a tutti quei sistemi nei quali i produttori delle *autonomous car* siano sempre responsabili per i danni causati da tali veicoli[42]. Si tratta, dunque, di forme di responsabilità che escludono la rilevanza dell'elemento soggettivo proprio dell'illecito civile tradizionalmente inteso, e che (ciò è particolarmente evidente nella riflessione nordamericana sul tema)[43] fondano l'onere risarcitorio in via prioritaria sull'elemento causale e sull'indesiderabilità sociale della condotta oggetto di responsabilità, in base all'idea per la quale chi risulta vittima di un illecito (dal suo punto di vista) inspiegabile o inevitabile non dovrebbe essere mai chiamato a sopportarne il costo.

Con riferimento al tema dei veicoli autonomi, la dottrina ha richiamato una pluralità di elementi a favore dell'idea per la quale l'applicazione di soluzioni attinenti all'area della responsabilità oggettiva potrebbe condurre ad un'efficace regolamentazione del settore.

In primo luogo, in ossequio a un approccio improntato a tradizionali nozioni di *Law&Economics* si è sostenuto che il produttore, chiamato a fronteggiare il costo totale di ogni sinistro che coinvolga i veicoli, avrà il massimo interesse a minimizzare tale spesa: in un sistema disciplinato da regole di *strict liability*, in sostanza, il costo sociale relativo agli incidenti causati da veicoli autonomi è uguale al costo privato del produttore degli stessi; ciò di per sé dovrebbe massimizzare gli incentivi ad implementare ogni innovazione finalizzata alla sicurezza, imponendo il più elevato tasso di deterrenza in capo alla casa automobilistica.

In secondo luogo, è stato sostenuto che un regime di responsabilità oggettiva sia idoneo a condurre ad un aumento dell'efficienza sotto il profilo dell'allocazione dei costi di rischio, favorendo esclusivamente i produttori più "virtuosi"[44]: se, infatti, il costo di messa in sicurezza dei veicoli autonomi è differente per ogni produttore – e il costo derivante dagli incidenti è inversamente proporzionale a quello di implementazione di nuove soluzioni tecnologiche – ciò dovrebbe condurre ad un processo di auto-selezione tra gli attori nel mercato, attraverso il quale i produttori che fronteggiano un maggiore costo marginale di messa in sicurezza per unità di prodotto tenderanno ad investire in maniera minore in tale

[42] Si noti che, in questa analisi, si farà riferimento in via generale alla nozione di responsabilità oggettiva – valorizzandosi l'assenza di qualsiasi indagine relativa al profilo soggettivo del dolo e della colpa – pur riconoscendo come, in quelle ipotesi dove non si consenta alcuna forma di prova liberatoria a vantaggio del danneggiante, sia, altresì, possibile fare riferimento alla distinzione tra responsabilità oggettiva relativa e la diversa categoria della cd. responsabilità oggettiva assoluta. Per i caratteri di tale distinzione e dei suoi fondamenti, è possibile richiamare P. Trimarchi, *Rischio e responsabilità oggettiva,* Milano, 1961; v. anche G. Alpa, *La Responsabilità Oggettiva*, in *Contratto e impresa*, 2005, 959; F.D. Busnelli, *Illecito civile (voce)*, in *Enc. Giur. Treccani*, XV, Roma, 1989, nonché C. Castronovo, *La Nuova Responsabilità Civile,* 1991, Giuffrè, 680 ss.

[43] V., recentemente, D.C. Vladeck, *Machines Without Principals: Liability Rules And Artificial Intelligence*, *Washington Law Review*, 89, 2014, 146.

[44] R. Cooter, T. Ulen, *Law and Economics*, ed. 2004, Pearson, 388. Cfr. in via generale A. Bertolini, *Insurance and Risk Management for Robotic Devices: Identifying the Problems,* in *Global Jurist*, 2016, 1 ss.

settore, rispetto a coloro che, invece, hanno raggiunto un livello di sofisticazione tecnologica tale da fronteggiare costi marginali minori[45].
In ultimo luogo, una regola di responsabilità oggettiva dovrebbe ridurre i costi di transazione legati al contenzioso in materia di sinistro stradale: ciò, innanzitutto, poiché – posto che in un tale sistema l'analisi dell'elemento soggettivo non è più necessaria – la maggior prevedibilità dell'esito della causa dovrebbe favorire il ricorso a soluzioni di tipo non contenzioso e a transazioni extra-processuali tra le parti; in secondo luogo (anche qualora si dovesse effettivamente pervenire alla fase giudiziale) l'assenza, per il giudice, dell'onere di verificare – da una parte – il tasso di diligenza ragionevolmente attendibile dal danneggiante e – dall'altra – quello da costui effettivamente tenuto dovrebbe ridurre il costo e la lunghezza del processo, con un conseguente risparmio di risorse a vantaggio delle parti e della collettività.

4.3. Il sistema MER: responsabilità oggettiva attraverso un fondo di partecipazione delle case produttrici

Tra le diverse soluzioni riconducibili al sistema della responsabilità oggettiva merita specifica attenzione la recente proposta di Kenneth Abraham e Robert Rabin (di seguito, A&R), sviluppata nel loro lavoro "*Automated Vehicles and Manufacturer Responsibility for Accidents: A New Legal Regime for a New Era*"[46], focalizzata sulla creazione di un assetto di *Manufacturer Enterprise Responsibility* (MER). La scelta di dedicare specifica attenzione a tale sistema emerge, da un lato, dall'innovatività (e dai conseguenti vantaggi) delle sue caratteristiche rispetto alle soluzioni tradizionalmente riconducibili all'alveo della responsabilità oggettiva, nonché dall'aspirazione degli autori – originale nel panorama del dibattito sui veicoli autonomi – a fornire una proposta organica di regolamentazione *de iure condendo* del fenomeno, senza limitarsi ad optare per una tra le regole di responsabilità civile attualmente esistenti.
Il MER, il quale – condividendosi le riflessioni qui già proposte[47] – dovrebbe operare in scenari ove la quasi totalità dei veicoli circolati è *driverless*, è essenzialmente un fondo provvisto di massimale di risarcimento, regolato a livello federale, deputato a risarcire la totalità dei danni personali di tipo patrimoniale (escludendosi, dunque, i danni ai veicoli e ad altre proprietà personali) derivanti da incidenti che coinvolgano uno o più veicoli automatizzati; da tale risarcimento sono esclusi solamente i danni riconducibili alla negligenza del proprietario del veicolo[48].

[45] H.B. Schaefer, F. Mueller-Langer, *Strict liability versus negligence*, in *German Working Papers in Law and Economics*, Vol. 2008, iss. 1, 2008.

[46] Di prossima pubblicazione in *Virginia Law Review,* vol. 105, 2019. V. *supra,* nota 17.

[47] V. *supra*, paragrafo 2.

[48] Si fa riferimento, ad esempio, al già menzionato caso di violazione dell'onere di aggiornamento del software da parte dell'utente, qualora ciò sia richiesto dal veicolo al fine di favorire il corretto espletamento dell'attività di circolazione.

I risarcimenti erogati dal MER includeranno, di conseguenza, il costo delle spese mediche e di eventuali salari non percepiti a seguito dell'infortunio, fino a un massimale ipotizzato da A&R in misura di 1 milione di dollari; per tutte le altre spese, il proprietario del veicolo dovrà procedere alla stipula di un regolare contratto di assicurazione. Il fondo, inoltre, opererà quale rimedio esclusivo in caso di sinistro, dal momento che la concorrenza con ulteriori rimedi implicherebbe – ad avviso di A&R – problemi relativi alla valutazione di causalità, introducendo l'esigenza di verificare quali incidenti siano stati causati dal veicolo *per se* e quali da altre caratteristiche dello stesso[49]; uniche eccezioni a tale architettura (destinata ad operare nel sistema giuridico americano) saranno l'espressa possibilità di imporre il risarcimento di danni punitivi da parte del giudice *a quo* e la possibilità di agire verso terze parti in caso di concorso di responsabilità.
Il costo per il mantenimento e il funzionamento del MER dovrà essere, ad avviso degli autori, posto interamente a carico dei produttori di autoveicoli: per il primo periodo di implementazione del sistema, la distribuzione delle spese tra le diverse case produttrici sarà operata in maniera presuntiva e basata sulle quote di mercato di ciascuna di queste, passandosi, poi, gradualmente ad un sistema dove ogni produttore dovrà contribuire in maniera proporzionale al numero di sinistri causati nell'anno precedente[50].
Per quanto riguarda, infine, la procedura per ottenere il risarcimento, A&R ritengono che la soluzione più efficace sia rendere l'impresa assicuratrice presso la quale sia stipulata la polizza a copertura del veicolo responsabile, in caso di incidente, di trasmettere al MER la relativa documentazione (ricevendo quale corrispettivo per il servizio una commissione in misura fissa)[51]. Una volta ricevuta la richiesta di risarcimento e la relativa documentazione, un responsabile del MER sarà tenuto a corrispondere il risarcimento in misura totale, parziale, o a negarne la legittimità: in caso di contenzioso, un giudice amministrativo sarà deputato a decidere se la scelta del funzionario sia stata legittima, e sarà possibile ricorrere in appello soltanto laddove la decisione sia ritenuta arbitraria in violazione della § 706(2)(a) dello *US Administrative Procedure Act*[52].

4.4. Analisi del sistema MER: vantaggi e criticità

Prima di procedere all'illustrazione di una diversa proposta, giova offrire una prospettiva di quelli che sembrano essere i principali punti di forza e di debolezza del modello proposto da A&R.

[49] K. Abrahams, R. Rabin, *Automated Vehicles and Manufacturer Responsibility for Accidents*, 26.

[50] *Ibidem*, 48.

[51] Secondo gli autori, tale processo dovrebbe in linea di massima ricalcare le analoghe disposizioni di matrice gius-lavoristica, disciplinanti gli oneri di risarcimento del danno ai dipendenti da parte della compagnia assicuratrice del datore di lavoro.

[52] *Ibidem*, 50.

Innanzitutto, appare condivisibile la considerazione secondo la quale, in via di principio, una soluzione improntata alla *strict liability* si riveli preferibile rispetto sia ad una tradizionale regola di negligenza, sia all'applicazione delle attuali regole di responsabilità da prodotto difettoso (nella loro ottica, naturalmente, si fa riferimento a quelle applicate negli Stati Uniti, ma valgono in merito a ciò anche le considerazioni precedentemente formulate anche relativamente alla disciplina comunitaria)[53]: l'incertezza della verifica circa la presenza di un difetto e, più in generale, le difficoltà insite nella ripartizione dell'onere probatorio, depongono a favore dell'introduzione di un sistema maggiormente obiettivo e idoneo a parificare la posizione delle parti in causa nei settori ad alto tasso tecnologico.
Parimenti felice, per una pluralità di ragioni, è la scelta di provvedere al risarcimento attraverso la creazione di un fondo *ad hoc* deputato alla corresponsione del *quantum debeatur*, piuttosto che richiedere ai danneggiati di agire direttamente nei confronti delle case produttrici.
Innanzitutto, la creazione di un fondo consente di fornire – a vantaggio delle vittime di un sinistro stradale – una chiara indicazione circa l'entità responsabile di corrispondere l'eventuale ristoro, promuovendo la certezza del diritto e semplificando l'accesso al risarcimento del danno.
In secondo luogo, l'istituzione di un fondo di risarcimento permette di evitare una sottovalutazione dei danni, suscettibile di verificarsi in un mercato come quello delle *driverless car*, il quale potrebbe svilupparsi in modo profondamente concentrato tra un numero esiguo di case produttrici: qualora, infatti, due veicoli autonomi prodotti da diverse case siano coinvolti in un incidente, e il produttore di ciascun veicolo sia chiamato a risarcire i danni causati al conducente dell'altro (secondo i principi generali di un sistema di assicurazione verso terzi), quest'ultimo potrebbe essere incentivato ad assumere condotte di *free riding*, giovandosi delle precauzioni delle altre compagnie e concentrarsi più sul minimizzare gli eventuali danni arrecati a terzi che non sul ridurre in via generale il tasso di incidenti (è possibile ipotizzare ad esempio che, se il veicolo prodotto da X è estremamente fragile, mentre quello sviluppato da Y è particolarmente resistente e sicuro per il proprio guidatore – posto che entrambi soddisfino i requisiti per la commercializzazione dei prodotti – in caso di incidente tra i due veicoli, Y potrebbe essere paradossalmente tenuto a pagare un risarcimento maggiore di quello a cui sarà tenuto X, qualora il conducente dell'auto prodotta da quest'ultimo soffra maggiori danni). Si noti che poiché, in via di principio, non è da escludere che una simile situazione emerga anche in presenza di un fondo, qualora il costo per la creazione e il mantenimento dello stesso sia diviso equamente tra i diversi produttori di veicoli autonomi, la soluzione proposta da A&R di dividere i costi sulla base del tasso di incidenti provocato appare sufficiente ad allontanare il rischio di ingiustizie sostanziali nella ripartizione dell'onere risarcitorio.

[53] V. *supra* paragrafo 4.1.

A fronte di indubbi punti di forza, il MER presenta invero significative criticità, che potrebbero dimidiarne in modo drastico l'efficacia: tali "debolezze" derivano, in particolare, dalla caratterizzazione del MER quale sistema di responsabilità oggettiva pura, e perciò suscettibile di ritardare l'introduzione dei veicoli automatizzati sul mercato a seguito del *chilling effect* provocato sugli operatori di settore. Il MER tiene in considerazione esclusivamente una delle due facce di un problema (il controllo della produzione e commercializzazione delle *driverless car*) che si rivela invero duplice: da una parte si ha, infatti, l'interesse nella protezione e la sicurezza degli utilizzatori del prodotto, dall'altra quello ad incentivare la rapida diffusione di una tecnologia che risulti (ancorché imperfetta e perfettibile) più affidabile della guida umana tradizionale.

Ben esprime la tensione tra questi due poli – e l'approccio che dovrebbe guidare la ricerca del difficoltoso bilanciamento tra i due – la riflessione di Ryan Abbott il quale, in un suo recente lavoro[54], si è posto in una diversa prospettiva rispetto ad A&R, proponendo l'adozione di una valutazione di diligenza quale parametro per imporre la responsabilità in caso di danni causati da intelligenze artificiali: Abbott sostiene, in particolare, che una volta che l'Intelligenza Artificiale – nel nostro caso, il *software* di guida – risulti in media più affidabile degli individui nello svolgimento di un'attività, il principale incentivo alla riduzione degli incidenti dovrebbe essere individuato nella maggior diffusione del prodotto piuttosto che nella ricerca di un miglioramento incrementale della sicurezza di quelli già sul mercato; coerentemente con questa prospettiva, è in tali condizioni più efficiente promuovere regole volte a favorire l'adozione della tecnologia (abbassandone il costo), che non imporre ulteriori vincoli sui produttori al fine di raggiungere un livello di affidabilità prossimo alla perfezione[55]. Simili considerazioni non sono, oltretutto, estranee alle disposizioni già esistenti in materia di prodotti difettosi, considerando che il *Third Restatement* contempla già la possibilità di esentare il produttore da responsabilità ogniqualvolta

[54] R. Abbott, *The Reasonable Computer: Disrupting the Paradigm of Tort Liability*, in *George Washington Law Review*, Vol. 86, n. 1, 2018, altresì consultabile al link: https://ssrn.com/abstract=2877380.

[55] *Ibidem*, 22, fornisce un esempio a supporto della propria posizione: supponendo the la tecnologia di un veicolo autonomo risulti 10 volte più sicura di quella della sua controparte umana, sostituire un guidatore umano con uno di questi mezzi risulterebbe più efficace in termini di benessere generale che rendere il veicolo 100 volte più sicuro di un conducente umano. Se si considera, infatti, un sistema chiuso nel quale sono presenti solo due veicoli, e dove il rischio di incidente mortale per un guidatore umano è 1 ogni 100 milioni di kilometri percorsi, e quello di un veicolo autonomo è di un 1 incidente ogni miliardo di kilometri, avremo in media, per ogni dieci miliari di kilometri guidati da entrambi, 110 incidenti. Immaginiamo, a questo punto, di poter migliorare il veicolo autonomo affinché il rischio di incidente sia ridotto a 1 ogni 10 miliardi di kilometri percorsi: ciò ridurrà il numero totale degli incidenti provocati dai due veicolo ad un totale di 101; tuttavia, se invece di concentrarci sul miglioramento della tecnologia (con i costi che esso comporta) avessimo semplicemente sostituito il guidatore umano con un secondo veicolo autonomo, il numero di sinistri attesti per la stessa distanza percorsa sarebbe stato solamente di 20. Tale esempio illustra con chiarezza come, raggiunto un determinato grado di affidabilità di un prodotto, incentivare l'adozione della tecnologia sia preferibile rispetto a imporne ulteriori miglioramenti, seppur volti all'aumento della sicurezza degli utenti. Contro questa posizione, parte della dottrina nazionale ha sostenuto che, al fine di evitare il più possibile lo svilupparsi di profili contenziosi in materia, sia opportuno garantire il massimo tasso di affidabilità prima dell'immissione in commercio; v., in particolare, M.C. Gaeta, *Automazione E Responsabilità Civile Automobilistica*, in *Responsabilità Civile e Previdenza*, 5, 2016, 1717.

il suo prodotto sia "inevitabilmente insicuro" e, ciononostante, "promuova la pubblica sicurezza"[56]. Di contro, in un sistema orientato puramente alla *strict liability* (come il MER), i produttori potrebbero trovarsi ad avere interesse nel ritardare la commercializzazione dei veicoli autonomi fino al momento in cui non sia raggiunta una piena certezza sul possibile tasso di rischio di incidente causato dai mezzi, e di conseguenza scaricarne i costi in termini di prezzo sui consumatori; ciò potrebbe ritardare l'ingresso sul mercato di prodotti che sono già più affidabili dei guidatori umani[57]. Dal momento, inoltre, che il principale strumento per i produttori al fine di recuperare i costi derivanti da possibili incidenti causati dai veicoli autonomi è il prezzo cui questi sono venduti, sussiste anche un concreto rischio che un sistema di responsabilità oggettiva pura determini un innalzamento del prezzo per le *driverless car* tale da renderle dei prodotti di lusso, con conseguenti ulteriori ritardi nella diffusione.

Al fine di mediare tra i diversi interessi in conflitto, è, dunque, necessario che le nuove regole mantengano, da una parte, ferma una netta opzione volta a responsabilizzare i produttori per danni causati dai veicoli autonomi e, allo stesso tempo, ridurre il rischio che il regime così delineato incida sugli investimenti in *R&D* o aumenti il costo dei prodotti per il grande pubblico. Il MER sembra, tuttavia, considerare solo il primo di questi due aspetti.

Un secondo elemento che la riflessione di A&R omette di tenere in considerazione riguarda l'accoglimento di una tradizionale obiezione mossa alle regole di responsabilità oggettiva, concernente l'assenza di una correlazione tra la gravità dell'errore che ha causato il danno ed il risarcimento dovuto dal produttore: posto che nel sistema MER l'onere viene quantificato esclusivamente sulla base del danno patito dalla vittima, la gravità (ad esempio, in termini di superficialità nel disciplinare un determinato aspetto del *software*) del comportamento del produttore non rileva ai fini della determinazione dello stesso. A fronte di tale considerazione, A&R obiettano che nel caso di errori grossolani la possibilità per il giudice di imporre danni punitivi sarà sufficiente a risolvere il problema. Una simile replica introduce, innanzitutto, una limitazione concettuale al sistema (di cui A&R non si curano, valutando l'applicazione del MER esclusivamente nel contesto statunitense), suscettibile di agire solo in quegli ordinamenti che contemplano un simile strumento; in secondo luogo, questa non pone soluzioni per il caso opposto, ossia qualora l'errore nel comportamento del veicolo sia causato da un difetto minore e difficilmente riconoscibile anche per il produttore: in tali casi, infatti, per costui non vi sarà alcun modo di ridurre la propria esposizione debitoria. L'implicita assunzione che sostiene tale scelta risiede, probabilmente, nell'idea che un *software* costruito con minore attenzione causerà *di per sé* un

[56] V. il Commento *k* del *Restatement (Second) of Torts section 402*. Per un'analisi delle implicazioni di tale disposizione nel settore dei veicoli autonomi, M. Geistfeld, *A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation,* in 9 *California Law Review*, 2017, 153.

[57] Cfr. M. Schellekens, *Self-driving cars and the chilling effect of liability law*, in 31 *Computer Law & Security Review*, 2015, 506-517.

maggior numero di incidenti, e, di conseguenza, la negligenza sarà naturalmente punita dal sistema (e dal mercato); dal momento, tuttavia, che il *quantum* risarcitorio non è determinato in ragione della frequenza degli incidenti causati, ma dai danni che essi provocano – e che questo aspetto dipende, nei casi concreti, da una pluralità di circostanze – la soluzione proposta desta quantomeno incertezza.
Che si condivida o meno tale posizione, un dato essenziale permane: il MER, nella formulazione proposta da A&R, è un sistema profondamente repressivo e poco incentivante; al verificarsi di un incidente, non rileva, infatti, che il produttore sia stato o meno diligente nello sviluppare il veicolo autonomo, posto che questo dovrà, comunque, corrispondere (nel migliore dei casi) la totalità dei danni personali patiti dalla vittima.
A fronte della mancata verifica del tasso di diligenza tenuto dal produttore, il sistema MER dovrebbe contrapporre un complessivo miglioramento del benessere generale in termini di riduzione dei costi di contenzioso, evitando la verifica della condotta della casa produttrice del veicolo. Ad un'analisi più accorta, tuttavia, emerge con evidenza come la valutazione di negligenza, seppur uscita dalla porta, sia destinata a rientrare immediatamente dalla finestra in conseguenza della necessità di ripristinare periodicamente il fondo di risarcimento: in caso di sinistro che coinvolga due veicoli prodotti da diverse case – una volta che il MER abbia risarcito i danneggiati – ogni produttore dovrà ripristinare il fondo sulla base del danno causato (immediatamente o, nel modello delineato da A&R, ogni anno); per poter svolgere tale operazione, tuttavia, sarà parimenti necessario operare un'indagine al fine di valutare (quantomeno) quanto e in che proporzione ognuno dei due produttori abbia contribuito al verificarsi dell'incidente. Di conseguenza, i due principali elementi che ad avviso di A&R rendono l'analisi dell'elemento soggettivo inadeguata a regolare il sistema dei sinistri provocati da veicoli autonomi – la prova circa l'esistenza di un difetto, e la riconducibilità di questo alla mancata diligenza del produttore – sono destinati a continuare ad esistere nel MER; tale considerazione è ulteriormente avvalorata laddove si consideri che, qualora (come sembra) la ripartizione di responsabilità – e di oneri di ristoro del fondo – tra le diverse case produttrici debba essere stabilita dal fondo stesso, non sembra improbabile che a queste sia, altresì, attribuito il diritto di contestare le valutazioni del fondo, qualora si ritengano errate.
Il risultato dell'introduzione del MER non sarà, dunque, l'eliminazione del contenzioso in generale: sebbene alcuni aspetti della valutazione di diligenza saranno esclusi – posto che il livello di attenzione del produttore non avrà alcun ruolo ai fini della determinazione dell'onere risarcitorio – un'indagine complessiva sarà, nondimeno, necessaria al fine di quantificare il danno e allocare la responsabilità tra diversi produttori potenzialmente coinvolti nell'evento lesivo. Considerandosi il già menzionato diritto di contestazione delle valutazioni del MER da parte dei produttori, è in ultima analisi difficile prevedere se il sistema ipotizzato da A&R sia effettivamente destinato a ridurre il contenzioso nel settore automobilistico.
Si evidenzia, infine, una nota conclusiva relativa ad aspetti più squisitamente procedurali: nel sistema predisposto da A&R, non è chiaro come il meccanismo di contestazione a favore fondo (ossia il diritto di valutare se corrispondere in tutto, in parte o per nulla il risar-

cimento) sia destinato ad operare, con particolare riferimento alle ragioni che dovrebbero legittimare un risarcimento parziale alle vittime. Sulla base delle informazioni sussumibili dal resto dell'analisi condotta dagli autori, è ragionevole presumere che tale risarcimento parziale possa aver luogo qualora il danno subito dalla vittima superi il massimale fissato per il fondo, oppure laddove un terzo abbia concorso al determinarsi dell'evento. Una diversa soluzione – ad esempio basare l'opposizione all'onere di integrale risarcimento su una marginalità causale tra il malfunzionamento del veicolo e il sinistro, oppure su un'asserita colpa lieve del produttore – rappresenterebbe, infatti, un'intrinseca contraddizione, posto che la struttura del MER è stata concepita da A&R proprio al fine di evitare che questi elementi possano svolgere un ruolo essenziale nella determinazione dei caratteri dell'illecito e del risarcimento.

5. Una nuova, modesta proposta

Dopo aver esaminato il panorama delle principali soluzioni proposte al fine di fornire una risposta alla sfida che l'introduzione dei veicoli autonomi crea per le tradizionali regole di responsabilità civile, è possibile illustrare una diversa alternativa, che potrebbe condurre ad un adeguato bilanciamento tra i diversi interessi coinvolti: si fa riferimento, in particolare, ad un sistema di responsabilità a "due elementi", basato su una valutazione di negligenza grave e sulla costituzione di un fondo (non esclusivamente finanziato dai produttori, bensì) partecipato in misura eguale dalle case produttrici – e tra di esse diviso in percentuale variabile, sulla base del numero di incidenti causati come già A&R avevano ipotizzato – e da risorse pubbliche. Il fondo dovrebbe essere amministrato in via esclusiva da un organo riferibile alla pubblica amministrazione e, in particolare, da un'autorità amministrativa indipendente. In tal modo, sarà possibile garantire che la valutazione di negligenza (di cui si dirà qui di seguito) sia condotta, da un lato, da un organo di elevata competenza tecnica e, dall'altro, con imparzialità ed equidistanza dai diversi interessi in gioco – trattandosi di un sistema che sfrutta il ricorso contestuale a risorse pubbliche e private: nell'ordinamento italiano, ad esempio, una simile competenza potrebbe attribuirsi all'Autorità di Regolazione dei Trasporti. Qualora, invece, si volesse valutare una soluzione alternativa ed attribuire la relativa funzione ad un organo posto direttamente sotto il controllo di un organismo di tipo governativo, una valida opzione potrebbe essere quella della costituzione di una società per azioni sul modello della Concessionaria Servizi Assicurativi Pubblici (Consap) – attualmente deputata alla gestione del Fondo di garanzia per le vittime della strada – controllata dal Ministero dell'Economia e delle Finanze.

Per quanto riguarda il funzionamento del sistema, una volta occorso il sinistro, le parti presenteranno domanda di risarcimento nei confronti del fondo e un funzionario amministrativo sarà incaricato di valutare se l'incidente sia stato causato da un comportamento riconducibile a negligenza grave del produttore (definita nei termini che verranno illustrati a breve): qualora tale valutazione dia esito positivo, l'intero risarcimento alla vittima sarà corrisposto dal produttore; laddove, invece, non sia possibile provare la condotta

negligente, il fondo risarcirà il danneggiato (e, di conseguenza, il produttore del veicolo beneficerà di una riduzione del 50% del *quantum debeatur*). In entrambi i casi, si ritiene opportuno che il risarcimento includa sia i danni alla persona sia quelli alle proprietà della vittima.

Con riferimento alla summenzionata valutazione di negligenza, il soggetto deputato a condurre tale analisi dovrà verificare la sussistenza di (almeno una tra) due circostanze:

a) l'errore che ha causato il comportamento anomalo del veicolo era semplice da identificare e risolvere (considerando, in via principale, i dati forniti dal mezzo stesso);
b) la tecnologia che il produttore ha impiegato per la creazione del prodotto era chiaramente inadeguata allo stato dell'arte vigente nel settore delle *driverless car*, facendo anche riferimento ai prodotti concorrenti.

Se almeno una di queste condizioni si è verificata, il produttore dovrà ritenersi interamente responsabile per i danni derivanti dall'evento, e conseguentemente non beneficerà del sussidio pubblico offerto dal fondo.

La scelta di promuovere l'istituzione di un fondo misto pubblico-privato per il risarcimento dei danni da veicoli autonomi mostra profili di continuità con altre soluzioni già implementate a livello europeo, presentando tuttavia caratteri di originalità rispetto ai sistemi presenti. Si è avuto modo di menzionare, nel presente lavoro, l'esperienza francese del sistema di supporto pubblico istituito dalla *Loi Kouchner*, in materia sanitaria: il fondo, gestito dall'ONIAM ("*Office national d'indemnisation des accidents médicaux, des affections iatrogènes et des infections nosocomiales*") opera in funzione ancillare rispetto al sistema delle disposizioni generali previste in materia di responsabilità della struttura ospedaliera, provvedendo a risarcire il danno grave ed anormale subito da un paziente quando non si sia verificata nessuna colpa delle cure mediche[58]. Nel caso della normativa francese, tuttavia, il fondo pubblico opera esclusivamente in via alternativa all'onere risarcitorio della struttura sanitaria, laddove si debba escludere la responsabilità di quest'ultima; non possono configurarsi, dunque, situazioni nelle quali – come quella qui prospettata – il risarcimento è corrisposto (in parti uguali) dal soggetto pubblico e da quello privato. Più vicina all'ipotesi in questo saggio considerata è, invece, una soluzione adottata dal legislatore tedesco in ambito di ristoro dei cc.dd. danni da farmaco[59]: mediante la legge *HIV-Hilfegesetz* del 1995 è stata, infatti, costituita la fondazione "*Humanitäre Hilfe für durch Blutprodukte HIV-infizierte Personen*", sottoposta alla supervisione del Ministero federale della sanità, al fine di provvedere al risarcimento di coloro che contraggano HIV a seguito

[58] In tema v. L. Nocco, *Un no-fault plan come risposta alla 'crisi' della responsabilità sanitaria? Uno sguardo sull''alternativa francese' a dieci anni dalla sua introduzione*, in *Rivista Italiana di Medicina Legale*, 2012, 449.

[59] In generale v. G. Guerra, *Responsabilità per danno da farmaco e da vaccino: un rapporto da genere a specie?,* in *Danno e responsabilità*, 2010, 998. Per un *excursus* circa gli orientamenti giurisprudenziali in materia nel nostro paese, si veda A. Parziale, *Responsabilità (Presunta?) Da Farmaco Difettoso: – Onere Della Prova, Valore Degli Accertamenti Amministrativi e Causa Ignota Del Difetto*, in *Danno e Responsabilità*, 1, 2016, 51-56.

dell'assunzione di farmaci emoderivati preparati con sangue infetto[60]; tale fondo è, infatti, finanziato congiuntamente dal governo federale tedesco, dalla Croce Rossa tedesca e dalle case farmaceutiche produttrici di emoderivati. Soluzione analoga, sempre nell'ordinamento tedesco, era stata già prevista per i danni provocati dal farmaco *Talidomide* – sedativo e anti-nausea provocante gravi alterazioni nei figli di donne che avevano assunto il medicinale durante la gravidanza. Anche in questo caso, il fondo è partecipato in misura sostanzialmente eguale dallo Stato tedesco e dalla casa produttrice del farmaco. Sebbene, dunque, si riscontrino alcune – invero sporadiche – applicazioni nel settore farmaceutico, l'istituzione di un fondo co-partecipato per il risarcimento del danno nel settore automobilistico rappresenta una misura d'intervento che non è stata mai oggetto di considerazione, stante la sostanziale idoneità delle regole tradizionali a disciplinare i sinistri causati da guidatori umani.
Una soluzione di questo tipo è suscettibile di condurre, a mio avviso, a risultati migliori di quella proposta da A&R, sia considerando il benessere generale dei consumatori, sia la diffusione delle *driverless car* e la convenienza per i produttori ad investire in tale tecnologia: è possibile evidenziare qui di seguito alcuni significativi benefici che tale sistema produrrebbe.

5.1. Maggiore trasparenza ed equità nell'allocazione dell'onere risarcitorio

Operare una valutazione di negligenza circa la condotta del produttore del veicolo è non solo auspicabile dal punto di vista di una corretta allocazione dell'onere risarcitorio, ma, altresì, in termini di promozione di un criterio di giustizia sostanziale e di una legittimazione (e responsabilizzazione) del produttore nei confronti della società. Una simile esigenza è particolarmente sentita nell'ambito delle tecnologie emergenti, nel quale la fiducia degli utenti è elemento essenziale per l'introduzione di nuovi prodotti e dove è fondamentale che i consumatori percepiscano un ruolo attivo dell'attore pubblico nel proteggere il loro diritto alla sicurezza. Dal momento che – come si è osservato nell'analisi del sistema proposto da A&R – qualunque sistema (persino quelli basati su responsabilità oggettiva) richiederà quantomeno una parziale analisi della responsabilità di ciascun produttore coinvolto nel sinistro al fine di valutarne l'onere risarcitorio, promuoverne una diretta rica-

[60] Il tema del danno da emoderivati stato soggetto ad un ampia trattazione da parte della dottrina italiana: *ex multis* v. R. Breda, *Danno da Emoderivato Infetto e Responsabilità dell'azienda Produttrice*, in *Danno e responsabilità*, 6, 2004; C. Favilli, *La responsabilità civile dello Stato per contagio da emoderivati infetti: responsabilità per colpa o responsabilità oggettiva?,* in *La Nuova Giurisprudenza Civile Commentata*, 2002, 835; U. Izzo, *Sangue infetto e responsabilità civile: appunti per un inquadramento olistico del danno da contagio,* in *Danno e Responsabilità*, 1998; G. Ponzanelli, «Pochi ma da sempre»: la disciplina sull'indennizzo per il danno da vaccinazione, trasfusione o assunzione di emoderivati al primo vaglio di costituzionalità, in *Foro Italiano*, I, 1996, 2326; L. Di Costanzo, *Il danno da trasfusioni ed emoderivati infetti*, Napoli, 1998. In merito ad una recente pronuncia in materia resa dal Tribunale di Roma (sentenza 3 maggio 2017, n. 8650) v. altresì S. Corso, *La responsabilità per i danni conseguenti a contagio infettivo contratto per effetto di trasfusioni e/o somministrazioni di sangue ed emoderivati*, in *Responsabilità Medica. Diritto e Pratica Clinica*, 2017.

duta in termini di supporto pubblico attraverso l'accesso al fondo aumenterà, senza costi aggiuntivi, la trasparenza complessiva del sistema, valorizzando l'idea che un produttore debba ritenersi pienamente e direttamente responsabile dei danni causati dai propri veicoli ogniqualvolta sia apprezzabile una sua condotta particolarmente superficiale.

5.2. Incentivi ad investire nei settori di Ricerca & Sviluppo e nel costante miglioramento dei veicoli autonomi

La previsione di un doppio binario di risarcimento introdurrà un sistema di incentivi all'innovazione per le case produttrici di *driverless car*. Da una parte, queste avranno la massima esigenza di evitare il verificarsi di incidenti, coerentemente con quanto già evidenziato nell'illustrazione dei caratteri delle regole di responsabilità oggettiva; dall'altra, inoltre, l'investimento in *R&D* sarà ulteriormente promosso dall'interesse ad accedere al meccanismo premiale del fondo: posto che uno dei parametri per la valutazione della condotta del produttore è l'adeguamento del veicolo agli standard tecnologici di settore, ogni sviluppo raggiunto da un produttore creerà un effetto di stimolo anche nei confronti dei suoi concorrenti, dato che le automobili da loro prodotte saranno valutate sulla base delle alternative presenti sul mercato.

5.3. Abbassamento del prezzo complessivo dei veicoli autonomi per i produttori più diligenti

La presenza di un sussidio pubblico (in misura del 50% rispetto al risarcimento dovuto in caso di sinistro) consentirà alle case produttrici di veicoli autonomi di ridurre il costo atteso a seguito della commercializzazione dei loro prodotti – e, di conseguenza, la necessità di porre un prezzo più alto in capo ai consumatori – solo qualora questi siano in grado di accedere al fondo con continuità. I produttori "virtuosi" potranno commercializzare le auto ad un costo minore, e questo promuoverà la diffusione dei veicoli autonomi con auspicabile riduzione del numero di incidenti e incremento del benessere generale.
In relazione a questo aspetto, la differenza tra l'impatto del MER e la proposta qui formulata in termini di prezzo dei prodotti può essere illustrata da un semplice esperimento.
Si assuma – per semplicità – che il mercato dei veicoli autonomi sia estremamente concentrato (quattro produttori), e che ognuno dei produttori detenga un pari potere di mercato (25%). In tale ipotetico mercato, ogni casa produttrice fabbrica un solo veicolo, e tutti i veicoli hanno il medesimo costo di produzione (8.000€), equivalente al prezzo di vendita; nell'allocazione delle spese, tuttavia, ogni produttore dedica una differente somma all'investimento in *R&D,* e ciò si traduce in una diversa possibilità di causare un incidente. Se –ottimisticamente – il fondo venisse creato per l'anno 2019 (e il costo dello stesso diviso equamente tra i diversi produttori), il contributo dei produttori per il successivo anno 2020 sarà calcolato sul costo degli incidenti causato da ciascuno di essi nell'anno solare precedente.

Tab. 1.1 Danni causati dai quattro produttori nel corso dell'anno 2019

Produttore	**Danni causati**	
	Danni dovuti a condotte negligenti	**Danni dovuti a condotte NON negligenti**
P1	€ 400	€ 600
P2	€ 500	€ 300
P3	€ 0	€ 400
P4	€ 300	€ 100

Secondo il sistema proposto da A&R, la differenza tra danni derivanti da errori dovuti a negligenza o meno è irrilevante ai fini dell'allocazione dell'onere risarcitorio; di conseguenza, nel corso del 2019, ognuno dei produttori dovrà risarcire – attraverso il MER – l'intero ammontare dei danni causati. Se il costo derivante dall'onere risarcitorio fosse neutralizzato attraverso una proiezione dello stesso sul prezzo del prodotto, in conseguenza di una simile scelta il costo dei veicoli per l'anno 2020 aumenterà della somma corrisposta a vittime di incidenti stradali. Il prezzo di vendita sarà dunque, rispettivamente, di €9.000 (P1); €8.800 (P2); €8.400 (P3) e €8.400 (P4). La proposta di A&R, dunque, provvede a garantire il risarcimento delle vittime, imponendo sui produttori un costo ulteriore e proporzionale ai danni causati; tuttavia, dato che il MER non distingue sulla base della gravità dell'errore, nel caso qui esaminato i danni prodotti da P3 e P4 sono considerati allo stesso modo, sebbene i danni causati da P4 derivino (ad esempio) da un *software* creato con maggiore superficialità o da altri grossolani errori di sviluppo.
Per converso, applicando la soluzione qui proposta – e conseguentemente distinguendo tra danni dovuti o no a comportamenti negligenti (con i secondi supportati al 50% da un fondo pubblico) – il costo per i veicoli in vendita nel 2020 sarà il seguente: € 8.700 (P1); € 8.650 (P2); € 8.200 (P3) e € 8.350 (P4).
Analizzando tale dato, due effetti sono chiaramente osservabili: in primo luogo, il costo complessivo del prodotto per ogni unità risulta più basso, in conseguenza del supporto del fondo per il risarcimento degli errori non dovuti a negligenza (e di conseguenza ritenuti parzialmente scusabili), e ciò consente a ciascuna casa produttrice di vendere la propria *driverless car* ad un prezzo più accessibile ai consumatori. In secondo luogo, il produttore P4, il quale ha operato in maniera più negligente, è tenuto al pagamento di un risarcimento più alto di quello dovuto da P3, sebbene l'ammontare complessivo dei danni causati dai due produttori sia il medesimo.
Un altro elemento che – pur considerando la natura teorica della proposta nella sua formulazione attuale – necessita una breve disamina è quello della tipologia di risorsa da ritenersi più adeguata al finanziamento del fondo. Intuitivamente, la soluzione più semplice sarebbe far ricorso alle risorse ottenibili da un'imposta generale sul reddito: una soluzione di questo tipo, infatti, dividerebbe il costo per il mantenimento del fondo sulla generalità della popolazione, riducendo il più possibile la contribuzione *pro-capite*. La principale obiezione che può sollevarsi a questa soluzione è che, attraverso tale sistema, nessuna

distinzione sarebbe operata tra cittadini che hanno un veicolo autonomo e quello che non ne possiedono uno, essendo tutti chiamati a sopportare il costo di mantenimento del prodotto a favore della collettività. Al fine di fornire una diversa soluzione, l'uso di una tassa sull'acquisto del prodotto potrebbe considerarsi l'alternativa primaria, se non fosse che in tal caso i consumatori si troverebbero a corrisponderla *una tantum* – al momento dell'acquisto – sebbene il fondo debba essere periodicamente oggetto di nuovi versamenti.
A fronte di una (almeno parziale) insoddisfazione circa le attuali soluzioni proposte, non si deve, tuttavia, escludere come gli sviluppi tecnologici legati alle *driverless car* possano nel prossimo futuro fornire nuove e migliori strumenti per collegare gli oneri contributivi dei consumatori al loro effettivo utilizzo del veicolo: un'opzione significativa è, ad esempio, l'introduzione di una *mileage-tax* attraverso la quale ogni utente sia chiamato a corrispondere una somma sulla base del suo uso effettivo del mezzo[61]; ogni *driverless car* sarà, infatti, in grado di monitorare il percorso compiuto dai propri passeggeri e calcolare la complessiva distanza percorsa da questi.
Una soluzione sul modello della *mileage-tax* consentirebbe, innanzitutto, di creare una relazione univoca tra il tasso di attività di ciascun individuo (e, conseguentemente, il livello di rischio che questa comporta per la circolazione) e la sua partecipazione al costo sociale per il mantenimento del sistema di responsabilità civile nel settore delle *driverless car*; in secondo luogo, essendo questa una tassa legata all'utilizzo – e non alla proprietà – del veicolo, sarà possibile applicarla anche qualora il sistema si orienti verso soluzioni riconducibili a modelli di *car-sharing*.

5.4. Corrispondenza diretta tra il livello di negligenza e il risarcimento dovuto dal produttore in conseguenza del verificarsi di un sinistro

L'introduzione di un sistema di valutazione della responsabilità "a due livelli" consentirà, infine, la riduzione dei costi derivante dalla causazione di un sinistro non per tutti i produttori sul mercato, ma solo a vantaggio di coloro che dimostrino di non essere negligenti nello sviluppo dei propri prodotti.
Il sistema qui proposto opera, infatti, una discriminazione – ai fini dell'attribuzione del supporto pubblico – tra gli errori in base alla loro gravità, riconoscendo che, pur mantenendosi ferma l'opzione in favore della responsabilità dei produttori, il rischio di sviluppo rappresenta una significativa incognita per costoro, e conseguentemente (specialmente considerando l'elevato livello tecnologico del settore), esprimendo un giudizio di almeno parziale tolleranza verso quegli errori che non siano dovuti ad un'attività superficiale nella creazione dei prodotti, a patto che il risarcimento corrisposto alla vittima mantenga intatta la sua integralità.

[61] Una simile soluzione è già stata proposta in alcuni stati americani: http://www.businessinsider.com/massachusetts-law-proposal-tax-self-driving-car-per-mile-2017-3.

6. Conclusioni e sistemi alternativi presi in considerazione – ed esclusi – nello sviluppo della proposta

Alla luce delle diverse posizioni che animano il dibattito sulla responsabilità per sinistri causati da veicoli autonomi ho deciso di proporre l'adozione di un sistema innovativo che potesse coniugare la esigenze di sicurezza e di incentivi alla ricerca e sviluppo, promuovendo al contempo la diffusione delle *driverless car*; considerando il rischio che un sistema improntato alla responsabilità oggettiva "pura" potesse in ultima analisi ostacolare l'innovazione nel settore, la predisposizione di un sistema a due livelli ha consentito di circoscrivere la piena responsabilità del produttore soltanto a quelle ipotesi in cui l'errore potesse considerarsi grave e non giustificabile.

Prima di procedere ad alcune riflessioni conclusive, giova soffermarsi brevemente ad illustrare due elementi alternativi presi in considerazione nello sviluppo del sistema, ed evidenziare perché entrambi non siano stati ritenuti pienamente soddisfacenti.

a) Nel considerare quali parametri potessero essere utilizzati al fine di valutare la negligenza del produttore a seguito di un incidente, si era innanzitutto ipotizzato di fare riferimento (non ad una valutazione su base casistica, bensì) a standard predefiniti, stabiliti *ex ante* da un organismo a tal fine preposto quale un'autorità indipendente. Si è ritenuto opportuno, tuttavia, accantonare un simile approccio sulla base della sostanziale incertezza che sembra caratterizzare lo sviluppo dei veicoli autonomi nell'industria[62]: la difficoltà nello stabilire degli *standard* di settore per la creazione del *software* di circolazione (e, in generale, per le caratteristiche del veicolo) prima che questo sia effettivamente immesso sul mercato rende a mio avviso preferibile guardare a soluzioni improntate ad una valutazione *ex post* delle caratteristiche del veicolo che ha concretamente prodotto il danno, e della condotta del produttore nello svilupparlo; ciò, altresì, al fine di tener conto in ogni situazione dei più elevati livelli raggiunti dall'industria e di offrire all'ente giudicante uno strumento di reazione più flessibile.

b) Nel sistema proposto, il 50% del fondo sarà sussidiato dal governo. Un'alternativa plausibile sarebbe stata quella di raccogliere le medesime risorse attraverso l'obbligo, per i proprietari di veicoli autonomi, di corrispondere somme periodiche attraverso la stipula di un sistema di assicurazione obbligatoria: il ricorso ad una simile soluzione avrebbe presentato l'indubbio beneficio di allocare il costo per il mantenimento del fondo esclusivamente in capo a coloro che effettivamente acquistino un automobile *driverless*, piuttosto che sull'intera comunità. Cionondimeno, ho ritenuto preferibile optare per un sostegno pubblico

[62] Cfr. M.U. Scherer, *Regulating Artificial intelligence Systems: Risks, Challenges, Competencies, And Strategies*, in 29 *Harvard Journal of Law & Technology*, 2016, 2; più in generale, cfr. A. Tutt, A*n FDA for Algorithms*, in *Administrative Law Review*, 2017, 83 ss.

sulla base di due considerazioni: in primo luogo, in virtù delle già menzionate incertezze circa l'impatto che la diffusione dei veicoli autonomi avrà sugli assetti proprietari e sulle dinamiche di *car-sharing* e, in secondo luogo, in considerazione del fatto che l'interazione tra veicoli autonomi e sviluppo del settore assicurativo rappresenta, al momento, un'altra significativa incognita, posto che l'appetibilità di tale mercato per le compagnie assicuratrici sarà radicalmente condizionata dall'effettivo grado di affidabilità che i veicoli autonomi raggiungeranno.

Alla luce di questi aspetti, e in base ai dati attualmente a disposizione, si è ritenuto che un contributo a carattere pubblico possa rappresentare la soluzione preferibile; inoltre, qualora il sistema di riscossione sia basato in futuro – come già accennato – sul ricorso ad una *mileage-tax,* sarà possibile mantenere, comunque, uno stretto collegamento tra l'effettivo utilizzo dei veicoli e il mantenimento del fondo.

Indipendentemente dall'accoglimento delle due alternative qui evidenziate, gli elementi essenziali del sistema rimangono nondimeno immutati: da un lato, i produttori saranno incentivati allo sviluppo responsabile di prodotti di qualità sempre crescente, e, dall'altro, la limitazione della piena esposizione risarcitoria ai soli casi di negligenza grave ridurrà il rischio che le imprese ritardino l'introduzione di nuovi prodotti sul mercato. In ogni caso, le vittime di incidenti stradali provocati da *driverless car* saranno sempre risarcite per la totalità del danno subito – interamente dal produttore o in via congiunta da questo e dal fondo.

Automated journalism and freedom of information: ethical and juridical problems related to AI in the press field

Matteo Monti*

Abstract

Journalism and the Press have always been deeply influenced by technological changes, and so they are in the digital world: from the competition of new media and the challenges of the Web 2.0 to the creation of a new way to produce news, i.e. automated journalism. Between the different notions of the use of AI in the Press field (automated journalism, robot journalism, News-Writing Bots, algorithmic journalism) in this paper the wording "automated journalism" is preferred as long as it seems to describe in a better way the practice of this type of journalism and it seems more used by the scholars who have studied this topic. Automated journalism is the use of AI, i.e. software or algorithms, in order to automatically generate news stories without any contribution of human beings, apart from that of programmers who (eventually) have developed the algorithm.

This paper aims to analyse the ethical and juridical problems of automated journalism, in particular, looking at the freedom of information and focusing on the issue of liability and responsibility. From a legal point of view, the analysis shall embrace and share the European concept of the freedom of information and media regulation, focusing in particular on the Italian legal system. Indeed in the range of European legal systems, the Italian system has more broadly developed the idea of freedom of information, and it has multiple approaches to the topic, which are partially explored here.

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The first paragraph of the paper shall explore the field of the media outputs in which automated journalism – as currently developed – could produce innovations and could be implemented. The utilization of the Italian model serves to understand how the pieces of automated journalism could be framed from a legal point of view.

The second paragraph shall analyse the legal and ethical problem of automated journalism by looking at the problems of liability and data use. As a consequence, a first section shall be dedicated to the issue of liability and another one to that of data utilization.

In the final remarks, some solutions and guidelines shall be proposed looking at the problems highlighted in the paper.

Key Words

Automated Journalism – Freedom Of Information – Artificial Intelligence – Algorithm – Press- Journalism

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1. Introduction: What is Automated Journalism?

Journalism and the Press have always been deeply influenced by technological changes[1]. Nowadays, they compete against new forms of media in the digital world[2] and face the challenges of Web 2.0 developments, including *automated journalism*. Although various terms are used to describe the use of AI in the Press field (e.g., automated journalism, robot journalism, news-writing bots, and algorithmic journalism), in this paper, the term

[1] R. Parry, *The Ascent of Media: from Gilgamesh to Google via Gutenberg*, London-Boston, 2011.

[2] Cfr. H. Örnebring, R. Ferrer Conill, *Outsourcing newswork*, in T. Witschge, C.W. Anderson, D. Domingo, A. Hermida (eds.), *The Sage Handbook of digital journalism*, London, 2016; M. Powers, *In Forms That are Familiar and Yet-to-be Invented': American Journalism and the Discourse of Technologically Specific Work*, in *Journal of Communication Inquiry*, 36, 1, 2012.

'automated journalism' is used because it seems most descriptive of the practice of this type of journalism and is often used in the research literature on this topic[3].
Automated journalism is a component of *post-industrial journalism*[4], which is a term used to describe the technological challenges affecting journalism, and involves the use of AI (e.g., software or algorithms) to automatically generate news stories without any input from humans, except for the programmer(s) who developed the algorithm. An AI algorithm independently collects and analyses data and then writes a news article. Automated journalism is based on *natural language generation* (NLG) technology, which permits, generally, the creation of text-based journalism from a dataset of digitally structured data: "Early examples of the use of NLG technology to automate journalism are mostly confined to relatively short texts in limited domains, but are nonetheless impressive in terms of both quality and quantity. The text produced is generally indistinguishable from a text written by human writers and the number of text documents generated substantially exceeds what is possible from manual editorial processes"[5]. Automated journalism operates by either independently writing and publishing news articles without input from a journalist or by 'cooperating' with a journalist who can be deputized to supervise the process or provide input to improve the article[6].
AI, in the contemporary sense of the term, was first used in a newsroom by *The New York Times (NYT)* in a project named 'Editor', which involved applying tags to traditionally-written news articles. Another early but more sophisticated use of AI in news writing was *The Washington Post (WP)*[7] utilizing Heliograf software to cover the 2016 Olympic Games in Rio; the software collected data related to the events schedule, results, and medal tallies. Since then, *WP* has begun to cover financial news and local sports events via automated journalism[8]. According to journalist Joe Kedhane[9], *WP* incorporated AI to cover simple local stories because it reduces costs and could broaden its audience and increase its market share.
Currently, many other new producers, such as *The Associated Press*, *Forbes*, *Los Angeles Times*, and *ProPublica,* use automated journalism[10], which is dependent upon access to

[3] K. Dörr, *Mapping the Field of Algorithmic Journalism*, in *Digital Journalism,* 4, 6, 2016.

[4] C.W. Anderson, E. Bell, C. Shirky. *Post-industrial Journalism: Adapting to the Present*, New York, 2012.

[5] D.Caswell, K. Dörr, *Automated Journalism 2.0: Eventdriven narratives*, in *Journalism Practice*, 2017, p. 2.

[6] This last issue could be considered a form of computational journalism. See J.T. Hamilton, F. Turner, *Accountability through algorithm: Developing the field of computational journalism*, Report from the Center for Advanced Study in the Behavioral Sciences, Stanford, 2009, available at https://web.stanford.edu/~fturner/Hamilton%20Turner%20Acc%20by%20Alg%20Final.pdf.

[7] WashPost PR Blog, *The Washington Post experiments with automated storytelling to help power 2016 Rio Olympics coverage*, in *washingtonpost.com*, 5 ago 2016.

[8] J. Kedhane, *What News-Writing Bots Mean for the Future of Journalism*, in *Wired*, 16 feb 2017.

[9] Id.

[10] A. Graefe, *Guide to Automated Journalism*, in *Columbia University Academic Commons*, 2016.

and the availability of structured data to generate news articles. The general advantages of this method are the speed with which data can be collected and articles can be written, fewer errors in the output, and cost savings[11]. However, the quality of automated journalism depends on the data it uses and often cannot introduce new issues, and it is currently unable to develop an in-depth critical analysis of the phenomena described. Indeed, technically speaking, the main problem of current AI articles is their low quality in terms of the narrative and critical considerations.

Legally and ethically speaking[12], it is clear that the main point of this revolution is the changes it brings about in media institutions (i.e., media outlets) and, above all, the rules of professional journalism[13]. Media institutions are commonly described as composed of regulative (i.e., rules and regulatory processes), normative (i.e., the link between social values and goals), and cultural-cognitive (i.e., the sharing mechanism) features[14]. Some scholars, such as Katzenbach[15] and Napoli[16], claim that media technologies should be analysed through the lens of institutional theory. Accordingly, this framework will be adopted in this essay to analyse the ethical and juridical problems of automated journalism, especially as it relates to freedom of information and the press. From a legal viewpoint, the analysis shall embrace and share the European concept of freedom of information[17] and media regulation while focusing on the Italian legal system. Of all the European legal systems, the Italian system has more broadly developed the idea of freedom of information, and it has multiple approaches to the topic, which are partially explored here[18]. As a consequence, the Italian legal system can be considered as a prototype case[19] in relation to the European paradigm of the freedom of information.

In the next section, the paper will explore the field of media outputs in which automated journalism, as currently developed, could produce innovations and how these innovations could be implemented, focusing on the Italian categorization of journalism outputs. Then,

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[11] See A. Graefe, cit. Cf. S.C. Lewis, O. Westlund, *Big data and journalism: Epistemology, expertise, economics, and ethics*, in *Digital Journalism*, 2015.

[12] See in general S.J.A. Ward, *Global Journalism Ethics*, Montreal, 2010.

[13] On the deinstitutionalization see: P.M. Napoli, *Navigating producer-consumer convergence: Media policy priorities in the era of user-generated and user-distributed content*, in *Communications & Convergence Review*, 1(1), 2009.

[14] W.R. Scott, *Institutions and organizations: Ideas and interests*, Los Angeles, 3rd ed., 2008, p. 52 and ff.

[15] C. Katzenbach, *Technologies as institutions: Rethinking the role of technology in media governance constellations*, in M. Puppis, M. Just (Eds.), *Trends in communication policy research*, Bristol, 2011.

[16] P.M. Napoli, *Automated Media: An Institutional Theory Perspective on Algorithmic Media Production and Consumption*, in *Communication Theory*, 24 (3), 2014.

[17] See for instance art. 20 of the Spanish Constitution and art. 5 of the German one; Art. 11 of the Charter of Fundamental Rights of the European Union and Art. 10 of European Convention of Human Rights.

[18] For an overview in English: F. Casarosa, E. Brogi, *The Role of Courts in Protecting the Freedom of Expression in Italy*, in E. Psychogiopoulou (ed.), *Media Policies Revisited*, London, 2014, 101. For an analysis of the implication of the Italian constitutional principles on the Internet platforms: M. Monti, *Perspectives on the Regulation of Search Engine Algorithms and Social Networks: The Necessity of Protecting the Freedom of Information*, in *Opinio Juris In Comparatione*, 1, 1, 2017.

[19] R. Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Oxford, 2014, 256 and ff.

in section 2, legal and ethical problems related to automated journalism will be analysed by examining the problems of liability and data use. Consequently, one subsection will be dedicated to the issue of liability and another to data utilization. In the concluding remarks, some solutions and guidelines will be proposed for the problems highlighted in the paper.

2. Reasonable and current use of AI in the Press Field: The framework of Automated Journalism

The 'disruptive innovation'[20] of automated journalism has lead to 'automation anxiety'[21], which is partially unjustified considering AI's limited effect on the press field. Additionally, the fear of technology is unjustified if it is utilized in sectors where it can operate without dangerous implications. To understand the best field of application of automated journalism, it could be useful to consider the paradigm of freedom of information and its *species* in the Italian legal system as an example[22]. Freedom of information is regulated quite differently in various legal systems across the world. In Italy, its regulation is well developed and articulated, and, as in the European field, it is based on active and passive features: the freedom to inform and the right to be informed[23].

While examining case law in the Italian legal system, it is possible to identify some *species* of freedom of the press and information[24]. The first category is the so-called *right of chronicle*, which is the right to merely report facts about something that has happened. This right is related to a journalist's commitment to and controls over sources of information and, therefore, on the accuracy and truthfulness of the events narrated[25]. It is possible,

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[20] C.M. Christensen, *The Innovator's Dilemma*, Harvard, 1997.

[21] D. Akst, *Automation Anxiety*, in *The Wilson Quarterly Summer*, 2013.

[22] P.Costanzo, *Informazione nel diritto Costituzionale*, in *Dig. Pubbl. VIII*, Torino, 1993, 319, 323. The Italian legal system is peculiar because it has enshrined in laws journalist rules of the profession and the code of ethics (law no. 69/1963), and it has formalized a sort of corporation of journalists that has been considered consistent with the Constitution by the Constitutional Court, which has highlighted the specific role played by journalists in democratic systems (Constitutional Court decision no. 11/1968. Cf. Constitutional Court decision no. 98/1968).

[23] See *ex pluribus* Constitutional Court decision no. 348/1990. Italian scholarship, independently from adhesion to an individualistic theory of free speech (i.e., a sort of American vision) or a functionalist theory of it (i.e., a vision more similar to the German idea of free speech), recognizes that the output of journalism to be considered protected as free speech has to be based on the diffusion of true facts, or – importantly – that subjectivity false reporting is not free speech. See P. Barile, *Il soggetto privato nella Costituzione Italiana*, Padova, 1953, 121; C. Esposito, *La libertà di manifestazione del pensiero nell'ordinamento italiano*, Milan, 1958, 37; A. Pace, *Commentario della Costituzione. Art. 21*, Bologna-Roma, 2006, 89; S. Fois, *Principi costituzionali e libera manifestazione del pensiero*, Milan, 1957, 210-211.

[24] Most of the reported Criminal Supreme Court's (Cass. pen. – *Corte di Cassazione Penale*) caselaw arises from the defamation matter.

[25] *Ex pluribus* Criminal Supreme Court (Cass. pen.) decision of the 7/7/1987. Cf. Criminal Supreme Court (Cass. pen.) decision no. 41249/2012.

in any case, that the facts are combined with a critique of the events described or with some comments made by the journalist. The second category is *right of critique* (i.e., the right to criticize), which means freedom to critique an idea, an event, or other aspects of society. In judicial applications[26], this right requires minor attention to the truthfulness of events that are commented on and critiqued. *Right of critique* could be considered a sort of political pamphlet made by a journalist. The third category is *investigative reports,* namely pieces of journalism that better correspond to the Press' role as the watchdog of democracy. It consists of exposing theories about facts that are not wholly-verifiable. According to the courts[27], in this case, the check on the sources of information is less needed. The field in which automated journalism could operate and be useful in increasing the quality of news seems to be *right of chronicle*. Indeed, in this framework, automated journalism could be a way to improve and make *right of chronicle* more objective by collecting data and reporting them without human input or distortion. It could potentially be the most 'pure' or a perfect form of *right of chronicle*. From the audience's viewpoint, it seems that automated journalism could completely substitute journalists' input in this field[28]. *The Los Angeles Times' Homicide Report* is a good example[29] of how automated journalism could avoid bias in media coverage of murders by reporting all types of murders and informing public opinion with correct data. The project started as a blog in 2008 and was then re-launched in 2010, retrieving homicide data directly from the Los Angeles County Coroner's Office. News stories could then be expanded with details provided by journalists: "crime reporters used the automatically generated stories as initial leads for exploring a particular case in more detail, for example by adding information about the victim's life and family"[30]. A useful evolution of this system would be the ability to add some details about family stories collected from the public register and other sources.
Other examples of implementing *right of chronicle* are *The Los Angeles Time*s' Quakebot, which involves earthquake reporting, and *AP's* Wordsmith platform, which concerns corporate earnings stories. Sometimes, the narration is more difficult due to specific elements of the data. Other times, the Wordsmith software is too simplistic to face the topic, as in the case of reporting local governments' activities[31].

[26] *Ex pluribus* Criminal Supreme Court (Cass. pen.) decision no. 15236/2005. And for the issue of the check on the facts: Criminal Supreme Court (Cass. pen.) decision of the 16/4/1993.

[27] *Ex pluribus* Criminal Supreme Court (Cass. pen.) decision no. 9337/2012.

[28] An experiment has demonstrated that "In sum, the available evidence suggests that the quality of automated news is competitive with that of human journalists for routine tasks". M. Haim, A. Graefe, *Automated News*, in *Digital Journalism*, 2017, 13.

[29] N. Lemelshtrich Latar, *The Robot Journalist in the Age of Social Physics: The End of Human Journalism?*, in G. Einav (ed), *The New World of Transitioned Media*, New York, 2015, 74.

[30] A. Graefe, cit., 22.

[31] D. Caswell, K. Dörr, *Automated Journalism 2.0*, cit., 11 and ff.

Thus, it seems that automated journalism is currently limited to *right of chronicle*[32] reporting because software and technology are not sufficiently advanced to improve or substitute a human being's critique[33]. As a consequence "These limitations, and others, ensure that manual writing will remain the only viable method for producing the most complex, impactful, and valuable journalism for the foreseeable future. Nonetheless (…) it is indeed possible to encode many journalistic events and stories as data, and thereby automate the writing of news that is more complex than routine sports and finance reporting"[34]. Actually and currently, "Most uses of robot journalism have been for fairly formulaic situations"[35]. Indeed, even if automated journalism can find new correlations in the data, it cannot explain the reasons for or consequences of these correlations. Although human reasoning is still necessary for non-*right of chronicle reporting*, in the near future[36], AI could be able to provide critique if programmers give them additional abilities, such as fact-checking political statements or simulating emotions related to unfair decisions[37].

In conclusion, in situations where data mining is impossible[38], human journalists are still needed. Additionally, automated journalism could relieve journalists from the task of covering the most straightforward events of public interest and allow them to focus on more complex events or *right of critique*-type reporting[39]. However, it should be noted that automated journalism should not be considered a form of neutral journalism because the editor still chooses which stories will be published[40]. Editors and publishers could introduce bias by choosing to focus on publishing news about crimes perpetrated by immigrants if they want to attack immigrants or news about problems in the financial market if they want to emphasize problems caused by capitalism.

[32] Perhaps, also in some fields of investigative journalism. Cf. S. Parasie, *Data-Driven Revelation: Epistemological Tensions in Investigative Journalismin the Age of 'Big Data'*, in *Digital Journalism*, 2014.

[33] Cfr. K. Dörr, *Mapping the Field of Algorithmic Journalism*, cit.

[34] D. Caswell, K. Dörr, *Automated Journalism 2.0*, cit., 16.

[35] T. Kent, *An ethical checklist for robot journalism*, in *medium*, Feb 24, 2015 (Updated march 2016).

[36] For more information regarding the possible evolution of NGL technology, see D. Caswell, K. Dörr, *Automated Journalism 2.0*, cit.

[37] For a very futuristic picture of the journalist's work, see F. Marconi, A. Siegman, *A day in the life of a journalist in 2027: Reporting meets AI*, in *www.cjr.org*, April, 11, 2017.

[38] "Despite all the buzz about Big Data and the possibilities of mining huge sets of information, availability of data is actually one of the barriers to increased automation". C-G. Linden, *Decades of Automation in the Newsroom*, in *Digital Journalism*, 5, 2, 2017, 132.

[39] A. van Dalen, *The algorithms behind the headlines: How machine-written news redefines the core skills of human journalists*, in *Journalism Practice*, 6 (5-6), 2012.

[40] Graefe, cit., 16.

3. Legal problems and ethical issues related to Automated Journalism

3.1. Is Automated Journalism protected as free speech, and who is liable for it?

From a legal viewpoint, the two main issues concerning automated journalism are: the legal status of automated journalism and the problem of liability. The two topics are strictly connected since the issue of AI's speech protection has consequences that impact liability. The first issue is the *vexata questio* of an algorithm's protection[41]. In the United States, for example, many scholars have debated whether the First Amendment protects algorithms' output. Summarizing the position that can be certainly endorsed, it could be said that the output of an algorithm must be considered protected speech as long as it has a content message[42]. From this perspective, the protection of algorithms could seem legitimate, but the message produced by an algorithm could be illegal. This leads to the second issue: Who is the author of this speech? Alternatively, and perhaps more importantly, who is liable for an algorithm's speech?

Indeed, it could be possible to distinguish the speaker or author of the speech (the Algorithm) from the subject liable for the speech: It could be said, following the aforementioned scholars, that the outputs of an algorithm could be considered free speech[43] despite the lack of human intervention, but liability should be identified. In a broader sense, the issue of responsibility seems to be central in the AI field: "Responsibility is therefore essential, in view of what sort of AI we develop, how we use it, and whether we share with everyone its advantages"[44]. The main problem of AI is, legally speaking, liability for the actions of robots or AI[45] and, in particular, the specific matter of imputation and liability for automated journalism raises different concerns.

[41] See *ex multis*: O. Bracha, F. Pasquale, *Federal search commission – Access, fairness, and accountability in the law of search*, in *Cornell Law Review*, 93, 2008; J. Bambauer, *Is data speech?*, in *Stanford Law Review*, 66, 2014; T. Wu, *Machine speech*, in *University of Pennsylvania Law Review*, 161, 2013; S.M. Benjamin, *Algorithms and speech*, in *University of Pennsylvania Law Review*, 161, 2013; E. Volokh, D. Falk, *Google: First amendment protection for search engine search results*, in *Journal of Law, Economics & Policy*, 8, 2012.

[42] It is a sort of vessel "for the ideas of a speaker, or whose content has been consciously curated" (Wu, cit., 1498). See Benjamin, cit.

[43] Consider the so-called Baidu doctrine: Jian Zhang v. Baidu.Com Inc, 10 F. Supp. 3d 433 (2014).

[44] J. Cowls, L. Floridi, *Prolegomena to a White Paper on an Ethical Framework for a Good AI Society (June 19, 2018). Available at SSRN: https://ssrn.com/abstract=3198732* **or** *http://dx.doi.org/10.2139/ssrn.3198732*, 3.

[45] *Ex multis* between criminal law and private law: P.M. Asaro, *Robots and Responsability from a legal perspective*, in *Proceedings of the IEEE*, 2007; U. Pagallo, *The Laws of Robots: Crimes, Contracts, and Torts*, Springer, 2013; G. Hallevy, *Liability for Crimes Involving Artificial Intelligence Systems*, Springer, 2015.

Scholars[46] who have focused on the matter of automated journalism have used a shortcut to solve the problem of liability: the editor's or the fact-checker's responsibility[47]. Indeed, in the Press field, it is quite easy to find individuals who are deputized to check the content of published news, and they are usually held responsible along with the author of the piece of journalism. If the writer of an article is an algorithm, which obviously cannot be charged for defamation, for example, only editors or fact-checkers remain, so all the liability will be placed on them. This position could also be compatible with the theory of an autonomous subjective liability of robots as proposed by Hallevy, who presented a complex twist of models of criminal liability concerning the actions of robots[48]. Hallevy's *perpetration-via-another model*[49] individuates a robot as an innocent instrument in the hands of an evil programmer or user who decides to commit a malicious crime, while in the *natural-probable-consequence liability model*[50], liability is connected to the programmer or the user's negligence, and the *direct liability model*[51] considers the AI or robot to have committed a crime independently.

In the automated Press field, as stated previously, the use of AI is not yet developed well enough to create critical journalism or decide what to generate and publish[52]; for this reason, just the first two categories of models of liability can be met. 'Perpetration via AI' seems the most applicable because if an editor or a programmer decides to alter or use AI to create fake news or defame someone (among other nefarious purposes), his or her crime and the consequent liability seem quite evident. However, if the AI's inaccurate or

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[46] L. Weeks, *Media Law and Copyright Implications of Automated Journalism*, in N.*Y.U. J. Intell. Prop. & Ent. L.*, 4, 81; S.C. Lewis, A. Kristin Sanders, C. Carmody, *Libel by Algorithm? Automated Journalism and the Threat of Legal Liability*, in *Journalism & Mass Communication Quarterly*, 2018.

[47] The only way in which a programmer could be considered guilty of defamation with actual malice would be when there is a proof that: "human programmers had a 'high degree of awareness' of false statements rather than interrogating the awareness of an algorithm. To do so, the plaintiff would need to show that the programmer knew, or should have known, that the algorithm would produce false statements that would be harmful to an individual's reputation. Such a showing could occur if an algorithm were intentionally programmed to develop and produce false content". S.C. Lewis, A. Kristin Sanders, C. Carmody, cit., 9.

[48] G. Hallevy, *Liability for Crimes Involving Artificial Intelligence Systems*, Springer, 2015; Id., *When Robots kill*, North-eastern University Press, 2013; Id., *The Criminal Liability of Artificial Intelligence Entities: from Science Fiction to Legal Social Control*, in *Akron Intellectual Property Journal*, 4, 2, 2010.

[49] G. Hallevy, *The Criminal Liability of Artificial Intelligence Entities: from Science Fiction to Legal Social Control*, in *Akron Intellectual Property Journal*, 4, 2, 2010, 179 and ff.

[50] Id., 181 and ff.

[51] Id., 186 and ff.

[52] In this case, the fine could be directly imposed on the editor, and the AI could be corrected (i.e., modified) to prevent further crimes. The programmer's liability could be less present since "Overall, the (delegated) power of algorithms is rising. A high degree of complexity in the cooperation between algorithmic agents and humans results in low transparency (not only for users, as in the mass media, but also for producers), controllability, and predictability compared to reality construction by traditional mass media. Agency and accountability problems become more important (Chopra and White, 2011) as well as the moral significance (Verbeek, 2014) of algorithms. Even programmers and software engineers increasingly do not know what 'their' algorithmic selection produces (Auerbach, 2015)". N. Just, M. Latzer*, Governance by Algorithms: Reality Construction by Algorithmic Selection on the Internet*, in *Media, Culture & Society*, 2016, 253.

libellous output is due to the negligence of programmers or editors ('natural-probable-consequence liability model'), the issue seems more complicated and related to the need for the development of some standard of due diligence.
If the lack of a human writer shifts responsibility to the editor, as in the case of an anonymous article, are programmers or engineers liable for their AI's output? In the literature (and laws), an analysis of automated journalism programmers' liability seems to be absent despite programmers being the controllers and writers of the variables in an algorithm. If it is true that AI could, in some way, act (or, in the future, learn) without human intervention, it does not seem like a current issue in automated journalism because AI's independent decisions are limited by the programmed data choices and instructions to assemble the data. Consequently, would it be possible to discharge the liability on the programmers? Editors or fact-checkers can examine certain aspects of the output, but they cannot check all the aspects of the algorithm and surely not the technical process from which the algorithm produces the news.
If there are significant errors in the programming, the algorithm could ignore pre-determined data, which would distort the output, and the editor and fact-checker would not have the technical skills to recognize it. Editors and fact checkers are probably unable to understand the algorithm's code and trust their engineers and programmers to develop good algorithms[53]. Indeed, although NLG technology is evolving, making the code more similar to an editorial task characterized by computational thinking than a code for programmers, in any case, it is "a skill set that is not yet a common component of journalism education"[54]. As a consequence, the issue of the programmer's responsibility cannot be ignored as we will see in the next section.
In conclusion, in the field of automated journalism, liability should also be determined for programmers in cases of negligence or actual malice. Some forms of liability should be established by legislators or, at least, developed by the Courts. Implementing and enforcing laws or creating *ad hoc* laws seems to be an urgent and crucial need.
Currently, due to the lack of *ad hoc* laws and rules for automated journalism, the concern arises regarding data use and whether some ethical problems could be resolved by media companies without the intervention of legislators. The types of questions the next section will focus on are those concerning data utilization and the problem of *bad data*[55].

[53] "In Algorithmic Journalism these principles are embedded within code, with journalists and coders working together to fit the product to individual and organizational ethical standards" (K.N. Dörr, K. Hollnbuchner, *Ethical Challenges of Algorithmic Journalism*, in *Digital Journalism*, 2016, 6). From this viewpoint, data analysis and programming are increasingly important skills (V. Mayer-Schonberger, K. Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think*, London, 2013), but currently, it is the individual journalist's responsibility to learn these skills (S.C. Lewis, N. Usher, *Code, Collaboration, and the Future of Journalism: A Case Study of the Hacks/Hackers Global Network*, in *Digital Journalism*, 2, 3, 2014).

[54] D.Caswell, K. Dörr, *Automated Journalism 2.0*, cit., 4.

[55] Q. E. McCallum, *Bad Data Handbook*, Cambridge, 2012.

3.2. Problems and ethical issues linked to Automated Journalism

Ethical best practices, as well as ethical problems, are often considered by scholars and journalists as important factors through which new technologies utilized by the media can be analysed to improve the work of journalists[56]. Starting with 'traditional' mass media ethics[57], this section will analyse new challenges introduced by automated journalism and the legal framework of *right of chronicle* (i.e., the main field in which automated journalism is applied). The advantage of automated journalism could be improvements to the legal category of *right of chronicle*, which is the main area in which objectivity is essential. The accuracy and objectivity of the news based on facts could be increased by the use of algorithms that are able to produce an article directly from a set of data. Indeed, Graefe[58] reports that Lou Ferrara, a former vice president and managing editor for entertainment, sports, and interactive media at *The Associated Press*, describe the benefits in term of accuracy derived by automated journalism: "The automated reports almost never have grammatical or misspelling errors, (...) and the errors that do remain are due to mistakes in the source data"[59]. Still, as stressed, automated journalism currently only works well "for fact-based stories for which clean, structured, and reliable data are available"[60]. Automated journalism could also reduce costs and allow journalists to dedicate more time to more important matters and, above all, critique events and even the facts reported by the same automated journalism.

However, automated journalism also creates many ethical dilemmas. Setting aside the use of automated journalism in creating fake news[61], the central ethical problems linked to AI's creation of news articles can be analysed. The main issue of the current use of AI in writing articles is the quality and correctness of the data used. Concerning this topic, the problems that could be highlighted are linked to the data used to generate an article, especially the identity (i.e., the source) of the data and their publicity, the accuracy of data, and the need to respect its integrity by avoiding manipulation.

The first issue concerns the identity of the data used or, more precisely, the transparency of data sources. If protecting sources of information is fundamental to traditional journalism, what is the ethically most desirable solution for data sources in automated journalism? As stressed by Dörr&Hollnbuchner "it is questionable whether source protection is possible or even desired as service providers and their journalistic clients should disclose

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[56] S.J. Ward, *The Invention of Journalism Ethics. the Path to Objectivity and beyond*, Montreal, 2006.

[57] D.S. Horner, *Understanding Media Ethics*, Brighton, 2013. Using a holistic approach as suggested by M. Ananny, *Toward an Ethics of Algorithms: Convening, Observation, Probability, and Timelines*, in *Science, Technology, & Human Values*, 41, 2015.

[58] Graefe, cit., 23.

[59] Ibidem.

[60] Id., 15.

[61] W. Knight, *Fake news 2.0: personalized, optimized, and even harder to stop*, in *MIT Technology Review*, 27 mar 2018.

all data sources in terms of data transparency”[62]. Indeed, it could be ethically desirable to make readers conscious of data sources used by AI to produce an article. Using data from a ‘political’ source or an independent/public authority could be acceptable even if – probably – the parameters used by a political actor and an independent one to collect these data are different[63]. The most important thing is that the reader is aware of the source of the dataset used by AI. From this viewpoint, it has to be stressed that a dataset used by AI could be a public and open source or public but based on the necessity to request access[64], and sometimes, data utilization could be illegal or barely legal[65]. Using these terms, the data source could sometimes be similar to an informant’s identity.

However, to be consistent with the principle of transparency, given the risk of abuse of AI, the data source should always be made clear. Being transparent about the provenience of the dataset could make discovering the ‘informant identity’ of the data (or the chink in the security system)[66] easier, but the accountability of the news transmitted seems to be more important as long as it informs the public debate and the political arena of facts, and the risks of abuse in AI journalism are high in term of misinformation and disinformation. Furthermore, it is also undeniable that factual information could come from a politically oriented source[67]. The consequence, from an ethical point of view, should be that as the audience has the right to know the political position of a newspaper, people also have a similar right to know the sources of data used by automated journalism, as well as their political orientation.

The second issue regards the ‘quality’ of the data employed (i.e., the accuracy and correctness of data from which the article is generated). “«The reason for the lower error rate is that algorithms don’t make typos or arithmetic miscalculations,» said AP’s global business editor, Lisa Gibbs. «The errors are generally because of a problem with the data. If the data’s bad, you get a bad story»”[68]. Regarding this problem, an ethical duty should be the necessity to only use correct, objective, and accurate data: “automation works particu-

[62] K.N. Dörr, K.Hollnbuchner, *Ethical Challenges of Algorithmic Journalism*, in *Digital Journalism*, 2016, 9.

[63] Cfr. M. Schudson, *Political Observatories, Databases & News in the Emerging Ecology of Public Information*, in *Daedalus*, 139 (2), 2010.

[64] “An American data journalist explained that getting interesting and useful data is often the result of long struggles based on Freedom of Information Act (FOIA) requests”. C-G. Linden, *Decades of Automation in the Newsroom*, cit., 132.

[65] For example, collaboration with hackers to detect financial scandals, from which a daily news automated journalism outputs could be generated: P. Bradshaw, *Data Journalism*, in L. Zion, D. Craig, *Ethics for Digital Journalists: Emerging Best Practices*, New York, 2014, 207.

[66] Cf. Id., 212.

[67] As stressed: “But factual information can be molded by the provider to its liking. Imagine if political campaigns began to offer data feeds of candidate speeches – location of speech, size of crowd, main points, key quote, etc. Even if a news company’s algorithm added background information on the candidate, poll numbers, etc., would we feel comfortable basing a news story on what the campaign considered the most significant things he said? How would a story like this be different from a press release?”. T. Kent, cit.

[68] F. Marconi, *A guide for newsrooms in the age of smart machines*, cit., 18.

larly well in domains such as finance, sports, or weather, where data providers make sure that the underlying data are accurate and reliable. Needless to say, automation cannot be applied to domains where no data are available. Automation is challenging in situations where data quality is poor"[69]. Hence, choosing a dataset should be guided by the ethical principle of accuracy because choosing a reliable source, especially if is politically oriented, is a central ethical point. Consider a dataset produced by a company or collected by a political organization. These sources could also be used if they are 'politically' oriented[70], but regardless the fact they only collect data they want or need (e.g., collecting just the criminal records of immigrants, the advantages of the commercialization of a product, or the aptitude test results of a private school), the data's accuracy must be undoubted. The programmer/editor/journalist must check the accuracy and correctness of the data[71]. Of course, this verification must also be conducted if the dataset is managed by the State or a public authority[72].

On the contrary, the consequence of using unreliable data could be the diffusion of fake news, such as *The Los Angeles Times*'s Quakebot reporting an earthquake that did not happen or inaccurate reports in the financial field due to an erroneous reading of the data, such as the error concerning Netflix's second-quarter earnings in 2015[73]. Searching for the most accurate data available and attempting to cross-check different datasets could be an excellent way to avoid making embarrassing mistakes or spreading fake news.

Additionally, automated journalism could be used only when the data are trustworthy and predictable events are involved; regardless, an ethical duty should be monitoring the process of producing and publishing the output of automated journalism. This last aspect leads us to the third ethical principle that should be at the base of automated journalism: Monitoring by a fact-checker or an editor could avoid the inevitable errors that a machine might make. The absence[74] of monitoring and validating[75] the produced output could be one of the most dangerous aspects of automated journalism. Conscientious monitoring and validating could eliminate or minimize errors due to, for example, unpredictable events[76] or misleading data: "The accuracy of these supervised learning systems is, of course, important. The two most common errors in this sort of machine learning are terms that we

[69] Graefe, cit., 17.

[70] Of course, as said before, readers have to be informed about the sources of the dataset and its political orientation.

[71] It is very important to verify data before using it and should be an ethical duty of every journalist. P. Bradshaw, *Data Journalism*, in L. Zion, D.Craig, *Ethics for Digital Journalists: Emerging Best Practices*, New York, 2014, 203.

[72] See, for instance, the mistake made by *The Texas Tribune*: Id., 204.

[73] Graefe, cit., 24 and 25.

[74] Regarding the lack of a monitoring process, see Dörr, Hollnbuchner, cit., 10. The newsroom should have it as claimed by T. Kent, cit.

[75] N.L. Latar, *The Robot Journalist in the Age of Social Physics: The End of Human Journalism?*, in G. Einav (ed.), *The New World of Transitioned Media*, New York, 2015.

[76] Regarding unpredictability, see Graefe, cit., 24.

borrow from statisticians – Type I (false negative) and Type II (false positive) errors"[77]. A verification process for AI-generated output should be mandatory in the Press field, which would make it possible to consider fact-checkers or editors liable for negligence.
The fourth ethical issue is linked to the problem of data distortion due to either someone modifying the results in bad faith[78] or the existence of bias in the AI algorithm. Journalism ethics has already dealt with this first aspect: the creation of fake news, as well as the distortion of facts and data, is prohibited[79]. For this reason, the solution is quite banal and straightforward: banning this type of conduct.
The second one is, instead, quite innovative as bias in the AI could influence the reading of data and, as a consequence, the correctness and accuracy of the news article. "Dan Keyserling, head of communications at Jigsaw, a technology incubator created by Google, explains the overarching concern – that algorithms are prone to bias, just like humans: «We need to treat numbers with the same kind of care that we would treat facts in a story,» Keyserling said. «They need to be checked, they need to be qualified and their context needs to be understood»"[80].
Linked to the problem of bias, there is also the problem of how ethical values[81] of journalism can be coded into an algorithm. These two correlated aspects lead to the necessity of a dual ethical solution: granting the accountability of the algorithm while making the programmers ethically bounded. Thus, the first issue could be resolved by making the algorithm accountable so that it becomes not only transparent but also understandable[82], which would make identifying bias easier[83]. Reputational pressure on the Press should then force the newspaper to resolve and eliminate possible bias by discovering it and

[77] F. Marconi, *A guide for newsrooms in the age of smart machines*, available at the website <https://insights.ap.org/uploads/images/the-future-of-augmented-journalism_ap-report.pdf>, 2017, 9.

[78] AI could be a very dangerous tool in the wrong hands. AI could be a very dangerous tool in the wrong hands: cf. M. Taddeo, *The limits of deterrence theory in cyberspace*, in *Philos. Technol.*, 2017. T. King, N. Aggarwal, M. Taddeo, and L. Floridi, (2018, May, 22), *Artificial Intelligence Crime: An Interdisciplinary Analysis of Foreseeable Threats and Solutions*. available at the website <SSRN: https://ssrn.com/abstract=3183238>.

[79] See T. Laitila, *Journalistic Codes of Ethics in Europe*, in *European Journal Of Communication*, 1995.

[80] F. Marconi, *A guide for newsrooms in the age of smart machines*, available at the website <https://insights.ap.org/uploads/images/the-future-of-augmented-journalism_ap-report.pdf>, 2017, 3.

[81] F. Kraemer, Felicitas, K. van Overveld, M. Peterson, *Is There an Ethics of Algorithms?*, in *Ethics and Information Technology*, 13 (3), 2011. Cf. M. Del Campo, A. Fure, W. McGee, S. Manninger, A. Flexer, *Autonomous Tectonics – A Research into Emergent Robotics Construction Methods*, in F.Scheurer, J. Nembrini, A. Kilian, C. Gengnagel, *Rethinking Prototyping: Proceedings of the Design Modelling*, Berlin, 2013.

[82] Cf. M. Coddington, *Clarifying Journalism's Quantitative Turn: A Typology for Evaluating Data Journalism, Computational Journalism, and Computer-Assisted Reporting*, in *Digital Journalism*, 3 (3), 2015. More broadly see M. Turilli, L. Floridi, *The Ethics of Information Transparency*, in *Ethics and Information Technology*, 11 (2), 2009.

[83] It would be possible, for instance, to develop an AI that can discover bias or analyse an AI program to verify which variables it uses. Cf. A. Caliskan, J.J.Bryson, A. Narayanan, *Semantics derived automatically from language corpora contain human biases*, in *Science*, 356 (6334), 2017, 183-186.

aiming "to move toward a model of algorithm ethics by asking when, how, and for whom NIAs work"[84].

The second issue should be overcome by also applying a code of ethics to programmers[85] who will be part of the new technological world of journalism. Indeed, with the advent of automated journalism, they will become proto-journalists: "a further challenge will be to develop and codify ethical guidelines building an ethical background for non-journalistic actors involved. This also applies to media organizations as they have to develop and adopt ethical codes of conduct for Algorithmic Journalism"[86]. Thus, the correctness of automated journalism is possible as long as the algorithm at the base of the AI that 'composes' (i.e., writes) the article is free from any ideological bias and programmers do not distort the data. Given the increasingly relevant role of engineers in the Press field, it is necessary to think about forms of ethical responsibility and the legal liability of programmers[87]. The idea that the programmers are free of any bias is naïve or, at least, too optimistic[88].

Finally, there is the problem of attributing the news generated by algorithms. Usually, in traditional journalism, when a piece of news is anonymous, it means it was created by the whole board of the newspaper and is attributed to the whole team (also, the liability remains just on the editor). In automated journalism, an issue arises concerning the necessity to highlight that the writer is AI and not a human being[89]. Ethically speaking, identifying whether a human being or a machine is the writer of a piece of news seems to be necessary so the reader will be aware when reading an article and allow him or her the freedom to choose between traditional journalism and automated journalism.

All these ethical issues and, most importantly, good practices[90] that avoid the diffusion of low-quality journalism could be enshrined in an ethical code or, even better, in a code of conduct based on the model of those required by the *EU General Data Protection Regulation* (art. 40). Although this solution could regulate automated journalism without the 'plaster effect' of a law, guaranteeing the possibility of modifying the code as AI continues

[84] M. Ananny, *Toward an Ethics of Algorithms: Convening, Observation, Probability, and Timeliness*, in *Science, Technology, & Human Values*, 2015, 7.

[85] According to some editors, they could be considered the true authors of the news. T. Montal, T., Z. Reich, *I, robot. You, journalist. Who is the author?*, in *Digital Journalism*, 5, 2016, 13.

[86] K.N. Dörr, K.Hollnbuchner, *Ethical Challenges of Algorithmic Journalism*, cit., 11.

[87] "New leaders can be expected to run the newsrooms – they will be the data silo managers and software writing engineers. Arthur Sulzberger, publisher of the NYT, was recently asked what he would do today in his media organization, given his experience: Arthur Sulzberger surprised some people recently when asked what he would do differently in the digital transition, given hindsight. Hire more engineers, he said". Latar, cit., 75. All of those involved in automated journalism should probably be subjected to a code of ethics. See S.C. Lewis, O. Westlund, *Actors, Actants, Audiences, and Activities in Cross-Media News Work: A Matrix and a Research Agenda*, in *Digital Journalism*, 2014.

[88] Cfr. D. Lazer, R. Kennedy, G. King, A.Vespignani et al., *The Parable of Google Flu: Traps in Big Data Analysis*, in *Science*, 6176, 2014.

[89] Cfr. T. Montal, T., Z. Reich, cit., 13. K. Dorr, *Mapping the Field of Algorithmic Journalism*, in *Digital Journalism*, 2015.

[90] D. Craig, *Journalism Ethics And Best Practices*, L.Zion, D. Craig (eds.), *In Ethics for Digital Journalists: Emerging Best Practices*, New York, Routledge, 2014.

to evolve[91], it could bind both programmers and journalists. In the complex mix of approaches guaranteeing rights and democracy on the Internet (e.g., digital governance, digital ethics, or digital regulation[92]), the utilization of a code of conduct, at least in Western democracies[93], could be the Aristotelian golden mean to safeguard technological evolution and progress, as well as integrate automated journalism in the Press field as a watchdog of democracy. The accuracy of news diffused through automated journalism is necessary for being framed as news output and for being consistent with the passive feature of freedom of information as contained in the Italian and European paradigms of the press and freedom of information (i.e., the right to be informed).

4. Final Remarks

The issue "is not whether data, computers, and algorithms can be used by journalists in the public interest, but rather how, when, where, why, and by whom"[94]. Automated journalism could be a very effective way to improve the quality and accuracy of news related to *right of chronicle*, but some ethical and legal rules need to be established. From this perspective, enshrining the aforementioned ethical principles in a code of conduct could assist judges in applying laws yet in force, interpreting them to apply to AI, and understand the respect of good practices in trials concerning liability.

De lege ferenda, the issue of liability could be resolved by assigning responsibility to the editors[95], who can develop tools for monitoring the results of automated journalism. For example, they could apply a monitoring process or check the sources of data to avoid being deemed negligent in a defamation case[96]. The application of criminal and civil liability for abuse and negligence in the use of automated journalism could be the best instrument

[91] F. Pizzetti, *La protezione dei dati personali e la sfida dell'Intelligenza Artificiale*, in Id. (ed.), *Intelligenza artificiale, protezione dei dati personali e regolazione*, Torino, 2018, 181.

[92] "On the governance of the digital, there is much to be said, and even more still to be understood and theorised, but one point is clear: the governance of the digital (henceforth digital governance), the ethics of the digital (henceforth digital ethics, also known as computer, information or data ethics (Floridi and Taddeo 2016)) and the regulation of the digital (henceforth digital regulation) are different normative approaches, complementary, but not to be confused with each other, in the following sense". L. Floridi*, Soft Ethics and the Governance of the Digital*, in *Philosophy & Technology*, 2018, 3.

[93] This solution could also accommodate the doubts of Floridi. Id., 6 and ff.

[94] A.B. Howard, *The Art and Science of Data-driven Journalism*, New York: Tow Center for Digital Journalism, Columbia University, 2014, 4.

[95] In the United States, Section 230 of the Communications Decency Act cannot act as a shield for automated journalism (Weeks, S.C. Lewis, A. Kristin Sanders, C. Carmody, cit., p. 12); the same could be said in the Italian legal system, where an online newspaper was considered a common newspaper (for additional information regarding warranty in the criminal trial, see Criminal Supreme Court [Cass. pen., Sez. Un.], decision no. 31022/2015) and under the European Union's legislation (Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000).

[96] Cf. S.C. Lewis, A. Kristin Sanders, C. Carmody, cit., 10.

to guarantee the accuracy of automated journalism, imposing a process of monitoring and fact-checking algorithms' outputs. This seems to be the easiest way to grant the respect of ethical principles, at least until the 'offenses' committed are checkable by a non-programmer. In this perspective, some *ad hoc* laws could be necessary to assign liability also to programmers.

Given as a pacific statement the unavoidable political nature of choosing which news stories to publish, automated journalism raises many questions concerning the future of the Press and journalism, but above all, it involves many ethical questions. The main problems are related to the way data are utilized, but they could be solved with the application of the best practices and some *ad hoc* law in the field of liability. The aforementioned ethical principles could, hence, be enshrined in an ethical code that should be enforced on workers involved in new journalism technologies and, preferably, linked to innovative law regarding the liability of programmers. Of course, some form of self-regulation of the category of techno-journalists, including programmers, such as the *IFJ Code of Principles*[97] or the *Charter of Poynter*[98], would also be desirable as a complementary tool. To sum up, with these rules, automated journalism could bring benefits to the world of journalism, but it cannot substitute for journalists. The role of human beings in journalism will not disappear because the kind of critique needed to read the facts currently cannot be performed by a machine. No AI can currently make the governments accountable for their choices. "No robot journalist can become a guardian of democracy and human rights. It is therefore extremely important that human journalists should understand the dramatic developments in their professions and make sure these changes serve them in ways that will preserve and strengthen their very important social function"[99].

[97] IFJ Declaration of Principles on the Conduct of Journalists, available at <http://www.ifj.org/about-ifj/ifj-code-of-principles/ >.

[98] Poynter Code of Principles, available at < https://ifcncodeofprinciples.poynter.org>.

[99] Latar, cit., 78.

Essays

Essais

Ensayos

Saggi

The evaluation of "culturality" of assets: verification and declaration

Roberto Dante Cogliandro*

Abstract

This contribution starts from an overview of the complex regulatory framework on cultural heritage, with the aim of investigating the innovative impact of the new discipline, drafted with the goal to overcome the idea that, according to the category of the asset, its culturality is assumed by law. Today, in fact, there has been a tendency to evaluate the "item" without presumption, in an attempt to find a balance between the public need to guarantee the conservation, enhancement and use of the asset and the interest not to prevent nor complicate its circulation. Following these needs, in 2004 the legislator decided to put an end to the system of "lists" with the Code of cultural heritage, introducing a general obligation for the Ministry of cultural heritage to verify the cultural asset and, therefore, to declare the interest. The Code at Art. 10 proposes a list of assets that can be defined as "cultural", of which the doctrine has proposed different classifications, among which is the one based on the relationship between asset and the process of verification or declaration regardless of their ownership. In order to identify the assets subject to verification, in addition to the subjective criterion – based on the ownership of the asset to the State, Regions, other local public bodies as well as any other public body and institute and non-profit legal entities – other indispensable requisites are the following: a) the asset must be a work of an artist who is no longer living b) the creation must date back over fifty years if movable and over seventy years if immovable.

Key words

Cultural Assets – Conservation – Enhancement – Use – Circulation – Code of Cultural Heritage – Declaration of Cultural Interest

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1. Premise

The current legislation concerning the assessment of the cultural nature assets is included in the Code of Cultural Heritage and Landscape, introduced by Legislative Decree dated 22nd January 2004, no. 42. For the purposes of analysing the current regulations, it is advisable to offer an overview of the complex regulatory framework characterized by a rather articulate and inhomogeneous process that goes back over time. Such a reconstruction seems necessary for the purposes of a more complete analysis of the innovative impact of the new discipline, aimed at overcoming legacies of the past which, according to the category of the asset, assumed its cultural nature *ope legis*.

The innovation lies precisely in the tendency to evaluate the "item" without presumption, in an attempt, «*on the one hand, to find the balance between the public interest in guaranteeing the conservation, enhancement and use of the cultural heritage, and the need, on the other, not to hinder the circulation of assets that are without interest or to allow it, even for assets that are of such interest, when the needs of protection are guaranteed and the disposal can, on the contrary, ensure their best value without prejudice to the public enjoyment*»[1].

[1] See the Resolution no. 16/2006/G of the Court of Auditors of October 24, 2006, in http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sez_centrale_controllo_amm_stato/2006/*Delibera_n._16_2006_G.pdf*.

2. The regulatory framework: the Code of cultural heritage

For years, L. n. 1089/1939 has been the benchmark for the discipline of objects of artistic or historical interest.

Such law at art. 1 and 2, identified the "items" subject to protection.

The regulatory framework was characterized by an *ope legis* subordination mechanism to the protection regime.

With the entry into force of the Civil Code of 1942, the state property was specifically identified and, moreover, the inalienability of an absolute and no longer relative nature was arranged.

The relative character of inalienability emerges again in 1997, following the entry into force of l. n. 662/1996, although limited to real estate used by the military administration. Indeed, for the organizational and financial needs related to the restructuring of the Armed Forces, by decree of the President of the Council of Ministers, on proposal of the Minister of Defence, after hearing the Ministers of Treasury and Finance, properties are identified to be included in a specific program of disuse to be carried out according to the indicated procedures. In particular, it happens that, for the purpose of exchange and disposal of properties to fall into disuse, according to special programs, the Ministry of Defence communicates the list of such properties to the Ministry for Cultural and Environmental Heritage that decides no later than ninety days from the receipt of the communication regarding the possible existence of the historical-artistic interest, identifying, if so, the individual parts subject to the protection of the buildings themselves.

Specifically mentioned is the discipline included in l. n. 1089/1939 for assets recognized for this interest, to which the provisions of art. 24 and ff. of that law, and, therefore, acknowledging the possibility of authorization for sale by the Minister for cultural heritage.

These provisions were re-proposed with adjustments in the 1999 budget and subsequently in 2001.

The need to produce incomes from state property generates a strange legislative mechanism now tending to expand, now to limit, the transferability of "cultural heritage".

A point of arrival in the normative chaos is the legislative decree of 29 October 1999, n. 490, approving the T.U. on cultural and environmental heritage, according to which (referring to art. 822 of the Civil Code) the inalienability of the assets belonging to state property, the Regions, the Provinces and the Municipalities is established.

A relative inalienability regime is also considered, subject to the authorization of the Ministry of Cultural Heritage and conditioned by the lack of interest in public collections and by the absence of damage to their conservation directly dependent on the alienation, in guarantee of non-impairment of the public enjoyment: a) of cultural assets belonging to the State, regions, provinces, municipalities that are not part of the historical and artistic state property; b) of cultural heritage, and, specifically, immovable and movable items that exhibit artistic, historical, archaeological, or demo-ethno-anthropological interest and

immovable things which, due to their reference to political, military, literature, and art history and of culture in general, have a particularly important interest, belonging to public bodies; c) of collections or series of objects that, by tradition, fame and particular environmental characteristics, have as a whole an exceptional artistic or historic interest and for which ministerial declaration of "items" of particularly important interest has intervened.
In reality, according to the provisions of the Enabling Act of 8 October 1997 n. 352, the Consolidation Act of 1999 has completely revised the discipline of cultural heritage, repealing the rules that existed until then, without, however, innovating the subject. In short, the existing legislation is brought together, introducing, when necessary, modifications to the rules for a more precise coordination and a simplification of the procedures.
Thus, a protection mechanism – already present with l. n. 1089/39 – is proposed, based on a rather vague discipline that required regions, provinces, municipalities, other public bodies and private non-profit legal entities to become an active part in identifying assets of presumable cultural interest through the preparation of appropriate descriptive lists to be submitted to the Ministry [2].
One of the problems yet unresolved by the T.U. is the enhancement to be given to said lists. In the absence of indications on the matter, the jurisprudence constantly believed that the lists had a declaratory character for the purpose of reporting to the Ministry about the "probabilities" of the existence of a cultural interest. This orientation has also and above all been affirmed on the basis of a constant non-compliance by public administrations and by the subjects similar to them in the preparation and transmission of said lists.
After all, neither the non-compliant administrations have ever been sanctioned, nor has the Ministry ever made use of its power-duty to provide for a substitute, as foreseen by the existing rules. The prevailing jurisprudence[3] considered that the mere inclusion in the list did not guarantee the requirement of "culturality", just as the lack of insertion did not preclude the application of the particular protection legislation. Therefore, the consequence of inclusion in the list was simply the provisional subjection to cultural protection, always having to, instead, follow an express provision of the administration concerning the recognition of the cultural interest of the assets.
With the enactment of the d.P.R. n. 283/2000, the regulation governing the sale of property belonging to the historical-artistic heritage, the obligation to compile the lists is extended to the state administrations involved in processes of disposal and enhancement of assets.

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[2] G. Casu, *Testo Unico in materia di Beni Culturali e Ambientali*, Studio n. 2749, edited by the National Council of Notaries, approved by the Civil Studies Commission on March 1, 2000, which can be consulted online at *www.notariato.it*.

[3] Cons. Stato, sex. VI, 9 February 2000, n. 678, in Mass. C.d.S., 2000, I, 263; Cons. Stato, 27 February 1998, n. 1479, in Mass. C.d.S., 1998, I, 1775. On the contrary, minority jurisprudence believed that the measure of recognition of cultural interest could also be implied on the basis of the intrinsic qualities and characteristics of the asset as well as the administrative acts and behaviour in the management of the asset. See Cass., 24 April 2003, n. 6522, in *Foro Amm. C.d.S.*, 2003, 1256. In doctrine, C. Volpe, *Commento agli articoli da 12 a 16 del Codice dei beni culturali e del paesaggio*, in *www.giustizia-amministrativa.it*.

Furthermore, within the range of the listed goods, the Ministry has the obligation to identify those having historical or artistic interest, as well as those requiring authorization for instruction (alienation, provision in concession or agreement).
A general prohibition on the disposal of assets that are not present in the list is established by the administrations (and similar bodies). This prohibition seems to have almost a punitive function for the continuing inactivity of the administrations or in any case can be understood as a stimulus to comply with the law.
There have been subsequent regulations aimed at controlling the enhancement, management and alienation of the State property assets also through the establishment of LTDs.
In particular, in 2002 the “Patrimonio dello Stato S.p.A.” was established and the legislator, with legislative decree April 15th 2002 n. 63, converted by l. n. 112/2002, considered the possibility to transfer to “Patrimonio dello Stato S.p.A.” full or partial rights on property belonging to the available and unavailable assets and to the state property with the task of enhancement, management and, possibly, alienation, prior, clearly, authorization from the Ministry of Cultural Heritage, also based on the provisions of Regulation no. 283/2000. “Patrimonio dello Stato S.p.A.” also has the possibility to transfer, for consideration, its assets to “Infrastrutture S.p.A.”. The latter was founded in 2002 following the l. n. 112/2002 with the task of financing, in partnership with banks and other intermediaries, infrastructures and large public works. Its activity consisted in collecting financial resources in order to use them for the financing of these activities related to infrastructures and large public works.
The implementation procedures consisted in the issue of stock and bonds as well as carrying out securitization transactions guaranteed by the public real estate assets (historic, artistic, state property, cultural and archaeological) owned by the “Patrimonio dello Stato S.p.A.”.
In 2004, however, the Code of cultural heritage entered into force and the legislator decided to put an end to the system of “lists” through it. Thus, in art. 184, repealing the Regulation n. 283/2000 and with art. 12 what generally happened in practice becomes a norm: the introduction of a general obligation of verification of cultural interest by the Ministry of cultural heritage and, therefore, a declaration of cultural interest.

3. Object of Protection: cultural heritage

The Code of cultural heritage is designed and drafted on the assumption, which is not new, that cultural interest cannot constitute an absolute presumption, but must be rather verified.
Art. 10 provides a list of assets that can be defined as cultural, regarding which the doctrine proposed different classifications.
One of these is based on the relationship between asset and the process of verification or declaration regardless of the relative ownership.
In particular, art. 10 paragraph 1 states that «*cultural assets are immovable and movable property of the State, regions, other local public bodies, as well as any other public institute and body and of private non-profit juridical persons, including civilly recognized eccle-*

siastical bodies, which have artistic, historical, archaeological or ethno-anthropological interest.».

According to art. 12, it is necessary that such assets are the work of an artist who is no longer living, the accomplishment of which dating back over fifty years, if movable, or over seventy years, if immovable. Said assets maintain such qualification until subjected to a special verification of the existence of cultural interest.

This category does not include specific typologies of goods identified in paragraph 2 of art. 10 of the Code.

This elencation identifies the universality of assets that *ope legis* are subject to protection as they are part of collections that can be representative of a specific case.

We talk about: a) collections of museums, art galleries and other exhibition areas of the State, regions, other local public bodies, as well as of any other public institution; b) archives and individual documents of the State, regions, of the other territorial public bodies as well as of any other public body and institution; c) book collections of the libraries of the State, regions, of the other local public bodies, as well as of any other public body and institute, with the exception of the collections which fulfil the functions of libraries.

Pursuant to art. 13, paragraph 2, such assets remain subject to protection even if the entities to which they belong mutate their legal nature in any way (so-called objective or inherent culture).

This provision responds to the twofold need to prevent the goods from being taken away from the special protection regime, as well as ensuring continuity of use by the community.

In the third paragraph, art. 10 lists categories of goods for which, for the purposes of submitting to the particular protection regime, a prior declaration of existence of cultural or historical-artistic interest is required (so-called subjective or declared cultural status).

In order to have a declaration of "interest", the interest must be considered "particularly important" or "exceptional". In particular, exceptionality is required for book collections belonging to individuals, as well as collections or series of objects not falling within the universality of goods indicated in paragraph 2 of art. 10 and that, by tradition, fame and particular environmental characteristics, or for artistic, historical, archaeological, numismatic or ethno-anthropological relevance, are of exceptional interest.

The particular importance of the interest is also required (a) for movable and immovable assets of artistic, historical, archaeological or ethno-anthropological interest, not in public hands or those of non-profit juridical persons, (b) for archives and individual documents of historical interest, (d) for immovable and movable assets which have a link with political and military history, literature, art, science and technology, industry and culture in general or that are testimonies of the identity and history of public, collective or religious institutions.

The reference to numismatic collections is expressed since 2006, the year of entry into force of Legislative Decree no. 156/2006. The clarification had been solicited for several reasons in order not to confuse ancient coins with other protectable assets[4].
In particular, anyone is given the possibility to possess private collections of coins, not all of which are subject to the particular protection for cultural heritage. Indeed, the protection of the collection or series of numismatic items follows the declaration provided for in art. 13 in the presence of an exceptional interest.
As for the coins, regardless of their inclusion in collections, it is necessary that they present an interest. The intensity of such interest changes according to whether the coins are in public or private hands. In the first case, an artistic, historical, archaeological or simple ethno-anthropological interest would seem sufficient, while in the second case it seems necessary for the interest to be of particular importance, in addition to being subordinated to the declaration of cultural interest.
The numismatic interest must be sought in the rarity and in the worth to be evaluated taking into account the age, the techniques and the materials of production as well as the context of reference. Such characteristics of rarity and merit are identified as alternatives unlike what is provided for other categories of goods, such as geographical maps, musical scores, manuscripts, photographs, for which the coexistence of both is required[5]. Such normative choice is not a misprint, an inattention or an oversight of the legislator, as a different prediction would have ended with the denial of cultural value to numismatic objects that, even if not rare, hold historical worth, especially when one comes across the so-called "hidden treasures"[6].
In listing the cultural heritage, the legislator also mentioned villas, parks and gardens as well as public squares, roads, streets and other urban open spaces[7] that however present an artistic or historical interest. For mining sites and rural architectures, however, the existence of a historical and ethno-anthropological interest is necessary, to which we must add the artistic one when the object of protection are ships and floats.
Specifically concerning mining sites, it is observed that the mining activity was a protagonist in the economic and cultural evolution of our country, whose subsoil, since ancient times, was considered one of the richest in Europe, not in terms of quantity but for the variety of minerals useful to men.

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4 D. Antonucci, *Codice commentato dei beni culturali e del paesaggio*, Napoli, 2009, 86.

5 T. Montorsi, *Le cose di interesse numismatico*, in *Aedon, rivista di arti e diritto on line*, n. 2/2006, *passim*.

6 D. Antonucci, *op. cit.*, 86-87.

7 Art. 10, par. 3, establishes the status of cultural assets for «immovables and movables*, belonging to anyone, which are of particular interest because of their reference to the political, military, literary, artistic, scientific, technological, industrial history and culture in general, or as evidence of the identity and history of public, collective or religious institutions*»; among such "items", the subsequent par. 4, encompasses, at lett. g): «*public squares, streets, roads and other urban open spaces of historical or artistic interest*»; but this happens not *ipso jure*, for intrinsic qualities of the asset, but only when the declaration of cultural interest provided for by art. 13. intervenes. On this point, T.a.r. Friuli Venezia Giulia, Trieste, 19 December 2011, n. 547, in *www.amministrativisti.fvg.it*.

The expansionist boom of mining sites took place around the fifties, decreasing later on because of the drop of materials to be extracted, a result of intense exploitation, and for their obsolescence in light of industrial development.
The sites, therefore, even if fallen into disuse, represent the example of the old economy and have provided a starting point for the development of conservation and enhancement policies. In many cases, these mining sites have become eco-museums able to represent aspects of a historical period[8], capable of favouring the economic development, with a cultural and tourist tone, of our country.
Rural buildings have value and must be protected as evidence of the traditional rural economy.
It happens, therefore, that often, while highlighting the deterioration of the structural elements of the building, the plasters, the fixtures, the floor, the architecture present valuable elements, for example with regard to the terrace, the battlements above the cornice, the entrance gates, perhaps finely built in blocks of stone in Piperno, such as to consider the building, for the particular architectural and constitutive type of materials, an example which is still original and not tampered with traditional agricultural structures, and therefore of considerable cultural interest pursuant Legislative Decree 42/2004[9].
With regard to the age set for real estate to be considered of cultural interest, it is noted that it has been raised from fifty to seventy years by virtue of a recent change.
From the first attempts to discipline and protect cultural heritage, or from l. n. 364/1909 (so-called Rosadi law) to l. n. 1089/1939 (the so-called Bottai law), to the legislative decree n. 490/1999 (T.U. of cultural heritage), to the Code of cultural heritage, the limit of fifty years was considered appropriate for a binding and effective protection of what could have a cultural interest.
With the intervention of the Legislative Decree May 13, 2011, n. 70 (converted into July 12, 2011, No. 106), as of May 14, 2011 (the day following publication in the Official Gazette), paragraph 1 of art. 12 was modified and therefore to date are subject to protection c.d. de jure (i.e. operating *ope legis* until the intervention of the specific provision of assessment of the interest in the protection itself) the assets «*whose execution dates back over fifty years, if movable, or over seventy, if immovable*»[10].

[8] L. Ficorilli, A. Patanè, *La valorizzazione dei siti minerari dismessi a fini culturali e turistici*, in *www.isprambiente.gov.it*.

[9] T.a.r. Campania, Napoli, sez. VII, 13 May 2013, n. 2471, in *http://lexambiente.it/*.

[10] T.a.r. Toscana, Firenze, sez. III, 15 May 2013, n. 805, in http://www.studiolegalepn.it/. Likewise, related articles have been modified for the purpose of a more precise regulatory coordination, such as art. 10, paragraph 5, which also specifies the mutual negative, establishing that the works «*are not subject to discipline*» restrictions «*whose execution does not go back over fifty years, if movable, or over seventy years, if immovable*»10, as well as art. 54, par 2 a) which establishes a general prohibition to alienate «*goods belonging to subjects indicated in art. 10, par 1, which are the work of an artist no longer living and whose execution dates back to over fifty years, if movable, or over seventy years, if immovable, until the conclusion of the verification procedure provided for in Article 12*». Therefore, only if the procedure ends with a negative result, the assets are freely transferable.

The elevation of the time limit is justified by the legislator on the basis of the need to maximize state-owned federalism, as well as with the interest in simplifying the administrative procedures related to building interventions in those municipalities that adapt urban planning tools[11] to the requirements of regional landscape plans[12].

4. The procedure to verify the existence of an artistic, historical, archaeological or ethno-anthropological interest

The discipline of the process of verification of cultural interest was anticipated by the Legislative Decree n. 269/2003 (Article 27, par. 9), adopted on 30 September, or the day following the date of approval of the scheme of the Code of cultural assets approved by the Council of Ministers, converted with amendments in l. November 24 2003 n. 326, which was followed by the Management Decree 6 February 2004, first provision for the implementation of the verification procedure.
With said Management Decree[13] it is noted that the State, Regions, Provinces, Metropolitan Cities, Municipalities and any other institution and public institute must identify the properties and describe the consistency, making use of a specific information model available on the Ministry’s website.
Such forwarding is, however, subject to the signing of agreements by the Regional Superintendents[14] with the parties involved in the legislation, subject to ministerial approval, with which the transmission times and number of lists are defined.
It is established that, during the first application (and in any case within thirty days of the publication of the Decree in the Official Gazette) the competent branches of the State Property Office transmit to the regional Superintendence of the Ministry for Cultural Heritage and Activities a first list of land, property of the State, together with the related descriptive sheets containing the data related to the individual properties.
The procedure, as described in Legislative Decree n. 269/2003, is known as particularly articulated according to a structured process on the tacit consent mechanism.
In fact, the regional Superintendence, on the basis of the preliminary investigation carried out by the competent Superintendence and of the opinion expressed by them in the peremptory term[15] of thirty days from the request, concludes the verification procedure

[11] With such notion we mean all the acts which have the purpose of protecting the territory and regulating its use and transformations.

[12] See comment by A. Ferretti, *Il decreto sviluppo e la tutela dei beni culturali*, in *www.leggioggi.it*.

[13] Act issued by a manager, an official of the Italian public administration.

[14] Peripheral organs of the Ministry of Cultural Heritage and Activities and Tourism (MiBACT) of the Italian Republic.

[15] This is the term that requires the fulfillment of an act within a given time, under penalty of loss.

regarding the existence of the cultural interest of the property with a motivated provision and it shall inform the requesting agency, within 60 days of receipt of the relevant descriptive card. The descriptive data sheets, integrated with the aforementioned provision, merge into an IT archive accessible to both administrations, for the purposes of monitoring the real estate assets and planning the interventions according to their respective institutional competences. The failure to communicate within the total term of one hundred and twenty days from receipt of the form is equivalent to the negative outcome of the verification.

Currently, the verification procedure is essentially the same as that considered in the previous system, even with corrections including the elimination of the tacit consent mechanism in contrast with art. 20, paragraph 4, of l. 241/1990, as amended by l. n. 80/2005 of conversion of the Legislative Decree n. 35/2005.

In fact, the legislator, specifying that in – the proceedings at the request of the party for the issuance of administrative measures – the silence of the competent administration is equivalent to granting the application, expressly excluded that such mechanism can be applied to proceedings concerning cultural and landscape heritage.

In order to protect the assets of probable cultural interest, their preventive and precautionary subjection to the particular protection regime is arranged up to the actual verification that can obviously end in a positive or negative sense.

However, there are different opinions according to which the setting of the Code of cultural heritage, in relation to the belonging of the asset, creates a "legal presumption of cultural interest", excluding that art. 12, paragraph 1, has a purely precautionary purpose pending the verification of cultural interest[16]. But let us check and analyse the various aspects.

5. (Follows): Subjective profile

Considering the subjective aspect, the assets must belong to the State, to local public bodies, to other public bodies, as well as to non-profit private legal entities.

A first important novelty lies in the express mention of the State amongst the recipients of the norm. Such indication was designed and intended on the assumption that not all the assets of the State's heritage are in the hands of the Ministry, as they may be in the availability of other administrations[17].

The historical exclusion of the State from the particular regime for the protection of cultural heritage was based on the assumption that the Ministry could not exercise formal

[16] On this matter see N. Aicardi, *L'individuazione dei beni di appartenenza pubblica e di enti privati non lucrativi*, in *I beni pubblici. Tutela, valorizzazione e gestione*, edited by Pollice, Milano, 2008, 314 ff.

[17] N. Aicardi, *L'individuazione dei beni di appartenenza pubblica e di enti privati non lucrativi*, cit., 314 ff.

administrative powers in respect of assets belonging to a subject whose Ministry is an organ[18].

Such approach should not be accepted without criticism[19] since within the State the individual Ministries are figures endowed with considerable autonomy. Moreover, the recipient of the rules is not only the owner but also the individual holder.

Particular attention should be given to ecclesiastical bodies[20] falling within the broader category of non-profit private legal persons, and therefore, recipients of the Code of Cultural Heritage.

Immediately after the entry into force of the Code it was easy to feel the catastrophic effect the application of the general regime of protection to the immense patrimony of the Church could have, characterized by the presence of numerous assets without cultural interest.

The Church was completely denied the legitimate expectation of being able to dispose of its patrimony. This was opposed to a general interest of the State not to see the cultural heritage of the country depleted[21].

This interaction is based on the Agreement of modification to the Lateran Concordat[22] (art. 12) of 18 February 1985, by virtue of which, in order to harmonize the application of Italian law with religious needs, it is expressly provided that the State and Church agree on the appropriate provisions for the protection, enhancement and enjoyment of cultural heritage of religious interest belonging to ecclesiastical authorities and institutions[23].

Two agreements followed, one signed on September 13, 1996, specifically concerning the protection of cultural heritage of religious interest belonging to ecclesiastical authorities and institutions; the other, signed on April 18, 2000, on the conservation and consultation of archives of historical interest and libraries belonging to ecclesiastical authorities and institutions.

With the entry into force of the Cultural Heritage Code, the need was felt to adapt the 1996 agreements. Thus, the Agreement was signed on 26 January 2005, between the Ministry

[18] T. Alibrandi, P.G. Ferri, *I beni culturali e ambientali*, Milano, 2001, 373.

[19] N. Aicardi, *op. cit.*, 314 ff. Interventions of different normative value have followed one another in order to clarify the impact of the new discipline on ecclesiastical authorities in the context of an open dialogue with the Church.

[20] Organisms, having purposes of religion and in particular of worship, which arose within the structure of the Catholic Church and of creeds other than the Catholic one, which can, currently and through recognition, play an important role also in the state system.

[21] M. Rivella, *Procedura per la verifica dell'interesse culturale dei beni immobili di proprietà di enti ecclesiastici*, in *www.olir.it and in ex lege*, IV/2004.

[22] With the 1984 agreement, the relations between the State and the Catholic Church were adjusted, adapting them to the principles established by the Constitution that had taken over by introducing substantially new elements to be taken into account.

[23] A. Ferretti, *Manuale di diritto dei beni culturali e del paesaggio*, Napoli, 2013, 52 ff.

for Cultural Assets and Activities and the President of the Episcopal Conference of Italy (CEI)[24].
It is established that (art. 2, paragraph 3) «*the inventorying and cataloguing of movable and immovable cultural assets belonging to ecclesiastical authorities and institutions constitute the cognitive basis for any subsequent intervention. To this end, the CEI collaborates in the cataloguing activity of such assets managed by the Ministry; in turn, the Ministry assures, where possible, the support to the inventoried activity promoted by the CEI and the parties guarantee the mutual access to the relative databases. For the implementation of forms of collaboration (...) the Ministry and the CEI can stipulate specific agreements*».
On 8 March 2005 the Department for Cultural Heritage and Landscape of the Ministry and the National Office for Ecclesiastical Cultural Heritage of the CEI sign the Agreement (Framework Agreement) to which the Regional Directorates must comply in preparing the local agreements with the ecclesiastical bodies.
Said agreement responds to a need expressed by the Ministry for reasons of uniformity and operational simplification to stipulate a single agreement applicable to all the ecclesiastical bodies acting on the Italian territory, and to identify a single channel for the introduction of the requests[25].
It is agreed that «*the Regional Directors of the Ministry for Cultural Heritage and Activities (...) sign with the Presidents of the Regional Episcopal Conferences – after their agreement with the diocesan Bishops of the Ecclesiastical Region, the Major Superiors of Institutes of Consecrated Life and men's and women's Institutes of Apostolic Life of Pontifical right of their own ecclesiastical Region or of their articulations located in the territory of the Region – agreements concerning the quantity, priority criteria and periodicity of sending requests for the verification of the cultural interest of the real estate of ecclesiastical institutions located in the territory of its competence*».
With regard to the procedures for completing the request for verification of cultural interest by means of appropriate software especially prepared by the Italian Episcopal Conference, reference is made to the layout set out in Attachment A of the ministerial decree of 25 January 2005 which defines the modalities of the verification of cultural interest for properties owned by non-profit private legal entities.
It is specified that only with regard to the process of verification of the cultural interest of the buildings of worship, the photographic documentation is limited to two.
Instead, the framework agreement of 8 March 2005 outlines the method for transmitting requests, which must take place through a single channel.
In short, the diocesan curia, having printed the descriptions of the goods through the software of the CEI, sends the documentation in paper and electronic format, together

[24] Permanent Assembly of the Italian Bishops.

[25] Mauro Rivella, *Procedura per la verifica dell'interesse culturale dei beni immobili di proprietà di enti ecclesiastici*, cit.

with the request for verification, to the representative for cultural heritage of the Regional Episcopal Conference. It will then be the regional appointee, within the first week of the month, to send to the Ministry – "Department for cultural and landscape assets", the documentation in electronic format; as well as, at the same time, to send the paper documentation to the Regional Directorates and, simultaneously, for reference, to the competent Superintendence with methods that provide for the proof of delivery.
The Ministry provides each diocesan Curia[26] with a password for read-only access to the information system, in order to know the progress of the procedures for verifying the cultural interest of the pertaining assets and grants the Regional Episcopal Conferences the password to enter the information system for verification requests sent by the diocesan Curia of the respective territory.
In addition, the Ministry grants the CEI – "National Office for religious cultural heritage", a password for read-only access to the information system in order to know the progress of the procedure for verifying the cultural interest of all Italian ecclesiastical bodies, and guarantees the Italian Conference of Major Superiors and the Union of Major Superiors of Italy read-only access to the information system through appropriate passwords concerning the ecclesiastical authorities of their responsibility.
The framework agreement also requires its application for one year only, from the date of signing, as well as the commitment of the parties to issue explanatory newsletters[27] for what is within its competence.
So, with Circular of March 14, 2005, on the assumption that it would be unthinkable to present complete lists of ecclesiastical estate assets, as well as very difficult for the Ministry to meet within the required time all requests for verification, the CEI specifies that the amount of requests should balance the operational capacity of the peripheral ministerial bodies with the consistency of the ecclesiastical property and the legitimate need of the authorities to be able to dispose of it. Priority, therefore, had to be given to those properties in respect of which deeds and interventions that could no longer be postponed were necessary.
The Ministry, however, with the circular of March 15, 2005 reiterates the inability to process verification requests not coming from official channels. At the same time, even if it does not exclude that this channel could be used by subjects who are not linked to the parameters dictated by the l. May 20, 1985 n. 222, such as private worship associations[28]

[26] Also called Bishop's Curia, in the Catholic Church, it is the assembly of all the organisms and persons who collaborate and help the Bishop in the pastoral guidance of the whole diocese. The curia is established and described by the Code of Canon Law in the canons 469-494.

[27] Written communication that in an organization, such as an enterprise or a public administration, is sent to a plurality of recipients to give orders, make arrangements or transmit information.

[28] Body characterized by the organization of different people in order to pursue a common non-profit purpose.

civilly approved according to the civil code, regional foundations[29], etc., it points out that said requests will be calculated in the number of procedures available to ecclesiastical bodies, thus reducing the number available to them[30].

6. (Follows): Objective profile

For the purpose of identifying the goods subject to verification, after operating a skimming from the subjective point of view, based on the ownership of the asset of the State, the Regions, other local public bodies as well as any other public body and institution and non-profit-making legal entities, other indispensable requisites to take into consideration are the following: a) the asset must be the work of an artist who is no longer living; b) the creation must date back over fifty years if movable and over seventy years if immovable.
As stated above, only recently the time limit for real estate, namely in 2011, was increased from fifty to seventy years.
This provision, in the silence that accompanied its introduction, leads, on the one hand, to the dissatisfaction of the Superintendence which in this way saw a crack in their power of control both on the maintenance and restoration interventions to be carried out on the assets of municipalities, provinces, regions, dioceses, parishes, foundations, etc., and on their circulation; on the other hand it brings the favour of the operators in the sector who sees the bureaucratic burden relieved concerning artefacts that most often show an absolute lack of cultural interest[31].
The assets are identified in the items indicated in art. 10, paragraph 1, to be read in conjunction with paragraph 4, which makes a list of goods to be considered included among those listed in paragraph 1. Therefore, we consider goods that have artistic, historical, archaeological or ethno-anthropological interest: a) assets that concern palaeontology, prehistory and primitive civilizations; b) goods of numismatic interest that, in relation to the period, to the techniques and materials of production, as well as the context of reference, have a character of rarity or merit; c) manuscripts, autographs, correspondences, incunabula, as well as books, prints and engravings, with relative moulds, having character of rarity and of value; d) geographical maps and musical scores of rare and valuable nature; e) photographs, with relative negatives, cinematographic films and audio-visual media in general, having a rare and valuable nature; f) villas, parks and gardens that have an artistic or historical interest; g) public squares, streets, roads and other urban open spaces of artistic or historical interest; h) mining sites of historical or ethno-anthropological interest; i)

[29] Body constituted by a patrimony preordained to the pursuit of a determined purpose.

[30] M. Rivella, *op. ult. cit.*, 30.

[31] See A. Ferretti, *Il decreto sviluppo e la tutela dei beni culturali*, in *www.leggioggi.it*, cit.

ships and floats with artistic, historical or ethno-anthropological interest; l) rural architectures with historical or ethno-anthropological interest as evidence of the traditional rural economy (paragraph 4).
Law[32] underlines that «A*rt. 12 (…) does not autonomously and exhaustively identify the requirements for the submission of the good to be verified, but quoting art. 10, paragraph 1, assumes that an, artistic, historical etc. interest subsists. Obviously the definitive assessment of the existence of the interest can only be achieved in the event of a positive outcome of the verification required by Art. 12 and, however, it appears necessary, from the beginning, to have a further objective connotation than the merely chronological one of the asset's origin and of the death of its creator. This conclusion is made clear by the wording of the rule of art. 12, Legislative Decree n. 42 /2004 which refers to art. 10, paragraph 1 of Legislative Decree n. 42 of 2004 and responds to practical needs of effectiveness of protection related to the impossibility for the peripheral organs of the Ministry of cultural and environmental heritage to verify, concretely, the existence of the interest in relation to all the things realized* ».

7. (Follows): the procedure

Pursuant to Art. 12, the procedure can be initiated by the competent bodies of the Ministry, ex officio or by request of the subjects whom the goods belong to and accompanied by the relative cognitive data[33]. The verification of the existence of artistic, historical, archaeological or ethno-anthropological interest is made on the basis of the general guidelines established by the Ministry itself in order to ensure uniformity of assessment.
For immovable property of the State, the request must be accompanied by a list of assets and their related descriptive sheets.
The identification of the criteria for the preparation of the lists, the procedures for drafting the descriptive sheets and the transmission of lists and sheets is delegated to Ministerial decrees, adopted in agreement with the State Property Agency and, for real estate used by administration of defence, also with the agreement of the competent general direction of the works and of the State Property Administration.
It is the Ministry, however, who establishes with its own decrees the criteria and procedures for the preparation and presentation of verification requests and related documentation.

[32] See T.a.r. Liguria, Genova, sez. I, 26 maggio 2010, n. 3297, Foro amm. TAR, 2010, 5, 1638.

[33] See Council of State, section. VI, 18 September 2013, n. 4649, Foro Amm. C.d.S., 2013, 9, 2587, according to which: «*With introduction of an asset belonging to a public body, art. 12, paragraph 2, of the legislative decree n. 42 of 2004 provides that the procedure for the verification of cultural interest can be initiated, not only on the initiative of the subjects whom the goods belong to, but also* ex-officio».

With regards to the lists and descriptive files, the concerned administrations referred to the management decree of 6 February 2004 and to the ministerial decree of 25 January 2005. In reality, the verification process could already be easily identified by reading only art. 12. Probably the Ministerial Decree of 2005 showed a practical function to solve operational problems that the computerized system had in the early applications as well as a function to separate the proceedings started on impulse from the ones started *ex-officio*. In fact, the 120-day deadline for the conclusion of the procedure is fixed in the hypothesis of request coming from the interested subjects. In case of silence the possibility of order to provide for is considered[34], to the Ministry and, in the event of continued inaction, after thirty days, the possibility of appealing to the TAR[35], which decides in council chamber[36].
The doctrine soon highlighted several critical issues regarding the content of the ministerial decree, believing that it was created already "old"[37]. In particular, considering the process of evaluating the "culturality" of the asset, it conditions the proposition of a judicial appeal to the prior injunction to the Ministry, excluded from the subsequent legislation.
Indeed, a few days after its adoption (on February 11th), law. n. 15/2005 came into force on the administrative procedure[38] with which the legislator, in the event of inaction by the administration[39], gave the possibility to act directly in court[40] without the need to send a prior notice of default[41].
Another problem arose from consideration of a deadline for completion of the procedure, of one hundred and twenty days, different and higher than that provided for by art. 27 of the Legislative Decree n. 269/2003, at the time mentioned in art. 12 of the Code.
Said article 27 was introduced before the entry into force of the Code in order to guarantee to the system an instrument able to bring to the declassification[42] of assets of the State that were not of cultural interest, thus allowing the availability[43] of the assets with consequent inflow of money into the state coffers[44].

[34] Written declaration by which the public administration is complied with the obligation to provide at its own expenses.

[35] Judicial body established in each region, competent to deal with administrative disputes at first instance.

[36] Location in which the judge withdraws for the case decision or particular modality with which the dispute is determined.

[37] A. Ferretti, *op. cit.*, 52 ff.

[38] Sequence of administrative acts that lead to the issue of a final act, the provision, and that therefore contribute to the achievement of a public interest.

[39] Inactive administration behaviour in response to a citizen's request.

[40] Make use of the court to enforce a right.

[41] Written declaration by which a party is bound to fulfil its obligation, indicating the legal consequences of the delay.

[42] Termination of the state character of an asset, resulting from a specific provision of the public administration.

[43] Right to dispose, i.e. to use the asset in a legal sense.

[44] C. Volpe, *Commento agli articoli da 12 a 16 del Codice dei beni culturali e del paesaggio*, cit.; A.L. Tarasco, *Beni, patrimonio e attività culturali: attori privati e autonomie territoriali*, in *www.giustizia-amministrativa.it*.

This law decree identified the length of the proceedings in sixty days.
It was immediately evident that, regardless of the problems of coordination with the legislation in force, a Ministerial decree could not modify what was established in a State Law.
The impasse was overcome by the Legislative Decree. n. 156/2006, which modified the last paragraph of Art. 12, expunging the reference to art. 27 of the Legislative Decree 269/2003 and ruling the duration of the procedure to be one hundred and twenty days from the request by the interested party.
Receipt of the request must be understood not as the date of submission of the application by electronic means, but rather the receipt of the paper application accompanied by the required information sheets, since, according to the Ministerial Decree of 2004, the sending of information albeit accompanied by digital signature[45] does not constitute the start of the verification process and requests cannot be considered if accompanied by lists that do not come from the printing of the web system[46].
As for the movable property, only with the issue of the decree of the General Director of 27 September 2006, published in the official gazette of 10 November 2006 n. 262, criteria and methods for verification were established.
As to the verifications initiated automatically, with M.d. February 28, 2005, which introduced art. 4-bis to the M.d. 6 February 2004, a similar period of 120 days is established for the conclusion of the proceedings from the date of receipt of the communication to initiate the verification procedure by the subject possessor of the asset.
The verification may have positive or negative outcome.
A negative assessment entails the exit from the protection system outlined by the Code of cultural heritage to which an ad hoc provision of de-standardization will necessarily follow so that the asset can be alienated. Nothing prevents, for other reasons of public interest, the good from remaining state property even if it is not considered of artistic, historical, archaeological or ethno-anthropological interest. This is the case, for example, of the assets attributable to the road, waterway, port state property.
If the verification process ends, however, with a positive assessment, this constitutes a «declaration» pursuant to art. 13 of the Code. In the case of things subject to property or movable advertising[47], the relative provision must be transcribed[48], upon request of the superintendent, in the relative registers in order to make it enforceable[49] against any subsequent owner, proprietor or holder for any reason whatsoever.

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[45] The computer equivalent of a traditional original signature on paper.

[46] D. Antonucci, *Codice commentato dei beni culturali e del paesaggio*, cit., 105 ff. Procedure of evaluation of the asset culturality.

[47] Set of resources prepared by the law to make certain facts and legal documents of real estate or property easily knowable, giving the interested parties the opportunity to gain knowledge of them, so as to ensure the certainty of legal relationships.

[48] Transcription is a type of real estate advertising.

[49] The enforceability is the suitability of a legal act to express its effectiveness toward third parties.

Article. 12, with reference to state-owned assets, establishes that the positive provision, together with the descriptive sheets, should be included in an IT archive, kept at the Ministry and accessible to the Ministry and the State Property Agency for the purposes of asset monitoring and planning of interventions according to their respective institutional competences.

8. The declaration of cultural interest

The procedure for the declaration of cultural interest is governed by Articles 13 and following of the Code and concerns the verification of the existence of cultural interest as identified in Art. 10, paragraph 3, and, therefore, differently graduated according to the various types of goods indicated therein.
The need for such an explicit declaration was introduced only with l. 11 June 1922 n. 778, which, however, has without prejudice to the further effects of the notification made in accordance with previous provisions.
As confirmed by the law, the previous regulation only required the notification of interest. In particular, pursuant to r.d. 30 January 1913 n. 363, art. 53, paragraph 1, the imposition of the unavailability constraint on building of historical-artistic value, in relation to private property or in any case held by private individuals "for mere title of possession", did not require, in the previous legislation, the formal declaration of considerable public interest in the preservation of the assets themselves, resulting the mere "notification of the restriction in the manner provided for by the regulatory provision" necessary (by registered letter, with acknowledgement of receipt or by formal notice or notification according to the rules of the code of civil procedure)[50].
The declaration procedure follows the procedural model already provided for by Legislative Decree no. 490/1999 (Testo Unico dei beni culturali).
In the 2004 Code, an innovative text and not merely a draft, the time of declaration and notification are clearly distinguished, therefore the provision containing the declaration constitutes the act with which the restriction is imposed, while the notification complies with the time of knowledge of the act[51].
In fact, the Code identifies assets by distinguishing them according to type and ownership, making a distinction between assets belonging to private individuals and assets belonging to anyone, requiring, as appropriate, a different assessment of interest, which must be exceptional, or particularly important.

[50] See State Council section VI, 10 July 2001, n. 3805, in *Foro amm.*, 2001, 2054.

[51] See C. Volpe, *Commento agli articoli da 12 a 16 del Codice dei beni culturali e del paesaggio*, cit.

In particular, paragraphs 3 and 4 of art. 10 list, albeit in a non-exhaustive manner, the various categories of goods subject to a particular binding regime upon declaration of cultural interest.

Therefore, pursuant to Art. 10 paragraph 3, with the declaration provided for by art. 13, cultural assets are: a) the immovable and movable goods that have particular artistic, historical, archaeological or ethno-anthropological interest belonging to subjects other than the State, the Regions, the other territorial Public Bodies and any other public institution and authority; b) archives and single documents belonging to private individuals, which have a particularly important historical interest; c) book collections, belonging to individuals, of exceptional cultural interest; d) immovable and movable assets, belonging to anyone, which are of particular interest because of their reference to the political, military history, literature, art, science, technology, industry and culture in general, or as evidence of the identity and history of public, collective or religious institutions; e) the collections or series of objects, belonging to anyone, that are not included among those indicated in paragraph 2 (see *infra*) and that, by tradition, fame and particular environmental characteristics, or for artistic, historical, archaeological, numismatic and ethno-anthropological relevance, are of exceptional interest.

To these categories we must add those that are specifically indicated in paragraph 4 when not belonging to the subjects indicated in paragraph 1 of article 10, that is the State, Regions, other local public bodies as well as any other public body and institute, private non-profit legal entities, including civilly recognized ecclesiastical bodies. These categories include: a) goods that concern palaeontology, prehistory and primitive civilizations; b) objects of numismatic interest that, in relation to the period, to the techniques and materials of production, as well as the context of reference, have a character of rarity or merit; c) manuscripts, autographs, correspondence, incunabula, books, prints and engravings, with relative moulds, having a rare and valuable nature; d) geographical maps and musical scores of rare and valuable character; e) photographs, with relative negatives, cinematographic films and audio-visual media in general, having a rare and valuable character; f) villas, parks and gardens which have an artistic and historical interest; g) public squares, streets, roads and other urban open spaces of artistic or historical interest; h) mining sites of historical or ethno-anthropological interest; i) ships and floats with artistic, historical or ethno-anthropological interest; l) rural architecture with historical or ethno-anthropological interest as evidence of the traditional rural economy .

The adoption of the declaration of cultural interest implies the need for a preliminary investigation in order to ascertain the existence of all the elements required by the relevant regulations.

Since there is no provision considering special rules to ensure that it is appropriate and adequate, it is considered peaceful that it should be based on objective elements, in order to arrive to a judgement on the asset and its characteristics.

Case law has consistently specified that the declarative provision is an expression of the exercise of a discretionary power and, as such, the administration is required to assess the

secondary interests involved, including private interests, whose sacrifice must be measured in relation to the intensity of protection of the cultural object present[52].

In fact, more recent decisions regarding the ethno-anthropological assets, specified that «*The imposition of the historical and artistic restriction does not require a weighting of the private interests with the public interests connected with the introduction of the protection regime, not even for the purpose of demonstrating that the sacrifice imposed on the private has been kept to the minimum possible, both because a declaration of particular interest is not an expropriation restriction, constituting the assets of ethno-anthropological importance a category that is originally of public interest, and because in any case the constitutional discipline of the historical and artistic heritage of the Nation (Article 9 of the Constitution) establishes its safeguarding as the primary value of the current regulation*»[53].

It is clear that, when the administration expresses opinions on the quality and value of an asset to be protected, it carries out assessments that relate to the merit of the administrative action even though it falls within the scope of the exercise of technical discretion. The latter, as is known, occurs when the examination of facts or situations relevant to the exercise of public power requires the use of technical or scientific knowledge of a specialized nature through an analysis of the facts and not of the interests. Hence the main difference between pure administrative discretion[54], which consists in examining the various interests at stake in the search for the most appropriate solution, and technical discretionality[55], the result of complex evaluations expressed through the use of questionable and non-certain criteria.

In the peculiar sector of cultural heritage, the assessment aimed at verifying the existence of the relative interest can only be accomplished by the Administration through the application of technical-specialist rules ontologically characterized by a physiological and indispensable questioning. It follows that these assessments can be censored in court only when it is clear that they are technically unreliable[56].

In any case, it is undisputed that the declaration of quality of cultural interest of an asset is based on the exercise of technical discretion, with the application of specialist technical-scientific knowledge, for which the judge's decision concerns the logic, consistency and completeness of the evaluation, considered also for the profile of the correctness of the technical criterion and of the chosen application procedure, with the limit of the relativ-

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[52] See State Council section VI, 2 September 1998, n. 1179, in *Foro Amm.*, 2000, 1796.

[53] See State Council section. VI, 3 July 2014, n. 3360, in *http://www.iusexplorer.it/ which recalls* CGARS, 10 June 2011, n. 418.

[54] Possibility of choice, or rather that "weighting" activity of all the interests at stake recognized to the public administration.

[55] Possibility of choice, recognized to the public administration, based on the verification of the existence of certain prerequisites of a technical nature required by law.

[56] Cons. Giust. Amm. Sicily, 10 June 2011, n. 418, Sez. Giur., with note by G. Tropea, *Il vincolo etnoantropologico tra discrezionalità tecnica e principio di proporzionalità: «relazione pericolosa» o «attrazione fatale»*, in *Dir. Proc. Amm.*, 2/2012, 718.

ity of the scientific evaluations remaining fixed. The administrative judge[57] can, therefore, censor the only evaluation that goes beyond the range of questionability, so that his judgement, while not remaining extrinsic, does not become a substitute for that of the Administration with the introduction of an equally debatable assessment[58]. This results in particular with regard to the judgement in historical-artistic matters for the ethno-anthropological profile, which, while anchored to technical criteria, has considerable margins of debatability due to the nature of the disciplines applied[59].

Obviously the imposition of the restriction must be adequately motivated.

In terms of the imposition of historical and artistic constraints, motivation relates to the indication and specification of the type of interest that justifies the provision, that is to say the artistic value of the asset, so that the administration's activity is that concerning the evaluation of particular relevance of the good from an artistic point of view, going beyond the evaluation of other profiles of public interest[60].

Nothing excludes that said motivation is expressed by reference herein concerning acts of the administration or even third parties[61], provided they respond to the need to externalize the reasons and the argumentative path at the basis of the provision, so as to allow a full and adequate reconstruction of the concrete reasons for the assessment and the consequent choice made and the correlative sacrifice imposed on the recipient of the provision. It therefore clearly appears as a necessity that motivation is adequate as the administration, albeit briefly, is required to establish the actual exercise of the assessment carried out in a logical process complying with the legislative requirements[62].

With specific regards to the declaration of "culturality" of a property it has been specified that in expressing its motivation, the Administration can limit itself to mention, also by way of example, only some of the characteristic elements from which the particular historical-artistic value of the asset can be deduced, understood as a whole. The fact that the motivation of the imposing decree of the restriction makes specific and prevalent reference to some external characteristics of the building is not in itself sufficient to consider that the restriction is only limited to the external parts and does not extend, to the internal parts, and to external parts other than those specifically considered. Indeed, it cannot be assumed that the objec-

[57] The knowledge of disputes regarding legal situations in the public administration.

[58] See State Council section. VI, 6 May 2014, n. 2295 and State Council, 14 luglio 2011, n. 4283, both can be consulted at the address *http://www.iusexplorer.it/*.

[59] See State Council section VI, 22 April 2014, n. 2019, in *De Jure*.

[60] See State Council section VI, 21 October 2005, n. 5939, in *Foro Amm. C.d.S.*, 2005, 10, p. 3030, and in *Riv. Giur. Ed.*, 2006, 2, I, 428.

[61] On this point, even recently, the jurisprudence affirmed the following: «*It is in fact peacefully necessary, when imposing a restriction on assets of historical and artistic interest, to give a detailed motivation, albeit for reference, that demonstrates the exposure and the complete evaluation of the elements that constitute the conditions for the imposition itself*»; State Council section VI, 31 May 2013, n. 2992, in *De Jure*.

[62] See C. Volpe, *Commento agli articoli da 12 a 16 del Codice dei beni culturali e del paesaggio*, cit.

tive scope of extension of the restriction should be derived exclusively from its motivation. Otherwise, we would face the paradox of having to describe analytically, in the provision of restriction, the particular merit of every single portion of the property, with the practical effect of having to exclude from the regime of cultural asset those parts of lesser prestige and to make the bond itself as a whole that is contradictory and of difficult management[63].

Often, the need of historical-artistic protection clashes with other requirements equally relevant for our system. In such cases, it is necessary to weigh up the sacrifice of the different interests at stake.

Object of discussion was, for instance, the protection of cultural heritage on automatic suspendibility of the legislation protecting cultural heritage whenever there is the need to eliminate architectural barriers.

It has been specified by law that «*it cannot be deduced from the text and the ratio of l. January 9 1989, n. 13 ("Provisions to facilitate the overcoming and elimination of architectural barriers in private buildings") the validity of a principle of overcoming and absolute and automatic derogation of the restrictions placed for the purposes of historical-cultural or landscape-environmental protection. These restrictions remain and must be respected (even where there are requirements for the protection of individuals with physical disabilities) if the realization of works preordained to overcome architectural barriers brings the "serious prejudice" to the cultural interest that is substantiated in safeguarding the restricted property, with the only limit of the obligation of adequate and reasonable justification of the possible refusal of authorization by the Superintendent. The "serious prejudice" to the protected property is not intended as physical damage to the property, but as a risk of damage to the value protected by the restriction, having the possibility, moreover, to relate only individual elements of the property, components of the overall historical-artistic connotation that underlies the qualification of cultural heritage*»[64].

9. Proceedings: competence; the investigation; the notification of the declaration and the transcription

The procedure for the declaration of cultural interest was outlined for the first time by art. 7 of the Legislative Decree n. 490/1999, considering that the start-up phase could be activated directly by the Ministry for cultural heritage and activities, or after proposal of the superintendent in charge by subject and by territory, also after request of the Region, the Province and the Municipality.

[63] State Council section VI, 2 July 2013, n. 3545, in *Foro Amm. C.d.S.*, 2013, 7-8, 2135.

[64] State Council section VI, 12 February 2014, n. 682, in *Riv. Giur. Ed.*, 2014, 2, I, 390.

It was also considered that the initiation of the procedure should be communicated to the owner, the proprietor or the holder of the property.
From the very beginning it was problematic to identify the subject responsible for the start up of the territorial articulation of the Ministry that worked together with the sector and regional superintendence.
Since with d.P.R. n. 441/2000 the adoption of measures was delegated to the regional Superintendence pursuant to Articles. 6 and 7 of the Legislative Decree n. 490/99, on proposal of the sectorial supervision in charge, the legislative office of the Ministry, on 10 June 2002, expressed its counsel identifying the regional superintendent as the competent body for the start-up communication65[65] and the sector supervisors as the subjects in charge of the proposal formulation66[66]
If the asset concerned real estate complexes, the above mentioned communication had to be sent also to the municipality where the property was located.
The communication had to have as its object the identifying elements of the asset and its assessment resulting from the act of initiative or proposal, the indication of the effects provided for in paragraph 4 as well as the indication of the term, in any case not less than thirty days, to submit any comments.
The communication also implied the application, as a precautionary measure, of the provisions of Section I of Chapter II and Section I of Chapter III of Title I of Legislative Decree no. 490/1999, with consequent subjection to public controls and conservation obligations as well as limits to alienation and other transmission methods.
Today the declaration procedure is governed by Art. 14 of the Code of cultural heritage with a formulation that largely follows that already provided for by art. 7 of Legislative Decree 490/1999, adding some modifications and clarifications.
The procedural initiative is entrusted to the superintendent, even on the motivated request of the region and any other interested territorial entity.
Furthermore, respected doctrine considers that the ex officio procedure can also be solicited by the request of any interested subject, such as the owner of the asset to declare, without however having any obligation to address the Superintendence. Therefore, the application is compared to a mere report[67].
The clarification that the request of the territorial authorities must necessarily be motivated has led the doctrine to believe that, in the absence of said motivation, the request can also be disregarded by the superintendent[68].

[65] Obligation to inform the initiation of the procedure to those who can a priori identify themselves as possible subjects involved.

[66] A. Ferretti, *Manuale di diritto dei beni culturali e del paesaggio*, cit., 127.

[67] T. Alibrandi, P.G. Ferri, *I beni culturali e ambientali*, cit., 283.

[68] A. Pontrelli, *Commentario al codice dei beni culturali e del paesaggio*, edited by Angiuli e Caputi Jambrenghi, Torino, 2005, 80.

In any case, in compliance with the dictates of the provisions on the administrative procedure, should the proceeding be activated on the motivated request of the territorial entities, it is to the latter that any notice of rejection must be communicated[69].
Pursuant to paragraph 1 of the art. 14, the superintendent must always communicate the initiation of the proceeding to the asset owner, the proprietor or the holder for any reason whatsoever.
The rationale of the legislator's choice to impose such communication must be sought, according to the jurisprudence, in the fact that, despite the assessment is based on a judgement of technical discretion, the final measure affects the recipient with direct or otherwise prejudicial effects. Allowing interested parties to be involved in the procedure, also through the presentation of observations, would respond to the need to allow the administration to assess all the interests and elements at stake, as a collaborative function, also in order to avoid erroneous decisions[70].
The third paragraph of Art. 14 of the Code of cultural heritage, in resuming the old provisions, with reference to "real estate complexes" requires that the communication to initiate the procedure should also be transmitted to the municipality and the metropolitan city. In this regard, even today we discuss the concept of "real estate complex". In any case, if we wish to change the relative definition from the jurisprudence affirmed in various areas of law, we can assume that the reference is to a building that as a whole constitutes a homogeneous unicum[71], or to

[69] The act by which, in proceedings at the request of the party, the person in charge of the proceeding or the competent authority, before adopting the negative provision, promptly informs the interested party of the reasons preventing the instance acceptance.

[70] See State Council section VI, 8 March 2000, n. 1171, in *Foro Amm.*, 2000, 927.

[71] On the concept of a real estate complex in the sense of a homogeneous unicum, see Cass., 16 May 2013, n. 11965, in *Guida al diritto*, 2013, 25, 51: «*On the subject of leases of urban buildings for use other than residential, in the case of sale, with a single deed or with several related deeds, to the same subject of a plurality of real estate units, including that object of the lease, the tenant, who invokes the right of first refusal and the related right of redemption referred to in Articles 38 and 39 of Law 392/1978, is responsible for proving that the parties have considered the various properties sold as separate units, without any unifying element, that have intended to conclude a cumulative sale by making it appear simulated as a block sale for the sole purpose of affecting expectations, being however irrelevant that the future, unitary destination of the building complex is only possible as a result of building interventions or renovations, provided these are physically executable and are not prohibited by urban planning instruments*»; Cass., 15 January 2001, n. 502, in *Giust. civ. Mass.*, 2001, 86: «*Without prejudice to the fact that in the case of sale of the entire building of which properties leased for use other than housing belong, the tenants of these do not have the right of pre-emption (and redemption) provided for by art. 38 and 39 of the law n. 392 of 1978, neither on the real estate unit object of the respective rental relationship nor on the entire building, representing this a different asset from the single units that compose it; in the different case of sale not concerning the entire building, but a part of it including the property unit leased and other – that is, the sale of several building units belonging to the same building – to determine whether or not the right of pre-emption and redemption of the tenant of one or more real estate units included in the sale fails, it must be ascertained if in relation to the object of the sale considered as a whole it can be considered a "*unicum*" that is a complex that in the state in which it is located is equipped of its own objective, effective and not fictitious structural legal individuality*»; Cass., 26 September 2005, n. 18784, in *Giust. civ.*, 2006, 10, I, 2071: «*In the hypothesis of renting of urban buildings used for purposes other than residential, in the case of sale – or promise of sale – with a single deed and for a total price, not of the entire building, but of a part of it, including the real estate unit leased and other real estate units belonging to the same building, to determine if there is a right of pre-emption (and redemption) of the tenant of the real estate units included in the sale, the judge must ascertain whether in relation to goods sold – considered as a whole – a* unicum *is configurable, that is, a building complex which, in the state in which it is at*

a group of buildings, also having different use destinations[72], that is also to an non-built area susceptible to fractionation[73]. As for the specific indication of recipients such as the Municipality and the metropolitan city, it is justified for the purpose of informing the subjects responsible for planning powers, the issuing of qualifications in the building sector and the related powers of control.

The original formulation of the law made the choice to send the communication to the municipality or to the metropolitan city an alternative. Only with the legislative decree n. 156/2006, the conjunction "or" was replaced with "and", with no margins of choice on the part of the body appointed for this purpose.

Although communication considered for the initiation of the procedure is not individual and personal, but given through appropriate forms of advertising, said form of communication is allowed thanks to the provisions of art. 8, paragraph 3, l. n. 241/90 whenever personal communication is not possible or is particularly onerous for the number of recipients.

Paragraph 2 of art. 14 specifies what the content of the communication should be. It must contain the elements of identification and evaluation of the asset resulting from the first investigations, the indication of the effects provided for in paragraph 4, as well as the indication of the term, in any case not below than thirty days, for the presentation of any observations.

For elements of identification and evaluation of the asset we mean those elements emerged in the pre-procedural phase that would induce the administration to initiate the procedure of declaration of cultural interest[74].

*the time of the "*denuntiatio*" or, in the absence of it, of the transfer, is endowed with its own objective and effective structural and functional individuality, such as not to be objectively fractionable into separate transfers of the individual portions of the building, and this regardless of the further and different evidence, at the expense of the tenant, of the fraudulent intent of the parties to evade the right of pre-emption by the surreptitious aggregation of other assets to the rented one*».

[72] Ministerial Decree n. 236/89 (art. 2), supplementing the minimum criteria already provided for by art. 1 of the l. January 9, 1989, n. 13, states that "building" must be considered «*a real estate unit with functional autonomy, or an autonomous set of property units that are functionally and/or physically connected to each other*». Therefore, for the purposes that the law intends to pursue, even a single portion of a larger building complex with different uses must be considered "building". For example, if there are premises for catering or recreational, cultural, entertainment activities etc., if these activities have independent access to residential units located on the upper floors and served by other access, the rules apply if works are performed on these premises; see F. Vescovo, *Progettare per tutti senza barriere architettoniche*, 1997, 17, in *http://www.progettarepertutti.org*.

[73] D. Antonucci, *Codice commentato dei beni culturali e del paesaggio*, cit.,123. See Cass. pen., sez. III, 04 April 2012, n. 526, in *De Jure*, 2012: «*Undoubtedly the offense of unlawful subdivision through the modification of the intended use of buildings subject to a development plan through the splitting of a real estate complex so that the individual units lose their original intended use to take over the residential one: modification that is in contrast with the urban planning instrument constituted by the subdivision plan*».

[74] See State Council section VI, 22 June 2006, n. 3825, in *www.giustizia-amministrativa.it*, which excludes the need for communication of the opening of the procedure in the preliminary phase of acquisition of the elements concerning the historical-artistic character, aimed at determining whether the conditions for the imposition of the bond on a building exist, for its historical-artistic importance. This phase, in particular, does not rise to an independent procedural moment (due to the effects of Law 241/1990), as it constitutes an instrumental cognitive activity, which takes place before and out of the administrative procedure that can be formally initiated only when such activity ends positively, in the sense

These elements, as a rule contained in a report, are never to be considered definitive as they are the result of initial investigations to which the actual investigation must always follow in order to issue the final provision.
With a clear participatory purpose, the communication is accompanied by a safeguard purpose since, pursuant to paragraph 4, the communication involves, as a precautionary measure, the application of the provisions considered in Chapter II, Section I of Chapter III and from Section I of Chapter IV of Title I of the Code[75].
In these regards, we recall articles 18 and 19 on supervisory and inspection powers, articles 20 to 28 relating to protection measures, consisting of bans on altering the asset or in the subordination to authorization of interventions on said asset, the articles from 53 to 59 on the limitations of the alienation and other modes of transmission of the asset[76].
The precautionary effects cease at the end of the term of the declaration procedure, which the Ministry establishes in conformity with the current legal provisions on the administrative procedure. Concurrently the l. n. 241/1990 for the integration of the content of the initial communication must, in fact, also indicate the name of the person responsible for the procedure[77].
As for the form, the principle of freedom seems to be asserted, provided it is suitable for achieving the goal.
The other principles expressed in l. 241/1990 are applicable, following the changes introduced by l. n. 15/2005, for which failure to communicate the opening of the procedure no longer entails the automatic annulment of the contested deed if the administration proves that the content of the final provision could not have been different even if it had guaranteed the participation of the interested parties in the proceeding .The final provision is adopted exclusively by the Ministry to which the protection functions are exclusively assigned, not leaving any competence in this regard to the Regions[78].
Written in its entirety, it must provide an account of the observations made by the parties in the proceedings in relation to the lack of cultural interest of the property. The lack of explanation, albeit consisting in a reference, of the reasons for overcoming the claims with memories or documents by the interested parties, is not substitutable, in court, with the

of existence, in the opinion of the administrative authority, of sufficient indicators of the need for an initiative aiming – after dialectical confrontation with the subjects involved – at placing the restriction and to conform its limits.

[75] See T.a.r. Lazio, Roma, sez. II, 29 January 2014, n. 1155, in *www.giustizia-amministrativa.it*, according to which: «*The imposition of the restriction, may it be direct or indirect, must be preceded by the communication of the opening of the proceeding against the owners of rights on the property towards whom it will exert its effects, in consideration of the particular sacrifice or compression of the landlord sphere that the private undergoes as a consequence of the imposition of the bond* ».

[76] See C. Volpe, *Commento agli articoli da 12 a 16 del Codice dei beni culturali e del paesaggio*, cit., *passim*.

[77] Figure that operates within the Italian public administration entrusted with the management of the administrative procedure.

[78] D. Antonucci, *Codice commentato dei beni culturali e del paesaggio*, cit., 121.

content of other acts of the procedure, from which it is not possible to deduce the existence of those reasons[79].

Moreover, in order to justify the adoption of a provision for the imposition of the historic-artistic restriction, the mere and generic circumstance that a building represents a testimony of a type of construction of a particular historical period is not sufficient, given that any building is itself testimony of a type of construction of its period in the area in which it is located, as well as an appreciation based on mere documentary value is not sufficient to identify a cultural asset legally; nor can the simple indication of the characteristics of the constructive style of which the building represents testimony (which results in a mere tautological description) or the consideration that that constructive style is slowly disappearing. Therefore, the Administration is still required to indicate the reasons of particular cultural interest for which it notes that a particular type of construction style deserves the special protection that is resolved in the imposition of the restriction, as the particular characteristics of the single building that make it particularly expressive of that type of construction[80].

lastly, pursuant to art. 3 of the l. 241/1990, the provision must indicate the deadline and the authority or body to address for the presentation of the judicial appeal[81] or the administrative appeal[82] in opposition.

Pursuant to art. 15, the provision is notified to the owner, proprietor or holder of the asset by messenger or by registered mail with return receipt.

Said notification is merely declaratory[83] of the restriction as the latter is constituted through the adoption of the provision.

More precisely, the provision for the imposition of the restriction does not have a nature of proof of knowledge[84], since the notification in an administrative form to private owners, proprietors or holders of goods that have cultural interest is merely informative and does not play a constitutive function[85], of the restriction itself, which is perfect independently of it, being exclusively intended to create in the its recipient the knowledge of the obligations incumbent on him. It follows that the notification to the subject who initially was its owner and who subsequently sold it does not constitute grounds for invalidity of the tax decree of the restriction[86].

[79] State Council section. VI, 09 January 2014, n. 23, in *Foro Amm. C.d.S.*, 2014, 1, 142.

[80] State Council section VI, 10 December 2012, n. 6293, in *Foro Amm. C.d.S.*, 2012, 12, 3274.

[81] An introductory act of the trial consists of the request made by a subject to a judge, to examine a certain situation in order to obtain a court order.

[82] The request addressed to a public administration in order to obtain a protection of their subjective legal situation.

[83] Non-constitutive or modifying effects of anything but solely for the assessment of legal situations and relations.

[84] Statement which produces legal effects only from the time of its receipt.

[85] Amending situations and legal relations.

[86] State Council section. VI, 13 March 2013, n. 1490, in *Foro Amm. C.d.S.*, 2013, 3, 785.

Obviously the possible omission of the notification makes the sanctions inapplicable towards those who, not knowing the provision of restriction declaration, have transgressed it[87].
The notification by messenger takes place according to the rules dictated by the code of civil procedure with application of Articles. 138, 139 and 140.
Possible flaws of the notification can be remedied with subsequent and regular notification without the need to adopt a new restraining order.
For the purposes of the efficacy with regard to third parties, where the subject of the restriction are objects subject to immovable or movable advertising, the provision of declaration is transcribed, at the request of the superintendent, in the related registers and is effective towards any subsequent owner, proprietor or holder for any reason.
We are faced with a hypothesis of declarative advertising[88] which constitutes an obligation for the administration with consequent liability for compensation in case of omission in all those cases which the violation of the obligation to transcribe has caused damage to those who purchased the restricted asset ignoring the existence of the restriction[89]. The transcription of the bond seems to be aimed only at facilitating its clarity for by third parties.
It is true that the pre-emption on the restricted asset is exercised by the administration towards the owner, or the person to whom the payment order was notified or a subsequent successor. In the first case, since notification of the provision has occurred, problems of knowledge of the restriction do not arise; in the second case, the negotiation must be concluded in compliance with the pre-emption legislation[90], that failing, the act will be void and therefore the buyer has no other possibility but to, exercising all the conditions, take action to obtain compensation for damages pursuant to Art. 1338 c.c.[91].
Once the transcription has stepped in, the bond follows the asset as a property charge[92] thus making subsequent notifications redundant as with the transcription the restriction can be known by anyone[93].

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87 T. Alibrandi, P.G. Ferri, *I beni culturali e ambientali*, cit., 262.

88 Type of advertising aimed at making the facts for which it is expected to be enforceable against certain parties.

89 A. Pontrelli, *Commentario al codice dei beni culturali e del paesaggio*, cit., 60.

90 Right of preference, based on the law or on the will of the parties.

91 G. Celeste, *Beni culturali: prelazione e circolazione*, in *Riv. not.*, 2000, 5, 1071.

92 Periodical performance, which is payable by the subject as it remains in the enjoyment of a certain property.

93 See State Council section VI, 27 August 2014, n. 4337, in *De Jure*, 2014, according to which: «*A restriction legitimately imposed by the notification to the owner of the property can not be considered cancelled due to the transfer of the property related to it that is not accompanied by an information on the seller in relation to the existence of the same restriction, due to the actual nature and the irrelevance, for the purposes of its existence and operation, of private activities which, if omitted, could imply civil liability actions related to the obligation of exact information in the procedure relating to the formation of contracts (State Council IV, sent. 7 November 2002, No. 6067); the transcription of the historical-artistic bond, once carried out, and its notification to the owner subject, do not require further notifications to its successors or those having a cause (see State Council section VI, sent 8 July 2009 , No. 4369); the cultural restriction is rooted* erga omnes *at the time of the transcription of the special decree, has a real nature and is opposable to all the subjects that become owners; once it has been transcribed, it undoubtedly expands its effects on the current owner and all his successors; the owner of a bound property and registered in the real estate records prior to its purchase, cannot avoid observing*

10. The administrative appeal opposed to the declaration

Pursuant to art. 16 of the Code of cultural heritage, opposed to the declaration pursuant to art. 13 and, following the amendments to the Code as a result of Legislative Decree no. 156/2006, against the conclusive provision of the verification referred to in art. 12[94], an appeal to the Ministry is allowed, for reasons of legitimacy and merit, within thirty days from notification of the declaration.
The decision to submit to the regulation the provision indicated in the verification and the declaration seems to be dictated by the need for balance of the system, avoiding an unjustified penalization of public property compared to the private one.
The Presidential Decree n. 233/2007 assigned to the general managers the tasks of verification and declaration of cultural interest, therefore the appeal as outlined by the regulation acquires the characteristics of the improper hierarchical appeal[95].
Originally, the decision of the appeals was a responsibility of the ministerial department for cultural and landscape heritage and for the archive and library assets, without the possibility of delegation in favour of the general managers.
With the Presidential Decree n. 233/2007 the decision is responsibility of the general directorates for each sector of competence, namely the general direction for archaeological heritage, architectural, historical-artistic and anthropological assets, archives and library heritage, cultural institutes and copyright.

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all the provisions that connote the binding discipline of the law relating to the property, not excluding the obligation of denuntiatio *in case of its future alienation (State Council No. 4369/2009), for the purpose of exercising the right of pre-emption by the administrative authority*». See V. Mastroiacovo, *Imposta di registro. Acquisto di beni culturali*, in *Studio del Consiglio Nazionale del Notariato n. 11/2005/T*, approved by the Commissione Studi Tributari, in *Studi e Materiali*, II, Padova, 2005, from which emerges the existence of non-concordant doctrine on the declarative or constitutive nature of the transcription. In particular, it focuses on the position taken by Giovanni Casu, “Statuto e circolazione dei beni culturali dei privati, persone fisiche e giuridiche” (Proceedings of the Study Convention – The discipline of cultural heritage in the light of the new Code – Verona, 13 November 2004), who maintains that the transcription of the bond on the cultural asset cannot have the value of constitutive effect as supporting the contrary would mean affirming that the third party can validly purchase a cultural asset that is not transcribed, preventing the State from having an artistic pre-emption. Following this doctrinal front (see G. Celeste, *Beni culturali: prelazione e circolazione*, cit., 1071) the reality of the bond is such as to make it effective against anyone even regardless of the transcription of the title. This fulfilment, however necessary for the administration, would then have only the most limited function of making the constraint known.

[94] See T.a.r. Lazio, Roma, section. II, 12 October 2010, n. 32765, in *Riv. Giur. Ed.*, 2011, 1, 48, for which «A*rt. 16 legislative decree n. 42 / 2004, modified by art. 2, paragraph 1, lett. e), legislative decree. n. 156 / 2006, provides for the admissibility to the Ministry for the assets and the cultural activities of the administrative appeal against the conclusive provision of the procedure of verification of the historical-artistic interest of the buildings, regardless of the positive or negative result that it has had and therefore of the content of the act of appeal, which may be constituted by the provision with which the presence or absence of the historical-artistic interest of the asset is found*».

[95] Administrative appeal produced by those who want to protect their right or legitimate interest, against acts of the public administration, presented to a body of the public administration that has no hierarchical relationship with the body that produced the act.

The communication of the final provision must also contain the deadline within which it is possible to appeal, namely thirty days.
The failure to indicate said term configures a hypothesis of excusable error for the appellant who can be relieved from the time limit.
The imposition of a restriction affects the market value of the asset, therefore the owner-alienant has an obligation to communicate to the buyer the existence of the restriction, which determines an essential quality. Any reticence of the seller during the negotiations or during the sale - can give rise to the remedies provided by the Civil Code, but does not affect in any way neither on the powers attributed by the law to the Administration for the protection of the asset, nor on the legal regime of the property, resulting from the certainty[96] of the binding decree. The purchaser of the restricted movable property, precisely because it happens in the position of the assignor, is entitled to challenge the bond decree, but does not make use of a further term of appeal, the act becoming unquestionable with the expiry of the time limit resulting from the notification of the bond decree[97].
The appeal must be presented to the competent Directorate-General. In any case, the possible submission of an appeal before a non-competent peripheral office does not make the application inadmissible. On the contrary, the unentitled body to which the appeal was filed is obliged to transmit the documentation to the competent body.
The appeal must be presented by filing or by sending a registered letter with return receipt. And in this last case the mailing date is considered as the date of presentation of the appeal for the purpose of assessing its promptness.
The administrative appeal has a wider object than the jurisdictional one, since the decision-making body has the possibility of examining not only the legitimacy[98] of the provision but also the merit[99].
In fact, according to constant case-law, the evaluations expressed by the Ministry for Cultural Assets and Activities represent technical evaluations, which can be criticized in the judicial review of legitimacy, only when they show obvious unreasonableness, illogicality, or are the result of factual errors[100].

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[96] That cannot be contested.

[97] State Council section VI, 21 May 2013, n. 2707 in *Foro Amm. C.d.S.*, 2013, 5, 1403.

[98] The state of compliance of the administrative act with the requirements inherent to the agent, the object, the form, the function and the content required by law so that the act, as well as existing, is also valid.

[99] The set of all matters of substantive law brought to the knowledge of the judge as an actor, defendant and third parties, not related to the mere aspects of the rite.

[100] State Council section VI, 30 May 2014, n. 2814, in *De Jure*, 2014. In compliance with T.a.r. Liguria, Genova, section. I, 19 May 2014, n. 787, in *www.giustizia-amministrativa.it*, by which «*The declaration of the historical or artistic value of an asset presupposes a judgement of technical discretion that cannot be considered in the judgement of legitimacy, if not for defects of excess of power due to errors in the assumptions or for manifest illogicality: it follows that in the face of the exercise of such a power of merit, broadly discretionary in the contents – and exclusive prerogative of the administration – the judgement experienced in the jurisdiction is limited to the verification of the existence of profiles of incongruity and illogicality which, as such, are susceptible of bringing out the unreliability of the technical-discretional evaluation performed*».

The simple submission of the appeal involves the suspension of the contested provision, without prejudice to the precautionary measures[101] provided for in the declarative procedure of cultural interest and placed to protection of the conclusive provision[102].
Since by express legislative provision, *ex* paragraph 5 of art. 16 of the Code, the administrative appeal must be applicable with the dispositions of the Presidential Decree November 24, 1971, n. 1199, it is not necessary to notify the appeal to any counter-parties[103], as the deciding body has the obligation to disclose the existence of the appeal to other interested parties identifiable on the basis of the contested act in order to allow the latter to present any memories and documents.
The Ministry decides to appeal, after hearing the competent advisory body, within ninety days from the presentation of the document.
The useless expiry of this term configures a hypothesis of silence-rejection[104] which, at the procedural level, detects for the purpose of accrue of the right of the interested party to challenge the original act in court or with appeal to the Head of State.
In fact, nothing excludes that the administration provides beyond the expiring of the indicated term.
It is noted that the parties concerned are not obliged to exert the administrative appeal in advance. Indeed, the final provision must be considered immediately prejudicial and, therefore, it is possible to challenge the act also directly in court.

[101] Provisional measures aimed at preventing irreparable damage related to process delay.

[102] D. Antonucci, *Codice commentato dei beni culturali e del paesaggio*, cit., 145.

[103] That holds an interest against the removal of the provision burdened by which could originate negative effects for its own legal sphere.

[104] The silence of the competent administration that is equivalent to a rejection of the application.

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