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COMPARING EU INITIATIVES ON DATA: ADDRESSING RISKS AND ENHANCING HARMONISATION OPPORTUNITIES.

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Abstract

The Author provides a mapping of the recent EU legislative initiatives on data, identifying common interpretative issues and gaps emerging from the fragmented evolution of the legal framework. In order to give a systematic interpretation of the different provisions, two sectorial initiatives impacting on completely different scenarios are compared: the European Health Data Space proposal and the Digital Service Act. This cross-sector exercise allows the Author to identify those common principles able to shape effective implementations strategies aiming to protect fundamental rights and democratic values in the information society.

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Keywords

Personal and non-personal data, data governance, health data space, digital services, impact assessments.

1. The EU Data Strategy: common features and tailored specifications.

The increasing datafication of the society required a new legislative approach aiming to regulate the consequences of digitalisation of services and products and to adapt the current applicable framework to the new risks and opportunities emerging within the information society dimensions. Data, in fact, have become essential either in business (B2B) or business to consumers contractual relationships (B2C) or among private organisations and public institutions (B2G)¹.

¹ B. Martens et al., Business-to-Business data sharing: An economic and legal analysis, JRC, Seville, 2020; A. Acquisti, C. Taylor and L. Wagman (2017) Economics of privacy, Journal of Economic

The EU approach in dealing with information society consists of shaping a strategy for single market for data where information can be shared across sectors in a transparent and fair manner, in compliance with the needs of confidentiality emerging from privacy and data protection rules and competition law².

To this end, a series of legislative initiatives have been promoted in order to boost data economy growth both in commercial and industrial sectors. In particular, the EU Reg. n. 2016/679 on General Data Protection Regulation (GDPR) and the EU Reg. n. 2018/1807 on Free Flow of non-personal data are defining how to process personal and non-personal data in EU, identifying conditions to ensure the free circulation of information. Moreover, the Data Governance Act (DGA) together with the EU Dir. n. 2019/1024 on Open Data Directive aim to facilitate the data sharing and their re-use, by reinforcing trust in data sharing intermediaries and in the public sector, in alignment with the purposes of openness in the digital market. These mentioned initiatives shall be read in a perspective of fostering innovation and competitiveness in several sectors, as specified by the Data Act (*i.e.* the Proposal for a Regulation of harmonised rules on fair access to and use of data, that has been published in 2022), setting rules for data exploitation to create value from them. These initiatives can be considered as the general framework on data-driven matters, functional to be “accommodated” and adapted for specific purposes and means. To regulate consistent applications of data processing in different sectors, indeed, is one of the EU challenges to boost data economy and innovation³.

Literature 54(2), 442-492; OECD (2019) Enhancing Access to and Sharing of Data: Reconciling Risks and Benefits for Data Re-use across Societies, OECD Publishing.

² M. Burri (ed), *Big Data and Global Trade Law*, Cambridge, 2021; A. Kuenzler, What competition law can do for data privacy (and vice versa), *Computer Law & Security Review*, Volume 47, 2022, 105757, ISSN 0267-3649, <https://doi.org/10.1016/j.clsr.2022.105757>; A. Davola; G. Malgieri, *Data, power and competition law: the (im)possible mission of the DMA?*, *Research in Law and Economics*, forthcoming, 2023.

³ M. Leistner, The Commission’s vision for Europe’s digital future: proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act—a critical primer, *Journal of Intellectual Property Law & Practice*, Volume 16, Issue 8, August 2021, Pages 778–784,

To this end, it is essential to understand what is meant for data⁴. According to article 2 DGA, it is a “digital representation of acts, facts, or information”, considered as a general asset. In this regard, further initiatives are focusing on defining sectorial boundaries and rules in terms of digital spaces where general provisions and specific ones find application. As complementary actions, indeed, we may focus on both the Digital Service Act (DSA), empowering users’ rights among digital platforms, and the European Health Data Space Proposal of Regulation (EHDS), laying down rules and mechanisms to boost the secondary use of electronic health data, by creating common safe spaces to share personal and non-personal data of patients. These two examples of sectorial legislative initiatives are particularly significant for our analysis as they allow to assess the current general legal landscape under a plurality of grounds, impacting on different categories of vulnerable subjects. If we identify common principles to cover gaps and lacks, their role of enablers will find validation in terms of model to be able to circulate among sectors.

Firstly, we will deal with the necessity to cover possible gaps emerging from the different initiatives on data strategy. From the analysis, we will identify common notions to verify room for sectorial accommodations and possible evolutions of concepts between different regulatory frameworks. Then, we will focus on two sectorial initiatives impacting on different sectors, like health data spaces and digital platforms, in order verify whether or not a common methodology based on

<https://doi.org/10.1093/jiplp/jpab054>; C. Sganga, Ventisei anni di Direttiva Database alla prova della nuova Strategia europea per i dati: evoluzioni giurisprudenziali e percorsi di riforma, *Il diritto dell’informazione e dell’informatica*, 2022, p. 657 ff; V. Zeno-Zencovich, Data protection[ism], *Rivista di diritto dei media*, 2/2022, 1 ff; G. Malgieri, Bart Custers, Pricing Privacy – The Right to Know The Value of Your Personal Data (2017) *Computer Law & Security Review* <doi: 10.1016/j.clsr.2017.08.006>. Trix Mulder, Nynke E Vellinga, Exploring data protection challenges of automated driving, *Computer Law & Security Review*, Volume 40, 2021, 105530, ISSN 0267-3649, <https://doi.org/10.1016/j.clsr.2021.105530>.

⁴ Quinn, P. and Malgieri, G., 2022, The Difficulty of Defining Sensitive Data – The Concept of Sensitive Data in the EU Data Protection Framework, *German Law Journal*, 2022, 22(8), 1583-1612. doi:10.1017/glj.2021.79.

interoperable standards can be identified together with principles able to address the harmonisation process.

Last but not least, we will identify monitoring mechanisms to detect and develop best practices with a bottom-up approach, in order to address existing vulnerabilities and possible new ones in order to suggest content for self-regulatory instruments, like codes of conducts whose development is particularly supported by the EU Commission.

2. Applicable notions to general and sectorial initiatives.

All the mentioned EU legislative initiatives are contributing to the global aim to regulate the data-driven challenges, even if impacting on different topics and profiles. The fact that there isn't a unique text to define all the aspects of the information society arises a series of concerns in terms of possible lacks and overlaps that could constitute a practical barrier against an overall compliant approach for stakeholders.

A first premise for a harmonized interpretation and application of the provisions included in the strategy consists of comparing definitions developed in the legal texts. In particular, it is essential to identify what is meant for the main objects, actors, and actions of each relevant framework in order to shape the interplay of the stated rights and obligations to comply with. Secondly, it is necessary to detect common principles inspiring the law in action whereas applicative lacks are identified in order to align the interpretations⁵.

In this regard, if we analyse the definition of “data”, we could appreciate a declared alignment between the GDPR and the Free Flow Regulation where the latter recalls the notion given in the first one to identify the opposite field of application. Therefore, the GDPR refers to “any information relating to an identified or identifiable natural person”, while Free Flow Regulation covers all other information.

⁵ G. Comandé (ed.), *Elgar Encyclopedia of Law and Data Science*, Elgar Publishing, 2022.

This approach seems easy to be addressed under a normative perspective as all possible information could have a regulatory framework of reference. However, in practice, it is not always so clear to establish whether or not a dataset includes only non-personal information. In fact, according to recital 26 GDPR, pseudonymized data are considered as personal data since with additional information persons are identifiable, taking into account the available technologies applied to the data processing. While anonymous information includes data not related to an identified or identifiable natural person or de-identified data, where data subject is not (or no longer) identifiable “by any means reasonably likely to be used”⁶. To distinguish between personal and non-personal data is essential in order to properly apply principles stated in the other legislative initiatives during their processing, however other characteristics of the information are relevant, especially in order to identify roles and responsibilities in the digital environment⁷. To this end, the DGA adds further details for the current analysis. In fact, as anticipated, in the DGA “data” is described as “any digital representation of acts, facts, or information”, accessible in several formats including audio and video, specifying that non-personal data are those falling out from the personal data under the GDPR. Conversely, audio and video representing identifiable persons are included in the concept of personal data under GDPR. Such a specification introduced in the DGA finds justification in the Recital 30 of the Open Data Directive, where it refers to the previous Public Sector Information (PSI) Directive that was limited to the concept of document, whose definition “is not intended to cover computer programmes”. Therefore, data is not only documents, but it includes information in any format that could be processed by

⁶ ICO, Introduction to anonymisation, 2021, 15 <https://ico.org.uk/media/about-the-ico/consultations/2619862/anonymisation-intro-and-first-chapter.pdf>.

⁷ C. Irti, Personal Data, Non-personal Data, Anonymised Data, Pseudonymised Data, De-identified Data, in R. Senigaglia, C. Irti, A. Bernes (eds), *Privacy and Data Protection in Software Services*, Springer, 2021, pp 49 ff.

a human being, or automated mechanisms, for example those ones based on artificial intelligence. This simple statement becomes essential in the identification of the object of a contractual relationship or a duty/right, not only to establish compliance requirements, but also to identify what can be processed, who can process, who owns a given dataset etc. This is relevant also when data processing brings to develop services and products. For instance, if we analyse the Data Act notions and definitions, we may notice that Recital 6 identifies the designer/manufacturer and the user as main actors of that regulatory framework aiming to establish how users can access and reuse the data generated by a given digital service or product, by empowering their role with the main purpose to ensure that products are developed “in such a manner that data generated by their use are, by default, easily, securely and, where relevant and appropriate, directly accessible to the user”. Therefore, according to the Data Act any contractual relationship establishing a purchase, rent or lease of a product or digital service shall include a series of elements in order to allow and facilitate data sharing. In particular, details on how data are generated, stored, and made available to users shall be specified as mandatory content of contractual relationships, taking into account that limits to data access could be applied only in case of trade secrets or if generated data are considered as personal ones.

Under these premises, the EU Health Data Space Proposal recalls all notions included in the GDPR and the ones of data and data access described in DGA, specifying for its purposes that electronic health data refer to both personal and non-personal data concerning health and genetic information and relating determinants⁸. In fact, taking into account that a “residual risk that the capacity to re-identify could be or become available, beyond the means reasonably likely to be used (...) is present in relation to rare diseases (...) where the limited numbers of case reduce the possibility to fully aggregate the published data in order to preserve the privacy of natural persons while also maintaining an appropriate level of granularity in order to remain meaningful”, an assessment on the characteristics of the data processed within a EHDS shall be

⁸ G. Schneider, *Health Data Pools Under European Data Protection and Competition Law*, Springer, 2022.

always undertaken. To this end, the level of granularity combined with the description of the characteristics of data subjects, and other information, like geolocalisation of patients or reduced number of cases, play a significant role to evaluate the impact on fundamental rights protection of a given access for reuse of collected and stored electronic health data⁹. Therefore, specific policy of reuse, also for non-personal data, and standards of aggregation shall be developed considering the features of datasets and the anonymization or aggregation techniques to protect data subjects' identity. The DSA, instead, does not provide an own notion of data. Considering the field of application, it is reasonably to apply the discussed extension of the concept of data beyond the documental perception of a data flow. Under the DSA, in fact, the main actors are the users-consumers and the intermediary services. The first ones, according to the general consumer law framework, are those acting for purposes which are outside their trade, business, craft, or profession and they can be recipients of a service online provided; while service providers are the ones who can transmit, cache or host information provided in a communication network provided by a recipient of the service. Conditions of liability are established under articles 3, 4, 5 for service providers, shaping the terms of a "responsible and diligent behaviour (...) for a safe, predictable and trusted online environment" (Recital 3 DSA), in order to prevent from sharing "illicit content" or to act against them. This latter notion is thus broadly conceived and referred to all information "irrespective of its form".

Some difficulties are emerging in the analysis of the main actors of the other legislative initiatives where roles may overlap in the interplay of different provisions¹⁰. As far as the target category whose fundamental rights shall be protected and promoted by the given legislative initiatives is concerned, we may list: the data subject under the GDPR, that is the identifiable natural person, whose notion is included in the DGA,

⁹ A. Mantelero, *AI and Big Data: a blueprint for a human rights, social and ethical impact assessment*, *Computer Law & Security R.*, 34:4(2018), pp. 754-772.

¹⁰ J-S. Bergé - S. Grumbach - V. Zeno-Zencovich, *The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance*, in *European Journal of Comparative Law & Governance*, 5, 2018, p. 144.

while defining the “data altruism”, and that could be the consumer law. In addition, the data holder under the DGA refers to those who have technical and legal control of data, granting the possibility to share or to access to flows. It also remarks at Recital 15 the need to introduce safeguards to protect their commercial interests and intellectual property rights against unlawful or unauthorized access, especially in circumstances involving requests from non-EU countries. In fact, according to article 19 DGA, the right to be informed in case of international access as well as about the conditions of data altruism shall be always ensured¹¹.

Looking at the adaptations emerging from the EU Health Data Space proposal, it addresses its provisions both to natural and legal persons who are processing personal and non-personal data, specifying that the data holder shall arrange how to ensure the legal and technical interoperability in order to disclose the data to health data access bodies in compliance with GDPR (Recital 37). Three are the main actors: the data holder, who provide data to the data space, the data access body, that are playing the role as intermediaries and guarantor of the data subjects’ anonymity, and the data user, who ask access to data for re-using purposes. The data holder could be an entity or a body in the health or care sector, or research institution, or specific organization identified by the EU/national law, processing health-related data that need to demonstrate the GDPR compliance to arrange their re-use. The data access bodies, indeed, are organisations established by the EU Member States, like -at this stage- Findata, French Data Hub, German Forschungsdatenzentren, that centralise the availability of electronic health data for secondary use. Data access bodies are entitled to “verify compliance and give data users and holders the opportunity to reply to any findings and to remedy any infringement” (Recital 48) and to provide the pseudonymization key to data users, who cannot attempt to re-identify data subjects. In fact, also in case of incidental findings or specific benefits that could emerge from the re-use of data, data users shall inform the data access body, that can solely directly

¹¹ A. Duisberg (2022), Legal Aspects of IDS: Data Sovereignty—What Does It Imply?, in B. Otto, M. ten Hompel, S. Wrobel (eds.) *Designing Data Spaces*. Springer, Cham. https://doi.org/10.1007/978-3-030-93975-5_5.

contact the data subject. Also in case of request concerning statistical data, the processing is provided by the data access body that will then communicate only the results.

Such role of intermediary for the data access body is twofold since it ensures the protection of data subjects' identities from any possible attempt of re-identification, but it also includes technical assistance duties for data users in the selection of suitable datasets according to the approved request of access. For these reasons data access bodies shall be organised as a complex interdisciplinary structure, including, but not limited to a digital library management. Firstly, contractual relationships with data holders shall be developed in order to set conditions for data sharing in the health data space. Therefore, for any dataset a tailored assessment shall be undertaken and translated into contractual clauses for establishing terms and conditions for data sharing. Secondly, considering the role of intermediary body towards data subjects, it is necessary to establish specific procedure to interact with them, including reporting mechanisms to exercise rights, all possible ethical concerns in case of incidental findings communication, smart systems to extract aggregate data considering tailored thresholds depending on the granularity of stored data and requests. Thirdly, common procedure to evaluate data users request shall be developed and mechanisms of enforcement, monitoring, auditing, and reporting established. In the next paragraph we will deep these profiles.

3. Risk based assessments for personal and non-personal data processing.

A common feature of all the initiatives on EU data strategy is the approach based on risk assessment that imposes the main actors to analyse how the data-driven activity could affect fundamental rights of the target groups and therefore which safeguards shall be put in place in order to avoid harms in the given scenario(s) of application¹².

¹² G. Georgiadis, G. Poels, Towards a privacy impact assessment methodology to support the requirements of the general data protection regulation in a big data analytics context: A systematic literature review, *Computer Law & Security Review*, Volume 44, 2022, 105640, ISSN 0267-3649, <https://doi.org/10.1016/j.clsr.2021.105640>; R. Binns, Data protection impact assessments: a meta-

The evaluation shall be put in place before enabling any data processing in order to reach the *by design* standards of compliance, meaning that the ethical legal issues are addressed since the very beginning and risks are consequently mitigated. Monitoring mechanisms of conformity during the development of the data-driven activity may contribute to achieve the by default standard as well, meaning that the solution could be put in the market as a fully compliant one. As known, these standards have been introduced for privacy-preserving techniques and extended to a general concept of ethical-legal assessment on fundamental rights protection. In this paragraph, we will analyse how these assessments are shaped for electronic health data processing in the EHDS and for online service providers in the DSA.

3.1 Risk based approach for health data spaces: comparing the existing experience with the EDHS provisions.

To address the risk-based approach by design and by default within a Health Data Space, the EHDS proposal identifies a procedure of access request addressing the ethical assessment in order to grant the secondary use and implement the proper technical and organisational safeguards. Firstly, in compliance with the principle of minimisation, any access to personal (pseudonymised and encrypted) data shall be justified by the data user (i.e. the natural or legal person who has lawful access to personal or non-personal electronic health data for secondary use), who will not get access to the re-identification key in any case. If no justification is provided, the request is considered for anonymised flows. The request shall include the legal basis, means and purposes envisaged for re-using the requested data (that shall be described) as well as the technical measures identified to protect the datasets during the re-use

regulatory approach, *International Data Privacy Law*, 2017, pp. 22 ff.; A. Mantelero, *AI and Big Data: A blueprint for a human rights, social and ethical impact assessment*, *Computer Law and Security Review*, 2018, 34 (4): pp. 754-772 ; N. van Dijk, R. Gellert, K. Rommetveit, *A Risk to a Right? Beyond Data Protection Risk Assessments*, 32 *Computer Law and Security Review*, 2017, pp. 286–306, <https://doi.org/10.1016/j.clsr.2015.12.017>.

processing. In this regard, to comply with the highest standards of security, third parties might be involved and therefore appointed as data processors under the article 28 GDPR by the data access body that - according to Recital 54 - “should remain at all time in control of the access to the electronic health data with access granted to the data users determined by the conditions of the issued data permit”. Furthermore, arrangements of joint controllership under the article 26 GDPR shall be established with the aim of boosting inclusive and sustainable framework for multi-country secondary use through research infrastructures ensuring legal certainty and interoperability in the re-use processing.

The proposal then identifies a national competence for the ethical assessment to comply with. In this regard, Member States may introduce different obligations for the ethics assessment, including the submission of a self-assessment, or an approval from an independent ethics committee, or an authorization from the competent authority. This may constitute a barrier for accelerating the constitution of cross-border health data spaces as the ethical-legal compliance at national and local levels is fragmented¹³. For example, in France a prior approval from the competent ethical committee and then an authorisation from the data protection authority is required. In fact, according to the article 1462-1 of the Public Health Code a Health Data Hub has been already established and the national authority – the CNIL - has already authorised some projects to be carried out on the technological platform. In particular, each project shall receive an opinion from a committee for the protection of persons (CPP) mentioned in article L. 1123-6 of the Public Health Code for research involving the human person or from the ethics and scientific committee for research, studies and assessments in the field of health (CESREES), for research not involving the human person. Once obtained the approval from the competent ethics committee, the CNIL shall verify the compliance of the data management plan with the GDPR and the national data protection legislation, including legal and technical

¹³ See D. Amram, Building up the “Accountable Ulysses” model. The impact of GDPR and national implementations, ethics, and health-data research: Comparative remarks, *Computer Law & Security Review*, Volume 37, 2020, 105413, ISSN 0267-3649, <https://doi.org/10.1016/j.clsr.2020.105413>.

standards recommended in its opinions on the Health Data Hub. The Finnish Findata space has been approved by the Act on the Secondary Use of Health and Social Data n. 552/2019 that specifies that reuse of data stored in the platform can be asked for the purposes of statistics, scientific research, development and innovation activities, teaching, information management, social and healthcare authority guidance and supervision, planning and investigation tasks of the authority. Access to the platform is subject to an authorisation from the Social and Health Information Authorization Authority that operates in connection with the Institute of Health and Welfare, unless the requested data are generated through clinical trials. In fact, in this case another authority is competent to issue permits, so-called Fimea. Other exceptions are illustrated in the Finnish act and summarised by the Findata terms and conditions as well. To the purposes of this essay, it is significant to address that not harmonised and centralised procedures to requests data from the health data space could limit its effective use at local, national, but especially at international level. The German Forshungsdatenzentren is committed to statistics analysis and includes two research data centers the one of the Statistical Offices of the Federation and the one of the Federal States. Access request includes a specific commitment on statistical confidentiality but no reference to specific ethics assessments seems to be required. This simplified procedure could be justified by the nature of data that are classified in the platform as absolute anonymised (those data that are modified “by coarsening or by removing individual variables to a degree that makes an identification of the respondents impossible”), that are available to both individuals and organisations, and factual anonymised (“if de-anonymisation cannot be ruled out completely but the allocation of data to the respective statistical unit is only possible with an unreasonable effort in terms of time, cost and manpower”), that are available only to scientific institutions for research purposes¹⁴. The two notions aim to distinguish between “sufficiently anonymous” data and pseudonymised data according to the recital 26

¹⁴ R. Becker, D. Chokoshvili, G. Comandé, E.S. Dove, A. Hall, C. Mitchell, F. Molnár-Gábor, é-Nicolàs, S. Tervo, A. Thorogood, Secondary Use of Personal Health Data: When Is It “Further Processing” Under the GDPR, and What Are the Implications for Data Controllers?, *European Journal of Health Law*, 2022, doi: 10.1163/15718093-bja10094.

GDPR. However, once that the EHDS proposal will enter into force, efforts for language alignment would be mandatory.

According to the mentioned experience of data spaces, it is reasonable to affirm the necessity to identify common paths of demonstrating a responsible and accountable approach towards the ethical-legal compliance also in light of the new EU framework and the room of application left to the national implementation. This is particularly relevant to avoid phenomena of forum shopping in the future, ensuring that the reuse of electronic health data would be permitted following simplified and harmonised procedure of ethical legal compliance, especially taking into account the increasing number of cross-border research infrastructure that are going to be implemented under the global and national data strategies.

3.2 Risk based approach for larger online platforms in the DSA.

As anticipated, the risk-based approach drives also the Digital Service Act implementation, even if with a different normative technique, consisting of introducing “asymmetric due diligence obligations” for larger online platforms, that are, according to parameters described by article 26, the ones with more than 45 million recipients each month.

In particular, in order to mitigate the risk of sharing illicit online contents, the DSA establishes obligations to conduct risk assessments on “any significant systemic risks stemming from the functioning and use made of their services in the Union” (Article 26). The grounds of analysis include the general risks of disseminating illicit content, risks to compromise fundamental rights, that are further specified as privacy and confidentiality protection in terms of private and family life rights; freedom of expression and information, especially against fake news but also in terms of ensuring equal access to online resources and contents, without discrimination; and, last but

not least, to protect the rights of the child, considered as *per se* vulnerable users¹⁵. Another ground of risk analysis consists of intentional manipulation that could affect democratic values and groups interests like public health and security, minors, civic discourse, elections¹⁶.

The assessment shall be continuous and addressed on developing tailored content moderation systems, recommender ones also for advertisement able to rapidly detect and avoid dissemination of illegal content, namely in contrast with fundamental rights and terms and conditions adopted by the platform. To this end, a series of measures are suggested by Article 27, including technical and organisational ones aiming to reinforce and adapt decision-making processes for content moderation and recommender systems to identify, detect, and block illicit contents. Therefore, duties of supervision, cooperation with other platforms, reporting measures are explicitly identified to develop common methodologies to be included in codes of conducts for digital service providers.

In fact, large online platforms have specific obligations of due diligence, but such an imposition shall be considered as an opportunity to develop standards of compliance in order to inspire also medium and small enterprises to adapt their systems, procedure, and compliance activities in alignment with them for a safer online environment¹⁷.

As illustrated, there are several grounds of assessment that may require different expertise from an ethical-legal viewpoint and specific skills in cybersecurity and programming both for detecting, reporting, blocking and replacing harmful content. To develop and share common methodologies as well as best practice could

¹⁵ M. Stoilova, S. Livingstone, R. Nandagiri Digital by default: children's capacity to understand and manage online data and privacy. *Media Commun*, 2020, 8(4):197–207.

¹⁶ G. Caggiano, G. Contaldi, P. Manzini (eds), *Verso una legislazione europea su mercati e servizi digitali*, Cacucci editore, 2021.

¹⁷ G. Resta, Digital platforms and the law: contested issues, *MediaLaws–Rivista di diritto dei media*, 2018, 1:231–242.

harmonise standards of accountability and reduce costs for compliance. This process of harmonisation could start from collecting practices in the context of the external and independent auditing procedure that are mandatory at least once a year under Article 28. Thus, an assessment to extract the most effective solutions could be undertaken to develop codes of ethics and conduct in order to ensure a wider implementation.

In particular, considering the variety of the profiles to be analysed an interplay of different checklists, recommendations, and guidelines¹⁸ could be tested for the purposes of the DSA ethical-legal compliance. In particular, we could verify which ones of the existing tools could be applied in this context.

Firstly, as known, the Assessment List on Trustworthy Artificial Intelligence (ALTAI) elaborated by the High-Level Group on Artificial Intelligence has identified seven requirements to assess a solution based on AI in terms of ethics, lawfulness, and robustness. They could be useful, with some adaptations, to address the level of safety of digital platforms, for example:

- i) Human agency and oversight could be developed into sections aiming to identify general safeguards to protect the freedoms of expression, association, and tailored ones to specifically empower users-consumers rights as well as vulnerable ones, like children. In this regard, the service providers could list which technical and organisational measures are implemented not only to protect users from illicit content dissemination and diffusion, but also to empower their fundamental rights in the digital environment.

In particular, it could be useful to list which safeguards are implemented to collect, store, and allow the withdrawal of consent(s) for the different services according to the maturity and age of users. Moreover, a section for each risk identified by article 26 DSA shall be introduced to assess its grade of occurrence and severity in the given

¹⁸ A. Mantelero, Human Rights Impact Assessment and AI. in *Beyond Data. Information Technology and Law Series*, vol 36. T.M.C. Asser Press, The Hague, 2022, https://doi.org/10.1007/978-94-6265-531-7_2.

platform, establishing - as a consequence - proper measures to be implemented for the three possible activities, namely the content moderation (e.g. how illicit content is detected, how content moderation is addressed, how to guarantee the free expression of users, which are the countermeasures in case of illicit content, how equal access to services is granted, how users can report their complaints etc), as well as the functions of the recommender systems (that are the ones suggesting in the online interface specific information to recipients of the service), and advertising ones.

- ii) Technical robustness and safety shall include an assessment on the cybersecurity aspects of the platform and the level of accomplishment with existing standards, for example taking into account the evolution of the state of the art by ENISA¹⁹.
- iii) Privacy and data governance, including the GDPR compliance according to the data protection impact assessment article 35 GDPR.
- iv) Transparency section can be used for analysing the lawfulness of users profiling activities in order to avoid manipulative advertising content, like the so-called “dark patterns”²⁰. The DSA, indeed, considers illicit manipulative content. According to article 24, therefore, each specific advertisement displayed shall be user-friendly in terms of being clear and unambiguous manner identified as an advertisement in the interest of a given natural or legal person with “meaningful information about the main parameters used to determine the recipient”. In addition, pursuant to Recital 63 public access to repositories of advertisements displayed in the platforms shall be ensured to both facilitate supervision and protect platforms’ content integrity. From this perspective, this section of the checklist could be articulated in order to assess platforms’ a) Terms and Conditions respect to users (according to Recital 47);

¹⁹ See the reinforced role of ENISA under the NIS Directive, and the dedicated web-page: <https://www.enisa.europa.eu/topics/cybersecurity-policy/nis-directive-new/nis-visualtool>.

²⁰ J. Luguri, L. Jacob Strahilevitz, Shining a Light on Dark Patterns, *Journal of Legal Analysis*, Volume 13, Issue 1, 2021, pp. 43–109, <https://doi.org/10.1093/jla/laaa006>.

- b) risks emerging during the activities of content moderation (according to Recital 39); c) compliance with specific additional safeguards required for the nature of service provided, including reporting procedure under articles 13 and 23, Recitals 51 and 65.
- v) Diversity, non-discrimination and fairness section could replicate the analysis under the ALTAI checklist. However, it is important to extend the concept of fairness in terms of commercial one respect to users-consumers and competitors (B2B). In fact, on the one hand it should be the opportunity to demonstrate the compliance with competition law as well as with the measures aiming to balance the increasing contractual asymmetry in the B2C relationships, determined for example by the digital divide or by unfair profiling activities. Among B2B and B2G relationships, the analysis could be associated to the Digital Market Act obligations as well.
- vi) Societal and environmental wellbeing section is the one that could be used to address the risks on democratic values, considering the risks and opportunities emerging in the digital dimension. Therefore, the adaptation of the ground of analysis could be translated into a formula related to “societal and digital wellbeing”, stressing that the objective of the assessment is to develop and maintain a safe digital environment. Cross references with section *sub i)* could be developed in order to facilitate the analysis.
- vii) Accountability could be maintained as the section to report all the initiatives aiming to detect, mitigate and monitor risks, including the compliance with the auditing obligations under article 28.

The described proposal of requirements to be addressed in compliance checklists could be further adapted to specific needs emerging for specific online services, taking into account, for example, the public or private nature of the provider, the state of the art of the safety standards, and the targeted group(s) of the platform users. The efforts developed for AI-based solution assessment could certainly constitute a starting point towards a more harmonised approach to deal with the compliance activities defined in the new DSA as well.

4. Codes of Conducts and standards of compliance

To better address the ethical-legal compliance, the EU Commission promotes the adoption of self-regulatory tools from those organisations that are sharing the same means/purposes of data processing/target groups in order to enable the development of tailored and appropriate safeguards to mitigate common risks. Such a bottom-up approach is justified since all the compliance activities are based on the perception of impacts that a given (personal or non-personal data) processing could have on fundamental rights protection, as well as on the case-by-case identification and implementation of mitigating measures considered as appropriate as effective for the given circumstances.

Thus, to draw up common paths of risk detection and mitigation among stakeholders could help the standardisation process and at the same time it could facilitate the adoption of already designed compliant methodologies, including complementary commitments that can increase the level of accountability, also for those organisations who have not started a conformity plan yet, ensuring monitoring mechanisms to maintain the highest adherence. From this perspective, organisational efforts could be limited to adapt the modalities of implementation of the mechanisms of compliance that have been agreed in the context, for example, of a Code of Conducts.

Currently, the EU Commission has assessed a series of Codes of Conducts aiming to identify convergences in dealing with specific issues. In 2016, for example, a Code of Conduct on countering illegal hate speech online was signed by Commission and Google (YouTube), Facebook, Twitter and Microsoft²¹, other companies joined in the following years. It establishes how to report, assess, and remove illicit content, including delays for detecting and replacing content, providing information and

²¹https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination-0/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

feedback to end-users²². In 2021, the European CRO Federation's GDPR Code of Conduct for Service Providers in Clinical Research has been submitted to create a transnational GDPR Code of Conduct for data processors working in the clinical research industry, under the supervision of the French CNIL.

Under the legal framework illustrated in this paper, Codes of conducts are promoted both under article 40 GDPR, and pursuant article 6 to boost data portability within the Free-Flow Regulation, and to strengthen the due diligence activities according to articles 45, 46, 47 DSA.

In particular, the DSA encourages the development of codes of conducts for minors as end-users in order to establish “appropriate and proportionate” measures for their protection (Recital 71) as well as to “support and complement the transparency obligations relating to advertising for providers of online platforms, of very large online platforms and of very large online search engines (...) to provide for flexible and effective mechanisms to facilitate and enhance the compliance” (Recital 107), in order to deal with “the specific challenges of tackling different types of illegal content and systemic risks” (article 45). It also regulates Codes of Conducts dealing with specific matters like the online advertising (article 46) and accessibility (article 47).

The purpose is to make participation and commitment of companies effective. Therefore, mechanisms of internal monitoring shall be introduced and undertaken by the EU Commission and the established European Board for Digital Services. These may include according to the identified objectives, reports on the achieved key performance indicators and auditing to verify the concrete adherence. In fact, proper actions shall be taken in case of default. In this regard, the involvement of stakeholders (from citizens to associations to independent authorities) in the draft and

²² K. Podstawa, *Hybrid Governance or... Nothing? The EU Code of Conduct on Combating Illegal Hate Speech Online*, in E. Carpanelli, N. Lazzerini (eds.), *Use and Misuse of New Technologies*, Cham, 2019, p. 167 ff.

assessment of the Codes are essential to develop protocols able to satisfy concrete tailored needs of compliance²³.

Articles 46 and 47 identify the specific objectives for the codes of conducts on online advertising, that shall address how to comply with article 26 and 39, including to ensure transparency in the information on data monetisation. The accessibility one instead shall ensure the inclusiveness in the digital environment taking into account specific vulnerabilities, like possible disabilities that could increase the asymmetry of the position of the user²⁴.

Other self-regulatory mechanisms are encouraged as well. In particular, the DSA regulates the adoption of crisis protocols to manage those situations affecting public security or public health. In parallel to data breach policies addressed in the GDPR, aiming to manage the violations in terms of availability, integrity, confidentiality of data flows, the crisis protocols are encouraged in order to pre-establish procedure to “to coordinate a rapid, collective and cross-border response in the online environment” determined for example by the misuse of the online platforms “for the rapid spread of illegal content or disinformation or where the need arises for rapid dissemination of reliable information” (Recital 108), by enabling response mechanisms under article 36, including the allocation of obligations of publishing information and contacts for crisis management.

As far as the European Health Data Spaces are concerned, a chapter of the proposal refers to the mechanisms of certification of the Electronic Health Records systems, setting common requirements of safety and interoperability in alignment with the CE marking requirements, registration, and conformity obligations.

²³ R. Thorburn, F. Paci, V. Sassone and S. Stalla-Bourdillon, Connecting Regulatory Requirements to Audit Outcomes: A Model-driven Approach to Auditable Compliance, ACM/IEEE International Conference on Model Driven Engineering Languages and Systems Companion (MODELS-C), 2021, pp. 641-642, doi: 10.1109/MODELS-C53483.2021.00100.

²⁴ U. Sury, Digital Services Act (DSA). *Informatik Spektrum* 45, 265–266 (2022). <https://doi.org/10.1007/s00287-022-01464-1>.

Certification mechanisms, codes of conducts, and public protocols are tools aiming to make public the level of conformity that the given company declares respect to general and tailored standards. This would increase the user / data subject awareness and would create competitiveness between companies on the ethical-legal matter ground. The adoption of voluntary monitoring systems, in fact, will increase the trustworthiness and awareness among users towards the “sealed” solution, contributing therefore to develop a cultural process where accountability, fairness, and transparency play a fundamental role in the B2C, B2B, and B2G relationships²⁵.

5. Towards an effective implementation of the EU Data Strategy between compliance and standardization through accountability, transparency, and fairness principles.

In the previous paragraphs, we illustrated the EU Data Strategy, classifying the legislative initiatives considering the ones aiming to achieve general purposes and the sectorial ones impacting on specific categories of data and data processing.

We identified the main interpretative paths to boost the data-driven economy and innovation balancing the fundamental rights protection and empowerment of individuals and groups with the potentialities of data analysis, sharing, and exploitation. To this end, we illustrated how the notions and definitions included in the normative texts are functional to identify roles and responsibilities in order to allocate duties and obligations, especially the ones to assess the impacts of a given data processing activity to implement mitigation measures and safeguards.

We compared two different and apparently far sectors of application like the health data space regulation and the digital service act in order to highlight the relevance of

²⁵ G. Amore, Fairness, Transparency e Accountability nella protezione dei dati personali, *Studium Iuris*, 2020, 4:414–429.

developing harmonised mechanisms of compliance starting from the risks assessments.

From our analysis, we may highlight some common principles that could drive further interpretations and implementation strategies even in other sectors than the described ones.

First of all, the principle of accountability that is paramount for the risk-based approach adopted by all the illustrated initiatives. In fact, despite of the nature, those who enable a data processing shall demonstrate to have assessed any possible impacts of their activity against fundamental rights of data subjects / users as well as to have introduced proper measures to mitigate either the occurrence or the severity of possible risks. If, despite the efforts, any harm occurs, an accountable approach could limit consequences against the victims and the sanctions by the competent authority. However, the main characteristic of the accountability is to contribute to a cultural change aiming to include, not only in the annual budget, the ethical-legal dimension in the design process of a digital/technological solution.

This element is particularly significant in terms of standards identification and harmonisation of procedure. In fact, if technical development is a global phenomenon completely interoperable despite of the frame of reference, the legal evolution is not easy to be adapted at national and local level, especially in a domain – like the ethical legal one – where strategies to achieve rights protections and empowerments are sophisticated and truly connected to the shared values at a given moment. To this end, the legal interoperability that could concretely realise common safe environment where to share data and boost innovation needs to be built up step by step through case-by-case and sectorial compliance to general principles as well as to specific provisions and standards.

Other two principles play a fundamental role in the harmonisation of the implementation of the EU data strategy: transparency and fairness, that together with the accountability rule could address all the interpretative issues emerging from the different interplay of the complex data regulatory framework.

Transparency²⁶ embeds legal and technical standards related to both the solution design and the information duties towards data subjects/users. Clear and public procedure can be included in reports made available both on digital platforms and on the health data repositories. This organisational measure is essential to understand how to identify in a transparent manner roles and responsibilities during the all life-cycle of the processing. Transparency is therefore also related to the concept of maintaining the control of the governance of processed data by technical measures (eg traceability) and organisational ones (eg activity reports, records of data processing, terms and conditions to get access to data/services, etc.). It shall be clear – or at least easily to reconstruct - who has which rights on a given (raw / processed) dataset.

Fairness²⁷ is a principle that finds application both in B2C and B2B relationships. It helps to cover the concept of accountability with meaningful content: to demonstrate to be compliant with the ethical-legal framework is not only a formal obligation to avoid sanctions but a relevant part of the solution development and deployment. To enable fair data processing is in fact a guarantee for the fundamental rights of the involved individuals and groups and it also ensures the robustness of the democratic architecture of values in the digital environment and the maintenance of competitiveness in the relevant market.

²⁶ G. Finocchiaro, Transparency of Digital Providers and Digital Divide, in R. Senigaglia, C. Irti, A. Bernes (eds) *Privacy and Data Protection in Software Services*, Springer, 2021, p. 3 ff.

²⁷ G. Malgieri, The Concept of Fairness in the GDPR – A Linguistic and Contextual Interpretation, *FAT* '20: Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency January 2020* (2020) 154–66, <https://dl.acm.org/doi/pdf/10.1145/3351095.3372868>; G. Schneider, Fairness, in G. Comandé (ed), *Elgar Encyclopedia of Law and Data Science*, cit., p. 168; H. Hoffmann, V. Vogt, M. P. Hauer, K. Zweig, Fairness by awareness? On the inclusion of protected features in algorithmic decisions, *Computer Law and Security Review*, Volume 44, 2022, 105658, ISSN 0267-3649, <https://doi.org/10.1016/j.clsr.2022.105658>.

The interplay between accountability, transparency, and fairness, therefore, seems to be the interpretative key for harmonising the different legislative initiatives on data, as well as to solve applicative issues and standardise procedure.

QUESTION OF GEO-LEGAL PERSPECTIVE: GEOPOLITICAL LINKS AS A POTENTIAL DRIVER OF LEGAL DEVELOPMENTS

Anna Marotta^{*}

Abstract

The Geopolitical decisions and actions, alliances included, may influence legal developments. In current societies, the coexistence of different cultural groups in the same territory sometimes generates an identity defensive attitude by minority groups, who refuse to adapt to the majority culture. These antagonisms may give rise to geopolitical conflicts, namely rivalries for the power over a territory, which may cause legal changes. The events connected with the institutionalization process of Islamic Alternative Dispute Resolution in England, which has resulted in bodies generally called '*sharia courts*', show that geopolitical dynamics impact on law, and vice versa. The use of geo-law as an exploratory methodological approach that combines Comparative Law and Geopolitics to address geopolitical conflicts arising from the circulation of legal rules, reveals that the functioning of *sharia courts* directs both the internal and external legal evolution, under the pressure of links between people with a common goal. At the domestic level, there are calls for legal changes. The required change concerns not only *sharia courts*, but also other phenomena linked to the application of *sharia*-based rules. At an external level, it seems that *sharia courts* are becoming a model of Islamic justice for Muslims in other countries, who resort to these structures to be trained as 'judges' and replicate that model in their own countries.

Through the geo-legal perspective, therefore, this paper aims to show the evolution of the relationship between the involved law systems and their founding values, turning the spotlight on human links as a potential driver of legal developments.

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Keywords

Geo-law, ADR, English law, Islamic law, sharia courts

1. Introduction

Law, as the set of rules through which a community organises itself and its internal and external relations, is a dynamic reality. It inexorably changes, without interruption.

Very often, the cause of legal change can be found in a phenomenon that comes from within the word of law itself. An example of this is the disapplication or the repeal of rules that have become obsolete. Other times, legal development follows from extra-

legal phenomena. Geopolitical conflicts, as rivalries for the power/influence over a territory, are one of them.

In times of globalisation, the circulation of legal rules and models as a consequence of population migration seems to frequently result in a reassertion of local identities. In such cases, legal transplants are accompanied by power struggles that may impact on the legal development of a country.

Currently, law and territory no longer coincide, and the coexistence of a variety of cultural groups in the State territory sometimes generates tense social relations. The widespread sense of superiority of a culture over another makes it difficult to establish a cultural dialogue, often with the complicity of inappropriate state policies. These antagonisms may result in geopolitical conflicts when the involved people act to have their claims over the territory recognised.

In a geopolitical situation, the legal sphere may become the space where actors try to consolidate their claims, forging links to achieve their objectives. The influence exerted by geopolitical links on the legal debate is the subject of this paper, which takes as an example the conflict connected with the functioning of English *sharia courts*: Islamic Alternative Dispute Resolution institutions widely represented as parallel legal courts.

This conflict of jurisdiction with a geopolitical meaning involves actors from the social, political and academic spectrum, each moved by different visions of the values at play. However, their common understanding of the sacred law of Islam – the *sharia* – and of *sharia courts* has favoured the emergence of links which have ended up directing the internal and external legal debate with respect to the application of *sharia*-based rules.

The present analysis is conducted through the lenses of ‘geo-law’ as a methodological approach that combines Comparative Law and Geopolitics to address geopolitical conflicts arising from the circulation of legal rules. The geo-law analysis studies the content of involved legal systems and investigates how their interaction impacts on a geopolitical level.

The geo-legal perspective shows a change in the relationship between the English common law system and the Islamic model, revealing, at the same time, the role played by human links as geopolitical strategies.

2. Combining Comparative Law and Geopolitics for a new methodological approach

Where there is a society, there is law. Law is one of the aspects that make up man's culture¹.

As a socio-cultural phenomenon, there is no global understanding on what is meant by law. The law-making process involves a plurality of actors that are to be thought within cultural coordinates². Law lives in multiple dimensions and results in multiple layers, as it is not only the product of a variety of actors playing different roles as rule-makers and rule-takers, but also of different identities, stories and interpretation practices that give rise to the different ways in which people organise social experience and give it meaning³.

Comparative law is aware of this and therefore presupposes the existence of a multiplicity of legal rules and institutions. It studies them in order to determine to what extent they are similar or different. The necessary aim of comparative law, as a science, is to acquire better knowledge of law⁴.

Comparative law also recognizes that living law consists of many different elements called 'legal formants'⁵. Every legal system contains a large number of formants (such as statutory rules, judicial decisions, scholarly workings), within each of which further

¹ R. Sacco, *Antropologia giuridica: Contributo ad una macrostoria del diritto* (Bologna, Società editrice il Mulino 2007).

² M. Bussani, *Il diritto dell'Occidente: Geopolitica delle regole globali* (Torino, Einaudi 2010).

³ F. Fiorentini, M. Infatino (eds.), *Mentoring Comparative Lawyers: Methods, Times and Places, Liber Discipulorum Mauro Bussani* (Ius Gentium: Comparative Perspectives on Law and Justice 77, Cham, Springer 2020) 274.

⁴ R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative' (1991) 39 *The American Journal of Comparative Law* 1 (Installment I of II).

⁵ *ibid*; R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative' (1991) 39 *The American Journal of Comparative Law* 343 (Installment II of II).

formants can be identified. Furthermore, these elements may or may not be in harmony with each other.

The study of legal formants allows the comparative law scholar to make a dynamic comparison, which highlights both the circulation mechanisms of legal systems and the competition between different legal formants within a law system and between legal systems⁶.

In order to acquire better knowledge of the legal rules and institutions that are compared, comparative law may benefit from the contribution of other disciplines. This is especially true when it comes to critical comparison, which aims to identify the reasons behind legal rules.

A significant contribution to comparative law analysis may come from geopolitics, as a method of analysis of power struggles over a territory, whether large or small, including territory within urban areas⁷. The question is: how can geopolitics contribute to comparative law analysis? Addressing a conflict between legal systems by focusing on the personalities in actions, their concrete opposing claims and the resulting impact on the wider society, appears to be more coherent with the need to conduct an operational analysis, i.e. an analysis focused on the application of law, which is what comparative law aims to do.

As a '*géographie des conflits*', geopolitics places territory at the centre of the analysis⁸. The term 'territory' has a wide meaning, however: it encompasses not only territory as such, with its size, land forms, resources, spatial sets with their order of magnitude and their intersections, but also men and women who live in the territory and the authorities they accept and those they fight against, by reason of their interpretation of history and their representations of both the past and the future⁹.

⁶ G. Ajani, D. Francavilla, B. Pasa, *Diritto comparato: Lezioni e materiali* (Torino, G. Giappichelli Editore 2018) 33.

⁷ Y. Lacoste, 'La géographie, la géopolitique et le raisonnement géographique' (2012), 3-4 *Hérodote* (n 146-147) 14, 27.

⁸ B. Giblin, *Les conflits dans le monde: approche géopolitique*, (Collection U, Paris, Armand Colin 2012).

⁹ Y. Lacoste, 'La géographie' (n 7) 14.

The ‘representations’ are at the root of the conflict, determining its intensity and duration¹⁰. A geopolitical conflict opposes people or groups who have contradictory representations, that is different points of view about a territory or a phenomenon taking place over it¹¹. These personal and collective ideas define actors’ objectives and explain their strategies.

A geopolitical representation is the result of a reasoning which combines elements of reality and more approximate facts, even untrue facts, in order to build a truthful interpretation of life, which must be defended¹². It aims to justify an opinion and conveys the message that a situation is fair or unfair, good or bad, without explaining its complexity¹³.

The contribution that geopolitics can give to comparative law analysis is particularly important in the era of globalisation and multicultural societies, where the circulation of rules and legal models places differences between legal systems within the same space: the state territory.

When it comes to Western secular states, the coexistence of different cultural groups and different rule systems occurs in a legal framework ruled by the principle of territoriality of law, which creates unified legal orders that grant internal plurality and, at the same time, retain the right to decide if foreign laws can be applied or not. This may generate a dialect between phenomena of socio-cultural homologation and identity-based refusal by cultural minorities to adapt to majority culture since, on the one hand, domestic policies sometimes prove to be reluctant to actually make room for cultural diversity, and, on the other hand, some cultural groups may decide to follow legal rules different from the law of the land in accordance with a principle of personality of law. The resulting state of tension may give rise to geopolitical conflicts when individuals demand recognition of their rights over the territory.

¹⁰ B. Giblin, *Les conflits dans le monde* (n 8) 9.

¹¹ B. Loyer, *Géopolitique: Méthodes et concepts* (Paris, Armand Colin 2019) 45-65.

¹² *ibid* 46-48.

¹³ *ibid* 46.

A geopolitical conflict should not be necessarily understood as an open conflict, however. In democratic societies, geopolitical situations deriving from problems of power-territory generally result in verbal controversies that are expressed by means of demonstrations, debate, controversy in the press or opposition vote¹⁴.

The mutual influence between some legal phenomena and geopolitical dynamics in the current globalised and multicultural world, requires analytical paths that go beyond the traditional limits between disciplines. The combination between comparative law method and geopolitical method in a geo-law analysis is an attempt in this direction.

The term 'geo-law' was adopted for the first time in Italy by Natalino Irti to indicate the renewed relationship between legal rules and space on account of changes produced by the globalisation of markets¹⁵. In the present paper, however, the expression 'geo-law' has to be understood in its methodological function, namely as a methodological experiment aimed to addresses geopolitical conflicts arising from the circulation of legal rules through the analysis of the content of the confronting law systems and the elements of the conflict, in order to verify changes (if any) occurring in the relationship between the involved legal systems and to examine what their direction is¹⁶.

This transdisciplinary approach does not identify and describe the legal issue and the geopolitical conflict as two separate entities. It examines how legal phenomena and power struggles affect each other, while also making use of the contributions from other disciplines. Legal systems, legal families, legal formants, legal tradition, circulation of rules and models, territory, actors, strategy, stake and representations: all of these elements are taken into account in a geo-law analysis.

The geo-legal perspective has been used to examine the phenomenon of English *sharia courts*: Islamic bodies resulting from the institutionalisation process of

¹⁴ B. Giblin, 'La géopolitique: un raisonnement géographique d'avant-garde' (2012), 4 *Hérodote* (n 146-147) 3, 9.

¹⁵ N. Irti, *Norma e Luoghi. Problemi di geo-diritto* (Bari, Editori Laterza 2006).

¹⁶ A. Marotta, *A Geo-Legal Approach to the English Sharia Courts: Cases and Conflicts* (Volume 1, *Comparative Law in Global Perspective*, Bussani and Della Cananea Editors, Brill 2021).

Alternative Dispute Resolution (hereafter referred to as ADR) in accordance with Islamic law. These institutions are the heart of a wide geopolitical conflict which covers a length of time ranging from 2008 to the present day and revolves around the prevailing representation of Islamic ADR institutions as a parallel legal system.

3. A conflict of jurisdiction with a geopolitical meaning: the controversial role of Islamic ADR bodies in England

It was 1982 when the representatives of ten mosques set up The Islamic Sharia Council in London¹⁷. It was the first *sharia council* to be established in the Britain and the whole of Europe.

Three years later, in the same city, the Egyptian scholar Zaki Badawi contributed to establish the Muslim Law (Shariah) Council UK¹⁸.

Those were years when Islam was becoming the major identity marker for Muslim populations in European countries¹⁹. At first, Muslim's relationship with Europe was based on categories such as ethnicity, national identity and political identity²⁰. Starting from the mid-1970s, however, Muslim migrants' original project of a temporary stay to make a fortune gave way to a permanent settlement in Europe. This resulted in a gradual process of visibility of Islam in Europe, which later became 'European Islam'²¹.

A series of events in Muslim countries have influenced the phases of this process: the Six-Day War, the death of the Egyptian leader Nasser, the Iranian Revolution, and

¹⁷ The Islamic Shari'a Council, Welcome to The Islamic Shari'a Council, < <https://www.islamic-sharia.org/> > accessed 11 October 2022.

¹⁸ The Muslim Law (Shariah) Council UK, Welcome to The Muslim Law (Shariah) Council UK, < <https://www.shariahCouncil.org/> > accessed 11 October 2022.

¹⁹ F. Dassetto, 'L' "islam europeo" e i suoi volti' in A. Ferrari (ed.), *Islam in Europa/Islam in Italia tra Diritto e Società* (Bologna, Società Editrice il Mulino 2008) 13-41. See also F. Dassetto, *L'islam in Europa* (Torino, Edizioni della Fondazione Giovanni Agnelli 1994).

²⁰ *ibid* 15-18.

²¹ *ibid* 22-28.

the strengthening of the Wahabi-Salafi vision connected with the international rise in oil price contributed to shape a new geopolitical vision of Islam.

“Concerns about energy resources and oil prices, along with multiple conflicts in the Middle East, have all conspired to construct ‘Muslim’ as a demonised social and cultural identity”²² over the years. 1989, the year of the Rushdie Affair and the *affaire du foulard* in France, marked the emergence of “a more specific concern about the ‘failure’ of Muslims (whether migrants, refugees or settled populations and their descendants) to integrate [...]. 9/11 and what followed are part of this, with demands for integration often couched in terms of ‘security’”²³.

The beginning of the new millennium was therefore dominated by ideas such as the global Islamic revival, the attraction of conservative ideologies among Muslims in Europe, the alleged incompatibility of Islamic values with the values underlying European countries, Muslims’ loyalty to *umma* and their ‘parallel lives’, all of this generating the fear of an Islamisation of Europe²⁴.

In those years, which made Islam the major site of antagonisms between principles and rules, the Birmingham Shariah Council, also now known as Family Support Services (Shariah Council), was established at the Birmingham Central Mosque²⁵.

Although a number of *sharia councils* have been set up in the UK over the years, there is neither an authoritative definition nor a single type of *sharia council*. *Sharia councils* may vary depending on doctrinal affiliation, size and even status. Only a few *sharia councils* are registered charities.

²² R. Grillo, *Interculturalism and the Politics of Dialogue* (B and RG Books of Lewes 2018) 52.

²³ *ibid* 52.

²⁴ *ibid* 52.

²⁵ Family Support Services (Shariah Council), <<https://centralmosque.org.uk/services/>> accessed 19 October 2022.

These “unofficial legal bodies”²⁶ offer their services to a doctrinally diversified Muslim population²⁷. Their services consist of three main functions. One is to provide mediation and reconciliation on family issues in accordance with the Children and Families Act 2014.

Under Islam, dispute resolution based on the search of a compromise is grounded in the primary sources of Islamic law (Qur’an and *sunna*), which enshrine the principle of *tabkim* (arbitration) as an integral part of the *sulh* (negotiated settlement)²⁸. Furthermore, not only it is a religious obligation upon the parties involved in a dispute to resort to some sort of arbitration should the need arise, but it is also a duty for Muslims, both as individuals and as part of a community, to help resolve disputes²⁹.

Islamic reconciliation-based dispute resolution has found a place in English law, which has been encouraging the use of ADR since Lord Woolf’s reform of civil justice in the 1990s, in order to set up a more simplified, accessible and less costly civil justice system for private litigants and reduce the costs linked to civil legal aid³⁰.

Sharia councils also produce expert opinion reports on matters of Islamic family law and custom to the Muslim community, solicitors and the courts. However, the vast majority of applications comes from women who wishes to obtain an Islamic divorce certificate. The will to assist Muslim women with Islamic dissolution of marriage – whose classical Islamic law rules may put the wife in a vulnerable position³¹ – is the reason of creation of the first and best-known *sharia councils* indeed³².

²⁶ S. Bano, *Muslim Women and Shari’ah Councils: Transcending the Boundaries of Community and Law* (London, Palgrave Macmillan 2012) 84.

²⁷ I. Bowen, *Medina in Birmingham Najaf in Brent: Inside British Islam* (London, Hurst & Company 2014).

²⁸ M. M. Keshavjee, *Islam, Sharia & Alternative Dispute Resolution: Mechanisms for Legal Redress in the Muslim Community* (London, I.B. Tauris & Co. Ltd 2013) 67.

²⁹ S. Bano (n 26) 102-103.

³⁰ H. Genn, ‘What is Civil Justice For? Reform, ADR, and Access to Justice’ (2012), 24 *Yale Journal of Law & Humanities* 397, 399-401.

³¹ F. Castro, *Il modello islamico*, edited by G.M. Piccinelli (2nd edn, Torino, G. Giappichelli Editore 2007), 51-55.

³² A. Marotta (n 16) 92-106; 109-112.

There is more than one reason that explains why *sharia councils* mainly operate in matters of family law, however: the Islamic tradition to solve family disputes out of courts; the role of concepts such as honour and shame, which prevent Muslims from publicly solving family disputes; the lack of recognition towards Western law of the same authority and legitimation recognised to Islamic law rules; the State failure to recognize plural orders³³.

The intention to provide Muslims in Britain with a wider range of services, which included a dispute resolution system different from *sharia councils*, drove Shaykh Faiz ul-Aqtab Siddiqi, barrister at law and leader of the Hijaz community, to establish the Muslim Arbitration Tribunal in 2007 (hereafter referred to as MAT)³⁴. MAT deals with commercial and civil arbitration, family dispute mediation, Islamic marriage dissolution, forced marriage cases, mosque disputes, inheritance disputes and the draft of *sharia*-compliant wills.

MAT and *sharia councils* distance themselves from one other³⁵. However, some commonalities can be observed: in spite of their own doctrinal orientation, their services are destined for all Muslims in Britain; records of the cases are not made public for privacy reasons; they have a transnational visibility: their decisions hardly reach domestic courts for enforcement and tend to be recognised in Muslim countries³⁶.

The alternative and institutionalised offer of Islamic justice by *sharia councils* and MAT has progressively resulted in a representation of Islamic ADR bodies as parallel legal courts referred to as '*sharia courts*'. Although the debate on Islamic ADR mainly revolves around these institutions, it sheds light on different understandings of the

³³ I. Yilmaz, 'Challenge of post-modern legality and Muslim legal pluralism in England' (2002), 28 *Journal of Ethnic and Migration Studies* 343.

³⁴ A. Marotta (n 16) 109.

³⁵ J. S. Nielsen, 'United Kingdom: An Early Discussion on Islamic Family Law in the English Jurisdiction', in M. S. Berger (ed.), *Applying Shari'a in the West: Facts, Fears and the Future of Islamic Rules on Family Relations in the West* (Leiden, Leiden University Press 2013) 93.

³⁶ A. Marotta (n 16) 92; 109-112.

type (and the number) of Muslim fora that fall into the category ‘*sharia courts*’³⁷. This seems to be due to several reasons. One of them is the existence of a large number of Islamic figures providing intra-communitarian dispute-resolution services in accordance with Islamic law: imams in the mosques, community elders, associations and community structures that provide the same services as *sharia councils*/MAT but have different names, as is the case with the Ismaili network of dispute resolution known as Aga Khan Conciliation and Arbitration Board for the United Kingdom (NCAB UK).

In addressing the controversial phenomenon of ‘*sharia courts*’, the prevailing representation of Islamic ADR institutions as (*sharia*) *courts* is deconstructed and reconstructed on the basis of the following criteria:

1. identification of the institution over the territory;
2. expert staff, whose members can be identified;
3. hierarchically organised internal structure;
4. jurisdiction granted by the involved parties on the subject matter of the claim;
5. pre-established and formal procedures that are made public (through a website);
6. pre-established costs for the applicant;
7. record-keeping;
8. information services for the public; and
9. external communication channels³⁸.

These criteria limit the use of the term ‘*sharia courts*’ to four institutions:

1. The Islamic Sharia Council
2. The Muslim Law (Shariah) Council UK
3. Birmingham Shariah Council

³⁷ *ibid* 84-91.

³⁸ *ibid*.

4. Muslim Arbitration Tribunal

Such terminological choice implies recognition that, from a technical-legal point of view, *sharia courts* are not legal courts. They are not permitted to operate either within the court system or in parallel with it. And yet, just like courts of law, *sharia courts* are structured institutions run by law experts who solve disputes in accordance with their understanding of the relevant law and in conformity with their pre-established procedures. Islamic law scholars analyse each case through multi-stage procedures that involve costs to be paid and forms to be filled by the parties, whose meetings with one other and with scholars are encouraged. Finally, a panel issues a decision, which is listed in a dedicated register.

From this perspective, *sharia courts de facto* appear as legal courts and act like parallel legal courts. However, unlike courts of law which apply domestic law, *sharia courts* apply a law model which can be defined as virtual and ahistorical. It is virtual because it is only derived from the speculative tradition of Islamic legal schools and there is no geographic space where it applies as a whole. It is ahistorical because it is abstract compared to the rules and legal practices applied in Muslim countries.

Sharia courts generally operate within the limits of domestic law. However, media investigations have turned the spotlight on a practical-informal operating level, where activities prohibited to ADR bodies take place and human rights violations may occur³⁹.

When *sharia courts* go beyond the limits laid down by English law and public policy for the administration of private justice, what follows is a conflict of jurisdiction with a geopolitical meaning: justice provided by domestic courts is represented as antagonistic to justice given by *sharia courts*, which are in turn represented as jurisdictional bodies competing with courts of law for the exercise of jurisdiction over Muslims.

A variety of actors and views emerges in this conflict. However, it is marked by two main ideological identity-based visions concerning the relevant law, its founding

³⁹ Panorama, 'Secrets of Britain's Sharia Councils', Part 1 (online video 2013), <<https://www.youtube.com/watch?v=4gZCFdHkd4A>>, Part 2 (online video 2013). <<https://www.youtube.com/watch?v=tQ3PIhFHDdE>> accessed 21 October 2022.

values and its objectives. The two opposing legal perspectives, which reflect respectively the Western Legal Tradition and the Islamic legal tradition, result in two formal public claims: the right to have English law, as one secular law for all, applied in England through courts of law, on the one hand; and the right of the Muslim minority to have Islamic law applied in given law fields through Islamic ADR institutions, which are entitled to exist and operate within the existing legal framework.

Prominent public figures have spoken in favour of Islamic ADR structures. They come from the religious circles, such as the former Archbishop of Canterbury Rowan Williams; the judiciary, such as the Lord Chief Justice (from 2005 to 2008) Nicholas Phillips of Warth Matravers, and the Muslim ‘representative’, as in the case of The Muslim Council of Britain.

As regards opposition to Islamic ADR bodies, three main types of opposition can be identified as a part of a broad coalition:

1. opposition grounded in Christian religious values, as in the case of Baroness Caroline Cox, cross-bench member of the the House of Lords;
2. opposition in the name of secularism, which brings together organisations such as National Secular Society, One Law for All, the Council of ex-Muslims of Britain, Southall Black Sisters, and British Muslims for Secular Democracy;
3. right ideology-based opposition, which includes political parties such as the United Kingdom Independence Party and the British National Party, groups such as Sharia Watch UK and street movements such as English Defence League.

The strong public opposition to *sharia courts* has not prevented interactions between such institutions and domestic courts, which occur in various ways: from requests by domestic courts to *sharia courts* for expert advice to the referral of cases in order for *sharia courts* to determine Islamic law-related aspects. Furthermore, case law shows English judges’ willingness to understand the needs linked to the use of intra-communitarian dispute resolution tools and their commitment to make room for

them, provided that English law is respected and English values are not compromised⁴⁰.

The beginning of the *sharia courts*-related conflict can be traced back to 2008, when the Archbishop Williams agreed to launch the series *Islam in English law* with a public lecture. This conflict has developed through significant moments over the years ever since, generating strategic links between people divided by different worldviews and united by a common goal.

4. Speaking with a single voice: legal debate between shared representations and alliances

Dr Rowan Williams triggered a media storm when he gave his lecture on ‘Civil and Religious Law in England’ on 7 February 2008, in the Great Hall of the Royal Court of Justice⁴¹. His suggestion to the ‘transformative accommodation’ scheme, which would give the individuals the liberty to choose the jurisdiction under which they can resolve specific matters, included “aspects of marital law, the regulation of financial transactions and authorised structures of mediation and conflict resolution”⁴².

In July of that year, the then Lord Chief Justice Nicholas Phillips further fuelled the debate by giving a speech on ‘Equality Before the Law’ at the East London Muslim Centre. He pointed out that, since the law of the land allows certain disputes to be solved by mediation or arbitration, there was no reason ‘why principles of *shari’a* law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution’⁴³.

⁴⁰ *Al Midani and another v Al Midani and others* (Lloyds Rep 923 (1999) C.L. R 904); *Khan v Khan* [2007] EWCA Civ. 399; *Bhatti v Bhatti* [2009] EWHC 3506; *Uddin v Choudhury* [2009] (EWCA Civ 1205); *Jivraj v Hashwani* [2010] EWCA Civ 712; [2011] UKSC 40.

⁴¹ R. Williams, ‘Civil and Religious Law in England: a religious perspective’, in R. Griffith-Jones (ed.), *Islam and English Law: Rights, Responsibilities and the Place of Shari’a* (Cambridge, University Press 2013) 20-33.

⁴² *ibid* 32.

⁴³ N. Phillips, ‘Equal Before the Law’, in R. Griffith-Jones (ed.), *Islam and English Law: Rights, Responsibilities and the Place of Shari’a* (Cambridge, Cambridge University Press 2013) 287.

While the Archbishop Williams and Lord Phillips were accused of advocating the application of *sharia* in the UK as a separate system of legal rules with its own officially sanctioned courts, the term '*sharia courts*' made its official entry into the public debate⁴⁴.

The Archbishop's lecture generated a domino effect which has influenced legal debate under the pressure of links between actors sharing the same understanding of both *sharia* as an intrinsically discriminatory law and *sharia courts* as parallel legal bodies abusing jurisdiction.

One of the first significant moments in the *sharia courts*-related conflict was the introduction of the Arbitration and Mediation Services (Equality) Bill by Baroness Cox in 2011. In order to “tackle the problem of Shari'a courts in England and Wales”⁴⁵, the Bill proposed amendments to a series of statutes, providing further provisions regarding arbitration and mediation services in light of the equality legislation.

The Brill brought together individuals and groups who called for a legislation to restrict the activities of 'Shari'a courts': Christians (such as Alan Craig, leader of the Christian political party Christian Peoples Alliance from 2004 to 2012; the then Anglican – now Roman catholic priest – Bishop Michael Nazir-Ali; leading Christian organisations such as the Christian Institute and the Christian Concern; the retired Anglican bishop Lord George Carey), Muslims (British Muslims for Secular Democracy, whose then leader, Tehnmina Kazi, advised on the Bill), advocates of secularism (One La for All, the Council of ex-Muslims of Britain, National Secular Society) and right-wing supporters (The United Kingdom Independence Party, British National Party, English Defence League and Sharia Watch UK) found themselves on the same side.

On the other hand, The Islamic Sharia Council's Secretary, Dr Suhaib Hasan, faced with Baroness Cox's statements about the need to protect Muslim women, stated that

⁴⁴ R. Edwards, 'Sharia courts operating in Britain' (The Telegraph, 14 September 2008), <<https://www.telegraph.co.uk/news/uknews/2957428/Sharia-law-courts-operating-in-Britain.html>> accessed 24 October 2022.

⁴⁵ R. Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain*, (Farnham, Ashgate 2015) 145.

Baroness Cox had “regurgitated common myths about the role of women in Islam”⁴⁶. For his part, Khurshid Drabu, adviser on The Muslim Council of Britain constitutional affairs at that time, declared: “Bills of this kind don’t help anybody. They don’t appear to understand that we live in a free country where people can make free choices”⁴⁷.

In order to promote Baroness Cox’s Bill in view of the second reading, a booklet titled *Equal and Free? Evidence in Support of Baroness Cox’s Arbitration and Mediation Services (Equality) Bill* was drafted by barrister and academic Charlotte Rachel Proudman and published as a part of the Equal & Free Campaign, which deals with women who suffer religiously-sanctioned gender discrimination⁴⁸. The booklet put emphasis on the way *sharia* law is applied in the UK and the aims of *sharia* bodies. It was prefaced by Baroness Cox, who provided Parliamentarians and others with evidence of the need for the Bill.

The Bill was widely celebrated during the second reading. However, the Lords emphasised that the existing legislation already provided measures to deal with the problems connected with the functioning of *sharia courts*⁴⁹.

The second reading did not leave *sharia courts* indifferent. In reply, The Islamic Sharia Council produced a pamphlet entitled ‘Response to Baroness Cox’s

⁴⁶ R. E. Maret, ‘Mind the Gap: The Equality Bill and Sharia Arbitration in the United Kingdom’ (2013), 36 Boston College International and Comparative Law Review 255, 276.

⁴⁷ K. McVeigh, A. Hill, ‘Bill limiting sharia law is motivated by “concern” for Muslim women’ (The Guardian, 8 June 2011), <<https://www.theguardian.com/law/2011/jun/08/sharia-bill-lords-muslim-women>> accessed 25 October 2022.

⁴⁸ C. R. Proudman, *Equal and Free? Evidence in support of Baroness Cox’s Arbitration and Mediation Services (Equality) Bill* (2012), <<http://www.secularism.org.uk/uploads/equal-and-free-16.pdf>> accessed 25 November 2022.

⁴⁹ UK Parliament, *Arbitration and Mediation Services (Equality) Bill: Second Reading* (House of Lords 19 October 2012), <<https://publications.parliament.uk/pa/ld201213/ldhansrd/text/121019-0001.htm#12101923000438>> accessed 25 October 2022.

Arbitration&Mediation Bill', which addressed the matters discussed at the House of Lords⁵⁰.

Meanwhile, concerns about an undefined category of 'Shari'a courts' voiced by Baroness Cox echoed in the words and actions of several supporters. On April 2013, it was journalist Jane Corbin who denounced *sharia councils* through an undercover investigation for the BBC programme Panorama, which included interviews to Baroness Cox and Charlotte Proudman⁵¹.

The documentary, titled 'Secrets of Britain's Sharia Councils', showed a reporter who pretended to be a Muslim woman who had suffered violence from her husband and resorted to The Islamic Sharia Council for advice. *Sharia councils* were described as patriarchal structures failing to provide help to women and going beyond their legal remit. In particular, The Islamic Sharia Council was accused of ruling on cases that it had no legal authority over. This gave new impetus to the opponents of Islamic ADR bodies.

In the aftermath of the programme, Conservative MP for Keighley, Kris Hopkins, opened a debate on 'shari'a law' at the House of Commons the next day, thanking both journalist Corbin and Baroness Cox for their work ⁵².

Questioned about *sharia* and the rulings by religious bodies, the Parliamentary Under-Secretary of State for Justice, Mrs Helen Grant, confirmed the positions previously expressed by the Government:⁵³ She maintained that *sharia* law has no jurisdiction under the law of England and Wales, that there is no parallel court system and that criminal law decisions issued by alternative courts are not recognised.

⁵⁰ The Islamic Sharia Council, Response to Baroness Cox's Arbitration&Mediation Bill (2012), <<http://www.islamic-sharia.org/wp-content/uploads/2014/05/Booklet-on-Coxs-Bill-Sep-2013.-2-1.pdf>> accessed 25 October 2022.

⁵¹ Panorama (n 39).

⁵² UK Parliament, Sharia Law (House of Commons 23 April 2013), <<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130423/halltext/130423h0002.htm>> accessed 25 October 2022.

⁵³ E. Butler-Sloss, and M. Hill, 'Family law: Current Conflict and their Resolution', in R. Griffith-Jones (ed.), *Islam and English Law: Rights, Responsibilities and the Place of Shari'a*, (Cambridge, Cambridge University Press 2013) 110-111.

BBC did not have to wait long for a reply from *sharia courts* and their supporters. Both The Islamic Sharia Council and The Muslim Law (Shariah) Council UK issued a written statement which clarified how *sharia councils* operated⁵⁴. Furthermore, The Islamic Sharia Council lodged a complaint with Ofcom (Office of communications), the UK's communication regulator, since Panorama was considered to be in breach of Ofcom's Fairness and Privacy's guidelines⁵⁵.

Academics, too, spoke on the issue, emphasising the changes made by *sharia councils*⁵⁶, and examining the reasons for The Islamic Sharia Council's actions⁵⁷.

A year later, protests linked to increasing concerns about *sharia* prompted The Law Society to withdraw a practice note on how to write *sharia* compliant wills and to publicly apologise for having produced the guidance⁵⁸.

After The Law Society Affair, the application of *sharia* in England and Wales did not cease to be a matter of concern, however. On March 2015, the then Home Secretary Theresa May reopened the debate on the application of *sharia* in the UK⁵⁹. She announced the intention to commission an independent figure to complete an investigation into the application of *sharia* law in England and Wales, as a part of a counter-extremism strategy.

⁵⁴ The Islamic Sharia Council, Response Regarding Panorama (11 May 2013), <<http://www.islamic-sharia.org/panorama/>>; The Muslim Law (Shariah) Council UK, Press Release (22 April 2013), <<http://blog.islamic-sharia.org/wp-content/uploads/2013/05/Press-Release-re-Panorama-Programme-2013-04-22-Imam-Raza.pdf>> accessed 25 October 2022.

⁵⁵ The Islamic Sharia Council, Complaint to Ofcom regarding Panorama (20 May 2014), <<http://blog.islamic-sharia.org/complaint-to-ofcom-regarding-panorama/>> accessed 25 October 2022.

⁵⁶ Bowen, J. R., 'Panorama's exposé of sharia councils didn't tell the full story' (The Guardian, 26 April 2013) <<https://www.theguardian.com/commentisfree/belief/2013/apr/26/panorama-expose-sharia-councils-balance>> accessed 26 October 2022.

⁵⁷ R. Grillo (n 45) 124.

⁵⁸ A. Molloy, 'Islamic law to be enshrined in British law as solicitors get guidelines on "Sharia compliant" wills: The Law Society has issued guidelines to solicitors on drawing up "Sharia compliant" wills' (The Independent, 23 March 2014), <<http://www.independent.co.uk/news/uk/home-news/islamic-law-to-be-enshrined-in-british-law-as-solicitors-get-guidelines-on-sharia-compliant-wills-9210682.html>> accessed 26 October 2022.

⁵⁹ Home Office, A Stronger Britain, Built on Our values: A New Partnership to Defeat Extremism, (Speech) (23 March 2015), <<https://www.gov.uk/government/speeches/a-stronger-britain-built-on-our-values>> accessed 26 October 2022.

The speech by the Home Secretary provoked mixed responses. The academic world was split between enthusiasm and doubts⁶⁰, but such a decision was welcomed by opponents to *sharia* and *sharia courts*, and did not encounter any public opposition from *sharia courts*⁶¹.

While Baroness Cox called for a judge-led inquiry⁶², her view about *sharia* and *sharia courts* found a voice in a 2015 Dutch study on Islamic ADR in Britain⁶³, whose contents were first published by *The Independent*⁶⁴, and then had a large press coverage, causing The Islamic Sharia Council to respond publicly and to lodge a complaint with *The Independent*'s complaints department⁶⁵.

The launch of the Home Office review in 2016 was followed by the launch of a review in parallel by the Home Affairs Committee, which aimed to address the increasing uncertainty concerning the role of 'Sharia courts' in Britain⁶⁶. Both marked a change in the Government's reassuring line, which had remained unchanged since 2008.

The early positive reaction to the Home Office review gave way to criticism when the members of the panel were revealed. The review was chaired by an academic specialised in Islamic law, who was supported by a family law barrister, a retired judge

⁶⁰ A. Marotta (n 16), 215-218.

⁶¹ *ibid* 200-205.

⁶² C. Cox, 'A Parallel World: Confronting the abuse of many Muslim women in Britain today' (The Bow Group, 2015), <<https://bowgroup.org/bow-group-report-a-parallel-world-confronting-the-abuse-of-muslim-women-in-britain/>> accessed 26 October 2022.

⁶³ M. Zee, *Choosing Sharia? Multiculturalism, Islamic Fundamentalism and Sharia Councils* (Eleven International Publishing 2015).

⁶⁴ The article is no longer available on the website of *The Independent*.

⁶⁵ The Islamic Sharia Council, *The Independent*, 'Sharia courts: The Inside Story' (10 December 2015), <<http://blog.islamic-sharia.org/the-independent-sharia-courts-the-inside-story/>>; The Islamic Sharia Council, *The Unholy Trinity* (January 2016), <<http://www.islamic-sharia.org/the-unholy-trinity/>> accessed 26 October 2022.

⁶⁶ Home Office, *Independent review into sharia law launched* (26 May 2016), <<https://www.gov.uk/government/news/independent-review-into-sharia-law-launched>>; Home Affairs Committee, *Sharia Councils inquiry launched* (24 June 2016), <<https://old.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news-parliament-2015/160623-new-inquiry-sharia-councils/>> accessed 26 October 2022.

and a specialist family law solicitor, and was advised by two religious and theological experts.

In an open letter to the Home Secretary, approximately one hundred organisations for women's rights and activists expressed opposition to the review, identifying five main areas of concern – the panel, the terms of reference of the review, the competence of imams as advisers, the issues covered by the inquiry and the implications deriving from the lack of representation of the victims of *sharia councils* and of organisations upholding women's rights – and called on the Government to act accordingly⁶⁷.

Campaigners such as One Law for All, Council of Ex-Muslims of Britain and Southall Black Sisters, together with other campaigners, invited the public to boycott the inquiry until such time as the Government had responded to their concerns and established a proper inquiry⁶⁸. However, the same organisations, alongside other groups and personalities, members of *sharia courts* and Muslim scholars, presented evidence to the Home Affairs Committee inquiry, in order to provide data supporting their positions⁶⁹.

While the Home Affairs Committee inquiry was closed for the 8 June 2017 general elections, and the collected evidence was conserved for an eventual future inquiry on the issue, the findings of the Home Office review were published on 1 February 2018⁷⁰.

⁶⁷ P. Patel, G. Sahgal, 'Whitewashing Sharia councils in the UK?' (Open Democracy, 4 July 2016), <<https://www.opendemocracy.net/pragna-patel-gita-sahgal/whitewashing-sharia-councils-in-uk>> accessed 26 October 2022.

⁶⁸ One Law for All, Boycott the Sharia law inquiry: Organisers call on women's rights campaigners and organisations to boycott the Sharia law inquiry (15 July 2016), <<http://onelawforall.org.uk/boycott-the-sharia-law-inquiry/>> accessed 26 October 2022.

⁶⁹ Home Affairs Committee, Sharia Councils inquiry (2016),

<<https://old.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2015/inquiry6/>> accessed 26 October 2022.

⁷⁰ M. Siddiqui et al, The independent review into the application of sharia law in England and Wales, Home Office (1 February 2018), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPFGR_Report_into_Sharia_Law_in_the_UK_WEB.pdf> accessed 26 October 2022.

In line with the requests from over a hundred Muslim women from a variety of professions and thirty-four different towns and villages⁷¹, it was stated that the closure of *sharia councils* was not a valid option. The panel made three main recommendations:

1. a legislative change consisting of amendments to the Marriage Act 1949 and the Matrimonial Causes Act 1973;
2. the promotion of awareness campaign to inform Muslim women of their rights and responsibilities under English law;
3. the creation of a body that “would set up the process for councils to regulate themselves”⁷².

The first and the second recommendation were intended to gradually reduce the use and the need for *sharia councils*. As such, they have been widely supported. By contrast, the third recommendation has not been unanimously supported by the review panel, even though the report stressed that “in speaking with the sharia councils, none were opposed to some form of regulation and some positively welcomed it”⁷³.

The first recommendation was intended to “ensure that civil marriages are conducted before or at the same time as the Islamic marriage ceremony, bringing Islamic marriage in line with Christian and Jewish marriage in the eyes of the law”⁷⁴. This choice was consistent with the Government’s previous attempts at curbing the widespread phenomenon of unregistered Muslim marriages, which has progressively led to the introduction of the category of ‘non-marriages’⁷⁵.

The practice of religious-only marriages with respect to Muslim couples has been one of the main reasons that has given rise to calls for a reform of marriage law over the

⁷¹ F. Perraudin, ‘Muslim women used as “political footballs in sharia court debate”’ (The Guardian, 1 November 2016), <<https://www.theguardian.com/law/2016/nov/01/muslim-women-used-as-political-football-in-sharia-court-debate>> accessed 26 October 2022.

⁷² M. Siddiqui et al (n 70) 5-6.

⁷³ *ibid* 6.

⁷⁴ *ibid* 5.

⁷⁵ V. Vora, ‘The Continuing Muslim Marriage Conundrum: The Law of England and Wales on Religious Marriage and Non-Marriage in the United Kingdom’ (2020), 40 *Journal of Muslim Minority Affairs* 148.

years, indeed. In 2015, the Law Commission issued a report titled ‘Getting married: a scoping paper’, where this practice was defined a major reasons for the reform of law of marriage⁷⁶. Furthermore, the scoping work was followed, on 3 September 2020, by the launch of a Consultation Paper on its provisional proposals to modernise and improve wedding law, publishing the final report on 19 July 2022⁷⁷.

The issue of Muslim religious-only marriages has generated multiple responses: one of them is the ‘Register Our Marriage’ campaign, led by Muslim solicitor and family law specialist Aina Khan, which is “committed to raising awareness of the lack of legal protection for unregistered religious marriages, campaigning for law reform to create a fairer society”⁷⁸.

Another solution has been offered by the first instance judge in the case *Akhter v Khan*, which was about a Muslim couple who had undertaken an Islamic religious ceremony in Dubai in 1998 and had been together 18 years, raising four children⁷⁹.

Justice David B. Williams of the Family Division of the High Court of Justice proposed a reversion of the judicial trend about ‘non-marriages’, ruling that an estranged couple’s Islamic marriage was ‘void’ (instead of a non-marriage) under section 11 of the Matrimonial Causes Act 1973, because it was entered into in disregard of certain requirements as to the formation of marriages. Therefore, the wife was entitled to a nullity decree. However, the Court of Appeal concluded that “the judge’s order must be set aside as there was, in this case, no ceremony in respect of which a decree of nullity could be granted pursuant to the provisions of s. 11 of the 1973 Act”⁸⁰.

⁷⁶ Law Commission, *Getting Married: a Scoping Paper* (17 December 2015), <http://www.lawcom.gov.uk/wp-content/uploads/2015/12/Getting_Married_scoping_paper.pdf> accessed 26 October 2022.

⁷⁷ Law Commission, *Weddings*, <<https://www.lawcom.gov.uk/project/weddings/>> accessed 26 October 2022.

⁷⁸ Register Our Marriage <<https://registerourmarriage.org/>> accessed 26 October 2022.

⁷⁹ *Akhter v Khan* [2018] EWFC 54 (Fam); [2020] EWCA Civ 122.

⁸⁰ *Akhter v Khan* [2020] EWCA Civ 122.

Wider concerns expressed by the Home Office enquiry into the application of *sharia*-based rules have crossed national borders. In the *Molla Sali v Greece* case, the Grand Chamber of the European Court of Human Rights, by recalling the findings of the Home Office review, pointed out that the use of *sharia* by European citizens is admissible on the conditions that it is voluntary and that it is not in opposition to an important public interest⁸¹.

On January 2019, the Parliamentary Assembly of the 47-nation Council of Europe, for its part, voiced concerns about the “judicial’ activities of ‘Sharia councils’” in the UK. Its resolution 2253 (2019), ‘Sharia, the Cairo Declaration and the European Convention on Human Rights’, called on the UK authorities: to ensure that *sharia councils* operate within the law of the land; to review marriage law; to remove the barriers to Muslim women’s access to justice; to carry out awareness campaigns that inform Muslim women of their rights, and to conduct further research on the ‘judicial’ practice of *sharia councils*⁸².

It must be said that is not only concerns linked to the application of *sharia*-derived rules that have crossed national borders. *Sharia courts* have a sphere of influence that goes beyond the UK in more than one way. Sometimes religiously-founded foreign state laws refuse to recognise decisions by secular states, whether they come from administrative bodies or courts, while they recognise decisions by ADR figures on the basis of the religious nature of their law⁸³. This is especially true for *sharia courts*, whose decisions are generally recognised in Muslim countries⁸⁴.

⁸¹ *Molla Sali v. Greece*, Application no. 20452/14, 2018, ECtHR (GC). See also

D. McGoldrick, ‘Sharia Law in Europe? Legacies of the Ottoman Empire and the European Convention on Human Rights’ (2019), 8 *Oxford Journal of Law and Religion* 517.

⁸² Council of Europe, *Sharia, The Cairo Declaration and the European Convention on Human Rights* (2019), <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25353>> accessed 26 October 2022. See also S. Sandberg, F. Cranmer, ‘The Council of Europe and Sharia: An Unsatisfactory Resolution?’ (2019), 21 *Ecclesiastical Law Journal* 203.

⁸³ M. Rohe, ‘Reasons for the Application of Shari’a in the West’, in M. S. Berger, (ed.), *Applying Shari’a in the West: Facts, Fears and the Future of Islamic Rules on Family Relations in The West* (Leiden, Leiden University Press 2013) 30-31.

⁸⁴ A. Marotta (n 16) 92-112.

Furthermore, it seems that *sharia courts* are becoming a model of Islamic justice for Muslims who live abroad. Muslims from Western countries resort to *sharia courts* not only to have their dispute resolved, but also to be trained as judges and replicate this model in their own country⁸⁵.

These dynamics confirm that the *sharia courts*-related conflict of jurisdiction with a geopolitical meaning has to be thought against the background of a wider geopolitical conflict opposing Islam and the West, *sharia* and democracy, Muslims and non-Muslims, all of them being representations of two incompatible worlds.

These representations take advantage of opportunistic links between people who mask their differences to achieve their goals, in this way directing legal debate and its developments.

5. Circulation of legal rules and impact of power struggles on legal evolution: some concluding remarks

The analysis of some current legal phenomena requires new disciplinary approaches. Geo-law aims to be a step in this direction.

The geo-legal methodology comparatively examines the data of legal systems and sheds light on how they are invoked and used by actors in a geopolitical conflict, helping the scholar evaluate the current and future relationship between the involved systems of law and their substratum of values.

In the case of *sharia courts*, the adoption of the geo-legal perspective has shown that the current scenario is the result of a gradual process. *Sharia courts* were set up to fill a gap in the law system: to provide services to British Muslims in response to ‘primary’ needs.

At the beginning of their operation, *sharia courts* played a major role in spreading that hybrid system of legal practices combining demands of Islamic law and English law that Judge Pearl and Professor Menski have called ‘*angrezi shariat*’⁸⁶. However, the

⁸⁵ *ibid.*

⁸⁶ D. S. Pearl, W. Menski, *Muslim Family Law* (London, Sweet & Maxwell 1998).

beginning of the new millennium marked a change. The new geopolitical vision of Islam on a global scale has ended up influencing the British debate about Islamic ADR, causing *sharia courts* to reverse the trend and resort to a virtual and ahistorical legal model.

The geo-legal approach has also revealed that geopolitical links may give a specific direction to legal debate. When it comes to *sharia courts*, Christians, secularists and exponents of right-wing views strategically come together against these bodies in the name of protecting human rights.

The response of both Muslim and non-Muslim communities to internal and international events linked to Islam results in an attitude of mutual closure and defence. The virtual and ahistorical law model driven-application of *sharia* within *sharia courts*, on the one hand, and the number of ideologically motivated campaigns against *sharia* and *sharia courts*, with the involvement of the far-right, have done nothing but increase the distance between the principles and values at play. This can be interpreted as one of the reasons why *sharia courts* are becoming a model of Islamic justice in the eyes of Muslims from other countries.

Positions taken by the actors involved in the conflict suggest that they are far from finding a compromise. Although UK public officials have managed the *sharia courts*-related conflict by showing a certain multicultural tolerance towards the activity of *sharia courts*, strong public opposition challenges the traditional model of English secularism. The future of multiculturalism in Britain appear to be uncertain.

In searching for valid solutions to improve the functioning of *sharia courts*, which may have great benefits for the relationship between the social constituents represented by the two legal systems at play, the answer may lie in the openness, permeability and flexibility of the English common law system, whose nature has proven to be able to ensure the respect of cultural diversity without compromising the founding values of a modern democracy.

EUROPEAN COURTS AND PREDICTIVE JUSTICE: A FEASIBLE SYMBIOSIS?

Simone Benvenuti ^(*) and Sirio Zolea ^(**)

Abstract

First of all, this paper considers the notion of predictive justice, assessing the new possibilities it opens up and, at the same time, the potential dangers associated to the application of algorithmic computer tools to the legal field. These issues are to be considered distinguishing the use of predictive justice by the judges from its use by the parties, their lawyers and legal advisors. Particular attention is devoted to the effective mechanisms of functioning of predictive justice services ‘in action’, showing, through concrete examples, how one of the main European providers (‘Predictice’) works, analyzing and re-elaborating judicial big data. Then, the current norms, institutional statements and legislative propositions concerning predictive justice within the European common legal space are envisaged. Finally, the paper focuses on the ECtHR and on the CJEU, wondering how the introduction of Artificial Intelligence tools could affect the operations and the procedures of such judges, taking in account their peculiarities and, as for the CJEU, the variety of its competences. It is finally asserted that all practices weakening the role of the human will in the judicial decision are to be discouraged, as the full accountability of the decision-making process is fundamental to keep and consolidate the authority and the legitimacy of these supranational courts. Nevertheless, tools that merely help European judges to strengthen and make more exhaustive their knowledge of case

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Paragraphs 2, 3, 4 are written by Sirio Zolea, paragraphs 5, 6 are written by Simone Benvenuti, paragraphs 1, 7 are jointly realized

law could be much more beneficial and in compliance with the systems of the sources of law.

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Keywords

Predictive Justice - Artificial Intelligence - European Court Of Human Rights - Court Of Justice Of The European Union – Legaltech - Algorithmic Decision – Transparency - Black Box Problem - Algorithmic Bias

1. Introduction

Predictive justice is today at the forefront of debates on the innovation of judicial systems, while legal systems are slowly yet unevenly adapting to this challenge. This article focuses on the techniques of predictive justice and their (potential) use by judges and by the parties (and their lawyers and other legal advisers), highlighting their potential benefits and dangers. It does so by paying particular attention to European supranational courts – the Court of Justice of the European Union and the European Court of Human Rights – which are still under-investigated compared to domestic courts.

In order to clarify the object of inquiry, the article first addresses the notion of predictive justice (par. 2) and provides one concrete example of predictive justice tool ‘in action’ analyzing big data, i.e. the one developed by one of the main European providers, ‘Predictice’ (par. 3). It then introduces the European approaches to predictive justice, in relation to the regulatory framework and its potential reform as well as the policies of both the EU and the Convention system (par 4). All this allows for a better understanding of the potentialities of predictive justice with respect to the European Court of Human Rights and the Court of Justice of the European Union, wondering how the introduction of Artificial Intelligence tools might affect the operations and the procedures of these courts, taking into account their peculiarities and the variety of their competences. After presenting the general features of these two Courts (par. 5), the article thus delves more specifically into the use of predictive technologies in relation to them, in terms of both feasibility and appropriateness, also providing concrete examples employing predictive justice methods to the ECtHR (par. 6). It then concludes, suggesting both the potential selective application of AI analytics to the case law of these courts and caution when it comes to their use by the judges of the two courts (par. 7).

2. What is predictive justice?¹

The capability to grant a certain degree of rational predictability is paramount for the success and the effectiveness of every legal order and, particularly, as pointed out by

¹ This paragraph develops the reflections of S Zolea, ‘The European courts faced with the unknowns of predictive justice’, to be published among the proceedings of the special workshop “Predictive Justice: an

Weber,² for the stability of the legal orders in modern (capitalist) societies, because rational calculability – through clarity and coherence both in lawmaking and in case law³ – is the necessary ground for business. Legal doctrine is aware of it for a long time now,⁴ yet contemporary debate about predictive justice particularly focuses on how certain cutting-edge Artificial Intelligence technologies, such as machine learning and natural language processing,⁵ analyze through complex algorithms a large number of judicial decisions, in order to make probabilistic projections on the outcome of new legal cases and help the parties and even the judge make the (allegedly) best choices. According to the most radical views, algorithmic decisions, realized through these and other AI technologies, should even replace the role of the judge, or a part of it. These are developments not only concerning the common law legal orders, traditionally based on a case-by-case inductive approach, but also the civil law legal orders, where it cannot anymore be denied the real role of case law as a substantial source of law.⁶ In a few words, assuming an easy access to judicial decisions, predictive justice is an in-depth computer analysis by algorithms of a massive scale of legal precedents, an analysis aimed to calculate and preempt the probabilities of the

Interdisciplinary Approach between Philosophy of Law, Legal Comparison and Informatics”, held within the 30th Biennial World Congress of the International Association for the Philosophy of Law and Social Philosophy: “Justice, Community and Freedom”, Bucharest, 7-8 July 2022.

² M Weber, *Economy and Society. An outline of interpretive sociology* vol. 2 (University of California Press 1978) 809 ff.

³ N Irti, *Un diritto incalcolabile* (Giappichelli 2016) 5.

⁴ Cf. OW Holmes, ‘The Path of the Law’ (1897) 8 Harvard L Rev 457 ff.

⁵ About natural language processing and the law, see, in general, G Comandè - D Licari, ‘ITALIAN-LEGAL-BERT: A Pre-trained Transformer Language Model for Italian Law’, in D Symeonidou *et alii* (eds.) *CEUR workshop proceedings*, Vol-3256, EKAW-C 2022, *Companion Proceedings of the 23rd International Conference on Knowledge Engineering and Knowledge Management*, Bozen-Bolzano, Italy, September 26-29, 2022 <<https://ceur-ws.org/Vol-3256>> accessed 17 May 2023.

⁶ E Calzolaio, ‘Il ruolo della giurisprudenza come fonte normativa tra civil law e common law’, in Liber amicorum *Luigi Moccia* (Roma Tre Press 2021) 175 ff.

outcomes of present litigation⁷, reducing the uncertainty of the judgement⁸ (and possibly avoiding and preventing the judgment itself).

The idea of using mathematical models and calculation methods to compute the probability of different possible outcomes of litigation was not previously unknown,⁹ but contemporary computer science enormously increases the opportunities for calculation at accessible costs, offering legal actors an appearance of restored certainty in the middle of a confusing time of multiplication and overlapping of the formal and of the *de facto* (national, transboundary, global, hard law, soft law, etc.) sources of law. Predictive justice poses several ethical and regulatory problems, even more so when the debate concerns tools available to use by judicial and police authorities (or even replacing them), particularly in the criminal law field, where the fundamental liberties of the individual are implied. In fact, the main worries concerning the replacement (in whole or in part) of the self-critical judgements of reason by the algorithmic rules of rationality¹⁰ are about: the difficulty in the selection (e.g., include or not to include old and very old cases? And cases judged before the advent of the democratic regimes? And the concurring and dissenting opinions? etc.) and in the hierarchy (how to weigh

⁷ See also the definitions of A Garapon – J Lassègue, *Justice digitale* (PUF 2018) 219: “La justice prédictive désigne *stricto sensu* la capacité prêtée aux machines de mobiliser rapidement en langage naturel le droit pertinent pour traiter une affaire, de le mettre en contexte en fonction de ses caractéristiques propres (lieu, personnalité des juges, des cabinets d’avocats, etc.) et d’anticiper la probabilité des décisions qui pourraient intervenir. L’expression est devenue générique en renvoyant à toutes les innovations numériques dans le domaine du droit”; S Lebreton-Derrien, ‘La justice prédictive. Introduction à une justice « simplement » virtuelle’, in R Sève (ed.) ‘La justice prédictive’, (2018) 60 Archives de philosophie du droit Dalloz 4-5: «la notion de justice prédictive qui s’est imposée, mais qui reste diversement définie, est toujours consubstantielle de celle d’algorithme, tout aussi nouvellement entrée dans notre quotidien et définie comme une suite finie et non ambiguë d’instructions permettant d’aboutir à un résultat à partir de données fournies en entrée, soit par un développement humain, soit par la machine elle-même pour l’algorithme d’apprentissage. Pour fonctionner, l’algorithme doit donc être exprimé dans un langage informatique, transcrit en un programme et exécuté dans un logiciel ou compilé sous la forme d’une application. Algorithmique, cette justice prédictive semble faire appel tantôt aux statistiques, tantôt aux équations mathématiques»; cf. A Santosuosso - G Pinotti, ‘Bottleneck or Crossroad? Problems of Legal Sources Annotation and Some Theoretical Thoughts’ (2020) 3 Stats 376 ff.

⁸ B Dondero, ‘Justice prédictive: la fin de l’aléa judiciaire? (2017) 10 Recueil Dalloz 532 ff.; Y Gaudemet, ‘La justice à l’heure des algorithmes. À propos de justice prédictive’ (2018) 3 Revue du droit public et de la science politique en France et à l’étranger 651 ff.

⁹ See for ex. L Loevinger, ‘Jurimetrics: The Next Step Forward’ (1949) 5 Minnesota Law Review 455 ff.; E Barbin - Y Marec, ‘Les recherches sur la probabilité des jugements de Simon-Denis Poisson’ (1987) 2 Histoire & Mesure 39 ff.

¹⁰ G Noto La Diega, ‘Against the Dehumanisation of Decision-Making’ (2018) 4 JIPITEC 4.

decisions of judges of different levels of jurisdiction?) of the relevant precedents;¹¹ the possibilities of computer errors and cyber-attacks;¹² the falseness of the idea that non-human AI agents are not affected by passions and ideologies, while algorithms are as biased as the people who trained them, but in a less transparent and accountable way;¹³ the opacity in the functioning of the algorithms: the black box problem not only arises from the intentional lack of transparency of the designer¹⁴ and from intellectual property rights,¹⁵ but also from the objective complexity of these mechanisms for the public of non-computer scientists,¹⁶ leading people to a “blind deference” to the machine’s decision, believing its answer as a transcendental truth, instead of a subjective one;¹⁷ the fact that the judge, mostly in the civil law world, has to apply not simply legal precedents or punctual norms, but also more discretionary legislative principles and general clauses;¹⁸ the fact that algorithms tend to equate several kinds of factual inputs (legal norms, precedents, facts and other elements of the folder, temperament of the judge, etc.) obtained from the mass of jurisprudential big data, associating all these elements in mathematical correlations stranger to the legal concept of causal link and to the legal hierarchy of the sources of law;¹⁹ the social legitimacy of the judicial decision, product of the wisdom and the experience of the judge, who must justify the reasons of it, which, at a later time, might be evaluated by

¹¹ E Battelli, ‘La decisión robótica: algoritmos, interpretación y justicia predictiva’ (2020) 38 *Revista de derecho privado* 61-62; R Mattera, ‘Decisione negoziale e giudiziale: quale spazio per la robotica?’ (2019) 1 *La nuova giurisprudenza civile commentata* 207.

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

¹³ G Noto La Diega (n 10) 33. See also G. Resta ‘Governare l’innovazione tecnologica: decisioni algoritmiche, diritti digitali e principio di uguaglianza’ (2019) 2 *Politica del diritto* 199 ff.

¹⁴ A M Carlson, ‘The Need for Transparency in the Age of Predictive Sentencing Algorithms’ (2017) 103 *Iowa Law Review* 303 ff.

¹⁵ Cf. the reflections of G Noto La Diega - C Sappa, ‘The Internet of Things at the Intersection of Data Protection and Trade Secrets. Non-Conventional Paths to Counter Data Appropriation and Empower Consumers’ (2020) 3 *European Journal of Consumer Law* 419 ff.

¹⁶ M Oswald - J Grace - S Urwin - G C Barnes, ‘Algorithmic Risk Assessment Policing Models: lessons from the Durham HART model and “Experimental” proportionality’ (2018) 2 *Information and Communications Technology Law* 233-234. More in general, see H Shah, ‘Algorithmic Accountability’ (2018) *Philosophical Transactions A* 376; F Pasquale, *The Black Box Society. The Secret Algorithms That Control Money and Information* (Harvard University Press 2015).

¹⁷ A Harkens, ‘The Ghost in the Legal Machine: Algorithmic Governmentality, Economy, and the Practice of Law’, (2018) 16 *Journal of Information, Communication & Ethics in Society* 16 ff.

¹⁸ See M Luciani, ‘La decisione giudiziaria robotica’ (2018) 3 *Rivista AIC* 890.

¹⁹ A Garapon - J Lassègue (n 7) 221-226, 230-231.

a higher judge;²⁰ and the democratic legitimacy of the judicial decision, challenged by the threat of a solely technical legitimacy;²¹ finally, how to face the existing contradictions in case-law and how to avoid to stop any possible evolution and democratic pluralism of the jurisprudence through the creation of an indissoluble bond to the previous decisions?²² And could not, through such AI proceedings, a misinterpretation (or, in any case, a disputable interpretation) of one or more judges become more authoritative than the law itself, contradicting even the fundamentals of the *État de droit*? It is important to remember that “the scientific and legal knowledge, the capacity to collect, classify and compare data, are important skills for solving the case, but they need to be supplemented by the ability of the judge to interpret the law. This is a human ability, as it needs awareness of the contextual dimension of law; in other words, it needs humanity: a free will that impacts with the concrete facts of the case together with the responsibility to seek justice for that case”.²³ In any case, a fundamental innovation in the system of the sources of law should pass through the constitutional democratic mechanisms and should not be introduced in the judicial procedure as a neutral, impersonal, objective product of technological innovation. In fact, “AI algorithms cannot replace social or legal reforms that need to be made in order to cultivate a more just society, but collaboration between all actors in the field can at least ensure that we are on the right path”.²⁴

Utilizations of predictive algorithms by the parties (and their lawyers and other legal advisers) involve less critical issues, as calculators just make more precise and “scientific” something that has always, empirically, been the work of experienced legal professionals. Nevertheless, in countries where such kind of services are already being offered to the public by the so-called LegalTechs (legal technology start-ups),²⁵

²⁰ R Bichi, ‘Intelligenza Artificiale tra “calcolabilità” del diritto e tutela dei diritti’ (2017) 7 *Giurisprudenza italiana* 1777-1778.

²¹ A Garapon - J Lassègue (n 7) 214-218; Y Meneceur - C Barbaro, ‘Artificial Intelligence and the judicial memory: the great misunderstanding’ (2022) 2 *AI and Ethics* 269-275.

²² B Dondero (n 8) 537-538; E Battelli (n 11) 62.

²³ L Vagni, ‘The Role of Human Judge in Judicial Decisions. Preliminary remarks on legal interpretation in the age of Artificial Intelligence’, in E Calzolaio (ed.), *La decisione nel prisma dell'intelligenza artificiale* (CEDAM 2020) 200.

²⁴ D Abu-Elyounes, ‘Contextual fairness: a legal and policy analysis of algorithmic fairness’ (2020) 1 *Illinois Journal of Law, Technology and Policy* 54.

²⁵ For this notion, see, more in depth, the Charte Éthique pour un marché du droit en ligne et ses acteurs, 2017 <<https://www.charteethique.legal/charte-ethique>> accessed 17 May 2023 , art. 1.

worries among authors and judicial institutions concern inequalities,²⁶ personal data protection²⁷ (requiring a more or less intense anonymization of the decisions²⁸ also to comply with the European GDPR), the lack of regulation and control of the reliability and of the neutrality of the AI-based algorithms offered to the legal professionals,²⁹ and opportunistic behaviors of forum shopping based on systematically profiling the judges.³⁰ One may wonder how the implementation in the market of legal services of these technologies, implying both sustaining and disruptive functions for the lawyers, will defy and change the legal professions and their ethics.³¹

Neither the real potential advantages of predictive justice, providing legal actors, including judges, with a more complete knowledge of precedents and perhaps reducing judicial litigation, should make legislators forget the hazards and the desirable limits of the utilization of such algorithms in the legal field – as their responsible utilization is paramount – nor such hazards should make legislators forget the advantages and introduce irrational, hasty and exorbitant prohibition rules, as it seems to be the case of France. Indeed, in this country, the law³² currently prohibits and punishes as a criminal offence any activity of profiling and classifying judges and chancellor's officers, through data elaborations aiming to evaluate, analyze, compare or predict their professional conduct, real or presumed. Several scholars criticize such an untransparent choice,³³ in contrast to the general French tendency towards the

²⁶ Because, at least in the next future, predictive justice services are likely to be accessible and affordable only for the wealthiest legal actors on the market: A Garapon - J Lassègue (n 7) 243.

²⁷ See É Buat-Ménard - P Giambiasi, 'La mémoire numérique des décisions judiciaires' (2017) 26 *Recueil Dalloz* 1485; G Grasso, 'Il trattamento dei dati di carattere personale e la riproduzione dei provvedimenti giudiziari: dal Codice della privacy all'attuale disciplina' (2018) V *Foro italiano* 349-353.

²⁸ O Cachard, 'Aux grands arrêts, les juristes reconnaissants... Brefs propos sur l'« anonymisation » des décisions de justice' (2004) *Recueil Dalloz* 429 ff.; C Bigot, 'Anonymisation, données sensibles et droit à l'information: à la recherche d'un équilibre entre la protection des données personnelles et la liberté de l'information dans le domaine judiciaire' (2021) 1 *Légipresse* (hors série : Le cours de la justice et la liberté de l'information: comment concilier des impératifs contradictoires, proceedings of the forum of 9/12/2020) 71 ff.

²⁹ Y Gaudemet (n 8) 651 ff.

³⁰ P Deumier, 'L'open data des magistrats: une petite histoire législative' (2019) *RTDciv* 72 ff.

³¹ Cf. R Susskind, *Tomorrow's Lawyers. An Introduction to your future* (Oxford University Press 2nd ed. 2017). See also A Santosuosso - OR Goodenough - M Tomasi (eds.), *The Challenge of Innovation in Law. The Impact of Technology and Science on Legal Studies and Practice* (Pavia University Press 2015); KD Ashley, *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age* (Cambridge University Press 2017).

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

³³ T Perroud, 'L'anonymisation des décisions de justice est-elle constitutionnelle? Pour la consecration d'un principe fondamental reconnu par les lois de la République de publicité de la justice' (*Le blog de Jus Politicum*, 11 March 2019) <<https://blog.juspoliticum.com/2019/03/11/lanonymisation-des-decisions-de-justice/>>

open data in the field of justice.³⁴ Some authors note that the risk of forum shopping is overestimated in relation to the existing processual rules on competence.³⁵ The next paragraph will give more insight about the services of predictive justice available on the French market, which elicited this worried response of the lawmaker.

3. Predictive justice in action: the example of Predictice in France

Many legal systems witness the actual application of AI tools affecting the operation of courts. To name just a few most important cases, the Chinese judicial system largely and increasingly uses predictive and other AI tools, arousing the interest of legal doctrine,³⁶ while in some States of the USA³⁷ and in the UK,³⁸ frequent utilizations of predictive algorithms by judicial and police authorities have been severely criticized by practitioners and scholars as relevantly biased. Some EU countries are experimenting similar technologies in their tribunals too.³⁹

[justice-est-elle-constitutionnelle-pour-la-consecration-dun-principe-fondamental-reconnu-par-les-lois-de-la-republique-de-publicite-de-la-justice/> accessed 17 May 2023](#); W Zagorski, 'Law as a Set of Decisions. On merits and dangers of legal realism through the prism of big data', in E Calzolaio (n 23) 181; L Janicot, 'L'anonymisation du juge', in P Bourdon (ed.), *La communication des décisions du juge administratif* (LexisNexis 2020) 85-87.

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

³⁵ See F Alhama, 'Vers une plus grande accessibilité des décisions rendues par les juridictions administratives' (2019) RFDA 703.

³⁶ See J Peng - W Xiang, 'The Rise of Smart Courts in China: Opportunities and Challenges to the Judiciary in a Digital Age' (2019) 9 Nordic Journal of Law and Social Research 345 ff.; C Yadong, *Artificial Intelligence and Judicial Modernization* (Springer 2020); RE Stern - BL Liebman - ME Roberts - AZ Wang, 'Automatic Fairness? Artificial Intelligence in the Chinese Courts' (2021) Columbia Journal of Transnational Law 515 ff.; C Shi - T Sourdin - B Li, 'The Smart Court – A New Pathway to Justice in China?' (2021) 1 International Journal for Court Administration 1.

³⁷ See R Courtland, 'Bias detectives: the researchers striving to make algorithms fair' (2018) 558 Nature 357-360; I De Miguel Beriain, 'Does the use of risk assessments in sentences respect the right to due process? A critical analysis of the Wisconsin v. Loomis ruling' (2018) 1 Law, Probability and Risk 45 ff.; 'Partnership on AI, Report on Algorithmic Risk Assessment Tools in the U.S. Criminal Justice System, 2019' <<https://partnershiponai.org/paper/report-on-machine-learning-in-risk-assessment-tools-in-the-u-s-criminal-justice-system/>> accessed 17 May 2023; D Abu-Elyounes (n 24) 1 ff.; K Hartmann - G Wenzelburger, 'Uncertainty, risk and the use of algorithms in policy decision: a case study on criminal justice in the USA' (2021) 2 Policy Sciences 269 ff.; F Lagioia - R Rovatti - G Sartor, 'Algorithmic fairness through group parities? The case of COMPAS-SAPMOC' (2022) 28 AI & SOCIETY 459.

³⁸ M Oswald - J Grace - S Urwin - G C Barnes (n 16) 223 ff. About the legislative proposal for a new statutory procedure for certain criminal cases to be dealt with via an automated online process, see G Cowie et alii, *Judicial Review and Courts Bill 2021-22* (House of Commons Library 2021) 33 ff.

³⁹ About the French project DataJust, aiming to elaborate a jurisprudential database serving as point of reference for judges, lawyers and other legal professionals on the amount of compensations for bodily harm, see F. G'sell, 'Les progrès à petits pas de la «justice prédictive» en France' (2020) ERA Forum 299 ff.

Services of predictive justice are offered for a few years now to legal practitioners also in European civil law countries such as France, Spain⁴⁰ and now in Italy too,⁴¹ legal orders where the precedents, even those of the supreme courts, are traditionally supposed not to be binding. In this paragraph, we take into account the case of France,⁴² in order to show some examples of predictive justice actually in action. Having a more practical comprehension of the predictive tools will help understand if and to what extent such mechanisms (or similar ones) might effectively be applied to the decisions of the European judges. Thanks to the courtesy of Predictice⁴³ (enterprise currently operating in France and Luxembourg), one of the very first European predictive justice LegalTechs, it is possible, in the present paper, to show some examples of how, concretely, predictive justice services work – considering and elaborating a huge number of decisions – and what services are proposed to their clients.

To choose a meaningful example, through the jurisprudential research engine of Predictice, we can select an object of frequent litigation, such as the dismissal of a worker.

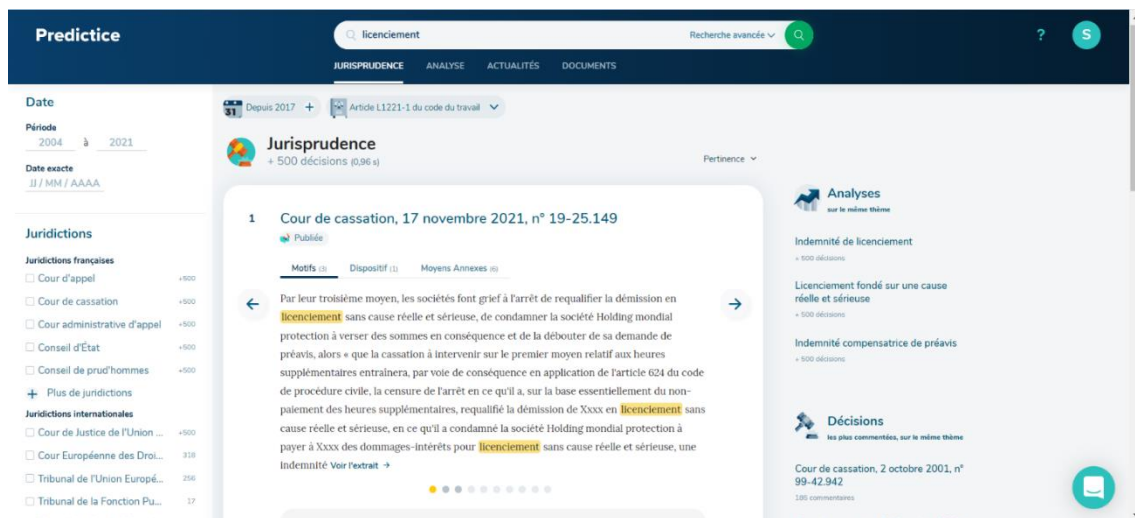
However, in France, according to art. 47 of the law n. 78-17 of 6 January 1978, in its current version, no judicial decision implying an assessment on the behavior of a person can be based on automatic processing of personal data aiming to appreciate some aspects of his personality.

⁴⁰ Wolters Kluwer, Jurimetría <<https://jurimetria.laleynext.es/content/Inicio.aspx>> accessed 17 May 2023.

⁴¹ Wolters Kluwer, Giurimetria <<https://www.wolterskluwer.com/it-it/solutions/one/onelegale/giurimetria>> accessed 17 May 2023 ; see also the software ReMIDA, offered on the market for utilizations in fields such as bodily harm (<<https://shop.giuffre.it/070002098-remida-danno-alla-persona>> accessed 17 May 2023) and maintenance allowance (<<https://www.remidafamiglia.com>> accessed 17 May 2023).

⁴² Cf., in addition to the French articles already mentioned, Y Meneceur, ‘Quel avenir pour la « justice prédictive » ? Enjeux et limites des algorithmes d’anticipation des décisions de justice’ (2018) JCP étude 190; S-M Ferrié, ‘Les algorithmes à l’épreuve du droit au procès équitable’ (2018) JCP étude 197; F Guéranger, ‘Réflexions sur la justice prédictive’ (2018) 13 Gazette du Palais 15 ff.; *Livre blanc Les enjeux éthiques de la justice prédictive* (Sciences Po – Predictice - Wolters Kluwer 2019); M Gaye-Palettes, ‘Le développement des outils algorithmiques prédictifs à l’épreuve de la question prioritaire de constitutionnalité’ (2020) 35 *Annuaire international de justice constitutionnelle* 637-657; C Bordere, ‘La justice prédictive: analyse critique et comparée d’un rejet doctrinal’ (2021) 1 *Revue internationale de droit comparé* 7-25.

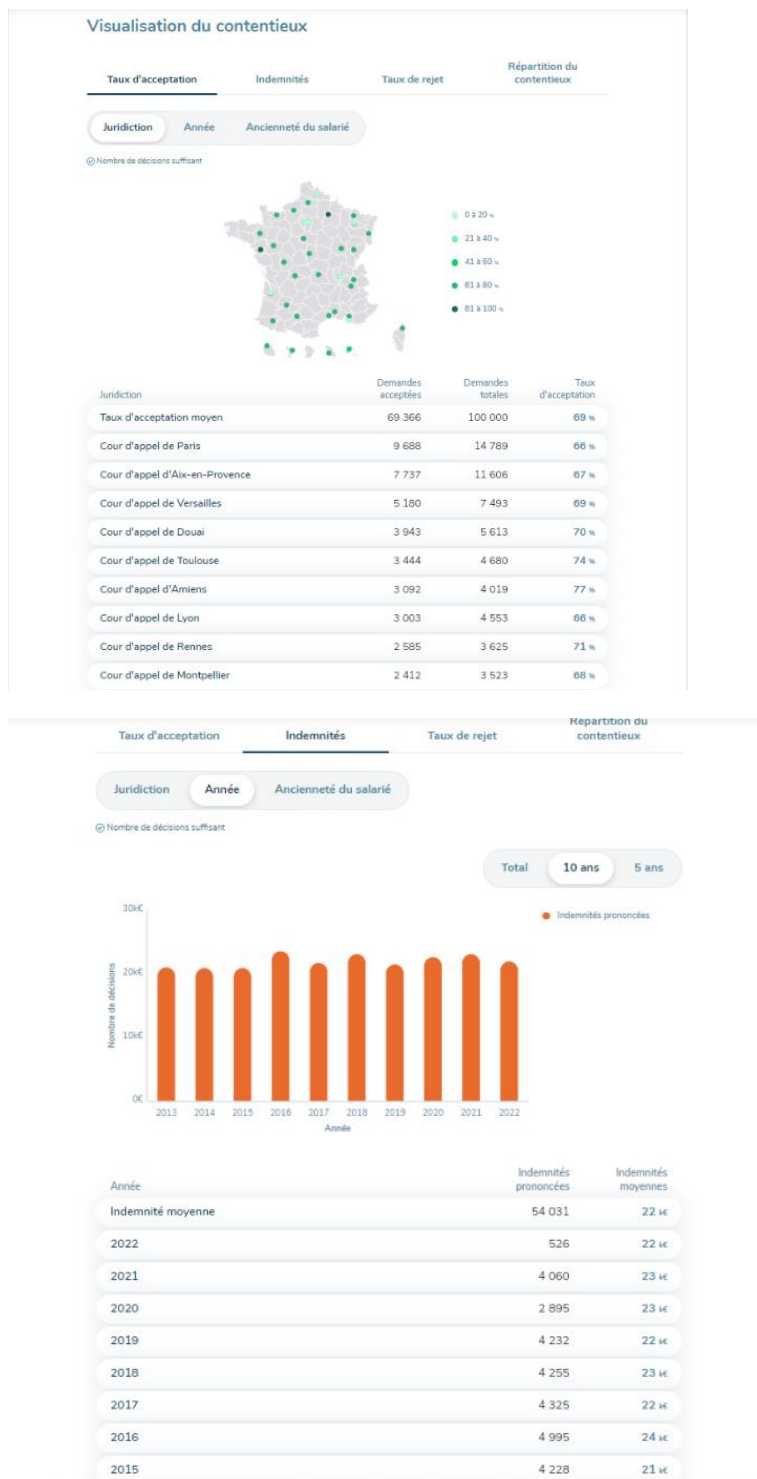
⁴³ <<https://predictice.com/>> accessed 17 May 2023; the check on this search engine of predictive justice was carried out in February 2022.



Then, selecting the data analysis function, the website offers a selection of more precise claim issues related to the wider subject of dismissal, for example: severance payment, dismissal without a real and serious cause, compensation in lieu of notice, vacation pay, back pay, dismissal for gross misconduct, unfair dismissal, etc. We can decide to go more in depth, for example about dismissal without a real and serious cause, which is one of the most recurring issues (more than 100000 decisions envisaged). First of all, general information about this issue is provided in an initial synthesis: the average amount of compensation for this claim is 22000€; the average length of the procedure (first degree jurisdiction and appeal) is 2 years and 2 months. It is also indicated that other issues often associated with this one are: dismissal for a real and serious cause, severance payment and compensation in lieu of notice. The acceptance rate is high (about 93000 claims out of 130000).



Subsequently, more information concerning the average length of the procedure is offered (1 year and 8 months between the appeal level and the last degree of the *Cour de cassation*). Some examples of reference texts of decisions, acceptances and refusals of the claims, are proposed, selected on the base of several parameters, including: the level of the jurisdiction, the date of the decision, as to whether it has been published or commented, and the presence of specific keywords relevant in relation to the research made. Finally, more detailed information is offered about four issues: acceptance rate, amount of compensation, refusal rate, distribution of litigation, and three sub-issues: competent French judge, decisions per year and seniority of the worker. These analyses are displayed with graphic supports: diagrams, tables and interactive maps of France indicating the different appellate circuits. The issues and sub-issues can variously be combined by the user, in order to obtain the more relevant pieces of information for his own case.





Predictice also offers further complex functions, for example analyzing the case law with reference to a certain issue in order to determine which reasonings and arguments, in this respect, might be more useful to support the position of a disputing party.

4. Predictive justice within the European legal space: norms, statements and propositions

The European legal space (EU and Council of Europe) is confronted with the issues of predictive justice too, and several European institutions are putting in place norms, plans and strategies in order to manage this technological challenge. According to the European Convention of Human Rights (art. 6), everyone, in the determination of his civil rights and obligations or of any criminal charge against him, is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law and judgment shall be pronounced publicly. It has been observed that “in order for AI to work in accordance with Article 6 of the ECHR,

this also means the following. It has long been known that bad data, such as legally incorrect decisions, reduce the quality of the AI result. But correct data is not enough. Text recognition with natural language processing, in which the text-driven behavior of lawyers and judges is calculated from an external perspective, can recognize patterns. Patterns such as statistical relations are not enough to substantiate a judgment. For the AI to be able to process and understand legal information, that information needs to be enriched: structured and provided with legal meaning. At present, this structuring and meaning must be added to judgments (text documents) after they have been written. AI can be used much more effectively once legal information such as court decisions is made machine-processable before publication with textual readability, document structures, identification codes and metadata all available”.⁴⁴

In the European Union, according to its Charter of Fundamental Rights (art. 47), everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law and everyone shall have the possibility of being advised, defended and represented. According to the General Data Protection Regulation of 2016 (art. 23), the protection of judicial independence and judicial proceedings is among the reasons authorizing restrictions by the EU or member states legislations to the scope of some obligations and rights of the Regulation,⁴⁵ when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate safeguard measure in a democratic society.

In 3-4 December 2018, at its 31st plenary meeting, the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe adopted a European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment.⁴⁶ The Charter was intended for public and private stakeholders

⁴⁴ AD Reiling, ‘Courts and Artificial Intelligence’ (2020) 2 International Journal for Court Administration 7-8.

⁴⁵ In particular, restrictions to artt. 12 to 22, concerning the rights of the data subject, art. 34, concerning communication of a personal data breach to the data subject, art. 5, concerning principles relating to processing of personal data, in so far as its provisions correspond to the rights and obligations provided for in artt. 12 to 22.

⁴⁶ European Commission for the Efficiency of Justice, *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment*, 3-4 December 2018 <<https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>> accessed 17 May 2023.

responsible for the design and deployment of Artificial Intelligence tools and services that involve the processing of judicial decisions and data (machine learning or any other method deriving from data science), and also concerned public decision-makers in charge of the legislative or regulatory framework, of the development, audit or use of such tools and services. It was observed in this document that, in 2018, the use of AI algorithms in European judicial systems remained primarily a private-sector commercial initiative aimed at insurance companies, legal departments, lawyers and individuals, while the use of AI in the judicial field already appeared to be quite popular in the United States, which had invested in these tools in a fairly uncomplicated way, both in civil and criminal matters. It was noted that the use of such tools and services in judicial systems seeks to improve the efficiency and quality of justice, and should be encouraged, but also be carried out responsibly, with due regard for the conventional European frameworks about human rights and protection of personal data. As reported in the Charter, judicial decision processing by Artificial Intelligence, according to their developers, is likely, in civil, commercial and administrative matters, to help improve the predictability of the application of the law and consistency of court decisions, while, in criminal matters, their use must be considered with the greatest reservations, in order to prevent discrimination based on sensitive data and grant a fair trial. Whether designed with the aim of assisting in the provision of legal advice, helping in drafting or in the decision-making process, or advising the user, it is essential that processing is carried out with transparency, impartiality and equity, certified by an external and independent expert assessment. The Charter established five principles:

- Principle of respect for fundamental rights: ensure that the design and implementation of Artificial Intelligence tools and services are compatible with fundamental rights.
- Principle of non-discrimination: specifically prevent the development or intensification of any discrimination between individuals or groups of individuals.
- Principle of quality and security: with regard to the processing of judicial decisions and data, use certified sources and intangible data with models elaborated in a multi-disciplinary manner, in a secure technological environment.

- Principle of transparency, impartiality and fairness: make data processing methods accessible and understandable, authorize external audits.
- Principle “under user control”: preclude a prescriptive approach and ensure that users are informed actors and in control of the choices they made.

Finally, in the Charter, possible uses of AI in European judicial systems were classified into a number of different groups: to be encouraged (case-law enhancement, access to law, creation of new strategic tools); requiring considerable methodological precautions (help in the drawing up of scales in certain civil disputes, support for alternative dispute settlement measures in civil matters, online dispute resolution, use of algorithms in criminal investigation in order to identify where criminal offences are being committed); to be considered following additional scientific studies (judge profiling, anticipating court decisions); to be considered with the most extreme reservations (use of algorithms in criminal matters, in order to profile individuals, and the idea of quantity-based norm, which means providing each judge with the content of the decisions produced by all the other judges and claiming to lock his future choice into the mass of these “precedents”, actually adding to or acting in place of the law). A more recent study of the CEPEJ concerns the possible introduction of a mechanism for certifying Artificial Intelligence tools and services in the sphere of justice and the judiciary: an objective, neutral certification aiming at upholding fundamental rights and freedoms.⁴⁷

The European Network of Councils for the Judiciary (ENCJ, which unites the national institutions of the member states of the European Union which are independent from the executive and legislative powers, and which are responsible for the support of the judiciaries in the independent delivery of justice), in the framework of its project about digital justice, showed interest for the issues of predictive justice in its meetings of Amsterdam (2018), where the debate dealt with the relationship

⁴⁷ European Commission for the Efficiency of Justice, *Possible introduction of a mechanism for certifying artificial intelligence tools and services in the sphere of justice and the judiciary*, 8 December 2020, CEPEJ(2020)15Rev. The certification of Artificial Intelligence systems in the judicial sphere could also make it possible to support private and public projects and to establish standards that reach beyond Europe, justifying, for example, the development of international mechanisms for the recognition and enforcement of foreign decisions or arbitral awards made by or with the assistance of Artificial Intelligence.

between prediction and due process in compliance with art. 6 ECHR,⁴⁸ and Lisbon (2019), where it was stated that AI is, at this point, a fact of life. We need to address the risks, but also to address how it could be used in the judicial sector, as it is not always incompatible with judicial reasoning. In the Lisbon meeting,⁴⁹ it was also noted that the benefits of AI need further scrutiny. Predictive justice based on judges' own data on decisions could be interesting to assist judges dealing with large numbers of similar cases and machines might be useful for standardized cases that normally would be settled before they go to court. In countries where there is pressure on judges, profiling them could be a danger. In criminal cases, a system capable of assisting in having more uniform sentences might eventually strengthen the trust in the judiciary and its position in society. These judges finally wonder if predictive justice should be left to private commercial providers, or public authorities should use it and, in the latter case, if there are dangers.

According to the EU 2019-2023 Strategy on e-Justice, "legal tech domains such as Artificial Intelligence (AI), blockchain technology, e-Translation or virtual reality, for example, should be closely monitored, in order to identify and seize opportunities with a potential positive impact on e-Justice. In particular, Artificial Intelligence (AI) and blockchain technology could have a positive impact on e-Justice, for example by increasing efficiency and trust. Any future development and deployment of such technologies must take risks and challenges into account, in particular in relation to data protection and ethics".⁵⁰ Furthermore, there are several references to using AI in the EU 2019-2023 Action Plan European e-Justice too.⁵¹ It is observed in this plan that interlinked legal data allows users to find relevant information in a fast and reliable way. Legal data can be used in open data format to help citizens, businesses and judicial authorities study and collate data, in order to analyze it and contribute to

⁴⁸ ENCI, *Report: Digital Justice, forum founding meeting and first annual seminar*, Amsterdam, 4 May 2018 <<https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/GA%2018/Report%20ENCI%20Digital%20Justice%20Forum%20Amsterdam%202018.pdf>> accessed 17 May 2023; cf. A Santosuosso, *Intelligenza artificiale e diritto. Perché le tecnologie di IA sono una grande opportunità per il diritto* (Mondadori 2020) 83 ff.

⁴⁹ ENCI, *Report: Digital Justice, forum seminar*, Lisbon, 29 March 2019 <<https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/Projects/digital/ENCI%20DJF%202019%20report.pdf>> accessed 17 May 2023.

⁵⁰ 2019/C 96/04, nn. 30-31 <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313\(01\)&from=ES](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313(01)&from=ES)> accessed 17 May 2023.

⁵¹ 2019/C 96/05, <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313\(02\)&rid=6](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313(02)&rid=6)> accessed 17 May 2023.

applications using this data, including by taking advantage of AI. Artificial Intelligence is envisaged in the plan as one of the major developments in information and communication technologies in recent years, to be further developed in the coming years. Its implications in the field of e-Justice need to be further defined. Two projects specifically concern AI: Artificial Intelligence for Justice, aiming to define the role which AI might play in the justice field and to develop an AI tool for analysis of court decision, and ChatBot for the e-Justice Portal, aiming to develop a ChatBot that would assist the user and direct him to the information he is looking for. It is also indicated to develop tools using AI technology to automatically anonymize or pseudonymize court decisions for open data reuse. Finally, as for semantic interoperability (facilitating communication between systems by aligning terms used in metadata and standards, also to reduce the impact of language differences by providing automatic translation), it is indicated that the processing of data and discoverability of information can be further enhanced and rendered more efficient by using controlled vocabularies (lists of terms used to index contents and make it easier to retrieve information), identifiers such as European Legislation Identifier or European Case Law Identifier, AI and analysis of legal open data and big data.

Finally, in the Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence,⁵² “AI systems intended to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts” are classified, in the Annex III, as high-risk AI systems, which must necessarily comply with several requirements,⁵³ concerning: risk management system, data and data governance, technical documentation, record keeping, transparency and provision of information to users, human oversight, accuracy, robustness, and cybersecurity.

5. General comparative overview of the ECtHR and the CJEU

In this paragraph, we analyze whether there are prospects of employment of predictive justice tools before the European Court of Human Rights and the Court

⁵² COM/2021/206 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0206&from=IT>> accessed 17 May 2023.

⁵³ Artt. 8 ff.

of Justice of the European Union, consistently with the institutional role of these two supranational courts. The most apparent feature of the ECtHR and the CJEU, compared to other courts and tribunals that are mostly the object of study in relation to predictive justice, is indeed their supranational nature. This has some consequences on their decision-making.

For instance, supranational courts are by definition at the crossroads of different legal cultures in stark contrast with the naturally homogeneous legal culture within national courts.⁵⁴ Thus, the profile of deciding judges can possibly determine the outcome of an individual case. Furthermore, supranational courts' legitimacy is in principle weaker compared to domestic courts, since they are not part of a State system based on democratic sovereignty while they have to accommodate pervasive national interests. As a consequence, supranational courts are intrinsically more permeable to political considerations.⁵⁵

That said, it is important to underline the differences among the two courts, that might bring to different conclusions in relation to the use of predictive justice tools. These concern the legal framework on whose basis decisions are taken and the broader context in which courts operate (which affect their legitimacy), the courts' jurisdiction and procedures, aspects related to decision-making such as rules about deliberation (collegiality of decisions) or the content of decisions (knowability of dissenting or concurring judges, style of drafting), the types of cases (by subject matter), etc.

It is therefore appropriate at first to highlight the specificity of these courts. Then, in the next paragraph the case for predictive justice will be considered.

⁵⁴ This is reflected for example in Rule 25 para 2 of the Rules of Court providing for the sections of the Court to be «geographically and gender balanced and [...] reflect the different legal systems among the Contracting Parties». In supranational courts, the difference in the national legal cultures might be in turn exacerbated by linguistic difference or by the variety of professional background of judges, A Nussberger, *The European Court of Human Rights* (Oxford University Press 2020) 45 f. As to language, see C Schönberger, '«Mi attendu, mi dissertation». Le style des décisions de la Cour de justice de l'Union européenne' (2015) 3 *Droit et société* 505-519. To be sure, this does not entail that supranational courts are not able to build up their own homogeneous legal culture. This indeed happens through internal socialization, yet the situation is more blurred compared to national courts.

⁵⁵ Even though it might be interesting to compare supranational courts to domestic constitutional courts.

a) The ECtHR

The ECtHR aims to ensure the observance of Member States' engagements under the European Convention of Human Rights and its protocols, with jurisdiction extended to all matters concerning their interpretation and application.⁵⁶ The Court may receive applications,⁵⁷ for breach of its provisions, after domestic remedies have been exhausted, by another Member State, or, what is more innovative in relation to international law, from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by a Member State.⁵⁸ Clearly enough, individual complaints, which are by far the majority of applications,⁵⁹ aim primarily at satisfying individual justice, while inter-State procedures (and advisory opinions) have the more general and abstract objective of clarifying 'the law'.⁶⁰ The ECtHR is thus a judge of last instance yet with a larger scope than an ordinary international judge only accessible by States to settle their disputes.

In the ECHR context, the applicable law is framed within the human rights paradigm. The Court's bulk of decisions relate to the right to a fair trial, the prohibition of torture and inhuman or degrading treatment, the right to liberty and security, while the remaining cases concern the right to respect for private life, the protection of property, the right to life and other violations of human rights.⁶¹ In its activity, the Court thus applies punctual norms but also general principles that are however operationalized more clearly and specified in the Court's elaborate case law.⁶² For

⁵⁶ Art. 32 of ECHR.

⁵⁷ Artt. 33 ff.

⁵⁸ Individual complaints (Article 34 ECHR) and Inter-State complaints (Article 33 ECHR) are integrated by advisory opinions on request by the Committee of Ministers (Article 47 ECHR) and by Member States (Protocol 16). See A Nussberger (n 54) 51 f.

⁵⁹ European Court of Human Rights, *Overview ECHR 1959-2021* (2022) <https://www.echr.coe.int/Documents/Overview_19592021_ENG.pdf> accessed 17 May 2023.

⁶⁰ *Inter-State cases under the European Convention of Human Rights*, Proceedings of the Conference organised under the aegis of the German Presidency of the Committee of Ministers (Berlin, 12 – 13 April 2021), Council of Europe, March 2022 <<https://rm.coe.int/interstate-cases-under-the-echr/1680a5e82c>> accessed 17 May 2023.

⁶¹ European Court of Human Rights, *The ECHR in Facts and figures 2021* (February 2022) <https://www.echr.coe.int/Documents/Facts_Figures_2021_ENG.pdf> accessed 17 May 2023; European Court of Human Rights (n 59).

⁶² It is important to stress that, while not being bound by previous legal decisions - *stare decisis* is not a legal principle as such - yet the Court tends to follow the rationale of previous decisions in the name of legal certainty, so that a «good reason» (a «motif valable») is needed to derail from it as the Court's Grand Chamber acknowledged on different occasions.

instance, between 1951 and 2021, the Court found 5480 violations of the right to fair trial ex article 6 of the Convention, and 4496 violations of the right to liberty and security ex article 5 of the Convention. Sure enough, in relation to other subject matters the Court's case law is less developed, as for the Freedom of thought, conscience and religion ex article 8 of the Convention, with 95 violations found in the same period.

Leaving aside decisions on admissibility of individual complaints that are taken by a single judge, it is important to stress that an internal distinction is made in the Court among cases decided by panels of three judges, the bulk of cases the five chambers are responsible of, and cases decided by the Grand Chamber (about twenty-five judgments per year). The difference lies in the importance of the case. Three-judge panels decide on so-called 'well-established case-law' (WECL) cases, i.e. «clear-cut repetitive cases», even though after 2018 more complex cases (so-called 'broader WECL' cases) are assigned to these panels.⁶³ On the opposite, the Grand Chamber decides upon the most legally controversial or politically salient cases.⁶⁴ Otherwise, as mentioned the majority of cases lies in between these two poles and is decided in the five chambers that deliberate every week and adjudicate about 1,000 cases per year.

Decisions by the ECtHR are thus collegially taken in chambers, but the possibility for separate opinions is foreseen, and therefore knowability of judges' stance and arguments. Existing studies show that the practice of separate opinions is common. However, the style of drafting is different from that found in other Courts where separate opinions exists, being mid-way between the «highly individualistic» approach of the British Supreme Court and the «comprehensive and theory-oriented» approach of the German Federal Constitutional Court.⁶⁵

Finally, as for other supranational courts, the ECtHR's political legitimacy is intrinsically fragile, as it does not stem from the democratic sovereignty of a State and it is not part of an established system of separation of powers, at least in the traditional

⁶³ Until 2018 the rule was established to bring case to the Chamber, while committee decisions were the exception; after 2018 this picture has been reversed.

⁶⁴ The composition of the Grand Chamber can obviously be controversial. Normally, apart from ex officio members judges are selected by drawing lot with a mechanism ensuring regional representation. It has been observed that, due to the changing composition, it is difficult for the Grand Chamber to develop its own "stable" culture, differently from other chambers.

⁶⁵ A Nussberger (n 54) 68.

sense.⁶⁶ As a consequence, the authority of the Court tends to be much more sensitive to political events, to policy-driven arguments and to the evolution of the diplomatic relationships among Member States.⁶⁷ This is particularly true for the ECtHR, by reason of the highly political subject matters treated, or the relatively high number of Member States, whose heterogeneity might be an element to take into account in order to decide on a specific outcome. Considering 2021, for instance, nearly half of the judgments concerned Russia, Turkey and Romania (around one quarter concerning Russia).⁶⁸ If so, the only way to strengthen the Court's position is not *ratione auctoritatis*, but *auctoritate rationis*, through the quality, the fairness and the transparency of its procedures and of its decisions.⁶⁹

b) The CJEU

Compared to the ECtHR, the CJEU presents a larger variety of competences, which should be taken in account, in order to assess how predictive technologies might be used in the framework of its activities. Some of its tasks, for instance, resemble the usual tasks of a national administrative court, judging about claims against the EU institutions for annulment⁷⁰ and for failure to act,⁷¹ brought by the Member States, the institutions themselves or any natural or legal person if the actions relate to a measure addressed to them. This partly applies to infringement procedures against a national government for failing to comply with EU law, started by the European

⁶⁶ About the independence, accountability, transparency and legitimacy issues of the ECtHR, cf. B Çalı - S Cunningham, 'Judicial Self Government and the Sui Generis Case of the European Court of Human Rights' (2018) 7 German Law Journal 1977 ff.

⁶⁷ MR Madsen, 'The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence', in J Christoffersen – MR Madsen, *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011) 43-60. The outcome of cases could therefore be dependent upon the Member States involved, while statistics show that complaint concern a relatively small group of countries (in 2018, over three-fourths of the complaints came from eight Member States).

⁶⁸ Since its establishment the Court delivered around 24000 judgments, more than one third of them concerning Turkey, Russia and Italy, European Court of Human Rights (n 59).

⁶⁹ Cf. S Dothan, 'Judicial Tactics in the European Court of Human Rights' (2011) 1 Chicago Journal of International Law 115-142; M Demetriou QC, 'Does the CJEU Need a New Judicial Approach for the 21st Century? A CJEU User's Perspective', paper presented at the conference A More Literal and Predictable Approach for the Court of Justice of the EU?, organized by the Bingham Centre for the Rule of Law, 2 November 2015.

⁷⁰ Artt. 263-264 TFEU.

⁷¹ Art. 265 TFEU.

Commission or another Member State⁷². In these procedures, the undeniable importance of case law coherence should not let us forget the eminent importance of the specificities and of the context of the case, especially in the most delicate questions, for which the role of the European judge as political and diplomatic engineer of the single situation is paramount.⁷³

One should also consider the judgments concerning reference for preliminary rulings about the interpretation of the Treaties, and the validity and interpretation of the European acts, when the national judge before whom such a question is raised considers that a decision on the question is necessary to enable him to give a judgment, compulsorily if it is a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law.⁷⁴

The CJEU decides less than 1000 case per year, with Preliminary rulings constituting the bulk of its activity. Thus, in the last year there have been 547 decisions following a preliminary reference, and only 30 decisions on direct actions for failure to fulfill States' obligations (while 183 are appeals against the General Court's decisions following claims against the EU institutions).

Within these procedures, the CJEU operates within an articulate legal compound resulting from an incremental process and inspired by different, if not conflicting rationales: the main cleavage being the market-oriented and the fundamental rights rationales. Furthermore, the CJEU often applies general principles more than punctual norms, even though this might differ according to the relevant area of law. Thus, a decision in the area of competition law tends to be more technical than a decision of the respect of the rule of law. Clearly, as for the ECtHR, the activity of the Court varies very much according to the subject matter upon which it decides. For instance, in 2021 the majority of decisions touched upon state aid and competition and the Area of freedom, security and justice (respectively, 115 and 136 decision). The remaining part of decisions concerned the areas of taxation (80), freedom of movement and establishment and internal market (77), social law (64),

⁷² Artt. 258 ff. TFEU.

⁷³ In particular, highlighting the low rate of success of such actions: R Mańko, EPRS (European Parliamentary Research Service), 'Action for damages against the EU, December' 2018, 8 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI\(2018\)630333_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf)> accessed 17 May 2023.

⁷⁴ Art. 267 TFEU. The bulk of decisions CJEU are preliminary references.

consumer protection (63) transport law (61), intellectual property (49), environment (45), agriculture (24) and customs union (17). Furthermore, some of these areas might entail heterogeneous legal issues.

After the 2004/2007 enlargement, CJEU judges decide in five-judge chambers or, in most important cases, in a Grand Chamber composed by fifteen-judges. A further, rather apparent difference compared to the ECtHR, is collegiality and impersonality of CJEU judgments. These impact the style of drafting, which has been defined «concise or even reductionist»,⁷⁵ since it tends to minimize the space devoted in the text to the detailed analysis of the facts (particularly in preliminary references), generally making it more difficult to fully understand judges' reasoning. The style is less cryptic than usual French style and notably that of the *Conseil d'Etat* (it has been defined «un style mixte mi attendu, mi dissertation»),⁷⁶ yet plain and impersonal. Also, the “forced” collegial nature of decision-making entails the need for broader compromise compared to the ECtHR, making it harder to grasp the underlying motivation of the reasoning.⁷⁷ However, one should not forget the possibility to rely on the detailed and more factual and properly reasoned conclusions of the Advocate-General in this regard.

Thus, the CJEU plays different roles within the system and complicatedly justifies its decisions on the cumulative basis of purposive, systemic and literal arguments. Therefore, the coherence of case law is fundamental to ensure a certain degree of legal certainty in the EU law and to foster Member States' compliance. This is why the Court tends to frequently refer to its precedents and to rarely explicitly change in its previous case law, adopting a high degree of formal standardization of its decisions, potentially suitable for the application of predictive technologies.

⁷⁵ A Nussberger (n 54) 68.

⁷⁶ The comparison with the French *Conseil d'État* – an institution that originally served as a template for the Court of Justice and is based on a homogenous and soundly established judicial culture – is particularly meaningful. The European Court lacks indeed of such highly institutionalized tradition and needs – for reasons of compliance among else – to put greater emphasis on the motivation. This explain why its style quickly departed from it inspiring institution characterized by extreme conciseness and hermetic character.

⁷⁷ Compared to the ECtHR, the CJEU motivation is still limited in its extent and based on undemonstrated assumptions (defined as «une série d'énoncés ex cathedra») and repetitions. Apparently, standardization of the style is due to its ability to both facilitate compromise among judges from different legal cultures (this would also explain the teleological approach to interpretation) and, more prosaically, to simplify translation tasks, C Schönberger (n 54).

However, some cases under the jurisdiction of the Court – for instance, with regard to the uncertain line between the competences of the Union and Member States, in the context of the recent tensions between the institutions of the EU and countries such as Hungary and Poland – require particularly strong policy considerations and mediation. Indeed, since the beginning of the European construction, the Court plays a cardinal – autonomously political – role in the establishment and evolution of the European political integration, as a pro-federalist policy-making, often beyond the limits of an explicit normative or even political mandate. Furthermore, in order to render such decisions acceptable to the national level, the style of the Court is much focused on the importance of persuasion in the judicial discourse. Hence, in many situations, the (political) substance tends to prevail over the standardized form, making it difficult to predict the decision through big data analytics, abstracting from the concrete political background of the case.

Finally, while being a supranational court based on an International Treaty, the CJEU operates in a different context than the ECtHR. This has to do, compared to the Convention system, with the higher degree of institutionalization⁷⁸ of the EU system and the Court itself within it, with the lower number of Member States and subsequent greater homogeneity of the relevant legal environment (or culture), etc. Therefore, CJEU's legitimacy is stronger in principle and such Court has to worry less about Member States' compliance and its decisions' *auctoritas rationis*. As a consequence, the relationship between this Court and political events, policy-driven arguments and the evolution of the diplomatic relationships among the Member States is still present but hidden.⁷⁹

⁷⁸ Understood as the process regulating behaviour within organizations.

⁷⁹ See for ex., as a preliminary rule, Joined Cases C-508/18 and C-82/19 PPU, *Minister for Justice and Equality v. OG e PI*, judgment of 27 May 2019, about a European arrest warrant issued by a public prosecutor's office of a member state (Germany).

6. Prospects of employment of predictive justice before the ECtHR and the CJEU

It is not possible to draw general conclusions on the use of predictive technologies related to the two Courts. AI encompasses indeed a variety of tools and techniques,⁸⁰ which might serve different purposes. Therefore, it would be appropriate first to identify such purposes and tools. That said, some observations can be made in relation to the prospects of employment, and the appropriateness thereof, of what have been called «third wave of computable law» (TWCL)⁸¹ machine learning tools through big data.

a) General observations on the potential use of predictive tools related to the ECtHR and the CJEU

In terms of feasibility, TWCL indeed needs a statistically significant amount of data: in fact, the key to establishing reliable probability calculations is to quantify an important and homogenous number of judgments to obtain a sufficiently refined analysis of the initial input.⁸² The available amount of these data naturally varies very much in relation to the Courts' types of procedure, the subject matter and the types of cases (more or less political) decided upon by the Courts.

When it comes to procedures, we showed in the previous paragraph that ECtHR individual complaints and CJEU's preliminary reference procedures encompass the majority of cases decided by the two courts, and this holds especially in relation to a set of limited subject matters (as we said, respectively article 5 right to liberty cases and article 6 fair trial cases, and state aid and competition cases). If it is to assess the

⁸⁰ F Bell *et al.*, *AI Decision-Making and the Courts. A guide for Judges, Tribunal Members and Court Administrators*, (Australasian Institute of Judicial Administration 2022) 7 ff.

⁸¹ G Contissa – G Sartor, How the Law Has Become Computable, in G Contissa et al. (eds), *Effective Protection of the Rights of the Accused in the EU Directives: A Computable Approach to Criminal Procedure Law* (Brill 2022) 35.

⁸² G Contissa, 'AI: which uses for judges and legal professionals? A historical overview', Speech at the Conference Artificial intelligence at the service of the judiciary, Ministry of Justice, Riga, 27 September 2018 <<https://www.coe.int/en/web/artificial-intelligence/-/conference-artificial-intelligence-at-the-service-of-the-judiciary->> accessed 17 May 2023.

feasibility of predictive justice tools, it is therefore reasonable to look at these procedures and areas first.

On the contrary, the scarcity of actions for damages caused by its institutions or by its servants in the performance of their duties ex articles 268 and 340 TFEU makes these procedures unsuitable for big data analytics. The same holds for those procedures where that Court resembles very much to a national administrative court, such as those ex article 270 TFEU on the CJEU jurisdiction in any dispute between the Union and its servants,⁸³ whose characters – the less political appearance of the relevant disputes and their more concrete nature – would otherwise possibly make them an area for potential use of AI technologies by firms having an experience in this kind of disputes.

However, when it comes to the CJEU, the peculiarities of the preliminary reference as a quasi-constitutional procedure, resulting in a judgment where the interests of the parties of the judgment *a quo* are only indirectly involved and envisaged, could limit the economic attractiveness for the parties of the utilization of predictive tools. Furthermore, by its very nature, the subject of the judgment is more complex than the mere prevalence of a party over another, making it difficult, at least in some cases, to approach the question through an abrupt, univocal prediction. However, more precise knowledge of the precedents might give some help to European judges – and to national judges in their dialogue with the CJEU – through the development and implementation of computer tools optimizing the precision of case law search engines and their standards of categorization. In fact, also for preliminary rulings the Court tends to respect its own precedents⁸⁴ aiming at a uniform interpretation of the EU law,⁸⁵ and, as a consequence, a good knowledge of the precedents is paramount for all the actors involved in the procedure.

In any case, due to the high number of cases decided by the ECtHR, this would definitely be the best candidate to test such tools⁸⁶. It is not maybe by chance that the

⁸³ See *supra*.

⁸⁴ Cf. art. 99 of the Rules of Procedure of the CJEU.

⁸⁵ See E Calzolaio, 'Il valore di precedente delle sentenze della Corte di giustizia' (2009) 1 *Rivista critica del diritto privato* 41 ff.

⁸⁶ For instance, the ECtHR delivered 871 judgments in 2020 (71% by three-judge panels) and 1105 judgments in 2021 (67% by three-judge panels), European Court of Human Rights, Analysis of Statistics (2021),

very first studies on the use of AI in supranational courts concern the ECtHR rather than the CJEU. These examples will be recalled below.

There might be more reasons making the ECtHR, due to the overall features of its decisions, more suitable for the use of AI predictive justice technologies. For instance, predictive justice can rely on strictly speaking legally relevant elements of cases, such as facts or the legal arguments and motivation, but also on non-legally relevant elements such as the identity deciding judges and their opinions, or the parties involved. In this regard, it has been acknowledged that «[c]ompared to legally relevant features such as case facts, it is technically more straightforward to extract information pertaining to characteristics such as the identity of the judge and lawyers involved in a case and use this to predict judicial outcomes».⁸⁷

However, the more articulate style of the ECtHR can have opposite effects. It has been observed that although AI technologies' accuracy increased substantially, «their efficiency over time and their capacity to encompass “abnormal” circumstances still remains questionable. Whereas binary outcomes are usually consistent, complex issues or technically-nuanced positions of common law courts seem to be more difficult to grasp in algorithmic terms; current general models do not seem to reach a judge's expectations, beyond given levels of complexity as they remain unable to assess all factual elements of a given context».⁸⁸

Also, compared to the CJEU, where the conflicting rationales of the system entail in principle more unpredictable outcomes, also in consideration of the abstract type of review (whereas ECtHR individual complaints are more factual), the ECtHR is embedded in a rather consistent system – the human right paradigm. To be sure, consistency can be lost in the more fragmented and less institutionalized nature of the Convention system. As mentioned, the resulting (greater) legitimacy deficit and the greater need for compliance makes the Convention Court more porous to external pressures (which does not necessarily mean more politicized).

[https://www.echr.coe.int/sites/search_eng/pages/search.aspx#{%22sort%22:\[%22createdAsDate%20Descending%22\],\[%22Title%22:\[%22\%22analysis%20of%20statistics\%22%22\],\[%22contentlanguage%22:\[%22ENG%22\]\]}](https://www.echr.coe.int/sites/search_eng/pages/search.aspx#{%22sort%22:[%22createdAsDate%20Descending%22],[%22Title%22:[%22\%22analysis%20of%20statistics\%22%22],[%22contentlanguage%22:[%22ENG%22]]}) accessed 17 May 2023. For the sake of comparison, see the number of cases decided by the CJEU per subject matter, Court of Justice of the European Union, *Annual Reports - Judicial Activity*, <https://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels> accessed 17 May 2023.

⁸⁷ F Bell *et al.* (n 80) 21.

⁸⁸ G Contissa (n 82).

b) Two examples of the use of predictive tools related to the ECtHR

It is at this point important to report an experiment of predicting judicial decisions of the European Court of Human Rights through natural language processing, whose results were published in 2016. To our knowledge, there is no specific study concerning the CJEU, except for a publication on claim detection in its judgments.⁸⁹

Applying predictive algorithms to the case law of such particular judge, the researchers aimed to predict whether a particular article of the Convention had been violated, given textual evidence extracted from a case, which comprises of specific parts pertaining to the facts, the relevant applicable law and the arguments presented by the parties involved. In this way, they wanted to corroborate their hypothesis that the textual content and the different parts of a case are important factors that influence the outcome reached by the Court, on the assumption that there is enough similarity between certain chunks of the texts of the published judgments (in particular, the procedure; the facts: circumstances of the case and relevant law other than articles of the Convention; the law: the alleged violation of an article of the Convention, comprising parties' submissions and legal reasons that purport to justify the specific outcome reached by the Court; the outcome of the case: a decision to the effect that a violation of a Convention article either did or did not take place⁹⁰) and of the applications lodged with the Court and/or briefs submitted by parties for pending cases⁹¹. Predictive tasks were concretely based on the text of published judgments rather than lodged applications or briefs simply because the researchers did not have access to the latters. Their model resulted to be able to predict the decisions of the

⁸⁹ M Lippi, 'Claim Detection in Judgments of the EU Court of Justice', in U Pagallo et alii (eds.), *AI Approaches to the Complexity of Legal Systems*, AICOL International Workshops 2015-2017 (Springer 2018), 513 ff.

⁹⁰ See, in particular, N Aletras et al., 'Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective' (2016) 4 PeerJ Computer Science 4, "The judgments of the Court have a distinctive structure, which makes them particularly suitable for a text-based analysis. According to Rule 74 of the Rules of the Court, a judgment contains (among other things) an account of the procedure followed on the national level, the facts of the case, a summary of the submissions of the parties, which comprise their main legal arguments, the reasons in point of law articulated by the Court and the operative provisions. Judgments are clearly divided into different sections covering these contents, which allows straightforward standardisation of the text and consequently renders possible text-based analysis".

⁹¹ *ibid* 4-6.

Court with an accuracy of 79% on average (75% for cases based on art. 3 of the Convention, about prohibition of torture; 84% on art. 6, about right to a fair trial; 78% on art. 8, about right to respect for private and family life): the authors also interpreted their results in the sense that “the 'facts' section of a case best predicts the actual court's decision, which is more consistent with legal realists”⁹² insights about judicial decision-making. We also observe that the topical content of a case is an important indicator whether there is a violation of a given Article of the Convention or not”⁹³.

A more recent study showed the results of another experiment of text-based approach and language analysis of the judgments of the Court, treated as quantitative data. It was realized increasing the number of the envisaged articles of the Convention (nine instead of three) and of the cases considered per article, and submitting to machine learning parts of the case different from the first paper (in particular, excluding the ‘law’ part, which sometimes explicitly mentions the verdict): the final score of the predictions was similar to the other study (77% vs 79%)⁹⁴. In addition, interestingly, in this paper predictions were also made about future cases on the base of the past cases, resulting in a lower classification performance (from 58% to 68%, depending on the gap between the training and testing data), and other predictions of outcomes were made, only based on the names of the judges who decide the cases, achieving a relatively high classification performance (average accuracy of these predictions: 65%)⁹⁵.

It is the opinion of the authors of the paper of 2016 that building a more complete text-based predictive system of judicial decisions could offer lawyers and judges a useful assisting tool, in order to identify cases and extract patterns that correlate with certain outcomes and to develop prior indicators for diagnosing potential violations of specific articles in lodged applications and possibly prioritize the decision process

⁹² About predictive justice and legal realism theories, cf. W Zagorski (n 33) 175 ff.

⁹³ N Aletras et al. (n 90) 2, 11: “The consistently more robust predictive accuracy of the ‘Circumstances’ subsection suggests a strong correlation between the facts of a case, as these are formulated by the Court in this subsection, and the decisions made by judges. The relatively lower predictive accuracy of the ‘Law’ subsection could also be an indicator of the fact that legal reasons and arguments of a case have a weaker correlation with decisions made by the Court. However, this last remark should be seriously mitigated since, as we have already observed, many inadmissibility cases do not contain a separate ‘Law’ subsection”.

⁹⁴ M Medvedeva - M Vols - M Wieling, ‘Using machine learning to predict decisions of the European Court of Human Rights’ (2020) 28 237-266.

⁹⁵ *ibid* 257-259, 259-262.

on cases where violation seems very likely, potentially reducing the significant delays of the Court⁹⁶.

Their viewpoint should be accurately evaluated, particularly in the light of the supranational institutional function of the Court. As for the lawyers and other professionals offering legal advice to potential claimants, the support of computer predictive systems, elaborated on the base of a full database of the past decisions of the Strasbourg Court, could actually be a precious tool to calculate in advance the chances of success of a claim in front of the judge and help the client decide whether or not to go ahead with a lawsuit which might cost him much time and economic effort.

With regard to the side of the judges of this Court – who, of course, come from different legal orders, both of civil law and common law – the matter is probably more sensitive and must be addressed very cautiously. This is true in general, as we already mentioned, but even more if we bear in mind the function of the European Court of Human Rights. This is why every proposition of innovations in the procedures of the Court that aims to increase the utilization of technologies often criticized for the black box problem, for the risks of excessive deference of the judges towards the precedents, for the algorithmic bias, etc., should be very attentively assessed and tested before implementation, adopting, meanwhile, an approach of self-restraint.

The current attitude of the Court in respect of its own case law is a delicate and pragmatic compromise between civil law and common law cultures⁹⁷ implying a certain doctrine of precedent⁹⁸ – strengthened by the amendments of 2004 to the

⁹⁶ N Aletras et al. (n 90) 3.

⁹⁷ Cf. E Lambert, *Les effets des arrêts de la Cour européenne des droits de l'homme. Contribution à une approche pluraliste du droit européen des droits de l'homme* (Bruylant 1999) 304-305: “les effets des arrêts de la CourEDH ne peuvent pas relever du schéma classique obligatoire/non obligatoire. Cette vision, critiquée pour sa simplicité et sa radicalité, ne correspond plus à l’analyse pluraliste des rapports entre l’ordre européen et les ordres internes. Il faut lui substituer le concept d’autorité, susceptible de gradation. Cette gradation dépend de plusieurs facteurs comme la qualité intrinsèque de la décision et l’existence d’une « jurisprudence constante »”; 398: “la Cour EDH [...] ne s’estime pas liée par ses propres jugements et elle recourt librement aux revirements de jurisprudence. Cette affirmation doit être immédiatement nuancée ; la CourEDH recourt très largement à la technique de l’auto-référence, laquelle comprend des réalités diverses qu’il faudra distinguer”.

⁹⁸ E Calzolaio, ‘La Giurisprudenza della Corte Europea dei Diritti dell’Uomo nella prospettiva della comparazione giuridica’ (2015) 4 *Rivista critica del diritto privato* 633-634. About the precedent in the

Convention⁹⁹ – which is applied by carefully using the techniques of distinguishing and openly departing from earlier decisions for significantly relevant reasons.¹⁰⁰ On the one hand, computer algorithmic tools merely facilitating a better knowledge and classification of the case law by the judges of Strasbourg seem to be advisable to improve the speed, the quality and the coherence of their judicial activities and decisions, whose “bureaucratic” style has been accentuated by the increase in number of cases.¹⁰¹ But, on the other hand, tools more actively susceptible to influence the attitude of the Court, radically changing its approach towards case law or even potentially weakening the independence and the transparency of the trial, and thus risking to weaken the prestige of the Court among the member states and their citizens, and consequently the compliance of the states towards its decisions, should

ECtHR, see also, ex ceteris, K Lucas-Alberni - F Sudre, *Le revirement de jurisprudence de la Cour européenne des droits de l'homme* (Bruylant 2009).

⁹⁹ The modification of 2004 of the procedural rules established in the Convention lets the Court focus on the most relevant and the less obvious cases, relying on single-judge formations (which may declare inadmissible or strike out of the Court’s list of cases an application, where such a decision can be taken without further examination, art. 27 of the Convention) and three-judges committees to filter and to decide the rest of them. About these committees, see art. 28: “Competence of Committees. 1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote, [...] (b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court”; cf. *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention - Explanatory Report - [2004] COETSER 1 (13 May 2004)*: “Paragraphs 1 and 2 of the amended Article 28 extend the powers of three-judge committees. Hitherto, these committees could, unanimously, declare applications inadmissible. Under the new paragraph 1.b of Article 28, they may now also, in a joint decision, declare individual applications admissible and decide on their merits, when the questions they raise concerning the interpretation or application of the Convention are covered by well-established case-law of the Court. Well-established case-law normally means case-law which has been consistently applied by a Chamber. Exceptionally, however, it is conceivable that a single judgment on a question of principle may constitute well-established case-law, particularly when the Grand Chamber has rendered it. This applies, in particular, to repetitive cases, which account for a significant proportion of the Court’s judgments (in 2003, approximately 60%). Parties may, of course, contest the well-established character of case-law before the committee”.

¹⁰⁰ For instance, reflecting societal changes: see L Wildhaber, ‘Precedent in the European Court of Human Rights’, in P. Mahoney *et alii* (eds.), *Protection des droits de l'homme: la perspective européenne / Protecting Human Rights: The European Perspective: mélanges à la mémoire de/studies in memory of Rolv Ryssdal* (Heymanns 2000) 1530-1531; but also to surmount uncertainties of interpretation in the case law of the Court and to meet the need to satisfy the increasing litigation on a key issue: see E Calzolaio (n 98) 631-632; see also J Mowbray, ‘An Examination of the European Court of Human Rights’ Approach to Overruling its Previous cases’ (2009) 2 Human Rights Law Review 179 ff., focusing on the Court’s reluctance to expressly acknowledge that it is overruling established case law and on its failure to always provide adequate justifications of the social or scientific developments underpinning its revised jurisprudence.

¹⁰¹ E Calzolaio (n 98) 630-631.

hopefully be avoided. In any case, relevant procedural innovations, potentially affecting the substantive law of the rights granted by the Convention and its protocols, should be subject to the greatest debate, not only involving professionals and legal doctrine, but also the diplomacies of the member states, in order to be fully accepted by all parties involved.

7. Conclusions

In this article, we have shown some examples of the practical functioning of predictive justice services, taken from the French legal landscape, in order to integrate the theoretical reflections on predictive justice in general, but also to pragmatically highlight the importance of a large amount of big data to make judicial algorithms work. The European courts cannot rely on the same number of legal precedents of their domestic counterparts, and, especially in some fields, case law is very scarce. Also, there are peculiarities of the European courts that might not favor the use of AI tools – e.g. ECtHR’s articulate style or CJEU’s hiding the stance of individual judges.¹⁰² Thus, this analysis suggests further caution when speaking about predictive justice in relation to the Strasbourg and the Luxembourg Courts.

By contrast, the homogeneity of the main topics of the ECtHR and, to a lesser extent, of some recurring topics of the CJEU tends to create a quite predictable framework, which can be potentially favorable for targeted applications of AI analytics to the case law on such subjects. We mentioned in particular article 5 right to liberty cases and article 6 fair trial cases for the ECtHR, and state aid and competition cases for the CJEU. As to the latter, article 270 TFEU disputes between the Union and its servants have intrinsic potentialities for AI use, but again, the problem lies in the (still) low number. In any case, to our knowledge there are few examples of uses (by researchers) of AI tools for these courts.

In relation to the European courts of Luxembourg and of Strasbourg, we specifically focused on some of the potentialities and of the limits of the AI technologies. These are undoubtedly useful to the parties in order to optimize their processual decisions,

¹⁰² Yet, some research is going on the possible use of AI tools to identify authorship of individual paragraphs of CJEU’s decisions, notably a (unpublished) paper on this topic has been presented at Brno Judicial Studies Institute on May 2022 by Michal Ovádek.

and useful – but merely in terms of supporting human decision-making – when used by judges, whose role is not one of merely automatic application of legal provisions and precedents, but of their critical evaluation and interpretation. The assistance of AI tools might be particularly beneficial considering the non-necessarily specialization of CJEU judges against the highly specialized characters of some EU matters (e.g. competition law),¹⁰³ or the overburden and workload of ECtHR judges. Yet, for fundamental reasons of respect of human rights and human dignity, the role of the machines should remain auxiliary to the activity of the human judge: empowering, but not replacing, him.¹⁰⁴

In any case, as a general observation, utilization of predictive justice by judges must – before every implementation – be the result of a serious debate within the legal doctrine, the community of legal professionals and the whole civil society, and, with regard to the supranational courts, among the representatives of the countries involved. A debate which should not only take in account the technical computer issues, but also the ethical and the political issues implicated, particularly relevant as policy and teleological arguments play an important part in the reasoning of these courts (particularly the CJEU). In any case, any project entailing implementation of algorithmic tools by European judges must consider the peculiarities of the functions and of the functioning of these courts, which should avoid the mistake to weaken and delegitimize themselves through too hurried innovations, which might make them more opaque or incapable of evolution of case law.

¹⁰³ M Jacobs – M Munder – B Richter, ‘Subject Matter Specialization of European Union Jurisdiction in the Preliminary Rulings Procedure’ (2019) 20 German Law Journal 1221.

¹⁰⁴ U Ruffolo, ‘Machina iuris-dicere potest?’ (2021) 2 BioLaw Journal - Rivista di BioDiritto 409-410.

ETHICS LOST IN TRANSLATION: TRUSTWORTHY AI FROM GOVERNANCE TO REGULATION

Irina Carnat^{*}

Abstract

The policy reaction of the European Union to the societal quest for fairer and more transparent Artificial Intelligence (AI) was immediate, yet partially unsatisfactory. Given the inadequacy of the liability regime and the absence of appropriate regulation of AI, the appointed High-Level Expert Group turned to ethics to develop the notion of Trustworthy AI. Generally, AI ethics was first tasked with providing guidance for global consensus on principles for AI governance. However, such ethics guidelines lack appropriate enforcement mechanisms, hence the unsuitability to provide clear guidance for AI regulation, leading to a potential phenomenon of ‘ethics washing’. The present article unveils the quintessentially political nature of the ethics guidelines, arguing that the strictly ethical nature of the guidelines got lost in translation in light of the proposed EU regulation of AI. Instead, it is claimed that the principle of accountability bridges the gap between the ethics guidelines and the regulatory framework, as shown by a first comparative glance at the US-proposed Algorithmic Accountability Act and the EU-proposed AI Act through the lenses of the recently proposed amendments concerning foundation models, thus providing the necessary enforcement mechanism to achieve trust in AI.

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Keywords

Trustworthy AI - Algorithmic accountability - AI regulation - AI governance - AI ethics

1. Introduction

The field of artificial intelligence ethics has largely emerged as a first response to the individual and societal harms that the misuse, abuse, poor design, or negative unintended consequences of AI systems may cause.¹ Absent an appropriate regulatory framework, given the inadequacy of the pre-existing product liability regime² to tackle the risks specifically posed by AI, the European Union recognized the need for ethics guidelines in order to create cohesion and consensus among its Member States on the issue of how to regulate artificial intelligence. These guidelines were meant to draw

¹ David Leslie, 'Understanding Artificial Intelligence Ethics and Safety: A Guide for the Responsible Design and Implementation of AI Systems in the Public Sector' (2019) <<https://zenodo.org/record/3240529>> accessed 18 August 2022.

² Note from the outset that civil liability rules were already under scrutiny to assess whether fit for purpose in the context of AI. An Expert Group on liability and new technologies tasked with the evaluation of the Product Liability Directive was appointed in 2018. More on their activities available at: <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&do=groupDetail.groupDetail&groupID=3592> accessed 25 July 2023.

attention to how Europe would approach the regulation of AI with respect to other countries in the global competitive market. However, the potential for ‘ethics washing’³ or the superficial adoption of ethical standards through codes of conduct without genuine commitment made it clear that a more robust regulatory approach was necessary. If the goal is to establish *trust* in the technology to foster its development while guaranteeing the protection of individuals, not only ethical considerations are required beforehand, but also a mechanism to ensure their practical implementation.

In the first part of this paper, the ethics guidelines adopted in the EU are analyzed to unveil their quintessentially political intent. By briefly exploring both the capabilities and limitations of ethics guidelines and principles for AI governance, their shortcoming in providing clear guidance for the adoption of a regulatory framework for AI are addressed.

The second part introduces and explains the principle of accountability as a possible solution to the lack of appropriate enforcement mechanisms, bridging the gap between the ethics guidelines and the legal framework, favoring legal certainty in the context of AI development, deployment, and use.

The third part deals with the risk-based regulatory approach adopted in the proposed EU regulation on AI, to show how the allegedly ethical principles were ‘translated’ into technical and compliance requirements, mainly regarding high-risk AI systems. Additionally, some considerations are made concerning the US regulatory framework, as laid down in the proposed Algorithmic Accountability Act, along with the latest developments in the EU concerning the regulation of foundation models.

2. What the EU wanted: the policy statement on Trustworthy AI

Facing the challenges arising from AI, the European Union’s reaction was to create a common approach⁴ across the Member States to boost research and industrial

³ Giovanni Comandé, ‘Unfolding the Legal Component of Trustworthy AI: A Must to Avoid Ethics Washing’ (Social Science Research Network 2020) SSRN Scholarly Paper 3690633 <<https://papers.ssrn.com/abstract=3690633>> accessed 25 July 2023.

⁴ All the relevant documents on the European approach to Artificial Intelligence are presented in detail in a timeline available here: <https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence> accessed 19 April 2023.

capacity while ensuring safety and fundamental rights. Such a policy statement aims to strike the right balance between innovation and protection of fundamental rights, avoiding a regulatory chilling effect on technological advancement.

The Declaration of Cooperation, signed in 2018 by all EU Member States plus Norway, was a first step towards the European approach to Artificial Intelligence.⁵ It was then followed by the European Commission's Communication on Artificial Intelligence for Europe,⁶ presented in April 2018 and endorsed by the European Council in June 2018, which aimed at strengthening the UE's competitive position on the international landscape with respect to the USA and China, leveraging on its world-leading AI research community to establish its leadership in AI regulation. Three main goals are pursued at this stage: 1) boosting the technological and industrial capacity and the AI uptake across the economy by increasing investments in research and innovation, along with data availability; 2) preparing for the socioeconomic changes, especially in the labor market; and 3) ensuring an appropriate ethical and legal framework.

Focusing on this last policy goal, relevant to the study at hand, the European Commission explicitly stated that for the development and use of AI, an environment of *trust and accountability* (emphasis added) is needed.⁷ For this purpose, the EU could rely on the values set out in Article 2 of the TUE⁸ and the Charter of Fundamental Rights,⁹ as well as on a strong and established regulatory framework in terms of safety standards and product liability, network and information system security, and protection of personal data,¹⁰ to be complemented by the forthcoming proposals under the Digital Single Market strategy. Such a policy statement was supported by

⁵ Building on the progress towards the creation of a Digital Single Market, the Declaration had the primary goal to ensure "an adequate legal and ethical framework, building on EU fundamental rights and values, including privacy and protection of personal data, as well as principles such as transparency and accountability". See European Commission, Declaration of cooperation on Artificial Intelligence (2018).

⁶ European Commission, Communication on Artificial Intelligence for Europe, (COM(2018) 237 final).

⁷ Ibidem.

⁸ Article 2 of the Treaty on European Union states: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

⁹ Charter of Fundamental Rights of the European Union (2012).

¹⁰ The Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) was bound to enter into force a month later, in May 2018.

the Coordinated Plan on Artificial Intelligence¹¹, which stressed the need for ethical guidelines to build societal trust in AI, unveiling the EU's ambition to become the global leader in AI governance. It is worth noticing that the initiative to develop ethics guidelines is coupled with an extensive review of the pre-existing liability regime, the Product Liability Directive in particular, to ensure that they are fit for purpose considering new risks posed by emerging digital technologies.¹²

On these grounds, after launching the European AI Alliance, in June 2018 the Commission established the High-Level Expert Group on Artificial Intelligence (hereinafter referred to as 'HLEG'), an independent group of 52 members mandated with the drafting of two deliverables: (1) AI Ethics Guidelines (hereinafter referred to as 'Ethics Guidelines'), and (2) Policy and Investment Recommendations (hereinafter 'Recommendations').¹³

Before delving deeper into the merits of the Ethics Guidelines as developed by the HLEG, three preliminary remarks are worth mentioning.

First, the role of ethics in AI governance is not new. In fact, there is an extensive study on how governments and private organizations adopted a set of seemingly ethical principles and guidance for AI governance,¹⁴ with a specific goal in mind: building a global consensus on the need to regulate, first, and on the standards for such regulation, second.¹⁵ As such, founded on rather abstract and somewhat vague principles that deliberately leave room for interpretation, the field of AI ethics has played a preliminary role in AI governance, by making governments willing to actively

¹¹ European Commission, Coordinated Plan on Artificial Intelligence (COM(2018) 795 final).

¹² See European Commission, Staff Working Document, Liability for Emerging Digital Technologies, SWD(2018) 137 final.

¹³ While the Guidelines were meant to provide guidance to individuals or organizations that develop, deploy, or otherwise use AI systems, the Recommendations addressed European institutions and Member States for their policy strategies on AI. See High-Level Expert Group on Artificial Intelligence, Ethics Guidelines for Trustworthy AI (April 2019).

¹⁴ See, for instance, Lewin Schmitt, 'Mapping Global AI Governance: A Nascent Regime in a Fragmented Landscape' (2022) 2 AI and Ethics 303 <<https://doi.org/10.1007/s43681-021-00083-y>> accessed 16 May 2023; Urs Gasser and Virgilio AF Almeida, 'A Layered Model for AI Governance' (2017) 21 IEEE Internet Computing 58. See also James Butcher and Irakli Beridze, 'What Is the State of Artificial Intelligence Governance Globally?' (2019) 164 The RUSI Journal 88. See also Daniel S Schiff and others, 'What's Next for AI Ethics, Policy, and Governance? A Global Overview' (SocArXiv, 17 December 2019) <<https://osf.io/preprints/socarxiv/8jaz4/>> accessed 3 May 2023.

¹⁵ Virginia Dignum, 'Ethics in Artificial Intelligence: Introduction to the Special Issue' (2018) 20 Ethics and Information Technology 1 <<https://doi.org/10.1007/s10676-018-9450-z>> accessed 8 May 2023.

engage in achieving a common approach for AI,¹⁶ despite inevitable divergences due to cultural and political contexts.¹⁷

Second, despite the existence of an extensive body of ethical principles and guidelines to be applied to AI at the time the HLEG was appointed,¹⁸ in the European Commission's view such a proliferation of guidelines may prove to be an obstacle to the development of the European Single Market, hence the need for a truly European approach to AI.¹⁹ This would also reinforce the EU's ambition to become a global leader in cutting-edge AI by building individual and collective trust in the technology. Moreover, the European AI Alliance was contextually established: an open multi-stakeholder platform providing input for the HLEG's tasks.²⁰ It is clear thus how ethics plays a central role in the European Commission's strategy aimed at enhancing the democratization process of AI regulation through a bottom-up approach of stakeholders' consultation, while at the same time strengthening the EU's global position as the pioneer of AI regulation.

Third, in comparison to the United States²¹ and China,²² which are both major players in the global AI market, focusing mainly on the utility and cost-benefit analysis,²³ the

¹⁶ Schmitt (n 14).

¹⁷ Seán S ÓhÉigeartaigh and others, 'Overcoming Barriers to Cross-Cultural Cooperation in AI Ethics and Governance' (2020) 33 *Philosophy & Technology* 571 <<https://doi.org/10.1007/s13347-020-00402-x>> accessed 3 May 2023.

¹⁸ For an extensive inventory of principles, voluntary commitments, and frameworks, see the Algorithm Watch in 'AI Ethics Guidelines Global Inventory', available at: <https://inventory.algorithmwatch.org/> accessed 19 December 2022. See also Anna Jobin, Marcello Ienca and Effy Vayena, 'The Global Landscape of AI Ethics Guidelines' (2019) 1 *Nature Machine Intelligence* 389 <<https://www.nature.com/articles/s42256-019-0088-2>> accessed 16 May 2022.

¹⁹ European Commission, Communication on Artificial Intelligence for Europe, (COM(2018) 237 final).

²⁰ Since its establishment in 2018, the European AI Alliance assembly has engaged more than 6.000 stakeholders. More on its activities and assemblies can be found here: <https://ec.europa.eu/futurium/en/european-ai-alliance/ai-hleg-steering-group-european-ai-alliance.html> accessed 25 July 2023.

²¹ The US national strategy on AI, while still referring to the trustworthy dimension of the technology, mainly focuses on establishing leadership in research and development for AI's integration across all sectors of economy and society, such as national defense: <https://www.ai.gov/legislation-and-executive-orders/> accessed 19 April 2023. Such an approach is confirmed by the latest released report by the National Security Commission on Artificial Intelligence in 2021 <https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf> accessed 19 April 2023.

²² Huw Roberts and others, 'The Chinese Approach to Artificial Intelligence: An Analysis of Policy, Ethics, and Regulation' (2021) 36 *AI & SOCIETY* 59 <<https://doi.org/10.1007/s00146-020-00992-2>> accessed 23 January 2023.

²³ National Science Technology Council (2019) The national artificial intelligence research and development strategic plan: 2019 update. National Science and Technology Council (US)-Committee on Artificial Intelligence. Retrieved October 01, 2021, from <https://www.hsdl.org/?abstract&did=831483>

EU has taken a more proactive approach to regulating the development and use of AI.²⁴ This approach sets the EU apart from other countries, which may be more focused on the economic benefits of AI and less concerned with its purely ethical implications. As a result, the EU's regulatory leadership on AI, rooted in ethical principles, could help to shape the global conversation on this technology²⁵ and set the standard for other countries to follow.²⁶ The very same trustworthy dimension of AI founded in ethics-like principles is promoted at the level of Organisation for Economic Co-operation and Development ('OECD'), listing both values-based principles, such as fairness, transparency, explainability, robustness, accountability, etc., as well as recommendations for policymakers.²⁷ Likewise, the United States has issued the Blueprint for an AI Bill of Rights,²⁸ which, despite different phrasing, aims at setting the desirable principles for trustworthy AI, namely, safety, fairness and non-discrimination, explainability, privacy and data protection, and human oversight.²⁹ Generally, scholars have identified overlapping and recurring principles towards which global consensus is deemed reached.³⁰ Although a thorough analysis of all

²⁴ Giovanni De Gregorio, 'The Rise of Digital Constitutionalism in the European Union' (2021) 19 *International Journal of Constitutional Law* 41 <<https://doi.org/10.1093/icon/moab001>> accessed 23 January 2023.

²⁵ Elettra Bietti, 'From Ethics Washing to Ethics Bashing: A View on Tech Ethics from within Moral Philosophy', *Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency* (Association for Computing Machinery 2020) <<https://dl.acm.org/doi/10.1145/3351095.3372860>> accessed 8 June 2023.

²⁶ Nathalie A Smuha, 'The EU Approach to Ethics Guidelines for Trustworthy Artificial Intelligence' (Social Science Research Network 2019) SSRN Scholarly Paper 3443537 <<https://papers.ssrn.com/abstract=3443537>> accessed 16 May 2022.

²⁷ See OECD, AI Principles overview, available at: <https://oecd.ai/en/ai-principles> accessed 25 July 2023.

²⁸ The White House, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, October 2022 <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf> accessed 31 January 2023.

²⁹ It is worth noting that the Blueprint on an AI Bill of Rights is consistent with the previous US Executive Order 13960 on Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government, which requires that certain federal agencies comply with nine stated principles when designing, developing, acquiring or using AI for purposes other than national security or defense. See The White House, Executive Order of the President n. 13960 of 3 December 2020: <https://www.govinfo.gov/content/pkg/FR-2020-12-08/pdf/2020-27065.pdf> accessed 7 June 2023.

³⁰ See, e.g., Daniel Schiff and others, 'AI Ethics in the Public, Private, and NGO Sectors: A Review of a Global Document Collection' (2021), 2, 31. The study analyzed 112 documents from 25 countries produced between 2016 and mid-2019, revealing significant variations in ethical coverage and depth across public, private, and non-governmental organizations, with NGO and public sector documents demonstrating broader ethical coverage, greater engagement with law and regulation, and more participatory processes, highlighting differing beliefs about organizational responsibilities, the role of experts versus public representatives, and the balance between prosocial and economic objectives. See also Luciano Floridi and Josh Cows, 'A Unified Framework of Five Principles for AI in Society' (2019) 1 *Harvard Data Science Review* <<https://hdsr.mitpress.mit.edu/pub/10jsh9d1/release/8>> accessed 7 June 2023. The study shows how four

principles would go beyond the scope of the present article, it is worth highlighting that, according to one such taxonomy, five topics are more prominent: social responsibility, transparency, fairness, privacy, and finally safety and reliability.³¹

Against this background, it is clear how the HLEG's work was meant to facilitate the global consensus on such principles grounded in traditional democratic values,³² thus strengthening the EU's leadership on AI governance.

2.1. What the HLEG delivered: the Ethics Guidelines for Trustworthy AI

According to the Ethics Guidelines, for AI to be trustworthy it must be: 1) lawful, 2) ethical, and 3) robust, both from a technical and social perspective. The framework provided by the HLEG consists of three chapters, briefly explained below:

Chapter I - Foundations of Trustworthy AI, laying out a fundamental rights-based approach, identifying and describing the relevant ethical principles. Such principles are: i) respect for human autonomy, based on a human-centric approach and human oversight; ii) prevention of harm, making sure that AI systems are safe and secure, with particular regard to vulnerable persons; iii) fairness, with a view to ensuring equal and just distribution of both benefits and costs without unfair bias, discrimination, and stigmatization; iv) explicability, concerning the so-called 'black-box' problem, aiming at ensuring that AI systems are sufficiently transparent, traceable, and auditable.

Chapter II - Realizing Trustworthy AI, listing seven key requirements to be implemented and met throughout the life cycle of an AI system, adopting *technical and non-technical* (emphasis added) methods. Such key requirements are: human agency and oversight; technical robustness and safety; privacy and data governance, transparency;

out of the five most recurrent principles, namely beneficence, non-maleficence, autonomy, and justice, stem from traditional bioethics principles, to which explicability is added specifically from the field of AI.

³¹ Schiff and others (n 30), p. 8. Similarly, the principles of transparency, justice and fairness, non-maleficence, responsibility, and privacy can be found in more than half of the evaluated guidelines, according to Jobin, Ienca and Vayena (n 18). See also Eva Erman and Markus Furendal, 'The Global Governance of Artificial Intelligence: Some Normative Concerns' (2022) *Moral Philosophy and Politics* <<https://www.degruyter.com/document/doi/10.1515/mopp-2020-0046/html?lang=en>> accessed 16 May 2022, p. 7 ff.

³² Erman and Furendal, (n 31), p. 8.

diversity, non-discrimination and fairness; societal and environmental wellbeing; and accountability.

Chapter III - Assessing Trustworthy AI: it sets up an Assessment List for the Trustworthiness of the AI system (hereinafter ‘ALTAI’).³³ The goal of such a non-exhaustive, pilot version, assessment list is to operationalize the concept of Trustworthy AI, with the caveat that compliance thereof does not prove compliance with legal requirements, nor is it intended as guidance for such compliance. Instead, it “*encourages reflection on how Trustworthy AI can be operationalized, and on the potential steps that should be taken in this regard*”.³⁴ Therefore, how to make such principles of Trustworthy AI operationalizable in practice remains an open question.

The European Commission contextually released a Communication in support of the Ethics Guidelines, stating that it should be considered valuable input for the forthcoming policymaking.³⁵ However, besides reaffirming that building trust is a prerequisite for the human approach to AI, it also restated the goal to play a leadership role in the development of international AI guidelines and potentially a related assessment mechanism. For this purpose, the EU plans to strengthen cooperation with like-minded countries, engage in dialogues with non-EU countries to build a consensus on human-centric AI, and to participate in the development of relevant international standards to promote its vision of human-centric AI.

2.2. The unsuitable role of the Ethics Guidelines for AI regulation

Having clarified how the current field of AI ethics developed in an attempt to strengthen the consensus on governance strategies for AI on a global scale, it is worth noticing that all the ethics guidelines suffer from the same shortcoming when applied as regulatory tools.³⁶ A common criticism is the lack of clarity due to overlapping and

³³ <https://futurium.ec.europa.eu/en/european-ai-alliance/pages/welcome-altai-portal> accessed 4 January 2022. Following a pilot process with more than 350 stakeholders, the ALTAI was revised, and a prototype web tool was released.

³⁴ European Commission, Content and Technology Directorate General for Communications Networks, and High-Level Expert Group on Artificial Intelligence, *Ethics Guidelines for Trustworthy AI* (2019) <<https://data.europa.eu/doi/10.2759/346720>> accessed 13 May 2022. p. 24.

³⁵ European Commission, Building Trust in Human-Centric Artificial Intelligence (COM(2019) 168 final), p. 4.

³⁶ For an extensive evaluation of the most relevant ethics guidelines, see Thilo Hagendorff, ‘The Ethics of AI Ethics: An Evaluation of Guidelines’ (2020) 30 *Minds and Machines* 99 <<http://link.springer.com/10.1007/s11023-020-09517-8>> accessed 16 May 2022.

ambiguous terminology of ethical principles.³⁷ Another critical issue is that ethical guidelines do not offer methods for solving tensions and conflicts between principles, which should account for appropriate societal stakeholder participation.³⁸ Other criticisms derive from the circumstance that ethics in the early stages of AI regulation has been associated with a ‘soft governance’ approach: scholars have pointed out that without common criteria to evaluate the quality of ethical and legal commitments around the impact of AI on fundamental rights, there is a considerable danger for such frameworks to become arbitrary, optional or meaningless rather than substantive, effective and rigorous ways to design technologies.³⁹

Although the so-called ‘soft law’ approach might cause companies to adopt better behavior models and operate more ethically with respect to commercial, social, and environmental values, it may result in a shift in legal responsibility if not finally reflected in legally binding rules.⁴⁰ In fact, private organizations adopting and formally implementing codes of conduct are still subject to a form of ‘self-regulation’ that lacks proper implementation⁴¹, leading thus to the phenomenon of ‘ethics washing’.⁴²

Concerning the HLEG, although some of the appointed members were lawyers, law professors, or law graduates,⁴³ it expressly did not deal with the lawfulness component.⁴⁴ Nonetheless, the three components of Trustworthy AI are clearly interconnected, and the overall approach is grounded on fundamental rights. Several attempts to make ethics guidelines actionable and useful to stimulate policymaking

³⁷ Jess Whittlestone and others, ‘Ethical and Societal Implications of Algorithms, Data, and Artificial Intelligence: A Roadmap for Research’, London: Nuffield Foundation (2019).

³⁸ Hagendorff (n 36). See also Jess Whittlestone and others, ‘The Role and Limits of Principles in AI Ethics: Towards a Focus on Tensions’, *Proceedings of the 2019 AAAI/ACM Conference on AI, Ethics, and Society* (ACM 2019) <<https://dl.acm.org/doi/10.1145/3306618.3314289>> accessed 16 May 2022.

³⁹ Brent Mittelstadt, ‘Principles Alone Cannot Guarantee Ethical AI’ (2019) 1 *Nature Machine Intelligence* 501 <<https://www.nature.com/articles/s42256-019-0114-4>> accessed 16 May 2022.

⁴⁰ Hagendorff (n 36).

⁴¹ Stefan Larsson, ‘On the Governance of Artificial Intelligence through Ethics Guidelines’ (2020) 7 *Asian Journal of Law and Society* 437 <<https://www.cambridge.org/core/journals/asian-journal-of-law-and-society/article/on-the-governance-of-artificial-intelligence-through-ethics-guidelines/992BD33CA7CBBE83E2FBBF6B0179896C>> accessed 3 May 2023.

⁴² Ben Wagner, ‘Ethics As An Escape From Regulation. From “Ethics-Washing” To Ethics-Shopping?’, *Ethics As An Escape From Regulation. From “Ethics-Washing” To Ethics-Shopping?* (Amsterdam University Press 2018) <<https://www.degruyter.com/document/doi/10.1515/9789048550180-016/html?lang=en>> accessed 18 May 2022.

⁴³ The composition and expertise of each member of the High-Level Expert Group can be found here: <https://ec.europa.eu/futurium/en/european-ai-alliance/ai-hleg-steering-group-european-ai-alliance.html> accessed 19 April 2023.

⁴⁴ Giovanni Comandé (n 3).

were proposed,⁴⁵ yet the most relevant issue is the lack of enforcement mechanisms that guarantee that they are adhered to, monitored, and regulated.⁴⁶ A recent example is provided with respect to an end-to-end AI system deployed for verifying the severity of lung damage caused by COVID-19, where the HLEG's Ethics Guidelines were used to assess the trustworthiness of the AI system.⁴⁷ The use case proves how the lack of clear guidance on how to apply the principles and the key requirements led to unclear results in assessing the trustworthiness of an AI system due to difficulties in mapping the relevant ethical principles and solving the contrasts among them.⁴⁸ Moreover, given the highly multidisciplinary nature of the assessing group,⁴⁹ mapping the issues and the corresponding key requirements for Trustworthy AI was very challenging, which may have caused vague and unclear results.⁵⁰ This is but one example how difficult the work of multidisciplinary auditing groups may be, if harmonized standards are not available for specific, oftentimes highly sectorial, applications of the AI system.

With specific regard to the public sector, multiple and diverse attempts to incorporate ethics-by-design have been developed. For instance, the Alan Turing Institute in 2019 envisaged a responsible AI project delivery ecosystem based on three building blocks, which are respectively composed of other value-based or procedural principles.⁵¹ In this case, the partial divergence from the HLEG's Ethics Guidelines demonstrates how a purely ethics-based approach to AI may lead to arbitrary frameworks that may be either very complex to navigate or of little practical usefulness if not

⁴⁵ Charlotte Stix, 'Actionable Principles for Artificial Intelligence Policy: Three Pathways' (2021) 27 Science and Engineering Ethics 15. Luciano Floridi and others, 'AI4People—An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations' (2018) 28 Minds and Machines 689 <<https://doi.org/10.1007/s11023-018-9482-5>> accessed 16 May 2022.

⁴⁶ Connor Rees and Berndt Müller, 'All That Glitters Is Not Gold: Trustworthy and Ethical AI Principles' (2022) AI and ethics, p. 11.

⁴⁷ Himanshi Allahabadi and others, 'Assessing Trustworthy AI in Times of COVID-19. Deep Learning for Predicting a Multi-Regional Score Conveying the Degree of Lung Compromise in COVID-19 Patients' (2022) IEEE Transactions on Technology and Society, 1.

⁴⁸ Ibidem.

⁴⁹ The group was composed by 58 members split in 8 working groups based on their field of expertise, namely technical, ethics, healthcare, law and social sciences.

⁵⁰ "Both the mappings and the consolidation of the mappings involve subjective decision-making components", Allahabadi and others (n 47), p. 15.

⁵¹ Leslie (n 1). In particular, the first building block consists of ethical values, namely the SUM Values (Support, Underwrite, and Motivate), respectively composed of four key notions, notably Respect, Connect, Care, and Protect; the second building block consists of actionable principles (FAST Track Principles): Fairness, Accountability, Sustainability, and Transparency; finally, the third building block requires a process-based governance framework (PBG Framework), which operationalises the first two building blocks.

operationalized through an enforcement mechanism⁵² grounded in legally binding rules. Moreover, the need for a more detailed risk management plan identifying the accountable subjects for the AI system's failures has been advanced, showing how the lack of a clear definition of roles and responsibilities under a liability framework hinders the full potential of an AI system.⁵³

Even from a philosophical perspective, the functional use of ethics as a means to achieve targets of trustworthiness of a system to increase its social acceptability is problematic in the sense that it sees the desirability of AI as an axiom⁵⁴. The concept of trust, when applied to AI, is somewhat problematic.⁵⁵ Simply put, we don't trust technology, we trust people. In the normative account, the trustee must be held responsible for its actions - which AI per se cannot be -; on the contrary, for AI to be reliable, the burden of responsibility must be necessarily placed on those developing, deploying, and using these technologies.⁵⁶

For all the reasons expressed above, the real problem that should have been defined by the HLEG is how to allocate responsibility for decisions concerning the development and deployment of AI. In fact, it is explicitly stated in the European Commission's White Paper, published in December 2020⁵⁷ consequent to the feedback on - and inevitable criticism around - the HLEG's Ethics Guidelines and Recommendations, that the actual challenge to fundamental rights and safety from a liability perspective in the context of AI is posed by the difficulty of tracing back potentially harmful AI-based decisions that may have caused damage. One key result of the feedback process that the European Commission took into consideration is that some of the requirements in the ethics guidelines are already covered by existing

⁵² Jobin, Ienca and Vayena (n 18).

⁵³ Allahabadi and others (n 47), p. 11.

⁵⁴ Bernd Carsten Stahl, 'From Computer Ethics and the Ethics of AI towards an Ethics of Digital Ecosystems' (2022) 2 AI and Ethics 65 <<https://doi.org/10.1007/s43681-021-00080-1>> accessed 16 May 2022.

⁵⁵ Matthias Braun, Hannah Bleher and Patrik Hummel, 'A Leap of Faith: Is There a Formula for "Trustworthy" AI?' (2021) 51 Hastings Center Report 17 <<https://onlinelibrary.wiley.com/doi/abs/10.1002/hast.1207>> accessed 13 May 2022.

⁵⁶ An extensive study on the concept of trust in AI is provided by Mark Ryan, 'In AI We Trust: Ethics, Artificial Intelligence, and Reliability' (2020) 26 Science and Engineering Ethics 2749 <<https://doi.org/10.1007/s11948-020-00228-y>> accessed 16 May 2022.

⁵⁷ European Commission, White Paper on Artificial Intelligence – A European approach to excellence and trust (COM(2020) 65 final).

regulatory regimes,⁵⁸ while others – perhaps the most relevant ones in the context of AI, such as transparency, traceability, and human oversight – are not reflected in existing legislation, thus the need to address them in a more attentive and specific manner.⁵⁹ As such, one fundamental failure of the AI ethics guidelines in the absence of clear identification of the responsible party for the enforcement, and measurement of suggested measures for AI systems, as well as the importance of accountability for the successful implementation of principles developed by different organizations.⁶⁰

However obvious it may seem, ethical principles alone do not guarantee compliance. Without a fundamental shift in regulation, the translation of principles into practice it will remain a competitive, not cooperative, process. Therefore, the elephant in the room of AI ethics is how to fit it under an umbrella of (legal) enforceability.

To ensure that ethical considerations are taken seriously and effectively integrated into decision-making processes, they should at minimum conform to certain basic criteria, including external participation and engagement with all relevant stakeholders; mechanisms for external independent oversight; transparent decision-making procedures that clearly explain why certain decisions were taken; a stable set of standards that can be plausibly justified and that do not arbitrarily prioritize certain values, principles, or rights over others; a commitment to not substituting fundamental rights or human rights; and a clear statement on the relationship between ethical commitments and existing legal or regulatory frameworks, particularly in cases where these frameworks may be in conflict.⁶¹

2.3. A partial step forward: the Policy and Investment Recommendation

As a closure to this ‘ethical’ framework, three months after the ethics guidelines, the HLEG also published the Recommendations, providing policies and measures that

⁵⁸ First and foremost, the General Data Protection Regulation. See also the recently adopted Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

⁵⁹ European Parliament. Directorate General for Parliamentary Research Services., *A Governance Framework for Algorithmic Accountability and Transparency*. (Publications Office 2019) <<https://data.europa.eu/doi/10.2861/59990>> accessed 5 May 2023.

⁶⁰ Rees and Müller (n 46), pp. 10-11.

⁶¹ Wagner (n 42), p. 3.

European institutions and Member States should adopt to ensure the beneficial impact of AI, both by promoting its development and competitiveness in Europe and by protecting individuals and society from the risks it poses. While being drafted by the same members that laid down the Ethics Guidelines, the Recommendations have an exquisite political nature. In fact, they are addressed to EU institutions and Member States to stimulate policymaking and investments in sectors that are crucial for the EU economy in a globally competitive landscape. The final goal is, once again, to strengthen the European Single Market.⁶²

However, perhaps the most important yet overlooked aspect is that the Recommendations (finally) deal with the 'lawful' component that was deliberately left undealt within the Ethics Guidelines. Here the HLEG acknowledges that Trustworthy AI requires appropriate governance and, while praising the EU's sound regulatory expertise, it also proposes several recommendations specifically for AI.⁶³ First, it suggests a risk-based approach based on proportionality and the precautionary principle, according to which certain AI applications should be prohibited if the risk level is deemed unacceptable. Second, it calls for an evaluation and potential revision of EU laws in critical domains, such as data protection, consumer protection, non-discrimination laws, cybersecurity, competition, etc. Third, it points out the possible need for new regulation to better deal with the critical concerns brought by AI that may not be properly addressed by existing legislation. Fourth, it questions the competencies, capacities, resources, and enforcement powers of the EU institutions to face the need for stakeholder consultation, auditing and effective redress mechanisms. Finally, it urges to establish governance mechanisms for a European Single Market for Trustworthy AI through harmonized regulation and cooperation across Member States, certification and standardization measures, and a sound enforcement mechanism.

Like the Ethics Guidelines, the Recommendations were not exempt from criticism either, pointing at their lack of problem structuring and definition, of democratic legitimacy with respect to civil society and other stakeholder consultation,

⁶² High-Level Expert Group on Artificial Intelligence, *Policy and Investment Recommendations for Trustworthy AI*, (2019), p. 7: "This more holistic vision lends itself to the creation of a European Single Market for Trustworthy AI, where Europe is in an exceptional position to put tailored policy and investment measures in place that can enable it to seize the benefits and capture the value of AI, while minimising and preventing its risks."

⁶³ *Ibid.* p. 39.

infrastructure from a data protection perspective, and decisiveness in their policy recommendations.⁶⁴

However, what is relevant for the study at hand is that while the Ethics Guidelines alone were not sufficient nor adequate to provide concrete guidance for AI regulation, the same can be said about the Recommendations but only if viewed from the ‘ethics’ perspective. For this reason, it is fundamental to understand the role the HLEG’s deliverables played in the broader political context, where the Recommendations were an early stage but perhaps more fitting approach and a step in the right direction. In fact, the Recommendations called for *traceability* and *reporting* requirements for AI applications with a view to facilitating *auditability*, *ex-ante oversight* and *monitoring* (emphasis added) by the competent authorities, and meaningful human intervention and oversight over the deployment of AI systems in critical decision-making contexts that have an impact on safety and fundamental rights.

3. What the EU actually needed: from ethics to accountability

In acknowledging their non-binding nature, the European Commission puts the HLEG’s Ethics Guidelines on a par with the President’s political guidelines,⁶⁵ for the ultimate policy statement on the European approach to AI contained in the White Paper. As such, the formally ‘ethical’ principles contained thereof are not to be considered as a matter of ethics in the strict sense, but a mere policy statement to stimulate a legally enforceable reaction. The European Commission calls thus for a clear regulatory framework that favors both consumers with adequate protection and businesses with legal certainty. It acknowledges that only a clear European regulatory framework can build the necessary trust in the technology. To this purpose, the White Paper contains recommendations for the adoption of risk-based regulation, focusing on risks to fundamental rights and safety, considering the specific characteristics of AI-driven technologies. The adequacy of the pre-existing legal framework to provide protection was challenged by AI’s opacity, complexity, unpredictability and partially

⁶⁴ Michael Veale, ‘A Critical Take on the Policy Recommendations of the EU High-Level Expert Group on Artificial Intelligence’ (Social Science Research Network 2020) SSRN Scholarly Paper 3475449 <<https://papers.ssrn.com/abstract=3475449>> accessed 16 May 2022.

⁶⁵ It also worth noting that the White Paper was released shortly after the new presidency of the European Commission assumed office at the end of 2019, under the guidance of the president Ursula von der Leyen. See President Von der Leyen, A Union that strives for more – My agenda for Europe, page 17.

autonomous behavior that makes it difficult to verify compliance and guarantee effective enforcement.⁶⁶ For this reason, the pressing concern for the European Commission was to adopt the appropriate adjustments to existing EU laws to tackle the specific risks posed by AI systems.⁶⁷

However, the Ethics Guidelines, although formally considered, were only partially reflected in the key features identified as the requirements to ensure legal certainty. In fact, the White Paper turned to features that do not recall any ‘ethical’ characteristic: training data; data and record-keeping; information to be provided; robustness and accuracy; human oversight. Instead, their shared normative semantic is that of a compliance and enforcement mechanism that ensures monitoring, verification, and documentation of the AI system’s development process. As a matter of fact, such requirements are addressed to the actors who are best placed to address the potential risks, clearly reflecting the risk-based logic behind them.⁶⁸ According to this - revised - EU policy statement, the future regulatory framework for Trustworthy AI does not turn to the ethical discourse to draw its regulatory guideline but rather anchors it in the well-established strict liability regime⁶⁹ with a fundamental, yet often overlooked, corrective action: *accountability*. After all, since its first policy statement, the European Commission stated that “*An environment of trust and accountability around the development and use of AI is needed*” to ensure an appropriate ethical and legal framework.⁷⁰

⁶⁶ European Commission (n 57).

⁶⁷ The report on the safety and liability implications of Artificial Intelligence, Internet of Things and robotics accompanying the White Paper identified the new risks presented by the emerging digital technologies and proposed specific provisions to address them. See European Commission, ‘Report on the safety and liability implications of AI, the Internet of Things and Robotics’ COM (2020) 64 final, 12 (Safety and Liability Report).

⁶⁸ See generally Guido Calabresi, ‘The Cost of Accidents: A Legal and Economic Analysis’, Yale University Press, 1970.

⁶⁹ While the HLEG reaffirms the importance of having adequate compensation schemes for damaged caused by AI, along with a mandatory insurance provision, new liability rules applicable to AI have recently been proposed: Proposal for a Directive of the European Parliament and of the Council on liability for defective products, COM(2022) 495 final; Proposal for a directive of the European Parliament and of the Council on adapting noncontractual civil liability rules to artificial intelligence (AI Liability Directive), COM(2022) 496 final. These proposed directives are based on the European Parliament’s ‘Resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence’ 2020/2014(INL) (Resolution on Civil Liability or Parliamentary Resolution) and the White Paper, European Commission (n 57). See, e.g. Gerhard Wagner, ‘Robot Liability’ in Sebastian Lohsse, Rainer Schulze and Dirk Staudenmayer (eds), *Liability for Artificial Intelligence and the Internet of Things* (Hart 2019). See also Beatrice Schütte, Lotta Majewski and Katri Havu, ‘Damages Liability for Harm Caused by Artificial Intelligence – EU Law in Flux’ (2021) SSRN Electronic Journal.

⁷⁰ European Commission (n 6), p. 13

3.1. Conceptual foundations of the (overlooked) principle of accountability

Generally, accountability is a multifaceted concept that can adapt to a wide range of meanings and applications.⁷¹ The most adopted conceptual framework is provided by Bovens, according to which accountability is a relational concept between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.⁷² From such a general conceptual framework one can tailor a definition of accountability that reflects beliefs about the ideal relationship between actors.⁷³ As such, accountability is highly contextual⁷⁴ and can assume multiple forms based on the normative logic,⁷⁵ power relation,⁷⁶ or the adopted substantive notion.⁷⁷

These notions are tailored and adapted to the specific risks and characteristics in the field of AI,⁷⁸ such as the ‘black box’ problem,⁷⁹ autonomous behavior, bias and

⁷¹ Stephen Keith McGrath and Stephen Jonathan Whitty, ‘Accountability and Responsibility Defined’ (2018) 11 *International Journal of Managing Projects in Business* 687 <<https://doi.org/10.1108/IJMPB-06-2017-0058>> accessed 18 December 2022.

⁷² Mark Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13 *European Law Journal* 447 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-0386.2007.00378.x>> accessed 12 August 2022.

⁷³ Jonathan GS Koppell, ‘Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder”’ (2005) 65 *Public Administration Review* 94 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6210.2005.00434.x>> accessed 8 January 2023.

⁷⁴ Jennifer Cobbe, Michelle Seng Ah Lee and Jatinder Singh, ‘Reviewable Automated Decision-Making: A Framework for Accountable Algorithmic Systems’, *Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency* (ACM 2021) <<https://dl.acm.org/doi/10.1145/3442188.3445921>> accessed 24 November 2022.

⁷⁵ Joseph Donia, ‘Normative Logics of Algorithmic Accountability’, *2022 ACM Conference on Fairness, Accountability, and Transparency* (ACM 2022) <<https://dl.acm.org/doi/10.1145/3531146.3533123>> accessed 15 November 2022.

⁷⁶ Based on the nature of the power relation which exists between the actor and the forum, accountability can be vertical, horizontal, or diagonal. See Bovens (n 72).

⁷⁷ Koppell (n 73).

⁷⁸ For an extensive study of the risks posed by AI and possible regulatory approaches, see Margot E Kaminski, ‘Regulating the Risks of AI’ (2022) SSRN Electronic Journal <<https://www.ssrn.com/abstract=4195066>> accessed 12 September 2022.

⁷⁹ See, e.g., Madalina Busuioc, Deirdre Curtin and Marco Almada, ‘Reclaiming Transparency: Contesting the Logics of Secrecy within the AI Act’ (2022) *European Law Open* 1 <<https://www.cambridge.org/core/journals/european-law-open/article/reclaiming-transparency-contesting-the-logics-of-secrecy-within-the-ai-act/01B90DB4D042204EED7C4EEF6EEBE7EA>> accessed 23 December 2022. See Madalina Busuioc, ‘Accountable Artificial Intelligence: Holding Algorithms to Account’ (2021) 81 *Public Administration Review* 825 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/puar.13293>> accessed 10 August 2022.

possible discrimination, etc. to develop a specific algorithmic accountability framework. To this purpose, scholars have identified the barriers to accountability in the context of AI⁸⁰ and proposed several possible solutions to address them. For instance, based on the specific regulatory goals, two different uses of accountability in AI: proactive and reactive, complementary one to another.⁸¹ The former is implemented ex-ante, serving the purposes of compliance and oversight. The latter is implemented ex-post, serving the purposes of reporting and enforcement. Accountability tools in AI range from reviewability,⁸² auditing,⁸³ impact assessments,⁸⁴ or other technical solutions.⁸⁵

A thorough analysis of possible accountability solutions for AI systems would go beyond the scope and purpose of this article; for now, it suffices to observe that the solutions proposed are based on the need for more fairness, transparency, and

⁸⁰ For instance, the four barriers to accountability identified by Nissenbaum in are: 1) the problem of 'many hands'; 2) 'bugs'; 3) computers as scapegoats; and 4) ownership without liability. See Helen Nissenbaum, 'Accountability in a Computerized Society' (1996) 2 Science and Engineering Ethics 25 <<http://link.springer.com/10.1007/BF02639315>> accessed 20 April 2023. See also A Feder Cooper and others, 'Accountability in an Algorithmic Society: Relationality, Responsibility, and Robustness in Machine Learning' (2022) <<http://arxiv.org/abs/2202.05338>> accessed 31 May 2022.

⁸¹ See, generally, Claudio Novelli, Mariarosaria Taddeo and Luciano Floridi, 'Accountability in Artificial Intelligence: What It Is and How It Works' (3 August 2022) <<https://papers.ssrn.com/abstract=4180366>> accessed 6 August 2022.

⁸² Chris Norval, Jennifer Cobbe and Jatinder Singh, 'Towards an Accountable Internet of Things: A Call for Reviewability' in Andrew Crabtree, Hamed Haddadi and Richard Mortier (eds), *Privacy by Design for the Internet of Things: Building accountability and security* (Institution of Engineering and Technology 2021) <https://digital-library.theiet.org/content/books/10.1049/pbse014e_ch5> accessed 8 January 2023. See also Joshua A Kroll, 'Outlining Traceability: A Principle for Operationalizing Accountability in Computing Systems', *Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency* (2021) <<http://arxiv.org/abs/2101.09385>> accessed 16 November 2022.

⁸³ Inioluwa Deborah Raji, 'From Algorithmic Audits to Actual Accountability: Overcoming Practical Roadblocks on the Path to Meaningful Audit Interventions for AI Governance', *Proceedings of the 2022 AAAI/ACM Conference on AI, Ethics, and Society* (Association for Computing Machinery 2022) <<https://doi.org/10.1145/3514094.3539566>> accessed 21 April 2023. See also Inioluwa Deborah Raji and others, 'Closing the AI Accountability Gap: Defining an End-to-End Framework for Internal Algorithmic Auditing' (arXiv, 3 January 2020) <<http://arxiv.org/abs/2001.00973>> accessed 16 November 2022.

⁸⁴ See, generally, Margot E Kaminski, 'Binary Governance: Lessons from the GDPR's Approach to Algorithmic Accountability' (2019) SSRN Electronic Journal <<https://www.ssrn.com/abstract=3351404>> accessed 12 December 2022. See also Heleen Janssen, Michelle Seng Ah Lee and Jatinder Singh, 'Practical Fundamental Rights Impact Assessments' (2022) 30 International Journal of Law and Information Technology 200 <<https://academic.oup.com/ijlit/article/30/2/200/6835507>> accessed 24 November 2022. See also Jacob Metcalf and others, 'Algorithmic Impact Assessments and Accountability: The Co-Construction of Impacts', *Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency* (Association for Computing Machinery 2021) <<https://doi.org/10.1145/3442188.3445935>> accessed 16 November 2022.

⁸⁵ Timnit Gebru and others, 'Datasheets for Datasets' (arXiv, 1 December 2021) <<http://arxiv.org/abs/1803.09010>> accessed 27 March 2023.

explainability,⁸⁶ but do not share an ‘ethical’ nature. Instead, they are addressed from an accountability viewpoint resulting in requirements for AI developers to meet,⁸⁷ while at the same time providing the justification for why certain decisions were adopted in the first place.⁸⁸ For instance, transparency is often associated with the need to scrutinize the inner workings of a system to understand the consequences of its operation.⁸⁹ However, transparency alone lacks practical effectiveness unless an additional enforceable framework is established to enable principals to hold agents accountable using transparent explanations and justifications.⁹⁰ In this sense, transparency is instrumental in achieving accountability, holding the system’s creator, provider or operator responsible for potentially harmful outcomes.⁹¹ A similar remark can be made with regard to explainability, the demand of which is justified by the need for moral agents to provide reasons for a decision or an action to whom they are accountable.⁹²

Ultimately, accountability provides a mechanism for the operationalization and allocation of responsibility in certain contexts:⁹³ such mechanisms applied to AI development and deployment seek to facilitate the recording, reporting, evaluation, and sanctioning of decisions and activities,⁹⁴ which contributes to building trust in the

⁸⁶ See, e.g., Miriam C Buiten, ‘Towards Intelligent Regulation of Artificial Intelligence’ (2019) 10 *European Journal of Risk Regulation* 41 <<https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/towards-intelligent-regulation-of-artificial-intelligence/AF1AD1940B70DB88D2B24202EE933F1B>> accessed 14 April 2023.

⁸⁷ Arguably, accountability provides the necessary framework for the requirements as set in the European Commission’s White Paper (n 57).

⁸⁸ Rebecca Williams and others, ‘From Transparency to Accountability of Intelligent Systems: Moving beyond Aspirations’ (2022) 4 *Data & Policy* e7 <<https://www.cambridge.org/core/journals/data-and-policy/article/from-transparency-to-accountability-of-intelligent-systems-moving-beyond-aspirations/E412FF94EC2A293985D414D80415F4AA>> accessed 24 November 2022.

⁸⁹ Deven R Desai and Joshua A Kroll, ‘Trust But Verify: A Guide to Algorithms and the Law’ (2017) 31, p. 7-11.

⁹⁰ Paul de Hert and Guillermo Lazcoz, ‘When GDPR-Principles Blind Each Other: Accountability, Not Transparency, at the Heart of Algorithmic Governance’ (2022) 8 *European Data Protection Law Review* (EDPL) 31 <<https://heinonline.org/HOL/P?h=hein.journals/edpl8&i=37>> accessed 26 June 2023. See also Joshua A Kroll and others, ‘Accountable Algorithms’ 165 *University of Pennsylvania Law Review* 74, p. 658.

⁹¹ Desai and Kroll (n 89).

⁹² Mark Coeckelbergh, ‘Artificial Intelligence, Responsibility Attribution, and a Relational Justification of Explainability’ (2020) 26 *Science and Engineering Ethics*, p. 2052.

⁹³ McGrath and Whitty (n 71).

⁹⁴ Generally on how accountability may be used for governance of AI, see Theodore M Lechterman, ‘The Concept of Accountability in AI Ethics and Governance’ in Justin B Bullock and others (eds), *The Oxford Handbook of AI Governance* (1st edn, Oxford University Press 2022) <<https://academic.oup.com/edited-volume/41989/chapter/386768252>> accessed 27 February 2023.

technology⁹⁵ by imposing a dimension of answerability or blameworthiness onto its developers.⁹⁶ Coherently, the NIST's recently adopted glossary for Trustworthy AI speaks the same language, linking accountability to the allocation of responsibility, and more specifically for AI governance, the obligation of an individual or an organization to account for its activities and to disclose the results in a transparent manner.⁹⁷

Yet, the principle of accountability was, if not completely disregarded, somehow underestimated in its potential.⁹⁸ Although accountability was indeed listed among the key requirements in the Ethics Guidelines, it was presented under the (perhaps wrong) assumption that it “*complements the [other] requirements, and is closely linked to the principle of fairness*”.⁹⁹ The following (not so wrong) assumption that accountability entails that “*mechanisms be put in place to ensure responsibility and accountability for AI systems and their outcomes, both before and after their development, deployment and use*”¹⁰⁰ is precisely the reason why the Ethics Guidelines missed their chance to provide tangible regulatory guidance.¹⁰¹ If only accountability were regarded as a principle sharing both an ‘ethical’ nature *and* that of an enforcement mechanism,¹⁰² it would have provided a precious tool for the practical implementation of the Ethics Guidelines.

⁹⁵ Johann Laux, Sandra Wachter and Brent Mittelstadt, ‘Trustworthy Artificial Intelligence and the European Union AI Act: On the Conflation of Trustworthiness and Acceptability of Risk’ (2023) Regulation & Governance <<https://onlinelibrary.wiley.com/doi/abs/10.1111/rego.12512>> accessed 13 February 2023.

⁹⁶ Nissenbaum (n 80).

⁹⁷ Daniel Atherton, Reva Schwartz, Peter C. Fontana, Patrick Hall (2023) The Language of Trustworthy AI: An In-Depth Glossary of Terms. (National Institute of Standards and Technology, Gaithersburg, MD), NIST Artificial Intelligence AI 100-3. <https://doi.org/10.6028/NIST.AI.100-3>. <<https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-3.pdf>> accessed 12 April 2023.

⁹⁸ The ALTAI provides a definition of accountability that is somewhat unsatisfactory: “[The] term refers to the idea that one is responsible for their action – and as a corollary their consequences – and must be able to explain their aims, motivations, and reasons. [...] But accountability might also express an ethical standard, and fall short of legal consequences.” The misconception of accountability in Artificial Intelligence is a common issue in many others so-called ethics guidelines. See, for instance, Rees and Müller (n 46), p. 6.

⁹⁹ European Commission, Directorate General for Communications Networks, and High-Level Expert Group on Artificial Intelligence (n 15), p. 19.

¹⁰⁰ Ibidem.

¹⁰¹ Williams and others, (n 88), p. 11, “*Accountability mechanisms, on the other hand, “are procedures and tools—often technical tools, including software, but also organizational and/or legal procedures and other mechanisms—by which accountability practices are supported and implemented.”*”

¹⁰² Mark Bovens, ‘Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism’ (2010) 33 West European Politics 946 <<https://doi.org/10.1080/01402382.2010.486119>> accessed 2 February 2023.

4. The legacy of the Ethics Guidelines in the proposed AI Act

Against this background, it is possible to draw some brief, tentative conclusions about the role that the Ethics Guidelines played in the proposed Artificial Intelligence Act (hereinafter referred to as ‘AIA’).¹⁰³

It constitutes on a global scale the first attempt to regulate AI systems. Adopting a risk-based approach, the AIA identifies four categories of AI practices based on their level of social risk-acceptability, ranging from unacceptable, i.e. prohibited practices, to those that pose minimal risk. Most of the provisions in the AIA concern the ‘high-risk’ AI systems, for which providers are required to put a risk management system into place¹⁰⁴. Although no definition of the risk management system is provided in the AIA¹⁰⁵, it can be entailed as a ‘system’ consisting of policies, procedures and instructions,¹⁰⁶ which shall also be approved by the responsible decision maker at the organizational level.¹⁰⁷ Its role is to ensure that risks are identified and adequately addressed by AI providers, despite the lack of harmonized standards or technical specifications, by adopting safeguards reducing the risks to an acceptable level.¹⁰⁸

Although many considerations could be made around this piece of regulation and its foundational basis under the New Legislative Framework (NLF),¹⁰⁹ for the scope and

¹⁰³ European Commission, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts COM/2021/206 Final, CELEX number: 52021PC0206, April 21, 2021.

¹⁰⁴ Art. 9 of the AIA.

¹⁰⁵ According to clause 3.2 of “ISO 31000:2018 Risk Management – Guidelines” <https://www.iso.org/standard/65694.html>, “risk management” can be defined as the “coordinated activities to direct and control an organisation with regard to risk”.

¹⁰⁶ Jonas Schuett, ‘Risk Management in the Artificial Intelligence Act’ (2023) European Journal of Risk Regulation 1
<https://www.cambridge.org/core/product/identifier/S1867299X23000016/type/journal_article> accessed 20 February 2023; See also Comandé (n 3).

¹⁰⁷ In the so-called Three Lines Defense Model in the context of AI, see Jonas Schuett, “Three Lines of Defense against Risks from AI” (arXiv, 16 December 2022) <<http://arxiv.org/abs/2212.08364>> accessed 13 April 2023.

¹⁰⁸ Ibid., p. 13.

¹⁰⁹ Key features of the NLF are: essential requirements the product needs to comply with to be put on the market; reliance on harmonized standards laid down by external standardization organizations to establish presumption of conformity; CE marking to certify compliance; specific obligations for the different actors along the distribution chain; conformity assessment procedure; market surveillance. See Council Resolution of 7.5.1985 on a new approach to technical harmonization and standards (OJ C 136). Regulation (EC) No 765/2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products (OJ L 218). Decision No 768/2008/EC on a common framework for the marketing of products (OJ L 218).

purpose of this contribution, the analysis will be narrowed down to how the seemingly ‘ethical’ requirements are ‘translated’ into legal ones for *high-risk* (emphasis added) AI systems to be complied with, reflecting the underlying need for accountability. Without claiming to be exhaustive and without delving into details, the following paragraphs briefly illustrate how most of the key requirements in the Ethics Guidelines are implemented in the legal framework, either in the AIA or in other EU legislations.

First and foremost, Article 8 of the AIA establishes that compliance with the set requirements is mandatory for high-risk systems, considering the intended purpose and the risk management system of the high-risk AI system. This means that compliance is subject to the principle of proportionality, coherent with the EU’s policy statement.¹¹⁰

For the sake of clarity, the abovementioned ALTAI checklist is further analyzed, with a view to establishing the link with the requirements set under the proposed AIA.

Requirement nr. 1 related to human agency and oversight, aimed at ensuring that individuals maintain their autonomy in interacting with an AI system and a certain degree of control in the algorithmic decision-making process. The same feature is required by Article 14 of the AIA, i.e. human oversight, consisting of the adoption of appropriate human-machine interface tools, ensuring that the system is effectively overseen by natural persons during the period in which the AI system is in use.¹¹¹ The requirement of human agency and oversight can be envisioned in the transparency obligations set in Article 52 of the AIA to allow users to make informed choices for other AI systems that are not classified as ‘high-risk’ but are characterized by the fact that they (i) interact with humans, (ii) are used to detect emotions or determine association with (social) categories based on biometric data, or (iii) generate or manipulate content (‘deep fakes’).

¹¹⁰ The goal is to adequately address the risks posed by AI systems in order to protect citizens, without stifling innovation, hence the proportionality principle: the higher the risks, the stricter the requirements. See, e.g., Tobias Mahler, ‘Between Risk Management and Proportionality: The Risk-Based Approach in the EU’s Artificial Intelligence Act Proposal’ (2022) The Swedish Law and Informatics Research Institute 247 <<https://www.lawpub.se/artikel/10.53292/208f5901.38a67238>> accessed 13 April 2023.

¹¹¹ It has been pointed out that in data protection law, human oversight typically relates to human dignity, whereas the AIA human oversight instead relates to minimizing risks to health, safety and fundamental rights. See Frederik J Zuiderveen Borgesius, ‘Strengthening Legal Protection against Discrimination by Algorithms and Artificial Intelligence’ (2020) 24 The International Journal of Human Rights 1572.

Requirement nr. 2 concerns technical robustness and safety, which addresses four main issues: security; safety; accuracy and reliability, fallback plans and reproducibility. Again, the same principles are ‘translated’ in Article 15 of the AIA in terms of accuracy, robustness and cybersecurity requirements.

Requirement nr. 3 deals with privacy and data governance, aimed at ensuring the quality and integrity of the data used, its relevance with respect to the intended purpose, and privacy protection. Needless to point out that compliance with the General Data Protection Regulation is the first step to ensure privacy and data governance. On the AIA side, the exact same requirements are mentioned in Article 10, requiring that training, validation and testing data are subject to appropriate data governance and management practices, mentioning also the need for appropriate safeguards for special categories of personal data, including technical limitations on the re-use and use of state-of-the-art security and privacy-preserving measures, such as pseudonymization or encryption.

It further specifies that datasets shall be relevant, representative, free of error¹¹² and complete, and with the appropriate statistical properties. These latter specifications clearly refer to requirement nr. 5 of the ALTAI, related to diversity, non-discrimination and fairness, addressing the risks of unintended prejudice and discrimination due to bias, incompleteness, and bad (data) governance models.

As far as transparency is concerned, requirement nr. 4 of the ALTAI, encompassing the need for traceability, explainability, and open communication about the limitations of the AI system is ‘translated’ into Articles 12 and 13 of the AIA: the former imposes record-keeping obligations for traceability purposes, the latter imposes transparency obligations to enable users to interpret output and information duties, such as characteristics, capabilities, and limitations of performance, along with appropriate instructions of use.

¹¹² It is true that datasets should ideally be free of error, but it would impose an unreasonably demanding standard of care onto AI providers. Recent proposals to amend Article 10 of the AIA would add a ‘reasonableness filter’, by stating that datasets shall be free of error “as far as this can be reasonably expected and is feasible from a technical and economical point of view”. See for instance the proposed amendments by the Committee on the Internal Market and Consumer Protection Committee on Civil Liberties, Justice and Home Affairs, available here: <https://artificialintelligenceact.eu/wp-content/uploads/2022/06/AIA-IMCO-LIBE-Report-All-Amendments-14-June.pdf> accessed 19 April 2023.

One aspect from the ALTAI checklist seems to be disregarded in the AIA, namely the societal and environmental well-being, but it is not disregarded by the legal framework altogether. In fact, the impact of AI on society and the environment, in general, is broadly addressed by the fundamental rights doctrine¹¹³, as well as by corporate social accountability schemes¹¹⁴.

Finally, the ALTAI lists accountability as requirement nr. 7, showing its close relation to risk management, identification, and mitigation in a transparent way that can be explained to and audited¹¹⁵ by third parties. Coherently, in a risk-based regulation such as the AIA, it is clear thus that accountability plays a central role in the risk management framework, while at the same time providing the tools to account for trade-offs and tensions between principles and requirements laid down by the Ethics Guidelines. The rationale behind these requirements is to engage AI providers not only in the risk management process but also in active knowledge creation to prove compliance through a detailed quality management system¹¹⁶ and mandatory requirements of technical documentation and record keeping¹¹⁷ throughout the entire lifecycle of the product.¹¹⁸ In essence, the AIA imposes a general duty onto AI providers to give explanations and justifications attesting the system's accuracy, robustness, security, transparency, and appropriate human oversight measures.

It is worth briefly mentioning that such a risk-based governance model is already familiar to the European policymaker, namely in the field of (personal) data protection, where accountability plays a central role in requiring data controllers to take responsibility for personal data processing, guaranteeing and proving compliance

¹¹³ Art. 37 of the EU Charter of Fundamental Rights on environmental protection.

¹¹⁴ See. e.g. Kudlak, Robert, Ralf Barkemeyer, Lutz Preuss, and Anna Heikkinen. *The Impact of Corporate Social Responsibility*. Milton: Taylor & Francis Group, 2022. Routledge Studies in Management, Organizations and Society. See also Wesley Gomes de Sousa and others, 'How and Where Is Artificial Intelligence in the Public Sector Going? A Literature Review and Research Agenda' (2019) 36 *Government Information Quarterly* 101392 <<https://www.sciencedirect.com/science/article/pii/S0740624X18303113>> accessed 19 April 2023.

¹¹⁵ Note that the ALTAI mentions the need for auditability of AI systems to ensure independent evaluation of AI systems. Although no specific provision concerning auditing is contained in the AIA, Recital 69 calls for the elaboration of functional specifications by the European Commission and independent audit reports with regard to the EU database for high-risk AI systems.

¹¹⁶ Art. 17 of the AIA.

¹¹⁷ Art. 11 and 12 of the AIA.

¹¹⁸ de Hert and Lazcoz (n 90), p. 38.

with the principles set in article 5 of the General Data Protection Regulation¹¹⁹ (hereinafter referred to as the ‘GDPR’). Here again, what may seem as the last *and* least principle among those governing data protection is actually – again – an overarching principle linked to the others listed in article 5 of the GDPR, namely lawfulness, fairness and transparency, purpose limitation, data minimization, accuracy, storage limitation, integrity, and confidentiality, allowing for a process-oriented demonstration of compliance.¹²⁰

In conclusion, although the AIA has not entered into force yet, providers of *all* (emphasis added) AI systems should not turn to AI ethics or ‘ethics’ broadly speaking, but to the principle of accountability to develop their AI systems. To provide further corroboration, consider how, pending the AIA approval in the trialogue, the European Parliament proposed an amendment to the original legislative text as to include *ex novo* Article 4 a, indexed as “*General principles applicable to all AI systems*”, which reports at paragraph 2 from a) to f) the seemingly ethical guidelines for Trustworthy AI.¹²¹ However, such attempt to revive the HLEG’s Ethics Guidelines shall not be interpreted as an exemption from adequate risk-management for non-high-risk AI systems. On the contrary, the expected ‘best effort’ shall be interpreted as an accountability measure to ensure the adoption of the highest possible standards for risk management, considering the state-of-the-art technological solutions and the requirements laid down in the AIA, regardless of the formal classification of risk.

As such, the assessment of compliance with the requirements for Trustworthy AI is exempt from any evaluation of an ‘ethical’ nature but is to be carried out from a perspective of risk regulation.¹²² A comprehensive risk assessment for AI systems would consist in identifying and estimating the likelihood of risks occurring, analyzing

¹¹⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

¹²⁰ de Hert and Lazcoz (n 90), p. 38.

¹²¹ Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html, accessed 25 November 2023.

¹²² Kaminski (n 78).

their potential impact, carrying out trade-offs, followed by implementing risk management actions to mitigate their effects on society.¹²³

5. Accountability: a common language for AI regulation

AI regulation is essentially a matter of social risk acceptability:¹²⁴ to determine what is seen as acceptable¹²⁵ requires making tensions and trade-offs explicit and subject to interrogation, demonstration, debate, and justification,¹²⁶ and such a regulatory action speaks the language of accountability¹²⁷, which ultimately contributes to the societal trust in the technology.¹²⁸

To achieve this objective, the United States is also actively working towards establishing a culture of efficient risk management as part of its overall approach to AI regulation. The National Institute of Standards and Technology (NIST) has developed the AI Risk Management Framework (referred to as 'AI RMF')¹²⁹, which approaches risk management in the context of AI through the perspective of enterprise risk management. Devised based on the NIST's Cybersecurity Framework of 2014¹³⁰, the AI RMF will consist of a Core and Profiles, where companies will use the Core to identify desired outcomes and techniques, select a risk-management Profile, and operationalize risk management by adopting suitable practices based on their preferences. However, unlike the European centralized top-down and precautionary approach, the AI RMF is to be regarded as soft law, i.e. mandatory

¹²³ Christoph Lütge and others, 'On a Risk-Based Assessment Approach to AI Ethics Governance', IEAI White Paper (2022), p. 1.

¹²⁴ Simone Borsci and others, 'Embedding Artificial Intelligence in Society: Looking beyond the EU AI Master Plan Using the Culture Cycle' (2022) AI & SOCIETY <<https://doi.org/10.1007/s00146-021-01383-x>> accessed 23 January 2023.

¹²⁵ See generally Bridget Hutter, 'The Attractions of Risk-Based Regulation: Accounting for the Emergence of Risk Ideas in Regulation' (2005).

¹²⁶ See the definition provided by the ALTAI (n 98). See also Francesco Gualdi and Antonio Cordella, 'Artificial Intelligence and Decision-Making: The Question of Accountability' (2021) <<http://hdl.handle.net/10125/70894>> accessed 12 August 2022.

¹²⁷ See, e.g., Kirsten Martin, 'Ethical Implications and Accountability of Algorithms' (2019) 160 Journal of Business Ethics 835 <<https://doi.org/10.1007/s10551-018-3921-3>> accessed 12 August 2022.

¹²⁸ Laux, Wachter and Mittelstadt (n 95).

¹²⁹ U.S. Department of Commerce, National Institute of Standards and Technology (NIST), Artificial Intelligence Risk Management Framework (AI RMF 1.0), 2023, available at: <https://www.nist.gov/itl/ai-risk-management-framework> accessed 13 July 2023.

¹³⁰ See the 2018 version 1.1 NIST Framework for Improving Critical Infrastructure Cybersecurity, available at: <https://nvlpubs.nist.gov/nistpubs/CSWP/NIST.CSWP.04162018.pdf> accessed 13 July 2023.

guidance on risk mitigation strategies.¹³¹ It nonetheless contemplates AI risk categorization and the adoption of technical and organizational measures for risk mitigation throughout the lifecycle of an AI system, and thus highlights the importance for organizations to establish and maintain appropriate accountability mechanisms, defining roles, responsibilities, and incentive structure for an effective risk-management framework.¹³²

The aforementioned ‘accountability language’ is also spoken by the US proposed Algorithmic Accountability Act (hereinafter ‘AAA’). The self-explanatory title of the bill, first introduced in the US Congress in 2019, then revised in 2022,¹³³ can be seen as an indication that policymakers in the US are increasingly aware of the importance of the principle of accountability in AI regulation. More specifically, the US policymaker is concerned with regulating ‘critical decision processes’ involving algorithmic systems that may have a significant legal or material effect primarily on consumers: this is one major difference compared to the EU’s AIA, which regulates AI systems in general.¹³⁴

If passed into law, the Act would require covered entities,¹³⁵ i.e. large companies deploying automated decision systems or augmented critical decision processes, to carry out impact assessments of their AI systems on a range of factors, including bias, fairness, and privacy. As mentioned above, impact assessments are but one tool from the regulatory toolkit provided by the principle of accountability, plus there are various models on how to carry out an algorithmic impact assessment¹³⁶. Nonetheless, the impact assessment model of the AAA resembles that of a collaborative

¹³¹ Kaminski (n 78).

¹³² AI RMF (n 130), p. 9.

¹³³ The Algorithmic Accountability Act was introduced by senators Ron Wyden, Cory Booker, and representative Yvette Clarke, with the goal of setting transparency and oversight for automated decision-making systems that affects mainly consumers. <<https://www.wyden.senate.gov/news/press-releases/wyden-booker-and-clarke-introduce-algorithmic-accountability-act-of-2022-to-require-new-transparency-and-accountability-for-automated-decision-systems>> accessed 5 May 2023. An important feature, which stresses the consumer protection purpose of the Act, is contained in Section 9, where it is stated that a violation of the Act or a regulation promulgated thereunder shall be treated as a violation of a rule defining an unfair or deceptive act or practice under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

¹³⁴ Jakob Mökander and others, ‘The US Algorithmic Accountability Act of 2022 vs. The EU Artificial Intelligence Act: What Can They Learn from Each Other?’ (2022) *Minds and Machines* <<https://doi.org/10.1007/s11023-022-09612-y>> accessed 21 November 2022.

¹³⁵ AAA, Sec. (2)(7).

¹³⁶ For a thorough study on capabilities and limitations of various algorithmic impact assessment models see Andrew D Selbst, ‘An Institutional View of Algorithmic Impact Assessments’, 35 *HARV. J.L. & TECH.* 117 (2021).

governance approach, similar to the GDPR, consisting of both a top-down action under the Federal Trade Commission's ('FTC') regulatory oversight and internal organizational compliance culture.¹³⁷ The requirements for such impact assessment are contained in eleven paragraphs,¹³⁸ the thorough analysis of which would go beyond the scope of this article. Nonetheless, it is worth noting that most requirements deal with specifications around its performance by the covered entities, taking into specific account the attempt to eliminate and mitigate any impact that is likely to cause a material negative impact with legal or similarly significant effects on consumers,¹³⁹ and the maintenance of relevant documentation. Moreover, the AAA requires covered entities to perform testing related to potential discriminatory impact, showing how the policymaker is concerned that the delegation of critical decision processes to private companies is oriented towards the public good.¹⁴⁰

Although the impact assessment is not overseen by regulators and thus it is not subject to public scrutiny, another accountability measure is implemented: covered entities are required to prepare and submit a summary report of the impact assessment to the FTC, which in turn is required to create a public repository containing substantial information from such summary reports.¹⁴¹

However, the AAA does not adopt a precautionary approach to AI risk categorization, prohibiting or strictly regulating conditions for high-risk AI applications, and it relies on self-assessments to be conducted by the providers themselves, as such substantially differing from the EU's AIA, which heavily relies on harmonized standards.¹⁴²

Overall, the same accountability vocabulary in terms of standardization, privacy and non-discrimination, information security measure, testing and evaluation of the

¹³⁷ Kaminski (n 78), p. 63.

¹³⁸ AAA, Sec. 3.

¹³⁹ AAA, Sec. 3(b)(1)(H).

¹⁴⁰ Furkan Gursoy, Ryan Kennedy and Ioannis Kakadiaris, 'A Critical Assessment of the Algorithmic Accountability Act of 2022' (3 March 2022) <<https://papers.ssrn.com/abstract=4193199>> accessed 13 July 2023.

¹⁴¹ AAA, Sec. 6(b).

¹⁴² Gursoy, Kennedy and Kakadiaris (n 140), p. 4-5.

model's performance, documentation, and data quality is used to describe the covered entities' requirements in Section 4 of the AAA.¹⁴³

On a more general note, it is worth noting that the OECD, besides developing its own AI principles for Trustworthy AI¹⁴⁴, has also recently proposed an accountability framework for AI risk governance and management.¹⁴⁵ It first and foremost states the need to clearly define roles and responsibilities of AI developers towards the deployers and all the possible downstream applications. The OECD accountability framework extends to all actors in the AI ecosystem, who should manage risks according to their roles, context, and following state-of-the-art practices.¹⁴⁶ This entails designing, implementing, and overseeing processes that encompass documenting AI system decisions, enabling audits, and providing adequate responses to risks and redress mechanisms.¹⁴⁷

Furthermore, it outlines the necessity to manage risks throughout the entire AI systems' lifecycle, which includes planning, designing, data collection and processing, model building and validation, deployment, operation, and monitoring. This can be performed through a four-step process, briefly reported as follows: i) Define: establishing the scope, context, actors, and criteria for evaluating AI system risks; ii) Assess: identifying, evaluating, and measuring risks to ensure the AI system functions as intended and remains trustworthy; iii) Treat: implementing appropriate techniques to prevent, mitigate, or cease identified problems; iv) Govern: ensuring continual monitoring, reviewing, documenting, communicating, and consulting on AI risk management actions and outcomes. Finally, the report emphasizes the importance of

¹⁴³ See generally AAA, Sec. 4. More particularly, at Sec. 4(a)(11), according to which covered entities are required to “[i]dentify any capabilities, tools, standards, datasets, security protocols, improvements to stakeholder engagement, or other resources that may be necessary or beneficial to improving the automated decision system, augmented critical decision process, or the impact assessment of such system or process, in areas such as— (A) performance, including accuracy, robustness, and reliability; (B) fairness, including bias and non-discrimination; (C) transparency, explainability, contestability, and opportunity for recourse; (D) privacy and security; (E) personal and public safety; (F) efficiency and timeliness; (G) cost; or (H) any other area determined appropriate by the Commission.”

¹⁴⁴ OECD (n 27).

¹⁴⁵ OECD, ‘Advancing Accountability in AI: Governing and Managing Risks throughout the Lifecycle for Trustworthy AI’, vol 349 (2023) OECD Digital Economy Papers 349 <https://www.oecd-ilibrary.org/science-and-technology/advancing-accountability-in-ai_2448f04b-en> accessed 16 August 2023. Interestingly, at the very beginning the report answers the questions of what constitutes Trustworthy AI, immediately followed by the concept of accountability in AI.

¹⁴⁶ Ibid., p. 17.

¹⁴⁷ Ibid, pp. 22-23.

instilling a culture of risk management throughout organizations and along the entire AI value chain.

As such, it is safe to consider that the OECD has to some extent provided a comprehensive taxonomy of accountability tools, which can be safely adopted by policymakers.

5.1. Accounting for possible mistranslations: the case of foundation models

Contextually to the proposed Article 4 a), following the widespread adoption of ChatGPT, released in early November 2022¹⁴⁸, along with rising concerns over the additional risks posed by generative AI,¹⁴⁹ the European Parliament has proposed amendments to specifically address foundation models,¹⁵⁰ in an attempt to counter the premature obsolescence of the AIA. Therefore, numerous references to foundation models were included, notably from Recital 60 e) to 60 h), along with Article 28 b) that imposes specific obligations to developers of foundation models. The most relevant requirement for the analysis at hand is the technical documentation related to the capabilities and limitations, the development, the testing and the validation of the foundation model that the provider must make available to the downstream developers. This is to be regarded as a risk mitigation strategy, accounting for the complex value chain of an AI system.

Nonetheless, the complexity of an AI value chain is not new, and the recent uptake of foundation model has only added an additional layer of complexity to a problem that was already well-known. The policymaker's - and more specifically the European Parliament's - introduction of additional obligations onto providers of foundation

¹⁴⁸ OpenAI, Introducing ChatGPT, available at: <https://openai.com/blog/chatgpt> accessed 25 November 2023.

¹⁴⁹ Consider, for example, how on 30 March 2023 the Italian Data Protection Authority temporarily banned ChatGPT for Italian users over privacy concerns. See Garante per la Protezione dei Dati Personali, Provvedimento n. 9870832 del 30 marzo 2023, available at: <https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9870832> accessed 25 November 2023.

¹⁵⁰ Foundation models refers to a type of AI system that is developed using extensive amount of data, designed to produce a wide variety of outputs, and capable of being customized for a wide range of downstream and more specific tasks. Large Language Models, such as GPT by OpenAI that powers ChatGPT, are a type of foundation models capable of generating text.

models is but an attempt to solve the so-called ‘many hands problem’,¹⁵¹ which refers broadly to the challenge of attributing responsibility in complex organizational settings where many individuals contribute to decisions and outcomes, making it difficult to pinpoint who is accountable. The additional obligations set in Article 28 b) are meant to solve the ‘many hands problem’ by establishing a clear framework of roles and responsibilities along the actors involved in the AI system’s value chain as to include the developers of the foundation model, who would stand at the very beginning of the development pipeline.

However, this apparently noble attempt may end up causing a backlash effect by exposing the EU regulatory approach to AI to the ‘pacing problem’,¹⁵² while at the same time undermining the normative force of the very same principles of Trustworthiness it aims to enforce. On the one hand, specific provisions covering foundation models may be a suitable regulatory response to the societal concerns about generative AI, but they might only offer a temporary relief for a permanent problem. Foundation models are just the frontier technology; but if the AIA is expected to be the frontier regulation, it must keep the pace of innovation beyond “the law of the horse”,¹⁵³ or the law of foundation models in Article 28 b) of the AIA. On the other hand, the return to general principles of Trustworthy AI envisioned in Article 4 a) may indeed constitute a permanent solution to yet emerging problems, but only if interpreted through the lenses of accountability, as argued *supra*. Failing in doing so would not only lead to redundant regulatory provisions but would also practically diminish the normative capability of such principles for a future-proof and resilient regulation of technology.¹⁵⁴

The central conflict lies in the yet-to-be-achieved balance between principle-based regulation and rule-based regulation for AI risk management.¹⁵⁵ While the latter is

¹⁵¹ Nissenbaum (n 80).

¹⁵² See generally Gary E Marchant, ‘The Growing Gap Between Emerging Technologies and the Law’ in Gary E Marchant, Braden R Allenby and Joseph R Herkert (eds), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight: The Pacing Problem* (Springer Netherlands 2011) <https://doi.org/10.1007/978-94-007-1356-7_2> accessed 26 November 2023.

¹⁵³ Frank H Easterbrook, ‘Cyberspace and the Law of the Horse’ (1996) The University of Chicago Legal Forum.

¹⁵⁴ Gary E Marchant and Yvonne A Stevens, ‘Resilience: A New Tool in the Risk Governance Toolbox for Emerging Technologies’ (2017) 51 U.C. DAVIS L. REV. 2.

¹⁵⁵ See generally Ruth B Carter and Gary E Marchant, ‘Principles-Based Regulation and Emerging Technology’ in Gary E Marchant, Braden R Allenby and Joseph R Herkert (eds), *The Growing Gap Between Emerging Technologies*

criticized for stifling innovation by allegedly imposing excessive compliance costs and burdens, which has led to France, Germany, and Italy advocating for self-regulation through codes of conduct for providers of foundation models,¹⁵⁶ the former requires clearer interpretation to guarantee enforcement. This situation can be seen as a case of evident mistranslation, revealing the potential shortcomings of an accountability-based regulation. If not properly understood by the policymakers themselves, it could lead the AI regulation towards one of the extremes: either inserting redundant provisions for any last-minute piece of technology or reverting to the same ‘ethics washing’ approach that was thought to have been lost in translation once and for all.

6. Conclusive remarks

In conclusion, the previous analysis illustrated the evolution of AI regulation, with a particular focus on the European Union's approach to AI ethics and the transition to the principle of accountability. The EU's AI Ethics Guidelines, developed by the HLEG, have served as a foundation for ethical and trustworthy AI development and deployment within the European Union. However, the paper has highlighted the shortcomings of these guidelines when applied as regulatory tools, leading to possible phenomena of ‘ethics washing’. Therefore, it exposes the need for a more robust and legally enforceable approach.

The discussion of the proposed Artificial Intelligence Act has illustrated how the seemingly ‘ethical’ principles from the Ethics Guidelines are translated into requirements for high-risk AI systems under the AIA, reflecting the underlying need for accountability. The principle of accountability emerged as a common language for AI regulation, contributing to societal trust in technology and serving as a foundation for regulatory frameworks around the world. On the same wavelength, in the context of the US-proposed Algorithmic Accountability Act and the AI RMF, we have demonstrated that the same accountability vocabulary is used to describe the

and Legal-Ethical Oversight: The Pacing Problem (Springer Netherlands 2011) <https://doi.org/10.1007/978-94-007-1356-7_10> accessed 26 November 2023.

¹⁵⁶ Andreas Rinke, ‘Exclusive: Germany, France and Italy reach agreement on future AI regulation’ (Reuters, 20 November 2023), available at: <https://www.reuters.com/technology/germany-france-italy-reach-agreement-future-ai-regulation-2023-11-18/> accessed 25 November 2023.

requirements for covered entities, emphasizing the importance of the principle of accountability in AI regulation, both in the US and the EU.

Ultimately, we argued that “*Trustworthy AI depends upon accountability*”.¹⁵⁷ AI providers should focus on the principle of accountability to develop their AI systems, accounting for the highest possible standards for risk mitigation measures, in line with what is already established in the field of personal data protection. The Ethics Guidelines may have provided a common global consensus on AI governance, but due to its lack of enforcement mechanisms, the strictly ‘ethical’ approach got lost in translation from AI governance to AI regulation. Arguably it is the principle of accountability that provides a common language, both in the EU and the US, which translates the need for transparency, fairness, explainability, and human oversight into practical technical requirements.

Where the Ethics Guidelines fell short, accountability bridges the gap between the abstract ‘ethical’ principles for trustworthy, *rectius* responsible, AI and the regulatory framework by providing the necessary implementation mechanism that guarantees compliance, oversight, monitoring, verification, and documentation of the AI system’s development.

¹⁵⁷ Directly quoted from the AI RMF (n 130), p. 15.

INTRODUCTION

Ignazio Castellucci¹

*"There is no dark side
of the moon really.
Matter of fact
it's all dark."*

(Pink Floyd, *Eclipse*)

Is law inherently good, reasonable, just?

Has it always been associated with positive values in all cultures, at all times? Has it always had that distinctive flavour of soundness/seriousness that we commonly associate with all things legal?

1. The *Juris Diversitas* 7th International Conference, based in Catania (Italy), was held as an online event on 9-11 June 2021, after rescheduling the event originally planned for 2020 due to the Covid pandemic.

Almost needless to say, the Conference title is inspired by Pink Floyd's milestone album of 1973: the executive Committee of *Juris Diversitas* realised, during a meeting held in Lausanne in 2019, how big has been the impact of that record on rock culture and language, and on pop culture at large.

A result reached through a synthesis amongst psychedelic pulsions, present in Pink Floyd's early recordings, together with more structured rock patterns of the 1970s, plus unusual additions to the musical discourse (like the sounds of cash registers, pendulum clocks, home conversations, airport announcements, laughs), sound power, and pure beauty.

¹ Associate Professor of Comparative Law, University of Teramo (Italy); Vice-President, *Juris Diversitas*.

The lyrics of the album's tracks, on the other side, revealed the dismaying feeling of finding oneself different from self-produced descriptions, for external or internal causes revealing our own dark side.

A synthesis which could be enjoyed in a reverse-engineered fashion as well – de-composed like a ray of light through a prism, producing a spectrum of colours, in which individual elements of the whole are singularly visible.

Too interesting, not to make it a *Juris Diversitas* event.

The Conference organisers, thus, envisioned a journey across the entire spectrum of uncommon legal epiphanies, seeking instances when the law has been or was believed to be evil, odd, bizarre, fantastic or absurd, ridiculous, esoteric, psychoactive or psychotrope – exploring the dark side of the law in time and space, to observe its many hidden facets (as underlined by Moustaira in her paper, presented in this collection).

Developing the idea has been thrilling, and organising the event has been exciting. The results have been rewarding: the papers collected in this special issue of *Opinio Juris in Comparatione* – for which we at *Juris Diversitas* are grateful² – cover a wide range of uncommon observations on legal phenomena, as well as uncommon laws, and their perhaps not-so-uncommon legal effects.

2. One thing we learned from this journey is that law can be very effective – besides some of its regulatory and securitarian aspects, and much beyond its protective function of public morals and community-building – as a respectable form of brainwashing, and of excersising body and brain control (papers of Chaibou Dan Inna, Vahabava), ranging from the soft suasive power of religious, social, political or affective networks, to legal sanctions from organised human wrath or from the State (Berkmann, Sabatino), to sheer terror (Didier).

² I cannot but publicly express *Juris Diversitas*' gratitude, an my personal one, to the Journal, to its Editor-in-Chief Prof. Giovanni Comandè, and to Dr. Eleftheria Ntanou for her professional, careful, very patient editing work.

The bad news is that each of us may at some junction in life find her/himself in the deviant's shoes, vis-à-vis the law, whether for reasons of substantive behaviour, for purely procedural reasons, or, perhaps, for no reason at all – as in a Kafkian plot, without entirely understanding the origins of our unexpected misery:

*"The lunatic is in my head
You raise the blade, you make the change
You re-arrange me 'til I'm sane.
You lock the door
And throw away the key
There's someone in my head but it's not me."*

(Brain Damage)

Good news are, of course, normally associated with the classic, respectable role and functionality of the law, including the provision of justice, of course, and even of remedies for miscarriages of justice. However, we still have to face the sometimes problematic functionality (Vanni) of those forms of redress; or the painful stretching exercise of lawyers' cognitive capabilities, usually needed when traditionally non-legal skills enter the picture for the purpose of understanding and enforcing the law (Tassone, Rigazio).

A quick search on the web will reveal the existence of a significant amount of legal literature dealing with these dark sides of ours, with a number of relatively successful published collections of weird, absurd, dumb, funny, unusual laws – reality can, of course, be much more interesting, in this respect, than the also existing 'fake dumb laws', or legal urban myths.

Thus, revealing, both with fake and with real 'dumb laws', how deeply convinced are we the lawyers, that the law reproduces, and at the same time reveals, our public virtues as well as our private weaknesses: as we browse through the search engine output, we cannot avoid a nervous giggle, due to the fact of our dark side having been exposed.

Despite the light tone, that literary genre satisfies a deep need of us, to exorcise that uncomfortable feeling, and to legally wash away our weaknesses or faults – ever-present, if covert and often not (entirely) known:

*"I've always been mad, I know I've been mad, like the
most of us...very hard to explain why you're mad, even if you're not mad..."*

(Speak to Me)

3. The papers presented here have been ordered according to a spectrum of sorts, ranging from more general, ariose observations about the law, to more technical analyses of specific legal phenomena.

We are much indebted, of course, to each and every one of the Conference presenters.

Each of them, with their differences in geographic, cultural and legal backgrounds, in approach to the topics dealt with, in their level of experience in legal research – ranging from mature analyses of seasoned researchers, to fresh products of younger colleagues – being truly unique, and in their own way inspirational. Each of them uniquely contributed to the success of the event, like different instruments playing together in a symphony.

We are confident that the Journal readers will be able to enjoy this collection, and perhaps extract some lessons from this or that individual paper, or from the *ensemble*. Those would be self-taught lessons, ultimately: the papers just being stimuli for reflection on our communities and selves, as lawyers, and humans.

THE [MANY] FACETS OF LAW

Elina N. Moustaira*

Abstract

Does Law lead always to Justice? Are there more facets of justice? Law is reflecting each human community's values, is trying to resolve the particular issues that might arise – different issues, different mentalities, different solutions. Is it always so clear? Law protects and Law forbids. Each community's Law is supposed to defend community's members' interests. Is that accurate? And who would be those members? Law is reflecting Culture, Law is [Legal] Culture. Law was and is created by each community's members, Law was imposed by conquerors, Law is imposed by international lenders, Law is often the product of many and various influences. Justice should prevail, it is said, it was always said. What sort of justice was sought, when European colonizers had imposed Black Codes to the peoples in the lands that they had conquered? What sort of justice is sought, when countries demand that other countries copy, transplant their laws? In the name of which justice, decisions are taken about attacking countries and their people? Is there a good and a bad Law? And who would be the judge of it? Should one Law prevail over all the other Laws? Legal hegemonism is at the threshold, if not already in the house...

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Keywords

Colonialism - Code Noir - Justice - Legal Culture - Legal Transplants - Dignity

1. Facts – Reasons – Excuses

Communities of people, in all times, made law, used law, exploited law. There is no community of people without some kind of law, as it has been pointed out.

Countries, especially when willing to become empires, try to legitimize their acts by laws and legal concepts especially created to that aim. Economic powers of today, follow the same path. Law is/should be reflecting the mentality and the specific characteristics of each human community, of each State, we, comparativists, point out. Probably (or obviously) this is of no concern for the power holders.

Is law just? Can law be cruel? Who will be the judge of it? Can rulers of one country intervene in the affairs (and the law) of another country? How did they do it in the past, how do they do it today? May they claim legal concepts in the name of which they could order another country to change its law, presumably “unjust”?

2. Colonial Past

How did conquerors use the law in their favor? Law which was far from what could have been meant as justice. It is not feasible to speak about all the colonizers and all

the facts that would answer to that question, so it is unavoidable to focus on a few, very clear, examples.

How did the British behave towards people in conquered [or “acquired”, to use an euphemism] lands? Let’s see some details concerning the use of law in Ireland and India. *Divide et impera*, a politics of difference and subordination, was always the way.

In 1541, the Irish Parliament passed a statute declaring Henry VIII to be king of all Ireland and the Irish his legal subjects¹. Intermarriage was forbidden – as was learning the Irish language or adopting Irish modes of dress. End of 16th – beginning of 17th century English Protestants founded large “plantations” in Ireland. Settlers from England, Wales, or Scotland became tenants on these large plantations. The government and the Protestant Elite claimed that these plantations would enhance agricultural production and would civilize(!) the Irish as Roman colonization had civilized the Britons.

Their aim, at putting English or Scottish settlers on the land was that Ireland’s Catholics would not anymore have rights or attachment to land². During all time of Elizabeth’s reign, native Irish landlords resisted to those plans about their lands and to the introduction of judicial officers as representatives of the legal order. That resistance, as it is pointed out, revealed an operative gap between theory and practice and between two legal concepts: *dominium*, in the sense of “possession” and *imperium*, or “sovereignty”.

According to the English Crown’s theory, it [the English Crown] had a claim to *dominium* through conquest. It had no *imperium*, though, in most parts of the island. The process of colonization chose a harsh solution, in order to diminish the gap between the two: it adjusted *dominium*, through a process of confiscation and redistribution. Ownership of the land was reinvested in the Crown and afterwards

¹ B. Cormack, *A Power to Do Justice. Jurisdiction, English Literature, and the Rise of Common Law, 1509-1625* (The University of Chicago Press 2007) 136.

² J. Burbank/F. Cooper, *Empires in World History. Power and the Politics of Difference* (Princeton University Press 2010) 171.

“by charter grant in New English settlers, who would carry English justice and sovereignty with them as part and parcel of their tenures”.³

English common law intended to replace Gaelic, Brehon law. *Convenience* was the critical term, a term borrowed from the sphere of judicial interpretation⁴, a term (and its connotations – and misunderstandings) that would be steadily used, directly or indirectly, by the judiciary in all colonies of England, in order to not be convinced about the existence of a local rule and to fill the “void” with a common law rule. This was very clearly represented in the work *The Faerie Queene*, of Edmund Spenser, himself too an undertaker in the first Munster plantation (1585-98) and a minor official in the Irish colonial government.

This was law. Was that justice? Or just a “coercive violence of interpretation that erase[d] the force of alternative jurisdictions”⁵?

Legal concepts were used – then and always – to give a foundation to the conquerors’ aims. Interpretations were adapted to the conquerors’ interests. In the above case – as in other cases too – theory was in the service of the Crown.

India is perhaps the saddest example of how colonialism contributed to the presentation of cultures and legal cultures of colonized people, in a distorted way – or in a simplistic, far from the truth, narrative. An example of this, was that the British magnified the problem of caste hierarchy in India, following various methods/ways. When Governor-General was Warren Hastings, he hired eleven pandits (Brahmin scholars) to create what became known as the Code of Gentoo Laws or the Ordinations of the Pandits. The British could not read or interpret the ancient Sanskrit texts, thus they could not check the accuracy of the work of their Brahmin advisers. The result, as it is pointed out, was an ‘Anglo-Brahminical’ text that was rather imprecise in regard to the originals, and that gave the possibility to the pandits

³ B. Cormack, ob.cit., 137.

⁴ B. Cormack, ob.cit., 174.

⁵ B. Cormack, ob.cit., 176.

to favour their own caste, “by interpreting and even creating sacrosanct ‘customs’ that in fact had no shastric authority”.⁶

Theory was also in the service of the European (and later American too) expansion, as Mattei and Nader have pointed out, in their book *“Plunder: When the Rule of Law is Illegal”*. John Locke in England (1698) and Emerich de Vattel in Switzerland (1797) articulated plunder by means of law: “As much land as man tills, plants, improves, cultivates and can use” and the idea of “terra nullius”,⁷ lands which presumably belong to no one and thus can be allocated to the powers that be.⁸

3. Variations on a theme

Were all [European] colonizers’ attitudes the same, towards the conquered people and their laws? No, several scholars answer. For example, it is stated by certain scholars that there was a strong legal presence of indigenous peoples in Spanish America, while in British America there was a relative legal absence of them. Still, when one reads, for example, that in 1558, Jesuit Manuel da Nóbrega had written in a letter that in Brazil people (obviously, the colonizers) thought “that the Indians did not have full rights before the law because, lacking a soul, they were not fully human”⁹, one is not really convinced about the truth of the above statement.

It is also claimed that the French followed a policy of cultural assimilation, so that, for example, children in Senegal or Vietnam learned to recite “nos ancêtres les Gaulois”.

Still, the following example does not really verify the above claim: when Algeria was occupied by the French, on July 5, 1830, there was an intense administrative activity,

⁶ S. Tharoor, *Inglorious Empire. What the British Did in India* (Hurst & Company 2017) 106.

⁷ U. Mattei and L. Nader, *Plunder: When the Rule of Law is Illegal* (Blackwell 2008) 67.

⁸ L. Nader, *Culture and Dignity. Dialogues Between the Middle East and the West* (Wiley-Blackwell 2013) 220.

⁹ B.P. Owensby and R.J. Ross, ‘Making Law Intelligible in Comparative Context’ in: B.P. Owensby and R.J. Ross (eds) *Justice in a New World. Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* (New York University Press 2018) 1, 6.

which culminated in a massive dispossession of property rights of the city habitants. The colonial jurists who wrote about that, insisted on the hypothetical need of the French authorities of that time, to diminish the big difference between the two legal regimes. However, documents not fully explored about this perspective, show that the real reason were the conflicts about the property and the conditions for its access, following the conquest.¹⁰

On the other hand, the British had a particular talent for ... drawing ethnically-based administrative lines in all their colonies. People in colonized countries were always subjects, never citizens. Law can form and transform.

But there were also the slaves – mostly people from Africa, transferred to the American Continent by the respective colonizers. And there were codes... created for the slaves, who were considered less than persons...

In Barbados, an English colony, in 1643, there were 18,600 white colonists and 6,400 African slaves. In 1680, of the total population on the island of around 60,000, almost 39,000 were African slaves. Those slaves were mostly the property of the largest 175 sugar planters, who also owned most of the land. The powerful - and owners of the slaves – planters could do whatever they wanted (obviously and sadly, buy and sell slaves) since of the forty judges and justices of the peace on the island, twenty-nine of them were large planters.¹¹

In 1661, the Barbadian Assembly passed the first comprehensive slave code in the English Americas, to 'better manage its profitable but unruly slave society'. The title of the Act was 'An Act for the better ordering and governing of Negroes'. Among its rules, was one that stipulated (clause 2) that if a slave ran away or misbehaved, he was to be 'severely whipped, his nose slit and bee burned in the face'.¹²

¹⁰ I. Grangaud, 'Le droit colonial au service des spoliations à Alger dans les années 1830' in : A. Bouchène/ J.P. Peyroulou/O. Siari Tengour/S. Thénault (eds) *Histoire de l'Algérie à la période coloniale (1830-1962)* (Editions La Découverte, Paris and Editions Barzakh, Alger 2012) 70.

¹¹ D. Acemoglu/J.A. Robinson, *Why Nations Fail. The Origins of Power, Prosperity and Poverty* (Profile Books 2012) 75.

¹² J. Collins, 'English Societal Laws as the Origins of the Comprehensive Slave Laws of the British West Indies' in: W. Eves/J. Hudson/I. Ivarsen/S.B. White (eds) *Common Law, Civil Law, and*

And there was the infamous French *Code Noir*, first promulgated by Louis XIV for his possessions in the Antilles. It was “one of the most infamous and important codes in the history of French codes”, says Vernon Palmer, who accurately points out that the *Code* “should be regarded as a sociological portrait, for no legislation better revealed the belief system of European society including its fears, values and moral blindspots”.¹³

Facts and law[s] were interpreted in ways that could and would “legitimize” the unjust behaviour of the colonizers or/and would award with more power, more lands, the winners of wars, presenting them as saviors.

That is what happened in Paris Conference of 1919 too, following the end of the WW1. The mandates and the League of Nations “injected new subtleties into notions of sovereignty and expanded ideas of the responsibility of “civilized” powers developed at earlier conferences”. Later, and in retrospect, they spoke about those changes as steps toward the dissolution of empires. At that time, though, those changes helped make the territories of some empires much bigger (the British empire alone acquired a million square miles), “enforced the legitimacy of administering “dependent” peoples and reaffirmed that not all polities were equivalent in international law and practice”¹⁴.

4. Colonial Present

Are systems of colonial rule and economic exploitation, a thing of the past?

Nietzsche, in *The Genealogy of Morals*, sought to demonstrate how modern moral values are based on truth claims that in reality obscure the truth, “distort the relationships between causes and effects”.

Colonial Law. Essays in Comparative Legal History from the Twelfth to the Twentieth Centuries (Cambridge University Press 2021) 305, 307, 319.

¹³ V.V. Palmer, *Through the Codes Darkly. Slave Law and Civil Law in Louisiana* (The Law Exchange, Ltd. 2012) 3.

¹⁴ J. Burbank and F. Cooper, *Empires in World History. Power and the Politics of Difference* (Princeton University Press 2010) 386.

In an about similar way, Gregory, in *The Colonial Present*, argues that the dominant discourse of counter-terrorism is founded on a narrative according to which the terrorist was the cause of violent counter-insurgency. Following this discourse, and mostly because of this, “the complex and overlapping histories of imperial interests that produced such acts of violence are effaced”.¹⁵

Law can be used by rulers, be it States, be it Empires, as a means to expand, to weaken rivals, to liberate, to subjugate, to fortify itself, to fortify its economy, to fortify its citizens. Law can be mobilized in various causes. It can be mobilized by multiple actors, in their own, often opposed to each other, interests. Institutionalization of law has offered in the past – and it can always offer – opportunities both to rule makers and to rule users. Legal pluralism in the former empires, often meant something more complicated (even darker) than recognition of more sources of law. More than one legal fora were connected to local practices and legitimated by a superior authority. As it is mentioned, “[c]oexistence of multiple sources of law (customary, religious, of a prior polity, devolved authorities, the emperor, etc.) combined with a multiplicity of instances for obtaining legal decisions meant that justice was not just a moving target but a many-centered one in any empire.”¹⁶

The same could be observed today. Law can be mobilized by multiple actors, in various causes. Different legal systems, all created and formed on the bases of various influences, either desired or imposed, mobilize law according to the aimed results. Comparativists can easier than other scholars understand why and how that happens. They can – or should be able to – see the obvious and the less obvious, in legal system, having in mind the respective sources of law and the permitted modes of law’s interpretation.

The administration of justice must serve the interests of society, it is said. This was always said, though. But the interests of society were and are considered differently, in various times and various places. Is there a unique way to interpret the law? Comparativists would obviously say no, since there are many and different laws in the

¹⁵ S. Morton, ‘Violence, Law, and Justice in the Colonial Present’ in: G. Huggan (ed) *The Oxford Handbook of Postcolonial Studies* (Oxford University Press 2013) 179.

¹⁶ J. Burbank and F. Cooper, ‘Rules of Law, Politics of Empire’ in: L. Benton and R.J. Ross (eds) *Legal Pluralism and Empires, 1500-1850* (New York University Press 2013) 279, 281.

world, and for a reason – or reasons. Law is not only the written one, so for a comparativist the exclamation of Napoleon, when confronted with commentaries on his civil code, “Mon code est perdu”,¹⁷ would only be an element to study in order to understand the legal mentality of France, at the beginning of the 19th century; in order also to understand the reasons for the French civil code’s “expansion”, influence on other civil codes of the world. A comparativist knows that there are more reasons for all influences (copying, reception, transplanting of laws) than the obvious. Often the non-obvious reasons are much more important. Politics is the word.

5. [The real] Cause of legal transplants: Is it prestige or is it [covered] imposition?

It is often argued that law, in many legal systems, was the result of legal borrowing, of legal transplants· that the “logic” of these transplants was formed, defined by elites of jurists, competing each other. Monateri insists that those jurists were seeking a certain legitimation – both of the rule(s) that were adopted from another law and of themselves, proposing that adoption. He argues that in such cases of “competition” among jurists who are seeking a primary role in a procedure of law creation, there is a “basic strategy”, consisting in finding legal solutions, in order to “cover cases” that they had not handled in the past.

If the “internal” sources do not cover certain cases, basic strategy imposes to jurists to find authorities in the “external” space and to borrow solutions from them. This borrowing, transplanting, is easier to be accepted, if it is being done from a law from which other laws too have borrowed rules. As Monateri convincingly argues, the best strategy for a legal transplantation is “ideology and propaganda”. That means that the elites of jurists must be convinced that the offered model meets their expectations.¹⁸

Often, the strategies followed by those seeking to transplant foreign rules and those “representing” the law/rules which might be transplanted, are absolutely competitive between each other. This has been obvious in cases such as the ones of States which

¹⁷ G. Corstens, *Understanding the Rule of Law* (Hart Publishing/Bloomsbury 2017) 41.

¹⁸ P.G. Monateri, ‘Methods in comparative law: an intellectual overview’ in: P.G. Monateri (ed) *Methods of Comparative Law* (Edward Elgar 2012) 7, 20.

transplant rules of Western legal mentality, in order to fortify themselves politicoeconomically and to compete Western States on that level.

That happened, for example, in Japan, at the end of the 19th century and that happens actually in China. That is mainly the reason why members of societies of other parts of the world (Africa, Asia) study in Western States. They believe that this way they will be able to face the political and economic aspirations in their countries, often former colonies, by the citizens of the Western States.

As it is very accurately pointed out, the reason that is often put forth for such a legal transplantation, is the desire for modernization. It can happen, though, that the meaning that people attribute to modernization is different than the meaning that an external observer attributes to it. It often happens too, that modernization means negation of the people's traditions. This fact, it is argued, plants a sense of guiltiness in the people's hearts, originated in the "sin" of not being one contemporary. This complex of modernization may create a vicious circle that often can explain the weird attitude of a society's members.¹⁹

This is, in essence, a case of a "ceaseless discursive warfare"²⁰ between antagonistic groups of different legal cultures. And it is the duty of the comparative law to see that and to comprehend the consequences that will be imprinted in the law of the concerned borrowing State.

6. Law protects dignity

Many countries' laws protect ethnic and racial groups from threatening, abusive, or insulting publications calculated to bring them into public contempt. There are exceptions, though.

¹⁹ T. Tanase, 'The Empty Space of the Modern in Japanese Law Discourse' in: D. Nelken and J. Feest (eds) *Adapting Legal Cultures* (Hart Publishing 2001) 187.

²⁰ F. Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism* (Duke University Press 1991) 397.

In USA there is a Constitutional debate about the Freedom-versus-dignity dilemma. Law may also protect dignity by prohibiting invidious discrimination. This has been proved very important in South African and Canadian jurisprudence.²¹

Law should be just, says Waldron. “Naturally the law should be just”, says Gardner, “but it should also be honest, humane, considerate, charitable, courageous, prudent, temperate, trustworthy, and so on ...”²²

People treat certain concepts as identifying a value or disvalue but disagree about how that value should be characterized or identified, Dworkin argued. The concept of justice is one of those concepts. People agree that this is a value, but they do not agree about its precise character. People do not agree about what makes an act just or unjust, right or wrong.²³ And this is most obvious when one studies (and compares) many and different legal systems. So, are moral concepts interpretive concepts, as Dworkin claimed?

7. Legal validity of laws

On what does the validity of an entire legal system rest? asks Frederick Schauer: “We know that laws are made valid by other laws, and those other laws by still other laws, and so on, until we run out of laws. But what determines the validity of the highest law? What keeps the entire structure from collapsing?”²⁴

And what about the indigenous legal systems, where there are no written laws? And what about the legal systems of the former colonies, now independent States, that have copied Western laws and at the same time have recognized directly or indirectly their indigenous peoples’ laws as equally applicable, at least at certain issues? What

²¹ J. Waldron, *Dignity, Rank, & Rights* (Oxford University Press 2012) 48.

²² J. Gardner, ‘The Virtue of Justice and the Character of Law’, (2000) *Current Legal Problems* 149, 183.

²³ R. Dworkin, *Justice for Hedgehogs* (The Belknap Press of Harvard University Press 2011) 160.

²⁴ F. Schauer, *The Force of Law* (Harvard University Press 2015) 78.

determines the validity of those legal systems? Which is their highest law and what determines its validity? If their highest law is a legal transplant of some Western law, what sort of independence is it? If the validity of those indigenous laws is determined by a legal transplant that has become the country's highest law, on what does the validity of such a legal system rest? The argument about a "freely" decided legal transplantation would not be so solid. Who decided about that? How free was such a decision?

Although one would doubt whether Schauer considers "the rule systems" of "indigenous tribes" as law, Schauer himself would cast doubt on that doubt, since he declares: "Accordingly, we may again learn more by observing just how much nonstate organizations betake of law, or simply *are* law, than assuming too quickly that they are not".²⁵

Law has many facets. The conversation between law and justice is still on the road. And the road, probably, has no end...

²⁵ F. Schauer, *ob.cit.*,163.

CONSTRUCTING A LEGAL CULTURE FOR THE GLOBAL AGE:

A Machiavellian and Ramist approach

Joseph P. Garske^{*}

Abstract

In a time of twenty-first century technological advance and globalization, the events of what historians call *The Renaissance* and *The Reformation* seem distantly in the past, no longer relevant. It is easy to forget, however, that the fifteenth and sixteenth centuries were also a time of world exploration and technological transformation; sometimes called the first globalization.

Like the world of the twenty-first century, the fifteenth and sixteenth centuries were a time when new methods of law converged with new aggregations of wealth to establish new and more expansive mechanisms of governance. Perhaps most of all, it was a time when human experience began a transition in learning, and finally, to a fixed structuring of what is called the *modern* mind.

These changes that took place in a confined geographic region of the historic past now include all regions and all peoples of the Earth. The twenty-first century is also an age of concentrated wealth, an expanding atmosphere of law, and a time when the mind of a global public is being redirected from a *modern* to a *postmodern* way of understanding.

The purpose of this paper is to show historic parallels in a way that might provide useful insight for the present-day global project. The emphasis will be on two pivotal figures, Niccolo Machiavelli and Pierre de La Ramee, and how they came to provide an ethic and a mode of thought that would shape governing relations between the *praestantae*, the elite, and the *popolo minuto*, the common people.

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Keywords

Machiavelli – Ramus – Politics – Law - Knowledge

1.

What historians have come to call the *Italian Renaissance* is usually understood to be a time of artistic and literary creation, a rebirth of ancient learning, the advent of scientific experimentation, and the beginning of a technological transformation. Truly, it was all these things as any visit to modern Florence or Venice will attest. But it was also and equally a time of intrigue and subterfuge, of violent uprising, revolt, and military invasion. It saw the cruel suppression of the *popolo minuto*, the common

people, by the *praestantes*, the wealthy *elite*. It was torn by rampant corruption, political reprisal and judicial terror.¹

In fact, what is called *The Renaissance*, and its influence that spread northward to all of Christendom, erupted from a collision of several irreconcilable forces. First, because of a rediscovery of ancient Greek and Latin writings it became an incredibly fertile ground of ideas. This led, in turn, to a rebirth of philosophy--but not in the modern sense of abstract speculation and institutional academics. Instead, at that time, philosophy developed on the ancient *Stoic* pattern as a way of life, a guide to conduct in both public and private affairs.

It encouraged guidance by what came to be called a *Divine Light* that was said to permeate the universe and existed naturally in all humans. *Renaissance Philosophy* also emphasized the importance of *embodied knowledge* expanded through the mnemonic capacity of the human mind. All these teachings followed on the ancient idea of *Sensus Communis*, that if men were given opportunities for cultivation and learning, they could substantially govern themselves; religious moralizing and the authority of law would be a mere supplement. In short, these rediscovered doctrines taught by Petrarch, Ficino, and Mirandola at the *Accademia Fiorentina* emphasized the cultivation of *wisdom* and harmony of the self. Most importantly, these teachings were not confined to a few devotees. Instead, the ideas spread among the Italian cities and then, eventually, across all of Europe.²

A second major influence during *The Renaissance* was a resurgence in the importance and study of jurisprudence. There were new approaches to understanding the ancient *Corpus Juris Civilis* that departed from the scholastic tradition handed down through the universities. Certain professors and practitioners of law attained an almost celebrity status, becoming close advisors to popes, emperors, and kings. This period

¹ Kristeller, *Renaissance Thought and the Arts* (Princeton University, 1990). Martines, *Power and Imagination: City-states in Renaissance Italy* (New York: Alfred A. Knopf, 1979).

² Misa, *Leonardo to the Internet: Technology & culture from the Renaissance to the present* (Johns Hopkins University, 2011). Kallendorf, *Humanist Educational Treatises* (Harvard University, 2002). Reydam-Schils, *The Roman Stoics: Self, responsibility, affection* (University of Chicago, 2005). Hadot, *What is Ancient Philosophy?* (Harvard University, 2003) & *The Veil of Isis: An essay on the history of the idea of nature* (Harvard University, 2006). Yates, *The Art of Memory* (London: Pimlico, 2000).

of legal inventiveness and confidence also produced an astonishing number of legal treatises and provoked an equal number of juristic debates. New impetus was given to an expanding work of *Reception*, or adoption, of revised and expanded judicial codes across all of Christendom. One result was the rise of what historians call the *New Monarchies*, especially under Ferdinand and Isabella in Spain, Henry VII in England, and Louis XI in France. Their kingdoms posed a challenge to the judicial reorganization, sponsored by Emperor Maximilian I that was intended to strengthen and standardize imperial administration. As a result, the Empire mostly failed in its legal project as it came to be assailed on every side by emerging and legally aggressive republics, commonwealths, and principalities.³

The tendency to jural inventiveness was also manifest in three other dramatic ways. First was within the *Curia Romana* of the Church in what historians call the *Conciliar Movement*. This movement claimed that ultimate governance in the Church rested, not with the single personage of a Pope, but with assembled councils, or courts--a doctrine with profound implications. Along with that constitutional change at the top, a second marked development spread throughout the dioceses. It was the proliferation of ecclesiastical tribunals during a period called by historians, somewhat misleadingly, *The Inquisition*. New legal instruments and codes were employed on an unprecedented scale to ensure uniformity in religious belief and practice.⁴

However, the third, and perhaps most important legal influence during this period, was a growing, powerful, and widely dispersed merchant class. The *popolo grosso* represented a new level of opulence that had first appeared in Venice, Florence, and Genoa and had spread northward across Latin Christendom. The original Italian city-states, centers of finance and trade, had come to wield a power comparable to that of popes and emperors. In the north, various ruling princes, attracted by the potential inflow of tariff and tax, granted monopoly charters to bankers, factors, and traders. Towns, burghs, and free cities, under royal sponsorship comprised, in effect, self-

³ Gilmore, *Humanists and Jurists: Six studies in the Renaissance* (Harvard University, 1963). Radding, *The Origins of Medieval Jurisprudence* (Yale University, 1988). Maclean, *Interpretation and Meaning in The Renaissance: The case of Law* (Cambridge University, 1992).

⁴ Bellomo, *The Common Legal Past of Europe 1000-1800* (Washington, D.C.: CUP of America, 1995). Stein, *Roman Law in European History* (Cambridge University, 2004). Peters, *The Inquisition* (University of California Press, 1989).

governing urban polities. They existed independently of the general law of Christendom and were aloof from customary habits that prevailed in rural manor and village. As concentrations of population and wealth, the merchant enclaves became increasingly powerful, eventually overawing both the ecclesia and the warrior nobility.⁵

2.

But as important as these developments of philosophy and law were, there were other developments of equal importance. Especially, the ruling families of the Italian cities began to undergo a transformation after around 1450, based on three converging elements. First were rediscovered writings that provided a formula for governance based on the training of an aristocratic class. This *studia humanitatis*, as it was called, set forth in the writings of Cicero and Quintilian, outlined a course of instruction that began with the boy, continued through adolescence, and into young manhood. It taught the refinements of manner and speech combined with a bearing of *sprezzatura*, an effortless superiority. Such men, by their very person, would command respect and loyalty, even submission from others. This ancient learning, when combined with the enormous wealth of long-established commercial and familial ties, produced an aristocratic fellowship that eventually reached from Italy and Spain, up across France to the Hanseatic cities on the Baltic. The effect was to create a new and compelling basis for timocratic rule, as the merely wealthy *grosso* became the eminently refined *praesantae* of aristocratic stature.⁶

The second important element in the rise of a new order of rule was a developing alliance between the wealthy and powerful merchant families and a learned, ambitious legal caste. Both were cosmopolitan in outlook and both enjoyed great prestige as well as a certain independence from the institutions of Church and Empire. Together this combination of monetary wealth and legal knowledge created a force that would transform Italy and then move the center of historical change to Northern Europe.

⁵ Lesaffer, *European Legal History* (Cambridge University, 2009)

⁶ Maclean, *The Renaissance Notion of Woman: A study in the fortunes of scholasticism and medical science in European intellectual life* (Cambridge University, 1992). Kallendorf, *ibid.*

They left behind the period of history called *Il Rinascimento*, leading to the *Praestante Riformazione*, ultimately making possible the *modern* world. However, despite the importance of class, wealth, and learning, none of these profound changes could have taken place without the appearance of another essential catalyst of change: what were called the *Three Great Inventions*: maritime compass, gunpowder weapons, and the printing press.⁷

Improved navigation brought, exploration, increased trade, and unimaginable wealth. The new weaponry brought a decline of the old knightly warrior and the beginning of *total war*, conflict in which all levels of the population were involved. Finally, the printing press brought an availability of books, widespread literacy, and a proliferation of novel ideas. But its moveable type also provided the ability to print Bibles, law codes, and entire literatures in the various regional languages. This weakened the hierarchy of ecclesiastical and imperial rule that had been conducted exclusively in universal Latin. Factions within the legal stratum combined with an aristocratic merchant class and armed with the new technologies formed such an overwhelming force that it could not be successfully resisted.⁸

But while discrediting the old Empire and Church was relatively easy, overthrowing their universal authority, their deeply held doctrines, together with the knightly virtues of fidelity and honor would be much more difficult. Moreover, creating their replacement, conceiving and establishing a new form of rule based on aggregated wealth, entitlements of class, and the instrument of encoded law, would be even more difficult. The beginning of a solution to this problem was put forth by a man who quintessentially embodied the many converging elements of the time—ancient learning, legal training, proximity to wealth, and use of the printed word. What that man, Niccolo Machiavelli (1469-1527), advocated was not written in detached and abstract theoretical terms; such an intellectualized approach to conceiving power

⁷ Febvre, *The Coming of the Book* (London: Verso, 1997)

⁸ Eisenstein, *The Printing Revolution in Early Modern Europe* (Cambridge University, 2012). Rhodes, *The Renaissance Computer: Knowledge and technology in the first age of print* (London: Routledge, 2000)

would come later. Instead, Machiavelli understood the ultimate principle of rule to be simply the power of men over men. He set forth an *ethos* of rule.⁹

There are many ways to interpret and understand the most famous book by Machiavelli, *The Prince*. It has come down through academic study as a virtual handbook of treachery. But when read against events of the time as well as the more extensive writings by the same author, especially his *Discourse on Livy*, it becomes clear that he was attempting to resolve the chaos and violence that was convulsing all of Italy and would soon spread across all of Europe. In fact, any malevolence spelled out in *Il Principe* would be equaled or exceeded by the later writings of Calvinist, Puritan, and Hobbesian authors. Also, when the *Praestante Reformation*, the Aristocratic Reformation, moved north of the Alps in what historians now call the *Protestant Reformation*, it would result in more than a century of bloodshed. There was a large incentive for the perpetrators to shift blame for the carnage to a long-deceased Florentine. But whatever his intention or fault, he had at least set forth in brutally straightforward terms the reality of deadly force that would come to permanently underlie the various forms of modern rule.¹⁰

3.

The beginning of what is called *The Protestant Reformation* is usually associated with the name of Martin Luther who began his revolt in Germany in 1517. Although the role of Luther can scarcely be overstated, in fact, the career of John Calvin a generation later would have a much more extensive and profound effect, one that would last into modern times. Obscuring this fact is the practice of historians to portray *The Reformation* as a religious event, which it was. However, during the sixteenth and seventeenth centuries questions of religion were inseparable from question of law. The two realms of theology and jurisprudence were inextricably bound together, two sides of a coin. Hence, the religious innovations associated with the Calvinist movement were equally important in the development of Western law. In fact, the

⁹ Leon Strauss, *Thoughts on Machiavelli* (University of Chicago, 1995).

¹⁰ Machiavelli, *The Prince* (Oxford University Press, 1984). Viroli, *Machiavelli* (Oxford University, 1998). Mansfield, *Niccolo Machiavelli: Discourses on Livy* (University of Chicago, 1998).

young Calvin, trained in law at the University of Orleans, would approach even his ecclesiastical work in an unwaveringly legalistic manner.¹¹

In the *Foederatio Mundi*, world system, he set out to construct from his headquarters in Geneva, Switzerland he rejected out of hand the forms of governance associated with the past of Christendom. He also dismissed both the *polis* of the ancient Greeks and the *civitas* of the Romans, just as he rejected any version of the *Sacerdotium et Imperium*. Instead, he chose to construct his new system of rule on the theocratic legalism of *Talmudic Judaism*. In doing so he built his *Respublica Hebraeorum* on two doctrinal assumptions; First was the principle of human depravity. For Calvin human nature was inherently rapacious and corrupt. But he did not lament those characteristics, instead he attempted to harness them for purposes of ruling. This led to the next premise: The idea of a *Chosen*, an *Elect* of Ministers and Magistrates who would teach the doctrines of God to the multitude and who would wreak punishment on all transgressors.¹²

The main population who made up the Calvinist movement combined attributes of wealth and law and, for the first time, was equipped to challenge the old Latin order. That was especially true because of the other development of his time that defined the work of Calvin, the printing press with moveable type. Lacking both the exalted majesty of the Church and the deeply embedded ancestral ties of the nobility, the Calvinists found a stable basis for public order in the fixed text, especially the *Bible* and law code. The movement was nothing if not a phenomenon of the printed word. Calvinism in its many variants would not have been possible without Gutenberg.¹³

Similarly, it was the effectiveness of the new gunpowder weaponry that made possible both the overthrow of the old order and the imposition of the new one. But the extreme measures employed inevitably provoked a reaction in opposition. Northern Europe was plunged into a virtual civil and religious war that lasted for a century. The scale of death and destruction is thought by some historians, at that time, to have

¹¹ Gorski, *The Disciplinary Revolution: Calvinism and the modern state* (University of Chicago, 2003).

¹² Nelson, *The Hebrew Republic: Jewish sources of European thought* (Harvard University, 2010). Cunaeus, *The Hebrew Republic* (New York: Shalem Press, 2006).

¹³ O'Malley, *Trent and All That: Renaming Catholicism in the early modern period* (Harvard University, 2002). Nelson, *The Hebrew Republic: Jewish sources of European thought* (Harvard University, 2010).

been the most catastrophic in human history, with millions of victims, and some regions almost entirely depopulated. Moreover, in the process of judicial consolidation thousands were tortured and executed for crimes of heresy, apostasy, and witchcraft—Michael Servetus, Edmund Campion, and Giordano Bruno as the most famous examples. Historians view this as one of the dark moments of human existence.¹⁴

In fact, the greatest obstacle faced by the Calvinists was the repeated uprising of commoners and peasants, what is now called the *Radical Reformation*. Although dismissed as illiterate rabble by the deeply learned Calvinists, this may not have been accurate. In fact, the printing press had reached an ever-widening circle and had created a highly literate public—and for the Calvinists, that was a danger. Eventually, there came to be a great revulsion toward the extreme cruelties and the sectarian bitterness of *The Reformation*, even a turning against the use of religion as the educative element of government. There began a search among leading lights of the age to discover a new basis of instruction that could replace religion as a foundation of rule. What was required was a new paradigm, a new *methodus*, or *method*, on which to base the structure of rule. There was a need for a new way to teach the common public the habit of compliance.

4.

Not until the innovation of Peter Ramus (Pierre de La Ramee, 1515-1572), in France, during *The Reformation*, was there the possibility of a solution to this problem. Ramus, professor of law and rhetoric, and a founder of the *College de France*, took a first step toward forming what is called the *modern* mind. His approach, like the *Studia*, involved a program of study among those of the *Praestantiae*, or *Elect*. However, Ramus offered an alternative to a religious, sacral, or miraculous view of the world, providing it instead, with an impersonal and objectively defined way of apprehending. All persons would still experience their subjective, intuitive musings, they could retain their religious beliefs in private life. But for purposes of governance, those dimensions of the self would be effectively excluded. Although Ramus posed his revolutionary new

¹⁴ Gorski, *ibid.*

plan of inculcation as an attack on Aristotle and on the medieval university, its more direct significance is apparent when viewed as a counter to the *Renaissance* philosophies of personal conduct espoused in the writings of Petrarch, Ficino, Mirandola, and later, of Bruno.¹⁵

Ramus developed his program by taking elements of the *Ars Rhetorica* and reassembling them to be the basis of a new way of apprehending the world. It is not necessary to repeat the complicated minutia of content he intended to teach in his program to objectify understanding. His attempt was an abject failure and is of only antiquarian interest. But it is important to view his contribution as an opening to a transformation in ways of engaging the world. It provided a way of *Being* different from that which naturally inhered in every person and that rests on holistic consciousness and intelligence. Instead, it was based on a uniformly disseminated structure of *Thought*—and it was to be instilled through the mechanical function of the mind, the *Intellectus*. It was a *method* of collective understanding only made feasible by the innovation of print.¹⁶

Until that time, persons of every rank and status understood themselves and their surroundings in natural ways, that combined the physical senses, learning of the mind, and intuition. Both subjective and objective, qualitative and quantitative, external sensation and internal sensibility were employed. In medieval Europe, this way of understanding had come to be expressed in the vocabulary of Christianity and its deeper meanings interpreted according to Christian doctrine. But that outlook on life was, in fact, quite primal, animistic, or what *modern* historians call *enchanted*. What *The Renaissance* had done was not to suppress these tendencies. Instead, its leading lights sought to probe these patterns of human awareness in a considered way, articulate them in a rational manner at a high level of sophistication, and publish them to the world.¹⁷

¹⁵ Craig, *The Enchanted Glass* (Westport: Greenwood Press, 1975). Martines, *ibid*, 1979). Ong, *Orality and Literacy* (London: Routledge, 2012)

¹⁶ Febvre, *ibid*. Ong, *Ramus: Method and the decay of dialogue* (Harvard University, 1983).

¹⁷ Yates, *Giordano Bruno and the Hermetic Tradition* (London: Routledge, 2015). Bertboud, *Peter Ramus: Precursor to Descartes against the confessional reformed faith* (Monticello: Psalm 78 Ministries, 2020). Popkin, *The History of Skepticism: From Erasmus to Descartes* (New York: Harper Torchbooks, 1968).

At the outset, Ramus engaged two of the more disruptive teachings of *The Renaissance*. First was the cultivation of *wisdom*, of inner balance, self-control, and reflection, what had been the basis of order and harmony among all traditional peoples. Even though Medieval Christendom was not a thoroughly traditional society, it still retained in its agrarian way of life many of the attributes of *wisdom*, often expressed in *Biblical* quotations, ancient aphorisms, or even sayings of pagan origin. The capacity for *wisdom*, as the Florentine *Stoics* taught, exists in the natural intelligence of every person—and that was precisely the problem: its influence could unite and embolden the multitude. In fact, this harmonizing effect as a basis of unity had become the nucleus of a united opposition against the ruling stratum both in the career of the Italian monk Savonarola and in the recent peasant uprisings.¹⁸

Finally, and perhaps most importantly, Ramus attacked what until that time had been the primary form of instruction and learning in both the *scholastic* tradition at the university and among the common population of manor and village. That was oral transmission by the reader, lecturer, or elder, together with the highly developed faculty of memory retention, the *ars memoriae*. The mnemonic tradition had begun in the tribal age, continued through the ancient and medieval periods, and to *The Renaissance*, when it had been refined to a very high level. Until that time, Christians, like Moslems and Jews, were widely capable of what in the modern age would be considered incredible feats of memorization—including the entire *Quran* or *Zohar*, or large parts of the *Bible*. This practice was a survival from an age when books were enormously expensive, and the reputation of a famous university might be based on the possession of a few treasured volumes. But it was enormously important as an experiential type of learning that led to a profound type of embodied knowledge.¹⁹

But Ramus vehemently opposed these *Renaissance* teachings, and no doubt recognized this form of transmission as being in direct competition with authorized instruction. Under the new regime, for purposes of rule, oral transmission and mnemonic retention were known to be uncontrollable, and therefore a threat to order. Ramus worked hard to eliminate the widely practiced *Art of Memory*. Henceforth, learning

¹⁸ Baylor, *The Radical Reformation* (Cambridge University, 2007). Ong, *ibid*, 2012.

¹⁹ Yates, *The Art of Memory* (London: Pimlico, 2000). Assmann, *Cultural Memory and Early Civilization: Writing, remembrance, and political imagination* (Cambridge University, 2011).

would be by reading or by lecture based on content stored within the covers of a book. The instrument of the book could be employed to direct and control the dissemination of learning.²⁰

In fact, the Ramist system of order would not be founded on *wisdom*. It would instead be a structure of rules founded on specialized *knowledge*. That *knowledge* would be limited to those who had access to the books or to the institutions where it was dispensed. Ramus conceived the idea that the whole of life for purposes of governance—politics, law, monetary exchange, relations of production, habits of consumption, legal norms, and punishments—could be understood as an impersonal complex of calculations and proofs. It was an approach that exactly coincided with the use of mathematical and objective fact employed in the measurements and calculations of finance and trade. His program was not concerned with ultimate questions of meaning or existence. Instead, it concentrated on the immediate and practical problems of wielding power based on the mechanical aspect of the mind. Equipped with an exclusive *knowledge*, the *Intellectus* was shaped to a certain a framework. An abstracted, objectified, and authoritative reality for an entire ruling class was made possible by mechanical print and the ability to produce myriad identical copies of a text.²¹

5.

The significance of this shift for purposes of rule can be seen when viewed in contrast with the unique achievements of *The Renaissance*. For Ramus, relations of persons and things would no longer be based on the cultivation of natural harmony, from the bottom up, as it were. Instead, they would be achieved by applying an explicit order from the top down. Individual members of the ruling caste would not only employ the arts of manner and speech learned from the *Studia Humanitatis* They would also

²⁰ Caruthers, *A Study of Memory in Medieval Culture* (Cambridge University, 2008. Ong, *ibid*, 1983).

²¹ Feingold, *The Influence of Petrus Ramus: Studies in sixteenth and seventeenth century philosophy and sciences* (Basel: Scwabe & Company, 2001). Poovey, *A History of the Modern Fact: Problems of knowledge in the sciences of wealth and society* (University of Chicago, 1998). Aho, *Confession and Bookkeeping: The religious, moral, and rhetorical roots of modern accounting* (State University of New York Press, 2005).

be guided by a fixed structure of *knowledge* and that structure would be held exclusively by them.²²

In the first instance, Ramus shifted the basis of governance from *truth* to *fact*. *Fact* was that which is objectively verifiable or quantifiable by the human senses, or by human reason. In contrast, *truth* was considered a personal, internal, and subjective matter. The commonly held view was that there were as many truths as there were people, although at some point all truths were expected to comprise one all-encompassing *truth*—for Ramus, recent experience showed this view to be dangerous. Philosophers of *The Renaissance* had taught that, even in its infinite variety, truth and more importantly, truth telling, was the necessary basis of harmony across all regions and peoples. However, when Ficino taught this as a facet of the *Divine Light* inherent to all persons, those in authority knew that persons infected with such an understanding could become dangerously ungovernable.²³

In 1498 Savonarola, for example, was convicted of heresy and sedition and burned at the stake for espousing such doctrines. Later, during *The Reformation* these ideas came to be suppressed on a massive scale in trials for heresy and witchcraft. Most famous was the case of Giordano Bruno, found guilty on such a charge in 1600, and burned alive at the stake. Any claim of sacred essence common to all human beings would be excluded from the adjudicative and educative mechanisms of rule. Among the unlearned multitude, persons who looked inward to the self, followed too closely their conscience, or invariably spoke the *truth*, could pose a grave threat to public order.²⁴

Another basic idea for Ramus was that *logic* in public discourse became, not primarily an instrument for finding truth, as in the case of philosophical dialogue, but rather an instrument of persuasion, as in a commercial negotiation or sophistic argumentation. For purposes of governance, the principles taught in the new regimen of instruction

²² Skalnik, *Ramus and Reform: University and church at the end of the Renaissance* (Kirkville: Sixteenth Century Essays & Studies, 2002). Reydam-Schils, *The Roman Stoics: Self, responsibility, affection* (University of Chicago, 2005). Graves, *Peter Ramus and the Educational Reformation of the Sixteenth Century* (Delhi: Facsimile Publishers, 1912/2017). Thomas 1997).

²³ Poovey, *ibid*, 1998. Eamon, *The Professor of Secrets: Mystery, medicine, and alchemy I Renaissance Italy* (Washington, D.C.: National Geographic, 2006).

²⁴ Martines, *Fire in the City: Savonarola and the struggle for Renaissance Florence* (Oxford University Press, 2006). Yates, *ibid*, 2015. Maclean, *Interpretation and Meaning in The Renaissance: The case of Law* (Cambridge University, 1992).

were not to be evaluated on the basis of whether or not they conformed to any conventional standard, or innate human sense of veracity. Instead, his principles would exist in an abstract and objectified realm of artifice. They would be evaluated on the basis of practicality: whether or not they could be taught and whether or not they would work. For Ramus, the new purpose of instruction was not necessarily human enlargement or expression. Instead, in the new understanding, *Being* would become separated from and subordinated to *Thought*. The new man would not be an organic, unified, natural entity, but would now be divided within himself, centered in a constructed mind, and with that mind shaped according to a standardized formula.²⁵

6.

The credit for originating this approach to training a ruling class in abstract imagination, calculation, and facticity—and diminishing the natural capacities of *wisdom, memory, and truth*—goes to Peter Ramus. But he was not able to work out a plausible and unified knowledge system that could effectively supplant the teachings of religion. Thus, after his death in 1572 there began, within leading circles of a convulsed and divided Christian world, the search for what was called a *methodus*, a *method*—a plausible system of knowledge that could be universally applicable, a *novum organum*. In the next century this search very famously concluded with two highly successful alternatives. One was the experimental *Natural Philosophy* of Francis Bacon—what is now called the scientific method. At almost exactly the same time Rene Descartes set forth a way of comprehending existence based on workings of the mind, itself—what came to be called *Rationalism*.²⁶

Both men stood at the crucial intersection of law and learning. Bacon, who trained as a Civil advocate at Trinity College, Cambridge and as a barrister at Grays Inn, was Lord Chancellor, highest ranking legal officer in England. His evidentiary, or empirical, approach made it possible to view the universe objectively, as a machine, unclouded by subjective inclination. Descartes had graduated in law from the

²⁵ Rhodes, *The Renaissance Computer: Knowledge and technology in the first age of print* (London: Routledge, 2000). Gilbert, *Renaissance Concepts of Method* (Delhi: Facsimile Publishers, 1960/2013). Ong, *ibid*, 1983.

²⁶ Poovey, *ibid*. Ong, *ibid*, 1983. Aho, *ibid*.

University of Poitiers, in France, but had given up legal practice to write his first book, *Rules for Direction of the Mind*. His later work, *Discourse on Method*, marked the symbolic beginning of modern philosophy. In its new incarnation, philosophy was no longer the cultivation of *wisdom* for living life and conduct of affairs, based on ultimate values. Instead, philosophy would become the province of academic debate, the elaboration of concepts and speculations. It would devolve into irresolvable questions regarding the nature of language, mind, and knowing. Nonetheless, the two men, Bacon and Descartes, had originated two ways of thinking able to supplant religion as a basis of authoritative rule and public order.²⁷

It should be noted that in this new way of thinking the validity of personal intuition, subjectivity, or religious sensibility was not questioned. Nor was it doubted that dreams might have real meaning, or that special gifts of healing were given to some. Beyond that, it was not questioned that spirits existed, intimations from the dead were possible, that divine or demonic beings were everywhere and every-day present. The *Ramist* author Jean Bodin made this clear in his widely translated book, *Demonomanie*. In fact, such beliefs were almost universally held among all factions—including the early scientists Copernicus, Kepler, and Galileo. These beliefs were held by Churchmen, peasants, townsmen, jurists, lawyers, nobles, kings, Moslems, and Jews. The point was that these beliefs and these intimate human apprehensions—valid or not—had to be excluded from the new mechanisms of legal rule and its correlate, the system of *knowledge* by which legal authority was made palatable. Miraculous gifts admired during *The Renaissance* now came to be grounds for prosecution in trials for witchcraft and heresy—not because their efficacy was doubted, *but because they were believed to be real*. Authorized religion in this new understanding was no longer a religion of miracles; for purposes of legal rule, the age of miracles was determined to have passed. Instead, the favored idea of religion would become, in effect, one of inculcated belief in doctrine, institutional truth, and morality. It would be taken from the printed text and preached to those who were subject to constituted authority.²⁸

²⁷ Tambiah, *Magic, Science, Religion, and the Scope of Rationality* (Cambridge University, 2006). Hadot, *Philosophy as a way of life* (Oxford: Blackwell Publishing, 2002).

²⁸ Kuhn, *The Structure of Scientific Revolutions* (University of Chicago, 2012). Ankarloo, *Witchcraft and Magic in Europe: The period of the witch trials* (University of Pennsylvania, 2002). Porter, *The Cambridge History of Medicine* (Cambridge University, 2006).

7.

One lesson of the sixteenth and seventeenth centuries was that every legal culture must have two aspects, the adjudicative and the educative. A judicial authority might impose itself temporarily by brute force, *in terrorem*. But to establish itself with stability and continuity the public must come to understand that authority in terms of the benefit it confers. They must be instilled with the habit of compliance. Since medieval times that educative need had been filled by the tenets of religion. Unsurprisingly, those men of *The Reformation* who led the initial assault on the medieval Church and Empire, Luther and Calvin, framed their argument in religious terms as well. At that time the two dimensions of law and religion were thought to be inseparable, two sides of the same coin. It is only modern academic historiography that has retrospectively separated the two elements during that period.²⁹

In fact, with the attempted application of the new paradigms of rule a new crisis arose. Although there existed a basis of unity among the ruling stratum, there was yet to be formulated a corresponding regimen of learning for the public of commoners. If the structure of rule was to be built on either the Baconian or Cartesian *method*, there was the necessity of an educative program by which the public could be indoctrinated as well. Part of that answer began to emerge at Westphalia in 1648. The agreement there not only marked the end of a century of civil and religious warfare on the continent, it also set forth a new type of polity, what came to be called the nation-state. This was an explicitly defined legal structure based in foundation documents and administered by officials bound together by oath. In addition, Westphalia began a trend in Continental governance from Christian theology to secular ideology to fulfill the educative function of rule. But the transition was not an easy one.

The educational innovator John Comenius (1592-1670) put forth a very influential program for the instruction of the common population, preparing them for productive labor and the obligations of citizenship. But his program was probably too ambitious and not yet perfectly constructed. Hence, he was met with much approval in the Protestant regions, but to little effect. Meanwhile, the old medieval universities

²⁹ Franklin, *Constitutionalism and Resistance in the Sixteenth Century* (Cambridge: Pegasus, 1969).

now seemed outmoded and, although the Jesuits made astonishing progress, their colleges and schools were suppressed in many regions. The old unity of thought that had once existed throughout Christendom had been shattered. Numerous academies and societies were established among the privileged, while strict policies of enforced illiteracy were imposed among the common population, notably in England. Doctrines of the newly founded national churches were often vehemently, even violently, rejected. Many non-conformist schismatic sects divided a formerly unified Christian realm. It was plunged into a cauldron of bitter sectarian divisiveness, met with unthinkable acts of judicial terror. Yet, no authorized or canonized body of knowledge had been established. A uniformly recognized source for the creation and dissemination of knowledge based wholly on *Science* and *Reason* had not yet been created.³⁰

The seventeenth century was swept, in effect, by anarchy of learning. Yet, remarkably, perhaps because learning had not yet been institutionalized and made authoritative, the late seventeenth century and the following eighteenth century became one of the most fertile periods of cultivation and learning in Western History. What is called by modern historians, *The Enlightenment*, was a period that seemed to carry on the spirit of *The Renaissance*. It was different in that the traditional doctrines of Christianity had been widely discredited and discarded. It also reversed the Calvinist-Puritan view of human nature as being inherently corrupt. The eighteenth century of Leibnitz, Wolff, Rousseau, Montesquieu, Condorcet, and Jefferson became one of the most fruitful periods in human history for its adherence to reason, its optimistic view of human potential, and its belief in the potential progress of the Human Mind.³¹

8.

But there would once again be dramatic advances in technology during the nineteenth and twentieth centuries. Especially, the steamship, railroad, and telegraph made it

³⁰ Comenius, *The Great Didactic* (Murrells Inlet: Andesite Press, 2017). Sadler, *Comenius and the Concept of Universal Education* (London: Routledge, 2014)

³¹ Martines, *Lawyers and Statecraft in Renaissance Florence* (Princeton University, 1968). O'Malley, *Trent and All That: Renaming Catholicism in the early modern period* (Harvard University, 2002).

possible to extend Western methods of rule to distant continents around the world. Equally important, the answer to the wider problem of education for the modernizing age was finally solved during the nineteenth century with two innovations. First was the founding of the University of Berlin in 1810. It became the prototype for all modern secular, scientific universities. Not only a place for the dissemination of knowledge, it was also a center for the creation of knowledge. The development of new scientific discoveries, new social theories, and new technologies were crucial in the *Age of Empire*. But most of all, with the modern university, knowledge became authoritative, and access became institutionalized. As a source of industrial and military invention the university was essential for any Western Power that sought to capture and colonize unclaimed territories of the Earth. Following closely was a second innovation, a program of public schooling based on the Prussian model of uniform instruction to age-based cohorts. The ideas of Comenius would finally be accepted around the globe.³²

In all these events the importance of technical advance cannot be overstated. With the ability to print in any language, the book was perfect for dividing the world population into governable enclaves, separated according to national programs of education. The book was useful not only for transmitting, but also for concealing knowledge as well. To control the spread of certain types of learning it was only necessary to control the printing presses. Nor was it difficult to restrict the use of certain books to certain institutions and make them accessible only to those with privileged admission. But in the process, religion, as the single educative basis of legal rule, had been surpassed. Instead, highly secularized ideologies were becoming a central factor in the *modern*, Western way of life. The book with its fixed and stable print became an anchor of certainty and stability in a world bereft of the old religious certainties. The territorial nation-state was so successful that it would, in its various iterations, come to cover virtually the entire habitable surface of the Earth.³³

The twentieth century underwent another period of technological transformation. New means of communication, radio, cinema, and mechanized publication were combined with the book and school as sources of public understanding. The new

³² Kuhn, *ibid.* Sadler, *Comenius and the Concept of Universal Education* (London: Routledge, 2014).

³³ Ong, *ibid.*, 2012. Feyerabend, *Against Method* (London: Verso, 1980)

methods became so highly effective that entire national populations could be mobilized for production and war. It was an advance that ended in catastrophe when another technological wonder, the atomic bomb, was first unleashed. However, by late in the twentieth century nuclear power had been harnessed for peaceful purposes and those early communication devices were far overtaken by television, communication satellites, computers, and electronic networks. These devices could be effective regardless of territorial border, geographic distance, or topographic barrier. Suddenly the old national boundaries no longer worked, the old enclaves of rule were being overshadowed by the more adaptable structure for legal ordering of persons and things, the multinational corporation.³⁴

9.

In the twenty-first century project of globalization, just as in the sixteenth century of reformation, the effort to shape understanding goes forward on two levels: among those who rule and those who are ruled over. However, the work of shaping the public mind to what Foucault called *governmentality* no longer relies on religion, books, or even brick and mortar schools. Nor does it rely on a fixed structure of knowledge inculcated in the public mind. Instead, it employs an electronically created virtual reality of timely and continuously streaming *information*. By this means a global multitude is provided with a way to understand the world, and to understand its atmosphere of continuous change as a desirable inevitability. At the same time, those who administer legal rule continue to be grounded in knowledge conveyed in the fixed text of the printed book.³⁵

³⁴ Jacob, *Scientific Culture and the Making of the Industrial West* (Oxford University, 1997). Cutler, *Private Power and Global Authority: Transnational merchant law in the global political economy* (Cambridge University, 2003). Rumble, *The Thought of John Austin: Jurisprudence, colonial reform, and the British Constitution* (London: Athlone Press, 1985). Micklethwait, *The Company: A short history of a revolutionary idea* (New York: The Modern Library, 2003). Maloney, *The Political Economy of Robert Lowe* (London: Palgrave, 2005).

³⁵ Foucault, *The Hermeneutics of the Subject: Lectures at the College de France* (London: Palgrave, 2005). Lumann, *The Reality of Mass Media* (Stanford University, 2000). Smith, *Natural Reflections: Human cognition at the nexus of science and religion* (New Haven: Yale University, 2009).

Yet, despite outward appearances, the difficulties faced by global leaders in the twenty-first century are very similar to those facing the ascendant classes during *The Reformation*. One reason those events might seem dissimilar is that they were cast in a language of religiosity. Christian teachings at that time provided the vocabulary of governance. But the challenge faced by those who seek to govern in the age of globalization is different from that of the fifteenth, sixteenth, and seventeenth centuries, and not only because the technology is more advanced. In addition, the current project of globalization involves people far more diverse than the relatively homogenous population that once comprised Latin Christendom. It includes not only all persons of every ethnicity and locality, but also persons of *modern, pre-modern, and tribal* mentality as well.³⁶

Popular reaction against the project of globalization, although expressed in many ways, can be seen as repeating a contest between those with institutional authority, who have privileged knowledge, against those excluded from the institutions, and who have only a subordinate understanding. It amounts to a resumption [revival?] of the battle that began with a transition from *The Renaissance* to *The Reformation*. A large segment of the global public, immersed in a mediated reality and existential confusion, continues to understand the expanding mechanisms of governance not in abstract terms, but rather as an assertion of power. Perhaps, once again, the *Populists* of today, like the *popolo minuto* of Florence, can only make their voices heard against the *Elites* by gathering in mass at the plaza or arena to openly protest; each twenty-first century nation has its potential Savonarola or Bruno. Just as in Calvinist Geneva or Puritan London, controversies may take place openly in displays of popular discontent, but the deeper implications often involve questions of cosmopolitan finance and judicial authority.³⁷

In the twenty-first century the lessons of Machiavelli and Ramus continue to be relevant, even decisive. The principles set forth by Machiavelli still provide an

³⁶ Giddens, *Modernity and Self-Identity* (Stanford University, 1991). Byers, *United States Hegemony and Foundations of International Law* (Cambridge University, 2003). Strauss, *Law, Resistance, and the State: The opposition to Roman law in Reformation Germany* (Princeton University, 1986). Cusset, *French Theory: How Foucault, Derrida, Deleuze & Co. transformed the intellectual life of the United States* (Minneapolis: University of Minnesota, 2008).

³⁷ Slobodian, *Globalists: The end of empire and the birth of neoliberalism* (Harvard University, 2018). Viroli, *How to Choose a Leader: Machiavelli's advice to citizens*, Princeton University, 2016).

underlying *ethos* of rule, men over men—although it may now be expressed in language less offensive to gender sensibilities. Similarly, the *Methods* built on the work of Ramus have not been superseded, they have only been added upon and adapted. Those who stand at the intersection of law and wealth continue to wield power through a language of calculative rationality. In the twenty-first century, there is no more complex and impenetrable maze of institutional and theoretical imagination than where the artificial realm of legal reasoning meets the abstract realm of finance and trade. When this mass of inventiveness is viewed in a Machiavellian way, the world appears, in fact, to be governed by a few privileged persons imposing their order upon a multitude of subjected persons. It is only the *Ramist* instrument of *method* that obscures this fact.³⁸

New structures for the aggregation of wealth, new adjudicative and educative techniques for ordering persons and things, are being expanded to include the entire habitable Earth, in a project made possible by technological advances. But the global public still must be taught to understand global rule in terms of the benefit it confers, they must be instilled with the habit of compliance. Although the fundamental mechanisms of law have remained remarkably stable, shaping the mind of a global public under the new conditions is a difficult process requiring alacrity and skill. As with the *Three Great Inventions* of the sixteenth century, only advancing technology can make such changes possible. The challenge remains: to construct a regimen of global rule based on instruments of law, aggregated wealth, and a shaping of the public mind. Yet, no matter how technologically advanced, it will be Machiavellian in its *ethos* and *Ramist* in its *method*.³⁹

³⁸ Kennedy, *A World of Struggle: How power, law, and expertise shape the global political economy* (Princeton University, 2016). Domingo, *The New Global Law* (Cambridge University, 2010).

³⁹ Negri & Hardt, *Empire* (Harvard University, 2001). Pocock, *The Machiavellian Moment: Florentine political thought and the Atlantic republican tradition* (Princeton University, 1975). Rose, *Governing the Soul: The shaping of the private self* (London: Routledge, 1995).

REASON AS THE DARK SIDE OF THE LAW: A LEIBNIZIAN PERSPECTIVE

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Abstract

The article argues that reason as the hallmark of Western civilisation can indeed be considered as the dark side of law. The perspective adopted focuses on the thought of the seventeenth-century philosopher Gottfried Wilhelm Leibniz and compares it to some contemporary developments. Reinterpreting Leibniz's idea of justice and its relationship to law, the article argues that according to Leibniz 'good' law reflecting his idea of justice as the charity of the wise has to be based on three values: reason, love, and action. In other words, it has to unite within itself a cognitive/epistemological element with an affective and a practical element. However, the contemporary form of law dominant in the global North largely neglects Leibnizian insights: the contemporary dominant vision of law represents and promotes law as reasonable only. Reasonableness and objectivity of law are even its main hallmarks. The affective side of law is largely neglected. According to Leibniz, law which is devoid of its affective side is unable to fulfil or even attempt to fulfil its promise of justice. Thus, law as reason exclusively is condemned to darkness. The article argues that these Leibnizian insights are very contemporary and resonate with the latest developments in the law and emotions scholarship. Therefore, the article concludes, law and emotion scholarship could benefit from a deeper engagement with Leibniz's thought.

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Keywords

Leibniz - Law, Justice, Reason, Affect

1. Introduction

Reason is the hallmark of Western philosophical thought since at least the Enlightenment period when the belief in the superiority of reason over other ways of experiencing and knowing the world became dominant.¹ The development of modern legal systems is also closely tied to this tradition which affirms both the superiority of reason but also the possibility of achieving separation of reason as something objective and neutral from emotion as something subjective and thus biased.² Traditionally, law aims to achieve objectivity and neutrality through a recourse to

¹ This general idea represents the overall argument of Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (Chicago: The University of Chicago Press, 1990).

² See for example, Aleksander Peczenik, *On Law and Reason* (Dordrecht: Springer, 1989) or Keekok Lee, *Positivist Science of Law* (Sydney: Avebury, 1989)

reason.³ This attitude is visible in many aspects of legal procedure, in legal concepts, and other aspects of law's operation.

However, for decades the supposed objectivity and neutrality of law was revealed as a mere illusion. Such strands of legal thought as critical legal studies, feminist approaches to law or critical race scholarship exposed that behind the façade of reason exemplified by alleged objectivity and neutrality of law nothing but a biased system privileging interests of some at the expense of interests of others is hidden. Moreover, more recently a law and emotions scholarship grew in importance. These critical approaches to law and their revelation of the insufficiency of reason as a foundation of law raise series of questions: is reason perhaps that ultimate device which simply hides biases of the law? Is reason the dark side of law? If so what are the alternatives? How to move beyond reason as the dark side of law?

This contribution provides a reflection on these questions utilising an historical perspective. The concept of law was not always discussed the same way we discuss it today. Discussions of the concept of law which are situated in a different context, including in a different historical epoch, can enable us to have a renewed look at our contemporary debates. This contribution utilises the thought on the concepts of justice and law of a seventeenth-century philosopher Gottfried Wilhelm Leibniz as such a prism which enables a fresh perspective on some of the contemporary debates. The argument developed based on these insights is the following: reason on its own is indeed bound to turn law into a dark force. Just (fair) law cannot be reduced to reason only but also has to include other components. The particular vision of these other components which emerges from Leibniz's writings resonates with the contemporary debates in law and emotions scholarship and thus constitutes a contribution with valuable lessons for legal scholarship today.

This article is organised as follows. First, Leibniz and his work in context are briefly presented. Then the concept of justice as developed by Leibniz is discussed. The next section establishes relationship between law and justice as Leibniz viewed it. The final

³ Kent Greenawalt, *Law and Objectivity* (Oxford: Oxford University Press, 1995), Nicos Stavropoulos, *Objectivity in Law* (Oxford: Oxford University Press, 1996).

section discusses some of the lessons that can be drawn from Leibniz's views for contemporary debates. Conclusions are also offered.

2. Leibniz, his work, and his time.

Gottfried Wilhelm Leibniz, 'German philosopher, mathematician, and political adviser'⁴ was born in 1646 and died in 1716.⁵ He thus lived and worked mostly in the seventeenth century. The seventeenth century is the century associated with the philosophical tradition of modernity and rationalism.⁶ It is commonly imagined as an age of reason and scientific enquiry.⁷ Although this image is only partially true because religion still remained a central consideration for all thinkers of the time,⁸ the general effort of that century can still validly be described as a search for ways to deal with disagreements, including religious, in a more dispassionate and certain manner. Seventeenth century, for example witnessed growth in interest in mathematics as a science which possesses a method leading to certainty in knowledge.⁹ Many scholars inspired by mathematical methods attempted to transpose them to other areas of

⁴ Encyclopedia Britannica online.

⁵ On Leibniz's life and work, see a particularly thorough work of Antognazza: Maria Rosa Antognazza, *Leibniz: An Intellectual Biography* (Cambridge: Cambridge University Press, 2009).

⁶ See e.g. Toulmin (n 1) in general.

⁷ Association between the seventeenth century and the 'mechanical' philosophy is perhaps the most telling in this regard. See Stephen Menn, 'The Intellectual Setting' in Daniel Garber and Michael Ayers (eds.), *The Cambridge History of Seventeenth Century Philosophy*, Vol. 1 (Cambridge: Cambridge University Press, 1998) 33-86.

⁸ Very illustrative is the summary on religious toleration in Philip Milton, 'Religious Toleration' in Desmond M. Clarke and Catherine Wilson (eds) *The Oxford Handbook of Philosophy in Early Modern Europe* (Oxford: Oxford University Press, 2011) 571-590.

⁹ Peter Dear, 'Method and the Study of Nature', in Daniel Garber and Michael Ayers (eds.), *The Cambridge History of Seventeenth Century Philosophy*, Vol. 1 (Cambridge: Cambridge University Press, 1998) 147-77.

human knowledge, including law and politics. Hobbes is perhaps one of the most well-known proponents of the geometrical method in the study of politics. Leibniz was no exception to this.¹⁰ However, Leibniz's interest in method went clearly beyond a narrow focus on mathematics. He attempted to develop a comprehensive method of scientific discovery and thus was able to embrace, as this contribution will argue, not only reason, which was usual for his time, but also other aspects of human experience.¹¹

Another way in which seventeenth century is often characterised by historians is as a period of crisis in many areas. The first half of the seventeenth century is particularly turbulent and according to some historians even 'among the most uncomfortable and even frantic years in all European history'.¹² Historical research highlights that this period witnessed significant political instability and challenges to traditional structures of authority, thus creating fertile ground for the rethinking of legal and political arrangements. Similarly, in face of confessional conflicts, which produced significant misery and suffering, scholars' effort was directed at constructing concepts able to result in legal and political structures capable of preventing and avoiding future conflicts. Leibniz actively participated in this effort both through his scholarly work but also through his practical initiatives and his work as advisor to powerholders of his time. The concept of justice and its relationship to law which is discussed further in this contribution was also developed as a theoretical reflection on the ways of achieving a more just and peaceful society. In this regard it is significant that Leibniz, despite working in a century where reason was valued above anything else, proposed a concept of justice which is not exclusively based on reason and even denies that reason is enough to achieve peace and justice.

¹⁰ Berkowitz, Roger, *The Gift of Science: Leibniz and the Modern legal Tradition* (Harvard University Press, 2005).

¹¹ The reference here is mostly to his development of *scientia generalis* and *characteristica universalis*, see e.g., Arnaud Pelletier, 'The *Scientia Generalis* and the Encyclopaedia', in Maria Rosa Antognazza (ed.), *The Oxford Handbook of Leibniz* (Oxford: Oxford University Press, 2018) 162–76 and Martin Schneider, "'Leibniz" Konzeption der Characteristica universalis zwischen 1677 und 1690' (1994) 48 *Revue internationale de philosophie* 213–36.

¹² Toulmin (n 1) 16; see also Hugh Trevor-Roper, 'The General Crisis of the 17th Century' (1959) 16 *Past and Present* 31–64.

3. The Concept of Justice in Leibniz

Leibniz's widely known definition of justice is that of justice as *caritas sapientis*.¹³ In English this definition is usually rendered as 'the charity of the wise'. However, other variations also exist,¹⁴ and the deepest understanding of this definition requires a careful engagement with each of the terms of the definition. Moreover, in order to fully grasp the significance of this definition it is important to interpret the terms of the definition the way Leibniz understood them.

The first important indication for the correct understanding of this definition comes from the fact that Leibniz changed quite significantly his definition of justice over time.¹⁵ The existing scholarship locates the first instance when the final definition mentioned in the previous paragraph emerged in May 1677,¹⁶ relatively late in Leibniz's life and more than a decade after he completes his widely known treatises on law. After Leibniz arrived at this definition of justice, he never changed or deviated from it until his death in 1716. Therefore, Leibniz's definition of justice as *caritas*

¹³ This definition is from Leibniz's Preface to his *Codex juris gentium diplomaticus* (Leibniz, A.IV.5, 61; the reference here and in the majority of subsequent references to Leibniz's works is to the Academy Edition of Leibniz's works: Gottfried W. Leibniz, *Sämtliche Schriften und Briefe* (Darmstadt and Berlin: Berlin Academy, 1923-) Cited as Leibniz, A. Series.Volume). According to Horowska, *Codex juris gentium diplomaticus* is the first published text where Leibniz adopts this definition of justice (Aleksandra Horowska, 'Justitia ut caritas sapientis: The Relationship between Love and Justice in G. W. Leibniz's Philosophy of Right' (2017) 65 *Roczniki Filozoficzne* 185–204, 191).

¹⁴ In some instances, '*caritas*' is translated as 'love'; see e.g., Gregory Brown, 'Happiness and Justice', in Maria Rosa Antognazza (ed.), *The Oxford Handbook of Leibniz* (Oxford: Oxford University Press, 2018) 623–40, 623; Patrick Riley, *Leibniz's Universal Jurisprudence. Justice as the Charity of the Wise* (Cambridge, MA, and London: Harvard University Press, 1996) 144. As argued later in this section, this is a controversial translation. Neither the current meaning of charity nor that of love provide a true reflection of the meaning of '*caritas*'.

¹⁵ On the progressive development of the concept of justice in Leibniz, see Hans-Peter Schneider, 'Der Begriff der Gerechtigkeit bei Leibniz', in Manuel Medina, Roberto Mesa, and Primitivo Mariño (eds.), *Pensamiento jurídico y sociedad internacional: Libro-homenaje al profesor D. Antonio Truyol Serra*, Vol. 2 (Madrid: Centro de estudios constitucionales Universidad complutense de Madrid, 1986) 1089–113; Werner Schneiders, 'Naturrecht und Gerechtigkeit bei Leibniz' (1996) 20 *Zeitschrift für Philosophische Forschung* 607–50.

¹⁶ *Ibid.*

sapientis is surely the final and perfect statement on the nature of justice from Leibniz's perspective. The elements of his earlier attempts at defining justice, which Leibniz changed or abandoned, are as important for interpreting his definition as the subsequent clarifications he offered. In particular, they guard us against any erroneous interpretation of its key term 'caritas'.

The term 'caritas' in Leibniz's final definition of justice came to replace another closely connected Latin term, namely 'amor' meaning 'love' (noun; the corresponding verbal form in Latin being 'amare'). In fact, in some of his earlier reflections on justice, for instance in the *Elementa Juris Naturalis*, Leibniz defines justice as 'habitus amandi omnes'.¹⁷ Therefore, it is necessary to understand the similarities and differences between the Latin terms 'caritas' and 'amor' to correctly interpret this element of Leibniz's definition of justice. Both terms possess the meaning of 'love' but do not carry the same connotations. Lewis and Short dictionary (1879) translates 'caritas' as 'regard, esteem, affection, love', while 'amor' is translated simply as 'love'.¹⁸ In explaining the difference between both terms, the dictionary states after translating 'amor' as 'love': 'to friends, parents, etc.; and also in a low sense; hence in gen., like amo, while *caritas*, like diligere, is esteem, regard, etc.; hence amor is used also of brutes, but caritas only of men.'¹⁹ Thus, both terms indicate different types of love. 'Caritas', with its connection to dearness, costliness, or high price (its first meaning) is a type of love which has more pronounced dimension of respect and value. This dimension is partly lost in the contemporary English connotations of charity. For example, apart from the meaning associated with various dimensions of Christian love, the term's contemporary usage is mostly associated with the understanding of charity as 'benevolence to one's neighbours, especially to the poor'.²⁰ Thus, if originally 'caritas' placed high value and sense of dearness into that towards which it

¹⁷ Leibniz, A.VI.1, 465.

¹⁸ Charlton T. Lewis and Charles Short, *A Latin Dictionary*. Founded on Andrews' edition of Freund's Latin dictionary. revised, enlarged, and in great part rewritten (Oxford: Clarendon Press, 1879); online edition was consulted as available at Perseus Digital Library (<https://www.perseus.tufts.edu/hopper/>).

¹⁹ Ibid.

²⁰ Oxford English Dictionary (online), term 'charity', meaning 4 which is also connected to meanings 5 and 6.

is directed, the modern meaning of charity is often condescending and patronising devaluing that towards which it is directed. This is best evidenced in the expression ‘cold as charity’ which unravels the unfeeling manner in which acts of charity are often done.²¹ Thus, any translation of ‘caritas’ into modern English with one single term cannot render justice to the richness of connotations it carried for Leibniz in his definition of justice.

Fortunately, Leibniz left us his own definition of ‘caritas’ as well as other key terms connected to his definition of ‘caritas’. Thus, In *Codex juris gentium diplomaticus* Leibniz defines charity as ‘a universal benevolence’; benevolence in turn is defined as ‘the habit of loving or willing the good’ and finally love according to Leibniz ‘signifies rejoicing in the happiness of another, or, what is the same thing, converting the happiness of another into one’s own’.²² Habit is defined in the *New Method of Teaching and Learning Jurisprudence* as ‘an acquired permanent readiness to act’.²³ This sequence of definitions reveals that ‘caritas’ as the first element of Leibniz’s definition of justice denotes for Leibniz a universal permanent readiness to act out of the joy we experience at the happiness of another, or, what is the same thing, out of converting the happiness of another into our own. Thus, fundamentally, for Leibniz ‘caritas’ as the first element of his definition of justice is an act of a particular type, not simply a feeling, a sentiment as the term ‘love’ would suggest. However, this act is motivated by a particular type of feeling. Before we consider further elements of this definition of ‘caritas’, we need to clarify the meaning of ‘sapientis’ in Leibniz’s definition of justice.

The translation of ‘sapientis’ poses fewer conundrums than that of ‘caritas’. It corresponds roughly to the idea of a wise, knowing, sensible person.²⁴ Though the question whether Leibniz means a wise person in a general sense or a person

²¹ Ibid., 9a.

²² Leibniz, A.IV.5, 61 (translation by Patrick Riley, *Leibniz, Political Writings* (Cambridge: Cambridge University Press, 1988) 171).

²³ Leibniz, A.VI.1, Part 1, para.2.1 (translation by Carmelo Massimo de Juliis (trans), *Gottfried W. Leibniz, New Method of Teaching and Learning Jurisprudence* (Clark: Talbot Publishing, 2017)).

²⁴ Lewis and Short (n 18), meaning II, 3 for ‘sapio’.

knowledgeable in a particular field arises. In this regard, Leibniz with his usual precision offered additional definitions. Thus, he states: ‘sapientia est scientia felicitatis’ (wisdom is the science of happiness).²⁵ Happiness in turn is defined as a lasting joy (‘laetitia durabilis’).²⁶ ‘Laetitia est status voluptatum in quo sensus voluptatis tantus est, ut sensus doloris prea eo non sit notabilis.’²⁷ Joy is a state of pleasure in which the feeling of pleasure is so great that in comparison to it pain is not noticeable. Pleasure in turn is defined as a sense of perfection, which can relate either to ourselves or to others.²⁸ ‘Sapientia’ as a part of definition of justice creates a necessary foundation in knowledge, something which can be called cognitive foundation of justice. However, surprisingly, it is not a foundation which appeals to some emotionless reason. To the contrary, this knowledge required for the existence of justice has necessarily to be an emotional knowledge, knowledge connected to feelings.

Leibniz’s definition of justice as the charity of the wise first establishes a double foundation for justice: it requires both cognitive (or knowledge-related) and practical (or action-related) components. If either of the two is missing, justice is impossible. Already at this stage it is obvious that although justice requires reason, justice is not reducible to reason. However, Leibniz went even further. Through his definitions of the two main terms, namely ‘caritas’ and ‘sapientia’, he introduced additional components to his definition of justice which relate to feelings or emotions of a particular type. If ‘sapientia’ is a science of happiness and ‘caritas’ is a permanent readiness to act out of joy for the happiness of the other, then happiness becomes that bridging device which connects knowledge-related and action-related components of Leibniz’s definition of justice. By the same token, happiness becomes a core affective component of justice. This interpretation challenges the traditionally dominant reading of Leibniz’s definition of justice. Thus, the author of one of the main English-language studies of Leibniz’s concept of justice Patrick Riley says that

²⁵ Leibniz, A.VI.4, 2810.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

in Leibniz 'love is "affective", wisdom "cognitive"'.²⁹ As already mentioned, it is wrong to translate 'caritas' with 'love' given the shift in Leibniz's own terminological choices. This shift also indicates that in the mature definition based on charity, which replaced love, the action element in 'charity' part of the definition is more important to highlight than the affective element. Affective element is linked to happiness and serves as a bridging device connecting action to cognition (or reason). This becomes even more obvious if Leibniz's position in relation to debates on disinterested love is considered.

The question of disinterested love in relation to justice emerges if one postulates love of the other as a foundation of the very possibility of justice. If justice requires disinterested love of the other, then justice becomes impossible if we cannot prove that disinterested love of the other is a natural inclination of all human beings. This latter proof was inexistent in Leibniz's times, nor is it firmly established today. In order to avoid this vicious circle, which would force him to abandon the possibility of justice, Leibniz eschewed basing his concept of justice on disinterested love and on love as such. He then replaces love, as a standard, with happiness. He also adopts a particular view of happiness allowing him to avoid arguing for the existence of disinterested love or arguing that justice requires us to prefer the interests of others to the detriment of our own interests. As already mentioned, Leibniz defines happiness as 'a state of permanent joy',³⁰ while joy is 'a pleasure which the souls feels in itself' and pleasure 'the feeling of a perfection or an excellence, whether in ourselves or in something else'.³¹ To illustrate his definition of pleasure Leibniz provides an example of pleasure we experience when listening to music or seeing an object of art.³² Thus, joy or happiness can be felt by human beings not only because something intrinsically internal to their interests occurs, but also produced by external factors,

²⁹ Riley (n 14) 5.

³⁰ Karl Immanuel Gerhardt (ed) *Die philosophischen Schriften von Gottfried Wilhelm Leibniz*, vol. 7 (Berlin: Weidmannische Buchhandlung, 1890) 86. See also a series of definitions at 73. This phrasing is slightly different from the previously mentioned and uses a different version of Leibniz's definitions to demonstrate more nuances of meanings.

³¹ Ibid.

³² Ibid., 86–7.

which includes our observation of other human beings' lives. For him, this is a crucial point where justice, while being based on a personal interest (pleasure and need for happiness), at the same time includes the possibility to experience pleasure and thus happiness through others.

An additional argument supporting the interpretation advanced here can be found in the following Leibniz's statement: 'Wisdom, which is the knowledge of our own good, brings us to justice, that is to a reasonable advancement of the good of others'.³³ This formulation clearly establishes priority of our own good. Only through a particular interpretation of our own good do we arrive at the realisation that the advancement of this personal good requires us to advance the good of others too. In the paragraphs preceding this sentence, Leibniz provides ample evidence of the logical priority of our own good over the good of others but also their intimate connection. Thus, Leibniz eliminates the paradox of justice based on love for the other, demonstrating that our own interests are not necessarily opposed to interests of others.

Leibniz is well aware that achievement of this capacity to experience happiness as a feeling in our souls arising when facing perfection and excellence in others does not always come naturally and actually needs to be cultivated. In one of his works he even emphasises that wisdom as a science of happiness is what needs to be studied above anything else.³⁴ In addition he provides more specific guidelines: According to Leibniz to arrive at a happy life, which is defined as a soul entirely satisfied and quiet,³⁵ it is necessary to observe three principles in life: one related to wisdom, one related to virtue, and one concerning the right state of mind or certain tranquillity.³⁶ The link between these three elements can be summarised as follows: one has first to learn what the reason dictates (wisdom), then act according to these precepts of reason

³³ Georg Mollat (ed) *Mittheilungen aus Leibnizens ungedruckten Schriften* (Leipzig: Verlag von H. Hassel, 1893) 58–9 (translation as in Riley (n 22) 57).

³⁴ Leibniz, A.VI.5, 130200.

³⁵ Gerhardt (n 30) 90–8. Very similar content but in a much shorter form is contained in a piece written in French in the same volume at 81 and 90.

³⁶ Ibid.

(virtue), and finally accept what happens to us.³⁷ I suggest that Leibniz envisages here a type of a technology of the self, whereby humans, through constant striving not only of an intellectual nature but also based on particular behaviours and habits, acquire a sense of existence most conducive to the realisation of Leibniz's ideal of justice which requires cultivation of happiness in an outward direction. Thus, the feeling of happiness required for the existence of justice is not some natural inclination, but a result of a consciously directed behaviour.

The final confirmation of this interpretation resides in Leibniz's remarks on legal education. These remarks also constitute a further connection between the action-related component of Leibniz's definition of justice and its cognitive component. As mentioned above 'caritas' as a permanent readiness to act is fundamentally a habit. A habit according to Leibniz is something which is not innate in us but acquired or learned similarly to the way Leibniz affirms that happiness can be learned through a particular sequence of behaviours. In his *New Method of Teaching and Learning Jurisprudence* he elaborated in significant detail not only the subject-matter of an ideal from his point of view legal curriculum but also certain approaches that need to become part of the legal curriculum. In this connection he discussed the ways of acquiring habits. According to Leibniz a habit can be acquired in two ways: either through 'supernatural infusion or natural familiarization'.³⁸ Leibniz does not deny either divine or devilish supernatural infusion,³⁹ but for the purposes of his treatise, he focuses on familiarisation or teaching. In his discussion of habituation or familiarisation, Leibniz emphasises the necessary balance between frequency of acts (repetition or quantity) and their intensity or magnitude (quality). Thus, according to Leibniz one can learn not only happiness but also acquire readiness to act in accordance with that acquired feeling of happiness.

Having, reviewed carefully all the elements of Leibniz's definition of justice, we can clearly see how Leibniz overcomes the traditional opposition between rationality and emotion. Reason not guided by a right feeling, right emotion cannot lead to justice

³⁷ Ibid.

³⁸ Leibniz, A.VI.1, Part 1, para 8.4 (translation as in de Juliis (n23)).

³⁹ Ibid, Part 1, Para 9.4-5.

and given Leibniz's definition it is not a reason at all. Reason as a simple learned knowledge is also not conducive to justice. In order to achieve justice, reason guided by emotion, which is understood, cultivated, and internalised, has to become an action. In the definitional chains discussed above, it is impossible to imagine a wise person who is emotionless, such a person would be unjust by definition. Justice requires that the emotion in the particular form of happiness defined by Leibniz is present otherwise law becomes a dark force. For the last statement to hold, it is necessary to clarify how Leibniz articulated the relationship between law and justice because for Leibniz neither law is reducible to justice, nor justice is reducible to law.

4. Law and justice

The discussion about justice in the previous section clarified Leibniz's understanding of that concept but we cannot assume an immediate correlation between justice and law. Given the level of precision with which Leibniz developed his ideas, he also clearly articulated his view of the relationship between law and justice. The starting point for his reflection is a carefully maintained distinction between *jus* and *lex*, Recht und Gesetz, droit et loi. This distinction denotes for Leibniz a difference between the normative ideal of justice and its concrete realisation in laws and legal regulations of a particular community. The following statement reflects well the core idea:

The error of those who have made justice dependent upon power comes in part from their confusion of *Right* with *law*. Right cannot be unjust, this would be a contradiction. But law can be, for it is power which gives and maintains law; and if this power lacks wisdom or good will, it can give and maintain very bad laws. But happily for the world, the laws of God are always just.⁴⁰

The original French text reads as follows:

La faute de ceux qui ont fait dependre la justice de la puissance vient en partie de ce qu'ils ont confondu le droit et la loy. Le *droit* ne sauroit estre injuste, c'est une contradiction; mais la *loy* le peut estre. Car c'est la puissance qui donne et maintient la

⁴⁰ Gottfried W. Leibniz, *Philosophical Papers and Letters*, Loemker, Leroy E. (trans) (The Hague: Kluwer, 1969) 564.

loy; et si cette puissance manqué de sagesse ou de bonne volonté, elle peut donner et maintenir de fort mechantes loix: mais heureusement pour l'univers, les loix de dieu sont toujours justes.⁴¹

In the original text, there are two concepts clearly marked by two different terms: 'droit', translated into English as 'right', and 'loi', translated as 'law'. This translation can be partly misleading to a native English language speaker. In particular, there is a danger of reading the term 'right' in a more familiar sense of personal legal entitlements, which obviously is not what Leibniz had in mind. For a person familiar with the linguistic usage of the two distinct terms in such languages as German, French, or Latin, it is obvious that Leibniz aimed to distinguish the absolute ideal of the perfectly just law (*droit*) from fallible and imperfect human laws (*loi*), or justice and law.

Another way in which Leibniz addresses the relationship between law and justice is his vision of the distinction and link between *jus civile* and *jus naturale*. Leibniz affirms that all positive law (*jus civile*) is a factual rather than a legal question because in positive law the proof comes not from the nature of things, but from history or facts.⁴² This idea is even more clearly expressed in a letter to Conring where he highlights that judicial knowledge (*prudentia dicastica*) has two parts: science and experience, whereby science refers to the science of natural law which is the expression of precepts of justice and experience to the experiential basis of positive law. He adds that positive law is more a fact than law.⁴³

The emphasis Leibniz places on the scientific nature of *jus naturale* is connected to his belief in the scientific discoverability of the precepts of justice or natural law. It will not be possible to go into detail of Leibniz's position on the question of truth and knowledge but it is necessary to mention that he argued that certain types of truths which are called eternal and necessary truths exist objectively and are discoverable by

⁴¹ Mollat (n 33) 47.

⁴² Leibniz, A.VI.2, 525.

⁴³ Leibniz, A.II.1, 45.

human reason.⁴⁴ According to Leibniz, justice and goodness belong to the necessary and eternal truths like numbers and proportions.⁴⁵ Thus, knowledge and understanding of justice is accessible to human reason in the same way as the truths of mathematics or geometry. Leibniz emphasised that the word ‘justice’ has ‘some definition or some intelligible notion’.⁴⁶ Therefore, the science of justice belongs to those sciences that Leibniz calls necessary and demonstrative science, which do not depend on facts but rather ‘give reasons for facts’.⁴⁷ In order to be able to discover precepts of justice, humans have to develop and apply correct methodological devices. One of the major preoccupations which accompanied Leibniz through his life concerns precisely the development of these methodological devices. In general, they are known as *scientia generalis* and *characteristics universalis*.⁴⁸ More specifically, his method in this regard is based on the idea of transferability of certain logical procedures of invention or discovery in geometry and algebra to other areas of human knowledge, including jurisprudence.⁴⁹ Leibniz never completed his work in this area, but we have several drafts in various languages on a variety of topics including the chains of definitions in relation to justice presented in the previous section.

Once humans know these precepts of justice, Leibniz was persuaded, they will be able to make law reflective of these precepts of justice. Leibniz’s interest in law is strongly motivated by his belief in the human capacity to discover eternal and universal truths, as well as the possibility to develop ways of making these eternal truths part of human life.

⁴⁴ His views on this matter are most clearly explained in *New Essays on Human Understanding*: Leibniz, A.VI.6. For the importance of these views for Leibniz’s vision of law and connections between these two fields of study see Ekaterina Yahyaoui Krivenko, *Space and Fates of International Law: Between Leibniz and Hobbes* (Cambridge: Cambridge University Press, 2020) chapters 3 and 4 in particular.

⁴⁵ Mollat (n 33), 45.

⁴⁶ Ibid., 49.

⁴⁷ Ibid., 50.

⁴⁸ For some references on these concepts see note 11.

⁴⁹ A very detailed discussion of this project from the perspective of logic as a project of uniting general logic with local logic of specific disciplines is contained in Arnaud Pelletier, ‘Logica est scientia generalis. Leibniz et l’unité de la logique’ (2013) 76 *Archives de philosophie* 271–94.

Therefore, although Leibniz clearly distinguishes *jus* and *lex*, justice and law, his own conceptualisation of law is closely linked to his conceptualisation of justice: Leibniz's concept of law is an attempt to articulate how to ensure that law is as much as possible compliant with precepts of justice. One interesting element from a practical perspective of application of law concerns Leibniz's remark on decision making. Leibniz suggested that in any decision as a balancing act, one should consider any given situation from the point of view of the other.⁵⁰ 'The place of the other is the true perspective point in politics as well as morals.'⁵¹ Its functionality is explained as follows: 'Thus, we can say that the place of the other in morals as well as in politics is a place for discovering considerations, which without it would not appear to us: that everything we would find unjust if we were in the place of the other shall appear to us as suspected of injustice.'⁵² This particular position – considering any given situation from the perspective of the other – enables the emergence of reflexions which can lead to the feeling of happiness in the other, which, as discussed in the previous section, is the foundation of justice. Another interesting practical observation by Leibniz concerns voting as a form of decision making. Leibniz was very articulate regarding the need to control unreasonable decision-making in different assemblies. He proposed to make any vote, even a secret vote, always accompanied by written reasons. Control of voting results will then, according to Leibniz, include a stage where reasons for voting are examined. He also contemplated a separate mechanism for holding those voting accountable for their votes, especially if they unreasonably refuse to vote for a measure, which is evidently necessary.⁵³

Based on these observations about the relationship between law and justice, it is possible to affirm that just like emotion – more precisely happiness as defined by Leibniz – is part of justice, so it is part of the functioning legal system. Similarly to

⁵⁰ Leibniz, A.IV.3, 903–4. See also the analysis of this idea in Fernando Gil, 'Leibniz: La place d'autrui, le principe du pire et la politique de la monadologie' (1984) 3 *Passé Présent* 147–64 and Quintin Racionero, 'El principio de la "place d'autrui" y la racionalidad de la política', in Ildefonso Murillo (ed.), *La filosofía ante la encrucijada de la nueva Europa* (Colmenar Viejo: Diálogo filosófico, 1994) 583–611.

⁵¹ Leibniz, A.IV.3, 903.

⁵² Ibid., 904.

⁵³ Leibniz, A.I.20, 285.

justice, law which is simply a neutral emotionless reason is not a good law but a dark force. This is also visible in the two practical examples. First, when adopting the perspective of the other, one is not simply receiving information from the other party, but actively attempting to situate him- or herself in the position of the other, which is not reducible to a purified disinterested knowledge about the other and his or her situation but represents a complete emersion in the other's perspective which of course includes knowledge of the objective elements of this situation but also an ability to share other's feelings. Otherwise, it would be unnecessary for Leibniz to talk about 'the place of the other' as the true perspective point. He could simply suggest collection of information, hearing of the other and similar standard procedures. Leibniz's insistence on knowing reasons for voting highlights his realism and his understanding of inseparability of reason and emotion. Since Leibniz knows that emotions, attitudes, and feelings are integral part of human lives and inseparable from reason, he tries to envisage a decision-making mechanism which enables taking these emotions into account. From his definition of justice, he knows that emotions required for justice to become part of reality have to be learned, he also knows that not all people will learn them equally well. Giving reasons for decisions, even in secret voting, becomes a control mechanism ensuring that only decisions based on right reason are taken into account and that the intimate dependency between reason and emotion is somehow accountable and controllable. Of course, these proposals raise many interrogations especially if we consider concrete unfolding of this type of measures in courts, parliaments or other institutions today. To the best of my knowledge, Leibniz also did not elaborate all the details of his proposal even for the institutions of his time. However, these examples to demonstrate that for Leibniz neither justice nor law can be viewed in a positive light if a dispassionate and thus indifferent reason is their foundation. The example relating to voting as a decision-making mechanism also demonstrates that Leibniz's thought resonates with insights of critical legal studies and other streams of contemporary legal thought that reveal the artificiality of law's claim to reasonableness and objectivity. Thus, pure reason is indeed the dark side of law for Leibniz, as it is the dark side of justice because law and emotion are inseparable. Law in fact has to learn how to deal with emotion instead of hiding behind the false claim of neutral objectivity based on reason.

5. Leibniz's view of law and justice within the context of contemporary debates

As mentioned in the introduction, law's self-portrayal as an objective and neutral discipline based on some pure reason devoid of emotion has a long pedigree. It is connected to the history of ideas in the West. This picture, which includes a binary oppositional vision of the relationship between law and emotion, was challenged for quite some time. However, the emergence of a distinct law and emotions scholarship is a relatively recent occurrence. Thus, writing in 2015 one author affirms: 'During the last two decades, a small group of legal scholars has begun to probe the scope of emotions in law.'⁵⁴ So if critical attitudes towards reasonableness and objectivity of law are largely a 20th century phenomenon, development of the law and emotions scholarship occurred mostly in the 21st century. Against this backdrop Leibniz's work on justice and law can be regarded as prefiguring some of the central developments not only in the critical thinking about law but also in the law and emotions scholarship.

Law and emotions scholarship has various approaches and phases. Leibniz's work does not have a direct correspondence to all the contemporary approaches to the study of law and emotions, which over years became quite diverse. However, if we follow the development of interrogations in the law and emotions scholarship, it becomes obvious that Leibniz's reflections are relevant to all these interrogations. Abrams and Keren in their seminal article identify three stages in the historical development of law and emotions scholarship: challenging legal rationality, studying the emotions, and making a normative turn.⁵⁵ By placing emotions at the heart of his definition of justice and avoiding the dilemma of disinterested love Leibniz, without expressly challenging legal rationality, made obvious that emotions are inseparable from legal reasoning, and that, as argued in the section on justice, reason without emotion is simply a dark force. The examples provided in the section discussing how Leibniz envisaged integration of justice in concrete legal systems further reinforce this position. Due to the size of this contribution, it was impossible to discuss Leibniz's thoughts which fall under the umbrella of 'studying emotions'. Such an endeavour in the seventeenth century cannot compete with contemporary advancement in the area.

⁵⁴ Renata Grossi, 'Understanding Law and Emotion' (2015) 7 *Emotion Review* 55-60, 56.

⁵⁵ Kathryn Abrams and Hila Keren, 'Who is Afraid of Law and the Emotions?' (2010) 94 *Minnesota Law Review* 1997-2074, 2003-2013.

Moreover, Leibniz's efforts in this regard are distributed across numerous contributions without being presented in a systematic way. However, some of the remarks made in this article about legal education or practical implementation of law mentioned in the previous sections demonstrate that Leibniz attempted to understand how emotions operate and influence humans including in legal processes. The most significant importance of Leibniz's thought resides in relation to the last stage of law and emotions scholarship, namely its normative turn.

Abrams and Keren affirm in relation to the normative turn: 'Most recently, law and emotions work has taken a normative turn, using the fruits of interdisciplinary exploration to argue for changes in legal conceptualization, policy, and doctrine.'⁵⁶ First, Leibniz clearly outlined a role of happiness for the conceptualisation and practical application of law. Discussing role of emotions in law is one of the earliest manifestations of normative turn.⁵⁷ Leibniz did not simply discuss emotions in relation to a specific legal field as is customary in law and emotions scholarship, but in relation to the concept of law as such something, which to the best of my knowledge remains only rudimentarily present in contemporary scholarship. Moreover, Leibniz reflected not only on the role emotions in law but also on the type of emotions that have to be part of law in order to arrive at a more just society. He also emphasised the need to cultivate certain emotions in legal education. This latter set of approaches and questions significantly enriches and illuminates even the most recent law and emotions scholarship.

While reason without emotions remains the dark side of law, how law and emotions should relate to each other remains a contested issue. This exploration into the views of a seventeenth century philosopher Gottfried Wilhelm Leibniz demonstrates the importance of looking into the past, even very distant past, for inspiration since the questions law and emotions scholarship raises are not as new as many suppose.

⁵⁶ Ibid., 2003.

⁵⁷ Ibid., 2011.

Conclusions

Leibniz lived and worked in the seventeenth century, the century that produced reason as a hallmark of modernity. He was also a scholar who aimed through his theoretical and practical work to contribute to ensuring peaceful and prosperous life for all. In his own work he demonstrated incessant effort to utilise the best elements of science, especially mathematics as methodological tools to guide his enquiries in other areas, including in relation to justice. In this environment and within these conditions he came up with a definition of justice that incorporated emotions, feelings as its central element. From his reflections on the concept of justice and law it becomes abundantly clear that reason alone cannot achieve justice; moreover, it cannot even appropriately aim to achieve it. Reason without action guided by right feelings, sentiments is simply a dark force. By omitting to consider feelings and focusing only on reason contemporary legal systems create a façade behind which they hide their inability to deal with emotions. This was abundantly clear to Leibniz already in the seventeenth century. Of course, reason is indispensable for justice and law to fulfil their promise, but they have to be underpinned by a certain emotional state which guides it. This approach to justice and law resonates with many themes of the contemporary law and emotions scholarship. Surprisingly, it even raises some of the questions that law and emotions scholarship started addressing only recently. Further exploration of Leibniz's work from the perspective of law and emotions scholarship could perhaps bring even further new insights.

LE DROIT NATUREL SUBJECTIF :
PASSAGER CLANDESTIN DU *CODE CIVIL DES FRANÇAIS*
Emmanuel Araguas^{*}

Abstract

Bien que le *Code civil des Français* promulgué le jour du printemps 1804 ait adopté les nouveaux principes maîtrisés d'un positivisme naissant, les sections dédiées au droit des contrats et au droit de la propriété en demeurèrent inchangées plus de deux siècles après que Portalis¹ eut signé le 21 janvier 1801, avec ses trois autres co-auteurs, le si puissant et inspiré *Discours préliminaire du premier projet de Code civil devant le Conseil d'État*² aux termes duquel, à propos du droit civil désormais mis en système, il écrivait :

- quant au rapport entre le droit et la loi :

« Quand la loi est claire, il faut la suivre ; quand elle est obscure, il faut en approfondir les dispositions. Si l'on manque de loi, il faut consulter l'usage ou l'équité. L'équité est le retour à la loi naturelle, dans le silence, l'opposition ou l'obscurité des lois positives ».

- quant aux espèces de conventions :

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¹ Sa vie est retracée dans plusieurs biographies, mais sa pensée peut être directement lue dans son précoce essai rédigé durant son exil près de Kiel en 1798, que son fils fit publier sous la Restauration, intitulé *De l'usage et de l'abus de l'esprit philosophique durant le XVIIIème siècle*, A. Egreon imprimeur, Paris, 1820.

² Si son œuvre la plus connue demeure le *Discours préliminaire sur le premier projet de Code civil*, livré devant le Conseil d'Etat le 1^{er} pluviôse an IX (21 janvier 1801), il convient également de se référer, pour se pénétrer de sa philosophie, aux *Discours de présentation du titre préliminaire du Code civil*, datés du 3 frimaire an X (24 novembre 1801) et du 4 ventôse an XI (23 février 1803), devant le Corps législatif qui le rejettera de peu de voix.

« Les contrats de mariage occupent une place particulière dans le projet du code civil (...) Quant aux autres contrats, nous nous sommes réduits à retracer les règles communes. Sur cette matière, nous n'irons jamais au-delà des principes qui nous ont été transmis par l'antiquité, et qui sont nés avec le genre humain. (...) »

- quant à la propriété privée supplantant la notion féodale de « domaine » : « L'homme naît avec des besoins ; il faut qu'il puisse se nourrir et se vêtir : il a donc droit aux choses nécessaires à sa subsistance et à son entretien. Voilà l'origine du droit de propriété ».

Œuvre de synthèse dira-t-on (*transaction*³ entre le legs de l'Ancienne France et les éclairages offerts par la *régénération*⁴ issue de la Révolution française), le *Code civil des français*⁵ est loin d'avoir entre temps abandonné le grave questionnement du jansénisme et le profond héritage du jusnaturalisme qui le précédèrent et préparèrent sa venue en se diffusant, depuis les milieux religieux et philosophiques continentaux⁶, à travers la tradition civiliste du XVIIIème siècle.

³ La citation exacte tirée du *Discours préliminaire* à ce titre est la suivante « (...) Tout ce qui est ancien a été nouveau. L'essentiel est d'imprimer aux institutions nouvelles, ce caractère de permanence et de stabilité qui puisse leur garantir le droit de devenir anciennes. Nous avons fait, s'il est permis de s'exprimer ainsi, une transaction entre le droit écrit et les coutumes toutes les fois qu'il nous a été possible de concilier leurs dispositions, ou de les modifier les unes par les autres, sans rompre l'unité du système, et sans choquer l'esprit général. Il est utile de conserver tout ce qu'il n'est pas nécessaire de détruire : les lois doivent ménager les habitudes, quand ces habitudes ne sont pas des vices. On raisonne trop souvent comme si le genre humain finissait et commençait à chaque instant, sans aucune sorte de communication entre une génération et celle qui la remplace. Les générations, en se succédant, se mêlent, s'entrelacent et se confondent. »

⁴ Sur cette expression qui demeure à jamais liée aux motifs de la Révolution tels qu'ils se présentèrent entre 1788 et 1791, nous renverrons à l'œuvre essentielle de l'Abbé Grégoire (chef de file du clergé jureur), son inventeur : *Projet de déclaration du Droit des Gens* qu'il soumettra devant la Convention le 23 avril 1795.

⁵ La formulation fut trouvée par Cambacérès.

⁶ L'influence anglaise dans la société française, quoique déterminante sur le plan politique et institutionnel, témoins Montesquieu ou Voltaire, doit être considérée comme indirecte sinon ineffective sur le droit civil, peut-être sous la réserve de ce que nous suggérerons en début de deuxième partie sur la formulation de l'art. 544 ?

Il est du reste plus que remarquable de mesurer, d'une part, qu'en dépit même d'une réforme sans équivalent intervenue entre 2016 et 2018⁷, notre droit des contrats demeure principalement enté sur l'emprunt fait aux principaux axiomes de liberté, de sécurité et de bonne foi⁸ dégagés par Domat dans *Les loix civiles en leur ordre naturel* (1689)⁹ puis Pothier dans son *Traité des obligations selon les règles tant du for de la conscience que du for extérieur* (1761)¹⁰ et que, d'autre part, ainsi que le Premier Consul l'avait ardemment voulu et Portalis brillamment écrit, nous avons hérité de lui notre définition de la propriété (« la propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on en fasse pas un usage prohibé par les lois et par les règlements »), ceci sans pour autant que contrat et propriété, nouvelles « tables » du droit civil codifié et de la vie sociale française depuis 1804, ne fussent établis selon la référence explicite à une école de pensée juridique affichée, ou à aucun principe philosophique qui pourrait en réclamer la « paternité légitime ».

C'est donc d'une « paternité naturelle » que furent issues ces institutions civiles rendues utiles par la nécessaire et indépassable distinction *entre le droit et la loi*, intemporel *credo* du droit « naturel » dit « subjectif ». Encore faut-il immédiatement préciser ces deux termes : « naturel » est ce droit qui se veut être conforme à la nature des choses et donc « juste en soi » pour suivre Aristote dont procèdent les trois préceptes d'Ulpien qui marquent le *Corpus Juris Civilis*¹¹ ; il devint « subjectif » et non

⁷ parution au J.O. n° 0035 du 11 février 2016 de l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, entrée en vigueur le 1^{er} octobre 2016 et qui a ainsi modifié une importante partie du Code civil, la loi est intervenue le 20 avril 2018, pour ratifier l'ordonnance.

⁸ V. les contributions aux ouvrages collectifs : *La réécriture du Code civil, le droit français des contrats après la réforme de 2016*, dir. J. Cartwright, B. Fauvarque-Cosson et S. Whittaker, coll. Dr. comparé et européen, n° 29, éd. Société de législation comparée, Paris, 2018 ; *La réforme du droit français des contrats*, dir. B. Fauvarque-Cosson et G. Wicker, coll. Dr. comparé et européen, n°31, éd. Société de législation comparée, Paris, 2019.

⁹ Jean Domat, *Les loix civiles en leur ordre naturel*, Paris, 1689.

¹⁰ Robert-Joseph Pothier, *Traité des obligations selon les règles tant du for de la conscience que du for extérieur*, Paris, Debure, 1761.

¹¹ *Neminem laedere, suum cuique tribuere, honeste vivere* – ne nuire à aucun, à chacun le sien, vivre honnêtement (Liebniz les réinterprétera pour décrire les trois degrés de la justice commutative, distributive et divine).

plus objectif comme à Rome (Byzance) – école dite « classique » – par l'apport « subjectiviste » que représente l'irruption, à la suite de la pensée de Guillaume d'Occam au XIV^{ème} siècle – école dite « moderne » – de la « nature humaine » dans la règle de droit. Affirmée au fil des œuvres de Grotius et Leibniz, l'ipséité du sujet transita longtemps sous le masque de la *persona* jusqu'à investir la personnalité juridique endossant les « qualités morales », attributs reconnus à l'homme¹².

¹² V. les très instructifs articles de Yves Charles Zarka, « Identité et ipséité chez Hobbes et Locke », *Philosophie*, n° 37, 1993, pp. 5-19 ; « Leibniz et le droit naturel », in *La nature selon Leibniz, Studia leibnitiana*, Franz Steiner Verlag, Stuttgart, Sonderheft, 1995 (pp. 181-192) ; « Leibniz et le droit subjectif » *Revue de métaphysique et de morale*, n° 1, 1995 (pp. 83-94). V. également son article « Ralph Cudworth et le fondement de la morale : l'action, le sujet et la norme », *Archives de philosophie* n° 55/3, 1995, p. 405-420 où l'auteur revient sur le questionnement central du XVII^{ème} siècle que fut la recherche, stimulée par les écrits contestés de Hobbes, du fondement du « juste » intellectuellement : « Ce n'est donc pas la volonté de Dieu mais la nature éternelle et immuable du bien et du mal, du juste et de l'injustice qui rend obligatoire ce que Dieu nous commande. On voit donc comment Cudworth rétablit l'idée d'une norme naturelle et immuable du bien et du juste contre le volontarisme de Hobbes. Cette démonstration va être transposée sur le plan politique car le relativisme produit par le volontarisme politique n'est lui-même que la simple transposition du relativisme produit par le volontarisme théologique. (...) On en trouve la formulation la plus directe et la plus claire dans le *Léviathan* [chap. XIII]. Ainsi, dans l'état de nature "nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common power, there is no Law : where no Law, no Injustice" Cudworth cite ce passage dans le *Treatise concerning Eternal and Immutable Morality* (I, I, 4). Contre cette négation de l'idée de justice naturelle et contre la subordination de toute justice humaine à l'existence d'un pouvoir et d'un commandement politique, il va tenter de rétablir l'existence d'une norme naturelle du bien et du juste. La critique du relativisme politique revient à une critique de la réduction du droit au droit positif, c'est-à-dire à la légalité de fait. La thèse principale consiste à affirmer que *ce n'est pas la volonté de celui qui commande, mais la nature intellectuelle de celui qui est commandé, qui fonde l'obligation* (*ibid.* I, II, 4, p. 20-24). Le changement de point de vue permet à Cudworth d'opérer une distinction entre les choses auxquelles *la nature intellectuelle oblige d'elle-même directement, absolument et perpétuellement*, et celles auxquelles elle oblige *seulement sous la condition d'une action volontaire* provenant de nous-mêmes ou de quelque autre personne. Les premières sont naturellement bonnes ou mauvaises, les autres le sont accidentellement ou hypothétiquement. Ainsi, une action naturellement indifférente devient obligatoire non par la volonté de celui qui l'énonce, mais en acquérant une nouvelle relation à la nature intellectuelle de celui qui y est soumis. Par exemple, *tenir notre parole, en exécutant les conventions que nous avons passées*, est un principe de justice naturelle qui oblige naturellement et absolument, en revanche ce n'est que sous la condition de l'existence d'un acte volontaire par lequel nous promettons qu'une action à laquelle nous n'étions pas obligé auparavant *devient obligatoire pour nous*, parce qu'elle tombe sous le principe naturellement obligatoire de garder notre foi et d'exécuter nos conventions (...) Autrement dit, la volonté ne crée pas une nouvelle entité morale, mais modifie le rapport entre une action et un principe naturel ou absolu de justice. L'idée même d'une obligation positive suppose comme son fondement l'idée d'une norme naturelle, éternelle et immuable de justice. Le relativisme politique de Hobbes se trouve par là même destitué. ».

Ainsi définitivement affranchie de son ultime trace de déterminisme mécaniste, la trirème romaine se voyait accastillée d'œuvres vives ontologiques, lestée d'une double quille rendant le vaisseau civiliste bon à la mer océane et habile à s'élancer, sous toutes les allures, à travers le globe. En d'autres termes, ce droit naturel subjectif « 2.0 » issu de l'*École de la Nature et des Gens* dont Hugo de Groot fut le premier précepteur, qui vit *raisonner* la chrétienté au crible des interrogations éthiques traversant l'Europe écartelée entre scolastique et réformisme, fit *résonner* métaphysiquement l'antique « défi d'Antigone »¹³ (le droit naturel objectif « 1.0 »).

L'écho de ce long cri de la *dignitas* humaine embarqua clandestinement dans les soutes du *Code civil des français*, dissimulé entre son droit des contrats rapatrié de l'Âge classique « copié-collé » sous la forme comprimée d'axiomes tirés des sages Domat et Pothier (regroupés autour du siège n° 1134), et sa nouvelle théorie de la propriété individuelle (installée au siège n° 544), cataplasme posé sur les marques laissées par les quinze années de convulsions que dura une Ière République en rupture violente avec l'ancien régime de la confusion des droits et des lois¹⁴.

¹³ Titre d'un ouvrage de Y. Lemoine et J.-P. Mignard, *Le Défi d'Antigone – promenade parmi les figures du droit naturel*, éd. Michel de Maule, Paris, 2012, par référence au drame mis en scène par Sophocle (442 av. J.-C.) avec le refus de sépulture au frère d'Antigone, Polynice (enfants d'Œdipe et Jocaste), commis par son oncle maternel, Créon roi de Thèbes, contre ce défunt ennemi de la Cité. Ce défi au droit naturel objectif exhorta Antigone à désobéir en inhumant son frère, ce qui fut cause de sa condamnation par la Cité (la raison d'Etat) la poussant au suicide provoquant *in fine*, désespoir induit par la démesure de sa tyrannie, la folie de son oncle : « ... *Créon* : – Et, malgré cela, tu as eu l'audace de passer outre à ma Loi ? – *Antigone* : Oui, car ce n'est pas Zeus qui l'avait proclamée ! Ce n'est pas la justice assise à côté des dieux infernaux qui a jamais fixé pareille loi aux hommes, et je ne pensais pas que tes défenses à toi fussent assez puissantes pour permettre à un mortel de passer outre à d'autres lois, aux *lois non écrites inébranlables* des dieux ! Elles ne datent, celles-là, ni d'aujourd'hui ni d'hier et nul ne sait le jour où elles ont paru. »

¹⁴ Citons brièvement ici les premiers mots du « Précis historique sur la confection du Code civil » qui ouvre le *Recueil complet des travaux préparatoires du Code civil* par A. Fenet (Tome I, pp. XXXV-XXXVI) : « Une infinité de lois diverses régissaient la France avant 1789 ; l'Etat semblait n'être alors qu'une société de sociétés, et pendant longtemps un retour à l'uniformité sembla impossible parce que chacun considérait comme des privilèges indestructibles les stipulations que sa province, au moment où elle s'était unie au même empire, avait faites *pour le maintien de la coutume qui lui était particulière*. Tous les obstacles disparurent à la révolution ; aussi l'assemblée constituante posa-t-elle les bases de la réforme. » On renverra aussi sur cet état de difficulté extrême de la connaissance des lois, aux réflexions de François Joseph Momart de Jussieu de Montluel, auteur d'un non moins fameux manuel

En raison de son format, la présente étude ne pourra qu'esquisser cette question des fondements philosophiques du Code civil que nous circonscrirons ; elle se bornera au retour successif sur l'esprit et la lettre des points cardinaux que furent les articles 1134 (I.) et 544 (II.) du *Code civil des français*, « piliers » d'un droit civil refondu, forgé du style neuf inaugurant l'ère moderne.

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Keywords

Legal History - Jurisprudence - Natural Law - Codification of Law - French Law

1. La conservation des principes du droit naturel en matière de conventions

Convention ou contrat sont les deux termes usités pour évoquer l'*engagement volontaire* de l'individu envers autrui. De nos jours toutefois, le terme de convention fait

de la même période, *Instruction facile sur les Conventions ou notions simples sur les divers engagements qu'on peut prendre dans la société & sur leurs suites*, Paris, chez Leclerc, 1773 (v. pp. 2-3).

littéralement référence à la dimension intellectuelle d'un simple accord¹⁵ ou d'un engagement atteint par les parties quand le contrat désigne l'instrument par lequel les engagements *convenus* se voient manifestés. En tout état de cause, on relèvera avec intérêt que ces deux termes caractérisent indifféremment les contrats en droit coutumier anglo-normand, à travers les deux maximes cardinales jumelles en usage depuis des temps immémoriaux dans le bailliage de Jersey (« La convention fait la loi des parties ») et celui de Guernesey (« Entre les parties, le contrat fait la loi ») respectivement. L'étude de cet « engagement consenti » ou « délibéré » qu'est le contrat civil – tel qu'il nous paraît exact de le décrire au vu des fondements philosophiques rappelés – sera menée à travers les développements du concept dans le droit civil antérieur au Code (A) ayant abouti à forger ses caractères doctrinaux définitifs lors de la codification de 1804 (B).

A. Développements philosophiques du concept de contrat dans le droit civil antérieur

En guise de retour sur la notion de contrat dans le droit de l'Ancienne France, nous évoquerons l'interpolation des coutumes franques et du droit romain tardif réinterprété à la lumière des canons de la foi chrétienne telles qu'elle était présentée dans les décennies de la période classique qui provoquèrent le basculement de l'ordre des choses dans l'inconnu de la révolution « régénératrice » de la Nation. C'est ainsi qu'un célèbre manuel portatif de droit français, celui de l'avocat parisien Argou, *Institution au droit François*, présentait, après une synthèse historique retraçant au *Tome I* le legs indirect du droit de Justinien dans l'ancienne Gaule romanisée, devenue successivement barbare, chrétienne, puis française¹⁶, une définition en quelque sorte

¹⁵ Comparaison étant parfois raison pour entendre le sens (incompris ?) d'un terme abscons, nous signalons l'article à paraître de G. Cerqueira, « L'acte juridique conventionnel – exégèse brève d'une vue de l'esprit » in *Mélanges en l'honneur du Pr. Iayr de Aguilar Viera*, Société de législation comparée, Paris, 2022.

¹⁶ Paru à Paris, chez Knappen, cité en sa 10^{ème} édition, 1771 : « Les livres des jurisconsultes étoient ceux qui sont autorisés par le Code Théodosien, sçavoir, ceux de Papinien, de Paul, de Cäius, d'Ulpian, de Modestin & des autres dont ils allèguent les autorités qui sont S[c]évola, Sabin, Julien & Marcel. Cette restriction fait voir que les livres des autres jurisconsultes, dont nous voyons des fragments dans le *Digeste*, n'étoient alors d'aucune autorité, ou n'étoient pas connus en Occident. J'estime aussi que les textes de l'édit perpétuel des loix, des plébiscites, des Senatus-consultes, &

« mixte » des conventions au *Tome II*, c'est-à-dire mâtinée d'une romanité réinterprétée par le droit naturel subjectif, comme nous l'avons déjà évoqué :

« *Livre III – Des Obligations. Chap. 1^{er} – Des obligations en général.* Les obligations sont des espèces de liens de droit, qui nous engagent à faire ou à donner quelque chose. Ces obligations peuvent avoir plusieurs causes : elles ont quelquefois leur fondement dans la seule équité naturelle, que la loi, par des raisons particulières, n'a pas voulu autoriser & alors elles sont appelées en droit obligations purement naturelles, & ne produisent aucune action [on croit sentir ici l'influence de Pothier l'orléanais sur la doctrine parisienne] (...) Il y a d'autres obligations qui n'ont d'autre fondement que dans la loi même, & qui sont, en quelque matière contraires à l'équité naturelle [ici, plutôt celle de Domat l'auvergnat traitant des lois arbitraires] (...) Il y a enfin des obligations qui ont une cause juste & naturelle, & qui outre cela est approuvée par la loi : elles sont appelées obligations civiles & naturelles tout ensemble ; c'est principalement de cette dernière sorte d'obligations dont nous parlerons ici ; car nous présumons que toutes les obligations, qui sont autorisées par la loi, ont, ou doivent avoir une cause raisonnable. Toutes les obligations naissent des contrats ou espèces de contrats, qu'on appelle en droit quasi-contrats ; ou elles naissent des crimes ou espèces de crimes, que la loi appelle quasi-délits. *Il ne faut pas concevoir ici le mot contrat de la manière dont on use, dans le discours ordinaire, le prenant pour un écrit authentique, qui n'est que la preuve du contrat ; il faut ici le prendre dans son vrai sens, pour une convention entre deux ou plusieurs personnes : tel est le contrat de vente, de société, de prêt.* »

On se contentera encore d'indiquer, en contrepoint des indications ainsi recueillies concernant l'incorporation des préceptes du droit romain au fonds juridique français, que la coutume fut incontestablement une source première du droit de la nation quant à la compréhension du contrat. Au fil des évolutions de la pratique dans les ressorts de chaque parlements aux traditions « régionales » diverses mais souvent

surtout de la Loi des Douze-Tables, très sages étoient dès lors tout à fait perdus, puisque Justinien voulant ensuite faire un corps parfait de tout le Droit, ne l'a composé que des Constitutions des Empereurs & des Traités des Jurisconsultes. (...) Les Francs & et les autres barbares apportèrent un nouveau droit dans les Gaules : mais comme ils n'avoient aucun usage des lettres en leur langue, leurs loix n'ont été écrites qu'en latin par des Romains, après leur établissement & leur conversion à la Religion Chrétienne. » (pp. 11-12).

complémentaires, leur existence stable durant plusieurs siècles rendit possible, d'une part, une forme empirique de « comparatisme municipal » attestant même du rayonnement et de l'influence de certaines coutumes sur d'autres à l'intérieur ou à l'extérieur des « groupes de coutumes » identifiés, d'autre part, l'émergence d'une identité de « principes généraux du droit » en France à travers le *ius commune*.

Contentons-nous, à ce double titre, d'évoquer ici l'exemple saillant offert par la précoce coutume de Normandie consignée sous l'intitulé : *Summa de legibus Normannie in curia laicali* provenant du Cotentin, mieux connue sous le nom de « Somme Maucael » et dont Tardif démontra qu'elle forma aussi le droit municipal de l'île de Jersey, précisant dès l'introduction de son étude : « La Normandie est la province dont le droit coutumier offre, avec une originalité persistante, le plus vaste ensemble et les plus riches développements »¹⁷. Le texte médiéval (1224-1234 ?) contenant les principes des « convenants », soit des conventions ordinaires et non pas uniquement des contrats solennels, ne sera abrogé que par la *Coutume Réformée* de 1583 en raison de l'antiquité du langage autant que devant l'adoption des développements techniques du *ius commune* et d'une faveur pour l'extension à tous les contrats de la « clameur révocatoire », voie procédurale de saisine de la juridiction du bailli, consacrée en exergue de la « Coutume Réformée » à son Article III – *De Jurisdiction*, rendue disponible pour trancher tous contentieux en matière contractuelle.

Sans développer le propos sur la coexistence, en Normandie médiévale, du droit romain et du droit canon (*ius commune*) à côté de la coutume¹⁸, citons le texte le plus intéressant concernant les contrats usuels, *capitulum XCI* [chapitre 91] « *De Pactis* (de

¹⁷ « L'identité de la *Somme Maucael* et du Coutumier de Normandie ne semble guère douteuse en présence de documents aussi positifs que le rôle des *Assizes* tenues par les justiciers itinérants de 1309 et la pétition des insulaires de 1332 (...) à deux reprises, en 1309 et en 1332, les habitants de Jersey et Guernesey affirment que la *Summe Maucael* contient les lois et coutumes de la Normandie (...) les historiens jersiais ou anglais, Le Geyt, Poingdestre, Dicey, paraissent croire qu'il ne saurait s'élever à cet égard aucun doute » Ernest-Joseph Tardif, *Coutumiers de Normandie, textes critiques*, (pp. 22-55), V. Tome II, Rouen, Lestringant, et Paris, Picard & fils, 1896, ici cité par S. Nicolle Q.C. *The origin and development of Jersey Law (an outline guide)*, 5^e ed. *Jersey & Guernsey Law Review* (p. 23).

¹⁸ Signalons, de Génestal : « *Études sur les sources du droit normand aux XIII^e, XIV^e et XV^e siècles* » au Bulletin de la Société des Antiquaires de Normandie, tome XL, publiées *post mortem* par J. Yver, à Caen en 1932, lui dont la thèse, *Les contrats dans le très ancien droit normand (Xe – XIII^e siècles)*, éd. du publicateur, Domfront, 1926, demeure inégalée dans la démonstration du « romanisme » du droit normand classique en matière de conventions.

convenant) » duquel ressort la prépondérance, lors de la conclusion d'un engagement, de l'expression d'une intention, d'une *cause juste* et de la *bonne foi entre les parties*, sous l'empire d'une police des mœurs et des pratiques dans le but préventif de réduire les querelles :

« *Capitulum XCI De Pactis – de convenants* : Les unes de ces querelles naissent de convenant et les aultres de chose receue (...) Toute telle querelle est de debte, si comme nous avons dict. Convenant qui est faict de chose receue oblige les recepveurs et sont tenus comme debtors. Aulcun n'est estably debteur pour promesse qu'il face, se il n'y eust droicte cause de promettre. Aulcun n'est tenu à payer chose qui ait esté promise pour faire vilain service (...) Aulcun n'est debteur pour promesse, se l'en monster cause pour quoi la promesse fut faicte (...). Toutes personnes layes en peuvent estre querellées, excepté les chatels¹⁹ aux morts et les mariages et les chatels à ceulx qui sont en solennel pèlerinage²⁰ (...) ».

On peut ainsi s'en convaincre, tout comme le droit civil, le *ius commune* qui avait imprégné la coutume dérivait du droit romain²¹. Poingdestre, comme les autres

¹⁹ Les biens meubles, toujours désignés « *chatels* » en droit anglais.

²⁰ Comme nous l'avons fait observer ailleurs (E. Araguas, *Le contrat civil à Jersey, bastion du droit coutumier en terre anglo-normande*, coll. Droits étrangers n° 16, Société de législation comparée, Paris, 2021), l'institution anglaise médiévale du *trust*, si importante pour la moderne Jersey, est de nos jours la conséquence juridique la plus marquante des pèlerinages : trouver ainsi son expression en germe dans *l'Ancienne Coutume* est évocateur.

²¹ On ne pourra que renvoyer à deux articles éclairants publiés ensemble sur ces questions d'interpolation entre compréhension médiévale du droit romain à propos de l'antique contrat *synallagmatique* d'une part, et rôle capital du droit savant par l'institution de la cause du contrat et de la bonne foi dans les conventions à peine de nullité, d'autre part, qui forgèrent l'instrument civil de l'engagement consenti par la suite désigné sous le signifiant générique de contrat (*cum-trahere*) pour signifier la « trans-action » : l'article de Jean-Michel Poughon « Une constante doctrinale : l'approche économique du contrat » qui nous rappelle que « le *synallagma* traduit juridiquement cette réciprocité de prestations en obligations réciproques, immédiates pour les contrats nommés, à venir pour les opérations innommées. Le contrat se présente donc avant tout comme un phénomène économique général dont certains aspects seulement sont pris en charge par le droit. Cette conception du contrat se retrouve chez les romanistes qui vont approfondir la distinction du juridique et du non-juridique et proposer une classification des contrats fondée sur un critère économique. Pour les romanistes, toute relation bilatérale est avant tout innommée et ne concerne pas le droit. Ce n'est qu'une *permutatio* (...). Les opérations contractuelles innommées sont assimilées aux *negotia*, au *commercium*. A plusieurs reprises, pour expliquer ce manque de qualification, les romanistes précisent que les rapports

juristes de l'Âge baroque, désignait d'ailleurs indifféremment ces sources du droit municipal normand sous l'expression de « *droit écrit* »²² précisant, à propos des conventions :

« (...) pour ces choses-là les anciens Normans (...) n'avoient point de loix particulières mais se réglaient par le droit civil qui en cela suit *la raison et l'équité naturelles* ». ²³

C'est assez dire à quels héritages raffinés et *communs à tous les systèmes juridiques* du continent européen, Domat et Pothier ont successivement puisé leur savoir. C'est encore faire entendre pourquoi, malgré l'excellence des conférences des professeurs universitaires et des plus doctes des praticiens données sur ces matières dans la société agraire, pastorale et paternaliste de la France de Louis XVI, fondée sur la foi en la parole donnée, il était impérieux que tout changeât : s'agissant des conventions, l'on pourrait donc se hasarder à reprendre pour notre compte la fameuse formule de Lampedusa, tant il était, en 1804, nécessaire que tout change... pour que rien ne change²⁴. Dans sa biographie de Portalis²⁵, *Portalis, l'esprit des siècles*, Joël-Benoît d'Onorio dit en quelques mots à la fois le « pourquoi » et le « comment » de cette *révolution* complète – c'est-à-dire, retour – de la matière sur elle-même :

d'affaires sont plus nombreux que les noms (*plura sunt negotia quam vocabula*). Nous ne pouvons d'ailleurs que renvoyer à l'explication étymologique du vocable *negotium* qui explique son assimilation à l'innomé (...) » ; et celui de Jean-Louis Gazzaniga, « Domat et Pothier : le contrat à la fin de l'Ancien Régime » où il est exposé que « (...) la volonté n'est pas tout, il faut la contrôler et ainsi les canonistes mettent au premier rang des éléments constitutifs du contrat la cause qui apparaît comme une limite imposée à la liberté. (...) On doit respecter la parole donnée et tenir la foi engagée, à condition que la promesse repose sur une bonne et juste cause. La justification morale est très nette. Il y a péché à manquer à sa promesse, il y en a un plus grand à promettre une mauvaise action. », revue *Droits* (n° 12, 1990, p. 39 s.).

²² Poingdestre, « *Lois et Coutumes de l'île de Jersey* (...) » (circa 1679) §. 261 : « ...il est certain que quand le Droit particulier & municipal se taist, il faut toujours avoir recours au Droit Commun qui est la Règle Générale, là où le Droit Coustumier n'est que l'exception particulière : et que la ou il n'y a point d'exception à ensuivre, on doit juger par la Règle ». V. S. Nicolle *Q.C. op. cit. Jersey and Guernsey Law Review Ltd*, (p. 37).

²³ Poingdestre, *Commentaires sur l'Ancienne Coutume*, cité par S.Nicolle, *The Origins and Development of Jersey law: an Outline Guide* (5th edn, 2009) § 13.4.

²⁴ Giuseppe Tomasi Di Lampedusa, *Le Guépard*, 1958.

²⁵ Joël-Benoît d'Onorio, *Portalis, l'esprit des siècles*, Dalloz, Paris 2005 (p. 204).

« La doctrine du positivisme juridique – terreau de l’absolutisme étatique – a eu logiquement ses représentants aux pires heures de la Révolution française, notamment Saint-Just avec son apophtegme emblématique « Hors les lois, pas de droit », en écho au « Hors l’Etat, pas de droit » du *Léviathan* de Hobbes au siècle précédent, qui sera repris par Hegel au siècle suivant »

C’est en contrepoint philosophique de l’ère révolutionnaire, terminée par la déclaration consulaire de Bonaparte du 25 décembre 1799 qui en clôtura le dernier chapitre historique et politique²⁶, que le Code civil fut élaboré puis promulgué. Il ouvrit un autre temps, ou plutôt, en appui sur le passé, permit d’enserrer la période révolutionnaire dans une parenthèse qui fera d’elle un temps fini, celui du « droit transitoire ». Ce n’est point un retour à l’Ancien régime qui prévaut avec le *Code civil des français*, mais un accommodage avec le pan de l’ancien droit qui ne pouvait être révoqué sans porter atteinte à la nouvelle société qu’il était inconcevable de bâtir sur une *tabula rasa*, croyance dont les excès venaient d’être subis.

En ce sens, sous le dais de cette *École du Droit de la Nature et des Gens* à la suite de l’héritage de l’avocat et diplomate Hugo de Groot et la mouvance protestante des auteurs qui succédèrent à Aristote, Cicéron puis Thomas d’Aquin, Portalis fit *renouer le droit français à la tradition philosophique* dans le droit fil de laquelle pensèrent et écrivirent Domat (1625-1696), d’Aguesseau (1668-1751), Pothier (1699-1772) ou Montesquieu qui reste son inspirateur majeur, tout en adoptant une lecture « posée »²⁷, soit positive, de la raison et de l’équité²⁸.

²⁶ « La Révolution est fixée aux principes qui l’ont commencée : elle est finie. »

²⁷ Nous empruntons le mot à un puissant article de Pr. Alain Sériaux en forme de *disputatio* paru à la revue d’Histoire des facultés de droit et de science juridique : « Le Droit naturel de Michel Villey », 1988, pp. 139-153 sur lequel nous nous retiendrons d’enter notre conclusion pour réserver nos réflexions à de futurs écrits.

²⁸ J.-E. d’Onorio nous le dit ainsi (p. 207) : « En bon modéré, il fait des emprunts au droit naturel moderne, il est pour la raison mais *contre le rationalisme* ayant constaté par lui-même dans les années noires de la Révolution, à quel point le culte de la Raison a pu être déraisonnable et combien de crimes on a pu aussi commettre en son nom. En bref, il parle le langage de son époque *sans qu’on soit certain qu’il donne le même sens aux mêmes mots*. Ainsi, taire le nom de Dieu pour s’en tenir à la nature, à l’instar de toutes les philosophies d’alors, ne fait, chez lui, que décaler la question, car cette nature suppose bien un Auteur, de même qu’évoquer la création ou les créatures comme il le fait renvoie implicitement à un Créateur. Ce langage éloigne de la source sans pour autant la tarir vraiment. ... S’il est vrai que l’on chercherait en vain, dans les discours de Portalis relatifs au Code civil, une affirmation

Ces éléments étant rappelés, nous pouvons désormais étudier le droit des contrats français livré à la modernité par Portalis, Maleville, Bigot de Préameneu et Tronchet, les rédacteurs du Code après une quinzaine d'années de travaux, débats, projets et difficultés de toutes sortes ayant rendu l'œuvre impossible jusqu'à l'impulsion de Bonaparte, *impérial* Premier Consul.

B. Origine doctrinale des caractères du contrat inscrits dans le Code civil des français

Dans son exaltante thèse de doctorat préfacée par Michel Villey, intitulée *Les origines doctrinales du Code civil français*, André-Jean Arnaud²⁹ démontrera avec brio que cette fameuse « transaction » entre le droit romain et les coutumes que réalisa le *Code civil des français* fut surtout un « moyen terme entre deux courants de la doctrine juridique française, un courant empirique positiviste, réactionnaire, soutenu par un certain jansénisme juridique, et un courant jusnaturalistique rationaliste moderne », approfondissant ce faisant l'analyse de la philosophie du droit³⁰, comme nous allons désormais l'aborder.

Portant au plus loin la volonté consulaire qu'il représente, Jean Étienne Marie Portalis consacré « père du Code civil » depuis l'expression d'Henri Capitant³¹ et l'étude de

explicite du fondement divin du droit naturel, cela ne fait aucun doute dans son esprit ainsi que le laissent induire ses écrits philosophiques et tout son bagage intellectuel et spirituel. Seulement, dans le contexte politique où il s'exprimait alors, l'orateur consulaire devait tenir compte de la pluralité des opinions et des tensions idéologiques encore non apaisées au sortir d'une Révolution qui fut aussi celle des idées. »

²⁹ publiée à la L.G.D.J., Paris, 1969.

³⁰ Arnaud, *op. cit.*, p. 20 : « (...) Déjà en effet, en 1934 M. Naber, voix assez solitaire, déclarait que pour l'intelligence du Code civil français, il convenait de ne pas négliger une influence, celle du droit naturel systématisé en livres, titres et paragraphes et comme codifié par Grotius et ses nombreux sectateurs, les Pufendorf, les Barbeyrac et tant d'autres (...) Depuis, des auteurs de plus en plus nombreux ont repris cette idée que les codes actuels pourraient bien être, pour une grande part, les *produits de la philosophie moderne*, introduits dans le droit par les tenants de de l'école du Droit Moderne au XVIIIème siècle. »

³¹ On précisera que le mot est le plus souvent employé pour désigner l'immense Joseph-Étienne Pothier.

l'œuvre menée par le doyen Carbonnier³² (travaux auxquels nous ne pouvons que renvoyer), ressort du *Recueil complet des travaux préparatoires au Code civil*³³ comme l'homme sans qui cette synthèse des doctrines autour de l'*engagement librement consenti* ne pouvait advenir.

Portalis ne fit pas mystère de la profonde empreinte jusnaturaliste dans les travaux menés par les rédacteurs du Code, guidés par les préceptes de la raison et de l'équité qui indiquaient déjà aux grands esprits du XVIIIème siècle tels Poingdestre³⁴ ou Domat, le cap à suivre, non sans leur inspirer exigence morale et humilité intellectuelle :

« Le droit est la raison universelle, la suprême raison fondée sur la nature même des choses. Les lois sont ou ne doivent être que le droit réduit en règles positives, en préceptes particuliers. *Le droit est moralement obligatoire ; mais par lui-même il n'emporte aucune contrainte ; il dirige, les lois commandent ; il sert de boussole et les lois de compas.* Les divers peuples entre eux ne vivent que sous l'empire du droit ; les membres de chaque cité sont régis, comme hommes, par le droit, et comme citoyens, par les lois. Le droit naturel et le droit des gens ne diffèrent point dans leur substance, mais seulement dans leur application. La raison, en tant qu'elle gouverne indéfiniment tous les hommes, s'appelle droit naturel ; et elle est appelée droit des gens, dans les relations de peuple à peuple. Si l'on parle d'un droit des gens naturel et d'un droit des gens positif, c'est pour distinguer les principes éternels de justice que les peuples n'ont point faits, et auxquels les divers corps de nations sont soumis comme les moindres individus, d'avec les capitulations, les traités et les coutumes, qui sont l'ouvrage des peuples ».

Ceci étant indiqué, il est permis de s'engager dans une lecture exégétique des dispositions les plus saillantes du droit français des contrats pour la première fois

³² Carbonnier, « Le Code civil », in *Les Lieux de Mémoire*, dir. P. Nora, III, Gallimard, Paris, 1986, pp. 293-315.

³³ Ce « Recueil Fenet » demeure une source d'information de premier ordre sur les débats qui émaillèrent les différentes versions des textes dont nous avons hérité. Signalons également le plus tardif « Recueil Moulon ».

³⁴ V. E. Araguas, « Ode ou Code ? Poétique du droit naturel : *Sur la coutume de Jersey* », revue Droit & littérature, n° 6, LGDJ 2022 (à paraître).

codifié en 1804 en attribuant – pour ainsi dire – « à chacun le sien », au premier rang desquels doit figurer Domat, avocat auvergnat en pays d'enclave du droit romain, formé à Bourges par le maître romaniste Mérille. Il demeurera l'introducteur du rationalisme dans la définition et l'ordonnancement de la règle de droit, qui fonda sa méthode inspirée de la géométrie de Pascal dont il fut l'exécuteur testamentaire, et non de Descartes, offrant à contempler – méditer – un « corps de Droit ordonné et conforme à l'idéal chrétien »³⁵.

Celui-ci, tout entier établi sur les lumières toujours vives du droit romain de Cicéron le stoïque et de l'Empereur Justinien, est enfin rendu « raisonnable » par l'équité naturelle dans la charité :

« Tandis qu'en effet, à Rome, l'équité se cherchait dans l'observation du monde, Domat utilise *l'introspection*. Pour lui c'est la raison qui permet de discerner l'équité. Et, sur la base des textes romains, il se propose d'édifier un *ensemble de droit naturel immuable*, fondé sur la raison. C'est là, pour lui, la véritable source du Droit. Mais, au nom même de la raison, Domat est amené précisément à écarter parfois les maximes romaines (...) [et, citant Michel Villey en sa composition écrite d'agrégation] Les romanistes, les glossateurs, post-glossateurs, jurisconsultes du XVIème siècle, souvent les canonistes et même les théologiens ont apporté leur pierre dans cet édifice rationnel. Leur rôle, même est considérable et leur œuvre était nécessaire. Nous touchons là un point fort important dans la philosophie juridique de Domat. Le droit romain ne pouvait être qu'imparfait, parce que les Romains n'avaient point les lumières de la Révélation »³⁶.

Celui que Boileau nommera « le restaurateur de la raison dans la jurisprudence »³⁷ n'était certes pas le seul qui cherchait l'équité dans l'intériorité de l'homme considéré comme sujet de droit et, en matière de contrat, il fut même précédé en cela par d'autres juristes de droit coutumier tels les trois auteurs de « l'Amalgame » comme on appelle

³⁵ Arnaud, *op. cit.*, p. 69.

³⁶ Arnaud, *op. cit.*, p. 71.

³⁷ Boileau, *Œuvres*, lettre à Brossette du 15 juin 1704, éd. St-Savin, Paris, 1821, t. IV (pp. 511-515).

encore à Jersey les *Commentaires sur la Coutume de Normandie*, édition de 1684 des œuvres amalgamées de Bérault, Godefroy et d’Aviron écrites en des périodes distinctes et rééditées sur près de cent cinquante ans entre 1648 et 1776³⁸ où on trouve l’affirmation du principe de liberté contractuelle et du consensualisme le plus proche possible de la théorie aujourd’hui improprement interprétée depuis la thèse d’E. Gounot comme celle de « l’autonomie de la volonté » sur un fondement de droit naturel, et non pas positif, *toujours* opérant en Normandie insulaire :

« Car la volonté est le principal fondement de tous contracts, laquelle doit avoir deux conditions, la *puissance* et la *liberté*... »³⁹

Pouvions-nous omettre une telle déclaration antérieure de cinq ans à l’œuvre de Domat dans sa publication mais sans nul doute depuis longtemps affirmée dans les prétoires normands et anglo-normands⁴⁰ ? Reste que c’est à Domat que revient devant

³⁸ Jacques Bathelier d’Aviron, avocat exerçant à Evreux, rédigea ses commentaires de la coutume réformée article par article sous le titre *Les Coustumes du pays et duché de Normandie* en 1599. Josias Bérault, avocat au Parlement de Rouen publia *La Coutume Reformée du pays et duché de Normandie* en 1612. Jacques Godefroy livra la première édition de ses *Commentaires sur la Coutume Reformée* entre 1626 et 1628 détaillant en longues discussions chapitrées les articles de la rédaction officielle de la coutume normande en 1583.

³⁹ Dans l’édition de 1684, la citation complète du passage du commentaire sous l’article III de la coutume réformée dédié à la clameur révocatoire au sujet du « dol & vice personnel » est la suivante : « Sous le dol et vice personnel, je comprends la force et la crainte car *la volonté est le principal fondement de tous contracts, laquelle doit avoir deux conditions, la puissance et la liberté* : et pour cette cause, en vain celui désire contracter qui en est interdit par la loi ».

⁴⁰ Citation que les juges et avocats de Jersey connaissent fort bien car largement commentée (et critiquée) depuis son emploi par le bailli jugeant dans l’affaire *Incat Equatorial Guinea Ltd v Luba Freeport Ltd* [2010] JRC 0834, (§ 21 et suivants), offrant en outre un point de comparaison avec notre ancien article 1134 du Code civil : “*requirements for the creation of a valid contract go some way to explaining the ancient maxim la convention fait la loi des parties, which reflects Article 1134 of the French Code Civil [alinéa 1^{er}] which is in these terms: “Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.” At the heart of this provision in the French Code Civil, and behind the maxim to which we are so accustomed in Jersey, is the concept that the basis of the Law of Contract is that each of the contracting parties has a volonté, or will, which binds them together and requires that the mutual obligations which they have agreed be given effect by the courts. The notion of volonté as the foundation of the contract is sometimes thought to result from the political liberalism of the age of reason and of the economic liberalism of the 19th century where obligations imposed from outside should be as few as possible. A man is bound only by his will, and because he is the best judge of his own interests, the best rules are those freely agreed by free men. However, it is to be noted that rather earlier the same rationale appears in the commentaries of Bérault, Godefroy and d’Aviron on the ‘Coutume Reformée du Pais et Duché de Normandie’, Tome 1 [pp. 73-75], this edition being published in 1684, where the authors say this (p. 73).”*

l'histoire le mérite d'avoir forgé les éléments essentiels de la formation, de la validité et de la force obligatoire des conventions, commutatives comme aléatoires, et défini la nature et le régime juridique de chaque convention en inspirant, aux mots « légalement formé » près et l'on va voir que ceci ne *mesure* que peu, les formules inégalées des deux dispositions générales ouvrant le chapitre dédié aux effets des obligations que sont les articles 1134 et 1135 du Code civil des français :

« Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi » ; « les conventions obligent non seulement à tout ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature. »

Il est acquis que, depuis la Loi des Douze-Tables sans doute, les pactes lient ceux qui les font, mais Rome méconnaissait la liberté individuelle que proclament ces textes, « expression de tout un système philosophique adapté au Droit » pour Arnaud⁴¹ par-delà les maximes de Loisel et en prolongement des écrits de Grotius et Pufendorf⁴², ce qui ne fait plus ou moins que recouper le droit romain, contrairement à d'autres auteurs tels Hennecius pour qui la volonté doit être vue comme souveraine. C'est à Domat que revient le privilège de la formule reprise à l'alinéa 1^{er} de l'art. 1134⁴³, l'incise « légalement formée » relevant non pas de l'interprétation positiviste d'une supposée « supériorité » de la norme de la loi sur l'intentionnalité conjuguée des parties lors de la rencontre des consentements, mais simplement de la nécessaire « licéité » dudit contrat⁴⁴ au regard des règles tenant à la capacité des parties, à la cause,

⁴¹ Arnaud, *op. cit.*, p. 200.

⁴² « que chacun tienne inviolablement sa parole », S. Pufendorf, *De Officio...*, I, 9, 3.

⁴³ Domat, *Les loix civiles en leur ordre naturel*, Partie I, L. I, T. I, S. 2, § 7 : « les conventions étant formées, tout ce qui a été convenu tient lieu de lois à ceux qui les ont faites, et elles ne peuvent être révoquées que de leur consentement commun... »

⁴⁴ V. sur ce point très important mais que nous devons délaissier, V. Arnaud, *op. cit.*, p. 204 et surtout l'article du Pr. émérite L. Aynès « Le contrat, loi des parties », Cahiers du Conseil Constitutionnel, mars 2005 : www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-contrat-loi-des-Parties

à l'objet et à l'ordre public ou aux bonnes mœurs de l'art. 6, rescapé du *Livre Préliminaire* rêvé par Portalis.

Quant à Robert-Joseph Pothier, le plus sage et assidu travailleur de tous les représentants du système coutumier orléano-parisien, son génie consista, après avoir assimilé l'*esprit* du droit romain en ayant commenté les *Pandectes*, à opérer un double mouvement de « rejet du système romain et adoption du système volontariste »⁴⁵ au fil d'une synthèse d'une clarté, d'une cohérence et d'une complétude inégalées qui lui offrit d'atteindre en 1761 avec son *Traité des obligations selon les règles tant du for de la conscience que du for extérieur*, l'édification d'une théorie générale des obligations résolument nouvelle et française⁴⁶, sise sur les fondements rationalistes articulés philosophiquement par Pufendorf, son principal inspirateur jusnaturaliste avec Grotius, et techniquement par Domat, le romaniste éthique et rationnel, qu'il recueillit *via* son protecteur éclairé, autre janséniste, le Chancelier d'Aguesseau. Ainsi, nous dit Arnaud :

« Une fois repoussée la conception romaine, Pothier adopte, au nom du droit naturel, les principes volontaristes modernes : la formation des contrats est soumise au consensualisme, la théorie des vices du consentement est parfaitement achevée. L'effet relatif des conventions est affirmé à plusieurs reprises. Très important, enfin, le système d'interprétation des conventions, fondé sur la recherche de l'intention des parties, qui seule, crée l'obligation. (...) Le consentement suffit à faire naître l'obligation, mais il doit être réciproque : Pothier se réfère, sur ce point, à Grotius dont il est nourri⁴⁷. C'est alors un leitmotiv, la convention est formée par l'intention des parties contractantes (...) Autant dire que notre Code, dans ce domaine encore, est redevable [vices du consentement comme au reste] à Grotius et Pufendorf de l'essentiel des dispositions qui y ont été consacrées. Il n'est pas de page, en effet, où Pothier ne renvoie à ces deux grands juristes *modernes*. Et plus précisément, ici, aux

⁴⁵ Arnaud, *op. cit.* p. 206.

⁴⁶ *Traité des obligations*, n° 3 : « L'espèce de convention, *qui a pour objet de former quelque engagement*, est celle que l'on appelle contrat. Les principes du droit romain sur les différentes espèces de pactes, et sur la distinction de contrats et des simples pactes, *n'étant pas fondés sur le droit naturel, et étant très éloignés de la simplicité, ne sont pas admis dans notre droit.* »

⁴⁷ *Traité des obligations*, n° 4 (Grotius, *De jure belli ac pacis*, L. II, c. 11, n° 3).

notes de Barbeyrac sur le *Droit de la Nature et des Gens* de Pufendorf. Le volontarisme, enfin, est constant dans les développements que Pothier consacre à l'effet relatif et à l'interprétation des conventions. »⁴⁸

Sur ce dernier point, essentiel pour la cohésion du système qui confie au juge le soin de l'interprétation des conventions, Pothier élaborait douze règles énoncées aux numéros 91 à 102 de son *Traité des obligations* et que l'on retrouve dans le même ordre – quoiqu'imparfaitement reproduites ! – aux articles 1156 à 1164 du *Code civil des français*, ce qui démontre le triomphe intellectuel de Pothier et des jusnaturalistes, sous les seules réserves de la relative inapplication ultérieure desdites règles en jurisprudence (comme le releva fort judicieusement en son temps le professeur Jacques Dupichot⁴⁹) et de la profondeur des marques du « jansénisme juridique » que relevait le doyen Carbonnier⁵⁰. Voici donc, en quelques mots, comment comprendre « le contrat à travers le *Code civil des français* »⁵¹.

Transition :

Le droit naturel subjectif fut, on le voit, le passager clandestin d'un navire positiviste contraint à une forme de tolérance par neutralité politique rendue nécessaire dans le contexte d'une « nouvelle donne » sociale dont les canons furent tout entiers exposés

⁴⁸ Arnaud, *op. cit.*, pp. 207-208 pour tout ce passage.

⁴⁹ dans une contribution d'intérêt livrée à l'occasion des Études offertes au Pr. Jacques Flour en 1979 : « Pour un retour aux textes : défense et illustration du « petit guide-âne » des articles 1156 à 1164 du Code civil » *Répertoire du Notariat Defrénois* 1979, pp. 179-206, où l'on peut lire en quoi (p. 187) : « Le premier devoir du juge consiste dans la recherche sincère des volontés internes *car le juge est le gardien naturel de la foi contractuelle*. A cette fin l'article 1156 constitue la *clé de voûte* de notre système d'interprétation *subjective* (il n'en est que pus déplorable que ce texte ne reçoive bien peu d'égards en jurisprudence. Les arrêts visent plutôt 1134 et 1135 C. civ. textes qui concernent la force obligatoire de l'engagement et *non la détermination de son domaine*. Même si l'on admet le caractère supplétif de ces règles d'interprétation, il conviendrait, du moins, qu'une pensée contraire expressément affirmée, donc une motivation explicite, en écarte l'application par le juge. Tel n'est pas le cas en pratique). » Une quarantaine d'années plus tard, des deux dernières décennies de pratique permettent d'affirmer qu'il en est toujours ainsi sous l'empire du Code d'avant la réforme de 2016...

⁵⁰ Cité par Arnaud, *op. cit.* p. 212, dans *Plaquette pour le Centenaire de Daguesseau*, p. 41.

⁵¹ Titre d'un article très complet sur la question du Pr. David Deroussin, revue *Histoire de la Justice* 2009, Association française pour l'Histoire de la Justice, Cairn.info 2009/1, n° 19 (pp. 249-289).

dans le fameux *Discours préliminaire* de 1801. Selon l'expression de son principal auteur, devenue fameuse, le Code civil y apparaît bien comme une « transaction⁵² » mais on méconnaît doublement le sens du terme tel qu'il résonnait à l'esprit du jurisconsulte formé chez les oratoriens : transiger en répartissant à chacun selon son dû – *suum cuique tribuere* ! – entre le droit coutumier et le droit écrit certes, mais surtout entre l'Ancien droit et le droit transitoire, c'est-à-dire, un emploi induit du mot transiger au sens faire « transit » et non nécessairement arbitrer : plutôt que trancher, rétrocéder au mérite des institutions éprouvées ce qu'il est le plus utile de leur emprunter pour bâtir un ordre nouveau fondé sur une vision *révolutionnée* de la propriété : d'où l'idée – pour mieux illustrer le sens du propos – d'en faire cas durant cette transition de notre texte entre contrat et propriété.

Que l'on retienne donc, par-delà ce terme de « transaction », l'idée de *transition* au sens du « mouvement », mesure de la nature des choses... indiscernable par leur observation directe.

En même temps qu'il portait cette œuvre, la gestation avortée du si précieux *Livre préliminaire* (à une poignée de voix près !) dont le « titre préliminaire » est le seul résidu⁵³ nous laisse à jamais philosophiquement orphelins du « code du Code » et maintient un océan entre la France et la Louisiane⁵⁴, le conseiller d'Etat Portalis allait

⁵² Dans la biographie qu'il lui a dédié, *op. cit.*, Joël-Benoît d'Onorio rapporte à ce sujet (p. 210 – 211) le mot de B. Beigner tiré de son article « Portalis et le droit naturel dans le Code civil », revue d'histoire des facultés de droit et de la science juridique 1988, n° 6 (pp. 82-83) : « le Code civil fut bien moins le produit de l'ancien droit qu'on ne s'est plu à le dire tout au long du XIX^e siècle que celui du *légalisme révolutionnaire*. La fameuse transaction évoquée par Portalis (...) masque un compromis plus marquant entre l'ancien droit et le droit révolutionnaire dénommé trompeusement « droit intermédiaire ». Pour le Code civil le droit révolutionnaire fut d'avantage le « droit liminaire » ; la vérité est qu'en 1804 on mit bel et bien le vin nouveau dans l'outre ancienne ».

⁵³ V. P.-Y. Gautier, « Pour le rétablissement du *Livre préliminaire* du Code civil », revue *Droits* 2005, pp. 37-52.

⁵⁴ Le Pr. O. Moréteau a (avant de faire paraître une *édition bilingue* du *Code civil de Louisiane*, coll. Droit comparé et européen n° 28, dir. Pr. B. Fauvarque-Cosson, éd. Société de législation comparée, Paris, 2017) précieusement livré plusieurs témoignages du jusnaturalisme (droit naturel objectif ou subjectif ?) du code civil de la Louisiane au fil de ses écrits tels que « Le Code civil de Louisiane en français : traduction et retraduction » *Int J Semiot Law*, Springer, 2015 ; « *Louisiana views on codification, Louis-Xavier Martin revisited* », *Louisiana Bar Journal* Vol. 60, No. 6 ; « *Les Codes civils de Louisiane dans leur ordre naturel, un Droit venu d'ailleurs* », parution aux si bien-nommées *Cahiers Portalis*, n° 7, nov. 2020 (p. 209-

livrer au nom du Consul à vie l'autre grande œuvre pacifiante du grand homme : le Concordat. Il est donc historiquement hasardeux de scinder (comme une part de la doctrine le fait plus par ignorance que par dogmatisme faut-il, malgré l'inconfort du propos, se prendre à souhaiter) la livraison du *Code civil des français* de la confection du Concordat : osons dire ceci sans ouvrir pour autant un front sur cet autre sujet.

Nous nous bornerons à indiquer que ces monuments sont, au plan des opinions alors mutilées par la Terreur et de l'état de conscience politique ambiant qu'ils retranscrivent, les deux faces de l'inspiration gallicane qui traverse les « œuvres philosophiques » de leur auteur, que ses coauteurs n'ont manifestement pas entendu quereller. En ce sens peut-être, en ce qu'il a résolument laissé Portalis en faire (en dépit de leur irréductible altercation sur le divorce précisément), le Code civil est bel est bien l'œuvre du futur Empereur des français.

Ceci étant rappelé, il reste encore à affirmer pour être parfaitement iconoclaste que l'on oublie toujours commodément de s'interroger sur les fondements intellectuels (philosophiques) des trois piliers (les *Livres I, II, III*) du Code qui traduisirent en droit les postulats inspirés de la pensée de Montesquieu qui habitait Portalis. En cela le Code civil est *transactionnel* : entre coutume et droit écrit, Ancien droit et droit « transitoire » (justement) ou révolutionnaire on l'a dit, mais surtout en ce qu'il est « transitionnel » entre le droit naturel enfin devenu subjectif au XVIII^{ème} siècle et le droit positif précocement prétendu objectif par la Convention.

Reformulons donc à l'occasion du présent exercice de style les titres des trois « Livres » de ce *Codex* destiné à un empire nouveau pour y voir apparaître la figure de son héros, le *sujet de droits*, nanti de ses attributs naturels : *Des personnes* (Livre premier), c'est *être* ; *Des biens et des différentes modifications de la propriété* (Livre second), c'est *avoir* ; *Des différentes manières dont on acquiert la propriété* (Livre troisième), c'est *faire/agir*, ceci à travers la consécration « la plus absolue » de la personnalité juridique (celle du citoyen), de la puissance sociale de l'homme (celle du possesseur), de l'engagement individuel (celui du translateur).

223). L'on invite le lecteur féru de comparatisme à se reporter aux articles du *Titre préliminaire* du *Code civil de Louisiane*, inspirés de notre *Livre préliminaire* avorté.

Esquisser à rebours les figures saillantes de ces vertus juridiques nous révèle les caractères doctrinaux indépassables du contrat consensuel⁵⁵ d'abord, de la propriété privée ensuite, de l'ipséité individuelle enfin (l'homme émancipé par sa capacité – qualité morale comme le signalait Grotius – de *concorde* avec autrui). Ce sont ces trois piliers qui instaurèrent *in concerto*, en contrepoint des excès philosophiques de la Révolution déclarée terminée par le nouveau maître de la France, ce véritable, et vraiment (r)évolutionnaire « Code des fils ».

Attachons-nous désormais à envisager la propriété privée telle que définie par Portalis en 1804 et dont nous avons hérité *ipso facto*. Nous dirons un mot en conclusion sur la surprenante fécondité contemporaine qui s'exprime actuellement au nom de l'humanisme à travers une forme renouvelée de clandestinité, celle des « causes finales ».

2. L'avènement sans retour d'un nouvel ordre par la propriété privée

Portalis, dans son *Discours préliminaire*, présente le besoin impérieux d'affermir par un Code inédit et inégalé la foi des français en leur future loi civile à travers de nouveaux principes quant aux biens et les manières de les détenir et de les transmettre :

« Aujourd'hui la France respire ; et la constitution, qui garantit son repos, lui permet de penser à sa *prospérité*. De bonnes lois civiles sont le plus grand bien que les hommes puissent donner et recevoir ; elles sont la source des mœurs, le *palladium* de la propriété⁵⁶, et la garantie de toute paix publique et particulière : elles le maintiennent ; elles modèrent la puissance, et contribuent à la faire respecter, comme si elle était la justice même. (...) En second lieu, dans les matières civiles, le débat existe toujours

⁵⁵ La responsabilité – concept historiquement tardif –, disons plutôt le « délit », le « quasi-délit » et le « quasi-contrat », sont *secondaires* dans l'examen du mécanisme de l'obligation au sens ou, extracontractuels, ils se définissent par rapport au contrat.

⁵⁶ *Palladium* au sens littéraire de garantie, bouclier, sauvegarde par une allégorie de la statue de Pallas à laquelle les Troyens confiaient le salut de leur Cité.

entre deux ou plusieurs citoyens. Une question de propriété, ou toute autre question semblable, ne peut rester indécise entre eux.»

C'est bien en réaction contre les abus générés par l'ancien ordre immémorial des choses, et non la Révolution ici, que le représentant du Premier Consul s'adresse au Conseil d'Etat en opposant l'idée neuve de propriété privée à l'état antérieur de la féodalité, renversée au nom de la raison et de l'équité d'une part, et comme seul gage de cette paix publique tant désirée puisqu'elle vise à constituer un pays de possédants paisiblement affairés à leur bonheur domestique, d'autre part. Ainsi se justifient les règles touchant aux absents⁵⁷, aux régimes des biens⁵⁸, aux successions⁵⁹, aux domaines de l'Ancien régime désormais autrement distribués : hier entre domaine « éminent » au possesseur noble et domaine dit « utile » à son tenancier assujetti par

⁵⁷ « (...) nous avons déterminé ces droits. Il a fallu déterminer encore la vie présumée d'un absent dont on n'a point de nouvelles, pour ne pas laisser les familles *et les propriétés* dans une funeste incertitude. »

⁵⁸ « (...) Dans l'ancien régime, la distinction des personnes privilégiées ou non privilégiées, nobles ou roturières, entraînait, par rapport aux biens, une foule de distinctions qui ont disparu et qui ne peuvent revivre.

On peut dire que *les choses étaient classées comme les personnes mêmes*. Il y avait des biens féodaux et non féodaux, des biens servants et des biens libres. Tout cela n'est plus : nous n'avons conservé que les servitudes urbaines et rurales, que le rapprochement des hommes rend indispensables, et qui dérivent des devoirs et des égards qui seuls peuvent rendre la société possible.

En parlant des différentes natures de biens, nous avons distingué le simple usage d'avec l'usufruit, et l'usufruit d'avec la propriété. Nous avons énuméré les diverses espèces de rentes et de droits qui peuvent *entrer dans le patrimoine d'un particulier*. »

⁵⁹ « Le droit de succéder a-t-il sa base dans la loi naturelle, ou simplement dans les lois positives ? De la solution de ce grand problème dépend le système que l'on doit établir. L'homme naît avec des besoins ; il faut qu'il puisse se nourrir et se vêtir : il a donc droit aux choses nécessaires à sa subsistance et à son entretien. Voilà l'origine du droit de propriété. Personne n'aurait planté, semé ni bâti, si les domaines n'avaient été séparés, et si chaque individu n'eût été assuré de *posséder paisiblement son domaine*. Le droit de propriété en soi est donc une institution directe de la nature, et la matière dont il s'exerce est un accessoire, un développement, une conséquence du droit lui-même. Mais le droit de propriété finit avec la vie du propriétaire : conséquemment, après la mort du propriétaire, que deviendront ses biens rendus vacants par son décès ? Le bon sens, la raison, le bien public, ne permettent pas qu'ils soient abandonnés ; il y a de puissants motifs de convenance et d'équité de les laisser à la famille du propriétaire : mais, *à parler exactement*, aucun membre de cette famille ne peut les réclamer à titre rigoureux de propriété. »

les statuts, les coutumes, l'argent et la force⁶⁰, aux nécessaires pouvoirs du juge civil enfin⁶¹. On relève par deux fois, au fil de ces citations, l'idée que les querelles concernant la propriété ne peuvent demeurer indécises. Cette répétition est tout sauf un effet de style. L'abolition de l'ancien ordre de la pensée se montre ici irrévocable et le plus glorieux acquis – quoique celle-ci demeurerait volontairement innommée – de la terrible République régicide⁶².

⁶⁰ « Point de méprise sur les mots *domaine éminent* ; ce serait une erreur d'en conclure que chaque État a un droit universel de propriété sur tous les biens de son territoire. Les mots domaines éminent *n'expriment que le droit qu'a la puissance publique de régler la disposition des biens par des lois civiles*, de lever sur ces biens des impôts proportionnés aux besoins publics, et de disposer de ces mêmes biens pour quelque objet d'utilité publique, en indemnisant les particuliers qui les possèdent. Au citoyen appartient la propriété, et au souverain l'empire.

⁶¹ « C'est toujours parce que la loi est obscure ou insuffisante, ou même parce qu'elle se tait, qu'il y a matière à litige. Il faut donc que le juge ne s'arrête jamais. *Une question de propriété ne peut demeurer indécise*. Le pouvoir de juger n'est pas toujours dirigé dans un exercice par des préceptes formels. Il l'est par des maximes, par des usages, par des exemples, par la doctrine. »

⁶² La curiosité pousse à interroger les sources doctrinales postérieures au Code touchant à la propriété, concernant une matière qu'il n'aborda point directement et qui demeura longtemps sus l'empire du « droit transitoire » : la législation rurale. *Le Précis de législation rurale* d'Auguste Rivet publié à Lyon et Paris en 1901 se révèle un si judicieux poste d'observation du positivisme français un siècle après la promulgation de l'article 544 C. civ. qu'il ne paraît pas vain d'en citer deux extraits, l'un dédié à la grande loi agraire du 28 septembre 1791 ayant ruiné la féodalité foncière (p. 6), l'autre nous instruisant de la notion républicaine de « domaine », c'est-à-dire, déterminer à qui appartient le sol (pp. 11-12) : « L'Assemblée Constituante s'imagina mettre fin à tous ces abus par la préparation d'un Code complet. Un moment séduite par les utopies et les déclarations creuses de ses membres, *elle dût bientôt reconnaître la difficulté de la tâche et avouer son impuissance* ; quand elle se sépara, elle n'avait pu élaborer que la loi du 28 septembre 1791 trop pompeusement connue longtemps sous le nom de « Code rural de 1791 ». La loi de 1791 est divisée en deux titres, le premier consacré aux biens et usages ruraux, le second à la police rurale. Si incomplète qu'elle soit, cette loi a rendu un service marqué ; *elle a établi la liberté du sol, la liberté de la culture, l'égalité des charges*. Le territoire de la France – déclare notamment l'article 1^{er} – *est libre comme toutes les personnes qui l'habitent...* et l'article 2 formule ce principe resté fondamental : « les *propriétaires* sont libres de varier à leur gré leur récoltes et de *disposer* de toutes les productions de leurs propriétés, dans l'intérieur et au dehors, *sans préjudicier aux droits d'autrui et en se conformant aux lois* » (...) ». C'est la structure de l'art. 544 C. civ. mais nul n'en souffla mot ! – « (...) Deux catégories entièrement différentes de personnes exercent des droits sur le sol de la France : la première comprend les simples particuliers ou les diverses associations formées entre eux ; la seconde embrasse ce qu'on est convenu d'appeler les corps de mainmorte, c'est-à-dire l'Etat, les départements, les communes, les établissements publics, etc. les plus importants de ces corps de mainmorte, c'est-à-dire l'Etat, les départements et les communes, ont eux-mêmes deux *ordres* de biens régis par des règles distinctes et contraires ; ils ont un *domaine* public et un *domaine* privé. Le domaine public comprend les biens qui sont affectés à une *destination* d'utilité publique (...) Les biens du domaine privé peuvent moyennant l'accomplissement de formalités spéciales faire l'objet de contrats, voire

Il convenait, parce qu'au nom même de la liberté proclamée, le siècle neuf réclame une nouvelle *mesure* qui ne divise plus les biens selon les statuts abolis de leurs possesseurs et l'usage effectif qu'ils peuvent désirer en faire, que la nouvelle classe indifférenciée des français pût *jouir* et *disposer* de ses biens, tels que répartis par la Révolution, *de la manière la plus absolue*. Il fallut donc forger de nouveaux termes pour ce nouveau canon. Ainsi naquit la formule de Portalis inscrite à l'article 544 du Code. Si elle représente, au regard des développements antérieurs du droit civil, une innovation philosophique – et bien sûr économique – majeure (A), elle puise, là encore, ses fondements dans un courant doctrinal qui, s'il est identifiable, demeure, à lire le *Code civil des français*, non formellement déclaré (B).

A. Développements philosophiques du concept de propriété dans le droit civil antérieur

« La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on en fasse pas un usage prohibé par les lois et par les règlements » : ce *nec plus ultra* est sacralisé par un superlatif que l'on ne retrouve nulle par ailleurs, si ce n'est dans deux sources latines de la période classique⁶³ sous la forme « *absolutissima* » et... dans le droit anglais de la propriété à travers l'adverbe « *absolutely* » qui, de nos jours encore, vise à qualifier en fin de clause contractuelle le caractère intégral, complet,

d'aliénations, et ils sont prescriptibles dans les mêmes conditions que les biens des particuliers (...) » Voici résumé en ces lignes l'héritage prégnant du droit révolutionnaire dans notre droit français de la propriété : le Code civil l'a avalisé, *mais en feignant l'ignorer*.

⁶³ Quoique plutôt confidentielles, nous n'avons pas cru devoir faire l'impasse sur ces éléments culturels et linguistiques qui ont fort bien pu imprégner le jeune Jean Étienne Marie Portalis, alors qu'il était pensionnaire des Oratoriens à Marseille (un court passage à Toulon à l'âge de sept ans fut interrompu par la maladie) où il apprit l'art oratoire et fut instruit selon les préceptes cartésiens (religieusement re-corrigés) sous l'influence du fameux oratorien Malebranche (1638-1715), ce qui entraînait une intense et permanente *disputatio* de son milieu confraternel avec les autres congrégations marseillaises thomistes à laquelle il s'exerça à son tour avant d'étudier le droit et d'entrer précocement au barreau. V. d'Onorio, *op. cit.* (p. 47) : « le garçonnet maniait déjà avec aisance les concepts de la philosophie et l'art de la dialectique, ce dont il ne se départira jamais plus ». Il n'est pas impossible donc, que le pensionnaire entre les mains duquel son éducateur, le père Dye-Gandrye, déposa les œuvres de Grotius, Nicole, Pascal, Bossuet, Fénelon, consulta ensuite le *Iuris Civilis universi absolutissima methodus* de Nikolaus Vigel (1595) et les *Absolutissima in omnes Beati Pauli et septem catholicas apostolorum epistolas commentaria* de Claude Josse, parus à Paris (1666).

inconditionnel dirions-nous, de la propriété exercée sur un bien par son légitime possesseur⁶⁴.

S'il était si précieux de marquer solennellement ce caractère *suréminent* de la propriété privée en contrepoint du « domaine éminent » des théories féodales révoquées, c'était peut-être surtout pour extirper enfin la racine communautaire germanique qui sous-tendait encore en loin ce système grégaire reçu des âges carolingiens enté sur les usages communautaires, coutumes de clochers et droits agraires préfix de glanage, assolement, communaux et vaine pâture, guérets après la moisson et prés après la première fauche, rendant l'idée de propriété d'un seul inadmissible en roture ? Le si important et contraignant droit de retrait lignager que toutes les coutumes provinciales de l'Ancien Droit pratiquaient confirme encore que les biens roturiers appartenaient au groupe social (village) ou familial (« héritage » par lignes) et point complètement « en propre » à des individus.

Le franc-alleu du système franc originel n'était plus qu'idéal au sens théorique depuis l'emprise féodale généralisée par la cristallisation de coutumes nobles et l'application du principe de la directe universelle du roi⁶⁵. Ce n'est donc pas sur le plan de la théorie juridique, imparfaite, que pourra s'affermir le concept de propriété – comme le fera le contrat dès que l'élaboration d'une théorie de l'obligation le dégagera de son arraisonnement coutumier formaliste et indigent –, mais plutôt par l'élaboration d'une pensée politique laborieusement guidée par les diverses théories philosophico-économiques successives qui, surtout depuis l'Angleterre élisabéthaine, contribueront à imposer l'idée d'une nécessaire redéfinition, toutefois impossible devant l'ampleur de la tâche et l'écrasement juridique et institutionnel de l'individu.

On comprend mieux pourquoi, en dépit de l'accès aux théories stoïciennes de Zenon et aux préceptes d'Epicure outre au droit romain, même tardif, qui instaura la notion de domaine unifié, cadastré et pouvant connaître des démembrements, il était impossible aux érudits de penser en termes de propriété privée sans oser s'affranchir

⁶⁴ V. *contra* : « vested ».

⁶⁵ A ce sujet, Arnaud *op. cit.*, évoque le « Code Michaud », soit l'ordonnance de janvier 1629, art. 383 (p. 173).

de la tutelle morale que la féodalité maintenait dans les esprits⁶⁶. C'est dans cet environnement mental que la classe bourgeoise instruite mais condamnée au travail sous la forme du commerce ou de l'exercice d'un art intellectuel (interdits aux nobles) produisit ses propres penseurs qui, fatalement, développèrent des théories articulées sur le « rapport » à/de la terre, tenue et exploitée. Ces « physiocrates » en virent à assimiler, en « honnêtes hommes » de la période classique, nécessités économiques et questionnements philosophiques pour distiller des idées politiques campées autour du travail et de la liberté individuelle.

L'enjeu des moyens de subsistance dans les îles britanniques allié aux considérations religieuses et institutionnelles inspirera notamment Locke qui, sous ce rapport, nourrira de manière déterminante le courant du droit naturel subjectif⁶⁷, dont le génial Leibniz parachèvera les espérances en bâtissant une métaphysique du droit au-delà même du propos induit des œuvres des juristes jansénistes, théorisant l'Amour divin transcendant la matière. Quant à la France de la fin du XVIII^{ème} siècle, Arnaud nous rappelle la cause déterminante du bouleversement social qui s'annonçait à mesure que la paysannerie et la bourgeoisie industrielles :

« (...) comprenaient que l'affranchissement du sol était la condition essentielle du développement de la production. Et c'est ce qui leur importait par-dessus tout. Alors, il se passa un fait peu commun, l'alliance de la bourgeoisie et d'une paysannerie excédée par la misère. (...) Aussi, opposées de leurs natures, au début, la destinée des paysans et celle des bourgeois devaient-elles se rencontrer dans le mécontentement.

⁶⁶ A ce sujet, le droit anglais, né au Moyen Âge de la lente fusion entre coutume populaire (anglo-saxonne) et droit noble du roi (normand) sur un territoire insulaire, naturellement unitaire et politiquement unifié, connut une fortune différente. Son droit de la propriété comme sa conception du contrat – et du rôle du juge – ont une racine indigène.

⁶⁷ Arnaud, *op. cit.* (p. 174), cite à bon droit un cours de J. Imbert, *Histoire des idées politiques jusqu'à la fin du XVIII^{ème} siècle* : « le droit naturel venait soutenir les prétentions de la classe bourgeoise des riches propriétaires anglais ou français qui, avec Hobbes, se plaçait sous la protection du pouvoir et qui, avec Locke, revendique le pouvoir pour elle-même ». Arnaud ajoute : « Désormais, quatre mots vont hanter les bourgeois : *propriété libre et franche*. Propriété foncière s'entend, car de la propriété mobilière, la définition reste obscure. L'expérience industrielle et financière de la France est trop courte pour avoir donné l'occasion à des prescriptions efficaces. C'est à peine si Maleville mentionne [l'évocation de machines] à propos des articles 519, 529 et 531 C. civ. »

Les unes et les autres avaient intérêt à voir proclamer l'émancipation de la propriété. (...) L'affranchissement du sol au nom d'un droit individuel de propriété, fondement pratique de la liberté, et plus particulièrement de la liberté du commerce.⁶⁸ »

C'est ainsi que, non sans écho à Montesquieu, Tocqueville put s'écrier : « le peuple voulait qu'on changeât toutes les lois »⁶⁹, ce que Karl Marx comprendra à son tour de la manière *la plus absolue* : c'est-à-dire *politique*. C'est bien de là, et non point seulement de la philosophie ou du droit que vint le coup de grâce porté à la féodalité devenue sclérosée. L'on mesure bien que contrat et propriété sont les deux faces de la même pièce de monnaie « Libre » (symbole de la balance, *libra*... et donc, en ce sens, de la *Livre*, que nous réemployons). Il fallut toutefois refonder le « pacte social » sur une philosophie qui ne fut pas de celles propres à diviser un peuple et une société déjà en proie à la misère, puis au choc de la guerre civile, puis au régicide, puis à la guerre livrée par une coalition, puis à l'instabilité et à la corruption. Cette philosophie ne pouvait qu'advenir par le bais de la science des lois pour proposer une doctrine nouvelle.

B. Origine doctrinale des caractères de la propriété inscrits dans le Code civil des français

Les solutions pouvaient-elles revenir intactes du droit romain qui ignorait les idées subjectivistes auxquelles la société s'était convertie ? Fallait-il imposer une coutume unifiée ? Pouvait-on, au fond, faire autre chose, ou faire mieux, que « transiger », opérer une *translation* entre « l'esprit des siècles » et « l'esprit national » ? Selon Carbonnier, la formulation de l'article 544 du Code civil des français traduit le « secret désir du gouvernement de protéger les acquéreurs des biens nationaux »⁷⁰. Bien entendu, la nouvelle classe de possédants installée à une place plus enviable par le jeu

⁶⁸ Arnaud, *op. cit.*, p. 175.

⁶⁹ A. de Tocqueville, *Le despotisme démocratique*.

⁷⁰ V. J. Carbonnier, *Droit civil*, coll. Thémis, n° 25, PUF (1957), p. 78.

de la redistribution des sols impulsée sous la Législative et la Convention dans les excès de la Terreur et de ses tribunaux révolutionnaires qui organisèrent massivement la spoliation des nobles, des biens d'Eglise et des « ennemis de la Révolution » entre 1792 et 1794 pourrait suffire à l'expliquer.

Toutefois, Portalis écrivait-il pour l'intérêt ou à l'égard de ceux-là même – receleurs, si l'on suit le raisonnement sous-jacent – qui inquiétèrent sa personne, l'incarcérèrent par deux fois, séquestrèrent ses biens, et auxquels il échappa de peu ? Il put certes y être poussé par les circonstances autant que par Bonaparte, farouchement désireux de rassurer les acquéreurs de domaines nationaux, au nom de la « foi publique » comme on disait alors, et de mieux s'assurer ainsi leur alliance sous son pouvoir – ce qui explique la désuétude de l'instrument de la rescision des contrats « vicieux » et ses limitations cumulées aux ventes, immobilières, lésionnaires de plus des sept douzièmes (ultradimidiaire soit au-delà de la moitié : 6+1/12èmes), au détriment du vendeur. Admettons que cela explique la lettre de l'article 544 qui pose un principe d'airain pour asseoir une nouvelle société en France, cela ne suffit cependant à justifier le titre entier, le Code étant manifestement une œuvre voulue du Premier Consul pour rayonner « *urbi et orbi* », et diffuser le génie de la France, enfin régénérée, à travers l'Europe (que l'Empire voudra « libérer ») comme le reste des nations⁷¹.

En effet, non seulement l'article 545 (pas d'expropriation sauf pour utilité publique) est l'exacte reprise – sans aucunement s'y référer – de l'article 17 de la Déclaration des droits de l'homme et du citoyen de 1789, l'article 546 consacre le droit d'accession sur ce que la chose produit ou ce qui s'y unit en vertu de la pensée physiocrate et non révolutionnaire, ce dont découlent deux importants chapitres du Code (art. 547 à 577) jusqu'à l'exposé du droit civil, régénéré, concernant les concepts si essentiels de l'usufruit, de l'usage et de l'habitation qui mène *naturellement* à l'examen des servitudes. Que l'on se remémore enfin le *Discours* de Portalis sur la Propriété (26 nivôse an XII

⁷¹ Sur la codification napoléonienne et son ambition ou son rayonnement dans le monde : V. de Saman Safatian, « La rédaction du Code civil », revue *Napoleonica*, cairn.info 2013/1, n° 16 (pp. 49-63) ; également l'article du Pr. Sylvain Soleil, « Le code civil de 1804 a-t-il été conçu comme un modèle juridique pour les nations ? », *Histoire de la Justice*, cairn.info 2009/1, n° 19 (pp. 225-241).

– 17 janvier 1804) et l'on verra qu'à bien des conquêtes révolutionnaires opérantes, furent préférées des formes issues de l'expérience.

Sauf bien sûr à relever que nous passâmes de « *dominium* » à « *proprietas* », la formule latine écrite au XIV^{ème} siècle par Bartole, fondateur de l'école des post-glossateurs n'est pas, bien que réduite aux choses appréhendées physiquement, si éloignée⁷² de notre droit, elle qui explique ce « pourvu qu'on en fasse pas un usage prohibé par les lois et par les règlements » par la *limitation de la puissance de domaine* exercée sur la chose par l'ordre de la loi⁷³. Cependant, loin de chercher à signifier une continuité avec le passé ici, le droit civil codifié entreprend comme on l'a vu une rupture fondamentale avec son environnement européen quant à *l'esprit du droit*. La meilleure preuve de ce que Portalis le premier aura réussi la synthèse entre le juste et l'utile plutôt qu'entre l'ancien et le nouveau avec le titre II du Livre II du *Code civil des français* réside peut-être dans ce constat que, s'agissant de définir et exposer la propriété, Pothier lui-même n'était pas parvenu à s'affranchir de l'ordre ancien, lui qui livra un *Traité du domaine de propriété* dont le titre trahit l'antiquité. Affirmons-le, avec l'article 544 du *Code civil des français*, Portalis boucle la boucle tout en révoquant Rousseau, ce qui ressort de l'exposé des motifs du *Discours sur le projet de loi sur la propriété* :

« Loin que la division des patrimoines ait pu détruire la justice et la morale, c'est au contraire la propriété reconnue et constatée par cette division qui a développé et affermi les premières règles de la morale et de la justice. Car, pour rendre à chacun le sien, il faut que chacun puisse avoir quelque chose. (...) Ce n'est pas non plus au droit de propriété qu'il faut attribuer l'origine de l'inégalité parmi les hommes. Les hommes ne naissent égaux ni en taille, ni en force, ni en industrie, ni en talents. Les hasards et

⁷² *dominum est ius de re corporali perfecte disponendi nisi lege prohibeatur*

⁷³ Sur ces fascinantes questions sémantiques et conceptuelles, on ne peut pas ne pas citer l'impressionnant article de L Pfister, « Domaine, propriété, droit de propriété. Notes sur l'évolution du vocabulaire du droit français des biens », *Revue générale de droit*, vol. 28, n° 2, 2008, pp. 303-338 dont l'abstrat indique : « Alors qu'étymologiquement, le mot *domaine* signifie la puissance de la personne sur les choses et le mot *propriété*, l'objet soumis au domaine, c'est pourtant le second qui a été retenu par les artisans de la codification du droit privé français pour désigner le droit de jouir et disposer des choses de la manière la plus absolue. La variation de sens invite à se pencher sur la révolution sémantique de *domaine* et de *propriété* depuis leur apparition dans la langue française (...) ».

les évènements mettent encore entre eux des différences. Ces inégalités, qui sont l'ouvrage même de la nature, entraînent nécessairement celles que l'on rencontre dans la société. [Et d'ajouter plus loin] (...) la propriété est *le droit de jouir et de disposer des choses de la manière la plus absolue* et ce droit est sacré *dans la personne* du moindre particulier ».

Voici comment il faut entendre l'adverbe « *absolutissima* » : consécration du *droit moral* inaliénable de l'homme à posséder et défendre son bien. Le Code civil proclame, à travers son plan en trois Livres, les *fins* du droit naturel *subjectif* – être, avoir, faire/agir –, raison pour laquelle il reprend à dessein le plan des *Institutes*⁷⁴ sans se confondre avec le droit romain, droit naturel, *mais* objectif. Innovant entre tous, le Code consacrait le contrat et la propriété comme les attributs de la liberté ontologique de l'homme, enfin saisi par le droit dans son ipséité. Il est temps de conclure sans doute, mais n'acceptons de le faire que pour la forme de cet exposé, nous interrogeant sur ce qu'il nous reste, deux siècles après la mort de Portalis (1807), des préceptes féconds du droit naturel mis en système subjectiviste. Réservant nos pensées sur *la nature du changement qui gouverne la nature des choses*, contentons-nous ici de conjurer, par une invocation finale, ce changement à l'œuvre dans le droit civil, orphelin de sa finalité

3. Conclusion :

El En écrivant « l'arbre tient encore debout avec toute sa frondaison ; il n'est pas sûr que la racine, c'est-à-dire la philosophe, ne soit pas depuis longtemps morte », Michel

⁷⁴ Arnaud, *op. cit.*, est encore à citer ici (p. 217-218) : « la division tripartite (personnes – biens – actions), fondée originairement sur l'observation du monde, offrait la charpente d'un plan axiomatique tiré de l'existence des droits subjectifs. A ce dernier s'étaient essayés de nombreux juristes de ce siècle et demi qui précéda la Révolution ; c'est à lui que se rallia Cambacérès acquis au principe de l'existence de droits subjectifs que le Droit a pour mission de protéger. A partir de ce postulat, il obtenait, par déductions progressives, un système, une logique, où étaient examinées successivement les personnes, les biens et les obligations. Il convenait de commencer par les personnes, puisque le Droit n'est fait que pour elles ; de continuer par les objets de leurs droits (et notamment l'étude du droit de propriété) ; pour terminer par l'étude des obligations, qui naissent à propos des actes accomplis par les individus sur leurs biens. Les rédacteurs du Code ont, de leur propre aveu, repris ce plan, *mais non pas dans l'esprit qui avait présidé à sa naissance*. Du plan des *Institutes* romaines, fondé sur l'observation du monde, les rédacteurs du Code civil devaient faire un système axiomatique et rationaliste. M Jean Ray l'a bien vu, rappelant la phrase du comte Portalis : *qu'est-ce que la codification si ce n'est l'esprit de méthode appliqué à la législation ?* ».

Villey⁷⁵ avait compris que l'esprit naturaliste originel du *Code civil des français* était voué à être trahi. Le navire civiliste (son équipage positiviste) est redevenu intolérant au droit naturel par polarisation autour de l'efficacité du droit au nom de son utilité sous l'empire de l'économie politique et, si le passager clandestin n'a pas été débarqué (faute d'étape), il fut du moins verbalisé pour avoir resquillé, outre l'excédent de bagages des deux piliers du contrat et de la propriété (la propriété tend à devenir « un droit absolument relatif »⁷⁶ ; la réforme des contrats décline et refaçonne la façade classée du monument de style dorique pour y apposer les ornements néobaroques des innombrables droits spéciaux⁷⁷ – commerce, concurrence, consommation, *etc.*).

Toutefois, désormais pourvu d'un titre de transport quoique démasqué et épargné du péril de la cale ou du débarquement, le droit naturel subjectif paraît saisir l'opportunité de diffuser sa philosophie du vagabondage altruiste à quelques nouveaux pans du droit, derniers embarqués des mutations sociales contemporaines qui persistent à affirmer que l'homme est destinataire du privilège de la personnalité juridique. Puissent les élans du « droit naturel 3.0 » (perceptibles à demi-mot dans l'avènement d'une responsabilité civile pour fait causal⁷⁸ ou la promotion des « buts monumentaux » de la compliance⁷⁹, *etc.*) parvenir à crever les nuées pour que perce le

⁷⁵ Dans ses *Leçons d'histoire de la philosophie du droit*, dernière édition, Dalloz, 2002, p. 67.

⁷⁶ V., par exemple et sans même développer sur les entailles profondes faites au droits subjectifs par les textes relatifs aux prérogatives réduites des bailleurs de locaux ou bien l'hypertrophie du droit de l'urbanisme, *etc.*, l'article de Romain Scaboro, « Le droit de propriété, un droit absolument relatif », in *Droit et Ville*, Institut des études juridiques de l'urbanisme, de la construction et de l'Environnement, cairn.info 2013/2 n°76 (pp. 237-255).

⁷⁷ V., entre autres, les ouvrages collectifs signalés *supra* dans la collection *Dr. comparé et européen*, n° 29 et 31 éd. Société de législation comparée : *La réécriture du Code civil, le droit français des contrats après la réforme de 2016* et *La réforme du droit français des contrats*, dir. B. Fauvarque-Cosson et *alii*.

⁷⁸ L. Kaczmarek, thèse de doctorat, université de La Rochelle, *La responsabilité pour fait normal : étude critique sur son originalité en matière civile extracontractuelle*, étude publiée chez EPU, coll. Droit et Sciences Politiques, 2009. Tout reste à voir de ce qui sortira des travaux gouvernementaux et législatifs attendus sur la réforme annoncée de la responsabilité civile. Pour un panorama sur la question, nous renverrons aux actes du colloque du 21 octobre 2021 de l'université de Nîmes, sous la direction scientifique du Pr. Gustavo Cerqueira et Vanessa Monteillet, *Les projets de réforme du droit de la responsabilité civile – études à la lumière de la proposition de loi sénatoriale du 29 juillet 2020*, Univ. Nîmes, laboratoire Chrome, éd. Dalloz, déc. 2021.

⁷⁹ Branche du droit en pleine croissance, rendue féconde en France grâce à l'impulsion remarquable du Pr. M.-A. Frison-Roche qui fonde son avènement sur les principes formels du droit de la

vœu finaliste (toujours révolutionnaire) de « gratuité » des transports chez les autres passagers.

concurrence. V. tout dernièrement son article paru au Recueil Dalloz, « La responsabilité *ex-ante*, pilier du droit de la *compliance* », 31 mars 2022.

L'ACTION PRECEDE LE DROIT OU L'INJUSTICE INSTITUTIONNALISEE ? - L'EXEMPLE DE L'*USE* ET DU *TRUST* EN DROIT ANGLAIS

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Abstract

Si aujourd'hui, en France comme dans une large partie du monde, toute personne qui a une prétention a le droit d'agir en justice pour être entendue sur le fond, il n'en fût pas toujours ainsi. Dans de nombreux systèmes juridiques, l'action précédait le droit et non l'inverse. Sans action pas de droit. Pas de droit sans action. Aussi était-il nécessaire au demandeur de trouver un formulaire correspondant à sa prétention pour espérer la faire valoir devant un juge, sous peine de voir sa demande rejetée sans même être entendue. L'un des exemples les plus percutants de cette injustice institutionnalisée est probablement celui des cousins historiques de la fiducie moderne et du *trust* : la *fiducia* du droit romain et l'*use* du droit anglais moyenâgeux. C'est du second que cet article se propose de discuter, dans une perspective historique soulignant l'évolution du régime juridique du *trust* et le rôle particulier du Chancelier et de l'équité, qui lui ont permis de devenir cette institution moderne et protéiforme qui rayonne aujourd'hui dans le monde entier.

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Keywords

Fiducie - *Fiducia*, *Trust*, *Use* – Droit substantiel - Droit d'action – Formulaire – *Writ* - Justice, *Common law* – Équité - Chancelier anglais

Introduction

Si aujourd'hui, en France comme dans une large partie du monde, toute personne qui a une prétention a le droit d'agir en justice pour « être entendue sur le fond de celle-ci afin que le juge la dise bien ou mal fondée »¹, il n'en fût pas toujours ainsi. Comme l'écrivait Motulsky, « tout incite à penser, en effet, que l'action a, historiquement, précédé le droit dit substantiel »². Dans de nombreux systèmes juridiques, l'action précédait le droit et non l'inverse. Sans action pas de droit. Pas de droit sans action. Aussi était-il nécessaire au demandeur de trouver un formulaire correspondant à sa prétention pour espérer la faire valoir devant un juge. Si la prétention n'entrait *a priori* dans aucune catégorie formelle, plusieurs suites pouvaient en découler. Dans le plus

¹ Code de procédure civile français, art. 30.

² Motulsky (1964), p. 215.

heureux des cas, une action voisine était déformée pour y faire entrer, par un tour de force aussi artificiel que discrétionnaire, la prétention orpheline. Néanmoins, il était fréquent qu’au contraire, la prétention du malheureux reste purement et simplement ignorée par la justice. Celle-ci n’entrant dans aucune catégorie d’action existante, l’accès au juge lui était refusé. À l’évidence, ce fonctionnement entraînait une iniquité flagrante pour celui qui, étant la cible d’un comportement marginal, n’avait pas la chance de trouver dans la justice d’écho formel à sa condition et se voyait subséquemment nier le droit de faire valoir sa cause devant les tribunaux.

L’un des exemples les plus percutants de cette injustice institutionnalisée est probablement celui des cousins historiques de la fiducie moderne et du *trust* : la *fiducia* du droit romain et l’*use* du droit anglais moyenâgeux. En effet, ces opérations complexes nécessitaient pour leur réalisation la réunion de deux éléments concomitants. D’une part, un transfert de propriété solennel, par lequel le titre de propriété d’un bien – le plus souvent un immeuble – était livré à un ami ou à un créancier. D’autre part, une promesse de la part du récipiendaire que le titre de propriété serait rendu en temps utile une fois la mission achevée. L’ami ou le créancier s’engageaient donc à rendre, à terme, la propriété ainsi confiée au bénéficiaire désigné, en principe le cédant ou ses héritiers. De la sorte, le droit de propriété était instrumentalisé pour les besoins d’une opération de transmission, de gestion ou de sûreté. Or en pratique, dans un nombre non négligeable de cas, alors que le cédant avait imaginé que la promesse serait exécutée et que la propriété serait restituée le moment venu, l’ami en lequel il avait placé toute sa confiance niait l’existence même d’une telle promesse, accaparant des biens qui n’étaient pas les siens... ou plutôt – et c’est bien là la complexité de la situation – accaparant des biens devenus légalement les siens mais qui, en vertu de la promesse donnée, devaient légitimement revenir à un autre. Les bénéficiaires se tournaient alors vers les tribunaux. Malheureusement, dans le cas de la *fiducia* comme dans celui de l’*use*, aucune forme d’action n’avait été anticipée, laissant les bénéficiaires de la promesse sans recours et incapables de faire valoir leurs prétentions au fond.

Mais tandis qu’en droit romain, un millénaire plus tôt, la réponse trop tardive des prêteurs entraîna progressivement la disparition de la *fiducia* au profit d’autres

techniques jugées plus sûres³, en droit anglais une réponse initialement marginale devait permettre le développement d'une institution qui fait aujourd'hui la fierté des juristes de *common law* et qui constitue sans doute l'un de leurs plus grands succès : le *trust*. Clarifions immédiatement les choses : le *trust* est né de l'*use* et les deux outils sont quasiment identiques. La différence est principalement terminologique⁴. Le mot *use* a été délaissé au profit du mot *trust* après la *Statute of Uses* de 1535, celle-ci ayant tenté d'enrayer la pratique en déclarant exécutés tous les *uses* pour lesquels l'administrateur n'avait aucune mission à effectuer, mais devait simplement détenir la propriété des biens confiés⁵. Schématiquement, un *trust* est donc à l'origine un *use* dont le gérant est actif et accomplit une véritable mission, tandis que les *uses* passifs furent éteints par la loi⁶. Néanmoins, la loi de 1535 ne prohibant pas pour l'avenir la constitution de *trusts* passifs, dont l'unique objet serait de dissocier propriété et jouissance des biens, cette distinction entre *uses* et *trusts* fût rapidement dépassée pour ne laisser subsister que le second terme⁷.

Ainsi, dans l'Angleterre du XIII^e siècle, les conflits autour de l'*use* se multiplièrent. Avec le temps, la mémoire de celui qui avait reçu don des terres s'effaçait parfois jusqu'à oublier la promesse faite jadis. Or, son droit de propriété étant reconnu par la *common law*, l'ami infidèle était légalement considéré comme le propriétaire des terres confiées. En l'absence de formulaire correspondant à l'action du bénéficiaire de la promesse – *writ* – nul recours n'était possible en *common law*, dont les tribunaux n'aient à ce dernier toute possibilité d'être entendu. À la merci de la seule conscience de son bourreau, la victime malheureuse ne retrouverait jamais la propriété des terres dont elle avait été spoliée. Situation de non-droit : revers et face cachée du droit.

³ Decoster (2022).

⁴ Sanders (1791), p. 9. Cet auteur reconnaît que les mots « *use* » et « *trust* » peuvent être utilisés pour synonymes. Dans le même sens, Smith (1966), p. 45 et s.; Holdsworth (1924), p. 450.

⁵ Smith (1966), p. 55. L'*use* passif peut être rapproché aujourd'hui du *bare trust*, c'est-à-dire du *trust* pour lequel le *trustee* n'a aucune obligation à l'exception de la conservation de la chose.

⁶ Sanders (1791), p. 9.

⁷ Suite au mécontentement de la noblesse, le *Wills Act* (1540) rétablit en outre l'essentiel du droit qui s'appliquait avant 1535 sous une terminologie modifiée.

Toutefois, malgré l'inertie de la justice de droit commun face au désarroi de la veuve et de l'orphelin, marque des insuffisances de la *common law* (1), l'intervention du Chancelier entraîna dès le XIV^e siècle des conséquences radicalement différentes de celles qui ont été évoquées pour le droit romain, une origine commune n'ayant d'ailleurs jamais pu être démontrée⁸. En effet, il en suivit la création d'une justice parallèle pour pallier l'intolérable vide juridique : celle-ci se trouve à l'origine de la naissance de l'*equity* (2).

1. L'inertie de la justice face au désarroi de la veuve et de l'orphelin : les insuffisances de la *common law*

En *common law*, si le formalisme est initialement conçu comme un moyen d'accroître la puissance royale, celui-ci entraîne des répercussions inattendues, dont celle de concourir à la limitation de la compétence des juridictions. Il en est ainsi en matière de *use*, pratique moyenâgeuse au cœur de la discorde, qu'il nous faudra présenter plus en avant (1.1). Ainsi, lorsque le chef de famille a transmis la propriété de tout ou partie de ses biens par ce biais, il n'existe aucune forme d'action contre le promettant défaillant, quelle que soit la bonne foi du demandeur, ce qui conduit à refuser à ses ayants-droits l'accès aux tribunaux de droit commun (1.2). Il en résulte dans certaines situations une profonde injustice.

⁸ Concernant une origine romaine du *trust*, cf. Blackstone (1766), p. 328. V. toutefois Holmes (1885), p. 162, qui s'est attaché à montrer que le *trust* viendrait plutôt du droit germanique (la *Treuhand*) ; Pollock et Maitland (1898), p. 241 qui défendent une origine hybride romano-germanique ; Ames (1930) qui refuse toute origine continentale et adopte un point de vue purement institutionnel (apparition due aux Chanceliers anglais) et Van Thomas Wynen (1949) qui plaide plutôt pour une imitation par les croisés de la technique islamique du *waqf*.

1.1 Le développement de l'*use*, une légitimité entachée par des utilisations frauduleuses

Aux alentours du XIII^e siècle naît la pratique de l'*use*⁹. Du latin *ad opus* qui signifie « pour mon compte » ou « au bénéfice de »¹⁰, la technique est essentiellement utilisée de deux manières¹¹.

D'abord, par les moines franciscains qui, guidés par leur vœu de pauvreté, ne peuvent détenir aucun bien¹². Les franciscains assurent le respect de ce vœu en transférant la propriété de leurs biens à des tiers, qui promettent toutefois de les détenir dans le seul intérêt des moines. De cette manière, les moines ne possèdent rien, mais profitent de leurs biens grâce à l'interposition d'un tiers. Ils peuvent notamment continuer d'habiter les terres et de jouir paisiblement de leurs fruits.

Ensuite, l'instrument est utilisé par les croisés qui ont besoin de l'intervention d'un tiers pour gérer leurs biens pendant leur absence. Ainsi, les croisés appelés *feoffors* – du vieux français « celui qui donne le fief » – confient jusqu'à leur retour à un ami désigné *feoffee to use* – « celui qui tient le fief pour l'usage d'un tiers » – la gestion de leurs biens au profit de leur épouse et de leurs enfants mineurs, nommés *cestuis que use* – du vieux français « *cestui a que use le feoffment fuit fait* » – littéralement, « celui à l'usage duquel le fief a été fait »¹³. Le *feoffee* est donc gratifié de la propriété des terres du croisé en échange d'une double promesse : d'une part, les administrer dans le seul intérêt du *feoffor*, de son épouse et de sa descendance et, d'autre part, les restituer au *feoffor* s'il revient de croisade ou à ses héritiers s'il décède. Blackstone évoque un développement substantiel de la pratique durant les « longues guerres avec la France », probablement en référence à la guerre de cent ans, après laquelle, écrit-il, les *uses* deviennent presque

⁹ Pollock et Maitland (1898), p. 241. Pour une discussion sur l'origine de la pratique et une comparaison des différentes thèses en présence, cf. Smith (1966), p. 40 et ss.

¹⁰ Dérivé du latin "*ad opus*", v. Maitland (1909), p. 24.

¹¹ Pollock et Maitland (1898), p. 241.

¹² Maitland (1909), p. 25.

¹³ Sur l'utilisation du vieux français par les légistes anglais après la conquête normande et pendant plusieurs siècles, Caenegem (1988), p. 85, p. 97 et p. 141.

universels¹⁴. L'absence des chevaliers peut être particulièrement longue et beaucoup ne reviennent pas. Il arrive alors que le *feoffee* profite de la situation pour conserver indûment les terres confiées sans honorer sa promesse. La veuve et l'orphelin sont ainsi laissés sans le sou et réduits à une bien piètre condition, quand ils ne sont pas tout simplement bannis de leurs terres.

Si le comportement du *feoffee* est révoltant et l'injustice criante dans l'hypothèse précitée, il faut toutefois observer qu'avec le temps s'installe une ambiguïté quant au bien-fondé de la pratique. En effet, celle-ci est parfois également utilisée de manière opportuniste dans l'objectif de contourner les règles en place. En particulier, les seigneurs s'en servent pour échapper aux contraintes du système féodal – mis en place par les Normands – à travers la pratique de *mortmain*. Du français qui signifie « la main morte », cette pratique spécifique de *l'use* permet au vassal d'échapper aux impôts féodaux dus en cas de décès, en faisant don de leurs terres à l'Église. Cette dernière est une entité non vivante et représente la main morte¹⁵. Aussi, le vassal transmet la propriété de ses terres à l'Église, qui promet de les détenir au bénéfice du donateur et de ses descendants, ceux-ci conservant le droit d'user et de jouir desdites terres perpétuellement. L'Église étant légalement l'unique propriétaire des biens et ne pouvant elle-même mourir, aucun impôt n'est donc jamais dû. L'Église a tout à y gagner, puisqu'en cas de défaut d'héritier, elle demeure propriétaire des terres, la promesse devenant caduque.

La comparaison avec le droit musulman mérite ici d'être relevée. En effet, le droit coranique connaît depuis près de 1500 ans une forme de *trust* appelée *waqf*, liée à l'obligation de charité (*zakat*), troisième pilier de l'Islam. Il existe ainsi deux types de *waqfs* : le *waqf* à but charitable et le *waqf* destiné à la gestion du patrimoine familial. Cette dernière utilisation du *waqf* a initialement pour objectif de contourner les règles strictes existantes en matière successorale. Mais elle est tolérée dans la mesure où, en cas de défaut de descendance, les biens sont destinés à être recueillis par un organisme charitable, le plus souvent religieux. Le *waqf* revêt ici toutes les caractéristiques d'un *trust* patrimonial. Ainsi, à la fin des années 1940, certains auteurs ont émis l'idée que

¹⁴ Blackstone (1766), p. 329.

¹⁵ Il est parfois indiqué que la main morte est celle du défunt donateur de la terre, qui continue d'imposer sa volonté au-delà du décès, cf. Blackstone (1765), p. 467.

la pratique des *uses* aurait en réalité pour origine le *waqf* musulman. Cette pratique bien implantée en droit coranique depuis la première moitié du VIII^e siècle aurait été imitée et adaptée par les chevaliers anglais à leur retour de croisade des siècles plus tard, alors que la pratique des *waqfs* atteignait son paroxysme¹⁶.

Quoi qu'il en soit, dans l'Angleterre du XIII^e siècle, il faut observer que la pratique de *mortmain* met à mal le système féodal et que l'autorité du suzerain s'en trouve diminuée. Non seulement le suzerain ne perçoit pas l'impôt dû en cas de décès, mais encore son droit de recouvrer les terres en cas de déshérence est écarté. En outre, celles-ci ne peuvent pas être confisquées lorsque le vassal est reconnu coupable de trahison ou d'autres crimes qui l'autorisent habituellement¹⁷. Les terres frappées par un tel dispositif lui échappent donc indéfiniment. Pour y remédier, le Roi Jean (1166-1216) interdit les donations à l'Église en 1215 au sein de la *Magna Carta*, mais meurt peu de temps après sa signature. Son fils, Henry III, décide finalement sous la pression de ne pas appliquer la prohibition. C'est la loi *De Religiosis* qui proscriit définitivement, en 1279, les dons de terres aux organisations ecclésiastiques sans consentement du Roi. Mais le dispositif reste inefficace car une nouvelle méthode de contournement se développe. Il suffit pour cela que le *feoffor* transmette le titre de propriété à plusieurs *feoffees to uses* en même temps. Quand l'un des *feoffees* décède, le titre ne passe pas à ses héritiers, mais reste entre les mains des autres *feoffees* (*joint tenants*). Ainsi, lorsque le nombre de *feoffees* diminue, ceux-ci sont progressivement remplacés par d'autres, ce qui entraîne l'externalisation du titre de propriété de manière perpétuelle¹⁸. En revanche, la loi *De Religiosis* a paradoxalement pour effet de renforcer la pratique de *l'use* dans l'ensemble des communautés chrétiennes. Elle devient ainsi parallèlement pour l'Église un moyen de contourner l'interdiction de recevoir des dons. Ici, le mécanisme est inverse : le « donateur » garde la propriété des terres, mais promet de les détenir dans l'unique intérêt des religieux, qui en usent et en jouissent pleinement.

¹⁶ Van Thomas Wynen (1949), p. 166. Cf. égal., sur l'utilisation de mécanismes similaires au *trust* en droit coranique, qui permettent notamment de respecter la *charia* - elle prohibe tant l'intérêt (*riba*) que le caractère aléatoire d'une convention (*gharar*) – en transmettant la propriété d'actifs frugifères à un tiers tout en restant bénéficiaire desdits fruits, Charlin, (2009), 1946 ; Barrière (2011), 1203 et G. Parleani, (2012).

¹⁷ Smith (1966), note 24, p. 45.

¹⁸ *Ibid.*, p. 45.

Ainsi, alors que la pratique de l'*use* a démontré son utilité, notamment pour l'administration des biens des chevaliers absents, son utilisation détournée par certains seigneurs pour échapper à leurs obligations féodales et à l'imposition correspondante, en dissociant le titre de propriété du droit d'usage et de jouissance, entraîne une perte financière durable et substantielle pour le pouvoir royal et affaiblit du même coup son autorité. C'est la raison pour laquelle Henry VIII fera adopter, non sans mal, la *Statute of Uses* destinée à éteindre les *uses* dits passifs¹⁹. Néanmoins, cette utilisation abusive de l'*use* marque durablement les esprits, ce qui explique aussi que, dans un premier temps, le droit du *cestui que use* n'ait été protégé ni par les cours de *common law*, ni par les juridictions ecclésiastiques (*ecclesiastical courts*).

1.2 L'absence d'action disponible contre le promettant défaillant

Après la conquête de l'Angleterre par Guillaume le Conquérant en 1066, les Normands ont installé durablement leur système pyramidal de juridiction. Bien que les tribunaux déjà en place aient été maintenus pour acheter la paix sociale, leurs compétences respectives font l'objet d'une réduction drastique au profit des juridictions royales, notamment grâce à l'introduction des *writs*, suite au travail de Glanvill, sous Henry II²⁰.

Face au refus du *feoffee to use* de restituer les biens, les héritiers légitimes du défunt croisé se tournent naturellement vers les tribunaux de droit commun : les tribunaux de *common law*. Cependant, la *common law* est à l'époque presque aussi rigide et formaliste que le droit romain et présente trois difficultés majeures. D'abord, elle ne reconnaît comme propriétaire légitime que le propriétaire de droit commun, c'est-à-dire le détenteur des titres, propriétaire légal. L'obstacle est immense puisque la propriété a été solennellement transmise au *feoffee* des années plus tôt, afin de lui permettre d'effectuer sa mission au bénéfice du *cestui que use*²¹. La mécanique même de la pratique se retourne donc contre les héritiers. Ensuite, il nous faut souligner que

¹⁹ Cf. *supra*, introduction.

²⁰ Glanvill (1900). Cf égal. Van Caenegem (1988) ; Plucknett (1936), p. 82 et s. ; Milsom (1981), p. 25 et s.

²¹ Sur le formalisme du transfert de propriété dans l'ancien droit anglais, cf. P. Vinogradoff (1907), p. 532 et s.

le seul remède disponible en *common law* est l'attribution de dommages et intérêts²². Les tribunaux de droit commun ne peuvent à l'époque octroyer à la victime qu'une compensation monétaire, inadaptée au vu de la nature du litige opposant *feoffor* et *cestui que use*. Percevoir un dédommagement pécunier n'est évidemment d'aucune utilité pour des héritiers qui n'aspirent qu'à la restitution de leurs terres. Enfin, et c'est probablement la principale source d'injustice, une action en justice n'est recevable en *common law* que s'il existe un *writ* particulier, c'est-à-dire un formulaire qui matérialise une forme d'action dans laquelle faire entrer un litige. Comme le droit romain, la *common law* est en effet fondée sur le principe selon lequel « l'action précède le droit ». Or comme le précise un auteur, « Au début la *common law* anglaise était de nature extrêmement rigide et, pour qu'un recours soit accordé, il était nécessaire qu'un formulaire corresponde précisément à la demande. »²³

Le terme *writ* est assez large puisqu'il désigne toute forme d'écrit, du livre (« Holy Writ ») à la Charte en passant par tout document officiel. En matière judiciaire, le *writ* est un document écrit qui permet de prétendre à l'accès aux juridictions. Le *writ* principal est l'*original writ*, ou « *breve royale* » selon le terme technique alors consacré, qui apparaît en 1203²⁴. Le *writ* est alors délivré par le Chancelier pour l'accès aux cours royales, auxquelles sont attribués la majorité des litiges depuis la fin du règne d'Henry II. L'objectif de l'introduction du *writ* est d'organiser l'accès aux cours, notamment en distinguant les motifs qui permettent l'accès aux cours royales de ce ceux qui permettent l'accès aux cours ecclésiastiques et seigneuriales, afin de réduire le nombre de litiges échappant aux premières, comme cela ressort implicitement de la lecture du *Traité de Granville*²⁵. Cependant, à l'évidence, la pratique du *writ* entraîne paradoxalement une restriction dans l'accès aux cours royales, tout litige devant trouver écho dans un *writ* pour pouvoir être jugé.

²² Marsh (1890), p. 46 et s.

²³ Smith (1966), p. 46 (traduction libre).

²⁴ Van Caenegem (1988), p. 29. Pour une thèse selon laquelle le *writ* serait apparu au IX^e siècle sous le Roi Alfred, cf. Harmer (1952). Néanmoins cette thèse a été réfutée à plusieurs reprises, cf. not. Bishop et P. Chaplais (1957) et Van Caenegem (1988), p. 31.

²⁵ Glanvill (1900), p. 3.

Ces formulaires comportent notamment le nom des parties, la nature et l'objet du litige et la demande de mise en œuvre d'un jury²⁶. Ils sont en nombre limité. Toutefois, comme le prêteur en droit romain, le Chancelier peut créer un nouveau *writ*. Ce dernier exerce pourtant ce pouvoir avec parcimonie car, contrairement au droit romain qui interdit aux juges de rejeter un formulaire octroyé par le prêteur, les cours anglaises exercent un contrôle strict sur la création de nouveaux *writs* et n'hésitent pas à déclarer nul un *writ* dont l'existence violerait une loi²⁷. Chacun des *writs* emporte l'application de règles procédurales qui lui sont propres (mode de preuve, assignation, modalités d'exécution du jugement etc). Un Registre des *writs* est créé, qui compile les centaines d'actions disponibles, et dont la plus ancienne version manuscrite qui nous est parvenue date des années 1220²⁸. Il existait probablement des dizaines voire des centaines de copies du *Register of Writs* – sans lesquelles la compréhension et la pratique de la *Common law* pouvait s'avérer éprouvante – aujourd'hui très souvent disparues²⁹.

Soulignons que, puisqu'une promesse accompagne le transfert de propriété, il eut semblé cohérent d'utiliser en matière de *uses* l'un des *writs* disponibles en droit des contrats. Toutefois, à l'époque le droit anglais des contrats n'est pas aussi développé qu'aujourd'hui et la qualification de contrat pose problème. Comme l'écrivait Maitland, « si [...] au XIV^e siècle, notre droit des contrats avait présenté sa forme moderne, je crois que les cours de justice auraient été obligées de dire 'Oui, ceci est une convention ; donc c'est un contrat qui peut légalement être exécuté' »³⁰. Ainsi les principaux *writs* en matière de contrats ne sont pas applicables au cas spécifique du *cestui que use*. En particulier, le *writ de covenant* (engagement) est inefficace car il requiert que le contrat soit scellé par écrit³¹. Or bien souvent, il n'existe qu'une promesse orale. Lorsque celle-ci a été mise par écrit, le support a souvent été perdu ou détruit avec le temps, car l'*use* perdure généralement sur plusieurs générations. Le *writ of debt* quant à

²⁶ À cette époque en Angleterre, le jury est omniprésent en matière pénale comme en matière civile.

²⁷ Van Caenegem (1988), p. 31.

²⁸ *Ibid.* La première version imprimée date quant à elle de 1531.

²⁹ Van Caenegem (1988), p. 30.

³⁰ Maitland (1909), p. 28 (traduction libre).

³¹ Langbein (1995), p. 634. Cf. égal, Pollock et Maitland (1898), p. 102 et p. 225 et s.

lui n'est pas adapté car il nécessite de se prévaloir de l'existence d'une dette de somme d'argent³². Dans notre hypothèse, l'enjeu est celui du retour des terres familiales dans le giron des héritiers³³.

Ainsi, ne possédant pas de *writ* adapté, les tribunaux de *common law* n'ont d'autre choix que de rejeter systématiquement l'action des *cestuis que use* sans prendre connaissance de l'affaire au fond. Du droit le plus strict résulte la plus grande injustice³⁴. Il faut remédier à cette situation éminemment préjudiciable à la société car, comme l'écrivait Montesquieu, « Une injustice faite à un seul est une menace faite à tous. »

2. La création d'une justice parallèle palliant l'intolérable vide juridique : la naissance de l'*equity*

L'injustice et le vide juridique résultant de l'impossibilité pour les demandeurs de porter leur action devant un tribunal réclament d'être corrigés. C'est une solution d'équité qui s'impose naturellement, grâce au pouvoir inhérent reconnu au roi de faire justice lui-même (2.1). Renforcée par l'intérêt financier que tire ce dernier à accueillir la demande de la veuve et de l'orphelin, la consolidation de ce système de justice parallèle permettra le développement exponentiel de l'héritier moderne du mécanisme de l'*use* : le *trust* (2.2).

2.1 Le pouvoir inhérent du roi de rendre justice au secours de l'équité

Bien qu'il n'existe aucun *writ* permettant au bénéficiaire de l'*use* d'accéder aux tribunaux de droit commun, le roi possède comme en France le pouvoir inhérent de faire justice lui-même. De nombreux *cestuis que use* désemparés se tournent alors vers lui pour l'implorer d'exercer son pouvoir souverain en leur faveur, « pour l'Amour de

³² Pollock et Maitland (1898), p. 180 et p. 214.

³³ Le *writ of detinet* (détention) aurait alors pu être utilisé mais présentait plusieurs défauts en la matière. Cf. Pollock et Maitland (1898), p. 181 et s.

³⁴ *Summum ius summa injuria*, Cicéron (1866), X.

Dieu et par voie de charité »³⁵. Les pétitions (*Petition* ou *Bill*) sont initialement adressées au roi lui-même. Cependant, celui-ci étant occupé à d'autres affaires et souvent lui-même absent, il délègue la compétence à son chancelier, ecclésiastique membre de la *Curia Regis*³⁶.

Ce dernier prend l'habitude de requérir la comparution devant lui du propriétaire officiel des terres – le promettant qui refuse de s'exécuter – pour qu'il soit confronté au plaignant³⁷. En cas de non-comparution, une amende dissuasive est infligée. Lorsque la confrontation a lieu, le chancelier décide, au nom du roi et en son âme et conscience, de la suite à donner à l'affaire. D'abord, il peut choisir d'en rester là, soit qu'il ne soit pas convaincu, soit qu'il découvre que l'*use* a été constitué dans un but frauduleux, par exemple dans l'objectif d'échapper aux impôts féodaux. Il est alors juste et cohérent que, devant la turpitude du demandeur, le chancelier en sa qualité de « Gardien de la conscience du Roi »³⁸ décline la demande qui lui est faite. Il en découlera la maxime « Celui qui invoque l'*equity* doit avoir les mains propres »³⁹, dont l'objet est notamment à l'origine de garantir l'intégrité du roi. Toutefois, comme le signalait Aristote, « La plus grande injustice est de traiter également des choses inégales. »⁴⁰ C'est pourquoi, refusant d'assimiler *use* et fraude, le chancelier prend une tout autre direction lorsque la veuve et l'orphelin sont injustement dépouillés de leurs terres par l'ami auxquelles elles avaient été confiées en vue de la longue absence du chevalier. Dans cette seconde hypothèse, le chancelier ordonne que justice soit faite en faveur du requérant. Ménageant les juridictions existantes, le chancelier raisonne en deux temps. D'une part, il reconnaît l'existence du droit de propriété en *common law* du défendeur. Il confirme ainsi la pleine efficacité des règles établies et ne s'immisce pas dans la compétence des tribunaux de droit commun. D'autre part, il juge qu'en

³⁵ « *For the love of God and in the way of Charity* », cf. Maitland (1909), p. 4 (traduction libre).

³⁶ La référence la plus ancienne d'une telle délégation date de 1280 sous Edouard I^{er}, cf. Parkes (1828), p. 29 et s. Le Chancelier sera un religieux au moins jusqu'à Thomas More, premier Chancelier laïc, de 1529 à 1532.

³⁷ Cf. Glister et Lee (2015), p. 3 et s. V. égal. Petit (2012), p. 2 et s.

³⁸ « *Keeper of the King's conscience* » (traduction libre).

³⁹ « *He who comes into equity must come with clean hands* » (traduction libre).

⁴⁰ Aristote (1979), V, 6, p.226.

équité, la promesse doit être exécutée. Il ordonne en conséquence le transfert de la propriété des terres au demandeur selon les formes solennelles habituellement exigées en droit commun⁴¹. En cas d'inexécution, la sanction est radicale : le chancelier statuant au nom du souverain, s'abstenir de faire ce qu'il ordonne est une offense punie d'emprisonnement. Suite au transfert de propriété, le bénéficiaire de la promesse devient propriétaire des terres dans le respect des règles ordinairement applicables. Son droit sera donc reconnu en *common law*. De la sorte, les deux systèmes coexistent parallèlement sans entrer en concurrence. Il n'existe en principe aucun conflit entre la *common law* et la décision du chancelier en *equity*⁴².

Le chancelier ajoute ainsi à l'ordre établi, sans pour autant le contredire. La décision du chancelier d'ordonner le transfert du bien est fondée sur la valeur donnée à la promesse, dont il exige le respect en équité. Si, comme l'affirmait Aristote, justice et équité ne sont pas absolument identiques, elles ne sont pas non plus d'un genre différent⁴³. En effet, « la loi ne prend en considération que les cas les plus fréquents, sans ignorer d'ailleurs les erreurs que cela peut entraîner »⁴⁴. L'équité prend alors la relève et, sans modifier la loi, la complète et la prolonge⁴⁵. Outre cet aspect philosophique fondé sur la morale, il faut souligner d'ailleurs que le chancelier a tout intérêt à accéder aux demandes de retour des terres dans le giron familial qui lui sont présentées par les *cestui que use*. De fait, l'exécution de la promesse, requise du défendeur par le chancelier, entraîne la cessation de l'*use*. Or, comme indiqué précédemment, l'*use* est à l'origine de difficultés rencontrées par le roi pour faire respecter les obligations féodales liées à la propriété, en ce compris le paiement des impôts liés à la transmission des terres. Pourtant, comme le souligne Blackstone, après les guerres avec la France, les *uses* sont si courants qu'ils deviennent « quasi universels », en raison du « désir des hommes (à une période où leurs vies sont

⁴¹ Sur ce thème, P. Vinogradoff (1907), p. 532 et s.

⁴² Les juges de *common law*, mais aussi le Parlement, se plaignent toutefois régulièrement de la concurrence apportée par l'*equity*, cf. not. Kerly (1890) p.107 et s. ; Carne (1927), p. 413. Par la suite, la jurisprudence a décidé que l'*equity* prévaudrait en cas de conflit : *Earl of Oxford Case* (1615) 21 ER 485.

⁴³ Aristote (1979), V, 14, p. 266.

⁴⁴ *Ibid.*, p. 267.

⁴⁵ Rouvière (2012), p. 8. Dans le même sens, Zaki (1990), p. 87.

continuellement en danger) de subvenir aux besoins de leurs héritiers et de sécuriser leurs biens contre les confiscations »⁴⁶. Toute demande de cessation de *l'use* est donc opportune pour le roi. Cet élément non négligeable explique sans doute qu'avec *l'use*, *l'equity* – qui y met fin – se développe de manière exponentielle. Alors qu'avant le règne d'Edouard IV (1442-1483) on ne trouve trace que de six cas relatifs à *l'use*, à partir de cette période la tendance s'inverse avec une explosion des demandes⁴⁷. Il en résultera la création d'un véritable système de justice parallèle organisé.

2.2 La consolidation de *l'equity* et le développement exponentiel du *trust*

Si, dans *Hélène*, Euripide faisait dire au chœur que « Jamais en dehors de la justice nul ne trouva le bonheur ; mais sur l'équité l'homme peut fonder l'espoir d'éviter sa ruine »⁴⁸, le Chancelier est parvenu à allier les deux, pour faire de l'équité une source institutionnelle de justice⁴⁹.

Dès le début du XIV^e siècle, sous le règne d'Edouard II, le Chancelier et son personnel donnent des audiences régulièrement. Ils s'installent à Westminster Hall sous le règne d'Edouard III⁵⁰, mais la *Chancery* reste alors un organe administratif. C'est au XV^e siècle que, devant l'explosion des cas à traiter, la Cour de la Chancellerie (*Court of Chancery*) est organisée en juridiction, à côté des trois autres principales cours royales

⁴⁶ Blackstone (1766), p. 329 (traduction libre).

⁴⁷ *Ibid.*

⁴⁸ Euripide (1975), p. 255.

⁴⁹ Au contraire, les juristes romains ne réagirent que (trop) tardivement à l'absence d'action spéciale en créant une action délictuelle infamante, à laquelle ils ajoutèrent plus tard deux actions spéciales fondées sur la bonne foi. L'apparition de ces sanctions n'eut pas l'effet escompté. En particulier, les nouvelles actions étaient inadéquates lorsque la chose se trouvait entre les mains d'un tiers, puisque son recouvrement devenait impossible. Ainsi la *fiducia* commença à décliner au profit de nouveaux contrats, parfois mieux adaptés ou dont l'inexécution était plus sévèrement sanctionnée. De même, l'abrogation des modes solennels de transfert de propriété, qui seuls pouvaient être accompagnés d'un pacte fiduciaire, contribua fortement au déclin de l'outil au sein de ce système juridique formaliste. Enfin, l'institution fût volontairement exclue des Compilations par Justinien (533 environ après J.C.), ce qui mit clairement un terme à l'utilisation de la fiducie en droit romain. Notons que la dernière occurrence du mot *fiducia* se trouve dans l'impériale des empereurs Arcadius et Honorius en 395, mais pas dans le sens originel du terme, uniquement dans le sens de contrat de gage.

⁵⁰ Kerly (1890), p. 28.

déjà en place, toutes issues du Conseil du Roi. La multiplication des demandes faites à la Cour de la Chancellerie résulte de divers facteurs. Comme souligné précédemment, d'une grande flexibilité, elle peut non seulement passer outre l'absence de *writ* et juger en équité, mais aussi accorder au demandeur des remèdes de toutes natures – contrairement aux cours de *common law* qui ne peuvent attribuer que des dommages-intérêts – ce qui n'est pas anodin⁵¹. Outre le fait que certains préjudices ne peuvent pas être efficacement compensés en équivalent – rappelons que les conflits en matière de *uses* ne peuvent appeler d'autre réponse satisfaisante qu'une remise en propriété des terres – il faut souligner que la capacité de la *Court of Chancery* à délivrer des injonctions (*injunctions*) a participé au développement de la justice préventive en Angleterre, en interdisant en amont l'accomplissement de faits de nature à causer un préjudice à autrui⁵². Aussi est-elle sollicitée dans de nombreuses affaires, qui débordent largement le cadre de l'*use* et du *trust*. Observons enfin que si les *writs* de *common law* sont formulés et déposés en latin, les pétitions adressées au Chancelier le sont initialement en vieux français – langue des seigneurs normands et de leurs descendants – puis, dès le début du XV^e siècle, en anglais, ce qui fera de la *Court of Chancery* une référence en matière de terminologie juridique⁵³.

Au XVI^e siècle, Thomas More, juriste de *common law*, est le premier laïc à être nommé Chancelier. Dès lors, les deux types de juridiction se rapprochent. Le système du précédent en vigueur en *common law* est adopté en *equity*, les juges de la *Court of Chancery* entreprennent de motiver leurs décisions et des maximes d'*equity* sont établies. Au XIX^e siècle, la compétence spéciale de chacune est définie et la spécialité des *writs* est abolie⁵⁴. Enfin, bien que la distinction entre *common law* et *equity* continue d'exister, le *Supreme Court of Judicature Act*⁵⁵ fusionne les cours de *common law* et d'*equity* au Royaume-Uni et uniformise les règles applicables devant chacune d'elles. Comme l'écrivait

⁵¹ Marsh (1890) p. 46.

⁵² *Ibid.*

⁵³ Carne (1927) p. 404.

⁵⁴ *Common Law Procedure Acts*, 1852 et 1854.

⁵⁵ *Supreme Court of Judicature Act*, 1873 et 1875.

Motulsky, « Voilà le point d'arrivée, aussi éloigné que possible des origines romaines... »⁵⁶

Aujourd'hui, le *trust* est omniprésent dans les pays de *common law*, au point que la majorité des États de droit civil tentent à présent de l'imiter. Comme l'écrivait Lepaulle il y a déjà près de cent ans : « Le *trust* est l'ange gardien de l'Anglo-Saxon, il l'accompagne partout, impassible, depuis son berceau jusqu'à sa tombe. Il est à son école comme à son association sportive, il le suit le matin à son bureau comme le soir à son club ; il est à ses côtés le dimanche à l'église ou au comité de son groupe politique ; il soutiendra sa vieillesse jusqu'à son dernier jour, puis il veillera au pied de son tombeau et étendra encore sur ses petits-enfants l'ombre légère de ses ailes »⁵⁷. Il y a quelques mois, le monde s'émouvait du divorce de Bill et Melinda Gates en raison des conséquences financières qui pourraient en découler quant à la gestion de leurs œuvres caritatives. À juste titre, puisqu'ils gèrent en qualité de *trustees* un *trust* comprenant 45 milliards de dollars d'actifs destinés à promouvoir la santé, l'éducation et l'accès au numérique ainsi qu'à combattre la pauvreté. Et ils ne sont pas les seuls à avoir fait du *trust* l'instrument privilégié de la gestion de leur patrimoine. On citera à titre d'exemple les *Kennedy Family Trusts*, qui défient le temps et permettent aujourd'hui à plusieurs dizaines de descendants de Joseph P. Kennedy de vivre confortablement⁵⁸, le *Princess Diana Testamentary Trust* en faveur des princes William et Harry, le *David Bowie Trust* qui a permis au chanteur de lever des liquidités alors qu'il était surendetté grâce à la cession en *trust* de ses droits futurs sur d'éventuels nouveaux albums, ou encore le célèbre *National Trust* anglais, qui gère les biens nationaux au Royaume-Uni.

Si, malgré des ressemblances troublantes, les historiens n'ont jamais pu démontrer une origine romaine du *trust*, il est certain néanmoins que, contrairement au prêteur romain au temps de la *fiducia*, le chancelier anglais a autorisé le *trust* à sortir de la face cachée du droit, lui permettant d'entrer dans la lumière et de devenir cette institution protéiforme moderne qui rayonne aujourd'hui dans le monde.

⁵⁶ Motulsky (1964), p. 215 et s., *in fine*.

⁵⁷ Lepaulle (1932), p. 114.

⁵⁸ O'Donnell (2014).

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L'ACTION PRECEDE LE DROIT OU L'INJUSTICE INSTITUTIONNALISEE ? L'EXEMPLE DE LA *FIDUCIA* EN DROIT ROMAIN

Caroline Decoster*

Abstract

« Pas de droit sans action ». Cet emblématique principe traversa l'histoire juridique de Rome : là où il n'y avait pas d'action, il ne pouvait y avoir de droit. Un droit individuel n'existait que par sa sanction judiciaire. Premier monument législatif de Rome, la Loi des XII tables met en place cinq actions, nommées actions de la loi¹, qui permettaient de couvrir les principaux besoins juridiques de la Cité du V^e siècle avant notre ère, une Rome dans laquelle les patrimoines et les fortunes étaient essentiellement foncières. La conquête et le développement de l'Empire changèrent considérablement la donne ; Rome devint un empire commerçant. Cette évolution du contexte économique impacta, fort logiquement, la réalité juridique. Le monde des affaires devint foisonnant à travers tout l'Empire. De là, de nombreuses situations n'étaient plus couvertes par ces cinq actions. Usant de leur pragmatisme habituel, les Romains procédèrent à une réforme de la procédure par le biais de la *Lex Aebutia*², loi qui introduisit la procédure formulaire. Grâce à elle, le préteur élargit son pouvoir créateur de droit ; en effet, c'est à lui que la *Lex Aebutia* confie la rédaction de la formule, désormais acte central de la procédure. Le préteur va alors l'utiliser pour couvrir des situations jusque-là inconnues du droit et, ainsi, le faire évoluer. La loi lui accordant une totale liberté d'organiser le procès, il peut prendre en considération des situations

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¹ Dans ses *Institutes*, Gaius nous présente ces cinq actions, ainsi que leurs caractéristiques communes : le *sacramentum*, la *judicis postulatio*, la *condictio*, la *manus injectio* et la *pignoris captio* (Gaius, *Institutes*, 4, 11-32 ; P.-Fr. Girard, *Manuel élémentaire de droit romain*, éd. revue et mise à jour par F. Senn, Dalloz, Paris, 2003, p. 1029-1054).

² La datation de cette loi est imprécise. On estime qu'elle a été votée entre 146 et 126 avant notre ère.

que le Droit civil a ignoré ou réglé imparfaitement, en octroyant une action³. Si l'adoption de la procédure formulaire assouplit notre principe, elle ne le remet pas en cause ; il demeure le fondement de toute procédure à Rome.

Le but de cette contribution n'est évidemment pas de questionner ce principe dans sa généralité, mais de l'interroger au prisme de certains mécanismes juridiques. Le mécanisme au cœur de notre propos sera la fiducie⁴. Celle-ci fut, sans doute, le premier contrat réel de bonne foi. Elle fut très utilisée à la période républicaine car elle devait couvrir tous les besoins juridiques pour lesquels le préteur créa, par la suite, d'autres contrats réels. Les sources juridiques, littéraires, ainsi que les actes de la pratique, nous montrent la très large variété de ses destinations. Elle était très prisée, notamment, en matière patrimoniale⁵. Pourtant, nous verrons qu'elle n'apparaît pas dans les Compilations de Justinien. Entretemps, la fiducie a donc totalement disparu. Nous allons voir si cette disparition peut être en lien avec l'application de notre principe « Pas de droit sans action ». En effet, la fiducie avait une structure particulière. Elle était composée de deux actes : le premier était une mancipation, un acte juridique permettant le transfert de la propriété d'une chose ; le second était un pacte fondé, non sur le droit, mais sur la *fides*. Cette structure même aurait-elle pu être cause d'injustice du fait de l'application de notre principe ? Nous allons essayer de déterminer si tel fut le cas en deux temps : d'abord en nous intéressant, de plus près, à la définition de la fiducie (I), puis en décryptant la dynamique de sa structure duale (II).

³ Entre autres moyens procéduraux, le préteur pouvait délivrer ce qu'on dénommait des actions *in factum*. Il rédigeait une formule prenant en compte des situations ignorées du droit civil. Il lui suffisait simplement d'ordonner au juge de condamner s'il constatait que certaines circonstances de fait étaient remplies. Une autre méthode assez efficace consistait à se servir d'une fiction juridique, en utilisant le mécanisme de l'action utile. Le préteur posait comme judiciairement vrai ce qui ne l'était pas dans la réalité. L'idée était de faire bénéficier un demandeur de certaines prérogatives du droit civil dont il ne pouvait se prévaloir. L'exemple classique était de réputer un pérégrin citoyen romain.

⁴ Sur les mécanismes similaires de l'*use* et du *trust* de droit anglais, voir dans cet ouvrage l'article de Célia Berger-Tarare, « L'action précède le droit ou l'injustice institutionnalisée ? L'exemple de l'*use* et du *trust* en droit anglais ».

⁵ P.-Fr. Girard, *Manuel élémentaire de droit roman*, op. cit., p. 552-558.

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Keywords

Substantive rights and remedies - Roma law fiducia

1. Les Aléas D'une Définition

Si l'on ouvre un manuel d'Histoire du droit privé⁶, ou plus spécifiquement d'Histoire des obligations⁷, la fiducia y est présentée parmi contrats réels de bonne foi, avec un accent mis sur sa structure particulière : la fiducia est

« un contrat aux finalités pratiques multiples, qui comporte un transfert de propriété d'une chose, assorti d'un pacte de fiducia par lequel l'acquéreur s'engage à restituer la chose acquise »⁸.

⁶ Il suffit de citer le manuel de référence en la matière : J.-Ph. Lévy et A. Castaldo, *Histoire du droit civil*, 1^{ère} éd., Dalloz, Paris, 2002, p. 708-710.

⁷ Par exemple, E. Chevreau, Y. Mauten et Cl. Bouglé, *Introduction historique au droit des obligations*, 1^{ère} éd., Litec, Paris, 2007, p. 59-61.

⁸ J. Gaudemet et E. Chevreau, *Droit privé romain*, 3^e éd., Montchrestien, Paris, 2009, p. 268.

Pourtant, si on s'attelle à en rechercher une définition sous la plume des jurisconsultes, les choses deviennent plus complexes. La place qui lui est accordée varie. Prenons l'exemple des *Institutes* de Gaius. L'émblématique jurisconsulte la mentionne à plusieurs reprises, sans toutefois la faire apparaître dans sa célèbre répartition quadripartite des contrats⁹, et plus spécifiquement dans sa présentation des contrats réels. De la même manière, la lecture des *Institutes* de Justinien¹⁰ laisse également le lecteur juriste dubitatif. Aucune mention de la fiducie. Pourtant, les textes relatifs à ce contrat furent repris par les compilateurs, mais dans les passages relatifs au gage, autre contrat réel du droit romain¹¹. Reste alors au lecteur la possibilité de se tourner vers les œuvres des auteurs non-juristes, recours parfois bien utile¹². Il trouve alors une piste intéressante dans le Commentaire sur les *Topiques* de Cicéron, rédigé en 523, par Boèce, philosophe et homme d'État. La définition qu'il nous en donne est assez enthousiasmante :

« Le fiduciaire est une personne à qui une chose est transférée par mancipation afin qu'il la retransfère par mancipation au transférant originaire. Ainsi, par exemple, lorsqu'une personne qui craint des temps incertains transfère par mancipation un fonds à un ami plus puissant afin que ce dernier le lui rende quand ces temps difficiles auront cessé. Cette mancipation est appelée fiduciaire car vient s'interposer l'assurance d'une restitution fondée sur la *fides* »¹³.

⁹ Gaius, *Institutes*, 3, 89.

¹⁰ *Corpus juris civilis*, éd. Th. Mommsen et P. Kruger, 3 vol., Berolini : apud Weidmannos, 1872-1895. Signalons une traduction récente des *Institutes* de Justinien : Ph. Cocatre-Zilgien et J.-P. Coriat, *Institutes de Justinien. Traduction française avec le texte latin en regard*, Dalloz, Paris, 2021.

¹¹ Ces interpolations ont été mises en lumière par Otto Lenel : O. Lenel, *Essai de reconstitution de l'Édit perpétuel*, trad. Fr. Peltier, Paris, 1901.

¹² La fiducie est également présente dans les *Étymologies* d'Isidore de Séville.

¹³ Boèce, *Commentaire sur les Topiques de Cicéron*, 4. 10. 14, trad. E. Chevreau, *Introduction historique au droit des obligations*, *op. cit.*, p. 59-60.

Cette définition accroche l'intérêt du lecteur ; elle nous apparaît tout à la fois simple et claire. Pourtant, sa structure est particulière : Boèce l'ouvre sur la personne du fiduciaire – premier mot choisi par lui –, pour, ensuite, nous décrire le mécanisme contractuel fondé sur une double mancipation. Le choix de Boèce fut donc de mettre en avant la personne, plus que l'acte. C'est par le prisme du fiduciaire qu'il nous définit la fiducie. Le terme est d'ailleurs étrangement absent de sa définition. D'une certaine manière, il nous présente le fiduciaire, plus qu'il ne nous définit la fiducie. Il semble, que, pour notre auteur, le cœur de l'institution n'est donc pas tant le mécanisme contractuel, que la personne choisie par le fiduciant, personne à laquelle il va transférer, temporairement, la propriété de la chose. Et c'est dans cet esprit qu'il nous présente ce contrat.

Il continue sa définition en nous donnant un exemple d'utilisation de la fiducie, choisi parmi la pluralité d'utilisations du mécanisme : la fiducie *cum amico*. Sa particularité est qu'il existe ici un lien d'amitié entre le fiduciaire et le fiduciant. Le lien fiduciaire repose sur un lien amical préexistant. Ce choix est assez parlant sur l'image que Boèce se fait de la fiducie. On peut remarquer ensuite la sémantique adoptée par notre auteur dans ce passage. Il nous dit que le fiduciant « craint des temps incertains », qu'il affronte des « temps difficiles » : Boèce nous le présente face à l'adversité. Il s'adresse alors « à un ami plus puissant » et conclut, avec celui-ci, un pacte fiduciaire. De ces quelques lignes, transparaît nettement l'idée de protection : la fiducie est là face à la crainte, à l'incertitude, aux difficultés essuyées par le fiduciant. C'est un mécanisme qui nous apparaît donc rassurant. Cette idée est encore renforcée par la suite de la définition. Boèce revient à l'étymologie de l'adjectif fiduciaire, accolé au terme mancipation. Fiduciaire vient de *fides*, c'est-à-dire, en latin, la confiance. Si le fiduciant est assuré/rassuré de récupérer sa chose, c'est que le fiduciaire est lié par la *fides*. C'est la source de son engagement envers son ami en détresse.

À s'en tenir à cette définition, Boèce nous décrit donc un mécanisme juridique source d'une belle protection pour le fiduciant. Pour autant, si l'on retient la date à laquelle cette définition a été rédigée, la réalité se trouble quelque peu. Nous sommes en 523, quelques années avant la promulgation du plus grand monument de notre histoire

juridique : les Compilations de l'Empereur Justinien¹⁴. Si l'on s'en tient à la définition laissée par Boèce, on pourrait s'attendre à ce que la fiducie ait toute sa place en leur sein. Or, nous avons vu qu'il n'en est rien. La fiducie n'y apparaît pas ou, plutôt, elle y est déguisée sous les traits du contrat de gage. Comment appréhender ce paradoxe ? L'examen du mécanisme fiduciaire peut nous donner des éléments de réponse.

2. Une Structure Duale, Cause De Désaffection ?

Comme nous l'avons vu, la fiducie est présentée comme un des contrats réels du droit romain. C'est-à-dire un contrat qui est subordonnée à la remise d'une chose, ou plus généralement à l'accomplissement d'une prestation réelle, qui sert de vecteur à l'expression des volontés des parties au contrat et permet la constitution d'un lien juridique entre elles. Il y a cinq contrats réels en droit romain, chacun destiné à couvrir un besoin juridique particulier¹⁵. Parmi eux, la fiducie a une structure particulière, une structure duale. Mais ce n'est pas un montage contractuel comme un autre. La définition de Boèce met bien en lumière cette double structure ; c'est un contrat qui est constitué par la juxtaposition de deux actes. La particularité est qu'ils ne sont pas de même nature. Si l'un est certes juridique, l'autre ne l'est pas.

Acte premier : le transfert de propriété, un acte juridique

Pour ce premier acte – le transfert de propriété –, il existe une action. Donc ici, l'application de notre principe, « pas de droit sans action », ne poserait pas de difficulté. En droit romain, il y a trois manières de transférer la propriété : la

¹⁴ Une première édition du Code date de 529, la seconde – celle qui nous est parvenue – de 534. Le Digeste et les Institutes entrent en vigueur en 533. Les Novelles seront publiées postérieurement à ce premier moment de compilation.

¹⁵ Outre la fiducie, il existe quatre autres contrats réels. Le premier, et le plus ancien, est le *mutuum*, un contrat de prêt à la consommation de choses fongibles et consommables par le premier usage. Les trois autres contrats sont des contrats de bonne foi : le *commodatum*, contrat de prêt à usage ; le dépôt et le gage qui sont généralement utilisés comme des sûretés (E. Chevreau, Y. Mäusen et Cl. Bouglé, *Introduction historique au droit des obligations*, op. cit., p. 53-63).

mancipation (mentionnée dans la définition de Boèce)¹⁶, l'*in jure cessio*¹⁷ et la tradition¹⁸. Et, pour chacun de ces différents modes, il existe une action correspondante. Toutefois, la fiducie ne peut pas être fondée sur n'importe lequel de ces mécanismes ; le transfert de propriété ne peut se faire que par une mancipation ou une *in jure cessio*. La raison se trouve dans leurs différentes caractéristiques. La mancipation et l'*in jure cessio* ont plusieurs points communs, dont trois vont plus particulièrement retenir notre attention.

Première caractéristique commune : ce sont des procédés formalistes, c'est-à-dire que le transfert de propriété est soumis à l'accomplissement de certaines formalités. Pour la mancipation, il s'agit de la pesée par la balance et l'airain, réalisée évidemment devant témoins ; quant à l'*in jure cessio*, c'est, en quelque sorte, un procès fictif. Dans ses *Institutes*, Gaius nous dit que, dans les faits, la mancipation a la préférence. Effectivement, la dernière mention de l'*in jure cessio* daterait du III^e siècle. Cela nous explique pourquoi, dans la définition de Boèce, seule la mancipation apparaît : à la période où l'auteur écrit son commentaire, l'*in jure cessio* est inusitée depuis longtemps.

Deuxième caractéristique commune : mancipation et *in jure cessio* ne peuvent être utilisées que par les citoyens romains et par les Latins, c'est-à-dire les personnes qui détiennent le *commercium*, le droit d'aliéner et d'acquérir conformément aux règles du droit de la Cité. Ces deux mécanismes sont parfaitement inaccessibles aux pérégrins qui ne possèdent pas la citoyenneté romaine, et donc le *commercium* nécessaire. De ce fait, ils ne sont pas en mesure d'utiliser le mécanisme fiduciaire. Dans un Empire romain qui transforme en un empire commerçant, dans lequel les citoyens romains et les pérégrins entretiennent des relations juridiques denses, cela a pu être cause de désaffection pour la fiducie. À l'inverse des deux mécanismes précédents, la tradition n'est pas un mode formaliste de transfert de la propriété. La remise de la chose suffit à effectuer ce transfert. De plus, elle peut être utilisée aussi bien par les citoyens romains que par les pérégrins. On pourrait donc penser que la tradition serait le

¹⁶ Ph. Lévy et A. Castaldo, *Histoire du Droit civil*, op. cit., p. 552-559.

¹⁷ *Ibid.*, p. 559-562.

¹⁸ *Ibid.*, p. 563-569.

mécanisme parfait pour contrebalancer les caractéristiques rigides des deux précédents, et, ainsi, assouplir le mécanisme fiduciaire. Cette utilisation n'est toutefois pas possible car il manque à la tradition une caractéristique possédée à la fois par la mancipation et l'*in jure cessio*.

Troisième caractéristique commune : lorsque les parties utilisent la mancipation et l'*in jure cessio* pour effectuer un transfert de propriété, elles peuvent en profiter pour faire naître des créances accessoires. Et c'est donc pour cela qu'elles seules peuvent servir de support au mécanisme fiduciaire. À l'inverse, la tradition a uniquement des effets réels. Elle ne peut faire naître aucune obligation, et donc, elle ne peut pas permettre de valider un pacte de fiducie.

Acte second : le pacte fiduciaire, un acte non juridique

Dans sa définition, Boèce nous indique que l'assurance d'une restitution de la chose est fondée sur la *fides*, que l'on traduit généralement par confiance ou encore, dans un contexte juridique, par bonne foi. Mais la *fides* signifie beaucoup plus que cela, tant dans la conscience romaine que dans l'exécution de la parole donnée. Lorsque nous considérons le pacte fiduciaire, nous sommes face à un acte qui n'est pas fondé sur le droit, mais sur la *fides*. Donc un acte non juridique. Or, si nous revenons au point de départ de notre réflexion – « pas de droit sans action » –, en cas de non-exécution du pacte fiduciaire par le fiduciaire, le fiduciant ne disposera, de ce fait, d'aucune action à invoquer devant le préteur. Placé face à un fiduciaire de mauvaise foi, le fiduciant se retrouverait dépourvu de recours juridique. En effet, il y a bien eu mancipation, donc transfert de la propriété de la chose. Le fiduciaire en est devenu le propriétaire. Il peut faire protéger ce droit par le préteur. Par contre, rien ne permet au fiduciant d'alléguer en justice le pacte fiduciaire, c'est-à-dire l'acte sur lequel est fondée l'obligation de restitution de la chose. Alors comment comprendre la genèse de ce pacte fiduciaire, ses multiples utilisations, et pourquoi la *fides* transparaissait, dans la définition de Boèce, comme fiduciant une assurance que la chose sera bien restituée ? Tout cela nous ramène à l'importance de la *fides* pour les Romains.

De l'importance de *Fides* pour les Romains

À l'origine, *Fides* était une déesse du Panthéon romain¹⁹, dont le culte aurait été introduit par le deuxième roi de Rome, Numa Pompilius²⁰. Le titre officiel qui lui avait été donné était *Fides populi romani* : la Bonne foi du peuple romain. Numa Pompilius aurait eu, à son égard, une dévotion si particulière qu'il lui aurait élevé un autel. *Fides* veille à la foi jurée, ainsi qu'à la foi promise. Pour Cicéron, qui invoquait ici les stoïciens, son nom viendrait de l'expression *Fiat* : « que soit fait ce qui a été dit »²¹. L'intérêt de cette étymologie ne réside pas essentiellement dans son exactitude – sans doute discutable – mais dans la compréhension qu'elle nous donne de la manière dont les Romains percevaient cette divinité. Dans le Panthéon romain, Jupiter était, entre autres, le dieu protecteur des contrats, le dieu du serment et de la loyauté. *Fides* était la divinisation de cette attribution propre de Jupiter. Elle personnalisait le respect des engagements ; elle était la gardienne de l'intégrité des transactions entre les individus. *Fides* représentait le plus ancien moyen pour conférer à un engagement un caractère contraignant, d'essence religieuse.

Dans l'ancien droit romain, la sanction de la fiducie nous apparaît comme purement morale, relevant du domaine religieux. Si l'efficacité d'un tel engagement nous paraît ténue, il faut bien garder à l'esprit que, pour les Romains, rompre un engagement fondé sur la *fides* était, sans doute, aussi grave – si ce n'est plus – que de ne pas exécuter une obligation juridique. Si le fiduciaire venait à conserver la chose, il aurait porté atteinte à la *fides*. Cela aurait causé un véritable scandale, scandale qui porterait une atteinte fatale à sa *fama*, sa bonne réputation. Et c'est une chose extrêmement grave pour un citoyen romain que de perdre sa *fama*. Si nous revenons à l'exemple retenu par Boèce dans sa définition, la fiducie *cum amico*, nous mesurons facilement la gravité

¹⁹ Sur *Fides* et sa place dans la Cité : G. Freyburger, *Fides. Étude sémantique et religieuse depuis les origines jusqu'à l'époque augustéenne*, Paris, Les Belles Lettres, 1986, 361 p. ; du même auteur, « La *fides* civique », *Antiquité et citoyenneté. Actes du colloque international de Besançon (3-5 novembre 1999)*, Besançon, Institut des Sciences et Techniques de l'Antiquité, coll. « ISTA » (n° 850), 2002, p. 341-348 ; P. Grimal, « *Fides* et le secret », *Revue de l'histoire des religions*, t. 185, n° 2, 1974, p. 141-155.

²⁰ Le second roi de Rome, Numa Pompilius, a une place toute particulière dans l'histoire juridique de Rome. En effet, la légende veut que c'est à lui que la nymphe Égérie aurait dicté la première législation romaine.

²¹ Cicéron, *De officiis*, livre I, VII.

d'un tel acte. Le fiduciaire viendrait non seulement à dépouiller un ami, mais un ami plus faible, affrontant des temps difficiles.

Donc, si les Romains mettent en place un pacte de fiducie, pour appuyer un acte aussi lourd de conséquence qu'un transfert de propriété, c'est que la *fides* apparaissait comme un fondement solide à l'obligation de restitution. Et cela est illustré par les utilisations très diverses de la fiducie. Les plus connues sont la fiducie *cum amico*, présente dans la définition de Boèce, et la fiducie *cum creditore*, où la chose sert de sûreté réelle envers un créancier. Cette dernière fut certainement l'utilisation la plus répandue. La formule de Bétique nous en donne un bel exemple²². Mais ce furent loin d'en être les seules ; la fiducie était employée en matière patrimoniale, également. Ainsi, en matière de testament, dans le mécanisme de la *mancipatio familiae*. Celle-ci consistait à vendre par mancipation tout son patrimoine à un acquéreur fictif, le *familiae emptor*. Tenu par la *fides*, il devait ensuite remettre les biens aux bénéficiaires indiqués par le testateur²³. Citons aussi le *coemptio* fiduciaire, qui était un mariage avec *manu*, mais accompagné d'une promesse de divorce quasi-immédiat²⁴. Plus encore, la fiducie était également utilisée pour transférer une puissance sur une personne. Ainsi, que ce soit pour l'adoption ou pour l'émancipation, on opérait au moyen de trois affranchissements, affranchissements qui faisaient l'objet d'une promesse fiduciaire. Pour tous ces actes, d'une importance lourde pour le patrimoine familial, les Romains trouvaient en la *fides* le fondement d'un engagement, certes de valeur morale, mais qui leur apparaissait suffisant pour les garantir.

Pourtant, aux alentours du IIe-Ie siècle avant notre ère, le préteur a reconnu la fiducie en créant l'action de fiducie, une action de bonne foi qui est octroyée au fiduciant en cas de non-restitution. Désormais, si le fiduciaire ne veut pas lui restituer sa chose, manquant ainsi à l'obligation prévue dans le pacte fiduciaire, ce dernier pourra tenter

²² Découverte en 1868 au sud de l'Andalousie, la formule de Bétique date du Ier ou du IIe siècle de notre ère (FIRA, III, p. 292). C'était un formulaire type de fiducie, qui servait d'exemple pour les actes de la pratique. Pour une traduction, voir E. Chevreau, Y. Mausen et Cl. Bouglé, *Introduction historique au droit des obligations*, op. cit., p. 61.

²³ J.-Ph. Lévy et A. Castaldo, *Histoire du droit civil*, op.cit., p. 1190.

²⁴ *Ibid.*, p. 86.

cette action devant le préteur. Qui plus est, c'était une action infamante, ce qui montre la gravité de la non-restitution. À la période classique, le préteur avait attaché un ensemble de conséquences juridiques automatiques à certaines condamnations. Il s'agissait à la fois d'interdictions de droit privé et d'incapacités de droit public, englobées sous le terme d'infamie : c'est-à-dire la situation de celui qui perd sa *fama*, sa bonne réputation. Par exemple, le condamné frappé d'infamie était déchu de son statut de *pater familias*, perdant ainsi son statut de *sui juris*, et, donc, sa capacité juridique. Avec la création de cette action, le préteur a pallié ce qui nous semblait l'inconvénient initial – et majeur – du pacte de fiducie : l'absence de recours en cas de non-restitution. L'application de notre principe – « pas de droit sans action » – ne semble plus poser aucun problème. Par la création de cette action, le préteur crée la sanction juridique nécessaire au pacte fiduciaire. À partir de là, la fiducie aurait donc dû continuer à être utilisée largement. Il n'en fut rien.

Cette intervention du préteur, que l'on aurait pu penser salulaire, reflète un changement sans doute plus profond que la simple volonté d'appliquer notre principe. Elle peut être mise en parallèle avec un changement de conception de la *fides* à l'époque impériale. Sous la Rome républicaine, la *fides* était pensée de manière horizontale ; les citoyens s'estimaient liés les uns aux autres par un devoir de fidélité, au sein d'une même communauté politique. Les troubles de la fin de la République commencèrent à y porter atteinte. Avec l'avènement du pouvoir impérial, elle était désormais appréhendée de manière verticale : elle incarnait la fidélité que les sujets devaient à leur empereur²⁵. D'où la nécessité de l'intervention du préteur. Les mécanismes fondés sur la *fides* ne pouvaient plus fonctionner comme précédemment. Cette création par le préteur reflète bien plus qu'un changement social ; elle exprime un changement de mentalité. Le citoyen romain est devenu un sujet.

Finalement, ce qui a causé la fin de la fiducie n'est pas tant le pacte fiduciaire que le formalisme de l'acte de transfert de propriété. Le sort de la fiducie était lié, en quelque sorte, au sort de la mancipation lui servant de support. Ce destin commun est mis en lumière par le fait que, tout comme pour la fiducie, les Compilations de Justinien viendront consacrer sa disparition. Et ce qui a, sans doute, accéléré le phénomène est que le préteur avait aussi créé d'autres contrats réels – tel le gage ou le dépôt – qui

²⁵ G. Freyburger, « *La fides civique* », art. cit., p. 341-348.

pouvaient également remplir le même objet : servir de sûreté, sans les inconvénients et la lourdeur du mécanisme fiduciaire.

Ce qui pourrait nous apparaître comme une injustice – l’absence de sanction juridique du pacte fiduciaire –, n’est peut-être qu’un reflet de notre propre conception du droit. Tant que le citoyen romain se sentait suffisamment lié par la *fides*, le mécanisme fonctionnait. Quand cette *fides* évolua et qu’elle changea de destination, alors le prêteur intervint pour accorder la sanction juridique attendue. Dans sa définition, Boèce avait su rendre, avec justesse, l’esprit originel de la fiducie : un mécanisme rassurant et protecteur, tant que la *fides* liait la conscience romaine. Le citoyen laissant la place au sujet, le temps de la fiducie était révolu.

ANY COLOUR YOU LIKE.

PLURINATIONALISM AS AN AGENDA OF INTERNAL COLONIALISM IN ANDEAN STATES

Enrico Buono^{*}

Abstract

The approval drop that led to the fall of Evo Morales in Bolivia in November 2019 might be traced back to the progressive disaffection of Bolivian indigenous peoples towards their alleged leader. The official multiculturalism pursued by the MAS party has been critically described by indigenous authors as ‘the concealing mechanism *par excellence* for new forms of colonization’. In that sense, the recent Bolivian crisis is a fitting example of a conflict heavily racialized by a precise political agenda. This agenda has officially adopted the decolonizing discourses of Global Northern academics, crystallizing identity fetishes based on the presumption of an (impossible) ‘authenticity’: a culturalist approach that conceals and obscures the ‘juxtaposition, in small points or spots, of opposed or contrasting colours’, represented by *mestizo* identities. In September 2022, about 80% of indigenous voters have overwhelmingly rejected the Chilean draft constitution, despite its inclusive and progressive character. These two examples show how populist uses of indigeneity can impair transformative constitutional projects, which end up being rejected by the very populations whose inclusion they promote. Therefore, the aim of this study is to investigate the difficulties currently faced by the plurinational discourse, in its pursuit of a genuinely multicolored Andean *nuevo constitucionalismo*.

Indice Contributo

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Keywords

Andean nuevo constitucionalismo – Indigenous rights – Bolivian plurinational State –
Chilean draft constitution

Introduction: From Abbey Road to the Andes. Internal Colonialism and Comparative Law

On the 9th of June 2021, during the *Juris Diversitas* Seventh General Conference – aptly
entitled ‘*The Dark Side of the Law*’ – I took part in a panel dedicated to the legacy of
Pink Floyd’s 1973 concept album *The Dark Side of the Moon*.

It proved to be a fascinating experiment in *concept conferencing*, one that referenced the
track titles of the progressive rock masterpiece in order to address the critical topics
underlying them and their relevance to contemporary comparative legal scholarship.
The Dark Side of the *Comparative Legal Moon* – as put by the panel’s coordinator

Pasquale Viola – has concealed from our view the influences exerted by colonialism and orientalism¹ on legal structures, including the circulation and transplant of constitutional models.

I was drawn to the track titled *Any Colour You Like* precisely for that reason. According to Roger Waters, the title of *Money*'s instrumental B-side was inspired by a street vendor pitch that reads '*Any colour you like, they're all blue*': 'So, metaphorically, *Any Colour You Like* is interesting, in that sense, because it denotes offering a choice where there is none'.² I was reminded of the 'choices' promised to indigenous peoples by the transformative constitutions of the Andean *nuevo constitucionalismo* and of the 'authenticity dilemma' affecting the 'multicolored fabric' (*hilado abigarrado*)³ of plurinational societies.

The plurinational design enacted by the recent *Constitución Política del Estado Plurinacional de Bolivia* (CPE) of 2009, for example, has redefined the traditional concept of national identity, but has also generated conflicts racialized by a precise political agenda. This agenda has officially adopted the decolonizing discourses of Global Northern academics, crystallizing identity fetishes based on the presumption of an (impossible) 'authenticity': a culturalist approach that obscures the 'juxtaposition, in small points or spots, of opposed or contrasting colours',⁴ represented by *mestizo* identities. This approach has also allegedly led to the negative outcome of the recent Chilean constitutional referendum,⁵ in a society characterized by 'identitarian racism', historically imposed through the unifying function of national

¹ T. Ruskola, *Legal Orientalism. China, the United States, and Modern Law* (Cambridge 2013).

² See P. Rose, *Which One's Pink? An Analysis of the Concept Albums of Roger Waters and "Pink Floyd"* (Collector's Guide Publishing 2002).

³ S. Rivera Cusicanqui, *Ch'ixinakax utxiwa: A Reflection on the Practices and Discourses of Decolonization* (2011) *The South Atlantic Quarterly* 111, 95.

⁴ *Ibid.*

⁵ S. Verdugo, *On the Democratic (but Limited) Virtues of the Chilean Exit Referendum*, IACL-AIDC Blog (4 October 2022).

identity.⁶ Despite its inclusive and progressive character, in fact, 80% of indigenous voters have overwhelmingly rejected the Chilean draft constitution.⁷

These examples show how populist uses of indigeneity can impair transformative constitutional projects, which end up being rejected by the very populations whose inclusion they promote.

‘*Any colour you like, they’re all blue*’ is, ‘*all in all*’, a fitting metaphor for ‘colonial continuity in republican times’:⁸ that is, the phenomenon known as *internal colonialism*.⁹

The Mexican sociologist Gonzalez-Casanova has described the emergence of internal colonialism in former colonies as they attained independence from Europe. Cut loose from the direct political subjugation of colonial powers, the creation of the nation-state turned the national governments into the new beneficiaries of the exploitative colonial model: ‘with the disappearance of the direct domination of foreigners over natives, the notion of domination and exploitation of natives by natives emerges’.¹⁰ Gonzalez-Casanova had initially referred to the light skinned elites (*criollos*) that led the Latin American independence movements in the early nineteenth century and their perpetuation of the colonial power dynamic: ‘the exploitation of the Indians continues, having the same characteristics it had before independence’.¹¹

Internal colonialism was therefore developed as a theoretical framework to understand patterns of uneven development within a nation-state, engendered by the exploitation of one population for the advancement of the national economy. This

⁶ C. Alvarado Lincopi, Una razón antropofágica para una constituyente plurinacional. De la nación blanqueada a la comunidad política abigarrada, in VV.AA., Wallmapu: ensayos sobre plurinacionalidad y Nueva Constitución (Pehuén

2020) 95.

⁷ Cf. T. Groppi, Il Cile da un “plebiscito” all’altro. Il rechazo del nuovo testo costituzionale nel referendum del 4 settembre 2022, visto dall’Italia (2022) 23 federalismi.it, ix.

⁸ Cf. Alvarado Lincopi (n 6) 95.

⁹ P. Gonzalez-Casanova, Internal Colonialism and National Development (1965) 1 Studies in Comparative International Development 4. Cf. L. Tapia, Dialéctica del colonialismo interno (Traficantes de sueños 2022).

¹⁰ Cf. Gonzalez-Casanova (n 9) 27

¹¹ Ibid.

growth in the economy thereby benefits the majority population in control of the national government at the expense of the marginalized minority population. In this manner, the exploitative relationship mirrors the core-periphery dynamic of dependency theory, but between populations within a nation-state. Likewise, many Latin American scholars have noted that this relationship also reproduces the extractivist exploitation of colonies by former European powers.¹² This conceptual model is of invaluable service to comparative lawyers observing the post-colonial legal orders of the *Global South*.¹³

The ultimate aim of this study is to investigate the difficulties currently faced by the plurinational discourse, in its pursuit of a genuinely multicolored Andean *nuevo constitucionalismo*, stemming from two initial research questions. Why do (some) comparative lawyers get so excited about the Andean plurinational projects, while their implementation has been politically undermined both in Bolivia and in Chile? Is there a dark side to the Latin American constitutional moon (*killa* in *aymara*)? Is it related to ages-old issues of internal colonialism/racism? Bolivian constitutionalism provides a case study for the difficulties faced by comparative constitutional lawyers in practice.

Quite fascinatingly, the gap between constitutional promise and political practice finds echoes in an account of *The Dark Side of the Moon*'s recording sessions at the Abbey Road studios, given by the four backing vocalists – Doris Troy, Leslie Duncan, Liza Strike and Barry St. John – and reported by John Harris: ‘the singers’ visit to Abbey Road shone light on an amusing irony: though the band’s new songs bemoaned humanity’s lack of mutual understanding and emotional generosity, the Floyd outwardly seemed to be part of the problem. They weren’t very friendly [...] They were cold; rather clinical. They didn’t emanate any kind of warmth’.¹⁴

¹² E. Dussel, *Cultura latinoamericana y filosofía de la liberación* (1984) 6 Concordia, *Revista Internacional de Filosofía*, 42.

¹³ The idea of Global South – as acutely stated by F. Hoffmann, *Knowledge Production in Comparative Constitutional Law: Alterity – Contingency – Hybridity*, *Völkerrechtsblog* (31 July 2017), 2 – has ‘been employed as a critical wedge to crack open the veneer of comparative law’s [...] fundamental and foundational concepts [...], its comfortable embeddedness in (Western) modernity’: as such, it is pushing critical comparative constitutional scholarship further beyond West.

¹⁴ J. Harris, *The Dark Side of the Moon. The Making of the Pink Floyd Masterpiece* (Da Capo Press 2005) 116.

Though the Bolivian Constitution of 2009 states in its preamble that ‘we never knew racism until we were subjected to it during the terrible times of colonialism’, and bemoaned ‘all forms of dictatorship, colonialism, neocolonialism and imperialism’ (Article 255.II.2 CPE), the *Movimiento al Socialismo* (MAS) and its leader Evo Morales seemed to be part of the neocolonial problem. The official multiculturalism promoted by MAS has been critically described by indigenous authors as ‘the concealing mechanism *par excellence* for new forms of colonization’.¹⁵

In order to address the aforementioned issues, this paper is comprised of three sections. The first section provides a comprehensive overview of the Bolivian (and Andean) racial hierarchy from the colonial age to its internalization in the contemporary constitutional discourse; the second section investigates the connection between Morales’ MAS in Bolivia and Iglesias’ *Podemos* in Spain, through the analysis of their plurinational political agendas. The third section tries to shed some light on the – allegedly indigenous – claim to indefinite presidential re-election, enforced by a ruling of the *Tribunal Constitucional Plurinacional*. This decision, which led to Morales’ (fourth) nomination and the resultant civil protests of November 2019, has raised many questions over the populist, distorted use of indigeneity and represents a potential example of an ‘unconstitutional constitutional ruling’¹⁶, or, better yet, of the *Dark Side* of Evo the *Indio*.

The paper ends with a brief analysis of the Chilean constitutional referendum demonstrating how the plurinational advancements proposed by the draft constitution have affected the outcome of the constituent process.

1. Mestizaje and Blanquitud: Racial Hierarchies in the Andean Constitutional Discourse

Unlike nineteenth century British colonies – where there was a strong colonial taboo against mixed marriages and interracial relations – Iberian rule led to *mestizaje* and,

¹⁵ Rivera Cusicanqui (n 3) 99-100.

¹⁶ See Y. Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (OUP 2019).

consequently, racism: ‘contemporary India has had to struggle with the question of caste but not as much with colonial racial categories as the states in Latin America’,¹⁷ where instead ‘the conqueror domesticated, structurized, and colonized the manner in which those conquered lived and reproduced their lives’.¹⁸ *Abya Yala*,¹⁹ now known as *Latin America*, reflects this colonization process through racial and cultural hybridity, which distinguished the *mestizo* – the son of the *conquistador* and the Indian woman – from the ‘legitimate *criollo*, or white person born into the colonial world’.²⁰

Criollos became the rulers of the neocolonial order, but *mestizos* were the actual responsables of the cultural construction of Latin America, while also trying to emulate their colonial ancestors. Ecuadorian philosopher Echeverría calls this phenomenon *blanquitud*: ‘*mestizos* who demonstrate *good behavior* [...] participate in *blanquitud*. And, as unnatural as it appears, over time they end up [...] looking white’.²¹

Blanquitud marks the transition from ethnic racism to identity racism, which elevates the needs, behaviors and values of white elites to a communitarian *ethos*, enforced through homogenizing nationalism.

The resistance movement to colonization known as *taki unquy*²² was an indigenous movement; the *libertadores* of the Hispano-American wars were, in contrast, predominantly creole aristocrats, such as Simón Bolívar himself. Unsurprisingly, the Argentine historian Donghi defines this century the *neocolonial* century:²³ for example, the census criteria underlying the recognition of republican citizenship did not

¹⁷ A. Gupta, *Viewing States from the Global South*, in C. Krupa and D. Nugent, *State Theory and Andean Politics: New Approaches to the Study of Rule* (University of Pennsylvania Press 2015) 458.

¹⁸ E. Dussel, *The Invention of the Americas: Eclipse of “the Other” and the Myth of Modernity* (Continuum 1995) 45.

¹⁹ *Abya Yala* (‘mature land’ in kuna) is the ancestral name of the South American continent. See also R. Webber Jeffery, *From Nuestra América to Abya Yala: Notes on Imperialism and Anti-imperialism in Latin America across Centuries*, (2018) 6 Viewpoint Magazine.

²⁰ Dussel (n 18) 47.

²¹ B. Echeverría, *Modernidad y blanquitud* (Era 2010) 65.

²² See J. Hurtado, *El katarismo* (Instituto de Historia Social Boliviana 1986).

²³ T. Halperín Donghi Tulio, *The Contemporary History of Latin America* (Duke University Press 1993).

promote the legal recognition of indigenous peoples who, in fact, helplessly witnessed the supplanting of the colonial monarchical order by the neocolonial republican one.²⁴

As further evidence of the persistence of a highly prolific legalist cryptotype²⁵ – a legacy of Spanish colonialism – some two hundred constitutional texts have been promulgated throughout Latin America from Independence to the present day.²⁶ It can be inferred that, from its genetic moment, Latin American constitutionalism has been characterized by such phenomena as constitutional ‘mimicry’ (also known as ‘*mala mimesis*’)²⁷ and constitutional ‘nominalism’.²⁸

The first Creole constitutions found their ideological references in the *Déclaration des Droits de l'Homme et du Citoyen* (1789) and in the prototypical separation of powers enforced by the U.S. Constitution (1787). In the Bolivian case, the *Constitución política* of 1826 nominally enshrined the principles of the French Revolution, but the abolition of slavery in Article 11 was accompanied by the unchallenged continuation of servitude in the *haciendas*.

Creole elites exerted, therefore, neocolonial domination over indigenous peoples through the acritical transplant of the features of classical constitutionalism; the adoption of the liberal constitutional model resulted in the exclusion of Indians from the republican political, economic and social circuit.²⁹ The liberal formant persists as

²⁴ See J.R. Arze (ed), *Antología de documentos fundamentales de la historia de Bolivia* (Biblioteca del Bicentenario de Bolivia 2015).

²⁵ R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (1991) 1 *American Journal of Comparative Law*.

²⁶ S. Lanni, *Il diritto nell'America Latina* (Edizioni Scientifiche Italiane 2017) 85.

²⁷ A. Colomer Viadel, *Tendencias del constitucionalismo en el siglo XXI: cuestionamientos e innovaciones constitucionales* (2015) 36 *Teoría y Realidad Constitucional*, 344-345. Cf. J.L. Mecham, *Latin American Constitutions: Nominal and Real* (1959) 21 *The Journal of Politics*, 258: ‘Nowhere are constitutions more elaborate and less observed. Politically, Latin Americans seem to be unqualified optimists, for the long succession of constitutional failures has never dampened hopes that the perfect constitution-a cure-all for national ills-will be discovered eventually’.

²⁸ D.E. López Medina, *Teoría Impura del Derecho. La transformación de la cultura jurídica latinoamericana* (Legis 2004) 39.

²⁹ M.E. Attard Bellido, *Sistematización de Jurisprudencia y Esquemas jurisprudenciales de Pueblos Indígenas en el Marco del Sistema Plural de Control de Constitucionalidad* (Konrad-Adenauer-Stiftung 2014) 56.

a systemic element in subsequent evolutions of South American constitutionalism: from colonial law to neocolonial law, from liberal constitutionalism to the neoliberal constitutional discourse that dominated Latin America until the early 2000s.

Bolivia's ethnic-racial hierarchy has formed as the result of economic, social and ideological influences: racism plays a fundamental role in the reproduction of this hierarchy. At present, most members of the Bolivian 'upper bourgeoisie' are white and belong to the white group of the highest socioeconomic status, which in Bolivia is called a *jailón*. The same conclusion can be extended to professional elites, as shown by phenotypes and surnames of their members. In the middle class it is possible to find people of indigenous and *Chola* origin, but who recognize themselves as white. They function as victims on the stage of social representation. At the other extreme, there are activities and economic sectors exclusively reserved for indigenous people. They are, without exception, the most modest: work in agriculture (*campesinado*); domestic service (which plays a fundamental role in the reproduction of racism); unskilled work in masonry, repairs, mining, etc.

This majority gradually disappeared due to a process of social mobility that was also ethno-racial, since it allowed economically ascendant groups and individuals to 'whiten themselves', that is, to repudiate their indigenous and *cholo* origins and 'advance' in the ethno-racial pyramid.

The dominant groups in the country – the whites and the successfully *whitewashed* – inherit racism and retain it because it helps them reproduce dominance over other groups, like the Indians and the *cholos*. As mentioned above, members of dominated ethnic-racial groups often internalize racism and actively participate in processes of whitening (*blanqueamiento*) and discrimination that tend to perpetuate white primacy. Echeverría's *Modernidad y blanquitud*³⁰ – inspired by Fanon's *Peau Noire, Masques Blancs*³¹ – defines *blanquitud* as the 'internalization of the historical capitalist ethos',³² identified with modernity, and distinguishes two types of racism: ethnic racism (based on skin)

³⁰ Cf. Echeverría (n 21).

³¹ F. Fanon, *Peau Noire Masques Blancs* (Points 2015). Cf. J.M. Persánch, (Preámbulo) De Whiteness a Blanquitud y Branquitude - (Preface) From Whiteness To Blanquitud And Branquitude (2020) 1 Journal of Hispanic and Lusophone Whiteness Studies.

³² B. Echeverría, Imágenes de la "blanquitud", in B. Echeverría et al, *Sociedades Icónicas* (Siglo XXI 2007), 20.

and identity racism (based on culture). Cultural racism does not seek to eliminate different skin colors. It only seeks to whiten them culturally: therefore, it is tolerant as long as non-whites whiten.³³

For this reason, one can be ethnically non-white but be ‘white’ nonetheless and, conversely, one can be white-skinned but, by rejecting the dominant *ethos*, not be white.³⁴ In the same way, a state that recognizes its inherent multiculturalism, or declares itself plurinational, does not necessarily drop the demand for whiteness, since it does not dissociate itself from the condition of a homogeneous nation-state. In Bolivia, the constituent process had the intention of creating an intercultural and plurinational state, as an alternative to the modern nation-state. This process led also to the adoption of a populist discourse, which is reviewed in the following paragraph.

2. The ‘Podemos Connection’: Plurinational Populism between Bolivia and Spain

A preliminary *caveat* seems advisable. Global Northern scholarship has sometimes contributed to the indiscriminate employment of very diverse categories, such as those relating to *multiculturalism* and *interculturalism*, whereas recent tendencies in Latin American constitutionalism – like *neoconstitucionalismo* and *nuevo constitucionalismo* – have been misleadingly confused. Both notions need to be clarified.

As argued aptly by Maldonado Ledezma, multiculturalism is a merely descriptive term, outlining an ‘inescapable reality’³⁵ of human societies; interculturalism is, instead, an ‘eutopic scenery’³⁶ for the construction of a democratic society in which ‘the relationship between cultures [...] are based on respect and equality between different cultural groups. Interculturalism does not admit asymmetries, that is, inequalities

³³ On Barack Obama as an example of *negritud* light see B. Echeverría, *Obama y la «blanquitud»*, in G. Gosálvez (ed), *Crítica de la modernidad capitalista* (Vicepresidencia del Estado Plurinacional de Bolivia 2011) 162.

³⁴ Cf. Echeverría (n 21) 18.

³⁵ I. Maldonado Ledezma, *De la multiculturalidad a la interculturalidad: la reforma del Estado y los pueblos indígenas en México* (2010) 14 Andamios, 298.

³⁶ *Ibid.* 299.

between cultures mediated by power, which benefit one cultural group over another'; as such, it is not a descriptive concept, but 'an aspiration'.³⁷

Plurinational constitutionalism, in fact, aims to overcome the sterile descriptivity of liberal multiculturalism (*à la* Kymlicka) towards an intercultural 'synthesis of diverse perspectives [...] able to inform collective decisions'.³⁸

As acutely denounced by Rivera Cusicanqui – one of the most sensitive *aymara* sociologists in Bolivia – the wave of *octroyé* constitutional reformism that spread in Latin America in the early 1990s was the result of protests throughout the continent against neoliberal policies.³⁹

Liberal multiculturalism employed the category of *minorities* to 'capture' indigenous peoples: in 1994, Bolivian president Gonzalo Sánchez de Lozada symbolically nominated an indigenous vice president, Víctor Hugo Cárdenas, opening to a 'truncated, conditional and reluctant' recognition of indigenous territorial and cultural rights. The imposition of a residual *status* – a *de facto* minority – was accompanied by a rhetorical discourse that neutralized every 'decolonizing impulse',⁴⁰ while relegating indigenous people to a stereotyped and static identity:

'And so, as the indigenous people of the east and west are imprisoned in their *tierras comunitarias de origen* (original communal lands) and are NGOized, essentialist and Orientalist notions become hegemonic, and the indigenous people are turned into multicultural adornment for neo-liberalism. The new stereotype of the indigenous combines the idea of a continuous territorial occupation, invariably rural, with a range of ethnic and cultural traits, and classifies indigenous behavior and constructs scenarios for an almost theatrical display of alterity. Rossana Barragán calls this strategy *cholo-indigenous ethnic self-affirmation*, as an 'emblematic identity'. [...] The elites

³⁷ S. Schmelkes, La interculturalidad en la educación básica (2006) 3 revista PRELAC, 122; cf. I. Maldonado Ledezma (n 35) 299.

³⁸ M. Aparicio Wilhelmi, Nuevos avances del poder constituyente democrático: aprendiendo del sur, in M. Aparicio Wilhelmi, A. de Cabo de la Vega, M. Criado de Diego, R. Martínez Dalmau, A. Noguera Fernandez and R. Viciano Pastor, Por una asamblea constituyente. Una solución democrática a la crisis (Sequitur 2012) 126.

³⁹ Cf. Rivera Cusicanqui (n 3) 98.

⁴⁰ Ibid. 99.

adopt a strategy of crossdressing and articulate new forms of cooptation and neutralization. In this way, they reproduce a ‘conditional inclusion’, a mitigated and second-class citizenship that molds subaltern imaginaries and identities into the role of ornaments through which the anonymous masses play out the theatricality of their own identity’.⁴¹

The liberal multicultural discourse conceals and denies the ‘ethnicity of the acculturated populations’ and of the *mestizos* (*abigarrados*) who live outside rural areas: ‘the term ‘original people’ affirms and recognizes but at the same time obscures and excludes the large majority of the *aymara* – and *qhichwa* – speaking population of the sub-tropics, the mining centers, the cities, and the indigenous commercial networks of the internal and black markets.’ Ultimately, liberal multiculturalism is a strategy for ‘depriving indigenous peoples of their potentially hegemonic status of indigenous populations’ and of ‘their capacity to affect the state’.⁴²

Eventually, liberal multiculturalism and economical neoliberalism would translate themselves into the constitutional paradigms of *neoconstitucionalismo* (not to be confused with *nuevo constitucionalismo*).

Neoconstitucionalismo aims to describe the results of *constitutionalization*, a process that has led to the positivization of the ‘idea of constitution as the supreme legal rule of the State’ and ‘its decisive presence in the legal system’.⁴³ As Viciano Pastor and Martínez Dalmau argue, it is a *theory of law*, but not a *theory of Constitution*.⁴⁴

⁴¹ Ibid. 99-100.

⁴² Ibid. 99.

⁴³ R. Viciano Pastor and R. Martínez Dalmau, *El nuevo constitucionalismo latinoamericano: fundamentos para una construcción doctrinal* (2011) 9 *Revista General de Derecho Público Comparado*, 7; cf. L. Pegoraro and A. Rinella, *Sistemi costituzionali comparati* (Giappichelli 2017) 93.

⁴⁴ R. Viciano Pastor and R. Martínez Dalmau, *La Constitución democrática, entre el neoconstitucionalismo y el nuevo constitucionalismo* (2013) 48 *El Otro Derecho*, 69; cf. Viciano Pastor and Martínez Dalmau (n 43) 6-10.

Pegoraro aptly defines the constitutions inspired by *neoconstitucionalismo* ‘metaphysical hyperconstitutions’:⁴⁵ these constitutions undermine the hierarchy of legal sources, while the enactment of its principles rest on the ambiguous interpretations of courts and doctrine, possibly leading to – especially in the Latin American context – distortion and abuse. *Neoconstitucionalismo* is, mostly, the product of several years of academic theorizing and is, as such, imposed *from above*.⁴⁶

Nuevo constitucionalismo has, instead, recently emerged – ‘in the periphery of the academic world’⁴⁷ – as a counter-hegemonic push *from below*, towards a constitutional paradigm shift: according to the aforementioned authors, it is mostly a Latin American movement,⁴⁸ as proved by the democratic essence of the indigenous constitutions of Bolivia and Ecuador. These constitutional texts were born out of genuinely participatory constituent assemblies and referendums, representative of demands that were historically excluded from *creole constitutionalism*.⁴⁹

Viciano Pastor and Martínez Dalmau have identified four formal characteristics of the constitutions of *nuevo constitucionalismo*: their innovative content (*originality*), the remarkable number of articles included (*extension*), the combination of technically complex elements with an accessible language (*complexity*) and the specific obstacles for their amendment (*rigidity*).

In the paradigmatic constitutions of Bolivia and Ecuador, substantial changes ‘can be identified in popular participation in the exercise of power, first of all in the constituent process itself, in interculturalism and in a new vision of the relations between man and nature, as the foundation of an attempt to adhere to new economic

⁴⁵ L. Pegoraro, *Constitucionalización del Derecho y cultura constitucional*, Conferencia ‘La constitucionalización del derecho y cultura constitucional’, IV Congreso Internacional sobre Derecho y Justicia Constitucional, Tribunal Constitucional de la República Dominicana, 21 September 2018, 14.

⁴⁶ Viciano Pastor and Martínez Dalmau (n 43) 7.

⁴⁷ Ibid. 6.

⁴⁸ With the relevant exceptions of Bhutan, Iceland and South Africa: see R. Martínez Dalmau, *El ejercicio del poder constituyente en el nuevo constitucionalismo* (2012) 11 *Revista General de Derecho Público Comparado*, 12; cf. Viciano Pastor and Martínez Dalmau (n 44) 82.

⁴⁹ Viciano Pastor and Martínez Dalmau (n 43) 7.

models'.⁵⁰ According to Bagni, this new vision of the relationship between man and Nature would lead to a new 'form of State': the *eutopia* of the *Caring State*.⁵¹ From another point of view, the relevance of interculturalism might indicate the emergence of a new 'type of State': the *Plurinational State*.⁵²

The significance of plurinationalism beyond Bolivia is proved by its centrality in the Spanish political debate: just eight months before the celebration of the *referèndum d'autodeterminació de Catalunya* in 2017, a survey conducted by GESOP showed a clear polarization of the opinions of Spanish citizens regarding the plurinational nature of the Spanish state (48.3% uninational vs. 46.1% plurinational).

In the Spanish context, *Podemos* – a left-wing populist party⁵³ – has obtained consistent electoral results between 2014 and 2016,⁵⁴ becoming the third party (69 seats out of 350, 21.2% of the votes, leading the electoral alliance known as *Unidos Podemos*) in the *Congreso de los Diputados*, with a political project that is closely related to the Bolivian plurinational project: their proposal to create a *Ministerio de la Plurinacionalidad* – clearly inspired by the Bolivian *Constitución Política del Estado* of 2009 – is considered the natural remedy to the territorial crisis that has historically afflicted Spain. This proposal clearly derives from the studies and experiences of the party's founders: Pablo Iglesias and Íñigo Errejón.

⁵⁰ S. Bagni, *Hitos de democratización de la justicia constitucional en América latina: una mirada desde afuera*, in R. Tur Ausina, *Problemas actuales de Derecho constitucional en un contexto de crisis* (Comares 2015) 222.

⁵¹ S. Bagni, *Lo Stato interculturale: una nuova eutopia?* (Dipartimento di Scienze giuridiche 2017).

⁵² On the two concepts – familiar to Italian constitutional lawyers – of 'form of State' and 'type of State', please see my E. Buono, "Columbus' Mistake". Bridging the Gap in the Global South: "Intercultural Constitutional Engineering" between India and Las Indias (2019) 26 *Revista General de Derecho Público Comparado*, 15.

⁵³ On the distinction between left, right and valence populisms, see M. Zulianello and E. Gahner Larsen, *Populist parties in European Parliament elections: A new dataset on left, right and valence populism from 1979 to 2019* (2021) 71 *Electoral Studies* 1. On left-wing populism see the classic E. Laclau, *On Populist Reason* (Verso Books 2007). See also C. Mouffe and I. Errejón, *Construir pueblo: Hegemonía y radicalización de la democracia* (Icaria 2015); C. Balderacchi, *Participatory Mechanisms in Bolivia, Ecuador and Venezuela: Deepening or Undermining Democracy?* (2015) 52 *Government and Opposition* 131.

⁵⁴ Most recently, Pablo Iglesias declared he was resigning from Spanish politics after he has lost the Madrid regional elections. This sound defeat reflects an ongoing trend: since Podemos entered a coalition government with Pedro Sanchez's PSOE, it has gradually lost electoral support (losing 36 in the November 2019 general elections).

In November 15, 2017 Pablo Iglesias, general secretary of Podemos stated in an edited volume: '*En España hay cuatro naciones que comparten un mismo Estado: española, la vasca, la gallega y la catalana*'.⁵⁵ Only five days before presenting his book Iglesias stated, while attending a conference in Cochabamba hosted by the Bolivian vice-president Álvaro García Linera: '*España nunca ha sido uninacional*'.

Íñigo Errejón, founder with Iglesias of Podemos, discussed in 2011 a doctoral thesis entitled: '*La lucha por la hegemonía durante el primer gobierno del MAS en Bolivia (2006-2009): un análisis discursivo*'. Errejón has extensively travelled throughout South America, as a Ph.D. student, to study the recent Andean constitutional experiences, with particular regard to the Bolivian and Ecuadorian cases. Both Iglesias and Errejón were members of the *consejo ejecutivo* of the *Fundación Centro de Estudios Políticos y Sociales* (CEPS), strategy consultant of the Bolivian and Venezuelan governments.

The *Podemos* connection to Morales' MAS (*Movimiento al Socialismo*) – deeply studied by its founders Iglesias and Errejón – is furtherly proved by their similarly built political discourse, which strongly emphasizes the democratic cleavage created by globalization. It is – more or less implicitly – a populist discourse, rooted in the juxtaposition of a hard *afuera*, constituted by the political and financial élite, and a soft *adentro*, heterogeneous and transversal in its dimension:

'The construction of a people, a force that successfully claims the representation of a new national project – in our case, necessarily plurinational – is never a closure. [...] How can we build a national-popular, democratic and progressive project, in a highly institutionalized society where the crisis of the elites and parties does not translate into a state crisis? Perhaps the answer has to do with the construction of a soft, light 'Us', always open to heterogeneity, and a hard 'Them', the privileged minority that has placed itself above the law'.⁵⁶

This idea of a soft 'Us' lends itself very well to the plurinational paradigm: not unlike Bolivia, Spain has repeatedly failed to build a unified nation. At the turn of the twentieth century, the national visions alternative to the Castilian identity emerged

⁵⁵ A. Domínguez (ed), *Repensar la España plurinacional* (Marcial Pons 2017).

⁵⁶ I. Errejón, *La construcción de un sujeto popular* (2015) 12 *Revista Teknokultura*, 39-53.

distinctly: the urgent need to address the issue remained unresolved. The proposal of *Podemos* has developed inside this framework, promoting the concept of ‘plurinational fatherland’ in a climate of institutional and political crisis; a first common theme between *Podemos* and MAS is therefore the promised recognition of distinct national sensibilities. On the political agenda of *Podemos*, plurinationalism goes further beyond the processes of nation-building and state-building: the ‘plurinational fatherland’ envisioned by Errejón is an inclusive welfare state where ‘we coexist as different nations and that is of no concern to us, nor do we tell anyone in what language he should speak. We are deeply proud of a homeland made up of different peoples and we are proud of the different nations, holding to different cultures and different languages as if they were our own’.⁵⁷

Both *Podemos* and MAS have been catalysts for the convergence of different popular movements: Morales’ MAS is – on a discursive level – the resultant of indigenism (*Katarism*) and marxism, with a broad support that has coalesced around indigenous movements, *cocalero* movements (*campesinado*) and mass protest movements arisen during the *guerra del agua* and the *guerra del gas*. The fundamental role of indigenism is the most distinguishing feature between *Podemos* and MAS: in Bolivia, plurinationalism is associated with decolonization and indigenous struggles for the defence of ancestral territories from corporate extractivism, that resulted in a plurinational constituent process; in Spain, the Catalan crisis – and its ultimate outcome – has demonstrated the presence of a strong state apparatus with no noticeable symptom of a widespread constitutional crisis.⁵⁸

In his fuzzy⁵⁹ classification of populism, Weyland defines Morales’ political agenda in the following terms:

⁵⁷ Ibid.

⁵⁸ This strength has been most recently confirmed during the COVID-19 pandemic: for the analysis of the ‘centralization’ of emergency management under the direction of the President of the Government, please refer to – in this review – my E. Buono, ‘The Estado ambiental de derecho under the ‘state of siege’: COVID-19 and Spanish environmental law (2020) 2 *Opinio Juris in Comparatione*, 241.

⁵⁹ S. Baldin, ‘Classifications and fuzzy logic: a comparative law perspective’, in S. Bagni, G.A. Figueroa Mejía and G. Pavani (eds), *La Ciencia del Derecho Constitucional Comparado. Estudios en Homenaje a Lucio Pegoraro Tomo I* (Tirant lo Blanch 2017) 129-151.

'Bolivia's Evo Morales also constitutes a mixed case because he applies various political strategies, but this combination lies more outside than inside populism. Morales deserves a fuzzy-set score of 0.33 because his rule rests largely on the backing of powerful, contentious social movements, which have retained considerable autonomy and mobilizational capacity. This mass base has continued to limit Morales' personal leadership and blocked important governmental initiatives. While the president has personalistic tendencies and populist aspirations, especially self-perpetuation in office, these goals have not achieved a definitive breakthrough; instead, Bolivia's politicized and highly mobilized social movements have insisted on a good deal of accountability and responsiveness, as demonstrated by their furious and effective reaction to the government's '*Gasolinazo*' of December 2010 [...]. Overall, therefore, Morales and his *Movimiento al Socialismo* do not qualify as populist'.⁶⁰

This claim needs to be tested under a constitutional assessment: the legal implications of the plurinational paradigm are reviewed in the following paragraph, through the analysis of the effective empowerment of indigenous agency more than a decade since the inception of the *Constitución Política del Estado*.

3. The Dark Side of Evo the Indio

In the first administrations of Evo Morales, it seemed that he was legitimized through decolonizing indigenous narratives that had a strong resonance both inside and outside the country: those were the years of the growing international reputation of the first indigenous president of a South American country who presented himself as a champion of the causes of social justice and defence of indigenous peoples and Mother Earth.

At the national level, the discourse of the indigenous state assumed the shape of plurinational indigenism and proposed a decolonizing project of state structures and society: Morales' first governments exploited the ideas and the narratives of decolonization to legitimize its own power.

⁶⁰ K. Weyland, Populism: A Political-Strategic Approach, in C. Rovira Kaltwasser, P.A. Taggart, P. Ochoa Espejo and P. Ostiguy (eds) *The Oxford Handbook of Populism* (OUP 2017) 66.

The enactment of environmental rights has represented the litmus paper of the plurinational project: for many authors, the turning point in which Morales *broke bad* occurred in September 2011 when the repression of the indigenous march for TIPNIS took place.⁶¹

The steps taken by Morales' government, from his third term (2014-2019), suggest that the justification of 'progressive extractivism'⁶² is but the rationalization of the government's predatory capitalist model.

This became more evident after the decision of the government in 2015 to expand the agricultural frontier by one million hectares per year. The pressure of these 'intercultural colonizers', carrying out their slash and burn practices on the public lands awarded to them led to the gargantuan fires in August and September 2019, resulting in more than 2 million hectares of scorched forests in the department of Santa Cruz.⁶³

These circumstances, among others, paved the way for the political resurgence of certain wealthy and white sectors of the population. Thanks to the economic boom of the decade 2005-2015, which generated multiple business opportunities and increased the salary of manual workers, there was a significant economic redistribution to the benefit of indigenous people and *cholos*. In this way, whites acted as a discriminated racial identity that demanded a lost space to be returned to them, but at the same time, they projected themselves as the universal identity, the only one that did not amount to *ethnos*, but to *demos*.

Two opposing tendencies – that had coexisted within the government until then – collided: the defence of the values of indigenous peoples and Mother Nature versus the extractivism of natural resources for the benefit of a populist state.

⁶¹ See the TIPNIS Sentence of the International Tribunal for the Rights of Nature: <https://www.rightsofnaturetribunal.org/wp-content/uploads/2018/04/sentence-tipnis.pdf>

⁶² J. Massal, Institutional multiculturalism in debate in Ecuador and Bolivia: between the plurinational State and the return of a/the nationalist model?, *Is Pluralism Still Relevant in the Contemporary World? Assessing Alternative Paradigms* (24 July 2014) 9.

⁶³ See the Chiquitania, Chaco y Amazonia vs. Estado Plurinacional de Bolivia Verdict of the International Tribunal for the Rights of Nature: <https://www.rightsofnaturetribunal.org/wp-content/uploads/2018/04/Verdict-Chiquitania-Chaco-Amazonia-ENGLISH-FINAL.pdf>

Such circumstance was strongly felt in the – allegedly indigenous – claim to indefinite presidential re-election, enforced by a ruling of the *Tribunal Constitucional Plurinacional*. This decision, which led to Morales' (fourth) nomination and the resultant civil protests of November 2019, has raised many questions over the populist, distorted use of indigeneity and represents a potential example of the *Dark Side* of the plurinational discourse. Evo Morales has, in fact, run for re-election in 2019 despite the outcome (51.3% No vs. 48.7% Yes) of the *referéndum constitucional de Bolivia* (21 February 2016 or 21-F): his unconstitutional *repostulación* raised strong political oppositions.

A ruling (SCP No. 084/2017) of the *Tribunal Constitucional Plurinacional* (TCP), based on an interpretation of the *Convención Americana sobre Derechos Humanos* (Articles 1.1; 23; 24; 29 CADH), has actually overruled the CPE, allowing for indefinite presidential re-election in spite of Article 168 ('The period of the mandate of the President or Vice President is five years, and they may be re-elected once for a continuous term'). Katia Uriona – former president of the *Tribunal Supremo Electoral* – declared that the result of the referendum of 21 February 2016 'is mandatory, binding and in force,' paving the way to a conflict of jurisdictions.

The legal reasoning and arguments behind the TCP decision allow us to define SCP No. 084/2017 a substantially *unconstitutional constitutional ruling*.⁶⁴

According to critics, the most astoundingly unconstitutional element of this decision concerns the competence of the TCP to exert constitutional review over constitutional norms: as in most legal orders inspired by the *Verfassungsgerichtsbarkeit*, judicial review is only exerted over infra-constitutional norms, such as laws, decrees, statutes, but never between constitutional norms.

The consequent declaration of unconstitutionality of Article 168 – with abstract, *erga omnes* effects – appears a constitutional aberration, to say the least: the TCP, not unlike every other constitutional court, has no such competence to modify the constitutional text, since it is an organ emanating from constituted power, with no constituent power. Article 168⁶⁵ has been drafted and approved by the Constituent Assembly,

⁶⁴ Cf. Roznai (n 16).

⁶⁵ The final text of Article 168 CPE is the result of a debate in the Constituent Assembly, as proved by a previous formulation (Proyecto de Texto Constitucional Aprobado en Grande, en Detalle y en Revisión de 9

enforced by the subsequent constitutional referendum, further strengthened by the results of the 21-F referendum: the TCP cannot single-handedly overrule millions of votes.

At a closer look – and by adopting a more literal interpretation – SCP No. 084/2017 does not directly declare any article of the Constitution unconstitutional, but rather affirms the *preferential application* of international human rights, according to Article 256.⁶⁶

Still, what has been universally criticized are the legal arguments developed by the TCP in their interpretation of comparative and international law, leading to no less arbitrary conclusions: a distorted interpretation of Article 23 CADH⁶⁷ is the basis of an (allegedly) human right to indefinite re-election.⁶⁸ The *American Convention on Human Rights* clearly refers to ‘genuine periodic elections,’ without further indications on the length or the number of consecutive terms. The second part clearly defines

Decembre de 2007: ‘La Presidenta o Presidente y Vicepresidenta or Vice-president, podrán ser reelectos consecutivamente por voluntad del pueblo’).

⁶⁶ Article 256.I. CPE: ‘The international treaties and instruments in matters of human rights that have been signed and/or ratified, or those that have been joined by the State, which declare rights more favorable than those contained in the Constitution, shall have preferential application over those in this Constitution’.

⁶⁷ ‘Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:

- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
- c. to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings’.

⁶⁸ This interpretation has its antecedents, aptly quoted by the TCP: Res: 2003-02771. Sala Constitucional de la Corte Suprema de Justicia (Costa Rica 2003); Sentencia No. 06, Jueves, 30 de Septiembre de 2010, Corte Suprema de Justicia (Nicaragua 2010); F-165., 23 de Abril de 2015, Corte Suprema de Justicia - la Sala de lo Constitucional (Honduras 2015).

the possible limitations to the right to participate in government, which is no way definable as an absolute, incompressible, human right.

It can be inferred that all the political turmoil in Bolivia from 2019 onwards derived from this unconstitutional constitutional decision. The political passage of Morales' (fourth) re-election represented a delicate turning point for the whole plurinational project, as its legitimacy – beyond the denounced populist distortions – has been put at stake. The controversial interim presidency of Jeanine Áñez – which led to a downward spiral of racism and violence against indigenous Bolivians – has been put to an end by the overwhelming electoral victory of Luis Arce, MAS' presidential candidate.

On November 10, 2019, the day Evo Morales resigned from presidency, an extra-electoral socio-political change took place in Bolivia. On October 18, 2020, 55% of the population said 'no' to this ongoing extra-electoral change that was promoted by these social sectors and represented by Áñez, Carlos Mesa and Luis Fernando Camacho. Why did the majority reject the change? The polls reported that the predominant values of the Bolivian population had not ceased to be, after the fall of Morales, socialist: moreover, the antinomy between indigenous and anti-indigenous conceptions of the state played a crucial role in Arce's victory.

It can be argued that Arce's election reaffirms the strength of the plurinational project and could pave the way – with the end of the pandemic – to its return to the centre of the Bolivian current political agenda. The transformation of the identity and modes of reproduction of the Bolivian community has been formidable and appears irreversible. Non-indigenous white sectors – the country's traditional elite – have also changed. They moved from scientific racism to cultural racism, advocating cultural miscegenation (*mestizaje blanqueado*) as the prototype of Bolivian national identity.

This leaves Bolivia in a very particular situation: on the one hand, it has an anachronistic elite that acts as a 'caste,' but has not enough political agency to ascend to power; on the other hand, indigenous and popular sectors have the necessary political agency, but their government is undermined by the elites. This contradiction (between many others) can be – as recent political events have aptly shown – the source of a great deal of violence.

After all, ten years is too short of a time span to come to hasty conclusions. The ‘legal formants’ studied by comparative constitutional law do not travel at the same speed: ‘(global) economy is fast, (constitutional) law is slow, (constitutional) culture is slower.’⁶⁹ Comparative constitutional scholarship should draw attention – with a longer look – to the evolution of the Bolivian plurinational state model, while being implemented in little steps.

Concluding remarks on Chile’s National Constitutional Referendum

The *Dark Side* of plurinationalism has shown its face also during the recent rejection of the Chilean draft constitution.

The constitutional history of Chile has been, in fact, characterized by a peculiar feature: despite an indigenous population amounting to 12,8%,⁷⁰ all seven constitutions in Chilean history have never mentioned its indigenous peoples. With the *Acuerdo Por la Paz Social y la Nueva Constitución* of November 2019 and the *Plebiscito Nacional 2020* of October 2020, Chileans have approved the establishment of the Constitutional Convention, in order to rewrite the basic law. The approval of the *Ley de escaños reservados para pueblos originarios* in December 2020 has ensured that 17 seats (out of 155) in the Convention were attributed to representatives of the Chilean indigenous peoples. This has been the first step towards the constitutional recognition of Chile’s plurinationalism, claimed for decades by part of the indigenous movements.

In the historical Chilean constitutions, as Domingo Namuncura points out, ‘indigenous peoples do not exist; not even as a problem [...] neither for good nor for bad [...] Here is the worst arrogance in our nation-building: absolute indifference to our indigenous peoples’.⁷¹ According to Namuncura, this exclusion has assumed the structural character of a historical debt (*deuda histórica*): ‘Chile has [...] omitted or simply ignored [...] the relationship with indigenous peoples in its constitutions, and

⁶⁹ See L. Pegoraro, *Introduzione metodologica*, in G. Morbidelli, L. Pegoraro, A. Rinella and Mauro Volpi, *Diritto pubblico comparato* (Giappichelli 2016) 26.

⁷⁰ Censo de Población y Vivienda, 2017

⁷¹ D. Namuncura, *Pueblos indígenas, reformas constitucionales en América Latina y derechos indígenas en una nueva Constitución*, in VV.AA. (n 6) 40.

this places us [...] as the country lagging furthest behind in [...] the recognition of our indigenous cultures and peoples. Which today, in the 21st century, can be considered as a barbaric and unacceptable omission'.⁷² In other terms, *blanquitud* and internal colonialism in Chile have assumed such proportions as to realize the 'dream of conservative historians: one Chilean nation, Catholic, Castilian and white. *Sin indios ni morenos*'.⁷³

In republican Chile, traditionally characterized by a Napoleonic 'form of State',⁷⁴ the concept of plurinationalism has been employed in the public debate 'without determining its specific content, almost as a synonym for ethnic diversity or for the old ideas of multiculturalism', and as a 'condenser' bringing together the 'demands for constitutional inclusion of indigenous peoples'.⁷⁵

The possibility of a 'domesticated' exercise of the right to self-determination has been critically raised by both the *Coordinadora Arauco Malleco* – which advocates a strategy of territorial control for *mapuche* communities – and the *Consejo de Todas las Tierras* (*Aukiñ Wallmapu Ngulam*), whose *werkén*⁷⁶ Aucan Huilcaman affirmed that the 'declarations of plurinationalism made in the constitutions of states such as Ecuador and Bolivia have solved absolutely nothing in relation to indigenous peoples, nor have they guaranteed plurinational coexistence at all'.⁷⁷ Despite these arguments, the concept of plurinationalism brought an 'emotional adherence'⁷⁸ across the board in the *estallido social* movements, transcending indigenous demands to engage the younger generations of Chilean *mestizos*. Millaleo observed that 'the path to plurinationalism

⁷² Ibid. 43.

⁷³ D. Namuncura, El complejo y más importante "momento constituyente" de los pueblos indígenas de Chile: experiencias y desafíos, in VV.AA. (n 6) 115.

⁷⁴ G. Pavani, El gobierno local. De los antiguos modelos europeos al nuevo paradigma latinoamericano (Olejník 2019) 206.

⁷⁵ S. Millaleo, Prólogo: ¿el surgimiento de un constitucionalismo indígena en Chile?, in VV.AA. (n 6) 32.

⁷⁶ Werkén is the mapudungun word for 'messenger'.

⁷⁷ N. Romero, Aucán Huilcamán: «El Estado Plurinacional no ha resuelto nada en relación a los pueblos indígenas», Revista De Frente (February 3 2020); cf. J. Aylwin, Pueblos indígenas en el proceso Constituyente de Chile: un desafío pendiente, Debates Indígenas (December 1st 2020).

⁷⁸ Millaleo (n 75) 32.

does not consist in replicating the experiences of Ecuador and Bolivia', but in the enshrinement of the principle of self-determination, from which a '*vía chilena a la plurinacionalidad*'⁷⁹ can be effectively traced.

Ultimately, it was the failure in mapping out an authentically Chilean way to plurinationalism that led to the rejection of the draft constitution. And indeed, this is but one of many reasons that favored the *rechazo*, which primary fall into three categories: political, procedural and substantive.

A thorough evaluation of these three categories goes beyond the reach of these concluding remarks. It suffices to say that political and procedural causes are closely intertwined: on the one hand, as aptly noted by most commenters,⁸⁰ the presence of as many as 88 independent representatives marginalized the role of traditional political parties, particularly those of the former *Concertación*, which steered the democratic transition during the 1990s and early 2000s. On the other hand, Article 133 of the current constitution⁸¹ introduced the much criticized two-thirds majority rule that characterized every aspect of the Constitutional Convention's operations. Meanwhile, Article 142⁸² reintroduced mandatory suffrage in the 'exit plebiscite' required for the final approval of the constitutional proposal. These combined political and procedural factors allowed the Convention to approve each article of the draft constitution by majority vote, without ever needing to compromise with right-wing minorities, which foreshadowed an ideologized 'presumption' doomed to collide with the mandatory nature of the exit referendum. The referendum, in fact, ended up performing an 'effective function of [...] check to the Constitutional Convention',⁸³ turning citizens into 'constitutional veto players'.⁸⁴ As Verdugo consistently points out, 62% of

⁷⁹ Ibid.

⁸⁰ Groppi (n 7).

⁸¹ 'The Convention shall approve the rules and its voting regulations by a quorum of two-thirds of its members in office'.

⁸² 'Suffrage in this plebiscite will be mandatory for those who have an electoral domicile in Chile. The citizen who does not vote will be punished with a fine for municipal benefit of 0.5 to 3 monthly tax units'.

⁸³ Verdugo (n 5) 3.

⁸⁴ Ibid.

Chilean citizens, ‘given the tragic dilemma of keeping the current Constitution or accepting a new constitution they disagreed with’,⁸⁵ chose to ‘reset’ the whole constituent process.

Among the ‘substantive’ arguments advanced against the approval of the Chilean draft constitution, a major role was played by the aforementioned *Dark Side* of plurinationalism.

From the preamble, the people of Chile are ‘made up of various nations’, while Article 1 of the constitutional proposal defined Chile ‘a social and democratic State based on the rule of law. It is plurinational, intercultural, regional and ecological’. Article 2 insists on this concept by stating that ‘Sovereignty resides in the people of Chile, made up of various nations’; and though Chile ‘forms a single and indivisible territory’ (Article 3), it ‘recognizes the coexistence of diverse peoples and nations within the framework of the unity of the State’ (Article 5). From an institutional standpoint, the Chilean plurinational paradigm would translate into the creation of ATIs, or indigenous territorial autonomies (Article 187, 234 and 235),⁸⁶ with the precipitates of interculturalism (Article 11) and legal pluralism (Article 309) accordingly enforced.

But the ‘binational’⁸⁷ *mapuche* issue is not at all akin to the plurinational composition of countries such as Bolivia and cannot be dealt with satisfactorily through similar experiments of intercultural constitutional engineering:⁸⁸ it is no coincidence that the highest rejection rates in the exit referendum were in municipalities with the greatest concentration of *mapuche* population.

That figure was already forecast in the January 2022 polls. As reminded by Verdugo, the polls clearly indicated legal pluralism and plurinationalism – two vague and easily distorted formulas – as potential culprits for the predictable rejection of the draft

⁸⁵ Ibid.

⁸⁶ See E. Szmulewicz Ramírez, ‘The ‘regional State’ in the proposed Chilean new Constitution: positive developments and challenges ahead (2022) 1 Diversity Governance Papers DiGoP.

⁸⁷ ‘The Council of All Lands proposed the conversion of Chile into a ‘binational’ state. See Minorities at Risk Project, Chronology for Indigenous Peoples in Chile (2004) available at: <https://www.refworld.org/docid/469f38781e.html>

⁸⁸ Cf. Buono (n 52).

constitution. This circumstance brought to a political agreement promoted by President Boric in case of approval (*apruebo con reformas*): the government ‘promised to amend the constitution to clarify or explain that the proposal was not as radical as the critics had suggested [...] This agreement was the parties’ response to the polls that showed that the Rejection vote was probably going to win. [...] In the agreement, they tempered the idea of the plurinational state and of legal pluralism—which did not rank well in the polls’.⁸⁹

In the aftermath of the vote, President Boric made amends: ‘This September 4th, Chilean democracy comes out more robust. This is how the whole world has seen and recognized it. A country that, in its most difficult moments, opts for dialogue and agreements to overcome its fractures and pain. And for this, compatriots, we should be deeply proud’.⁹⁰

Negotiations for a new constituent process continue, hopefully with greater awareness of past mistakes: there is no space left for plurinationalism in the 12 *bases constitucionales* supported by all parties in Parliament. Former president of the Chamber of Deputies, Raúl Soto – who mediated the constituent ‘dialogues’⁹¹– categorically rejected the re-inclusion of plurinationalism in the constituent debate.

As the preceding pages – and the ultimate outcome of the Chilean referendum – have tried to prove, comparative lawyers should not ignore the *Dark Side* of Comparative Law: that is, the colonial and racial layers that underlie any public discourse, which can frustrate and impair the decolonial scope of transformative constitutional projects, especially in the legal environments of the *Global South*.

⁸⁹ Verdugo (n 5) 5.

⁹⁰ S. Schmidt, *Chilean voters decisively reject leftist constitution*, The Washington Post (4 September 2022).

⁹¹ R. Gargarella, *Para continuar con el diálogo sobre el “plebiscito de salida” chileno*, IACL-AIDC Blog (11 October 2022).

THE PUBLIC PERFORMANCE OF SANCTIONS IN INSOLVENCY CASES: THE DARK, HUMILIATING, AND RIDICULOUS SIDE OF THE LAW OF DEBT IN THE ITALIAN EXPERIENCE. A HISTORICAL OVERVIEW OF SHAMING PRACTICES

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Abstract

This study provides a diachronic comparative overview of how the law of debt has been applied by certain institutions in Italy. Specifically, it offers historical and comparative insights into the public performance of sanctions for insolvency through shaming and customary practices in Roman Imperial Law, in the Middle Ages, and in later periods.

The first part of the essay focuses on the Roman *bonorum cessio culo nudo super lapidem* and on the medieval customary institution called *pietra della vergogna* (stone of shame), which originates from the Roman model.

The second part of the essay analyzes the social function of the *zecca* and the *pittima Veneziana* during the Republic of Venice, and of the practice of *lu soldate a castighe* (no translation is possible).

The author uses a functionalist approach to apply some arguments and concepts from the current context to this historical analysis of ancient institutions that we would now consider ridiculous.

The article shows that the customary norms that play a crucial regulatory role in online interactions today can also be applied to the public square in the past. One of these tools is shaming. As is the case in contemporary online settings, in the public square in historic periods, shaming practices were used to enforce the rules of civility in a given community. Such practices can be seen as virtuous when they are intended for use as a tool to pursue positive change in forces entrenched in the culture, and thus

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to address social wrongs considered outside the reach of the law, or to address human rights abuses.

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Keywords

Public Shaming - Diachronic Comparative Method - Pietra Della Vergogna – Pittima -Zecca
- Functionalism

1. Introduction

This study provides a diachronic comparative overview of how the law of debt has been applied by certain institutions in Italy. Specifically, it offers historical and comparative insights into the public performance of sanctions for insolvency through shaming and customary practices in Roman Imperial Law, in the Middle Ages, and in later periods.

The first part of the essay focuses on the Roman *bonorum cessio culo nudo super lapidem* and on the medieval customary institution called *pietra della vergogna* (stone of shame), which originates from the Roman model.

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To provide the international reader (who is not Italian or a civil lawyer) with a better understanding of these issues, I will discuss the meanings of certain legal concepts, categories, and institutions that cannot be translated directly from Italian into English¹. When referring to those concepts, I either use the Italian or Latin term or a roughly equivalent English term. Moreover, I seek to provide adequate definitions and explanations for each of the categories I am using, and for the functions of the legal concepts cited².

Generally speaking, shame is considered a form of social control, which ‘occurs when a person violates the norms of the community, and other people respond by publicly criticizing, avoiding, or ostracizing him’³. Shame can be distinguished from the largely self-imposed feeling of guilt because of the external element of public transgression/behavior and social enforcement⁴. In other words, guilt is falling short of individual and personal expectations, while shame is a violation of a norm group, and has an audience⁵.

The definitional focus on the normative role of shame in the contemporary context is mainly provided by ‘internet law scholarship’, with a specific emphasis on the role

¹ Susan Šarčević, *New approach to legal translation* (Kluwer Law International 1997) 145-160.

² Valentina Jacometti and Barbara Pozzo, *Traduttologia e Linguaggio Giuridico* (Wolters Kluwer Cedam 2018) 91-117.

³ Eric Posner, *A terrible shame: Enforcing moral norms without law is no way to a virtuous society*, Slate, 9 April 2015 <<https://slate.com/news-and-politics/2015/04/internet-shaming-the-legal-history-of-shame-and-its-costs-and-benefits.html>>.

⁴ Kate Klonick, ‘Re-shaming the debate: social norms, shame and regulation in an internet age’ (2016) 75 Maryland Law Review, 1033.

⁵ Jennifer Jacquet, *Is shame necessary: new uses for an old tool* (Pantheon Book 2015) 11-12.

of norms in regulating the online environment. I use a functionalist approach⁶ to apply some arguments and concepts from the current context to this historical analysis of historical institutions that we would now consider ridiculous. This paper shows that the customary norms that play a crucial regulatory role in online interactions today can also be applied to the public square in the past. One of these tools is shaming, and I dissect what happens when shaming goes awry. As is the case in contemporary online settings, in the public square in historic periods, shaming practices were used to enforce the rules of civility in a given community⁷. Such practices can be seen as virtuous when they are intended for use as a tool to pursue positive change in forces entrenched in the culture, and thus to address social wrongs considered outside the reach of the law, or to address human rights abuses. For example, shame campaigns have been waged against corporations to punish them for violating a perceived social norm or committing a moral wrong, or to pressure them to improve environmental standards. Such a campaign was waged against Facebook for its refusal to shut down a rape joke group⁸.

At the same time, shaming also has a dark side, as it can become a brutal form of abuse that causes social withdrawal, depression, and anxiety in the person who is shamed, especially when the sanctions and the punishments are disproportionate to the social transgression; the perpetrators of the shaming are anonymous and diffuse;

⁶ On functionalism and comparative law, see Ralph Michaels, 'The Functional method of comparative law' Duke Law School Legal Studies, research paper n. 87 <<http://ssrn.com/abstract=939826>>; Jakko Husa and Jan M. Smits, 'A dialogue on comparative functionalism' (2011) 18 Maastricht Journal of European and Comparative Law, <<http://ssrn.com/abstract=1965933>>; Pier Giuseppe Monateri, 'Methods in comparative law: an intellectual overview' Pier Giuseppe Monateri (ed), *Methods of comparative law* (Edward Elgar Pub. 2013) 7-24, an electronic version is available at <http://papers.ssrn.com/sol3/paper.cfm?abstract_id=2151819>; James Gordley, 'The functional method' Pier Giuseppe Monateri (ed), *Methods of comparative law* (Edward Elgar Pub. 2013) 107-119. On functionalism and on the way in which it has been reconsidered through the factual approach, see Michele Graziadei, 'The functionalism Heritage' Pierre Legrand and Roderick Munday (eds), *Comparative legal studies: Traditions and transitions* (CUP 2003) 100. On the necessity to over pass the formula of the *praesumptio similitudinis*, which is not enough to ensure a reliable map of similarities and divergences, as, instead, thought by Konrad Zweigert and Hein Kotz, *Introduzione al diritto comparato*, vol. I (Giuffrè 1988) 44, see Ugo Mattei, Teemu Ruskola and Antonio Gidi, *Schlesinger's comparative law* (7th edn, Thompson Reuters Foundation Press 2009) 70. For an analysis on the links between the textual approach and the functional approach, see Vivian Grosswald Curran, 'Cultural immersion, difference and categories in U.S. Comparative Law' (1998) 46 *Am. J. Comp. L.* 43-60.

⁷ Lawrence Lessing, 'Social Meaning and social norms' (1996) 144 *University of Pennsylvania Law Review* 2181-89.

⁸ Lizzy Davies, 'Facebook refuses to take down rape joke pages' *The Guardian*, 30 September 2011.

and the shaming is immediate, reaches a worldwide audience, and is memorialized in Google search results⁹.

2. The *manus iniectio* and la *pietra della vergogna* in ancient rome: personal executions and public spaces

In Rome, a public announcement of an individual's insolvency was made in the *Comitium*, and thus in the same place as the location where funeral ceremonies took place, and eulogies for the deceased were delivered. Thus, a 'reverse funeral' for the insolvent debtor, which affected the debtor as a person rather than his family of origin, resulted in the spectacle of a 'civil death' in a place crowded with images and symbols. At the time of Cicero, traces of such archaic 'concrete' laws persisted. However, the personal procedure for dealing with an insolvent debtor gradually – albeit much more slowly than has often been assumed – lost its most punishing elements and became depersonalized, and was thus 'softened'.

Only a few years after Cicero's orations, the 'spectacle' of the shaming of the insolvent debtor moved to another location, marking the transformation of ancient values and changes. The lack of a clear demarcation between personal and patrimonial executive procedures, which characterized the entire Ciceronian age, was overcome only gradually. However, in the Middle Ages, the legal culture returned to the use of humiliating and dark customs, which had probably survived through traces of past practices, and can be seen as *cryptotipical*¹⁰. In Italy, the personal executive procedure that mandated imprisonment as a penalty for debts was not abolished until the enactment of the 1942 Code. Even today, people may be subjected to various shaming practices through the media, newspapers, the web, and social networks, which have a broader diffusion, and can have more far-reaching effects on an individual's reputation, privacy, and life.

⁹ Emily Laidlaw, 'On line shaming and right to privacy' (2017) 6 *Laws* 3.

¹⁰ On the concept of legal formant and cryptotypes, see Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *Am. Journ. Comp. Law* 343, 401; Mauro Balestrieri, *La legge e l'arcaico. Genealogia comparata dell'ordine moderno* (Mimesis 2017).

Under Julius Caesar (I BC), one of the Laws of the XII Tables was replaced: namely, the rule that stated that unsatisfied creditors were authorized to kill or enslave the defaulting debtor. The ancient institution that was abolished was called *manus iniectio*¹¹.

While this new punishment did not deprive the debtor of his physical life, it annihilated all of his personal dignity through a sort of ‘civil death’.

It appears that the Roman legal culture at the time of Cicero (I BC) was still steeped in traces of archaism. It is well-known that archaic law was based on the ritual pronouncement of solemn words that were capable of determining reality. Thus, convictions were arrived at almost as if through magic. By contrast, later on law was based on both words and actions: i.e., on the ability to listen, which was, for example, prompted by touching the earlobe to invite a person to give witness (*aurem vellere*)¹²; but also by the ability to see, which required the concrete materialization of rights, powers, and forms of subjugation.

A living debtor, who was not a fugitive and had not defaulted on his debt, could be dealt with in different ways: namely, through the ‘*funerale civile*’ where the individual was not killed following a personal procedure, or through being *addictus* or *ductus*, which required the *compedes* to spend the rest of his life redeeming the debt by working as a slave for the creditor.

It is important to note that the ‘civil death’ took place *ante rostra*, and thus in the place where real funerals were celebrated, and the life and the actions of the deceased were praised.

The meaning and the relevance of the choice of this location for carrying out credit and debt practices have been studied and described by F. Coarelli¹³, who analyzed the connections between the monuments that had the function of admonishing debtors

¹¹ Mario Varvaro, ‘Gai 4.21 e la presunta manus iniectio ex lege Aquilia’ *Annali del Seminario giuridico della Università di Palermo AUPA* (Giappichelli 2016) 335-347; Riccardo Cardilli, ‘Damnas Esto e Manus Iniectio nella Lex Aquilia: un indizio paleografico?’ (2014) 20 1 *Fundamina* on line at <<https://journals.co.za/doi/pdf/10.10520/EJC159278>>.

¹² Plinio, *Naturalis Historia*, 11, 103, 251 on line <https://www.latin.it/autore/plinio_il_vecchio/naturalis_historia>; Carla Masi Doria, ‘Aurem vellere’ *AA.VV., Iuris Vincula Studi in onore di M. Talamanca* (Napoli 2001) 314-342.

¹³ Filippo Coarelli, *Il Foro romano. Periodo repubblicano e augusteo* (Quasar Edizioni 1985).

and compensating creditors. It is hardly necessary to emphasize the very significant ideological and symbolic value of this area of the *Comitium*, where the *actio* took place in front of the ‘*niger lapis*’¹⁴ (the black stone) and under the eyes and the *imperium* of the *pretor*, who had become the guardian of the peace among the citizens (creditors and debtors) a short time before being subordinated to the imperial majesty.

When insolvency was sanctioned in a public performance, the main character was the debtor, who was subjected to a ruthless personal execution, and, at the same time, to a harsh patrimonial procedure. The stage was a meeting place where the monuments were linked to the execution, particularly to the forced execution for debts¹⁵. Moreover, the show that was created through the system of monuments (*monumenta-monimenta*) had the power to transmit values and to call to mind specific images that were evocative of archaic traditions that were still salient in Cicero’s Rome¹⁶. It is not by chance that scholars have underlined the existence of real and effective ‘images of power’¹⁷, and of the use of physical objects, artifacts, or monuments as a means of communicating and capturing legal traditions¹⁸.

After what has been defined the ‘*invenzione del diritto in Occidente*’¹⁹ and since the start of modernity, a ‘forced execution’ has normally been resolved within the jurisdiction

¹⁴ Raimondo Santoro, ‘Il tempo ed il luogo dell’*actio* prima della sua riduzione a strumento processuale’ *Annali del Seminario giuridico della Università di Palermo AUPA* (Giappichelli 1991) 281 ss.

¹⁵ Gianfranco Purpura, *La pubblica rappresentazione dell’insolvenza. Procedure esecutive personali e patrimoniali al tempo di Cicerone*, relazione al Convegno ‘Lo spettacolo della giustizia a Roma: le orazioni di Cicerone’ Palermo 7 marzo 2006, online at <<https://www1.unipa.it/~dipstdir/portale/lo%20spettacolo%20della%20giustizia/Insolvenza.pdf>> refers to the a specific zone between the Curia and the jail where the *subsellia tribunicia*, the ‘court’ of the *pretor*, the *tresviri capitales*, and the *Menia* column were located.

¹⁶ Gianfranco Purpura, ‘Luoghi del diritto, luoghi del potere’ *Annali del Seminario giuridico della Università di Palermo AUPA* (Giappichelli 2005) 249-268.

¹⁷ Paul Zanker, *Augusto e il potere delle immagini* (Bollati e Boringhieri 2006); ID., *Un’arte per l’impero. Funzione e intenzione delle immagini nel mondo antico* (Mondadori Electa 2002) 63-96.

¹⁸ H. Patrick Glenn, *Legal traditions of the World. Sustainable Diversity in Law* (OUP 2014) 7-8; Rodolfo Sacco, *Il diritto muto. Neuroscienze, conoscenza tacita, valori condivisi* (Il Mulino 2015).

¹⁹ Aldo Schiavone, *Ius. L’invenzione del diritto in Occidente* (Einaudi 2005).

through a state enforcement procedure aimed at concretely satisfying the claims alleged and ascertained in a previous judgment²⁰.

By contrast, the most ancient practices were based on a complex set of ritualized acts that were performed in public by the active subject, the creditor, as a means of self-protection. At least initially, these acts were performed without any judicial intervention²¹.

Until recently, modern juridical practices have reacted to the non-observance of duties by private individuals – even if these duties were derived from mandatory constraints – through the use of personal enforcement procedures that involved serious punishments of the debtor, such as the deprivation of liberty and various kinds of corporal and moral physical penalties.

In Italy, the regime of imprisonment for debts, which was provided for by the Napoleonic Code of 1804, and was adopted²² in the Italian Civil Code of 1865, remained in force at least until the enactment of the Civil Code of 1942, except for some exempt cases enumerated in a law enacted in 1877.

In a reconstruction that goes beyond the assumption of the inability of ancient thought to conceive of a direct execution on the *res*, it is recognized that even when the creditor put ‘his hands on’ the insolvent debtor by implementing a personal

²⁰ Here I am referring to the judicial proceeding where the legal existence of the credit can be verified, proved, and declared in cases of litigation between the creditor and the debtor.

²¹ Giovanni Nicosia, *Il processo privato romano. I. Le origini* (Giappichelli 1986) 87 ss.

²² On the circulation and imitation of different models through legal transplants, see Alan Watson, ‘Legal Transplants and law reform’ (1972) 92 *L.Q.R.* 79 *et seq.*; Id., ‘Law and legal change’ (1978) 38 *Camb. L. J.* 313 *et seq.*; Id., ‘Two-Tier Law, An approach to law making’ (1978) 27 *Int. & Comp. L. Q.* 552 *et seq.*; Id., ‘Legal change: sources of law and legal culture’ (1983) 131 *Un. Of Pennsylvania L. Rev.* 1121 *et seq.*. With some criticisms on Watson theory, see Hotto Kahn-Freund, ‘Book Review, Legal Transplants’ (1975) 91 *L.Q.R.* 292 *et seq.*; William Twining, ‘Diffusion of law: a global perspective’ (2004) 49 1 *Journal of Legal Pluralism* 34-35; Id., *General jurisprudence: understanding law from a global perspective* (CUP 2009). On legal formants and circulation of models in the Italian literature, see again Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law’ (1991) 39 *Am. J. Comp. Law*, 1-34 and 343-402; Rodolfo Sacco and Antonio Gambaro, *Sistemi Giuridici Comparati* (Utet 1996) 4-7; Rodolfo Sacco, *Introduzione al diritto comparato* (Utet 1992) 43; Ugo Mattei, ‘Why the wind changed. Intellectual leadership in western law’ (1994) 42 *Am. J. Comp. Law* 195 *et seq.*; Alan Watson, ‘From legal transplants to legal formants’ (1995) 43 *Am. J. Comp. Law* 469 *et seq.*; Pier Giuseppe Monateri, ‘Black Gaius’ (2000) 51 *Hastings LJ*. 510-513.

enforcement procedure, there was, at the same time, a type a patrimonial execution that aimed to restoring the assets of the creditor himself.

In short, the archaic *manus iniectio* was not exercised only to exact revenge or to subjugate the debtor while inducing his relatives and friends to pay back the debt, but also to lay claim to his labor and to take possession of any surviving assets during the state of subjugation. This state could last a long time, causing the *addictus* (forced) to adapt the condition of the *nexus*, and thus to more or less voluntarily submit to being subjugated.

On the other hand, if the very ancient practice taking of possession of the debtor's things (*pignoris capio*) has not gained ground on the use of *manus iniectio* as a procedure aimed at reinstating the property of the creditor, it is because the latter achieves a public and sacral effect of punishing the debtor that goes beyond the goal of ensuring that the debt is repaid.

It has generally been observed that at the end of the republican age, the *praetor* was induced to create a means of execution based on assets, which had long held a position secondary to that of personal execution. Such remedies ended up being of primary importance, and their field of application was increasingly extended. For instance, modern codes provided for imprisonment for debts, and the *glossa* to the '*Institutiones*'²³ mentioned the procedure of '*bonorum cessio culo nudo super lapidem*' for insolvent debtors.

This custom, which was connected to the '*pietra della vergogna*' or '*vituperium*', spread rapidly throughout the imperial territories, and lasted for a long period of time, even after the end of the empire. In the early years of the empire, under Tiberius (I AC), there were numerous executions for the non-payment of large debts. Thus, the application of this new custom was hailed as an act of relative leniency by the public powers.

The debtors were taken to the *Campidoglio* and exposed to public mockery, stripped from the waist down and obliged to participate in the '*bonorum cessio culo nudo super*

²³ *Glossa alle Istituzioni* IV, 6, 40.

lapidem': to sell their assets (to the auctioneers) while sitting with bare buttocks on a stone²⁴.

In front of everyone, the condemned man had to shout three times '*Cedo bona*' – that is, 'I surrender my property' – while he sat with his clothes pulled up in front of a crowd who mocked him. The figure of a lion was carved on the stone that was placed in front of the *Campidoglio* in Rome.

After the insolvency declaration and the related conviction, the creditors could no longer retaliate against the debtor after he had transferred his assets as compensation. As the era of the bankruptcy judge was still to come, the recovery arrangements were quickly decreed and carried out in the public square. The public performance served to warn all people to behave correctly, and to follow good practices in their business and trade relationships.

3. In the Middle Ages and in later periods

The expressions '*la pietra dello scandalo*,' '*la pietra della vergogna*,' and '*la pietra del vituperio*,' are still widely used in Italy. They refer to the practice of exposing the debtor to public mockery in a scandalous way that leads to him being ridiculed. Today it is only as a symbolic saying, because this custom is no longer practiced. While the phrase 'stone of scandal' is still widely employed, few people who invoke it stop to wonder why a stone is associated with a scandal.

In Turin, people still say '*andare dal culo*', which can be translated literally as 'going from the ass.' It is a popular saying that comes from the practice of forcing the debtor to beat his backside on the stone while shouting '*cedo bona*' in front of everyone. The punishment was carried out with great clamor from the crowd near the old Tower of the City, which stood in the current *Via Garibaldi*, and has since disappeared.

²⁴ Juan Alfredo Obarrio Moreno, 'The Cessio Bonorum in the Medieval Legal Tradition' (2016) 443 *Glossae: Eur. J. Legal Hist. on line* < <https://www.glossae.eu/wp-content/uploads/2016/11/Obarrio-Cessio-bonorum.pdf>>.

While the popular phrase ‘to go from the ass’ (to fail) is more common than ‘*batè 'l cul sla pera*’ (beating your ass on the stone), that latter gives a better sense of this very old custom.

Economic enterprises that end badly are described with the expression ‘*finì cont el cù per tearra*’ in the Milanese dialect; ‘*restà a cul biòt*’ (naked) in the Piedmont dialect; and ‘*dà du cù in ta ciappa*’ in the Genoese dialect.

Actually, these idioms are widespread throughout Italy, because they all derive from the same customary practice and law.

The ‘stones of scandal,’ also known as ‘stones of infamy’ or ‘stones of failures,’ were scattered throughout Italy, even outside of the big cities. Some of these stones are still visible today.

In San Donato Valdicomino (Frosinone), there is the 16th-century *pietra di San Bernardino* (promoter of the *Monti di Pietà*), where the debtor had to sit uninterruptedly with bare buttocks for a period of time proportionate to the size of his debt.

In Rimini, under the *portico* of the *Palazzo dell'Arengo*, where justice was publicly administered among the bankers and notaries, there was a large stone (*lapis magnum*) where the condemned man had to beat his bare bottom three times and with violence, shouting each time: ‘*Cedo bona!*’ (I sell my assets!).

In Asti, the stone of shame is now hanging vertically in the atrium of the town hall, but it was once in the center of the main square where the markets were held.

In Genoa, the stone was located near the fish market and *Palazzo San Giorgio*. In Bergamo, it was a seat attached to one of the two columns in *Piazza Vecchia*. In Milan, it was a block of black granite located in *Piazza Mercanti*.

The punishment in Florence had a precise name, ‘*the Acculata*,’ and took place in the *Loggia del Porcellino* in the new market. The stone, which is still visible today, was a circle of six segments of marble representing the Carroccio wheel, a symbol of legality.

In Florence, the magistrate of the *Bargello* chanted aloud the name of the condemned man and the reason for the sentence during hours when the market was full. The debtor then lowered his breeches, was grabbed by the arms and legs, and was made to swing over the crowd ‘*ostentando pubenda*,’ which can be translated as ‘showing the

lower parts of the body'. Finally, as the crowd laughed, the debtor dropped to *'percutiendo lapidem culo nudo'*.

Similar performances also took place also in Salaparuta in Sicily, where the stone can still be seen in the city center. Its former use is evoked by a colorful Sicilian expression to indicate insolvency: *'sugnu cu culu 'nterra'*, literally: 'I find myself with my back on the ground'.

In Modena, the treatment of debtors was particularly cruel. The city used the *'ringadora'* stone, which is gigantic block of red Veronese marble that is now located at the corner of the *Palazzo Comunale* in *Piazza Grande*, to punish debtors. An ordinance of the Citizen Statute of 1420 prescribed that the debtor must be led there for three consecutive Saturdays (a market day), and go around the square three times preceded by trumpeters to attract attention. At every turn, the debtor was pushed to *'dare a culo nudo su la petra rengadora la quale sia ben unta da trementina'*, which can be translated as 'to stay with a bare backside on the *rengadora* stone, which is well-oiled with turpentine'. Thus, the debtor was made to suffer, and not just because of shame (!).

Today, when people in Abruzzo want to emphasize that a certain person is in bad economic straits, they still say that he *'ha misse lu cule a lu tùmmer'* (he has put his bottom on the *tomolo*). The dialect word *tùmmer* derives from *tomolo*, and indicates not only an agrarian measure of surface (2,700 square meters), but also a measure of capacity for cereals, especially wheat, equivalent to about 44 kg.

Lu tùmmer was made of stone, and its shape recalled that of some ancient mortar stones where salt and spices were ground, and which today are highly sought after for furnishing rustic settings, or for use as ornaments in modern apartments. In Roccaraso and in other Abruzzo town centers, there was a kind of public *tùmmer* that was used for measuring the quantity of cereals given on loan, and for measuring the cereals when they were returned with a certain quantity added. The function of this vessel was probably to establish a fixed point of reference in an economy often regulated by barter, thus obviating the need to change the regulations if the currency had depreciated when the sale was made.

However, people who had borrowed a certain quantity of cereals, as measured at the *tùmmer*, were not always able to return the same amount, especially if the harvest was

ruined due to drought or other poor weather conditions. The creditor then had two options to seek compensation for the damage suffered: i.e., to take the normal path of justice, or to take revenge in a more unusual way. On a day and at a time previously communicated to the debtor, the creditor could force the debtor to go to the place where the *tùmmere* was located and to remain seated there for a certain period of time with his behind completely naked, and thus exposed to stinging taunts or to the pity of passersby²⁵.

In Pescocostanzo, the stone of shame was located at the foot of the steps of the church of *Santa Maria del Colle*. In this city, a person who had substantial debts and could not repay them was obliged to attend the main mass celebrated on Sunday. After the blessing, he had to quickly descend the staircase to reach the place where the *tùmmere* was located. He then had to drop his trousers, and to remain seated until the last faithful man had left the church. After voluntarily exposing himself to the pillory, he no longer had any debts. By ancient custom, the creditors could no longer legally prosecute him. There were no known instances in which some poor devil, after sitting on the *tùmmere*, still received pressure from creditors. Thus, there was a kind of honor code that was respected by both sides²⁶. With the passage of time, the infamous punishment of the *tùmmere* was extended to a series of other crimes. As D'Antonio reported: 'In Pescocostanzo, in the case of *abigeato* (which was the theft of animals, such as sheeps, cows...), the prosecuted was led to the public square and, after a summary judgment, in the presence of all the people summoned for that occasion, was condemned to contempt and flogging. Leaning against a stone stool, he had to show his backside to the people, uncovering himself amid the laughter and contempt of all; and then he was whipped'²⁷.

According to Luigi Braccili, in Castilenti, in the province of Teramo, 'a large parallelepiped stone called *tomolo* still exists today. Today the stone is found at the foot of a large elm at the beginning of an avenue of the town's ring road, but once it was

²⁵ Franco Cercone, 'La Pietra della Vergogna e la Zacca nella Tradizione Popolare Abbruzzese' (1979) 45 1 Lares 59-60.

²⁶ Ibid, 61

²⁷ The translation presented here proposed is by the author, from the Italian scholar Antonio D'Antonio, *Villalga. Storia, leggende, usi, costume* (Editrice Italica 1976) 79.

placed in the square at the end of an inclined plane leading to the mother church. *Lu tòmmele*, as the big stone is still called, was used to seat those who became bankrupt. In a certain sense it was a kind of pillory, an ungenerous means of exposing to teasing those who had not been able to keep their financial commitments²⁸.

Even today, in the area of the Fino Valley, a person who becomes bankrupt is described as '*quello ha messo il culo a lu...tommole*;' which can be translated as 'that put his ass to *lu ... tòmmole*'.

The rite took place in the main square of the town at the exit of the main mass, around half past 11 on Sunday and in the presence of almost the entire population of Castilenti. The poor bankrupt man had to expose his backside and sit several times on the *tomolo*, shouting each time he sat on the stone: '*tommolo è uno, tommolo è due, tommolo è tre*,' etc. Of course, the number of sessions mandated depended on the extent of the failure. For the merchants of the Fino Valley, suffering the stigma of participating in the rite of sitting on the *tomolo* in the square of Castilenti meant that they were then able to return to engaging in business.

After the rite was forbidden, the *tomolo* was removed from the main square and was placed on the outskirts of the town, as if to demonstrate to the people of Castilenti that civilization had rightly purged a custom that was considered medieval.

According to some authors, this ancient legal tradition was also in force in Vasto, where the '*Piazzetta del tomolo*' still exists; and in Ortona, where vessels from the Roman period were used as *tummere* for public measures for cereals, and were then placed at the entrance of *Palazzo Farnese*.

Moreover, in Sulmona, 'in the small square called Nunzio Federico Faraglia [...] which even before had the name of *Piazza del Pesce*, there was a large and thick stone slab called the stirrups. In ancient times, perhaps in the century XVI, the stubborn debtors were forced to beat their naked backside three times on that stone'²⁹.

²⁸ Ut supra, the translation here proposed is by the author, from the Italian scholar Luigi Braccili, *Folk in Abruzzo* (Tipografia Arte della Stampa 1973) 30.

²⁹ Ut supra, the translation here proposed is by the author, from the Italian scholar Francesco Sardi De Letto, *La città di Sulmona. Impressioni storiche e divagazioni* (Tipografia Labor 1972) 154.

Lu tùmmerè was a popular juridical custom that was very well known in Abruzzo, and that may have been in force as late as the 17th century. If it were still practice today, it would lead to substantial disruptions of the social life of our towns and cities, due to the many ‘false bankruptcies’ filed by contemporary traders. We would thus see endless lines of individuals who were waiting quietly, reading the newspaper while awaiting their turn to sit on the *tummere* and declare their well-calculated bankruptcy.

In the cases described above, public shaming had a precise compensative function: i.e., shame was demanded instead of money or assets to pay off the debts. Thus, shaming took the place of satisfying the creditors.

To a contemporary observer with a state-based conception of justice, such forms of public shaming would likely appear to be overdetermined punishments with indeterminate social meanings, or to be poorly calibrated or disproportionate forms of punishment that lacked precision in terms of who and what was being punished. The historical perspective shows us the viability of the legal, normative, private, but also public solution of shaming as a practice intended to enforce substantive norms. These practices had a similar function compared to the shaming which occurs today online, albeit in a more pervasive way³⁰. But, looking at certain effects, it was more favorable to the debtor, because after the public performance the debt was intended as solved.

4. The *zecca* in abruzzo and the *pittima veneziana*. The juridical and social functions of these figures in the institutional structure

The word *zecca* can be translated into English as tick, which is a parasitic arachnid that attaches itself to the skin of a terrestrial vertebrate from which it sucks blood, leaving the host when sated and sometimes transmitting diseases.

In some Italian regions, the word was used to refer to a person who was empowered by the city administration to collect taxes, or who was hired by a private person (a

³⁰ Kate Klonick, ‘Re-shaming the debate: Social norms, shame, and regulation in an internet age’ (2016) 75 4 Maryland Law Review 1029.
<<https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3720&context=mlr>>.

creditor) to demand payment from a debtor. In both cases, the *zecca* received a percentage of the recovered amount of money as payment for his services.

According to an ancient custom, neither the public administration nor the private creditor could order the *zecca* to go to the debtor's house, which was considered sacred. The *zecca's* efforts at persuasion could take place only in the public streets and squares. The stage on which the debtor was held accountable was outdoors, as we will see was also the case for the *pittima*. The debt collector wandered through the streets and squares of the town waiting for the debtor, and then, with two blows on his shoulder, reminded him to pay the debt.

The *zecca* did not have any qualms about carrying out his task even when the debtor was with other people. Thus, the debtor's friends, as well as strangers, were made aware of his unfortunate economic situation, which could seriously damage his image, reputation, and name.

The only way for a debtor who did not want to pay or who could not pay to escape from the *zecca* was to stand with his shoulder in front of and alongside the wall of a private house, where, according to a customary rule that was widely followed in Abruzzo, the *zecca* could not continue to pursue the debtor. Thus, the wall gave the debtor a degree of protection or immunity from prosecution. It is likely that the Italian expression '*mettere qualcuno con le spalle al muro*,' which can be translated as 'pushing someone with his shoulder close to the wall,' comes from this practice. Indeed, it now means 'forcing someone not to move anymore'³¹, and it can be used in a literal or a metaphorical sense.

Pittima is a term that was used particularly in the maritime republics of Venice and Genoa, but also in Naples, to refer to a person who was paid by creditors to constantly follow their debtors. He was a sort of debt collector whose job was to remind debtors that they had to pay off their debts. The *pittima* could scream loudly to embarrass the debtor, and his constant stalking was intended to exhaust the debtor so that he would decide to pay what he owed. Upon collection of the debt, the *pittima* would earn a certain percentage of the amount collected.

³¹ Franco Cercone, cited 62.

The *pittima* wore red so that everyone would know that he was chasing and pestering a defaulting debtor. This spectacle served to heighten the embarrassment of the individual who was being tailed by the *pittima*.

In the Serenissima Republic of Venice, a *pittima* was usually recruited from among the marginalized and disadvantaged residents of the city-state, who benefited from certain forms of social assistance provided by the *doge*, including public canteens and hostels reserved for their use. However, the individuals who took on the role of the *pittima* had to make themselves available upon the request of the republic's institutions. If the stalked debtor tried to harm these institutional figures, he could be punished.

This system, which was fully integrated into the social structure of the Serenissima, helped to ensure that accounts were settled, and the reputation of the Republic was upheld. Hence, defaults by debtors were discouraged, and the economic system was protected. Creditors had to be defended to preserve the good name of the Republic of Venice, which was a major commercial center.

However, this form of debt collection was not a private initiative, as in Venice, the defense of creditors was seen as a state affair. Thus, the *pittimas* were protected by law, and while they were not public officials, they served a public function. As was mentioned above, the *pittimas* were chosen from among the poor people who were receiving social assistance from the state, and who were allowed to use canteens and public dormitories. To repay this assistance, they had to agree to act as a *pittima* when the authorities asked them to, and they were also permitted to keep a percentage of the sum repaid. In short, being a *pittima* was an institutional assignment, and was therefore seen as socially useful work.

The same figure, with the same name and the same position, also existed in the maritime Republic of Genoa. Institutional models tend to be shared and imitated across systems that have similar problems and needs. Thus, the solutions to the problem of debt collection were similar in these maritime republics, where trade was the lifeblood, and the very life of the state³² depended on its smooth functioning.

³² There is a huge body of comparative law literature on the reasons why a juridical solution, a legal model, or a rule might circulate and be imitated in other juridical contexts, starting with Alan Watson's studies, and continuing with debates about different theories and approaches. Among these reasons are, generally, the prestige of the imitated model or its economic efficiencies or rhetorical and hegemonic narratives, and the

In Abruzzo, in the area of Teramo, the *zecca* was called the *pittima*. As L. Braccili explained: '[I]t often happened that in the most heated moments of a discussion, perhaps between friends of a certain importance around a table, [the *pittima*] would approach someone and, after having patted one of the interlocutors on the shoulder, would suddenly distract him from the fervor of the discussion, saying something like: 'Remember that the debt you have with Tizio is still waiting to be paid and it's time to pay it off, don't you think?' The *pittima*, in doing so, was performing the job the creditor had paid him to do [...]. Sometimes it happened that the *pittima*, while trying to persuade the debtor, was hit, punched, or slapped by the latter. In this case, the expenses for the mistreatment were paid by the creditor-employer-client. Being beaten by the victims of his solicitations was not the only risk for the *pittima* [...] When he entered a public place, there were more than a few who turned their backs on him. [...] Marginalized from the world of friendship, the *pittima* put more effort into his work, thus increasing the negative reactions of those who had to undergo his constant solicitations'³³.

The *pittima* had both a social and a moral role. Indeed, he could be seen as a guarantor of rules of good conduct.

Today, the word *pittima* refers to a person who always complains, is insistent, and is pedantic.

To understand the etymology of the word, we must go back to ancient Greek. The origin is linked to the Greek term ἐπιθεμα, which means 'what is placed above'. This word also refers to a kind of bandage or poultice used for therapeutic purposes. The application of a bandage can lead the person who wears it to feel annoyed or embarrassed, as his mobility is limited. This original meaning later changed as the term came to refer to an annoying person. In the Venetian and Genoese dialects, the term

capacity of the imitated model to respond to the underlying social needs. In particular, in Monateri's theory, the main aspects of the import/export of rules and legal categories as crucial points in comparative law and politics are: 1) that normally, the process is not governed by the exporting party, but by the importing actors, and according to local strategies; 2) that because most of the legal systems in the world are 'hybrids,' 'pure' models are isolated historical cases, and are therefore relatively unimportant when considering how law really works in the global legal landscape. Pier Giuseppe Monateri, 'The 'Weak Law: Contaminations And Legal Cultures. Borrowing Of Legal and Political Forms' (2003) 13 Transnational Law & Contemporary Probs 575.

³³ Luigi Braccili, cited 56-58. The translation is by the author.

has come to mean a lamentable person. This meaning was derived from the figure of the noisy debt collector.

The phrases in which the term *pittima* is most commonly used today are ‘*Ti xe proprio na pittima!*’ (You're really someone who constantly complains about nothing!) in the Venetian dialect, and ‘*T'è pròpio 'na pìtima!*’ in the Genoese dialect. The term is also used in the Florentine dialect, and it still appears among the entries in the *Garzanti* Italian dictionary, which defines a *pittima* as ‘a boring person who constantly complains about little things’.

The *Treccani* dictionary defines the term similarly. The etymology it provides (lat. Late epithēma, from the Gr. Ἐπιθεμα, propri. ‘What is placed above’) states that the original meaning of *pittima* is a ‘compress for therapeutic purposes,’ from which the meaning of ‘annoying person’ was derived. A comparison with the word ‘poultice’ is suggested.

Beyond the ancient origin of the term, its current social implications remain fascinating. There is a beautiful song by Fabrizio De André that refers to it, and that can help people today better understand it. This song, ‘*A' pittima*’, is on the album *Creuzza de mä*.

The social function of the *pittima* can be recognized in another customary institution, ‘*lu soldate a castigo*’, which was quite common in many areas of Italy where the land was the main patrimonial asset, mainly during the Bourbon dynasty.

In cases of non-payment or evasion of land taxes, a soldier or a policeman entered the house of a debtor and started living there, and ate and slept with the debtor's family until the taxes due had been paid. A debtor who had a ‘*soldate*’ in the house typically tried very hard to hide his presence in the house from other people, as it indicated the dire economic situation of the family. Usually, however, after a soldier arrived in a debtor's house, the news spread quickly in the neighborhood, bringing shame and dishonor on the debtor.

5. Some insights into contemporary shaming practices. Concluding remarks

In the introduction of this paper, I referred to online shaming practices, and to the literature on such worldwide, communitarian, and spontaneous shaming practices in

order to define shaming as a social sanction. However, it is important to underline that contemporary governments, as well as public administrators, judges, and state entities, can also use shaming, particularly in the form of ‘regulatory shaming’³⁴. This form of shaming refers to the publication of negative information by public institutions or agencies about private regulated bodies, mostly corporations, in order to pursue public interest goals³⁵. For example, in Italy, the agency that is responsible for investigating tax evasion and collecting taxes has the power to publish data on tax evaders. Moreover, in many legal systems, certain courts have the power to order the publication of judgements that provide for the payment of punitive or compensative damages in mass tort law cases. For example, in Indonesia, Brazil, and the United Kingdom³⁶, institutionalized practices of ‘naming and shaming’ have been used to publicly disclose the names of companies that do not comply with minimum wage regulations.

It is evident that such practices are expressions of a democratic regulatory approach, which suggests that shaming tactics can be legitimately and efficiently used in the public interest. Thus, these forms of shaming are quite different from private shaming.

The shaming of private individuals by other private individuals has changed in the internet era. In the past, private shaming mainly took the form of a statement being made about a person or a corporation in a physical public space where other people could hear it, or could read it if it was written. This type of shaming, which is generally regulated through defamation laws, is no longer the main arena of shaming practices³⁷, as communication tools and mass media have broadly changed the epistemic identity of communities³⁸. The spread of social media networks, as well as of other online platforms, has increased the damage that public statements can inflict, as these

³⁴ Sharon Yadin, ‘Regulatory Shaming’ (2019) 49 *Environmental Law* 407-451.

³⁵ *Ibidem*.

³⁶ The list of companies that were not paying the minimum wage in the UK has been published on the government’s institutional website, at <http://www.gov.uk/government/news/record-number-of-employers-named-and-shamed-for-underpaying>.

³⁷ Jon Ronson, *So you've been publicly shamed* (Riverhead Books 2015).

³⁸ H. Patrick Glenn, cited, (OUP 2014) 21-22.

statements can reach a wide audience in few seconds, thereby amplifying the adverse effects of shaming³⁹ and the harm to the person being shamed, as well as to others in her/his circle. Indeed, in extreme cases, shaming statements can even lead to the loss of life. The contemporary form of ‘lynch-mob justice’ can be considered a type of private shaming (perpetrated by individuals), even if it done by a mob of individuals. This type of shaming, which occurs outside the realm of formal legal proceedings⁴⁰, is often used as a kind of social justice tool to punish a person who, according to the shamers, has acted illegally or immorally. But in many cases, this kind of shaming is itself immoral, undemocratic, and disproportionate.

In scholarly debates, private shaming is considered by some authors to be a harmful social practice that should be eliminated⁴¹, while others see it as an effective civilian ‘punishment’ that can achieve commendable outcomes and maintain civil order⁴². The latter group argue that shaming is generally intended as a democratic practice and an expression of freedom of speech that can successfully bypass slow and costly governmental bureaucracy and justice.

Shaming performed by governmental actors (regulatory) is very different from civilian-private forms of shaming. From a historical perspective, the Western legal tradition⁴³ has discussed governmental shaming as part of the state’s punishment doctrine, whereby shaming is mainly applied by the courts to individuals or companies

³⁹ Ronen Perry and Tal Z. Zarsky, ‘Liability for online anonymous speech: comparative and economic analyses’ (2014) 5 J. Eur. Tort L. 205-206.

⁴⁰ Daniel Solove, *The future of reputation: gossip, rumor, and privacy on the Internet* (Yale University Press 2007) 80, 92 full text available at <<https://ssrn.com/abstract=2899125>>.

⁴¹ Martha C. Nussbaum, *Hiding from Humanity: Disgust, shame, and the law* (Princeton University Press 2004) 321.

⁴² Amkitai Etzioni, *The monochrome Society* (Princeton University Press 2003) 42.

⁴³ On the concept of Western legal tradition, John Henry Merryman, *The civil law tradition. An introduction to the legal systems of western Europe and Latin America* (Stanford University Press 1969) 2. According to the author, ‘A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective’.

who are charged under criminal law as an alternative to the use of traditional sanctions (incarceration, penalties, or license revocation).

The diachronic comparative analysis presented here has shown that the history of legal shaming was rooted in punishments, such as public beating and mockery, that included a component of public moral denunciation, and that were characterized by a strong stigmatization of the illegal act. Thus, public shaming was intended to prevent future damages to the group. The goal of these punishments was to reinforce pervading social norms and a law-abiding culture by denouncing the non-conforming behavior of the shamed individual⁴⁴. While in the past, criminal shaming was executed by simple technical means, as was illustrated above through the examples of the *pietra della vergogna*, the *pittima*, and the *zecca*; today these punishments have been replaced by other measures that are less extreme, but that serve the same function. Contemporary regulatory-governmental shaming proceedings are often mandated by courts, as the defendant may, for example, be ordered to publish an apology in the newspaper for the unlawful act.

The ridiculous and humiliating practices that this historical analysis has described can be seen as the ancestors of regulatory shaming, rather than of private shaming (perpetrated by civilians), as customary rules provided mechanisms through which the entire community (in the case of the *pietra della vergogna*), or a specific figure with public relevance (the *zecca*, the *pittima*, or the *suldate a castighe*) undertook shaming as a communitarian (*pietra della vergogna*) or governmental strategy (*pittima* and *zecca*).

Those were institutions that expressed disapproval with the intention of eliciting the condemnation of others who were made aware of the shaming: i.e., they were social processes of expressing disapproval with the intention of invoking remorse in the shamed person⁴⁵.

In the past and in the present, regulation by shaming is utilized to help in enforcing administrative or civil norms, and not only to punish and deter criminal behavior.

⁴⁴ Dan M Kahan, 'What do alternative sanctions mean?' (1996) 63 U. Chi. L. Rev. 591 et seq.

⁴⁵ John Braithwaite, *Crime, Shame, and reintegration* (CUP 1989) 100.

Today, it can even be used in connection with corporate moral and social responsibilities, and in situations in which no legal norms have been breached.

While a detailed discussion of contemporary legal systems is beyond the scope of this diachronic comparative analysis, it is worth noting that regulatory shaming is a useful strategy from both a normative and a practical perspective for three main reasons.

First, it is inherently efficient, as it can achieve goals more quickly, more simply, and at less expense than other enforcement tools.

Second, it encourages citizens to play an active role in the regulatory process by promoting cooperation, democratic values, and trust between citizens and their government, their bureaucracies and legal systems, and the corporations themselves at a time when this trust is being eroded.

Third, unlike in the past, in the current context, regulatory shaming does not affect regulated corporations in the same way that shame affects individuals psychologically and personally. Thus, today, regulatory shaming can be considered a softer and more proportional tool when compared to other sanctions and enforcement strategies, such as criminal or administrative proceedings⁴⁶.

⁴⁶ Sharon Yadin, cited (2019) 411.

**THE ENFORCERS OF JUDICIAL TERROR:
FOUQUIER-TINVILLE, VYSHINSKY, FREISLER**
Emmanuel Didier^{*}

Abstract

A review of some of the main legal terrorists in modern Western history, using the law and legal proceedings to establish and maintain political control. Through the examples of Fouquier-Tinville, Vyshinsky, and Freisler, an analysis is carried out of how the formality of law may add weight to repression, and how excellent jurists may lose sight of purpose of the law, and of the underlying, fundamental sense of justice, when involved with power, thus becoming prey of their own inner ghosts, and/or of political power making recourse to them. Introspection, cultivation of humanity, and humility keep being essential virtues of jurists involved in the creation and enforcement of the law.

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Keywords

Legal History - Judicial terror - Law, Politicsa, and justice

I. Introduction ¹

Clumsy despots are those who use bayonets: the art of tyranny is to do the same things with judges.
(Desmoulins) ²

There is no Terror without terrorists. The Law has its own Darth Vaders: the Enforcers who will eschew any form of ethics, or even legality, in order to carry on the orders of the Patron, or Ruler, whether he is The People, Stalin or Hitler.

They are Fouquier-Tinville, Vyshinsky and Freisler. Lawyers admitted to the Bar. Who pleaded for, or managed, the killing of thousands of innocents³ in parodies of proceedings. And eliminated the few, like Faina Niurina or Sophie Scholl, who tried to enforce the highest judicial or moral standards.

They could not have acted without legal accomplices: the judges who sat in their proceedings; the prosecutors who pleaded to send innocents to the Gulag or to death; and the lawyers who remained silent, acquiesced in the proceedings or even pleaded against their own clients.

From 1933 to 1945, only SIX French, German or Russian lawyers opposed publicly the Petainist, Nazi and Stalinist dictatorships.

And after the curtain fell on the regimes, usually following the natural or forced death of the Patron, very few of the monstrous prosecutors or judges were punished.

Fouquier-Tinville was judged and guillotined. But Freisler was killed in a bombing attack on Berlin, and Vyshinsky died from a heart attack in New York a year after Stalin's demise.

For the rest, it was authority and solidarity above all. Only a handful of the Revolutionary, Soviet or Nazi jurists were punished, however lightly. In fact, most of them continued their legal careers under the new regimes, whether democratic or dictatorial, in France, Russia and Germany. And some of those jurists have voiced proudly their support for the dictatorships they had faithfully served, while their victims were denied justice, or even monetary compensation.

And the same situation has been going on in Iran, Iraq, Syria and Afghanistan, under the Khomeinist, Baathist, ISIS and Communist regimes which have been ravaging those countries.

One damning lesson must thus be retained by all of us Jurists: before judging others, let us practice, personally and professionally, self-introspection and humility.

A. Judicial Terror

The deadline for punishing the enemies of the fatherland should only be the time to recognize them; it is less a question of punishing them than of annihilating them ... It is not a question of giving a few examples, but of exterminating the implacable satellites of tyranny or of perishing with the Republic.⁴

They looked for partial jurors, they accepted or even justified the use of torture to extract "confessions"; they amalgamated guilty, innocent and even incompetent persons in batch trials; they manipulated trial

procedures and administrative processes; they used, and created, false evidence; and they begged their political masters for the verdicts well before the arrests, let alone before the trials had begun.

And public prosecutors played a fundamental role in the transformation of the Courts into instruments, not only of repression, but of terrorization of individuals or groups perceived as competitors, or simply as passive onlookers.

The judicial process became, first, a parody, and, then, a show intended to terrorize the real or faked enemies of the new order.

B. Enforcers as tools and then architects

As public prosecutors, Fouquier-Tinville, Vyshinsky and Freisler begin merely as enforcers. But they quickly make themselves indispensable to their Patrons, thanks to their deep knowledge and experience of the judicial system, their enormous work capacity, their mastery of language and eloquence, their political and individual commitment to the powers-in-existence, and their crushing personal ambitions.

In particular, Vyshinsky and Freisler write extensively. Not only pleadings and judgments, but also laws, regulations, treatises and courses justifying, orienting and rooting legally the dictatorships.

C. Three epochs, three destinies, one common path

Although the three men live and work in very different cultural contexts, that is France at the end of the XVIIIth century, Russia at the beginning of the XXth century and Germany at the beginning of the second third of the XXth century, their three different destinies, that is one beheaded, the second killed by a heart attack and the third killed by a bomb, have an astonishingly similar common path: that of judicial enforcers of pitiless and genocidal dictatorships. Born in bourgeoisie, trained as lawyers, political opponents of the old regime who join the victorious Patron in order to eliminate the old elites and the present opposition and establish a new legal order.

Perhaps the most astonishing revelation of this study is the resemblance in the methodologies applied by the dictatorial regimes in which Fouquier-Tinville, Vyshinsky and Freisler act as enforcers responsible in the legal and judicial realms through special courts while the State is simultaneously conducting genocidal processes in which the Devil's Advocates are also involved actively:

D. A universal phenomenon : Afghanistan, Iraq, Iran, ISIS

Dictatorships use eight basic tools in order to tame the Judiciary:

1. exceptional laws and jurisdictions;
2. competition between the judiciary and political police;
3. purging of the Courts;
4. court packing;
5. limitation of jurisdictions;
6. creation of special courts;
7. persuasion; and
8. conditioning of legal minds. ⁶

The common path taken by Fouquier-Tinville, Vyshinsky and Freisler is by no means unique. As I have explained in a former article about the reformation of the judicial systems in Afghanistan and Iraq⁷, similar patterns of abuse of law (“dévolement du droit”) by legal and judicial authorities have taken place under the Communist and Baathist regimes.

And the same patterns and methods of judicial repression and oppression are found in Iran⁸, under the dictatorship of the mollahs, since the Revolution of 1979. One of the most revealing abuses of judicial authority is the massacre of prisoners, especially members of the Toudeh communist party in Evin and Gohar Dasht prisons in 1988.

In ISIS administered territories, sharia courts have been used to repress the population and the religious critics, punish unmotivated soldiers, eliminate teenage girls “mocking the caliphate”, exterminate disabled children with Down Syndrome, and genocide⁹ the Yazidis – including ordering the sale of Yazidi women as sex slaves. ¹⁰ The key institution in charge of repression, both as intelligence collector and executioner, has been the ISIS Bureau of Justice & Grievances.

The oppression against the Yazidis has been so brutal and systematic that it has been characterized by the United Nations as a genocide which, according to ISIS’ own magazine *Dabiq*, has been authorized and supervised by religious judges.

In Iran as well as in ISIS controlled territories, religious judges are the Patrons¹¹, confusing purposely the judicial and executive powers.

II. Inauspicious beginnings

A. Fouquier-Tinville: bankrupt member of the nobility of robe



Antoine Fouquier-Tinville

Antoine Fouquier de Tinville is born in Hérouel on 10 June 1746, second of five children in a family of the lower nobility.¹² One of his cousins is Camille Desmoulins.¹³

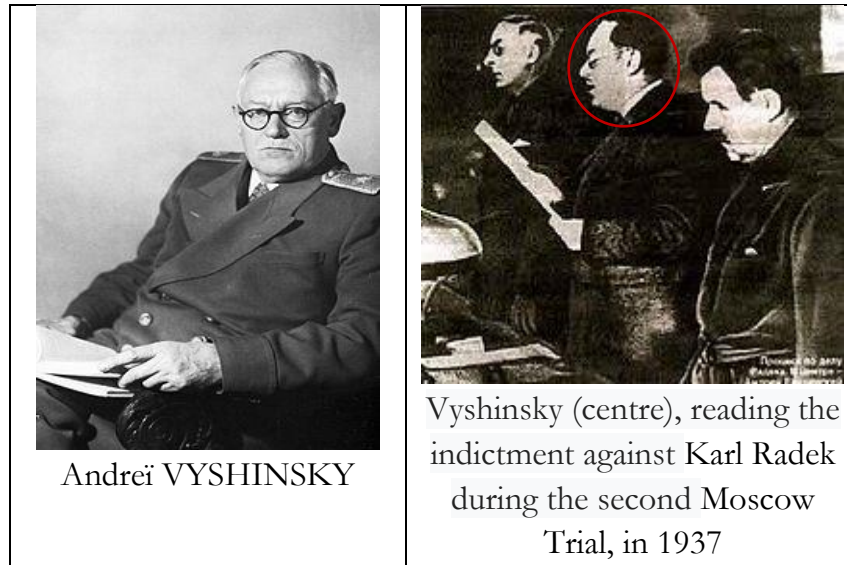
He starts articling in 1769 with two Crown prosecutors at the Châtelet, in Paris. Known to be hard working and very conscientious, he becomes First Clerk and, in 1774, he buys the office of Me Cornillier. On 21 January 1774, the Chamber of Prosecutors at the Châtelet gives him its admittatur after recognizing him “of good life and morals, catholic, apostolic and roman conversation and religion”.

In 1775, he marries a cousin, Dorothee Saugnier, who gives him five children but dies in 1782. A few months later, he marries Henriette Gérard d'Aucourt, who gives him two children.

Fouquier-Tinville occupies his charge at the Châtelet until 1783. His practice is prosperous, including many clients from the lower middle-classes and several religious congregations.

But, in September 1783, he has to abandon his practice and sell it to Me Bligny, for professional misconduct after falling into gaming debt. Thereafter, he engages into murky business and frequently changes his dwelling. He takes a clerical position under the Lieutenant-General of Police, which he occupies until 1789 when he sides with the revolutionaries by participating in the siege and fall of the Bastille fortress in Paris.

B. Vyshinsky: rebellious child of the bourgeoisie



Andrei Vyshinsky

Andrei Vyshinsky¹⁴ is born in Odessa on 28 November 1883, in a prosperous Polish Catholic family which emigrates to Baku. He marries Kara Mikhailova and they have in 1909 a daughter named Zinaida Andreyevna Vyshinskaya. As a law student at Kiev university in 1903, he joins the *Menshevik* faction of the *Social-Democratic Workers' Party of Russia* (POS DR)¹⁵ and participates in revolutionary activities for which he is expelled from the university. He then goes to university in Baku, where he takes part in disturbances organized by students and workers in 1905.

According to some sources, he would have been employed by the tsarist secret police, the *Okhrana*, as an agent provocateur in the POS DR. He also takes part in the assassination of the provocateurs Grigoriev, Movsumov and Plakida.¹⁶ For this, he is arrested in 1906 and sentenced in February 1908 by a special session of the Tiflis Court to one year of imprisonment in a fortress.

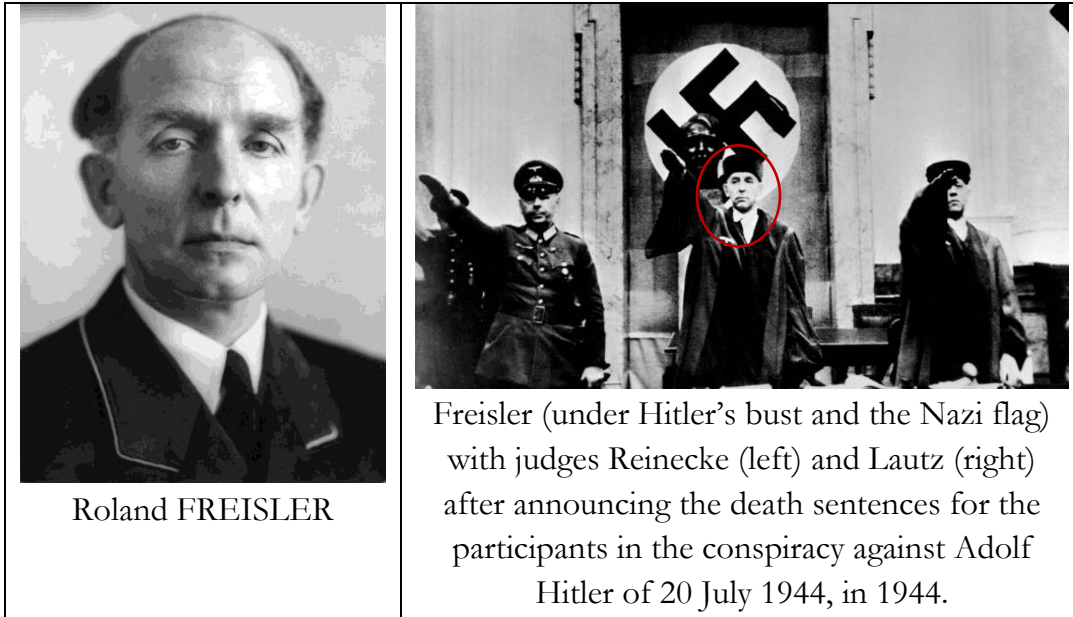
At the Bailovka Prison, he meets another revolutionary with whom he shares the food sent by his mother: “Koba”, or Iosif Vissarionovich Dzhugashvili, then “Stalin”, who might also have been an agent of the Okhrana from 1906 to 1910, when he is elected to the central committee of the Bolshevik party.¹⁷

In 1909, Vyshinsky is freed and enrolls again at the Faculty of Law of the University of Kiev. There, he is recognized as a talented and diligent student worthy of being kept in the Department of Criminal Legal Proceedings to study for a professorship.

But he is targeted again by the University authorities and obliged to go back to Baku, and then Moscow. There, he is spotted by Malyantovich, a counsel for the defence at numerous political trials who takes him as an assistant and helps him to become a lawyer before the Moscow courts.

In Moscow, Vyshinsky becomes a successful lawyer for a couple of years, while remaining an active Menshevik, giving many passionate speeches, and becoming involved in the municipal government.

C. Freisler: son of a bourgeois family



Roland Freisler

Roland Freisler¹⁸ is born on 30 October 1893 in Celle. His father is an engineer and a teacher. He passes his Abitur (German university entrance qualification) as the best in his class.

In 1914, after he has begun studying law, the war starts and he enlists as officer-cadet. In October 1915, he is wounded in action in Flanders. After his return, his regiment is sent to the Eastern front. In 1915, he is promoted to lieutenant and awarded the Iron Cross 2nd class, and then 1st class, for heroism in action on the front-line. He is taken as prisoner by Russian troops and interned in a war prisoners camp North of Moscow. There, he learns Russian and becomes interested in Communism. In 1917, after they have seized power, the Bolsheviks make Freisler one of the camp superintendents, responsible for organizing food supplies and start repatriating the German war prisoners. There are speculations that Freisler then delays his return to Germany until July 1920 because of his interest in Communism¹⁹. Later, Freisler does not deny having been a camp superintendent, but he denies any “Bolshevik past”.

Back in Germany, Freisler studies Law at the University of Jena, where in 1921 he presents his doctoral thesis which is rated ‘summa cum laude’ and published by the University. In 1922, he is awarded his Doctorate in Law, and in 1924 he opens a law office in Kassel. There, he has a reputation for being extremely competent and a skilled public speaker.

In 1924, Freisler wins a seat on the Kassel city council, representing the right-wing nationalist splinter party *Völkisch-Sozialer Block* (People's Social Block).

On 24 March 1928, he marries Marion Russegger.

III. The earthquake and the realignment

Fouquier-Tinville, Vyshinsky and Freisler share a life-shattering process which orients their present and future: in France, Russia and Germany, a social earthquake imposing a complete political and ideological realignment.

A. Fouquier-Tinville: surviving the death fight between the Girondins and the Montagnards: 1789-1794

In France, it is the fall of the absolute monarchy and the establishment of a constitutional monarchy in 1789, after the capture, on 14 July, of the symbol of the absolute power of the monarchy: the Bastille fortress-prison.

A few days later, Fouquier-Tinville's cousin Desmoulins takes the position of Secretary General of the Department of Justice.

In August 1792, the *Extraordinary Criminal Tribunal*, or *Extraordinary Tribunal*, is created to try as a final instance the authors of the "crimes" committed on 10 August and all participants to the "plot of the King's court". And on 25 August, Fouquier-Tinville is nominated by Desmoulins and elected as director of one of the accusatory juries of the Extraordinary Tribunal.

B. Vyshinsky: surviving the death fight between the Mencheviks and the Bolcheviks: 1917-1935

In Russia, the Revolution of February 1917 following disastrous war losses in the war against Germany provokes the abdication of the Tsar and the establishment of a provisional government.

In the Spring of 1917, Vyshinsky works with the legal bureau of the Provisional Government, where he undersigns a ministerial order to arrest Lenin.

In October 1917, the Bolsheviks establish the *Council of People's Commissars (Sovnarkom)*, of which Lenin declares himself Chairman, with the support of Stalin. And in December 1917, the *Sovnarkom* creates the *All-Russian Extraordinary Commission for Combating Counter-Revolution and Sabotage under the Council of People's Commissars of the RSFSR ("Cheka")*,

to liquidate to the root all of the counterrevolutionary and sabotage activities and all attempts to them in all of Russia, to hand over counter-revolutionaries and saboteurs to the revolutionary tribunals,

develop measures to combat them and relentlessly apply them in real world applications. The commission should only conduct a preliminary investigation.²⁰

Then, Vyshinsky resumes contacts with Stalin who has become an important Bolshevik leader and a close associate of Lenin. Later, he becomes a commissar of the first militia division of the Yakimanka district of Moscow and is elected chairman of its first division.

In 1920, he becomes member of the Communist Party and head of the requisition department of the Moscow Railways, where he confiscates food brought for sale in Moscow.

In 1922, he is appointed as President of the College of Lawyers of Moscow and takes part in the Party Congress, close to Lenin:



1922 Soviet Party Congress²¹

From 1923 to 1925, he acts as chairman of the Collegium of Lawyers for a few months and then is appointed as prosecutor in the judicial board of the Supreme Court of the RSFSR. When he is interviewed by Control Commission member Golkin, of the Supreme Court's Party cell, about the sincerity of his break with the *Mensheviks*, he sobs his way out and his Party card is given back to him. But thirteen years later, he has Golkin arrested by the NKVD.

From 1925 to 1928, he is Professor of Jurisprudence and rector of Moscow State University, which he clears of "unsuitable" students and professors".

In 1928 and 1930, he presides two *Special Judicial Presences* created to try fifty-three engineers and managers from the town of Shakhty for "wrecking" the Soviet economy (the *Shakhty Trial*), and then eleven economists and engineers for forming the anti-Soviet "Union of Engineers' Organisations" to wreck the Soviet industry and Transport (the *Industrial Party Trial*).

On 11 May 1931, he is appointed Procurator of the RSFSR, and ten days later he is also appointed as Deputy People's Commissar of Justice of the RSFSR.

His activities as a Procurator between 1931 and 1935 remain shrouded in secrecy. For example, on 28 December 1934, and 15 January 1935, he acts in secret trials before the Military Collegium. The first trial, of the “Nicolayev-Kolynov Group”, ends with the sentencing of 14 accused to death. The second trial remains secret.²²

In 1935, he is appointed by a secret Central Committee decree, to a Special Security Commission of Politburo members, including Stalin, Yezhov, Zhdanov, Malenkov and Shkiryatov, tasked to direct the liquidation of “enemies of the people”.

On 24 May 1935, he is appointed Procurator-General of the USSR. He immediately writes to Stalin:

Dear Iosif Vissarionovich,

Embarking upon my new appointment as Procurator-General of the USSR, I feel an insuperable desire to express to you my most profound gratitude, touching me to the very depths of my soul, to the Party, to the Government and to yourself, our leader and beloved teacher, for the trust you have bestowed upon me.

For fifteen years I have served our Communist Party and the cause of the working class, which has been working miracles under your great leadership.

Sparing neither my strength nor my life, I am ready to serve the great cause of Lenin-Stalin to the end of my days.

Please accept, deeply respected teacher and beloved leader, dear Iosif Vissarionovich, once again this expression of my sincere gratitude. ²³

C. Freisler: surviving the First World War and avenging the defeat: the rise of the Nazi party: 1917-1933

In December 1924, Hitler begins the reorganization of the *NSDAP* (*Nationalsozialistische Deutsche Arbeiterpartei*, or *National Socialist German Workers' Party*). In July 1925, Freisler joins the Nazi Party and starts defending Party members who need legal representation, drawing the attention of the Nazi hierarchy. In Northern Hesse, he is considered an invaluable member of the Party and a local celebrity, an outstanding speaker and lawyer. He is also renowned for his ‘business acumen’ in mixing political and private interests.

On 30 January 1933, Hitler is appointed chancellor by President Hindenburg. One month later, Freisler is appointed as the Department Head in the Prussian Ministry of Justice.²⁴

In 1934, Freisler is appointed as Secretary of State to the Reich Ministry of Justice, where he remains until his appointment on 20 August 1942 as president of the *People's Court* (*Volksgerichtshof*), which has been created in 1934 to hear cases of high treason and has its mandate extended later to other crimes against the security of the State.

In 1934 and 1936, Freisler makes public statements framing the roles of the People's Court, judges, political offences and sentencing in the Nazi judicial system:

There is no place in National Socialism for the recognition of political offenses. This would be tantamount to classifying the offender as a decent and respectable adversary and this is not possible under National Socialism.²⁵

For the enemy of the state and the community of the Volk there is only one course in prosecution and sentencing: unflinching severity and, if necessary, total annihilation.²⁶

He also plays an essential role, as representative of the Department of Justice, in the administrative conferences which organize *Aktion-T4*, the euthanasia of mentally and physically handicapped persons, and the *Shoah*, the deportation and extermination of Jews in Nazi-occupied Europe.

D. Know thyself: knowing one's strengths and weaknesses

Fouquier-Tinville, Vyshinsky and Freisler would not have achieved their high positions and their influence in their respective countries if they had not been endowed with very strong personal and professional qualities, and defects.

Their re-humanization is essential to describe and understand such strengths and weaknesses, which pushed them to the top while leaving them susceptible to coercion by the Patron and caused their ultimate demise.

a. Strengths

The three Devil's Advocates share the same strengths:

- technical knowledge: they have been successful law students, legal practitioners and writers;
- commitment and hard work: they are workaholic and very much involved in the legal profession;
- adaptability: they adapt to political change until they reach the top of the legal pyramid in the service of the Patron;
- anticipation: they foresee the possible political scenarios, and the losers and winner thereof;
- understanding of individuals and ideas: they understand the objectives and methods of the actors in presence;
- intelligence of situations in the new public order and in office dynamics: they take advantage of developing situations in order to survive or advance inside the system;
- intelligence of the strengths and weaknesses of other actors and of themselves: they see clearly the weak actors and rally the stronger ones;
- knowledge and cultivation of their own reputation: they publish and network extensively in order to become the top source and the top actor in their field;

- manifestations of humanity, or semblance thereof: they cultivate a public image of openness and generosity to the less fortunate, even when they betray simultaneously their rivals or their subordinates.

Fouquier-Tinville, Vyshinsky and Freisler are known and appreciated as good (Fouquier-Tinville), or even excellent (Vyshinsky and Freisler) lawyers.

b. Weaknesses

They also share similar weaknesses:

- lack of emotivity: their humanity is limited to their close family, as Desmoulins will learn after being sent to the guillotine by Fouquier-Tinville;
- objectification of future victims: they dehumanize their future victims, as “noblemen”, “kulaks” or “Jews”;
- absurd abstraction or ideological discourse: they do not hesitate to justify their pleadings and policies by absurdities such as sentencing children or elderly people, or ideological discourse such as condemning entire families of noble people;
- association with the old order: at the beginning of their careers, they have associated with the old regime;
- association with vanquished competitors: at the beginning of their careers, they have been associated with the losers in the party;
- cognitive challenges: they are used to be irresponsible, since until their Patron brings them down with him, they are unanswerable to anybody but him. And they also have some personal weaknesses: Fouquier-Tinville has been a gambler and is a drunk. Vyshinsky has been a double-agent for the Tsarist secret police and a murderer. Freisler is subject to abrupt mood swings and perceived as temperamental, unpredictable, arrogant and prompt to fanatical tirades on National Socialist ideology.

c. Ambivalence: the exploitation of strengths and weaknesses by the Patron

To keep away or deter all possible competitors, the Patron will detect ²⁷ and use against them and for his own purposes, the strengths and the weaknesses of his subordinates, going so far as fabricating evidence in order to test their fidelity.

The success and the fragility of Fouquier-Tinville, Vyshinsky and Freisler derive from the indisputable fact that each of them is BOTH very intelligent AND ideologically oriented. Their ideological commitment places them in the group which seizes control, and their intelligence allows them to survive close to the top. But there is a price to pay: survival is always precarious and based on infamous subjection to the top predator.

Thus, they are indispensable tools, but will never reach the top of the political ladder.

IV. Instruments of judicial terror

A. The contexts of Judicial Terror

a. France: 1792-1794

1792 is the year of all dangers: in April, France declares war to Austria and Prussia, but is quickly defeated on the northeastern and southeastern fronts. In August, the Royal Palace of Tuileries is seized by the Commune, the royal family is imprisoned, and an *Extraordinary Criminal Tribunal* is setup to repress the defenders of the Monarchy with the support of local Surveillance committees. The *National Convention* is elected and immediately abolishes the monarchy. On 25 August, Fouquier-Tinville is elected as director of one of the accusatory juries of the Extraordinary Criminal Tribunal.

In October, the *Convention* establishes the *Committee of General Safety and Public Surveillance* (or *Committee of General Safety*),²⁸ “tasked with ensuring the general security of the State”.

In November, the *Extraordinary Criminal Tribunal* is suppressed and Fouquier-Tinville becomes Substitute of the Public Prosecutor of the Criminal Court of the department of Seine, and First Substitute of the Public Prosecutor of the *Revolutionary Tribunal*.

After the discovery of his secret correspondence with several European kingdoms, King Louis XVI is tried, found guilty as enemy and usurper, and beheaded on 21 January 1793. The King’s execution causes a Coalition of European states as well as civil war against the nascent Republic. Insurrections in the Northwest (Normandie), West (Bretagne), Southwest (Vendée and Bordelais) and Southeast (Provence) are crushed. And at the end of the month, hundreds of priests, nuns, noble men and women are murdered in prisons, mainly in Paris.

On 12 March 1793, the *Convention* creates another *Extraordinary Criminal Tribunal*, the future *Revolutionary Tribunal*, which is suspended temporarily between 1 and 10 August 1794. On 13 March 1793, the *Convention* elects the members of this Tribunal. After the resignation of his predecessor, Fouquier-Tinville is elected by the *Convention* as Public Prosecutor of the *Revolutionary Tribunal*.

As Public Prosecutor, Fouquier-Tinville is tasked with greeting the judges and the members of the jury; choosing the court room; ordering the arrest, prosecution and judging of suspects on denunciation from authorities or citizens; drafting the accusations; pleading the accusations; ordering the carts transporting the condemned; ordering the executions; receiving the report of the executioner; reporting to the *Committee of Public Salvation* and taking orders from the Committee.

In April 1793, the *Convention* creates the *Committee of Public Salvation* and then the *Committee of General Safety* ²⁹, tasked with the presentation of accused before the *Revolutionary Tribunal*.

Girondins and *Montagnards* control alternatively the majority in the Committee until 17 September 1793, when the *Convention* adopts the *Decree on Suspects*³⁰, which deems “suspects” those:

who, either by their conduct, their relationships, their words or their writings, have shown themselves to be supporters of tyranny or federalism and enemies of freedom, those who cannot justify, in the manner prescribed by the decree of 21 March, of their means of existence and the achievement of their civic duties; those who were refused certificates of civic mindedness, public officials suspended or dismissed from their functions by the National Convention or by its commissioners and not reinstated, those of the above nobles, together husbands, wives, fathers, mothers, sons or daughters, brothers or sisters, and emigrant agents, who did not constantly manifest their attachment to the Revolution, those who emigrated in the interval from 1 July 1789 to the publication of the 30 March - 8 March 1792 decree, although they have returned to France within the time limit prescribed by this decree or previously. (My translation) ³¹

The *Decree* orders the arrest of all avowed or suspected enemies of the Revolution: nobles, parents of emigrants, dismissed officials, officers suspected of treachery and monopolists, and it entrusts the arrests to local *Committees of Surveillance* instead of legal authorities. In October 1793, the Commune of Paris describes the characteristics of suspects as: “Those who having done nothing against liberty, have done nothing for it”. ³² Marie-Antoinette, widow Capet and former queen of France, is tried on 14-16 October 1793 and executed immediately.

In March 1794, the partisans of Hébert in the *Convention* are arrested. They are tried from 21-23 March and executed immediately. And on 30 March 1794, the *Committee of Public Salvation* decrees the arrest of Danton, who is tried from 2-5 April and executed immediately.

In July 1794 (9 Thermidor, an II), the opposition to Robespierre in the *Convention* and the *Committee of Public Salvation* counters an anticipated coup by Robespierre, by outlawing him and his supporters with the *Jacobins* and the *Commune*. Fouquier-Tinville remains faithful to the *Convention*. The next day, the outlaws are brutally arrested by the National Guard and Fouquier-Tinville is called to recognize officially the identities of Robespierre, Saint-Just and Couthon before they are sent, without trial, to the guillotine.

b. Russia: 1917-1939

The revolution

In March 1917, Russian workers go on strike and take the streets in Saint-Petersburg to protest against food shortages and the continuation of the war. Tsar Nicholas II abdicates and a provisional government is formed.

In July, spontaneous armed demonstrations of workers and soldiers begin in Saint-Petersburg. Kerenski takes power, crushes the demonstrations, orders the arrest of Lenin and Bolshevik leaders.

In November, the *Bolsheviks* take control of Saint-Petersburg and seize the seat of the provisional government. They pass a number of decrees withdrawing Russia from the war (*Decree on Peace*); abolishing private property and redistributing land amongst the peasantry (*Decree on land*); abolishing the bourgeois press (*Decree on the press*); and imposing labour standards on working day, minimum wages and factories management (*Workers Decrees*). They also abolish the legal system, including property, contracts and business law. Stalin, who has been a member of the first *Bolshevik Central Committee* and editor of the party newspaper “*Pravda*” since 1912, becomes People’s Commissar for Nationalities in the Central Committee. At the end of the month, the *Constituent Assembly* is elected, with the *Socialist Revolutionaries* taking the largest number of seats and the *Bolsheviks* winning less than a quarter of the vote.

In December 1917, the *Bolsheviks* adopt a *Decree on Courts*, followed by another on 15 February 1918.

In January 1918, the *Constituent Assembly* meets but is dissolved by the *Bolsheviks*, and the Red Army of workers and peasant is constituted by a decree of the *Sovnarkom* (*Council of People’s Commissars*).

An armistice is signed with Germany and Austria, followed by the peace *Treaty of Brest-Litovsk* on 3 March 1918. Russia loses one-third of its population, one-third of its railway network, half its industry, three-quarters of its supplies of iron ore, nine-tenths of its coal resources, much of its food supplies. It also loses its western provinces (today’s Baltic states), whose recuperation becomes an essential objective for Stalin, through the negotiation of the *Molotov-Ribbentrop Agreement* and then the invasion of Poland and the Baltic states, in 1939.

In February 1918, new district courts are established.

In March, the *Bolsheviks* adopt the name of *Russian Communist Party* and move the capital from Saint-Petersburg (renamed later Petrograd) to Moscow.

From the mid-1918, anti-Bolshevik militias and military units are formed in piecemeal fashion, without planning nor coordination, often spontaneously in response to local conditions, events or *Bolshevik* actions. They are characterized as “the Whites” and composed not only of monarchists but also of republicans, liberals, democrats and non-Bolshevik socialists which fight alone or together. The last White armies are defeated in Crimea in 1920, and in Siberia in 1922.³³

In July 1918, the first constitution of the *Russian Socialist Federated Soviet Republic* is adopted. It gives equal rights to men and women. The Tsar and his family are massacred by the *Bolsheviks*.

In March 1919, the *Third International*, or *Komintern*, is created in Moscow in order to spread revolution all over the world. The rouble has lost 96% of its pre-war value, industrial production has fallen to 10% of its 1913 level and the population of Petrograd has fallen to 600,000, from 2.5 million in 1917.

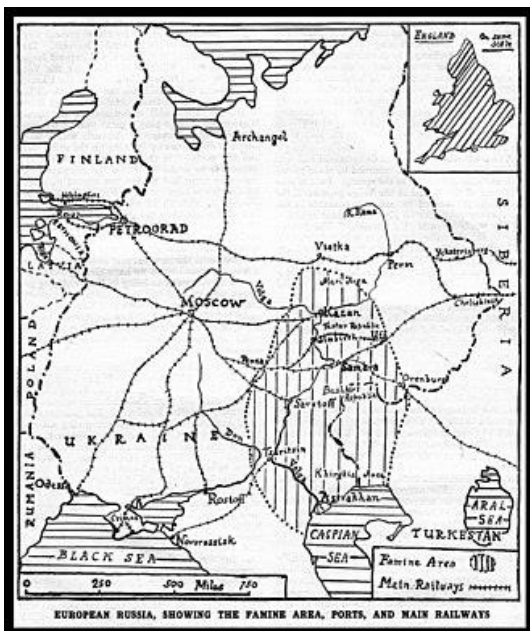
In March 1921, after the Kronstadt mutiny against the *Bolshevik* government, Lenin puts an end to “War Communism” and introduces the “New Economic Policy” (NEP).³⁴ The NEP permits the creation of a private sector and a currency in order to allow the peasantry, the vast majority of the population, to sell food surpluses so as to generate cash for the industrialization programs. Small businesses and light industry thrive and, by 1928, agricultural and industrial production are back to the 1913 level. The Communist establishment is profoundly divided by the NEP. For Lenin and his main supporter Bhukarin, “we are taking one step backward, to take two steps forward later”. But Trotsky and his supporters believe that socialism must impose state control of the entire economy.

In April 1922, Stalin is appointed General Secretary of the Communist Party. In June, the *Criminal Code* of the RSFR is adopted.³⁵ Its article 58, on *State crimes*, is rewritten and considerably expanded on 15 February 1927.³⁶ On 30 December, the Soviet Union is created.

The Red and the White Terrors

From December 1917 to February 1922, the *Bolsheviks* and the White Army wage a campaign of Terror against each other, but also peasants and industrial workers. The *Bolsheviks* have modelled their campaign on the French Terror and they implement it through their secret police, the *Cheka*. Estimates of the number of victims vary widely, between 100,000 and 200,000 victims.³⁷

In 1921, the Russian famine in the Volga and Ural rivers region, kills 5 millions, obliging many to resort to cannibalism. One of the direct consequences of the dire economic situation is the Kronstadt mutiny of March 1921, suppressed bloodily by Lenin.



1921 famine ³⁸

Between 1921 and 1923, Stalin takes advantage of Lenin’s aggravating health problems to consolidate his position in the Party. At the end of 1922, both men are in frequent disagreements, Lenin preferring Trotsky

to Stalin as his successor, even though they agree about the repression of the leaders of the *Socialist Revolutionary Party* ³⁹; or the eradication of the *Menshevik* faction.⁴⁰ After Lenin's death, on 21 January 1924, the competition begins for his succession, between Stalin, Trotsky, Zinoviev, Kamenev, Bukharin and Tomsy. Stalin moves against Kamenev and Zinoviev by removing their supporters from key positions. He also starts to build a police state whose secret police uses tanks and armored cars to stop riots, monitors telephone lines, reads mail, and plants informers everywhere.

The elimination of political competitors

In 1925, Stalin associates with Bukharin to eliminate their competitors. First, Trotsky is removed from his post in the war commissariat, expelled from the *Politburo*, deported to Alma-Ata in 1928, expelled from the Soviet Union in 1929 and murdered in Mexico in 1940 by an agent of the NKVD.

Then, Kamenev and Zinoviev join with Trotsky's supporters to form the United Opposition against Stalin, but Zinoviev and Kamenev are excluded from the Party and obliged to recognize publicly their mistakes. They are readmitted in the Communist Party as mid-level bureaucrats only.

Finally, Stalin turns against his former ally Bukharin, who is expelled from the *Politburo* and obliged to sign a declaration of submission to Stalin, whom he had characterized in 1928 as a “Genghis Khan” who “is not afraid to cut throats” and “is leading the country to famine and ruin”. ⁴¹

Succeeding agricultural and economic crisis between 1928 and 1933 bring Stalin to play on both sides.

In 1928, he abandons the NEP and adopts the first Five Years Plan, reinstates collectivization to “liquidate kulaks as a class”, creating massive internal migrations⁴². But in 1932, he has to backoff. On the one hand, he introduces *kolkhoz* markets where peasants can trade their surplus produce. On the other hand, in August 1932 the “spikelet decree” is taken, characterizing the theft of a handful of grain as a capital offense.

The second five-year plan reduces production quotas and emphasizes the improvement of living conditions, such as expansion of housing space and production of consumer goods.

But the collectivization of farms does not work because of poor planning. Once again, food production is disrupted and mass famines occur in Kazakhstan, Ukraine and the Caucasus from 1931 to 1933, causing between 3.3 and 7.5 million victims. The NKVD increases the use of prisoner labor, and Stalin blames the famine on hostile elements and wreckers within the peasantry.⁴³ The existence of the famines is denied to foreign observers.

In October 1933, Stalin initiates confidential communications with Hitler, whom he admires for his manoeuvres to remove his rivals in the Nazi Party.

Hesitations in criminal law policy

In April 1927, the *OGPU* is given the right to examine cases “extra-judicially, including the application of the death penalty”, for actions committed “both with and without malicious intent”.

In 1933, Stalin has released from prison many individuals convicted of minor offenses and orders the security services not to enact further mass arrests and deportations. And the Procuracy of the USSR is established with the aim of strengthening “socialist legality”.⁴⁴

In September 1934, Stalin has false imprisonments investigated, but also calls for the execution of workers at the Stalin Metallurgical Factory who were accused of being Japanese spies.

After Kirov’s murder in December 1934, Stalin becomes more concerned by the threat of assassination, increases his personal security and rarely goes out in public. He increases police repression and prioritizes security, issuing a decree establishing the *NKVD* “*troikas*” which are empowered to sentence individuals to imprisonment, or later death, outside the criminal justice process and system.

In 1935, Stalin orders the *NKVD* to expel suspected counter-revolutionaries from urban areas.

In 1936, as Yezhov becomes head of the *NKVD*, a new Soviet constitution is adopted.

Then, comes the Great Terror of 1937-1938.

The social purges: the Great Terror of 1937-1938 ⁴⁵

The Great Terror of 1937-38 is intended by Stalin as a form of social engineering enforced by the State’s

- justice apparatus: the courts;
- security apparatus: the *dvoikas*, *troikas* and *Special Board* tribunals of the *NKVD* secret police; and
- political jurisdictions: the *Special Judicial Presence*,

with three objectives:

1. to substitute a social class, the technicians raised and trained under Communism, to another: the technicians raised and trained under the monarchy;
2. to eliminate the “useless” class: the well-off peasantry (*kulaks*), the “people of the past” (*byvchie*), and the “socially harmful elements”;
3. to eliminate ethnic minorities in order to purge Russia ethnically.

Conceptualization of the Great Terror ⁴⁶

FORMS OF REPRESSION	NAME	OFFICIAL TARGETS	CONTENT	PROCEDURES
- "mass operations" - more than 90% of all victims)	<i>Kulak line</i>	"former- <i>kulaks</i> "	rich peasants	- rigorously secretive

<ul style="list-style-type: none"> - targeting categories of people: "contingents of elements" - "mass covert operations" are striving to "definitively" eradicate "elements" deemed "foreign" or "harmful" in a project of homogenization and "purification" of socialist society 		<i>byvchie</i> "people of the past"	elites of the Old Regime, members of the clergy, former members of non-Bolshevik political parties	<ul style="list-style-type: none"> - bureaucratically planned - incorporate police targeting by categories constructed of "objective enemies" (social or ethnic); it's a "professional matter"
		"socially harmful elements"	social, delinquent and criminals grouped under the generic term	
	<i>National line</i>	<ul style="list-style-type: none"> - Polish - German - Latvian - Finnish - Romanian - Japanese operations 	Soviet citizens of this origin	
			relationship: <ul style="list-style-type: none"> - professional - family - simply geographical 	
<ul style="list-style-type: none"> - purges of some of the elites, including <ul style="list-style-type: none"> - political, - intellectual, - industrial (up to 10% of victims) - intending to replace one elite with another 				public or semi-public meetings (party meetings, at various levels) that call for the participation of the public or activists, or even denunciations
		according to political expediency	from 1928: <ul style="list-style-type: none"> - trial of the Chakhty mining engineers, - Trial of the Union for the Liberation of Ukraine - trial of the so-called "industrial party." 	hundreds of "exemplary" trials, with a pedagogical function, are staged in 1937-1938

Conceptualization of the Great Terror

The epitome of this genocide is the adoption by the *Politburo* of the *NKVD Operational orders*, targeting political enemies and their families (“mass operations”), or specific ethnic groups (“national operations”), which we will see later.

Vyshinsky plays an important role in the enforcement of the Terror. For example, as Procurator-General of the USSR:

- he gives legal approval to the *NKVD* operations;
- he supports the establishment of secret *NKVD* extrajudicial organs, the “*dvoĭkas*” and “*troikas*”;
- he orders procurators to use the *troiki*, instead of the courts "when the evidence of guilt will not allow its use at trial", that is when it features denunciations or false testimony from provocateurs;
- he orders that courts should characterize negative opinions on Soviet and Party leaders under par. 58-8 (“Terrorist acts against representatives of Soviet power or of workers and peasants organisations”) rather than par. 58-10 (“Anti-Soviet and counter-revolutionary propaganda and agitation”);
- he supports the amendment of the *Code of procedure* to ban appeals of the sentences under articles 58-7 (“wrecking”) and 58-9 (“Damage of transport, communication, water supply, warehouses and other buildings or state and communal property with counter-revolutionary purpose”); and impose on convicted accused death penalty to be executed within one day after the court sentence.

c. Germany: 1933-1945

A deeply wounded country

The *Treaty of Versailles* which concludes World War I in 1919, leaves Germany profoundly wounded politically, geographically, psychologically and economically.

Politically, the situation is extremely unstable: the Weimar Republic proclaimed on 9 November 1918, has great difficulty to impose itself on the extreme left to the communists, and on the extreme right to the former monarchists and the military establishment.⁴⁷ Geographically, Germany has lost important territories in the North (to Denmark), East (to Poland), and West (to France, Belgium and the League of Nations). Psychologically, over 2 million German soldiers have been killed, a military and demographic catastrophe. Economically, the country is devastated by the priority attributed to armaments during the war and the transfer to France of the Rhine valley.

On 9 November 1923, Hitler and the Nazi militia, the *Sturmabteilung* (or *SA*), fail to overthrow the government of Bavaria during the “Brewery Putsch” in Munich. Hitler is found guilty and sentenced on to 5 years of imprisonment ⁴⁸, of which he serves only 9 months which he uses to dictate his programme for Germany: *Mein Kampf* (*My fight*). The foundational principles of the programme are simple:

- racial superiority and predestination of the “Aryan people”,
- vital space for the “Aryan people”,

- a “popular” State, and
- the “Principle of the Leader”, or *Führerprinzip*.⁴⁹

The Great Depression, in 1929, provides a political opportunity for Hitler. The moderate political parties are less and less able to control the extremist political factions, and the “German referendum” of 1929 against the *Treaty of Versailles* raises the popularity of Nazi ideology. In the elections of September 1930, the Nazi Party wins 18.3% of the votes and 107 seats, becoming the second-largest party in the legislative assembly. After the elections, the minority cabinet which replaces the grand coalition has to govern by emergency decrees issued by the President and general von Hindenburg, paving the way to authoritarian government. In 1932 and 1933, the political situation begins to shift in favour of Hitler, who prepares for the seizure of absolute power.

The establishment and consolidation of Nazi power

The next day after the fire of the *Reichstag*, the German Parliament, on 28 February 1933, president von Hindenburg signs the decree *For the protection of the people and the State*, awarding emergency powers to Hitler. Over the next year, the Nazis systematically abolish all political opposition and establish a dictatorship.

More than 400 legal restrictions are imposed on Jews and other groups during the first six years of the regime.⁵⁰ For example, on 15 September 1935, the *NSDAP* congress in Nuremberg adopts the racial laws : the *Law for the Protection of German Blood and German Honour*, and the *Reich Citizenship Law*, which come into force on 14 November when the term “Jew” is defined by Executory Ordinance .⁵¹ On 26 November, Romani people and Black people are included in the scope of the *Law for the Protection of German Blood and German Honour*, Romanis as "enemies of the race-based state" like Jews.⁵² And in November 1938, the *Kristallnacht* (“Broken Glass Night”) targets Jews everywhere in Germany.

From 1933 to 1939, Germany reindustrializes, remilitarizes and associates with the dictatorial governments of Japan, Hungary, Romania, Bulgaria, Yugoslavia, Italy and Spain. And in 1939, it associates with its ideological opponent Russia against the European democracies: the *Molotov-Ribbentrop Pact*.

On 1 September 1939, Hitler orders *Aktion-T4*, the genocide of mentally and physically handicapped Germans, and the invasion of Poland. Two days later, France and the United Kingdom declare war to Germany. The Second World War is on.

On 7 December 1941, he takes the *Nacht und Nebel Decree* (*Night and fog decree*), ordering the deportation without trace of all opponents to Nazi occupation.

And on 20 January 1942, the *Wannsee Conference* is held in Berlin, to plan the extermination of all European Jews.

B. The tools of Judicial Terror

Fouquier-Tinville, Vyshinsky and Freisler are enforcing laws, regulations, decrees and decisions adopted, passed or taken by their superior authorities, whether those are legislative, administrative or political. But, for two reasons, it is very difficult to establish a complete list of the authoritative instruments invoked as “legal” foundations of the legal, political or administrative operations of the Devil’s Advocates:

1. in all dictatorships there is no clear distinction, or boundary, between legal, administrative or political domains: the will of the Ruler is the law, whatever its method of formulation; and
2. many of those documents are still cloaked in official secrecy, have been obliterated from official memory or are deemed non-existent.

a. Terrorist law

The three dictatorships use the same means to consolidate power: terrorist law as an instrument of Judicial Terror:

- consolidation of power by the sovereignty of the Ruler, or Patron;
- the criminalization of difference or divergence;
- the annihilation of protections;
- the intimidation of the population: death for nothing;
- the annihilation of political and racial enemies.

You will notice the ever-enlarging scope and reach of terrorization.

i. Consolidation of power by the sovereignty of the Ruler, or Patron

One of the fundamental characteristics of the Devil’s advocate is his absolute devotion and unconditional commitment to his Patron, the Ruler. The Ruler is most often an individual, such as Stalin for Vyshinsky or Hitler for Freisler, but it can also be a concept:

- “The People”, for Fouquier-Tinville;
- “Comrade Stalin”, for Vyshinsky;
- “The Fuhrer as the Guardian of Justice”, for Freisler.

ii. The criminalization of difference or divergence

Revolutionaries, Bolsheviks and Nazis share a methodology concerning the social and then physical elimination of any real or perceived opposition.

First, entire categories of people are defined as “enemies” to be targeted (notice the common targets):

CATEGORIES OF ENEMIES	FRENCH REVOLUTION	BOLSHEVIK RUSSIA	NAZI GERMANY
Social groups	<ul style="list-style-type: none"> • noblemen • farmers • merchants • people without means of existence 	<ul style="list-style-type: none"> • noblemen • <i>kulaks</i> • merchants • managers • economic saboteurs • petty thieves 	<ul style="list-style-type: none"> • petty thieves
National groups	<ul style="list-style-type: none"> • « Vendéens » 	<ul style="list-style-type: none"> • Jews, Poles, Chinese, etc. 	<ul style="list-style-type: none"> • Jews, Gypsies
Political enemies	<ul style="list-style-type: none"> • partisans of Lafayette • supporters of foreign powers 	<ul style="list-style-type: none"> • Trotskyists-zinovievists • supporters of foreign powers 	<ul style="list-style-type: none"> • Communists • supporters of foreign powers

Categories of enemies

And second, a plethora of laws, regulations, decrees and orders are adopted, often secretly, to structure and organize the elimination of the "enemy".

LOIS FRANCAISES	SOVIET LAWS	NAZI LAWS
<p>1791 <i>Décret du 17 novembre 1791 relatif aux prêtres réfractaires</i> (Decree of 17 November 1791 relating to refractory priests)</p> <p>1792 <i>Décret du 17 août 1792 relatif à la formation d'un tribunal criminel pour juger les crimes commis dans la journée du 10 août 1792</i> (Decree of 17 August 1792 relating to the formation of a criminal court to</p>	<p>1918 <i>Leading Principles of the Criminal Law</i> <i>Decree on the Court</i></p> <p>1922 <i>Criminal Code</i></p> <p>1923 <i>Decree of the Presidium of the Central Executive Committee, Organizing the Unified State Political Administration of the Soviet Federation, of 15 November 1923</i></p>	<p>1933 <i>Law on Defence of the State Enabling Act</i> <i>Law on Dangerous Habitual Criminals</i> <i>Law for the Restoration of the Professional Civil Service</i> <i>Decree to Protect the Government of the National Socialist Revolution from Treacherous Attacks, of March 21, 1933</i></p>

<p><i>judge crimes committed on 10 August 1792)</i></p> <p>1793</p> <p><i>Loi du 10 mars 1793 portant création du tribunal criminel extraordinaire (Law of 10 March 1793 establishing the Extraordinary Criminal Court)</i></p> <p><i>Décret du 31 juillet 1793 relatif à une nouvelle organisation du tribunal extraordinaire et révolutionnaire (Decree of 31 July 1793 concerning a new organization of the Extraordinary and Revolutionary Tribunal)</i></p> <p><i>Loi des suspects du 17 septembre 1793 (Law of suspects of 17 September 1793)</i></p> <p>Caractères qui doivent distinguer les hommes suspects, et à qui on doit refuser le certificat de civisme (<i>Characteristics which should distinguish suspect men, and to whom the certificate of citizenship should be refused</i>)</p> <p>1794</p> <p><i>Décret du 19 floréal an II [8 mai 1794] (Decree of 19 Floreal Year II [8 May 1794])</i></p> <p><i>Décret du 22 prairial (10 juin 1794) relatif au tribunal révolutionnaire (Decree of 22 Prairial (June 10, 1794) concerning the Revolutionary Tribunal)</i></p> <p><i>Loi du 22 prairial an II (10 juin 1794) relative au Tribunal révolutionnaire et instaurant la Grande Terreur (Law of 22</i></p>	<p>1927</p> <p><i>Criminal Code</i></p> <p>1929</p> <p><i>Politburo instruction of January 1929</i></p> <p><i>Politburo resolution of May 1929, On the use of the labor of criminal convicts</i></p> <p><i>Decree of the CECe1 of the USSR from 21 November 1929, On the Outlawing of Government Officials, Citizens of the USSR Abroad, Who Have Fled to the Camp of Enemies of the Working Class and Peasantry, and Who Refuse to Return to the USSR</i></p> <p>1930</p> <p><i>Criminal Code, art. 57, 58, 69, 70, 72</i></p> <p><i>Politburo resolution of 14 March 1930, On the struggle against distortions of the party line in the collectivization movement</i></p> <p><i>Decree of 16 December 1930 of the plenum of the Supreme Court</i></p> <p><i>Edict on Revolutionary Legality</i></p> <p>1932</p> <p><i>Edict of 25 June 1932, On Revolutionary Legality</i></p> <p><i>Law of 7 August 1932</i></p> <p><i>Decree of the Central Executive Committee and the Council of People's Commissars of the USSR of 7 August 1932, About protection of the property of state enterprises, kolkhozes and cooperatives, and</i></p>	<p><i>Law for the Guarantee of Peace Based on Law, of 13 October 1933</i></p> <p><i>Law for the Prevention of Hereditarily Diseased Offspring, of 14 July 1933</i></p> <p><i>Decree of 30 November 1933</i></p> <p>1934</p> <p><i>Law against treacherous criticism of the government</i></p> <p><i>Law on Treason</i></p> <p>1935</p> <p>Nuremberg Laws:</p> <ul style="list-style-type: none"> - <i>Law for the Protection of German Blood and German Honor</i> - <i>Reich Citizenship Law</i> <p>1936</p> <p><i>Decree of 10 February 1936</i></p> <p>1937</p> <p>1938 (See US Holocaust Memorial Museum, Antisemitic Legislation 1933–1939)</p> <p><i>Law on the Alteration of Family and Personal Names, of 5 January 1938, forbidding Jews from changing their names</i></p> <p><i>Law on the Profession of Auctioneer, of 5 February 1938</i></p> <p><i>Gun Law of 18 March 1938, banning Jewish gun merchants</i></p> <p><i>Decree against the Camouflage of Jewish Firms, of 22 April 1938</i></p> <p><i>Order for the Disclosure of Jewish Assets, of 26 April 1938</i></p> <p><i>Reich Ministry of the Interior order of 11 July 1938, banning Jews from health spas</i></p> <p><i>Order of the Mayor of Berlin, of 17 August 1938, to public</i></p>
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<p><i>Prairial Year II</i> (June 10, 1794) concerning the Revolutionary Tribunal and establishing the Great Terror)</p>	<p><i>strengthening of the public (socialist) property</i> <i>Law of 21 August 1932</i> <i>Law of 16 September 1932, of Five ears of corn</i> 1933 Instruction to police of 22 January to prevent Ukrainian peasants from leaving their homes in search of food. <i>Law of 8 December 1933</i> 1934 Regulation of the Central Executive Committee of 10 July 1934 Regulation of the Central Executive Committee and the Council of People's Commissars U.S.S.R. of 5 November 1934 <i>Law of 1 December 1934</i> Circular 13/36/00728 of Akulov to all local procurators 1935 Supreme Court Directive of 7 March 1935 <i>Decree of 29 June 1935</i> - edict of 17 June 1935 - edict of 19 December 1935 1936 Regulation of the Council of People's Commissars U.S.S.R. and the Central Committee of the Communist Party of 7 March 1936 Article 131 of the <i>Soviet Constitution of 1936</i> 1938 <i>Law of December 1938</i></p>	<p>schools not to admit Jewish children until further notice <i>Wartime Special Penal Code</i>, of 17 August 1938 <i>Decree on the Confiscation of Jewish Property</i>, of 3 October 1938 Reich Ministry of the Interior order of 5 October 1938, invalidating all German passports held by Jews <i>Decree on the Exclusion of Jews from German Economic Life</i>, of 12 November 1938, closing all Jewish-owned businesses Reich Ministry of Education order, of 15 November 1938, expelling all Jewish children from public schools. Reich Ministry of the Interior order, of 28 November 1938, restricting the freedom of movement of Jews. Reich Ministry of the Interior order, of 29 November 1938, forbidding Jews to keep carrier pigeons Executive Order on the <i>Law on the Organization of National Work</i>, of 14 December 1938, cancelling all state contracts held with Jewish-owned firms. <i>Law on Midwives</i>, of 21 December 1938, banning all Jews from the profession 1939 <i>Decree concerning the Surrender of Precious Metals and Stones in Jewish Ownership</i>, of 21 February 1939, requiring Jews to turn in gold, silver,</p>
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	<p>Politburo resolution of 17 November 1938, <i>On Arrests, Procuracy Supervision and Conduct of Investigation</i></p> <p>1941</p> <p>GKO State Defense Committee directive of 17 November 1941</p> <p>1950</p> <p>Decree of the Presidium of the Supreme Soviet of the USSR, 12 January 1950, <i>On the Use of the Death Penalty</i></p>	<p>diamonds, and other valuables to the state without compensation</p> <p><i>Order of the President of the German Lottery</i>, of 1 August 1939, forbidding the sale of lottery tickets to Jews</p> <p>1941</p> <p>Decree of 30 March 1941, “<i>Barbarossa Decree</i>”</p> <p>Decree of 4 December 1941, <i>Concerning the Organisation and Criminal Jurisdiction against Poles and Jews in the Incorporated Eastern Territories</i></p> <p><i>Nacht und Nebel Decree</i>, of 7 December 1941</p> <p>1942</p> <p><i>Decree of 20 August 1942</i></p> <p>1944</p> <p>Decree of Minister of Justice Thierack of 13 December 1944</p> <p>1945</p> <p><i>Law of 15 February 1945</i></p>
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Laws against “enemies”

A more detailed table of the *Types of actors* is particularly revealing as to the legal methodology used in each country to define the categories of enemies:

TYPES OF ACTORS	USSR (RSFSR Penal Code)	GERMANY	FRANCE (<i>Decree on suspects</i> , my translation)
Counter-revolutionaries	58-1 : definition of "counterrevolutionary"		Are presumed suspects: (1) those who, either by their conduct, by their relations, or by their words or writings, have shown themselves to be supporters of tyranny or federalism, and enemies of freedom;
Ideological enemies	<p>Authors of counter-revolutionary activity</p> <p>58-2: bourgeois nationalists and separatists</p> <p>See also: <i>Law of 1 December 1934</i> and <i>NKVD Order 486 on repression of wives and children of enemies of the people</i></p>	<p><i>Reich Citizenship Law of 15 September 1935</i>: obligations of Reich citizens and subjects of the State</p> <p><i>Law for the Restoration of the Professional Civil Service 1933</i>: Jews and Communists purged from the public service</p>	<p>(1) those who, either by their conduct, by their relations, or by their words or writings, have shown themselves to be supporters of tyranny or federalism, and enemies of freedom;</p> <p>(5) those former members of the nobility, together husbands, wives, fathers, mothers, sons or daughters, brother or sisters, and agents of emigrants, who have not shown constantly their attachment to the Revolution;</p> <p>11. Those who signed counter-revolutionary petitions or frequented anticivic societies and clubs.</p>
Former internal enemies	58-13 : service to former (Tsarist) government		12. The partisans of Lafayette and the assassins who went to Champ-de-Mars.
“racial enemies”, such as Jews and Gypsies		<i>Law for the Protection of German Blood and German Honor of 15 September 1935</i> :	

		prohibiting sexual relations and marriages between Aryans and Jews, later extended to include "Gypsies, Negroes or their bastard offspring".	
"abnormal" people		<p><i>Law on Dangerous Habitual Criminals 1933</i></p> <p><i>Law for the Prevention of Hereditarily Diseased Offspring 1933</i></p> <p><i>Criminal Code 1935, Article 174, 175, 175a, 175b, prohibiting homosexuality</i></p> <p>See also euthanasia program <i>Aktion-T4</i> and the Wannsee Conference on the organization of the Holocaust.</p>	
Traitors	<p>58-1a: traitors to the motherland (including defectors)</p> <p>58-1b : military traitors</p> <p>58-1v family members of military traitors</p>	<p><i>Law on Defence of State (Reichstag Decree)</i>: death penalty for arson, treason, and several other crimes</p> <p><i>Law of 29 March 1933</i> : authors of crimes "committed in the period between January 31 and February 28."</p>	
Aiders and abettors	<p>58-3: abettors of the enemy</p> <p>58-11: members of a hostile group (aggravating factor)</p>		5. Those who, always having the words of freedom, Republic and country on their lips, frequent the former nobility, the counter-revolutionary priests, the aristocrats, the <i>Friends of the Constitution</i> , the

			<p>moderates and are interested by their fate.</p> <p>(3) those who have been refused citizenship certificates;</p> <p>6. Those who did not take any active part in everything that concerns the Revolution and who, to exculpate themselves, assert the payment of contributions, their patriotic gifts, their service in the National Guard, by replacement or otherwise, etc ...</p> <p>7. Those who received the republican constitution with indifference and reported false fears about its establishment and its duration.</p> <p>8. Those who, having done nothing against freedom, also did nothing for it.</p> <p>9. Those who do not attend their sections and who give as an excuse that they do not know how to talk, and their business prevents them from doing that.</p> <p>10. Those who speak with contempt of the constituted authorities, the signs of the law, the popular associations and the defenders of freedom.</p>
Accomplices of former internal enemy	58-4 : agents of the international bourgeoisie (eg		<p>(3) those who have been refused certificates of civic mindedness;</p>

	émigrés)		(6) those who emigrated between 1 July 1789 and the publication of the decree of 30 March - 8 April 1792, even though they had returned to France before the deadline set by this decree, or previously. 5. Those who, always having the words of freedom, Republic and country on their lips, frequent the former nobility, the counter-revolutionary priests, the aristocrats, the <i>Friends of the Constitution</i> , the moderates and are interested by their fate.
Inciters and accomplices of foreign enemy state	58-5 : incitators of a foreign state to declare war on USSR		
Spies	58-6 : spies; including PSh (Suspicion of Espionage), NSh (Unproven Espionage), SVPSH (Contacts Leading to Suspicion of Espionage)		
Agitators and propagandists	58-10 : anti-Soviet agitators and propagandists		1. Those who, in the assemblies of the people, stop its energy by shrewd speeches, boisterous cries and threats. 2. Those who, more cautious, speak mysteriously of the misfortunes of the Republic, take pity on the plight of the people and are always ready to

			<p>spread bad news with apparent pain.</p> <p>3. Those who have changed their behavior and language according to events; those who, silent about the crimes of royalists, of the federalists, criticize emphatically the slight faults of patriots and affect, to appear republicans, fake austerity and severity, and who give in as soon as the subject is a moderate or an aristocrat.</p> <p>11. Those who signed counter-revolutionary petitions or frequented anticivic societies and clubs.</p>
Subverters	58-8 : terrorists (may include TN, "Terrorist Intent," eg speaking rudely to an official)		
Authors of administrative sabotage and economic sabotage	<p>58-7: subversives</p> <p>58-8: terrorists (may include TN, "Terrorist Intent," eg speaking rudely to an official)</p> <p>58-9: saboteurs (wreckers)</p> <p>58-14: authors of economic sabotage: any failure to perform a task.</p> <p>See also NKVD Order No. 00447, on</p>	<p><i>Law on dangerous habitual 1933: thieves and other petty criminals</i></p> <p><i>Law of 1933 on the war on drugs (Rauschgiftbekämpfung)</i></p>	<p>(4) public officials suspended or removed from office by the <i>National Convention</i> or its commissioners, and not reinstated, including those who have been or must be removed under the decree of 14 August last;</p> <p>4. Those who feel sorry about the greedy farmers and merchants against whom the law is obliged to take measures.</p>

	“criminals and other anti-Soviet elements”		(2) those who will not be able to justify, in the manner prescribed by the decree of 21 March last, their means of existence and the execution of their civic duties; 4. Those who feel sorry about the greedy farmers and merchants against whom the law is obliged to take measures
Non-informers	58-1b : military traitors 58-12 : non-informers		

Types of actors

The official legal framework is completed by a secret one, through the mechanism of indirect reference to:

- Party directives, such as the joint decree No. 81 of Sovnarkom USSR and the Central Committee of CPSU *about Arrests, Prosecutor Supervision and Course of Investigation* of 17 November 1938, which refers to “spies”, “terrorists”, “diversionists”, “wreckers” and “enemies of the people”;
- political decisions, such as Hitler’s personal comments concerning plotters of July 1944; and
- the specific constitutions of the repressive institutions in charge, like the Military Collegium or the Special Collegium of the USSR NKVD (“OSO”), such as “spy”.

iii. The annihilation of legal protections

The role of the courts

The courts play an essential, although discrete, role in the enforcement of those mechanisms of elimination. For example, German lower courts are not behind but ahead in annulling tutorships, securities, attachments, debts, divorces, adoptions, leases, or employment contracts, on the motive that:

every law was to be understood as containing the "unwritten proviso" that "Jews should receive no advantages." They also noted that the legal position of Jews had by no means been fully and finally established yet: "The Nuremberg Laws were only a beginning. The process is not yet concluded."⁵³

The three Devil’s Advocates play very important roles in those activities.

Fouquier, by enforcing the *Decree on the Definition of Suspects* in the Revolutionary Tribunal.

Vyshinsky, by using his position as Procurator General of the USSR to enforce the *Criminal Code*. For example, the *Letter from the Procurator-General decreeing that "all hooliganism" having contra-revolutionary or chauvinistic*

motives is classified as a political crime, under par. 58-10 ("Anti-Soviet and counter-revolutionary propaganda or agitation"), or 59-7 ("Provoking national hatred") of the Soviet Criminal Code, of 7 July 1937.

Freisler, by participating in January 1942, as representative of the Minister of Justice, to the Wannsee conference organizing the Holocaust.

The three of them, by enforcing those laws and decrees as prosecutor or judge:

- Fouquier-Tinville, as Chief Prosecutor in the *Revolutionary Tribunal* in 1793 and 1794 ;
- Vyshinsky, as judge in the *Shakhty Trial* (1928) and the *Industrial Party Trial* (1930) and then as Prosecutor-General of the USSR in the *Moscow Trials* in 1936-38;
- Freisler, as president of the *Volksgerichtshof* from 1942 to 1945.

iv. The intimidation of the population: death for nothing

The purpose of those legal and judicial norms is very simple: the intimidation of the population by imposing social or physical elimination for nothing.

A few examples: joking, listening to radio, “wrecking”, “wilfully damaging official property by allegedly wounding the dog of a German policeman behind the ear”, or gleaning.

An example in the case of “wrecking”: a letter from Chief Prosecutor Vyshinsky to Stalin in January 1938:

I inform you that the Prosecutor's Office of the Leningrad region has completed its examination of the case concerning the trolleybus accident that occurred on December 26 in Leningrad. The investigation showed the existence, in the trolleybus park of the city of Leningrad, of a group of saboteurs composed of the director of the park, PI Iakovlev, the chief engineer AM Gousseff, engineers ED Ouimian, MV Reizmakh, the head of the FA Ivanov depot, the foreman KI Padin. This group aimed to cause accidents and ruin the city's public transport. The counter-revolutionary activity of this group of saboteurs resulted, during the year 1937, in 44 accidents for a fleet of trolleybuses of 50 units. These accidents resulted in 105 victims; in addition, 140 accidents without casualties were recorded. The accident that occurred on December 26 is also the result of the activity of this group. While the trolley bus was traveling on the Fontanka quay, the tire on the right front wheel burst. Driver Baikov jumped out of the vehicle, leaving it uncontrolled, as a result of which the trolleybus fell into the canal. 13 of the 50 passengers died.

I propose to take this case behind closed doors before the Military Court of the Leningrad region. Condemn all participants to the death penalty. Baikov to 10 years. Have a short article published in the press.

I ask for your instructions.

Vyshinskii

In red pencil, Stalin scribbles on the letter: "Qualify Baikov as 58-7". Under article 58-7 of the *Criminal Code*: "(u)ndermining of state industry, transport, monetary circulation or credit system, as well as of cooperative societies and organizations, with counter-revolutionary purpose ..." [death, confiscation of property and loss of citizenship].

v. The annihilation of political and racial enemies

In the 3 countries, both

- a form of State terrorism, aiming at a “rational instrumentalization of violence, its premeditated and calculated use including its intensity”, in order to create a governing system based on arbitrariness and fear imposed to the whole social body; and
- a system of terrorist overbidding operated by some actors to dominate their enemies in permanent power competitions.

In summary:

	Revolutionary France	Nazi régime	Bolshevik régime
Form of State terrorism	<ul style="list-style-type: none">• genocide of Vendée• drownings of Nantes• massacres of Lyon	<ul style="list-style-type: none">• Wannsee conference• Aktion T-4	<ul style="list-style-type: none">• NKVD Orders
System of terrorist overbidding	<ul style="list-style-type: none">• trials of the Girondins and of Danton	<ul style="list-style-type: none">• elimination of Rohm and the SA	<ul style="list-style-type: none">• Moscow trials

Now, the details.

1. French Laws

In 1791, the *Constituant Assembly* starts the spiral by outlawing emigrants.

1793 sees an avalanche of legal measures for the elimination of perceived enemies, such as the creation of the *Extraordinary Criminal Tribunal* in March, and the *Law of Suspects* in September. They are used to frame repressive campaigns such as the genocide in Vendée, and the political trials of Marie-Antoinette and the Girondists in October.

2. Soviet Laws

From its beginning, the Soviet regime uses legal, para-judicial and administrative procedures to eliminate its enemies:

- legal, such as the Decrees and resolutions of 1918 and 1934;

- para-judicial, such as the show trials in Moscow and elsewhere, the special procedures for NKVD and military officials, and the subdelegation of authority from the Military Collegium to a local tribunal or *troika*; and
- administrative, such as the NKVD Secret Orders for “mass operations” and “national operations”, which we will examine later.

The legal setting

As soon as 1917-18, the Soviets pass a number of Decrees and resolutions confiscating all power, such as the *Resolution Giving All Power to the Soviets and the Soviet Institutions* of 3 January 1918 and the decree *Socialist Homeland is in Danger!* of 21 February 1918.

In 1934, those laws are completed by the legal foundations of the Great Terror:

- the *Law of 8 June 1934* which punishes the “act of betrayal of the Fatherland” with death, deportation to Siberia, loss of Soviet citizenship or loss of civil rights; all adult members of the family are held responsible and can be sentenced to 2-5 years imprisonment or exile in Siberia, and
- the *Decree of 1 December 1934 on the procedure to be followed in dealing with terrorist acts against officials of the Soviet regime*,⁵⁴ after Kirov’s murder :

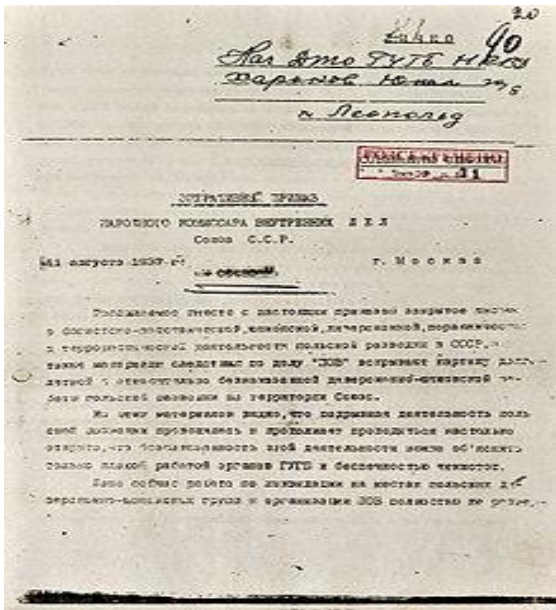
To amend the present Union Republic codes of criminal procedure with regard to investigation and trial of cases of terrorist organizations and terrorist acts against the functionaries of Soviet power:

- Investigation in these cases shall be concluded in not more than ten days.
- The indictment shall be handed to the accused 24 hours before the trial.
- The cases shall be tried without the parties present.
- There shall be no cassational review of the judgments or acceptance of petitions for clemency.
- The sentence of the supreme punishment shall be executed immediately upon rendering judgment.⁵⁵

The para-judicial and administrative settings

We have seen above, under **Conceptualization of the Great Terror**, a table summarizing the forms of repression used by Stalin in order to effect ”social engineering”.

One of the most important tools for the mass repression and elimination of any opposition are the Secret NKVD Orders.



NKVD Order No 00485 (*Polish Operation*)



Politburo's acquiescence (26 April 1938) to demand by Irkutsk NKVD to increase by 4000 the quota of persons to be shot

A summary of the most relevant of those NKVD Orders:

A summary of the most relevant of those NKVD Orders:

TYPES	TARGETS	ACTIONS AND RESULTS
Mass operations of NKVD 56	- <i>Ex-kulaks, criminals, and other anti-Soviet elements</i> ⁵⁷ NKVD Order No. 00447 ("About repression of former kulaks, criminals, and other anti-Soviet elements") (30 July 1937) ⁵⁸	- by August 15, 1937, 101,000 are arrested and 14,000 convicted - by the end of 1938, 387,000 Soviet citizens executed by NKVD
	- <i>Traitor of Motherland Family Members</i> ⁵⁹ NKVD Order No. 00486 (15 August 1937) ⁶⁰ NKVD Order № 00689 (17 October 1938) State Defense Committee resolution No 1926SS "On the Family Members of Traitors of the Motherland" (24 June 1942)	- criminal prosecution of wives and children (kin punishment) of all people arrested and convicted as "traitors of the Motherland" - women sent to Gulag, children to state orphanages - all cases considered by <i>the Special Council of the NKVD (OSO)</i> , empowered to punish without trial: banishment, exile,

		corrective labor camps up to five years, deportation
	- <i>Kharbin operation of the NKVD</i> ⁶¹ NKVD Order No. 00593 (NKVD Order about Harbinites) (20 September 1937) ⁶²	~30,992 killed - orders arrest (from 1 October to 25 December 1937) and prosecution of former personnel of the China Far East Railway (KVZhD), who had lived in Harbin and reemigrated into the Soviet Union after 1935
National operations of the NKVD	- <i>Polish Operation of the NKVD</i> ⁶³ NKVD Order № 00485 ("On the liquidation of the Polish diversionist and espionage groups and POW units") (9 August 1937) ⁶⁴	139,835 people sentenced; ~111,091 killed - adopted the simplified "album procedure" lists of Poles condemned by lower NKVD " <i>dvoikas</i> " collected into "albums" sent to midrange NKVD offices for stamp of approval by a <i>troika</i> (communist official, NKVD leader, and party procurator) - after the approval of the entire "album", executions carried out immediately - same procedure used later on in other mass operations of the NKVD
	- <i>German Operation of the NKVD</i> ⁶⁵ NKVD Order № 00439 ⁶⁶	55,005 persons sentenced ; ~41,898 killed - German citizens who worked at railways and defense enterprises qualified as "penetrated agents of the German General Staff and Gestapo", ready for diversion activity "during the war period"
	- <i>Greek Operation of the NKVD</i> ⁶⁷ NKVD Order № 00485 ("On the liquidation of the Polish diversionist and espionage groups and POW units") (9 August 1937) ⁶⁸	~20,000—50,000 dead - targeting "subversive activities of Polish intelligence" in the Soviet Union - later expanded to Latvians, Germans, Estonians, Finns, Greeks, Iranians and Chinese
	- <i>Latvian Operation of the NKVD</i> ⁶⁹	22,369 convictions; 16,573 shot; est. 73,000 dead

	<i>NKVD Order No. 49990</i> (30 November 1937)	
	- <i>Korean Operation of the NKVD</i> ⁷⁰ joint decree #1428-326cc of the USSR Sovnarkom and VKP(b) Central Committee of 21 August 1937, "About Deportation of the Korean Population from the Border Regions of the Far Eastern Krai", signed by Stalin and Molotov	~40,000 killed in 1937 and 1938 from starvation, exposure - almost the entire Soviet population of ethnic Koreans (171,781 persons) forcefully moved to unpopulated areas of the Kazakh and the Uzbek SSRs in October 1937 - deportation executed by NKVD <i>troikas</i> of several levels — <i>oblast troikas</i> , <i>raion troikas</i> , and "group" <i>troikas</i> (кустовая тройка) — under monitoring of deadlines.
	<i>Romanian Operation of the NKVD</i> ⁷¹	undocumented
	<i>Estonian Operation of the NKVD</i> ⁷²	undocumented
	<i>Finnish Operation of the NKVD</i> ⁷³	undocumented
END	joint decree No. 81 of Sovnarkom USSR and Central Committee of Communist Party of the Soviet Union <i>Decree about Arrests, Prosecutor Supervision and Course of Investigation</i> (17 November 1938) ⁷⁴	Cancels most NKVD orders of mass type BUT not all: see, e.g., <i>NKVD Order no. 00689</i> ⁷⁵ suspends implementation of death sentences

Summary of NKVD Secret Orders

The NKVD Orders establish regional quotas of targeted of victims to be shot ("1st category") or deported to the gulag ("2nd category"). For example, under Order No 00447, the Byelorussian SSR is estimated to have 12,000 anti-Soviet social elements divided into 2,000 Category I and 10,000 Category II elements.

NKVD officers in the field are attributed quotas under the Orders. Officers who do not observe the quotas are punished, which starts a frantic search for victims to fill the quotas and demands for supplementary quotas of victims in order to demonstrate political commitment and administrative efficiency.

Quotas are filled in two ways: lists of isolated individuals and grouped cases, who are forced into confessing. Two examples:

- in Gorkii, to find a sufficient number of German spies from the categories indicated by NKVD Order № 00439, the regional head of the NKVD simply reverses the category from "ex-German prisoners of war who remained in the USSR" to "ex-Russian prisoners of the imperialist war who were in captivity in Germany", which enables his agents to arrest 440 Russian war veterans; and

- to fill in the German or Polish “lines”, it is common to search for German or Polish names in companies deemed “strategic” for espionage work, such as railway or defence production.

The files (“Protocols”) are a few lines and sent in “binders” to *troïkas* and *dvoïkas* special tribunals⁷⁶, or to the Politburo, to be decided in abstentia. Two examples of *troïka* verdicts:

Case No. 3, File No. 11027, presented by the NKVD Department of the Doubovo-Ummetsky district, and concerning the citizen Riabets Mikhail Ivanovich, born in 1907 in Malaïa Tokmashka, Ukrainian SSR, Ukrainian, kulak expelled from the collective farm.

Accused of being hostile to Soviet power. This hostility manifested itself in systematic anti-Soviet propaganda, undermining the collective farm before being expelled from it. Willfully broke a 12 horsepower engine, tried to convince collective farm workers to throw metal forks into the combine harvester system, all these facts falling under articles 58-7 and 58-10, al. 1 of the Penal Code of the RSFSR.

Riabets has been, since 31 July 1937, imprisoned in Kriajsk prison.

Verdict of the *troïka*: SHOOT Riabets Mikhail Ivanovich.

Case No. 4, File No. 11026, presented by the NKVD Department of the Doubovo-Ummetsky district, and concerning the citizen Rodin, Vassilii Vassilievitch, born in 1900 in Mikhailovka, Doubovo-Ummetskyi district, Kuybyshev region, Mordve, citizen of the RSFSR, kulak. Until his arrest, worked as a tractor driver in Mikhailovka's Success collective farm.

Accused of being hostile to Soviet power. In doing so, he carried out anti-Soviet propaganda and acts of sabotage in his workplace: he allowed a kolkhoz horse to die under the pretext that it was too old, systematically neglected the care of horses, slowed down the operation of tractors. on the pretext of jerks in the fuel supply, all these facts falling within the scope of articles 58-7 and 58-10, al. 1 of the Penal Code of the RSFSR.

Rodin has been, since 31 July 1937, imprisoned in Kriajsk prison.

Verdict of the *troïka*: Lock up Rodin for a period of 10 years in a concentration camp.⁷⁷

The “binders” or “albums”

To expedite sentencing, the *dvoïkas* and *troïkas* special tribunals circulate binders between the NKVD and the Procurator General’s representatives on the tribunal:

As men and women were shot, their names were struck off endless typed lists which bore the signatures of an NKVD *troïka* or, if the condemned were of any importance, of Politburo members. Attached to the lists were photographs of harrowed and beaten faces, taken shortly after arrest — the NKVD owned perhaps the world’s largest photographic archive, of some 10 million faces. The execution orders bore just one instruction: “When carrying out the sentence it is obligatory to check the person against the photograph”.⁷⁸

After an investigation is finished, the local bodies of the NKVD write minutes for each prisoner with a sentencing proposal (execution or 5–10 years of imprisonment). The minutes, collected in “albums,” are signed by a panel of two people: the head of the regional NKVD and the prosecutor (the “*dvoika*”).

The album is then forwarded to Moscow, where the final sentence is imposed by the People’s Commissar for Internal Affairs, Yezhov, and the Prosecutor of the USSR, Vyshinsky. Typically, the albums are not carefully considered in Moscow, where the proposals of the local bodies are usually approved mechanically.

On return of the album to the local bodies of the NKVD, sentences are executed.

In the cases of party members and cadres, the “albums” are sent to Stalin, to be circulated among Stalin and “the five” before being sent to the Military Collegium of the Supreme Court for “official” sentencing.

The Party members and cadres are condemned by Stalin’s personal signature - often associated with vicious invectives - , to death for 85% of them:

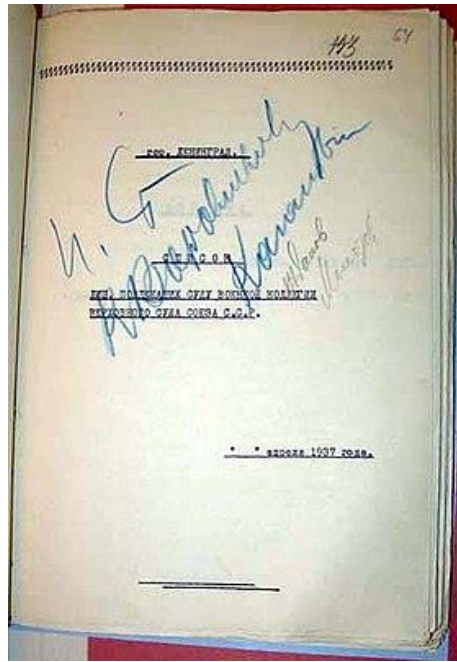
Whenever senior party members or key professionals were sentenced, lists went to the Politburo — to Stalin , Kaganovich , Molotov , and Voroshilov — for their emendations . The names of some 7 percent of the victims of the Great Terror — 40,000 — were perused by one or more of these four. Occasionally Stalin crossed out a name or substituted imprisonment for death; Molotov, for reasons he would not later recall, did the opposite. All four added comments: “deserves it”, “prostitute”, “scum”. On one day they confirmed over 3,000 death sentences.⁷⁹

Molotov signs 372 execution lists, more than Stalin himself; Vorochilov signs 195 lists; Kaganovitch, 191; Jdanov, 177.⁸⁰

Frinovsky, Yezhov’s deputy is particularly lax in his processing of the albums:

On his tour of the Far East in July 1938, Frinovskii brought with him piles of albums for thousands of convicts, asking Listenbourg, Lulov and Ushakov to take a look. The albums were read around watered tables and to the sound of the gramophone. Listenbourg, Lulov and Ushakov were in "competition" - who would get the most records. Usually the notices weren't even read, officials just put R's (for Rasstreliat " - shoot). In this way, during the train journey, all the albums taken were locked and returned by special courier to Moscow for execution of the sentences.⁸¹

383 such “binders” are sent, concerning 44,465 individuals.



List (“binder” or “album”) of persons to be sentenced by the Military Collegium of the USSR Supreme Court, April 1937.

Annotated and signed by Stalin, Vorochilov, Kaganovitch, Jdanov and Molotov ⁸²

The killings extend to the wives and the children:

On 5 July 1937, the Politburo ordered the NKVD to “confine all wives of condemned traitors . . . in camps for 5–8 years” and to take under State protection children under fifteen: 18,000 wives and 25,000 children were taken away. But this was not enough: on 15 August, Yezhov decreed that children between one and three were to be confined in orphanages but “socially dangerous children between three and fifteen” could be imprisoned “depending on the degree of danger.” Almost a million of these children were raised in orphanages and often did not see their mothers for twenty years.⁸³

The result: 1.5 million people are arrested, 1.4 million sentenced, 800,000 executed in secret. More than half under Order N° 00447: over 16 months: 50,000 executions per month, or 1 700 per day for nearly 500 days.

Vyshinsky’s role

From 1935 until 1939, Vyshinsky is the Prosecutor General of the RSFSR, and it is under his authority on the judicial apparatus that two categories of repressive actions take place in parallel:

1. the adoption of the deadliest NKVD Orders and their enforcement by secret jurisdictions; and
2. the trials of the political and military oppositions to Stalin.

On 7 August 1937, he issues a *Letter from Procurator-General Vyshinsky* stating that executions and imprisonments under Order 00447 do not require confirmation from any judicial body.

3. Nazi Laws

At the same time in Germany, several laws are adopted to destroy democracy and freedoms, some even before the Nazi assume total control of the government:

1933	<ul style="list-style-type: none"> - the <i>Malicious Practices Act</i>: criminalizes criticism or expression of dissent concerning the Nazi government or its leaders; - the <i>Decree on Defence of the State (Reichstag Fire Decree)</i>: declares a state of emergency; - the <i>Decree on Treason against the German People and Activities of High Treason</i>: characterizes as treason all criticism of the regime; - the <i>Enabling Act</i>: grants full legislative power to the government, and thus Chancellor Hitler, for 4 years; - the <i>Law concerning the imposition and implementation of the death penalty</i>: imposes the death penalty for crimes "committed in the period between January 31 and February 28", in fact the Reichstag arsonists;
1934	<ul style="list-style-type: none"> - the <i>Law against the treacherous criticism of the government</i>: criminalizes remarks damaging the prestige of the Nazi government; - the <i>Law for the Reconstruction of the Reich</i>: abolishes the landers; - the <i>Law against Insidious Attacks upon the State and Party and for the Protection of the Party Uniform</i>: reinstates special tribunals;
1935	<ul style="list-style-type: none"> - the <i>Law for the Restoration of the Professional Civil Service</i>: purges the civil service, universities and bars from Jews, communists, non-desirable and Non-Aryans elements; - the <i>Law for the Protection of German Blood and German Honor</i>, and the <i>Reich Citizenship Law</i>: punish "race defilement" (sexual relations between an Aryan and a member of an "inferior race"); defines Reich citizens as individuals with "German or related blood";
1938	<ul style="list-style-type: none"> - the <i>Special Wartime Penal Code</i>;
1939	<ul style="list-style-type: none"> - the <i>Decree against Public Enemies</i>: punishes by death offences against persons, property, community or public security during blackouts.

As a senior executive in the Justice department, Freisler is heavily involved into the setting up of this network of repressive legislation. Two examples of his involvement:

The *Nacht und Nebel Decree* of 1941

The "*Night and Fog Decree*" is issued by Hitler on 7 December 1941. It condemns "hostile elements" in occupied countries to be disappeared, either

- by immediate execution after a death sentence; or
- by ill treatment and starvation in a concentration camp after purging a prison sentence,

in either case pronounced by a civilian Special Court (*Sondergerichte*) or by military judges, at the discretion of the Army's High Command.

The scope of the decree is extended on 16 April 1942, to individuals sentenced to reclusion by military courts and women sentenced to death in occupied countries.

On the personal insistence of Freisler, then Secretary of State in the Justice department, the *People's Court* (*Volksgerichtshof*) is granted jurisdiction in Night and Fog trials. The first Night and Fog trials begin in August 1942, after his appointment as President of the *Volksgerichtshof*. By the end of the year, more than 1,000 cases have been assigned to the *Volksgerichtshof*.

The Wannsee conference of 1942

An essential marker of the importance of Freisler's role in the Nazi legal system is his participation as Secretary of State representing the Reich Minister Franz Schlegelberger, to the Wannsee Conference in January 1942 in Berlin, which establishes the administrative framework of the Holocaust.

Other Nazi laws

The Nazi adopt many other repressive laws and decrees, such as the *Decree on Violent Criminals*, the *Decree on Asocial Elements*, the *Decree on the War Economy*, the *Decree on Continued Use of Motor Vehicles* and the *Regulation for Consumption of Vital Commercial Products*.

Those legislative instruments share some essentially repressive characteristics:

- they are often retroactive;
- they apply to crimes of omission;
- they impose extreme sanctions, often the death penalty;
- they are written in general terms, which allow the repressive courts like the *Volksgerichtshof* to extend their jurisdictions and impose more brutal sentences by analogy.

In conclusion, we find a common characteristic to the legal systems of the French Revolution, the Soviet Union and Nazi Germany: the absolute necessity of legal norms to enunciate, organize, rationalize and enforce savagery.

vi. Exceptional jurisdictions

Terrorist Laws are enforced by “exceptional jurisdictions” which, with the passage of time, become “ordinary”. Such jurisdictions are developed – often with the complicity of the judges - in 3 ways, not necessarily exclusive of each other:

1. the politization or elimination of existing jurisdictions, such as Criminal Courts;
2. the creation of specialized jurisdictions, which become more and more politicized, such as the *Extraordinary Criminal Tribunal*; and
3. the creation of purely political jurisdictions, such as a *Special Judicial Presence*, or the *Volksgerichtshof*.

The Revolutionary, Bolshevik and Nazi régimes developed a plethora of exceptional jurisdictions, divided in 3 categories:

1. civilian jurisdictions, such as the *Hereditary Health Courts* and the factories courts;
2. military jurisdictions, such as the *Military Collegium of the USSR Supreme Court*; and
3. secret police (= political) jurisdictions, such as the *dvoïkas*, the *troïkas* and the *OSO*.

The purpose of such diversity, is not logic or administrative rigor, but systemic and merciless competition between institutions in order to protect:

- the powers of local leaders, OR/AND
- the physical security and the political dominance of the Leader and his henchmen, in the framework of geographic AND political competitions.

1. Civilian jurisdictions

In France

The Revolutionary regime begins by extending the jurisdiction of ordinary criminal courts to "counter-revolutionary crimes", such as emigration, "uncivic speech" or trafficking in assignats. Then, it establishes people's commissions, an *Extraordinary Revolutionary Tribunal* and a *Revolutionary Tribunal*, which is transformed into a terrorist organization.⁸⁴

Between April 1793, and July 1794, the *Revolutionary Tribunal* pronounces 4,032 judgments, of which 2,625 death sentences and 1,306 acquittals.

Fouquier-Tinville is elected by the *National Convention* as "Public Accuser" on 13 March 1793, and invested with enormous powers: to "arrest, pursue and deliver to the tribunal" anyone suspected of having committed any of the crimes enumerated in article 1 of the *Decree of 10 March 1793*.

Until his arrest on 1 August 1794, he acts as Public Prosecutor in many important trials, such as those of Charlotte Corday (17 July 1793); Queen Marie-Antoinette, (14-16 October 1793); the Girondins (24-30 October 1793); the Hebertists (21-24 March 1794); the Dantonists (2-5 April 1794); the Carmelite Nuns of Compiègne (17 July 1794).

In Russia

The Bolsheviks begin in December 1917 by abolishing all courts and establishing Worker's and Peasant's revolutionary tribunals to repress counterrevolutionary and sabotage crimes.⁸⁵ In May 1918, the jurisdiction

on common crimes is transferred to local courts and the *Revolutionary Tribunals* are constrained to struggling against pogroms, bribery, forgery, illegal use of the Soviet documents, hooliganism and espionage. And in 1922, the Revolutionary Tribunals are abolished.

But many exceptional jurisdictions are created as organs of the NKVD (*dvoïkas*, *troïkas* and *OSO*) or the Supreme Court (*Military Collegium*), or *Special Judicial Presences*. Between 1921 and 1953, those exceptional jurisdictions will pronounce 70% of death penalties.⁸⁶

And from 1922 to 1937, hundreds of show trials are setup in factories and localities everywhere in the USSR, in order to support a vast program of social engineering by "educating the people" against political enemies and "social problems" like pilfering or drunkenness. The trials of September-October 1937 in the countryside are initiated by an instruction of 3 August 1937, issued by Stalin personally only four days after *NKVD Order No 00447*.⁸⁷ The instruction warns the regional party organizations of the discovery of a plan of sabotage of Soviet agriculture by "enemies of the people" infiltrated in the management of collective farms, local administrations, tractor stations and district committees of the Party. It also orders the organization of two or three public trials in each district, with large press coverage and strong participation of "simple collective farm workers" as witnesses.⁸⁸

We will see later, under **c. Theatricality**, the theatrical organization of the proceedings in order to, literally, "setup" judicial proceedings.

Vyshinsky plays an important role in those jurisdictions,

- as prosecutor, as in the *Semenchuk* trial in 1936 and in the Moscow Trials of 1936-38; or
- as a judge, as *Special Judicial Presence* in the *Shakhty Trial* in 1928.

In Germany

The Nazi regime creates a profusion of special jurisdictions destined to eliminate political enemies and mentally incompetent people inside, and to crush opposition to Nazi occupation outside. They are:

- the *Special Tribunals*,
- the *People's Courts* (*Volksgerichtshof*), and
- the *Hereditary Health Courts*.

The *Special Tribunals* are reinstated on 21 March 1933, by the *Decree to Protect the Government of the National Socialist Revolution from Treacherous Attacks*, and their powers are broadened by the *Law for the Guarantee of Peace Based on Law* of 13 October 1933, and the *Law against Treacherous Attacks on the State and Party and for the Protection of the Party Uniform*, of 20 December 1934. Their number is increased from 26, in 1933, to 74 in 1942.⁸⁹ Citizens of occupied countries placed by the Wehrmacht under the authority of the Reich's department of justice are judged by *Special Tribunals*.

The *People's Court* (*Volksgerichtshof*) is created on 24 April 1934 and invested with the same powers as the former *Reichsgericht*, the Imperial Court of Justice, to hear cases concerning the most serious political crimes:

- high treason;
- treason;
- attacks on the Reichspräsident;
- particularly serious damage to military resources;
- murder or attempted murder of members of the government of the Reich or state governments.⁹⁰

It becomes a regular court with extended jurisdiction in 1936 and in 1944 it is empowered to hear the cases against the July 1944 plot against Hitler.

According to Freisler's own report on 11 January 1943, for the period from 1 January to 31 December 1942, out of the 2,573 defendants brought before the *People's Court*, 1,192 receive death sentences, 107 are acquitted and the rest are sentenced to life imprisonment or detention in prison camps.

Then, in the first six months of 1943, after Freisler has been given sole responsibility for the Court, it tries 1,730 cases, imposes 804 death sentences and acquits only 95 defendants.⁹¹

The *Hereditary Health Courts* are created by the *Law for the Prevention of Hereditarily Diseased Offspring* of 1933 to impose sterilization to "any person suffering from a hereditary disease". They are composed of three members, two of whom are close to the Nazi régime. Their decisions to sterilize can be enforced by force. Between 200,000 and 350,000 people are sterilized.⁹² The administrative infrastructure developed to support them is used later to enforce Hitler's memorandum of 1 September 1939, allowing *Aktion-T4* to euthanize between 80,000 and 100,000 people.⁹³

2. Military jurisdictions

Military jurisdictions are used in the three countries to discipline military staff, including for political errancy. But in the USSR, Stalin uses them also to eliminate his real or perceived political competitors, whether civilian or military.

According to Snegov, a survivor sentenced to "only" 18 years in labor camps:

A prisoner used to be called from his cell and taken to the yard of the Interior [Lubyanka] Prison, where he was put in a bus called 'Black Raven'. Usually several prisoners were transported together. The vehicle left through the iron gates at the back of the complex of the GUGB NKVD buildings and... moved backward into the closed narrow yard of the Military Collegium...

The accused were taken from the vehicle one by one, and brought, using the back stairs, to the second floor, where the Military Collegium was sitting. Usually the Army Jurist Vasilii Vasilievich Ulrikh presided during the 'trial'.

The hearing was short, ten minutes per person. The verdicts— usually a sentence of death by shooting for everyone— were prepared in advance. After the announcement of the verdict, the condemned was brought to the deep basement by the same stairs, and was shot in the back of the head. The executioner was the commandant on duty at the Military Collegium.

The body was dragged to the corner of the basement, where a shoe was taken off the right foot [of the corpse], and a tag made of plywood was attached to the toe. The Investigation File number was

written on the tag with a pencil. From this moment on the name of the person was never mentioned again.⁹⁴

The *Military Collegium of the Supreme Court of the USSR* is created in 1924 as one of the three colleges of the *Supreme Court*, to hear cases against high-ranking officers of the Red Army and the Red fleet, and act as appeal authority above ordinary military tribunals.⁹⁵

In June 1934, cases concerning counter-revolutionary activity under sec. 58-1, 58-6, 58-8 and 58-9 of the *RSFSR Criminal Code* are transferred from the *OGPU Collegium* to the *Military Collegium*.

Members of the *Military Collegium* are appointed by joint orders of the Justice and *NKO* commissariats.

The “trials” are held by the *Military Collegium* in accordance with the *Law of 1 December 1934*, that is within 24 hours after the communication of the indictment to the accused, *in camera*, in no more than 10 minutes per accused, without examination of the evidence and without the presence of prosecutors, defenders or witnesses.⁹⁶

During the 1930s and 1940s, Marshal Tukhachevsky and his seven co-defendants; 25 USSR commissars; 19 republic commissars; 131 brigade, corps, and army commanders; more than 100 professors from various universities and institutes; and over 300 directors of the most important industrial plants, among others, are sentenced to death.

During the Great Terror, in 1937-38, the *Military Collegium* is in charge of the repression of the Communist Party leaders, including the trials of Zinoviev, Kamenev, Bukharin and Yezhov. It hears 44,465 cases, 85% of whom are sentenced to death after Stalin and *Politburo* members have ordered the verdict in advance, by their own hand in “binders” containing the names of the individuals to be sentenced.⁹⁷ And between 1941 and 1945, the *Military Collegium* pronounces more than 471,000 convictions on the basis of article 58.

Although he is formally responsible to the chairman of the Supreme Court, Ulrikh knows who his real boss is. As he writes to Stalin :

Although formally the Military Collegium is part of the Supreme Court, in fact it acts as an independent court... While hearing the cases on treason against the Motherland, preparation of terrorist acts, espionage, and diversions, the Military Collegium has been and still is working under the *direct* [italics in the original] guidance of the highest directive organs.⁹⁸

That is Stalin and the *Politburo*.

3. Secret police jurisdictions

In the three dictatorships, police forces are absorbed into the political security forces to develop into a tentacular repressive system which creates its own administrative mechanisms of repression. This is the story of the *SS*, the *Gestapo*, the *Kripo*, the *Orpo*, the *droïkas*, the *troïkas* and the *OSO*: the administrative terror machine.

We refer you to the book *Devil's Advocates* for more details about the first four.

The *dvoikas* and *troikas*

The best way of envisaging the *dvoikas* (“two members”), *troikas* (“three members”) and the *NKVD Special Board (OSO)* is as bureaucratic committees endowed with power of life or death. It is precisely their absence of judicial status which renders them so lethal.

Dvoikas are extrajudicial commissions created by NKVD Order No 00485 *On liquidation of Polish sabotage*, composed of two persons: a Committee of the People's Commissar for Internal Affairs (chief of the NKVD) and the Procurator or adjunct-procurator of the USSR. They are supervised by the NKVD's *Special Board*, led by Yezhov, and the Prosecutor general of the USSR, led by Vyshinsky, who confirm the verdicts issued by the *dvoiki*. From time to time, Yezhov and Vyshinsky browse themselves the “albums”: on 10 January 1938, they confirm 1,667 convictions; on 14 January, 1,569; and on 21 January, 2,164.⁹⁹ The same procedure is applied to all other national operations of 1937-1938: German, Latvian, Finnish, Estonian, Romanian, Greek, and others. And in September 1938, the process is accelerated: regional NKVD units are ordered to set up *Special Troikas*, or *troikas*, mandated to dispose locally of the cases concerning “national operations”.

The *OSO*

The *Special Board of the NKVD (OSO)* is created on 10 July 1934, by the same decree as the NKVD. It remains attached to the secret police whatever the latter's change of name. It is composed of the NKVD Commissar and two of his deputies. The Chief Prosecutor of the USSR, thus Vyshinsky after his nomination as Procurator General of the USSR in 1935, or his deputy attends the sessions. The sessions are held without the defendant and in secrecy. Decisions are typed by the *OSO* secretariat before the sessions, on the basis of pre-approved indictments written by NKVD investigators. Cases are those which are investigated by the NKVD under art. 58 or 59 of the *Penal Code* and cannot be heard by civilian or military courts “because of operational reasons”. Practically, those are cases which could not stand in an open trial and in which the NKVD does not want to identify its informants.

The meeting of the [NKVD] Special Board took place in an office on the so-called Narkoms' Floor [i.e., where Commissar Beria's huge office was located]. The office was small, and the walls were painted a deep crimson color. Curtains on the windows were closed.

To the left from the window, there were two desks positioned perpendicular to each other; on them were desk lamps, turned on. [Sergei] Kruglov, deputy NKVD Commissar, was sitting behind one of the desks, and [Viktor] Bochkov, USSR Chief Prosecutor, was behind the other...

There was a row of chairs in front of the desks occupied by investigators who would make presentations of their cases... Each of them held a sheet of paper (some had several sheets) with a number that corresponded to the number in the files that were lying in front of the two members of the Special Board.

After the Deputy Commissar called my number, I (as well as the other investigators in their turn), was obliged to say the following: “‘N’ is accused under Article 58-6 of the Russian Federation Criminal Code of espionage for German intelligence. He pleaded guilty, which is confirmed by such-and-such investigation materials.” My presentation took no more than a minute. The Deputy Commissar suggested sentencing ‘N’ to a 10-year imprisonment. The prosecutor agreed, and the fate of the accused ‘N’ was sealed. I left the room.

Description of an *OSO* procedure ¹⁰⁰

The *OSO* meets twice a week, hearing about between two and three hundred cases per session, which will increase later to as many as 980 cases.

The *OSO* sentences automatically the family members (*chisly*) of those who had been condemned to death by the *Military Collegium* as “traitors” or “spies”, under NKVD Order No 00486.

In twenty years, the *OSO* sentences close to half a million people, most of them to camps and half of them between 1941 and 1945.

b. Terrorist institutions

Exceptional jurisdictions are fed by terrorist institutions, which are sometimes empowered to exercise themselves judicial functions by administrative mechanisms. The *Comity of General Safety*, the NKVD, the RSHA and the *Gestapo* have many things in common. The most important one is that, although legally they are responsible before the legislative assembly, in reality they are answerable only to the Boss, the ruler of the day.

Concerning the *Comity of General Safety*, the NKVD and the RSHA, we refer you to the book *Devil's Advocates* for more details, but we will see hereafter some aspects of the relationships between the Terrorist institutions and the Procurators.

The relationships with the Procurators

The relationships between those repressive jurisdictions and the Procurators are essential: they feed each other and work together to eliminate “enemies”. But they are also complex or even brutal, since the intensity of the administrative and individual competition is enormous, as wanted by the Ruler.

An example: the office of the Procurator General of the USSR. It is created in 1936 and is responsible for all public procurators offices and the supervision of their activities in the Soviet Union. According to the *1936 Constitution*, the Public Procurator controls, indirectly through subordinate public procurators, the execution of laws by ministries and their subordinate establishments, administrative bodies of local Soviets, cooperatives, officials, judges in court proceedings, and citizens on behalf of the state.¹⁰¹ The Procurator General is appointed by the Supreme Soviet of the USSR for a 7-year term, his deputies and the Procurator General of the Military are appointed on his recommendation by the Presidium of the *Supreme Soviet of the USSR*. The Procurator General appoints public procurators of the Soviet republics and, on their recommendation, the local public procurators at the levels of republics, krais and oblasts. He also issues orders and instructions for all public procurators.¹⁰²

Thus, as Procurator of the RSFR (1931-1935) and then Procurator General of the USSR (1935-1939), Vyshinsky and his subordinates work closely with the representatives of the political police at all

administrative and geographical levels. For example, in 1936 Yagoda, as Head of the *NKVD*, works closely with Vyshinsky, as Procurator General, in the organization of the trial of the *Anti-Soviet Trotskyist Center* which results in the execution of Zinoviev and Kamenev.¹⁰³

The closeness of the relationship does not prevent bitter competition, as evidenced in correspondence between Vyshinsky¹⁰⁴ and Yagoda¹⁰⁵ through Stalin in 1936, just before Yagoda's arrest and his replacement by Yezhov.

The closeness of the relationship between the élites goes both ways: to and from the Procuracy.

In one way, heads of the political police can become Procurators, as in the case of Pyotr Krasikov and Ivan Akulov, Vyshinsky's predecessors as Procurator General. And in the other way, in the small world of the Bolsheviks in the 1920s and 30s, procurators are also *related* to political police officials.

For example, Ida Averbakh,¹⁰⁶ who is the niece of the revolutionary leader Sverdlov. She becomes Assistant Prosecutor of Moscow and writes an idealization of the Gulag, *From Crime to Work*,¹⁰⁷ edited by Vyshinsky. But she is also Yagoda's wife and, in 1938, she shares his fate after his condemnation to death in the *Trial of the Twenty-One*, the third Moscow Trial prosecuted by Vyshinsky.



Ida Averbakh and Genrikh Yagoda, 1922¹⁰⁸

As a general rule, familial proximity in the top political/judicial échelons is deadly dangerous. An example: Mikhail Frinovsky, who is appointed as head of the border and internal troops of the *NKVD* under Yagoda, is then appointed deputy-chairman of the *NKVD* a month after Yagoda's arrest. He then sets up with Yezhov the 383 "albums" of party members submitted to Stalin before their trial in the *Military College of the Supreme Court* in 1937-1938, when 117,000 Party members are arrested by the *NKVD*, 39,000 of whom

executed through the album process.¹⁰⁹ Frinovsky himself is arrested in 1939 and executed in 1940, as well as his wife Nina and their 17 years old son Oleg.

c. Terrorist judiciary

Fanatical judges and prosecutors

In the three regimes, judges and prosecutors are selected for their political opinions and not their legal competence, without debate. As witnessed by this debate at the highest level of the State, in the Politburo:

When Bukharin explains, with factual evidence in support, that he did not meet Trotskyists, when he points out the contradictions of his various accusers, when he demonstrates the inexistence of the facts with which he is accused, his colleagues from the Politburo reply to him that "the facts prove nothing" because Bukharin "stinks politically". "You are a political hypocrite," Molotov told him, "and we are now going to prove this political hypocrisy legally." ¹¹⁰

The consequences are deadly: according to recent research, the depth of the ideological commitment of the judge to the Nazi Party worldview was an important determinant of the imposition of the death sentence. Judges who were more ideologically committed to the Nazi Party were more likely to impose the death sentence on those who belonged to the most organised political opposition groups to the Nazi state:

- those whose acts of treason or high treason involved violent resistance against the state, and
- those with characteristics to which Nazism was intolerant. ¹¹¹

Some examples of French and Soviet judges:



Martial Herman

Martial Herman

Herman is President of the *Revolutionary Tribunal* from August 1793 to April 1794. He presides the trials of Marie-Antoinette, the Girondins, the Hébertists and the Dantonists. He then acts as minister of the Interior, and minister of the Interior and Justice until the crisis of 9 Thermidor.



Leonid Zakovsky ¹¹²

Leonid Zakovsky

Zakovsky is one of the founding members of the *Cheka* in 1917, in which he suppresses anti-communist rebellions in Astrakhan, Saratov, Kazan, etc. In 1926, he is appointed head of the *OGPU* in Siberia, where he enforces Stalin's orders to seize grain from farmers who are unwilling to sell. ¹¹³ In 1928, he is head of the *troika* system, where he imposes reprisals against peasants who resist the confiscation of their property. Under his direction, in 1930 the *troikas* pronounce 16,553 convictions, out of which 4,762 to death (28.8%) and 8,576 to labor camp (51.8%). ¹¹⁴ In 1932, he is appointed head of the *OGPU* in the Belorussian Soviet Republic. In 1935, he is head of the Leningrad *NKVD*, where he organizes the secret trial of the *Leningrad counter-revolutionary group of Safarov, Zalutsky and others* against supporters of Zinoviev, and the mass deportation of 11,702 'Leningrad aristocrats'. He is then promoted to Commissar of State Security, First Rank. In 1937, he denounces his former boss, Yagoda, for impeding investigations and repression against oppositionists in the Party, and starts a purge of the Leningrad party. In 1937, he is awarded the Order of Lenin and he writes a guide on torture. ¹¹⁵ He is said to have boasted that if he had Karl Marx to interrogate he would make him confess to being an agent of Bismarck. In January 1938, he is transferred to Moscow as First deputy head of the *NKVD*, second to Yezhov, where he kills the head of the *NKVD* foreign department, Slutsky, and tortures his former boss Yagoda to oblige him to confess that he is a terrorist. In April 1938, his origin as a Latvian and his association with Yagoda place him in the sights of the new boss, Beria, and of Order No. 49990, the "Latvian Operation". He is sacked, arrested, accused of being a member of the "Yagoda conspiracy" and organizing a Latvian clique in the *NKVD*, tortured and, finally, shot on 29 August 1938 on the orders of his successor Frinovsky who wants to prevent his predecessor from incriminating him.

And, of course, Andrei Vyshinsky and Roland Freisler.

ii. Pliant or amateurish judiciary and prosecutors

The second worst case scenario is the pliant or amateurish judge. The first is most common in Nazi Germany and France; and the second, in Soviet Russia.

In the three countries, a similar chronological scenario is discernible.

First, the support of lawyers and judges to the change of regime.

Second, a distancing between the legal establishment and the ideologically driven revolutionary parties.

Third, institutional replacement, through the control of judicial careers or judicial decisions.

Judicial careers can be controlled in three ways:

1. the firing of moderate judges and their replacement by more ideologically pliant ones, as in France through the election of judges, or the replacement of Montané by Herman.
2. The firing of all judges and their replacement by ideologically close ones, as in Russia in 1918.
3. The creation of new jurisdictions, such as the *Volksgerichtshof*, or the soviet courts in 1935 in which 85% of the new magistrates have only a secondary education and 90% only 3 months of training.

Judicial decisions can be controlled ideologically, for example in France by obliging judges to deliberate and opine publicly.

Fourth, case by case manipulation, as in the case of *Danton* in 1793.

Fifth, the abandonment of legal practise. For example, in Moscow after the Revolution 90% of lawyers abandon legal practise. And in the late 1930s, about 160 lawyers in Moscow alone are accused of counterrevolutionary plots, sentenced to death, and shot; several die in custody; 60 are sent to labor camps or exiled to far-away Russian regions.¹¹⁶

Sixth, repression. For example, in France during the Terror, lawyers and judges are systematically targeted as potential opposition. First, they are denounced as political enemies by their former colleagues such as Robespierre, Couthon and Barrère. Then, they are targeted administratively by the obligation to produce a “certificate of civic mindedness”. Finally, they are accused and tried before the *Revolutionary Tribunal*. Lawyers and judges are the most represented professional category of victims of the bloodbath during the Terror: 433 of them are arrested, judged and guillotined, representing 3% of the 14,080 victims of the Terror.¹¹⁷

Seven, opposition. For example, in France on 2 September 1941, judge Paul Didier refuses to swear the oath of fidelity to Marshall Pétain. As we will see later, he is suspended, revoked and sent to a prison camp. In Russia, in 1922 for the *trial of the Socialist Revolutionaries* in 1922, three of the nine defense lawyers have acted in defense during the tsarist regime. One of the three is Nikolai Muravyov, one of the founding members of the Political Red Cross which rescued or provided material help to political prisoners until 1935.

Eight, collaboration. Collaboration can be motivated egoistically, by one’s hope for amelioration, or ideologically, by one’s support to the regime.

There is a sharp contrast between the French and Soviet situations, on the one hand, and the Nazi one, on the other.

In France and Russia, there is little collaboration between the regime and the judges: judges are simply eliminated for their political and legal opinions when those are simply perceived to be in opposition or merely critical of the régime. On the other hand, judges in special courts such as the *Section Spéciale de la Cour d'appel de Paris* (Special Section of the Paris Court of Appeal) created in 1942 to judge and sentence to death communists, are selected for their devotion to the State. ¹¹⁸

Whereas in the Nazi regime, judges are slowly, but efficiently, coopted until most become collaborative or partisan.

iii. Absent or pliant Bars and Law professors



“Defense” attorney addressing the Court in the trial of Semenchuk and Startsev (1936) ¹¹⁹

In most political jurisdictions such as *Volksgerichtshof* or *Special Judicial Presence*, lawyers are selected for their political opinions as Nazis or Bolsheviks.

After the elimination of politically non-compliant lawyers, professional organizations are also politicized. For example, in the spring of 1933, the *Federation of National Socialist German Jurists* vows solemnly that it would "never cease to demand that Jews must be utterly excluded from all forms of legal life".

For legal practitioners, such statements have two important consequences.

- first, they can no longer represent the interests of their clients; and
- second, after Noack's report, on 25 September 1930 the fifth decree for administering the *Reich Citizenship Law* revokes the right to practice of all remaining "non-Aryan" attorneys and demotes them to the status of "Jewish legal advisers" who are permitted to act only on behalf of Jewish clients. ¹²⁰

Thus, they no longer defend their "clients" but they opine in their guilt, like Ilya Braude about Knyazev's defense in the *Trial of the seventeen, Parallel anti-Soviet Trotskyist Center* of January 1937:

Comrade Judges, I am not going to conceal from you the exceptionally difficult and immeasurably hard position a counsel for the defence finds himself in this case. After all, a counsel for the defence,

Comrade Judges, is first and foremost a son of his Motherland, he is also a citizen of the great Soviet Union, and the feelings of great indignation, wrath, horror which all our country, both young and old, are now seized with, the feelings which the Prosecutor expressed so clearly in his speech, these feelings are inevitably shared by the counsels for the defence as well.... I am defending Knyazev, the head of the railway, who in order to please the Japanese Intelligence Service derailed trains carrying workers and Red Army men. ¹²¹

Alternatively, they refuse on the basis of political arguments to protect them after the verdict, as illustrated vividly by Arthur London in his biography *The confession* :

That's when the lawyers arrive. First contacts of defenders with their clients ... When they are already condemned ! ... With a rapid flow, they tell us that they have just consulted the most knowledgeable personalities and that they strongly advise against appealing. "You do not realize the situation that exists outside. There are trucks full of resolutions arriving from all corners of the Republic, emanating from factories, administrations, villages, which demand the death penalty for the fourteen. Moreover, is the international situation not very serious? Eisenhower has just been elected president of the United States. We are on the threshold of a new war. (My translation) ¹²²

iv. Absence of review

Another important common characteristic of the three regimes is that in all, parliamentary review of judicial activities has been suppressed.

d. Terrorist proceedings

An individual was arrested as a suspect. The official report of his arrest was drawn up at the committee of surveillance of his Section. This document contained the cross-examination he had undergone before the members of that committee. The accused person was then sent, with the documents relating to him, before the Committee of General safety, where he was again questioned. Thence he was despatched to the Revolutionary Tribunal. The documents were sent by the Committee of General safety to the Public Prosecutor, who examined them, made a summary of the facts, arranged the charges, quoted the incriminating words or writings, noted the denials of the accused. In a word he drew up his indictment. He took care to indicate that the accused person acted " wickedly and intentionally " with a view " to provoke the national dissolution and the re-establishment of royalty." In consequence, he demanded that the assembled Tribunal should grant him a writ of indictment, that the person of the accused be seized, and that he be entered on the gaol-book of the house of detention of the Conciergerie, to remain there as in a house of justice. At the hearing of the case before the Tribunal, Fouquier-Tinville supported the accusation. If the declaration of the jury were negative, the accused was set at liberty, at least unless Fouquier demanded his detention in prison as a measure of general safety. (We shall see that in this way some accused persons, such as Freteau, were acquitted by the jury, to be rearrested afterwards by Fouquier, again brought before the Tribunal,

and this time condemned.) If the declaration of the jury were affirmative, the Public Prosecutor moved that the law be applied, which meant sending the prisoner to the guillotine. (My translation)¹²³

One of the fundamental attributes of the Devil's Advocates is their deliberate use of terrorist proceedings, deliberately ignoring the most fundamental constitutional protections, such as the right to be heard, or to an impartial tribunal. We will see now several practical illustrations of terror trials in France, the USSR and Germany.

Terror trials in France

During the first months of its existence, the court strictly observed judicial procedures and applied in all respects the procedure in force in the ordinary criminal courts. The trials were conducted following examinations for discovery, witness statements and investigations aimed at gathering evidence, mainly consisting of documents from the General Security Committee and local authorities, letters of denunciation written by individuals and papers found in the suspects' homes. (My translation)¹²⁴

But one can see in October 1793 a sudden and brutal increase in the numbers and nature of sentences pronounced by the *Revolutionary Tribunal* between April 1793 and May 1794.

NUMBER AND NATURES OF SENTENCES PRONOUNCED BY THE <i>REVOLUTIONARY TRIBUNAL</i>									
	TOTAL JUDGED	Discharges	Acquittals	Death	Deportation	Detention	Forced labour	Referral to another jurisdiction	Banishment
6 April to 21 October 1793	349 (12,5/week)	130	214	92 (26,4% of sentences; about 60/month)	14	14	8	7	
22 October 1793 to 9 June 1794	2,009 (60,7/week)		756	1,167 (58,1% of sentences)	20	29	20	15	2

Jan-Feb			106	about 60/month					
Feb-March			59	116					
April-May				354					

Sentences pronounced by the *Revolutionary Tribunal*¹²⁵

In political trials in particular, basic legal protections are ignored and procedures turned against the accused. Two examples: the trials of *Queen Marie-Antoinette*, and *Danton and the Indulgents*. In both, the President and the Chief Prosecutor of the Revolutionary tribunal use a succession of vicious and illegal tricks to exhaust, disconcert and discredit the accused.¹²⁶

In the case of Marie-Antoinette,

- many accusations are founded on rumor or hatred;
- the President, Hermann, and the jury have been selected for their partiality;
- her lawyer is appointed late, sees her only the day before the trial and isn't given the time to read the whole file before the trial.

She is sentenced to death and executed the next day.



Sketch of Marie-Antoinette Queen of France driven to her execution, by painter David¹²⁷

In the case of Danton and the *Indulgents*, the procedure is a cascade of procedural and substantive irregularities:

- **by the President Herman:** personal partiality against the accused, refusal to call defense witnesses, refusal to let the defendants speak, exclusion of the accused from the public proclamation of the verdict and sentences;
- **by the Prosecutor Fouquier-Tinville:** prior screening of jurors, amalgamation with other accused (ex. robber and bankers), absence of real indictment, absence of material evidence;
- **by the President and the Prosecutor:** they exert secretly pressures on the jurors while they are deliberating, and they obtain secretly a decree from the Committee of Public Salvation prohibiting public debates and pleadings by the accused;
- **by members of the Committee of General Security,** who are standing behind the jurors.

Danton is sentenced to death *in absentia* and immediately executed.



Danton going to his execution, drawing from Wille ¹²⁸

Terror trials in Russia

The Bolsheviks organize two categories of highly irregular “trials”:

- economic trials: from 1922 to 1932, in order to deflect the public’s attention from the disastrous economic policies; and
- political trials (*Moscow trials*): from 1936 to 1938, in order to eliminate the possible opponents to Stalin’s seizure of power, including the top military officers.

The reader will find hereafter two tables summarizing the economic trials and the Moscow trials.

The economic trials

Socialist Revolutionaries (1922)	Elimination by Lenin of the Party of Socialist Revolutionaries. During the trial, a “public protest” takes place in Moscow to support the proletarian court and demand the execution of the accused. Based on the retroactive application of the <i>1922 Criminal Code</i> .	10 sentenced to death, none shot	Presided by Pyatakov; prosecuted by Krylenko
Engineers, <i>Shakhty</i> trial, (1928)	55 engineers and managers tried for “wrecking” the Soviet economy	11 sentenced to death, 5 shot	presided by Vyshinsky; prosecuted by Krylenko
Scientists (1930)	8 scientists holding key posts in the State Planning Commission (Gosplan) and the Supreme Economic Council	5 sentenced to death, none executed	presided by Vyshinsky; prosecuted by Krylenko
<i>Industrial Party Trial</i> (1930)	11 economists and engineers for forming the anti-Soviet "Union of Engineers' Organisations"	5 sentenced to death, none executed	presided by Vyshinsky; prosecuted by Krylenko
Mensheviks (1932)	14 economists of the Gosplan for setting up the "All-Union Bureau of Mensheviks" counterrevolutionary group in Gosplan in 1923 to try to "influence the economic policy of the Soviet authorities"	14 sentenced to imprisonment from 5 to 10 years	presided by Shvernik, prosecuted by Krylenko

And,

The Moscow trials			
Trial of the Sixteen, Anti-Soviet Trotskyist Center, August 1936	16 including Zinoviev, Kamenev, Yevdokimov, accused of forming a terrorist organization for the purpose of killing Stalin and other members of the Soviet government. On 31 March 1936, Stalin instructs Yagoda and Vishinsky to submit a concrete proposal on the trial of suspected	16 sentenced to death	presided by Ulrikh; prosecuted by Vyshinsky

	<p>Trotskyite underground terrorist groups, of whom they give 82 names. In July, after an all-night interrogation, Kamenev and Zinoviev agreed to go on trial with the condition that Stalin would promise to spare their lives in the presence of the whole <i>Politburo</i>. Stalin answers "that goes without saying", but the <i>Politburo</i> seized of the issue is composed only of Stalin, Voroshilov and Yezhov. Smirnov confesses only after intense interrogations and threats against his family. During the trial, behind the defendants there is a door, with an area where Yagoda and Vyshinsky can discuss with the accused to criticize their performances and give them instructions. When the court withdraws to consider the verdict, Yagoda has prepared it for them in the Council Chamber. A few hours after the conviction, Stalin orders their execution that night. Vyshinsky as Procurator-General was meant to attend important executions but was said to be so squeamish that he usually sent one of his chief investigators, Lev Sheinin.</p>		
<p>Parallel anti-Soviet Trotskyist Center, January 1937</p>	<p>17, amongst whom Radek, Pyatakov, Sokolnikov, accused of being Trotskyists. When Stalin briefs Vyshinsky on the trial, he addresses the accused thus: "You lost faith"—and they must die for losing it. He tells Beria: "An Enemy of the People is not only one who does sabotage but one who doubts the rightness of the Party line. And there are a lot of them and we must liquidate them."</p>	<p>13 sentenced to death; 4 to labor camp</p>	<p>presided by Ulrikh; prosecuted by Vyshinsky</p>
<p>Trial of the Generals, June 1937</p>	<p>9 top ranking officers including Tukhachevsky, Iakir, Uborevich, Kork, Eideman, Feldman, Primakov and Putna, are accused of conspiracy as a military-Trotskyite organization operating on the instructions of the German High Command and Trotsky, linked with men already executed and others still to be convicted (Bukharin, Rykov), as well as wrecking, sabotage and terror. Before the trial begins, the accused are beaten into making incriminating statements against their 7 military judges in the</p>		<p>presided by Ulrikh as Special Judicial Presence with 7 generals (5 of whom will be shot within 18</p>

	<p>Special Presence. On 7 June, before the investigation ended, Vyshinsky and Yezhov see Stalin, Molotov, Kaganovich and Voroshilov to acquaint them with the indictment that Vyshinsky has compiled before the end of the investigation and make the necessary corrections. Stalin's instructions are carried out the very same day, and the final text of the indictment is edited and printed. Only then are the arrested military commanders formally charged, and the aim of the ensuing interrogations is to get their answers to fit the formulas Stalin has put in the indictment. After a one-day hearing, the Special Presence pronounces its judgement. Late in the evening, Ulrikh visits Stalin, who, in the presence of Molotov, Kaganovich and Yezhov, orders him to execute all the defendants.</p>		<p>months); prosecuted by Vyshinsky</p>
<p>Trial of the Twenty-One, Anti-Soviet "Bloc of Rightists and Trotskyites", March 1938</p>	<p>21, including Bukharin, Rykov, Krestinsky, Yagoda and 3 Kremlin doctors, accused of murdering Gorky, attempting to murder Lenin and Stalin from 1918, plotting the dismemberment of the USSR, espionage, wrecking, undermining Soviet military power, provoking a military attack on the Soviet Union, and overthrowing the social system in favor of a return to capitalism. Bukharin's confession has been personally amended by Stalin and given for him to sign. Krestinsky refuses to confess but is then removed and tortured so as to confess the next day. Stalin prepares personally the stenographic record of the trial for publication and edits the speeches, deleting words used by the deceased and writing in others.</p>	<p>18 sentenced to death; 3 to imprisonment between 15 and 25 years</p>	<p>presided by Ulrikh; prosecuted by Vyshinsky</p>
<p>Trial of the Sixteen, Anti-Soviet Trotskyist Center, August 1936</p>	<p>16 including Zinoviev, Kamenev, Yevdokimov, accused of forming a terror organization for the purpose of killing Stalin and other members of the Soviet government. On 31 March 1936, Stalin instructs Yagoda and Vishinsky to submit a concrete proposal on the trial of suspected Trotskyite underground terrorist groups, of whom they give 82 names. In July, after an all-</p>	<p>16 sentenced to death</p>	<p>presided by Ulrikh; prosecuted by Vyshinsky</p>

	<p>night interrogation, Kamenev and Zinoviev agreed to go on trial with the condition that Stalin would promise to spare their lives in the presence of the whole <i>Politburo</i>. Stalin answers "that goes without saying", but the <i>Politburo</i> seized of the issue is composed only of Stalin, Voroshilov and Yezhov. Smirnov confesses only after intense interrogations and threats against his family. During the trial, behind the defendants there is a door, with an area where Yagoda and Vyshinsky can discuss with the accused to criticize their performances and give them instructions. When the court withdraws to consider the verdict, Yagoda has prepared it for them in the Council Chamber. A few hours after the conviction, Stalin orders their execution that night. Vyshinsky as Procurator-General was meant to attend important executions but was said to be so squeamish that he usually sent one of his chief investigators, Lev Sheinin.</p>		
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The economic trials and the Moscow Trials

Vyshinsky's performance as Chief prosecutor of the USSR in the Moscow trials is particularly abject, as shown in the video on the author's website : *Devil's Advocates - Moscow Trials - Vyshinsky at Bukharin Trial 1938*.

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Terror trials in Germany

We will summarize two particularly significant categories of political trials, those of the plotters of the bombing against Hitler on 20 July 1944, and those of ordinary citizens.

The Plot of 20 July 1944

After the failed attempt to kill Hitler on 21 July 1944, the plotters are tried on 8 August 1944 before Freisler in the *People's Court*. The verdicts, delays and method of execution - hanging by piano string to a butcher's hook - are decided in advance by Hitler.

The accused are humiliated by wearing dirty clothing and being kept dirty themselves. The audience is entirely Nazi. And Freisler uses the opportunity to humiliate and scorn the accused.

On 20 August 1944, Kaltenbrunner reports to Hitler on the contrasted effects of Freisler's presidency of the *Volksgerichtshof*:

The President's sharp, often ironical and extremely quick-witted manner was received by broad sections of the workforce with enthusiasm and satisfaction. The President's criticism of the criminal intentions of the accused was completely in accord with the indignation of the public over this base deed. The details of the preparation for the assassination attempt were discussed with particular revulsion, especially the traitors' previous plan to carry out the attempt during an exhibition.¹³⁰

But 'the intelligentsia and legal professionals' comment that the 'cheap way' in which the President insulted and ridiculed the defendants was 'unbecoming to the highest German court' and reminded many of the Soviet show trials:

In particular, there have been objections to the President engaging in a discussion with the defendant Hoepner on whether the word 'Schweinehund' or 'ass' most aptly described him [Hoepner].¹³¹

Freisler's performance as President of the *People's Court* is particularly abject, as shown in the video on the author's website: *Devil's Advocates - Examination and cross examination by Freisler of Schwerin von Schwanenfeld*.¹³²

Ordinary people

We will see in **D. The victims** the categories of victims targeted:

- Political enemies: the old order
 - o the nobility,
 - o the clergy,
 - o the communists,
 - o the old élites,
 - o the dehumanized: Jews, Poles, etc.,
 - o the forced laborers.
- Political competitors:
 - o the new patrons,
 - o their clients.
- Power competitors :
 - o the military,
 - o the idea-makers: the artists.
- Enemies of circumstances :
 - o engineers,
 - o doctors,
 - o water managers,
 - o economic offenders.
- Imagined enemies :
 - o prisoners,
 - o freed prisoners,
 - o minors,
 - o innocents and incompetents,

- lovers,
- drunks,
- women.

C. The techniques of Judicial Terror

The Devil's Advocates employ a huge array of terrorization techniques, which can be divided into two general categories:

a. Techniques implying an appearance of legality:

- i. vagueness of accusations,
- ii. confusion of criminal and political offences: abuse of law (détournement du droit),
- iii. confusion of investigation and prosecution,
- iv. tardiness of communication of the file,
- v. restriction to right to defend oneself,
- vi. limitation or manipulation of hearings,
- vii. substitution of propaganda to legal motives,
- viii. pressures on judges or jurors,
- ix. political offences,
- x. lack of evidence,
- xi. destruction, or silencing, of evidence,
- xii. inefficient or wrong rules of evidence, including the absence of intent,
- xiii. maximization of sentences,
- xiv. guilt by association,
- xv. retroactive application of criminal law,
- xvi. manipulation or incompetence of administrative process.

b. Techniques outside of the Law:

- i. confession or punishment by torture, spying or pressures on family,
- ii. false or exaggerated accusations, falsification of evidence, false witness, public or accused,
- iii. describing the accused with words of negative connotation
 - a. insulting,
 - b. silencing,
 - c. humiliating,
- iv. sentencing without trial, or false sentencing,
- v. confusion of innocent and guilty accused ("amalgame"),
- vi. verdict decided in advance, partiality and theatricality,
- vii. disappearance,

- viii. execution without trial,
- ix. secret communication with repressive institutions,
- x. abuse or lack of jurisdiction, incl. substitution of political decision to judgment,
- xi. defilement of body,
- xii. physical exhaustion of the accused,
- xiii. quotas of guilty accused.

We refer you to the book *Devil's Advocates* for specific examples concerning each technique.

But all have in common the deliberate setup of the proceedings as *theatrical events*.

c. Theatricality

The Soviet court should, above all, persuade, prove and subordinate the public attention to its moral influence and authority. ¹³³



Soviet Show Trial ¹³⁴

“Show trials” are exercises in “public education”, that is political propaganda **framing** the accused and the public psychologically, physically and socially in order to create a new “truth”. In other words, justice is a cognitive exercise.

To convince himself or herself, the reader should look at the videos on the author’s website:

- *Devil's Advocates - Examination and cross examination by Freisler of Schwerin von Schwanenfeld*
- *Devil's Advocates - Moscow Trials - Vyshinsky at Bukharin Trial 1938* ¹³⁵

The most elaborate model of “theatricalization” is the Moscow Trials of 1936-1938, which we will analyze now.

On the psychological plane, “confessions” are obtained in two steps: breaking resistance and imposing collaboration.

First, the resistance of the accused is broken

- *physically*, by sleep deprivation, endless walking, beating, drugging, etc.; and
- *psychologically*, by false promises of leniency, threats against his or her family, manipulation of interpersonal conflicts, voluntary or desperate “revolutionary sacrifice”, etc.

Second, the accused is *forced to memorize and regurgitate the script* prepared in advance by the NKVD in accordance with its present objectives and ideology, which are constantly changed by the Ruler to impose fear.

Public confession is an extraordinarily efficient, and painful, method of intellectual and social suicide, as testified by Fedorov in tears:

Today the circumstantial testimonies of Mr. Oren, London and Lobl leave no doubt: When I had learned everything by heart, we proceeded to a rehearsal. My “personal rapporteur”, a decent man [...] asked me questions which I answered. I remained standing as if in court, while he took care of the staging. He told me if I spoke loud enough, too slowly or too fast. The terrible thing was that I was not even aware of my humiliating and stupid position.¹ That the thesis of the ultimate revolutionary sacrifice is a simplification, if not a mystification, we have moreover two proofs a contrario. On the one hand, in the Soviet Union, men who were not Communists and therefore had no reason to trample on their honor for the Cause “confessed” in the same terms and in the same tone as the old men had to confess. Bolsheviks of the Great Trials: I confess my guilt. I am guilty of having been a member of the Central Committee of the Industrial Party, of having served on the governing body of a group of industries, of having inspired, contemplated and recommended the adoption of measures of sabotage which disintegrates to a greater or lesser extent the functioning of our industry.

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The failures of the early political trials have obliged the NKVD to perfect its techniques, including the staged repetition of the trials without the accused’ knowledge. According to General Bogoutsky to Alexander Weissberg:

A Chekist told me something that I refused to believe but which sheds light on things if it is true. He got close to me. “We apparently made repetitions of these trials. The room was filled with Guepeou agents. Some were disguised as foreign journalists. During these rehearsals we tested the confidence that we could have in the accused at the time of the real hearing. The session was short. The accused were asked if they admitted to being guilty. Anyone who changed their testimony was subjected to torture and then shot.”¹³⁷

The physical and social staging of the proceedings are based on techniques created at the same epoch by “avant-garde” soviet drama and cinema:

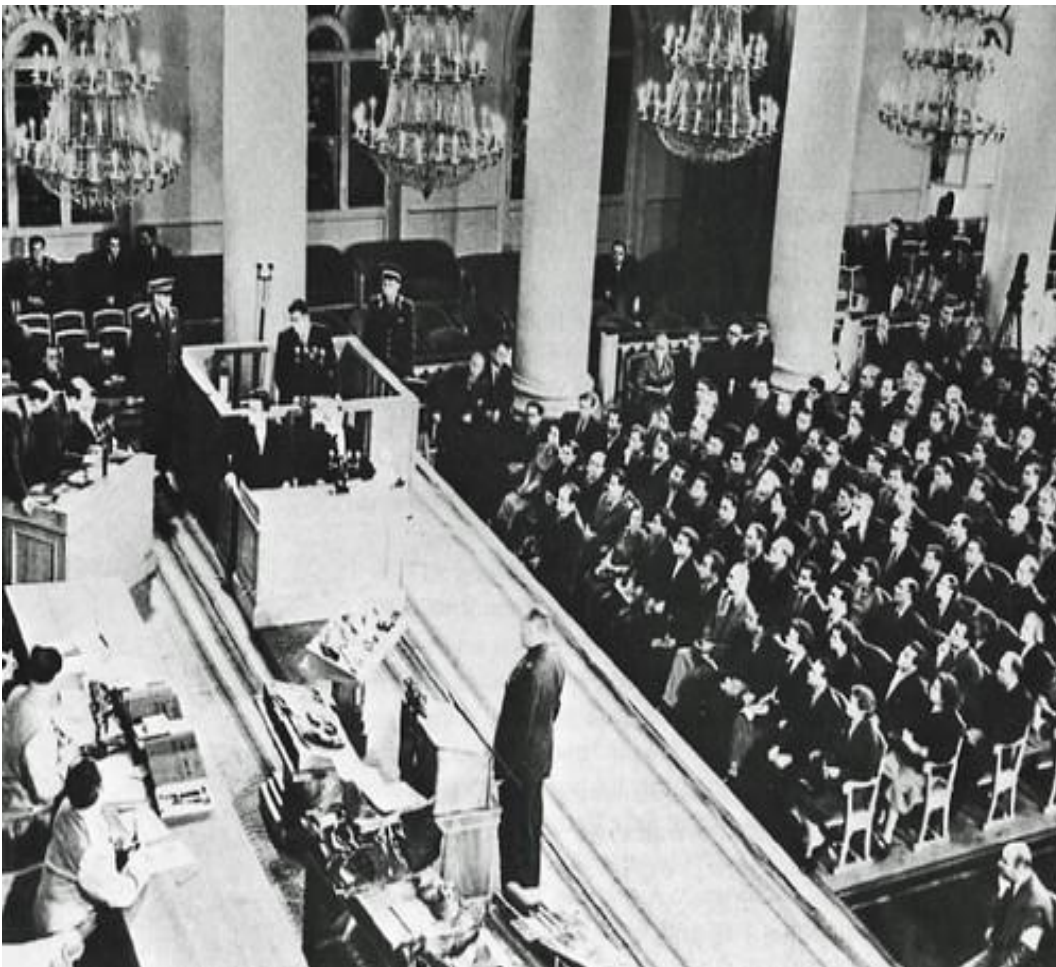
- choice of the *place of the trial* as a symbol of socialist majesty or production;
- choice of the *clothing of the participants* to the trial;
- manipulation of the proceedings to remain within a *pre-ordained time-script*;
- *obligation imposed on the public to assist and to comment* publicly within a politicized labor context;
- *substitution of political police to the public* if there is a risk of contradiction;
- organization of *public rallies and media propaganda* against the defendants.

The staging is organized at the macro and micro levels: the macro-structure and the micro-structure.

The macro-structure

The macro structure is the courthouse and the courtroom. In Moscow, the courthouse is the former club of the high aristocracy under the Tsarist regime. In Paris, the courthouse varies according to the accused: Marie-Antoinette is judged in the Conciergerie, like common criminals. Danton is judged in the Great Chamber of the Parliament.¹³⁸

Hereafter, the trial of Francis Gary Powers in 1962, in the same courtroom where the Moscow Trials were in held in 1936-1938:



Show trial of U2 Pilot Francis Gary Powers (1962)¹³⁹

The stage designers had turned the October Room into a revolutionary court, decorated in different shades of red. The judge's desk was covered with bright red cloth. There were monumental chairs embossed with the arms of the Soviet Union. The defendants were near the right-hand wall, behind a wooden barrier. In back of them stood Red army soldiers with rifles and fixed bayonets. Also behind the defendants was a door, beyond which was, shall we say, the "Wings of His Theater," with a buffet, restrooms for the defendants, and an area for Yagoda and the prosecutor, Vyshinsky, to hold friendly discussions with the accused in the course of the trial, to criticize their performances and give them instructions. There were additional actors in the body of the hall, NKVD agents in mufti acting the part of "the people." If the accused departed from the script as rehearsed, "the people's" job was to drown their voices with cries of indignation.

The charge against the defendants was that acting on Trotsky's instructions they had organized a "center" for the purpose of assassinating the leaders of the Party and the state. They had succeeded in murdering Kirov and created a number of terrorist groups to kill Stalin and his loyal comrades-in-arms.

The state prosecutor, A. Vyshinsky, demanded that these "mad dogs" (the sixteen accused) be executed by shooting. After that the accused, all famous Bolsheviks, eagerly confessed their guilt and declared themselves repentant.¹⁴⁰

An interesting example of the use of the micro-structure in order to influence the process of communication is the positioning of the judge, the accused and the defence.

As we can see in those pictures of trials before Vyshinsky and Freisler, the accused is placed only a few feet before the court, with his back to the public. The message is clear: the people see that the accused is not one of them and that he is alone before the representatives of power.



Ramzin testifying at the Industrial Party Trial, August 1930 ¹⁴¹ (encircled: Vyshinsky)

The structuring is even more apparent from the perspective of the judge in Freisler's courtroom:



Trial of the participants in the July 1944 plot to assassinate Hitler ¹⁴² (encircled: Freisler)

The micro-structure – Dehumanization by insulting

Since one of the essential purposes of the political trial is the dehumanization of the victim, the physical proximity between the accused and the judge is calculated to foster an atmosphere of contempt, reinforced by the flow of insults from the judge or the prosecutor against the accused.



Trial of Josef Wirmer, 8 September 1944 ¹⁴³ (encircled: Freisler)

Freisler: "Joseph Wirmer, yes you belong to a black faction (Catholic Centre Party), yes that's what you're taken for, that can't be otherwise. It's weird. How important the position as a civilian lawyer that you have had must have been that you never once became a soldier at that age. And from then on you have been mobilized, which also speaks for your attitude, that you first wait, until someone mobilizes you. Fine rascal. (Shouting loudly) Yes, yes, yes, fine rascal!"

Wirmer: "When I hang, I'll have no fear, but you will!"

Freisler retorts that Wirmer will soon be going to hell.

Wirmer answers with a "courtly bow", "I'll look forward to your own imminent arrival, Mr. President!"

The striking similarity between the Soviet and Nazi hearing rooms is another indicia of the close proximity, at least intellectual, between Freisler and Vyshinsky.

But ordinary people are not necessarily fooled, in particular in the local trials. Because of the obvious politicization of the procedures, the public is not convinced or the accused turn the trial against the accuser. In consequence, the authorities put an end to the local trials in 1936.

D. The victims: an ever-enlarging ring

Three reasonable ¹⁴⁴ hypotheses have been made to explain the "Great Terror" and its constant and systemic enlargement of the ring of victims: paranoia, flight forward and police management of society. ¹⁴⁵

According to Conquest's paranoia hypothesis, the major Moscow trials, the systematic and planned destruction of the "Bolshevik old guard" and the purges of political, military and economic executives and the intelligentsia, were caused by Stalin's "paranoia" as an "architect of terror". This explanation is based mainly on the testimonies and memoirs of survivors or those who had defected and who had "passed to the West", as well as on the few Soviet publications of the time of the Khrushchev's thaw. But little is known about ordinary victims. ¹⁴⁶

According to Getty' flight forward hypothesis, the Great Terror was not a carefully planned project of a paranoid dictator. It was a "headlong rush towards chaos". The extent of the repressions can be explained by the fact that the local communist cadres would have been targeted by the Stalinist group wishing to "put order" in the Party and to break the networks of solidarity and the "family circles" of the nomenklaturas provincial authorities. Thus, they would have tried to demonstrate their loyalty and their vigilance by exercising repressive zeal and the process would then have run amok in an anarchic and uncontrolled manner, reflecting latent social violence, settlements of accounts, conflicts between clans and local cliques. The "Great Terror" would have anticipated the turn taken, thirty years later, by the Chinese "Cultural Revolution". ¹⁴⁷

According to Werth and Blum's hypothesis of police management of society, the Great Terror was the point of culmination of a practice of police management of the social inaugurated in the early 1930s by "dekulakisation" and continued from 1933 by a policy of expulsion of "socially harmful" elements from the

cities and “cleansing” of ethnic minorities from border areas, both groups being perceived by Stalin as a mythical “fifth column of terrorists in the pay of foreign Powers hostile to the USSR”. The “Great Terror” concentrated nearly 75% of the death sentences handed down between 1921 and 1953 by political courts or military tribunals. This explanation is based on the authors’ opinion that great secret terrorist operations, at the origin of more than 90% of the arrests, convictions and executions in 1937-1938, seem to have to be clearly differentiated from the purges of the elites and political, economic, military and intellectual executives. Both were held in parallel, but used different extra-judicial procedures and responded to other objectives and to another political function. The 1937-1938 purges aimed at the replacement of one elite by another, younger, often better trained, politically and ideologically more obedient and malleable, shaped in “the Stalinist spirit of the 1930s”. The mean to achieve that objective was the destruction of all political, administrative, professional and personal bonds that generate solidarity (what Stalin called “family circles”) and the promotion of a new layer of young leaders who would owe their careers to the Ruler and would be absolutely devoted to him.¹⁴⁸

But these explanations are not mutually exclusive: Stalin was diagnosed as psychopathic, his objectives were to wipe out the old guard and the old élites, and he was preparing a nuclear war in 1953.

a. General principles: individual targeting, or the definition of categories of enemies

The targeting of victims is individual as in the case of political enemies, and collective as in the case of the “kulaks” or the “suspect people” (*gens suspects*).

The Devil’s Advocates target five main categories of victims, the last two of which revealing a growing paranoia of the perpetrators:

1. political enemies: the old order;
2. political competitors ;
3. power competitors ;
4. enemies of circumstances ;
5. imagined enemies.

We will now give a few examples of victims in each subcategory.

b. Political enemies: the old order

a. The nobility

The policy of elimination of the nobility is particularly obvious in France and Russia, where Robespierrists and *Bolsheviks* want to establish a “New Society”.

In France, according to the *Law on Suspects* of 17 September 1793:

Art. 2. Are deemed suspects (...)

5 ° those of the former nobles, together husbands, wives, fathers, mothers, sons or daughters, brothers or sisters, and agents of émigrés, who have not constantly shown their attachment to the revolution; (My translation)

And Fouquier-Tinville targets specifically many of them, such as Marie-Antoinette, Philippe-Égalité, the Comte de Fleury, Madame de Lavergne.

He is not alone, as seen in the case of the Maréchale de Noailles in July 1794:

You were a party in the Luxembourg conspiracy?", dares to ask President Dumas to the Maréchale de Noailles, 70 years old, almost blind, almost deaf, who has to wear an acoustic instrument to her ear. She pronounces these words: "Citizen President, I am extremely deaf, I have not heard." Dumas launches this crude wit very loudly: "So you were conspiring silently!" And judges and jurors burst out laughing. ¹⁴⁹ (My translation)

b. The clergy

For the same reason, in France and Russia the second main category of victims is the clergy, without gender discrimination. Since many members of the clergy have entered into open or quiet opposition to the new political order, they are targeted generally or as members opposition groups.

For example, in July 1794, Fouquier charges the Carmelites of the little town of Compiègne for "having formed councils of counter-revolution and having continued to live subject to their rule and to their superior". Since they refuse to take an oath to the Republic, they are sentenced and executed immediately as "fanatics and seditious". ¹⁵⁰

And in the Soviet Union, in 1932-35, the potential punishment against believers under art. 58-10 is exile or three to five years in the Gulag. But in 1937, 132 out of 175 cases end in "Execution by shooting" and prison sentences are increased to "ten years of correctional labor camp".

c. The communists

Communists are targeted in Nazi Germany, as well as in Stalinist Russia.

For example, Liselotte Hermann is a member of the Communist Youth Federation as a student in chemistry and biology since 1928 and then a member of the German Communist Party since 1931. ¹⁵¹ In December 1935, she is arrested for collecting intelligence on the secret rearmament programme. She is held in solitary confinement for eighteen months and on 12 June 1937, she appears in the *People's Court* where she is sentenced to death for "treason and acts preparatory to high treason". Treated as a Communist spy, she remains in isolation and is subjected to repeated interrogations. ¹⁵² On 20 June 1938, she is executed in the Plötzensee prison.

And in the Soviet Union, we have already discussed the Moscow Trials conducted by Vyshinsky in 1936-1938:

- the *Case of the Trotskyite-Zinovievite Terrorist Center*, or *Zinoviev-Kamenev Trial*, or *Trial of the Sixteen*, in August 1936;
- the *Case of the Anti-Soviet Trotskyist Center*, or *Pyatakov-Radek Trial*, in January 1937; and
- the *Case of the Anti-Soviet Bloc of Rights and Trotskyites*, or *Bukharin-Rykov Trial*, or *Trial of the Twenty-One*, in March 1938.

d. The old élites

In France and in the Soviet Union, the old elites are programmed for extinction, if necessary by genocide. One example: NKVD Operational Order 00447, *About repression of former kulaks* ¹⁵³, *criminals, and other anti-Soviet elements*, of 30 July 1937:

ON THE OPERATION TO REPRESS FORMER KULAKS, CRIMINALS AND OTHER ANTI-SOVIET ELEMENTS

30 July 1937.

Mountains. Moscow.

The materials of the investigation into the cases of anti-Soviet formations establish that a significant number of former kulaks, previously repressed, who fled from repressions, fled from camps, exile and labor settlements settled in the village. Many formerly repressed churchmen and sectarians, former active participants in anti-Soviet armed uprisings, settled. Significant cadres of anti-Soviet political parties (SRs, Gruzmeks, Dashnaks, Mussavatists, Ittihadists, etc.), as well as cadres of former active participants in bandit uprisings, whites, punishers, repatriates, etc., remained almost untouched in the village.

Some of the elements listed above, having gone from the village to the cities, penetrated into industrial enterprises, transport and construction.

In addition, significant cadres of criminal offenders still nest in the village and the city - cattle and concert robbers, repeat thieves, robbers, etc. who served their sentences, escaped from prisons and are hiding from repression. The inability to combat these criminal populations has created a climate of impunity for them that is conducive to their criminal activities.

As established, all these anti-Soviet elements are the main instigators of all kinds of anti-Soviet and sabotage crimes, both in collective and state farms, and in transport and in some areas of industry.

The task of the state security organs is to crush this whole gang of anti-Soviet elements in the most ruthless way, to protect the working Soviet people from their counterrevolutionary machinations and, finally, to put an end once and for all to their dastardly subversive work against the foundations of the Soviet state.

In accordance with this, I ORDER - FROM AUGUST 5, 1937 IN ALL REPUBLICS, TERRITORIES AND REGIONS TO BEGIN AN OPERATION TO REPRESS FORMER KULAKS, ACTIVE ANTI-SOVIET ELEMENTS AND CRIMINALS.

IN THE UZBEK, TURKMEN, TAJIK AND KYRGYZ SSR, THE OPERATION WILL BEGIN ON AUGUST 10 OF THIS YEAR, AND IN THE FAR EASTERN AND KRASNOYARSK TERRITORIES AND THE EAST SIBERIAN REGION - FROM AUGUST 15 of this year.

When organizing and conducting operations, be guided by the following: (...)

I. CONTINGENTS SUBJECT TO REPRESSION.

1. Former kulaks who returned after serving their sentences and continue to conduct active anti-Soviet subversive activities.

2. Former kulaks who fled from camps or labor settlements, as well as kulaks who hid from dekulakization, who conduct anti-Soviet activities.
3. Former kulaks and socially dangerous elements who were members of insurgent, fascist, terrorist and bandit formations, who have served their sentences, who have fled from repression or who have escaped from places of detention and resumed their anti-Soviet criminal activities.
4. Members of anti-Soviet parties (SRs, Gruzmeks, Mussavatists, Ittihadists and Dashnaks), former whites, gendarmes, officials, punishers, bandits, bandits, bandits, ferrymen, re-emigrants, who hid from repressions, fled from places of detention and continue to conduct active anti-Soviet activities.
5. The most hostile and active members of the Cossack-White Guard insurgent organizations, fascist, terrorist and espionage-sabotage counter-revolutionary formations exposed by investigative and verified intelligence materials.

Elements of this category currently in custody whose investigations have been completed but whose cases have not yet been examined by the judicial authorities are also subject to repression.

6. The most active anti-Soviet elements from former kulaks, punishers, bandits, whites, sectarian activists, churchmen and others, who are now held in prisons, camps, labor settlements and colonies and continue to conduct active anti-Soviet subversive work there.

7. Criminals (bandits, robbers, repeat thieves, professional smugglers, repeat offenders, cattle thieves) who conduct criminal activities and are associated with the criminal environment.

Elements of this category who are currently in custody whose investigation has been completed but whose cases have not yet been examined by the judicial authorities are also subject to repression.

8. Criminal elements who are in camps and labor settlements and conduct criminal activities in them.

9. All the above-mentioned contingents currently in the countryside — in collective farms, *sovkhozes*, agricultural enterprises and in the city — in industrial and commercial enterprises, transport, Soviet institutions and construction shall be subject to repression.

II. ON THE MEASURES OF PUNISHMENT OF THE REPRESSED AND THE NUMBER OF THOSE SUBJECT TO REPRESSION.

1. All repressed kulaks, criminals, and other anti-Soviet elements shall be divided into two categories:

(a) The first category includes all the most hostile of the elements listed above. They are subject to immediate arrest and, upon consideration of their cases in *troikas*, to EXECUTION.

b) the second category includes all other less active, but still hostile elements. They are subject to arrest and imprisonment in camps for a period of 8 to 10 years, and the most malicious and socially dangerous of them, imprisonment for the same terms in prisons according to the definition of the *troika*.

(...)

V. ORGANIZATION AND WORK OF THE TROÏKAS

1. I approve the following personal composition of the republican, regional and regional *troikas*:

(...)

2. A republican regional or regional prosecutor may be present at the meetings of the *troika* (where he is not a member of the *troika*).

3. The *troika* shall conduct its work either at the location of the relevant NKVD, UNKVD or regional departments of the NKVD or traveling to the locations of operational sectors.

4. The *troikas* shall examine the materials submitted by them for each arrested person or group of those arrested, as well as for each family to be evicted individually.

Troikas, depending on the nature of the materials and the degree of social danger of the arrested person, can refer persons scheduled for repression in 2 categories - to the first category and persons scheduled for repression in the first category - to the second.

5. The *troikas* shall keep minutes of their meetings, in which they shall record the sentences they have handed down against each convicted person.

The minutes of the meeting of the *troika* are sent to the head of the operational group for the execution of sentences. Extracts from the protocols in respect of each convicted person shall be attached to the investigation files.

VI. PROCEDURE FOR EXECUTION OF SENTENCES.

1. Sentences shall be carried out by persons on the instructions of the chairmen of the *troikas*, i.e. people's commissars of the republican NKVD, heads of departments or regional departments of the NKVD.

The grounds for the execution of the sentence are a certified extract from the minutes of the meeting of the *troika* setting out the sentence in respect of each convict and a special order signed by the chairman of the *troika*, handed to the person carrying out the sentence.

2. Sentences in the first category shall be carried out in places and in order on the instructions of the People's Commissars of Internal Affairs, heads of the department and regional departments of the NKVD with the obligatory full preservation of the time and place of execution of the sentence.

Documents on the execution of the sentence are attached in a separate envelope to the investigation file of each convict.

3. Persons convicted in category 2 shall be sent to the camps on the basis of orders reported by the GULAG of the NKVD of the USSR.

(...)

PEOPLE'S COMMISSAR OF INTERNAL AFFAIRS OF THE USSR

COMMISSIONER GENERAL OF STATE SECURITY

(N. YEZHOV)

TRUE: M. FRINOVSKY (My translation) ¹⁵⁴

e. The dehumanized: Jews, Poles, etc.

In Nazi Germany and in Soviet Russia, entire ethnic groups are dehumanized and targeted for genocide. Two of those groups are particularly targeted: the Jews and the Poles.

In 1935, the Nazi régime adopts the *Law for the Protection of German Blood and German Honor*, whose Section 1 decrees that:

Marriages between Jews and citizens of German or kindred blood are forbidden. Marriages concluded in defiance of this law are void, even if, for the purpose of evading this law, they were concluded abroad.

Under this law, Leo Katzenberg is sentenced to death for “racial defilement” by Oswald Rothaug in March 1942. ¹⁵⁵

In the Soviet Union, the publication on 9 August 1937 of NKVD Operational Order № 00485, *On the liquidation of the Polish diversionist and espionage groups and POW units*, followed by Yezhov's letter *On fascist-resurrectionist, spying, diversionist, defeatist, and terrorist activity of Polish intelligence in the USSR*, launches the NKVD's National Operations. On application of that Order alone, 139,835 people are sentenced and around 111,091 are killed. ¹⁵⁶

f. The forced laborers

On 5 July 1937, the Politburo orders the NKVD to “confine all wives of condemned traitors . . . in camps for 5–8 years” and to take under State protection children under fifteen: 18,000 wives and 25,000 children are taken away. All cases are to be decided by the NKVD’s *Special Council* (OSO).

And on 15 August 1937, NKVD Operational Order No 00486, *Traitor of Motherland Family members*, orders that children between one and three should be confined in orphanages and “socially dangerous children between three and fifteen” can, “depending on the degree of danger”, be placed in labor camps, corrective labor colonies, or special-regimen orphanages. Almost a million of these children are raised in orphanages and often will not see their mothers for twenty years.¹⁵⁷

All persons sentenced under the quotas imposed for “category 2” in NKVD Operational Orders are sent for ten years to the Gulag, where they work under extreme duress, under starvation and in appalling conditions¹⁵⁸ for example cutting trees in “Forest Gulags” or digging canals like the Moscow canal.

Out of the seven million Russians arrested in 1937 and 1938 alone, two millions die in the Gulag. From 1934 to 1939, the total number of victims is estimated conservatively at 15 million. Among those:

- 44,000 are sentenced by the *Military College of the Supreme Court*, which deals mostly with the “elites”;
- 800,000 are sentenced by the NKVD’s *troikas* under NKVD Operation 00447 ;
- 335,000 are sentenced within NKVD’s “National Operations” ;
- 190,000 are sentenced by the military tribunals and special colleges of ordinary courts ; and
- 70,000 are sentenced by the NKVD’s “Special Conference” (OSO).¹⁵⁹

c. Political competitors

Devil’s Advocates are important, although secondary, players in deadly political games between political patrons and their clients. Three examples:

- in France, the trial of the Girondins in October 1793;
- in the Soviet Union, the elimination of the Trotskyists in the Moscow Trials;
- in Nazi Germany, the elimination of Hitler’s opponents after the plot of 21 July 1944.

Vyshinsky is particularly adept at eliminating political or administrative rivals under the vigilant eyes of the Patron. Three examples among his own subordinates in 1937 and 1938:

- Faina Niurina, because she had refused to allow the NKVD to dictate the verdicts¹⁶⁰;
- then Grigori Roginsky, who he has used to eliminate rival prosecutor Krylenko and is handed by Beria to torturers Kobulov and Vlodzimirsky;¹⁶¹
- and then procurator Ishoy, who had arrested NKVD henchmen and freed their victims.¹⁶²

All are shot.

Shortly thereafter, on 29 January 1939, Beria and Malenkov write to Stalin:

(...) 5. There was serious negligence in the work of the *troikas* of the *NKVD* of the union republics, the directorates of the *NKVDs* of the *krais* and independent *oblasts*, and also in the work of verifying materials sent from the local areas to the *NKVD* of the USSR (in the so-called “large collegia” at a single session in a single evening between 600 and 1000 – 2000 cases were reviewed).

(...)

Arbitrariness was permitted also in the work of the *troikas* of the *NKVDs* of the republics and the *UNKVDs* of the *krais* and *oblasts*. There was no supervision at all over the work of these *troikas* from the *NKVD* of the USSR.

Approximately 200 thousand persons were sentenced to sentences of up to 5 years by the so-called police *troikas*, whose existence had no legal basis.

There has not been a single session of the special conference of the *NKVD* of the USSR with its lawful composition.

(...)

In addition we believe it essential to note that all the above disgraceful actions, distortions and excesses <in the matter of arrests and the conduct of investigation> were carried out with the sanction and knowledge of the organs of the Procuracy of the USSR (coms. Vyshinsky and Roginsky). Assistant Procurator of the USSR Roginsky has been especially zealous in this matter.

Roginsky’s practice of work raises serious doubts about this political honesty <and reliability>. ¹⁶³

And the Supervisors of those atrocities, Yejhov and Beria, are themselves eliminated later by their own competitors for the top job. ¹⁶⁴

d. Power competitors

In the three countries, the Patron is jealous and mistrustful of the army officers

a. The military

In Revolutionary France in September 1793, General Houchard, winner of the battle of Honschootte against English and Austrian forces a few days earlier, is tried and sentenced to death for ordering rest to his troops and ignoring the order of the Public Safety Committee to pursue the enemy after the battle:

After blaming him for not pursuing the Anglo-Austrian army, Vice-President Dumas called him a coward. Count Beugnot recounts that “at this word, which began the torment of the old warrior, he tore his clothes and exclaimed, presenting his chest covered with scars: ‘Jurors, read my answer, this is where it is written’, and he fell back on the fatal armchair, lost in his tears. (My translation) ¹⁶⁵

In Soviet Russia, during the civil war, Stalin tries and fails to gain a reputation as a general. In the 1930s, he is still pushing for obsolete techniques, such as cavalry charges. He is extremely jealous and distrustful of high-ranking military officers, especially Marshal Tukhachevsky who had criticized him for lack of support which cost him the victory in the Polish war of 1920, and whom he sees as a potential competitor. In the first Moscow trial in 1936, the *Trial of the Anti-Soviet Trotskyist Center*, Vyshinsky has Tukhachevsky involved implicitly by the accused Radek, himself sentenced to ten years imprisonment. And in May 1937, Yejhov

and Voroshilov arrest most of the Soviet Army's high command. At a meeting with Stalin, Vyshinsky recommends the use of torture against Tukhachevsky and Stalin sends him to Lubyanka prison to supervise such torture. A few days later, Tukhachevsky confesses that he has been a German agent plotting since 1928 with Yenukidze and Bukharin to seize power. His written confession is spattered with his blood. On 11 June 1937, the Supreme Court convenes a *Special Military Tribunal* presided by Ulrikh and staffed by other generals, who will be eliminated soon after,¹⁶⁶ to try secretly Tukhachevsky and seven other generals. They are sentenced to death at 23:35 and Ulrikh reports immediately to Stalin, who answers: « Agreed ». They are shot a few hours later. Tukhachevsky's wife is arrested and becomes mad; their 12 years old daughter hangs herself; his mother, his 3 brothers and one of his sisters are shot.¹⁶⁷

b. The idea-makers: the artists

In Soviet Russia, idea-makers are carefully supervised, and vetted. Two examples:

Between 27 October and 4 November 1937, almost 300 Ukrainian artists representative of the Ukrainian Renaissance are shot at Sandarmokh.

The same year, the interrogator of poet Nikolai Oleinikov, Major Iakov Perelmutter, tells him:

I know you're innocent, but the lot has fallen on you and you must sign this fake statement, or else you will be beaten until you sign it or die.

Oleinikov is shot as a Japanese spy on 24 November 1937. Perelmutter is shot in 1940.¹⁶⁸

e. Enemies of circumstances

They are engineers, doctors, water managers, economic offenders, scientists and academics. They have nothing in common, except being easy targets for political gain, or for social or ideological resentment, and being setup with Vyshinsky's complicity.

In the 3 countries, the technical elites can be targeted for elimination for four reasons:

1. they are the "old guard", such as early *Bolsheviks* linked with Lenin and the New Economic Policy;
2. they are potential political competitors;
3. they can be blamed by the public for the failures of agricultural and industrial policies;
4. they are subjects of personal resentment, often by reason of their ethnic origin as Jews, Poles, etc.¹⁶⁹

In the USSR, several great trials target the "class enemies" between 1927 and 1938.

a. Engineers

In 1927-1928, the *Shakhty Trial* targets fifty-three Soviet and foreign engineers and technicians who were supposed to have acted as a “wrecking organization” on the orders of France to fight against the *Bolsheviks* by blowing up and destroying the Donbass mines. The trial innovates in several respects:

- it is based on a new provision of the *Criminal Code* on “wrecking”;
- it is staged in the marbled Hall of Columns in Trade Union House, the former Moscow Club of the Nobility;
- it is not based on evidence – which is nonexistent - but on ideological drama managed by Prosecutor Krylenko;
- it is presided by Vyshinsky as a *Special Judicial Presence*.¹⁷⁰

Eleven of the fifty-three accused engineers are sentenced to death, thirty-four sentenced to prison, four acquitted and four given suspended sentences. Six of the death sentences are commuted as a reward for their confessions, but two are executed later for their political opinions.

In 1930, the *Industrial Party Trial* targets eight top engineers who are charged with sabotage and wrecking. Once again, Vyshinsky presides a *Special Judicial Presence*. Five of the nine accused are sentenced to death, but later amnestied, and the others to prison terms.

The great novelty of that trial is the public confessions of all accused, and in particular Professor Ramzin:

I unreservedly admit my guilt. I do not intend to defend or justify myself before the Supreme Court and the country as a whole. For how can I defend myself or justify the tremendous crimes which I have committed? I can only succeed in mitigating my guilt by frank and truthful testimony and by sincerely admitting my crimes and my mistakes. Therefore, by making here my full and wholehearted repentance, by undertaking to cut off all my connections with the anti-Soviet circles both in the USSR and abroad, by fully disarming myself and discontinuing forever my struggle against the Soviet government, I wish to reveal with merciless clarity the whole truth before the Supreme Court and before the wide masses in our Union as well as the proletariat the world over.¹⁷¹

The *Industrial Party Trial* is also the opportunity for the legalization of public confessions, for political and ideological reasons.

On the political plane, during the investigation Stalin read transcripts of interrogations of the arrestees and suggests questions for interrogations.

And on the ideological plane, Prosecutor Krylenko declares during the trial, on 4 December 1930, that in political cases a confession from perpetrators prevails over the proof of their guilt:

In all circumstances the defendants’ confession is the best evidence.

Krylenko deliberately goes back to the principle *Confessio est regina probatum* (“Confession is the Queen of evidence”) used earlier in Roman Law and by the Inquisition, in order to create a legal basis for the extraction

of evidence by torture by the Secret Police.¹⁷² And in 1933, Vyshinsky adopts the same principle as a legal theorist and as a Public Prosecutor in the *Metro-Vickers Trial*.¹⁷³

b. Doctors

In the Soviet Union, doctors are targeted specifically by the Prosecutor General as imaginary plotters against the life of the Ruler.

In the *Trial of the Twenty-One*, the 3rd Moscow trial in 1938, three Kremlin doctors are accused by Vyshinsky :

- Dr Pletnyov, is accused of killing Gorky;
- Dr Levin, is accused of membership in a counter-revolutionary plot to eliminate the leadership;
- Dr Kazakov, who had had created the NKVD's "special room" (poison lab) in 1927, is accused of poisoning soviet leaders.

Levin and Kazakov are shot on 15 March 1938, Pletnyov on 11 September 1941.¹⁷⁴

c. Water managers

The industrialization of the Soviet Union imposes a lot of pressure on the primitive transportation system, in particular the waterways which are used to carry crops to be sold abroad in order to buy industrial machinery.

While Vyshinsky is Procurator General of the USSR, the Instruction of the NKVD of 24 July 1937, *For the prevention of bacteriological diversions*, orders the arrest of all people with foreign connections and "anti-Soviet elements" working in water supply.¹⁷⁵

And on 15 September 1937, *Amendments to the Code of procedure* ban appeals of the sentences under art. 58-9 of the *Criminal Code*¹⁷⁶ ("Damage of transport, communication, water supply, warehouses and other buildings or state and communal property with counter-revolutionary purpose") and impose on convicted accused the death penalty to be executed within one day after the court sentence.

In 1945, individuals sentenced under art. 58-9 of the *Criminal Code* represent 0.8% of prisoners, or 3 206 individuals, in NKVD labor camps.¹⁷⁷

d. Economic offenders

In Revolutionary France and in the Soviet Union, "rich people" are specifically targeted as supporters of the old regime or as "bourgeois". In Nazi Germany, they are not targeted as such but as "Jews", or simply "harvested".

In Revolutionary France, the *Trial of the Farmers-General*, from 5 to 12 May 1794, aims at the tax collectors and bankers of the Monarchy. Thirty-five of them are charged with falsifying their accounts and the products sold.

The trial, presided by Coffinhal and prosecuted by Fouquier-Tinville, is undermined by irregularities. For example:

- Fouquier-Tinville prepares his writ of indictment before the decree of indictment is sent to the Tribunal;
- the facts on which the accusations are based are common delicts, outside the jurisdiction of the *Revolutionary Tribunal*;
- the accused are not allowed to defend themselves:
 - o their defences are neither communicated to the tribunal nor contradicted before the jury;
 - o their witnesses are prevented from testifying;
 - o their detailed arguments are ignored;
 - o the hearings are cut short by president Coffinhal, who limits the accused to answering by “yes” or “no”;
- the requisitions are a mere copy of the report of the investigator;
- the questions asked to the jurors are vague, political and unrelated to the evidence:

Has there been a plot against the French people to promote, by all possible means, the success of the enemies of France, by exerting all kinds of abuses and concussions on the French people by mixing water tobacco with ingredients harmful to the health of citizens, ... and by plundering and stealing by all possible means the people and the National Treasury, to take away from the Nation, the immense sums and necessary for the war against the despots coalesced against the Republic and supply them to them?

All the accused are sentenced to death, including the great chemist and biologist Lavoisier who is rehabilitated, for “false conviction”, a year and a half after his execution. ¹⁷⁸

In the USSR, after the establishment of the *Gosplan*, following the cancellation of the New Economic Policy, Stalin needs victims to be blamed for the failures of central planning and the merciless pillaging of the peasant class. As we have seen above, he uses the *Shakhty Trial* and the *Industrial Party Trial*, both presided by Vyshinsky, to target managers from the top of the Gosplan to local factories as “spies” and “wreckers”.

In Nazi Germany, during the war, petty "economic" offenses such as illegal slaughtering of animals, hoarding of goods, fraud involving food or rationing, or minor violations of the *Decree on the War Economy*, the *Decree on Continued Use of Motor Vehicles*, and the *Regulations for Consumption of Vital Commercial Products* are transformed into capital crimes. ¹⁷⁹

f. Imagined enemies

Since the security services must fulfill quotas, they do not hesitate to make vague or unfounded accusations against imagined categories of enemies like

- prisoners and ex-prisoners,

- minors,
- innocents and incompetents,
- lovers,
- drunks, or
- women.

A few examples.

In Revolutionary France, many judicial errors are committed negligently or deliberately by the *Revolutionary Tribunal*.

Many elderly people appeared when they were deaf, blind or manifestly senile, such as Durand Pierre Puy de Vérine, a seventy-year-old former master of accounts, who was sentenced to death without understanding what he was accused of. On June 24, three young Bretons convicted of having felled a tree of freedom were tried and sentenced to death despite not understanding French, no interpreter having been available. Due to lack of time, the court doctors no longer examined women who claimed to be pregnant – only those convicted whose pregnancy was visible were now taken to the court's hospice – and it is therefore very likely that many defendants who were in contact with men during their detention and expecting a child were convicted and executed. (My translation) ¹⁸⁰

According to Fouquier-Tinville himself during his trial in 1795,

In the matter of young de Maillé, who was condemned to death as a conspirator for having thrown a rotten herring at the head of a turnkey in Saint-Lazare, his mother, Madame de Maillé appeared, and was asked by Ardenne : “Can you prove that your son was only sixteen years old ?” The witness produced a copy of his birth certificate certifying that he was born on August 25, 1777. And he had been condemned to death on the 6th of Thermidor in the year II. Fouquier answered : "If young Maillé is included in the indictment, the reason is that he was impeached by a resolution of the Committee of Public Safety." Ardenne : "I submit to Fouquier that no resolution of the Committee of Public Safety is to be found among the documents relating to the case, and that there is no date on this indictment." Fouquier : " There ought to be a list on which is written, 'To be sent to the Public Prosecutor'. It is signed by three members of the Committee." Ardenne : "It is not in existence" . Fouquier : " Documents have been taken away. That being so, I have nothing more to say". ¹⁸¹

Madame de Lavergne is twenty-six and beautiful. Her husband, lieutenant-colonel de Lavergne-Champlaurier, is accused of having delivered Longwy to the enemy. He is old and infirm, and is about to be tried by the *Revolutionary Tribunal*. Despite her pleas, Dumas and other members of the Tribunal refuse to release him. On 1 April 1794, the day before Danton's trial, she goes to the Tribunal, where she sees her husband being brought in, on a mattress and in a dying condition. The writ of indictment is read, and he is sentenced to death. Then, in a room adjacent to the Tribunal, Madame de Lavergne shouts several times: "Long live the King!" She is arrested and before the police, she declares:

I have asked for a King. I want to be guillotined. They are going to murder my husband. I want to go to bed.

She is tried, sentenced to death and sent to the guillotine with her husband the same day. ¹⁸²

On 25 May 1793, fish merchant Pierre Prudhomme, his wife Françoise Lambert (60 years old), and laundress Catherine Perrard (39 years old) appear before the *Revolutionary Tribunal*. Judge Masson notes on the cover of their files:

Two drunk women were confined to the jail and shouted “Long live the King!” They were accompanied by the husband of one of them. They agree on the fact. All say they were drunk. They wear the most pantless exterior. However, it is known that among these women in the hall there were aristocrats.

All three are sentenced to death and guillotined. ¹⁸³

Among the 2800 sentenced to death by the Revolutionary Tribunal, many women including 116 noble ladies, 100 wealthy ladies, 30 nuns, 28 servants and a hundred workers. ¹⁸⁴

In Soviet Russia, genocide by famine in Ukraine - the Holodomor – is accepted by the legal establishment without protest. On 14 April 1937, Procurator-General Vyshinsky writes to the Premier to inform him of a cluster of cases of cannibalism in Cheliabinsk in the Urals in which one woman ate a four-month-old child, another ate an eight-year-old with her thirteen-year-old, while yet another consumed her three-month-old baby. But the real cause of the tragedy is not mentioned. ¹⁸⁵



Cannibalism and famine in Russia in the 1920s ¹⁸⁶

In 1937, NKVD's boss, Yehjov, issues NKVD Secret Order 00486, *On repression of the family members of traitors, Trotskyists, and other citizens sentenced by the Military Collegium and the Special Commission*, which targets children specifically.

I will reproduce hereafter the whole Order, in order to document its infamy:

OPERATIONAL ORDER
PEOPLE'S COMMISSAR OF THE INTERNAL AFFAIRS OF THE USSR
15 August 1937 Moscow

No. 00486

Upon receipt of this order, proceed with the repression of the wives of traitors to the motherland, members of right-wing Trotskyist espionage and sabotage organizations convicted by the military collegium and military tribunals in the first and second categories, starting from August 1, 1936. When carrying out this operation, be guided by the following:

Content

- 1 PREPARATION OF THE OPERATION:
- 2 ARRESTS AND SEARCHES
- 3 PROCEDURE FOR REGISTRATION OF CASES:
- 4 PROCESS AND PENALTY
- 5 PROCEDURE FOR ENFORCEMENT OF SENTENCES
- 6 ACCOMMODATION OF CHILDREN OF CONVICTS
- 7 PREPARATION FOR THE RECEPTION AND DISTRIBUTION OF CHILDREN
- 8 REGISTRATION OF THE CHILDREN OF CONVICTS
- 9 SUPERVISION OF THE CHILDREN OF CONVICTS
- 10 REPORTING
- 11 See also

PREPARATION OF THE OPERATION:

1) In relation to each family scheduled for repression, a thorough check is carried out, additional installation data and compromising materials are collected.

Based on the collected materials are compiled:

- a) a detailed general certificate for the family indicating: the last name, first name and patronym of the convicted head of the family, for what crimes, when, by whom and what punishment they will be subjected to; a personal list of family members (including all persons dependent on the convict and living with him), detailed identification data for each family member; compromising materials on the convict's wife; characteristics regarding the degree of social danger of children over 15 years of age; data on the presence in the family of elderly and parents in need of care, the presence of seriously or contagiously ill patients, the presence of children who, according to their physical condition, require care.
- b) A separate brief reference to socially dangerous and capable of anti-Soviet actions children older than 15 years of age.
- c) Personal lists of children under 15 years of age separately of preschool and school age.

2) The certificates are considered respectively by the people's commissars of internal affairs of the republics and the heads of the departments of the *NKVD* of the territories and regions.

Last:

- a) authorize the arrest and search of the wives of traitors to the motherland;
- b) determine measures in relation to the children of the arrested person;

c) indicate measures taken in relation to parents and other relatives who were dependent on the convict and who live together with him.

ARRESTS AND SEARCHES

3) Those who are scheduled for repression are arrested. The arrest is issued by warrant.

4) Wives who were legally or de facto married to the convicted person at the time of his arrest are subject to arrest.

Wives are also subject to arrest, although they were divorced with the convict at the time of his arrest, but:

a) involved in the counter-revolutionary activities of the convict;

b) sheltering the convict;

c) those who knew about the counter-revolutionary activities of the convict, but did not inform the relevant authorities about it.

5) The following are not subject to arrest:

a) pregnant women; wives of convicts who have babies, are seriously or contagiously ill; having sick children in need of care; having advanced age.

In relation to such persons, temporarily limited to the withdrawal of a written undertaking not to leave with the establishment of careful monitoring of the family.

b) Wives of convicts who exposed their husbands and reported information about them to the authorities, which served as the basis for the development and arrest of their husbands.

6) Simultaneously with the arrest, a thorough search is carried out. During the search, the following are confiscated: weapons, cartridges, explosives and chemicals, military equipment, duplicating devices (shapirographs, glass printers, typewriters, etc.), counter-revolutionary literature, correspondence, foreign currency, precious metals in ingots, coins and products, personal documents and monetary documents.

7) All property personally owned by the arrested (with the exception of necessary underwear, upper and lower dresses, shoes and bedding that the arrested take with them) is confiscated. The apartments of the arrested are sealed.

In cases where their adult children, parents and other relatives live together with the arrested person, they, in addition to their personal belongings, are left for use with the necessary: living space, furniture and household utensils of the arrested persons.

8) After the arrest and search, the arrested wives of the convicts are escorted to the prison. At the same time, in the order indicated below, children are also taken out.

CASE PROCEDURE:

9) For each arrested and for each socially dangerous child over 15 years of age, an investigation file is opened, in which, in addition to the established documents, certificates are placed (see subparagraphs "a" and "b" of article 1) and a brief closing indictment.

10) The investigation file is sent for consideration by the Special Meeting of the *NKVD* of the USSR.

The heads of the *NKVD* departments for the Far East and Krasnoyarsk Territories and the East Siberian Region, do not send investigative files on those arrested to the Special Conference. Instead, communicate by telegraph general information about the families of the convicts (paragraph "a", art. 1), which will be considered by the Special Meeting. The latest decisions on each family with a simultaneous indication of the place of detention (camp) informs the heads of the listed *UNKVD*, also by telegraph.

PROCESS AND PENALTY

- 11) A special meeting considers cases against the wives of convicted traitors and those of their children older than 15 years of age who are socially dangerous and capable of committing anti-Soviet actions.
- 12) The wives of convicted traitors to the motherland are subject to imprisonment in camps for terms, depending on the degree of social danger, not less than 5-8 years.
- 13) Socially dangerous children of convicts, depending on their age, degree of danger and possibilities of correction, are subject to imprisonment in camps or correctional labor colonies of the *NKVD*, or placement in orphanages of special regime of the People's Commissariat of Education of the Republics.
- 14) The verdicts of the Special Conference are communicated to the People's Commissars of the republican *NKVD* and the heads of the *NKVD* departments of the territories and regions by telegraph for enforcement.
- 15) Investigative cases are handed over to the archives of the *NKVD* of the USSR.

PROCEDURE FOR ENFORCEMENT OF SENTENCES

- 16) The wives of traitors convicted by the Special Meeting should be sent to serve their sentences in a special department of the Temnikovsky forced labor camp, according to the personal outfits of the *GULAG* and the *NKVD* of the USSR.
Direction to the camps to produce the existing order.
- 17) Convicted wives of traitors to the motherland, who are not arrested, due to illness and the presence of sick children in their arms, are arrested upon recovery and sent to the camp.
The wives of traitors who have babies, after the verdict is passed, are immediately arrested and sent directly to the camp without being brought to prison.
Do the same with convicted wives who are of advanced age.
- 18) Convicted socially dangerous children are sent to camps, correctional labor colonies of the *NKVD* or to special regime houses of the People's Commissariat of Education of the Republics for personal outfits of the *GULAG* and the *NKVD* for the first and second groups and the Academy of Arts of the *NKVD* of the USSR - for the third group.

ACCOMMODATION OF CHILDREN OF CONVICTS

- 19) Place all orphans remaining after conviction:
 - a) children aged from 1-1 1/2 years and up to 3 full years - in orphanages and nurseries of the People's Commissariat of Health of the republics at the places of residence of convicts;
 - b) children aged from 3 full years to 15 years old - in orphanages of the People's Commissariat of Education of other republics, territories and regions (according to the established location) and outside Moscow, Leningrad, Kyiv, Tbilisi, Minsk, coastal and border cities.
- 20) For children over 15 years of age, the issue is decided individually. Depending on age, ability to work independently, or ability to live as dependents of relatives, such children may be:
 - a) sent to orphanages of the People's Commissariat of Education of the republics in accordance with paragraph "b" of Article 19;
 - b) sent to other republics, territories and regions (to points, with the exception of the cities listed above) for employment or placement for study.
- 21) Infants are sent along with their convicted mothers to camps, from where, upon reaching the age of 1-1 1/2 years, they are transferred to orphanages and nurseries of the People's Commissariat of Health of the republics.
- 22) Children between the ages of 3 and 15 are admitted to state care.

23) In the event that other relatives (not repressed) wish to take the remaining orphans to their full dependency, do not interfere with this.

PREPARATION FOR THE RECEPTION AND DISTRIBUTION OF CHILDREN

24) In each city in which the operation will be carried out, specially equipped:

a) reception and distribution centers to which children will be delivered immediately after the arrest of their mothers and from where the children will be sent, then to orphanages.

b) Premises are specially organized and equipped in which socially dangerous children will be kept until the decision of the Special Conference. For the children mentioned above, where they are available, children's receivers of the departments of labor colonies of the *NKVD* are used.

25) The heads of the *NKVD* bodies of the points where the children's homes of the People's Commissariat of Education are located, designed to receive children of convicts, together with the heads or representatives of the *OBLONO*, check the staff of the houses and persons who are politically unstable, anti-Soviet and decomposed - fired. Instead of the dismissed personnel of the houses, they are understaffed with a proven, politically reliable staff capable of conducting educational work with the children arriving to them.

26) The heads of the *NKVD* bodies determine in which orphanages and nurseries of the People's Commissariat for Health it is possible to place children under 3 years of age and ensure the immediate and trouble-free reception of these children.

27) People's commissars of internal affairs of the republics and heads of departments of the *NKVD* of the territories and regions, report by telegraph personally to the deputy head of the *AHU* of the *NKVD* of the USSR comrade SCHNEERSON name lists of children whose mothers are being arrested. The lists should indicate: surname, name, patronym, year of birth of the child, in which class he is studying. In the lists, children are listed in groups, completed in such a way that children related to each other by kinship or acquaintance do not end up in the same house.

28) The distribution of children to orphanages is carried out by the deputy head of the *AHU* of the *NKVD* of the USSR. He informs by telegraph the people's commissars of the republican *NKVD* and the heads of the *NKVD* departments of the territories and regions which children and to which house to send. A copy of the telegram is sent to the head of the corresponding orphanage. For the latter, this telegram should be the basis for receiving children.

29) During the arrest of the wives of convicts, their children are confiscated and, together with their personal documents (birth certificates, student documents), accompanied by an employee or employee of the *NKVD*, specially dressed up as part of the group making the arrest, are taken away:

a) children under 3 years of age - in orphanages and nurseries of the People's Commissariat of Health;

b) children from 3 to 15 years of age - to the reception and distribution centers;

c) socially dangerous children older than 15 years of age in rooms specially designed for them.

Sending children to orphanages:

30) Children at the reception and distribution center are received by the head of the center or the head of the children's reception center of the *NKVD OTK* and a specially assigned operative (worker) of the *UGB*.

Each adopted child is recorded in a special book, and his documents are sealed in a separate envelope.

Then the children are grouped according to their destinations and, accompanied by specially selected workers, are sent in groups to the orphanages of the People's Commissariat of Education, where they are handed over, along with their documents, to the head of the house against his personal receipt.

31) Children under 3 years of age are handed over personally to the head of orphanages or nurseries of the People's Commissariat of Health under their personal receipt. Together with the child, his birth certificate is also handed over.

REGISTRATION OF THE CHILDREN OF CONVICTS

32) Children of convicts placed in orphanages and nurseries of the People's Commissariat of Education and the People's Commissariat of Health of the republics are taken into account by the *ACS* of the *NKVD* of the USSR.

Children over 15 years of age and convicted socially dangerous children are taken into account by the 8th department of the *GUGB* of the *NKVD* of the USSR.

SUPERVISION OF THE CHILDREN OF CONVICTS

33) I entrust the supervision of the political moods of the children of convicts, their study and educational life to the People's Commissars of Internal Affairs of the republics, the heads of the *NKVD* departments of the territories and regions.

REPORTING

34) Report the progress of the operation to me by telegraph in three days. About all excesses and emergencies immediately.

35) The operation to repress the wives of already convicted traitors to the motherland should be completed by 25/X/X.

36) From now on, all wives of exposed traitors to the motherland, right-wing Trotskyist spies, are to be arrested simultaneously with their husbands, guided by the procedure established by this order.

PEOPLE'S COMMISSAR OF INTERNAL AFFAIRS OF THE UNION OF THE SSR
GENERAL COMMISSIONER OF STATE SECURITY (Ezhov) (My translation) ¹⁸⁷

In late 1938 or early 1939, Vyshinsky reports that the *NKVD* has faked the arrests of hundreds of teenagers in Novosibirsk:

the children were innocent and have been released but three senior officials including the head of the *NKVD* and the town Procurator were guilty of 'betraying revolutionary loyalty' and expelled from the Party." What should be done with them?

On 2 January 1939, Stalin responds by hand: "It's necessary to have a public trial of the guilty." ¹⁸⁸

On 1 December 1937 Alexandra Petrovna Nikolaieva, a 74 years old former seamstress, is interrogated in Leningrad by an *NKVD* officer two days after having been arrested at her domicile. The subject-matter is the circulation of rumors according to which people who have been shot are secretly buried in a cemetery where Mrs Nikolaieva is selling flowers.

Question [State Security Lieutenant Vassiliev]: "You are lying when you say that no one told you that the shots [shot people] were buried at night, we demand that you tell us who spoke to you in this way. »

Answer [Alexandra Petrovna Nikolaieva]: "I admit that I lied. It was the gravedigger Pavel who told me about the shots."

Question: "Tell us exactly what Pavel said to you and if anyone was present when this conversation took place."

Answer: "That we were bringing shots to the cemetery, the gravedigger Pavel told me in the presence of my daughter-in-law Maria Vasilievna Nikolayeva in October at the beginning of the

month, or perhaps around the middle of the month, in the evening, around 5 hours, at the entrance to the cemetery, where I sell my flowers.”

Question: “Tell us the precise circumstances of this conversation.”

Answer: “With my daughter-in-law, I was about to leave the cemetery, we were putting away our flowers when we saw the gravedigger Pavel pass by, who had had a good drink. I asked him: how many deaths will there be tomorrow, to know how many flowers I should prepare for the next day, to which Pavel replied: “Tomorrow there will be no ordinary deaths, but on the other hand there will be shots, and for those, no need to bring flowers.” With these words, we left, without asking for anything more.”

Question: "And Pavel drinks often?"

Answer: “After every funeral.

Question: "And who was buried that day?"

Answer: “That day, if I remember correctly, there were three burials, a man, a woman and a child.”

Question: “Why have you hidden what Pavel told you so far?”

Answer: “I was afraid of getting into trouble, and I have to go to the cemetery every day to earn a living.”

According to the Protocol of the Leningrad *troika* of 15 December 1937 concerning AP Nikolaieva:

Nikolaieva A. P., while selling flowers at the Preobrajenskii cemetery, systematically spread provocative and hostile counter-revolutionary rumours among the peasants (sic) who went to the cemetery. There was also terrorist propaganda against Communist Party leaders. Troika Verdict: SHOOT Nikolaieva A. P. ¹⁸⁹

And **in Nazi Germany**, on 5 August 1943, Maria Terziel is found guilty, by the *People's Court*, of assisting Jews by providing food ration cards and identity papers. She is sentenced to death and executed on 5 August 1943 ¹⁹⁰

We refer you to the book *Devil's Advocates* for more details.

E. The justifications of Judicial Terror: Devil's advocates as Devil's preachers

The Devil's Advocates are abundant writers, for recognition as well as legal and political influence.

a. Legal writings of Fouquier-Tinville

Fouquier-Tinville did not leave any writings apart from his abundant pleadings and – after his arrest – defences, which are available today. ¹⁹¹

b. Legal writings of Vychinsky

Starting in 1925, Vyshinsky publishes an important literature, which by 1941 reaches more than 300 books and articles on the theory of law, legal history, criminal law and procedure.

In a book rewarded in 1947 by the Stalin Prize, he summarized as follows the five principles of his *Theory of Judicial Evidence in Soviet Law*:

1. the judge is not obliged to establish the absolute truth, but only the probability of the facts submitted to the appreciation of the Court;
2. the accused is presumed to be guilty, and it belongs to him to prove his innocence;
3. in matters regarding plotting, admission is irrefutable evidence;
4. guilt can be recognized without evidence of an intention to cause damage;
5. one can be held guilty of a crime committed by someone else without having participated to the crime or even while ignoring the crime.¹⁹²

And in 1948, he publishes *The Law of the Soviet State*, which must be read by anyone interested to the legal framework and the rhetoric of the *Bolshevik* dictatorship.

The book is full of hateful rhetoric, metaphors and apologetical rhetoric, such as:

The theory of Marx and Engels on the revolutionary overthrow and annihilation of the bourgeois machinery of state power is organically connected with the entire Marxist theory of the state. Suppression and the use of force by the state are still essential during the transition period (...) The indispensability of this force necessitates a special apparatus adapted to realize these purposes. The Soviet state is the particular apparatus, the special machinery, to crush enemies and all elements hostile to socialism. ¹⁹³

Marxism revealed the pseudoscientific character of diverse trends in the field of legal science. It put an end, once and for all, to the conceptions of formal jurisprudence and abstract idealism which had so completely muddled the idea of law and the state. Marxism explained all the hitherto inexplicable questions and problems, and brought into a strictly scientific and logical system the solution to these questions, which were thus raised to the level of truly scientific theory. (...) ¹⁹⁴

NOTE 20: One of the most brilliant examples of uniting measures of repression and measures of economic organization is the conduct (in the villages, under the guidance of the proletariat, 1929-1931) of the liquidation of the kulaks as a class, on the basis of complete collectivization. The mass *kolkhoz* (collective farm) movement arose on the basis of such measures as the development of socialist industry and the equipment of the country with machines and tractors (...) and, finally, the decisive struggle with the kulaks. (...) . The "theory" that the kulaks would "peacefully" assimilate into socialism is a provocative snare of fascist agents of Japan and Germany, who strove to prepare the defeat of the proletariat (...). ¹⁹⁵

The exploitation of man by man is annihilated and exploiter classes are liquidated. ¹⁹⁶

But Vyshinsky demonstrates constantly a fundamental ambivalence between prosecutorial and educational roles.

Three examples:

- Vyshinsky's discourse as a law professor and his actions as Chief Prosecutor;
- Vyshinsky's support for the principle that "confession of the accused is the queen of evidence"; and
- Vyshinsky's use of his judgments in his publications.

c. Legal writings of Freisler

Freisler is a prolific and influential writer who publishes numerous essays in influential professional journals ¹⁹⁷, and co-authors in 1935 *Das kommende deutsche Strafrecht (Future German Criminal Law)*, a two-volume report on the 'work of the official criminal law commission' published by the Reich' Department of Justice. ¹⁹⁸

His works revolve around four basic themes:

- the Leader principle;
- the People;
- the Party and the State;
- Law and the judiciary.

Four examples :

National Socialism is characterized by its biological perspective. It looks at the *Volk*, its internal and external growth, biologically, sees its history as biologically determined, biologically determined through the people's selection of its life goal and the selection of the correct path to achieve this life goal. The National Socialist also sees the law as biological. Our view of the nature of the law differs from that held by others who wrestled with themselves and the world to achieve knowledge of and insight into the law. ¹⁹⁹

It is the duty of the German nation and of every individual to practise racial hygiene; failure to fulfil this duty is tantamount to treason. ²⁰⁰

The German judiciary has every reason to be proud of being the first state institution to have implemented the unity of the movement, the *Volk* and the state in its staffing policy, throughout the Reich and on all levels of the civil service. ²⁰¹

It is indeed possible that though the letters, words and paragraphs of the law have not changed, a judge's decision underpinned by the objectivity of a neutral age may differ from a judge's decision underpinned by the exercise of judicial freedom in the spirit of National Socialism. One cannot

approach the question of the judge's position on right and law in his professional work only from the same standpoint as that from which a soldier who has been assigned a task sets about doing his duty: respect for the will of the *Führer* as the natural expression of law and pride in the trust invested in us ... and the sense of obligation to take into account all circumstances in accordance with the National Socialist directive. ²⁰²

V. The end

The end of the Ruler brings the end of his Advocate. First, by discrediting his work, and then by causing his physical elimination.

a. Judicial discredit

What do you see in common between Fouquier, Vyshinsky and Freisler's writings?

The use of law to define, exclude and eliminate anybody who does not fit the ideological prototype: "citizen", "proletarian" or "*volk*".

In France, Russia and Germany, the judicial system is discredited by the ideological contradictions, the corruption and the trauma engendered by the revolutionary courts and the terrorist tribunals.

i. Ideological contradictions

Contradictions abound in the political as well as in the judicial hierarchies concerning the administration of Justice and the courts.

For example, in Soviet Russia, the paranoia for control of the Soviet leadership is reflected in its own hesitations and contradictions concerning the jurisdiction of the *dvoikas* and *troikas*.

And in each of the three countries, despite its frantic efforts to maintain ideological purity the entire judicial system is discredited by its self-contradictions. Three examples:

- the sentencing to death of people known for their patriotism, such as Danton, Desmoulins, Bukharin, Kamenev, Zinoviev;
- the terrorization of critics of the courts and tribunals: judges and Procuracy denounce the political police for arresting thousands of people without legal basis, while blindly signing off arrest and death warrants; and
- careerism: both in Germany and in Soviet Russia, the Departments of Justice cooperate administratively with the secret police (*RSHA* or *NKVD*), recognizing therefore tacitly the primacy of the second.

ii. Judicial corruption

Despite their ideological commitments, or maybe because of them, the three Devil's Advocates are not opposed to taking advantage of their positions to obtain material advantages.

Fouquier's indictment in 1795 details his appropriation of money or property belonging to accused. He also has a reputation for taking bribes to influence proceedings, as witnessed by Manon Roland, a pro-Girondin saloon owner guillotined on 8 novembre 1793, who says that Fouquier-Tinville received 80,000 pounds from Mme de Rochechouart in order to acquit Reviers de Mauny who had been accused of emigration.²⁰³ There are also rumors of Fouquier's involvement in the trafficking of false assignats,²⁰⁴ then a capital crime, and in sexual orgies.²⁰⁵

Vyshinsky is proven to have abused his position as Prosecutor on at least one occasion. After the First Moscow trial (*Anti-Soviet Trotskyist Center*) in August 1936, he takes possession of the personal villa of Leonid Serebryakov, former commissar for roads who is accused during the *Second Moscow Trial (Trial of the 17)* in January 1937 of damaging attacks on Soviet railways, although he was then the head of Soviet automobile transport. Vyshinsky calls him an "enraged dog of capitalism" and asks for the death penalty. Serebryakov is found guilty and shot; his wife and daughter are sent to the Gulag. After Stalin's death, the Serebryakovs obtain the return of half of the property, but the Vyshinskys keep the other half.²⁰⁶

Nazi judges, including Freisler, are encouraged in their ideological commitment by material advantages: on 12 October 1942, a circular from Minister of Justice Thierack grants them a special status, different than that of other civil servants

Traumatic stress and psychopathy

Berlin-Plötzensee 3 June 1937

Dear Mother, dear Father,

I have just been told that my appeal for clemency was turned down. I must die then.

We need not say anything anymore to each other. You know that in these last months I have really found the way to myself and to life. Real beauty must stand before unswerving honesty. You know that I have lived every moment fervently and that I have remained true to myself until the end. You must live on. There can be no giving up for you. No becoming soft or sentimental. In these days I have learned to say 'yes' to life. Not only to endure it, but to love life as it is. It is our own inner gravity, the force by which we have entered life.

It must help you in some way that I know I have finally reached my own inner image and feel complete. And in this feeling is much of our time and our world.

The only way I know how to thank you is by showing you until the last moment that I have used all your love and goodness towards becoming a whole being of my time and my heritage. Do not think of the unused possibilities, but take my life as a whole. A great search, a foolish error, but on the path to finding final truth, final peace.

Please care for Vally as for a child [his girlfriend at the time of his death]. I embrace you, dear mother and you, my father, once more for a long, long time. Only now have I realized how much I love you.

Yours forever,
Helmuth.

Last letter of Helmut Hirsch ²⁰⁷

It is important not to underestimate the ambivalent consequences of the social pressures and psychological stress imposed on the magistrates and jurors in the terror courts and tribunals.

At the beginning, judges and jurors are emotively involved negatively (fear, disgust, pity) in the proceedings, especially when they sentence accused to death. But later, they are less and less involved negatively and render a growing number of excessive sentences, because of

- radical convictions of a growing number of them;
- growing numbers of accused to try;
- hardening of the legislation;
- submission of the courts to political or administrative institutions;
- fear to be characterized as counter-revolutionary;
- exhaustion and nervous tension.

Five paths are open to them:

1. to leave the institution, by resigning;
2. to enter into open opposition, as judge Roussillon who writes to the Convention a memorandum in favour of proportionality of penalties and indicates that death penalty is not conceivable in many cases (for which he is arrested and imprisoned);
3. to enter into hidden opposition, such as moderating as many sentences as possible;
4. to show docility;
5. cooperation, which often transforms into open partisanship and mockery of the accused as in the case of President Herman.

The paths are not mutually exclusive and with increasing and more and more hidden stress, except the last one which is for the psychopaths.

So, where to put each of the Devil's Advocates: terrorist, fanatical, pliant or amateurish?

Vyshinsky, Freisler and Fouquier-Tinville are:

- NOT AMATEURISH: they write extensively; take part in trials; take part in legislative drafting; write orders, letters, etc., interpreting and enforcing terrorist laws;
- NOT PLIANT: they take the initiative in manipulating trials.

The only difference between them is in the degree to which they are **TERRORISTS AND FANATICAL**: Vyshinsky and Freisler have murdered, and plotted to murder individuals themselves, whereas there is no evidence that Fouquier-Tinville murdered anybody, even though he plotted to murder specific individuals.

Thus, it is not necessary to kill by oneself to become a Devil's Advocate, even if it helps.

b. Cleansing

Terror is exhausting. The French Judicial Terror lasted only 11 months, but the Nazi Judicial Terror lasted 12 years and the *Bolshevik* one lasted 71. And in all cases, the judicial system crashed down with the entire political system.

The Thermidor Revolution and the trial of Fouquier-Tinville

"I was the axe of the Revolution, do you punish an axe?"

Fouquier-Tinville's defense at his trial ²⁰⁸

On 9 Thermidor year II (27 July 1794), Robespierre is outlawed by the National Assembly after threatening to unseat his opponents there. After a short flight, he is arrested on 10 Thermidor, identified by Fouquier-Tinville and sent to the guillotine. The same day, the *Decree of 22 Prairial* is abrogated, the Committee of Public Salvation renews the staff of the *Revolutionary Tribunal* and Fouquier is proposed again for the position of Public Accuser. But 3 days later, deputy Fréron asks for his arrest: "I ask that the earth be purged of this monster, and that Fouquier go vat in the underworld the blood he has shed!" Sure of himself, Fouquier surrenders himself the next day.

In the next months, the exceptional rules and jurisdictions are abolished, including the *Revolutionary Tribunal* on 31 May 1795.

From 28 March to 1 May 1795, Fouquier is tried with 23 co-accused in front of the reorganized *Revolutionary Tribunal*, presided by one of its former judges. Fouquier faces 25 accusations: amalgamation, lack of evidence, sentencing of innocents, influencing the judges and jurors, hampering the defence, etc. On 1 and 2 May, the prosecution presents its pleadings. On 2 and 3 May 1795, Fouquier presents his defence:

It is not I who should be presented here, but the leaders whose orders I have carried out. I have acted only under the laws of a Convention invested with all powers. Because of the absence of its members, I find myself as leader of a conspiracy that I have never known. Here I am facing slander, from a people always eager to find culprits."

(...)

I was the axe of the Revolution, are we punishing an axe? (My translation) ²⁰⁹

On 4 and 5 May, the defenders of his co-accused are heard. And on 6 May, the jury deliberates for 5 hours before coming back with a guilty verdict against Fouquier and 15 other accused. On 6 May, they are

convicted of manoeuvres and plots aimed at promoting the liberticidal projects of the enemies of the people and the Republic, provoking the dissolution of national representation, and the overthrow of the republican regime, and of arming the citizens against each other, notably by killing in the disguised form of judgment an innumerable crowd of Frenchmen, of all ages and sex; by imagining, for this

purpose, plans for conspiracy in the various prisons of Paris; by drawing up lists of proscriptions, etc., in these different houses, and for acting with bad intentions. (My translation) ²¹⁰

All are then sentenced to death.

Back into prison, Fouquier writes:

I have nothing to reproach myself for: I have always complied with the laws, I have never been the creature of Robespierre or Saint-Just; on the contrary, I was about to be arrested four times. I die for my homeland and blameless. I am satisfied: later, my innocence will be recognized. (My translation) ²¹¹

The next day, he is the last of the sixteen to be guillotined, under the insults of the public. His last words, to one of his insulters:

Go on then, scoundrel, go to the section and get your 3 ounces of bread. I go with a full stomach! ²¹²

The end of Stalin and Vyshinsky's exile to the United Nations

Vyshinsky: "I feel ill!"

Zinaida Andreyevna (his daughter): "They've killed him!" (...)

Henry Cabot Lodge (US permanent delegate to the UN): "What's going on?" (...)

The Soviet diplomat on duty: "Nothing, Mr Ambassador."

Cabot Lodge: "Are you sure? maybe you need some medical aid?"

The diplomat: "No, thank you, Mr Ambassador." ²¹³

Vyshinsky's late career is characterized by his ascension to the top of the establishment from 1939 to 1953, notably in intelligence and foreign affairs, and his sudden demise, exile and death following Stalin's death.

The following table summarizes Vyshinsky's late career, his brief ascension to the Presidium of the Communist Party, and his brutal exile and death in 1953.

DATE	POSITION	ACTIVITIES
1938	Chief Prosecutor of the USSR	On 17 November 1938, the <i>Sovnarkom</i> and Central Committee Decree of 17 November 1938, <i>On Arrests</i> , <i>Prosecutorial Supervision and Investigation</i> rebalances power between <i>NKVD</i> and the Ministry of Justice. BUT it does not affect ongoing files and is not retroactive. ²¹⁴
1939	Deputy Chairman of the People's Commissariat (1939)	Oversees culture and education, which are incorporated more fully into the USSR (1 June).

	Academician in the Soviet Academy of Sciences (1939-54)	Director of the <i>Institute of State and Law</i> of the <i>Soviet Academy of Sciences</i> .
1939-44	Vice-Premier (1939-44)	Transferred to the shadow capital at Kuibyshev.
1940	First Deputy Minister of Foreign Affairs, under Molotov (1940-49) ²¹⁵	<p>Sent to Latvia to supervise the establishment of a pro-Soviet government and incorporation of that country into the USSR; and to purge the Latvian Communist Party of Trotskyists, Bukharinites, and possible foreign agents. (June). The Latvian Soviet Republic is proclaimed and admitted in the USSR (21 July). Then appointed First Deputy Minister of Foreign Affairs.</p> <p>Remains in the Soviet Union to "keep shop" while Stalin at <i>Tebran Conference</i>.</p>
1943		<p>Appointed by Stalin to the <i>Allied Control Council on Italian affairs</i> where he</p> <ul style="list-style-type: none"> - begins organizing the repatriation of Soviet POWs (including those who do not want to return to the Soviet Union), - liaises with the Italian Communist Party in Naples. <p>Accompanies Stalin, Molotov and Beria to the <i>Yalta Conference</i> (4-11 February).</p>
1945		<p>Sent to Romania to arrange the seizure of control by a Communist regime (26 February).</p> <p>Participates to the ceremony of surrender of the Nazi forces (8 May).</p> <p>Accompanies again the Soviet leadership to the <i>Potsdam Conference</i> (17 July-2 August).</p> <p>Heads the <i>Commission on the Guidance of the Work of Soviet Representatives in the International Tribunal in Nuremberg</i> responsible for the Soviet preparations for the trial of the major German war criminals by the International Military Tribunal, directly under the control of the <i>Politburo</i> and composed of representatives of <i>NKGB</i>, <i>SMERSH</i>, General Prosecutor, USSR Supreme Court, Justice Department. The Commission prevents the examination by the IMT of Nazi/Soviet cooperation and the Katyn massacres. ²¹⁶</p> <p>Sends to Molotov a list of proposed defendants for Nuremberg who are in <i>SMERSH</i>'s custody (18 August).</p>

1949	Minister of Foreign Affairs (4 March 1949-5 March 1953)	Appointed Minister of Foreign Affairs (4 March) and chairman of the Committee of Information combining <i>MGB</i> and <i>GRU</i> 's foreign intelligence directorates. ²¹⁷
1952		Appointed Candidate Member of the Presidium of the Communist Party (16 October).
1953		Accused by the U.S. Congress Kersten Committee during its investigation of the Soviet occupation of the Baltic states.
	Death of Stalin (5 March). The same day, the 'leading group' (Malenkov, Beria, Molotov, Bulgarin and Kaganovich) dismiss him from the Central Committee's Presidium and strip him of his ministerial portfolio. ²¹⁸	
	First Deputy Minister of Foreign Affairs (5 March 1953-22 November 1954)	Appointed First Deputy Minister of Foreign Affairs (5 March)
Trial and execution of Beria (26 June), for treason, terrorism and anti-Soviet activities under articles 58-1B, 58-8, 58-13, 58-11 of the <i>Penal Code</i> .		
Appointed by the <i>Politburo</i> as permanent representative of the USSR to the UN (5 March).		
1954		Dies of a “heart attack” in New York (21-22 November). The medical report, in Moscow, attributes his death to “a sharp interruption in the coronary circulation of the blood”. ²¹⁹

Vyshinsky's late career

Five important issues remain to be examined by historians:

1. his role at the top of the Soviet *Commission on the Guidance of the Work of Soviet Representatives in the International Tribunal in Nuremberg* in 1945 to prevent the International Military tribunal from investigating the Soviet role in the Katyn massacres of 22,000 Polish officers and intelligentsia members.
2. His role before Stalin's death, between 1949 and 1953, as Minister of Foreign Affairs and chairman of the *Committee of Information* combining *MGB* and *GRU*'s foreign intelligence directorates.
3. His collaboration in Beria's rise and fall in 1952 and 1953.
4. The political reasons for his dismissal as Minister of Foreign Affairs and his eviction from the Presidium of the Communist Party immediately after Stalin's death on 5 March 1953.
5. The circumstances and motives of his sudden death in New-York on 21 November 1954: was he poisoned and, if yes, was it because he had been a supporter of Beria, or because he knew too much about the new Ruler?

The bombing of Berlin and the death of Freisler

On 3 February 1945, Freisler conducts a hearing of the *People's Court* against Fabian von Schlabrendorff, a jurist before the war who had attempted in 1943 to kill Hitler and a suspected conspirator in the July 1944 plot. An air raid alarm interrupts the hearing. Freisler stays in the building to collect some documents. A bomb pierces the roof and explodes, collapsing a roof beam which falls on Freisler. He is killed instantly. ²²⁰

From Nazi to Communist dictatorship

Liberation from the oppressive regime is only the beginning of a complex and ambivalent process of elimination of the Judicial Terror.

The case of Nazi Germany is particularly revealing: after their Victory, Allied Powers adopt opposite policies concerning the cleansing of the Nazi judicial establishment.

In the British Zone of Occupation, faced with the lack of judicial opponents to the Nazi judiciary, the British military administration adopts the 'piggyback procedure' according to which up to 50 per cent of judges and public prosecutors in the Zone could be former NSDAP members.

In East Germany, the Soviet military administration wipes out 90% of the judicial establishment and imports the Soviet justice system. *NKVD Order No. 00315*, of 18 April 1945, orders the internment without prior investigation by the Soviet military of:

- "spies, saboteurs, terrorists and active NSDAP members";
- heads of Nazi organizations;
- people maintaining "illegal" print and broadcasting devices or weapon deposits; and
- members of the civil administration and journalists.

In all, 123,000 Germans and 35,000 Russians are imprisoned, most in ten NKVD Special camps in East Germany where at least 43,000 will die. ²²¹

In September 1945, almost 90% of the legal personnel is fired. Nazi public prosecutors and judges are accused of 'crimes against humanity' and 'fundamental support' of the Hitler regime. The majority of the defendants receive prison sentences of ten years or more, and twenty-four are executed on the night of 3 to 4 November 1950. ²²²

Laymen receive crash courses in the administration of justice *Volksrichterschulen* (schools for the training of people's judges).²²³

Proceedings in the courtrooms are frequently show trials incompatible with the rule of law:

- the accused have few rights;
- there are no independent lawyers, or the defendants have no lawyers;
- there are no witnesses for the defence;
- the public is usually excluded;

- public prosecutors use the courtroom as an ideological tribune;
- judges hand down sentences dictated in advance by the *SED* and the *Staatssicherheit* (East German *Ministry for State Security*). ²²⁴

One example: Hilde Benjamin is a judge in many show trials before the *East German Supreme Court* from 1949 to 1953 and Minister of Justice of the GDR from 1953 to 1967. She declares that: “criminal justice should be a political act”, subjects defendants to tirades of insults or shouts them down, and is known for her propensity for handing down death sentences.

She is nicknamed “the Red guillotine”, or ... “the Red Freisler”. ²²⁵



Hilde Benjamin ²²⁶

VI. Justice delayed, justice denied

A. The French ambivalence

On 28 December 1794, the *National Convention* votes the reorganization of the *Revolutionary Tribunal*, which is put into effect a month later. New judges are appointed, who come from the provinces and cannot officiate in Paris for more than 3 months. ²²⁷

Between 6 April 1793 and 27 July 1794, the *Revolutionary Tribunal* has sent 2,625 people to death. Its successor pronounces only 17 death sentences, including those of Fouquier and his 15 co-accused.

An example of the revived clemency: Fouquier-Tinville’s deputy, Gilbert-Liendon, escapes execution and continues his judicial career under the First Empire. ²²⁸

Some victims will even receive justice, such as the Duchess of Saint-Aignan, who was sentenced to death despite being pregnant but saved by 9 Thermidor. She was freed, her trial quashed and she was put back into possession of the remnants of her property. ²²⁹

But bad habits are difficult to lose: France will use special jurisdictions again a century later, during World War II. In August 1941, after an attack in the Paris metro against a German officer, the Petain regime establishes a special jurisdiction, the *Special Section of the Court of Appeal*, to try summarily communist resistance fighters; at least 12 are sentenced to death and guillotined after secret trials. ²³⁰

B. The Soviet Judges and the revision of miscarriages of justice

From Stalin to Putin, contradictions are a favorite instrument of Rulers to distinguish the real from the fake followers.

In 1934-1936, Stalin develops two parallel strategies to overcome obstacles to his power, each of which having long-term consequences for Soviet criminal justice.

First, the reinforcement of the autonomy of the judicial apparatus, through

- the reorganization of the legal agencies to produce a more centralized and pliant administration of justice, with an increase in the power of the procuracy through the binding of *Narkomiust* [Justice Secretariat] and *OGPU*, as well as the weakening of local power and reinforcing of criminal sanctions as a reliable weapon for the Patron;
- the elimination of weakly prepared legal officials and provision of remedial legal education for the rest, leading in 1936-1937 to universal legal preparation, expansion of higher legal education and infusion of more lawyers into the ranks of legal officialdom.

Second, at the same time, Kirov's murder becomes the justification for the Great Terror targeting prosecutors, *Narkomiust* and the USSR Supreme Court in 1937, before ending abruptly in 1938:

- in the second half of 1937 and early 1938, close to half of all procurators and judges in the USSR lose their jobs and in most cases are also arrested;
- as of 1 January 1939, 35.9% of *People's court* judges have served less than one year, and another 31.0% less than three years;
- in 1938, 40% of the members of regional and republican supreme courts are changed;
- lenient judges are condemned as "enemies of the people" and denounced to the *NKVD* by Ulrikh, as in the cases of Vinokurov and Solts.

The consequences for procuracies are devastating, with a general decline in standards and a huge work overload.

And the problem is this is still going on NOW.

In February and June 1988, under the pressure of the families and young historians who have access to the official records, the *Soviet Supreme Court* rehabilitates Bukharin, Zinoviev, Kamenev, Radek and 49 other Bolsheviks sentenced during the Moscow Trials. But not Trotsky and his son Sedov.

And now, in 2022, efforts to obtain *perestroika* (revision) are limited to private initiatives which are systematically blocked by authorities and society. At the end of December 2021, Russia's Supreme Court orders the closing of Russian human rights organization *Memorial* following charges by the Prosecutor General that it "creates a false image of the USSR as a terrorist state, whitewashes and rehabilitates Nazi criminals", and the list of dissidents contains "Nazi offenders with blood of Soviet citizens on their hands".

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C. The Nazi judges and the absence of revision of miscarriages of justice

Three factors will play an essential role in the evolution of the policies of cleansing of former Nazi judges after the war:

- the largely exemplary punishment of selected members of the former judicial establishment;
- the paralysis of the judicial system in the Occupied zones stemming from serious personnel shortages caused by the removal of all incriminated persons; and
- the opposition of former Nazi judges to the "law of the vainquor", which contradicts their own precedent as judges in the territories conquered by the Reich in the early 1940s.

a. The *Alstotter* trial: a slap on the wrist

In 1947, fourteen members of the Nazi legal and judicial establishment are judged by the International Military Tribunal on 4 counts:

- Count 1 — CONSPIRACY to commit crimes alleged in the next three counts;
- Count 2 — CRIMES AGAINST PEACE including planning, preparing, starting, or waging aggressive war;
- Count 3 — WAR CRIMES including violations of laws or customs of war;
- Count 4 — CRIMES AGAINST HUMANITY including murder, extermination, enslavement, persecution on political or racial grounds, involuntary deportment, and inhumane acts against civilian populations. ²³²

The *Alstotter Trial* produces three acquittals, four life sentences, six sentences from 5 to 10 years, and one mistrial. ²³³

Freisler is characterized as "the most evil, brutal and bloody judge in the entire German legal administration".

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But not a single former member of the *Volksgerichtshof* figures among the convicted war criminals, and the heads of the Justice system have died: Reich Minister of Justice Gürtner died in 1941, his successor Thierack committed suicide in a British internment camp in 1946, and Bumke, the President of the *Reichsgericht*, committed suicide in 1945 when the US Army entered Leipzig. ²³⁵

b. The reintegration of Nazi judges in the German judiciary: a political dilemma or professional complicity?

Most former Nazi agents of Judicial Terror are not prosecuted and pursue their careers in the judicial system after the war.

In the Post second-world war period, the German judicial system goes through four steps:

- de-nazification (1945);
- institutional continuity and re-nazification (1948-1949);
- officialization of re-Nazification (1950s-1989); and
- German re-unification (post-1989).

De-nazification (1945)

In April 1945, ordinary courts are suspended and extraordinary courts are abolished. By November 1945, some courts are back in operation and the de-nazification of the judicial system begins officially, but immediately the objective appears unattainable: between 93% (Westphalia) and 100% (Schweinfurt) of the existing court staff have been Nazi.

Several methods are used to try to run around the problem:

- calling back judges who had retired before 1933;
- appointing attorneys as part time judges;
- treating as “clean” all jurists who joined the Nazi Party after 1937; or
- employing a “tainted” judge for every untainted one (the "piggy-back method").

In the Soviet zone, the occupant forces enforce a method reminiscent of the *Bolshevik* 1920s: all judges are fired and replaced by lay judges specially trained and politically reliable.

Institutional continuity and re-nazification (1948-1949)

In 1948, 30% of the presiding judges and 80 to 90% of the assisting judges in the County Courts of the British Zone and other Western zones are former Nazi Party members. ²³⁶

Western Allies end their restrictions on jurists with a Nazi past. Slowly, Nazi judges and prosecutors return to office in the positions occupied by former Weimar judges, exonerated by the de-Nazification procedures

which classified virtually everyone as "followers" or "exonerated". In 1949, according to the report *Some Aspects of ReNazification in Bavaria*, 752 of 924 judges and public prosecutors (81%) are former Nazis. ²³⁷

Officialization of re-Nazification (1950s-1989)

In the 1950s, through the support of the Minister of Justice and legal scholars, German caselaw and legislation officialize the "continuity" of the State and grant effective exoneration to Nazi-era judges.

For example, in 1950, a judgement of the *Bundesgerichtshof* (*Federal Court of Justice*) grants to all Nazi-era judges a practical exoneration through the *Rechtsbeugungs-Prinzip* ("perversion of the law principle"): a judge can be convicted of murder or other serious crimes ONLY if he is at the same time found guilty of perverting the course of justice. This theory obliges the prosecutor to prove without doubt that the accused had knowingly or intentionally violated laws valid at the time.

In 1951, the *131 Law* gives retroactively a legal foundation to the reintegration of Nazi officials in the civil service. It is amended in August 1953 by :

- giving to all public servants of the Nazi state a legal claim to reemployment and the right to claim back pay for the time they have not been able to work; and
- requiring that at least 20 percent of employees in all departments of public administration be former Nazis; departments failing to meet this requirement would be fined an amount equal to the salaries thus "saved".

The only exceptions are agents of the *Gestapo* and civil servants who have been characterized as "major offenders" in de-Nazification proceedings.

The practical consequence is that old Nazi Party members must be given first priority in hiring, and thus more than 90% of the Nazi officials dismissed after 1945 come back to the public service. Because of financial difficulties of landers and bureaucracy overstaffing, for all practical purposes former membership in the Nazi party becomes a requirement for joining the civil service.

In 1956, the *Committee for German Unity* voices serious concerns over the evidence that the majority of Nazi judges have been returned to office and that 800 *Special Court* and *Military Court* judges particularly implicated with the Nazi Party are then occupying responsible positions.

On 19 October 1958, the West German Federal Prosecutor-General, Dr Max Güde, admits that:

the mass of today's judges and public prosecutors were already active in legal office between 1933 and 1945 ... they were tools of illegality, and instruments of terror" (...) "the rule of law perished, but they survived. ²³⁸

In the 1970s, attempts are made to establish a new, democratic legal culture. But the attempts are not always successful, as demonstrated by the cases of Chapeaurouge and Weber-Lortsch.

On 6 February 1975, the Second Criminal Panel of the *Federal Supreme Administrative Court* must decide whether members of the German Communist party can join the civil service. But two of the judges on the panel have served in the Nazi courts and police:

- Edmund de Chapeaurouge has served on the bench in *Race Law* trials in Hamburg, and decided the case of Leon Abel, whom he characterized as "an inferior human being".
- Rudolf Weber-Lortsch has been a high-ranking officer in the *SA* in 1933, acting chief of police in Kattowitz, Konigshurte (Kro-dewska Huta), and Sosnowiec in occupied Poland, and later an *SS* and police officer in the "Reich Territory of the Ukraine". From 1942 on, Lortsch is the head of the Legal and Administrative Office of the Senior Officer of the *SS* and Police Forces in Norway. On 25 November 1942, his office reports that under its direction 700 Norwegian Jews have been "transferred to Auschwitz".²³⁹

By 1984, the Nazi jurists still alive who served on the bench after the War include:

- two county court judges;
- one chief judge of a county court;
- two associate judges in regional courts;
- four chief judges in regional courts;
- four associate judges in higher regional courts;
- six public prosecutors;
- three senior public prosecutors; and
- two senate presidents.²⁴⁰

The West German government employed 181 former Nazi public prosecutors, and *Volksgerichtshof* judges who were not employed by the Federal Republic after the end of the Second World War have been the exception.

German re-unification (post-1989)

With the reunification, the same problems which have plagued the de-nazification of the West German judiciary in 1945 arise again concerning the East German judiciary.

The East German judiciary is a copy of **both** the Nazi and the Soviet ones, in its objectives and in its methods.

Until 1987, the German Democratic Republic (GDR) imposes the death penalty for capital crimes such as murder, espionage, and economic offenses. After the mid-1950s, nearly all executions are carried out in secrecy, initially by guillotine and later by a pistol shot to the neck. In most cases, the relatives are informed, neither of the sentence, nor of the execution. The corpses are cremated and the ashes buried secretly at construction sites.²⁴¹

At least 300 such executions are documented, although the real number will probably never be known because no complete record of death sentences imposed by civil or military tribunals can be found.

Similarly, there are no precise figures concerning the number of victims shot for attempting to escape to the West (at least 825), or the members of the *Stasi* who were executed for various crimes including attempts to escape to the West (at least 200).

At least 40,000 sentences are handed out by the courts for “political offences”.²⁴²

The East German judiciary is particularly vicious: several judges and prosecutors have, in collusion with the *State Secret Police*, the *Stasi*, requested or handed down more severe sentences in political cases in order to allow the East German government to collect larger ransoms from the West German government for the liberation of such “convicts”.²⁴³

We have seen above, with the case of the “Red Freisler”, Hilde Benjamin, a particularly visible example of the viciousness of the East German judiciary.

The failure of West Germany to bring the Nazi judges to justice, *die Jauche der Justiz* (the cesspool of justice), plays an important role in motivating a strong investigative policy after the reunification, from the end of 1990 to July 1996:

- 52,050 investigations are launched into charges of murder, attempted murder, manslaughter, kidnapping, election fraud, and perversion of justice; and
- 29,557 investigations are stopped for various reasons including death, severe illness, old age, or insufficient evidence.

The disappointment is in the results of those efforts: only 139 convictions in those five years.²⁴⁴ Although that is still 139 times better than the results concerning the Nazi judges...

c. The continuance of financial benefits

After the war, Nazi jurists benefit handsomely from their crimes, by receiving generous sums and pensions.

For example, Schlegelberger, who has been State Secretary in the Ministry of Justice from 1931 to 1942 and Director of the Ministry of Justice for the last 17 months of his service, receives 100,000 marks from Hitler at his retirement in 1942 and, later, DM 160,000 in back pension as well as a monthly pension of 2,894 marks.

The legal basis for such treatment is an amendment to the *Law on Judges*, on 8 September 1961, which gives to all judges and public prosecutors who had "participated in the administration of criminal law from September 1, 1939, to May 9, 1945" the opportunity to resign with no reduction in pension by 30 June 1962. But only 149 former Nazi jurists take advantage of it.²⁴⁵

d. The denial of benefits to the victims

By contrast, victims of the Nazi agents of Terror are left struggling for survival.²⁴⁶

For example, between November 1948 and March 1949 in the district of Lower Bavaria Upper Palatinate, new staff is hired to fill positions in reopened government agencies. But while 69 former Nazi Party members are reemployed, no jobs are offered to 58 non-Nazi former government employees.

Victims of the Nazi regime are entitled to compensation **only** if they can prove that they have committed no crime, aided and abetted no tyrannical regime, never violated United Nations or international law, and never been a member of a National Socialist organization. ²⁴⁷

In the case of Gypsies, insult is wilfully added to injury: although they were sent to concentration camps for racial reasons, until 1956 the administrations and courts seize the fact that their deportation was justified by their being “asocial” and “work shy” - because they were characterized in the beginning as “Indo-Germanic race” - to hold that they have no claim to reparations for harm suffered before 1 March 1943. ²⁴⁸

VII. Conclusion

The lessons: characteristics of the Repressive State

Pozdnakova introduces an important concept for our comparative analysis of the Revolutionary, Bolshevik and Nazi institutions, the concept of the Dual State: the Prerogative State and the Normative State. In short, the Devil’s Advocate’ Repressive State, whether Revolutionary, Soviet or Nazi, can be divided into

- a **Prerogative State** governed directly by the rule of force, supported by
 - special laws, such as the *Decree on suspects*, art. 58 of the *Penal Code* or the *Law against treacherous criticism of the government*; and
 - special courts, such as the *Revolutionary Tribunal*, the *dvoïkas* and *troïkas*, the *Sondergerichtshof* and *Volksgerichtshof*; and
- a **Normative State** regulated through a system of sanctioned legal norms prescribing the permissible boundaries of interpersonal relations and citizen-state relations, to ensure stability, predictability and the strict implementation of policies decreed by the Party.

The Normative State can be more or less cut from the past. For example,

- in Russia: nihilism is opposed to Socialist Legality, itself based on Marxist precepts according to Vyshinsky. The system is stabilized in the 1920s with the *Criminal Code*, the *Civil Code* and the *Code of Procedure* of the 1920s.
- Whereas in France and Germany: the previous legal orders are preserved except in some areas, such as racial and political exclusion, or war law.

But in the Prerogative State, the law can be broken for any reason of political expediency decided by the Patron without justification.

For example, the trial of the Girondins, “The Führer is the Law”, the *NKVD* Secret Orders, the Moscow Trials.

In consequence,

- the Normative State is subordinated to the Prerogative State, and
- its limits are defined by the Prerogative State.

The transition from Normative State to Prerogative State is very fast, but brutal, like the Soviet Revolution in 1918, and the seizure of power by the Nazi in 1933.

The transition back to an exclusively Normative State, following the fall of the Robespierrists, Hitler and Stalin, is extremely difficult, especially in the legal and judicial domains, because of two categories of factors:

- the continued physical existence of individuals linked to the Prerogative State as judges or administrators, like the German judiciary or Mornet after World War II; and
- the physical and administrative consequences of the rules or legal situations they created, such as the legal “disappearance” of the victims of the Gulag (“10 years without right to correspond”), and the physical disappearance of victims of the *Revolutionary Tribunal* or the *volksgerichtshofs*.

A complicit judiciary

While some are indeed fanatical Revolutionaries, *Bolsheviks* or National Socialists like Fouquier-Tinville, Vyshinsky or Freisler, others are typical conservative representatives of the national legal system, a fact which only underscores how closely it is intertwined with the political terror regime. They are revealed as the very type of compliant jurists without whom the Revolutionary, *Bolshevik* or Nazi regime could not have survived.

a. Only a few known dissidents

In the three countries, only a handful of judges or prosecutors manifest openly their dissidence.

France

In France, we have no example of open dissidence to the *Revolutionary Tribunal*. But during World War II, there are only two known French dissidents judges to the Pétain régime: Didier and Lambert.



Paul Didier

Justice Paul Didier is admitted to the Bar of Paris in 1911. In 1914, he is mobilized and fights on the front, where he is taken as prisoner and detained in Mainz. He is admitted to the judiciary in 1919 but refuses to take the oath of office as long as he is still officially counted as a soldier. He works in the Chancery from 1922 to 1937, when he becomes deputy-director responsible for naturalizations. On 22 September 1940, he is set aside for his public opposition to the measures of de-naturalization to be taken by the Vichy regime. He is appointed as simple judge to the tribunal of the department of Seine. A year later, he opposes the creation of the *Sections spéciales* and the obligation imposed on 14 August 1941 on all judges to swear allegiance to Marshall Pétain. After he has refused to swear allegiance, he is suspended by the Minister of Justice Barthélémy, dismissed, arrested and imprisoned. He is freed and placed under house arrest in February 1942, and then sent into retirement on 11 August 1942. He supports the Resistance and takes part in several actions in the region of Corbières. He is reinstated in the judiciary in October 1944 as one of the presidents of the Court of Appeal of Paris. Later, he is in charge of the presidency of one of the sections of the court of justice of the department of the Seine. In 1950, he is appointed to preside over the indictment chamber of the Paris Court of Appeal. In 1951, he declines his proposed promotion to the *Cour de Cassation*. He retires in 1958.²⁴⁹

Nazi Germany

Nazi Germany treats dissident judges and lawyers very differently.

Between 1932 and 1941, five German judges are removed, all on the basis of their behavior outside their judicial role such as engaging in political opposition against the Nazis or refusing to adopt Nazi conventions. Two of them, Dr Karl Sack, a general staff judge, and Dr Johann von Dohanyi, a *Supreme Court* judge, participate in the plot of July 1944 against Hitler. They are both arrested and murdered in 1945 in concentration camps.²⁵⁰ Two others, Kreyssig, a judge in the *Petty Court* in Brandenburg, and Hermanns, oppose the T-4 euthanasia program or abuse of authority by local party or government officials. Both are forcefully “retired”.²⁵¹

The situation of opposing lawyers is much worse, as exemplified by the fate of Hans Litten.

Hans Litten is born in 1903 in a Jewish family but converts to Lutherianism. In 1927, he is admitted to the Bar and in 1928 he opens a law office with a Communist friend. In 1930, in the *Tanzpalast Eden* case, he

sues the SA for attempted manslaughter, breach of the peace and assault. He wants to show that the Nazis used terror intentionally in order to destroy the democratic structures of the Weimar Republic. Hitler is summoned to appear as a witness in court on 8 May 1931. During his cross-examination, Litten shreds Hitler's argument that the Nazi party is a democratic organization:

Litten: (...) Did you know that in the circles of the SA there is talk of a special *rollkommando* (mobile paramilitary unit) ?

Hitler: I haven't heard anything about a *rollkommando*. (...)

Litten: You said that there will be no violent acts on the part of the National Socialist Party. Didn't Goebbels create the slogan, "one must pound the adversary to a pulp?"

Hitler: This is to be understood as "one must dispatch and destroy opposing organizations". (...) (The presiding judge read a question formulated by Litten): Did Hitler, as he named Goebbels "*Reichsleiter*" (Leader for the empire) of Public Enlightenment and Propaganda, know of the passage from his book, where Goebbels declares that fear of the coup d'état cannot be permitted, that parliament should be blown up and the government hunted to hell and where the call to revolution was made again, letter-spaced?

Hitler: I can no longer testify under oath, if I knew Goebbels' book at the time. The theme (...) is absolutely of no account to the Party, as the booklet doesn't bear the Party emblem and is also not officially sanctioned by the Party. (...)

Litten: Must it not be measured against Goebbels' example, to awaken the notion in the Party, that the legality scheme is not far away, if you neither reprimanded nor shut out a man like Goebbels, rather straightaway made him head of Reich Propaganda?

Hitler: The entire Party stands on legal ground and Goebbels (...) likewise. (...) He is in Berlin and can be called here any time.

Litten: Has Herr Goebbels prohibited the further dissemination of his work?

Hitler: I don't know.

[In the afternoon, Litten returns to the subject.]

Litten: Is it correct that Goebbels' revolutionary journal, *The Commitment to Illegality* [*Das Bekenntnis zur Illegalität*], has now been taken over by the Party and has reached a circulation of 120,000? (...) I have concluded that the journal is sanctioned by the Party. (...)

Presiding judge: Herr Hitler, in point of fact, you testified this morning, that Goebbels' work is not official Party [material].

Hitler: And it isn't, either. A publication is an official Party [organ] when it bears the emblem of the Party.

Hitler (shouting, red-faced): How dare you say, Herr Attorney, that is an invitation to illegality? That is a statement without proof!

Litten: How is it possible that the Party publishing house takes over a journal that stands in stark contrast to the Party line?

Presiding judge: That doesn't have anything to do with this trial. ²⁵²

In 1932, in the *Felsenbeck Trial* Litten sues five Nazis for the murders of five residents of the Felsenbeck colony. With the support of the prosecutor, the court expels him as counsel and ancillary counsel for the plaintiff because he has "unfurled unrestrained partisan propaganda in the trial" and "made the courtroom a hotbed of political passions". Later, Litten is removed again from a high court for influencing a witness,

raising the ire of the defense lawyers in Berlin. And after being threatened by the Nazi press, he needs a bodyguard to go out in public.

On the night of the *Reichstag* fire, he is arrested and “taken into protective custody”. He is then sent, as a Jew, into various concentration camps where he is beaten and forced into hard labour. So much that he attempts several times to commit suicide, and succeeds in Dachau on 4 February 1938.

According to Freisler, when Minister of Justice Franz Gürtner says: “No one will be able to do anything for Litten”, Hitler turns red with rage and shouts: “Anyone who advocates for Litten lands in the concentration camp, even you.”²⁵³

Soviet Union

In the Soviet Union, some Soviet prosecutors oppose the *NKVD*’s arrests and tortures, at the risk of their lives.

In 1937, Prosecutor Ishov arrests an *NKVD* henchman and frees his victims; he is later arrested and tortured by the same man, but survives and is reinstated.

In 1937 also, Acting Chief Prosecutor of the Russian Federation Faina Niurina, a Jew, signs her own death warrant when she quotes the guillotined French revolutionary Olympe de Gouge : “If a woman has the right to mount the scaffold , she has the right to join the tribunal”. Vyshinsky denounces her to Yejhov, and she is arrested. She is shot in 1938.²⁵⁴

b. The rest: authority and solidarity above all

For the others, “silence is gold”.

B. The absence of responsibility

In most cases, criminal judges and prosecutors have not been held responsible.

a. France

Apart from the trial of Fouquier and his colleagues in Paris, there is either people’s justice, or no justice at all.

People’s justice

In Lyon, judge Fernex is responsible for the Terror in the city after its recapture from the insurgents in 1793. He is a former silk worker, ascetic and especially severe against wealthy people. He is mentioned on

the “list of patriots” made by Robespierre. He is a member of the Revolutionary Commission, nicknamed “Tribunal of the Seven”, which judges all prisoners either by acquitting or sentencing them to death. There is no public prosecutor or clerk, but only a secretary. Judgments are not signed. The members of the Commission wear around their neck a tricolor ribbon with a small steel axe. Each accused is heard separately and publicly. The hearing lasts on average two minutes for the discussion of the file of the Commission, the examination and the judgment. From 27 November 1793 to 16 April 1794, the Commission sentences 1,684 accused to death, frees 1,682 and keeps 162 in detention. It is dissolved on 6 April but continues its operations until 16 April 1794.

After the judgment has been rendered, the prisoners descend by a small winding staircase into the cellars of the City Hall; one of the cellars lead to freedom, the other to the guillotine.

In 1795, Fernex tries to escape from Lyon, but he is recognized, massacred and thrown into the Rhône. ²⁵⁵

No justice

Fouquier-Tinville and Fernex are the exception.

Proconsul Magnet, “Robespierre’s monkey”, becomes a moderate, registers to the Bar in Ambert, is banned as regicide in 1816 but his pardon is requested in 1821. ²⁵⁶ Cottier, chief secretary and friend of the Public prosecutor Viot, becomes a well known lawyer in Carpentras and dies in 1854. ²⁵⁷ Gilbert-Liendon, Fouquier-Tinville’s deputy, escapes execution after 9 Thermidor and continues his legal career as a judge under the First Empire. ²⁵⁸

b. Russia

Many, but not all, of Stalin’s victims are rehabilitated by Khrushchev and by the USSR Supreme Court after Stalin’s death.

But then, none of the members of the political tribunals or secret police is tried or accused even after the disappearance of the Soviet Union.

For example, Alexander Rekunkov, Prosecutor General of the USSR from 1981 to 1988, dies in 1996 without having faced any consequence for his persecution of Sakharov in 1980. ²⁵⁹

See also the videos on the author’s website: *Devil’s Advocates – Survivors – Vera – Ludmila – Fainsten*. ²⁶⁰

c. Germany

Only Germany has taken things seriously, but after a long delay and without much result.

Until very recently, the judicial system of the Federal Republic of Germany has failed to confront the legacy of its Nazi past.

Acquittals for former Nazi jurists have not been the exception, but the rule. Injustice has been routinely legitimized.

Inhumane sentences have been declared ‘valid under rule of law’ or as ‘just about acceptable’.

Denials and excuses have come in five categories, in a cascade of bad and contradictory arguments:

CATEGORY	SUBCATEGORY	EXAMPLES
Denial of victimhood	Distinction between categories of victims	Only former Nazi civil servants are protected in the Federal Republic.
	Emphasis on the loyalty of the defendants	Loyalty of the judiciary to state leadership.
	Characterization as mercy killings	The killing of human beings in the T-4 program was seen "chiefly as an act of humanitarianism".
Denial of wrongfulness	Framing as exceptional circumstances	It is ‘necessary to take into consideration the ‘special circumstances of war’, which created ‘an atmosphere of sensitivity towards law-breakers of any kind’. BUT there are contradictions: in the <i>Rehse</i> case (1967), it is held that the characterization of the <i>Volksgerichtshof</i> as a court implies that it acted in accordance with the ‘exceptional circumstances’ of that time; CONTRA: in 1985, the <i>Bundestag</i> declares that “the institution known as the “ <i>Volksgerichtshof</i> ” had not been a court as defined by rule of law, but rather an instrument of terror for the implementation of arbitrary National Socialist rule”.
	Denial of “injustice as such”	The combination of the <i>Blood Protection Law</i> and the <i>Blackout Regulations</i> to convict Katzenberger is not "injustice as such".
	Enforcement of valid law at the time	The sentences during the Third Reich were based on "valid law at the time”, including the laws and "Führer's decrees", since it is "the right of a nation to protect its own interests".
Wrongful legal consequences	Annulment of sentences of <i>Volksgerichtshofs</i> would annul exonerations pronounced by <i>People’s Courts</i>	<i>Volksgerichtshof</i> sentences should not be declared void because its few verdicts of not guilty would then be legally invalid. BUT: on 25 August 1998 and 23 July 2002, Nazi-era sentences are removed from the German criminal justice system.

Denial of capacity to be sued	Hitler's fault or Freisler's fault	"With reference to the killing of these four officers in Danzig, the perpetrator was the former Fuhrer and chancellor of the Reich, Adolf Hitler. In so doing, he acted in violation of the law and with intent."
	Incapacity to stand trial	"Dr. Hoffmann is unfit to stand trial not because of physical infirmity but rather because he suffers from intellectual and emotional disturbances. The intent of the accused to continue ... to devote himself to the practice of law does not contradict the finding that he is unfit to stand trial."
	Exoneration of accomplices	Accomplices can be sentenced only to a maximum sentence of 15 years, which is now prescribed.
Minimization of consequences	Characterization as misdemeanor	Nazi behaviors are characterized as mere "misdemeanour" if they are rooted not in National Socialism, but in "German nationalist sentiment".

Denials and excuses in Germany

C. The rejection of responsibility

Not only the agents of judicial terror have been punished rarely, they have themselves rejected any responsibility for their crimes.

a. France

During his trial, Fouquier-Tinville denies any responsibility:

This woman [Marquise de Feuquières, guillotined without evidence] was arraigned before the Tribunal. The proceedings opened. She confessed. There were no further proceedings. You are here trying the Tribunal as if a Revolutionary Tribunal were an ordinary tribunal! You ought to refer to the Revolutionary laws. ²⁶¹

b. Russia

Russian justice is torn apart.

On the one hand, private individuals such as Yuri Dmitriev, the association *Memorial* and the editor Rosspen research actively, and often find, evidence of the cruelties inflicted to their families and to the country as a whole by the *Bolshevik* terrorists. ²⁶²

But, on the other hand, as we have seen earlier the present Patrons and their agents do not hesitate to rehabilitate Stalinism in history schoolbooks, to bring false accusations to punish the memory hunters:

SANDARMOKH, Russia — The day began, like many others in her childhood years, with hours of tramping through an insect-infested forest with the family dog while her eccentric father, Yuri Dmitriev, wandered off to hunt in vain for corpses buried among the trees.

On that day more than 20 years ago, however, Mr. Dmitriev, an amateur but very determined historian, finally found the gruesome prize he had long been searching for — burial mounds containing the remains of political prisoners executed by Stalin's secret police.

"Everything started here," said Mr. Dmitriev's 35-year-old daughter, Katerina Klodt, during a recent visit to the forest at Sandarmokh in Karelia, a peninsula in northern Russia. "My dad's work has clearly made some people very uncomfortable."

Mr. Dmitriev is now in jail, awaiting trial on what his family, friends and supporters dismiss as blatantly fabricated charges of pedophilia, an accusation that has frequently been used to discredit and silence voices the Russian authorities do not like. ²⁶³

Even by dissolving the *Memorial* association.

c. Germany

German justice is still facing a cascade of dilemmas.

First, many German jurists reject the judgments of the *International Military Tribunal* in the cases of *Alstotter et al.*, dismissing it as "victor's justice". But wasn't that same principle invoked by Nazi jurists to justify their jurisdiction in conquered countries like Poland?

Second, it is essential that the Courts rehumanize both victims and perpetrators. Some German courts have shown remarkably little tact in their characterization of survivors: in a decision of 24 October 1951, the *Cologne County Court*, refers to the victims of the T-4 program as "burned out human beings"; "creatures vegetating below the level of animals". ²⁶⁴ On the other hand, the dehumanization of the perpetrators does not help in understanding their motives and their actions, so as to be able to prevent their repetition.

Third, it is essential to continue pursuing justice: war crimes, crimes against humanity and grave crimes such as murder are imprescriptible. That is why the heroic efforts of individuals like Robert Kempner, Gerhard Meyer or Rupert Scholz should never be stopped, or forgiven. ²⁶⁵

Justice may be slow, but it can erupt in a totally unpredictable manner. I know, I was myself Her agent when I excluded from Canada, as a refugee judge, a major accomplice of the perpetrators of the Rwandese genocide and a major judicial official in the communist government of Afghanistan.

D. The need for self-introspection and humility

Muller's comments apply without any doubt to ALL agents of Judicial Terror:

The judicial system of the Third Reich remains an open chapter. The *People's Court* was the chief symbol of a system without justice and no doubt its most openly brutal institution, but it was only a part of that system. If its judges had been tried and found guilty, then it would have been

impossible to acquit the numerous others who had handed down sentences on the Race Laws elsewhere or had presided at the *Special* and *Military Courts*. Conviction of a single judge of the Third Reich would have started an avalanche that would inevitably have engulfed the majority of postwar West German judges. Only with difficulty could it have been prevented from reaching the judges of the Federal Supreme Court, the Federal Administrative Court, and even the Federal Constitutional Court. As the journalist Jorg Friedrich observed bitinglly, "Judge Rehse of the *People's Court* could not have committed murder, for this would have meant that the West German judicial system had been established by murderers in the hundreds. ²⁶⁶

But is it possible to go forward and, if yes, how?

I think that this boils down to two fundamental issues:

- a question: as prosecutors and judges, deciding what is more important: authority, or justice?
- a step forward: as human beings, acknowledging and forgiving.

An example: the grandchildren of Stepan Karagodin and Nikolai Zyryanov.



Stepan Karagodin

In 1937, Stepan Karagodin, a peasant, is arrested by *NKVD* officers in Tomsk, tried by a *dvoika* and sentenced to death as a Japanese spy (*NKVD Harbin Operation*) and organizer of an espionage and saboteur group. He is shot in January 1938 and fully rehabilitated in the 1950s.

His grandchild, Denis Karagodin, searches for the individuals involved in his grandfather's death. He compiles a list of dozens of names, from Stalin to Vyshinsky, *NKVD* typists and driver, and the three signatories of the death report including Nikolai Zyryanov, an aide to the head of the Tomsk prison whom he thinks was an executioner of Stepan.

Zyryanov's granddaughter, Yuliya, writes to Denis:

I haven't been able to sleep for several days, I just can't... [...] I am very ashamed about everything. I physically feel this pain. I bitterly regret that there is nothing I can do to make amends apart from admit to being a relative of N.I. Zyryanov and remember your great-grandfather in my prayers.

She adds that her maternal great-grandfather has also been killed in the purges, and thus "there were victims and executioners within one family." In his reply addressed to "the granddaughter of the executioner who killed Stepan Karagodin", Denis writes:

I extend you my hand in reconciliation, no matter how hard it is for me to do it. ²⁶⁷

As the final word, let us answer Fouquier-Tinville's last words of defence at his trial on 3rd May 1795:

« J'étais la hache de la Révolution, punit-on une hache ? » - "I was the ax of the Revolution, does one punish an ax?"

Antoine, tu n'étais pas un objet, mais une *personne* dotée d'une tête ***et d'un cœur***.

Antoine, you were not an object, but a *person* with a brain ***and a heart***.

ENDNOTES:

¹ Thank you to Michael Ellman and Hans Petter Graver.

² Jansen, *A Show Trial Under Lenin. The Trial of the Socialist Revolutionaries, Moscow 1922* (1982), 186

³ Fouquier-Tinville: 2755 victims from 25 January 1793 to 29 July 1794; see [Liste des Victimes du Tribunal Révolutionnaire à Paris](#). Freisler: at least 2600 victims. Vyshinsky: the total number of his victims is unknown, since he prosecuted in many secret trials. But he requested 49 death sentences against 54 accused in the “public” Moscow Trials: in the *Case of the Anti-Soviet Trotskyist Center*: 16 accused, 16 executed; in the *Case of the Parallel anti-Soviet Trotskyist Center*: 17 accused, 13 executed; in the *Case of the Bloc of Rightists and Trotskyites*: 21 accused, 18 executed.

⁴ Couthon, as rapporteur to the Convention on the draft law for the creation of the Revolutionary Tribunal, Décret du 22 Prairial an II (10 June 1794); in Des Essarts, *Procès fameux, extraits de l'Essai sur l'histoire générale des tribunaux des peuples tant anciens que modernes* (1796), Tome XIII, p. 75.

⁵ For France: the genocides of Vendée, the nobility and the clergy; for the Soviet Union: the Holodomor and the Gulag; for Germany: the Shoah and the genocide of the Gypsies.

⁶ Graver, *Judges Against Justice. On Judges When the Rule of Law is Under Attack* (2015), 35

⁷ See [CRIMINAL JUSTICE SYSTEMS - The criminality and the reformation of the Afghan and Iraqi justice systems / Des systèmes judiciaires criminels: la réforme des systèmes judiciaires afghan et irakien - rev 070105](#).

⁸ See: [IRAN: explanatory note on amnesty international's use of the term “extrajudicial executions” in reference to 1988 prison massacres](#); [Iran: Blood-soaked secrets: Why Iran's 1988 prison massacres are ongoing crimes against humanity](#); [Iran's 1988 Massacre: Ebrahim Raisi, key member of Tehran death committee planning presidential bid](#); [Abolqasem Salavati - Wikipedia](#); [Hard-line judge in Iran is assigned case of jailed Post Reporter Jason Rezaian](#); [Human rights violator: Abolghassem Salavati](#); [Six judges accused of leading role in Iranian crackdown](#); [abolghassem salavati – Center for Human Rights in Iran](#); [Iran imprisons journalist for reporting on judiciary corruption allegations](#); [Report: Iran Tortured, Sexually Abused, and Killed Protesters in Detention](#); [1988 executions of Iranian political prisoners explained](#); [In Iran, It Is a Crime to Be a Christian](#); [Iran's hostage factory](#); [US should sanction Iran's notorious 'hanging judge'](#); [1988 executions of Iranian political prisoners](#); [1988 massacre of political prisoners in Iran](#); [The Forgotten Mass Execution of Prisoners in Iran in 1988](#); [Images de executions Erin Prison 1988](#); [Evin prison: the hell on earth](#); [The 1988 massacre in Iran](#); [Exécution des prisonniers politiques iraniens de 1988](#); [Iran executes man for heresy](#); [Abolqasem Salavati - Wikipedia](#); [US denounces Iran rights abuses, imposes sanctions on judges](#); [Islamic Revolutionary Court](#).

⁹ [UN Commission of Inquiry on Syria: ISIS is committing genocide against the Yazidis](#).

¹⁰ See: concerning the application of Sharia law: [Abdullah Qardash: IS Successor to Al-Baghdadi?](#); [ISIS Sharia judge killed by gunmen in Raqqa](#); [Inside the former ISIS Sharia school in Manbij](#); [Head of ISIS-led Sharia Court in Iraq's Tel Afar killed in U.S. strike](#); [ISIS-linked Sharia Court sentenced four Muslim clerics to death for refusing orders](#); [ISIS executes two Iraqi teenage girls for 'mocking the caliphate'](#); [ISIS jihadis behead Imam of Mosul mosque for 'fighting the Caliphate'](#); [Islamic State beheads two of its own jihadis in Mosul on charges of 'treason'](#); [ISIS beheads Syria imam for 'insulting God': activists](#); [Prosecuting Gender-Based Persecution: The Islamic State at the ICC](#); [Judge, Jury and Executioner: the ISIS Bureau of Justice and Grievances](#); [REPORT RELEASE: SJAC Unmasks Decision-Makers Behind ISIS Brutality](#).

[Concerning the elimination of disabled children: Is ISIS Killing Babies with Down Syndrome?](#); [ISIS issues fatwa to exterminate disabled children, 38 cases of babies killed through lethal injection or suffocation](#); [ISIS issues fatwa to kill children with Down syndrome: is that wrong?](#); [ISIS orders killing of kids with Down's Syndrome in latest sickening attack on the innocent](#); [ISIS is slaughtering babies born with disabilities](#); [How much more depraved can ISIS get? Group's Sharia judges order children with Down syndrome and other disabilities to be killed in chilling echo of the Nazis](#).

[Concerning the genocide of the Yazidis: UN Commission of Inquiry on Syria: ISIS is committing genocide against the Yazidis](#); [ISIS Enshrines a Theology of Rape](#); [Surviving Islamic State: The Plight Of The Yazidi Community](#); [The prosecution at national level of sexual and gender-based violence \(SGBV\) committed by the Islamic State in Iraq and the Levant \(ISIL\)](#); [Slavery: The ISIS Rules](#).

¹¹ In Iran, Grand Ayatollahs Khomeiny and Khamenei; in ISIS, Ibrahim Awad Ibrahim al-Badri (“Abu Bakr al-Baghdadi”) and Amir Mohammed Abdul Rahman al-Mawli al-Salbi (“Abu Ibrahim al-Hashimi al-Qurashi”).

¹² [Antoine Fouquier-Tinville](#) ; ‘Odious beyond its original perversion’: [Fouquier-Tinville and the Tribunal Revolutionnaire of Paris](#) ; Boulant, *Le Tribunal Révolutionnaire. Punir les ennemis du peuple* (2018), 640; Dunoyer, *The public prosecutor of the terror* (1883; translated by Evans) ; [FOUQUIER-TINVILLE ANTOINE](#).

¹³ [Antoine Fouquier-Tinville](#).

¹⁴ Vaksberg, *Stalin’s Prosecutor* (1991) ; [Andrei Vychinski](#) ; [Andrey Vyshinsky](#) ; Frerejean, *Les procès staliniens* (2017)

¹⁵ Social-Democratic Workers’ Party of Russia, a Marxist revolutionary party created in 1898 which, in 1903, split in two factions: *bolsheviks* and *mensheviks*.

¹⁶ [Andrei Vychinski](#) ; Vaksberg, *Stalin’s Prosecutor* (1991), 17

¹⁷ [Report: Stalin was a secret police agent in czarist era](#)

¹⁸ Ortner, *Hitler’s Executioner* (2018), 556; Pateman, [Beheaded by Hitler. Cruelty of the Nazis. Civilian executions and judicial terror 1933-1945](#) ; Muller, *Hitler’s Justice* (1991), 145

¹⁹ Schirer, *Le 3ème Reich, des origines à la chute* (1960), tome 2, 574

²⁰ [Cheka](#)

²¹ [https://en.wikipedia.org/wiki/Andrey_Vyshinsky#/media/File:Lenin_Zinoviev_Kamenev_Vyshinsky_\(cropped\).jpg](https://en.wikipedia.org/wiki/Andrey_Vyshinsky#/media/File:Lenin_Zinoviev_Kamenev_Vyshinsky_(cropped).jpg) ; Vyshinsky circled in red.

²² Vaksberg, *Stalin’s Prosecutor* (1991), 69, 70

²³ Vaksberg, *Stalin’s Prosecutor* (1991), 71

²⁴ Shirer, *La montée du nazisme* (1959), vol. 1, p. 93

²⁵ Muller, *Hitler’s Justice* (1991), 76

²⁶ Muller, *Hitler’s Justice* (1991), 76

²⁷ When the author was a refugee judge at the Immigration and Refugee Board of Canada, he noticed that the most impressive quality of a dictator, such as Saddam or Mobutu, was the ability to detect instantly the weakness, and thus the malleability, of his interlocutors.

²⁸ Comité de sûreté générale et de surveillance

²⁹ Comité de sûreté générale

³⁰ [Loi des suspects du 17 septembre 1793](#) ; [Loi des suspects](#)

³¹ [Loi des suspects du 17 septembre 1793](#) ; [Loi des suspects](#)

³² [Caractères qui doivent distinguer les hommes suspects, et à qui on doit refuser le certificat de civisme](#)

³³ [White Russians - Russian Revolution](#) ; [White movement](#)

³⁴ [New Economic Policy](#)

³⁵ [Criminal Code of the RSFSR 1922](#)

³⁶ [Article 58 \(RSFSR Penal Code\) - Wikipedia](#)

³⁷ [Red Terror](#)

³⁸ [The Povolzhye Famine & Cannibalism – 1921-1922](#)

³⁹ Lenin called for their immediate execution after their trial for conspiracy against the government, in August 1922; they were imprisoned until their executions during the Great Purges in 1937-1938.

⁴⁰ See above : **The competition between Mensheviks and Bolsheviks.**

⁴¹ [Nikolai Boukharine](#)

⁴² Wegren, [Patterns of Internal Migration During the Russian Transition](#) (2001), 20

⁴³ Stalin’s intent to enforce a policy of starvation of the peasants during the famine is strongly debated: Ellman, [Stalin and the Soviet famine of 1932-33 Revisited](#) (2007), Rozenas, [Mass Repression and Political Loyalty: Evidence from Stalin’s ‘Terror by Hunger’](#) (2019); but see also Davies, Wheatcroft, [Stalin and the Soviet Famine of 1932 - 33: A Reply to Ellman*](#) (2006). Davies and Wheatcroft argue that they

“found no evidence, either direct or indirect, that Stalin sought deliberately to starve the peasants. The top-secret decisions of the Politburo, endorsed by Stalin, never hint at a policy of deliberate starvation. Moreover, in their most secret letters and telegrams to Stalin, his closest associates Molotov and Kaganovich treat hunger and death from famine as an evil for which the kulaks or wider sections of the peasants, and inefficient local organization, are largely responsible, but which must be mitigated as far as possible by local and central measures.”

But such arguments are very weak:

- as witnessed by the Wannsee conference, in 1942,

- the Shoah was ordered verbally by Hitler to Heydrich, despite Hitler's opposite declarations to his close staff, as witnessed by the reaction of the representative of the Department of Justice during the conference in January 1942;
- It is highly improbable that an order to commit genocide would be committed in writing, or communicated to anybody except the enforcer, like Yagoda, or Iejov;
- the physical elimination of Yagoda and Iejov is strong corroborative evidence of their involvement in a genocidal process;
- even the NKVD Orders were communicated in writing to less than a hundred people;
- Molotov and Kaganovich's comments are not evidence of the lack of genocidal intention from Stalin, but merely ideological statements;
- Bukharin was very clear in 1928 in his characterization of Stalin as a "Genghis Khan" who "is not afraid to cut throats" and "is leading the country to famine and ruin";
- the famine of 1932 had been preceded by another famine in 1921, in the same region and with the same victims; the repetition in 1932 of the famine which happened 10 years earlier is at least evidence of criminal negligence with genocidal results.

⁴⁴ [Davies, The crime of "anti-Soviet agitation" in the Soviet Union in the 1930's \(1998\), 151](#)

⁴⁵ Werth, [LA GRANDE TERREUR DES ANNÉES 1937-1938. Un profond renouveau historiographique](#) (2010)

⁴⁶ Werth, [LA GRANDE TERREUR DES ANNÉES 1937-1938. Un profond renouveau historiographique](#) (2010)

⁴⁷ Shirer, *La montée du Nazisme* (1965), 68

⁴⁸ Whereas sec. 81 GCC imposed a sentence of life imprisonment. See Shirer, *La montée du Nazisme* (1965), 93.

⁴⁹ Shirer, *La montée du Nazisme* (1965), 95

⁵⁰ [Part II: SELECTED DOCUMENTS SHOWING KEY LEGAL MECHANISMS USED TO IMPLEMENT THE NAZI AGENDA](#), 26

⁵¹ Loewenstein, [Dictatorship and the German Constitution: 1933-1937](#) (1937), 571, note 118

⁵² [Nuremberg Laws](#)

⁵³ Muller, *Hitler's Justice* (1991), 118

⁵⁴ Taken by Stalin on the 1st of December and published officially, after ratification by the Sovnarkom on December 8th.

⁵⁵ [The Kirov Law at 75](#)

⁵⁶ [Mass operations of NKVD](#)

⁵⁷ [Mass operations of NKVD](#)

⁵⁸ [Mass operations of NKVD](#)

⁵⁹ [Traitor of Motherland Family Members](#)

⁶⁰ [NKVD Order No 00486](#)

⁶¹ [Kharbin operation of the NKVD](#)

⁶² [NKVD Order No. 00593](#)

⁶³ [Polish Operation of the NKVD](#)

⁶⁴ [NKVD Order № 00485](#)

⁶⁵ [German Operation of the NKVD](#)

⁶⁶ [NKVD Order № 00439](#)

⁶⁷ [Greek Operation of the NKVD](#)

⁶⁸ [NKVD Order № 00485](#)

⁶⁹ [Latvian Operation of the NKVD](#)

⁷⁰ [Korean Operation of the NKVD](#)

⁷¹ [Romanian Operation of the NKVD](#)

⁷² [Estonian Operation of the NKVD](#)

⁷³ [Finnish Operation of the NKVD](#)

⁷⁴ [Decree about Arrests, Prosecutor Supervision and Course of Investigation](#)

⁷⁵ [NKVD Order no. 00689](#)

⁷⁶ Created by NKVD Special Order 00485, 'On liquidation of Polish diversion-spying groups and elements of Polish Military Organization'. See below IV,B,vii,4 - Secret police jurisdictions, b - The dvoïkas and troïkas

⁷⁷ Werth, *L'ivrogne et la marchande de fleurs, autopsie d'un meurtre de masse 1937-1938* (2013), 3508

⁷⁸ Rayfield, *Stalin and His Hangmen* (2005), 5545

- ⁷⁹ Rayfield, *Stalin and his Hangmen* (2005) 5554
- ⁸⁰ Werth, *Les « opérations de masse » de la « Grande Terreur » en URSS 1937-1938* (2006), 32
- ⁸¹ Werth, *L'ivrogne et la marchande de fleurs, autopsie d'un meurtre de masse 1937-1938* (2013), 2479
- ⁸² [Liste de personnes à juger par le Collège militaire de la Cour suprême de l'URSS, avril 1937. Paraphes de J. Staline, K. Vorochilov, L. Kaganovitch, A. Jdanov, V. Molotov](#) ; this list is compiled by Senior Major of State Security Gendin, Deputy Chief of the 4th Department of the Main Directorate of State Security of the NKVD, it contains 145 names in the first category (to be executed by firing squad), 50 names in the second category (to be imprisoned for 10 years) and one name in the third category (to be imprisoned for 5 to 8 years).
- ⁸³ Montefiore, *Stalin. The court of the Red Tsar* (2003), 306
- ⁸⁴ Boulant, *Le Tribunal Révolutionnaire. Punir les ennemis du peuple* (2018), 482; Gautherot, *Les suppliciés de la Terreur* (1926), 60
- ⁸⁵ [Decrees on Abolition of Existing Legal Institutions](#)
- ⁸⁶ Werth, *LA GRANDE TERREUR DES ANNÉES 1937-1938. Un profond renouveau historiographique* (2010)
- ⁸⁷ Ellman, [The Soviet 1937 Provincial Show Trials: Carnival or Terror?](#) (2001), 1221
- ⁸⁸ Werth, [La mise en scène pédagogique des grands procès staliniens](#) (2010), 151
- ⁸⁹ [Sondergericht](#) ; Shirer, *La montée du nazisme* (1965), 280; [Authority, Control, and Class Justice: The Role of the Sondergerichte in the Transition From Weimar Germany to the Third Reich](#) (From Criminal Justice History: An International Annual, Volume 15, P 209-233. ; Pateman, *Beheaded by Hitler* (2014), 3947 ; Broszat, *The Hitler State. The Foundation And Development Of The Internal Structure Of The Third Reich* (2013), 328
- ⁹⁰ Ortner, *Hitler's Executioner* (2018), 388
- ⁹¹ Ortner, *Hitler's Executioner* (2018), 1866
- ⁹² Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (1986) 25, 27
- ⁹³ [Nazi Eugenics ; Lifton, THE NAZI DOCTORS: Medical Killing and the Psychology of Genocide](#) (1986)
- ⁹⁴ Birstein, *SMERSH* (2011) 1974
- ⁹⁵ [Collège militaire de la Cour suprême de l'URSS](#) ; Crowe, *Stalin's Soviet Justice: "Show" Trials, War Crimes Trials, and Nuremberg* (2019), 52-54, 57
- ⁹⁶ Janssen, [Mass terror and the court the military collegium of the USSR](#) (2006), 589
- ⁹⁷ [Collège militaire de la Cour suprême de l'URSS](#) ; [Military Collegium of the Supreme Court of the Soviet Union](#)
- ⁹⁸ Birstein, *SMERSH* (2011), 1974
- ⁹⁹ Werth, *L'ivrogne et la marchande de fleurs, autopsie d'un meurtre de masse 1937-1938* (2013), 2479
- ¹⁰⁰ Birstein, *SMERSH* (2011) 1974 ; described by Nikolai Mesyatsev, who worked from 1942– 43 as an investigator at the Investigation Department of the Military Counterintelligence (UOO).
- ¹⁰¹ [Petr Ananievich Krasikov](#)
- ¹⁰² [Petr Ananievich Krasikov](#)
- ¹⁰³ [Genrikh Yagoda](#)
- ¹⁰⁴ Khlevniuk, *The History of the Gulag: From Collectivization to the Great Terror* (2004), 294, 296-299
- ¹⁰⁵ Khlevniuk, *The History of the Gulag: From Collectivization to the Great Terror* (2004), 294, 296-299
- ¹⁰⁶ [Ida Averbach](#)
- ¹⁰⁷ Averbakh, [From crime to labor. Under the editorship of A. Y. Vyshinsky](#) ; Averbakh, [From Crime to Labour](#)
- ¹⁰⁸ [Авербах, Ида Леонидовна](#)
- ¹⁰⁹ Werth, *Les « opérations de masse » de la « Grande Terreur » en URSS 1937-1938* (2006), 10; [Mikhail Frinovsky](#)
- ¹¹⁰ Werth, [La mise en scène pédagogique des grands procès staliniens](#) (2010), 147
- ¹¹¹ Geerling, [Hitler's Judges: Ideological Commitment and the Death Penalty in Nazi Germany](#) (2018)
- ¹¹² [Leonid Zakovsky](#)
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- ¹¹⁵ Montefiore, *Stalin. The court of the Red Tsar* (2003), 322
- ¹¹⁶ Shabelnikov, [Why Did Stalin Kill \(Not All\) the Lawyers?](#) (2019). See also : Loryi, [The role of defence counsel in political trials in the USSR](#) (1977) ; Cadot, [Accessory and witness – The profession of lawyer under Stalin \(1945-1953\)](#) (2016) ; Huskey, [The politics of the Soviet criminal process: expanding the right to counsel in pre-trial proceedings](#) (1986)
- ¹¹⁷ Varrault, *La terreur judiciaire* (2017), 185
- ¹¹⁸ [Sections spéciales en France pendant la Seconde Guerre mondiale](#)
- ¹¹⁹ Lukina, [The Soviet Court as a Propaganda Instrument](#) (2017)
- ¹²⁰ Muller, *Hitler's Justice* (1991), 62

¹²¹ Vaksberg, *Stalin's Prosecutor* (1991), 98; the counterarguments are explained in [Not Guilty. Report of the Commission of Inquiry into the Charges Made Against Leon Trotsky in the Moscow Trials. John Dewey, et al. \(1938\), PR 369, 383](#)

¹²² London, *L'Aveu* (1970), 266, 322

¹²³ Dunoyer, *The Public Prosecutor of the Terror, Antoine Quentin Fouquier-Tinville* (1913), 39

¹²⁴ Boulant, *Le Tribunal Révolutionnaire. Punir les ennemis du peuple* (2018), 980

¹²⁵ Boulant, *Le Tribunal Révolutionnaire. Punir les ennemis du peuple* (2018), 1072

¹²⁶ For a more sympathetic vision of Fouquier-Tinville's job, see Dunoyer, *The Public Prosecutor of the Terror, Antoine Quentin Fouquier-Tinville* (1913), 39

¹²⁷ [711ejjHlqaL_ AC SY445 QL70 ML2 .jpg \(312×445\) \(ssl-images-amazon.com\)](#)

¹²⁸ [Le procès de Danton](#)

¹²⁹ [Emmanuel Didier \(academia.edu\)](#)

¹³⁰ Ortner, *Hitler's Executioner* (2018), 2877

¹³¹ Ortner, *Hitler's Executioner* (2018), 2877

¹³² [Emmanuel Didier \(academia.edu\)](#)

¹³³ Vyshinski, *Theory of Evidence in the Soviet Law* (1946)

¹³⁴ [SOVIET SHOW TRIAL MOSCOW - Dr. Rich Swier \(drrichswier.com\)](#)

¹³⁵ [\(99+\) Emmanuel Didier - Academia.edu](#) ; <https://independent.academia.edu/EmmanuelDidier>

¹³⁶ Kriegel, *Les grands procès dans les systèmes communistes. La Pédagogie infernale* (1972), 72

¹³⁷ Weissberg, *L'accusé* (1953), in Kriegel, *Les grands procès dans les systèmes communistes. La Pédagogie infernale* (1972), 72

¹³⁸ *Les grands procès de l'histoire de France, Marie-Antoinette - Ney* (1966), 13 ; *Les grands procès de l'histoire de France, Louis XVI - Danton*, 159

¹³⁹ [The Show Trial of U2 Pilot Francis Gary Power](#)

¹⁴⁰ Radzinski, *Stalin The First In-depth Biography* (1996), 335

¹⁴¹ [soviet-show-trials.jpg \(320×240\) \(russiantumble.com \(left\), and Industrial_Party_Trial.jpg \(264×378\) \(wikimedia.org \(right\)](#)

¹⁴² [Trial of participants in the July 1944 plot to assassinate Hitler | Holocaust Encyclopedia \(ushmm.org\)](#)

¹⁴³ [Trial of Josef Wirmer, 8 September 1944 Josef Wirmer VGH.jpg \(600×468\) \(bp.blogspot.com\)](#) ; see also [The Nazi Party: The "People's Court"](#) ; Ortner, *Hitler's Executioner* (2018), 3007, 3061 ; Ortner, *Hitler's Executioner* (2018)

¹⁴⁴ But some patently unreasonable ones have also been made, such as Furr, [Yezhov vs. Stalin: The Causes of the Mass Repressions of 1937–1938 in the USSR](#) (2017), according to whom:

Primary-source evidence strongly supports the hypothesis that these repressions were the result of anti-Stalin conspiracies by two groups, which overlapped somewhat: the political Opposition of supporters of Grigorii Zinoviev, of Trotskyists, of Rightists (Bukharin, Rykov, and their adherents); and of military men (Marshal Mikhail Tukhachevsky and others); and high-ranking Party leaders, nominally supporters of Stalin, who opposed the democratic aspects of the "Stalin" Constitution of 1936. It discusses Stalin's struggle for democratic reform and its defeat. The prevailing "anti-Stalin paradigm" of Soviet history is exposed as the reason mainstream scholarship has failed to understand the mass repressions, misnamed "Great Terror."

¹⁴⁵ [The NKVD Mass Secret National Operations \(August 1937 - November 1938\)](#)

¹⁴⁶ Conquest, [The Great Terror: A Reassessment](#) (2007)

¹⁴⁷ [The NKVD Mass Secret National Operations \(August 1937 - November 1938\)](#) ; Getty, *The Road to Terror: Stalin and the Self-destruction of the Bolsheviks, 1932-39* (2010) ; Getty, *Les bureaucrates bolcheviques et l'État stalinien* (1992),

¹⁴⁸ Werth, Blum, *LA GRANDE TERREUR DES ANNÉES 1937-1938. Un profond renouveau historiographique* (2010), 8

¹⁴⁹ Gautherot, *Les suppliciés de la Terreur* (1926), 65

¹⁵⁰ [Carmélites de Compiègne](#)

¹⁵¹ She married a fellow communist, Fritz Rau, who was tortured to death by the Gestapo.

¹⁵² Pateman, *Beheaded by Hitler* (2014), 1412

¹⁵³ In Tsarist Russia, "Kulaks" are peasants who own over 8 acres (3.2 hectares) of land. Lenin describes them as "bloodsuckers, vampires, plunderers of the people and profiteers, who fatten themselves during famines". See: [Kulak](#).

¹⁵⁴ [NKVD Order No. 00447](#)

¹⁵⁵ [Katzenberger case](#)

¹⁵⁶ [NKVD Order № 00485](#)

¹⁵⁷ Montefiore, *Stalin. The court of the Red Tsar* (2003), 4113

¹⁵⁸ *Inspection from Vyshinsky to Yezhov*, 19 February 1938, in Werth, *L'ivrogne et la marchande de fleurs, autopsie d'un meurtre de masse 1937-1938* (2013), 4723

¹⁵⁹ Werth, Blum, *LA GRANDE TERREUR DES ANNÉES 1937-1938. Un profond renouveau historiographique* (2010), 17

- ¹⁶⁰ Rayfield, *Stalin and His Hangmen* (2005), 4638, 6312; [Faina Niurina](#)
- ¹⁶¹ Rayfield, *Stalin and His Hangmen* (2005), 6312
- ¹⁶² Sharlet, Beirne, [In Search of Vyshinsky: The Paradox of Law and Terror](#) (1984), 137; Rayfield, *Stalin and His Hangmen* (2005), 5475; Sharlet, Beirne, [In Search of Vyshinsky: The Paradox of Law and Terror](#) (1984), 136, 137
- ¹⁶³ Letter Accompanying the document of transfer of Cases into the NKVD USSR from People's Commissar for Internal Affairs of the USSR L.P. Beria, Secretary of the CC of the ACP(b) A. A. Andreev and the Head of the Department of Organizational-Party Work of the CC ACP(b) G. M. Malenkov to J. V. Stalin, in [No. 18. Letter Accompanying the document of transfer of Cases into the NKVD USSR from People's Commissar for Internal Affairs of the USSR L.P. Beria](#)
- ¹⁶⁴ [\(1\) The BRUTAL Execution Of Nikolay Yezhov - Stalin's Great Purger - YouTube](#), 8:23 ; and Wittlin, Beria. Vie et mort du chef de la police secrète soviétique (1972)
- ¹⁶⁵ Boulant, *Le Tribunal Révolutionnaire. Punir les ennemis du peuple* (2018), 2661
- ¹⁶⁶ Montefiore, *Stalin. The court of the Red Tsar* (2003), 4004
- ¹⁶⁷ Birstein, *SMERSH* (2011), 1974; Crowe, *Stalin's Soviet Justice: "Show" Trials, War Crimes Trials, and Nuremberg* (2019), 57 ; [Vasily Blokhin - Wikipedia](#) ; [Vasily Ulrikh - Wikipedia](#) ; Vaksberg, *Stalin's Prosecutor* (1991), 105 ; Montefiore, *Stalin. The court of the Red Tsar* (2003), 1271, 3955, 3967, 4004
- ¹⁶⁸ Rayfield, *Stalin and His Hangmen* (2005), 5838
- ¹⁶⁹ Kriegel, *Les grands procès dans les systèmes communistes. La Pédagogie infernale* (1972), 39
- ¹⁷⁰ Vaksberg, *Stalin's Prosecutor* (1991), 42, 44, 46; Montefiore, *Stalin. The court of the Red Tsar* (2003), 924
- ¹⁷¹ Dewar, [The modern Inquisition](#) (1953), 17
- ¹⁷² Birstein, *SMERSH* (2011), 674
- ¹⁷³ [Façade d'état de droit et procès truqués](#)
- ¹⁷⁴ [Case of the Anti-Soviet "Bloc of Rightists and Trotskyites"](#) ; Radzinski, *Stalin The First In-depth Biography* (1996), 371 ; Dewar, *The Modern Inquisition* (1953) ; Vaksberg, *Stalin's Prosecutor* (1991), 117 ; [Dmitry Pletnyov \(doctor\) - Wikipedia](#)
- ¹⁷⁵ [Timeline of the Great Purge - Wikipedia](#)
- ¹⁷⁶ [Article 58, Criminal Code of the RSFSR \(1934\) \(cyberussr.com\)](#)
- ¹⁷⁷ See in ii. **The criminalization of difference or divergence, Soviet laws,**
- ¹⁷⁸ Dunoyer, *The Public Prosecutor of the Terror, Antoine Quentin Fouquier-Tinville* (1913), 63 ; [Antoine Lavoisier](#)
- ¹⁷⁹ Muller, *Hitler's Justice* (1991), 156
- ¹⁸⁰ Boulant, *Le Tribunal Révolutionnaire. Punir les ennemis du peuple* (2018), 2714
- ¹⁸¹ Dunoyer, *The Public Prosecutor of the Terror, Antoine Quentin Fouquier-Tinville* (1913), 297
- ¹⁸² Dunoyer, *The Public Prosecutor of the Terror, Antoine Quentin Fouquier-Tinville* (1913), 56
- ¹⁸³ Gautherot, *Les suppliciées de la Terreur* (1926), 239
- ¹⁸⁴ Gautherot, *Les suppliciées de la Terreur* (1926), 218
- ¹⁸⁵ Montefiore, *Stalin. The court of the Red Tsar* (2003), 11612 (note 1)
- ¹⁸⁶ [How starving Russians became CANNIBALS and sold human body parts as meat in World Cup city where England clash with Sweden](#)
- ¹⁸⁷ [Приказ НКВД от 15.08.1937 № 00486](#)
- ¹⁸⁸ Montefiore, *Stalin. The court of the Red Tsar* (2003), 11706
- ¹⁸⁹ Werth, *L'invroge et la marchande de fleurs, autopsie d'un meurtre de masse, 1937-1938* (2013), 5444
- ¹⁹⁰ Pateman, *Bebeaded by Hitler* (2014), 1411
- ¹⁹¹ Fleischmann, *Réquisitoires de Fouquier-Tinville* (1911)
- ¹⁹² Frerejean, *Les procès staliniens* (2017), 72
- ¹⁹³ Vyshinsky, *The Law of the Soviet State* (1948), 3, 4, 5 ; Ch. 1 Sec. 1: *The October Socialist Revolution and the State*
- ¹⁹⁴ Vyshinsky, *The Law of the Soviet State* (1948), 8 ; Ch 1 Sec 2: *The Foundations of the Marxist-Leninist Theory of State and Law*
- ¹⁹⁵ Vyshinsky, *The Law of the Soviet State* (1948), 43 ; Ch. 1 Sec. 3: *The State and the Law of the Period of Transition from Capitalism to Communism*
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- ¹⁹⁷ Ortner, *Hitler's Executioner* (2018), 1135 et seq. ; Muller, *Hitler's Justice* (1991), 151, 322
- ¹⁹⁸ Ortner, *Hitler's Executioner* (2018), 1135 et seq.
- ¹⁹⁹ Freisler, *The task of the Reich legal system developed from a biological understanding of law*, in *Deutsche Justiz*, 1935 ; Ortner, *Hitler's Executioner* (2018), 1135
- ²⁰⁰ Ortner, *Hitler's Executioner* (2018), 1135
- ²⁰¹ Freisler, *The unity of party and state in the staffing policy of the judiciary* (1935); Ortner, *Hitler's Executioner* (2018), 1135
- ²⁰² Ortner, *Hitler's Executioner* (2018), 1135

- ²⁰³ Boulant, *Le Tribunal Révolutionnaire. Punir les ennemis du peuple* (2018), 1530
- ²⁰⁴ Boulant, *Le Tribunal Révolutionnaire. Punir les ennemis du peuple* (2018), 1530
- ²⁰⁵ Domenget, *Fouquier-Tinville et le Tribunal révolutionnaire* (1868), 10°
- ²⁰⁶ Frerejean, *Les procès staliniens* (2017), 132 ; Montefiore, *Stalin. The court of the Red Tsar* (2003), 11661; Vaksberg, *Stalin's Prosecutor* (1991), 86-93.
- ²⁰⁷ Pateman, *Beheaded by Hitler* (2014), 1579
- ²⁰⁸ [FOUQUIER-TINVILLE ANTOINE \(1746-1795\)](#)
- ²⁰⁹ [Antoine Fouquier-Tinville](#)
- ²¹⁰ [Antoine Fouquier-Tinville](#)
- ²¹¹ [Antoine Fouquier-Tinville](#)
- ²¹² De la Mahérie, [Le Livre rouge: Histoire de l'échafaud en France](#) (1863), 207
- ²¹³ Vaksberg, *Stalin's Prosecutor* (1991), 315
- ²¹⁴ [DECREE of November 17, 1938 No 81, ON ARRESTS, PROSECUTORIAL SUPERVISION AND INVESTIGATION \(Постановление СНК СССР и ЦК ВКП\(б\) № П 4387 от 17.11.1938 «Об арестах, прокурорском надзоре и ведении следствия» — Викитека \(wikisource.org\)\)](#) ; [Decree about Arrests, Prosecutor Supervision and Course of Investigation - Wikipedia](#)
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- ²¹⁶ Birstein, *SMERSH* (2011), 11699, 12161, 11696, 11919 ; Parrish, *The lesser terror: Soviet state security 1939-1953* (1996), **62**
- ²¹⁷ Parrish, *The lesser terror: Soviet state security 1939-1953* (1996), 224
- ²¹⁸ Vaksberg, *Stalin's Prosecutor* (1991), 309
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- ²²¹ [NKVD special camps in Germany 1945–1950](#) ; Pateman, *Beheaded by Hitler* (2014), 3409 ; Koehler, *STASI, The untold story of the East German secret police* (1999), 135, 136, 137 ; Ortner, *Hitler's Executioner* (2018), 3443, 3564, 3572
- ²²² Ortner, *Hitler's Executioner* (2018), 3572
- ²²³ Ortner, *Hitler's Executioner* (2018), 3443
- ²²⁴ Ortner, *Hitler's Executioner* (2018), 3572
- ²²⁵ [Hilde Benjamin](#)
- ²²⁶ [hilde_010.jpg \(1800×1800\) \(elles-magermans.com\)](#)
- ²²⁷ [Antoine Fouquier-Tinville ; SÉRIE W JURIDICTIONS EXTRAORDINAIRES](#)
- ²²⁸ [‘Odious beyond its original perversion’: Fouquier-Tinville and the Tribunal Revolutionnaire of Paris](#)
- ²²⁹ Gautherot, *Les suppliciés de la Terreur* (1926), 280
- ²³⁰ Sansico, [La répression politique devant les tribunaux de l'Etat français : Lyon, 1940-1944](#) ; Sansico, [La justice éshonorée 1940-1944](#)
- ²³¹ [Russian court dissolves human rights organization Memorial](#) ; [Russian court orders closure of country's oldest human rights group](#) ; [‘Another foreign agent’: Russian court orders closure of country's oldest human rights NGO, Memorial](#) ; [Friends, and Enemies, of the People](#)
- ²³² Pateman, *Beheaded by Hitler* (2014), 3813
- ²³³ [The Nuremberg Trials: The Justice Trial](#)
- ²³⁴ Ortner, *Hitler's Executioner* (2018), 3385
- ²³⁵ Muller, *Hitler's Justice* (1991), 270, 241, 278
- ²³⁶ Muller, *Hitler's Justice* (1991), 201
- ²³⁷ Muller, *Hitler's Justice* (1991), 201
- ²³⁸ Pateman, *Beheaded by Hitler* (2014), 4299
- ²³⁹ Muller, *Hitler's Justice* (1991), 217
- ²⁴⁰ Ortner, *Hitler's Executioner* (2018), 329
- ²⁴¹ Koehler, *Stasi. The untold story of the East German secret police* (2008), 18
- ²⁴² Koehler, *Stasi. The untold story of the East German secret police* (2008), 17
- ²⁴³ Koehler, *Stasi. The untold story of the East German secret police* (2008), 13
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- ²⁴⁵ Muller, *Hitler's Justice* (1991), 208, 216
- ²⁴⁶ Muller, *Hitler's Justice* (1991), 203
- ²⁴⁷ Ortner, *Hitler's Executioner* (2018), 3617
- ²⁴⁸ Muller, *Hitler's Justice* (1991), 203, 263

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- ²⁴⁹ Dunoyer, *The Public Prosecutor of the Terror, Antoine Quentin Fouquier-Tinville* (1913), 266, 267
- ²⁵⁰ Muller, *Hitler's Justice* (1991), 192
- ²⁵¹ Muller, *Hitler's Justice* (1991), 194, 195
- ²⁵² [Hans Litten](#)
- ²⁵³ [Hans Litten](#)
- ²⁵⁴ Rayfield, *Stalin and His Hangmen* (2005), 6312
- ²⁵⁵ [Terreur Lyonnaise](#) ; [La Commission Révolutionnaire de Lyon](#)
- ²⁵⁶ Gautherot, *Les suppliciées de la Terreur* (1926), 305
- ²⁵⁷ Gautherot, *Les suppliciées de la Terreur* (1926), 305
- ²⁵⁸ [‘Odious beyond its original perversion’: Fouquier-Tinville and the Tribunal Revolutionnaire of Paris](#)
- ²⁵⁹ [Exile in Gorky, 1980-1986](#)
- ²⁶⁰ [\(99+\) Emmanuel Didier - Academia.edu](#) ; <https://independent.academia.edu/EmmanuelDidier>
- ²⁶¹ Dunoyer, *The Public Prosecutor of the Terror, Antoine Quentin Fouquier-Tinville* (1913), 292 ; Wittlin, *Beria. Vie et mort du chef de la police secrète soviétique* (1972), 228, 276, 279, 303, 312, 317.
- ²⁶² [He Found One of Stalin's Mass Graves. Now He's in Jail](#) ; Werth, *La Grande Terreur des années 1937-1938* (2010), 19
- ²⁶³ [He Found One of Stalin's Mass Graves. Now He's in Jail](#)
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- ²⁶⁶ Ortner, *Hitler's Executioner* (2018), 3746
- ²⁶⁷ [Stalin's terror: Should the names of NKVD executioners be made public?](#)

CHURCH LAW WITHOUT DARK SIDES? COMPARING CATHOLIC AND PROTESTANT POSITIONS IN GERMANY

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Abstract

A comparison between the internal laws of different religions reveals contradicting conceptions of law. From its beginning, Christianity has had an ambivalent attitude towards the law. The Protestant legal historian Rudolph Sohm (1841-1917) pointed out the dark sides of law (especially coercion). It is in this sense opposed to the spiritual nature of the church. The Munich school of Catholic canon law contradicts this. It states that the word of God and the sacraments have a legal dimension of their own. The author compares positions of Catholic and Protestant church law that were held in Germany in the 20th century. The main thesis is that the church also needs those facets of law which some people find disturbing.

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Keywords

Canon law - Law and religion – Spiritualism - Legalism

1. Positive and negative view of law in religions

A comparison between the internal laws of different religions reveals contradicting conceptions of law. In Judaism and Islam, law is, for the most part, perceived positively. Judaism is a religion in which the law plays a central role. Part of the essential content of the Sinai covenant, which has fundamental significance, is that the people of Israel has committed itself to a considerable quantity of legal norms. "What great nation has laws and rules as perfect as all this Teaching that I set before you this day?"¹ Judaism is a religion of practice, which is all about correct behaviour, i.e. conduct in accordance with the law.² As far as Islam is concerned, the Sunni branch in particular has the reputation of being a strictly law-focused tradition.³

In contrast, Daoists and Confucianists - whether they are religious or rather philosophical traditions, cannot be discussed here - regarded written law as a violation

¹ Deut 4:8.

² Berkmann (2021), 40.

³ Ibid. 44.

of the social order provoking disharmony. Daoism takes a critical stance towards the law, because laws simply serve interest groups and an increase of laws leads only to an increase in transgressions.⁴ The Confucian concept of law is that of *Lǐ*. This designates the totality of all forms of intercourse and behaviour which make for a good person and an intact social order. It is based on the natural order.⁵ For Confucianism, court cases are an evil, because it is better to make compromises than to insist on one's rights. ⁶It is directly opposed to the concept of law in Chinese legalism: *Fǎ*. According to this, law is what is created as law by the ruler.⁷ It is accompanied by official codes and a centralized bureaucracy.⁸ The legalists insisted on the complete equality of all people before the *Fǎ*, as opposed to the Confucian acknowledgement of the inequality of people.⁹ While Confucianism saw a law itself as a violation of the social order, legalism aimed consciously to destroy and remake the old social order.¹⁰ In the *Lǐ*, Confucianism offered a middle way between the scepticism of the law in Daoism and the positivism of the *Fǎ*.¹¹

2. Biblical and theological view of law in Christianity

From its beginning, Christianity has had an ambivalent attitude towards the law. Redemption is certainly not expected as a result of compliance with the laws. A certain degree of scepticism towards the law is evident in some passages of the New Testament.¹² The biblical statements, however, are by no means one-dimensional.

⁴ Cf. Glenn (2014), 317f.

⁵ Lee / Lai (1978), 205.

⁶ Ibid. 206.

⁷ Ibid. 203.

⁸ Ibid. 205.

⁹ Ibid.

¹⁰ Peerenboom (2002), 87.

¹¹ Cf. Glenn (2014), 318.

¹² E.g. Mark 2,27; John 1:17.

Jesus Christ emphasised that he did not come to abolish the law, but to fulfil it (Mt 5:17). Paul placed grace before law,¹³ while creating the first church orders for his congregations.¹⁴ Steps towards a legal order for the primitive Jerusalem church and the congregations founded by Paul are found already in the New Testament.¹⁵ As early as in the first centuries, collections of law, such as the *Didache* and the Apostolic Constitutions, came into being.¹⁶

Great figures of the Middle Ages had a positive view of law, especially canon law, which was associated with justice. Gratian, the outstanding canonist of the 12th century, handed down the dictum of Isidore of Seville: "Law is so called because it is just."¹⁷ Thomas Aquinas, the most influential theologian of the 13th century, regarded law as an ordinance of reason (*ordinatio rationis*) for the common good.¹⁸ He concluded that law is the object of justice.¹⁹ The roots of this concept of law lie in Greek philosophy and Roman law. For Aristotle, everything legal in the broadest sense is something just.²⁰ The important Roman jurist Ulpian (170-228) described law as the

¹³ Rom, 6:14 and 10:4, Gal 3:13.

¹⁴ E.g. 1 Cor 16:15-18; 1 Thess 5:12; Phil1:1; Eph 4:11; 1 Cor 12:28-30.

¹⁵ Acts 14:23; 1 Tim 3:2-7; 1 Tim 3:8-13; Titus 1:6-9.

¹⁶ Cf. May (1990), 3.

¹⁷ "Ius autem est dictum, quia iustum est." D 1, 2. Isidore Etymologiae, v. 2.

¹⁸ STh I^a-II^ae qu. 90 art. 4: "Thus from the four preceding articles, the definition of law may be gathered; and it is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated." English translation (1917).

¹⁹ "Unde manifestum est quod ius est obiectum iustitiae." STh II-II, q. 57, a. 1. "For this reason justice has its own special proper object over and above the other virtues, and this object is called the just, which is the same as 'right'. Hence it is evident that right is the object of justice." English translation (1917).

²⁰ Aristotle (1934): "Again, we saw that the law-breaker is unjust and the law-abiding man just. It is therefore clear that all lawful things are just in one sense of the word, for what is lawful is decided by legislature, and the several decisions of the legislature we call rules of justice." (1129 b 13).

art of goodness and equity.²¹ By justice he understood the constant and perpetual disposition granting to each person his right.²²

On the other hand, spiritualist tendencies, which have always existed within Christianity, have called canon law into question. Examples are Joachim of Fiore in the 12th century and Marsilius of Padua in the 14th century.²³ Similar ideas resurfaced around the Reformation, e.g. with Thomas Müntzer. Martin Luther burnt the medieval canon law in Wittenberg in 1520.²⁴ However, Melancthon published a selection from the *Decretum Gratiani* as early as 1530, which found Luther's sympathy and served as an ecclesiastical order for the early Evangelical parishes and schools.²⁵ In accordance with protestant ecclesiology, the hidden church of faith is not subject to regulation in law. Only historically concrete churches can therefore have a legal constitution. The content of church law was evaluated from the point of view of functionality.²⁶

At the beginning of the 20th century, the Protestant legal historian Rudolph Sohm took the separation of the spiritual and secular spheres further by positing that church law stands in contradiction to the nature of the church. For the essence of the church was spiritual, while the essence of the law was secular.²⁷ He was denying any separate right of existence to church law. He argued that the Early Church had no legal constitution, but was ruled by a power he called "charisma". Admittedly, his

²¹ "Ius est ars boni et aequi." Digesta I.1.1.

²² "Iustitia est perpetua et constans voluntas ius suum unicuique tribuendi." Digesta I,1,10.

²³ Marsilius of Padua (1324), Conclusions No. 14: "No bishop or priest has coercive authority or jurisdiction over any layman or clergyman, even if he is a heretic." No. 16: "No bishop or priest or body of bishops or priests has the authority to excommunicate anyone or to interdict the performance of divine services, without the authorization of the 'legislator'."

²⁴ Based on Luther's own statement (Weimar Edition 7, 180, 13-17), it can be assumed that he burned not only the papal decrees of the Middle Ages, but also the *Decretum Gratiani*, because as far as there was anything good in it, everything was to the detriment and strengthening of the papal regime, cf. Brecht (1983), 406; Kaufmann (2009), 53. Witte (2009), 53.

²⁵ Witte (2009), 72f.

²⁶ Berkmann (2021), 32.

²⁷ Cf. Sohm (1923), 1.

understanding of law corresponded to that of his time. At that time, law was seen primarily as a coercive order. The dark sides were therefore in the foreground and did not seem appropriate for the Church. His criticism triggered several attempts on both the Protestant and Catholic sides to justify the existence of Church law.

3. Approaches in the 20th century in Germany

3.1 Protestantism

3.1.1 Heckel

Johannes Heckel lived from 1889 to 1963 and was a Protestant legal expert. The title of his main work is programmatically: "Lex Charitatis", i.e. "Law of Love". He examines Luther's work for statements on canon law and finally arrives at a dualistic concept. His answer to Sohm could be summarised as follows: State and Church law are essentially different. He stated:

"The starting point is the eschatological dualism of Luther's teaching on natural law. A distinction must be made between divine natural law as the legal order of the kingdom of Christ and secular natural law as the supreme legal order of the kingdom of the world. The former was interpreted spiritually by Christ. The latter was given its material legal form by Moses in the Decalogue. Both legal systems have their unity in God's will of law. But it works differently in the two kingdoms, in the kingdom of Christ as *lex charitatis spiritualis* [law of spiritual love], in the kingdom of the world as *lex irae et mortis* [law of wrath and death]".²⁸

The bright and dark sides of the law could not be contrasted more vividly. The bright sides are assigned to the kingdom of Christ, the dark sides to the world. Heckel's thesis amounts to a spiritualisation and a theological exaltation of Church law.

Heckel, however, must assume an autonomous church law on the level of the visible church, which serves the external church regime. It is irrelevant to the Christian

²⁸ Heckel (1973b), 202f.

condition what this law looks like, and it cannot claim the label "spiritual law".²⁹ In this way, he himself admits that he cannot uphold the thesis of the fundamental difference in the concept of law.

3.1.2. Dombois

Hans Dombois lived from 1907 to 1997 and was a Protestant legal expert who used argumentation of legal theology to lay the foundations for an ecumenical church law. His three-volume major work is entitled: "Law of Grace. Ecumenical Church Law"³⁰. He looked at church law across denominational boundaries and historical epochs and tried to systematically establish an ecumenical church law.

In contrast to Heckel, he adheres to a uniform concept of law. However, his concept of law remains deliberately vague because he thinks that law cannot be defined.³¹ He tries to overcome the contrast between law and grace by deriving law directly from grace. He interprets church law as a complex of processes in which the relationship between God and man is performed directly.³² He stated:

"Grace is a legal process in which a destroyed legal relationship is restored between two persons or a new one is established. The unilaterally entitled giver, by virtue of his superior legal power, grants the non-entitled person a new foundation or an increase of legal status as a freely given, unconditional favour. The grace requires acceptance by the beneficiary. It is not dependent on the recipient's own performance. However, it obliges the recipient to be grateful in a legal sense. A violation of this obligation would lead to the forfeiture of the benefit."³³

²⁹ Heckel (1973a), 374f.

³⁰ In German: „Das Recht der Gnade. Ökumenisches Kirchenrecht“.

³¹ Dombois (1961), 216.

³² Germann (2016), 67.

³³ Dombois (1961), 178f.

However, the question remains whether grace can be grasped in legal terms at all. Ultimately, this too is a theological exaltation of law.

3.2 Catholicism

In Catholic theology, the principle of incarnation is applied to the Church. Just as Jesus Christ is both true God and true man, so too in the Church there exists one complex reality which coalesces from a divine and a human element.³⁴ The Church is therefore not only a spiritual community which has withdrawn from a legal regime, but also a visible assembly which, like any human society, needs a legal order.³⁵

3.2.1 Barion

On the Catholic side, Hans Barion, who lived from 1899 to 1973, dealt with Sohm's thesis early on. He recognised that a response to Sohm had to start from the concept of church and therefore had to be theological.³⁶ He stated: "Creed determines the concept of church, while the concept of church determines church law. Whoever professes Sohm's religious conviction finds it difficult [...] to justify church law; the Catholic must reject Sohm's thoughts and recognise church law from the own standpoint of faith, not for the sake of legal considerations."³⁷ Barion links the

³⁴ LG art. 8 para. 1: „Christ, the one Mediator, established and continually sustains here on earth His holy Church, the community of faith, hope and charity, as an entity with visible delineation through which He communicated truth and grace to all. But, the society structured with hierarchical organs and the Mystical Body of Christ, are not to be considered as two realities, nor are the visible assembly and the spiritual community, nor the earthly Church and the Church enriched with heavenly things; rather they form one complex reality which coalesces from a divine and a human element. For this reason, by no weak analogy, it is compared to the mystery of the incarnate Word. As the assumed nature inseparably united to Him, serves the divine Word as a living organ of salvation, so, in a similar way, does the visible social structure of the Church serve the Spirit of Christ, who vivifies it, in the building up of the body.”

³⁵ Berkmann, Internal Law, 17f.

³⁶ Müller (2015), 22.

³⁷ Barion (1931), 26f.

foundations of canon law to the regime in the Church. He goes on to say, "The hierarchy supports church law, while being supported by divine law."³⁸

Ultimately, however, Barion contents himself with the statement that Christ willed the Church and endowed it with a legal structure. Such an argument, however, would have been opposed by Sohm himself.³⁹ To counter Sohm, it would have been necessary to ground canon law in the nature of the Church.⁴⁰

3.2.2 Mörsdorf and Corecco

Klaus Mörsdorf, who lived from 1909 to 1989, made precisely this attempt. According to him, the nature of the Church is revealed in its essential practices, namely in the proclamation of the Word of God and in the celebration of the Sacraments. According to Mörsdorf, these themselves have a legal character.⁴¹ The proclamation of the Word in the Church possesses a legal character in that it takes place by the authority of the Lord.⁴² The legal claim of the proclamation is conveyed by the authorisation of the Apostles in the Jewish legal form of the *shaliach*.⁴³

Mörsdorf also explains the legal character of the Sacraments by means of the legal symbols. The Sacrament is not only a symbol of a salvific reality that is invisible in itself; it is also an efficacious symbol. This makes it related to the legal symbol, which has the power to say or effect something that is legally binding.⁴⁴ Firstly, several

³⁸ Barion (1969), 216.

³⁹ Cf. Müller (2015), 22.

⁴⁰ Cf. Krämer (1977), 62.

⁴¹ Mörsdorf (1965), 76.

⁴² Ibid. 79.

⁴³ Ibid. 51; id. (1965), 61.

⁴⁴ Aymans / Mörsdorf, (1991), 31.

Sacraments have immediate legal effects in the church. Secondly, they require a legal order to ensure their authenticity.

The strength of this approach lies in the fact that canon law is truly grounded in the nature of the Church. A weakness, on the other hand, is that the concept of law remains unclear. Law in the church is not the same as law in the state. For Mörsdorf, canon law is a *ius sacrum* (sacred law) that is completely different from secular law.⁴⁵

Corecco, a follower of Mörsdorfs theory, took this approach to an extreme. According to him, canon law is different from state law in the totality of its elements.⁴⁶ The difference of canon law is also reflected in the fact that it is less concerned with the virtue of justice than with the virtues of faith, hope and love.⁴⁷ Following Aquinas, the ecclesiastical tradition regarded law as an ordinance of reason (*ordinatio rationis*). In contrast to this, Corecco describes canon law unlike secular law as an ordinance of faith (*ordinatio fidei*).⁴⁸ He justifies this by saying that reason in our modern culture is detached from any structural connection to faith.⁴⁹ According to Corecco, the relationship between the faithful and the hierarchy is fundamentally different from that between the citizen and the state.⁵⁰ The autonomy that the citizen needs vis-à-vis the state cannot be applied in the same sense to the relationship between the faithful and the hierarchy, because both are part of the ecclesial communion.⁵¹ Therefore, in cases of dispute, it is more important to avoid litigation. The trial procedure, which is indispensable in a state upholding the rule of law, could be replaced in the Church by other instruments of sacred power.⁵² Such a view is very reminiscent of the position

⁴⁵ Mörsdorf (1976), 57f.

⁴⁶ Corecco (1980), 98.

⁴⁷ Corecco (1994a), 3-16.

⁴⁸ Corecco (1994b), 35.

⁴⁹ Ibid. 31.

⁵⁰ Corecco (1986), 171.

⁵¹ Ibid.

⁵² Ibid. 168.

of Daoism and Confucianism outlined at the beginning, which desires to avoid litigation in favour of harmony.

4. Dark sides of law versus dark sides of religion

The Protestant and Catholic positions presented in this contribution are very similar to each other in one point: they justify church law theologically. Some of them - especially Heckel and Corecco - go even further by making church law itself a theological reality that is fundamentally different from secular law. This result of the comparison may be surprising, since catholic and protestant ecclesiology diverge quite strongly.

Certainly, other positions are held in Germany, both in Protestantism and Catholicism, which have been disregarded here. But those mentioned are of particular interest with regard to the bright and dark sides of law. They recognise that law has both sides and find that the dark ones are not appropriate to the Church. As a result, they split the concept of law and develop their own theologically disguised and purified concept for the Church.

The emphasis on communion and love runs the risk of spiritualising the law and overemphasising harmony in the church at the expense of freedom and justice.⁵³ Conflicts arising between the hierarchy and the faithful, which should be resolved precisely through legal proceedings, would easily appear pathological.⁵⁴ The scandals of recent years in the areas of sexual offences, asset management and abuse of power show that the Church itself has dark sides. They are, among other things, a consequence of the disregard for church law and cannot be brightened by sacralising or spiritualising the power of governance. On the contrary, in order to shed light on them, the disturbing sides of the law must also be endured: litigation, condemnations and indemnity. Not only is law something ambivalent, but religion is as well. Law does not darken the nature of the church. Rather, the church becomes dark when she disregards the law.

⁵³ Cf. Maier (1989), 39 and 41.

⁵⁴ Cf. Maier (2005), 78.

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GOUVERNER SELON LA LOI ET GOUVERNER SELON LA VERTU DANS LE DROIT CHINOIS CONTEMPORAIN

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Abstract

Depuis longtemps les juristes s'intéressent au concept d'état de droit dans le droit chinois. En même temps, les juristes sont fascinés par l'intégration, dans le droit chinois contemporain, des paradigmes du gouvernement, produits par l'élaboration philosophique et juridique de la Chine ancienne. La théorie du socialisme aux caractéristiques chinoises pour la nouvelle ère, élaborée par Xi Jinping, met l'accent sur un binôme qui reflète la coordination entre deux modes de gouverner à travers l'état : le *fa_{zhi}* (法治), souvent traduit par « état de droit » ou « *rule of law* » mais aussi par « *rule by law* » ; et le *de_{zhi}* (德治) qui est communément traduit par « gouvernement de la vertu » ou « *rule of virtue* ».

Le but de cet essai est de vérifier dans quelle mesure cette connection entre droit et vertu est valable, dans une perspective comparative, et déterminer quels sont ses effets sur la nature du système juridique chinois.

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Keywords

Gouverner selon la loi - Gouverner selon la vertu - Socialisme aux caractéristiques chinoises - Droit et éthique - Tradition juridique chinoise

1. Introduction

Depuis longtemps les juristes s'intéressent au concept d'état de droit dans le droit chinois¹. En effet, ce concept pourrait définir aussi bien la transformation du droit socialiste vers des modèles juridiques libéraux, que l'élaboration d'un nouveau modèle, original, qui mélange des structures de la légalité soviétique (gouverner par la loi), des valeurs de la tradition culturelle chinoise, de nouvelles solutions importées de l'Europe et de l'Amérique et, enfin, des outils originaux pour la coordination publique du marché socialiste.

En même temps, les juristes sont fascinés par l'intégration, dans le droit chinois contemporain, des paradigmes du gouvernement, produits par l'élaboration philosophique et juridique de la Chine ancienne. Ce problème est lié à la reconstruction d'une tradition juridique chinoise et asiatique qui, comme soutient Patrick Glenn, peut être interprétée historiquement comme une conjoncture

¹ R. Peerenboom, *China's Long March Toward the Rule of Law*, Cambridge University Press, Cambridge, 2002; I. Castellucci, *Rule of Law and Legal Complexity in the People's Republic of China*, Quaderni del Dipartimento di Scienze Giuridiche dell'Università di Trento, Trento, 2012.

idéologique entre des structures sociales confucéennes et leur revitalisation à travers l'adaptation du marxisme².

Les plus récents développements du socialisme chinois semblent confirmer cette opinion. En particulier, la théorie du socialisme aux caractéristiques chinoises pour la nouvelle ère, élaborée par Xi Jinping, met l'accent sur un binôme qui reflète la coordination entre deux modes (et deux groupes d'instruments juridiques) gouverner à travers l'état : le *fazhi* (法治), souvent traduit par « état de droit » ou « *rule of law* » mais aussi par « *rule by law* » ; et le *dezhi* (德治) qui est communément traduit par « gouvernement de la vertu » ou « *rule of virtue* »³.

Ce qui pourrait paraître un argument d'esthétique politique, a en effet connoté l'évolution du droit chinois dans sa dimension législative, sa dimension judiciaire et sa dimension doctrinale, de telle sorte qu'il est presque impossible de comprendre la réflexion sur le *fazhi* sans se référer à l'implémentation des modes du gouvernement fondés sur les paradigmes d'actions éthiques et politiques, promues et guidées par le Parti Communiste de Chine.

En outre, l'analyse des innovations législatives au niveau local et des réflexions élaborées par les chercheurs, nous donne l'impression que le *dezhi* – qui dans le passé correspondait à une forme de gouvernance relationnelle opérant à l'ombre du droit étatique – est devenu un modèle officiellement sanctionné et reconnu, particulièrement par les gouvernements locaux et les villages ruraux⁴.

Le but de cet essai est de vérifier dans quelle mesure ces arguments sont valables et également déterminés, dans une perspective comparative, quel effet ces évolutions ont sur la collocation du système juridique chinois parmi les traditions du droit de l'Asie orientale.

² P. Glenn, *Legal Traditions of the World*, Oxford University Press, Oxford, 2014.

³ G. Wu, S. Zhang, 习近平以德治国与依法治国思想相结合之实施路径研究 (Recherche sur le chemin de l'implémentation de l'idée de Xi Jinping sur le gouvernement par le droit e le gouvernement par la vertu), *baixia faxue*, 2020, p. 27 ss.

⁴ Y. Yu, Y. Lei, 以法治、德治助力村民自治的路径探析 (Explorer les moyens pour aider l'autonomie des villageois sur la base du gouvernement par le droit e le gouvernement par la vertu), *Hunan jingcha xueyuan xuebao*, 1, 2019, pp. 15 ss.

L'essai est composé par trois sections : la première (§ 2) expliquera brièvement le sens et l'importance de la notion de *dezh* dans le développement de la culture juridique chinoise et asiatique, en raison de la circulation des grands modèles juridiques de la gouvernance dans cette macro-région. La deuxième (§ 3) portera sur les façons à travers lesquelles le socialisme chinois a intégré, dans son milieu, un concept traditionnel de vertu et les objectifs qui ont poussé ce processus. La troisième concernera l'exemple plus récent d'intégration du *dezh* dans la législation chinoise, ainsi que les instruments concrets utilisés par la mise en application des standards éthiques de la conduite.

2. Le gouvernement par la vertu et la culture juridique chinoise (et asiatique)

La relation entre droit et vertu (ou droit et morale) n'est pas un problème exclusif de la culture chinoise. En effet, la pensée juridique occidentale – depuis Aristote – a prêté une grande attention à l'intégration ou la séparation de ces concepts⁵. Jusqu'au début de l'âge moderne et le triomphe du rationalisme étatique qui inspirera les révolutions libérales du dix-huitième siècle, l'Europe, comme soutenu par Paolo Grossi, avait développé une conception du pouvoir fondée essentiellement sur l'exercice de la justice à la place de la création des lois⁶.

Par ailleurs, depuis la deuxième guerre mondiale, le positivisme traditionnel a rencontré la résistance d'une nouvelle saison juridique, très intéressée à la valorisation du caractère moral du droit.

Cependant, la spécificité du raisonnement juridique chinois, quant à la dichotomie droit-vertu, est l'aboutissement, fondé sur l'intégration des concepts, d'une philosophie de la gouvernance qui a maintenu une constance à travers les siècles et

⁵ M. Villey, Sur l'antique inclusion du droit dans la morale, *Archiv für Rechts- und Sozialphilosophie*, 42(1), 1956, pp. 15-30 ; H.L.A. Hart, Positivism and the Separation of Law and Morals, *Harvard Law Review*, 71(4), 1958, pp. 593-629; T. Honoré, The Necessary Connection between Law and Morality, *Oxford Journals of Legal Studies*, 22(3), 2002, pp. 489-495.

⁶ P. Grossi, *L'Europa del diritto*, Laterza, Roma-Bari, 2009.

qui n'a pas non plus été refusée par les ancêtres modernes de la pensée juridique chinoise (sur tout Sun-Yat Sen)⁷.

Il y a des auteurs chinois contemporains qui, quoiqu'utilisant un peu la simplification, interprètent la *rule of virtue* comme le point de départ de la tradition juridique chinoise, qu'ils opposent à la pensée occidentale classique⁸. En effet, le mythe d'Antigone distinguait déjà comment la culture grecque avait conçu la relation entre lois « étatique » et morales comme intrinsèquement conflictuelle⁹.

En Chine, au contraire, l'essor de la civilisation est associé à un concept de gouvernement des relations sociales fondé sur la ritualité fonctionnelle au maintien de l'ordre cosmique. Il s'agit du *li* (礼), opposé au *fa* (法) qui indique le commandement "positif" de l'autorité¹⁰.

Cette vision, toujours très populaire dans les manuels, est clairement une caricature et en même temps une simplification de la culture juridique chinoise. Nous n'avons pas le temps ici d'examiner les mécanismes du développement historique du droit chinois, mais qu'il faut au moins souligner.

En premier lieu, en effet, la prévalence de la *rule of virtue* est liée à une phase de l'histoire chinoise connotée par la présence d'une féodalité familiale comme modèle de développement économique et social. Une forme d'état « patrimonial », dont la structure était relativement simple, dont la production n'employait pas de corps sociaux intermédiaires pour assurer la distribution et la consommation, qui pouvait avoir au cœur une nature « humaniste », enracinée dans l'équilibre éthique de l'obéissance et la bienveillance entre les membres de statuts sociaux différents¹¹.

⁷ A. Wells, *The Political Thought of Sun Yat-Sen*, Palgrave Macmillan, New York, 2001.

⁸ X. Ma, M. Yu, 中国传统德治与法治的思考 (Réflexions sur le gouvernement par la vertu et le gouvernement par la loi dans la Chine traditionnelle), *faxue*, 9, 2002, pp. 15 ss.

⁹ F. Hegel, *Fenomenologia dello spirito* (1807), édité par G. Garelli, Einaudi, Torino, 2008, pp. 284-290; G. Zagrebelsky, *Antigone fra diritto e politica*, in *Associazione per gli studi e le ricerche parlamentari*, Quaderno n. 13, Torino, 2002, pp. 15 ss.

¹⁰ R. Cavalieri, *La legge e il rito. Lineamenti di storia del diritto cinese*, Franco Angeli, Milano, 1999.

¹¹ R. von Glahn, *The economic history of China*, Cambridge University Press, Cambridge, 2016.

Cependant, la complexité croissante de l'économie et la diversification du travail au-delà de l'agriculture, demandaient une organisation bureaucratique du pouvoir sur la terre et sur les personnes, qui ne pouvait compter que sur quelques formes d'autocratie. C'est, en effet, la justification logique de la pensée légaliste, dont les idées sur l'organisation étatique ont connoté l'expérience historique de toutes les dynasties impériales chinoises depuis les Qin (221-206 av. J.-C.). Malgré la glorification des idées confucéennes sous le règne de plusieurs dynasties successives, l'administration impériale n'a jamais soutenu le retour à une conception d'état « patrimonial » et totalement « familial »¹².

En deuxième lieu, le gouvernement par la vertu ne correspond pas à une ritualité seulement cérémonielle. Au contraire, il est fondé sur une rationalité communicative qui se montre dans la bienveillance (仁 – *ren*) que le seigneur, le noble, ou le « gentilhomme » confucéen doit pratiquer quand il interagit avec les autres classes sociales¹³. Cette notion de rationalité communicative est en même temps une technique pour élaborer des règles, que celui qui règne emploie pour définir les obligations des sujets en considérant aussi la spécificité des contextes locaux, les intérêts de groupes différents. De ce point de vue, la vertu légitime la décision du souverain puisqu'elle incarne sa capacité à être digne de confiance sur la base d'un ensemble de valeurs éthiques¹⁴. La vertu est donc aussi l'aptitude à persuader les sujets et à les guider sur la base de la connaissance que le souverain a des mêmes sujets¹⁵. L'emphasis basée sur la connaissance souligne aussi l'importance de la relation entre la gouvernance et l'éducation, qui seule peut soutenir l'effort communicatif du *decision-making*¹⁶.

¹² *Ibid.*

¹³ P. He, *Chinese Lawmaking: from non-communicative to communicative*, Springer, Cham, 2014; B. Wong, Hui-Chieh Loy, *The Confucian gentleman and limits of ethical change*, in *Journal of Chinese Philosophy*, 28(3), 2001, pp. 209-234.

¹⁴ Q. Zhang, 法治, 德治与宪政 (*Gouverner par la loi, gouverner par le vertu et le constitutionalism*), *fashang yanjin*, 88(2), 2002, pp. 34-39.

¹⁵ A. Cheng, *Storia del pensiero cinese*, I, Einaudi, Torino, 2000, pp. 65-66.

¹⁶ C. Deng, 儒学礼乐教育背景下的法治与德治 (*Gouverner par la loi, gouverner par le vertu sous fond de l'éducation ritual et musical confucéenne*), *Journal of Xinxiang University*, 35(4), 2018, pp. 8-11.

Entre loi et vertu il y a un rapport qui est complémentaire et ambigu en même temps. Il faut que la vertu distingue similitudes et différences, vrai et faux, bien et mal. La loi, dans une certaine mesure, assure que la vertu se réalise¹⁷. La force de la loi est donc en partie fonctionnelle au consolidation de la morale confucéenne ; la morale confucéenne est donc en partie fonctionnelle à la légitimité de la loi. La recherche d'un équilibre entre des deux éléments est un tourment historique du droit chinois, qui, après le commencement du « siècle des humiliations » (1839-1949), est aussi entrelacé avec la réflexion sur la modernité du droit exprimée par les modèles étrangers, en premier lieu japonais et européens.

Le concept de vertu, en effet, a influencé le développement de la pensée juridique chinoise aussi au moment de sa confrontation avec l'idéologie du constitutionnalisme libérale et de la séparation des pouvoirs. Dans la deuxième moitié du dix-neuvième siècle, et particulièrement depuis la révolte Taiping (1850-1864), la réalisation de l'affaiblissement de l'Empire et la connaissance des modèles étrangers promeuvent une réflexion sur les trajets possibles pour des réformes institutionnelles. Certains penseurs comme Kang Youwei ou Liang Qichao s'interrogent sur les opportunités et les limites d'une rénovation structurale de la gouvernance impériale¹⁸. La critique de l'autocratie, aux yeux de ces « réformateurs », ne peut pas être séparée d'une exacte compréhension des traits spécifiques du contexte chinois et de la connotation morale de la rénovation de l'état.

La démolition de l'ordre feudal, perçue comme le symbole du retard du développement, est liée, selon ces penseurs, à la capacité du pouvoir de poursuivre les intérêts objectifs des communautés et non les intérêts subjectifs des cliques (familiales ou non) dont les institutions sont composées¹⁹. En même temps, la décentralisation du pouvoir et l'organisation des structures d'autonomie gouvernementale au niveau

¹⁷ D. Jiang, 中国先秦德治、法治及人性基础 (*Gouverner par la vertu et gouverner par la loi dans la pré-Qin Chine et leur base d'humanité*), *jingmao falu pinglun*, 2, 2020, pp. 16 ss.

¹⁸ S. Cai-Z. Wang, 梁启超《开明专制》之学理辨析 (Analyse de la théorie de l'autocratie éclairée" chez Liang Qichao), *Jiangsu shehui kexue*, 2017, pp. 223-229; R. Yu, 超越儒法之争 (Au-delà de la controverse confucéenne-legiste), *fazhi yanjiu*, 2018, pp. 3-13.

¹⁹ S. Cai, Z. Wang, 梁启超“开明专制论”之学理辨析 (Une analyse de la théorie de l'« autocratie des lumières » par Liang Qichao), *Jiangsu shehui kexue*, 4, 2017, pp. 223-229.

local, devraient être conformes à un processus de perfectionnement éthique des individus et des collectivités locales elles-mêmes²⁰. Autrement dit, le peuple, même s'il n'est pas encore qualifié pour se gouverner, s'engage dans une phase de croissance spirituelle qui conduit les individus à devenir citoyens²¹. La promotion de l'autonomie locale est donc fonctionnelle à la création d'un esprit civique qui est en premier lieu moral et qui reflète la notion de gouvernement par l'autodiscipline, élaborée par l'école néoconfucéenne²².

La réflexion sur la nécessité d'un développement moral de la nation chinoise, dans la pensée de Liang Qichao, conduit même à proposer l'instauration d'une « autocratie des lumières », comme une phase intermédiaire entre le despotisme féodal et la république²³. Selon Liang, cette autocratie doit promouvoir l'objectivation des buts poursuivis par les gouvernants et la graduelle formation d'une classe de fonctionnaires qui ne soient pas liée aux logiques féodales²⁴.

L'instauration d'une moralité « vertueuse » dans les relations entre le peuple et ses gouvernants est un problème perçu aussi par le plus notable des ancêtres de la Chine moderne, i.e. Sun Zhongshan (孙中山), connu en Occident comme Sun-Yat Sen. En effet, la pensée de Sun-Yat Sen, dans son développement historique, représente la graduelle juxtaposition et intégration d'une conception traditionnelle et confucéenne de l'ordre entre la terre et les hommes, la légitimation « harmonique » est justifiée par la vertu du pouvoir et la modernisation institutionnelle inspirée par le constitutionalisme occidental²⁵. S'inspirant de Liang Qichao, Sun-Yat Sen voyait, dans la théorie de la gouvernance confucéenne, un modèle paternaliste et démocratique en même temps. Selon lui, la renaissance de la nation chinoise devait

²⁰ T. Man Ling Lee, *Local Self-Government in Late Qing: Political Discourse and Moral Reform*, *The Review of Politics*, 60(1), 1998, pp. 31-53.

²¹ *Ibid.*

²² *Ibid.*

²³ S. Cai, Z. Wang, *Une analyse de la théorie de l'« autocratie des lumières »*, cit.

²⁴ *Ibid.*

²⁵ A.J. Gregor, *Confucianism and the Political Thought of Sun Yat-Sen*, *Philosophy East and West*, 31(1), 1981, pp. 55-70.

passer par la reconstruction (et non par l'élimination) d'une dépendance morale et la connexion institutionnelle entre les individus et les communautés²⁶. C'est dans cette perspective que la pensée de Sun-Yat Sen évoque aussi certaines bases idéologiques proches de la tradition socialiste, quoique « sinisé »²⁷.

Les implications de cette conception sont en même temps théoriques et structurelles. En premier lieu, la même notion de démocratie et, surtout, le principe du « bien-être du peuple », s'inspirent en partie de la doctrine du « mandat du ciel »²⁸. Le bien-être du peuple, qui est un des principes au cœur de l'action étatique, est poursuivi par la correcte connaissance et compréhension des intérêts des différents groupes sociaux. En second lieu, la constitutionnalisation de la vertu est réalisée par l'introduction de deux nouvelles « fonctions » ou « pouvoirs », au côté des trois pouvoirs indiqués par Montesquieu : une fonction de supervision et une fonction d'examen, pour sélectionner les fonctionnaires publics. La présence d'un pouvoir séparé de l'exécutif et du législatif pour la sélection des fonctionnaires publics, évoque l'idée des examens impériaux pour les mandarins, abolis en 1904 dans l'empire des Qing ; par ailleurs, il souligne l'exigence de méritocratie, que Sun-Yat Sen ne trouve pas dans la théorie classique du constitutionnalisme libéral (et surtout américain) qui est plutôt exposé aux risques du *spoil system*²⁹.

2.1 Quelques remarques au sujet de la circulation du *dezhi*

La gouvernance selon la vertu peut être vue aussi comme un modèle juridique circulant. La science du droit comparée a désormais réalisé la capacité du droit chinois

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*; J. Leibold, Positioning “Minzu” within Sun-Yat Sen’s discourse of Minzhuzhuyi, *Journal of Asian History*, 38(2), 2004, pp. 163-213.

²⁹ S. Shouhuang, Y. Du, 论孙中山自由平等观与五权宪法思想 (La pensée de Sun-Yat Sen sur la liberté, l'égalité et le cinq pouvoirs de la constitution), *xiandai faxue*, 2, 1993, pp. 81 ss.; Y. Wang, 再论孙中山“五权宪法” (Encore sur le “cinq pouvoirs de la constitution” de Sun-Yat Sen), *zhongguo faxue*, 2003, pp. 159 ss.

de circuler et de devenir l'objet des transplantements juridiques³⁰. Cependant, la dimension historique du *dezhi* nous montre que le gouvernement selon la vertu a été, en effet, le plus antique et plus important paradigme juridique exporté par la culture chinoise. Sa circulation est liée à la diffusion de la pensée confucéenne dans l'Asie orientale. En même temps, sa diffusion a promu la confiance dans la dimension communicative du pouvoir et de la règle. On peut identifier au moins trois régions qui ont vécu l'influence du *dezhi* et l'ont incorporé dans leur conception de la gouvernance : la Corée³¹, le Japon³² et le Vietnam³³. Ce n'est pas le moment pour s'engager dans une recherche compréhensive sur le développement de ces systèmes juridiques ; il suffit de souligner que le paradigme confucéen a favorisé une conception dialectique de la gouvernance sociale et économique, fondée en premier lieu sur l'interaction entre l'état et les corps sociaux intermédiaires pour l'aboutissement d'un ordre social « juste » (i.e. qui inclut et combine la pluralité des intérêts sociaux). Cette conception implique que la loi (ou le commandement « positif ») est uniquement un des instruments pour réaliser l'équilibre. Quand la loi est excessivement stricte, sa naturelle tendance à la centralisation du pouvoir peut entraver la coexistence des différents corps sociaux et empêcher la réalisation du bien-être commun. En effet, c'est la conception qui a justifié, dans la Corée du Sud des années 1960, une grâce générale pour les entreprises coupables de corruption, de mèche avec le gouvernement de Syngman Rhee, afin d'assurer une soi-disant « alliance de

³⁰ S. Lanni, Dalla Cina con rigore. Brevi note sul nuovo codice civile del Catai, *CALUMET – intercultural law and humanities review*, 13, 2021, pp. 60-77.

³¹ B. Mitu, Confucianism and the contemporary Korean society, *Rom. Jour. of Sociological Studies, New Series*, no. 1, 2015, pp. 31-38; I.H. Park, L.J. Cho, Confucianism and the Korean Family, *Journal of Comparative Family Studies*, Vol. 26(1), 1995, pp. 117-134; I. Castellucci, *La Corea*, dans M. Mazza (édité par), *I sistemi del lontano oriente*, Cedam, Milano, 2019, pp. 297-407; J. Li, 汉文化对朝鲜司法文化的影响 (L'influence de la culture Han sur la culture judiciaire coréenne), *Journal of Yanbian University*, Vol. 3, 1996, pp. 29-32.

³² J.O. Haley, *Authority without Power. Law and the Japanese Paradox*, Oxford University Press, Oxford, 1991.

³³ Bui Ngoc Son, *The Law of China and Vietnam in Comparative Law*, *Fordham International Law Journal*, Vol. 41(1), 2017, pp. 135-206; Pham Duy Nghia, *Confucianism and the conception of the law in Vietnam*, dans J. Gillespie, P. Nicholson (édité par), *Asian Socialism and Legal Change*, ANU Press, Australia, 2005, pp. 76-90.

développement » et garantir la coopération des grands groupes industriels pour l'implémentation des plans étatiques du développement³⁴.

3. L'intégration avec le droit socialiste

En observant les dernières évolutions de la réflexion du communisme chinois sur la « tradition » juridique, on pourrait soutenir que le *dezhi* est seulement un parmi tant d'autres paradigmes de la culture chinoise et confucéenne de la gouvernance que le nouveau *leadership* a intégré au lendemain du socialisme avec des caractéristiques chinoises³⁵. En effet, d'un côté, il est bien possible de comparer le rôle du *dezhi* avec le rôle des valeurs fondamentales socialistes (社会主义核心价值观 – *shehuizhuyi hexin jiazhi*), qui, ainsi que le *dezhi*, sont liés à des valeurs « classiques » de la pensée chinoise (surtout, l'harmonie, ou *hexie* – 和谐) et qui aujourd'hui, figurent à l'article 1 du code civil, comme principes généraux qui inspirent le fonctionnement du système de droit civil et aussi comme objectifs, dont la réalisation devrait guider les actions juridiques civiles³⁶.

En même temps, cette perspective nous amène à nous demander quelles sont les réelles applications et limites pratiques de l'intégration entre socialisme et culture traditionnelle, spécialement quand le *leadership* de Xi Jinping, même si attentif à la valorisation théorique de la valeur de l'harmonie, a plusieurs fois souligné l'adhérence à une *rule of law* forte et à une centralisation du pouvoir³⁷.

En ce qui concerne le *dezhi* et, plus généralement, la vertu comme moyen de la gouvernance, sa redécouverte théorique dans la Chine des réformes, est initialement

³⁴ D. Hundt, *Korea's developmental alliance*, Routledge, London, 2008.

³⁵ C. Smith, J. Deng, *The rise of New Confucianism and the return of spirituality to politics in mainland China*, *China Information*, 00(0), 2018, 1-21.

³⁶ Sur les valeurs fondamentales socialiste v. H. Li, 社会主义核心价值观融入民法典的理论意蕴 (Les implications théoriques de l'intégration des valeurs fondamentales socialistes dans le code civil), *Journal of Henan Normal University*, 45(3), 2018, pp. 65-70.

³⁷ G. Wu, S. Zhang, *Recherche sur le chemin*

accompagnée par la critique à son aptitude « féodale » et conservatrice, qui l'identifie comme un vestige du passé, une solution inappropriée pour toute modernisation³⁸. Selon ce point de vue, la relation entre *dezhi* et *fazhi* (au sens moderne) est conflictuelle. Autrement dit, le *dezhi* s'identifie au *li* (le rite) et l'évolution du droit chinois n'aurait pas dû considérer la moralité confucéenne et rituelle comme un modèle réalisable ; ni pouvoir s'inspirer à la légalité brutale et autocratique du légisme³⁹.

Cette position théorique, visant à soutenir l'étude et l'adoption des structures de légalité « occidentales » appartient à une époque (les années 1990) connotée par un visible enthousiasme pour la construction (partiale) des structures « libérales » de *rule of law*. Cependant, le nouveau siècle a conduit le droit chinois sur la route d'un modèle de développement socio-économique vraiment original, qui n'hésitait pas à synthétiser le *rule of law* et la légalité socialiste⁴⁰, la planification pour le développement (reformée et renforcée) avec l'amélioration de la coordination du marché et l'ouverture aux marchés internationaux⁴¹.

Le milieu culturel était donc plus favorable à la valorisation du *dezhi*. L'idée soutenue par de nouvelles positions était la complémentarité entre le *dezhi* et l'état de droit « occidental ». Le point de départ, pour ces positions, est l'opposition entre la vertu (qui implique un gouvernement fondé sur l'amélioration morale de l'individu et, en conséquence, des liens sociaux) et le légisme antique, perçu comme une approche totalement autocratique, qui conduit à la tyrannie⁴². D'autre part, la vertu souligne l'importance du caractère éthique des gouvernants et favorise aussi bien la connexion entre la loi positive et les valeurs de la communauté qui la promulgue, que le développement des jugements et des évaluations des conduites des fonctionnaires et des cadres⁴³. Selon cette vision, la vertu devient un instrument de « démocratie »,

³⁸ D. Jiang, 论当代中国的德治心态 (Sur la mentalité de le gouvernement par la vertu dans la Chine contemporaine), *zhengzhi yu falü*, 4, 1997, pp. 35 ss.

³⁹ *Ibid.*

⁴⁰ I. Castellucci, Rule of Law and Legal Complexity.

⁴¹ I. Castellucci (édité par), *Saggi di diritto economico e commerciale cinese*, Editoriale Scientifica, Napoli, 2019.

⁴² X. Ma, M. Yu, *Reflexions sur le gouvernement*.

⁴³ *Ibid.*

parce qu'elle permet au peuple d'évaluer les gouvernants et, en même temps, stimule une éducation « morale » pour les fonctionnaires et, en premier lieu, pour les procureurs⁴⁴.

Cette théorie, cependant, construit une dichotomie entre deux notions de *dezhi* qui sont apparemment contradictoires. D'une part, l'actualisation et la modernisation du concept de vertu devrait aboutir à une « égalisation », de sorte que le *dezhi* ne soit plus lié à l'ancienne ritualité hiérarchique mais devienne source d'obligations éthiques pour tout le peuple⁴⁵. D'autre part, la même théorie croit que la vertu implique des devoirs différents et plus forts pour les dirigeants⁴⁶.

Comment résoudre une telle dichotomie ?

L'observation de la législation et de l'évolution des théories de la gouvernance en Chine dans la dernière décennie indique, en effet, l'existence de différents paradigmes du *dezhi* qui soulignent, selon le contexte social, l'interprétation « hiérarchique » ou « démocratique » de la vertu.

3.1 La vertu comme instrument de supervision

Le droit chinois a connu en 2018 une révolution constitutionnelle, qui a établi un nouveau « pouvoir » ou – en employant un lexique socialiste – une nouvelle « fonction » de l'état, i.e. la supervision. Au niveau institutionnel, la réforme établit des Commissions de Supervision – une Commission « nationale » et des Commissions locales – chargées de l'inspection des conduites des fonctionnaires publics. Le contexte culturel qui entoure ces innovations a attiré l'attention des juristes, au point d'en explorer les documents, dans une perspective historique et comparative, les

⁴⁴ Y. Zhou, 寻求宪法原则下的德治 (En cherchant le gouvernement par la vertu dans le contexte des principes constitutionnelles), *faxue*, 4, 2002, pp. 3 ss.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

connexions avec la pensée de Sun Yat-Sen, le « pouvoir moral » du constitutionnalisme bolivarien, la fonction éthique des *censores* romains⁴⁷.

Sans aucun doute, la philosophie de la gouvernance de Sun Yat-Sen est un modèle naturel pour la Chine socialiste, qui tient également la figure de Sun en haute estime. Toutefois, les « cinq pouvoirs » élaborés par Sun sont aujourd'hui incorporés dans la constitution de Taiwan, qui en effet régule l'activité d'un « Yuan » superviseur. Ce Yuan était considéré comme l'évolution d'un processus historique qui établissait son point de départ dans le rôle des fonctionnaires superviseurs impériaux, employés par plusieurs dynasties et qui, selon Sun Yat-Sen, aurait eu le but d'améliorer les *checks and balances* du constitutionnalisme « à la Montesquieu » et particulièrement la concentration des fonctions de supervision de l'administration dans le pouvoir législatif et le pouvoir judiciaire⁴⁸.

En effet, la connotation morale du « Yuan superviseur » taiwanais existe surtout dans une perspective historique et le droit de Taiwan, sûrement sous l'influence des droits administratifs libéraux, a graduellement transformé la fonction de supervision en un concept proche de la notion d'audit. Les reportages du travail de ce Yuan démontrent que le *focus* de son action est principalement sur la relation entre supervision et protection des ressources publiques⁴⁹. Ce Yuan détient aussi le pouvoir d'accusation et de censure⁵⁰ ; cependant, les critères employés par la Constitution sont ceux du manquement au devoir et de la violation de la loi⁵¹. Il n'y a pas de références à une norme exclusivement morale.

D'autre part, dans la République Populaire, la loi sur la supervision (2018) introduit des paradigmes de contrôle particuliers. Selon l'Art. 11(1) de la loi sur la supervision, les commissions de supervision doivent fournir une éducation à l'intégrité (廉政教

⁴⁷ M. Huang, 监察模式及其权力本质的历史解释 (Explication historique des modèles de supervision et la nature du pouvoir), Peking University Law Journal, 31(4), 2019, pp. 984-1003.

⁴⁸ H.H.P. Ma, Chinese Control Yuan: An Independent Supervisory Organ of the State, Washington University Law Review, 4, 1963, pp. 401-426.

⁴⁹ V. Annual Report of the Control Yuan, Taiwan, Republic of China, 2019.

⁵⁰ Art. 90 de la Constitution.

⁵¹ Art. 97 de la Constitution.

育 – *lianzheng jiaoyu*) pour les fonctionnaires, conduire la supervision conformément à la loi ainsi que l'exercice impartial des pouvoirs, une administration propre et l'intégrité morale (道德操守 – *daode caoshou*).

Donc, la loi introduit la vertu comme un critère (équivalent à la loi positive) d'évaluation des conduites des fonctionnaires publics. Cette innovation fait écho à la réforme du système disciplinaire du Parti Communiste Chinois, qui confirme et renforce l'adhérence des cadres aux valeurs poursuivies par le PCC également en ce qui concerne les normes de conduite éthique⁵². La même approche est soutenue par la « Résolution du Comité central du Parti communiste chinois sur les principales réalisations et l'expérience historique du Parti au cours du siècle passé » (novembre 2021), qui, à plusieurs reprises, souligne l'autonomie conceptuelle et systémique de la morale « chinoise » des cadres, enracinée dans les valeurs traditionnelles et socialistes, loin de l'individualisme de l'occident « libéral »⁵³.

Le standard introduit par la loi sur la supervision semble constituer un véritable « pouvoir moral », car il ne se soucie pas de l'effectivité de l'action gouvernementale, mais il se concentre plutôt sur la promotion d'une « vie morale » pour tous les sujets – publics ou privés – qui s'engagent dans les affaires publiques, non seulement en termes de fonctions publiques mais aussi de partenariat public-privé, d'activités menées conjointement, etc.⁵⁴.

Le lien juridique entre les pouvoirs de contrôle (et de sanctions) et l'exercice de ces pouvoirs moraux constitue une originalité du droit chinois qui, aux yeux de certains juristes, témoigne la profonde intégration entre droit et vertu dans le socialisme contemporain⁵⁵.

⁵² V. Art. 7 du règlement disciplinaire du PCC (2018), qui fait référence à la « moralité socialiste ».

⁵³ G. Santoni, *La risoluzione storica del partito comunista cinese*, in *ApertaContrada*, 10 janvier 2022.

⁵⁴ M. Huang. V. aussi Art. 15 de la loi sur la supervision.

⁵⁵ *Ibid.*

3.2 La vertu et l'autonomie de la gouvernance locale

La « redécouverte » de la vertu comme paradigme de gouvernance influence non seulement le développement du nouveau système de supervision, mais aussi la création des systèmes de gestion des territoires. En effet, la combinaison de droit et vertu pour le management des communautés locales, a été soulignée à plusieurs reprises par Xi Jinping et elle a même été mentionnée dans la « Résolution du Comité central du Parti communiste chinois sur les principales réalisations et l'expérience historique du Parti au cours du siècle passé »⁵⁶. La prémisse conceptuelle d'une telle approche est qu'une application unilatérale de l'État de droit n'est pas adaptée à l'efficacité d'une gouvernance de base, compte tenu de la proximité et des liens relationnels au sein de la communauté. Le rôle de la vertu est donc d'introduire dynamisme et flexibilité dans cette gouvernance. D'autre part, la valorisation de la vertu est en même temps liée à la promotion de l'autogouvernance (自治 – *zìzhì*) des communautés rurales.

Quelle est l'interprétation de la vertu qui rend un tel modèle possible ?

En premier lieu, il faut souligner que le dilemme de la gouvernance des espaces ruraux à une profonde dimension historique. Depuis ses débuts, le droit chinois a dû faire face aux problèmes posés par la grande extension géographique des pouvoirs centraux, qui inévitablement favorisaient un certain degré de localisme, selon le mot « le ciel est haut est l'empereur est loin ». Le modèle plus ancien et traditionnel de gouvernement des communautés rurales était fondé sur la compénétration des dialectiques familiales et des stratifications sociales, tel que les « vieillards » et les sages qui étaient chargés de la conduction des affaires communes, de l'éducation, de l'administration de la justice⁵⁷. Au cours des siècles et des dynasties impériales, ce modèle a été, à plusieurs reprises, aussi bien soumis à une gouvernance bureaucratique et administrative des communautés rurales, que promu par la réorganisation des

⁵⁶ Sec. IV(8).

⁵⁷ Y. Yu, Y. Lei, Explorer les moyens

structures d'autonomie locale et l'intégration entre les élites locales et les cadres administratifs⁵⁸.

En 1908, le gouvernement Qing publia le « Règlement sur l'autonomie locale des villes, des cantons et des comtés » réglementant la création de conseils locaux dans le cadre d'un plus grand effort de réorganisation de la structure administrative de l'État⁵⁹. Dans les années suivantes, particulièrement suite à la révolution de 1911 et à la chute de l'empire Qing et l'expérience (très turbulente) de la république, plusieurs penseurs ont proposé de nouvelles solutions pour moderniser et renforcer la gouvernance locale⁶⁰. Certains d'entre eux, comme Liang Shuming, se sont opposés à l'imitation des modèles constitutionnelles occidentaux et se sont inspirés à la morale hiérarchique confucéenne pour élaborer les critères de la gouvernance des communautés rurales⁶¹.

L'expérience historique de la Chine Nationaliste et des premières phases de la République Populaire confirment le trend « oscillant » de l'autonomie des villages, parfois limité par les besoins du contrôle administratif, parfois valorisé aussi comme expression de la volonté démocratique des masses⁶². C'est enfin au cours des vingt-cinq dernières années que le gouvernement a démontré des efforts compréhensifs pour mettre en place une organisation des collectivités locales, cherchant à équilibrer hiérarchie et autonomie. La voie choisie, et de plus en plus accentuée ces dernières années, a été celle de créer de grands espaces informels de gouvernance au quotidien,

⁵⁸ *Ibid.*; P. Gong, 传统中国的县域治理及其近代嬗变 (La gouvernance traditionnelle des comtés en Chine et son évolution moderne), *zhengfa luntan*, 4, 2017, pp. 3 ss.

⁵⁹ Z. Xia, 论乡镇法治政府建设路径的法治化 (Sur la légalisation de la voie du gouvernement de canton sous l'État de droit), *Suzhou daxue xuebao*, 2, 2021, pp. 75 ss.

⁶⁰ Y. Yu, Y. Lei, Explorer les moyens

⁶¹ Z. Xu, 梁漱溟论中国人的人生态度与法律生活 (Le point de vue de Liang Shuming sur la vie chinoise, l'attitude et la vie légale), *zhongwai faxue*, 6, 1998, pp. 17 ss.

⁶² Y. Yu, Y. Lei, Explorer les moyens

en établissant, en même temps, des liens relationnels profonds avec les cadres du parti afin d'assurer le respect des politiques publiques⁶³.

Le plus important acteur institutionnel est sans doute le comité du village, élu par les villageois et chargé non seulement de gérer les problèmes quotidiens et les efforts du développement infrastructurel, mais aussi de résoudre les disputes⁶⁴. La transversalité de ces comités au regard des pouvoirs et fonctions de la gouvernance favorise l'intégration de la vertu comme un paradigme décisionnel. En pratique, cela signifie que des personnalités respectables parmi les villageois peuvent être chargées par les comités de régler les différends, compte tenu de la nécessité de préserver autant que possible l'harmonie sociale au sein de la communauté⁶⁵. En même temps, les cadres du parti du village sont encouragés à organiser des consultations « porte-à-porte » avec les villageois, et écouter leurs opinions concernant les principales questions de la vie communautaire⁶⁶.

Cet idéal est incarné par l'expérience des soi-disant « *xinxiangxian* » (新乡贤). Ce concept, qui a plusieurs significations, exprime la pratique selon laquelle des membres « sages » du village – membres du PCC ; fonctionnaires, professeurs ou soldats à la retraite ; personnes anciennes qui sont tenues en haute estime – lorsqu'ils reviennent au village après la cessation du travail, sont chargés des fonctions « publiques », et particulièrement de la résolution des disputes⁶⁷. Leur rôle est pris en compte par les autorités car ils ont la capacité et la connaissance pour intégrer l'application de la loi et l'application des valeurs « populaires » de la communauté. D'autre part, le *status* qu'ils détiennent au sein du village augmente la chance de succès des médiations,

⁶³ V. la Loi organique sur les comités des villageois (村民委员会组织法) publiée en 1998. V. aussi G. Rossi (édité par), *Stato e Società in Cina. Comitati di Villaggio, Organizzazioni Governative, Enti Pubblici*, Giappichelli, Torino, 2011.

⁶⁴ Art. 2 de la Loi organique sur les comités des villageois.

⁶⁵ Y. Yu, Y. Lei, Explorer les moyens

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*; H. Chen, Q. Gao, 新乡贤参与乡村治理的作用分析与规制引导 (L'analyse du rôle et l'orientation réglementaire du *xinxiangxian* participant à la gouvernance rurale), *qinghua faxue*, 4, 2020, pp. 5 ss.

souvent organisées à travers des réunions communes, des dîners communautaires et des fêtes traditionnelles⁶⁸.

La pratique du *xinxiangxian* fonctionne en dehors du domaine d'application d'un régime juridique défini⁶⁹. Donc, les « sages » du village opèrent dans le cadre des fonctions des comités réglementées par la loi organique sur les comités de villageois. L'absence d'une qualification spécifique, d'autre part, assure aussi bien une certaine autonomie qu'un dynamique *decision-making*.

Cependant, il faut rappeler que le but final du *xinxiangxian* est promouvoir l'intégration entre *fazhi* et *dezhi*. En effet, la connaissance et l'application de la loi sont soulignées par les juristes, qui considèrent la vertu comme une sorte de « facteur d'atténuation » de la « dureté » de la loi⁷⁰. Certains gouvernements locaux se sont penchés sur la question et ont souligné que l'implémentation du *dezhi* doit être fondée sur l'activité d'éducation, coordination et supervision du PCC⁷¹. Même la culture populaire a la fonction de promouvoir l'amélioration de la qualité morale des villageois et l'observation de certaines valeurs qui font partie de la culture chinoise mais, en même temps, reflètent la décliné éthique du socialisme contemporain⁷².

4. La moralisation de l'action privée

L'intégration entre le droit et la vertu dans le socialisme chinois contemporain est, en premier lieu, la source d'une nouvelle expression du management des structures

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ H. Hou, P. Ma, “自治、法治、德治”三治融合体系下治理主体嵌入型共治机制的构建 (Construction d'un mécanisme de co-gouvernance intégré aux sujets de gouvernance dans le cadre du système d'intégration de « l'autonomie, le gouvernement par la loi et le gouvernement par la vertu »), *huanan shifan daxue xuebao*, 6, 2018, pp. 141 ss.

⁷¹ V. l'Avis du gouvernement populaire municipal de Xinzhou sur le renforcement du système de gouvernance combinant l'état de droit et la moralité dans l'autonomie rurale (忻州市人民政府关于进一步加强农村自治法治德治相结合治理体系的通知), publié le 9 septembre 2019.

⁷² Avis du gouvernement populaire municipal de Xinzhou, Sec. V.

publiques. Aussi bien la supervision que le gouvernement rural représentent des fonctions publiques qui utilisent la vertu pour gérer et interpréter les relations « verticales » entre les membres des institutions – administratives ou communautés locales – et les sujets privés. En effet, nous venons de voir que le rôle du *dezhi* dans la gouvernance rurale est fonctionnel et renforce les instruments dynamiques du contrôle par le PCC.

Cependant, on pourrait se demander si la vertu, en tant que principe général du droit chinois, pourrait également influencer sur la régulation des relations horizontales, entre sujets privés. Autrement dit, la vertu peut être utilisée comme un critère général pour interpréter les relations de droit civil ? Au cours de la dernière décennie, le droit chinois a en effet réalisé un effort pour intégrer certains paradigmes éthiques dans le droit civil. Nous parlons des valeurs fondamentales socialistes, qui sont aujourd'hui mentionnées par l'Art. 1 du code civil et peuvent être considérées à la fois comme but et critère des relations privées⁷³.

Au moins au niveau législatif, la vertu n'a pas eu le même succès. L'intérêt des dirigeants politiques et des juristes ne se reflète pas dans une légalisation appropriée de la vertu comme paradigme de la gouvernance. Il existe une décision judiciaire isolée qui rattache la clause générale de bonne foi dans les relations contractuelles aux vertus morales de la civilisation chinoise et au principe de *dezhi*, mais l'attention portée à cette notion reste faible et se résume, en réalité, à une brève mention⁷⁴.

Ces observations ne doivent pas surprendre. En effet, le *dezhi* est une philosophie de la gouvernance qui ne représente pas un ensemble des valeurs définies, mais plutôt l'idée d'une fonctionnalisation de la règle juridique et de sa structure conformément aux valeurs ou, autrement dit, l'atténuation de la loi en raison de la promotion de certaines valeurs. Dans cette perspective, l'existence du *dezhi* dans le système de droit

⁷³ Z. Li, 社会主义核心价值观融入法规的基本形式 (La forme de base de l'intégration des valeurs fondamentales socialistes dans le système juridique), *Zhejiang Academic Journal*, 1, 2018, pp. 38-44 ; H. Li, 社会主义核心价值观融入民法典的理论意蕴 (Les implications théoriques de l'intégration des valeurs fondamentales socialistes dans le code civil), *Journal of Henan Normal University (Philosophy and Social Sciences)*, 45(3), 2018, pp. 65-70.

⁷⁴ Tribunal populaire du district de Zhaoling, ville de Luohe, province du Henan, arrêt civil no. 2553 (1104 du Henan), 28 novembre 2018.

civil chinois devrait être détectée dans les clauses qui favorisent l'application des normes morales dans les relations civiles. L'exemple le plus original et le plus célèbre d'une telle approche est le système des « clauses vertes », qui visent à assurer que le sujet civil tienne compte à la fois de la protection de l'environnement et de la nécessité d'économiser les ressources⁷⁵. L'art. 9 du code civil pose un principe général, vu qu'aussi bien le livre des droits réels que le livre des contrats, contiennent des dispositions correspondantes qui imposent des obligations particulières aux propriétaires, usufruitiers et contractants⁷⁶.

En outre, la moralisation de l'action privée est également promue comme paradigme opérationnel pour les entreprises privées. Les « Opinions sur le renforcement du travail du Front uni dans l'économie privée à l'ère nouvelle » (septembre 2020) préconisent un système de recommandations (et vraisemblablement un soutien financier) pour les entrepreneurs privés qui respectent les normes éthiques promues par le PCC⁷⁷. Il s'agit d'une forme d'influence indirecte, qui est canalisée par l'adhésion au parti de nombreux entrepreneurs ; cependant, l'effet concret est d'assurer le respect de certains ensembles de valeurs filtrés par l'interprétation du PCC, comme cela se produit également avec les règles de gouvernance locale.

5. Observations finales

Ceux qui étudient le droit chinois savent depuis longtemps que le droit de l'État et la vertu (entendus comme valeurs culturelles et coutumes régissent les relations) représentent une dichotomie critique dans le système juridique chinois et, dans une certaine mesure, dans les traditions juridiques de l'Asie orientale. Le problème, pour le juriste, est donc de détecter et d'identifier ces règles non écrites (et souvent non

⁷⁵ D. Xu, Introduzione, in O. Diliberto, D. Dursi, A. Masi (édité par), Codice civile della Repubblica Popolare Cinese, Pacini Giuridica, Pisa, 2021, pp. V-XX; K. Tao, 以习近平生态文明思想为指引切实贯彻实施《民法典》绿色条款 (La mise en œuvre effective des clauses vertes dans le « Code civil » avec Xi Jinping mais sur la civilisation écologique comme guide), *faliu shiyong*, 23, 2020, pp. 3 ss.

⁷⁶ K. Tao, La mise en œuvre

⁷⁷ G. Sabatino, *The Legal Dimension of the Relation Between the Chinese Communist Party and the Private Economy. A Perspective of the Article 19 of the Company Law*, Global Jurist, 2021.

dites) qui orientent l'évolution du système, parfois aussi, en opposition silencieuse au droit statutaire.

Les récentes vicissitudes du *dezhi* semblent indiquer que cette tendance évolue rapidement. Il y a une faveur croissante envers l'intégration du gouvernement selon la vertu avec la loi positive. Toutefois, cette intégration repose sur une interprétation de la vertu traditionnelle selon les valeurs promues par le parti et, en effet, reste souvent imposée par l'activité des cadres du parti. Au niveau local, ce mécanisme assure que la gouvernance sociale reposant sur la « vertu » de certains membres de la communauté, complète et soutient les institutions officielles de gouvernance. D'autre part, les paradigmes éthiques de la conduite ont été profondément intégrés dans les critères d'évaluation et d'appréciation de la conduite professionnelle et personnelle des fonctionnaires et autres personnes chargées des affaires publiques, conformément à la loi sur la supervision.

L'analyse empirique, bien qu'encore incomplète, soutient l'idée d'une valorisation de la fibre éthique du droit moderne, en valorisant une vertu à la fois traditionnelle et contemporaine, dans le sens où elle est de plus en plus (re)façonnée selon la vision culturelle portée par les forces directrices de la nation et leur expression politique, i.e. le PCC.

THE DARK SIDE OF THE BRICS: THE LACK OF A LEGAL DEFINITION

Marta Bono^{*}

Abstract

The uniqueness of the BRICS group makes it difficult to define, especially from a legal perspective. The scopes and the levels of cooperation among the member States are so heterogeneous and multifaceted that the BRICS could be analyzed under many lenses. Most of the present-day literature attempts to explain the BRICS phenomenon especially from an economic and/or political perspective, whereas there is a lack of research focused on its legal international dimension. To make things more complicated, the BRICS themselves seem to voluntarily forget about defining the legal foundation of their cooperation. Therefore, the aim of this paper is to shed some light on what we consider a dark side of the BRICS, namely the lack of a legal definition. In order to do so, it becomes extremely important to broaden the understanding of the BRICS. The paper thus begins with a brief introduction retracing the historical steps that have led to the BRICS as we currently know it, also describing the decision-making process employed in the BRICS cooperation style. With this overall picture in mind, the paper investigates how the BRICS qualifies within the international law, assessing whether it could be classified as international organization, and whether it is a global/international actor with legal personality/legal capacity. Finally, the paper reviews some of the definitions given by prominent scholars of BRICS, in the search for an agreeable legal definition that is capable of capturing the real essence of the group.

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Keywords

BRICS - International law - International cooperation - Global South, - Legal definition, - Ios - Multipolarity.

1. The BRICS: an introduction

In 2001, the then chief economist of Goldman Sachs, Jim O'Neil, first brought forward the idea of BRICs.¹ In the analytical report of global investment of his company, he forecast that China, Russia India, and Brazil, the four emerging markets with promising economic development, would catch up with– and by 2050 overtake – the G7 countries (the USA, Japan, Canada, France, Italy, Germany United

¹ This paper uses the two versions of the acronym: BRICs and BRICS. The first version has been used to designate the group until its enlargement to South Africa, which entailed a change in the initial shape of the acronym that now sees a capital S to denote, precisely, the new BRICS country.

Kingdom) in terms of total GDP.² The BRICs leaders saw a potential beyond the purely economic acronym O'Neil had created, and thus in 2006, the first informal meeting of the foreign ministers of Brazil, Russia, India, and China took place at the margins of a United Nations General Assembly to discuss the potential of a future cooperation among their respective countries. Three years later, shortly after the 2008 economic crises hit the then major economies and political powers - the US and the EU-, the BRICs was officially inaugurated with its first summit in Yekaterinburg, Russia. Since then, the four countries have been meeting regularly once a year, alternating themselves in the hosting of the Summit. South Africa joined the group just two years later, in 2011, during the Sanya summit, upon Beijing's invitation. The result was a new acronym strengthened with an upper-case S, bringing together the five fastest-growing emerging economies distinguished by high rates of economic development and a high-degree of export orientation, which according to Goldman Sachs experts had, in the long term, the potential to become the most dominant economic actor in the world.³

Although the BRICS was first referred to the investment opportunities of emerging economies, the regular meetings of the leaders of the BRICS countries, during several years, have turned this idea into joint efforts to participate in global governance. Thus, it would be clearly reductive to look and define the BRICS only from an economic perspective, considering exclusively the economic or financial reasons that pushed the BRICS to aggregate. Rather, the striking pace at which the BRICS economies had grown and were expected to grow was seen as the basis from which they could have legitimately requested to have a greater say in global governance. Indeed, the flourishing economic self-confidence of the BRICS found expression in an increasingly political assertiveness.⁴ Besides, remarkably large population and size of territories other than the economies of the BRICS States made them different from others. At present, the BRICS countries represent 42% of the world's population

² J. O'Neill, 'Building better global economic BRICs' (2001) Goldman Sachs Global Economics Paper no. 66. <build-better-brics.pdf> accessed March 2022.

³ M. Zakharova, V. Przhilenskiy, 'Experiences of legal integration and reception by the BRICS countries: five passengers in a boat (without a dog)' (2018) 5 (2) BRICS Law Journal 4.

⁴ A. F. Cooper, A. B. Farooq, 'BRICS and the Privileging of Informality in Global Governance' (2013) 4 Global Policy 428.

(about 3 billion of people); they account for 23% of the world's GDP and amount to an extremely large portion of territory which covers about 30% of the entire earth (40 million km²).⁵ Therefore, their cooperation proves the desire to make the voice of an important part of the world.⁶

In this regard, it is worth stressing a cornerstone of the BRICS cooperation, which is summarized in their ambition to affect global governance. Since the beginning, the political goals of these States were clear. As the joint statement issued at the end of the first meeting in Yekaterinburg reads: 'We [the BRICS] are committed to advance the reform of international financial institutions,⁷ so as to reflect changes in the global economy. The emerging and developing economies must have greater voice and representation in international financial institutions, whose heads and executives should be appointed through an open, transparent, and merit-based selection process. We also believe that there is a strong need for a stable, predictable, and more diversified international monetary system'⁸ and further agree, at point 15 of the same statement, to cooperate 'to build an harmonious world of lasting peace and common prosperity'.⁹ What distinctly emerges is the strong willingness of five countries to coordinate and have a positive impact at the global level, wanting to represent not only their respective States, but the Global South as a whole. The choice of including South Africa to the BRICS group falls precisely within this political ambition. Indeed, by encompassing the African continent, the BRICS group secured itself with a more planetary dimension. Moreover, South Africa plays a very important geopolitical reference point, as it has represented developing African countries within the G20, not to mention that it is also a founding member of the United Nations. From a more

⁵ IMF; Word Bank statistic 2019.

⁶ L. Scaffardi, 'BRICS, a Multi-Centre "Legal Network"?' (2014) 5 Beijing Law Review 140.

⁷ The financial institutions to which the BRICS refer are the so-called Bretton Woods institutions: the International Monetary Fund (IMF) and the Word Bank. Established in the aftermath of the Second World War, these institutions were found to be over dominated by the Western countries, especially by the US and many European countries. What the BRICS lament the most is that their economic growth is not reflected in the political power distribution within such institutions, which has always been significantly low. Therefore, they advocated for a more democratic and fairer representation.

⁸ BRIC, 'Joint Statement of the BRICs Countries' Leaders', Yekaterinburg, Russia, 2009, point 3.

⁹ Ibid., point 15. See also BRICS 'Johannesburg Declaration,' Johannesburg, South Africa, 2018, point 5.

intra-BRICS perspective, the opening up to South Africa, a country with which China has established important political interests and energy-related investments over time, and which also offers room for development to India and Brazil, certainly contributed to the choice of this particular African country, over others.¹⁰

Furthermore, some scholars have interpreted the brief quotations mentioned above, as an attempt on behalf of the BRICS to provide a counterpoint, or even a challenge to the existing institutions and to the dominant role played by the US and the dollar. However, as we will see below, this paper argues that the BRICS did not positively implement a defiance towards the existing status quo. They have never truly disengaged from the universal institutions they wanted to reform. Indeed, the institutions created by the BRICS (the New Development Bank and Contingent Reserve Agreement) are not to be considered alternative but rather complementary to the existing ones. In a way, this links with a concept and a goal that lies particularly at heart of the BRICS, which is the pursuit of multipolarity as opposed to unipolarity. The idea they bring forward is that the world witness now various poles of economic growth that should be reflected in the international political arena. The key to the BRICS' international influence is "the power of the superpowerless world".¹¹ The coming world order they ought for is inclusive of all States, where all countries are to be treated as equal members of the international community. The group, in sum, does not propose itself as a 'block' or a new pole that challenges the hegemonic one in power. Rather, it sees itself as part of the collective of powers rising together. It calls on the fact that less and emerging countries should have better representation at international level, thus asking for a reform of the international institutions to cope with this democratic deficit.¹²

¹⁰ From a purely economic perspective, other emerging countries in the African continent could have been better suited to be included in the BRICS (e.g., Nigeria), but they could have not ensured to the group the same political stability. and doubtless not the same geopolitical appeal as South Africa, see Scaffardi (n.6) and J. O'Neill, *The Growth Map. Economic Opportunity in the BRICs and Beyond* (Penguin Books 2011).

¹¹ K. Nicolaidis, 'The power of the Superpowerless', in T. Lindberg (ed.) *Beyond Paradise and Power: Europeans, Americans and the Future of a Troubled Partnership* (Routledge 2004).

¹² M. Papa, 'BRICS as a Global Legal Actor: from Regulatory Innovation to BRICS Law?', in L. Scaffardi, (eds) *The BRICS group in the spotlight* (Edizioni Scientifiche Italiane 2015).

It is no coincidence that we started talking about BRICS in a period of crisis of the Western democracies, both economically and politically. The 2008 crisis shed a light on the need for a reform of international governance institutions, particularly in the financial sphere, to reflect the new multi-polar setting, which sees now the rise of the developing world.¹³ In this sense, it becomes possible to better understand the desire and ambition of BRICS to become the voice of the developing countries, of the Global South, and to raise the demand to be better represented in the international arena, counterbalancing the US–European Union (EU) monopoly of power.¹⁴

The BRICS represented a great opportunity not only as a platform from which to stand up and to speak up to the world, but also as a venue to create networks of cooperation among the member countries. In this regard, a true escalation occurred. While the formal declaration issued at the end of the very first summit had only 16 articles, the following summits expanded the dimension and scope of the joint agenda along with the subsequent declarations, which got longer including several items and areas of cooperation.¹⁵ The BRICS collaboration covers now a wide range of matters: from trade and finance to energy, sustainability, science and technology, outer space, innovation, education, health, security, counterterrorism, climate change, corruption, physical culture, and sport. Frequently, the BRICS also expresses opinions and support during war episodes, as it was the case of the war in Iran or Syria,¹⁶ thus displaying a deeply political dimension.

When approaching the study of BRICS, we cannot but notice the striking heterogeneity of its member States. It comes naturally to question how such different countries, with very distinctive economic structure, socio-political background, legal set-ups, culture, and traditions, could make a cooperation among them work (for quite

¹³ F. D' Amico, *Previous History: from a market acronym to political-diplomatic dialogue*, in R. Bauman et. al, *BRICS: studies and documents* (Fundacao Alexandre De Gusmao 2017).

¹⁴ G. Formici, 'The role of the BRICS group in the international arena: a legal network under construction' (2019) 4 Third World Thematics: A TWQ Journal <<https://www.tandfonline.com/doi/abs/10.1080/23802014.2019.1650391>>

¹⁵ D'Amico (n.13).

¹⁶ See BRICS 'Durban Declaration', Durban, South Africa, 2013; BRICS 'Fortaleza Declaration', Fortaleza, Brazil, 2014. See also A. E. Abdenur, 'Rising Powers and International Security: the BRICS and the Syrian Conflict' (2016) 1 *Rising Powers in Global Governance* 109.

a long time now) even in spite of the internal political tensions that yet have occurred between some of its members.¹⁷ In fact, the BRICS countries try to move beyond these tensions through regular meetings and enhanced dialogue. On this subject, the coordination strategy adopted by the group becomes relevant and deserves a further examination.

The decision-making process within the BRICS occurs at two main levels: the level of coordination among the heads of States and the inter-ministerial cooperation. The coordination among the heads of State takes place within the Summits themselves. On this occasion, the BRICS leaders exchange their views on common international issues of concern,¹⁸ and at the end, they generally release joint statements and declarations.¹⁹ It should be noted that such official statements are not just the product of the discussions that occurred during the summits, but they are supported by heavy preparatory work carried out by groups of representatives from each of the member country before the summit takes place. Thanks to this process of intense exchange, BRICS Heads of State and government share common positions in their summits, which in turn set the course for the BRICS.

The second level of cooperation mentioned is the inter-ministerial one. It consists of regular meetings among BRICS ministries on key areas of concern (e.g., BRICS foreign ministers' meeting, BRICS health ministers' meeting, BRICS trade ministers' meeting), whose work is generally later acknowledged during the summits.

Such degrees of cooperation -which are to be considered as in continuous communication and to be mutually influenced- differ from each other in method and scope. The aim of the summits is to shape or, at least, to influence global dynamics and to advance proposals to reform global governance, whereas the inter-ministerial

¹⁷ This refers particularly to the border political and military hostilities between China and India over Tibet and the Asiatic region of Kashmir, among others.

¹⁸ Typically, the host country is responsible for setting the agenda and identifying the main issues to be addressed at the summit. The BRICS also has a rotating presidency that coordinates the implementation of the decisions taken by its leaders.

¹⁹ It is also very common for them to sign Mutual Understanding Agreements (MuA) i.e., documents that do not create rights and obligations under international law among its signatories, for example between governmental agencies, state-owned banks and ministries traditionally not involved in the classical international legalization process.

level aims at encouraging economic, political, and cultural integration among the BRICS themselves. Therefore, whereas the first level is used to shape the external dimension of BRICS and represents the platform from which the BRICS talk to the rest of the world, displaying their concerns and ambitions, the second one aims at improving the quality of intra-BRICS cooperation.

Next to these rather widespread ways of cooperation, the more interesting and innovative aspect of the BRICS regards the adoption of other collaborative instruments, which are more informal and involve many different types of actors, especially from the civil society. These softer forms of international cooperation consist of the creation of think-tanks, networks, and forums, generally put in place by experts, academics, young people, and students belonging to the different BRICS countries, promoting the exchange of best practices and know-how, and facilitating legal flows and policy transfers.²⁰ It is worth noting that these intra-BRICS activities, realized among the five States, are often integrated within the decisions concerning the BRICS' external actions. To clarify, let us take the example of health cooperation's field, where the aims pursued in the BRICS internal dimension are also reflected in its external actions by supporting existing international organizations such as the World Health Organization, and participating in global projects.²¹

More formal than the ones just mentioned, the Sherpa meetings are another fundamental landmark in the BRICS decision-making and cooperation process. During these meetings, the "sherpas"²² and "sous-sherpas" (senior officials of the member countries' foreign ministries who are in permanent contact) prepare the leaders' meetings, conduct a review of the progress achieved over the past year and the progress of BRICS' joint actions, discuss the possible implementation of previous action plans and fix priorities and principles for the next annual summit.

²⁰ Formici (n.14); Scaffardi (n. 6)

²¹ Formici (n.14).

²² The name Sherpas derives from the "Sherpa people", Nepalese ethnic groups. They serve as guides and porters across the Himalayas. Thus designated, the Sherpa groups clear and prepare the way for the head of States at the major Summit. Sherpas are generally quite influential even though they do not have the authority to make decisions over any agreement. Sherpas were already much in use relating to the G7 preparation. As for the BRICS, the first BRICS Sherpa meeting was held in 2019 under the Presidency of Brazil in Curitiba, Brazil.

As to the practical part of the economic cooperation, it mostly relies on the establishment of Economic Strategic Partnerships which have become the institutional basis of the BRICS cooperation.²³ These documents define the long-term benchmarks of the sectoral and general conceptual nature, to strengthen economic growth and increase the level of competitiveness of the BRICS economies in the international arena. As it can be noted in the 2017 Xiamen declaration, where it is stated that: ‘We note that practical economic cooperation has traditionally served as a foundation of BRICS cooperation, notably through implementing the Strategy for BRICS Economic Partnership and initiatives related to its priority areas [...]’,²⁴ such Partnerships represent a topical moment in the BRICS cooperation.

It is through this particular ‘all-dimensional and multilayer cooperation’²⁵ process that BRICS succeeded in “bridging” their distances, and positively use their differences to improve their collaboration. Indeed, the exchange of experiences -generally shared through the more unofficial venues- gains in terms of ‘richness of solutions, strategies, and final outcomes’.²⁶

2. How to define the BRICS? A public international law perspective

Once we have a rather clear image of what the BRICS is in terms of membership, objectives and scopes pursued, together with the cooperation strategy implemented to make the group successfully work and have an impact both internally and externally, we can bring the BRICS within the international law framework. The main question we are seeking to address is: what is the BRICS under international law? Considering that we have just described a whole new “cooperation platform”, capable of gluing together such different countries with the same ambitions in global

²³ The BRICS Economic Partnership 2021-2025 was approved in the BRICS, ‘New Delhi Declaration’, New Delhi, India, 2021, point 3.

²⁴ BRICS, ‘Xiamen Declaration’, Xiamen, China, 2017, point 8.

²⁵ BRICS, ‘Xiamen Declaration’, Xiamen, China, 2017, point 2.

²⁶ Scaffardi (n.6).

governance, can we use the traditional categories of international law to define if from a legal point of view?

Traditionally, Public International Law has treated States as subjects, actors with legal influence in the international system. States have legal personality on the notion of sovereignty and recognition by others, thus, they have a right to engage in law-making but, at the same time, they bear obligations and are held accountable to other States.²⁷ Therefore, singularly taken, each BRICS member State obviously is an actor under international law. However, the dimension we are investigating concerns the qualification of BRICS as an aggregation of States, as a group. In this regard, international law has adapted, over time, to recognize not only States but also non-States entities as legal actors, attributing them the ability to create, apply, and administer international legal rules. This latter category includes civil societies and international organizations. Yet, as a conglomerate of States, the BRICS cannot be qualified as an international organization. Indeed, the BRICS lacks the traditional elements generally required to be classified as such: it does not have a constitutive treaty, it has no charter whatsoever, headquarters, fixed secretariat (either physical or virtual), nor it has dedicated staff or funds to finance its activities.²⁸ Moreover, international organizations are generally equipped with a stable institutional apparatus. Their bodies are mostly made up of representatives of States (which gives an «intergovernmental» dimension to the organization), and more rarely from individuals acting in their capacity (which is the case of courts or bodies with purely secretarial/executive or organizational functions). Decision-making methods are commonly by majority (possibly qualified or weighted: e.g., art. 27, par. 3, UN Charter); for more «sensitive» issues, decisions are taken by unanimity, whereas the BRICS working methods are essentially consensus-based.²⁹ Thus, similarly to other groups as the G20, they regularly produce consensus on joint state actions with highest global impact.

²⁷ Papa (n.12).

²⁸ A. E. Abdenur, M. Folly, 'The New Development Bank and the Institutionalization of the BRICS' (2015) 3 R/evolutions: Global Trends & Regional 66.

²⁹ BRICS, 'New Delhi Declaration', New Delhi, India, 2021, point 5: "We reiterate our commitment to preserving and further strengthening the consensus-based working methods in BRICS at all levels which have been the hallmark of our cooperation".

Furthermore, as full-fledged subjects of international law, international organizations can enter treaties and bear responsibilities under international and national law.

International forums as the, G8, G20, or the Arctic Council that do not have all the features of an international intergovernmental organization, are usually defined as quasi organizations (from Greek “quasi” – pseudo), para-organizations, or as informal international institutions. These forms of concerted action between States represent a weaker form of an organization. Rather than being based on an international treaty or agreement containing their constitution, they rely upon a political declaration, which is respected by the participating States having an interest in bringing about the summit consultations, which usually deal with economic, commercial, or financial issues.³⁰ They have neither a formalized organizational structure, nor the right to make legally binding decisions, and ultimately, they do not have international legal personality. In this sense, the BRICS is closer to a G-group rather than to an organization.

Considering all the above, we understand even more how, despite the importance of the economic and financial dimensions that characterize the BRICS cooperation, and notwithstanding the impact of the Economic Strategic Partnerships mentioned before, we would be mistaken in defining it as an “Economic Integration Organization”.³¹ Other than requiring the traditional criteria to qualify as an organization (which the BRICS already lacks), an economic organization would require the transfer of sovereign competence on economic matters by its member States, which does not occur in the BRICS. And after all, how could it? Even though the BRICS countries are characterized by a considerable level of State intervention in the economy,³² they all have such different economic structures that would make it impossible for them to enter an economic organization with each other. Moreover, even if the BRICS economies are all growing fast, they are not doing so at the same pace.

³⁰ These forms of concertation are often referred to also as “summit organizations”.

³¹ “Economic Integration Organizations” can be understood as a subtype of international organizations.

³² M. Carducci, ‘Il BRICS Come “Legal Network” e le sue implicazioni costituzionali’ in *Costituzione, Economia, Globalizzazione. Liber amicorum in onore di Carlo Amirante* (Edizioni Scientifiche Italiane 2013); L. Scaffardi (n.6) 146.

In fact, the BRICS economies are situated at very different stages of development and rely on different sources for their growth, with Brazil specializing in agriculture, South Africa and Russia in commodities, India in services, and China in manufacturing.³³ Moreover, China is known for its low tariffs for manufactured products; India is protectionist when it comes to goods; and South Africa, while relentlessly enforcing its black economic empowerment and local content, is becoming increasingly protectionist, too. Also, 'when it comes to GDP per capita, Russia and Brazil are champions compared with the other members, while India has a very long way to go before catching up with the others'.³⁴

Defining the BRICS as an economic integration organization would not only be incorrect, but also extremely reductive. As mentioned before, the cooperation among the BRICS involves, indeed also non-economic fields, such as education, counterterrorism, or poverty and faces deeply political issues, albeit, we must admit, the most successful achievements of BRICS have occurred in the financial field, with the establishment of the New Development Bank (NDB) and the Contingent Reserve Agreement (CRA) in 2014.³⁵

In today's world, international cooperation is more and more characterized by informality. There are a lot of entities and State forums that do not have all the features of an international organization but make a great contribution to the development of international relations and, often, of international law.³⁶ Agreeably, the BRICS falls within this latter category of international actors. The critical thing with BRICS lies in this continuous tension between a very high degree of informality and institutionalization tendencies, which raises doubts as if BRICS might be experiencing a transition period into becoming an international organization or if this is a perpetual situation that makes it extremely different from other international cooperation experiences. As a matter of fact, occasionally, the States involved in an international forum are quite satisfied with the uncertainty of its status (e.g., the

³³ K. Kralikova, 'BRICS: Can a marriage of convenience last?' (2014) 13 *European View* 243.

³⁴ *Ibid.*

³⁵ BRICS, 'Fortaleza Declaration', Fortaleza, Brazil, 2014.

³⁶ A. Abashidze, A. Solntsev and E. Kiseleva, 'Legal Status of BRICS and Some Trends of International Cooperation' 9(36) (2016) *Indian Journal of Science and Technology* 1.

Group of 8) but, some other times, States' formations born under the informality sign, get progressively more and more institutionalized, up to becoming full international organizations. This was the case of the Association of Southeast Asian Nations (ASEAN), which has long been an international quasi-organization. Similarly to what happen with the BRICS, ASEAN was first established in 1967 with the Bangkok Declaration. A decade later, in 1976, the ASEAN Secretariat was established, indicating that a strengthening of the institutional framework was occurring, and finally, 40 years after its establishment, ASEAN adopted its Charter and turned into a full organization, officially acquiring international legal personality.

Arguably, for the BRICS, some steps in this direction were apparent in 2014 when they established two institutions on their own, the NDB and the CRA,³⁷ and when in 2015, during the Ufa BRICS summit, the BRICS Heads of States discussed the possibility of establishing a joint website that could have been regarded as a virtual secretariat.³⁸ However, such a proposition never became a reality. Therefore, whereas some years ago we could have legitimately believed that a true transformation of BRICS was occurring, now we have reasons to abandon such an idea. Indeed, the BRICS member states have not shown any recent sign of willingness to commit themselves into a joint BRICS organization. The most likely scenario is that BRICS will continue to have a very informal shape and will be used strategically by its member States as a platform of coordination to act at global level. To do this, they do not need to be an international organization and to be vested of international legal personality. They are not seeking to conclude international treaties, to send diplomatic missions, or to interact and acquire rights and duties towards third parties or other international organizations, they are trying to accomplish a global reform. However, all of this would also mean that group cannot legally stand as one in the international scene, and therefore other global players, as the EU, still have to deal with each of the BRICS states individually and on a bilateral basis.³⁹ To sum up, the BRICS countries did not

³⁷ The NDB and the CRA were created by formal treaties, under international law, and at least the NDB certainly has international legal personality.

³⁸ BRICS, 'Ufa Declaration', 2015, point 74: "We welcome the signing of the MoU on the Creation of the Joint BRICS Website among our Foreign Ministries [...] We will explore the possibility of developing the BRICS Website as a virtual secretariat".

³⁹ Kralikova (n.33).

create a new entity which can act autonomously and independently from its member States, as it is the case of the United Nations, to make an example, who “has a life on its own”. The BRICS essentially is the “total of its parts”, its States are the driving forces of the cooperation. Within the BRICS, Brazil, Russia, India, China, and South Africa agree on common issues and decide upon what positions they share, but then, this choice is singularly -and not collectively- implemented by the member States in the pertinent forum. The purposes and goals established by BRICS during the summits and meetings are the same for all its members, but the way each state acts to meet these goals could vary, respecting each state’s unique character, which is not denied or ignored by BRICS as a group. Thus, outside the NDB, the BRICS remains a *sui generis* or non-formal forum of international cooperation. Its members are driven by the desire to bargain together and change international reality directly and without the formalism and institutional hinderances of an international organization.⁴⁰

3. An introspective analysis on the BRICS’ legal dimension

The BRICS never truly attempted to define themselves from a legal perspective. Since, at no time, they have adopted a charter or a treaty, we do not find any official and coherent definition of BRICS in a legal sense. There are very few references in the BRICS declarations as to the legal aspects and prospects of the group, and the wording used on this wise has always been vague and open to interpretation. Such scattering mentions of constitutional BRICS define it as a ‘platform for dialogue and cooperation’,⁴¹ a ‘strategic partnership’,⁴² and again as a ‘forum’⁴³ leaving the strictly

⁴⁰ A. Thomashausen, ‘Is BRICS becoming an international organization?’ (2018) <<https://www.iol.co.za/news/is-brics-becoming-an-international-organisation-16291598?msclkid=004e5fafa7a911ecb8fae7ba9369477>> accessed April 2022.

⁴¹ BRICS, ‘New Delhi Declaration’, New Delhi, India, 2012, point 2; BRICS, ‘Sanya Declaration’, Sanya, China, 2011, point 6.

⁴² BRICS, ‘Ufa Declaration’, Ufa, Russia, 2015, point 1; BRICS, ‘Johannesburg Declaration’, Johannesburg, South Africa, 2018, point 5; BRICS, ‘Xiamen Declaration’, Xiamen, China, 2017, point 5.

⁴³ BRICS ‘Sanya Declaration’, Sanya, China, 2011, point 2.

legal margins of the group out of the discussion. More than providing a legal foundation, such definitions specify the mission of the BRICS and its general design.

A more complete description of a future legal understanding of BRICS can be found in the 2013 Durban declaration, where it is stated that: ‘We [the BRICS] aim at progressively developing into a full-fledged mechanism of current and long-term coordination on a wide range of key issues of the world economy and politics (...)’.⁴⁴ The characterization given here is still rather abstract. Doubts remain as to what, such full-fledged mechanism of coordination is supposed to mean, and how should this translate into practice. The wording of the sentence seems to suggest the aiming at an evolution of the BRICS experiment. One may interpret it, once more, as an open door to the establishment of an organization. We can read in this light the following idea of establishing a virtual secretariat, or the institutionalization of the inter-ministerial level of cooperation, and again the establishment of the NDB and CRA, together with the expansion of the areas of cooperation among BRICS. However, this remains merely an assumption. As already stressed in the previous paragraph, presently, the BRICS countries do not seem to have any interest to engage in a proper organization. They have always refrained to do so, supposedly on purpose. Certainly, what we can read in the quotation just above, is the willingness of the BRICS to increasingly commit to the cooperation and to strengthen their economic and political coordination one step after the other or better, one summit after the other.

What just said comes as no surprise. In the mind of its creators, BRICS was intended to be a loose mechanism of international cooperation, characterized by informality and flexibility of both instruments and intents. Only a flexible approach would have enabled the group to encompass their differences and fix shared aims without resorting to binding and well-established legal means of international cooperation, but using more ‘delicate’ tools and diplomatic mechanisms, which would have allowed them to achieve their goals with less financial and other costs.⁴⁵ As Gvosdev writes: ‘One of the advantages of the BRICS process is that it remains a loose association of states with somewhat disparate interests, so no effort is made to force a common

⁴⁴ BRICS ‘Durban, Declaration’, Durban, South Africa, 2013, point 2.

⁴⁵ T. Luzina, E. Dudareva, E. Akhmetshin, V. Yankovskaya, Y. Berdova, G. Emaletdinova, ‘The International and Legal Framework for Transregionalization of Trade and Economic Cooperation of the BRICS Countries’ (2018) 21 (3) European Research Studies Journal 166.

position when the BRICS states cannot agree on one. But these states have also found a way to disagree on some key issues (...) without torpedoing the entire enterprise'.⁴⁶

This strategic cooperation style characterized by adaptability was particularly important for the creation and preservation of the group, through which member states work to find those areas where they are likeliest to find a common ground. Such a flexibility entails a process of negotiation and accommodation rather than rigidly following a prior agreed-upon template, and it allows for greater agility in the formulation and implementation of their joint commitments, especially during the initial phases.⁴⁷ Indeed, the group's cooperation is not built on hard law measures or on the renunciation, even partial, of their prerogatives. Rather, BRICS member countries play a significant role within it; they continue to be strong and centralized countries whose power and authority is clearly reaffirmed through BRICS. Conversely, the increased activity of the BRICS countries on the global stage automatically increases the influence of the countries that participate in this union.⁴⁸ The fact that decisions, joint statements, or ministerial meetings are taken by the highest level of the national governments, results in a strong affirmation of the role of the single state,⁴⁹ which never disappears and is always well recalled.⁵⁰ Also, the sharing of juridical and constitutional instruments is not characterized by a rigid

⁴⁶ N. Gvosdev, 'The Realist Prism: What the U.S. Can Learn From the BRICS' (2012) *World Politics Review* <<https://www.worldpoliticsreview.com/articles/12087/the-realist-prism-what-the-u-s-can-learn-from-the-brics>> accessed April 2022.

⁴⁷ Abdenur, Folly (n.28).

⁴⁸ K. Alexander, Y. Dovbush, T. Nikolaevich, 'International legal and Economic Aspects of Interaction of the BRICS countries and the Organization of Economic Cooperation and Development in Modern Conditions' (2020) 3 *European Journal of Law and Political Sciences* 7.

⁴⁹ Formici (n.14).

⁵⁰ It is worth noting how the BRICS never refer to the countries that are part of the group as "member states" or "member countries". They are generally referred to as "BRICS countries". This represents a relevant hint in the analysis of BRICS' self-understanding. The language used is simple and detached from the traditional and legal one. "Member states" or "member countries" are expressions commonly used to refer to States that are parties to an organization or to a Convention and which are, consequently, legally bound to that organization or convention. This reminds of a formalized, legally bonding group. The avoidance of using such terms, may thus derive from the underlying idea on which BRICS is based: a flexible and informal structure that comes with no costs in terms of legal commitment.

structure of institutions, depositories of members' sovereignty, but by what could be defined as a 'flow', a 'transfer', an 'informal dialogue'.⁵¹

It is evident that the bond that links the BRICS states together is different from the bond between the EU member-states, to make an example. The BRICS is a constitutional non-homogeneous group,⁵² which can be regarded as a peculiar element that differentiates it from the 'common constitutional traditions' formations such as the EU. Indeed, the BRICS lacks the classical logic behind the coming together of states: they do not share traditions, common history, culture, or values. What they share is objectives, political and economic ones. Paradoxically, their lack of constitutional homogeneity becomes a strong global competitive advantage because it does not produce the costs of structural adjustment required by any process of integration. But the BRICS have another global competitive advantage: they activate an economic cooperation without any clause of conditionality.⁵³ Unlike formal institutions, there is no attempt to negotiate nor to impose binding rules or codes of conduct nor there is any strict follow-up mechanism for the implementation of common policies.⁵⁴ As already mentioned, there are convergences that affect each country legal system. But, if the EU requires new member states wishing to enter the organization to strongly review their constitutional and legal systems, the BRICS group has been using what may be described as soft policy transfer.⁵⁵

In view of a legal definition, it is worth pointing out that the BRICS has not set up a radical group whose goal is to revolutionize or overturn global governance⁵⁶. It aims at the creation of long-term cooperation plans to tackle common challenges with gradual and joint processes. In other words, the BRICS states do not want to work

⁵¹ Carducci (n.32).

⁵² M. Carducci, A. S. Bruno, 'The BRICS Countries between Justice and Economy' (2014) 2 *Sociology and Anthropology* 46.

⁵³ Ibid; M. Bodenstein, H.W. Ursprung, 'Political Yardstick Competition, Economic Integration, and Constitutional Choice' (2001) Working Paper in Federation Independent Institute No. 37, 1.

⁵⁴ This feature distinguishes the BRICS declarations from other summit's communiqués.

⁵⁵ Scaffardi (n.6).

⁵⁶ Ibid.

against the international organizations but act within them and to produce a change in such global institutions “from the inside”. As a matter of fact, the BRICS repeatedly affirmed their support to the UN and the Bretton Woods institutions together with the G20, to which they always acknowledge an important role in their declarations. In parallel with this activity, they have created two financial institutions that still are not supposed to challenge the current ones but complement the existing efforts of multilateral and regional financial institutions for global growth and development.⁵⁷ Indeed, the NDB and the CRA were created to support initiatives, to consolidate economic relations within BRICS states, ‘to mobilize resources for infrastructure and sustainable development projects in BRICS and other emerging market economies and developing economies(...)’.⁵⁸ The Bank shall also cooperate with international organizations and other financial entities and provide technical assistance for projects. In a nutshell, the new Bank would fill the gaps that the old ones could not cover. Rather than serving the BRICS interests only, these financial institutions were meant to satisfy the needs of the emerging and less developing countries as well. By using less stringent criteria for the issuing of loans, the Bank was supposed to meet the financial demands of those countries in need of infrastructure and other investments, without having to comply with intrusive conditionality requirements as it happened with the IMF and World Bank. Yet, these instruments exemplify the evolution of BRICS’ global governance functions and its capability to build something together as a group,⁵⁹ regardless the legality of their cooperation. This could be regarded as a clear example of how, sometimes, the substance goes beyond the form. The legal definition of BRICS may be blurry and malleable but, on many occasions, it proved to be capable of getting things done.

Notwithstanding such successful achievements, some other times, such a lack of homogeneity within the group had bad repercussions on the accomplishment of political goals, as for example, in 2012, during the discussions about the presidency of the World Bank, when BRICS members failed to unite and campaign for the

⁵⁷ BRICS ‘Fortaleza Declaration’, Fortaleza, Brazil, 2014.

⁵⁸ Idib BRICS, ‘Fortaleza Declaration’ point 11.

⁵⁹ J. Kirton, ‘Explaining the BRICS Summit Solid, Strengthening Success’ (2015) 10 International Organisations Research Journal 9.

Nigerian or Colombian candidates, which consequently paved the way to the appointment of the American nominee.⁶⁰ The group has not been able to reach its goal because of the absence of a coherent and cohesive cooperation for the enhancement of common interests at the UN level.⁶¹

We can conclude that the BRICS do not simply continuously forget about laying the legal basis of their cooperation. On the opposite, what we have understood as a dark side of BRICS, seems to be a conscious and informed choice that perfectly goes along with the initial idea and operation style of such group. As mentioned, the BRICS need flexibility and adaptability to work out. A strict legal commitment would have bound them to the pursuit of specific goals, depriving them with the possibility to change the missions and scopes of the group to adjust to their changing needs, and to do so in the easiest way, without having to renegotiate the terms of their cooperation every time. Moreover, the BRICS is based on the consensus of its member countries, which is reiterated during the summits. Thanks to the loose basis they equipped the group with, the BRICS countries always retain the choice not to renew their consent and detach from the group whenever this is not convenient to them anymore. This is also the result of such a heterogeneous composition of the group. It is indeed not too unlikely that tensions or incompatibility within its members arise, given a certain set of objectives. Therefore, not giving a legal basis to their formation, and by not legally binding them to the group, the BRICS countries have essentially kept an “emergency door” to use whenever they wish to leave the group, as the cost of staying gets higher or the group ceases to be considered advantageous and beneficial. It may come a time when the democracies of the group, for example, no longer desire to be associated with the other two authoritative dictatorial regimes. At the same time, such a legal oversight allows the BRICS to remove a member state under certain circumstances, similarly to what happened with the exclusion of Russia from the G8 after the Crimea events.

⁶⁰ M. R. Freire, ‘Political Dynamics within the BRICS in the context of multilayered global governance’, in J. Kirton and M. Larionova (eds) *BRICS and Global Governance* (1st edition, Routledge 2018)

⁶¹ B. Hooijmaaijers, S. Keukeleire, ‘Voting Cohesion of the BRICS Countries in the UN General Assembly, 2006–2014: A BRICS Too Far?’ (2016) 22 *Global Governance* 389; G. Toloraya, R. Chukov, ‘BRICS to be Considered?’ (2016) 11 *International Organizations Research Journal* 97.

4. Definitions' review and conclusive thoughts

Since there is no official definition of BRICS, scholars and academics who study it tend to give a different definition of the group, depending on the perspective they have adopted, and under which lens they have studied such an atypical subject. Being a *sui generis* formation, developed on many different areas and levels of cooperation, and having both an internal and an external dimension, -each pursuing different aims- the definition of BRICS may change. The literature abounds with examples.

Those who have privileged the observation of the internal dimension of BRICS - which thus primarily looks at the intra-BRICS cooperation- defined it as a 'legal network',⁶² or as a 'platform of dialogue and cooperation'. This latter expression is also frequently used by the BRICS themselves. Words such as 'platform' and 'network' are excellent to explain the way these five countries cooperate with each other. They evoke a clear image of a venue where it is possible to work in conjunction and share projects and solutions; where the 'nets' among the disparate countries involved are built through legal borrowings, soft policy transfers, exchange of best practices and know-how and with the creation of soft forms of cooperation, such as think-tanks and forums. From this point of view, the internal dimension of the BRICS results in a clear, varied, and coherent system of cooperation. Scholars as Carducci, Bruno, Scaffardi -the firsts who brough forward the idea of the BRICS as a 'legal network'- have the merit to straighten how the cooperation among the BRICS occurs, especially under a legal and juridical perspective. Carducci and Bruno dig deeper their analysis of juridical BRICS as a 'not equal' phenomenon based on a multiple interstate dynamic and characterize it as a 'hybrid' subject that results as an effect of the fuzzy logic⁶³ practiced in comparative law to understand how very different complex

⁶² Carducci (n.32); Scaffardi (n.6).

⁶³ To learn more about the use of the fuzzy logic see S. Baldin, 'Riflessioni sull'uso consapevole della logica fuzzy nelle classificazioni fra epistemologia del diritto comparato e interdisciplinarietà' (2012) 10 *Revista General de Derecho Público Comparado*.

systems can live together through serial similarities, further asserting how the future of the global institutionalism is probably marked by such forms of ‘hybridism’.⁶⁴

The BRICS phenomenon can also be described by stressing the external purpose of the group. Under this perspective, the BRICS has been defined in many ways. For starters, it has been qualified as a ‘cross-continental pressure group’⁶⁵ or as a ‘platform that allow[s] for the pursuit of principles of world order’,⁶⁶ which aims at obtaining a stronger and more influential voice in the global arena, rather than being an exclusive model, opposing and contrasting the Western one. Other scholars defined it as a ‘coalition of convenience’,⁶⁷ which is generally framed as ‘temporary alliance or partnering of groups to achieve a common purpose or to engage in joint activities’.⁶⁸ Its purpose is to confer legitimacy to individual states’ pursuit of multipolarity and share global responsibilities.

Using an institutionalist approach, Abdenur and Folly referred to the BRICS as a ‘platform of convenience’. To these authors, the BRICS created a normative platform able to influence the rulemaking process in global development. And again, in their analysis, Larionova et al., include the G7, G8, G20, and the BRICS all in the same category and define them as ‘Plurilateral Summit Institutions’,⁶⁹ thus giving significance to the key role such groups may play in affecting global governance. The BRICS has also been described as an ‘informal international organization’ because its members have an explicitly shared expectation about its purpose and participate in

⁶⁴ M. Carducci, A. S. Bruno, ‘The Brics Countries between Justice and Economy Methodological Challenges on Constitutional Comparison’ (2014) 2 *Sociology and Anthropology* 46, 53.

⁶⁵ M. Emerson, ‘Do the BRICS Make a Bloc?’ (2012) CEPS Commentary.

⁶⁶ C. de Coning, T. Mandrup, L. Odgaard, ‘Conclusion: Coexistence in between World Order and National Interest’ in C. de Coning, T. Mandrup, L. Odgaard (eds) *The BRICS and Coexistence. An Alternative Vision of World Order*, (1st edition, Routledge 2014).

⁶⁷ Papa (n.12) 23. See also S. E. Kreps, *Coalitions of Convenience: United States Military Interventions after the Cold War* (Oxford University Press 2011).

⁶⁸ Papa *ibid*.

⁶⁹ M. V. Larionova, M. Rakhmangulov, A. Sakharov, A. Shelepov, and V. Nagornov, ‘Global Risk Governance and G20, G8, and BRICS Capabilities’ in M. V. Larionova, J. Kirton (eds) *The G8–G20 Relationship in Global Governance* (1st edition, Rutledge 2015).

regular meetings, but not have an independent secretariat, headquarters, or permanent staff.⁷⁰

There is not just a single definition that is the correct one. In an ultimate analysis, the BRICS seems to remind of a Rorschach picture. Being so blurry but adaptable, it is open to different interpretations, and eventually, everyone sees something different in it. The BRICS countries themselves have different understanding of it and may 'use' the group for different purposes. Russia probably sees BRICS as a geopolitical counterweight to the eastward expansion of the Atlantic system, whereas China most likely participates in the forum because it recognizes BRICS as an important vehicle for fashioning governance systems in which its political influence is commensurate to its growing economic heft.⁷¹

Agreeably, the most indicative legal definition we can attribute to the BRICS is the one suggested by the international law, ascribing the BRICS the qualification of informal international quasi-organization. Such a definition is capable of describing the reform and innovation-oriented character of the BRICS, its primarily function as dialogue forum and cooperation platform, as well as its institutionalizing tendencies in the forms of the NDB and CRA, and yet indicating the lack of the traditional elements that may properly qualify it as an international organization. In such manner the non-binding and flexible character of the group is preserved as well.

The brief review conducted just above, which arises from the necessity to legally classify the BRICS phenomenon, makes it clear how the search for a proper definition is highly affected by a determination of the activities and actions of the group, their objectives and impact in the international scenario, which eventually result in different and diverse descriptions of this five-country grouping.

Furthermore, as it was pointed out by Formici, 'a study of BRICS represents a task not only for political but also law scholars: understanding this phenomenon from the

⁷⁰ Papa (n.12). See also F. Vabulas, D. Snidal, 'Organization without Delegation: Informal Intergovernmental Organizations (IIGOs) and the spectrum of Intergovernmental Arrangements' (2013) 8 *Review of International Organizations* 193.

⁷¹ S. Saran, 'The next ten years of BRICS - will the relationship last' (2017) *Information Bulletin of the BRICS Trade Union Forum* <https://tufbrics.org/tilda/en/page17607_15.html> accessed April 2022

legal angle is crucial since the group is reforming and reshaping the law as well'.⁷² The BRICS proved to be an imitable model and an exemplar alternative to the hard EU regional structure, and in fact, the BRICS model has been reproduced by other regional players.⁷³ The persistence of the BRICS acronym, indeed, inspired the formulation of other groups, such as the N-11 ("Next Eleven" refers to the eleven most promising developing economies after the BRICS); the CEMENT (Countries in Emerging Markets Excluded by New Terminology); and, more recently, MINT (Mexico, Indonesia, Nigeria and Turkey).⁷⁴ These States understood the positive impact that informal dialogue and cooperation could have globally, without giving up part of their sovereignty in certain fields (as happened in the EU) and without starting a process of 'homogenization' of their constitutional and economic structures.

In the end, what we have characterized as a dark side of the BRICS responds to their need to adopt a cooperation model that allows them to establish relations and pursue common goals. The darkness we see is more related to the fact that such an original cooperation is not recognized by international law, and scholars as well struggle to find an agreeable definition, because in fact, the BRICS is many things all at once. But what we perceived as a dark side, certainly is not to the BRICS countries, which seem to be quite satisfied with the uncertain status on which they founded their partnership, regardless of the disappointing outcomes they experienced on some occasions.

The research would benefit from further studies of BRICS, especially from a legal perspective. A real and comprehensive view allows us to properly study such an original form of cooperation characterised by strengths and weaknesses,⁷⁵ which proved to be a source of inspiration to other formations, making a great contribution to the development of international relations and international law, thus forcing us to rethink the way we approach and study international cooperation in this new Era characterized by informality.

⁷² Formici (n.14)

⁷³ Carducci, Bruno (n.62)

⁷⁴ D'Amico (n.13)

⁷⁵ But then again, what kind of international cooperation is not equally characterized by strengths and weaknesses?

ANTITRUST POLITICAL SIDE

Andrea Piletta Massaro*

Abstract

The 2021 *Juris Diversitas Conference*'s topic was 'The Dark Side of the Law' and the aim of this article is that of exploring the 'dark side' of competition law. This discussion, as we will highlight below, is of particular importance in the current social and economic scenario, characterised by the rise of the so-called 'tech giants' and by the transition towards a more sustainable economy. Competition law, especially from the 1970s to the present days, has been viewed as a highly technical – and often technocratic – discipline, with its broad law provisions filled by the fundamental intervention of economic analysis. Of course, this view is correct, but it may result oversimplified. Indeed, competition law has a very deep 'dark side', which lies in its political foundations. This characteristic of antitrust law is particularly evident in the U.S. experience, but cannot be ignored also in the European context. Moreover, recently adopted competition law regimes, such as the South African one, have a strong political imprinting.¹ In fact, as every legislation, competition law follows a policy direction, which is rooted into the constitutional dimension of every legal system. This concept has been brilliantly exemplified by the 'sponge' figure proposed by Professor Ariel Ezrachi.² Moreover, the issues which are dealt with by competition law, often implying fundamental choices of economic and industrial policy, render this political side paramount in the interpretation of antitrust statutes. Anyhow, for

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¹ The South African Competition Act No. 89 of 1998, at point 2, expressly states that, inter alia, its provisions are aimed to promote employment and advance the social and economic welfare of South Africans; ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and promote a great spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons. The text of the South African Competition Act No. 89 of 1998 is available at <https://www.compcom.co.za/wp-content/uploads/2021/03/Competition-Act-A6.pdf> (accessed 12 March 2022).

² Ezrachi (2017).

the sake of clarifying, we are not suggesting here that competition law shall be guided by politics, this would be a major mistake. However, we are sustaining that the ‘revolution’ advanced by the so-called Chicago school has – in the words of Professors Stucke and Steinbaum – ‘hijacked’ competition law from its roots.³ In particular, the focus on economic efficiency has often led to a failure in including a broader set of elements into the assessment of potentially anticompetitive conducts. This, as a consequence, has moved away the antitrust discipline from its constitutional background, which is very different from the political realm. Thus, what we are suggesting is to recalibrate the interpretation of competition law into its foundational dimension, that, as we will demonstrate, can be found – with some needed specification that will be delivered below – in the primary concept of liberal systems: Economic freedom.

Finally, a correct understanding of the goals of competition law other than those identified by neoclassical economic thinking might prove essential to find the better solution in order to tackle the ever-increasing market power exercised by tech giants, which, as suggested especially by Tim Wu, closely resembles the big trusts which led to the enactment of the first – and still most famous – modern antitrust statute, the Sherman Act. In particular, Professor Wu draws a parallelism between the 1800 *fin de siècle* ‘gilded age’ and the current ‘new gilded age’.⁴⁵ Only if we understand in depth the soul of competition law, we would be able to fine-tune tools that can be effective in challenging the current market concentration rates. Of course, antitrust shall not be seen as a cure for every disease, but, as we will see, some outstanding economics scholars sustains that a reduction of the current levels of market power may prove beneficial in reducing negative outcomes such as, for instance, increasing income inequalities.

³ Steinbaum and Stucke (2019).

⁴ We make reference to the Sherman Act as the first modern antitrust statute, although provisions aimed at regulating competition were present even in the Roman Empire, with the Lex Iulia de Annona, dated around 18 b.C.. Recently, also the EU Commission’s Executive Vice-President M. Vestager made reference to this Roman law in the speech A New Era of Cartel Enforcement, delivered at the Italian Antitrust Association Annual Conference, 22 October 2021, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en (accessed 11 February 2022).

⁵ Wu (2020).

Given this introduction, which summarises the gist of our arguments, this contribution will be articulated as follows: The first part will deliver an insight into the foundations and the evolution of U.S. antitrust law. The same will be carried out with reference to EU competition law in the following part. The third part will establish a link between market concentration and inequalities and it will suggest some policy changes in order to refine the application of competition law vis-à-vis the ‘new gilded age’ scenario. Then, conclusions will be drawn.

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Keywords

Antitrust - Competition Law – Policy - Comparative Law - Market Power

1. The ‘inner side’ of U.S. antitrust law

The process culminated with the enactment of the abovementioned Sherman Act represents without any doubt the moment in which antitrust law gained its role as a

fundamental tool for the regulation of a market economy system. The discussions that led to the proposal of the Sherman Act bill and the relevant congressional debates are fundamental to cast light on what were the objectives that the antitrust legislation was intended to pursue in the late 1800 U.S. system. The hostility towards monopoly positions was well rooted in the common law history as it dates back to the XVII century's England, when the well-known *case of monopolies* was decided by the Queen's Bench in 1602⁶ and the *Statute of Monopolies* was passed into law in 1624.⁷ However, this primordial concern for monopolies was focused on public monopolies granted by the Crown. Contrariwise, the situation in the XIX century's American economy was different and the fear was directed towards private monopolies, created by means of schemes like pooling or the use of typical common law figures like the trust.⁸ In particular, the latter scheme allowed directors of different and competing firms to exchange voting proxies in order to coordinate their companies' pricing policies.⁹ Given this premise, whilst the American economy was undergoing a transformation into mass production, new comers were less likely to enter the market due to high fixed cost and big companies, such as *Standard Oil*, were becoming increasingly dominant in the U.S. economy.¹⁰ Historian Richard Hofstadter described this metamorphosis by stating that *bigness had come with such a rush that its momentum seemed irresistible. No one knew when or how it could be stopped*.¹¹ The natural outcome of the described situation was the enactment of the Sherman Act on 2 July 1890.

However, the provisions provided for by the Sherman Act were (and still are) drafted in a broad shape, thus rendering the correct interpretation of the relevant legislative intent necessary. Indeed, in this sense, the same U.S. Supreme Court in *Apex Hosiery Co. v. Leader* affirmed that *the vagueness of its language, perhaps not uncalculated, the courts have*

⁶ Queen's Bench, 1602, *Darcy v. Allen* (The Case of Monopolies), (1602) 77 E.R. 1260.

⁷ Wu (2020), 54; Lianos, Korah, Siciliani (2019), 52.

⁸ Amato (1998), 13. The English edition of the book is titled *Antitrust and the Bounds of Power. The Dilemma of Liberal Democracy in the History of the Market*, published by Hart Publishing, 1997.

⁹ Ibidem, 13-14.

¹⁰ Thorelli (1954), 161-163.

¹¹ Hofstadter (2008), 196.

been left to give content to the statute, and, in the performance of that function, it is appropriate that courts should interpret its words in the light of the legislative history and of the particular evils at which the legislation was aimed.¹² This interpretation can be viewed also as an ‘adaptation’ of the relevant provisions to the ever changing social and economic environment. In this sense, a metaphor was used to describe U.S. antitrust law, which has been viewed as a pendulum swinging among the various interpretations.¹³ The first movement of that pendulum could be seen during the years immediately after the Sherman Act’s enactment, characterised by a strong enforcement of antitrust provisions. In particular, in the 1897 *Trans-Missouri* case,¹⁴ the U.S. Supreme Court adopted a rigid structuralist approach, although the cartel at stake would have proven beneficial for consumers, because it would have kept railway tariffs down after years of fierce price competition.¹⁵ In particular, the Supreme Court argued that *competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom.*¹⁶ This strictly structural interpretation of antitrust rules was then refined by the same Supreme Court some years later, while deciding for the break-up of Standard Oil. In this case, the Court affirmed that the Sherman Act prohibited unreasonable and undue restraints of trade, thus establishing a sort of ‘rule of reason’.¹⁷ However, this exception was assessed on structural basis, like showed by the 1918 *Chicago Board of Trade* judgement, where a pricing scheme in favour of smaller wheat producers was deemed lawful.¹⁸ This approach, aimed at applying antitrust law in order to keep a competitive market structure, appears in line with the primary intent expressed by Senator Sherman in the relevant Congressional

¹² U.S. Supreme Court, decision 27 May 1940, *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), at 489.

¹³ Broder (2016), 5; Fox (2008), 77.

¹⁴ U.S. Supreme Court, in decision 22 March 1897, *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897).

¹⁵ Amato (1998), 15-16.

¹⁶ 166 U.S. 290 (1897), at 337.

¹⁷ U.S. Supreme Court in decision 15 May 1911, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), at 1. See also Wilgus (1911), 645 and Baker (2019), 37.

¹⁸ U.S. Supreme Court, decision 4 March 1918, *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). See also G. Amato (1998), 17.

Records.¹⁹ In particular, a competitive marketplace, characterised by rivalry among market players, was intended to grant the absence of excessive powerful firms.²⁰ Other benefits, such as lower prices or increased efficiency, were seen only as a beneficial by-product of the competitive process, but not as ends in themselves.²¹ This interpretation is brilliantly summarised in the police patrol metaphor provided by Thorelli, who affirmed that antitrust enforcers shall control the *highways of commerce* [...] *to keep the road open for all and everyone*.²²

This approach to antitrust law continued until the Great Depression, when anti-monopoly legislation was at a certain extent ‘frozen’ due to the State’s attempt to overcome the crisis. However, empirical studies suggest how this system, if compared to a competitive one, only had the result of postponing the economic recovery.²³ Subsequently, antitrust law was again applied according to a structuralist paradigm, based upon what Baker addresses as a ‘political bargain’ in regulating the economy. In particular, a market economy system protected by antitrust rules was preferred to a regulatory model or a complete *laissez-faire* approach.²⁴ This period saw – among other judicial pronouncements – the famous opinion delivered by Judge Learned Hand in the *Alcoa* case,²⁵ when he stated that the Congress enacted the Sherman Act to *put an end to great aggregations of capital because of the helplessness of the individual before them*.²⁶ Furthermore, he emphasised that *it is possible, because of its indirect social or moral effect, to*

19 Orbach (2013), 2262; Vaheesan (2019), 480-481. It is however worth clarifying that the final Sherman Act that was passed was not a creation of Senator Sherman alone. Instead, it was the outcome of an intense parliamentary debate, which produced lots of amendments to the bill. See Orbach (2014), 892.

20 Osti (2015a), 228.

21 Fox (2008), 88.

22 Thorelli (1954), 226.

23 Combe (2020), 68.

24 Baker (2019), 38-41.

25 U.S. Court of Appeals for the Second Circuit, decision 12 March 1945, *United States v. Aluminium Co. of America et al.*, 148 F.2d 416 (2d Cir. 1945).

26 148 F.2d 416 (2d Cir. 1945), at 428.

*prefer a system of small producers, each independent for his success upon his own skill and character to one in which the great mass of those engaged must accept the direction of a few.*²⁷

However, the subsequent period, starting from the 1970s to the present days, saw a complete change of direction of the antitrust pendulum, which shifted towards an almost exclusive focus on economic efficiency. This ‘revolution’ was promoted by the so-called Chicago School²⁸ and, *inter alia*, by its prominent figure Robert Bork, author of *The Antitrust Paradox*.²⁹ According to Bork *the essential objective of antitrust is to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or no loss in consumer welfare*.³⁰ However, the real significance of the expression ‘consumer welfare’ is virtually impossible to assess.³¹ Bork gave importance to aggregate welfare, while others – and the Courts – preferred a consumer welfare approach.³² The first episode of this shift can be seen in the *Sylvania* case,³³ when the Supreme Court allowed a vertical restraint scheme by stressing its importance for the efficiency gains it would have delivered. In doing so, the Court made direct reference to the Chicago Scholars’ works.³⁴ Afterwards, the consumer welfare standard became the lodestar of antitrust law, at the point that the same Supreme Court, in *Reiter v. Sonotone*,³⁵ stated that the *Congress designed the Sherman Act as a ‘consumer welfare prescription’*.³⁶

27 148 F.2d 416 (2d Cir. 1945), at 427.

28 Reference to the Chicago School is a way of simplifying the historical reconstruction. Indeed, as pointed out by Kovacic (2020), 459, whilst other scholars, like those linked to the so-called Harvard School, contributed to this change.

29 Bork (1978).

30 Ibidem, 91.

31 According to Orbach (2013), 2275, the phrase “consumer welfare” has mostly served as a source of debate among scholars but has no accepted meaning in antitrust. The history of the consumer welfare standard undermines its validity and its rationalization defies common sense. See also Ezrachi (2017), 61.

32 Baker (2019), 45. Hildebrand (2017), 7; Schmalensee (2008), 13.

33 U.S. Supreme Court, decision 23 June 1977, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

34 Amato (1998), 29-30.

35 U.S. Supreme Court, decision 11 June 1979, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

36 Ibidem, at 343.

The following years saw a steady decrease in the number of antitrust cases brought, especially in the field of monopolisation. On the other hand, the Courts adopted ever more rigorous standards for plaintiffs in order to succeed in lawsuits.³⁷ The consequence has been a languishing state of U.S. antitrust enforcement,³⁸ to the point that, not casually, it became central in almost all the latest Presidential campaigns. Anyhow, also reform efforts, like the Antitrust Modernisation Commission in the early 2000s did not change the situation.³⁹ Conversely, in 2003 the Supreme Court expressed a sort of ‘praise’ for monopolies in the famous *Trinko* decision.⁴⁰ The opinion of the Court, delivered by Justice Scalia, affirmed that *the opportunity to charge monopoly prices – at least for a short period – is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.*⁴¹

In conclusion, these are the two sides of U.S. antitrust enforcement. We could name the bright side the interpretation given during the foundational years of the antitrust discipline and until the ‘Chicago revolution’. Then, the dark side emerged, and it relegated in a secondary – if not null – position all the societal objectives linked to the maintenance of a competitive market structure through antitrust enforcement. All this was done for the sake of efficiency, but, as Professor Fox correctly pointed out, the exasperate research for efficiency can lead to what she called an ‘efficiency paradox’, *i.e.* where monopolies stem at the detriment of innovation and, in the end, in damage of efficiency itself.⁴² This is evident and can result particularly perilous in the current

³⁷ See, for instance, the standard adopted in predatory pricing cases by the Brooke Group decision, U.S. Supreme Court, decision 21 June 1993, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209. See also U.S. Supreme Court, decision 26 March 1986, *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986). See Khan (2017), 727-730; Scott Memphill and Weiser (2018), 2051; Vaheesan (2015), 82.

³⁸ Wu (2020), 118; Steinbaum and Stucke (2019), 599.

³⁹ Broder (2016), 8-13.

⁴⁰ U.S. Supreme Court, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, (02-682) 540 U.S. 398 (2004) 305 F.3d 89.

⁴¹ *Ibidem*, at III.

⁴² Fox (2008), 77.

economic scenario, where tech giants are continuously increasing their share of market power, which, more dangerously, by means of a sort of transitive property, can turn into political power.

However, the new appointments by President Biden appear to suggest a change of direction. In fact, ‘Neo-Brandeisians’ Lina Khan and Tim Wu were appointed, respectively, as Federal Trade Commission (FTC)’s Chair⁴³ and at the National Economic Council,⁴⁴ together with Jonathan Kanter as Assistant Attorney General at the Department of Justice’s Antitrust Division.⁴⁵ Indeed, this time of ‘reorientation’ needs a competition policy aimed at reaching the concept of desirable competition expressed exactly a century ago by Justice Brandeis in his dissenting opinion for the *American Column* judgement.⁴⁶ Critics of a ‘polycentric’ competition policy⁴⁷ should remind that, according to Professor Pitofsky, *it is bad history, bad policy, and bad law to exclude certain political values in interpreting antitrust law*.⁴⁸

However, before trying to find solutions capable of reconciling the two sides of U.S. antitrust law, it is worth conducting a brief analysis of EU competition law’s evolution.

⁴³ C. Kang, Lina Khan, a progressive trustbuster, displays get-tough approach to tech in confirmation hearing, The New York Times, 21 April 2021, available at <https://www.nytimes.com/2021/04/21/business/lina-khan-ftc.html> (accessed 26 April 2021).

⁴⁴ C. Kang, A Leading Critic of Big Tech Will Join the White House, The New York Times, 5 March 2021, available at <https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html> (accessed 26 April 2021).

⁴⁵ The White House, President Biden Announces Jonathan Kanter for Assistant Attorney General for Antitrust, 20 July 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/20/president-biden-announces-jonathan-kanter-for-assistant-attorney-general-for-antitrust/> (accessed 11 February 2022); L. Hirsch and D. McCabe, Biden to Name a Critic of Big Tech as the Top Antitrust Cop, The New York Times, 20 July 2021, available at <https://www.nytimes.com/2021/07/20/business/kanter-doj-antitrust.html> (accessed 11 February 2022).

⁴⁶ U.S. Supreme Court, *American Column & Lumber Co. V. United States*, 257 U.S. 377 (1921) at 413. Professors Ezrachi and Stucke suggests a similar figure with their ‘noble competition’ concept: See Stucke and Ezrachi (2020), 254.

⁴⁷ This concept has been advanced by Lianos (2018).

⁴⁸ Pitofsky (1979), 1051.

2. The development of EU competition law

The evolution of competition law in the European Union apparently has not dark sides, it might be regarded as a regular path. However, blind aspects were present since its foundation. Indeed, if U.S. antitrust law – as we have seen above – can be considered as a reaction to the social fear for the so-called ‘robber barons’, EU competition law lacks this sort of popular legitimation and, at a certain degree, its origins might appear darker, at the point that, during its initial phase, EU competition law was perceived as lacking democratic legitimation.⁴⁹ Two factors may have impacted on the creation of EU competition rules. We are referring, from a political standpoint, to the U.S. influence after World War II, and, from a theoretical perspective, to the Ordoliberal school’s ideas. The degree of involvement attributed to both these factors cannot be precisely measured, although it is undisputed that they both played a fundamental role. In particular, the U.S. influence may be regarded as the propulsive factor which led the European Coal and Steel Community to adopt competition rules, whilst the Ordoliberals’ assumptions might have guided the further development of this regulatory regime.

However, in order to understand this development, some steps backwards are deemed necessary. Europe saw in increasing degree of monopolisation and market power before World War II. More precisely, the German economy suffered a heavy downturn after the World War I. In this context, and given the Weimar Republic’s profound weakness, some large firms started supporting Hitler’s National Socialist party, which then reached the power in 1933. In particular, large firms were not initially supportive to the Nazi party, but the promise of political and economic stability, matched to the eventual risk of a communist revolution, convinced them to support Hitler. The consequence was an increased cartelisation of German economy, where firms were intended to serve the scope of the nation.⁵⁰ This system is referred to as a ‘capitalist planned economy’, where property rights were maintained, but the State kept the right to intervene in the economic realm.⁵¹ The consequences of this

⁴⁹ First and Waller (2013). On the relationship between ‘technocracy’ and competition law, see, inter alia, Vaheesan (2018); Crane (2008).

⁵⁰ Gerber (1998), 147; Wu (2020), 35-38; Stucke and Ezrachi (2020), 189. See also Sweezy (1941), 27-28.

⁵¹ Wu (2020), 39-40; Stucke and Ezrachi (2020), 189.

high degree of market concentration in the hands of the Nazi regime, unfortunately, are well known to everyone. For this reason, after World War II, the Allies were particularly worried by the possibility that the German industrial system could return to such a level of market power, which – this is maybe the best, although practically worse, example – turned deeply into political power in support of the Nazis. Consequently, so as to avoid a newly established German dominant position over the coal and steel industry, a common control in this sector was needed.⁵² In this context competition rules were deemed necessary, and the U.S. undoubtedly played a role in their establishment. According to Osti, the input for the adoption of competition provisions came directly from the U.S. officials, which saw the European Coal and Steel Community (ECSC) as a big coal and steel cartel.⁵³ However, according to Gerber, the involvement of the U.S. happened ‘behind the scenes’.⁵⁴ What is certain is that ECSC’s competition rules were drafted by Robert Bowie, a Harvard University antitrust professor, then working for the U.S. High Commissioner for Germany. Afterwards, the provisions were translated into a European idiom by Maurice Lagrange of the French Conseil d’État.⁵⁵ In this context, the propulsive figure shall be identified in Jean Monnet. In the end, the ECSC’s competition rules were translated into the subsequent Rome Treaty without any substantial amendment.⁵⁶

After the EEC establishment, competition rules were not intended as a tool to achieve, *inter alia*, also social purposes, like the Sherman Act.⁵⁷ However, they served as an instrument in order to reach the creation of the common market and the erosion of national barriers to the free movement of goods.⁵⁸ This approach can be found in

⁵² Gerber (1998), 335-336.

⁵³ Osti (2015a), 237; Osti (2017), 51-52.

⁵⁴ Gerber (1998), 338.

⁵⁵ Ibidem, 338-339; Osti (2015a), 238.

⁵⁶ Osti (2015a), 237.

⁵⁷ The Sherman Act’s social purpose is referred to by Thorelli (1954), 227, stating that the Sherman Act embodies what is to be characterized as an eminently ‘social purpose’.

⁵⁸ Wesseling (2000), 11-12, reporting how this need was central in the Spaak Report’s considerations. See also Gerber (1998), 352; Ezrachi (2017), 53; Whish and Bailey (2018), 23-24.

the very first cases dealt with by the Court of Justice. For instance, in the *Consten and Grundig* case,⁵⁹ the Luxembourg Court stated that the allegedly anticompetitive agreement under scrutiny was intended *to separate national markets within the Community, it is therefore such as to distort competition in the common market*.⁶⁰

Subsequently, and in parallel to the market integration goal, EU competition rules gained an increasingly precise content,⁶¹ which was seen in the protection of a competitive market structure in the internal market. In particular, in the seminal *Continental Can* decision,⁶² the ECJ stated that article 86 of the Treaty (now article 102 TFEU) *is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure*.⁶³ This approach appears consistent with the declarations made in the EEC foundational years by the first Competition Commissioner, Hans von der Gröben, who affirmed that the Treaty *requires the establishment of a system which will provide a general assurance that competition in the Common Market will not be distorted*.⁶⁴ This concept was then stressed by the Court of Justice also in more recent years, in particular while ruling on the *British*

⁵⁹ European Court of Justice, decision 13 July 1966, joined cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission*. See also ECJ, Decision 25 November 1971, case C-22/71, *Béguelin Import Co. v. S.A.G.L. Import Export*, paras 14-18; decision 8 November 1985, joined cases from C-96/82 to C-102/82, C-104/82, C-105/82, C-108/82 and C-110/82, *N.V. IAZ International Belgium et al. v. Commission*, para 23, 45; decision 6 April 2006, case C-551/03 P, *General Motors BV v. Commission*, para 67-68; decision 16 September 2008, joined cases from C-468/06 to C-478/06, *Sot. Lélos kai Sia EE et al. v. GlaxoSmithKline AEVE Farmakeftikon Proïonton*, paras 65-66; decision 6 October 2009, joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v. Commission (GlaxoSmithKline)*, para 61; decision 17 February 2011, case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB (TeliaSonera)*, paras 20-21.

⁶⁰ ECJ, *Consten v. Grundig*, cit, at 343. See also Lianos, Korah, Siciliani (2019), 131-142; Wesseling (2000), 24.

⁶¹ In this sense, Ibáñez Colomo and Kalintiri (2020), 322, sustain how the objectives of competition law are defined on an ex post incremental basis and not by means of an ex ante choice.

⁶² European Court of Justice, decision 21 February 1973, case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*.

⁶³ *Ibidem*, para 26.

⁶⁴ Commissioner Hans von der Gröben, Competition in the Common Market, speech delivered during the debate on the draft regulation pursuant to Articles 85 and 86 of the EEC Treaty in the European Parliament, 1961, 5, available at <http://aei.pitt.edu/14786/1/S49-50.pdf> (accessed 5 May 2021).

Airways case.⁶⁵ Here, the Court, recalling the previous *Continental Can* ruling, declared that *Article 82 is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(1)(g) EC.*⁶⁶

The above-described approach is one side of EU competition law, but, starting from the new millennium, a darker side – cognate to the ‘Chicago revolution’ – emerged under the name of ‘more economic approach’. In particular, the quest for efficiency and lower prices became central also in the European discourse and ‘consumer welfare’ made its appearance as competition law’s guiding principle,⁶⁷ as stressed by then Competition Commissioners Mario Monti and Neelie Kroes, as well.⁶⁸ However, some criticism stemmed about this ‘economisation’ of EU competition law. In particular, it has been sustained that relying on economics often lead to an illusion of certainty, especially in case difficult evaluations of long-term effects in comparison to short-term ones shall be carried out.⁶⁹ Moreover, the focus on efficiency and price levels may have partially shifted the focus of EU competition law’s enforcement away

⁶⁵ European Court of Justice, decision 15 March 2007, case C-95/04 P, *British Airways plc v. Commission*.

⁶⁶ *Ibidem*, para 106. In this sense it is worth mentioning the statement at paragraph 68 of the opinion delivered on this case by Advocate General Kokott, who affirmed that the provision [Article 82 EC] forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article 82 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of the individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution), which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.

⁶⁷ Wu (2020), 118-119; Osti (2015a), 243; Osti (2015b), 114.

⁶⁸ See, *inter alia*, Commissioner Mario Monti, *The Future for Competition Policy in the European Union*, speech delivered at the Merchant Taylor’s Hall, London, 9 July 2001, available at https://ec.europa.eu/commission/presscorner/detail/en/speech_01_340 (accessed 19 October 2021); Commissioner Neelie Kroes, *European Competition Policy – Delivering Better Markets and Better Choices*, speech delivered at the European Consumer and Competition Day, London, 15 September 2005, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512 (accessed 2 May 2021). See also the Policy Opening address at the conference *Competition and Consumers in the 21st century*, Brussels, 21 October 2009, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_486 (accessed 2 May 2021), when Commissioner Kroes stated that today we have the right political context for promoting consumer welfare.

⁶⁹ Blockx (2019), 484-487.

from the broader set of policy objectives contained in the whole EU Treaties system.⁷⁰ This can be affirmed even though the Court of Justice adopted a more economically oriented approach in some recent decisions, such as *Intel*.⁷¹ Here, the Luxembourg Court sustained, *inter alia*, that efficiency advantages may counterbalance a disadvantage for competition, but only if they benefit the consumer.⁷² However, the Court made also explicit reference to the previous and abovementioned *British Airways* judgement, thus implying a certain degree of consistency in its case law and not a complete shift towards a pure ‘efficiency oriented’ consumer welfare approach. In this sense, eminent scholars have indeed affirmed that despite the more efficiency-oriented approach by the ECJ in *Intel*, *positive law still supports the view that EU competition law pursues multiple goals*.⁷³ In fact, as sustained also by the European Commission itself, the European ‘version’ of the consumer welfare standard refers *not only to price reduction, but also to quality and innovation*.⁷⁴

Nevertheless, the panoply of policy objectives we are referring to in this article shall not constitute the primary object of competition law, but shall be regarded as positive consequences of a healthy competitive process on the market. In this light, competition law is compliant with the social market economy objective sets out by article 3, paragraph 3, TEU. The social market economy and the focus on the regularity of the competitive process as such is rooted in the Ordoliberal tradition, which certainly constitutes a theoretical background for the interpretation of EU competition provisions. The Ordoliberal tradition was born as a reaction to the abovementioned raise of market power which turned into political power during the Nazi era. In a nutshell, quoting Franz Böhm, they were concerned by *the issue of private*

⁷⁰ Ibidem, 491.

⁷¹ European Court of Justice, decision 6 September 2017, case C-413/14 P, Intel Corporation Inc. v. Commission.

⁷² Ibidem, para 140.

⁷³ Lianos, Korah, Siciliani (2019), 120.

⁷⁴ European Commission, Competition Policy in Support of Europe’s Green Ambition, Competition policy brief 2021-01, September 2021, 1-2, available at <https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF> (accessed 11 February 2022).

power in a free society.⁷⁵ In this sense, the Ordoliberals advocated for an ‘economic constitution’ centred on rules directed at avoiding the distortion of competition as such.⁷⁶ As seen for certain Brandeisians assumptions with regard to U.S. antitrust law, this approach was intended as a *metriotes*⁷⁷ between socialist economic planning and an unregulated *laissez-faire* liberalism. In particular, Ordoliberals believed that the maintenance of a competitive market would have delivered equality of opportunities for individuals, thus delivering an inclusive society.⁷⁸ Moreover, the rejection of monopoly positions and of excessive industrial conglomerates would have kept the *Ordnung* safe from undue economic influence into the political realm.⁷⁹ In order to preserve this system, a ‘strong state’ – which is to say not being able of being captured – was needed.⁸⁰ This requirement stemmed again from the history of the Nazi regime, which gained its power on the ‘ruins’ of the weak Weimar Republic.⁸¹ In this sense, the *political* need for a market freed from undue influences can be summarised by the words of former Italian President of the Republic Luigi Einaudi, who stated that *economic freedom is the necessary condition for political freedom*.⁸²

In light of the above, in a social market economy system, citizens should thus receive a ‘fair share’ from the market activity.⁸³ This ‘fair share’, expressly mentioned by article 101, paragraph 3, TFEU, shall be regarded as one of the positive consequences brought by a healthy competition on the market. This constitutes also the manner in which the much-debated concept of *fairness* should be addressed in EU competition

⁷⁵ Böhm (1960), 162, quoted by Gerber (1998), 235. See also Gerber (1994), 29-30.

⁷⁶ Gerber (1998), 245.

⁷⁷ Intended as the classic ideal of measure and moderation, which is brilliantly represented by the expression *aurea mediocritas* by Horace, Odes, II, 10, 5.

⁷⁸ Gerber (1998), 241; Ahlborn and Grave (2006), 200; Rieter and Schmolz (1993), 100.

⁷⁹ Gerber (1998), 246, 251-252, 255-256;

⁸⁰ Ibidem, 249-250. See also Bonefeld (2012), 633.

⁸¹ Gerber (1998), 235. See also L. Lovdahl Gormsen (2007), 332.

⁸² Einaudi (1948).

⁸³ Hildebrand (2017), 3.

law.⁸⁴ Indeed, although we deem this concept of little practical influence in the day-by-day evaluation of the single cases, it informs the whole system of EU competition law.⁸⁵ In particular, according to Ezrachi, the concept of fairness should not be used to protect competitors, but as an abstract normative value aimed at preserving the competitive process, thus consequently increasing trust in the market.⁸⁶ In this way, *i.e.*, through the maintenance of a competitive market structure as such, competition law can deliver its best results, which includes both societal and inclusive goals, but also benefits related to economic efficiency. Indeed, for the sake of clarifying, it shall be sustained that an economic-based approach shall not be deemed incompatible with the ‘social side’ of competition law. Contrariwise, economic analysis shall be regarded as a fundamental tool in order to reach procedural fairness and certainty during the enforcement of competition rules. However, it shall not amount to an end of competition law in itself. The same applies to social benefits. The main concern shall be placed upon the competitive process, whilst the rest would automatically follow. In this manner, the twofold sides of EU competition law described above can reconcile to provide better results, especially in the present epoch, characterised by the ever-increasing tech giants’ power.

⁸⁴ See, *inter alia*, Dunne (2021), 230; Gerard, Komnios and Waelbroeck (2020); Lamadrid de Pablo (2017), 147.

⁸⁵ In this sense former Director-General for Competition Johannes Laitenberger stated that fairness is a way to express the overall goals and benefits of EU competition policy in a more tangible manner. It is not meant as a self-sufficient, generic legal test to be applied in cases. And certainly, the very concept of “fairness” excludes that it substitutes rigorous, fact-based analysis. See J. Laitenberger, Panel on “Fairness in Unilateral Practice Cases”, speech delivered at the GCLC Conference, Brussels, 26 January 2018, available at https://ec.europa.eu/competition/speeches/text/sp2018_02_en.pdf (accessed 6 May 2021). See also Lamadrid de Pablo (2017), 148. Here the Author also sustains that connecting ‘fairness’ to competition law is therefore not a way to divorce the discipline from economics but to reconcile it with society, showing the wider public that it can contribute to their well-being.

⁸⁶ Ezrachi (2018), 13-14. Here it is also reported an interesting passage from former President of the European Commission Jean-Claude Juncker speech at the State of the Union, when he stated that the Commission watches over this fairness. This is the social side of competition law. And this is what Europe stands for. See State of the Union 2016, 14 September 2016, 11, available at <https://op.europa.eu/en/publication-detail/-/publication/c9ff4ff6-9a81-11e6-9bca-01aa75ed71a1> (accessed 6 May 2021).

3. The political side of competition law as a cornerstone for future developments

The brief reconstruction provided above of both the U.S. antitrust law and EU competition law's history⁸⁷ was aimed at proving how multifaceted this discipline is. In the 2021 *Juris Diversitas Conference's* context, the aim of this paper was to demonstrate that competition law is not exempt from dark sides. Though, these sides shall be regarded as layers, as a rock's composition. During the primordial phase, only one layer was visible and the observers of this 'competition law rock' could not properly understand its exact composition. Still, they succeeded in establishing the gist of the subject, *i.e.* the protection of the competitive market structure from undue exercise of market power. Anyhow, as the years passed by, and the river of enforcement washed away this 'rock', other strata emerged, thus rendering the framework clearer. In this sense, the interpretation of competition law is a never-ending and always under refinement exercise. Nevertheless, some assumptions might be fixed. In particular, the subsequent strata of our competition law rock precise the mineral composition, but they do not change the nature of our stone, which remains focused on protecting the competitive process. In this sense, our metaphor made clear how in both the U.S. and the EU tradition societal goals and economic ones might be intended as the inner nature of the rock, while the strata are the additional benefits reached through the maintenance of rivalry and competition on the market.

However, in the current economic scenario, some firms appear not to suffer from rivalry on the market and they act as masters in the market in which they operate and in sectors where they try to expand, as well. We are referring to the so-called tech giants. A lot of research on this topic has been done and even more is still to be carried out, and competition enforcers are trying to handle this issue. In a first phase, a lot of reports and sector inquiries have been published, with the aim of understanding how digitalisation and big data are changing the assumptions on which competition enforcement was based.⁸⁸ During a second phase some decisions have

⁸⁷ It is worth specifying that the term 'competition law' is mostly used in the EU context, while the expression 'antitrust law' is more common in the U.S.

⁸⁸ Joint report by the Bundeskartellamt and the Autorité de la Concurrence, Competition law and data, May 2016, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf;jsessionid=A3F64F481FEF2A276E34398D5182E41E.1_cid387?_blob=publicationFile&v=2 (accessed 21 May 2021); Report by the European Commission, Competition policy for the digital era, May 2019, available at <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1>

been issued. The most famous one is the decision against Facebook from the German Bundeskartellamt,⁸⁹ which was then confirmed – although, by now, on an interim basis – by the Bundesgerichtshof.⁹⁰ In this ruling, the German Competition Authority did not charge a fine, but imposed behavioural remedies related to the protection of the users' personal data.⁹¹ Indeed, in this case the Bundeskartellamt relied on the quality degradation stemming from low privacy levels as a parameter for establishing an abuse of dominant position.⁹² Very recently, also the Italian Autorità Garante della Concorrenza e del Mercato (AGCM) issued an infringement decision against Google for abuse of dominant position. In particular, Google has been found guilty of not having granted access to Android Auto to the *Juicepass* application developed by Enel X. Google has been imposed both a behavioural sanction (making Android Auto accessible also to the Enel X's app) and a fine of more than Euro 100 million.⁹³ It is also worth noting that the Italian Authority observed that the foreclosure of *Juicepass*

(accessed 19 May 2021); Final report by the University of Chicago Stigler Center on antitrust and digital platforms, September 2019, available at <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> (accessed 19 May 2021); Report by the Autorità Garante della Concorrenza e del Mercato (together with Autorità per le Garanzie nelle Comunicazioni and Garante per la Protezione dei Dati Personali), Indagine conoscitiva sui big data, February 2020, available at https://www.agcm.it/dotcmsdoc/allegati-news/IC_Big%20data_imp.pdf (accessed 19 May 2021).

⁸⁹ Bundeskartellamt, decision 6 February 2019. An English summary of the decision is available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4 (accessed 19 May 2021). The relevant press release is available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.pdf?__blob=publicationFile&v=2 (accessed 19 May 2021).

⁹⁰ Bundesgerichtshof, decision 23 June 2020. A summary of the relevant press release is available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/23_06_2020_BGH_Facebook.pdf?__blob=publicationFile&v=2 (accessed 19 May 2021).

⁹¹ A joint approach between competition law and privacy was suggested by the European Data Protection Supervisor (EDPS) in the preliminary opinion of 26 March 2014, Privacy and competitiveness in the age of big data, available at https://edps.europa.eu/sites/edp/files/publication/14-03-26_competition_law_big_data_en.pdf (accessed 19 May 2021).

⁹² The approach aimed at linking data degradation to a lower level of quality was brilliantly addressed in the interesting article by Ezrachi and Stucke (2015), 227.

⁹³ Autorità Garante della Concorrenza e del Mercato, decision 27 April 2021, case A529, Enel X – Android Auto, available (in Italian only) at https://www.agcm.it/dotcmsdoc/allegati-news/A529_chiusura.pdf (accessed 22 July 2021). The relevant press release (in Italian only) is available at <https://www.agcm.it/media/comunicati-stampa/2021/5/A529> (accessed 22 July 2021).

from Android Auto might have created harm to innovation in the electric automotive sector in general, other than to Enel X.⁹⁴ This point is of particular interest, as the decision considered the effects of the anticompetitive behaviour on a growing market also on the basis of policy considerations, such as the importance of the electric vehicles market for the transition towards a more environmentally sustainable mobility. At the European Union level, it is worth mentioning the decisions issued by the Commission in the *Google Shopping*⁹⁵ and *Google Android*⁹⁶ cases. Having regard to the former decision, it was largely confirmed on 10 November 2021 by the General Court, which also upheld the Euro 2.42 billion fine imposed by the Commission.⁹⁷

In addition, legislators are trying to keep the pace of digitalisation. In Germany, for instance, in January 2021 an amendment to the GWB added section 19a, which includes special powers to the German watchdog, together with a fast-track proceeding which skip the appeal in front of the Düsseldorf Higher Regional Court.⁹⁸ In a similar vein, the Italian AGCM recently proposed to the Italian Government an amendment to the competition act in order to strengthen the abuse of economic dependence, with the aim of granting the Authority more effective powers vis-à-vis the tech giants.⁹⁹ At the European level, the Commission has proposed a regulation

⁹⁴ Ibidem, point 413.

⁹⁵ European Commission, decision 26 June 2017, case AT.39740, Google Search (Shopping). The relevant press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784 (accessed 15 February 2022).

⁹⁶ European Commission, decision 18 July 2018, case AT.40099, Google Android. The relevant press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 (accessed 15 February 2022).

⁹⁷ European General Court, decision 10 November 2021, case T-612/17, Google LLC and Alphabet, Inc. v. Commission. The relevant press release is available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf> (accessed 15 February 2022).

⁹⁸ See the explanation on the Bundeskartellamt's website at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB_%20Novelle.html (accessed 19 May 2021).

⁹⁹ AGCM, AS1730 – Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2021, 22 March 2021, 56-57, available at [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/\\$File/AS1730.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/$File/AS1730.pdf) (accessed 19 May 2021).

on a Digital Markets Act, which grants the European watchdog more effective powers towards the so-called digital ‘gatekeepers’ and provides for sanctions which include also divestitures.¹⁰⁰ This proposal is currently under negotiation by the European Parliament and the Council.¹⁰¹

In the U.S., as well, an interesting report about competition in digital markets has been released on December 2020 by the Antitrust Subcommittee of the Committee on the Judiciary.¹⁰² In addition, the U.S. appears to try regaining pace in the enforcement of antitrust rules, as several bills directed at curbing tech giants’ market power are under discussion at the Congress.¹⁰³ Among them, it is worth mentioning the *American Choice and Innovation Online Act*,¹⁰⁴ the *Ending Platform Monopolies Act*,¹⁰⁵ the

¹⁰⁰ The Regulation proposal is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en> (accessed 19 May 2021). A summary of the proposal is available at https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (accessed 19 May 2021) and https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347 (accessed 19 May 2021).

¹⁰¹ European Parliament, Digital Markets Act: Parliament ready to start negotiations with Council, 15 December 2021, available at <https://www.europarl.europa.eu/news/en/press-room/20211210IPR19211/digital-markets-act-parliament-ready-to-start-negotiations-with-council> (accessed 15 February 2022). The amended text adopted by the Parliament is available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0499_EN.html (accessed 15 February 2022); Council of the European Union, Regulating ‘big tech’: Council agrees on enhancing competition in the digital sphere, 25 November 2021, available at <https://www.consilium.europa.eu/en/press/press-releases/2021/11/25/regulating-big-tech-council-agrees-on-enhancing-competition-in-the-digital-sphere/> (accessed 15 February 2022); The amended text adopted by the Council of the European Union is available at <https://data.consilium.europa.eu/doc/document/ST-13801-2021-INIT/en/pdf> (accessed 15 February 2022). See also L. Bertuzzi, EU Parliament adopts regulation targeting internet giants, Euractiv, 15 December 2021, available at <https://www.euractiv.com/section/digital/news/eu-parliament-adopts-regulation-targeting-internet-giants/> (accessed 15 February 2022).

¹⁰² Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations, 2020, available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 (accessed 19 May 2021).

¹⁰³ R. Lerman, Big Tech antitrust bills pass first major hurdle in House even as opposition grows, The Washington Post, 24 June 2021, available at <https://www.washingtonpost.com/technology/2021/06/24/tech-antitrust-bills-pass-house-committee/> (accessed 25 July 2021).

¹⁰⁴ U.S. Congress, H.R.3816 – American Choice and Innovation Online Act, available at <https://www.congress.gov/bill/117th-congress/house-bill/3816/text> (accessed 25 July 2021).

¹⁰⁵ U.S. Congress, H.R.3825 – Ending Platform Monopolies Act, available at <https://www.congress.gov/bill/117th-congress/house-bill/3825/text?r=34&s=1> (accessed 25 July 2021).

Platform Competition and Opportunity Act,¹⁰⁶ the *Augmenting Compatibility and Competition by Enabling Services Switching Act*.¹⁰⁷ In brief, the *Augmenting Compatibility and Competition by Enabling Services Switching Act* is aimed at promoting competition by lowering barriers to entry and lock-ins, so as to favour interoperability and data portability; the *American Choice and Innovation Online Act* is directed at prohibiting discriminatory conducts by digital gatekeepers, with a specific reference to self-preferencing; the *Ending Platform Monopolies Act* has the objective of curbing the possibility of digital gatekeepers to use abusive conducts allowed by their market dominance in order to expand into adjacent markets; and the *Platform Competition and Opportunity Act* is targeted at prohibiting the so called ‘killer acquisitions’ of competing firms threatening the gatekeepers’ dominant position in a market as well as at impeding acquisitions directed only at strengthening such a position. Having regard to the possible remedies, breakups have been envisaged both in the proposed legislation and in the mentioned Congressional Report.¹⁰⁸

4. Conclusion

The abovementioned initiatives, besides being directed at tackling the excessive market power held by digital gatekeepers, share another common feature: They are all based upon a renewed ‘political’ side behind antitrust intervention. For the sake of clarity, we are not intending here that there is a political influence on antitrust enforcement, which is something that shall be absolutely avoided. We are affirming that there is a new awareness of the *policy*¹⁰⁹ role that competition law shall play in our

¹⁰⁶ U.S. Congress, H.R.3826 – Platform Competition and Opportunity Act of 2021, available at <https://www.congress.gov/bill/117th-congress/house-bill/3826/text?r=5&s=1> (accessed 25 July 2021).

¹⁰⁷ U.S. Congress, H.R.3849 – Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021, available at <https://www.congress.gov/bill/117th-congress/house-bill/3849/text> (accessed 25 July 2021).

¹⁰⁸ U.S. House of Representative, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets, cit., 380-381.

¹⁰⁹ The difference between the terms policy and politics is subtle, but of paramount importance for the purpose of this article. Here we want to underline that, according to our view, antitrust law shall be completely immune from political influences. Anyhow, we deem that competition enforcement shall not be detached from the policy considerations and values upon which our societies’ constitutional background is built. The confusion between these two terms probably lies in the union, in the English term policy, of both the reference to the

societies. However, although this ‘multipurpose’ *policy* approach to competition law has its undoubted academic charm, it is not enough alone, and it also ought to be handled with care. Indeed, even tough competition law shall be viewed as composed by our societies’ *policy* substrata, we should not forget what the real aim of competition law, its prominent side, which encompasses all the others, is. We are referring to the protection of the competitive process, of competition as such, as advocated by the Ordoliberals and, a century ago, by Louis Brandeis, who, not casually, has been referred to as an ‘American prophet’ by Jeffrey Rosen.¹¹⁰ Thus, for the sake of concluding, the ‘multipurpose’ approach to competition law necessarily needs to be matched with a ‘multi tool’ strategy to its enforcement.¹¹¹ This means that competition law ought to be ready for the challenges that the economy’s evolution brings. For this purpose, the availability of a variable enforcement toolbox is deemed necessary. In this sense, the ‘common’ *ex post* approach to competition law, which is directed at imposing a pecuniary fine after a long investigation by a competition Authority, appears outdated and new paradigms are needed. In fact, companies such as tech giants may consider a pecuniary fine as the simple ‘cost of doing business’,¹¹² and if this comes years after the harmful conduct, the damage on the market cannot be recovered at all. The policy proposals mentioned in this article, like the new German GWB’s Section 19a or the DMA Regulation proposal, are proof of this renewed approach, as – in line with a structuralist approach to competition law – they involve an *ex ante* assessment of a company’s market position and they provide also for behavioural and structural remedies, instead of pecuniary ones only. Moreover, other tools ought to be empowered to reach the critical mass needed for competition law in the current market scenario. Reference can be made to the abuse of economic dependence, explicitly recognised, *inter alia*, by Section 20 of the German GWB,

practice of government and to the principle or course of action adopted or proposed as desirable, see Oxford English Dictionary (2006). It is here also worth mentioning that in the EU context the Competition Authorities’ independency has been strengthened by means of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, published in OJ of the EU 14 January 2019, L 11.

¹¹⁰ Rosen (2016).

¹¹¹ See also Piletta Massaro (2021a).

¹¹² See, *inter alia*, Stucke and Ezrachi (2020), 217.

Article L420-2, *alinéa* 2, of the French *Code de commerce* and by Article 9 of the Italian law on subcontracting in productive activities.¹¹³ This tool is indeed capable of being applied to tech giants' conduct without the high evidentiary burden required for abuses of dominant position. Under another perspective, also private enforcement of competition law needs to be strengthened so as to be applicable also vis-à-vis digital gatekeepers.¹¹⁴ This means that – with reference to private enforcement – the improvements introduced by means of Directive 104/2014¹¹⁵ are positive, but not enough, and tools such as collective redress and third-party litigation funding ought to play a role.¹¹⁶ Therefore, competition law cannot express its 'multipurpose' *policy side* without being also 'multi tool'. Along the lines outlined in this article, competition law's *dark side* can turn into a *bright side*.

¹¹³ Law 18 June 1998, no. 192, published in OJ 22 June 1998, no. 143. At this purpose, it is worth mentioning that in 2021 the Italian Competition Authority suggested the Italian Government to integrate the provision in object with the introduction of a rebuttable presumption of economic dependency with regard to contractual relationships with a platform acting as an intermediary and benefitting of a fundamental tool for reaching a firms' users or suppliers. See Autorità Garante della Concorrenza e del Mercato, AS1730 – Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2021, 22 March 2021, 56, available (in Italian only) at [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/\\$File/AS1730.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/$File/AS1730.pdf) (accessed 23 July 2021).

¹¹⁴ At this purpose it is worth reminding that the abovementioned U.S. Congressional Report has recognised the role that private antitrust enforcement can play in the described scenario. See Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations, cit., 403-404.

¹¹⁵ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringement of the competition law provisions of the Member States and of the European Union, published in OJ 5 December 2014, L 349.

¹¹⁶ In this sense, the exclusion of competition law from the scope of Directive 1828/2020 appears quite unreasonable. See Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, published in OJ 4 December 2020, L 409/1. See also Having regard to third-party litigation funding and collective redress, see, inter alia, European Parliamentary Research Service, Responsible Private Funding of Litigation, March 2021, 77-81, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU\(2021\)662612_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf) (accessed 11 October 2021); Piletta Massaro (2021b), 96.

LANGUAGE AND CULTURE IN INTERNATIONAL ARBITRATION:

THE IMPACT ON PARTIES' *DUE PROCESS* RIGHT

Ornella Guarino^{*}

Abstract

Over the last decades, the significant rise in international commercial transactions has led to the need for a harmonized dispute settlement system that is capable of resolving conflicts among the parties at the international level both quickly and effectively. In particular, this directly relates to the most effective alternative dispute resolution method for cross-border commercial transactions, namely the International Commercial Arbitration. Interestingly enough, the latter allows parties coming from different countries and different legal cultures to settle their dispute without necessarily going through litigation before courts. However, this can have an impact on how the national arbitration laws are drawn up in the various legal systems and on the parties' expectations on the conduct of the arbitration proceedings.

This article will therefore analyze how the different languages and different legal systems of origin of both parties and arbitrators might lead to misunderstandings – both verbally and in writing – that undermine the precise conduct of the arbitration procedure. Subsequently, a selection of civil law and common law systems (Italy, Germany, Spain, United Kingdom, United States) since the adoption of the UNCITRAL Model Law on International Commercial Arbitration in 1985 are taken into analysis in order to demonstrate how language plays a key role not only in the international arbitration discourse and practice, but also in impacting the parties' due process right, which would be infringed if they were not able to properly understand and follow suit with the arbitration procedure.

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Keywords

International commercial arbitration - ADR - Language - Culture - Due process - UNCITRAL model law

1. Introduction

In the last decades, international commercial arbitration (ICA) has become the most widely used alternative dispute resolution method (ADR) for settling international commercial disputes. Parties who resort to such a method decide to agree on having their dispute settled by a third party – namely, a single arbitrator or a tribunal consisting of more than one arbitrator – instead of going through litigation before

courts. The third party is also appointed in accordance with specific rules that are adopted by the parties by mutual agreement¹.

Specifically, arbitration is considered particularly effective thanks to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is a very successful transnational law instrument with 169 signatory states. The aim of this convention is to facilitate the recognition and the enforcement of arbitral awards almost everywhere in the world². Because of its high probability of enforcement, traders and businesses usually resort to arbitration in the event that a dispute arises³.

In 1985, the United Nations General Assembly additionally introduced the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration with the aim of providing guidelines to states in developing and updating their arbitration laws. Such a model law has constituted a fundamental step for the harmonization of international trade law as it was adopted integrally by a great number of countries that incorporated it into their national legislations, although in some cases with substantial modifications⁴.

Nevertheless, to this day such a model law fails to ensure a complete uniformity among the different national legislations as each country has used and translated its original English text in different manners according to their legal traditions and to the cultural and linguistic constraints of each system. English – which is the *lingua franca* since the beginning of the XX century – is indeed the dominant language used for

¹ M. Gotti, C. Candlin, V. K. Bhatia, *Discourse and Practice in International Commercial Arbitration: Issues, Challenges and Prospects* (Routledge 2012).

² M. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2017).

³ S. Tung, 'The Importance of Languages in International Arbitration and How They Impact Parties' Due Process Rights' (2017) 10[1] *Contemporary Asia Arbitration Journal* 113 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2979139> accessed 15 April 2022.

⁴ V. K. Bhatia, C. Candlin, J. Engberg, *Legal Discourse across Cultures and Systems* (Hong Kong University Press 2008).

international businesses and legal proceedings at the global level⁵. It is possible to state that English language represents a fundamental part of the ‘infrastructure of globalization’⁶ and, therefore, of the international arbitration context as well. However, at the international level, arbitration is not only characterized by the use of English⁷, but also by the participation of a multitude of subjects having very different cultural and linguistic backgrounds, which in some cases are particularly distant from each other.

The matter of linguistic and cultural issues affecting and undermining the arbitration procedures is a cause for concern as it can generate serious misunderstandings, and it is therefore important to investigate the impact of the abovementioned different linguistic and cultural backgrounds of the participants in the arbitration procedures. Also, it is crucial to understand to what extent the different backgrounds in terms of legal education of the participants in arbitration influence the expectations of the parties and the arbitrators.

This paper therefore aims at analyzing how the different languages and different legal systems of origin of both parties and arbitrators can lead to confusion, further arguments and disagreements that undermine the precise conduct of the arbitration procedures, and at discussing the possible strategies to implement in order to minimize such negative outcomes.

2. Multicultural and multilingual arbitration: what role do the different linguistic and cultural backgrounds play in international arbitration?

As mentioned in the previous section, one of the most important aspects of international arbitration is that it allows both parties and arbitrators coming from different countries of the world to settle their dispute without necessarily going

⁵ J. P. O'Regan, ‘English as a Lingua Franca: An Immanent Critique’ (2014) 35[1] *Applied Linguistics* 533 <<https://academic.oup.com/applij/article/35/5/533/175252>> accessed 15 April 2022.

⁶ *Ibid.*

⁷ A. Riley, *Legal English and the Common Law* (2nd edn, CEDAM 2012).

through litigation before courts⁸. Thus, participants in arbitrations are often speaking different languages. The context of international commercial arbitration can therefore be described as ontologically multilingual and multicultural. Cultural and linguistic aspects have a very strong impact on arbitration at two important levels:

- The arbitration law level, which is related to the differences existing among the arbitral texts that are produced in the various legal systems;
- The procedural level, as the parties can have different expectations on how the arbitration procedure will be conducted.

There are indeed many ‘dark sides’ that characterize international arbitration at the different levels on which it is necessary to shed light. The major cultural and linguistic differences in international arbitration undoubtedly depend on the country of origin of the participants who have different backgrounds in terms of native language and in terms of legal culture, philosophy, and education⁹.

With regard to the differences between the different legal systems, there are some important aspects that need to be highlighted in order to prove how the different specificities of the individual systems influence the expectations of the participating actors in the international arbitration. As a matter of fact, there are important differences between *common law* and *civil law* systems. Such differences generate both linguistic issues – for instance, in terms of concepts and expressions used in the two types of legal systems that lack equivalent terms in other legal systems, or in terms of linguistic misunderstandings between the participants involved in the arbitration procedures – and issues connected with the manner of conducting legal proceedings in the systems which are involved¹⁰.

8 Bhatia, Candlin, Engberg (n 4)

9 Ibid.

10 A. Kocbek, ‘Language and Culture in International Legal Communication’ (2006) 4[3] Managing Global Transitions. International Research Journal 231 <https://www.fm-kp.si/zalozba/ISSN/1581-6311/4_231-247.pdf> accessed 15 April 2022.

For instance, misunderstandings may arise due to the different terms existing in the various legal systems referring to the role of the legal representative: in most continental countries, such a role is referred to as *Rechtsanwalt* in German, *avvocato* in Italian, *abogado* in Spanish, and it has a basic role in each *civil law* system¹¹. On the contrary, in the English legal system the corresponding translation could be either the *barrister* – namely a qualified legal professional who offers legal advice and represents, advocates, and defends its clients in courts – or the *solicitor* – namely a qualified legal practitioner who prepares the legal documentation before and during a court case¹². Even in the US there are two terms referring to such roles, namely *attorney-at-law* and *lawyer*. The latter are considered synonyms as the *Cambridge Business English Dictionary* defines *lawyer* as “someone whose job is to give advice to people about the law and speak for them in court”¹³, whereas the *Cambridge Advanced Learner’s Dictionary & Thesaurus* defines *attorney-at-law* as “the formal name for a lawyer”¹⁴. However, there is an additional – not so subtle – difference between the two terms as *attorney-at-law* is often used to refer to “a person who has successfully passed the bar examination administered by the American Bar Association”¹⁵, whereas the term *lawyer* is used to indicate a person who has not passed the bar exam and, therefore, cannot represent clients in court¹⁶. Given the difficulty of translating some terms from one language and from a specific culture into another, during arbitration it becomes crucial for the translator, the interpreter, and the arbitrator/s to be aware of this issue so as to prepare thoroughly and avoid any translation mistakes that could evolve into misunderstandings between all participants.

¹¹ Ibid.

¹² Ibid.

¹³ Cambridge Business English Dictionary.
<<https://dictionary.cambridge.org/it/dizionario/inglese/attorney-at-law>> accessed 15 April 2022.

¹⁴ Cambridge Advanced Learner’s Dictionary & Thesaurus.
<<https://dictionary.cambridge.org/it/dizionario/inglese/lawyer>> accessed 15 April 2022.

¹⁵ Dictionary.com. <<https://www.dictionary.com/e/lawyer-vs-attorney/>> accessed 15 April 2022.

¹⁶ Ibid.

With regard to the different manners of conducting procedures, the *common law* procedure is called ‘adversarial’, hence the parties are considered ‘adversaries leading the proceedings’¹⁷. Through the discovery of documents, the parties hand over documents and information that are considered relevant for the matter at stake, by allowing the judge and the counterparty to access that information. On the contrary, the *civil law* procedure is called ‘inquisitorial’. In such a procedure, the judge plays an active role by being in charge of clarifying the issues and examining the witnesses. Moreover, in *civil law* systems, parties are not required to provide documents to the counterparty; instead, the latter has to ask the court to have the opportunity to access documentation¹⁸.

Another important difference concerns the role of the witnesses during the trial. In the *common law* systems, the cross-examination represents one of the most important principles. Oral evidence is particularly relevant and generally prevails over written evidence. On the contrary, in the *civil law* systems written evidence prevails over oral evidence. Therefore, in the case of a document contradicting a statement from a witness, the document will usually prevail¹⁹.

In the light of the above, if the parties or the arbitrators come from a *civil law* country, they are likely to have certain expectations on how the procedure will be conducted. Likewise, participants coming from a *common law* country are likely to have their own expectations based on the typical methods of conducting legal proceedings in their own legal system. As Lalive stated

Participants in international arbitration have different origins or places of businesses, different educations, methods, reactions or *Weltanschauungen*. In short, what has perhaps struck me more than anything after many years of arbitral practice, either as advocate or as arbitrator, is the capital role played by what may best be called ‘conflicts

¹⁷ C. Pejovic, ‘Civil Law and Common Law: Two Different Paths Leading to the Same Goal’ (2001) 40[155] *Poredbeno Pomorsko Pravo* 7 <<https://hrcak.srce.hr/en/file/170467>> accessed 15 April 2022.

¹⁸ Ibid.

¹⁹ Pejovic (n 17)

of cultures' between the parties (as well as their respective counsel) and, as a result, by difficulties of 'communication' between them and arbitrators²⁰.

In this connection, it is self-evident that language plays a key role in law and in international legal communication, as the genre of legislation is indeed expressed through words and concepts that have to be used with "mathematical precision"²¹. Clearness is a fundamental aspect both in oral discourses and, most importantly, in written texts for the correct transmission of legal meanings. As a matter of fact, if the language is ambiguous, the interpretation of the message conveyed may be distorted. For example, this is particularly relevant with regard to the European Member States. In this case, legal drafting and translation take a very important role, as the European legislation must be translated correctly in order to be incorporated in the national legislations of the individual states without generating doubts or uncertainties. Indeed, many of the legislative texts used at the national level are translations of other legislative texts elaborated at the supra-national level²².

If the matter of language is important in law, it is even more so in the context of international arbitration. Given the purely multicultural nature of international arbitration, one of its greatest challenges is precisely that of acting as a bridge between people belonging to different nations²³. For this reason, the choice of the language to be used during the proceedings is particularly relevant, although such an issue is often not taken into account both by the parties and the arbitrators. In some cases, this can even lead the parties to waive their right to determine the language in the arbitration

²⁰ P. Lalive, 'On Communication in International Arbitration' (1992) 3 *The American Review of International Arbitration*, 80.

²¹ Bhatia, Candlin, Engberg (n 4) 9

²² M. Gotti, 'Globalisation in the Legal Field: Adopting and Adapting International Commercial Arbitration Rules', in C. Pérez-Llantada and M. Watson (eds.), *Specialised Languages in the Global Village: A Multi-Perspective Approach* (Cambridge Scholars Publishing 2011).

²³ S. Wilske, 'Linguistic and Language Issues in International Arbitration - Problems, Pitfalls and Paranoia' (2016) 9[2] *Contemporary Asia Arbitration Journal* 159 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2879479> accessed 15 April 2022.

agreement²⁴. However, knowing with certainty which language will be used has a positive impact on the efficiency of the proceedings. Choosing the language and indicating it in the arbitration agreement positively impacts the communication between the participants²⁵. If this does not happen, the first steps of the arbitration could be made in different languages, and this could generate confusion and misunderstandings.

3. Linguistic and cultural issues in international arbitration

Most of the misunderstandings in international arbitration derive from two types of linguistic and translation issues: the first one involving documents, and the second one involving witnesses. With regard to the issues involving documents, the *Kılıç v. Turkmenistan* case shows how linguistic issues connected with legal documents can generate substantial disagreements and further conflict between the parties. In particular, the case dealt with the question whether the Turkey-Turkmenistan Bilateral Investment Treaty (hereinafter referred to as ‘BIT’) contained a local courts requirement establishing that the Turkish Claimant should first go before the Turkmen courts for one year before initiating arbitration proceedings²⁶.

It is relevant to point out that there were two authentic versions of the BIT recognized by the arbitral tribunal: one written in English and one in Russian, with the English version defined as “grammatically incorrect”²⁷ in some parts and “its meaning ambiguous or obscure”²⁸. Due to the presence of some controversial linguistic elements in the English authentic version, one of the most controversial aspects of

²⁴ V. Faienza, ‘The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?’ (2014) Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2014/05/06/the-choice-of-the-language-of-the-proceedings-an-underestimated-aspect-of-the-arbitration>> accessed 15 April 2022.

²⁵ Ibid.

²⁶ Wilske (n 18)

²⁷ *Kılıç v Turkmenistan* (2012) ICSID ARB/10/1, 25.

²⁸ Ibid. 47

this case concerned the interpretation of specific parts of the two English translations (the authentic version and a certified version) of the BIT. Specifically, parties strongly disagreed on the interpretation of Article VII.2 of the BIT. The main linguistic issue concerned the use of the word 'if' in the second line of sub-paragraph (c) of the first authentic version which distorted the meaning of the original sentence. As shown below, the first authentic English version stated that

2. If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the conflict may be submitted at investor's choice to

(a) ...

(b) ...

(c) The Court of Arbitration of the Paris International Chamber of Commerce, on the condition that, if the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.

Instead, the second English translation of the Russian version of Article VII-2 of the BIT stated that

2. If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the conflict may be submitted at investor's choice to

(a)

(b) ...

(c) The Court of Arbitration of the Paris International Chamber of Commerce, on the condition that the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.

In the latter translation, the translators justified the removal of the word ‘if’ from the second line of sub-paragraph (c) by stating that the addition of such a word in the sentence implies a literal word-for-word translation – a translation strategy carried out in the authentic version indeed – which does not correctly convey the meaning of the Russian version of the Article VII.2 of the BIT. More specifically, the addition of such a term creates a syntactical error which prevents the correct understanding of the meaning of the sentence²⁹. For these reasons, the translators deleted the word by making the sentence grammatically correct and, therefore, more understandable.

Such a translation mistake was the reason for many discussions between the parties. However, based on the tribunal’s understanding of the two authentic versions of the BIT, the tribunal concluded that the most accurate translation is the one in which the word ‘if’ is removed from the second line of sub-paragraph (c) and, therefore, it required investors to try to settle their disputes before the Turkmen courts for one year without receiving a final judgment before they could try to settle their dispute through arbitration³⁰. As the tribunal pointed out, “[A]ccurate translation of, for example, a sentence in one language into another, requires something more than a literal and word-for-word translation of each and every word employed in the text that is being translated.”³¹ In the light of the above, it is therefore necessary to make sure that the translation of the legal documents is as accurate as possible in order to avoid potential problems related to the misinterpretation of the text itself which may lead to different conflicting interpretations.

With regard to the linguistic issues involving witnesses, the latter are considered less predictable than the issues involving documents. For this reason, such issues often require spontaneous decisions³². For instance, one of such issues concerns Chinese-speaking witnesses. In 2011, it was noticed that in the US the number of litigation involving Chinese companies had significantly increased, so there has been an increase in the number of Chinese-speaking witnesses since then. In his article, Sant reported

²⁹ Kılıç v Turkmenistan (n 22)

³⁰ Wilske (n 18)

³¹ Ibid. 168

³² Ibid.

that when a Chinese-speaking witness is involved in the proceedings “there is near certainty that significant miscommunication will occur”³³. This is due to many linguistic and cultural reasons: for instance, contrary to what happens in the English language, Chinese verbs do not conjugate and do not often differentiate between present and past tense or between ‘he’, ‘she’ and ‘it’. Moreover, Chinese nouns do not have singular and plural forms³⁴.

Such linguistic challenges often require interpreters to make assumptions about the meaning of the deposition of the witnesses, and the various cultural aspects connected with the body language do not often help to correctly detect what the witness intends to say. Therefore, as Sant states, “some of those assumptions will likely be wrong”³⁵. For instance, in *He v. Ashcroft*, the description of Mr. He of “ten men driving and jumping out of a vehicle” was considered as not credible because of some linguistic issues that led to miscommunication between Mr. He and the interpreter. In this case, the latter did not mean that “ten individuals jumped out of one car”, but rather more than one car. However, the interpreter translated the sentence by using the singular form ‘a car’ by making a translation mistake and generating confusion. The issue related to the fact that Chinese people do not usually distinguish between singulars and plurals, which is the reason why originally the interpreter guessed that the issue concerned only one car, and thus continued using the singular form throughout the translation³⁶.

The examples regarding the potential linguistic issues concerning Chinese-speaking witnesses involved in U.S. proceedings underline the importance of being careful when dealing with arbitration at the international level, which is a context characterized by individuals coming from different countries and speaking different languages thus generating misinterpretations and miscommunication easily generate. Nevertheless, as mentioned in the previous section, the matters connected with the

³³ G. Sant, ‘Commentary: Overcoming Language Traps in Depositions of Chinese-speaking Witnesses’ (2011) 24[2] NYSBA International Law Practicum 100.

³⁴ Sant (n 28)

³⁵ Sant (n 28)

³⁶ Ibid.

language are often underestimated and considered as minor issues. Specifically, there are three types of attitudes that are often adopted by the participants in the arbitration. A first type of attitude is that of merely ignoring linguistic issues, which rarely turns out to be successful and often undermines the effectiveness of the proceedings³⁷. A second kind of attitude adopted in international arbitration is related to the decision to invest financial resources on lawyers, on travel or the accommodation rather than on the quality of translators or the linguistic experts³⁸. However, it should be pointed out that such decisions are often dictated by the lack of financial resources, rather than on an underestimation of the problem. Finally, a third kind of attitude is having the arbitration proceedings run exclusively by native English speakers, as it is assumed that they are going to have an excellent understanding of the language. Nevertheless, even if it is true that the linguistic competence of the participants influences the result of the proceedings, such an approach is very costly and does not always represent the optimal strategy as the final outcome of the international arbitration does not exclusively depend on the linguistic skills of the witnesses or the arbitrators³⁹.

4. Due process in international arbitration

After having discussed the linguistic problems that may arise in the arbitration proceedings, a very relevant aspect to tackle is the one concerning the *due process* right of the parties. As a matter of fact, such a right is likely not to be respected because of the abovementioned linguistic issues. The concept of due process can be defined in various ways, but it is commonly accepted that it entails that “no one should be deprived of his or her rights without the due process of law”⁴⁰. Such a concept originates from the English *common law* system. As a matter of fact, the *Magna Carta*

³⁷ Sant (n 28)

³⁸ Wilske (n 18)

³⁹ Wilske (n 18)

⁴⁰ M. S. Kurkela, S. Turunen, *Due Process in International Commercial Arbitration* (2nd edn, Oxford University Press 2010) 1.

of 1215 already established the rights of a subject against the authority of the king in order to ensure the ‘constitutional’ right of due process by stating in Charter 39 that “no free man shall be seized, or imprisoned... except by the lawful judgment of his peers, or by the law of the land...”⁴¹. More specifically, the expression ‘due process of law’ first appeared in 1354 during the reign of King Edward III in Chapter 3 of the Liberty of the Subject Act which stated that “no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law”⁴². In 1608, Sir Edward Coke wrote a treatise in which he discussed the meaning of *Magna Carta* and further explained that

No man shall be disseised, that is, put out of seison, or dispossessed of his free-hold (that is) lands, or livelihood, or of his liberties, or free customes, that is, of such franchises, and freedomes, and free customes, as belong to him by his free birth-right, unless it be by the lawfull judgement, that is, verdict of his equals (that is, of men of his own condition) or by the Law of the Land (that is, to speak it once for all) by the due course, and process of Law⁴³.

The concept of due process has then developed over time and nowadays courts generally recognize worldwide that three important conditions have to be ensured in order for a process to be considered as ‘due’:

41 Magna Carta 1215.

42 Liberty of Subject Act 1354.

43 F. M. Gedicks, ‘An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, And the Fifth Amendment’ (2009) 58 Emory Law Journal 585 <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1275&context=faculty_scholarship> accessed 15 April 2022.

- A first important condition is procedural fairness, including the proper notice to the parties of what the case is about and how the trial will take place, by taking into account time and cost issues as well;
- Secondly, another important condition concerns the equal treatment, which must be ensured by the impartiality of the judges and the lawyers⁴⁴;
- Thirdly, the right to be heard must be ensured. This includes the right to present the case, to defend oneself and to confront the counterparty or any witnesses⁴⁵ - a right which greatly involves the possibility for the participants to fully express themselves in the language chosen for the proceedings.

Moreover, ‘due process’ usually refers to a set of criteria that have to be respected in order to protect individual rights in relation to the State and authorities. However, as arbitration is a private system of resolving disputes to which parties voluntarily – in most cases – resort to, at first glance such a concept may not seem to be relevant. Nevertheless, as previously mentioned, the arbitral awards produced by the arbitral tribunals are enforceable in a very large number of countries thanks to the New York Convention. One of the greatest advantages of arbitration is indeed represented by the enforceability of the final awards. Therefore, in order to ensure such an enforceability, the arbitral proceedings are required to meet specific quality standards and constraints in compliance with the ‘due process’ conditions⁴⁶; hence, the due process right can therefore be considered relevant in arbitration as well.

Also, as the arbitration agreement can prevent a party from starting a procedure in a court, some procedural standards need to exist in order to compensate for such a ‘deprivation of right to access to court’. As a matter of fact, for instance, the European

⁴⁴ See e.g., UNCITRAL Model Law, art. 12 (I-2); UNCITRAL Rules, art. 12 (I); LCIA Rules, arts. 5.2, 10.3.

⁴⁵ Tung (n 3)

⁴⁶ Kurkela, Turunen (n 35)

Court on Human Rights has ruled that the right of access to court and a public trial in a court of law may not be respected if the parties have agreed on resolving their dispute through arbitration via an agreement⁴⁷. Furthermore, the European Convention on Human Rights (“ECHR”) established in its Article 6(1) that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”⁴⁸, which is a principle that can be directly applicable to arbitration as well in order to protect individuals when going through arbitration, especially since the principles of the ECHR shall be horizontally applied to private subjects and protected by the states.

As the principles contained in the human rights conventions could be indirectly applied to arbitration, the latter therefore requires certain procedural requirements of quality to ensure fairness⁴⁹. As a matter of fact, when specific principles are violated during the arbitration procedure, the award could be considered null and void and deprived of its enforceability⁵⁰. As previously mentioned, such principles involve the right for the parties to understand the language of the proceedings and to express themselves throughout the arbitration. For instance, an award can be considered null because the right of the parties to present the case or confront the counterparty has not been respected or because the language of the clause contained in an arbitration agreement is so vague that the parties’ intent cannot be determined⁵¹.

Moreover, Article 6(3) of the ECHR specifies the most important procedural requirements concerning criminal charges by stating that “everyone charged with a criminal offence has ... [the right] to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”⁵². Criminal cases are not resolved through international commercial arbitration, but

⁴⁷ Ibid.

⁴⁸ European Convention on Human Rights 1953.

⁴⁹ Kurkela, Turunen (n 35)

⁵⁰ Ibid.

⁵¹ Moses (n 2)

⁵² European Convention on Human Rights 1953.

once again this is to emphasize the importance of ensuring due process rights – which includes the right to be able to correctly understand throughout the proceedings – and to highlight that both in litigation and arbitration procedures differences in terms of linguistic skills unfairly preventing a party's right to properly participate in the proceedings lead to an infringement of the due process right of that party.

5. Requirements of due process in arbitration at national and international level:

language as a fundamental right of the participants

National arbitration laws usually impose due process requirements of quality, although they do not generally contain a complete definition of due process. As a matter of fact, the requirements and the quality standards of due process vary depending on the legal system in question⁵³. However, at the international level, arbitration conventions and models do provide requirements of due process by listing the reasons why an award may not be recognized and enforced, thus ensuring that this right is effectively observed. For instance, Article V of the New York Convention contains detailed grounds for the non-enforcement of the arbitral award, with some of them stemming from violations of due process rights of the parties. Specifically, Article V(1)(b) of the New York Convention states that an award may not be enforced when the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case⁵⁴.

Furthermore, the UNCITRAL Model Law on International Commercial Arbitration states in Article 18 that

53 F. Fortese, L. Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3[1] Groningen Journal of International Law 110 <<https://ssrn.com/abstract=2611337>> accessed 15 April 2022.

54 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case⁵⁵.

The UNCITRAL Model Law also states in its Article 24(2) that

The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents⁵⁶.

According to the UNCITRAL Model Law, many countries have introduced such rights of procedural fairness, equal treatment and of being heard in their national laws, in some cases by making some minor modifications while maintaining their core concepts. A few examples are given below:

- a) The English Arbitration Act contains many provisions based on the Model Law, but it has not adopted it in its entirety. Indeed, in its Section 33(1)(a), Article 18 of the Model Law is not fully reproduced. On the contrary, the following sentence is stated, thus not using the expression ‘full opportunity’ but rather ‘reasonable opportunity’. Specifically, the article states that

The tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.⁵⁷

55 UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration 1985.

56 UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration 1985.

57 Arbitration Act 1996 s 33(1)(a).

The concept of reasonableness is indeed deep-rooted in *common law* systems, thus constituting a fundamental pillar in the legal discourse of such systems and differentiating themselves from other types of legal systems⁵⁸.

- b) In the case of France, the latter has not adopted the UNCITRAL Model Law. Hence, there are some differences between the French arbitration law and the Model Law. By taking into consideration Article 18 of the Model Law, it is possible to notice that the French Civil Code of Procedure does not produce a faithful version to the original text while still retaining the core principles of the due process right as it states in its Article 1485 that

Le tribunal arbitral ... statue après avoir entendu les parties ou celles-ci appelées.⁵⁹,

[The arbitral tribunal ... shall decide after hearing the parties or the so-called parties]

Based on this article, it is implied that the right of the parties to be heard is fundamental for the arbitral tribunal in order to produce the final award. One of the main principles of due process is therefore included in the French Civil Code of Procedure.

- c) Italian law is also not explicitly based on the Model Law. Indeed, Italy has not adopted the Model Law. However, most of the principles contained in the UNCITRAL Model Law are accepted and included in the Italian arbitration law. Specifically, in the Fourth Book of the Italian Code of Civil Procedure – which governs arbitration in Italy – the due process principle is implicitly established in Chapter IV Article 829(9), which states that

58 G. P. Fletcher, 'The Right and the Reasonable.' (1985) 98[5] Harvard Law Review <<https://doi.org/10.2307/1340881>> accessed 31 March 2023.

59 Code de procédure civile 2005 (France)

L'impugnazione per nullità è ammessa, nonostante qualunque preventiva rinuncia ... se non è stato osservato nel procedimento arbitrale il principio del contraddittorio.⁶⁰

[The grounds for setting aside arbitration awards are valid, despite any prior waiver ... if the adversarial principle has not been observed during the arbitration proceedings.]

Specifically, in the Italian article the '*principio del contraddittorio*' is included. This principle literally translates to 'adversarial principle', namely a fundamental principle of the Italian procedural law which establishes that everyone who has a legally qualified interest in obtaining a court judgment may participate in the judicial process with the right to defend themselves as permitted by law⁶¹. Therefore, in the Italian law reference is made to one of the principles of due process as well.

- d) Unlike the three countries that have been previously discussed, Germany had adopted the UNCITRAL Model Law. As a matter of fact, the Tenth Book of the German Code of Civil Procedure – which governs arbitration in Germany – provides a completely faithful version to the original text in its Chapter 5 Section 1042(1) by stating that

Die Parteien sind gleich zu behandeln. Jeder Partei ist rechtliches Gehör zu gewähren.⁶²

[The parties shall be treated equally. Each party shall have a right to be heard],

This clearly establishes the due process right of the parties. Specifically, both the principles referring to the right for the parties to be treated equally and to be heard are included in the article under consideration.

⁶⁰ Codice di Procedura Civile 2006 (Italy)

⁶¹ Enciclopedia Treccani. <<https://www.treccani.it/enciclopedia/principio-del-contraddittorio-diritto-processuale-civile/>> accessed 15 April 2022.

⁶² Zivilprozessordnung 2005 (Germany).

- e) Finally, Spain has adopted the UNCITRAL Model Law as well. With regard to the due process right, the Spanish Arbitration Act 60/2003 clearly establishes the right of the parties to be treated equally and to be given equal opportunity to enforce their rights in Article 24 by stating that

Deberá tratarse a las partes con igualdad y darse a cada una de ellas suficiente oportunidad de hacer valer sus derechos.⁶³

[The parties shall be treated equally and they should be given sufficient opportunity to enforce their rights.]

As it can be noticed, the principle of due process with its main conditions is present in all the national legislations taken into account, although with different formulas and expressions. As Gotti states, the articles included in UNCITRAL Model Law are drawn up as clearly and precisely as possible. This is because the main goal of the model law is to avoid conceptual and terminological ambiguity⁶⁴. Such an approach is similar to the one adopted by common law systems in their legislation. However, in the case of the UNCITRAL Model Law the language is even more plain as the text is drafted in order to be universally applicable. Indeed, the concepts and the terms that are used must be as neutral as possible as the main goal is for them to be incorporated into the national laws of as many legal systems as possible.

Also, it is important to highlight that no arbitral law – neither nationally nor internationally – includes the linguistic proficiency and/or the assistance of an interpreter who allows a party to understand throughout the procedure and, therefore, to correctly participate in the procedure as a fundamental due process right of the parties. However, as discussed in Sections 2 and 3, language plays a crucial role in impacting parties' due process rights, and it may be convenient to include specifications in this regard in order to point out that the choice of the language and the right to understand the proceedings shall be included in the due process rights of the parties. As a matter of fact, language can interfere with the correct conduct of the

⁶³ Ley 60/2003 de Arbitraje (Spain).

⁶⁴ M. Gotti, 'Translating International Arbitration Norms into the Italian Language and Culture', in L. Cheng, K. Kui, and A. Wagner (eds.), *The Ashgate Handbook of Legal Translation* (Routledge 2016) 193-207.

arbitral proceedings by undermining the fundamental principles of procedural fairness, of equal treatment and of the right of being heard⁶⁵. Specifically, procedural fairness requires that parties must be given proper notice, that they must be able to understand throughout the procedure and be aware of how the procedure will take place. As mentioned above, this simply entails that if the parties do not understand correctly the language used for the procedure, their due process right is not respected⁶⁶.

Also, the fact that an arbitration procedure is defined as international will certainly entail that one or more parties will be using a secondary language; hence, a procedural meeting between the parties and the arbitral tribunal should occur before the actual procedure so that each party can provide their own opinion on the language to be used during the proceedings. If this does not happen, parties may not be able to accurately describe all the relevant facts during the trial, and the language could be chosen by the arbitral tribunal without having taken into account the will of the parties. On the contrary, if parties decide in advance the details of the arbitration procedure – including the language to be used – they will be given equal notice of the proceedings and will know precisely what to expect from the procedure⁶⁷.

Finally, language is also relevant with regard to the right to be heard. In particular, parties have the right to appoint the arbitrators and the right to have arbitrators who are independent and impartial, which is an obligation that is established at the international level by many laws and rules such as the UNCITRAL Model Law, the UNCITRAL Rules, the LCIA Rules, the ICC Rules⁶⁸. Therefore, parties have the right to choose arbitrators because of their impartiality and because of their fluency in all the relevant languages to the case⁶⁹.

65 Tung (n 3)

66 Ibid.

67 Ibid.

68 Moses (n 2)

69 Tung (n 3)

6. Concluding remarks

Based on the above, the matter of the language to be used during the arbitration proceedings is extremely important for the whole arbitration procedure and for the enforcement of the award. Indeed, if the rights of the parties are not respected, the award is likely to be declared as non-enforceable. For this reason, it is important that both parties and arbitrators recognize the importance of languages, their impact on the proceedings and on their rights, and that they carefully address such issues. It should also be stressed that language is a crucial matter especially for the parties to a contract who might eventually become parties involved in the arbitration procedure. Specifically, the parties – as well as the arbitrators – should be aware of the importance of choosing and knowing the language of the contract, which could indeed become the language of the arbitration procedure. The more arbitration cases increase at the global level, the more the issue of dealing with the interculturality of arbitration becomes more and more urgent. Therefore, it is important to discuss and address the importance and the impact of linguistic and cultural differences in international arbitration in order to develop methods and strategies that could settle potential conflicts arising in international arbitration.

On the one hand, it is already possible to agree on certain aspects that can be addressed and decided in order to facilitate multicultural proceedings. Firstly, at the beginning of the arbitration procedure parties should agree on the language to be used. This would eradicate a great number of potential problems⁷⁰. Furthermore, participants could strategically appoint an arbitrator who speaks the languages spoken by the parties. This would restrict the number of potential arbitrators; however, at the same time it may lead to a win-win solution. With regard to this second point, however, it is important to point out that it is fundamental that arbitrators do not accept any case in which they are not proficient in the language spoken by any of the parties. Indeed, Article 2 of the IBA Rules of Ethics states that,

70 T. Várady, 'Language Issues and Language-Related Strategies Prior to the Constitution of the Arbitral Tribunal' (2006) 7[2] *Across Languages and Cultures* 209.

“a prospective arbitrator shall only accept appointment if he is fully satisfied that he is able to discharge his duties without bias, if he is fully satisfied that he is competent to determine the issue in dispute, and also if he has an adequate knowledge of the language of the arbitration”⁷¹.

Finally, in connection with the above, parties should strategically hire an arbitrator who has an ‘adequate command’ of the language chosen for the arbitration⁷². It is also important to highlight that in such an international context it is particularly relevant – both for parties and probably even more for arbitrators – to keep an open mind that allows them to deal with individuals coming from different parts of the world and to be aware of the many conflicts that can arise due to misunderstandings stemming from cultural differences. In order to conduct the arbitration as efficiently as possible, arbitrators should know which are the most controversial issues during the proceedings and should be prepared to tackle them promptly. In this connection, the early meeting at the beginning of the procedure to discuss those aspects – including the issue of language – that usually generate arguments, conflicts and misunderstandings would be very convenient in order for the arbitration procedure to be successful.

On the other hand, however, further investigation needs to be conducted with regard to the strategies to be adopted in international arbitration to facilitate the discussion between the participants by transcending the linguistic and cultural boundaries that separate them. The multicultural and multilingual education of the arbitrators, the early meeting and the strategies mentioned above would certainly be a fine start to address the problem. However, improved methods and techniques still need to be implemented in order to effectively ensure that fewer misunderstandings and conflicts occur during international arbitration proceedings, to minimize the risk of affecting the successful outcome of the arbitration procedures. Specifically, such improved methods should be employed to guarantee the right of due process.

⁷¹ IBA Rules of Ethics.

⁷² Várady (n 70)

COMPENSATION OF VICTIMS OF MISCARRIAGE OF JUSTICE IN A COMPARATIVE PERSPECTIVE

Domitilla Vanni^{*}

Abstract

The research aims to examine the complex and polyhedral topic of miscarriage of justice in two different legal systems.

Beginning from the English legal system it is clear that this expression is capable of a number of different meanings. Section 133 of the Criminal Justice Act 1988 provides that the Secretary of State for Justice shall pay compensation 'when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice'. It was enacted to give effect to Article 14(6) of the International Covenant on Civil and Political Rights 1966, which the United Kingdom ratified in May 1976.

The research will pass to explore the same topic in Italian legal system. In Italy judicial wrongs can bring to the review of the sentence and to the compensation of the damage suffered by the victim of the judicial wrong. The rule of art. 630 of criminal procedure code provides for the hypotheses in which a definitive sentence can be revised. After the introduction of art. 533 criminal procedure code - operated by art. 5 of the law 20 February 2006 no 46 - also the criterion of "beyond any reasonable doubt" has become an express rule of Italian criminal process giving rise to the need to coordinate it with other constitutional principles such as the mentioned principle of due process of law.

Given that the research focuses about how the application of these criteria must deal with respective specific legal contexts, taking into account, for example, the big gap between the procedures for forming judgments in the different legal systems.

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Keywords

Miscarriage of justice – Compensation - Judicial wrong – Judgment - Review

1. Introduction

The topic dealt with here with reference to the English and Italian legal systems touches on one of the most delicate aspects of any legal system, namely the very credibility of the administration of justice, referring to cases in which the judicial decision is based on a procedural truth that does not conform to the substantive truth

and is not faithful to the reality of the human events on which it intervenes. In other words, a connection is missing between the universe of human phenomena and their projection in a juridical ambit in which they will find their regulation by the judicial decision. What strenghtens the seriousness of the topic and its consequences is the circumstance, unfortunately repeated several times in the history of almost all legal systems, that it occurs in a time subsequent to that in which the judicial proceedings take place, so that the break between historical truth and proceedings is revealed only after the judicial decision has been issued.

Miscarriage of justice in common law systems¹ refers to a situation in which a person is convicted of a crime but later his/her case is reopened by another Court as his/her conviction is found to be 'unsafe' and 'unsatisfactory'². It happens when a break between the historical reality and its reconstruction in the courtroom arises after a judicial decision has been adopted and the pronouncement itself, which conflicts with

¹ Common law doctrine concerned with miscarriage of justice, as c.walker - k.starmer, *Miscarriage of justice*, Oxford 1999, cites the fundamental work of dworkin, *Taking Rights Seriously*, London, 1977, chapters 7 and 12.

² Indeed today, the hypothesis of unsatisfactory sentence has lost importance, after the entry into force of the Criminal Appeal Act of 1995. See the famous case *Birmingham Six*, in which six Irish citizens, suspected of belonging to the military wing of the Irish Republican Army, an armed movement fighting for independence of Northern Ireland from England, were indicted for the explosion of two bombs in two Birmingham pubs, causing 21 deaths and 162 injuries. On 15th August 1975 the jury established at the Crown Court found them guilty of the murder. The defendants were, therefore, sentenced to life imprisonment. In the following years, an articulated and widespread campaign, also conducted thanks to the generous commitment of a British MP, Chris Mullin, led to the revision of the trial on the basis of a supplementary investigation into the explosives and the work of the Police. The new evidence collected, which threw a new light on the methods of acquiring the previous one, led, finally, after a first and unsuccessful complaint, the Court of Appeal on March 1991 to annul the verdict of guilty, deemed 'unsafe' and 'unsatisfactory'. See *R. v. McKenny and others* (1992) 2 ALL ER 417. See C. Mullin, *Errors of judgment*, Poolberg, 1990; l.blom – cooper, *The Birmingham Six and other cases: victims of circumstances*, London, 1997, about the fact that the trial against the police officers, believed to be the perpetrators of the manipulation of evidence, was abandoned by the prosecution: *R. v. Read Morris and Woodwiss*, The Times, 8 ottobre 1993, I. The case just reported had been preceded by another analogue, concerning the false indictment and conviction of four innocent defendants, also Irish, in relation to a terrorist attack that took place, also in the autumn of 1974, in Guildford, a town in south-east of London (the case, later narrated in the film *In the name of the father*, is known as *The Guildford four*). Even then, after long disputes and the discovery of new evidence (obstinately kept secret by the police and only accidentally come to light), the judicial error was discovered and in 1989 the annulment of previous convictions was ordered by Court of Appeal in review. On it see G.McKee and R.Franey, *Time Bomb*, Bloomsbury 1988; R.Kee, *Trial and Error*, Hamish Hamilton 1986.

the truth of the facts, ends up in embodying the essence of the miscarriage of justice, that appears - because of circumstances which change from time to time - unable to ensure its primary social, institutional, political function, that is, the distributive one, among all men of wrongs and reasons, of rights and duties, of responsibilities and remedies, which finds its apogee in the equality of rights among all citizens³.

In the same way judicial wrongs in civil law systems occur when the criminal trial ends with a narrative that does not correspond to what really happened in the outside world⁴, although the different conformation of the mentioned legal systems and above all of the mechanisms of formation of judicial decisions and consequently of the nature of the relative remedies can determine a different approach to the topic and impose diversified solutions, shaped on the respective legal models of reference. Already for example the mere circumstance that the need to regulate this topic was in UK originally affirmed in a judicial precedent⁵, although subsequently regulated by a legislative source, that is section 133 of the Criminal Justice Act 1988, despite the unique source represented by primary legislation in Italian experience, including sections 629-633 and 643 of criminal procedure code, determines a different origin of the rules, reflecting on the structure, range of application and flexibility of the respective remedies, offering the starting point for a comparative view which - beyond of the terminologies used in this or in that legal model - can highlight the existence of elements of peculiarity of one or the other experience from the point of view of operational rules rather than on the level of theoretical propositions or, on the contrary, allow the identification of common protection itineraries that put in first place the protection of individual needs above other general principles and values regulating the whole legal system and the proper functioning of justice.

So even in Italian legal system a specific remedy, the so called revision, is provided by art.630 of criminal procedural code, by which the victim of a unjust decision can

³ In this perspective, M.SERIO, *Osservazioni Su Miscarriage of justice e diritti umani: un'indagine comparatistica*, in *Problemi attuali di Diritto Privato, Studi in memoria di Nicola Di Prisco*, I, Giappichelli, 2015, pp.1015-1040.

⁴ R.NOBLIS – D.SCHIFF, *Understanding miscarriages of justice*, Oxford, 2000, with a preface by G.TEUBNER, p. VII.

⁵ Lord Manfield affirmed this need in *R. v. Wilkes* (1770) 98 ER, 347. About the specific mechanism of forming judicial precedents in UK, Criscuoli-Serio, *Nuova Introduzione allo studio del diritto inglese*, Giuffrè 2021, p. 285.

obtain to reopen the judicial process for changing the final decision even if it has become *res indicata*.

And, as well as the primary object of this kind of protection is clearly to compensate a person who had been convicted and punished for a not committed crime, both in English law and in Italian law the general provision of the miscarriage with the consequent duty of the judge to impose the truth on the erroneous misrepresentation, is followed by the acknowledgment in favour of the victim of a right to obtain compensation for the suffered damages. And just under this compensatory outline which makes effective the legal protection, I found very interesting apply the comparative approach⁶ to recognize – besides the homologous legal provisions - the real amplitude of the respective remedies and to verify the actual functioning and the concrete restorative impact of the different rules. And it will be very interesting at the end of this brief search to discover by comparative tools that a wider practicability of the remedy does not always correspond to an equally broad capacity to satisfy individual claims and to reintegrate into the *ex ante* situation, altered by the erroneous representation of the human phenomena.

From another point of view, the topic also appears to be related to the structure and organization of proceedings in a way that respects freedom and individual rights, in order to avoid any violation of human rights, to which it is closely connected and for which reference to the European case law on the topic appears essential.

In this sense an important role in the creation and development of miscarriage of justice has been carried out by the <due process of law>⁷, an expression of Anglo-Saxon origin which does not limit to guaranteeing the observance of the rules of the judicial procedure but underlies the claim of every citizen towards his/her own State so that rules that are suitable for guaranteeing the conduct of a fair trial will be

⁶ About the fundamental distinction between operational rules and declamatory statements cfr. R.SACCO, *Introduzione al diritto comparato*, Utet 1992, p.62; ID., *Sistemi giuridici comparati*, Utet 2008, pp. 3-6.

⁷ About it see m. serio, *Brevi note sul due process of law nell'esperienza del common law inglese*, in *Europa e diritto privato*, 2000, pp.205-214.

adopted. The Edwardian Statute⁸ of 1368 contains the first reference to the due process of law as an indispensable nexus for verifying the validity of a criminal charge. Indeed the chapter 3 of this ancient Statute presents an absolute modernity as it is claimed that every accusation must receive the scrutiny of a judge, before whom the accused must appear for due process to take place. So on the basis of it the penalty for non-compliance with due process of law is the nullity of any unlawfully performed act and its evaluation in terms of an error of law. The due process of law must therefore be seen as a place of celebration of the process which sees the accuser and the accused opposed before a judge, in order to guarantee the accused the possibility of fully exercising his right of defense by all means.

In the same direction, Article 24 par. 1 e 2 and Article 111 of Italian Constitution⁹ guarantee the action and defense in Court, as the due process of law clause does,

⁸ 1368 c. 3 8 Regnal. 42 Edw 3 <Observance of due Process of Law>: *None shall be put to answer without due Process of Law. ITEM, At the Request of the Commons by their Petitions put forth in this Parliament, to eschew the Mischiefs and Damages done to divers of his Commons by false Accusers, which oftentimes have made their Accusations more for Revenge and singular Benefit, than for the Profit of the King, or of his People, which accused Persons, some have been taken, and [sometime] caused to come before the King's Council by Writ, and otherwise upon grievous Pain against the Law: It is assented and accorded, for the good Governance of the Commons, that no Man be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land: And if any Thing from henceforth be done to the contrary, it shall be void in the Law, and holden for Error.*

⁹ Art.24 of Italian Constitution states: 1. *Everyone can promote legal action to protect own rights and legitimate interests. 2. The defense is an inviolable right in every state and level of the proceeding. [...].* Moreover the subsequent Constitutional Law n° 2 of [23 novembre 1999 modified](#) Art. 111 of Italian Constitution which now states: 1. *Jurisdiction is implemented through due process regulated by law. Each process takes place in the contradictory between the parties, on equal terms, before a third and impartial judge. 2. The law ensures its reasonable length. 3. In criminal proceedings, the law ensures that the person accused of a crime is, in the shortest possible time, confidentially informed of the nature and reasons for the accusation leveled against him; he has the necessary time and conditions to prepare his defence; he has the right, before the judge, to interrogate or have interrogated the persons who make statements against him, to obtain the questioning of persons in his defense under the same conditions as the prosecution and the acquisition of any other means of evidence in favor of him; he is assisted by an interpreter if he does not understand or speak the language used in the process. 4. The criminal trial is governed by the principle of the adversarial process in the formation of evidence. The accused's guilt cannot be proven on the basis of statements made by those who, by free choice, have always voluntarily avoided interrogation by the accused or his lawyer. 5. The law regulates the cases in which the formation of evidence does not take place in a cross-examination due to the consent of the accused or due to ascertained impossibility of an objective nature or as a result of proven illicit conduct.. [...]*

albeit apparently operating on a more technical level¹⁰. Really, on a closer inspection, both of the two principles placed at the foundation of the respective judicial systems determine a declination of procedural justice in terms of fairness¹¹, to be understood - as well as compliance with the positive rules in force - as a guarantee of the concretization in the proceedings of principles which in a certain historical moment are felt in a specific social context as an integral part of that notion. And it is interesting to note from a comparative perspective how this similarity in the substantial content of the two clauses is reflected in a common approach of the respective Courts with regard to the guarantee of action and defence, as they are constantly concerned with verifying in practice the effective possibility of the parties to participate in the procedural adversarial rather than considering sufficient compliance with abstract forms or conditions.

The particular interest of the comparative analysis on this issue cannot but be underestimated, as we are at a field in which the evident structural differences attributable to the different traditions of the legal systems considered, which are reflected in the diversity of the technical tools actually used, do not prevent a commonality of judicial choices and trends that denote an evolutionary and creative interpretation necessary for every legal system to implement and make effective the guarantees of a constitutional nature.

¹⁰ v. vigoriti, *Garanzie costituzionali del processo civile*, Giuffrè 1970, Introduzione, p.1.; m.cappelletti, *Diritto di azione e di difesa e funzione concretizzatrice della giurisprudenza costituzionale* (art.24 Costituzione e <due process of law clause>), in *Giur. Cost.* 1961, pp.1284 ff.

¹¹ About fairness and its derivation from the due process of law see d.j.galligan, *Due process and fair procedures*, 1996, pp.170-171: <Procedural fairness is the modern concept, and only on rare occasions is reference made to its predecessor, due process. But on close inspection, it is clear that the two ideas cover the same ground; procedural fairness is a wider concept, but the core idea common to both is that certain procedures are needed to give effects to the ends of justice within legal decisions. There is, moreover, a direct line of development from the earliest idea of due process of law to the modern notion of procedural fairness. [...].>

2. The International framework: the European Convention of Human Rights 1950 (“the ECHR”) and the International Covenant on Civil and Political Rights 1966 (“the ICCPR”)

Given that the starting point of every speech about this topic cannot be different from the International framework as in this matter human rights play a fundamental role: firstly the European Convention of Human Rights 1950 (“the ECHR”) and the International Covenant on Civil and Political Rights 1966 (“the ICCPR”).

On one side infact, the [right to a fair trial](#) ex [article 6 of the European Convention](#) ECHR means everyone is presumed to be innocent until guilty is demonstrated and he/she is entitled to have a legal representation to prepare own defence¹². On the other side, the [right to liberty](#) ex article 5 of ECHR ensures everyone to be imprisoned only in certain circumstances and, if arrested, he/she has to be told why and given speedy access to a judge¹³. Moreover [freedom of speech](#) ex article 10 of

¹² Art.6 (2) and (3) ECHR states:

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

¹³ Art. 5 ECHR states:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;

ECHR gives everyone the possibility to contact people who can help to investigate in the case and to collect proves to demonstrate every person innocence¹⁴.

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

¹⁴ Art.10 ECHR states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In the same direction article 14(6) of the International Covenant on Civil and Political Rights 1966 (“the ICCPR”), provides:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Nonetheless, we know that in practice in every legal system miscarriages of justice do happen. When they do, human rights are especially important because legal protection they give can help to expose the wrong that has been done.

In European Court of Human Rights case law, the leading case on compensation for miscarriage of justice is *Allen v. the United Kingdom* [GC] - 25424/09 Judgment 12.7.2013, stating that refusal of compensation following reversal of applicant’s conviction of criminal offence does not represent a violation of art. 6 par. 2 of ECHR. The question before the Court was not whether the refusal of compensation *per se* violated the applicant’s right to be presumed innocent (Article 6 § 2 did not guarantee a person acquitted of a criminal offence a right to compensation for a miscarriage of justice), but whether the individual decision refusing compensation in the applicant’s case, including the reasoning and the language used, was compatible with the presumption of innocence.

3. Miscarriage of justice in the English legal system

3.a) the doctrinal level

The expression *miscarriage of justice* - which literally indicates the failure to achieve the purpose of an action - very popular in the English legal experience, generically indicates the hypothesis in which the outcome of a given process was actually contrary to justice for a variety of causes, among which mainly the judicial error, understood as an error of judgment, the irregularity in its conduct, the lack of knowledge of decisive evidence, the fraudulent behavior of some of the protagonists in the trial

himself, etc. As it has been well specified at a doctrinal level¹⁵, there may be the following miscarriage of justice hypotheses based on the violation of individual rights. In particular, the cases in which the suspect or the accused or the convicted suffer violation of their rights by the State as a result of: 1) irregular proceedings; 2) the erroneous application of the law; 3) the lack of factual basis for the application of sanctions; 4) the disproportion between the treatment inflicted on them and the need to defend the rights of the community; 5) the inadequate protection of individual rights compared to those of those who have attacked them; 6) legislative measures then declared illegitimate.

As for hypothesis 1) it occurs when individual rights are infringed due to irregular proceedings, such as in the case of unlawful arrest or detention. The hypothesis occurs even if the violation occurs due to the bias of the judge or the jury or the manipulation of evidence or, finally, the unfaithful patronage of the defenders. As for hypothesis 2) it occurs when the violation of individual rights depends on an intrinsically unjust law (rather than unjustly applied), or on discrimination to the detriment of the accused, from any cause depending. Hypothesis 3) occurs if there is no factual justification for the sentence (this is the case, for example, of the sentence resulting from an exchange of person). The State must, in fact, ensure the reliability of the jury and the relative ability not to make errors of evaluation and judgment that can be resolved in unjust convictions. Hypothesis 4) occurs when, for example, restrictive measures of personal freedom are adopted or sentences that are completely disproportionate to the seriousness of the crime are inflicted. Hypothesis 5), which can be briefly described as miscarriage of justice deriving from the inadequate protection of the rights of the victims of others crimes, can arise in a wide range of hypotheses, such as, for example, the failure to prosecute certain categories of crimes or the failure to plead guilty to a defendant due to pressure and intimidation suffered by the jury, as occurred in some cases of proceedings against Northern Irish terrorists or, finally, the oppressive methods of conducting trial examination of victims of sexual violence. Hypothesis 6) refers to the case of the existence and application of

¹⁵ C.WALKER, in C.WALKER and K.STRAMER, *Miscarriage of Justice – a Review of Justice in Error*, London, 1999, p. 31; S.Greer, *Miscarriages of Justice Reconsidered*, in the *Modern Law Review*, 1994, pp.58 ss. Not all doctrine agrees on the requirement of violation of individual rights to constitute a miscarriage of justice, as R.Nobles - D.Schiff, *Miscarriages of Justice: A Systems Approach*, in *The Modern Law Review*, 1995, p.299 ff., for whom cases such as the *Birmingham six* concern the erroneous assessment of evidence rather than the violation of individual rights.

inherently unjust or ineffective laws against victims of particular categories of illicit. All the hypotheses here examined can be briefly described as direct miscarriages. Then there is a seventh category, consisting of the so-called indirect miscarriages, which affect the community as a whole, as when there is a generalized inefficiency in the general system of administration of justice¹⁶.

It has been well said by doctrine¹⁷ that four profiles can be deduced from the concept of miscarriage adopted up to now, always in the same way as the specialist doctrine cited several times. Firstly, the notion is not confined only to the hypotheses that occur in court, and in any case, within the criminal justice system. In fact, there may be miscarriages also linked to police activities, such as the illegitimate use of powers of personal coercion. Secondly, there may be miscarriages connected not only with the laws themselves but also with their erroneous application. Thirdly, for a miscarriage to occur it is necessary to have the defective exercise of a public function, both that it is directly carried out by the State and that it has been delegated to private subjects. Fourthly, the occurrence of a miscarriage of justice hypothesis is inextricably linked to the violation of individual or collective rights and implies the duty of the State to intervene to eliminate it.

3.b) the section 133 of the 1988 Criminal Justice Act and the UK Supreme Court

case-law

On a legislative level miscarriage of justice arises under section 133¹⁸ of the Criminal Justice Act 1988 (“the 1988 Act”) as amended by the Anti-Social Behaviour, Crime and Policing Act 2014.

¹⁶ The most alarming cases of misadministration of justice that provoke citizens' trust in it can well be ascribed to this category: see also *R. v. Enson* (1989) 2 All ER 586.

¹⁷ WALKER, in WALKER AND STRAMER, *Miscarriage of Justice – a Review of Justice*, cit., p.32.

¹⁸ Section 133(1) as originally enacted provided: *Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.*

And infact, section 133 of the Criminal Justice Act of 1988 states that a compensatory obligation is incumbent on the State in favor of anyone who has served a sentence unjustly inflicted on him following a miscarriage of justice concretely manifested through a new fact, or a newly discovered fact, which demonstrates beyond any reasonable doubt that the original sentence - subsequently annulled or followed by judicial pardon - was vitiated, in fact, by a serious form of disadministration of justice.

Section 133 was enacted to give effect to the UK's international obligations under cited article 14(6) of the International Covenant on Civil and Political Rights 1966 ("the ICCPR"), which was ratified by the UK in May 1976. There is an almost identical provision in article 3 of the Seventh Protocol ("A3P7") of the European Convention on Human Rights ("ECHR").

The expression *miscarriage of justice* was not defined in the statute when originally it was enacted. So judges called to rule on the compensatory complaints made by the unjustly convicted had to verify whether in the specific procedural circumstance a qualified miscarriage of justice had taken place in the sense required by section 133.

Even though already in a case *R. v. Wilkes* of 1770¹⁹, the famous Lord Mansfield proclaimed the judge's duty to remedy the judicial error, whatever the consequences might be, the most recent English case law formed under the leadership of the newly constituted Supreme Court has found itself engaged in a work that is placed in an intermediate position between the systematic-conceptual definition of the recurrent phenomenon of miscarriages of justice and the determination of forms of protection, and remedies in general, even of a substantial nature to be recognized for the benefit of those who have suffered from it²⁰.

The primary reason for caution that inspired the activity of English Courts over time has been to avoid uncritical and mechanical coincidences between the annulment of convictions resulting from the occurrence or the discovery of new evidence and the undue granting of compensatory measures. This consideration of judicial policy has led the Supreme Court, from its earliest experiences, to develop in a taxonomic form - also making use of previous decisions of the lower courts, and in particular of Court

¹⁹ *R. v. Wilkes* (1770) 98 ER 347.

²⁰ M.SERIO, *Osservazioni Su Miscarriage of justice e diritti umani: un'indagine comparatistica*, cit., p. 1027.

of Appeal - the factual and legal conditions implying the declaration of the recurrence, in the perspective of section 133 cited, of a miscarriage of justice. So this lack of definition gave rise to a series of cases in which the courts sought to interpret the meaning of the term, culminating in the Supreme Court of UK decision in *R (Adams) v Secretary of State for Justice*²¹ of 2011, in which four categories of case were considered as candidates for satisfying the statutory definition:

- 1) where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted, as reformulated by the Supreme Court;
- 2) where the fresh evidence so undermines the evidence against the defendant that no conviction could possibly be based upon it;
- 3) where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant;
- 4) where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.

In *Adams* case, by a majority the Supreme Court held that the term included only category 1) and 2) cases, but no others. The minority view was that the term was restricted to category 1) cases.

Following the previous uncertainty as to its meaning and the litigation that it generated, Parliament inserted, with effect from 13 March 2014, a new statutory definition of *miscarriage of justice* in sub-section (1ZA) of section 133. The new definition provides: *For the purpose of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal offence in England and Wales....if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence (and references in the rest of this Part to a miscarriage of justice are to be construed accordingly)*. So section 133 of the Criminal Justice Act 1988 today provides for compensation by the Secretary of State of those whose convictions have been quashed in a narrow set of circumstances: on appeals out of time or on a reference by the Criminal Cases Review

²¹ *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48.

Commission (CRCC)²², when a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice. The previous leading case of *R (on the application of Mullen) v Secretary of State*²³ of 2004 presented differing views as to whether applicants had to establish factual innocence to warrant compensation under the scheme, with Lord Steyn finding that they did and Lord Bingham indicating that miscarriage of justice is a somewhat wider concept.

Later two conjoined appeals required the Supreme Court to address this perceived conflict and clarify the meaning of miscarriage of justice under the statute. Infact in the joined cases *R (Hallam) v Secretary of State for Justice*; *R (Nealon) v Secretary of State for Justice*²⁴ of 2019, the UK Supreme Court addressed whether the UK's scheme for compensating victims of a miscarriage of justice is compatible with the presumption of innocence, as guaranteed by Article 6(2) of the European Convention on Human Rights (ECHR). By a majority of five to two, the Court held that the scheme was compliant. In Court's opinion, it happens from time to time that a person's conviction is overturned after he/she has served a considerable period of time in prison for an offence of which, in the eyes of the law, he/she is not guilty. Inevitably the question arises whether, or to what extent, such a person should be awarded financial compensation. The International Covenant on Civil and Political Rights (ICCPR) imposes an obligation on States to provide compensation for a person convicted of a criminal offence where he succeeds subsequently in having that conviction overturned because a new fact shows conclusively that he has been the victim of a miscarriage of justice. A similar obligation is contained in Protocol 7 to the ECHR.

²² A Royal Commission, the first of the Thatcher and post-Thatcher eras, was appointed in the summer of 1991 under the chairmanship of Lord Runciman to <examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources>. See *The Report of the Royal Commission on Criminal Justice*, London: HMSO, 1993. The Recommendations of the Royal Commission were implemented in the *Criminal Appeal Act* 1995, establishing the Criminal Cases Review Commission (CCRC), who began to work in 1997. See S.Field - P. Thomas, *Justice and efficiency*, Royal Commission on Criminal Justice in *Journal of Law and Society*, 1994, p.155; R.Nobles - D.Schiff, *Miscarriages of Justice: A Systems Approach*, cit., pp. 299 ss.

²³ *R (on the application of Mullen) v Secretary of State* [2004] UKHL 18.

²⁴ *R (Hallam) v Secretary of State for Justice*; *R (Nealon) v Secretary of State for Justice* [2019] UKSC 2.

Inevitably, such provisions give rise to the difficult question of what constitutes a miscarriage of justice for the purposes of compensation where a conviction has been quashed on the emergence of a new fact. Should it be confined to situations where a new fact (or newly discovered fact) shows that the person did not commit the crime in question? An example might be newly discovered DNA evidence or a in an alibi exonerating the convicted person. Alternatively, should a miscarriage of justice extend to situations where the conviction is subsequently quashed because a new fact raises at least a reasonable doubt over his guilt, but falls significantly short of establishing that he did not commit the offence? Or, should the cut-off point fall somewhere in between these two situations? If the bar is set too high, many individuals who are factually innocent will be denied compensation because of the inherent difficulties in proving factual innocence. On the other hand, if the bar is set too low, it will open the door to some factually guilty people qualifying for compensation.

A separate, but related, question is whether compensation should extend to situations where the conviction is quashed because the investigation, prosecution or trial was tainted by egregious corruption, even though there is still sufficient admissible evidence to warrant a conviction.

Pursuant to its obligation under the ICCPR, the UK provided for a compensation scheme in the Criminal Justice Act 1988. It applies to persons who were convicted of a criminal offence only to have that conviction quashed on an appeal out of time as a result of a new or newly discovered fact. Under the scheme, it is not sufficient to show that a new fact has resulted in the quashing of the conviction without an order for a re-trial. The applicant must also persuade the Secretary of State that the new fact shows conclusively that he has been the victim of a miscarriage of justice.

As originally enacted, the 1988 Act did not define a miscarriage of justice. Only in 2011, in *Adams case* (2011), the Supreme Court identified four possible categories of progressively wider scope:

1. the new fact shows clearly that the defendant is innocent of the crime of which he was convicted;
2. the new fact so undermines the evidence against the defendant that no conviction could possibly be based upon it;
3. the new fact renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant; and
4. something had gone seriously wrong

in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.

By a five to four majority, the Court in *Adams* confined a miscarriage of justice for the purposes of the compensation scheme to categories 1 and 2. It seems that the minority would have been more stringent and confined it to category 1. Even on the majority approach, many persons who had served long prison sentences for offences, of which they were not guilty under criminal law, would not be considered to have suffered a miscarriage of justice to qualify for compensation within the scope of the scheme.

Despite the arguably high bar for compensation set by the majority in *Adams*, Parliament raised it even higher by an amendment performed by the 2014 Anti-Social Behaviour, Crime and Policing Act. This confines a miscarriage of justice to situations where the new fact shows beyond a reasonable doubt that the applicant did not commit the offence (effectively category 1 situations). That, of course, looks very like a requirement on the acquitted applicant to prove his innocence beyond a reasonable doubt.

In 2019 *Hallam* and *Nealon* case, the Supreme Court was asked to rule on whether the new test was compatible with the Art.6 (2) ECHR presumption of innocence which states: *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

The applicant in *Hallam* had been convicted of murder and related offences. He had spent almost eight years in prison before his conviction was quashed on the basis of a new fact that undermined the prosecution case to the extent that the conviction was unsafe. Critically, the new fact was not sufficient to prove beyond a reasonable doubt that the applicant did not commit the offence (category 1). Nor was it sufficient to establish that the evidence against the applicant was such that no conviction could possibly be based upon it (category 2). In effect it was a category 3 situation. Applying the statutory test, the Secretary of State refused the application for compensation on the basis that the new fact did not show beyond a reasonable doubt that the applicant had not committed the offence.

The applicant in *Nealon* had his conviction for attempted rape quashed by the Court of Appeal on the basis of a new fact after he had served seventeen years in prison.

As with *Hallam*, the Court of Appeal found that the new evidence did not completely demolish the prosecution's case, but substantially undermined it to the extent that the applicant's conviction was unsafe. In other words, it was a category 3 case. His application for compensation was also refused by the Secretary of State on the basis that the new fact did not show beyond a reasonable doubt that the applicant had not committed the offence.

There was a general consensus in the Supreme Court in these cases that setting the test at the category 3 threshold would not conflict with the presumption of innocence. An acquitted person's innocence is not necessarily called into question by saying that there remained evidence upon which a jury might convict. This had effectively been accepted by the Grand Chamber decision of the European Court of Human Rights (ECtHR) in *Allen v United Kingdom* of 2013. Although the Supreme Court in *Hallam* and *Nealon* was addressing whether the current category 1 threshold violated the presumption of innocence, the real issue was whether the threshold should be set at category 2; namely that the new fact had demolished the case against the person to the extent that no conviction could possibly be based upon it? The ECtHR in *Allen* gave a very strong indication that it would be a violation of the presumption of innocence to set the threshold higher at category 1 by requiring the applicant to prove that he did not commit the offence.

By a majority of five to two, the Supreme Court held that the current scheme (confining compensation to applicants who could show that they did not commit the offence) does not conflict with the presumption of innocence. However, the majority judges did not speak entirely with one voice in their reasoning. Four of them did not feel bound to follow the ECtHR lead in *Allen*, as they considered that its case law on the matter was not yet settled. The point at issue had yet to be the subject of a direct decision by the ECtHR and, at least some of them (Lord Mance and Lady Hale), were not confident that the ECtHR would find a violation of the presumption of innocence if called upon to decide it.

Lord Mance would have been content to dismiss the applications for compensation in both cases because neither the test nor the Secretary of State's decisions refusing compensation involved any suggestion that the applicants should have been convicted. Nevertheless, he went on to consider whether it would be contrary to the

presumption of innocence to confine the compensation scheme to category 1 situations.

He deduced its decision from *Allen* case in which the ECtHR would adopt category 2 as the cut-off point. In other words, there would not necessarily be any violation in requiring an applicant to persuade the Secretary of State that the new fact so undermined the evidence against him that no conviction could possibly be based upon it. If that was compatible with the presumption of innocence, he could see no reason why it would be incompatible to require the applicant to show that the new fact established his innocence (category 1). Lord Mance could see little, if any, practicable distinction between the two categories from the perspective of the presumption of innocence. Lord Lloyd Jones and, arguably, Lord Wilson, endorsed his interpretation.

It is submitted that there are a few problems with Lord Mance's reasoning. The ECtHR has yet to rule on whether it would be compatible with the presumption of innocence to require an applicant to persuade the Secretary of State that the new fact so undermined the evidence against him that no conviction could possibly be based upon it. That issue did not arise for decision in *Allen*. Moreover, the mere fact that the ECtHR deemed category 3 compatible with the presumption of innocence does not necessarily preclude it from finding category 2 incompatible. The categories were formulated by Lord Mance himself from the Supreme Court judgments in *Adams*. They do not possess a definitive status, and there is no reason why they might not be recast by the ECtHR when a category 2 type situation arises for decision before it.

Lord Hughes took a slightly different approach. He proceeded on the basis that the compensation scheme and the presumption of innocence are directed to two different issues. The former is concerned with whether the applicant is exonerated on the facts (and satisfied the other conditions for eligibility), while the latter is concerned with the proof of guilt beyond a reasonable doubt in a criminal trial. In his view, the presumption of innocence does not protect an acquitted person's conduct from subsequent examination in civil proceedings conducted on a lesser standard than proof beyond a reasonable doubt. He went on to say that an applicant's presumption of innocence was not infringed by requiring him to prove, for the purposes of compensation, that he was innocent of the offence. Innocent in the context of the compensation scheme meant exoneration on the facts while, in the context of the

presumption, it means not convicted or not guilty in accordance with the criminal standard of proof beyond a reasonable doubt. It is submitted that this reflects a highly artificial approach to the substantive issues at stake. Arguably, it also raises the peculiar prospect that the category 2 situation could violate the presumption of innocence even though a category 1 situation did not.

Lady Hale seemed more concerned with how a category 1 or category 2 test was applied in an individual case, as distinct from their formulation. For her, the key issue was whether the language used in determining a claim for compensation avoided any assertion to the effect that the accused was guilty of the offence. Indeed, she felt that it would not be impossible to explain a refusal of compensation under the current test (category 1) without necessarily using language that casts doubt on the acquittal. In other words, it did not necessarily violate the presumption of innocence. Ultimately, however, she felt it would be better to leave the matter until a category 2 situation arose where it might be more difficult to explain the difference with category 1 without necessarily using language that casts doubt on the acquittal. Since the facts of the instant cases were category 3 situations, she felt it was not necessary to address the matter.

Lord Reed (with whom Lord Kerr essentially agreed) delivered the main judgment for the minority. He relied heavily on the guidance offered by the ECtHR in *Allen* to the effect that requiring an applicant to establish that he did not commit the offence would be incompatible with the presumption of innocence. He explained that a decision by the Secretary of State that a new fact did not establish the applicant's innocence beyond a reasonable doubt would be the same as to casting doubts on his/her acquittal in the criminal proceeding. Accordingly, the test would almost inevitably provoke a clash with the applicant's presumption of innocence. Lord Reed doubted very much whether the current test would be in accordance with the ECtHR.

The minority's interpretation is surely more in accordance with the conventional understanding of the presumption of innocence. The majority's interpretation means that compensation will be refused where the acquitted applicant can do no more than prove beyond a reasonable doubt that a new fact shows that he should never have been convicted. For the Secretary of State to say that he/she is not persuaded beyond a reasonable doubt that such an applicant is innocent surely raises doubts over the applicant's acquittal. It is difficult to accept that this would not violate the applicant's

presumption of innocence. It also means that many persons who are factually innocent of a crime for which they spend many years in prison will be denied compensation, even though a new fact shows that they should never have been convicted before.

It must be acknowledged that the interaction between an acquittal (or the quashing of a conviction) and subsequent proceedings in the same matter presents complex challenges for the presumption of innocence. This is due in large measure to the diversity of situations in which the issue can arise. These range over applications by the acquitted person for costs or compensation for time spent in prison; claims for compensation by a third party against the acquitted person; disciplinary action against the acquitted person; child care proceedings; and more besides. Attempting to deal with these situations, and the different factual permutations within each, on a case by case basis as they arise has resulted in a complex, and not always coherent, case law on the presumption of innocence. It is difficult to extract clear and comprehensive principles from it. Admittedly, the decision of the Grand Chamber of the ECtHR in *Allen* has gone some distance towards providing a degree of principled coherence from the case law, but there is still some distance to go. Unfortunately, the judgments in the Supreme Court in the *Hallam* and *Nealon* cases have not made a significant contribution in this direction. Further clarification will be still required from the ECtHR.

Finally, it is worth adverting to a related issue that was discussed substantively in most of the judgments in the *Hallam* and *Nealon* cases. This concerns whether the Art.6 (2) presumption is applicable at all to a compensation procedure that is triggered later in time to, and separate from, the criminal proceedings in question. At least some of the judges were inclined to the view that it had no application as it applied to “a person charged with a criminal offence [...]” and, as such, had no application after the charge had been finally disposed of in the criminal proceedings. The Supreme Court’s decision in *Adams*, for example, has been interpreted to the effect that it is not so applicable. The later decision of the ECtHR in *Allen*, however, was emphatic that the presumption of innocence is not confined to the criminal proceedings. It extends to subsequent proceedings, and to the actions and decisions of public officials, in which the innocence of a person is called into question after he has been acquitted or had his conviction quashed. The justification proffered is the need to ensure that the

protection afforded by the presumption is not rendered illusory or theoretical. In the *Hallam* and *Nealon* cases, it is not always clear whether the majority judges are addressing the applicability issue or the violation issue. What is clear is that at least some of them are distinctly uncomfortable with the ECtHR's position on the former.

4. Judicial wrong in the Italian legal system

The Italian Constitution in Article 24 paragraph 4²⁵ expressly guarantees the possibility of repairing judicial wrongs, referring to legislator for the indication of the conditions and forms suitable for this purpose. In doing it, it grants the victims two distinct rights: on one hand the right to act for the identification and correction of the error, on the other hand, the right to compensation for the unfair limitation of personal freedom deriving from the unjust conviction²⁶.

Italian legislator by Articles 629-633 and 643 of criminal procedure code implemented the constitutional rule following the same two lines of legal protection. Article 629 introduced the so called revision, that is an extraordinary appeal aimed at the annulment of unjust conviction while Article 643 provides an economic compensation for the damages suffered as a result of the wrongful conviction²⁷. For this purpose Article 643, paragraph 1, as it expressly refers to judicial wrongs, which

²⁵ Art.24 par.4 of Italian Constitution states: *The law shall determine the conditions and forms regulating damages in case of judicial errors.*

²⁶ M.GIALUZ, *Remedies for miscarriage of justice in Italy*, in L.Luparia (ed.), *Understanding wrongful conviction. The protection of the innocent across Europe and America*, 2015, p.117.

²⁷ The rule of Article 630 clearly provides for the hypotheses in which a definitive sentence can be revised: a) *if the facts underlying of the judgment or the criminal decree of conviction are incompatible with those established in another final criminal judgment by the ordinary court or by a special court;* b) *if the judgment or criminal decree of conviction order considered the existence of the offence against the convicted person as a result of a judgment of the civil or administrative court, subsequently revoked, which decided on one of the questions referred for a preliminary ruling in Article 3 or one of the questions referred for in Article 479;* c) *if, after conviction, new evidence is found or is discovered which, either independently or together with already assessed evidence, proves that the convicted person must be acquitted in accordance with Article 631;* d) *if it is proven that the judgment of conviction has been delivered on the basis of or as a consequence of falsehood in acts or in court or another fact provided for by law as a crime.* Then the subsequent rule of Article 643 criminal procedural code provides for the hypotheses of compensation of the damage derived by the wrong, that are : 1. *If you have not sued for misconduct or gross misconduct, you are entitled to reparation commensurate on the basis of the length of imprisonment and of the personal and family consequences of the sentence.* 2. *The compensation is carried out by payment of a sum of money or, taking into account the conditions of the person entitled and the nature of the damage, by an annuity.* 3. *The right to compensation is excluded for that part of the sentence which states for a different offence.*

take the form of the unjust conviction, and the consequences of the conviction, requires the Court to take into account, in addition to the prejudices deriving from the pre-trial detention suffered, also the prejudices attributable to the criminal trial promoted against the instant and not only those related to the unjust conviction. Furthermore, more recent legislative interventions expanded the range of tools exploitable by convicted after final judgments, as the so called rescission, provided by the new Article 629-bis²⁸, that is another extraordinary appeal aimed at removing the conviction in case of a trial conducted entirely in absence of the accused, who was unaware of the ongoing proceeding.

Revision is in Italian law the main tool to ascertain a judicial error. By it an irrevocable judgment of conviction can be reversed because of the existence of new cognitive elements which reveal the erroneous evaluation of the facts on which the final decision has been built on. Therefore the hypotheses of revision are intended to remedy a substantial and not procedural injustice of the ruling, i.e. an error in the reconstruction of the facts before the judge, expressing an antinomy between the definitive statement of guilt and the ascertained historical truth. So it has been well said²⁹ that between revision and judicial error there is a mutual relationship as the alleged error is the prerequisite for the request of revision while on the other side the judicial error acquires legal significance only by the revision judgment. Indeed only the errors emerging from new facts can justify the overcoming of a final judgment, thus avoiding the review may turn into a fourth degree of judgment based on a mere re-evaluation of the same facts underlying the previous judgments³⁰. These hypotheses must be integrated with another one provided by Constitutional Court decision n° 113 of 7 April 2011, by which revision is allowed when the reopening of the proceeding is necessary to comply with a final judgment of the European Court of Human Rights, although this hypothesis differs from a functional point of view as

²⁸ Inserted by Article 1 par. 71 Law n° 103 of 23 June 2017.

²⁹ R.DEL COCO, *Giudicato, progresso scientifico e prova nuova. Limiti e prospettive del giudizio di revisione*, in L.Luparia, L.Marafioti & G. Paolozzi (eds), *Errori giudiziari e background processuale*, 2017, p.101.

³⁰ As stated by Art. 637 par. 3 criminal procedural code. See A.PRESUTTI, *La revisione del giudicato penale tra impugnazione straordinaria e quarto grado di giudizio*, 3 Studium Iuris, 2009, p.245.

it doesn't imply giving the Court new evidence proving the convicted's innocence as the other hypotheses provided for Art.630 do.

Focusing on the compensatory aspect, which represents the objective of the present research, Art.643 entitles victims of a judicial error to a compensation in proportion to the duration of sentence or confinement that may have been served and to the personal and family consequences resulting from the conviction³¹. The request can be proposed by the victim within 2 years of the final judgment³² before the Court of Appeal who decides on it in chambers.

Specifically clarifying the meaning and the scope of Art.643, by judgment of 25 February 2016 n°7787 the Court of Cassation ruled on the *vexata quaestio* of compensation for unjust detention and for judicial wrong, as well as on the criteria for its correct quantification. First of all, the Italian Supreme Court underlined it is appropriate to distinguish two different hypotheses (unjust detention and judicial wrong), which are different in terms of conditions and applicable discipline, although the Court of Cassation expressed itself more strongly on the second legal model. For this purpose Article 314 of criminal procedure code which provides that *those who are acquitted with irrevocable judgment because the fact does not exist, for not having committed the fact, because the fact does not constitute a crime or is not provided for by law as a crime, has the right to fair reparation for the pre-trial detention suffered, if it has not given you or contributed to sue you for malicious misconduct or gross negligence [...]* is applicable. Also in a European framework the Italian Supreme Court acknowledges that compensation for judicial wrongs is recognised by various regulatory sources, that is, by art. 3 of the Protocol to the European Convention on Human Rights, art. 14.6 of the International Covenant on Civil and Political Rights and Art. 85.2 of the Statute of the International Criminal Court. Moreover the Court underlines the central role developed in Italian legal system by the mentioned art. 24, paragraph 4 of Constitution (which provides that *law determines the conditions and ways for the reparation of judicial errors*) beside art. 643 c.p.p., where it is expected that the person who was acquitted during the revision judgment, if he did not give cause with malicious misconduct or gross negligence, is entitled to

³¹ See L.SCOMPARIN, *Errore giudiziario (Riparazione dell')*, XII Digesto penale, 1997, p.319; E.TURCO, *L'equa riparazione tra errore giudiziario e ingiusta detenzione*, Giuffrè 2007; ID., *Errore giudiziario e ingiusta detenzione (riparazione di)*, Foro Italiano, 2013, 2727, 10.

³² See Court of Cassation n° 31432 of 10 August 2021.

a compensation commensurate with the length of imprisonment and the personal and family consequences deriving from the conviction.

It is interesting to note that the cited 2016 Court of Cassation judgment established³³ that, in the settlement of non-pecuniary damage, account must be taken of all the facets of which the specific case is composed, such as "the interruption of work activities" and affective ones, as well as the "[...] pejorative and radical change in life habits".

In particular, the Court of Cassation has considered "unjustly restrictive" the principle affirmed by the Court of first instance that "the only refundable biological damage" would be that related to the period of unjust detention and not that deriving from the prejudices suffered as a result of the "erroneous" conviction. This ruling does not appear to be accompanied by particular innovativeness, even in view of previous rulings by the Supreme Court³⁴. In fact, the principle that biological damage consists of the impairment of the psycho-physical integrity of the person accompanied by a loss or reduction of vital functions can be substantially consolidated. Furthermore, the Court itself also pointed out that, for the purposes of determining that damage, it was not necessary to observe the table criterion adopted by civil caselaw as it must be considered that the non-patrimonial nature of this type of damage also makes it possible to resort to equitative criteria, provided that they are not illogical and lead to a result that does not deviate unreasonably and unjustifiably from the above-mentioned table parameters³⁵.

With regard to economic damage as loss of profit, the Court of Cassation, again, seems to express itself in the wake of Italian legal tradition, recognizing the admissibility of the use of equitative criteria in the quantification of damage, even in the absence of the express reference to fair compensation in the rule relating to the recognition of reparation for judicial error (ex Art. 643).

Beyond considerations on the evidence of the damage - on which, of course, the Court did not rule, referring these aspects to the revision on the substance - the

³³ Starting from a previous decision, 18 March 2009, n. 22688 on existential damage.

³⁴ Cfr judgment Cass. No 22444/15, and above all judgment Cass. No. 2050/2004, so-called "Barillà case".

³⁵ See in this sense, Cass. no. 36442 of 23/05/2013.

Italian Supreme Court seems to have confirmed once again the mixed, indemnity and compensation nature of the remedy for judicial error, which is now consolidated both in doctrine and case law³⁶.

Once again - as already noted in the present discussion of the topic with regard to UK legal system - the influence of European law on the Italian rules on judicial error appears unavoidable, as Italian Supreme Court, in basing the victim's right to reparation on international law rules, aligns with the other Member States case law in the recognition of a common core in terms of judicial error, characterized by the need on one hand to ensure compliance with all the procedural rules in force within own legal system, and on the other hand to restore as completely as possible the victims of any judicial errors as a violation of a human right was committed³⁷.

³⁶ See also Court of Cassation, section IV, n° 273403 of 4 April 2018.

³⁷ Once again the national judge is called to come to terms with European case law. Previously the European Court of Human Rights in the case *Lorenzetti v. Italy* on 10 April 2012, in relation to the proceeding of reparation for unjust detention pursuant to art. 314 and 315 of the Italian Criminal Procedure Code, recognized the violation of art. 6, par. 1, ECHR, on the subject of "the right to a fair trial", due to the lack of publicity of the chamber ritual which is celebrated before the Court of Appeal. In particular, the European Court, underlined the importance that the publicity of the hearing assumes within the framework of the principles outlined by the Convention and also recalled, in the light of its own caselaw, the cases in which it may be considered possible to derogate from the principle in question (such as those that contemplate highly technical matters), observing that, in the proceeding for the reparation of unjust detention - where the judge is called to evaluate "whether the victim has contributed to causing his detention intentionally or through fault serious" - "no exceptional circumstance justifies refraining from holding a hearing under the scrutiny of the public, since we are not dealing with questions of a technical nature that can be settled satisfactorily solely on the basis of the file". Having taken note of this ruling, the joint sections of Court of Cassation (by ordinance 18 October 2012) could not escape the «obligation» to invoke the intervention of the Constitutional Court, declaring the relevance and the not manifest groundlessness - with reference to the art. 111, 1st paragraph, and 117, 1st paragraph, of the Constitution - the question of constitutional legitimacy of art. 315, 3rd paragraph, criminal procedure code in relation to art. 646, paragraph, in the part in which it does not allow that, at the request of the interested parties, the proceeding for the reparation is carried out, before the court of appeal, in the forms of a public hearing. On that occasion, however, the Constitutional Court had declared the question inadmissible due to lack of relevance, since in the main proceedings the party had never requested a public discussion. About the influence of European Court of Human Rights case law on Italian law, see AA.VV., *Giurisprudenza europea e processo penale - Nuovi parametri di costituzionalità, obbligo di conformarsi alle decisioni della corte europea, persistenti nodi di criticità nel diritto interno* a cura di R.E. KOSTORIS e A. BALSAMO, Torino, 2008; S. BUZZELLI-C. PECORELLA, *Il caso Scoppola davanti alla corte di Strasburgo*, in *Riv. it. dir. e proc. pen.*, 389; R. CONTI, *La Corte costituzionale viaggia verso i diritti Cedu: prima fermata verso Strasburgo*, in *Corriere giur.*, 2008, 205 ss.; U. DRAETTA, *Elementi di diritto dell'Unione europea - Parte istituzionale*, Milano, 2009, 332 ss.; M. LUCIANI, *Alcuni interrogativi sul nuovo corso della giurisprudenza costituzionale in ordine ai rapporti fra diritto italiano e diritto internazionale*, in *Corriere giur.*, 2008, 201 ss.; R. MASTROIANNI, *Conflitti tra norme interne e norme comunitarie non dotate di efficacia diretta: il ruolo della Corte costituzionale*, in *Dir. Unione europea*, 2007, 585, ss.; B. NASCIBENE, *Violazione «strutturale», violazione «grave» ed esigenze interpretative della convenzione europea dei diritti dell'uomo*, in *Riv. dir. internaz. privato e proc.*, 2006, 645 ss.; L. SALVATO, *Il rapporto tra norme interne, diritto dell'Ue e disposizioni della Cedu: il punto sulla giurisprudenza*, in *Corriere giur.*, 2011, 333 ss.; A. SACCUCCI, *Rango e applicazione della Cedu nell'ordinamento interno secondo le sentenze della Corte*

Moreover, the reception into Italian criminal procedure code of the rule of assessment of "beyond any reasonable doubt (b.a.r.d.)"³⁸, carried out within the so-called reform of *due process*³⁹, oriented to strengthen the accusatory structure of the Italian criminal trial also by the reception of some elements of the common law proceedings and, in particular, of North-American one that must concile with judicial wrong as it derives from a manifest illogic decision. In the US trial⁴⁰, the exhortation to judge "beyond reasonable doubt" is, in fact, part of the instructions that judge must give to the jury, who decides by an unjustified verdict: it is therefore a recommendation that, in that system, has no consequences on the legal reasoning.

After the reception of the formula into the Italian code, the prevailing doctrine linked the criterion to the presumption of not guilty contained in art. 27, paragraph 2 of

costituzionale sull'art. 117 Cost.: un passo avanti, due indietro?, in *Dir. uomo*, 2007, fasc. 3, 26 ss.; E. SCODITTI, *Il giudice comune e la tutela dei diritti fondamentali di fonte sovranazionale*, in *Foro it.*, 2010, V, 42 ss.; G. TESAURIO, *Diritto dell'Unione europea*, Padova, 2010; A. TIZZANO, *Ancora sui rapporti tra corti europee: principi comunitari e c.d. controlimiti costituzionali*, in *Diritto comunitario e diritto interno*, Milano, 2008, 479 ss.

³⁸ Art.5 of Law n. 46 of 2006 states:

In article 533 of the criminal procedure code, paragraph 1 is replaced by the following: <1. *The judge pronounces a sentence if the accused is found guilty of the crime against him beyond any reasonable doubt. With the sentence, the judge applies the penalty and any security measures*>. For a historical reconstruction of this rule in common law see E.DEZZA, *Breve storia del processo penale inglese*, Torino, 2009, p.108; J.H.LANGBEIN, *The Origins of Adversary Criminal Trial*, Oxford, 2003, p. 261; B.SHAPIRO, "Beyond Reasonable Doubt" and "Probable Cause", *Historical Perspectives on the Anglo-American Law of Evidence*, Berkeley-Los Angeles-Oxford, 1991; T.WALDMAN, *Origins of the legal doctrine of reasonable doubt*, in *Journal of the History of Ideas*, 1959, p. 299; J.Q.WHITMAN, *The origins of resonable doubt. Theological roots of the criminal trial*, New Haven-London, 2008. For a theoretic reconstruction: L.LAUDAN, *Truth, Error, and Criminal law. An Essay in Legal Epistemology*, Cambridge, 2006, p. 29. Contra F.STELLA – M.C.GALAVOTTI, "L'oltre il ragionevole dubbio" come standard probatorio. *Le infondate divagazioni dell'epistemologo Laudan*, in *Riv. it. dir. proc. pen.*, 2005, p. 883; F.STELLA, *Giustizia e modernità. La protezione dell'innocente e la tutela delle vittime*, 3^a ed., Milano, 2003, p. 154.

³⁹ As seen in note 9, in the previous due process of law Constitutional Reform, the Art. 1 of Constitutional Law n° 2 of 23 november 1999 introduced new five paragraphs in Art. 111 Italian Constitution. The 1st and the 2nd par. concern every judicial proceeding while the others paragraphs concern only the criminal trial. The new 1st par. states: <Jurisdiction is implemented through due process regulated by law.> The new 2nd par. states: <Every trial takes place in the contradictory of the parties, on equal terms, before a third and impartial judge. The law ensures its reasonable length>.

⁴⁰ The [US Supreme Court](#) held that "the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged." See *Coffin v. United States*, [156 U.S. 432](#) (1895)

Italian Constitution, finding authoritative confirmation in the United Sections of Court of Cassation case law⁴¹.

Italian doctrine also considered that the evaluation criterion in question marks the overcoming of the principle of "free conviction of the judge" and, therefore, of the need for the conviction to be based on the valorization of the evidence taken in adversarial terms which, in order to respect the evaluation fee, must have sufficient demonstrative capacity to neutralize the antagonistic value of the alternative thesis. Sharing this appreciable attempt to positivize the b.a.r.d. formula, the Court considers that the criterion in question cannot be translated into the enhancement of a "psychological state" of the judge, indeed subjective and inscrutable, but it is indicative of the need for the court to make a close comparison with the elements that emerged during the progression of the trial.

Not every "doubt" about the evidential reconstruction adopted by the Court of merit translates into an "obvious illogic", since it is necessary that a defect be found that severely damages the stability of the motivation, highlighting a logical fracture not only "manifest", but also "decisive", as it is essential for maintaining the reasoning justifying the sentence.

That is, it is believed that the evaluation parameter indicated in art. 533 of Code of Criminal Procedure, which requires that the sentence must be pronounced if any "reasonable doubt" is dispelled, operates differently in the merit and legitimacy jurisdiction: only before the merit jurisdiction this parameter can be invoked to obtain an alternative assessment of the evidence on the basis of the defensive allegations; otherwise, in terms of legitimacy, this rule is relevant only to the extent that its non-observance results in a manifest illogicality of the legal reasoning⁴².

⁴¹ Cass. United Sections. no. 18620 of 19/01/2017 ; Cass. United Sections no. 14800 of 21/12/2017.

⁴² Cass. Sez. 2, n. 28957 del 03/04/2017 - dep. 09/06/2017, D'Urso and others.

5. Conclusive remarks

The big gap between the procedures for forming judgments in the considered legal systems transpires in the different consequences that the same legal model produces in practice. In each legal system this model must be reconciled with the respective procedural rules thus determining a significant gap among the areas of protection granted to victims of judicial error in one or in the other system. In this perspective, the narrowing of the area of compensation for damages in the English system, marked by the UK Supreme Court case law above examined, can be compared to the widening of compensation protection in the Italian legal system from the Court of Cassation's point of view. Despite it the present research highlighted the essential key role played by some common constitutional principles which guarantee in each of the considered legal system the correct conduct of the judicial proceedings and the fair, intended as according to law, treatment of every citizen⁴³.

Moreover the brief analysis conducted so far offers interesting insights on a separate but related topic as relevant differences between the considered legal systems are also in terms of judicial liability⁴⁴ as in Italy the civil liability of magistrates — the other system of extra-procedural control of their activity through the threat of the penalty for compensation — is now governed by the new discipline of Law 27 February 2015 no 18 which has made significant changes to previous Vassalli Law 13 April 1988 no 117. The Law 18/2015 significantly reduced the judicial immunity in Italy. The magistrate will not be liable for errors made in the course of the interpretation of rules of law or for the assessment of the fact and evidence, unless it is established — in a positive way — one of the typed hypotheses of gross negligence, listed in the new formula of paragraphs 3 and 3° bis of Law 117/1988, in addition to the cases of malice and denial of justice ex art. 4.

It may be interesting to note how the United Sections of the Court of Cassation, with judgment 3 May 2019 n. 11747, delimited the control on judicial interpretation in the field of civil liability. The serious violation of the law must therefore be identified only in cases where the decision does not appear to be the result of a conscious

⁴³ In this sense D.J.GALLIGAN, *Due process and fair procedures*, Oxford 1996, p. XVIII.

⁴⁴ On the connection between these different topics see Zuckerman, *Miscarriage of Justice and Judicial Responsibility*, 1991, 1 CLR 492.

interpretative process, but contains statements not attributable to it, because they are boundless in an abnormal way and characterized by an unjustified negligence, even before they are inexcusable. So the deviation from a precedent cannot in itself constitute a source of civil liability, because the precedent, although authoritative, is not binding in Italian law: failure to respect the previous one cannot, therefore, constitute, in itself, a serious violation of the law for the purposes of liability.

Under a different perspective in both legal systems it is immediately evident that a first conception of the relationship between miscarriage of justice and legal certainty, the latter understood as an immanent value in every legal system, is not extraneous to a feeling of conflict or, at least, difficult relationship. The reason for this first ideological impact is easily identifiable in the circumstance that both the empirical and the formal notion of judicial error are centered on the misadministration in judicial proceedings of the decision-making rules destined to lead to a just sentence, that is, that really reflects the actual truth⁴⁵. In this sense Blackstone's words sound grave, according to whom it is preferable that ten guilty be subtracted from the sentence to the hypothesis of the conviction of an innocent⁴⁶. It is, in fact, "unsafe" the sentence that lacks a positive confirmation of the logic and congruence of one's argumentative structure, and this also because of the failure to examine not only the *noviter inventum* evidence, but also that *noviter repertum*.

It is equally significant that the most accurate investigations carried out in the common law systems tend to combine the addressed theme with the lintel of those systems, consisting in the compliance with the fundamental principle of the *rule of law*⁴⁷, which must be understood as an affirmation of the primacy and centrality of the law, and its more scrupulous respect, firstly by public authorities. In this direction

⁴⁵ In this sense M.SERIO, *Osservazioni Su Miscarriage of justice e diritti umani: un'indagine comparatistica*, cit., p. 1019.

⁴⁶ W. BLACKSTONE, *Commentaries on the law of England*, 1765 – 1769, vol. IV, p. 27.

⁴⁷ A.V.DICEY, *Introduction to the Study of the Law of the Constitution*, X ed. with a preface by WADE, Londra 1968, p. 183; A.L.GOODHART, *The Rule of Law and Absolute Sovereignty*, in *University of Pennsylvania Law Review*, 1958, p. 945; I.JENNINGS, *The Law and the Constitution*, Londra, 4° ed., 1952, p. 47; R.A. COSGRAVE, *The rule of law: Albert Venn Dicey, Victorian Jurist*, The University of North Carolina Press, 1980; N.S.MARSH, *The rule of law as a supranational concept*, in A.G. GUEST (ed.), *Essays in Jurisprudence, A collective work*, London, 1961; W.LUCY, *Abstraction and the Rule of Law*, in *Oxford Journal of Legal Studies*, 2009, p. 483; M.SERIO, *Brevi osservazioni su rule of law e sviluppi della teoria di Albert Venn Dicey*, in *Persona e attività economica tra libertà e regola. Scritti dedicati a Diego Corapi*, 2016, pp. 233-245.

credit must be given to the doctrinal⁴⁸ opinion according to which the conflict between the rule of *due process* and the truth must be resolved in favor of the protection of individual rights, taking into account that the notions of truth and guilt find a pertinent place within a hierarchy of values, among which fundamental human rights must prevail.

⁴⁸ C.WALKER and K.STARMER, *Miscarriage of Justice*, cit., p. 43.

THE DARK SIDE OF LEGAL TECHNICAL ASSISTANCE: LESSONS FROM FIELDWORK IN KOSOVO

Cristina Poncibò*

Abstract

International organisations and/or the EU or individual states have frequently sponsored and funded projects of legal technical assistance in third countries, including post-conflict areas. They have done so with the intention of promoting and guiding legislative reforms, judicial training, and more generally reforms in the domain of legal systems. These projects would – at least in the intentions of their promoters – have substantially contributed to the social, economic, and political development of these countries in economic, social and political transition. This chapter, which also draws on the author’s fieldwork in Kosovo, emphasises that only the proper practice of comparative law can significantly contribute to limiting the serious shortcomings that characterises these internationally-funded projects.

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Keywords

Law And Development, Legal Technical Assistance, Civil Law, International Organisations, Comparative Law, South-Eastern Europe, Kosovo

1. Introduction

Legal technical assistance is a specific area of work within the more general international assistance projects funded by international organisations, the EU or individual states, with the intention of promoting and guiding legislative reforms, judicial training, administrative and land registry reforms. The chapter points out the shortcomings of such projects in light of the author's field experience in Kosovo.¹

In its first part, the chapter considers the legal traditions of Kosovo and the impact of legal technical assistance projects on those traditions. In the second part, it

¹ The author has been a legal expert in Kosovo within the Project: Support to Civil Code and Property Rights (Phase 1). The draft text of the Civil Code of the Republic of Kosovo (Phase II) (in Albanian and English) can be found at <http://civilcode-kosovo.org/documents/?lang=en> (accessed 17 October 2022). The project was obviously affected by the pandemic, which slowed down adoption of the text by local institutions.

discusses the limitations of such projects and possible ways to reconsider them in light of the practice of comparative law and the lessons learnt in the field. Specifically, the conclusion stresses that comparative lawyers play a fundamental role in the analysis of historical sources and legal traditions, debiasing experts and, above all, protecting local legal cultures against the dark side of legal colonialism.

2. Legal Traditions of Kosovo

The reconstruction of the legal traditions of Kosovo reveals a complex and very interesting historical stratification of those traditions.² The state of the law is strongly influenced by historical events.³ For this reason, it can legitimately be said that Kosovo today is a rich case-study for a comparative lawyer: that is to say, a legal system where it is nevertheless possible to find a surprisingly wide array of legal experiences. After all, the area has always been a geographical borderland between Serbia and Albania and a cultural borderland between Europe and the Ottoman Empire. This juxtaposition is symbolised by the battle of Kosovo Polje (in English: the ‘Plain of Blackbirds’) which, in June 1389, saw the epic and bloody clash between the Christian armies of Prince Lazar Hrebeljanovic and the Muslim armies of Sultan Murad I.⁴ For more than five centuries, the region was under the rule of the Ottoman Empire, when certain principles of the *Mejelle* (the civil code of 1876), as well as the Shari’a, were superimposed (mainly in urban areas) on the customs of the local populations.⁵

² For a fundamental study on the history and cultures of the Western Balkans, see Ivo Andrić’s book, *The Bridge on the Drina*, translated by Dunja Badnjević, Arnoldo Mondadori Editore, 2016.

³ The region was under the rule of the Roman Empire and then the Byzantine Empire. In particular, the Byzantine feudal property right known as ‘pronoia’, which consisted of the granting of land to distinguished citizens to administer (εἰς πρὸνοίαν) in return for services rendered to the state, found application in the region. This form of ownership existed in Kosovo until the Middle Ages. Some scholars believe that the Albanian term for feudal property ‘Pronësia’ is derived from the Byzantine ‘pronoia’.

⁴ The Battle of Kosovo marked the end of the independence of the Slavic kingdoms in the Balkans: the new king of Serbia, Stephen Lazarević, became tributary to the sultan.

⁵ The legacy of Ottoman law concerns, for instance, the law of real estate, specifically the institutes of pledge and pre-emption.

2.1 Legacy of Kanun

Ottoman institutions allowed local populations to practise their customs, especially in the countryside: the Albanian cultural community was, for example, able to continue applying the principles of the well-known text *Kanun*, or *Kanuni* (Canon, etym. gr. κανών), by Leke Dukagjini: the most important code of Albanian customary law. The origin of the Kanun is lost in time, although tradition dates it back to 1444, the year in which Lekë Dukagjini, an Albanian leader famous for his tenacious resistance to the Ottoman Empire, is said to have drafted the contents of the aforementioned code.

Until the early 20th century, the Kanun was handed down only in oral form and, for centuries, it was the main reference point for regulating all aspects of social life in the local communities of Albania. The currently available written text is the result of the philological reconstruction work carried out by a Franciscan friar from Kosovo, Shtjefën Kostantin Gjeçov, who, after Albania's independence from the Ottoman Empire in 1912, attempted to transcribe the provisions of the Kanun, organising them systematically. However, Father Gjeçov's version does not concern the Kanun in the broadest sense of the term, because the provisions of the code, passed down orally for centuries, varied from fiefdom to fiefdom, so that it is impossible to reconstruct these customs in their entirety.

That said, the Kanun is the ultimate expression of tribal reciprocity among members of the Fis, the Albanian counterpart of clans, who were bound together by blood ties. Thus, for example, in the Kanun, there is no distinction between public and private law, because certain fundamental concepts, such as trust ("Besa"), honour and blood ties, infuse all the provisions of the code.⁶

The aforementioned text regulated all aspects of the social order and everyday practices of the community. It dealt with institutions ranging from property

⁶ Besa is an Albanian cultural concept that is usually translated as "faith", which means "keeping a promise" and "word of honour".

(ownership of land by the clan) to the organisation of the family system (a system in which women played a subordinate role to men). It was a code that fully expressed the Albanian sentiment of independence from oppressing foreign peoples and reflected the proud harshness of the mountains and the character of the people inhabiting the region. In other words, the rules of the Kanun and the symbolic and social values that formed its foundation would ideally allow the integration of individual identity with the collective consciousness of a people resisting external pressures. The writer, Ismail Kadaré, describes this history in his outstanding books.⁷ Tito's communist regime, which attempted to impose coexistence between a centralised state and a social order based on tribal blood relations, made enormous efforts to contain the influence of the Kanun. However, although it achieved some results, it never managed to fully modernise the Albanian customary tradition. Indeed, after the local communist regime fell, the code continued – and to some extent continues – to implicitly influence the lives of Albanians, even in Kosovo.

2.2 The influence of Serbian Law

The territory of today's Kosovo was annexed to Serbia after the First Balkan War (1912-1913) and became part of Yugoslavia in 1918. Tito's victory in Yugoslavia marked the return of the Kosovan territory to Serbia, with the status of an autonomous region.

In truth, because Tito believed that he had to counter the risks of Serbian national primacy, he was not indifferent to demands for autonomy by the Kosovo Albanians. For example, in 1974, Tito granted Kosovo a constitution that recognised the province as a constituent part of the Yugoslav Federation, gave it the legitimacy of an autonomous local government. In particular, the Autonomous Socialist Province of Kosovo was recognised at the central level, while formally remaining a part of the Serbian Republic, became an integral part of the Federation (Art. 3).⁸ The 1974 Constitution, however, fuelled the discontent of the Serbian minority.

⁷ I. Kadaré, *Broken April*, New Amsterdam Books 1998.

⁸ The Kosovo Assembly elected its own member to the Yugoslav Presidential Council (Art. 321), which had to make decisions unanimously (Art. 330: Kosovo had in practice the right of veto at the federal level). Without

With particular reference to civil law, a civil code (namely, the *Srpski Gradjanski Zakonik*) had been in force in Serbia since 1844. It originated from elaboration of the Austrian General Civil Code (i.e. *Allgemeines bürgerliches Gesetzbuch*) of 1811, with some references to the French Code Civil of 1804, Serbian customary law and the aforementioned *Mejelle*. Therefore, the Serbian Civil Code was also officially applied in Kosovo for some time.

2.3 The Code of Zog

The union of the region with Albania in 1941 led to the adoption of the Albanian Civil Code of 1928 (the Zog Code, named after the King of Albania from 1928 to 1939). The Zog Code marked an important step in the history of Albanian and Kosovo law because, having been drafted by jurists with a western background, it was significantly influenced by the French Civil Code (1804), the Italian Civil Code of 1865, the Bürgerliches Gesetzbuch (BGB) (1900), the Swiss Civil Code (1912) and, finally, by the French-Italian project on the regulation of obligations (1927).⁹ It is interesting to note that Italian law made its entrance into the Kosovo region through the Zog Code.¹⁰ Subsequently, at the end of the Second World War, the Kosovan territory again became part of the former Yugoslavia: specifically, it became an autonomous region of Serbia. The Zog Code was no longer applied in the area because it was an expression of values that did not fit with the socialist vision of Yugoslavian societies.

the consent of the Kosovo Assembly, borders could not be changed (Art. 5). Federal acts would henceforth be published in both Serbo-Croatian and Albanian (Art. 269).

⁹ G. Chiodi, *Innovating without Destroying: The Italian-French Project for a Code of Obligations and Contracts*, in G. Alpa, & G. Chiodi (eds.), *Il progetto italo francese delle obbligazioni (1927). Un modello di armonizzazione nell'epoca della ricodificazione*, Giuffrè Editore, 2017, pp. 223-326.

¹⁰ G. Ajani, *Codification of civil law in Albania*, in G. Ginsburgs, D.D. Barry, W.B. Simons (eds.) *The Revival of Private Law in Central and Eastern Europe*, Martinus Nijhoff Publishers, 1996, p. 518 ff.

3. The Disintegration of The Socialist Federal Republic of Yugoslavia

The period of the Republic of Yugoslavia (1945-1981) was marked by the proliferation of socialist-inspired legislation aimed at filling the gaps created by the formal abrogation of the rules, including ones in civil law, enacted before the revolution (the aforementioned Zog Code). The law of the Socialist Federal Republic of Yugoslavia was characterised by the predominance of politics over the rule of law, the influence of public law in the private sphere of citizens, the superiority of the interests of the community with respect to the rights of the individual. During this period, private property was the subject of a socialist collectivisation process aimed at the creation of state and social property and a planned economy by the Yugoslav federal state. It is also true that Tito pursued an original interpretation of the socialist model which recognised local autonomy and the collective and autonomous management of state enterprises, to provide just two examples.¹¹

In such an institutional and political context, the system of civil law was based on four fundamental laws relating to obligations, property, succession, and the family.¹² After the end of the political unity of the former Yugoslavia, it was natural that some of the fundamental laws relating to civil law would continue to apply in states after a process of nationalisation (consider the experiences of certain countries, such as Slovenia, Croatia, Serbia, Bosnia-Herzegovina and Montenegro). In fact, Kosovo maintained the system of fundamental laws as the backbone of its civil law system and updated some of the fundamental norms in light of the experience of some Balkan countries and, in particular, Slovenia.

¹¹ A. Benacchio, *The New Yugoslavian Law on Obligations and Contracts*, in *Riv. Dir. Civ.*, 1983, I, 1, pp. 77-95.

¹² A. Benacchio, *Il diritto italiano nella Ex Jugoslavia (con particolare riferimento a Croazia, Montenegro, Serbia, Slovenia)*, in AA.VV., *Annuario di diritto comparato e studi legislativi*, ESI, 2014, pp. 507-537.

To be mentioned in this regard are the Basic Law on Obligations (2012)¹³ and the Basic Law on Property and Other Real Rights (Law No. 03/L-154).¹⁴ These were supplemented by the Basic Law on Succession (Act No. 2004/26) and the Basic Law on Family Matters (Act No. 2004/32).¹⁵ Specifically, the Basic Law on Obligations adopted the Slovenian model (itself close to the traditional Yugoslav model, with some modifications and additions dictated by political change), while the Basic Law on Private Property was influenced by German law.¹⁶

The aforementioned legal text comprised a general part regulating the general principles common to all obligations (Articles 1-437) and a special part concerning certain types of contracts (Articles 438-1056). The general part regulated obligations arising not only from contracts, but also from other sources of the law of obligations, such as civil liability, unjust enrichment and unilateral legal acts. Moreover, the 2012 Law of Obligations definitively abandoned the concepts of socialist private law and embraced some of the concepts distinctive of liberal contract law – that is, ones proper to western contract laws, such as party autonomy and the prohibition of abuse of rights.

4. International Organisations as Law-Makers in Kosovo

It is well known that the conflicts between the Albanian and Serbian ethnic groups in the area and the development of Serbian nationalism grew during the 1980s. At the

¹³ Basic Law on Obligations ('*Obligacijski zakonik*'), in Official Gazette of the Republic of Slovenia, RS 83/2001. Laws are not indicated by number and date as in Italy, but by abbreviations of their names, indicating only the G.U. of publication.

¹⁴ The property law was passed in 2009 during the UNMIK period. This legislation is heavily influenced by German property law (being the result of German technical assistance), except for the provisions on pledge and mortgage, which appear to have been influenced by common law principles. The institution of *leasehold* also appears, confirming the presence of such influence.

¹⁵ The weight of local customary law is most evident in family law. For instance, Articles 271-277 provide for the personal and economic responsibility of family members towards each other. These rules reflect the traditionally communal character of the Kosovar family.

¹⁶ An initial attempt to prepare a new text was the subject of an international technical assistance project (GIZ, when the region was still under the control of UNMIK) that ended in 2004. The draft was not approved on the grounds that it was too abstract and complex because it was subject to the influence of German law and, thus, difficult to understand by local jurists.

end of 1987, with the seizure of power in Serbia by General Milošević, tensions increased further. The Constitution adopted by Serbia in 1989 drastically curtailed Kosovo's autonomy and began a strong campaign of Serbian influence on Kosovo's institutions.¹⁷ In response, a parallel Albanian state was formed in 1991. It was headed by Rugova, president of the Democratic League of Kosovo (LDK), and after a referendum, the Republic of Kosovo was proclaimed, although it was recognised only by Tirana.

In 1995, while the international community seemed to ignore the risks associated with the difficult coexistence of the various ethnic groups in the area, the Kosovan forces disunited and, in open defiance of Rugova's non-violent resistance, a fighting movement was born, from which the Kosovo Liberation Army (UÇK) was formed. By the end of 1997, some rural areas of Kosovo were under the control of the UÇK separatists, and Serbian General Milošević authorised a ferocious repressive campaign, with massacres and deportations carried out by Serbian militias and paramilitary troops. Then, in 1999, the failure of the Rambouillet peace accords and the dramatic air attack on Serbia by NATO forces (March 1999) led the UN Security Council to adopt Resolution No. 1244 on Kosovo.

This resolution provided for the deployment of two military forces, KFOR and UNMIK¹⁸, under the leadership of the United Nations, and it established an interim international administration of Kosovo. This measure, although it called for autonomy in the area, reaffirmed the sovereignty of Serbia. In fact, the subsequent negotiations under the auspices of the United Nations to define the status of Kosovo

¹⁷ In order to debase the reborn Kosovan sense of belonging and to enshrine the idea of Greater Serbia, Slobodan Milosevic, with the Constitution of the Serbian Republic adopted on 28 September 1990, renamed the Socialist Autonomous Province of Kosovo as the Autonomous Province of Kosovo-Metohijan, limiting its autonomy (Art. 3), elevating Serbo-Croatian to the sole official language (Art. 8), and declaring the Serbian territory "one and indivisible" (Art. 4), which could only be changed by a referendum organised at the national and not local level. All main powers were transferred to Belgrade.

¹⁸ Since the end of the 1990s, a multinational mission under the aegis of NATO has been active in Kosovo. It is known as the Kosovo Force (KFOR), and its priority objectives are to maintain the security and stability of the small but complex Balkan country. The acronym UNMIK stands for the United Nations Mission in Kosovo.

immediately appeared to be very complex because the ethnic Albanians' demand for independence was not accepted by the Serbs, who were only prepared to grant an autonomous status. Peacekeeping and security tasks were allocated to the aforementioned KFOR mission. The civilian component of the international intervention was entrusted to one of the most ambitious and demanding missions in the history of the United Nations (the aforementioned UNMIK), which was conceived as a mission to manage the entire administrative sphere of Kosovo.¹⁹

It is important to note that, within the framework of the provisions of Resolution 1244, UNMIK set up an *interim* administration that was neutral with regard to the international legal status of Kosovo: on the one hand, it was conceived as a transitional solution in view of the handover of competencies to local interim institutions; on the other hand, the UN undertook to facilitate negotiations between Serbia and Kosovo.²⁰

However, over the years, UNMIK ended up by being neither transitory nor neutral. Several factors contributed to making the international presence indispensable and prolonged over time: the almost total absence of local institutions able to administer the territory autonomously; the withdrawal of Serbian personnel and officials; the persistence of strong ethnic tensions; and uncertainty over the future *status* of the area. For the same reasons, the more the international presence tended to become permanent and managed the administration of Kosovo, the more it created autonomous government structures from Serbia, ones very close to *de facto* independence.

¹⁹ United Nations Security Council, Resolution No. 1244. The mission has four pillars, each of which falls under the authority of the Special Representative of the UN Secretary-General: the first pillar, managed by the United Nations High Commissioner for Refugees, concerns humanitarian affairs (Human Affairs) and justice (Law Enforcement and Justice); the second pillar, managed by the United Nations, concerns civil administration; the third pillar, led by the Organisation for Security and Cooperation in Europe (OSCE), is responsible for democratisation and institution-building (Democratization and Institution Building); the fourth pillar (EU) concerns economic reconstruction.

²⁰ R. Blerim, *UNMIK as an International Governance with Post-War Kosova; Nato's Intervention; UN Administration and Kosovar Aspirations*, Shkup, 2003.

For our purposes, it is particularly interesting to note that UNMIK assumed (from June 1999 onwards), a (questionable) legislative competence in many areas of local laws.²¹ According to the official reconstruction, Kosovo turned to the international community for technical assistance to promote a legal framework, also by means of legal transplantation, that would favour transition to the construction of an independent state in a market economy framework.²² The rules (referred to as *regulations*) of UNMIK were such that they covered, for example, the sale of goods, pledging, and commercial law.²³ In other words, these international subjects actually performed a (emergency) legislative function with effects on civil law until 2008.²⁴ That was a crucial year. As said, Kosovo declared independence. In this stalemate, the Kosovo Parliament unilaterally declared the country's independence on 17 February 2008; and in June of the same year, the Constitution, inspired by the proposal of the mediator, M. Ahtisaari, came into force.²⁵ Secondly, the United Nations granted authority and control over the territory to the European Union (EU). Thirdly, Kosovo

²¹ UN Security Council Resolution No. 1244, UNMIK Regulation No. 1999/01, according to which all legislative, executive and judicial powers would be vested in UNMIK and exercised by the Special Representative of the UN Secretary-General.

²² D. Berkowitz, K. Pistor, J.F. Richard, *Economic development, legality, and the transplant effect*, in *European Economic Review*, 2003, 47, pp. 165-195.

²³ Regulations are accessible

at <https://unmik.unmissions.org/sites/default/files/regulations/02english/Econtents.htm>

(consulted 17 October 2022).

²⁴ The reference is to the UNMIK regulations on civil law. For obvious reasons of space, this article does not cover the countless Regulations on public and administrative law. The Regulations concern, in particular, the period from 1999 to 2008.

²⁵ Despite the fact that Kosovo has been recognised by around 74 states in the world, including 86% of NATO members and 81% of EU members, the opposition of some major powers (Russia, China, India, Brazil) and the hesitancy of some European states (Spain, Cyprus, Greece, Slovakia and Romania) persist. The region's tribulations seem never-ending.

signed an agreement with the EU to establish the European Union Rule of Law Mission in Kosovo (EULEX).²⁶

In this context, the international community assured the region a kind of 'supervised' independence, i.e. one expressly guided by the international institutions present in the country. On the other hand, the unilateral nature of the declaration of independence exacerbated ethnic tensions, so that a greater effort by the international administration was required to prevent conflict. However, after independence, UNMIK and EULEX²⁷ continued to play a leading role in providing legal assistance to the young parliament in the performance of its legislative functions.²⁸ The two organisations were sometimes joined in their mission by individual states (Germany, Norway) through bilateral technical assistance projects focused on substantive and procedural aspects of the law.

As a consequence of the above, the regulations adopted under the auspices of the international community were imposed on the above-mentioned legal traditions that were historically present in the area (namely, customary law (e.g. Kanun), Serbian and Albanians influences, Yugoslavian socialist and post-socialist laws). The result was a lacunose, fragmentary and conflicting regulatory landscape. In this regard, suffice it to mention, by way of example, the introduction of a regulation about the legal concept of the *leasehold* (specifically: a form of land tenure or property tenure where a party buys the right to occupy land or a building for a given length of time) by a legal

²⁶ A. L. Capussela, "Kosovo: EULEX disaster", published on 28 November 2012 in the online journal Balkans and Caucasus Observatory at <http://www.balcanicaucaso.org/aree/Kosovo/Kosovo-disastro-EULEX-126993> (accessed 17 October 2022).

²⁷ In February 2008, the EU decided to launch the EULEX mission, which aimed to assist Kosovo's institutions in achieving and consolidating European and international standards of law enforcement. To this end, the mission performed leadership, monitoring, advisory and, where necessary, executive functions in the three key areas of police, customs, and justice.

²⁸ According to the 2008 Constitution, Kosovo's Parliament is unicameral and consists of 120 members, of whom 100 are directly elected and 20 are distributed among the country's ethnic minorities (10 for Serbs and 10 for other minorities). Still today, Belgrade refuses to recognise the independence of what it considers an autonomous region of Serbia.

technical assistance project sponsored by the US government. Precisely, a leasehold estate is an ownership of a temporary right to hold land or property in which a lessee or a tenant holds rights of real property by some form of title from a lessor or landlord. Although a tenant does hold rights to real property, a leasehold estate is typically considered personal property. As a result, the said regulation was disapplied by local jurists, because leasehold is alien (or rather, unknown) to local legal traditions and also devoid of usefulness in the economic context of Kosovo.²⁹

5. The failure of legal technical assistance projects

The introduction of this and other ‘alien’ legal concepts into the local legal environment was primarily the result of international projects of ‘legal technical assistance’. This is a practice that may concern various legal issues (e.g. constitutional reforms, criminal law and private law reforms) and that, in concrete terms, results in the planning and delivery of diverse assistance activities, such as the drafting of new laws and regulations, judicial training programmes. The field has been subject to extensive research and criticism, especially in *law & development* scholarship.³⁰ The movement has for decades been the subject of doctrinal disputes that have made this interdisciplinary field of study somewhat elusive in its principles and methods.

²⁹Other relevant regulations are: The Leasing Contract Act (Law No. 03/L-103), which is governed according to common law principles; the Slovenian Land Ownership Act (Law No. 02/L-26); the Information Society Act, which regulates e.g. electronic commerce (Law No. 04/L-094).

³⁰ Y. S. Lee, *Law and Development, Theory and Practice*, Routledge, 2020. ID., *Call for a New Analytical Model for Law and Development*, *Law and Dev. Rev.*, 2015, 8, p. 1. W. Vandenhoe, *Towards a Fourth Moment in Law and Development?* *Law and Development Review* 2019, 12, 2, pp. 265-283. M. J. Trebilcock, M. Mota Prado, *Advanced Introduction to Law and Development*, Edward Elgar, 2014. D. M. Trubek, *Law and Development 50 Years On*, Univ. of Wisconsin Legal Studies Research Paper No. 1212/2012. K. Davis & M. Trebilcock, *The Relationship between Law and Development: Optimists vs. Skeptics*, *Amer. J. Comp. L.*, 2008, 56, p. 895 ss. G. Ajani, *Poverty and Development*, in AAVV, *Human Rights. Cultura dei diritti e dignità della persona nell'epoca della globalizzazione*, Altante I, Soggetti e i Temi, Utet, 2007, pp. 77-112. D. Trubek, A. Santos (eds), *The New Law and Economic Development, A Critical Appraisal*, 2006. D. Trubek, M. Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, *Wisconsin Law Review*, 1974, pp. 1062-1101. J. H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, *Amer. J. Comp. L.*, 1977, 25, pp. 457-491.

Some authors (Trubek and Santos) have produced a useful reconstruction of the evolution of this doctrine,³¹ which initially held that law should be conceived as an instrument of state intervention in the economy. Subsequently, law came to be seen primarily as an instrument of the market. In both perspectives, law was understood as a social engineering mechanism at the service now of the state, now of the market. Finally, law was conceived by the doctrine as regulatory and/or complementary to the market and aimed at protecting and promoting the social element. Clearly, the latter perspective tends to focus on respect for the local context and diversity. Thus, this doctrinal reconstruction evidences an evolution from the instrumental conception of law with respect to the state and the market to the affirmation of the role of law as a regulator attentive to the social dimension.

More recent scholarship has noted that this description of the doctrine of *law & development* always ends up by placing the paradigm of economic development at the centre of its interest, whilst it side-lines certain fundamental reflections related to rights and social needs. Such critical (sometimes even self-destructive) thinking offers a rationalisation of this strand of interdisciplinary studies in terms of content and methodology and provides – perhaps – a glimpse of some new perspectives.³²

The new period (now underway) would consist of a phase in which the doctrine under consideration could focus its attention – despite the diversity of conceptions and approaches (ending in pluralism) – on the objectives of social change and social justice; and in which it could do so without letting the question of economic development end up, as in the past, by absorbing most of the conceptual effort of the authors belonging to this school.

Undoubtedly, we are witnessing some signs of a renewed interest in the field of law and development, which has resulted in the creation of a new international network

³¹ D.M. Trubek and A. Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in D.M. Trubek and A. Santos (eds.), *The New Law and Economic Development A Critical Appraisal*, Cambridge University Press, 2006, p. 2.

³² W. Vandenhoele, 2019, pp. 265-283. K. De Feyter, G. E. Türkelli, S. de Moerloose (eds), *Encyclopedia of Law and Development*, Edward Elgar, 2021, Ch. 1 and Ch 12.

of scholars belonging to different disciplinary fields.³³ Therefore, it must be emphasised that some interesting matters for reflection are emerging, and that they concern both the scope of the doctrine itself – with a renewed vitality that reduces the weight of the paradigm of economic development as the sole and primary objective – and the object of study, which is more attentive to the pluralism of perspectives (e.g. sustainability, gender studies, to name but a few). These scholars often conduct a critical reading of the fundamental issues of inequality and poverty that will certainly occupy the doctrine in the years that will follow the current pandemic. Equally promising appears to be the effort to achieve methodological clarity with respect to a doctrine that requires a multidisciplinary, interdisciplinary, empirical approach closely bound up with political, social, and cultural analysis.

To return to the specific domain of international and European projects of legal technical assistance, many authors belonging to the above-mentioned law & development school of thought believe that these kinds of projects are ideologically-driven and therefore consist of attempts by the Western countries and economies to advance some sort of legal colonisation with respect to legal systems and economies in transition.³⁴ There is a long distance between the everyday practice of international organisations and the theories falling under the umbrella of the law & development school. This causes total distrust of those organisations' capacity in this field and of their experts' ideologies and biases.³⁵ Moreover, the large majority of international legal technical assistance projects still resemble social experiments: it remains very difficult to understand their practical and stable results.³⁶

The reasons for this situation are manifold and difficult to analyse in depth. Management difficulties may be a first cause. International organisations manage such

³³ See the proposals of the *Law and Development Research Network* at <https://lawdev.org> (accessed 17 October 2022).

³⁴ L. Martino Levi, *Law and Development, Mission and Instruments of International Economic Organisations*, Aracne, 2011.

³⁵ R. Z. Sannerholm, 'Cut-and-paste'? Rule of law promotion and legal transplants in war to peace transitions, in A. Bakardijeva Engelbrekt, J. Nergelius (eds.), *New Directions in Comparative Law*, Edward Elgar, 2010, pp. 56-77.

³⁶ R. Peerenboom, *Toward a Methodology for Successful Legal Transplants*, *The Chinese Journal of Comparative Law*, (2013) Vol. 1 No. 1 pp. 4-20, p. 12.

projects, and they often do so without the input of local lawyers (judges, for example). Often, certain projects are the result of contingent political necessity, as in the case considered here. Moreover, the evaluation of project results is often difficult: in such areas, the analysis stops at the reports and similar documents attesting to the project's goals and main results. Consequently, the effects of such initiatives are either difficult to measure or they are modest – and temporary – because the projects are not able to profoundly affect the country's institutions and legal culture.

As a result, it is possible to detect a case of total detachment between the highly critical academics in law & development and the organisations, including the EU, and states involved in legal technical assistance projects. Clearly, one option consists in leaving the practice of legal reforms in the hands of international organisations and their experts. Admittedly, there are sound ethical reasons and political and personal convictions that may justify scholars' reluctance and criticism in this context. However, the result of this attitude of reasonable reluctance is to watch from afar and criticise the project that states and international organisations are developing in the field.

5.1 Kosovo as a Case of Legal Colonialism

The above-described experience of Kosovo has similarities with other cases from the post-socialist area: with the collapse of socialism, a mechanism of (re)westernisation of the legal system emerged so that it could re-join the international community. The point is that, in the case of Kosovo, many (perhaps too many) answered the call. And it is true that some economic powers, including the EU, felt that exporting their law was necessary to gain attention and political visibility.³⁷

³⁷ M. Bussani, L. Heckendorn Urscheler (eds), *Comparisons in Legal Development. The Impact of Foreign and International Law on National Legal Systems*, Schulthess, 2016. R. Michaels, *One Size Can Fit All - Some Heretical Thoughts on the Mass Production of Legal Transplants* in G. Frankenberg (ed), *Order from Transfer: Comparative Constitutional Design and Legal Culture Law*, Edward Elgar, 2013. S. Newton, *Law and development, law and economics and the fate of legal technical assistance*, in J. Arnscheid, B. Van Rooij, J.M. Otto, *Lawmaking for Development. Explorations into the Theory and Practice of International Legislative Projects (Series on Law, Governance, and Development)*, Leiden University Press, 2008, pp. 23-50. The authors note: "Legal technical assistance ('Legal TA') over the past ten years or so has become an integral part of economic development and transition programmes" (p. 23).

In our case, the absence of a coherent strategy among the different projects in Kosovo emerged also due to the lack of functioning coordination structures at the Ministry of Justice. This was in contrast to other Balkan countries where legal reform projects had been more successful and had visibly affected the EU accession process. And it is quite obvious (except to the initiators of such initiatives) that a legal system has its own internal coherence, or at least it should have. Therefore, reform projects should be coordinated among the promoters in such a way that the aim of promoting and safeguarding the coherence of a country's law is respected. In the case considered here, however, this intention was disregarded because of the different political agendas of the states that financed the projects.

The present case is, in our view, emblematic: in the aftermath of the armed conflict, a number of international actors (the United Nations, the EU, the United States, individual states) undertook to financially and technically support a multiplicity of legal reform projects. In particular, the manifold programmes financed by international bodies, as well as by individual states, had the aim of promoting the reform of substantive civil and criminal law, as well as civil and criminal procedural law.³⁸

However, because these projects were previously coordinated, they produced a fragmentary and sometimes contradictory regulatory framework. Moreover, some projects did not take due account of the local reality: some norms resulting from such initiatives proved to be unreasonable when related to the economy of a country in transition (consider the aforementioned case of the introduction of the *leasehold* institution that Kosovar jurists ignore).

Some norms are, in fact, alien to the experience of Kosovan jurists and contribute to the complexity and fragmentation of, among other things, the Kosovan law system. Consequently, for instance, the country's property law is a chaotic set of norms referring to socialist law, as well as some more recent transplants of norms from

³⁸ J. Arnscheidt, B. Van Rooij, J.M. Otto, *Law-making for Development, Explorations into the Theory and Practice of International Legislative Projects*, Leiden University Press, 2008.

German property law, with some references to Slovenian and/or Croatian law. The reason for this lies, as mentioned, in the total lack of coordination among the reform programmes promoted by international bodies, as well as by individual states in bilateral projects. The result is discouraging, because these programmes should have contributed to simplifying and modernising Kosovo's civil law system.³⁹ For the sake of intellectual honesty, it must also be said that the approach criticised here was also due to the urgent need to rebuild the institutional and regulatory fabric of a country immediately after an armed conflict.

In truth, the same considerations could also apply in the case of Bosnia and Herzegovina. In essence, this article emphasises that international projects have developed a kind of 'legal colonialism'⁴⁰, which, without taking the consequences into account, has introduced *civil law*, *common law*, US Law, Nordic legal traditions, into the Kosovan legal system, creating, without any coordination, a situation of unsustainable regulatory fragmentation and confusion.⁴¹ Consequently, the Kosovan legal system is a mixed but artificial legal system resulting from a series of fragmented, overlapping and uncoordinated transplants of common law and civil law, Nordic law, US Law, legal concepts, institutions and procedures.⁴²

³⁹ The main entities are the Federation of Bosnia and Herzegovina, Republika Srpska and the Brčko district. See also P. Cserne, *Drafting Civil Codes in Central and Eastern Europe: A Case Study on the Role of Legal Scholarship in Law-Making Pro Publico Bono*, 2011, pp. 9-10, at <https://www.semanticscholar.org/paper/Drafting-Civil-Codes-in-Central-and-Eastern-Europe%3A-Cserne/502e2033118ebcaa672c2cde67ffb785f149d287> (22 November 2022).

⁴⁰ L. Salaymeh, R. Michaels, *Decolonial Comparative Law: A Conceptual Beginning*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2022, 86, pp. 166–188, where the authors claim that "Rather than organizing comparative law around the objective of unifying or "modernizing" law, we advocate using comparative law to decolonize legal thinking and to create conditions for legal pluriversality. A decolonial analysis reveals the coloniality within conventional comparative law and thereby helps move beyond it."

⁴¹ V. Marmullakajal, *Legal Transplants and Their Impact on Kosovo's Legal System, Sociology and Anthropology*, 2017, 5, 4, pp. 373-377.

⁴² V. Marmullakajal, cit., p. 375. He notes: "The US, for example, has had significant influence in drafting the Criminal Code and Criminal Procedure Code whereby it can be easily stated that these two codes resemble very much Anglo-Saxon (adversarial) system. Many concepts that have been introduced in the codes are new for legal practitioners in Kosovo".

6. The Dark Sides of Legal Technical Assistance: The role of comparative lawyers

6.1 Debiasing the expert

Generally, when international organisations, and the EU itself, conduct technical assistance projects, they make use not only of their own officials, but also of ‘experts’ (officials of international organisations, jurists specialised in technical assistance projects, university lecturers). The doctrine regards these experts with suspicion: “Sometimes, the influence of foreign law is conveyed by the work of a person who wears (apparently) modest clothes: that of the consultant, or expert”.⁴³

In regard to the experience considered here, the legislative activity of international organisations has been criticised for the poor quality of legislative texts and the fragmentation of the legal sources: the aforementioned reforms were conceived by the international officer with the collaboration of experts (or consultants). Hence, a main question concerns the biases of, and the role played by, international experts. Indeed, the experience of Kosovo seems to confirm the bias of the experts, namely a certain preference for the solutions of the legal system of cultural reference (this observation also applies, for example, to the case of Bosnia-Herzegovina).⁴⁴

Hence, experts may not be able to point out the flaws and merits of foreign legal systems, also considering aspects of their application. On the contrary, they tend to show, consciously or unconsciously, an inclination towards certain solutions linked to their own cultural, ideological or national affiliation. This preference may be dictated by a better knowledge of the legal system of their own country, or it may also be ideologically or politically motivated by the affirmation of the domestic model. Apparent in reform projects, is a preference for certain solutions according to on the nationality of the experts, or the choice of compromise solutions. The legislative reform projects favoured the transplantation of *common law* and *civil law* concepts (and thus a kind of artificial creation of a mixed legal system based on the two systems)

⁴³ M. Graziadei, *L'influenza del diritto privato italiano in Europa*, in AA.VV., *Annuario di diritto comparato e di studi legislativi*, ESI, 2014, p. 310. The author reports on the legal technical assistance project to develop Albania's civil code that came into force in 1994.

⁴⁴ C. Picker, *An introduction to comparative legal cultural analysis of International Organizations*, in *Comparative Law and International Organizations. Cooperation, Competition and Connections*, Schulthess, Zurich, 2014, pp. 11-40.

into the legal system of Kosovo, thereby favouring the establishment of a mixed legal system.

In our opinion, the practice of comparative law should act as an antidote to the cognitive limitations of experts.⁴⁵ Those who practise comparative law have (or should have) an awareness of the limitations of the legal system to which they belong (and usually the one in which they have been trained), so that they are less subject to the cognitive limitations mentioned above. Thus, a jurist who has been trained in comparative law and is aware of his/her bias towards his/her own legal system is able – or should be – to examine possible solutions in a more rational and fruitful manner.

Moreover, a comparatist has – or should have – an exceptional ability to understand, also from a historical perspective, the stratification of local legal traditions, and will thus be able to contribute to the reconstruction of the system subject to the transposition of a new model. Such a scholar should also have a greater interest in dialogue with local jurists. It is thus the comparatist who should oppose the adoption of models that are incompatible with, and *foreign* to, the country's legal tradition.⁴⁶ Unfortunately, a significant number of experts working in international projects have not received specific training in the theory and practice of comparative law.⁴⁷

6.2 Understanding legal formants

In regard to the project described here, the focus on legislative formants has absorbed all the attention of the experts and institutions involved. This is a shortcoming that anyone who deals with comparative law will immediately note.⁴⁸ In fact, the success of a civil law codification project depends on the acceptance of the model proposed by the local courts and academics. These subjects – judges, notaries, lawyers,

⁴⁵ D. Kennedy, *The Methods and Politics of Comparative Law*, in M. Bussani and U. Mattei (eds.), *The Common Core of European Private Law: Essays on the Project*, Kluwer Law International, 2003, pp. 131-207.

⁴⁶ To cite just one example, the working group strongly supported the principle of gender equality in civil law.

⁴⁷ S. Cassese, *Beyond Legal Comparison*, in M. Bussani, L. Heckendorn Urscheler (eds.), *Comparisons in Legal Development. The Impact of Foreign and International Law on National Legal Systems*, Schulthess, 2016, p. 227.

⁴⁸ J. H. Merryman, *The Loneliness of the Comparative Lawyer*, Kluwer, 1999, pp. 31-32.

university lecturers/scholars – play a fundamental role in the understanding, sharing and, finally, application of the new rules in practice.

Hence, evident to the scholar of comparative law is the importance of certain good practices that too often do not receive the requisite attention in international programmes. These good practices concern, for instance, giving access to the preparatory work on the text, providing an explanatory commentary on the text of the code, and adopting/devising measures to implement the code. However, the need for a rapid and politically visible result, as well as the management shortcomings mentioned above, induce the international organisations supporting the projects to ignore such good practices.

On this basis, it is possible to envisage the disapplication by local jurists of rules imposed by international organisations or individual states in the international community. The local legal system consists of rules that local jurists often disapply because they are too complex and far removed from the experience of individuals such as students, lawyers, judges or academics. This calls for more attention to be paid to the 'reaction' of jurisprudence and doctrine, as well as a greater effort to ensure that the new text of the civil code is taught both professionally and in universities.

The above-described case of Kosovo also underscores the importance of legal transplantation as an ongoing process. On some occasions, technical assistance projects in the legal field must respond to international and local political pressure to adopt texts quickly.⁴⁹

By contrast, according to the case considered here, local legal culture should drive reform (not the other way around).⁵⁰ It thus emerges that it is necessary to shift attention to the capacity – and willingness – of local jurists (judges, lawyers, scholars) with respect to reception of the proposed model. By 'capacity' is meant the possibility for local jurists to know and apply the model in question. The idea expressed here

⁴⁹ P. Legrand, *The impossibility of legal transplants*, in *Maastricht Journal of European & Comparative Law*, 2007, 4, pp. 111-124.

⁵⁰ E. Örüçü, *The Enigma of Comparative Law. Variations on a Theme for the Twenty-first Century*, Martinus Nijhoff Publishers, 2004, pp. 93-105. In particular, see the chapter entitled "Comparative Law and Law Reform by Transposition".

can be made clearer by referring to a concrete example: in the year 2004, the Kosovar authorities had already promoted a first project of private law reform. The text resulting from that project eventually proved to be too close to the approach of the above mentioned BGB. Actually, this is not surprising given the leading role of German bilateral cooperation in the operation. This draft code was not, however, accepted and approved by the local institutions: it appeared to be too hostile to, and remote from, the experience of local jurists and, therefore, difficult for them to understand and apply.⁵¹ There was consequently a shared conservative determination not to replace the four fundamental laws of Kosovan law with an unfamiliar and highly sophisticated text in the light of German jurisprudence and doctrine.

It should also be once again emphasised that Kosovo's public and civil law systems have historically been founded on a set of fundamental laws of private law. This is the choice pursued in Slovenia, and, on closer inspection, there are few examples of codification in the region. This demonstrates, in the writer's opinion, the endurance and quality of the Yugoslav model of fundamental laws, a system that has not, as said, undergone a codification process. Still today, the judges of the countries of the former Yugoslavia, especially the Kosovo judges, find themselves applying more recent legal texts in the same way as the jurisprudence of the Yugoslav courts or the national courts of the states of the former Yugoslavia. In this way, a process of fruitful interaction has been created among the courts of the region, even though they now belong to independent states. In the present case, it is therefore questionable whether codification is desirable. First of all, the codification or restatement projects of local legal sources are so complex that they would require years of study and preparation, preferably by local jurists, possibly with the technical support of international and EU ones.

It is doubtful whether an international project, lasting four years, could achieve such a goal: the risk is that of ending up with a text lacking the necessary and desired qualities. Needless to say, the success of national codifications has historically been

⁵¹ This was a draft civil code from 2004, which was based on the BGB. The text appeared excessively complex and far removed from the mentality of local jurists and was never approved. Curiously enough, the local jurists were quite favourable to this text because they were often trained in Germany and were therefore familiar with German civil law.

linked to long and fruitful preparation, and facilitated by the existence of a well-established legal doctrine.

6.3 Localising legal transplants

Finally, the constant involvement of local lawyers in the preparatory work on the text should be a prerequisite for any reform project.⁵² However, in the case of Kosovo, international reform processes could only partly rely on local experience.⁵³

Indeed, the comparison with local jurists allows one to grasp their reaction of agreement, surprise or irritation with respect to the solutions proposed in the course of the preparatory work. Suffice it to recall that, in the case of the Albanian civil code, the choice of the Italian model had been guided not only by considerations of historical continuity, linked to the Albanian legislator's traditional reliance on the Italian model, but also by the characteristics of the Italian civil code – that is, by its mixed nature, comprising both French and German influences, which made it, at that historical moment, a synthesis of the European law to which Albania intended to move closer. One does not discern here an equal collaboration between local jurists and international experts: it is the local jurists who must guide the reform process and show a willingness with respect to the process of transposition of the model and training with respect to its concrete application. In short, it must be the local legal system and culture – with the support of foreign scholars – that evolves by itself thanks to external stimulus and pressure. To put it differently, evolution is something that emanates from within in order to be real and lasting.⁵⁴

The term local jurists denotes judges, lawyers and academics, so as to have theoretical, historical but also application-related perspectives. Indeed, such a suggestion would be a Copernican revolution in the field of international law reform projects: in most of such projects, it is the experts who direct the process, with the advice of local

⁵² E. Öricü, before, p. 102.

⁵³ V. Marmullakajal, before, p. 375.

⁵⁴ E. Öricü, before, p. 97

jurists. In the case of Kosovo, local jurists were called upon to play a merely advisory role, and the judges surprisingly played an wholly minor role compared to the academics. This is because the European Commission, as the initiator of the project, excluded in principle the possibility of involving local judges as consultants for reasons related to the risk of a conflict of interest.⁵⁵

7. Conclusion

The chapter has examined the case of a legal technical assistance project in Kosovo. Our conclusion is that a response to the dark side of legal technical assistance may come from the background of comparative law scholars who are used to consider the historical roots and the formants of the law, explicit and implicit in their becoming and influencing each other. Only a proper practice of comparative law can offer an opportunity to de-bias the experts and, more important, defend local legal culture against the risks of contemporary attempts of legal colonialism. Indeed, comparative law still teaches, as in the case considered in this chapter, the fundamental role to be played by histories, places, and legal traditions.

⁵⁵ S. J. Toope, *Legal and Judicial Reform through Development Assistance: Some Lessons*, in *McGill Law Journal*, 2003, 48, 3, pp. 357-412.

FUNDAMENTAL RIGHTS AND CORPORATE PERSONHOOD: VIEWS FROM THE US SUPREME COURT

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Abstract

This paper examines, through the lens of two seminal judgments by the US Supreme Court (*Citizens United v Federal Election Commission* and *Burwell v Hobby Lobby Stores*), the issues of speech and freedom of religion as corporate rights. It looks at two distinct levels of analysis, namely the content assigned to these freedoms and the theories of corporate personhood impacting on the entitlement of legal persons to specific rights. Are corporations, legally understood as ‘persons’, fully equal to human entities? Should First Amendment freedoms be recognized in the same way and to the same extent to corporate entities and natural persons or should this equal treatment reveal a dark side of the law, insofar as the principle of the equal protection of the laws would be jeopardized? This survey will address these major issues, highlighting the manifold factors and arguments underlying the Court’s decisions. A general conclusive answer to those questions may not be given; it is necessary to scrutinize the specific facts and legal points of the cases putting at the foreground the issue of corporate personality.

[Corporate personhood; exercise of religion; speech; electioneering communications; independent expenditures; health plans]

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Keywords

Corporate Personhood - Exercise Of Religion - Speech; Electioneering Communications - Independent Expenditures - Health Plans

1. Introduction

This paper aims to shed light on the possibility of acknowledging constitutional freedoms – such as those of speech and religion, usually only referring to natural individuals – to non-human entities, such as corporations, focusing on the issues of the content and breadth of these rights when they are claimed by legal persons. This research question is not only significant in order to deal with specific legal points, but also to address more general issues at a policy level, such as the following: is the judicial acknowledgement of corporations as owners of fundamental rights usually acknowledged as part of the natural persons' property clear evidence of their power, namely, of their ability to put significant pressure on courts when corporate interests are at stake, so endangering the autonomy of the judicial body as well as its impartiality vis-à-vis the interests subject to judgment? A positive answer to this question would reveal a dark side of the law insofar as adjudication is affected by non-legal factors putting at risk the principle of equal protection of people and corporations. Awarding the same protection granted to natural persons would reveal a preferential treatment at law to the corporations' benefit. These issues call for a thorough analysis of the concept of corporate legal personality in the US legal world on the ground of those rights which are acknowledged to legal entities.

Freedom of expression and religion clearly fulfill a remarkable role in the development and evolution of human beings, having a deep impact on their personality. Recent US cases concerning the acknowledgement of fundamental rights on behalf of corporations are worthy of attention. I will address two major questions:

A) First, is the core content of these rights the same for both natural and legal persons?

B) What is the scope of and justification for legal subjectivity bestowed on legal persons? Has this concept been consistently understood and applied throughout time, or has it undergone a substantial change?

The scope of corporate freedoms is also significant as to the extent of corporate liability. This latter aspect, however, will not be tackled in this essay.

2. An overview of two seminal cases: *Citizens United v Federal Election*

Commission and Burwell v Hobby Lobby Stores

Let's start with two quite recent cases decided by the US Supreme Court. The reason for choosing these cases is that they reveal a judicial outlook on corporate rights which still holds validity.

The first one is *Citizens United v Federal Election Commission*.¹ The case arises from the federal law prohibition – set by the Bipartisan Campaign Reform Act of 2002 § 203 (henceforth, BCRA)² through criminal sanctions – to corporations and unions to use their funds for independent expenditures financing speech amounting to ‘electioneering communication’ (i.e. in the statutory words, having for object ‘a clearly identified candidate for Federal Office’, made ‘within 30 days of a primary election’, and ‘publicly distributed’ [i.e. ‘received by 50,000 or more persons in a State where a primary election [...] is being held’]). The challenged statute does not address

¹ 558 U.S. __ (2010).

² § 203 amended the 2 U. S. C. §441b.

corporate contributions to a political action committee or direct contributions to political candidates.

The Court interprets the limitation on expenditures set by section 441b as an unconstitutional limitation on freedom of speech;³ applying different rules according to the speaker's identity would give rise to discrimination to the detriment of legal persons, ending in a breach of the principle of equal treatment.

The Court finds for a strong protection of the freedom of expression in a remarkable passage:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people [...]. Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints [...]. Speech restrictions based on the identity of the speaker are all too often simply a means to control content [...]. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each [...]. The corporate independent expenditures at issue in this case, however, would not interfere with governmental functions [...]. We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.⁴

Majority deemed it necessary regarding the issue of section 441b's unconstitutionality – in order to decide the claim, not deeming it possible to set aside this issue through a narrow interpretation of the text – to leave the case at stake outside the scope of

³ The dissenting judges put at the foreground the argument that even though appellants did not facially challenge the constitutionality of sec. 441b, the court decided on this ground: 'five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law' (Stevens, 6). This choice seems in the dissenting judges' view startling, being at odds with the principle of the judicial restraint and the strategic value of the *stare decisis* principle.

⁴ Judge Kennedy's opinion (on behalf of majority), 23-25. In his concurring opinion, Judge Scalia adds that 'the individual person's right to speak includes the right to speak *in association with other individual persons*' (7); speech and freedom of association seem to be intertwined. Scalia's view on corporate personhood in this case will be considered *infra*.

application of the abovementioned provision.⁵ The precedent *Austin v Michigan Chamber Commerce*, governing the same issues, is examined.⁶ The majority looked at this case as a watershed. Older cases had prohibited restrictions to political speech regardless of the speaker's identity; *Austin* turns the tables, holding that restrictions concerning political speech may be admitted on the basis of the speaker's identity. Because of allegedly conflicting lines of precedent, the Court takes its cue from the present case to shed light on the issue.

Corporate political speech can be banned to prevent corruption. However, the majority found that putting a restriction on independent expenditures reduces the quantity of corporate expression by narrowing: a) the number of issues discussed; b) the depth of their exploration; c) the size of the audience reached. Quite interestingly, commercial speech, the most likely to be practiced by corporations because of the economic nature of their activity, is not given any consideration. Corporate speech *tout court* in its broadest sense – without any modifier – is at the center of the majority's opinion.

According to the court, possible limitations to this freedom are subject to strict scrutiny; only restrictions pursuing a compelling governmental interest may be admitted in so far as they are necessary to the protection of this latter.

In this case Kennedy, on behalf of the majority, excluded further possible grounds for restrictions of that freedom – other than the one justified by the risk of corruption – by the corporation at stake. The major one is the anti-distortion argument, endorsed in *Austin*: the immense wealth possessed by most (albeit not all) corporations may inappropriately boost the societal-political views of the persons behind them at the expense of less affluent subjects, regardless of these opinions lacking public support. According to the Court, this distinction between individuals and groups, grounded on their power of influencing the outcome of elections, is foreign to the First Amendment *rationale*. Furthermore, this approach would also prevent small and non-

⁵ The court interpreted the unconstitutionality issue before it as a facial challenge – occurring when the legislation is thought to be in any case unconstitutional, and therefore void – rather than an as-applied one, in which only a particular application of a statute is considered as unconstitutional.

⁶ 494 U.S. 652 (1990). In this case, Court declared that the Michigan Campaign Finance Act banning corporations from using treasury money for independent expenditures to support or oppose candidates in elections for state offices squared with the First Amendment.

profit corporations from circulating their views; by restricting free and full public discussion, the marketplace of ideas⁷ would be poorer, undermining the First Amendment's most important goal. Neither is the argument accepted that the sacrifice of corporate First Amendment rights would be justified by the special advantages – such as that of corporations' members limited liability for contractual obligations taken in the corporations' name by persons acting as their proxy – conferred to legal entities through the corporate form. The assumption underlying the majority holding is that corporations are entities independent from states and shareholders. As speakers, they enjoy the same status as individuals and enjoy the same First Amendment protection.⁸

The other justifications for the curtailment of corporate speech, such as the above-mentioned necessity of fighting corruption or the necessity of protecting shareholders who do not agree with the decisions made by the management,⁹ are dismissed as not being applicable to independent expenditures. Investing money to advocate for the success or failure of a clearly identified candidate at election and not made in cooperation or in concert with this latter – the kernel of what is meant by 'independent expenditure' – is not enough to accurately show a real risk of corruption or a weakened protection of dissenting shareholders. In conclusion, the Court overturns § 441b's restriction on corporate independent expenditures and overrules *Austin*.

This decision, far from gaining a unanimous scholarly consensus, has been criticized as 'divorced from corporate law perspective' and based on 'flawed assumptions'.¹⁰

⁷ The origins of this concept – but not the definition quoted in the text – date back to the well-known *dictum* by Oliver Wendell Holmes in *Abrams v United States*, 250 US 616 (1919). The concept is clearly applied to extend corporate political speech rights.

⁸ The dissenting opinion by Stevens (28-30) highlights that 'the Court's denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality [...] Yet in a variety of contexts, [...] speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. [...] When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems [...]. The free speech guarantee thus does not render every other public interest an illegitimate basis for qualifying a speaker's autonomy; society could scarcely function if it did'.

⁹ This argument stating that the corporations' management opinions may not find the shareholders' support is shared by Justice White in his dissenting opinion in *First National Bank of Boston v Bellotti* 435 U. S. 765 (1978).

¹⁰ Anne Tucker, 'Flawed Assumptions: a Corporate law Analysis of Free Speech and Corporate Personhood in *Citizens United*', (2010) 61 Case W. Res. L. REV. 497, 520-521, who remarks that '[a]pplying a corporate law

In my opinion, a deep analysis of speech should take into account the major role allegedly played by money in making this freedom actual.¹¹ Money may affect speech in different ways:

1. money may provide incentives to speak;
2. money may facilitate speech;
3. spending money may be seen as a way of expressing one's own opinion. In general, spending money may be assigned a constitutional value when conceived of as a way of exercising a given constitutional right depending on a good distributed through the market mechanism.¹² The Court clearly sees in this case a ground for the application of the third option, considering the spending of money to lie within the penumbra of the freedom of expression. Putting a cap on independent expenditures on speech would take electioneering away from the market, ultimately having repercussions on the exercise of the freedom of expression.

The second case is *Burwell v Hobby Lobby Stores*.¹³ In this case, at stake are the regulations issued by the Health and Human Services (henceforth, HHS) under the *Patient Protection and Affordable Care Act* of 2010, which requires specified employers' group health plans to furnish 'preventive care and screenings' for 'women without any cost sharing requirements' (the cases of preventive care having not been specified by the Congress, their specification has been delegated to a component of HHS). These regulations impose on employers (in this case, corporations) to cover the cost of some contraceptives. The corporations involved – Hobby Lobby, Conestoga Wood Specialties and Mardel, whose nature is that of closely-held corporations (i. e.

perspective to the *Citizens United* debate, five points for discussion emerge: (1) the economic motivation of corporate speech, (2) the lack of a single corporate voice, (3) the threat of compelled speech, (4) the prevalence of existing regulation of corporate speech, and (5) the applicability of the equalization rationale to corporate speech'.

¹¹ For the understanding of money spending as 'a form of Modern Property', since 'it is frequently in the corporation's interest to spend money for political purposes', Carl J Mayer, 'Personalizing the Impersonal: Corporations and the Bill of Rights', (1990) 41 Hastings L. J. 577, 616.

¹² Deborah Hellman, 'Money Talks but it isn't Speech', (2011) 95 MINN. L. REV. 953, 985-986, who thinks that a system of circulation of goods different from market is not foreclosed by the constitution.

¹³ 573 U.S. _ (2014).

in the hands of few persons, unlike publicly traded corporations, who jointly exercise ownership and control) – were entirely owned by very religious individuals believing that life starts at conception and thus opposing paying for four contraceptives having the effect of preventing an already fertilized egg from developing any further. There were two main legal issues: whether for-profit corporations might avoid these regulations; and who – individuals or corporations in their own name – has the standing to sue. In this case, in fact the owners and not the companies sued HHS and other federal agencies, seeking to enjoin the mandate requiring (corporations) to provide coverage for the above recalled contraceptives. The abovementioned statutory instrument provides that, in the case of a breach of a statutory duty, a penalty is imposed on the employer whose entity depends on the number of persons deprived of such coverage. The Court dismissed the argument that freedom of religion may be affirmed only by individuals or exempted subjects, such as churches or religious non-profit corporations, consistently with what the HHS regulations' provisions in force stated at the time when *Hobby Lobby* was decided. Even for-profit corporations may claim this freedom. This solution is, according to the court, the one which effectively protects the freedom of persons behind corporations, who otherwise would be forced to choose between the judicial protection of their religious liberty as individuals – and not through corporations – or giving it up. The Court grounds the solution on the Religious Freedom Restoration Act (henceforth, RFRA) enacted in 1993, which prohibits the Government from placing a burden on the person's exercise of religion 'even if the burden results from a rule of general applicability', unless the Government 'demonstrates that application of the burden to person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest'. RFRA was enforced in order to heighten the protection of the freedom of religion.

According to the Court, the businesses at stake should be considered as 'persons' under the federal legislation (in the meaning disclosed by the Dictionary Act, the governing legislative source since the RFRA does not provide a specific definition in its own terms).¹⁴ This case, therefore, though appearing analogous to *Citizens United*

¹⁴ Alan J. Meese & Nathan B. Oman, 'Hobby Lobby, Corporate Law, and the Theory of the Firm: Why for-Profit Corporations are RFRA Persons', (2013-2014) 127 HARV. L. REV. F. 273, 277 adopt the same stance endorsed by the Court, relying on 'corporate law's enormous flexibility. The structure of corporate governance is contingent and contractual, enabling shareholders of closely held corporations to unify ownership and control and exercise the same prerogatives as owners of non-corporate businesses, such as partnerships. While such

(in both cases corporations are involved), shows a distinctive feature; it was not decided on constitutional grounds as a case of infringement of the First Amendment, but on a statutory basis, namely the federal law in force. The standard of protection then depends on the Congress.

The crucial argument in the majority's reasoning is the fact that the legal persons involved were closely-held corporations; the business is family-run. Individuals' religious beliefs should not be weeded out because of the corporate shield.

According to the majority, 'exercise of religion' (under the RFRA) involves not only belief and profession but the performance of (or abstention from) physical acts: 'business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition'.¹⁵

The principles stated in *Braunfield v Brown*,¹⁶ laying down the rules to apply when a law interfering with a person's religious practice may be held compatible to the US Constitution, were set aside by the RFRA. In Braunfield, an individual – an Amish proprietor who complained that he was forced by a state law to close on Sunday – claimed the violation of the First Amendment's free exercise clause, being forced to choose between not abiding by his religious beliefs (providing to shut his business on Saturday) or suffering an economic loss keeping his business closed even on Sunday. The court stated that when a law is generally applicable, not targeting religious practices but having only indirect effects on them, it does not violate the First Amendment.¹⁷ Nobody is therefore relieved of the obligation to comply with such a valid and neutral law. This legal principle has, in the majority's opinion, to be considered overturned from RFRA.

The majority deemed that the veil of corporate personhood may be pierced to give the floor to the freedoms of the persons who own those freedoms. The court also

closely held firms retain limited liability and entity status, neither attribute justifies denying shareholders of such entities the right to advance religion while earning a profit'.

¹⁵ 21.

¹⁶ 366 U.S. 599 (1961).

¹⁷ In the wake of Braunfield, see Employment Division, *Department of Human Resources of Oregon v Smith* 494 U.S. 872 (1990).

adds that ‘modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so’.¹⁸ The example of corporations supporting a variety of charitable causes is expressly considered.

In this case, however, the religious belief of owners allows corporations to avoid a cost. The women’s free choice and cost-free access to the challenged contraceptive methods show the existence of a compelling governmental interest; yet the Court states that the least-restrictive means test has not been satisfied by the appellants, insofar as they were not able to clearly show the lack of alternative options to that of burdening employers holding sincere religious beliefs.

It is interesting to remark that even if no free exercise of religion clause under the First Amendment is at stake, an understanding of this freedom does not seem to find in practice a limit in the women’s well-being and health, therefore curtailing or foreclosing for the women who can’t afford those expensive contraceptives the ability to make recourse to them. This argument is at the core of Judge Ginsburg’s dissenting opinion.

3. A look at the main US theories of corporate personhood

The conceptual framework used by the Court to adjudicate these cases results from two distinct, albeit deeply interrelated grounds. The first one – to which specific remarks will be devoted in the concluding paragraph – is a broad understanding of the two freedoms consecrated by the First Amendment, as a bulwark against possible governmental interferences to the benefit of either physical or legal persons. It implies a long-time and consolidated concern; or it would be better to say, a mistrust of governmental action pursuing the aim of redistributing wealth. Judges, in this conceptual frame, would be the gatekeepers of a ‘natural’ order that should not be upended by political choices.

The second ground is that of legal theories governing the issue of the legal person’s subjectivity. Three approaches are worth recalling. They may be considered, to a certain extent, as different steps in an evolutionary process, in which, however, older

¹⁸ 23.

theories – i.e., those dating back to a less recent past – have not disappeared once and for all. Some cases show they are still alive.¹⁹

The oldest doctrine is the so called ‘artificial entity theory’ (also called ‘grant/concession theory’). Its underpinnings are clearly expounded in *Dartmouth College v Woodward*²⁰: a corporation is an ‘artificial being, invisible, intangible, and existing only in contemplation of the law’, to be kept distinct from the natural persons behind it, having ‘those properties which the charter of its creation confers upon it’. Therefore, since corporations are creatures of the state (their existence being conditioned to an explicit acknowledgement by this latter), it may cut down their autonomy at will. Legal personality has the nature of a granted privilege allowed in order to ensure the safeguard of a public interest. The term ‘privilege’ is a keyword for a deep understanding of this doctrine, for it expresses the idea that limited liability of persons behind corporations is a derogation from the general principle of the unlimited liability usually incurred by individuals for the obligations assumed. The powers enjoyed by corporations – as the flipside of the duties imposed on them – were grounded from this theory on the charter of incorporation and limited to those expressly recognized; the corporation would be endowed with a special legal capacity. In this regard, *ultra vires* doctrine is the artificial entity theory’s linchpin. Their freedom, as the by-product of a previous concession by the government, must be exercised within the sphere marked by the state.²¹ Within this framework, the interests which might be claimed were only those that were tangible (i.e., having an economic content), the intangible ones, such as free speech, privacy and personal security, being reserved for human beings. The argument of exclusive institutional competence (according to which only the government has the power to establish corporations) is brought forward to justify this conclusion; in the wake of *Dartmouth*, this solution

¹⁹ For an in-depth analysis of these theories, Darrell A. H. Miller, ‘Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights’, (2011) 86 N. Y. U. L. Rev. 887, 914-931.

²⁰ 17 U.S. 518 (1819).

²¹ Miller (n 19), 920 sees in the artificial entity theory ‘a doctrinal device that the court uses to justify regulation of corporations to a degree different than individuals’.

was adopted in *Bank of Augusta v Earle*.²² According to some scholars,²³ even *Santa Clara County v Southern Pacific Railroad*,²⁴ regarded as a trailblazer for a new era in corporate rights, was no different under a theoretical viewpoint from the above recalled precedents. In Santa Clara, the issue was whether corporate property may be subject to taxation differently from that of natural persons. The answer, grounded on the applicability of the 14th amendment even to corporations, was in the negative. This theory progressively lost ground – suffering an erosion of its scope of operation from the 1880s onwards – since corporations were increasingly conceived of as a normal way of carrying out business and not as exceptions to be looked at with skepticism; the premise of their oddity – singularity – was no more tenable. However, sometimes – and throughout the 20th century – it is still employed. A clear example may be found in Rehnquist’s dissenting opinion in the already mentioned *First National Bank of Boston v Bellotti*, a case involving issues showing similarities to those covered by *Citizen United*.²⁵ In this case two national banking associations and three corporations expressed their opposition to a referendum proposal aimed at amending the Massachusetts Constitution to authorize the legislature to enact a graduated personal income. The appellants brought this action challenging the constitutionality of a Massachusetts criminal statute inhibiting contributions and expenditures by specific corporations aiming at influencing the vote on issues submitted to voters. This statute at the same time provided that ‘no question submitted to voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation’. The Court constructed the First Amendment as referring to the activity of addressing a topic of the utmost importance for the public opinion and therefore worthy of being

²² 38 U.S. 519 (1839).

²³ Morton Horwitz, *La trasformazione del diritto americano. 1870-1960* (Il Mulino 2004), 109-117 [*The Transformation of American Law 1870-1960* (OUP 1992)].

²⁴ 118 U.S. 394 (1886).

²⁵ Rehnquist in his dissenting opinion argues against the idea of a general freedom of expression assigned to corporations beyond the realm of their business and property interests. Rehnquist pointed out that restrictions on such speech had been approved by Congress and over thirty states. In the Judge’s view, corporate speech should be safeguarded when linked to commercial interests: ‘although the Court has never explicitly recognized a corporation’s right of commercial speech, such a right might be considered necessarily incidental to the business of a commercial corporation. It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes’ (825).

debated, rather than to a subject, who claims the right to express their opinion. Emphasis was therefore laid on speech as such, rather than on speakers.²⁶ Judges found that the criminal statute violated the First Amendment; corporations meant to express their views on an ‘issue of public importance’ and there was no overwhelming interest at stake for citizens that would legitimate restricting the freedom of expression of corporations.

The second theory in order of time is the ‘aggregation’ one. According to this doctrine, a corporation may be seen as a web of contracts. Corporations are therefore similar to partnerships, since natural persons are co-owners of them, and there is no distinct legal entity other than the persons acting through them.²⁷ To sum up, corporations should be seen as an aggregation of natural persons having legal rights, being corporate rights derivative of the individuals’ ones. Corporations do not depend on a decision made by the political power, but on a choice made by private persons to exploit their free will and give rise to corporations. Within the conceptual

²⁶ According to Mayer (n 11) 650, the trend highlighted in the text is the result of a ‘pragmatic, antitheoretical approach to corporate rights’ defined as ‘Constitutional Operationalism’, not depending on a specific theory of corporate personhood. ‘[A] corporation is only entitled to the guarantees of a certain amendment if, by so awarding the protection, the amendment’s purposes are furthered. Therefore, the corporation is defined by the operation it performs’. For a historical insight into the pragmatic approach to the issue of the legal personality of legal persons (detached from any reference to their entitlement to constitutional freedoms), John Dewey, ‘The Historic Background of Corporate Legal Personality’, (1926) 35 YALE L. J. 655, 673 lays emphasis on the legal concept of ‘person’ as a ‘duty-and-rights bearing unit’. This definition is not grounded on a given ‘substance’ of the entities to which is referred, having rather to be based on the consequences assigned to their acts by a given legal system. According to Dewey, this method is appropriate in order to get rid of the ‘mass of traditional doctrines and remnants of old issues’ which ‘needlessly encumbered’ ‘the entire discussion of personality’. Dewey remarks that theories concerning the corporate legal personality are not worthy of attention since they are extremely manipulable, being able to serve opposite ends depending on the specific legal problems at stake. Dewey’s stance is criticized by Horwitz (n 23), who observes that legal concepts and theories’ scopes depend on the historical contexts in which they are established.

A similar approach is followed by Bryant Smith, ‘Legal Personality’, (1928) 37 YALE L. J. 283, 296 who fully rejects any effort of theorization aimed at seizing the essence of corporate legal personality. Legal personality is in his terms ‘the capacity for legal relations’ (283). Being qualified as a legal person means simply being ‘the subject of rights and duties’ (ibid.). Smith’s survey seems to be marked by a sort of legal agnosticism. In this regard, a seminal passage devoted to better explain that author’s viewpoint may be found in the following page: ‘[...] the function of legal personality [...] is not alone to regulate the conduct of the subject on which it is conferred; it is to regulate also the conduct of the human beings toward the subject or toward each other. [...] The broad purpose of legal personality [...] is to facilitate the regulation, by organized society, of human conduct and intercourse’.

²⁷ This assumption underlies the essay by Max Radin, ‘The Endless Problem of Corporate Personality’, (1932) 32 COLUM. L. REV. 643, 666 who suggests that ‘the corporate entity is thought of as a name or symbol which facilitates reference to a complicated group of relations, but adds nothing to them’.

framework of the aggregation theory, corporate identity would be a conceptual means of simplification, achieved by replacing the real owners of rights and parties to complex relations with a unitary entity. A recent application of this theory is made by Scalia's concurring opinion in *Citizen United*, where corporations are clearly viewed as an incorporated association of individuals. Among US scholars, there are some, even today, who think that the true beneficiaries of the protection are the natural persons behind the corporations. In my opinion, this theory attempts to distance itself from the artificial entity theory and may be considered as a bridge to the most recent doctrine, the so-called 'real entity' one, to the extent that it acknowledges the crucial role displayed by human decisions as to the creation of corporations, by-products of the individual entrepreneurial initiative and not of states.

According to this latter, a corporation is to be considered a real (and separate) entity, not just the sum of its parts (the physical persons behind it), with its own will and well-defined interests.²⁸ In the legal literature, the first case in which this doctrine was applied was *Hale v Henkel*,²⁹ stating that the 14th Amendment applies to corporations. This theory is a reaction against the states' interference in the economy; for this reason, state police power is restrictively understood. As a result of the corporation's autonomy from the shareholders' persons, managers are not anymore considered the shareholders' proxies, and are instead considered to be the corporations' ones.³⁰ The gradual overcoming of the *ultra vires* doctrine (fulfilled by the parallel widening of the corporations' implied powers) prompted the transition from the two theories previously recalled to this latter. Under the cloak of the 'real entity' theory, viewed as a typical apparatus of the 'Modern Regulation era',³¹ the Bill of Rights was transformed 'from the most cherished palladium of personal liberties to one of

²⁸ Kostantin Tretyakov, 'Corporate Identity and Group dignity', (2016) 8 WASH. U. JUR. REV. 171, 182 understands the three theories on corporate personhood as 'narratives', i.e. stories concerning the legal status of corporations. According to Tretyakov, the real entity theory is based on the assumption 'that corporations are capable of formulating and advancing their own will (in the forms of choices and judgments) through the interaction between their members. In this respect, the real entity theory presupposes corporations' *personal identity* and, consequently, their personhood'.

²⁹ 201 U.S. 43 (1905).

³⁰ Horwitz (n 23) 124.

³¹ This framework is used by Mayer (n 11).

organizational prerogatives'.³² It was used as a unifying basis for corporate interests to oppose social regulations aiming at the protection of labor, consumer and public interest groups.

Both the aggregate and the real entity theory show that corporations exist independently from a state decision³³; they may be recognized but are not created by the state.³⁴ A logical consequence of this premise is that rights are not awarded to corporations by the state, having an autonomous foundation.

4. Concluding remarks

The decisions rendered in *Citizens* and *Hobby Lobby* may be considered as the result of several factors.

The first is the fear of governmental intervention in spheres in which private persons have to be viewed as sovereign, such as the economy. Governmental acts addressing the behavior of individuals in order to steer their aims are clearly at odds with the idea of neutrality – equidistance – which should be the main drive to governmental action. According to this paradigm, government should be far removed from the societal interests at stake and refrain from affirmative actions aimed at confronting (and decreasing) existing social inequalities, not ‘taking sides’ with the most disadvantaged community layers. Leaving the *status quo* unchanged was and is still considered in some legal quarters to be less dangerous than undertaking a positive action. According to this approach, like a sort of underground river which from time to time comes to the surface, corporate freedoms should not be considered and treated differently – as to

³² ‘Ibid’ 578. As Miller (n 19) 927 poignantly notices ‘[r]eal entity theory solved the problem of fitting the corporation into the common law system, but it did so at a price. The price was the heavy strain that constitutional adjudication placed on the personhood metaphor once corporate rights transitioned from property to liberty’.

³³ Miller (n 19) 931 draws a distinction between aggregation and real theories in this way: ‘[a]ggregation theory tries to reap all the benefits of the real entity theory without all of the metaphorical hocus-pocus. Corporations are not artificial; they are not real; they are a set of relationships with which government should not, or constitutionally must not, interfere’.

³⁴ For the theory that corporations may be considered ‘artificial’, but not ‘fictitious’, Arthur W. Machen, Jr, ‘Corporate Personality’, (1911) 24 HARV. L. Rev. 253, 266, who points out that ‘although corporate personality is a fiction, the entity which is personified is no fiction’.

their quality and extent – from those enjoyed by physical persons. *Lochner v New York*³⁵ is in this regard paramount, a judicial milestone which significantly foregrounded the idea that all changes in the distribution of wealth triggered by legislation – other than those made through taxation – are contrary to the substantive due clause enshrined in the Fifth Amendment, if made for purposes which, far from being of general interest, are linked to the interests of a societal group and to the aim of making this latter better off. *Lochner*’s underlying idea is that the judiciary must maintain a position of neutrality and resist the temptations of political drift. The value of neutrality finds a constitutional foundation in the due process clause and is aimed at preserving the market framework, seen as part of a spontaneous order – not the by-product of a legal construct – mirrored in the common law.³⁶ According to this paradigm, governmental intervention may raise legitimate criticism when it infringes upon individual interests, whereas its inaction does not. The decision made in *Lochner* does not address corporations; yet its reading of the Fourteenth Amendment as a significant evidence of the acknowledgement by the Constitution of the laissez-faire doctrine and as a bulwark of the freedom of contract gives to legal persons a highly persuasive argument for a strong protection of their interests. The acknowledgement of corporate rights and freedoms may be grounded on two – not necessarily opposing – reasons: either the safeguarding of legal persons’ own interests or an underlying public interest (thus, a utilitarian explanation).³⁷

In *Hobby Lobby*, the strong protection awarded to corporate rights rests upon a not complete separation – a fully-fledged barrier – between the legal person and the physical persons standing behind in spite of the fact that the legal person is a for-profit corporation.

³⁵ 198 U.S. 45 (1905).

³⁶ This view is adopted by Cass Sunstein, ‘*Lochner*’s Legacy’, (1987) 87 COLUM. L. REV. 873, 875 who suggests that ‘the case should be taken to symbolize not merely an aggressive judicial role, but an approach that imposes a constitutional requirement of neutrality, and understands the term to refer to preservation of the existing distribution of wealth and entitlements under the baseline of the common law’.

³⁷ On this point, Peter Oliver, ‘Companies and their Fundamental Rights: a Comparative Perspective’, (2015) 64 ICLQ 661.

If the economic sphere is considered as the corporations' 'natural' realm, acknowledging the right to them of fundamental freedoms takes these latter too far³⁸. Treating corporations as natural persons would not have negative effects if they were required at the same time to act as diligent citizens. Yet, such an expansion of the scope of corporate freedoms did not end as a result in a parallel extension of corporate liability on the international human rights ground.³⁹

In my opinion a further reason – related to the ways US legal tradition framed the freedoms of religion and expression – prompted the Court to decide *Citizens United* and *Hobby Lobby* the way it did. The majority of judges conveyed an understanding of their core content which is strongly embedded in the US constitutional law historical background, regardless the identity of the subjects claiming their protection.

The fact that in those cases protection was accorded to entities having the status of corporations is a side effect of a given reading of the First Amendment 'as an absolute',⁴⁰ i. e. as a legal text forbidding any possible abridgment of the rights enshrined in it, based on the plain meaning of the provision. This construction of the First Amendment's meanings may have had a hold on the way the majority saw the legal issues before them.

Criticisms of the judgements discussed above, focused exclusively on corporations' economic power (and prompted by a political commitment to fight societal inequalities), may at the end of the day be inappropriate, as ideologically biased. The issues concerning legal personality have a technical reach and meaning which need to

³⁸ 'Ibid'.

³⁹ See e.g. *Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), where the Court disregarded corporate accountability on the ground of human rights' infringement. For a critical appraisal of the approach adopted in the realm of international law by the Court, Beth Stephens, 'Are Corporations People: Corporate Personhood under the Constitution and International Law: An Essay in Honor of Professor Roger S. Clark', (2013) 44 Rutgers L.J. 1, 5 who sharply remarks that 'the *Kiobel* majority, [...] ignored the robust corporate identity that many are quick to adopt when considering a corporation's constitutional rights'. In Stephens' words, 'the robust, multi-dimensional entity' of corporations depicted by constitutional law cases is replaced – when international law applies – by 'a one-dimensional dot'.

⁴⁰ Among the scholars supporting such a reading, Hugo Black, 'The Bill of Rights', (1960) 35 N. Y. UNIV. L. REV. 865; Alexander Meiklejohn, 'The First Amendment is an absolute', (1961) The Supreme Court Review 245. Against this approach, Cass Sunstein, *#republic. La democrazia nell'epoca dei social media*, (Il Mulino 2017), 240, [*#Republic: Divided Democracy in the Age of Social Media* (Princeton University Press 2017)], who considers the idea that the First Amendment is an 'absolute' a 'myth'.

be carefully taken in account. A reading of these questions exclusively through the lens of political commitment runs the risk of simplistically leading to an allegedly dark side of the law. For the sake of clarity, two general remarks have to be made before reverting to the peculiarities of the above analyzed cases.

Firstly, the recognition of some rights to natural persons behind corporations may sound astonishing if one applies the concept of ‘person’ to non-human entities as well as human ones in the same way and to the same extent. One has to bear in mind that in both cases the concept of ‘person’ has a legal nature; thus, its meanings have to be elicited from positive law.

Secondly, even if natural persons behind corporations are the ultimate and real beneficiaries of the freedoms acknowledged to corporations in those cases, a difference has to be made between the case in which these rights are invoked by persons as individuals or as members of a group.⁴¹ In this latter case, these rights cannot be conceived of as entitlements owned by those persons as individuals; rather, they must be understood as referring to their status of corporations’ members and considered as functional to the achievement of the goals underlying the acts by the legal person.

In order to understand the decisions’ *rationale*, one should bear in mind that Citizen United is a nonprofit corporation, and Hobby Lobby a (for-profit) closely held company. The specific features characterizing those corporations (emphasizing the importance of their non-profit nature or that of the human component) allowed to avoid the technical conundrums brought about by the theoretical conception of corporations as real entities, clearly separate from their human members.

Furthermore, the Court’s acknowledgement of speech to corporations may be appreciated as the outcome of a conception of that freedom not just as an instrument of self-realization and active participation of individuals as citizens aimed at their self-government (these goals may be referred only to natural persons), but also as a signpost of a different quality, that of consumers. In this latter sense freedom of choice displays a major role. This second layer of meanings is the by-product of a market-oriented understanding which is the corporations’ natural framework.

⁴¹ This distinction is criticized by Tretyakov (n 28) 181.

Freedom of speech would be therefore the ground of two noticeable interpretations of the individual sovereignty: the first – the political one – emphasizing the commitment of individuals to be good citizens; the second one, highlighting their role of consumers. These two coexisting meanings of sovereignty underlying the freedom of speech were historically embodied, among the US Supreme Court's judges, by Brandeis, who pointed out the freedom of speech's role as a tool enabling the fulfilment of the citizens' duty to participate to the public debate, and Holmes, whose belief in an open marketplace of ideas (fundamentally assimilated to goods) underlined the possibility for everyone to opt for the most appreciated ones.⁴² A realistic explanation of the judicial support of the corporate freedoms may be that Holmes' view gained momentum within the Supreme Court.

An accurate survey of these decisions asks for prudence and a thorough analysis of the legal points at stake as well as the conceptions underlying them before finding for a judicial subjection to corporations' interests disclosing a dark side of the law.

⁴² For the thesis that judges Holmes and Brandeis are respectively propagators of the consumer's and political sovereignty, Sunstein (n 39) 69-73.

CAUSATION, PROOFS AND SCIENCE: THE DARK SIDE OF NUMBERS

Bruno Tassone^{*}

Abstract

A great number of modern studies on causation argue that it is not possible to build a theory which can be applied to any situation, up to the point of either: evoking different truths narrated by the characters of the well-known Akira Kurosawa movie “Rashomon” (Cendon); stating that “causality is a nail to which the judge can hang the hat he likes most” (Hart and Honoré); or just seeing it as a tool which permits the most “unscrupulous” legal policy operations (Alpa).

The problems of this legal category have been magnified since many jurisdictions have reverted to the “more likely than not” standard, which has brought them to consider causation established if the plaintiff succeeds to prove that it is more probable than not that the damage was caused by the defendant; and since they have acknowledged the so-called “loss of chance” doctrine, where a plaintiff can claim damages if he is simply being neglected the possibility of getting benefit or avoiding harm with the probabilities of these happenings higher than 50%.

The just outlined scenario turns to important legal and interdisciplinary questions, such as, whether there might be a possibility of establishing causation and/or imposing a compensation for the “loss of chance” relying on statistics, epidemiological and other scientific studies. In more general terms, the paper confronts the question whether these studies can provide a solution to the legal “innumeracy” that erode many judgments and foster bias (that often leads to an erroneous view that if the defendant is black and poor, he is more likely to steal). In this context, we turn to another question: of whether we should carry out trial by mathematics – as suggested by a well-known article (Tribe) - and whether we should

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allow it to become the foundation for determining the evidence; or whether this approach will inevitably take us into the past, to the judicial standards of the Middle Age proceedings (where it took several lower class witnesses to rebut the statement made by just one testimony that belonged to an upper class). Thus, the paper considers not only the legal relationship between the cause and effect, but also whether we are facing the future where the assessment of evidence shall be entrusted to computers and Artificial Intelligence.

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Keywords

Torts – Liability – Medical Malpractice – Negligence – Causation – But-For Test – More Likely Than Not – Preponderance of the Evidence – Compensation – Indemnification – Damage – Loss of Chance – Probability – Scientific Evidence – Statistics – Epidemiology – Civil Law – Common Law – Comparison – Policy

1. Introduction

A great number of modern studies regarding causation conclude that it is not possible to build a theory which can be applied in any situation. To put it briefly, in order to describe the problems that causation nowadays faces we can recall the “blanket syndrome”, which states that covering one’s feet will get one’s neck exposed, and covering one’s neck will expose one’s feet.

Furthermore, those problems have been magnified since Italian Courts – along with other jurisdictions – have reverted to the “more likely than not” standard, pursuant to which causation is established if the plaintiff succeeds to prove that it is “more probable than not” that the damage was caused by the defendant. The standard, amongst other things, raises legal, scientific and linguistic issues regarding the meaning of the word “probability”, a multi-faceted concept.

Another set of problems stems from acknowledging the so-called “loss of chance” doctrine (hereinafter “LOC”), where the plaintiff can claim damages if they are simply being neglected the possibility of getting a benefit or avoiding a detriment. Some systems require the lost probabilities to be higher than 50%. Other systems insist that it is sufficient for them to be fairly substantial, while some believe, in principle, no threshold should be established at all. In all such cases the plaintiff is entitled to a partial compensation.

Nevertheless, it is still unclear how a finding of causation based on a probabilistic approach (because of the said more likely than not standard) is to be coordinated with the indemnification of a “loss” also defined in stochastic terms.

Those problems are especially difficult in the medical malpractice area, where the link between the defendant’s behavior and the plaintiff’s damage can often be established only through statistics, medicine, epidemiology and other sciences. However, the consideration of how other disciplines define probabilities can unveil a new way to solve them and to lead to innovative legal solutions.

The first Paragraph displays a brief sketch on the current causation and LOC applications in the field of med-mal in the Italian system. The second Paragraph enriches it with a comparative perspective. The third Paragraph then highlights some scientific and linguistic issues related to the concept of “probability”. The final Paragraph proposes a possible framework to sort (some of) them out.

2. Causation and LOC: A Difficult Relationship

As pointed out above, it is generally agreed within the Italian scholarship that it is nowadays impossible to build a theory of causation *bonne à tout faire* (Capecchi 2012; Pucella 2007; Tassone 2007; Nocco 2010; Tassone 2020a).

The idea – sometimes expressed in colorful terms, as an event is said to have as many explanations as “the truths narrated by the characters of the Akira Kurosawa movie *Rashomon*” (Cendon 2015: 11) – is accepted also beyond Italian boundaries¹: up to saying that “causation is a peg on which the judge can hang any decision he likes” (Hart and Honoré 1985: 488).

Eventually, even the Italian Supreme Court of Cassation admitted that causation is an almost insolvable hermeneutic problem on the level of pure legal dogmatics, [being] inevitably destined to be resolved within the (more pragmatic) boundaries of a “historical” dimension, or, if you like, of legal policy (Cass. April 18, 2005, no. 7997).

The dominant model has been – and still is, with some “temperaments” – the one of the *condicio sine qua non* which roughly corresponds to the “but-for” test and its variations in Common Law countries².

Nevertheless, the theory is as fascinating as empty: to say that the conduct A is not the cause of the effect B if without A – mentally subtracting its existence – B would still take place, it is necessary to know in advance the relationship between A and B;

¹ Whereas all quotations will be extremely limited for reasons of space, for a comparison among six legal systems Infantino 2012, to be added to Porat and Stein 2001.

² See the “relevant factor” (Hart e Honoré 1985: 157), the NESS (Necessary Element of a Sufficient Set) test developed on its basis (Wright 1988), the adjustment known as INUS (Insufficient but Nonredundant part of an Unnecessary but Sufficient Set) test (Mackie 1965) and the “material contribution to harm” depicted by the House of Lords in *Bonnington Castings Ltd v. Wardlaw* [1956] AC 613. For more references, Green 2015 and Turton 2016.

so that while the world – even that of knowledge – becomes more and more complex, causation has to be filled through science.

Besides, the theory is inapplicable where causation can be assessed only in a probabilistic way, especially where a so-called “general causation” – instantiated by a recurring model situation in the field of med-mal – comes into play.

Assume that a patient is hospitalized for a bowel infarction and is taken into surgery only three and a half hours later and dies. Clinical studies show that if the surgery takes place within two hours, the patient has a 30% chance of survival. This means that, in principle, there is no way of knowing whether the patient fell into the “lucky” group – that of 30% – or the “unlucky” one, so that the *conditio sine qua non* is a blunt weapon: even if the patient had been operated sooner, we do not know whether or not they would have survived.

Before further elaborating on the example, Courts all over the world are aware of the problem raised by general causal explanations (for an overview, Tassone 2020a: 231).

To this regard, a judgment which sprouted a new interest for causal studies in the Italian system – that of the Supreme Court of Cassation, Criminal United Sections, of July 10, 2002, rendered on a bowel infarction case –, stated that

is not allowed to automatically draw from the probability coefficient expressed by the statistical law the confirmation, or not, of the prosecutor hypothetical accusation about the existence of the causal link [and] the judge must verify its validity in the specific case, on the basis of the circumstances and the available evidence,

so that

at the outcome of the reasoning on the evidence [...] the conclusion that the doctor's conduct was a necessary condition of the event with a “high degree of rational credibility” or “logical probability” is justified and certain from a procedural point of view.

Such a landmark judgement is a very good example of “legal transplant”, as was strongly influenced by the U.S. formants.

As the O.J. Simpson case makes clear, it welcomes the distinction between general and specific causation³. Furthermore, applying the “beyond any reasonable doubt” standard in the criminal setting – now provided by Art. 533 of the Italian Code of Criminal Procedure – it paved the way to the “more likely than not” in the civil one: which the Supreme Court sustained a few years later⁴.

Nevertheless, in the short run the Civil Sections of the Supreme Court avoided a “fontal collision” with the *dictum*: still on a case of bowel infarction Cass., March 4, 2004, no. 4400, stated that damages resulting from incorrect or late diagnosis can lead to the loss of chances of survival or recovery, which are themselves a “protected legal situation”, so introducing LOC in the field of med-mal⁵.

After the above mentioned decisions were pronounced the “more likely than not” has not only been quickly consolidating, but – starting from Cass. July 2011, no. 15991 – it has been applied according to its “weak version”. It is sufficient that the conduct of the plaintiff be the cause of damage with a degree of probability higher than the one of other single causes and not in “absolute” terms (i.e., higher than the one of each of all the other causes joined together).

Therefore, the judgement states

in the field of damage stemming from infected blood transfusions, if the possible contributing causes appear to be multiple and quantifiable up to ten, each with a probabilistic incidence of 3%, while the transfusion reaches a degree of probability equal to 40%, the claim has not to be dismissed.

Coming back to LOC, few years later the Supreme Court established that even chances lower than 50% are recoverable, which enlarged its potential sphere of

³ On the distinction Nesson 1979, Kaye 1982, Dore 1983, Wright 1988 and Stella 2003: 291.

⁴ Supreme Court of Cassation, United Sections, January 11, 2008, nos. from 576 to 585.

⁵ LOC has been accepted in the Italian system since the mid-80s, even though both its legal foundations and its sphere of application are still controverted. Born in the context of labor career progressions, it was applied some years later in public competitions and landed into the realm of medical malpractice. After such a moment its expansion seemed to be relentless, involving, for example, professional liability in general, the right to self-determination and many other cases. For a critical overview, see La Battaglia 2019.

application⁶. Therefore, the Court of Cassation tried to put some limits, for the first time, in the year 2018, completing its work in 2019⁷.

In particular, in November 2019 its Third Section decided to publish the so-called “health system project”, rendering over sixty judgments on the matter, with ten of them expressing its final view on quintessential issues and a specific decision devoted to LOC: which is now seen by the majority of judges as an autonomous legal “item” featured by the system, to be compensated if the deprived possibilities were “serious, appraisable and consistent”⁸.

Thus, to obtain redress the plaintiff must only prove that they were deprived of those possibilities “more likely than not” because of the defendant’s behavior, which creates a problem of coordination with causation.

Indeed, even from this brief sketch some questions arise, leaving aside the issue of the “refinement” of the statistic class of reference⁹:

First, is the “probability” implied by the “more likely than not” other than the one implied by LOC?

Second and if so, how can an assessment of causation in probabilistic terms can live together with a legal situation defined in the same way?

Third, if the case is the contrary, how are probabilities to be defined and how do they relate to ones implied by the “general causation” assessment?

⁶ Cass., March 27, 2014, no. 7195.

⁷ Cass. March 9, 2018, no. 5641, and Cass. March 19, 2018, no. 6688.

⁸ Cass. November 11, 2019, no. 28993.

⁹ Assuming that the 30% was drawn considering a target group of people over fifty, where the patient was an Olympic champion, do the general health conditions matter? What if the case is about a transplant and the key issue is the patient rejecting the new organ? Unfortunately, “more often than not” the answers to such questions do not make general causation applicable to a single case, but only allow to better define the class of reference (as explained in Tassone 2020b: c. 358). If those factors have not been considered because they are irrelevant, they make no difference. If they are relevant, the study cannot be used to assess causation and a further study is needed. But it is very likely that it only brings a change in the percentage of success, saying nothing about the specific situation.

3. Comparative Considerations and Common Law Reactions

In the light of the difficult relationship between causation and LOC, it is no coincidence that legal systems all around the world have different approaches as to its admissibility (for an overview Saporito and Tassone 2020: 99).

It is well known that the doctrine originated in the French system, along with a decision of 1889¹⁰. But even in the system to which the birth of LOC is attributed, the doctrine is controversial, as the proposal to amend the *Code Civil* presented some years ago clearly confirms¹¹.

Therefore, it's worth testing a number of common assumptions as the one spotting the French system as the only cradle of LOC: to discover that *chance* is already dealt with by the English system with *Chaplin v. Hicks* of 1911, become very popular also because of John Maynard Keynes treaty on probabilities, which in turn strongly influenced Common Law systems (Keynes 1921: 3)¹².

Furthermore, fifty years later – in *Kitchen v. Royal Air Force Association* – one finds Courts admitting the compensation for the loss of a *chance* of certain consistency where a lawyer belatedly filed an appeal¹³.

However, a line which seems in harmony with the Italian and French evolution – one would expect an extension from the field of professional liability to that of med-mal – comes at some point to an end or, in any case, is strongly questioned. In *Wright (A Child) v. Cambridge Medical Group* of 2011 – after a leap of another fifty years –, the sharp rejection of a typical LOC claim in the area of medical negligence area is based

¹⁰ Cass. req. July 17, 1889, in *Rec. Sirey*, 1891, I, 1399. On the French system Feola 2004.

¹¹ Art. 1346 (“[t]he loss of opportunity is a repairable prejudice distinct from the benefit that the chance would have provided if it had been fulfilled”) of the Draft Reform of the Law of Obligations (Arts. 1101 to 1386 of the Civil Code) and Statute of Limitation Law (Arts. 2234 to 2281 of the Civil Code), available on www.lexisnexus.fr.

¹² On the influence of *Chaplin v. Hicks* [1911] 2 KB 786, in Australia and North America, Coote 1988: 761, and Feldman 1987: 139.

¹³ *Kitchen v. Royal Air Force Association* [1958] 1 WLR 563.

on the peremptory assertion that such doctrine has no citizenship¹⁴: following the position taken by the House of *Lords* in *Hotson v. East Berkshire Area Health Authority* of 1987 and in *Gregg v. Scott* of 2005¹⁵.

Moreover, North American jurisdictions as well are beset with strong doubts on the role of LOC, as stressed out by the rulings of two Supreme Courts which – even at a short distance – assumed very different positions¹⁶.

More generally, it results that some States are very favorable to LOC and others are vehemently opposed to it, with the related inventories needing a constant update, because of an incessant evolution¹⁷; and another overview leads to highlight a general trend using LOC to temper the effects of the all-or-nothing principle (stemming from the application of the “more likely than not”), but – unlike the English system – limiting such a solution, mainly, to the area of medical negligence¹⁸.

In addition, the negative reactions arisen in Common Law countries go beyond those ones.

For example, the Canadian Supreme Court flatly denied the eligibility of LOC in *Laferrière v. Lawson*, which concerned Quebec, a system heavily tributary of the French experience¹⁹: a decision which triggered a serious reflection on the reasons behind

¹⁴ *Wright (A Child) v. Cambridge Medical Group* [2011] EWCA Civ 669, [2013] QB 312.

¹⁵ *Hotson v. East Berkshire Area Health Authority* [1987] 2 All ER 909 and *Gregg v. Scott* [2005] UKHL 2.

¹⁶ It was only one month apart that the Supreme Courts of Massachusetts and Kentucky in 2008 admitted and denied the redress for the loss of chances below 50%, respectively with *Matsuyama v. Birnbaum*, 890 N.E.2d 819 (Massachusetts 2008) and *Kemper v. Gordon*, 272 S.W.3d 146 (Kentucky 2008).

¹⁷ As an example, a count carried out in 1995 indicated 24 States in favor, 12 against and 4 taking contradictory decisions (Hodson 1995: 34). A 2012 article argues that LOC has made inroads into the system of 26 States, with 19 of them and the District of Columbia continuing to oppose its recognition, in addition to 5 States where the situation is not well defined (Shnoor and Bacon-Shnoor 2012: 1). Finally, an even more recent review confirms the significant rift that continues to exist in the American context: as an Author maintains that 23 States – lead by Massachusetts – have given way to LOC, while 20 States driven by California with the support of the District of *Columbia* are oriented in a negative way (Casaceli 2014: 521).

¹⁸ Shnoor 2009: 33.

¹⁹ *Laferrière v. Lawson*, [1991] 1 S.C.R. 541.

this setback also because some Courts applied its rules in other Provinces, such as Ontario and, in part, British Columbia²⁰.

Finally, also in Australia the highest Court has shown to be refractory, if not hostile, to LOC, especially with the decision made in *Tabet v. Gett*, to be mentioned also for its comparative gaze (extended to France, Belgium and Germany)²¹. Still, the judgment was followed by a less restrictive legislation, likely to exceed the High Court's *dictum*²²: which in its turn is particularly relevant as in conflict with supervening laws and with other judgements (rendered by appellate courts) very favorable to LOC²³.

There are very noteworthy decisions here as well²⁴; in addition to some scholarly works, such as the papers by Harold Luntz (2011), aimed at verifying its penetration into the law of medical negligence in Common Law countries²⁵.

The investigation starts from the paradigmatic situation where a doctor makes a wrong diagnosis that precludes a timely treatment. The delay in discovering of a tumor impairs the chances of patient's survival up to 5 or 10 years – the typical temporal projections considered by medical studies – further reduced where one moves from the time when the correct diagnosis could be made.

Such a model situation – where statistics state that the patient has an X% chance of survival up to a Y of time, and yet lives longer – strongly question the idea that *chance* is autonomous legal asset, as constantly maintained by the Italian legal system.

²⁰ *Cottrelle v. Gerrard* (2003), 67 OR (3d) 737 (CA). In the legal literature, Brown 2011: 3, and Knutsen, 2010: 153.

²¹ *Tabet v. Gett* 2010, [2010] HCA 12.

²² See the Section 5D of the *Civil Liability Act* 2002 *New South Wales*, which leaves room for the compensation of LOC as an “exceptional case” in respect to the but-for test and if “in accordance with established principles”.

²³ *New South Wales v. Burton*, (2006) DDCR 398 (NSW CA).

²⁴ *Grant v. Australian Knitting Mills Ltd.*, (1933) 50 CLR 387, although later reformed by the Privy Council with *Grant v. Australian Knitting Mills* [1936] AC 85. More recently, *Chappel v. Hart* (1998) 195 C.L.R. 232, *Naxakis v. Western General Hospital* (1999) 197 C.L.R. 269, and *Amaca Pty v. Ellis*, [2010] HCA 5, (2010) 240 CLR 111.

²⁵ See also Lunney 2014: 205, and Stapleton 2011: 331.

Provided it was so, it would not be possible to deny compensation, even in that fortunate event, and LOC must find other grounds.

Furthermore, the enquiry into the way statistics are built is useful to spot common errors, at times committed by the Supreme Courts as well²⁶; and enlightens some further problems that the relationship between law and science raises²⁷.

The above leads us to conclude that the enquiry on Common Law approach is useful not only because they are usually less considered than the French one.

After all, a wider perspective leads to the consideration that the recognition of LOC in other European systems is not to be taken for granted. For example, according to a careful comparative work, the doctrine is unknown in Austria, Switzerland and Greece, and it has not yet been admitted in Hungary, the Czech Republic, Slovenia, Estonia, Denmark, Switzerland, Norway and Finland²⁸.

Eventually, it is not a coincidence that the case-law of a German system – which historically “dialogues” with the Italian one on various issues relating to civil liability

²⁶ In *Matsuyama* above the Massachusetts Supreme Court explains that, assuming a life value of 600,000 \$ and a chance of survival reduced from 40% to 10% due to doctor's negligence (because of the delayed diagnosis of a tumor), the damage must be 180,000 \$ (600,000 x 30%, given by 40% – 10%). But the said result would be correct only if the decrease had brought the chances of survival to a zero, not if some chances of survival would remain unchanged despite the said medical negligence, as it is possible to identify not two but three classes of patients. The first is made up of 60 patients who would meet their fate in any case, with or without medical treatment; the second - of only 4 patients who would have survived despite the statistics (i.e. 10% of 40% of patients subjected to the said malpractice); to which is added, *de residuo*, the class of those who would benefit from the treatment. Then, the probability should be calculated assuming as “basis” for the patients affected by the conduct a cohort of 96, so that the lost chances stem from the proportion 30/96, that is 31.25%, having to recalculate in 192,000 \$ the value of them (31.25% x 600,000) with an upward correction of 12,000 \$.

²⁷ Classes could increase depending on how the case is structured, for example on the basis of the incidence of other factors and – however – percentages can vary as one moves forward from “time 0”, when the correct diagnosis was to be carried out. If the due outcome is the expectation to prolong survival for up to five years, the 36% chance of living for the duration of that timeframe can only be the aggregate result of partial percentages of different magnitudes or (assuming it as a number placed at the end of the period) must postulate that the percentages in the intermediate periods are higher. Moreover, the same evolution of the pathology may require various sub-distinctions: some patients may have a relapse and others may not; some may develop metastases and others may not; some may have operations with their own risks, others - not; and so on.

²⁸ Graziano 2008: 1009.

– does not contemplate LOC at all and other techniques are used to mitigate the consequences of the “all or nothing” principle²⁹.

Finally, the Common Law systems shed a light on how the “more likely than not” is to apply, because of the distinction between what the plaintiff has to prove (conceptual element) and the way in which she has to do it (evidential element)³⁰.

The English version of the “more likely than not” standard does not follow that the difference between the probability of an event taking place and the judge’s inherent degree of “belief” should be annulled³¹. According to some Authors, the assessment is, indeed, qualitative and not quantitative³². For that reason, they find it more preferable to adopt the “balance of probabilities” expression instead of giving it a numerical formulation³³.

Apart from a few exceptions, the same generally applies in North American systems as well, even though the “preponderance of the evidence” has a wider use, in line with the recommendation of the Restatement Third³⁴.

However, in this perspective the scientific, epidemiological and statistical evidence is included in a broader framework. In other words, they represent a mere element of that “mix” which leads to the conclusion that the plaintiff’s allegation is more likely to be grounded than not³⁵.

²⁹ See Stauch 1997: 218, Jansen 1999: 275, Cricenti 2019: 2073 and 2020: 64.

³⁰ Steel and Ibbetson 2011: 451.

³¹ Gold 1986: 376; Barnes 2001: 191; Miller 2006: 544, Haack 2014: 19.

³² Turton 2016: 83.

³³ McIvor 2013: 553.

³⁴ *Restatement of the Law, Third, Torts: Liability for Physical and Emotional Harm*, 2010, § 28 *Comment c*.

³⁵ See Saporito and Tassone 2020: 99.

4. Probability, Science and Language

The points discussed above offer us a possibility of coordinatig causation and LOC: while the former does not imply a mathematical assessment of the credibility of the plaintiff arguments over the existence of the causal link, the latter requires an estimation of the lost possibilities they had to accomplish a benefit or avoid a detriment (even though it is discussed whether or not the compensation should be awarded in a strictly proportional manner)³⁶.

The said picture demonstrates that LOC is often a “fiction”: chances do not exist by themselves and they make up for the structural impossibility or the insurmountable difficulty of predicting the outcome, while not laying the blame on the plaintiff not offering the related evidence.

Therefore, the Italian Supreme Court’s statement that it must be verified whether the probability of avoiding a detriment or achieving a benefit has been “more likely that not” elicited by the defendant is just an “optical illusion”³⁷. The conduct of the doctor who does not operate on the patient is by definition such as to preclude, more likely than not, if not in an absolute way, a course of events more favorable to the plaintiff and the same is true in other contexts³⁸.

Indeed, the general attitude of suspicion or, in any case, of caution, expressed by the English and North American systems offers other arguments to refrain from theoretical constructions identifying chance as an autonomous “item” to be protected; and comparison supports the idea that LOC should be based on the identification of the dynamics that cause a substantial and/or procedural uncertainty that the plaintiff could not in any way overcome³⁹.

³⁶ In the English system, *Sienkiewicz by Greif* [2011] UKSC 10, And *Reay and Hope v. British Nuclear Fuels Plc* [1994] Env LR 320.

³⁷ Cass. November 11, 2019, no. 28993.

³⁸ That is for the employer who unlawfully excludes the worker from a career progress competition, for the public administration that makes a contract through a private negotiation instead of a tender, for the lawyer who allows a statute of limitation to run.

³⁹ This is the comprehensive view lately expressed in Tassone 2020a.

Still, a serious reflection on the concept of probability is needed. Non-legal scholarship lists at least five meanings of that concept, related to: 1) the classic theory (La Place, Bayes); 2) the frequentist theory (Von Mises, Pearson); 3) the likelihood ratio theory (Fischer); 3) the logic theory (Keynes, Carnap and Jeffreys); and 5) subjective theory (de Finetti and Bernoulli)⁴⁰. These enquiries permit internal distinctions within the scientific (medical, statistical, epidemiological) evidence and foster the understanding of the concept as well as its legal application: recalling that in Common Law systems the evaluation of the scientific evidence is more investigated than in Italy⁴¹.

For example, if a given disease can be attributed by 75% to smoking and by 67% to alcohol consumption, one may wonder how it could be possible that the sum of the percentages assigned to each factor is greater than 100%. The explanation is easy considering theory no. 3 mentioned above: all those considered have some impact on the pathological state, so that the single percentage – taken alone – does not bring out an incidence really equivalent to what the number suggests. Epidemiological studies often limit themselves to establishing “associations” between variations in frequency of events in considered classes, so that they do not define how likely it is for a single event to cause another, but rather how unlikely.

It might be a step forward not only to define the probability itself, but to decide which words we use to apply it, as well; considering the variety of “actors” involved in the use of the scientific evidence, such as non-legal literature, legal literature, lawyers, expert witnesses and judges; and here linguistic studies can be helpful both in decrypting the way terminology is employed and in building a common vocabulary to be shared among those actors⁴².

This is both true for causation and LOC: relevant probabilities have been defined from time to time as “serious”, “effective”, “concrete” or “not hypothetical” possibilities of success, up the blaze of “the reasonable certainty of the existence of a non-negligible chance” (Cass. April 22, 1993, no. 4725).

⁴⁰ For further details and the related references, see Tassone 2020a: 265.

⁴¹ See Tribe 1971: 1329; Cohen 1977: 2; Eggleston 1978: 137; Magnusson 2002: 400; Haack 2014: 78.

⁴² For a proposal from the legal side, Trimarchi 2019: 662. See also Allen 2017: 133.

Needless to say, the interaction between law, science and language goes beyond those hints, as comparative studies have shown. For example, dealing with law and language a very influential Author demonstrated that only a peek into a system from an external perspective may highlight its “crypto-types”, of which inside formants are not aware⁴³; and such approach can be extended to the relationship among law, science and language, as the consideration of other disciplines lead to ask: when we say that chance is a “lost possibility”, do we refer to a probably? Of which kind? Of which degree?

A fist answer – within the limit of this paper – can be offered together with some interesting conclusions.

5. Conclusions

Regarding Thanks to the above framework some guidelines can be proposed as to the application of causation and LOC within the Western Legal Tradition⁴⁴.

The distinction between the kind of probabilities (usually) identified by the general causation (apart from other internal sub-distinctions not to be analyzed in this paper) and the degree of credibility (usually) defining the “more likely than not” (apart from other ways to interpret it, which again is not to be analyzed in the present paper), leads to limit the typical area of the former and the subsequent award of full compensation to cases where a universal or statistical law with a value close to “1” can be applied, not to be confined to a small number of situations, as some say⁴⁵.

It is also possible to maintain that similar consequences are brought by the application of statistical laws that predict their “regularities” for a very high percentage: although here it is to draw the distinction between true “naked statistics” and those which express a degree of certainty with a relativistic nuance only for intellectual humility with respect to the limits of knowledge.

⁴³ Sacco 1992: 25.

⁴⁴ For more details, see Tassone 2020a: 337.

⁴⁵ If they were not available, it would not be possible to commit – for example – to the construction of ships, trains, airplanes and buildings.

Therefore, only for practical – and policy – reasons a statistical law expressing a very high percentage, for example close to 99%, can be used for ordinary causation, so that the quantitative element turns into the qualitative one, even though this is not strictly consistent with the nature of the law considered.

Of course, it is not to be excluded that a statistical law can be subject to *concretization* in the single case, but – as has been already demonstrated – it does happen rather rarely. In such case it might be better to search viable solutions rather than endorse the refrain of many Courts around the world on the abstract distinction between general and specific causation, without providing an indication on how to decide the dispute where only the former is available⁴⁶.

In its turn, the typical area of LOC is that of general causation, where only the time machine would let us know how things would have gone.

The first benefit of this approach is related to the long-established issue of the LOC threshold, which becomes completely meaningless not only for the chances below 50%, but for the higher chances as well.

Secondly, the awareness of the chance being a fiction invented in order to meet relevant instances of justice can be related to continuous activities such as health ones to prevent a systematic effect of under-deterrence. If a certain type of surgery has on average a low probability of success, say 30%, the ones that perform it could assume a structurally negligent conduct, believing that none of the patients could obtain full compensation from the traditional point of view.

Nevertheless, the damage that cannot be ascertained on a single basis – as no one is able to know which patient falls into that class – becomes assessable in an aggregate perspective. If all 100 patients could ideally return to the pre-op moment and have it properly performed, there would be no doubt about the identity of the 30 patients entitled to full compensation. The effect of LOC is then equivalent to that of awarding each one of them 30% of the final damage by developing the (category of) the

⁴⁶ Tassone 2020a: 333.

individual (and abstract) *chance* as a fragment of a broader collective (and concrete) one, according to a newly proposed construction⁴⁷.

In other words, the lack of knowledge about individual causation emerging in such cases offers one of the most convincing explanations of the case-law on LOC developed on both sides of the Atlantic.

Naturally, a step further outlines the issue of the possibility of extending the typical area of LOC, for example, in the different context of non-medical professional responsibility, together with many others, to be coped with a broader framework aimed, *inter alia*, at simplifying complexity.

At the end of the day, causation (the same is true for LOC) is a “vision of the world”: while other branches of science have a lot to say about the “vision” we build, language is essential in deciding how we “name” all the relevant elements which are necessary for defining and applying it.

⁴⁷ Tassone 2020b: c. 358.

THE SHADOW OF OBSOLESCENCE ON FAMILY LAW RULES

Rosamaria Tristano^{*}

Abstract

Legal rules are different from any other rule because they are legally binding, which means that a country recognizes them as right, and then enforceable, and ensures their observance.

They are legally relevant, and issued because of their effectiveness in pursuing values and objectives that each country acknowledges as its own, but from this fact comes an observation: what happens when a legal rule that is in force does not reflect society and its changes and necessities?

Regardless the binding value of a law rule, in fact, it is truly perceived as a “right” one by the people when it reflects their needs, and it gets complicated when law rules are outdated or connected to an obsolete socio-cultural background.

This situation particularly affects family law, because family is a concept that is more tightly connected with society than any other and has been strongly influenced by the technological and social development of the last decades but, undeniably, the innovation wasn't the same for family law rules, which to a large extent are still referring to outdated concepts.

That is the reason why we talk of obsolescence as a dark side of family law, analyzing the different approaches of the Italian system and the British one through their acts and decisions regarding some recent issues of family law, such as surrogate motherhood and medically assisted procreation.

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Keywords

Family law - Same sex parenting - Surrogate motherhood - Medically assisted procreation

Legal rules are adopted because of their effectiveness in pursuing values and objectives that each country acknowledges as its own, but sometimes it may happen that a rule, which is considered effective and useful at the time of its amendment, is affected by the passing of time and becomes useless or even counterproductive. In fact, society changes continuously, together with its habits and needs, and the law is supposed to reflect these changes in order to maintain its effectiveness and be actually applied.

Regardless of the persistence of the binding value of a legal rule, in fact, it is truly perceived as right and applied by the people only when it reflects their needs, and it may get complicated when it is outdated or connected to an obsolete socio-cultural and economic background.

It has been observed, in fact, that new issues cannot be addressed with concepts and legal schemes already prepared and inspired by very different needs¹, but that they require an appropriate regulation that, as said, will show how “*society responds to the reevaluation of the currency of personhood which technology has forced us upon it. That response will help to understand the sort of people we say we want to be and want to become*”².

That’s why we talk about obsolescence as one of the dark sides of the law, and of family law in particular, that is for sure the branch of private law that is most dynamic and sensitive to different influences and whose study would not lead to a correct result if it was conducted without taking into account all the extra-legal elements and their implications.

Family is not a legal institution and it is pre-existent to the law, which is limited to recognize it as a natural social entity that, consequently, evolves and changes regardless of the legal categories related to it.

This makes the subject particularly challenging for lawyers who, in reconstructing the matter in legal terms, cannot help but confront with elements that are instead sociological, religious, political, but not legal, and also for Parliaments and legislative bodies who have to deal with a constantly evolving concept, which escapes the strict classifications typical of positive law.

The approach of legal systems to family is like a continuous, endless pursuit, because as soon as a reform is enacted, new demands emerge from society, and laws are again outdated. The reason lies precisely in the remoteness of the family from law and in the absolute autonomy and independence between the two concepts: family, and its forms and expressions, changes due to social, economic or political reasons, and

¹ Giovanni Criscuoli, La legge inglese sulla “surrogazione materna tra riserve e proposte”, in Dir. Fam. Pers., 1987, p. 1030.

² Derek Morgan, Who to be or not to be: the surrogacy story, in The Modern Law Review, 1986 (vol. 49), p. 368, cit. in G. Criscuoli, La legge inglese sulla “surrogazione materna tra riserve e proposte”, in Dir. Fam. Pers., 1987, p.1030.

departs from the cases regulated by law rules, which become outdated, and then useless, and require a reform. But social changes do not stop, and with them those of the family, that are faster than the legal ones, which chase them in a loop that risks tending to infinity.

Sociology and other sciences give a definition of family which takes into account the peculiar dynamism of the concept of family, that we can consider, actually, as “*an intimate domestic group of people related to one another by bonds of blood, sexual mating, or legal ties*” that “*has been a very resilient social unit that has survived and adapted through time*”³. But this definition was very different ten, twenty or more years ago, because it has changed over time to this result and we don’t know how long it will remain adherent to reality, nor we can, actually, know it.

One of the main issues in family law arises properly from the necessity to lead back the concept of family to a legal category, in order to regulate and protect it, defining with certainty its borders but, inevitably, leaving out some aspects, including all those resulting from the physiological evolution of the concept.

A clear example can be found in the Italian legal system that, in fact, neither in the Constitution, nor in the Civil Code or other acts lays down a description of family, recognizing only some of its aspects, but neglecting many other of its peculiarities, which remain devoid of regulation, and then of legal protection, making necessary continuous reforms, additions and updates.

It’s no coincidence that family law in Italy (but even, for example, in Spain or France, which share the same approach and therefore the same issues of the civil law system to which they belong) has been one of the most frequently reformed branches of private law, since the introduction into the Constitution in 1948 of new values, which had to be transposed into legislation by updating the original regulations laid down in the Civil Code.

³ UK Essays. (November 2018). The Sociological Definition of Family. Retrieved from <https://www.ukessays.com/essays/sociology/the-definition-of-family-sociology-essay.php?vref=1>.

The first attempt of the Italian legislator to regulate family relationships was in 1942 with the Civil Code. It was referred to a traditional social context with a strong religious component, where family was based on the indissoluble marriage between a man and a woman, and the first one was in a position of supremacy and exercised his parental authority over children. This approach aimed to reflect the traditional Catholic idea of family, which was predominant at the time, and to satisfy the public interest as perceived during those days, meaning the economic interest concerning the certainty of family relations, in order to ensure that asset transfers can be predicted with certainty.

This framework was changed six years later by the Constitutional values, which replace the solidaristic - productivist principle of the 1942 Code, with the new principle of social solidarity placed by the Constitution as the guiding principle of the entire legal order.⁴

The Constitutional values of equality and protection of the individual, in fact, influenced even the idea of family, which article 29 defines as a “*natural society founded on marriage*”, reconnecting precisely to those social formations protected by article 2 as an expression of each person.

The text of articles 29-31 of the Constitution shows the new perspective on family and the integral protection of each of its members, in their dignity as persons and in the full and free development of their personality, without distinctions between the spouses, who are equal, according to article 3. This protection is no longer the expression of a specific interest of the State towards marriage and family, but is based on and intended for the individuals who compose it.

The formulation of these principles made it necessary to modernize family law by reforming the Civil Code, which was still connected to an outmoded context, but this took a little time, and the most important reforms of family law took their effects only in the Seventies.

⁴ Gabriella Autorino, *Manuale di diritto di famiglia*, Giappichelli, 2015, pp. 3-5.

These reforms, with the dual purpose to adapt the traditional scheme of family law to the new principles guaranteed by the Constitution and to reflect the social revolution started in the Sixties, introduced the legal regime of matrimonial property, abolished the institution of the dowry, and admitted divorce. The relationship between parents and sons changed too, and the patriarchal approach, marked by the strong authority of the father, was overtaken by the idea of an equal authority of both parents, and of greater equality between legitimate and natural children.

The process of adjustment to Constitutional values has continued, gaining in the following years the total equalization between sons, the evolution of the authority of parents in responsibility, a new regulation of adoption, the definitive abandonment of the concept of guilt in divorce... But these well-known reforms, while innovating family law, did not leave the path already covered: they didn't really depart from the traditional idea of family which, although modernized and adapted to new social needs, remained in the background.

However, the evolution of the family of the Seventies with respect to the 1942 one, was nothing compared to the leap forward of the Nineties and later, and the complexity of approaching family law today lies precisely in this complete detachment from the roots and in the emergence of new concepts, far from the traditional categories of family law.

In the last three decades, in fact, inconceivable possibilities have arisen: customs, values and social models have changed, also because of the simpleness of communication permitted by internet, which has facilitated the spread of habits, ideas and discoveries, and even personal movements are easier and faster.

Furthermore, the evolution of science has given the possibility to know and understand the biological mechanisms of life, and this upsets the relationship of man with procreation, making him able to control and artificially replicate it. This has opened new scenarios regarding parenting, filiation and families, even same-sex ones, introducing cases not only completely new, but also totally uprooted from the traditional concepts, and difficult, if not impossible, to trace back to the traditional legal categories of family law.

The reaction of the Italian legislator was the introduction of new laws and reforms, in order to regulate the new topics, and a new period of reform in Italy took place from 2000 onwards.

But these measures, while regulating new cases, remain anchored in outdated concepts, and instead of taking into account the continuous evolution of family and the need for protection of its new forms, they crystallize the new cases in concepts outdated and often ambiguous.

This situation complicates the framework in two ways: on one hand, they too often leave room for gaps in protection, and whenever people can't find the remedy to their concrete case in a statute enacted to regulate it, it's not uncommon for them to consider it useless and to decide not to apply it, looking for a remedy elsewhere, maybe in a more favorable foreign legal system. On the other hand, the lack of adequate provisions may lead to the opposite result of an increase in the use of justice, in an attempt to remedy the problems left unresolved by the law and to obtain clarification for concrete cases not adequately regulated; this put the Courts in the uncomfortable position of having to force their interpretations as much as possible and compensate the shortcomings of the law looking for a foothold in the Constitution or in the decisions of European and international Courts.

This is what happened, for example, with one of the most problematic Italian statutes in the field of family law, that is for sure the Human fertilization and embryology Act of 2004, which clearly shows how an act biased by policy reasons and that doesn't reflect the social context, remain empty words. The main consequence of this statute, in fact, was exactly the need for clarification and interpretation by the Courts, in parallel with the race of many interested couples for a more favorable legal regime abroad.

The debate was back a few years ago, after the enactment of the Same-sex civil unions and cohabitation regulations Act of 2016, which recognized same sex unions and cohabitations as other forms of family beyond marriage.

This Act, although innovative, has not been decisive and while trying to reconcile the pressures of opposing socio-cultural groups, ended up without completely satisfying almost anyone. The delicacy and sensitivity of the subject, in fact, has raised a bitter contrast, that was social, and not only political, and that is reflected in the disorganic formulation of the Act, which in order to obtain the approval of the Parliament had to undergo many cuts and changes.

The few years that have passed were enough to bring out the points of greater weakness of this Act which, in the path already traced by previous reforms of family law, intervenes in a fragmentary and non-organic way on a discipline that remains fundamentally anchored in its original traditional principles.

The main problem is that, even on the outcome of this reform, those that nowadays, in the common experience, are all considered three forms of family, are different for the law, and although the equalization of some specific aspects, they differ from each other for nature, rights and regulation: we have marriage, as said, as a natural society recognized by the law (article 29 of the Italian Constitution), civil unions as social formations established by the law (article 1 of the 2016 Act), and cohabitations that are not even awarded this status, but only some specific aspects of which are regulated, without a classification in legal terms (article 1, section 36 of the 2016 Act).

The practical repercussions are not few, as well as the issues arising from the many aspects that the Act has omitted, like the regulation of adoption or medically assisted procreation for same sex couples and the recognition of their parent-child relationship with a children born abroad with artificial insemination or surrogacy.

The consequences were exactly those described above, in fact it is precisely in regard of same sex parenting that there are many cases of children born abroad after medical assisted procreation or even surrogacy, and there are also many decisions of the Corte di Cassazione⁵, forced to recognize the need for legislative reforms, stating that “*in a scenario in which parenting often breaks away from the link with marriage and family, declined into*

⁵ See: Corte di Cassazione n. 13000/2019, in www.dejure.it.

a multiplicity of contexts previously considered unpublished, it is, then, necessary to put ourselves in another perspective, where the family relationship no longer stands in conventional terms, in which new hypotheses of intersubjective relationships fit the scene of the family, which can no longer be only the one which the civil code predicted in 1942”, and that “the phenomenon of the emergence of different intersubjective relationships in emotional relationships is progressively evolving, and requires a systematic and no longer occasional protection of phenomena, previously unknown or considered minority, by imposing solutions capable of emancipating themselves from those traditional models that risk, by now, proving inadequate compared to the first”⁶.

This awareness, together with the protection of the best interest of the child as the Polar Star of the family law system, should guide the reforms, given that *“any consideration regarding the assessment in terms of the unlawfulness or illegality of the medically assisted procreation technique and of the conduct of those who allow its access or application, could certainly not be reflected, in negative, on the minor and on the whole complex of the rights recognizable to him”⁷.*

⁶ “In uno scenario, nel quale, come si è detto in precedenza, la genitorialità spesso va staccandosi dal nesso col matrimonio e dalla famiglia, declinandosi in una molteplicità di contesti prima ritenuti inediti, è, allora, necessario porsi in un'altra prospettiva, dove il rapporto familiare non si pone più in termini convenzionali, in cui nuove ipotesi di relazioni intersoggettive calzano la scena della famiglia, che non può più essere solo quella che il codice civile ha previsto nel 1942. Il fenomeno dell'emersione di diverse relazioni intersoggettive nelle relazioni affettive è, del resto, in progressiva evoluzione, così da richiedere una tutela sistematica (e non più occasionale) dei fenomeni prima sconosciuti o ritenuti minoritari, imponendo soluzioni capaci di emanciparsi da quei modelli tradizionali che rischiano, ormai, di rivelarsi inadeguati rispetto ai primi.” Cass. 13000/2019, cit..

⁷ “Qualsivoglia considerazione riguardante la valutazione in termini di illiceità/illegittimità, in Italia, della tecnica di P.M.A. in precedenza specificamente richiamata, oltre che, eventualmente, delle condotte di coloro che ne consentono l'accesso o l'applicazione, non potrebbe certamente riflettersi, in negativo, sul nato e sull'intero complesso dei diritti a lui riconoscibili” Cass. 13000/2019, cit..

This decision and the similar ones are inspired by cases decided by the European Court of Human Rights⁸, and the Italian Constitutional Court⁹, the last one which clearly states that in the Constitution there isn't an opposite sign or a preclusion regarding the matter, but this cannot automatically give rise to legitimacy in the absence of an express legislative provision¹⁰.

This is just one of the many issues resulting from this Act of 2016 and another matter, as said, regarding the protection of unmarried couples, which are not defined as a form of family nor as a social formation worthy of protection. The Act indicated the essential elements of this category of couples and extends to them only a few of the rights and prerogatives of married couples, leaving the rest to their contractual autonomy by giving them the freedom to conclude a contract to regulate their property relations.

This Act is not as innovative as it may seem because the rights granted to unmarried couples are nothing more than a fragmentary reformulation of those already consolidated by the Courts in the past years and, furthermore, many gaps of protection remain and the problem of the regulation of property relations of unmarried couples is solved only in appearance. In fact, the partnership agreement which specifies the property regime of the couple and the contribution to family life of its members must have precise form requirements and must be registered on a

⁸ Between the most famous cases of the European Court of Human Rights there are *Mennesson vs. France* (26 June 2014, n. 65192/11) and *Labassee c. France* (26 June 2014, n. 65941/11). One of the most recent decisions of the European Court of Justice is n. 490 of 14 December 2021, which underlines the necessary primacy of the child's interest.

⁹ One of the most recent is Corte Costituzionale n. 230/2020, in www.dejure.it.

¹⁰ "Se, dunque, il riconoscimento della omogenitorialità, all'interno di un rapporto tra due donne unite civilmente, non è imposto dagli evocati precetti costituzionali, vero è anche che tali parametri neppure sono chiusi a soluzioni di segno diverso, in base alle valutazioni che il legislatore potrà dare alla fenomenologia considerata, non potendosi escludere la capacità della donna sola, della coppia omosessuale e della coppia eterosessuale in età avanzata di svolgere validamente anch'esse, all'occorrenza, le funzioni genitoriali (sent. nn. 162 del 2014, 84 del 2016, 221, 237 del 2019)", Corte Cost. 230/20 in www.dejure.it.

special list at the municipal offices. These formalities make those kinds of contracts poorly applied in practice, as shown by statistics.

It's quite odd, in fact, that a couple which doesn't want to formalize its union with marriage, needs to be formally registered in order to obtain some rights and their protection, and, once again, the Act of 2016 has proven to be a wasted opportunity to respond to the needs of protection felt by people by providing a more comprehensive set of regulations.

The subject certainly deserves a more profound study, but even these few nods are enough to show the inadequacy of the current family law system, which must be rethought in order to be less disorganized and closer to the new social needs, overcoming the traditional obsolete legal categories and their socio-cultural substrate and giving and effective protection to the rights of the different forms of family that are currently in existence.

New issues, in fact, are on the horizon, such as the regulation of surrogate motherhood, that is currently forbidden in Italy but, as it happened a few years ago with medical assisted procreation, is widely used abroad by Italian couples, and raises many questions, recently addressed by Italian Courts.

Until a few years ago, in fact, the prevailing orientation was the one stated by the Italian Corte di Cassazione in the decision nr. 12193 of 2019¹¹ which, talking about surrogacy, affirmed that the recognition of the effectiveness of the order of a foreign court establishing the relationship of sonship between a child born abroad by recourse to surrogacy and the intentional parent who is an Italian citizen, finds an obstacle in

¹¹ See Corte di Cassazione SS. UU., n. 12193 of May 8th 2019, in www.dejure.it, which states: "Il riconoscimento dell'efficacia del provvedimento giurisdizionale straniero con cui sia stato accertato il rapporto di filiazione tra un minore nato all'estero mediante il ricorso alla maternità surrogata ed il genitore intenzionale cittadino italiano trova ostacolo nel divieto di surrogazione di maternità previsto dall'art. 12, 6° comma, della l. 19 febbraio 2004 n. 40. Tale divieto costituisce, infatti, un principio di ordine pubblico, essendo posto a tutela di valori fondamentali, quali la dignità umana della gestante e l'istituto dell'adozione. La tutela di tali valori, non irragionevolmente ritenuti prevalenti sull'interesse del minore nell'ambito di un bilanciamento effettuato direttamente dal legislatore, al quale il giudice non può sostituire la propria valutazione, non esclude peraltro la possibilità di conferire rilievo al rapporto genitoriale, mediante il ricorso ad altri strumenti giuridici, quali l'adozione in casi particolari, prevista dall'art. 44, 1° comma, lett. d), della l. 4 maggio 1983 n. 184."

the prohibition of surrogacy of motherhood enacted by Article 12, 6 of the Act nr. 40 of 2004 on medical assisted procreation. According to the decision, this prohibition constitutes a principle of public order, to protect fundamental values such as the human dignity of the pregnant woman and the institution of adoption, that shall be deemed to prevail over the interests of the child as a result of a balance of interests made directly by the legislator, which in order to give importance to the parental relationship between the child born after surrogacy and the intentional parent already provides other legal institutions, such as the special hypothesis of adoption regulated by Article 44 of the Act nr. 184 of 1984 on Adoptions.

Later, the Italian Constitutional Court¹² finally disclosed a gap in the protection of child's interest, inviting the legislator to provide a regulation of the subject that organically identifies the most appropriate ways of recognizing the stable affective bonds between the child born from medically assisted procreation and the intentional parent.

The change of trend between the two decisions has not gone unnoticed, and last January the Italian Corte di Cassazione referred to the United Sections a question regarding surrogate motherhood asking, in light of the decision of the Constitutional Court, whether the right to life represented by the previous decision of 2019 has been overturned, and whether this has led to a regulatory gap, to be filled by way of interpretation, pending a reform of the regulation¹³.

The Court already suggests some principles for the interpretation of future cases, also noting the opportunity for a concrete assessment to find the optimal balance between

¹² See Corte Costituzionale n. 32 of march 9th 2021, in www.dejure.it, which states: “Le questioni sollevate rivelano un vuoto di tutela dell'interesse del minore che questa Corte ritiene di non poter ora porre rimedio. Il legislatore, nell'esercizio della sua discrezionalità, dovrà al più presto colmare il denunciato vuoto di tutela, a fronte di incompressibili diritti dei minori. Si auspica una disciplina della materia che, in maniera organica, individui le modalità più congrue di riconoscimento dei legami affettivi stabili del minore, nato da Procreazione medicalmente assistita praticata da coppie dello stesso sesso, nei confronti anche della madre intenzionale”.

¹³ See: Corte di Cassazione, ordinanza n. 1842 of January 21st 2022, in www.dejure.it.

the interests involved: those of the child and the intentional parent, and those of the biological mother.

The matter is open, but only with the intervention of the Parliament can there be a decisive turning point.

These and other phenomena which are overturning family law and its traditional categories are not a peculiarity of our legal system but, as said, are the result of a general and widespread situation and are common to different countries. An analysis of those systems that are similar to our own in social, economic and political structures and which consequently go through a comparable ideological upheaval and have needs similar to the Italian ones may be particularly interesting, especially if we consider countries with a different legal system, like Britain.

The British government has dealt longer with the legal issues connected with medical assisted procreation, since the birth of the first child born after conception by an *in vitro* fertilization experiment, Louise Brown, in 1978.

The public opinion was “*divided between pride in technological achievement, pleasure at the new-found means to relieve, at least for some, the unhappiness of infertility, and unease at the apparently uncontrolled advance of science, bringing with it new possibilities for manipulating the early stages of human development*”¹⁴, and for this reason a few years later, in 1982, a special investigative committee was appointed in order to consider the potential developments in medicine and science related to human fertilization and embryology and the policies and safeguards which should be applied, including consideration of the social, ethical, and legal implications of these developments, and to make recommendations thereon.

In 1984, the Committee released a report known as “*Warnock report*”, from the name of the philosopher Mary Warnock who chaired it, and on its basis, albeit with some

¹⁴ See Warnock Report, 1984, available at:

<https://webarchive.nationalarchives.gov.uk/ukgwa/20101007182820/http://sen.ttrb.ac.uk/attachments/21739b8e-5245-4709-b433-c14b08365634.pdf>.

divergence, was drafted the Surrogacy Arrangements Act of 1985 and, later, the Human Fertilization and Embryology Act of 1990.

Already in 2005, the House of Commons Science and Technology Select Committee published another report on Human Reproductive Technologies and the Law, which led to a reform of the Act of 1990 and to the enactment of the Human Fertilization and Embryology Act of 2008, which is currently in force. It also amends the Surrogacy Arrangements Act of 1985, regulating surrogate motherhood which is prohibited when it is the result of an economic arrangement but is legal otherwise.

This Act states the main principles on this subject, even regarding issues related to parental orders and same sex parenting, and expressly states the need to consider primarily the welfare of the child, taking into account his need for supporting parenting¹⁵. Furthermore, the Act gives the definition of the most important concepts, starting from the meaning of mother, which is, according to the Human fertilization and embryology Act of 2008, “*the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child*”¹⁶. This clarification gives a certain starting point: in fact the mother is considered and remains such, unless an application for a parental order is made by the intentional parents, under certain conditions.

Section 54 of the Act states that a couple of married or unmarried people or of civil partners who are in an enduring relationship, or even a single person, who have attained the age of 18 and are domiciled in England, may apply when the child has been carried by a woman who is not the applicant or one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination, or the gametes of the applicant or one of them were used to bring about the creation of the embryo. Furthermore, is necessary that the application is made no later than 6

¹⁵ Section 13 of the 1990 Act, subsection 5, as amended by the 2008 Act, states that: “a woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for supportive parenting and of any other child who may be affected by the birth”.

¹⁶ Human Fertilization and Embryology Act, 2008 sect. 33.

months after the child's birth, that the child lives with the applicants at the time of the application and that the surrogate mother or any other person different from the applicants and who is a parent of the child (for example the husband of the surrogate mother), have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order. Finally, is necessary to prove that there was no economic arrangement between the surrogate mother and the applicants and that no money or other benefit has been given or received by them, in accordance with the prohibition of economic surrogacy arrangements.

When the parental order is granted, the parental relations between the applicants and the child is legally recognized and the child is treated in law as the child of the applicants; the decision issued takes into account the welfare of the child and his best interest, which is considered prominent over the other interests involved. Since the first surrogacy case¹⁷, in fact, has been stated that “*morals and ethics are irrelevant, what matters is what is in the child's best interest*”, and since the enactment of the first Act on medical assisted procreation and surrogacy, in 1990, section 33 of which draws attention to “*the welfare of any child who may be born as a result of the treatment*”, a stand is clearly taken to protect the child's best interest, anticipating the conclusions reached much more recently by the Italian Courts.

The “*paramount concern*”¹⁸ of British Courts regarding parental orders and cases connected to surrogacy is, in fact, the child's welfare, as shown by many decisions¹⁹, and by the related, not uncommon flexible application of the Act, even in more complicated situations, like international surrogacy cases.

¹⁷ Re C (A Minor) (Wardship: Surrogacy) (Baby Cotton Case) [1985] F.L.R. 846

¹⁸ Re X (A Child) (Surrogacy: Time Limit) [2014] E.W.H.C. 3135 (Fam)

¹⁹ Among others: A and A v P, P and B [2011]; X (A Child - foreign surrogacy) [2018] EWFC 15; X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam); L (A Minor) [2010] EWHC 3146; IJ (A Child) [2011] EWHC 921; Re C (A Child) [2013] EWHC 2408 (Fam); JP v LP & Others [2014] EWHC 595 (Fam).

In *Re X (A Child) (Surrogacy: Time Limit)* [2014] E.W.H.C. 3135 (Fam), for example, the Court states that the time limit of six months imposed by section 54 of the Act is not absolute, and applies a purposive interpretation to the Act, granting a parental order after two years and a half from the birth of the child. The Court states that it could not have been the intention of Parliament to place an ultimate bar on the grant of parental orders where applications were made after the expiry of the six months period and gives an interpretation consistent with the precedent established by *Theis J in A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145 and the European Convention on Human Rights, stating the need to “*read down*” to the statute in such a way as to ensure the protection of the rights involved, first of all those of the child.

Even according to the British family law, like the Italian law mentioned above, the alternative to a parental order is adoption, but its lower correspondence to the child’s interest instead of a parental order is unquestionable for the British Courts, and it would be even more so in Italy, considering that the particular kind of adoption that would be applicable in Italy is a peculiar, “weakened” kind of adoption, whose effects cannot be compared with a parental relationship.

Nevertheless, the limit of public policy operates in England too, and is mainly connected to cases of commercial surrogacy, as in *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), where a surrogacy arrangement was made in the U.S. under American law, but the payments were unlawful in Britain under the Act of 2008: the decision was in favor of the child’s welfare, stating that only in the clearest case of the abuse of public policy the Court could withhold a parental order, whenever welfare considerations suggested otherwise.

The abundance of case law shows how the mechanism of parental orders, while helping intentional parents with the recognition of their rights, is not free of issues; for this reason the framework is going to change again, since the Law Commissions of England, Wales and Scotland completed their consultation in October 2019, in order to put together a proposal for a reform of the regulation of surrogate motherhood.

Unlike in the United States, in England the arrangements made before or after the birth in order to transfer parenthood are unlawful, and obtaining a parental order is not immediate. During the time necessary to obtain it, children are in a difficult situation, between their legal surrogate parents wanting to give them away, and their genetic intentional parents who are not yet recognized as their true legal parents.

This situation of temporary uncertainty can last six weeks minimally, as parental orders cannot be granted without the consent of the surrogate mother, which is considered invalid if given at any point up to six weeks after birth; furthermore, the child must live with the applicants at the time of the application, and it is complicated in case of international surrogacy, because often the country where the birth takes place recognizes the intentional parents as the legal ones, then the birth certificate bears their names, but in England they are not legally considered such before the granting of the parental order, creating complications for the child's entry in the country.

Other issues arise from the unenforceable nature of the surrogacy agreements, and from the prohibition of economic arrangements, unless the payments made to the surrogate mother are qualified as reasonable expenses. This ambiguous formulation is not enough to regulate the matter, and currently, even when large sums are paid to the surrogate, in the balance made by the Courts, the child's welfare cannot but prevail. This exposes to the risk of speculation and compromises the position of the surrogate mother and her dignity and rights, and for this reason it was considered necessary to intervene, planning a reform that would better regulate the point.

Interventions of the Courts mitigate the issues and protect children's interests by granting parental orders; once again, this peculiar role of the Courts distinguishes the British legal system: even in family law, decisions inserted within the regulatory framework give relevance to the specific features of singular concrete cases, without being trapped in the immutability of the literal formulations of the statutes.

This guarantees a more effective protection even in transitional periods and avoids the premature obsolescence of the law, interpreting it in order to keep it adherent to its functions, and lighting up its dark side.

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L'ARTICLE 282 DU CODE PENAL NIGERIEEN : ENTRE TORTS ET TRAVERS !

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Abstract

The paper deals with the shortcomings of the legislative sanctions provided in the Criminal Code of Niger for sexual offences involving underage persons, and for same-sex sexual offences.

The analysis reveals how the legislative intervention in an area closely related to people's traditional values may interact unsatisfactorily with the community's traditional rules, producing unreasonable and/or unjust results.

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Keywords

Sexual Offences - Same-Sex Sexual Acts - Sex With Underage Persons

Introduction

L'article 282 du Code pénal nigérien dispose que : « Quiconque aura commis un acte impudique ou contre nature avec un individu de son sexe, mineur de vingt un an, sera puni d'un emprisonnement de six mois à trois ans et d'une amende de 10 000 à 100 000 francs ». Il est situé dans le chapitre intitulé « attentats aux mœurs » sous la section « actes impudiques sur mineurs de même sexe ». Si nous le mettons en rapport avec les autres dispositions du chapitre dans lequel il se trouve, nous constatons malheureusement qu'il consacre une dépénalisation de certaines infractions de nature sexuelle. Il s'agit des atteintes sexuelles¹ qu'il ne faut confondre avec les agressions sexuelles. Ces dernières sont en principe violentes et sont constituées pour l'essentiel par le viol et d'autres infractions assimilées.

L'article 282 pris individuellement porte sur les actes impudiques sur mineurs de même sexe. Il soumet au même régime les actes impudiques et les actes contres natures. Ces actes impudiques sont définis comme des actes qui dénotent de l'impudeur, c'est-à-dire qui manque de pudeur, de décence. De ce fait, un acte impudique serait alors une atteinte à la pudeur c'est-à-dire tout acte qui atteste d'un mépris de la tendance à éprouver de la gêne, de la honte devant ce qui touche à la sexualité.

La sexualité est longtemps restée tabou dans beaucoup de société c'est pourquoi, les violences et agressions dans ce domaine ont pris du temps avant d'être pris en charge par le droit. Mais il faut relever que des atteintes sexuelles comme l'inceste a depuis toujours été puni et stigmatisé dans presque toutes les sociétés². En Europe, plus particulièrement en France, l'évolution des mœurs et des sciences au cours du grand XIXème siècle a été un des facteurs du début de la judiciarisation des violences sexuelles³. Au Niger, les mœurs et la culture étant très islamisés, la question sexuelle n'étant envisagée que dans le cadre du mariage, le sujet reste encore tabou aujourd'hui.

¹ Marie Romero, *Le traitement juridique des délits sexuels sur mineurs, une enquête de sociologie judiciaire et législative*, thèse de Doctorat en sociologie, PSL Research University-EHESS, 2018, 660 p.

² Annie Lochon, *L'évolution de la réaction sociale aux violences et crimes sexuels entre 1989 et 2012 dans la presse française*, thèse de Doctorat en Sociologie Démographie, Université de Caen Normandie, 2019, 458 p.

³ Idem.

Cela est en contradiction avec l'idée selon laquelle en islam il n'y a pas de sujet tabou. Quoiqu'il en soit, les crimes sexuels pour leur part restent peu judiciairisés car la victime est le plus souvent face au choix de se faire faire justice ou taire son mal et éviter la honte et le déshonneur.

La gravité des infractions sexuelles lorsqu'elles sont perpétrées avec violence justifie qu'elles soient punies. Le Niger ne fait pas exception à ce principe d'incrimination et de punition des attentats aux mœurs. C'est dans ce cadre que l'article 282 punit les actes impudiques et contre nature sur mineur de même sexe de 21 ans. Mais il reste curieux de constater que la lecture de ce texte laisse penser qu'il consacre dans certains cas une dépénalisation des certaines infractions sexuelles. C'est le cas notamment lorsqu'elles sont commises, sans violence sur un individu majeur quel que soit son sexe, et sur mineur de l'autre sexe. Cette déduction qui découle de la lecture à contrario du texte de l'article 282 est lourde de conséquences et de sens. Elle signifie entre autres qu'il n'est pas pris en considération le fait que l'individu victime de l'atteinte sexuelle n'ait pas donné son consentement. Or, l'absence de consentement devrait être pris en compte pour sanctionner toute atteinte à la pudeur sur autrui. L'article 282 du Code pénal nigérien semble prévoir le contraire.

Nous pouvons aussi estimer que ces dispositions qui découlent de l'article 282 ne sont pas en adéquation avec les mœurs, la culture et les croyances religieuses de la population nigérienne. C'est pourquoi il serait intéressant sur un plan théorique de rechercher la *ratio legis* qui sous-tend ce texte. Immédiatement nous penserons à la protection de l'innocence de l'enfant et de sa chasteté.

D'après les termes de la magistrate Maimouna Gazibo : « Dans cette infraction ce n'est pas l'homosexualité qui est réprimée, c'est plutôt la minorité civile de la victime qui conditionne le délit ». Elle répond à la question de savoir en quoi consiste l'infraction, par ces termes : « C'est le fait pour quiconque (homme ou femme) de commettre des attouchements à connotation sexuelle sur une fille ou garçon de moins de 21 ans ». A la question sur les caractéristiques de l'infraction ? Elle répond : « Pour que l'infraction soit constituée, il faut que la victime soit du même sexe que l'auteur des attouchements. En d'autres termes, une femme qui abuse d'un jeune homme de moins de 21ans ne sera pas poursuivie pour actes impudiques sur mineur de moins de 21ans. Par contre les femmes qui s'adonnent à certaines danses outrageuses à l'occasion des cérémonies de mariage et des animations des orchestres communément

appelés "keri", en feignant certains comportements à connotation sexuelle d'une extrême impudeur, pourraient un jour avec grande surprise, recevoir la visite des envoyés du Procureur de la République, s'il s'avère que certaines danseuses ont moins de 21ans. Également les hommes, qui recrutent dans la rue moyennant de l'argent, les enfants mendiants ou les jeunes lycéens, qu'ils abusent sexuellement pour des cérémonies de culte ou simplement pour cause d'homosexualité ou bisexualité (parfois il est même question d'hommes mariés et pères de famille) seront punis en cas de poursuites. Enfin les femmes d'un certain âge qui, recourent aux services de jeunes filles de moins de 21ans pour s'adonner à certaines galipettes pourraient être inquiétées, par les services du procureur sur dénonciation »⁴.

Les atteintes sexuelles étant de plus en plus fréquentes dans les réalités nigériennes comme dans toutes les sociétés actuelles, il convient de compléter ces commentaires et d'essayer une interprétation approfondie de cet article et étendue au chapitre dont il est extrait de façon plus globale.

Ce travail se donne de ressortir l'envers de ce décor planté par l'article 282 du Code pénal. Sur un plan pratique, il y a de l'intérêt à ressortir le degré de sévérité des sanctions aux atteintes sexuelles non violentes. Cette sévérité dépend en effet du type de mineur que l'on supplicie alors que pour les majeurs il y a pratiquement une dépénalisation complète du délit d'atteintes sexuelles, c'est-à-dire d'attentat aux mœurs sans violence. C'est pourquoi nous verrons d'une part, que la pénalisation des atteintes sexuelles sur mineur se traduit par l'instauration d'interdits sexuels limités (I). Et d'autre part, que la dépénalisation des atteintes sexuelles sur majeurs se traduit par l'instauration d'une liberté sexuelle sans aucune limite (II).

⁴ Goge Maimouna Gazibo, Code Pénal : Article 282 Les Agressions Sexuelles, Chroniques Juridiques 10 novembre 2019, disponible sur la page Facebook MaimounaGazigo.

I- La pénalisation des atteintes sexuelles sur mineurs ou l'instauration d'interdits sexuels limités

La sévérité du régime de la pénalisation des atteintes sexuelles sur mineurs est graduée selon qu'il s'agisse de mineurs de moins de 13 ans et de mineurs de 13 ans et de 21 ans de même sexe (A). Ce qui laisse à désirer car excluant de la protection contre les actes impudiques et contre nature sur certains mineurs (B).

A- La sanction graduée en fonction de l'âge et du sexe des mineurs

Dans les règles de pénalisation des atteintes sexuelles sur mineur, le droit pénal nigérien a établi des critères de l'aggravation et de l'atténuation des sanctions fondées sur l'âge et le sexe du mineur. L'article 282 combiné avec les autres dispositions du chapitre du code pénal consacré aux attentats aux mœurs laisse percevoir des conditions de l'incrimination des actes impudiques sur mineur indifférentes au sexe de celui-ci et liées à son âge quant à l'aggravation de la sanction (1) et des conditions de l'atténuation de la sanction des atteintes sexuelles dépendantes du sexe du mineur et liées aussi à son âge (2).

1- L'indifférence du sexe du mineur de moins de treize ans quant à l'aggravation de la sanction

L'élément matériel de l'infraction en question est constitué par les actes impudiques ou contre nature. C'est à dire tout attouchement, caresse, baisé ou autre qui sont de nature à entraîner de la gêne ou de la honte chez la victime. Le droit pénal nigérien ne précise pas en son article 282 que lorsque ces actes sont commis par une personne sur un mineur, elle doit le faire avec l'intention de produire cette gêne chez le mineur ou en tirer plaisir. C'est donc une infraction matérielle qui se consomme en dehors de toute intention dans sa consommation. L'attentat à la pudeur est un acte impudique et il peut même être considéré comme contre nature lorsqu'il porte sur certaines personnes. C'est ce que l'on peut déduire de la combinaison de l'article 282 et de l'article 278 du Code pénal nigérien. L'article 278 du Code pénal nigérien dispose : « Tout attentat à la pudeur, consommé ou tenté sans violence sur la personne d'un

enfant de l'un ou de l'autre sexe âgé de moins de treize ans, sera puni d'un emprisonnement de 2 à moins de 10 ans et d'une amende de 20 000 à 200 000 francs ». Il est alors aisé de constater que la sanction est plus grave dans ce cas. C'est à dire lorsque l'acte porte sur un mineur de moins de treize ans. C'est la une forme d'aggravation de la peine de l'infraction d'actes impudiques sur mineur quel que soit son sexe. Selon donc le législateur nigérien, le mineur de moins de treize ans doit être protégé non seulement de l'homosexualité mais aussi de la pédophilie. C'est ce qui explique l'indifférence du sexe du mineur pour la constitution de l'acte matériel de l'infraction et la sanction de 2 à moins de 10 ans d'emprisonnement ainsi qu'une amende de 20 000 à 200 000 francs. Alors que l'acte impudique ou contre nature sur mineur de même sexe lui est puni de 6 mois à 3 ans d'emprisonnement et d'une amende de 10 000 à 100 000 francs. Il faut alors constater que cette peine est atténuée lorsqu'il s'agit de mineur de 21 ans d'après l'article 282 du Code pénal.

2- La prise en compte du sexe du mineur de vingt un an quant à l'atténuation de la sanction

Il y a atténuation de la peine lorsque l'atteinte porte sur un mineur de 21 ans de même sexe car la peine est alors de 6 mois à 3 ans d'emprisonnement et d'une amende de 10 000 à 100 000 francs d'après l'article 282 du Code pénal. C'est dire que lorsqu'il s'agit de mineur de l'autre sexe, il n'y aura pas sanction des atteintes par actes impudiques ou contre nature. Donc l'homosexualité et la pédophilie sont tolérées sur les mineurs de plus de treize ans par le Code pénal du Niger. Nous détaillerons ces aspects sur le point suivant. Mais avant il convient de souligner l'article 281 du Code pénal nigérien qui dispose que : « Dans tous les cas prévus à la présente section, les coupables pourront être, conformément aux dispositions de l'article 25, privés de tout ou partie des droits mentionnés à l'article 21. L'interdiction de séjour pourra, en outre, être prononcée contre les coupables ». A l'aune de ce texte donc, tout attentat à la pudeur se verra sanctionner de la peine complémentaire de l'interdiction en tout ou en partie de l'exercice des droits civiques, civils et famille tels qu'ils figurent à l'article 21 du Code pénal. Il s'agira alors de la dégradation civique encourue du jour où la condamnation sera devenue irrévocable et, en cas de condamnation par défaut du jour

de l'affichage de l'extrait de l'arrêt de condamnation⁵. La sanction prévue à l'article 281 se traduit par la destitution et l'exclusion des condamnés de toutes fonctions, emplois ou offices publiques ; la privation du droit de vote, d'élection, d'éligibilité et en général de tous droits civiques et politiques et du droit de porter aucune décoration ; l'incapacité d'être juré-expert, d'être employé comme témoin dans des actes et de déposer en justice autrement que pour y donner de simples renseignements ; l'incapacité de faire partie d'aucun conseil de famille et d'être tuteur, curateur, subrogé tuteur ou conseil judiciaire, si ce n'est de ses propres enfants et sur l'avis conforme de la famille ; la privation du droit de port d'arme, de tenir école ou d'enseigner et d'être employé dans aucun établissement d'instruction, à titre de professeur, maître ou surveillant⁶. En outre, les tribunaux pourront, ordonner l'affichage de leurs décisions⁷ dans les conditions et sous les peines prévues à l'article 22 alinéa 2, 3 et 4 du Code pénal. C'est-à-dire qu'ils pourront prononcer l'affichage en caractères très apparents dans les lieux indiqués par la juridiction compétente aux frais du condamné⁸, pour une durée ne pouvant dépasser deux mois⁹, sans aucune suppression, dissimulation ou lacération totale ou partielle opérée volontairement par le condamné sous peine d'amende de 10 000 à 100 000 francs et d'un à six mois d'emprisonnement¹⁰. Il sera aussi procédé de nouveau à l'exécution intégrale de l'affichage aux frais du condamné dans ce cas.

Bien que ces sanctions semblent assez dissuasives, on peut relever des torts et des travers à cette pénalisation des atteintes sexuelles sur mineurs. A ce propos nous allons montrer que cette pénalisation est ineffective car n'impliquant pas tous les mineurs et que cette ineffectivité présente des conséquences importantes sur l'appréhension de certains phénomènes qui peuvent être observer dans la société nigérienne.

⁵ Article 21 alinéa 1 du Code pénal nigérien.

⁶ Article 21 alinéa 2 du Code pénal nigérien.

⁷ Article 25 alinéa 2 du Code pénal nigérien.

⁸ Article 22 alinéa 2 du Code pénal nigérien.

⁹ Article 22 alinéa 3 du Code pénal nigérien.

¹⁰ Article 22 alinéa 4 du Code pénal nigérien.

B- Une pénalisation ineffective aux conséquences individuelles et sociales néfastes

Les torts et les travers de ces règles sur les actes impudiques sur mineurs de même sexe se trouvent dans l'exclusion des mineurs de l'autre sexe de plus de 13 ans de la protection accordée au mineur contre de tels actes (1). Ces torts et ces travers se trouvent également dans le fait que cette exclusion rend inefficace la lutte contre le phénomène du mariage précoce de la jeune fille (2).

1- Les actes impudiques et contre nature possibles sur mineur de l'autre sexe de plus de 13 ans

Les torts et travers de l'article 282 au niveau de l'individu du mineur se ramènent à ce que ces actes impudiques seraient à contrario admis sur les mineurs de l'autre sexe. En effet, l'article 282 ne punit que les atteintes sur mineurs de même sexe, ce qui laisse impunies alors les atteintes non violentes commises sur mineurs de l'autre sexe de plus de 13 ans et âgé de moins de 21ans. Dans la mesure où l'article 278 punit les actes impudiques sur mineurs de moins de treize ans quel que soit son sexe, résulte-t-il que la pédophilie est autorisée légalement sur mineur de plus de treize ans de l'autre sexe ? Apparemment il est réprimé l'homosexualité et la pédophilie sur mineur de moins de treize ans et toléré la pédophilie sur mineur de vingt un an lorsqu'il est de l'autre sexe. Les contours du contre nature se dessinent. L'emploi des termes « acte impudique » et « acte contre nature » n'est pas anodin alors ? Aussi, doit - on considérer que l'homosexualité est contre nature et que la pédophilie serait impudique ?

Il faut cependant se poser aussi la question de savoir si le mineur de 21 ans est un enfant car la pédophilie n'est autre que l'attirance sexuelle pour les enfants¹¹. Or un mineur de 21 ans n'est pas un enfant contrairement au mineur de moins de treize ans, si on considère la définition selon laquelle l'enfant est un être humain dont l'âge est compris de la naissance à l'âge de la puberté¹². C'est certainement ce qui explique la sévérité du législateur nigérien par rapport à tout attentat à la pudeur contre un mineur de moins de 13 ans quel que soit son sexe. C'est comme on le voit un enfant. Et son corps et son esprit sont toujours en construction car n'étant pas pubère avant ses 13 ans. Il faut donc le protéger de toute déviation dans le cours normal et naturel de sa constitution. Cette déviation peut être entraînée par la survenance d'acte impudique ou contre nature dans cette enfance.

La question légitime qui vient à l'esprit est alors celle de savoir si le mineur de 21 ans lui n'étant plus un enfant comme on l'a vu, lorsqu'il est de l'autre sexe ne mérite-t-il pas de protection contre les actes impudiques et contre nature ? On pourrait aussi légitimement penser qu'il n'y a rien de contre nature à faire des attouchements, baisés, ou caresses en vue de tirer du plaisir ou donner du plaisir au mineur de 21 ans. Tout au plus ces actes peuvent il être vus comme impudiques lorsque, le cas échéant, ils produisent de la gêne ou de la honte. Et alors dans ce cas, ce mineur de plus de 13 ans n'a-t-il pas droit à la protection comme tout individu ? L'article 277 du Code pénal nigérien répond par l'affirmatif¹³. Mais le dispositif pénal en vigueur ne prévoit aucune sanction lorsque la victime est un mineur de 13 à 21 ans de l'autre sexe. On est tenté de penser que cette attitude est guidée par la nécessaire prise en compte par le Code pénal nigérien des dispositions d'autres Codes prévoyant certaines institutions sociales au Niger. Il en est ainsi de l'article 144 du Code civil nigérien sur le mariage. Nous allons envisager les aspects de cette étude autour de la problématique du mariage précoce dans les développements suivants pour voir l'impact d'une telle législation sur la lutte contre ce phénomène.

¹¹ Dictionnaire universel francophone, édition mai 2005, p. 900.

¹² Dictionnaire universel francophone, op. Cit., p. 419.

¹³ L'article 277 du Code pénal dispose que : « Constitue un attentat à la pudeur tout acte impudique exercé directement sur une personne de l'un ou de l'autre sexe ».

2- La lutte contre le mariage précoce peu efficace

L'article 282 du Code pénal nigérien, tel qu'il est libellé ne permet pas une lutte efficace contre le mariage précoce. En effet au Niger, il est estimé que 76 % des filles sont mariées avant leurs 18 ans et 28 % avant leur 15ème anniversaire¹⁴. Selon l'UNICEF, le Niger a le taux le plus élevé au monde en ce qui concerne les mariages d'enfants, se positionnant en tête du classement international¹⁵.

Nous pouvons surtout expliquer cela par l'appartenance de la presque totalité de la population à la religion musulmane. Et selon cette confession religieuse, le mariage de la jeune fille est admis. En effet, le verset 4 de la Sourate 65 du Coran intitulé "La répudiation" dicte que : « La période d'attente pour celles de vos femmes qui ont atteint l'âge de la ménopause sera de trois mois, pour plus de sûreté. Il en est de même pour celles qui n'ont pas encore atteint l'âge de puberté... »¹⁶. Les commentaires de ce verset par les savants musulmans n'ont rien signaler de contre nature ou d'impudique dans le fait pour la fille qui n'a pas encore l'âge de la puberté d'être répudiée. La conséquence que l'on peut tirer de ce verset est que la fille impubère peut se marier car il faudrait encore être marié pour faire l'objet de répudiation en toute logique. Les commentaires du Coran ne se sont pas attardés sur cet aspect sans doute parce que pour les commentateurs il n'y avait pas de doute à ce sujet¹⁷. C'était donc une admission du mariage de la fille impubère voire même une permission¹⁸. Beaucoup de musulman dont les épouses sont mineures prétendent suivre l'exemple

¹⁴ Données recueillies sur le site : <https://www.humanium.org/fr/le-mariage-denfants-en-afrique-subsaaharienne-le-cas-du-niger/>, consulté le 28 janvier 2022 à 10h.

¹⁵ Idem.

¹⁶ Coran, Sourate At-Talaq, verset 4.

¹⁷ A l'instar du célèbre commentaire ou interprétation d'Ibn Kathir, Voir : L'interprétation du Coran (Texte et explications) Tafsir Ibn Kathir, traduit en français par Ahmad Harkat, Volume VI, Dar el fiker, Beyrouth-Liban, 2013, p. 220.

¹⁸ Nous employons le terme « admission » parce qu'il n'est pas à exclure l'hypothèse suivant laquelle la pratique des mariages des mineurs ait cours chez les populations d'avant l'islam. Donc il était question de le réguler. En effet, cette pratique est connue chez beaucoup de peuples comme chez les indiens car après tout ne nous rapporte-t-on pas que le célèbre Ghandi se serait marié à 13 ans ?

du Prophète Mohammad P.S.L qui s'est marié avec son épouse Aicha alors qu'elle n'avait que 6 ans. L'investigation des sources de la tradition prophétique laisse clairement voir qu'il en était bien ainsi. C'est en modérant cette idée et éviter qu'elle ne soit admise à l'extrême que le législateur a fixé certaines limites d'âge dans la réglementation du mariage prévue par le Code civil. Ce dernier dispose en son article 144 que « l'homme avant 18 ans révolus, la femme avant 15 ans révolus ne peuvent contracter mariage ». Car l'âge de 15 ans révolus pour la jeune fille est considéré comme l'âge le plus probable pour qu'elle soit pubère. Et ainsi le droit positif n'enfreint pas la religion.

Le Code civil ne définit pas le mariage. Et La sanction civile de la violation des conditions du mariage est la nullité. C'est donc pour une partie de ces 28% de jeunes filles qui se marient avant de fêter leurs 15 ans comme l'indique les données précitées qu'il y a inefficacité de la lutte contre le mariage précoce, et conflit entre le droit et la religion. Plus précisément pour celles situées entre l'âge de 13 et 15 ans.

La sanction civile de nullité du mariage ne saurait être suffisante pour lutter contre les mariages précoces des jeunes filles dans les campagnes. Le fait d'avoir dénuer les atteintes sexuelles non violentes sur mineurs de l'autre sexe dépassant 13 ans et n'atteignant pas 21 ans de sanctions pénales rend cette lutte inefficace. Car celui qui aura contracté le mariage avec une fille mineure de 21 ans ne risque que la nullité du mariage. En cas de consommation du mariage, cette consommation ne pourra pas être considérée comme un acte impudique ou contre nature dans la mesure où il a porté sur un mineur de l'autre sexe. Ce mineur ne peut s'en plaindre, ou même s'il le fait le dispositif nigérien ne prévoit pas de sanction pénale pour les actes impudiques ou contre nature sur mineur de l'autre sexe. Cette tolérance des atteintes sexuelles sur mineur de l'autre sexe de 21 ans permet de comprendre la totale dépénalisation de ces atteintes chez les individus majeurs.

II- La dépénalisation des atteintes sexuelles sur majeurs ou l'instauration d'une liberté sexuelle sans limite

L'analyse du dispositif pénal nigérien laisse percevoir une dépénalisation des atteintes sexuelles entre personnes majeures débouchant sur l'instauration d'une liberté

sexuelle sans limite à cause d'un dispositif juridique permissif (A). Si cette attitude peut sembler normale et louable ailleurs, elle ne reste pas moins déplorable et contraire aux réalités présentes au Niger (B).

A- Le dispositif juridique permissif

Le dispositif pénal du Niger est permissif face aux atteintes sexuelles sur majeur car il ne prévoit aucune sanction à leur commission sous quelques formes que ce soit, même lorsqu'elles portent sur des majeurs de même sexe (B), et se limite à une simple incrimination (A).

1. La simple incrimination des atteintes sexuelles sur majeurs

La majorité est fixée à 21 ans accomplis et à cet âge on est capable de tous les actes de la vie civile d'après le Code civil nigérien¹⁹. L'article 277 du Code pénal quant à lui dispose que « constitue un attentat à la pudeur tout acte impudique exercé directement sur une personne de l'un ou de l'autre sexe ». Par cette disposition, le Code pénal prévoit l'attentat à la pudeur sur une personne de l'un ou de l'autre sexe mais ne prévoit pas de sanction lorsqu'il porte sur des majeures en dehors du cas de sa commission avec violence²⁰. Ce cas correspond à ce que nous avons qualifié d'agression sexuelle que l'on peut retrouver dans l'article 280 du Code pénal du Niger qui dispose : « Quiconque aura commis un attentat, consommé ou tenté avec violence, contre des individus de l'un ou de l'autre sexe, sera puni d'un emprisonnement de deux à moins de dix ans et d'une amende de 20 000 à 200 000 francs ». Mais notre étude se place dans l'hypothèse des atteintes sexuelles dans laquelle nous situons les actes impudiques et contre nature ainsi que les attentats à la pudeur sans violence.

Si on s'en tient aux termes de l'article 282 du Code pénal c'est-à-dire sur ce qui concerne les actes impudiques sur mineurs de même sexe. Et que l'on combine cet

¹⁹ Article 488 du Code civil nigérien.

²⁰ Article 280 du Code pénal nigérien.

article avec les autres dispositions du chapitre qui le contient on peut avancer que ces actes sont interdits sur les mineurs les plus vulnérables à savoir les moins de 13 ans du fait de leur âge. Ils sont tolérés chez les mineurs pubères c'est-à-dire de 21 ans. Et ne saurait qu'être permis chez les majeurs.

Autrement on pourrait songer que lorsqu'ils sont commis sans violence sur des majeures c'est la sanction de l'article 281 qui s'applique, or il s'agit là seulement des sanctions complémentaires des articles 21 et 25 du Code pénal²¹ aux attentats à la pudeur sur mineurs de moins de treize ans quel que soit le sexe avec ou sans violence, les mineurs de moins de 21 ans et les majeurs avec violence. Il paraîtrait aberrant de dénuier une infraction de peine principale et ne la frapper que de peines complémentaires légales. C'est pourquoi il est juste de considérer que les attentats à la pudeur entre majeures sans violence sont tolérés c'est-à-dire des actes contre nature comme l'homosexualité chez les personnes majeures. Ainsi, au Niger l'homosexualité ne saurait être juridiquement condamnée du fait de l'absence d'incrimination pénale et de sanctions prévues.

2- L'absence de sanction des atteintes sexuelles sur majeurs

L'absence de sanction des atteintes sexuelles sur les majeures concerne même les cas où les atteintes portent sur des majeurs de même sexe. L'article 282 ne précise la prise en compte du sexe que lorsque l'infraction porte sur un mineur. Alors, nous pouvons avancer l'idée selon laquelle, ce qui est interdit sur le mineur de moins de 13 ans quel que soit son sexe, mais n'est interdit que sur mineur de 21 ans de même sexe ne peut qu'être permis entre majeur quel que soit le sexe. Il peut sembler qu'avec les mineurs c'est l'homosexualité que l'on vise aussi à éviter. D'où la sanction lorsque l'atteinte est commise sur un mineur de même sexe. Elle est cependant tolérée par la loi entre personne majeures, tout comme les actes contre nature entre majeures à l'exemple de la sodomie. On peut de ce fait confirmer l'idée d'une liberté sexuelle pleine et entière laissée aux personnes majeures et adultes promue par le législateur nigérien. Une liberté où la satisfaction des plaisirs charnels n'est pas limitée au cadre unique du partenaire de l'autre sexe, puisque tout est permis, même les actes impudiques et

²¹ C'est-à-dire l'interdiction des droits civiques civiles et de famille, ainsi que l'interdiction de séjour.

contre nature dès lors qu'il n'y pas eu de violence dans leur tentative ou leur consommation. Cet article 282 figure dans le Code pénal depuis la première loi portant institution du Code pénal au Niger²². C'est dire qu'au Niger la législation a sans doute promu la théorie du genre dès les premières heures de l'époque post moderne²³. « *La théorie du genre est une hypothèse selon laquelle l'identité sexuelle de l'être humain dépend de l'environnement socio-culturel et non du sexe – garçon ou fille – qui caractérise chacun dès l'instant de sa conception. Autrement dit, notre sexe biologique ne serait pas plus déterminant que le fait d'être grand ou petit, blond ou brun : notre identité féminine ou masculine n'aurait pas grand-chose à voir avec la réalité de notre corps. La cohérence entre sexe et genre nous serait en fait imposée par la société. N'ayant pas le choix, chacun intérioriserait dès son plus jeune âge le rôle qu'il est supposé tenir dans la société comme femme ou comme homme. D'après la théorie du genre, notre genre devrait être fondé sur notre orientation sexuelle, que nous sommes libres d'accepter. Celle-ci pourrait avoir des formes diverses tout comme elle pourrait évoluer dans le temps. Certains soutiennent qu'il existerait jusqu'à six genres : hétérosexuel masculin, hétérosexuel féminin, homosexuel, lesbienne, bisexuel et indifférencié (ou neutre, c'est-à-dire ni homme, ni femme)* »²⁴.

B- L'indifférence du législateur quant aux réalités individuelles et sociales

La posture du dispositif nigérien sur les actes impudiques ou contre nature laisse penser à une indifférence du législateur quant à la place du consentement dans les rapports entre adulte (1) et aussi à son indifférence quant aux mœurs

Under the proposed regulation, which also codifies case law, the person who causes a disturbance that goes beyond normal neighbourhood nuisance is liable for the damage resulting from that disturbance. Even if the harmful activity has been authorised by an administrative decision, the judge can award damages or even order

²² Loi n°61-27 du 15 juillet 1961, portant institution du Code Pénal, publiée au Journal officiel spécial n°7 du 15 novembre 1961.

²³ La théorie du genre, module de cours pour les étudiants de licence 1 mis en œuvre par l'UNESCO et l'EUE disponible sur https://fr.unesco.org/sites/default/files/module_11.pdf, consulté le 30 janvier 2022 à 13h.

²⁴ Fondation Jérôme Lejeune, Théorie du genre : décryptage à l'intention des jeunes, <https://www.fondationlejeune.org/assets/uploads/2013/01/manuel-gender-fondation-lejeune.pdf>, consulté le 30 janvier 2022 à 13h 30.

reasonable measures to end the disturbance,²⁵ as is also provided for in the Catala-Viney draft of 2005.²⁶ Although this regulation seems to concern real property law, the jurisprudence has established this case as an autonomous one, and it is based on the general principle that no one should cause an unusual nuisance to the neighbourhood.²⁷ Proof of fault is not required, only excessive nuisance,²⁸ which is assessed against the effect an activity produces,²⁹ even if this activity is legal or licensed. However, there is no mention of what the nuisances might be, nor are there any criteria for when or how excessive nuisance will occur.³⁰ For example, in Greek law a relevant provision in the section regarding property law mentions the emission of smoke, soot, fumes, heat, noise, vibrations, or other similar effects coming from another property as neighbouring nuisances. According to the same provision,³¹ two criteria are considered to determine if it is a nuisance or not: 1) if the disturbances do not significantly impair the use of the neighbour's property, or 2) if the disturbances come from a normal use for real estate in the area of the property from which the damage is caused. Similar criteria are considered in Quebec law³².

²⁵ Art. 1249 of the law proposal of 2020.

²⁶ Art. 1244. In contrast, the Catala-Viney draft of 2005 draft did not provide the judge with the ability to order the cessation of the injurious activity if administrative permission had been obtained.

²⁷ Cass. ass. plén., 9.5.1984, no. 79-16.612, Bull. ass. plén., no. 4, RTD civ. 1984, 508, commented by J. Huet; JCP 1984, II, 20255, commented by N. Dejean de la Bâtie.

²⁸ D. Mazeaud, Synthèse Le juge et le droit de la responsabilité civile : bilan et perspectives, *Revue des contrats*, 7.12.2017, no. 114, p. 158.

²⁹ M. Lacroix, Regard québécois, in *Vers une réforme de la responsabilité civile française* (fn. 3), p. 79, 91; B. Waltz-Teracol (fn. 21), 19, 26.

³⁰ B. Waltz-Teracol (fn. 21), 19, 26.

³¹ Art. 1003 of the Greek Civil Code.

³² Art. 976 of Civil Code of Quebec: "Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local usage".

1. L'indifférence du législateur quant au consentement du majeur

Ici, il y a lieu de s'interroger sur l'hypothèse similaire à celle prévu par L'article 227-25 du Code pénal français³³ dans sa rédaction du 6 août 2018. C'est-à-dire si, hors le cas de viol ou de toute autre agression sexuelle, le fait, par un majeur, d'exercer une atteinte sexuelle sur un majeur pourrait être puni de sanctions pénales, ne serait-ce que pour prendre en compte le cas de certains majeurs incapables qui sont à protéger. En effet ces derniers peuvent sans violence, contrainte, menace ou surprise être victime d'atteinte de nature sexuelle. Il ne saurait alors dans ce cas être question de viol au sens de l'article 283 du Code pénal nigérien³⁴. N'ayant pas l'esprit de discernement pourrait-on parler de consentement éclairé et conscient à l'acte impudique ou contre nature auquel ils sont victimes ? En effet, même dans le cas où en droit pénal, le consentement de la victime fait obstacle à l'exercice des poursuites, il faut que le consentement de celle-ci soit libre, antérieur ou concomitant³⁵. La condition qui n'est pas remplie ici pour le cas des majeurs incapables c'est le libre consentement. N'étant pas conscient comment peuvent-ils être libres de leur décision ? C'est comme s'ils sont sous l'emprise de leur manque de discernement. On pourrait alors songer à les traiter comme des mineurs de 21 ans et leur appliquer la protection contre les actes impudiques et contre nature de l'article 282. Mais ils ne sont pas à tous les coups de même sexe que le délinquant comme l'exige l'article 282. Et aussi, le droit pénal est d'interprétation stricte. Même s'il en était autrement, les incapables majeurs de l'autre sexe seraient comme les mineurs de 21 ans de l'autre sexe dépourvus de protection contre les actes impudiques et contre nature sans violence au Niger.

Il est notoirement connu que « la liberté de chacun s'arrête là où commence celle des autres ». L'affranchissement dans le cadre de cette liberté sexuelle des actes impudiques et contre nature non violent de toute sanction pénale entre adultes fait

³³ L'article 227-25 du Code pénal français dispose : « Hors le cas de viol ou de toute autre agression sexuelle, le fait, par un majeur, d'exercer une atteinte sexuelle sur un mineur de quinze ans est puni de sept ans d'emprisonnement et de 100 000 € d'amende ».

³⁴ L'article 283 du Code pénal nigérien dispose que ; « Tout acte de pénétration sexuelle, de quelque nature qu'il soit, commis sur la personne d'autrui par violence, contrainte, menace ou surprise est un viol ».

³⁵ Jean Larguier, Droit pénal général, Mémentos Dalloz, 19^e édition, 2003, p. 60-61.

franchir à celle-ci aussi les limites de la liberté de l'autre. C'est pourquoi il semble opportun de prendre en compte le consentement entre majeur en cas d'atteintes sexuelles et punir les atteintes sexuelles sur majeur et les attentats à la pudeur non violents sur mineur de l'autre sexe de 21 ans.

2- L'indifférence du législateur quant aux réalités sociales du Niger

Dans le dispositif juridique nigérien sur les attentats aux mœurs, précisément les articles 275 à 294 du Code pénal on peut trouver des dispositions qui témoignent d'une certaine méconnaissance par le législateur des bonnes mœurs, de la religion et des traditions du pays.

En effet, dire que seules les atteintes sexuelles sur individus de même sexe de moins de 21 ans seront réprimées n'est rien d'autre que permettre les actes contre nature sur mineur de 21 ans de l'autre sexe et permettre l'homosexualité entre personnes adultes. Ce qui est contraire à la foi musulmane de la majeure partie de la population nigérienne.

Le législateur nigérien décide donc, que pour le majeur capable qui découvre après avoir été convaincu par un coreligionnaire de la licéité de la sodomie avant sa consommation que cet acte est condamnable par sa religion, il n'y a pas d'action ? L'hypothèse n'est pas seulement fictive, elle fait l'objet de controverse par les différents courants de pensée. En effet, les uns se basent sur le verset du Coran selon lequel : « Vos femmes sont pour vous comme un champ de culture ou de labour ; allez donc à vos champs comme vous l'entendez »³⁶ pour permettre une telle pratique en se fondant sur une traduction littérale. Alors que les plus sensés condamnent cette pratique sur la base d'une traduction beaucoup moins dégradante pour la femme à savoir : « Vos femmes sont pour vous la source de la vie et de la richesse, allez donc à cette source comme vous l'entendez (librement) » beaucoup plus proche de la philosophie du Coran³⁷. Aussi l'argument de ceux qui autorisent la sodomie ne pourrait tenir. Car comment Dieu saurait dans un même livre donner cette

³⁶ Coran, Sourate 2, verset 223.

³⁷ Asma Lamrabet, « Vos femmes...un "champ de labour" ? », https://www.lescabiersdelislam.fr/Vos-femmes-un-champ-de-labour_a1220.html, Consulté le 31 janvier 2022 à 10h.

autorisation et en même temps châtier³⁸ ceux qui se permettent ces actes alors qu'il affirme que c'est un livre qui n'est sujet à aucun doute³⁹, explicite⁴⁰ et sans détour⁴¹ ni contradiction⁴².

Aussi, il est connu de tous les nigériens que les actes impudiques et contre nature sont prohibés ainsi que toute autre forme de sexualité qui sort de l'ordre naturel dans le cadre du mariage et de la procréation. Que le législateur nigérien de 1961 ait autorisé ces actes peut paraître en adéquation avec l'évolution de la société occidentale influente dans les institutions mondiales qui dirigent le monde comme l'UNESCO. Mais on peut aussi lui reprocher d'être en contradiction avec la majeure partie de sa population et de ne pas prendre en considération les aspirations de celle-ci. La souveraineté et l'autodétermination des peuples proclamées par les grandes déclarations de droits devraient impliquer aussi la liberté pour chaque peuple de choisir, conformément à sa culture, ses mœurs et ses croyances, son droit pénal.

Il est à craindre qu'une telle disposition, qui n'a survécu aux multiples réformes du Code pénal nigérien que du fait de la méconnaissance par les populations des textes, entraîne un tollé voire des soulèvements de masse. Car après tout, la DUDH⁴³ ne considère-t-elle pas qu'il est essentiel que les droits de l'homme soient protégés par un régime de droit pour que l'homme ne soit pas contraint, en suprême recours, à la révolte contre la tyrannie et l'oppression.

Conclusion

L'article 282 a pour préoccupation la protection des mineurs. Mais il n'y parvient que de façon parcellaire car les mineurs de l'autre sexe de 21 ans sont exclus de la protection qu'il prévoit. Pire, il suggère une sexualité osée et libertine entre personnes majeures dans une société aux réalités hostiles à cela par ses mœurs et croyances. Dans

³⁸ Coran, Sourate 7 Les murailles, versets 80 à 83.

³⁹ Coran, Sourate 2 La Vache, verset 2.

⁴⁰ Coran, Sourate 12 Joseph, verset 1.

⁴¹ Coran, Sourate 18 La caverne, verset 1.

⁴² Coran, Sourate 4 Les femmes, verset 82.

⁴³ Voir le préambule de la Déclaration Universelle des Droits de l'Homme du 10 décembre 1948.

la rédaction de ce dispositif sur les infractions sexuelles, on relève un échec du législateur à concilier son besoin de progrès dans les pratiques sexuelles avec les habitudes établies. On note également un échec à proportionner l'étendue des interdits par rapports aux individus à protéger et l'étendue des libertés à accorder par rapport aux nécessaires barrières à fixer.

COMPARING THE SOVIET LEGAL ORDER AND SOME CONTEMPORARY EUROPEAN LEGAL ORDERS

Maryna Vahabava^{*}

Abstract

This contribution aims to illustrate the legislation providing criminal prosecution in the Soviet Union for systematic vagrancy and parasitism. It analyses in detail such legal provisions and their evolution over time, until the fall of the USSR. The first part is focused on the right to work in the Soviet Constitution, in order to go beyond a mere description of bizarre penal provisions and try to understand their actual role in the light of the socialist conception of labour inspiring the legal order of the USSR, where work was considered both as a universal social right and a universal social duty and structural unintentional unemployment was excluded by the socialist system of production. The concluding remarks explore the connecting thread of this article, the legal conception of work, highlighting how its consideration in a society, as a right and a duty or as a commodity, basically depends on the relations of production and on the history and the present of the social conflict, and how, in turn, this societal consideration determines the approach and the priorities of the lawmaker towards unemployment, severely fighting it, hesitantly alleviating some of its more dangerous consequences or even implicitly fostering it, in a certain amount, as part of the market mechanism.

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Keywords

Vagrancy, Begging, Parasitic Lifestyle, Soviet Criminal Law, Right To Work, Welfare

1. Introduction

Consistently with the topic of the Juris Diversitas 7th General Conference “The dark side of the law”, concerning “bizarre” and curious laws in the world, at least in the eyes of the Western lawyer, this contribution aims to illustrate the legislation providing criminal prosecution in the Soviet Union for systematic vagrancy and parasitism. First of all, par. 2, with all its subparagraphs, analyses in detail such legal provisions and their evolution over time, until the fall of the USSR. Par. 3 focuses on the right to work in the Soviet Constitution, in order to go beyond a mere description of bizarre penal provisions and try to understand their actual role in the light of the socialist conception of labour inspiring the legal order of the USSR, where work was considered both as a universal social right and a universal social duty and structural unintentional unemployment was excluded by the socialist system of production. Finally, the concluding remarks (4) explore again the connecting thread of this article,

the legal conception of work, highlighting how its consideration in a society, as a right and a duty or as a commodity, basically depends on the relations of production and on the history and the present of the social conflict, and how, in turn, this societal consideration determines the approach and the priorities of the lawmaker towards unemployment, severely fighting it, hesitantly alleviating some of its more dangerous consequences (misery, social anger) or even implicitly fostering it, in a certain amount, as part of the market mechanism.

2. Engaging in vagrancy, begging and leading a different parasitic lifestyle in the Criminal Code of the RSFSR.

One of the most discussed and bizarre laws of Russia is the one that provides for liability in case of parasitic lifestyle. According to article 209 of the Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR) named “Systematic vagrancy or begging” and “for parasitism”: *the systematic practice of vagrancy or begging, continued after a second warning made by the administrative authorities, is punishable by deprivation of liberty for a term of up to two years or correctional labor for a term of from six months to one year¹.*

In the eyes of the Western reader, it is surprising not only the type of crime described but also the severity of the penalties provided for. But what exactly is meant by parasitic life and how Soviet criminal law identified such subjects for punitive purposes²?

¹ V. Pavlov, Selected writings, Anthology of Legal Science, Legal Center – Press, ISBN: 9785942016655, 2015, p. 15.

² The criminal law of the RSFSR was not a peculiarity of that Republic but exponential of a common character of Soviet criminal law. The adoption of a law "On the intensification of the struggle against people who avoid socially useful work and lead and antisocial parasitic lifestyle" dates back to 4 May 1961 and was introduced by a decree of the Presidium of the Supreme Soviet of the RSFSR, which was followed by similar decisions in other federated republics such as Belarus, Ukraine and Estonia.

Article 209 established criminal liability for three different forms of so-called parasitic existence in Russian called “*tuneyadstvo*”, forming independent *corpus delicti*, - engaging in vagrancy, begging, leading a different parasitic lifestyle³.

It seems useful to briefly retrace the fundamental stages of the evolution of the criminal legislation in comment and try to frame it in the historical period in which it was introduced.

The adoption of a law "On the intensification of the struggle against people who avoid socially useful work and lead an antisocial parasitic lifestyle" dates back to 4 May 1961 and was introduced by a decree of the Presidium of the Supreme Soviet of the RSFSR. It was not a sudden decision, but the choice of introducing such a rule is based on the process of evolution of legislation which began in the years immediately following Stalin's death and ended - as far as the criminal sector is concerned - with the adoption in October 1960 of the New Codes of Criminal Law and of Criminal Procedure by the Supreme Soviet of the RSFSR. It can be said⁴ that it was an important evolution aimed at incorporating into the penal rules also those cases that harmed social justice.

These changes are based on the increased attention to "socialist legality" that has grown after the 20th Party Congress in 1956 which had introduced a principle of application of the rule of law characterized by due attention to the Marxist-socialist character of the country⁵.

The measure issued by the Supreme Soviet in 1961 is the result of a discussion that began in the first half of 1957 when the first draft laws of the various Soviet Republics "on the intensification of the fight against antisocial parasitic elements" were

³ V. Pavlov, Selected writings, Anthology of Legal Science, Legal Center – Press, ISBN: 9785942016655, 2015, p. 16.

⁴ R. Schlesinger - Soviet Studies, Vol. 12, No. 4 (Apr. 1961), Taylor & Francis Ltd, pp. 456-464.

⁵ R. Beermann, in The British Journal of Criminology, JULY 1962, Vol. 3, No. 1 (JULY 1962), ed. oxford university press, p. 72 ff.

published⁶, intended to affect all those who did not live on a working income and avoided carrying out work activities useful to society.

The proposed draft were the subject of wide debate⁷ because, on the one hand, the need to combat social parasitism was understood, on the other, there was a strong doubt -especially on the part of the legal schools and the Public Prosecutor's Office - about the effectiveness of the proposed rules and their compliance with the rule of law.

On the basis of the Decree of Presidium of the RSFSR Supreme Soviet of 20 September 1965 the expulsion was used exclusively in cases of persons who lived in the cities of Moscow and Leningrad - actual San Petersburg - as well as in their respective provinces. In this way, these decrees established the procedure for involving persons leading a parasitic lifestyle in socially useful work and determined fulfilment of administrative measures against them.

The rule in comment was added to the Soviet Criminal Code of 1966⁸ following the entry into force with a special amendment. The rule provided that initially the authorities had to proceed with a warning and only in case of failure the subjects were subjected to more stringent measures. In the latter case, expulsion to the specifically identified posts was envisaged for a period of 2 to 5 years with the obligation to carry out socially useful work and the confiscation of assets obtained with the proceeds deriving from unauthorized work. The decision was taken by the Local City Court called "*Gorodskoy Narodny Sud*" and did not provide for the possibility of appeal or revision⁹.

⁶ slackers were divided into two categories: (a) people who do not work, or if they work only by appearance, with permanent residence; and (b) persons who also live on a pension but without a known domicile. The first category would be considerate by the administrative authorities, while the second one would be considered by the ordinary courts (the people's courts). The sanction common to both categories was exile from two to five years.

⁷ R. Beermann, in *The British Journal of Criminology*, JULY 1962, Vol. 3, No. 1 (JULY 1962), ed. oxford university press, p. 73 ff.

⁸ R.S.F.S.R. 1960 UGOL.KOD. (Criminal Code).

⁹ V. Pavlov, *Selected writings, Anthology of Legal Science*, Legal Center – Press, ISBN: 9785942016655, 2015, p. 53.

Further improvement of the criminal legislation on liability for leading a parasitic lifestyle is associated with the adoption of 23 February 1970 of the Resolution of the Central Committee of the Communist Party and the Council of Ministers of the USSR n. 136 “On measures to strengthen the fight against persons who evade socially useful work and lead an antisocial parasitic lifestyle”. The resolution provided for a number of specific measures which were envisaged aimed at intensifying the fight against parasitism and it was also recommended that the Union republics made the necessary changes to the criminal legislation¹⁰.

On 7 August 1975, the Presidium of the RSFSR Supreme Soviet issued a Decree “On the introduction of amendments to Article 209 of the RSFSR Criminal Code”¹¹. At the same time, the Presidium of the RSFSR Supreme Soviet adopted a resolution “On the procedures for applying Article 209 of the RSFSR Criminal Code” (CCE 37)¹².

These rules introduced instructions for the application of warnings to “parasites” as an initial measure of suppression of such behavior. If then, after the warning, the parasites did not get a job for one month, then the police gave them an official warning and thus we can say that a parasitic lifestyle could last up to six months.

On 30 May 1977, the Presidium of the RSFSR Supreme Soviet halved another period on the norm in comment. Precisely, “On the procedures for applying Article 209 of the RSFSR Criminal Code” the following text will substitute:

“2. Persons leading a parasitic way of life (in the absence in their actions of evidence of vagrancy or begging) are summoned by the organs of internal affairs and officially warned that a parasitic existence cannot be tolerated. These persons are informed that, within a month, they must choose a place of work at their own discretion, and obtain employment, and that necessary assistance in obtaining work can be provided by the executive committee of the local Soviet of Workers Deputies.

¹⁰ *Ibidem*, p. 55.

¹¹ *Gazette of the RSFSR Supreme Soviet* 1975, No. 33, p. 698 ff.

¹² H.J. Berman, *Soviet Criminal Law and Procedure*, Harvard University Press, Cambridge, 1966.

“If a person continues to lead a parasitic way of life, one month after such an official warning, the organs of Internal Affairs will decide the question of bringing criminal charges against him in accordance with Article 209 of the RSFSR Criminal Code.”¹³

It can be said that the maintenance of parasitic lifestyle is an independent crime, whose composition differs from the composition of vagrancy and begging, provided by the same article 209 of the RSFSR Crime Code.

Always useful to specify that in accordance with the law, “malicious evasion” was considered the behavior of the person who failure to appear at the enterprise where he was sent by decision of the executive committee absence from work after entering this enterprise. As well as those cases where the directed person started to work only for appearances, but his/her subsequent behavior testified to a stubborn unwillingness to work. For example, the behavior of systematic and prolonged absences from work or the abandonment of the workplace without a reason, permission or justification.

The *ratio legis* for the introduction of the rule in question was to prevent and combat crimes against subjects who did not want to carry out work activities and, consequently, led a parasitic lifestyle.

The anti-parasite law represents an important means, also due to the vagueness of the definitions contained in it, to punish even those crimes related to the use of common goods or those illegal activities for which there is not sufficient evidence to open criminal proceedings¹⁴.

One of the most relevant aspects of the law, according to authoritative opinion¹⁵, is the fact that the power to order exile is not exercised through a judgment but through administrative orders or decisions of assemblies of factories, offices, institutions or collective farms. A sort of administrative deportation that originates from pre-revolutionary legislation and that, with different relevance and different uses, has

¹³ *Ibidem*.

¹⁴ R. Beermann, in *The British Journal of Criminology*, JULY 1962, Vol. 3, No. 1, ed. oxford university press, p. 78 ff.

¹⁵ *Ibidem*.

remained in force as a solution to punish those who did not have sufficient evidence of guilt against them or as a means of removing unwanted citizens from cities and villages.

It is recalled that in the Constitution of the period in Article 60 it was provided that any form of subtraction from socially useful activities and work cannot exist and is not adherent to the principles of Soviet social life¹⁶. The basic idea was that subjects who did not want to carry out any work activity and led a parasitic life also represented serious economic and moral damage to the Soviet state.

The high social danger of the *"tuneystvo"* was considered not only on the basis of the lack of adherence to the principles of socialism but also because it represented a prerequisite for the commission of other crimes. Persons who did not carry out any work activity, not having the means of subsistence, not infrequently were led to commit crimes against property, crimes against people and other dangerous criminal activities. In fact, even in other Western legal systems, the same reasons were to justify the existence of norms such as, for example, the crime of begging ex article 670 of the Italian criminal law system¹⁷.

According to the reconstruction of legal doctrine¹⁸ the subsequent improvement of the legislation consisted in further simplifying the procedure for binding parasitic elements to criminal liability for evading socially useful works and in stepping up the fight against this antisocial phenomenon.

With the decree of the Presidium of the RSFSR Supreme Soviet of 11 October 1982, amendments were made to the rule which made it possible to specify the legal aspects

¹⁶ V. Pavlov, Selected writings, Anthology of Legal Science, Legal Center – Press, ISBN: 9785942016655, 2015, p. 15.

¹⁷ Article 670 of the Italian Penal Code provided in the first paragraph for the arrest of up to three months *for "anyone who begs in a public place or open to the public"*. The penalty of arrest ranged from one to six months if the act of the crime was *"committed in a repugnant or vexatious manner, that is, by simulating deformities or diseases or using fraudulent means"*.

¹⁸ See V. Pavlov, Selected writings, Anthology of Legal Science, Legal Center – Press, ISBN: 9785942016655, 2015, p. 59.

of criminal liability arising from parasitism¹⁹. This norm clarified the legal grounds for liability for parasitism, the disposition was somewhat changed and the sanctions was strengthened.

The fight against “parasitism” was conducted until the adoption in 1991 of the law "On Employment of the Population", which abolished criminal liability for parasitism and recognized the *status* of unemployment, although the criminal article had existed for 30 years²⁰.

2.1 Preliminary requirements and constituent elements of crime

An obligatory prerequisite for bringing to criminal liability under the article 209 of the RSFSR Criminal Code was an official warning to such a person about the inadmissibility of such a parasitic lifestyle²¹. The warning was presented by the internal affairs authority by signing the formal warning deed. The police warned the subject of branding to criminal liability in case of non-cessation of the parasitic lifestyle. At the same time was explained the need to find a job within one month and the possibility of obtaining assistance in this regard from the executive committee of the local Soviet²².

In fact, the executive committee of the local Soviet were obligated to provide labor and domestic accommodation for persons who evade socially useful labor, taking in account their specialty, qualifications, education. Aid had to be provided within a period not later than 15 days from the date of applying for assistance in finding employment. This meant that the only form of unemployment during the Soviet

¹⁹ The decree of the Presidium of the RSFSR Supreme Soviet of 11 October 1982 “Relating to the amendments and additions to the RSFSR Criminal Code” on *Gazette of the RSFSR Supreme Soviet*, 1982, n. 41, p. 1513 ff.

²⁰ Law of the Russian Federation of April 19, 1991, No. 1032-1 "On Employment of the Population in the Russian Federation".

²¹ V. Pavlov, Selected writings, Anthology of Legal Science, Legal Center – Press, ISBN: 9785942016655, 2015, p. 19 ff.

²² The decree of the Presidium of the RSFSR Supreme Soviet “Relating to the amendments and additions to the RSFSR Criminal Code” on *Gazette of the RSFSR Supreme Soviet*, 1984, n. 51, p. 1793 ff.

period described was voluntary and non-structural relating to the economic and labor system.

If the person did not get a job after a period of one months and following the official warning was made and continued to evade socially useful labor, live on unearned income and stay in a state of constant alcoholism, then the police could decide to attribute a criminal liability for leading a parasitic lifestyle²³. On the basis of the normative provisions of Soviet criminal law we can say that it is a criminal case with progressive formation.

As for the constituent elements of the criminal case of the vagrancy in order to bring to criminal liability under the article 209 of the RSFSR Criminal Code for the crime in question, it was necessary: 1) establishment of long-term evasion from work, 2) living on unearned income and 3) leading a guilty anti soviet social lifestyle²⁴. It immediately appeared that the constituent elements of the crime for their generic definition would have created application difficulties for excessive genericity of the regulatory provision.

For this reason, the application in practice of the criminal law on liability for maintaining a different parasitic lifestyle caused difficulties for law enforcement of Soviet state in a different number of cases.

Finally, for the correct individuation of the crime, the subjective element of the criminal case that had to consist in the specific and direct intent was fundamental. We can say that those who carry out a parasitic life were aware that their behavior and way of life were intentional. Motives and goals of those who perform socially useful work often consisted in the goal of not working at all or of leading life using others, precisely parasitic life²⁵.

²³ *Ibidem*.

²⁴ V. Pavlov, Selected writings, Anthology of Legal Science, Legal Center – Press, ISBN: 9785942016655, 2015, p. 20.

²⁵ *Ibidem*, p. 34-35.

2.2 The concept of the parasitic lifestyle in the Soviet Criminal law

The concept of parasitic lifestyle that has been going on for a long time includes those cases when a person evades socially useful work and lives on unearned income for more than four consecutive months or for a total of the year. For this reason, individuals received an official warning about the inadmissibility of such lifestyle²⁶.

To explain what the parasitic way of life means in Soviet society it is necessary to consider the definition of socially useful works. The socially useful work was considered only by work in a state-sanctioned form. Self-employed and other type of work were allowed only in their spare time from "socially useful work" otherwise it was equated to parasitism. For example, studying at a public school was considered a sufficient equivalent of socially useful work.

The concept of parasitic life has been better identified by the decree of the Presidium of the RSFSR Supreme Soviet "On the procedure for applying article 209 of the RSFSR Criminal Code" of 13 December 1984 in accordance with which the conduct of parasitic lifestyle should be understood as *"a long term, more than 4 months in a row or more than 4 month in a total during the year, the adult able to work and person on unearned income with evasion from socially useful work"*²⁷.

It should be remembered that the Soviet criminal law system has its own peculiarities. In this sense two types of considerations seem important: first, it is necessary to recall the purpose of the entire Soviet penal system linked to the ideological conception of the socialist state and to the archetype of man who lives in that state; secondly, the fact that Soviet criminal law is state-based law.

On the first aspect, it should be noted that soviet criminal law generally seeks to create an ideal man of Soviet society that by its own conduct and can achieve all the goals that the state has set. In this context the ideological background is very significant

²⁶ H.J. Berman, *Soviet Criminal Law and Procedure*, Harvard University Press, Cambridge, 1966.

²⁷ The decree of the Presidium of the RSFSR Supreme Soviet "On the procedure for applying the Article 209 of the RSFSR Criminal Code" of 13 December 1984 on *Gazette of the RSFSR Supreme Soviet*, 1984, n. 51, p. 1793 ff.

and, therefore, in socialism could not find space for a life without dedication to work that could lead to the evolution of society as it has been well evidenced in doctrine²⁸.

As evidenced above, Soviet criminal law is essentially part of state law. This means that the regulatory provision is of fundamental importance compared to the jurisprudential practice²⁹. In the context examined, in fact, there is no rule that induce the courts to follow the jurisprudential precedents. Although in the case of parasitism there is a diversified practical application due to the excessive generic nature of the description of the crime in the Soviet criminal code. The practical application of the standard has not always complied with the regulatory provision in a rigid way, as it will be highlighted in the following paragraphs.

2.3 Application issues and some practical cases.

The most interesting aspects of Article 209 of the RSFSR Criminal Code are evidenced by application practice.

One of the first questions confronted that legal practitioners in order to establish whether it was possible to bring “parasites” to criminal liability concerns the definition of the initial moment of evasion from socially useful work. It is important to remember that the socially useful work was considered only by state recognized work.

The definition of the initial moment of evasion depended on the application of the norm: for this reason, different theories of thought in doctrine were formed³⁰. Someone³¹ believes that the initial moment should be carried out from the moment

²⁸ Chris Osakwe, *Contemporary Soviet Criminal Law: An Analysis of the General Principles and Major Institutions of Post-1958 Soviet Criminal Law*, 6 GA. J. INT'L & COMP. L. 437 (1976). Available at: <https://digitalcommons.law.uga.edu/gjicl/vol6/iss2/5>, last consultation 3.04.2023.

²⁹ *Ibidem* p. 438.

³⁰ V. Pavlov, Issue of criminal liability for maintaining a parasitic lifestyle, *Pravovedenije*, 1985, n. 5, p. 23-28 (in Russian).

³¹ In this sense E. A. Chudakov, on The effectiveness of the application of norms by administrative prejudice, Moscow, 1981, p. 28 ff (in Russian).

of the factual evasion from work, others³² considers from the date of dismissal from job or expulsion from an educational institution.

The second reconstruction was more followed in practice for these reasons: it allowed avoiding mistakes and inaccuracies that might arise when deciding whether to bring a person to criminal liability for leading a parasitic lifestyle during the period of inquiry and preliminary investigation³³. On the other hand, the first reconstruction cannot allow to identify with certainty the initial moment of the commission of the crime since in practice it was very rarely possible to objectively document that “factual” moment.

The second application problem concerns the understanding and investigation of the use of means of subsistence of the individual suspected of the crime of “*tuneyadstvo*” that derive from non-work activities. It should be borne in mind that the application problems arise from the fact that the content of the concept of unearned income in the soviet legislation was not given. Also, in this case the role of doctrine was decisive, and the different positions were formed.

For some³⁴, the concept of unearned work was given by the gain obtained as a result of criminal actions or, more generally, not recognized as legal, due to activities not their own but those of others and deriving from other sources. Other scholars³⁵ considered unearned work that deriving from the growth of the patrimony in a passive way, which does not derive from the factual work activity and, therefore, not allowed by the soviet norms.

It seems that the most accredited position was the one that identified in unearned work the gain obtained thanks to illicit activities and without the use of one's own

³² The position is summarized by U. I. Liyapunov, on Liability for parasitism, Moscow, 1982, p. 23 ff (in Russian).

³³ V. Pavlov. Selected writings, Anthology of Legal Science, Legal Center – Press, ISBN: 9785942016655, 2015, p. 21.

³⁴ This is the position of U. K. Tolstoy as it is highlighted in the writing of V. Pavlov, Selected writings, Anthology of Legal Science cit. p. 23 ff.

³⁵ In this sense G. K. Kostov, on Socio-legal means of combating unearned income, Soviet state and law, 1985, n. 4, p. 16 ff.

work force or thanks to the attribution of the result of another person's work in various possible forms³⁶.

Another application aspect to be considered concerns the use of the punitive sanction provided for. According to the penal regulatory system³⁷, the person who was convicted of the crime of parasitism to imprisonment from one to two years was able to apply an alternative condemnation which consisted in obligatory work for the corresponding period. The alternative condemnation did not apply if the person in question had already benefited from the same treatment in the previous three years. If during the period of carrying out the alternative condemnation of socially useful work the person did not comply with the obligations laid down and did not have a disciplined behavior, the court could revoke the measure and, therefore, restore custody in prison.

From these brief considerations we understand the complexity of the practical application of the criminal norm. Reason why under the article 209 of the RSFSR Criminal Code relating to vagrancy, parasitism and wandering many very different cases have been tried and convicted for such a crime.

It is interesting to note that from the jurisprudential practice and the guidelines given by the plenary session of the Supreme Court of the USSR³⁸ it emerged that the individual courts should had to find out the profile of the person brought to justice under the article 209 of the RSFSR Criminal Code³⁹. In particular, the elements to be considered were ability to work, age, marital status, criminal record, sources of livelihood, reasons for leading a parasitic lifestyle and other circumstances that are important for the correct solution of the question of guilt, qualification of the crime and measure of punishment.

³⁶ This is the position of the scholar V. P. Gribanov, as reported by V. Pavlov, *Selected writings, Anthology of Legal Science* cit. p. 23 ff.

³⁷ Article 34 of Soviet Criminal Code.

³⁸ Decree of the Plenum of the Supreme Court of the USSR of 28th June 1973 available in *Collection of resolutions of the Plenum of the Supreme Court of the USSR 1924-1977*, part 2, Moscow, 1981, p. 286 ff.

³⁹ V. Pavlov, *Selected writings, Anthology of Legal Science*, Legal Center – Press, ISBN: 9785942016655, 2015, p. 33-34.

The cases that the Soviet Courts took into consideration were different and often, for reasons of excessive genericity of the regulatory provision, gave rise to different applications. One question arises: who were the people convicted of the crime of systematic vagrancy and parasitism? To answer this question, it is necessary to consider - on the one hand - judicial statistics of some courts that showed some trends. On the other, there are cases that have caused so much discussion in public opinion⁴⁰. As for the cases officially detected in different hypotheses these were persons who lived thanks to the help of their parents or spouse, cohabitant or relatives. In some cases, these were persons who rented an apartment and obtained an income that in the Soviet period was not equated with a recognized work. There were several cases of those persons who used the proceeds of other crimes such as theft and scams.

These statistics are not exhaustive but gives a better picture of the categories of persons who were convicted of the offences referred to in article 209 of the RSFSR Criminal Code. The study of judicial practice shows that the antisocial parasitic way of life, which -as a rule – persons led during the period of evading social useful work and living on unearned income, was often accompanied by the commission of other crimes and immoral behavior⁴¹. This type of correlation described led to the intensification of the repression of behaviors attributable to the parasitic life and wandering.

As has been said before since the mid-sixties the fight against crime in comment has intensified. It can be pointed out that by mid of 1964, more than 37.000 people had been taken into exile under the application of the article 206 of Soviet Criminal Code. It is curious to notice how “the parasites” were recognized and referred to the cases of the engineer-technologist, who stopped working, equipped a rabbit farm and began to live off the income it brought, the firefighter, who was engaged in his land plot and traded in the market vegetables and fruits⁴².

⁴⁰ *Ibidem*, p. 26.

⁴¹ V. Pavlov, *Selected writings, Anthology of Legal Science*, Legal Center – Press, ISBN: 9785942016655, 2015, p. 29.

⁴² *Ibidem*, p. 27.

Charges of parasitism were frequently applied to dissidents, who were often intellectuals and writers. An example is Joseph Brodsky, the Russian poet awarded the Nobel Prize in Literature. He was charged with social parasitism by the Soviet authorities in 1964 because the Court established that his series of odd jobs and role as a poet were not a sufficient contribution to society. It must be said that for the moral and ethical of citizens during the Soviet period full employment was considered as a right guaranteed by the State and as a form of personal and social realization.

Since the 80s the fight against the parasitic lifestyle intensified. Many preventive actions were put in place up to organized raids by the police on shops and cinemas during working hours. All citizens of working age caught there were checked and reported to the place of work about truancy⁴³.

Subsequently with the decree of the Presidium of the Supreme Soviet of the USSR and the Presidium of the Supreme Soviet of the RSFSR of 16 May 1985 strict liability measures were established for drunkenness and connivance with it, which was essential for the fight against parasitism.

2.4 Special categories provided by Soviet criminal law that excluded punitive claims.

As briefly illustrated in the previous paragraph, the application cases of the article in comment were many and different from each other. It should be pointed out that there were tools to mitigate the effective application of the criminal legal situation in comment and so categories were identified which, although they represented all the constituent elements of the criminal case, were not punished by the Soviet state.

It has already been evidenced that to be prosecuted for leading a parasitic lifestyle under the article 209 of the RSFSR Criminal Code a set of conditions must include antisocial behavior. In Soviet legislation, a clear circle of persons belonging to the category of the legally disabled population was established on legal level. At the

⁴³ R. Gregory. Paul, Stuart, C. Robert, *Comparing Economic Systems in the Twenty-First Century*, South-Western College Pub., 2003, p. 118 ff.

same time it was considered categories of persons who, for other reasons, were not subject to the general obligation to work.

This is the case of minor citizens, invalids of various categories, women over the age of 55, men over the age of 60, pensioners, pregnant women and women with minor children under 12 years of age and likewise subjects (men or women) who took care of domestic life⁴⁴.

A separate consideration deserves the analysis of domestic care activities in relation to the article 209 of the Soviet Criminal Code. More generally, it should be noted that in the society of the Soviet period the activity of domestic care was recognized as an important role. It was not always possible to reconcile working life with the commitments of care and management of the family. Soviet society reserved particular attention for the education of children in the family. For these reasons, mothers were granted a period of maternity leave and sums as state maternity allowance. In larger families and in the presence of invalids, the Soviet state considered domestic work as a real socially useful work job.

Those conditions of equivalence removed the categories of persons described from the application of the criminal rule of the article 209 of the RSFSR Criminal Code⁴⁵. It should be emphasized that the preferential treatment did not concern only women, but also men in cases where the profession of the woman made it possible to obtain greater sustenance for the family and it was more useful for the wife to work and not for the husband who, in turn, provided for domestic activities and childcare.

There were also other situations that had a legal treatment that excluding the application of criminal liability for vagrancy. In Soviet society it was allowed to carry out work on one's own only in very limited cases and under certain conditions. It was possible in the context of cultivation activities in order to sustain one's close family circle, in the field of handicrafts, consumer services for the population as well

⁴⁴ V. Pavlov, *Selected writings, Anthology of Legal Science*, Legal Center – Press, ISBN: 9785942016655, 2015, p. 31.

⁴⁵ *Ibidem*, p. 32 ff.

as other types of activities permitted by law, based only on the personal labor of soviet citizens and members of their families, even officials of religious cults⁴⁶.

3. The right to work in the Soviet Constitution

To clarify the reasons why the analyzed norm provided for in Article 209 of the RSFSR Criminal code were introduced during the Soviet period it is useful to evidence how the right to work was considered in that historical period.

The Union of Soviet Socialist Republics (USSR) Constitution of 1936 foresaw as follows: *"labour in the USSR is a duty and a matter of honor for every able citizen"*. Under this principle of the Constitution on 1961 the Presidency of the Supreme Council of the RSFSR adopted a decree "On strengthening the fight against persons (slackers, parasites, vagrancy), evading socially useful work and leading an antisocial parasitic lifestyle".

The right to work in the USSR was enshrined in Article 118 of the Soviet Constitution of 1936, and after in article 40 of the USSR Constitution of 1977.

The *"Citizens of the USSR have the right to work, that is, are guaranteed the right to employment and payment for their work in accordance with its quantity and quality.*

*The right to work is ensured by the socialist organization of the national economy, the steady growth of the productive forces of Soviet society, the elimination of the possibility of economic crises, and the abolition of unemployment"*⁴⁷.

Every citizen of the USSR was guaranteed employment like *"the right to receive a guaranteed job with pay in accordance with its quantity and quality and not lower than the state minimum size, including the right to choose a profession, occupation and work in accordance with vocation, ability, training, education and social needs."*

⁴⁶ These are considerations made on the basis of the normative provisions of Article 17 of the Soviet Constitution.

⁴⁷ The Article 118 of the USSR Constitution of 1936.

This last aspect was emphasized in the Soviet Constitution of 1977: “(1) *Citizens of the USSR have the right to work (that is, to guaranteed employment and pay in accordance with the quantity and quality of their work, and not below the state-established minimum), including the right to choose their trade or profession, type of job and work in accordance with their inclinations, abilities, training and education, with due account of the needs of society.*

*(2) This right is ensured by the socialist economic system, steady growth of the productive forces, free vocational and professional training, improvement of skills, training in new trades or professions, and development of the systems of vocational guidance and job placement*⁴⁸.”

By official work was meant to be employed for a company or institution with a mandatory mark in the so - called “workbook” in Russian “*trudovaya knijka*”. The pinnacle of following the social ideal of the Soviet work ethic was considered two entries in the workbook: first, about employment after graduation and, the last, about dismissal from it in connection with retirement. It was a belief strongly rooted in the mentality of people in that historical period.

4. Conclusions

Legal rules of different legal orders have a logic only if they are analyzed in the historical, cultural and social context in which they were introduced. In the case of the crime of vagrancy and parasitism provided for in the Criminal Code of the Soviet period, the reason was the ideological principle and, at the same time, the factual reality of a planned economy, without structural unemployment and in which the labour-power was in turn a variable subject to planning according to which every citizen was supposed to find full realization in the work and the state guaranteed full employment. The need to ensure the possibility of working for every Soviet citizen for whom work was understood as a form of collective realization and, at the same time, the excessive rigidity of the interpretation of constitutional norms made these institutions excessively strict.

The anti-parasite law is certainly not an expression of the Latin brocade *nullum crimen, nulla poena sine lege* as it contains precisely such vague and poorly made definitions of

⁴⁸ The Article 40 of the USSR Constitution of 1977.

the different types of offenses such as to introduce into judicial practice the concept of "dangerousness" of certain individuals because what is punished is not a particular crime committed but a lifestyle in a preventive way to avoid dangers in the future.

Nowadays, according to Article 37 of the current Constitution of the Russian Federation and the Labor Code, forced labour in Russia is prohibited. The phrase about guaranteed employment for all citizens, present in Article 40 of the USSR Constitution of 1977, is absent.

The comparative study conducted showed how the various configurations of the binomial citizenship-work is central to the different legal systems and in different historical periods. The ways in which this relationship is regulated differentiate the relationship of the State with the organization of the labor system and welfare policies. These principles find their maximum expression in the norms of Constitutional rank because of the primary importance that the work pours into the organization of a given country. These considerations, as it emerges from the writing, apply both to Western legal systems and to those of socialist derivation.

Another fundamental issue is the relationship between the constitutional level and the legislative and regulatory level, entrusted with the task to apply and implement the Constitution, but sometimes practically hampering the accomplishment of the emancipatory aspirations of the fundamental charter, due to excesses and mistakes of the political officers, or due to changes in the societal relations of production and in the ideology of the ruling elite. This is precisely the case of labour, in Europe, protected, exalted and put in the center of several post-World War II constitutions, willing to mark a turning point also in this regard after the fall of fascisms; but, nowadays, the constitutional emancipatory role of work is openly threatened by legal provisions more and more inspired to the neoliberal market ideology. Contrary to what is solemnly stated in the Declaration of Philadelphia⁴⁹, inspiring the constitutions of the immediately following years, work is, in fact, currently envisaged by many lawmakers as a commodity much more than as a right, recalling the pre-

⁴⁹ Declaration concerning the aims and purposes of the International Labour Organisation, 10 May 1944, art. I.

constitutional legal paradigm⁵⁰. From this arises the legislative tendency of the last years to try to alleviate some of the more tragic and apparent consequences of the work conceived as a dependent variable in the market without questioning the dominant market ideology.

In conclusion, it is undeniable that the presence and the evolution of ideology in the legislation of certain states in particular historical periods has paramount importance and influence also in the legal field and it is clear that any rule, even sanctioned by a written constitution, can be misused, betrayed or, on the contrary, too zealously applied, in all this cases with the risk of serious consequences on people's lives.

⁵⁰ See L. Gallino, *Il lavoro non è una merce. Contro la flessibilità*, 2nd ed., Laterza, ISBN: 978-88-420-8875-2, 2010; see also Z. Bauman, *The individualized society*, Polity, ISBN: 978-0-7456-2506-5, 2001, pp. 17 ff.

LOST IN THE WEB: THE DARK SIDES OF SMART CONTRACTS. EXCEPT THERE IS STILL HOPE

Sara Rigazio*

Abstract

This article addresses the issue related to the potential harms and the abuses arising from the application of the latest and disruptive decentralized ledger technologies (DLTs) to self-executing software, commonly known as smart contracts. To this end, the article identifies and describes the main features of the DLT – namely the blockchain – most frequently underlying smart contracts, showing their innovative yet challenging profiles. As a matter of fact, these same features may lead to mishandlings and distorted uses when applied to smart contracts, as it happened in the case study presented. Notwithstanding these undeniable ‘dark sides’ then, this paper suggests that it is still possible to balance the need for regulation and the development and encouragement of an (informed) implementation of the new information technologies, through a law by design approach.

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Keywords

Blockchain - Smart Contracts - Decentralized Autonomous Organizations (Daos) - Self-Regulation - Law By Design Approach.

1. Introduction

This article addresses the dangers potentially deriving from self-executing processes or code-oriented contracts, widely known as smart contracts, in the contractual relationships. The analysis focuses in particular on the abuses that might occur and that can lead to reach illicit agreements.

The first part of the paper briefly introduces smart contracts highlighting the main features of the technology behind them, namely the blockchain. It focuses on decentralization, immutability and pseudonymity. It is important to note that smart contracts can also exist thanks to the traditional technologies, ie centralized data bases and, therefore, even without a blockchain¹. However, I choose to look at blockchain-based smart contracts because of the recent uprising in the use of this technology in virtually every area and aspect of life, including daily life².

¹ In this regard, see Roberto Pardolesi and Antonio Davola, 'What is wrong in the debate about smart contracts', (2020), 9 (5) *Journal of European Consumer and Market Law* 201, who underline the fact that "the blockchain is not the condition sine qua non for the functioning of smart contracts, but just one of the possible tools for their implementation; if smart contracts are meant to spread in the legal practice, this might as well happen through technologies, other than the blockchain, that will reveal themselves as more suited to adapt to users' needs".

² For an example of a very positive account on blockchain's potential, see Jamie Smith, 'There Is More to Blockchain than Moving Money. It Has the Potential to Transform Our Lives—Here's How', *WORLD ECON. F.* (Nov. 9, 2016), <<https://www.weforum.org/agenda/2016/11/there-is-more-to-blockchain-than-moving-money/>> [https://perma.cc/7GLT-XP3D]. More generally, on the applications of the blockchain technology in the daily life, consider, for example, the agri-food system. See, Gianpiero Ruggero, 'Tracciabilità e blockchain: le sfide nella filiera agroalimentare', (2019) *Agenda digitale EU*, <<https://www.agendadigitale.eu/documenti/tracciabilita-e-blockchain-le-sfide-nella-filiera-agroalimentare/>>. Last accessed on April 2022. Also, one of the latest applications of the blockchain technology is in the art law sector. In this regard, see Martin Zeilinger, 'Digital Art as 'Monetised Graphic': Enforcing Intellectual Property

The second part of the paper shows how blockchain-based smart contracts can result in twisted applications and could be executed for illegitimate purposes³. In this regard, I will analyze the case of the U.S. digital platform *TheDAO*, where leaks of confidential information and theft of cryptographic keys occurred.

The topic of smart contracts recalls the debate on the relationship between law and technology, certainly not new to the scholars and extremely complex. While a study on such an issue is definitely beyond the scope of this analysis, this paper shows how smart contracts, despite their ‘dark sides’, can still contribute in a positive way to this debate thanks to their intrinsic (positive) potentials and a law by design approach by the interpreters.

2. The Blockchain revolution

Over the past two decades, computers and digital platforms have risen to such level of prominence in several different industries that devices have been able to perform automatically countless tasks. In the very recent years, some advanced and innovative information technologies have had such a fast and disruptive impact over business, social interactions and, of course, contractual relationships, to the point of getting rid of (almost) any human interventions.

Among these technologies, the ones characterized by a decentralized structure have gained a lot of attention: first by the programmers, then by the users and, finally, by the legal experts. They are called ‘distributed ledger technologies (DLTs)’ and blockchain is one of them.

DLTs are different from the traditional technologies (the centralized databases): they are indeed completely decentralized, meaning that there is no need for intermediaries

on the Blockchain’, (2018) 31 *Philos. Technol.*, 15-41. Last accessed on March 2022. R. Maffei, “Blockchain: Xe Invisible Technology That’s Changing the World”, *PC Magazine* 2017. Available at: <https://www.pcmag.com/article/351486/blockchain-the-invisible-technology-thats-changing-the-wor>

³ Ex multis, Ari Juels, Ahmed Kosba, Elaine Shi, ‘The Ring of Gyges: Investigating the Future of Criminal Smart Contracts’, (2016), *Proceedings of the 2016 ACM SIGSAC Conference on Computer and Communication Security*, NY 283.

because the users (called ‘nodes’) themselves participate to the update and the maintenance of the network through a specific algorithm called ‘consensus protocol’⁴.

Therefore, the autonomy of the single node, in terms of the transactions to be carried out, represents the core idea at the basis of these networks as opposed to what happens in the traditional ones, where only the administrator of the system is in charge of the decisions to be made and the users can either accept those decisions or exit the system.

To make this concept clearer we refer to the famous large Internet companies or cloud computing operators (called gate keepers for their dominant position in the digital market) such as Amazon, Microsoft or Google that are in charge of all the data. Blockchains dramatically change this dynamic offering the management of these data to new single operators, not dependent on centralized control.

It is a different hierarchical structure that relies on shared databases operating globally and borderless. Because of this decentralized structure, anyone with an Internet connection can retrieve information stored on a blockchain, by downloading the available opensource software⁵.

Being intrinsically transnational implies the critical potential to support global disintermediated services and to facilitate the parties to engage with one another in an easier way than usual for a series of different reasons. To get an idea of the potential vastity of online services available it is just sufficient to look at what happened with Bitcoin from its launch in late 2008.

⁴ See, Christian Cachin and Marco Vukolic, ‘Blockchain Consensus Protocols in the Wild’, (2017), <<https://arxiv.org/abs/1707.01873>>, Cornell University, who specify that “A blockchain is a distributed ledger for recording transactions, maintained by many nodes without central authority through a distributed cryptographic protocol. All nodes validate the information to be appended to the blockchain, and a consensus protocol ensures that the nodes agree on a unique order in which entries are appended” accessed March 2022. See, also, Andrea D’Anna, ‘La formazione del consenso nella blockchain in assenza di autorità centralizzate, il problema dei generali bizantini e prospettive future’, (2018), CyberLaws <<https://www.cyberlaws.it/2020/formazione-consenso-blockchain-prospettive-future/>> accessed February 2022.

⁵ Arvind Narayan and others, *Bitcoin and Cryptocurrency Technologies: A Comprehensive Introduction*, Princeton University Press 2016.

One thing to remember is that the more ‘engagements’ by the nodes the blockchain gains, the more complex it becomes in terms of managing the protocol. This has of course consequences for leaving the system exposed to security flaws.

Another characteristic that makes the blockchain so unique is its immutability. Once the information has been recorded to a block, it becomes very hard to change the record or to delete it. It would be indeed very expensive to convince the other nodes to implement a change to the protocol and it would be a difficult and time-consuming process. Moreover, it is the technical design of the blockchain that favors the status quo, making the networks very resistant to changes. In any case, if the majority of the nodes does not agree on a change, the blockchain remains the same.

The tamper-resistant nature of the data stored on the blockchain combines with the transparency of the overall system. In this case it is a slightly different concept of transparency than the one commonly known because the information maybe in fact encrypted⁶. However, the information about the sequence of the transactions and the accounts that are engaging in those transactions are available for anyone using the chain. In other words, there are different degrees of transparency depending on the domain of application: there are blockchains where data are publicly shared, such as in the case of Bitcoin (called permissionless) and blockchains where transactions data remain confidential and, as mentioned above, the information is encrypted (called permissioned)⁷.

The blockchain system helps to create trust in the network because the parties can review (without changing of course) the blockchain and verify that the transaction has

⁶ The issue of transparency in blockchain systems has been investigated at many levels. An interesting article published in February 2020 on Forbes concluded that the blockchain technology could represent the solution for corporates and companies in the USA: indeed, the article argues that through this system complete transparency is granted at reasonable costs. In addition, the ‘good practice of transparency’ is encouraged and it becomes of benefit for the whole market. The actual system prescribed by the US federal rules, instead, is not only prohibitively expensive, but achieves the exact opposite of the intended effect. Companies, as a matter of fact, try in every way possible to avoid the prescribed procedure and do not comply with the obligation of transparency with obvious negative consequences on the market. See <<https://www.forbes.com/sites/forbestechcouncil/2020/02/14/how-the-transparency-of-blockchain-drives-value/?sh=d0ab19431a6d>>.

⁷ See, Giusella Finocchiaro and Chantal Bompreszi, ‘A legal Analysis of the use of blockchain technology for the formation of smart legal contract’, (2020), MediaLaws <https://www.medialaws.eu/wp-content/uploads/2020/07/RDM_2_2020-Finocchiaro.pdf>.

indeed occurred or that the information is authentic in relation to its source (without necessarily trust each other). This represents a useful tool also for governmental authorities in the organization of their records, making data paperless and available worldwide to anyone who is connected to the Internet⁸.

Another element that makes blockchains so unique is the pseudonymity. Generally speaking, pseudonymity represents a weaker form than anonymity since the user appears with a different identity than the real one, but at the same time he can be still identifiable⁹.

As already mentioned, in the case of the blockchain, the system allows the nodes to store information or to engage in transactions: all these actions can be assessed by relying on digital signatures or public-private keys without revealing the true identity of the user. As a matter of fact, pseudonymity makes it possible to assign the transactions to the same user and, therefore, to identify the users behind. Needless to say, at the same time this system may facilitate parties to engage in suspicious activities¹⁰.

⁸ An example of the use of the blockchain technology can be found in some States of the US. In Georgia, Vermont and Wyoming, for example, the local government has employed this technology to speed up and to manage the land registry. See, <https://www.ncsl.org/research/financial-services-and-commerce/the-fundamentals-of-risk-management-and-insurance-viewed-through-the-lens-of-emerging-technology-webinar.aspx>. See, also, Pierluigi Matera who analyses the evolution of the use of the blockchain technology in relation to the specific sector of corporate law, 'Delaware's Dominance, Wyoming's Dare. New Challenges, Same Outcome?', (2021), 1 *Cersig Research Paper* <<https://ssrn.com/abstract=3763106>>.

⁹ Alex Biryukov and Sergei Tikhomirov, 'Deanonymization and linkability of cryptocurrency transactions based on network analysis' (2019) *European Symposium on Security and Privacy* <<https://doi.org/10.1109/eurosp.2019.00022>>. Francesco Rampone, 'I dati personali in ambiente blockchain tra anonimato e pseudonimato', (2018), 19 *Cyberspazio e Diritto* 457.

¹⁰ Omri Marian, 'Are Cryptocurrencies *Super Tax Heavens*?', 112 (2013), *Michigan Law Review* (First Impressions) 38.

3. Smart contracts: a fancy name for a complex issue structural remarks

As briefly mentioned above, one of the most frequent applications arising from the use of technologies based on distributed ledgers, and in particular those of blockchain type, is represented by smart contracts.

As a matter of fact, the story of digital contracts dates back to 1948, when in response to the Soviet Union block of the western Germany, the USA and its allies developed a ‘manifest system that could be transmitted by telex, radio-teletype or telephone’ to organize the cargos sent to West Berlin¹¹. Later on, in 1965, also the private sector benefited from the Berlin system and developed a new method of electronic messages (called EDI- electronic data interchange).

The EDI system continued to be used in the decades that followed mainly for transforming paper agreements and orders into digital representations. Nonetheless, EDI came with some limits, namely the fact that it restated only what was already established on the paper.

In the late 90s a computer scientist, Nick Szabo, seeing those limits, conceived a new system of executing electronic contracts. In his famous paper “Formalizing and Securing Relationships on Public Networks” he described how it would have been possible to have new computer software that resemble ‘contractual clauses’, and in so doing, to bound the parties ‘in a way that would narrow opportunities for either party to terminate its performance obligations’. His idea started from the simple functioning of a vending machine, that he takes as a model for a ‘contract with bearer’ and that ‘minimizes the need for trusted intermediaries’¹².

The following years other scientists developed computer-based contractual languages: it happened, for example, when Microsoft teamed up with the researchers of the University of Glasgow to study the case of computerized financial contracts, or when

¹¹ Frank Hayes, ‘The Story so Far’ (2002) <<https://www.computerworld.com/article/2588199/the-story-so-far.html>> cited also by Primavera De Filippi and Aaron Wright, *Blockchain and the Law* (Harvard University Press 2018), 73.

¹² Nick Szabo, ‘Formalizing and Securing Relationships on Public Networks’, (1997) <<http://ojphi.org/ojs/index.php/fm/article/view/548/469>>.

a contract readable by both machines and humans was developed in 2004 at the University of Colorado¹³.

With the rise of bitcoins and the consequent growing interest in the blockchain technology, the idea described by Szabo started to become concrete. Blockchain based protocols could provide the adequate technical structure to enter into automated commercial-binding relationships, ie smart contracts.

One of the main differences with traditional legal agreements is that in the case of smart contracts the promises are memorialized in a code (not in the natural language, ie legal prose) and once started, the terms will be executed and cannot be stopped unless there is a specific program that provides for this option. This implies a great effort both by the parties and by the programmers: in some cases, third-party sources, commonly referred to as *oracles*, can be employed to adjust performance obligations during the term of an agreement. Oracles can be real persons or programs and their principal function is to respond almost in real time to the changing conditions and necessities of the parties¹⁴. Moreover, oracles can also be seen as an opportunity for the automatic system to communicate with the real world¹⁵.

Since the launch of Ethereum, the first and most famous platform for running smart contracts, we have witnessed the rise of a series of different types of such agreements regarding commercial arrangements, from the transfer of digital money to the exchange of fungible or non-fungible assets in several different industries.

Upon the enthusiasm smart contracts spawned in the international arena, they raised some concerns as well¹⁶.

¹³ Primavera De Filippi and Aaron Wright, 74. Harry Surden, 'Computable Contracts', 46 (2012) *University of California -Davis Law Review* 629.

¹⁴ M. T. Giordano, (2019) 'Il problema degli oracoli,' in Raffaele Battaglini, Marco Tullio Giordano (ed.), *Blockchain e Smart Contract* (Giuffrè, 2019).

¹⁵ M. Ethan Katsh, *Law in a Digital World* (Oxford University Press, 1995); Primavera de Filippi and Aaron Wright, *Blockchain and the Law*, 71.

¹⁶ For example, George Smart, 'Smart Contracts: Tools for Transactional Lawyers', (2018) 81 *Texas B. J.* 403, affirms that "There is [...] no agreed upon definition for smart contract, this creates the greatest confusion and an incomparable level of disagreement for regulators". See, also, M. Dell'Erba, (2018) 'Do Smart Contracts require a new legal framework?Regulatory fragmentation, self-regulation, public regulation', *University of Pennsylvania Journal of Law & Public Affairs* 3. For a general overview, Larry A. Di Matteo, Michael Cannarsa and

In particular, part of the existing literature has focused the attention on the basic question about their nature: can smart contracts be really considered a contract according to the legal definition commonly accepted in the legal systems? While the compatibility with the traditional categories belonging to contract law is not the specific subject of analysis in this paper, it is worth to be noted that, in general, scholars are divided between those who do not recognize any legal nature to smart contracts; those who, instead, consider them simply the digital transposition of traditional contracts, and those, finally, who prefer to focus on the concrete applications of such agreements suggesting, therefore, a functionalist approach¹⁷.

It is not certainly the first time that contract law and technology meet¹⁸. This has indeed already happened with the case of telematic contracts where electronic means were used to put distant parties in contact. At that time, scholars have tried to reconcile, with different solutions, the categories traditionally belonging to contract law to the new technological instruments. In that context, notwithstanding the different levels of automation involved in the different types of contracts, the ‘human factor’, tough reduced, was still an essential part of the main phases of the contract.

Cristina Poncibò, *The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms* (Cambridge University Press 2019); Andrea Stazi, *Automazione contrattuale e contratti intelligenti. Gli smart contracts nel diritto comparato* (Giappichelli, 2019).

¹⁷ Among the many contributions, see Riccardo De Caria, ‘The Legal meaning of smart contracts’, (2019) 6 *European Review of Private Law* 731; Gideon Greenspan, ‘Beware of the Impossible Smart Contract’, (2016) *Multichain* <<https://www.multichain.com/blog/2016/04/beware-impossible-smart-contract/>>, accessed April 2022; S.D. Levi and A.B. Lipton, ‘Smart Contracts and Their Potential and Inherent Limitations’, (2018) <<https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitation/>>, accessed April 2022, where the authors define the transactions executed by smart contracts “fairly rudimentary”, so that they are considered “ancillary smart contracts”. According to the authors, “we are many years away from code being able to determine more subjective legal criteria”. Also, see Francesco Di Ciommo, ‘Smart contracts and (Non) Law. The case of the Financial Markets’, 7 (2018) II, *Law and Economics Yearly Review* 291, who believe that “smart contracts are not contracts”, e “any attempt made by jurists to understand and regulate the phenomenon risks becoming obsolete at the very moment is carried out”. Among the authors who suggest a functionalist approach, see Roberto Pardolesi and Antonio Davola, 10, who believe that “Considering these (still unsolved) issues, a viable solution for legal scholars could be “giving up” on qualifying smart contracts as a general topic”. For a general analysis, see Marisaria Maugeri, *Smart contracts e disciplina dei contratti*, (Il Mulino, 2021).

¹⁸ In this regard, see the extremely interesting doctrinal debate between N. Irti and E. Severino, ‘Le domande del giurista e le risposte del filosofo (un dialogo su diritto e tecnica)’, (2006) *Contratto e impresa* 665 and ‘La Filosofia di una generazione’, (2011) *Contratto e impresa* 1309; L. Mengoni, ‘Diritto e tecnica’, (2001) 1 in *Riv. trim. dir. e proc. civ.* See, also, in general on this issue, Giovanni Perlingeri, ‘Le nuove tecnologie e il contratto’, (2004), *Manuale di diritto dell’informatica* 17.

In the case of smart contracts, instead, the specific structure and functioning are designed to *avoid* the human action (as much as possible), as the definition given by their creator recalls. This leads to a condition of extreme uncertainty - due to the novelty and to the unfamiliarity with this new dimension - that necessarily requires a completely different approach by the scholars¹⁹.

The main doubts regard: the area of privacy, the difficulty of adapting some particular types of agreements to the code and the potential use of smart contracts also for illegitimate purposes. While both privacy issues (in terms of the necessary protections about sensitive data disclosed on the blockchain) and the formalization of legal obligations (in terms of reconciling these new realities to the traditional legal categories known and applied) have been widely investigated, the aspect connected to the potential use of smart contracts for illegitimate goals has not received the same attention so far²⁰. It is true that these aspects are strictly connected, but at the same time, as we will see, the use case involving this specific trait casts a new light on the overall picture.

In 2015 a provocative paper titled “The Ring of Gyges: using smart contracts for crime” was published by a team of researchers from Cornell University and the University of Maryland²¹. Taking the example of the mythical magical artifact described by Plato, which granted the owner the power of becoming invisible at will, the authors show how smart contracts might become the source of illicit activities taking advantage of the pseudonymity and the decentralized structure of the

¹⁹ Francesco Di Ciommo, ‘Gli Smart Contract e lo smarrimento del giurista nel mondo che cambia. Il caso dell’High Frequency Trading (HFT) finanziario’, (2019), *Fintech*, by F. Fimman- G. Falcone, Napoli, 157.

²⁰ The main area of interest in the literature has been about the compatibility of smart contracts and the blockchain technology and, for example, with the European regulation, the GDPR. See, Francesco Rampone, ‘I dati personali in ambiente blockchain tra anonimato e pseudonimato’, 61 (2018), 19 *Cyberspazio e diritto*, 457; Ramya Ratham Kumar, ‘Impact of Blockchain Technology on Data Protection and Privacy’ 2017, available at SSRN <<https://ssrn.com/abstract=3040969>> accessed April 2022; M. F:#\$K, “Blockchain and Data Protection in European Union”, Max Planck Institute for Innovation & Competition Research Paper No. 18-01, feb. 2018.

Available at SSRN: <https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=3080322>; S. Ramsay, ‘The General Data Protection Regulation vs. the Blockchain – A legal study on the compatibility between blockchain technology and the GDPR’, (2016), <http://www.diva-portal.se/smash/get/diva2:1221579/FULLTEXT01.pdf> (last accessed April 2022).

²¹ See, Jules et al., ‘The Ring of Gyges: using smart contracts for crime’, (2015) <

blockchain technology behind. Specifically, they refer to these activities as to ‘criminal smart contracts (CSCs)’ and divide them in three different categories: leakage/sale of secret documents, theft of private keys and a very broad class of physical-world crimes (murders, terrorism acts) that are referred to as ‘calling-card’ crimes. To get a concrete idea we can think of someone who has access to confidential information and, behind payment, will reveal the information. The smart contract expresses precisely this situation through the well-known structure ‘if-then’ and works automatically (meaning it delivers the payment) once the condition is met (meaning the final goal of obtaining the confidential information).

The same mechanism works also for crimes in the real physical world. For example, the assassination of a person could be arranged through a smart contract: subject A posts a contract for the murder and establishes a reward for the commission of the crime to a potential perpetrator P. Receiving an input from any P, the contract establishes in advance all the necessary details for the murder (date, time, place). Before P can claim his reward, the contract itself looks for authenticated data feed or news confirming the murder and, if verified, P can get the money. The example also shows how difficult it would be for the law enforcement to trace the perpetrators, due to the fact that the contract can easily provide for no further contact between the parties other than the initial input by P²².

What it is extremely interesting and critical in the analysis presented is that the nodes simply take advantage of the architecture of the program (specifically the immutability of the blockchain and its pseudonymity) to support the exchange between them about the crime to be committed, and the consequent commensurate payment for the perpetrator. In other words, they simply use the ‘if-then’ clause and build their promises.

A few years later, Kevin Werbach, a professor of law from the University of Pennsylvania, published a book titled “After the Digital Tornado: Networks, Algorithms, Humanity” where he supports and explains the idea that blockchain

²² Ibid., assassination CSC.

technology could wreak unintentional havoc if its characteristics are not understood fully and completely²³.

According to Werbach, smart contracts have an implicit dark side due to the immutability of the blockchain, which he considers the real weakness of these instruments. To overcome or, at least, to contain this weakness he suggests an external intervention, for example by the institutions. As a matter of fact, in his opinion, the blockchain technology should be considered, nonetheless, a governance technology: therefore, torn between the desire to guarantee freedom to its nodes, and the necessity of imposing some constraints, to maintain the system working²⁴.

3.1 TheDAO case: what could go wrong, (almost) went wrong

A concrete example of smart contracts used for illicit purposes is given by *TheDAO* case, a decentralized autonomous organization (DAO) created in 2016 by a team behind a German company, Slock.it.

Decentralized autonomous organizations (DAOs) consist of a set of smart contracts that do not have any owner²⁵. Essentially, these organizations act on the basis of a code deployed on a blockchain and sustain themselves relying on digital currency accounts to fund their operations²⁶. In general, a DAO works as follows: the programmers write the smart contracts that will run the DAO; a funding window is open and this means that during this period people add funds to the DAO buying the

²³ Kevin Werbach, *After the Digital Tornado: Networks, Algorithms, Humanity* (Cambridge University Press, 2020).

²⁴ *Ibid.*, 239.

²⁵ See, Vitalik Buterin, 'DAOs, DACs, DAs and More: An Incomplete Terminology Guide', Ethereum Blog, 6 May 2014, <https://blog.ethereum.org/2014/05/06/daos-dacs-das-and-more-an-incomplete-terminology-guide/>, accessed April 2022.

²⁶ See, for example, the document issued by the US Securities and Exchange Commission (SEC), in 2017, that defines decentralized autonomous organizations as "virtual organizations embodied in computer code and executed on a distributed ledger technology or blockchain", Release No. 81207 / July 25, 2017.

tokens²⁷ (digital assets that represent the organization) related to the DAO itself; finally, at the closure of the window, the DAO starts to work. At this point people participate to managing the DAO making proposals and voting to eventually approve them. People who bought in, have the right to vote.

There are different types of DAOs depending on their level of automation: it could be a simple lottery or a more sophisticated system that requires layers of smart contracts.

Usually, the protocol of the blockchain determines the overall organization of the DAO (how to distribute rewards for example) without any third-party involved. This organization is then: self-sufficient, borderless and open to any user who wants to join.

Even though the simple idea of algorithm systems governing an organization seems closer to science fiction than to reality, it is worth to remember that in 2014 a company based in Hong Kong employed an algorithm to the board of directors to help the firm with the investments²⁸. Other famous CEOs, as Jack Ma, the founder of the giant Alibaba, believe that such experiment will gain much more attention in the next future²⁹.

Among the benefits related to DAOs we find: more certainty for the overall organization than the traditional models due to the immutability of the blockchain; more efficiency in the decision-making process in terms of speed, and also more alignment with the shareholders' interests, considering that the smart contracts would

²⁷ In this regard, see the definition by Riccardo De Caria who defines the process of tokenization as “un processo, collegato ma diverso, di conversione della ricchezza in *token* digitali che vengono poi emessi su piattaforme basate su una *blockchain* tramite *smart contracts*”, (2020) 1 Il Diritto dell'economia 855.

²⁸ Primavera De Filippi and Aaron Wright, *Blockchain and the Law*, 151, note 19. See, also, Simon Sharwood, 'Software appointed to board of venture capital firm', 2014, The Register, https://www.theregister.com/2014/05/18/software_appointed_to_board_of_venture_capital_firm/, accessed April 2022.

²⁹ See, Sherrisse Pham, 'Jack Ma: in 30 years, the best CEO could be a robot', Technology, CNN, 2017, <<https://money.cnn.com/2017/04/24/technology/alibaba-jack-ma-30-years-pain-robot-ceo/index.html>>. Accessed April 2022. Also, Primavera De Filippi and Aaron Wright, 146.

be designed to serve exclusively the latter, without being at the mercy of the CEOs' will³⁰.

Among the side-effects we certainly find the jurisdictional issue: since the DAOs are maintained by a series of nodes located around the world, it would be indeed very hard to identify the applicable law. And even assuming some kind of legal liability, some questions arise on which law has to be applied, for example, to seize the DAO's assets, considering their digital nature³¹.

Perhaps the most critical concern regards the autonomy of the DAO in terms of the execution of the code: as long as it collects funds to operate on the blockchain, the organization will keep running without paying attention if the program has negative consequences or runs illicit activities. Moreover, being the code automatically enforced by the blockchain, it would be very hard to force an intervention such as, for example, an amendment.

TheDAO affair is a perfect example of what we have just described. This particular DAO was deployed on the Ethereum blockchain and launched on April 2016. For reasons that are not clear, it became very popular and raised a lot of money (ether coins), more than expected, by the end of the funding period. Even though soon after the funding window was closed some concerns arose on potential bugs, the organization kept running. Voters (token holders) were then waiting to express their vote on the proposals. While the programmers were still working to fix the initial problems, an attack started to drain funds from the organization and transfer them in a different DAO, called by the experts, 'a child DAO'. It is estimated that the attack led to a loss of over \$50 million worth of ether just in a few hours. Since no one was

³⁰ See, Anthony J. Bellia, 'Contracting with Electronic Agents', 50 (2001), *Emory Law Journal* 1047; Norman H. Nie and Lutz Erbring, 'Internet and Society', 3 (2000) *Stanford Institute for the Quantitative Study of Society* 14.

³¹ According to Aaron Wright, the co-author of *Blockchain and the law* with Primavera De Filippi, there could be a possibility that DAOs could 'go to court': the *conditio sine qua non*, tough, would be first to establish the jurisdiction and secondly, in case of a US one, to have a cause of action to bring it to court. In this case, DAOs could be indeed considered some sort of implied partnerships. Nevertheless, Wright thinks that it would be less likely to see any case in front of a judge, at least not in the next future. See his interview available at <https://unchainedpodcast.com/can-a-dao-go-to-court-according-to-two-dao-legal-experts-probably/>. Last accessed on April 2022.

in control, there was not any possibility to fix the code and, therefore, the smart contract (even defective) still continue to run.

After a complicated deliberation by the majority of the nodes, the organization eventually agreed on intervening directly on the blockchain (through what is called the practice of forking)³². This is an extreme solution since it implies, basically, to ‘rewrite’ the history of the transactions (forcing the immutability) to change the protocol and retrieve the funds. In this way, there was a ‘new’ version of the blockchain where the hack has never occurred³³. Moreover, this intervention allowed to ‘freeze’ the assets, so that the attacker could not physically withdraw any ether from the funds.

Needless to say, the decision ‘to fork’ has raised more than one concern among the users. Some believed this action was completely contrary to the founding principles of the blockchain; others, instead, fully agreed with this decision considering it still an expression of the will of the nodes³⁴. Also, it should be noted that some nodes simply pointed out that the alleged ‘hacker’ could not in fact be considered as such. As a matter of fact, as mentioned earlier, this person just took advantage of some bugs in the system for his own interests but did not commit any prohibited action according to the code³⁵. Given the fact that this case has never been brought to court, it is extremely complicated to predict how a judge would have decided it.

³² See, Cristina Poncibò, *Il diritto comparato e la blockchain* (Edizioni Scientifiche Italiane, 2020), 62.

³³ See, Quinn DuPoint, *Bitcoin and Beyond Cryptocurrencies, Blockchains, and Global Governance* (Routledge, 2017).

³⁴ See, Robbie Morrison, Natasha C. H. L. Mazey and Stephen C. Wingreen, “The DAO Controversy: The Case for a New Species of Corporate Governance?”, 3 (2020) *Frontiers in blockchain* 1. Regarding the different positions of the nodes concerning the decision ‘to fork’, see Mehar, M. I., Shier, C. L., Giambattista, A., Gong, E., Fletcher, G., Sanayhie, R., ... & Laskowski, M., ‘Understanding a revolutionary and flawed grand experiment in blockchain: the DAO attack’ (2019) 21 *Journal of Cases on Information Technology* (JCIT) 1 19.

³⁵ On this consideration, see *Ibid.*, 7, where the authors report that “At worst, the hack was a perfectly valid but unethical maneuver, at best it was not even unethical. Many would still argue that The DAO’s solution to the problem was the only unethical behavior in evidence”.

4. Is there still hope? The 'law by design' approach. Conclusive remarks.

This overview showed that it is credible that smart contracts might be deployed for running illicit agreements as well as that their applications could lead to distorted consequences. In this respect, we can certainly affirm that these are aspects that fall within the 'dark sides' or, at least, the 'grey area'. Against this background, tough, it is the system itself that suggests that a solution is possible³⁶. Primarily, it should be noted that any thoughts on the matter is strictly connected to the technology smart contracts are most likely to run on, that is the blockchain.

As we have described above, this particular type of distributed ledger technology is characterized by distinctive yet challenging features that can be reasonably defined disruptive. Not only do they differ radically from the traditional known data systems regarding the technical aspects of the code-execution (decentralization, immutability, pseudonymity) but, more generally, they are designed to avoid any kind of human intervention such as in the specific case of the smart contracts. "Code is law" would seem to be indeed the perfect motto³⁷.

TheDAO affair has proven, however, that this is not always exactly the case: in the face of an event, even if exceptional, in fact, the system has been stopped, forced and modified and, more important, 'human' actors were the ones who decided to intervene. This happened and allegedly could happen again since, as it has been noted, "no blockchain is an island" and many factors contribute to this ecosystem³⁸. Among

³⁶ In this respect, see the definition of DLT by Primavera De Filippi, who compares DLTs to plantoids, artificial protolife forms conceived and realized for the first time by a research team at IIT (a lab based in Italy, Ponettedera). See, LiftLab, Geneva, 11 February 2016.

³⁷ Lawrence Lessig, *Code and other laws of cyberspace* (New York, 1999). The work is considered a sort of 'manifesto' on the role of information technology in society and on the complex relationship between law and technology. See, also, Samer Hassan and Primavera De Filippi, 'The Expansion of Algorithmic Governance: From Code is Law to Law is Code', (2017) 17 *Field Actions Science Reports* 88.

³⁸ See Primavera De Filippi, <https://www.coindesk.com/markets/2018/02/28/no-blockchain-is-an-island/>, (2018), last accessed on April 2022.

them, we find law, social norms, market, as well as the technical infrastructure, that is the code³⁹.

Under this perspective, then, any attempt aimed at removing or, worse, denying these ‘dark sides’ would seem pointless, mostly given the widespread use of smart contracts, as mentioned at the beginning, in many areas of interest.

A more adequate approach, then, seems the one which acknowledges the possibility of these drawbacks as part of the structure of the technology and, at the same time, tries to limit and model this structure towards a more sustainable architecture. In so doing, the outcome (that is the direct application of the technology, ie the smart contract) should not be a CSC or, worse, a ‘calling card’ crime anymore. A valid help in this direction comes, therefore, from an innovative and quite recent approach that has received some attention in the literature in the very last years: the legal design.

This new way of approaching the legal issues is based on the idea that through a human-centered vision to the challenges of the legal system, the latter can be improved.

As a matter of fact, as declared in the manifesto published by the Legal Design Alliance in 2018, legal design is a growing movement to make the legal system work better for people⁴⁰. Moreover, according to Margaret Hagan, the pioneer of the legal design and actual director of the Stanford legal design lab, a design-driven approach is what is needed to face legal innovation in a sustainable way. In other words, a way to bring together the world of law and the world of innovation (especially technological innovation) and prevent them from remaining two separate and conflicting fields⁴¹. Critical for succeeding is the interdisciplinarity intersection among the designers (lawyers, computer scientists, engineers, designers ...).

In practice, the legal design approach works as a process: it identifies the challenge area and the status quo through an ‘on-site’ action, moves through synthesizing a

³⁹ Lawrence Lessig, *Code and other laws of cyberspace*. See, also, Cristina Poncibò, *Il diritto comparato e la blockchain*, 37, who recalls Lessig’s theory and talks about ‘formanti della blockchain’ referring specifically to law, social norms, market and architecture.

⁴⁰ See, Legal Design Alliance, ‘The Legal Design Manifesto’ (2018), <[https:// www.legaldesignalliance.org/](https://www.legaldesignalliance.org/)> .

⁴¹ See, Margaret Hagan, Law by design < <https://lawbydesign.co>>, accessed April 2022.

specific user or group of users, ends up with prototypes which consist of pilots and scaled implementations. In this respect, for example, the Stanford design lab teamed up for a project work aimed at building new tools to help foreign students navigating the U.S. legal system⁴²: first they studied the state of the art, and this activity implied knowing all the issues that these students were facing. They did that through interviews and data collection. Then, through multidisciplinary groups, they reunited their ideas and drafted a series of projects, and finally presented them through the testing phase to the final users, who gave them constant feedbacks. The successful projects were ultimately implemented and coded for use by the computer scientists (through prototypes).

The Stanford lab works in many other projects such as, for example, LIST (Legal Issues Taxonomy) which is a user-centered system on the legal problems that people might have in the U.S., or the eviction legal help platform, that covers renters' rights and protections during the Covid 19 pandemic, as well as many others⁴³. These examples are valuable since they show how the legal-design approach is indeed a use-case based approach aimed at giving practical solutions, not limited to abstract speculation.

The key words related to this approach are indeed: process - that recalls a dynamic conception of law as an experience - interdisciplinary perspective and a user-centered perspective - that refer respectively to the necessity of receiving inputs from other areas of expertise, especially in this new digital reality, and the importance of focusing on the user's needs and not on the developer's ones.

Interestingly, if we look closely, these are key concepts that can also be referred to the context we have presented and analyzed above. New technologies, such as the blockchain, indeed relate to a natural dynamic, although complex, legal framework

⁴² This was the Immigration workshop projects, ran by Margaret Hagan. She illustrated this project in 2014 in New York, during the conference 'Reinventing law'.

⁴³ See, <https://www.legaltechdesign.com/our-projects/>. The *eviction legal help* project consists of a national network of housing law experts to be able to present, in plain language, if renters could be evicted, how much time they had to pay rent, and what new protections they might have in court. It also has a national database of local legal aid groups, court self-help sites, emergency rental programs, and other services that we could connect renters to in each state. In particular, technological innovations are investigated and used to build new regulations and models to be used in the future. *Learned Hands* is another design project, a machine learning project to use interactive games to build tools that can automatically spot people's legal issues.

(specifically in terms of compatibility with the traditional categories and in terms of facing completely new issues). Similarly, the character of interdisciplinary distinguishes this particular technology where it requires an evident synergy at least between the legal expert on the one hand, and the computer scientist on the other. Finally, and this is the challenging profile, as *TheDAO* affair has widely shown, the 'human' intervention, within the meaning of the user's will, is fundamental even in a technology that is the means of subsequent self-executions, as in the case of smart contracts.

In this respect, it is worth pointing out that technology can very well be built and designed to respond adequately and efficiently to the needs of those who use it.

This means, therefore, that in the specific case of the blockchain, and consequently the deployment of smart contracts, the architecture (that is the code) should be written so to avoid illicit 'if-then' structures or questionable operations on the chain. It may be argued that this is only a matter for computer technicians', i.e. those who "write" the code. While the material act of writing the code certainly pertains to the competent professionals, it is worth to remember that the blockchain technology is the object of attention nowadays by the entire international community.

Not only, in fact, the individual states have moved towards regulating, at different levels, blockchain and DLTs in general, but the European Union, as well as some of the most important international actors, such as UNICEF, have embraced and implemented the idea of a blockchain *designed* to respond to specific purposes⁴⁴.

Among the benefits of adopting such an approach, there is also the fact that it would put the users in a more conscious role, than just simple passive consumers of

⁴⁴ The European Union has been particularly active concerning the study and the measures to support the investigations around the blockchain technology. See the initiatives promoted by the Commission in order to better understand this new phenomenon. See, <https://www.eublockchainforum.eu>. More generally, the E.U. has been active regarding the study of cryptocurrency as well as the digital market with the recent proposed directive on the matter (Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive", (EU) 2019/1937, COM/2020/593 final (<https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52020PC0593&from=EN>). See the projects run by UNICEF about a conscious use of the blockchain technology and its applications (smart contracts). Some of them: the Digicus project, where UNICEF is studying how the blockchain can be used to increase efficiency and transparency in the payments between the agency and its partners (<https://www.unicef.org/innovation/blockchain/digicus>); Project Connect that aims at providing real-time data assessing the quality of each school's internet connectivity (<https://projectconnect.unicef.org/map>).

technology, since they could participate actively to the testing and prototype phase⁴⁵. This would also not betray the idea at the basis of the blockchain technology itself, which is to be a disintermediated and not centralized one, with no intermediaries and able to build direct relationships among the participants.

A final observation should be made regarding the area of application of the legal design. It could be argued, in fact, that this is an approach exclusively aimed at the regulatory process and, therefore, reserved for policy issues. Although it is undeniable that this approach involves the choices made by the legislators in terms of policies, it should be emphasized that the field of private relationships also represents – specifically in the field of contract law - a suitable framework for the application of the legal design approach. The intrinsic flexibility of this approach proves to be particularly adequate to enhance the autonomy of the parties⁴⁶.

While the law by design approach may not be the *panacea* for solving the undoubtful issues related to smart contracts, its focus on the interaction between the law and the users' actual needs can help to facilitate the process of bringing technological innovation and law closer, in a more conscious and legitimate way.

⁴⁵ See, Matthew J. Koehler and Punya Mishra, *Teachers Learning Technology by Design*, (2005) https://www.researchgate.net/publication/240273300_Teachers_Learning_Technology_by_Design/link/00b4953038a5a3b2ef000000/download. Margaret Hagan 2016. 'The User Experience of the Internet as a Legal Help Service : Defining Standards for the next Generation of User-Friendly Online Legal Services' 20 *Va. JL e Tech.* (2)395.

⁴⁶ In this regard, see the project run by Margaret Hagan, still on going, that studies how to improve people's health insurance contracts through the legal design approach and the use of computable contracts. See, <https://medium.com/legal-design-and-innovation/there-has-to-be-a-better-way-than-this-ee2ab7df80b8>.

