THE ITALIAN JOURNAL OF PUBLIC LAW

Vol. 17 Issue 1/2025

ISSN 2239-8279

BOARD OF EDITORS

ITALIAN JOURNAL OF PUBLIC LAW, VOL. 17 ISSUE 1/2025
TABLE OF CONTENTS

EDITORIAL

ARTICLES

NOTES

JOURNALS REVIEW

EDITORIAL

LEAVING *CHEVRON* BEHIND?

*Giacinto della Cananea**

1. Judicial preconceptions of discretion

In every legal system – at least in democracies and other well-ordered polities – there are issues concerning how judicial review applies in relation to fact, law, and discretion. The demarcation between law, fact, and discretion may however be problematic, as every public lawyer may observe. In different legal systems, there can be diversity of opinion as to where the distinction between law and fact should be drawn. The intensity of judicial review, too, can, and often does, differ. While recognizing all this, and giving due weight to the choices made by both constitutions and statutes, it is nonetheless necessary to be mindful of the key role that is played by background theories about public law, as well as by changing doctrines concerning whether and how far the courts should review the exercises of discretion by administrative authorities. The recent ruling of the US Supreme Court in *Loper* is both a paradigmatic and problematic example. It is paradigmatic, because it concerns the test for review of issues of law that had been used for four decades. It is problematic, because the *révirement* follows a single school of thought. It shows, moreover, that administrative law does not necessarily follow a certain path, but may, and sometime does, move backwards.

* Full Professor of Administrative and Public Law, Bocconi University Milan

2. *Chevron*

Until last year, the approach of US courts was centered on *Chevron* (*Chevron USA Inc v NRDC* 467 US 837 (1984). Decided by the Supreme Court at the epoch of the Reagan presidency, *Chevron* concerned agency's interpretation of statutes. In its essence, *Chevron* implied and rested upon a basic distinction. On the one hand, if the reviewing court decided that Congress had a specific intention (that is, legislative intention) on a particular question, then the court had to substitute judgement for that of the agency, in order to ensure the respect of the intention manifested by Congress. On the other hand, if the reviewing court decided that Congress had not directly addressed the point for which the agency had made a policy choice, then the court did not have to impose its judgment, even though the agency's interpretation was very distant from that which the court itself would have deemed preferable. The only limit which the agency had to respect was that of rationality or reasonableness, in the sense that it sufficed that the agency had remained within the range of permissible – that is, non-irrational or unreasonable – choices.

With regard to *Chevron*, probably everything that needs to be said has already been said, or contested. For various critics of the modern administrative State, *Chevron* was simply unacceptable, because – as Justice Antonin Scalia asserted – it implied the "adoption of a blanket default rule, which presumed that statutory ambiguity constituted a conferral of delegation from Congress" (*Remarks made by Justice Scalia for the 25th anniversary of Chevron v. NRDC*, 66 Administrative Law Review, 244 (2014)). It thus amounted to an unwarranted transfer of interpretative authority from the courts to agencies. For others, *Chevron*'s underlying assumption was that, after all, agencies are better equipped than judges to solve certain complex policy issues including. For example, Cass R. Sunstein held that, although *Chevron*'s critics addressed legitimate concerns, with which public lawyers were inevitably confronted, the arguments for overruling it were unconvincing. Moreover, he continued, overruling *Chevron* would create a "major upheaval – a large shock to the legal system, producing confusion, more conflicts in the courts of appeal" (*Chevron as Law*, 107 Georgetown Law Journal, 1658 (2019)).

Interestingly, still others, from a comparative perspective, observed that *Chevron* was a significant approach, but not the only one. Thus, for example, Paul Craig said that Canadian courts took

a more nuanced approach, oscillating between a correctness test and a reasonableness or rational basis test (*Judicial Review of Questions of Law: A Comparative Perspective,* in S. Rose Ackerman and P. Lindseth (eds.), *Comparative Administrative Law*, Elgar, 2017, 2nd ed., 389). This is helpful to relativize the perceived peculiarity of judicial approaches, but it does not diminish their importance. Quite the contrary, as will be said in the next paragraph, few months ago the Supreme Court issued a landmark decision.

3. "Leaving *Chevron* behind"

In recent years, the US Supreme Court reversed various precedents. In 2022, in *Dobbs* it officially reversed *Roe v. Wade*, which guaranteed a constitutional right to abortion under federal standards. Writing for the majority, Justice Alito held that the only legitimate rights that are not explicitly stated in the Constitution are those "implicit in the concept of ordered liberty", and abortion was not such a right (*Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022)). The following year, the Court's majority ruled – by 6 to 3 - that race-conscious admissions are unconstitutional in cases involving some universities, thus reversing decades of rulings supporting affirmative action (*Students for Fair Admissions Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023). *Chevron* was the next target. It did not escape overruling by the Court's majority.

In *Loper Bright Enterprises* c. *Raimondo* (603 U.S.369 (2024)), the Supreme Court reiterated the doctrine enounced several times before *Chevron*, that is, "the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits". It then criticized *Chevron*, on grounds that it had been "decided in 1984 by a bare quorum of six Justices" and had "triggered a marked departure from the traditional judicial approach of independently examining each statute to determine its meaning". For the Court, therefore, *Chevron* could not be reconciled with the APA. Quite the contrary, it was "the antithesis of the time honored approach the APA prescribes". Moreover, and perhaps more importantly from a constitutional perspective, the Supreme Court rejected the view that agencies have special competences – due to their expertise – in resolving statutory ambiguities (for it, only "the courts do"). The upshot of all this was the decision to "leave *Chevron* behind".

4. Institutional ramifications of *Loper Bright*

There is, not surprisingly, variety of opinion about the scope and effects of *Loper Bright*. Some commentators observe that it shows that even super-precedents can be overruled. Others emphasize the overturning of the longstanding doctrine known as "*Chevron* deference". From this viewpoint, *Loper Bright* expands the powers of the judiciary, first and foremost those of the Court itself. Still others see *Loper Bright* as another manifestation of the split along ideological lines, a further weakening of what remains of the "liberal" era.

But things are more complex than it may appear at first sight. First, *Chevron* was initially celebrated as a triumph by many Republicans, in a period in which they could rely more on appointees in agencies than on federal courts. Secondly, both agencies and courts will have to clarify the ramifications of *Loper Bright*. To begin with, was the overruling prospective only or would it have retroactive effects? To continue, though Chief Justice Roberts wrote in *Loper Bright* that "statutes, no matter how impenetrable, do – in fact, must – have a single, best meaning", in some cases it may be hard, if not almost impossible, to say which interpretation is the best. Did, then, the judiciary really obtain more power? Or will conflicts proliferate, as Sunstein held? Agencies take every year thousands of decisions, often either on highly technical issues or in areas characterized by rapid changes. Will judges be able to manage these issues and, thus, to respond to social demands? Last but not least, in *Loper Bright* what was at stake was the agency's attempt to prevent the excesses of fishing, which undermine the survival of an adequate stock. In this respect, the correctness of the majority's approach will be established some time in the future. But if the outcome is that natural resources – as the agency held - are exhaustible, it might be just too late.

ARTICLES

GROUNDBREAKERS: FEMALE JUSTICES AND PRESIDENTS IN THE ITALIAN CONSTITUTIONAL COURT

Diletta Tega[*] *& Tania Groppi*[**]

Abstract

The history of the Italian Constitutional Court (ItCC) reflects a significant gender disparity, with the absence of women justices until 1996, forty years after its establishment. Despite subsequent appointments, women remain a minority on the Court: only eight out of 121 justices are women, with just two being elected as presidents. This underrepresentation poses challenges for research, compounded by the Court's secrecy regarding deliberations and the scarcity of historical and political studies on female justices at ItCC.

To address this gap, we propose an empirical methodology based on interviews with the female justices. In fact, due to the Court's collegial nature, relying solely on case-law analysis provides only a partial picture, as individual opinions are not discernible.

The initial section of the article presents data on the eight women justices in the ItCC, contextualizing their presence within

[*] Full Professor of Constitutional and Public Law, University of Bologna

[**] Full Professor of Constitutional and Public Law, University of Siena

Both authors clerked at the Italian Constitutional Court. Introduction and Conclusion are co-authored. Diletta Tega wrote Sections II, V, VI and VII, Tania Groppi wrote Sections III and IV. The Authors want to thank: Antonio Chiusolo, Alessia-Ottavia Cozzi, Fabrizia Covino, Pietro Faraguna, Fulco Lanchester, Virginia Lemme, Patrizia Pederzoli, Micol Pignataro, Ilenia Ruggiu, Francesco Troncelliti and Nicola Vizioli. The article was conceived for, and will be published also in, Erin Delaney and Rosalind Dixon (eds), *Constitutional Heroines and Feminist Judicial Leadership*, Edward Elgar Publishing, forthcoming. The Authors thank the publisher and the editors for allowing them to anticipate here this chapter.

In beloved memory of Filomena Perrone see note 38.

the broader struggle for gender equality in Italy, particularly in legal and judicial professions. Following this, an overview of the legal framework governing the ItCC, including appointment procedures and internal decision-making processes, is provided. Subsequent sections analyze the Court's role in the Italian constitutional and political landscape over time, focusing on its impact on gender equality. Specific attention is paid to the individual contributions of the eight women justices, starting from the first appointee. Additionally, the two female presidents, Marta Cartabia and Silvana Sciarra, are examined separately to assess their leadership within the Court.

The paper concludes with reflections and insights aimed at guiding further research in this area. By shedding light on the experiences of women justices and the dynamics of gender representation within the ItCC, it is hoped that this study will contribute to a more nuanced understanding of constitutional justice in Italy and pave the way for future inquiries into gender equality in legal institutions.

TABLE OF CONTENTS

1. Introduction and Methodology

In 1996, forty years after the establishment of the Italian Constitutional Court (hereinafter ItCC), the first comprehensive study on the history of the Court was published by a well-known Italian scholar[1]. It included some tables on the justices appointed until that date, one of which bore a striking title: "The Men of the

[1] F. Bonini, *Storia della Corte costituzionale italiana* (1996), 353.

Constitutional Court." Although the title seems affected by a gendered bias, it was not. It only depicted the harsh reality: no women had been appointed as justices of the ItCC at that time. The first female justice was appointed soon after the publication of the book, on November 4, 1996. Since then, a total of eight women have been appointed to the Court: eight out of 121 justices. Only very recently have two of them become presidents of the Court (two out of forty-eight presidents).

This data makes any research on the women justices in the ItCC quite challenging—even more challenging if we consider that the Italian Constitutional Court is one of the few constitutional jurisdictions worldwide that still protects the secrecy of its deliberations, therefore not allowing its members to express separate opinions. This feature prevents the possibility of attributing judgments to specific justice[2]. In addition, historical and/or political studies on the Court can be counted on one hand, despite the overwhelming abundance of theoretical analyses of its case law. Because of this, there are many studies in Italian literature that describe and discuss how women's equality or women's rights have been recognized by constitutional jurisprudence, but none on the women of the Court[3]. The lack of these fundamental studies, as well as the scarcity of female biographies and oral histories that is available,[4] represent a reminder that there is a compelling need to give further analytical and developed reconstructions of the phenomena.

The time has come to start exploring this issue, not only to investigate the contribution of the female justices and presidents, but also to examine the reasons behind this data and the

[2] As it has been also emphasized by R. Abeyratne, I. Porat (eds.), *Towering judges. A comparative study of Constitutional Judges* (2021), 12.

[3] Neither the Constitutional Court has done any. However, the first task assigned to the newly created historical archive of the Court by the President in charge (elected on December 12, 2023), Augusto Barbera, is to "recreate" the journey of the 8 women in the Court. A special reference to the "Women of the Court" was introduced in the 2023 edition of the Annuary: <https://www.cortecostituzionale.it/annuario2023/le-donne-e-la-corte.html>. As for scholarship, see the passing reference in P. Pederzoli, *I giudici della Corte costituzionale*, in C. Guarnieri, G. Insolera, L. Zilletti (eds.), *Anatomia del potere giudiziario* (2019), 23.

[4] The point is raised in E. Delaney, R. Dixon, *Judicial Heroines? Comparative and Conceptual Reflections*, in E. Delaney, R. Dixon (eds.), *Constitutional Heroines and Feminist Judicial Leadership*, Edward Elgar Publishing, forthcoming.

consequences of the overwhelming masculine environment on the few women that have been appointed. Meaningful research on this subject within the Italian legal order requires a description of all the female justices, not just the female presidents: very few women sat on the bench, and only two as presidents; moreover, usually presidents' tenure is short, as he (or she) is usually elected among the most senior justices and therefore comes just before the end of the mandate.

To achieve this purpose, we need to apply an empirical methodology based on interviews with the female justices[5]. Indeed, a research based solely on an analysis of the case law is useless, as the collegiality of the Court's work prevents any research based on individual opinions.

This article will develop as follows. In the next section, we will present the data on the eight women justices in the ItCC. In doing so, we will consider more broadly the difficult path towards gender equality in Italy, with a special emphasis on women's late access to the legal professions and to the judiciary. In Section III, we introduce a few aspects of the legal framework that regulates the ItCC, especially in relation to the appointment procedure and the internal decision-making process. Sections IV and V will assess the role that the ItCC played over time within the Italian constitutional and political system, with a special focus on gender equality. Section VI will examine the eight women justices, including the first appointee, whereas Section VII will be devoted to the two female presidents. Finally, some conclusions will be presented, with the hope of paving the way for further research.

2. The Infirmitas sexus and the Long Walk of Women in the Judiciary – The Context Matters

It was not until 1996 that the first female justice was appointed in the ItCC: Fernanda Contri. And it was not until the end of 2014 that three female justices sat simultaneously on the Court's bench (made up of fifteen justices), when Marta Cartabia—appointed in 2011, following the death of Maria Rita Saulle (who herself had been appointed after Contri's term had expired)—was joined by Daria de Pretis and Silvana Sciarra.

[5] We decided to use the term "judge" to indicate an ordinary judge and "justice" to indicate a constitutional judge.

The highest number of female justices in charge at the same time came in late 2020, when four female justices sat in the Court: Daria de Pretis; Silvana Sciarra, the first woman elected by the Parliament; Emanuela Navarretta; and Maria Rosaria San Giorgio, the first woman elected by the judiciary. At the time this work is completed, there are three female justices in the ItCC: Emanuela Navarretta, Maria Rosaria San Giorgio, and Antonella Sciarrone Alibrandi, since no successor to Silvana Sciarra has been elected by Parliament so far.

It was only at the end of 2019 that the first female president of the Court, Marta Cartabia, was elected. She was followed in 2022 by the second, and so far, last, female president: Silvana Sciarra.

Presently, no incumbent justices belong to the generation of the 1970s, the youngest having been born in 1966. More generally, until about fifteen years ago, the constitutional justices were predominantly Caucasian, male, old, and often from southern Italy[6]. Over the years, although the composition has generally changed, the current president still fits this description perfectly[7].

Looking more broadly at the judiciary—which nowadays counts more female judges than male ones—data does not appear to be any better: only in 2019 was a woman (Gabriella Palmieri Sandulli)[8] appointed as General Attorney of the State[9], and only in 2023 was a woman (Margherita Cassano)[10] appointed First President of the Supreme Court of Cassation.

How can such small numbers, and very recent appointments of "the first woman that…", be explained? To understand this, it is necessary to retrace the obstacles—a reflection of the status of women in the society of the time—women have encountered in accessing legal professions and the judiciary in Italy.

---

[6] L. Rullo, *The Road to Palazzo della Consulta: Profiles and Careers of Italian Constitutional Judges*, 17 Italian Political Science 226 (2022). N. Pazienza, *Faciant Meliora Sequentes* (2016).

[7] The two last Presidents have been: Professor Augusto Barbera, a Constitutional Law professor born in Aidone (Sicily) in 1938 and Giovanni Amoroso, a judge elected by the Court of Cassation born in Mercato San Severino (Campania) in 1949.

[8] Appointed by the President of the Council of ministers, Giuseppe Conte.

[9] The official Italian denomination is Avvocato generale dello Stato, head of the Avvocatura generale dello Stato, established in 1933 as the service for legal counseling and judicial defense of the State and all its administrative offices.

[10] Appointed by the High Council of the Judiciary.

For instance, it was not until the passage of Law No. 1176/1919[11] that it became possible for a woman—Elisa Comani—to join a bar association[12]. Before that, some bar associations had indeed accepted registration by women, but judges had always intervened to annul them. For example, the first woman to be inscribed to the bar, on August 9, 1883, was Lidia Poët—but her registration was annulled on November 11, 1883. She was allowed to join a bar association only after the enactment of the Law of 1919[13]. The female lawyers—who consisted of, in 1921, eighty-five women—mostly worked in the field of family law, due to their supposed "natural" predisposition for care- and family-related roles.

The number of female lawyers doubled in ten years (180 in 1931) and grew very slowly in the following decades. In 1940, female lawyers represented just 1% of the members of the bar[14]; in 1971, 3.4%; and 9.7% in 1981[15].

As for the judiciary, until Law No. 66/1963, women were not even allowed to become judges[16]. Law No. 66/1963 was propitiated by the ItCC Judgment No. 33/1960[17], which stated that diversity of

[11] Law No. 1176/1919 was rather innovative considering the time it was adopted. It allowed women, on an equal footing with men, to exercise all professions (including becoming barrister) and hold many, but not all, jobs in public administrations. It also eliminated the archaic marital authorization (imposed on wives for some major legal acts).

[12] F. Tacchi, *Eva togata. Donne e professioni giuridiche in Italia dall'unità a oggi* (2009), 54.

[13] See N. Sbano (ed.), *Women and Rights* (2004). The entry of women into the armed forces only occurred with Law No. 380/1999.

[14] F. Tacchi, *Donne e avvocatura in Italia. Questioni di genere (e di lungo periodo)*, in R. Bianchi Riva, C. Spaccapelo (eds.), *Parità di genere e professioni legali, una lunga storia…* (2023), 35.

[15] According to the statistical data from ISTAT. Nowadays, women represent the 47.2 % of all the barristers (CENSIS Report 2023 on the Bar Association).

[16] See B. Pezzini, *La rappresentanza di genere in magistratura*, Questione giustizia (2024), available at <www.questionegiustizia.it>; M. D'Amico, C. M. Lendaro, C. Siccardi (eds.), *Eguaglianza di genere in magistratura* (2017).

[17] The exclusion of women was challenged before the Court by Costantino Mortati (former member of the Constituent Assembly, future member of the ItCC, and arguably the most eminent father of contemporary Italian constitutionalism) as legal counsel for a female graduate in Political Science, Rosa Oliva, who wanted to take part in the competition for the selection of Prefects (senior State official representing the national administration in the territory of a single Province, in charge of an office currently named Prefettura, a Territorial office of the Government, which depends on the Ministry of the Interior).

sex, in and of itself considered, can never be a reason for legislative discrimination[18]. Thus, the Court articulated the correct interpretation of Article 51 of the Constitution, whose first paragraph provides that "All citizens of either sex shall be eligible for public office and for elective positions on equal terms, according to the conditions set forth by law"[19]. Consequently, the ItCC annulled Article 7 of Law No. 1176/1919, inasmuch it excluded women from all the public offices requiring the exercise of political rights and powers.

It took fifteen years after the Constitution came into force, and no less than sixteen public selections of male-only judges (with the appointment of a total of 3,127 judges), for the principle of gender equality in access to the judiciary to be implemented. In 1965, eight women won the first competition open to candidates of both sexes[20].

The deeper reason for women's arduous progress in the judiciary was represented by cultural prejudice and the stereotype of women as immature beings in need of male protection. This prejudice came into light during the work of the Constituent Assembly[21] when the Constituents dealt with the judicial system directly and the possible participation of women in it[22]. Some recalled Jean Martin Charcot and his theory on female hysteria. Others emphasized that women could not be judges because they

[18] However, only a few years earlier, the ItCC (Judgment No. 56/1958) had written to the contrary, sharing the then widespread prejudice that considered women too fragile and emotional for an activity like adjudication, which requires the exercise of pure rationality. In its infamous decision, the Court pointed out that 'the constitutionality of a rule declaring female citizens to be exclusively suited or more particularly suited to certain public offices or services could not be denied *a priori*'. English translations of the ItCC's decisions are available at <www.cortecostituzionale.it>, but only to a limited extent for older judgments.

[19] In 2003 a constitutional amendment was passed, adding a further sentence to the paragraph (see also Section V): 'To this end, the Republic shall adopt specific measures to promote equal opportunities between women and men'.

[20] Graziana Calcagno, Emilia Capelli, Raffaella d'Antonio, Giulia De Marco, Letizia De Martino, Annunziata Izzo, Ada Lepore, Maria Gabriella Luccioli.

[21] Out of the 556 members of the Constituent Assembly, only 21 were women.

[22] Especially in the debate sitting on 31 January 1947 in the Second Subcommittee of the Commission for the Constitution. See Carlotta Latini, 'Quaeta non movere. The entry of women into the judiciary and Article 51 of the Constitution. An occasion for reflection on women's access to public office in *Republican Italy*', 27 Journal of Constitutional History 143 (2014).

"lacked temperament, strength of mind, firmness of character, and physical resistance." Still, others considered it appropriate to circumscribe the possible presence of women only to judgments concerning family law and minors[23]. In short, the weakness of women—*infirmitas sexus* —was used as an excuse for depriving females of the ability to judge, despite the fundamental role they had played even a short time before during the war of resistance against fascism, which had earned them the right to vote and be elected. This right was exercised for the first time only a few months earlier, on June 2 and 3, 1946 (in the referendum that determined the abandonment of the monarchy in favor of the republican form of state, and in the simultaneous election of the Constituent Assembly).

Coming back to those first eight trailblazing female judges selected in 1965, one of them, Giulia De Marco[24], in a recent interview recalled the legal condition of women in Italy at that time. Family law was still governed by the Civil Code of 1942, according to which the unity of the family was understood as unity of command entrusted to the husband/father. The man was the head of the family, holder of marital authority and legal power over the children. The wife's infidelity was always a criminal offense, while that of the husband only acquired criminal relevance if it resulted in public concubinage. The offense of rape was extinguished if the so-called "reparatory marriage" followed, and, in any case, the accused were almost always acquitted because the prejudice of *vis*

[23] Notwhithstanding all the prejudices, the principle that 'women may also be admitted to the judiciary' seemed to be accepted. However, this statement disappeared later in the proceedings, to make way for a much vaguer perspective – on which a heated debate would subsequently ensue – stating that the appointment of women to the judiciary could take place 'within the limits and for the matters provided for by the judicial system'. The Constituents finally decided to leave the matter to subsequent legislation, on the basis of what would become the aforementioned Article 51 of the Constitution. See M. Cartabia, *Il principio di pari opportunità nella giurisprudenza costituzionale*, 162 Quaderni del Consiglio Superiore della Magistratura 53 (2014). See A. Meniconi, *Storia della magistratura di italiana* (2012); F. Tacchi, *Eva Togata. Donne e professioni giuridiche in Italia dall'Unità ad oggi* (2009); S. Cocchi, M. Guglielmi, *Gender Equality in the Judiciary: Experiences and Perspectives from Italy*, 2 *The Italian Law Journal* (2020). In general, the activity of the twenty-one female Constituents was crucial in preventing explicit limitations to women's rights and was also supported by many of their male colleagues.

[24] Recently interviewed by E. di Caro, *Magistrate finalmente. Le prime giudici d'Italia* (2023), 81.

grata puellis (girls like violence) prevailed even among judges. A special provision existed for murder for the sake of honor, e.g., for those who killed a spouse, daughter, or sister caught in the act of "illegitimate carnal relations": the culprit received only a lenient sentence of three to seven years' imprisonment, indicating how little a woman's life was considered in the face of a man's offended honor. There were no laws on divorce, nor on the termination of pregnancy[25]. There was no equality within the ambit of employment, meaning that a woman could be dismissed for marriage and pregnancy.

It is no surprise, then, that the implementation of the principles of equality and free access to public offices for women proved very laborious and slow. In particular, the ItCC was not established until 1956 (although the Constitution had come into force in January 1948), and this allowed for interpretations of the constitutional text that were actually harbingers of gender-based discrimination.

Since that first judicial selection became open to women, much has changed. Figures for 2023[26] confirm a trend that has been ongoing since 2015: there are more women in the judiciary than men. In 2023, 56% of ordinary judges were women (4,213 male and 5,321 female judges). However, directive positions still saw a higher percentage of men (out of 379, there were 268 men, 70.71%), partly due to the delay in women's access to the judiciary. The situation is more balanced in semi-directive functions (out of 690, 371 were men, 53.77%).

3. The basic features of the ItCC: Composition and the Principle of Collegiality

In order to better understand the role female justices and presidents played in the ItCC, we must introduce some aspects of the legal framework that regulate the Court. We will focus especially on the appointment procedure and the internal decision-making process, based on the collegiality principle.

The Constitutional Court of Italy is one of the oldest

[25] They were enacted, respectively, in 1970 and in 1978.
[26] Data available on the website of the Statistical Office of the High Council of the Judiciary: <https://www.csm.it/web/csm-internet/statistiche>.

specialized constitutional courts in the world[27]. Its composition reflects the effort to balance the need for legal expertise and the characteristic of a judicial body against the acknowledgment of the inescapably political nature of constitutional review: fifteen justices, chosen from among legal experts (judges from the higher courts, law professors, and attorneys with more than twenty years of experience), one-third of whom are named by the President of the Republic, one-third by Parliament in joint session by secret ballot and qualified majority, and one-third by the upper echelons of the judiciary (Court of Cassation three justices, Council of State one justice, Court of Auditors one justice). Their term of office, not renewable, is nine years[28].

Although, according to the legal sources, the three appointing bodies are free to choose among the three qualified categories, it is crystal clear that some tendencies have developed. Since the establishment of the Court, in 1956 (the first appointments taking place in 1955), it is common for the President of the Republic to appoint law professors, whereas the parliament elects mostly attorneys or professors with a previous political record, and the higher courts always elect the justices from among their members[29].

It has been said—and we agree with this evaluation—that by and large, constitutional justices have always fulfilled the expectations, and that only on a few occasions have certain appointments been deeply criticized[30]. Usually, justices do not resign from office before the end of their nine-year terms. Early retirement or resignation is extremely rare.

To better understand the data on female justices presented above, we would first like to contextualize the institutional

[27] See V. Barsotti, P. G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context* (2016); T. Groppi, *The Constitutional Court of Italy: Towards a Multilevel System of Constitutional Review?*, 3 Journal of Comparative Law 100-118 (2008).

[28] A good example of the lack of attention for the opacity of the appointment procedure is represented by a recent study of the composition of the Constitutional Court: Ugo Adamo, *La composizione ordinaria della Corte costituzionale* (2024).

[29] On the composition see Diletta Tega, *Articolo 135*, in F. Clementi et al (eds), *La Costituzione italiana. Commento articolo per articolo* (2018) 450. See L. Rullo, *The Road to Palazzo della Consulta: Profiles and Careers of Italian Constitutional Judges*, 17 Italian Political Science 234 (2022).

[30] V. Barsotti, P. G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context* (2016), 44.

framework within its historical context. Back in 1955, there were only a few women holding the necessary qualifications to become judges. None were judge of the highest courts, as the first women was admitted in the judiciary in 1965, as said above. As for lawyers, only 180 women were lawyers in the early 1930s, as stated previously; therefore, we can suppose that in 1955, this was the class of qualified female lawyers with twenty years of experience. We must add that there were only two female full professors of law in 1955, as we will discuss in Section VI.

If we consider the eight women appointed since then, we should add that six of them are academics appointed by the President of the Republic. The Presidency is a highly respected institution within the Italian parliamentary form of government, which always provides great attention to social changes. Only one female justice, an academic, has been elected by the Parliament. And in parliamentary appointments, political affiliations play a key role—all the other aspects (including gender) are overshadowed by the need to reach the qualified majorities and the related political agreements. As for the higher courts, they elect their senior members, very often their presidents. Taking into account the long journey of women towards top positions in those Courts, it is easy to understand why, until now, there has been only one female justice elected by the higher courts[31].

Table 1: Justices by Gender and Appointing Body[32]

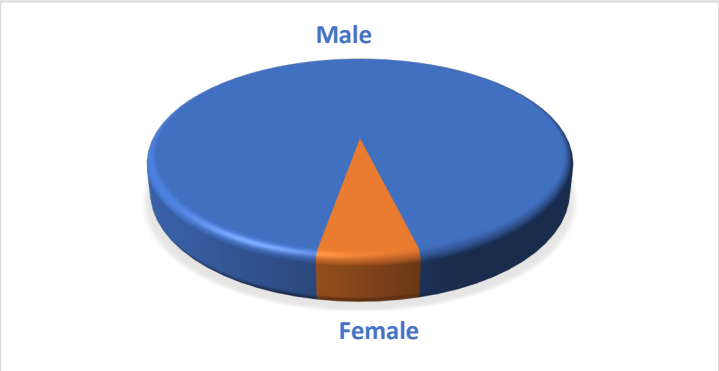
Appointing body	Justices (male and female, 1956-2023)	Female Justices
President of the Republic	43	6
Parliament	37	1

[31] For a similar remark, V. R. Scotti, *The Italian Constitutional Court on Women's Rights: Patriarchal Remnants Versus Transformative interpretations*, 18 ICL Journal 165-168, 170 (2024). More details on these appointments will be presented in Section VI.

[32] Source: own elaboration from Constitutional Court's website.

Higher Courts	41	1
Total	121	8

Chart 1: Justices According to Gender[33]



As for the President of the Court, he (or she) is elected by the Court from among its members for a renewable term of three years. However, the President tends to be elected on the basis of his (or her) seniority as a justice, very often when his (or her) mandate is about to end[34]. As a consequence of this practice, the presidencies tend to be rather short, most often less than one year (the average being nineteen months, a figure that is affected by the fact that during the early decades the presidencies used to be longer). This practice curbs the possibility for the President to develop long-term strategies, especially in the institutional relations with domestic institutions and foreign courts. Once a justice is elected as a President, usually he (or she) stops acting as a rapporteur and authoring opinions for the Court.

The President is vested with several power, including both a "public" role and a "chairing" role.

As for the "public role," he (or she) represents the Court in

[33] Source: own elaboration based on the Constitutional Court's website.

[34] Of the 117 constitutional justices in office from 1956 to 2021, 38% achieved the role of President, i.e. 44. Almost half were in office for a year or less, see L. Rullo, *The Road to Palazzo della Consulta: Profiles and Careers of Italian Constitutional Judges*, 17 Italian Political Science 237-238 (2022).

the extrajudicial activities, including the networking with other constitutional courts or international courts and the communication activities: among them, the annual address on the state of the Court vests an important role.

As for the "chairing role," he (or she) chooses the reporting justice, who is in charge also of writing the final judgment for the Court. In addition, the President establishes the calendar of the Court. In that activity, he (or she) enjoys wide leeway for the timing of the decisions: he (or she) can prioritize or postpone cases and opinions, although in doing so, he (or she) has always had to consult the other justices. The President also plays a role in structuring the deliberations of the Court in oral argument and in internal discussions among the justices.

One of the main features in the functioning of the Italian Constitutional Court, deeply influencing our study on female justices, are the principles of collegiality and secrecy of deliberation: separate opinions are not envisaged in the procedural rules of the ICC.

Collegiality is one of the essential features of the ItCC[35]. This characteristic has been linked by scholars to the same necessity of finding a balance between politics and the law. In this view, the principle of collegiality is a way to protect the Court from the pressures and interferences of politics, giving justices the opportunity to express their opinion freely, without having to justify their position outside the Court[36]. On the other hand, the prohibition on disclosing the justices' individual opinions has been criticized because it may result in an opaque process in which the justices' contrasting views are not publicized and therefore cannot contribute to public debate. Over the years, some attempts to introduce dissenting opinions have been made by the Court itself, but all failed due to lack of consensus.

How does achieving this collegiality work? First, the President of the Court distributes pending cases among the justices.

---

[35] D. Tega, *Collegiality over personality: The rejection of separate opinions in Italy*, in V. Barsotti, P. G. Carozza, M. Cartabia, A. Simoncini (eds.) *Dialogues on Italian Constitutional Justice: A Comparative Perspective* (2021) 107-122.

[36] The centrality of the principle of collegiality has been recently emphasized by the President of the Court, Augusto Barbera, in his 2023 Annual report, available at <Relazione annuale 2023 ENG.pdf (cortecostituzionale.it)>. He expressed his opinion against separate opinions and in favour of the secrecy of the deliberations.

The justice that is appointed as rapporteur (reporting justice) has the duty to study the case, in order to open public discussion about it in the event of a public hearing, and, more importantly, to bring it before the Court for deliberation. The deliberations take place in the Court's private chamber and are covered by a duty of secrecy. Only the members of the Court attend the meeting. Very often, the decisions are the result of a deliberative process, although there may be a formal vote. The result is that the decision is unitary and always represents the Court as a whole.

Thus, decisions tend to incorporate the Court's prevailing line of reasoning, while *obiter dicta* are often inserted to take into account minority views. Therefore, the individual contribution of the reporting justice is very difficult to detect, as he (or she) has to incorporate the reasoning the arguments suggested by other justices, in order to try to reach the broadest possible consensus.

The content of a decision remains secret until the written text has been approved, deposited, and published. All the judgments are signed by the President and by the reporting justice, with the only exceptions being the rare cases in which the reporting justice refuses to write the judgment, in which case another justice is appointed to write it[37].

Actually, only in highly polarized cases can the reporting justice refuse to write the decision and must be substituted. Usually, the reporting justice writes the judgment, notwithstanding his (or her) dissent. Therefore, although the appointment of a drafter other than the rapporteur can be a clue of the latter's dissent and, conversely, we can suppose that the drafter agrees with the majority, we cannot rely on it to try to explore the individual attitude of the justices.

These types of attempts to glean individual justices' specific attitudes have especially targeted women. In 2020, the Court itself highlighted in a tweet by its Press Office the signature of a decision

[37] This practice was firstly mentioned in the annual relation on the case-law of 2003. Since the Judgment No. 393/2006 it is highlighted in the part in fact of the judgment. The Court's Additional Rules in 2008 recognized the President's power to appoint a substitute rapporteur (previously it was up to the Court): see art. 17.4 of Additional Rules. 36 cases in total have been counted until 2019: S. Panizza, *Composizione, organizzazione e funzionamento della Corte costituzionale*, in R. Romboli (ed.), *Aggiornamenti in tema di processo costituzionale (2027-2019)* (2020), 23.

by a female president and a female rapporteur[38]. Another formal change has been the use of the Italian female reference to *redattrice* or *relatrice* (instead of the sole male reference to *redattore* or *relatore*) for the signing female justice, beginning in 2021, when justices Navarretta and de Pretis started using the female wording[39]. Finally, the expression *I signori giudici* (which exclusively refers to male justices) was eliminated from the heading of the judgments, starting officially with Judgment No. 223/2023[40].

4. The "Eras" of the ItCC

In addition to the functions of the ItCC and appointment system of justices, to try to assess the role of the female justices in the ItCC, we must present a general overview of its case law. As a standpoint, we should consider the usually highly positive evaluation of the Constitutional Court's role in the evolution of Italian constitutional democracy: the Court is meant to have provided an important contribution to the implementation of the Constitution and to the guarantee of the constitutional rights and freedoms.

The case-law is usually grouped into four main periods[41]:

The first period, defined as "implementation of the

[38] Judgment No. 150/2020, signed by the President Marta Cartabia and by the rapporteur Silvana Sciarra. In that case, also the registrar (who signed the decision as well) was a woman: Filomena Perrone, a brilliant civil servant coming from the offices of the Court of Cassation: M. Iossa, *Una sentenza "fermata" da tre donne*, il Corriere, (16 Luglio 2020) <https://www.corriere.it/cronache/20_luglio_16/corte-costituzionale-prima-volta-una-sentenza-firmata-tre-donne-ff83661e-c767-11ea-a0f9-db06e95bcc12.shtml#:~:text=Per%20la%20prima%20volta%20nella,Perrone%20nella%20funzione%20di%20cancelliere>. More precisely, the very first decision signed by a female President and a female rapporteur was the Order No. 9/2020, signed by President Cartabia and rapporteur de Pretis. Between that Order and the Judgment No. 150/2020, there have been other 18 decisions signed by President Cartabia and de Pretis or Sciarra as rapporteurs.

[39] The first case was Order No. 19/2021, signed by Emanuela Navarretta, *redattrice*.

[40] E. Santoro, *I giudici della Corte non son più "signori"* (6 January 2024), available at <https://www.lacostituzione.info/index.php/2024/01/06/i-giudici-della-corte-costituzionale-non-sono-piu-signori/>. To be precise also in Judgment No. 27/2023 the expression '*I signori giudici*' did not appear.

[41] V. Barsotti, P. G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context* (2016), 37; D. Tega, *La Corte nel contesto* (2020); T. Groppi, A. Simoncini, *Foundations of Italian Public Law* (2023), 49.

Constitution" or "promotion of reforms," begins with the establishment of the Court in 1956 and ends in the beginning of the 1970s: in this phase, the Constitutional Court dealt with the elimination, through the declaration of unconstitutionality, of the laws adopted during the fascist regime[42]. In fulfilling its role, the Court replaced some fragments of the contested rules, acting as a vehicle for the modernization and democratization of the Italian legal system. During this period, it took some time until the Court started implementing the provision on gender equality contained in the Italian Constitution, especially in Articles 3 and 51. For example, the law that made adultery by a wife punishable as a criminal offense was judged not unconstitutional in 1961 (Judgment No. 64/61). Only some years later, in 1968, was it declared unconstitutional in that it violated the principle of the moral and legal equality between spouses established by Articles 3 and 29 of the Constitution (Judgment No. 126/68)[43].

A second phase followed from the mid-1970s to the mid-1980s, which could be defined as "mediation of social and political conflicts," during which the Court was called upon to judge the constitutionality of more recent laws, approved by ruling political majorities. The Court's work was channeled principally through the application of the criteria of reasonableness and proportionality. In these years, social changes altered the patriarchal understanding of the family: the Court adopted well-balanced decisions on abortion, declaring unconstitutional the provision of the Penal Code "that does not provide for the termination of pregnancy when prolonged gestation might cause harm, medically ascertainable and inevitable, to the health of the woman" (Judgment No. 27/1975). By doing so, the Court gave an answer—and a voice—to women's claims, anticipating the legislature's later move to decriminalize abortion only some years later (Law No. 194/1978).

The third phase took place from the mid-1980s to the mid-

[42] M. Cartabia, N. Lupo, *The Constitution of Italy. A Contextual Analysis* (2022); D. Tega, *Rights and Duties in the Italian Constitution*, in D. Tega, G. Repetto, G. Piccirilli, S. Ninatti (eds.), *Italian Constitutional Law in the European Context* (2023), 270.

[43] V. R. Scotti, *The Protection of Women's Rights in Italy: A Constant Dialogue Between the Legislator and Constitutional Judges*', in I. Spigno, V. R. Scotti, J. Lima Penalva da Silva (eds.), *The Rights of Women in Comparative Constitutional Law* (2023), 67-84.

1990s: in this period, the Court mainly committed itself to clearing up the backlog of cases that had arisen in previous years. In fact, we speak of this as the "operational efficiency" phase. Today, the accumulated backlog has been eliminated and the Court is able to decide disputes in less than a year, guaranteeing, also in this way, the effectiveness of its decisions. During this period, the Court was quite reluctant to develop case law aimed at enforcing gender equality. We must also mention the dismissal, in the name of legislative discretion, of the case on the family surname in 1988 (Order No. 176/1988, see Section VI). A similar attitude can be detected in Judgment No. 422/1995 on gender quota in electoral lists (see Section VI).

As a final era, in the last two decades, the Court has often found itself in the midst of political debate. The judgments concerning electoral law, for example, beginning with No. 1/2014, represent this new trend very well. Precisely to try to defend itself from getting involved in current political affairs, the Court has tried to engage in dialogue more—not only with other judges, both national and supranational, but also with legislators and even with the public directly.

On the one hand, the Court has continued the practice (introduced since the first years of its activity) of "decentralizing" the control of constitutionality, involving ordinary judges more and more and increasingly asking them to provide an interpretation of the law in accordance with the Constitution before raising the question of constitutional legitimacy. On the other hand, the Court frequently refers to supranational sources and judgments, both using the case law of the European Court of Human Rights and intensifying the dialogue with the Court of Justice of the European Union, in cases in which the law of the European Union is invoked as a consideration.

Furthermore, the Court is particularly attentive to creating a dialogue with the legislature: while not renouncing the guarantee of constitutional rights and principles for fear of invading the sphere of the legislator, it seeks continuous collaboration through innovative techniques that are aimed at giving Parliament a period to modify unconstitutional legislation. Faced with Parliament's lack of collaboration the Court can decide to replace the unconstitutional provisions with new provisions consistent with the Constitution, intended to be effective until the legislator intervenes. Gender equality has been one of the preferred fields for this new attitude,

often coining this practice as "re-centralization" of judicial review[44].

Finally, the Court is increasingly interested in a direct dialogue with public opinion. This operates on two fronts, one outside the constitutional judgement and one inside.

On the external side, the most dynamic communication strategies introduced in recent years (such as the use of social media; the creation of podcasts; and the Journey to Italy, which saw constitutional justices engaged in meetings and conferences in schools and prisons), are steps in this direction.

On the internal side, the modification of the rules on the constitutional process have the same purpose. In fact, at the beginning of 2020, the Court introduced the figure of the *amicus curiae* (well-known in common law), allowing subjects with widespread or collective interests, such as NGOs and trade associations, through a very simple procedure, to present brief written opinions that offer the Court useful elements of knowledge. In addition, the possibility of summoning into the council chamber well-known experts, when the Court deems it necessary to acquire information on specific disciplines, has been foreseen.

Ultimately, the Constitutional Court does not rest on its laurels, but shows that it is aware of the need to continuously re-legitimize itself: that is, to evolve and to self-reform, in the pursuit of a renewed dialogue with the subjects and needs that animate pluralist society.

Against this background, what role do female justices play? We will try to answer this question in the next sections by listening to their voices. However, we should point out that their presence has had an impact only starting from the fourth era of the ItCC. During the first three periods of the ItCC, women voices were, in fact, entirely absent. Finally, in the mid-nineties, the first female justice was appointed. As such, the groundbreakers have arrived.

5. Gender Diversity in the ItCC

In the interviews conducted the preparation of this paper, the justices expressed almost uniform views, which we summarize below[45].

[44] D. Tega, *The Italian Constitutional Court in its context. A narrative*, 17 European Constituional Law Review 369 (2021).

[45] We interviewed all the justices who were sitting on the bench when the article was written, plus Marta Cartabia, Daria de Pretis, Silvana Sciarra. We spoke with

Before their appointment to the ItCC, they were practically always the first women to occupy important academic, judicial, or institutional roles (see Section VI). In these roles, they sometimes felt alone: an understandable circumstance when one considers that, often, those functions were not subsequently assigned to other women. In retrospect, in their previous experience, some perceived differences in treatment, particularly when they found themselves in roles where "real power" was administered; others perceived no real obstacles, but still some difficulty in asserting themselves. All felt that they always were required to be hard-working and perform better than their male colleagues. Almost all of them reported that their greatest disadvantage was being the center of all family care activities[46]. They ran the same race as their male colleagues, but with less available time, given these familial responsibilities. At the same time, however, they all recognized that a lot of progress has been made, even if the cultural problem still persisted. They also recognized progress in evolved and refined circles, such as academic ones (where even today some do not feel that it is improper to organize so-called "manels," or to invite female guests only as chairpersons)[47].

They credited the diversity of the work at the Constitutional Court to its greater exposure, as well as the more recent efforts to change and push a rather traditionalist institution towards more contemporary registers. Some felt it was an anachronism not to have been able to use feminine terms in official legal language, e.g., *relatrice* instead of *relatore* (rapporteur) or *la Presidente* instead of *il Presidente* (the President). For a long time, the question of gender in official titles did not raise much interest within the Court. Only

one clerk of Maria Rita Saulle, Judge Silvia Coppari. We reconstructed the experience of Contri mainly through the interviews she gave. We chose not to transcribe the justice' individual answers in order to allow them more freedom in their responses. Again, this is the first time they have been systematically interviewed on this topic and we considered this decision the most fruitful one.

[46] All the justices but one had children: Contri one, Saulle two, Cartabia three, de Pretis two, Sciarra two, Navarretta two, Sciarrone Alibrandi three. We do not have any information, except for Saulle, on their other activities as caregivers (i.e. for fragile persons within the family).

[47] Editorial Team, *The unequal impact of the pandemic on scholars with care responsibilities: What can journals (and others) do?*, 37 European Journal of International Law (2021); G. de Búrca, R. Dixon, M. Prieto Rudolphy, *Gender and the legal academy*, 22 International Journal of Constitutional Law (2024).

recently, as mentioned above, has the situation changed: a symbolic but important change, desired by the sensitivity of the justices.

They all appreciated the richness of reasoning and exchanges linked to the collegiality of judicial work. None of them has ever suffered discriminatory behavior within the Court, although one of them felt patronized at least at the beginning of her term. In general, they consider that, in the Court, good skills in arguing count more than gender.

They all confirmed the importance of sitting on the bench with other women. Being, at last, more than one at the same time allows female justices to innovate the "traditional" model of discussion, to develop greater persuasive force, and to bring their specific experience into the discussion. For some, women are bearers of a different wisdom and sensitivity that also comes from their own lived experiences[48]. For all of them, it is crucial that the bench is made up of different personalities and professional backgrounds, as it is indeed a place where charismatic strength and credibility count. However, there are also those who link this diversity not necessarily to gender, but rather to cultural sensitivity at large. They all are well aware of the historical sources of gender injustice in Italy and ready to promote women's equal dignity.

In a constitutional justice system such as the one in Italy, which we have already described, it is difficult to say whether and to what extent female experience and sensitivity influence the legal solutions adopted by female justices and, through their work, by the whole Court. One cannot attribute a precise jurisprudential decision, or strand, to one or more female justices, because there are no separate opinions. However, a few of the interviewees observed that some degree of influence may be presumed: courts are made up of human beings, each with their own histories that also condition their views. In this regard, and with the caveats already mentioned, some examples from constitutional case law may be useful, particularly with regards to questions more directly connected to gender equality and rights, and considering how they were decided when women joined the Court's bench.

1. Since the 1990s, the Constitutional Court has often been called upon to deal with the issue of gender

[48] See also G. Luccioli, *Diario di una giudice. I miei cinquant'anni in magistratura* (2016).

balance in political representation. In 1993, the first attempt was made to remedy the huge historical gap between the number of men and women holding public offices: it was provided that, in municipal councils, neither gender could hold more than two-thirds of list candidates. This provision was condemned unanimously by ordinary courts, many scholars, and the ItCC (Judgment No. 422/1995). After some constitutional amendments[49], in 2003 (Judgment No. 49), the Court—still male-only—rejected the challenge, brought forth by the national government against a regional law merely establishing, in a completely neutral fashion, that lists for the election of the regional assembly must include candidates of both genders, under penalty of invalidation by the competent electoral offices. This new approach was subsequently confirmed and expanded in later years: Judgment No. 4/2010 saved another regional electoral law, challenged again by the national government (once again standing out in its cultural backwardness), which for the first time introduced in the legal system gender preferences;[50] Judgment No. 81/2012 recognized that appointments to regional executives may be legally challenged if they infringe legally-mandated gender balance[51]; recently, Judgment No. 62/2022 affirmed the need to ensure gender balance in elections to small municipality councils.

2. Judgment No. 233/2005—and later Nos. 158/2007, 19/2009, 203/2013—progressively enlarged the list and number of family members who may take paid

[49] In 2001, Article 117 of the Constitution was amended, its new para. 7, provided that regional laws should remove hindrances to the full equality of men and women in social, cultural, and economic life and promote equal access to elected offices for men and women. In 2003, Article 51, para. 1, was also amended, as already recalled above; the Judgment no. 49/2003 was ruled before the entry into force of the constitutional amendment but was probably affected by it.

[50] 'Gender preference' means that, when a voter is entitled and wishes to express two preference votes, one must be for a male candidate and the other for a female one.

[51] In this case, the relevant regional statute explicitly required that the regional executive be formed in compliance with the principle of balance between men and women. The question was whether the violation of said principle might be challenged before courts, or the appointments remained entirely political, legally unquestionable acts.

special leave from work to care for disabled relatives, in order to protect their physical and psychological health and promote their integration within the family.

3. Starting with judgment No. 61/2006, the ItCC affirmed that the attribution of only the father's surname to the child "is the legacy of a patriarchal conception of the family, which has its roots in Roman family law, and of an outdated marital power, no longer consistent with the principles of the legal system and the constitutional value of equality between men and women"[52]. After years of legislative inaction, through Judgments Nos. 286/2016 and 131/2022[53], the Court positively rewrote the relevant legal rules (raising itself a question of constitutional legitimacy, Order No. 18/2021, as it does only rarely), holding that the simplest and most immediate enforcement of constitutional principles requires the attribution to children of both the parents' surnames, without prejudice to the possibility for the parents to decide to attribute only one surname[54].

4. Judgment No. 193/2017 recognized that women, and not just men, are entitled to inherit the so called "closed farmstead"[55]: a minor and local issue, but still a symbol of patriarchy in its clearest form.

---

[52] Previously, in Orders Nos. 176 and 586/1988, the ItCC had limited itself to stating that this was a matter of legislative policy and technique, within the exclusive competence of the Parliament. At that time, the ItCC was made up exclusively by men.

[53] G. Giorgini Pignatiello, *The Italian Surname Saga: The Italian Constitutional Court Latest Judgment Signifies a Turning Point Within the Constitutional Order*, VerfBlog, 2022/7/05,<https://verfassungsblog.de/the-italian-surname-saga/>.

[54] It must be noted that Giuliano Amato - justice of the ItCC since 2013 and President in 2022, as well as rapporteur of Judgment No. 286/2016 - publicly stated his personal favor for these decisions. Although the Court urged the Parliament to take action and regulate the aspects of the discipline left uncovered by the judgments (e.g., the potential multiplication of surnames in future generations), this call has not been answered to date. At the time of writing, a parliamentary bill is under discussion: <https://www.senato.it/leg/19/BGT/Schede/Ddliter/55197.htm>.

[55] 'Closed farmstead' (maso chiuso) is an ancient form of ownership, traditional in the Eastern Alps, including the Italian province of South Tyrol (and the neighboring Austrian region of Carinthia). Under its specific inheritance

5. Judgment No. 178/2019 confirmed the possibility that two spouses could work at the same time in the same university faculty (or in the university where one has management roles). This possibility is excluded among relatives and relatives-in-law. If one considers the career delays women still experience—even in universities (especially in senior positions)—one can understand how denying this possibility would have represented an additional obstacle, one that is more clearly and immediately realized by female professors and judges.

Of course, female justices at the ItCC had an impact on an uncountable number of issues beyond women's rights and gender equality: to state or presume the contrary would entail the same ghettoization that even some Constituents, as we have said, had attempted. On the other hand, even at the time when the Court consisted of all men, fundamental decisions for women's emancipation were adopted[56]: e.g., the above mentioned Judgment No. 27/1975, which outlined the constitutional protection of abortion (not explicitly provided for in the Constitution); or Judgments Nos. 404/1988 and 559/1989, which extended the right to rent the family home, after the tenant's death, to the tenant's unmarried partner; or Judgment No. 28/1995, which stated that the work carried out within the family, because of its social and economic value, can be included—albeit with the peculiar characteristics that distinguish it—within the sphere of protection that Article 35 of the Constitution ensures to work "in all its forms."

Still, we cannot ignore that in years long gone by, when no woman sat on its bench, the ItCC also made some major blunders: e.g., Judgment No. 56/1958, upholding the limits to female participation in courts of assizes (overruled by Judgment No. 33/1960, mentioned above); the already mentioned Judgment No. 64/1961, upholding the criminal indictment of marital infidelity only for women (reversed by Judgment No. 126/1968); or the

discipline, the closed farm is considered indivisible and may only be assigned to a single heir: traditionally, only a male heir.

[56] 'You do not have to be a woman to be feminist and the reverse is also true' wrote Lady Brenda Hale, discussing the fact that she does not deny that many developments of anti-discrimination laws were made by courts composed of men, see 'Equality in the Judiciary' (2013), Kuttan Menon Memorial Lecture, available at <www.supremecourt.uk>.

mentioned Judgment No. 422/1995, on gender quota in electoral law.

6. Fernanda and the Others: The Rise of Female Constitutional Justices

If the 20th century has been the century of judicial review in Italy, then the 21st century is the age of women in the ItCC. The first two justices to arrive at the Court, Fernanda Contri and later, once her term expired, her successor, Maria Rita Saulle, certainly felt the loneliness of being on a bench composed, for the rest, exclusively of men.

On February 11, 2005, Contri presided, as the first female justice in Italian history, for two-month public hearings of the Constitutional Court[57]. Appointed on November 6, 1996 by the President of the Republic, Oscar Luigi Scalfaro[58], she became Vice-President on March 10, 2005, and left office the following November[59]. As we repeatedly underscored, until her appointment, the bench had always been made up entirely of men: there had been seventy-five justices: twenty-five of whom had been appointed by the President of the Republic, twenty-four elected by the Parliament and twenty-six elected by the higher Courts.

Fernanda Contri was born in Ivrea (province of Turin) on August 21, 1935. Previously, she had been a practicing lawyer in the field of family law[60]. In 1986, she was elected by the Parliament to the High Council of the Judiciary as the first woman who had not

[57] She served as President from the January 31 till March 9, 2005.

[58] In his seven-year term President Scalfaro appointed three male and one female justice. For all justices, the date of appointment is indicated as the date of their swearing in before the President of the Republic, from which the nine-year term of office begins.

[59] It was argued at the time that Contri had not reached the requirement of a 20-year service as a lawyer that is necessary to be appointed to sit in the Court; the latter, however, confirmed her lawful appointment.

[60] In an interview of 2018, she stated that she would have preferred other topics, but family law and juvenile law were considered more suitable for a woman at her times. In the same occasion she recalled that when she started practicing law a senior lawyer suggested her that women would be better off to knit than to argue in court The interview is available at <http://www.giudicedonna.it/2017/quattro/articoli/Fernanda%20Contri%20e%20il%20suo%20lungo%20cammino%20nelle%20istituzioni.pdf>.

already belonged to the judiciary prior[61]. Her candidacy was supported by the Socialist Party to whom she belonged. At the High Council, she chaired the important disciplinary section. Then she served—again, as the first woman to do so—in the office of Secretary General of the Presidency of the Council of Ministers, with Giuliano Amato as Prime Minister (1992–1993). She was then nominated Minister for Social Affairs during the Ciampi government (1993–1994)[62]. She encouraged women to develop inner strength, to ensure that their voices are heard in male-dominant spaces to practice persistence, and to outline clear goals for themselves. Regarding her experience at the bench, she stated that she did not encounter any hostility, but sometimes a subtle form of discrimination in ignoring her hand raised to ask for the floor. As she retrospectively considered her path within different institutions, she numbered herself among the supporters of gender quotas—she used the expression "results quotas"—a concept that before experiencing the institutions, she had refused.

Fernanda Contri was succeeded by Maria Rita Saulle, and for the second time the President of the Republic acted as "queen maker."

Maria Rita Saulle was born in Caserta on December 3, 1935, and died in Rome on July 7, 2011. She joined the Court on November 9, 2005, appointed by the President Carlo Azeglio Ciampi[63]. She was professor of international law and the first female academic on the bench. Therefore, due to her advocacy for human rights, her humanity, and her role as a pioneer for female emancipation, she holds a special place in our hearts. We

[61] The first female judge elected to the High Council of the Judiciary was Elena Paciotti in the same year, 1986. She entered in the Judiciary winning the second public selection that was open to women as well.

[62] In an interview with the newspaper *Il Messaggero* in 2019, she stated that she had always favored women's careers, always remembering the suggestion of a woman friend to 'send the lift back to another woman'. And again, still in that interview, she stated that 'the obstacles are always men, who see us as competitors in the positions of power to which they aspire. Yet women are invaluable in places of leadership, they are more capable of finding mediated solutions and calibrating distances'. M. Lombardi, *Fui la prima donna alla Consulta: mi accolsero con le rose ma erano sospettosi*, il Messaggero, (12 Dicembre 2019) <https://www.ilmessaggero.it/mind_the_gap/intervista_fernanda_contri_la_prima_donna_giudice_costituzionale-4660446.html, 02/29/2024>.

[63] In his seven-year term, President Ciampi appointed four male and one female justice.

reconstructed her time at the Court mainly through one of her clerks, Judge Silvia Coppari.

The appointment of Saulle gives us the opportunity to denounce the difficulty of Italian women not only in reaching the apex of their judicial careers but also in becoming full professors in legal topics. Saulle became full professor in 1980: she was the first woman, together with Maria Laura Picchio Forlati, to become a professor in international law in Italy. Before them, Lea Meriggi had also taught international law and became full professor in 1940: she got the full professorship only because of her fascist militancy and the ignominious Racial Laws of 1938 that obliged Jewish professors to leave Academia[64].

Following the invaluable research by professor Fulco Lanchester—who conducted a census over more than 41,000 positions of academics in legal topics between 1860 and 1971 within the faculties of legal studies, political science and economics—we can say that in 1953 only two women were eligible to the Court: Luisa Sanseverino (labor law) and Francesca Bozza (history of Roman law) (out of 421 full professors); ten years later, in 1963, the figures had not changed: again the only women were Luisa Gilardi Riva Sanseverino and Francesca Bozza (out of 376 full professors); in 1971, the number of eligible women became three: Luisa Sanseverino, Anna Lina Ravà (ecclesiastical law), and Cecilia Assanti (labor law) (out of a total of 518 full professors). The gendered barrier to entry, as he wrote, broke down at the end of the seventies[65].

Saulle can be described as an academic who managed to balance family life and caregiving[66] with a high-level career. She openly stated the centrality of family in her life. She gave special attention to women's empowerment without being ideological about it. She herself was an example of emancipation achieved in the face of sacrifices that certainly scared her, even if they never

[64] S. Forlati, *Lea Meriggi. A fighter - For the wrong cause*, in I. Talgren, (ed.), *Portraits of women in International Law. New names and forgotten faces?* (2023), 339.

[65] F. Lanchester, *La lunga marcia per l'uguaglianza di genere nei SSD dell'area giuridica*, 2 Nomos 1 (2021). For a recent overview of the current gender composition in Italian universities see: F. Roberto, A. Rey, R. Maglio, F. Agliata, *The academic "glass-ceiling": investigating the increase of female academicians in Italy*, 28.5 International Journal of Organizational Analysis 1031 (2020).

[66] She personally cared for disabled relatives, in a time when society was not as welcoming as, perhaps, it is today, towards people with disabilities.

really nicked her[67]. She liked to use the metaphor of the little blue dress—which she always wanted as a child but never owned because the social and cultural conventions of the time imposed her to wear pink—to indicate the many clichés imposed on all women since childhood.

She always nourished a strong scholarly interest for the protection of fundamental rights at both the national and international level. This interest also strongly marked her institutional experience, as she was a member of the National Commission for Gender Equality of the Presidency of the Council of Ministers from 1984 to 1992, as well as a member of the Ministry of Defense's Advisory Committee for the inclusion of women in the Armed Forces[68].

She was the Italian negotiator for the United Nations Convention on the Rights of the Child (1986–1989), and she was part of the Italian delegation to the UN World Conference on Women (Nairobi 1985). In 1987, she proposed, as Italy's delegate to the United Nations, to work on a Convention on equal opportunities for persons with disabilities. The Convention on the Rights of Persons with Disabilities. The Convention on the Rights of Persons with Disabilities was ratified by Italy in 2009 and by the European Union in 2010. Thanks to her foresight, at the beginning of the 1990s, a multidisciplinary course on migration and asylum, a PhD offering in international order and human rights, and a masters in international protection of human rights, nowadays named after her, were instituted. And in 1996, she was appointed President of the Commission for Real Property Claims of Displaced Persons and Réfugées. She certainly left a mark on constitutional jurisprudence concerning paid leave for family members caring for the disabled and informed consent[69].

[67] Even if an incurable illness affected her experience at the Court (which, indeed, ended prematurely), she managed to work until the very last possible moment.
[68] See note 13.
[69] The Court, delivering her eulogy, recognized openly her contribution to the recognition of the right to informed consent (breaking the secrecy of deliberations, Judgment No. 438/2008). It is very telling that in the text of the eulogy we can read that all justices 'got acquainted with her'. It went on to state that she had 'that seemingly hasty way of greeting us, her jokes, sometimes even salacious, always tinged with polite irony'. We are not surprised by this way of doing of Saulle that was a clear reaction to the fact that she did not feel to be a part of the bench in the same way as her colleagues did.

Maria Rita Saulle was followed by Marta Cartabia, who was once again appointed by the President of the Republic, then Giorgio Napolitano[70], and whom we will discuss in the following section, as she was the first woman president of the Court. Cartabia's solitude in the Court was interrupted by the appointments of Daria de Pretis and Silvana Sciarra, the latter being the first woman to be elected to the Court by Parliament[71] and, subsequently, its second president.

Daria de Pretis was born in Cles (province of Trento) on October 31, 1956. She joined the Court in 2014 and was appointed vice-President on January 29, 2022. Before her, only Contri and Cartabia had held this position (first time for a professor of administrative law). Daria de Pretis is full professor of administrative law (since 2000). The first full female professor in administrative law in Italy was Francesca Trimarchi Banfi in 1980. In February 2013, Daria de Pretis became the first woman elected as Rector of the University of Trento. At that time, there were only five female Rectors in all the Universities of Italy.

She has been the rapporteur of important decisions on environment, competition, cooperative and credit union banks, tender, city planning, social rights for migrants, and gender balance in politics (among the many decisions we can recall: Judgments Nos. 107/2018, 254/2019, 44/2020, 276/2020, 218/2021, 62 and 112/2022). This clearly exemplifies that once the glass ceiling is broken, women's activity is not circumscribed or limited to gender-specific cases. Rather, competence becomes the sole pivotal criterion that emerges from the inner workings of the ItCC.

As we already noted, by the end of 2020, for the first time, there were four female justices in the ItCC: de Pretis and Sciarra were joined by Emanuela Navarretta, appointed by the President of the Republic; Sergio Mattarella; and by Maria Rosaria San Giorgio, elected by the Court of Cassation. The era of the so-called tokenism

[70] Giorgio Napolitano was the first President to appoint two women. During his two terms as President (2006-2015) he appointed in total five justices.

[71] In January 2025 the Parliament must elect four justices (only 11 justices are currently in office, the bare legal minimum; just a single occasional absence, e.g. due to illness, would paralyze the Court). The vote has been postponed several times in lack of a political agreement. The public debate has been inadequate and superficial. No serious commitment to gender (or generational) balance has been shown by political parties. The foreseeable outcome is that no more than one woman is going to be elected.

had ended[72]. And it ended in particular thanks to the commitment shown by the Presidents of the Republic to the principle of a gender-diverse bench. Indeed, they have appointed a total of six women out of the eight that have been nominated so far[73].

Emanuela Navarretta was born in Campobasso on January 3, 1966. She joined the Court on September 15, 2020. She is full professor of civil law (since 2001). To note, the first female full professors of civil law were Lina Bigliazzi Geri, Giovanna Visintini and Annamaria Galoppini in 1980. Navarretta served as Dean of the Department of legal studies at the University of Pisa (the first female dean out of twenty male deans), and she was also appointed by the High Council of the Judiciary to the board of the School of the Judiciary (first female professor in this role). It is interesting to notice that Navarretta started her career at the Sant'Anna School of Advanced Studies, which, just like the Scuola Normale di Pisa, selects students on the exclusive basis of a public competition. This kind of admission allowed women to enter into the academic contest more easily. Navaretta has been the rapporteur of Judgment No. 131/2022, which recognized the attribution of both parents' surnames to children, as we recalled in Section V.

Finally, in 2020, one of the higher Courts—the Court of Cassation—elected a woman to the Constitutional Court for the very first time[74]: Maria Rosaria San Giorgio[75]. She was born in Naples on July 16, 1952, and joined the Court on December 17, 2020. Before entering the judiciary, she started her career in the

[72] For the use of this expression to indicate an isolated appointment of one or a very small percentage of women with the sole aim of showing that the position is formally open to women see S. J. Kenney, *Choosing Judges: A Bumpy Road to Women's Equality and a Long Way to Go*, Michigan State Law Review 1508 (2012).

[73] To this date, also Sergio Mattarella (President of the Republic since January 31, 2015, currently in his second term), like Giorgio Napolitano, has appointed two women (out of five justices appointed).

[74] At the time of writing, no women have been elected to the ItCC by the other two supreme jurisdictions, namely the Council of State (administrative jurisdiction) and the Court of Auditors, which also elect one justice each.

[75] Female judges of Cassation only started standing for election as constitutional justices from the appointment round before the one in which San Giorgio was elected. It is customary that no Cassation judges may stand for this election, but only those already holding the senior position of section presidents, such as San Giorgio. San Giorgio recorded the podcast on Judgment No. 33/1960, available at the Court's website.

Prefettura[76] of Bologna, in a particularly heated historical period characterized by student protests and acts of terrorism. Then, she passed the selection to become a judge and chose the career of public prosecutor[77]. The last position she held before being elected at the Constitutional Court was judge at the Court of Cassation where she collaborated with Maria Gabriella Luccioli, one of the first eight judges that were selected in 1965. She also worked as assistant (clerk) at the ItCC for a very long period, from 1988 to 2014. At the beginning, in 1988, she was the only female assistant together with another colleague, Lucia Tria[78]. She was the first female judge to be elected to the High Council of the Judiciary and just like Contri she chaired the disciplinary section.

Antonella Sciarrone Alibrandi was born in Milan on May 2, 1965. She joined the Court on November 14, 2023. She is a full professor of Law and Economics (Diritto dell'economia) (since 2001). To note, the first female full professor of Law and Economics was Carla Rabitti Bedogni in 2000. In 2013, Antonella Sciarrone Alibrandi became the first woman appointed vice-rector with vicarious functions at the Università Cattolica del Sacro Cuore (her term was of nine years). Then, in 2022, she has been also the first and only woman to be appointed as Undersecretary of the Holy See's Dicastery for Culture and Education. In 2010, she founded the National Association of Law and Economics Professors and has been its president for 12 years. It is quite remarkable to note that this woman has been able – for the first time - to bring together professors of a scientific academic sector which is, notoriously, quite heterogeneous and fragmentated.

[76] Territorial office of the Government, which depends on the Ministry of the Interior.

[77] In Italy judge and prosecutor belong to the same judicial body, although from time to time – even very recently – a debate arises about the opportunity to distinguish between the two careers in order to avoid interferences and influences between judges and prosecutors, see M. Cartabia, N. Lupo, *The Constitution of Italy. A Contextual Analysis* (2022), 180.

[78] Assistants come either from the judiciary or from academia and are appointed on a discretionary basis by the justices of the ItCC: three for each justice, four for the President. See E. Lamarque, *Who are the Study Assistants of Constitutional Judges*, available at https://www.mpil.de/files/pdf4/Elisabetta_Lamarque.pdf, 02/29/2024. At the time of writing, there are 19 women assistants – 13 judges and six academics – and 23 men.

Table 2: Female Justices in the ItCC

Name	Place of Birth	Date of Birth	Qualification	Appointing (or electing) body	Date of appointment or election	Date of sworn in	End of term	Election as Vice-president	End of term as Vice-president	Election as President	End of term as President
Contri Fernanda	Ivrea (TO)	21/08/1935	Lawyer	President of Republic	04/11/1996	06/11/1996	06/11/2005	10/03/2005	06/11/2005		
Saulle Maria Rita	Caserta	03/12/1935	Professor Emeritus of Internationa Law	President of Republic	04/11/2005	09/11/2005	07/07/2011				
Cartabia Marta	San Giorgio sul Legnano (MI)	14/05/1963	Full Professor of Constitutional Law	President of Republic	02/09/2011	13/09/2011	13/09/2020	12/11/2014	11/12/2019	11/12/2019	13/09/2020
Sciarra Silvana	Trani	24/07/1948	Full Professor of Labour Law	Parliament	06/11/2014	11/11/2014	11/11/2023	29/01/2022	20/09/2022	20/09/2022	11/11/2023
de Petris Daria	Cles (TN)	31/10/1956	Full Professor of Administrative Law	President of Republic	18/10/2014	11/11/2014	11/11/2023	29/01/2022	11/11/2023		
Navarretta Emanuela	Campobasso	03/01/1966	Full Professor of Private Law	President of Republic	09/09/2020	15/09/2020					
San Giorgio Maria Rosaria	Napoli	16/07/1952	President of a chamber of Court of Cassation	Court of Cassation	16/12/2020	17/12/2020					
Sciarrone Alibrandi Antonella	Milano	02/05/1965	Full Professor of Economic Law	President of Republic	06/11/2023	14/11/2023					

Source: own elaboration from Constitutional Court's website.

7. The Two Female Presidents

A crystal ceiling has been broken: I hope to lead the way. I feel the honor to be here as an inspiration for others. I hope to be able to say in the future, as the new Finnish prime minister did, that age and gender don't count in our country either. Because in Italy they still count a little… The fact that I am the first woman elected President is not a

> secondary element within the history of the Court. It is a step ahead for our institutions and democracy[79].

These are Marta Cartabia's words immediately after being unanimously elected as President of the Court in December 2019. Before her, there had been no less than forty-one male presidents.

As already mentioned, Marta Cartabia joined the Court on September 13, 2011, succeeding Maria Rita Saulle[80]. She became vice-President in 2014. Her term of office ended on December 13, 2020. She was the youngest female justice, born in San Giorgio sul Legnano (province of Milan) on May 14, 1963. Like Maria Rosaria San Giorgio, she had previously worked as assistant to a constitutional justice (to Antonio Baldassarre, from 1993 to 1995). A few months after the end of her term, she was appointed as Minister of Justice in the Draghi government (2021–2022). In December 2023, she was appointed as one of the four vice-presidents of the European Commission for Democracy through Law (Venice Commission; she has been a member of the Commission since 2017). She is co-editor of the most important journal of constitutional law in Italy, *Quaderni Costituzionali*, as well as co-founder and co-editor of the first Italian journal of public law in English, *Italian Journal of Public Law*. She is co-president of ICON-S, the International Society of Public Law.

Her intense research activity in the field of constitutionalism has always been characterized by a strong European and international outlook, starting from when she obtained her PhD at the European University Institute of Fiesole (1993). She has held visiting scholarships in many European and U.S. universities: for example, the Inaugural Fellowship at the Straus Institute for Advanced Study in Law and Justice, New York University (2009–2010). She regularly attends the seminar on Global Constitutionalism, part of the Gruber Program for Global Justice and Women's Rights organized by Yale Law School.

Her academic mentors have been men: among others, Valerio Onida (1936–2022, constitutional judge from 1996 and then President of the Constitutional Court until the end of his term in 2005) and Joseph H.H. Weiler (1951, a prominent American

---

[79]< https://www.radioradicale.it/scheda/592763/la-presidente-della-corte-costituzionale-marta-cartabia-incontra-la-stampa?i=4074138>

[80] In the eulogy for Saulle see note 69, Cartabia was welcomed as a very young scholar compared to the average age of the 2011's Court.

academic, who contributed to the legal theory of European integration, who is currently Director of the Jean Monnet Centre for International and Regional Economic Law & Justice at NYU).

Her career as a professor spanned various universities, which is still relatively rare in Italy, and recently led her to the chair of Constitutional Law at the Università Commerciale Luigi Bocconi. She was the first and, so far, only female constitutionalist at the Constitutional Court (she has been full professor since 2000): far more numerous are her male colleagues, of whom twelve (including, as mentioned, her mentor Onida) have also been presidents. Then again, the path for women towards professorships in constitutional law has been a slow process, just as the one towards the judiciary has been: the first woman to become a full professor of constitutional law in Italy was Lorenza Carlassare in 1978[81]. Until then, therefore, no woman was eligible to be elected to the Court as a professor of constitutional law. The comparison with male colleagues is extremely telling: the first professor of constitutional law to be elected President—for the long period from 1962 to 1967—had been Gaspare Ambrosini, full professor since 1911!

The style chosen by Cartabia to lead the Court was one of moderation and collegiality enhancement. She certainly benefited from the authority and trust that her profile and experience guaranteed in the eyes of her colleagues. Likewise, her approach to judging is commonly described as moderate, gentle, reliable, and particularly competent, able to give value to the different options raised by the bench.

Cartabia led the Court in the first year of the pandemic, managing within a few days of the lockdown to ensure that the Court's work proceeded without delay online: not a trivial experience when one considers that, still in 2011, at the beginning of Cartabia's term of office, the seat of the Constitutional Court (Palazzo della Consulta) did not have a wi-fi network.

The pandemic prevented Cartabia, like most of the other justices, from pursuing activities she had previously engaged in, namely visits to both schools and prisons. It is worth observing that these initiatives, especially the last one, gave rise to considerable debates[82]. In fact, these are two very different experiences, but they

[81] While in 1987 Maria Alessandra Sandulli got the first full professorship in Institutions of Public law.

[82] A. Sperti, *Constitutional Courts, Media and Public Opinion* (2023), 102-106.

have in common both the fact that they are absolute novelties in the Court's history and the need to which they respond: to open up the Court to society and to encourage the encounter between one another in order to make the Constitution and the rights and guarantees it provides better known to the public, while also remedying some of the historical shortcomings of civic education in the Italian education system[83].

Shortly after the beginning of Cartabia's presidency, but on the basis of an earlier elaboration, new rules of procedure were approved that expressly contemplated an Italian version of the *amici curiae* and the possibility of courts hearing from experts in non-legal disciplines. On the one hand, provision has been made for any non-profit organization and institutional bodies to submit brief written opinions to the Court, in order to offer useful elements for its knowledge and assessment of the case submitted to it based on their experience in the field. On the other hand, the Court may convene and hear renowned experts from other disciplines to receive input on specific problems that come to the forefront in dealing with the issues at stake.

Under Cartabia's presidency, the Court's website has continued to develop increasingly: a major advancement in a traditionalist environment such as that of the Palazzo della Consulta. In less than ten years, which included Cartabia's tenure, the site underwent a communication revolution in several respects. Firstly, the number of decisions and documents translated into English has increased, as has the speed of translations, now almost simultaneous with the official publication of the pronouncement. In a scholarly forum such as this, it is not necessary to dwell on the importance of such a choice in bringing Italian constitutional jurisprudence into the international discussion. Secondly, the Court's communication services consolidated the practice of issuing/delivering press releases on the decisions that are most awaited by the public or that have a particularly high degree of complexity. Now, on the release day of the Court's decision and while waiting for the official grounds (which are also often

[83] On the contribution of the Constitutional courts (including the ItCC) at improving constitutional literacy see T. Groppi, *Constitutional Jurisdictions in the ICT Revolution. Looking for legitimacy through communication*, VIII Comparative Constitutional Law and Administrative Law Journal 1-63 (2023); M. De Visser, *Promoting Constitutional Literacy: What Role for Courts?*, 23 German Law Journal 1121 (2022).

accompanied by specific press releases), journalists are better positioned to understand and disseminate the news.

The pandemic emergency prompted the introduction of the telematic process. The lockdown was also the occasion for the emergence of new initiatives, such as the Constitutional Court Podcasts, which made it possible to recount a moment in the Court's history or the changes in the lives of people and institutions as a result of constitutional case law.

Although it is impossible to univocally link individual decisions individual justices, Cartabia has been the rapporteur of very important judgments on gender balance in politics, protection of disabled persons, prisoners' rights, compulsory vaccinations, EU law, proportionality of criminal norms, and the effects of the judgments of the ItCC (among many of them, one can recall Judgments Nos. 81/2012, 203/2013, 10/2015, 269/2017, 99/2019, 18/2020, 5/2018)[84].

All presidents issue a report to illustrate the Court's activity in the previous year. What has been mentioned above also applies to these reports: the activity is attributable to the Court as a whole; the contributions of individual justices, including women, are not detectable in the absence of separate opinions—neither is that of the individual presidents, who, as a rule, speak about the months during which they had not yet been elected to that office. Nonetheless, some nuances occasionally emerge in these reports, which can be traced back to the individual ideas of the president, especially when—as is usually the case with those of academic extraction—they echo writings and scientific publications of the same person in their capacity as a scholar. If we take into account the above, as well as Cartabia's overall scholarly activity, and particularly the contents of the two English volumes on Italian constitutional justice on which she worked together with other authors[85], it is possible to highlight, in the report on the activity of

[84] Many of them are discussed in D. Tega, *Rights and Duties in the Italian Constitution*, in D. Tega G. Repetto, G. Piccirilli, S. Ninatti, (eds.), *Italian Constitutional Law in the European Context* (2023).

[85] V. Barsotti, P. G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context* (2017); V. Barsotti, P. G. Carozza, M. Cartabia, A. Simoncini (eds.) *Dialogues on Italian Constitutional Justice. A Comparative Perspective* (2020).

the Constitutional Court in 2019[86], at least some aspects that are typical of the *style* of the first female president: the emphasis on the openness of constitutional justice, both in the sense of institutional communication and in the sense of the procedural innovations referred to; the importance assigned to loyal cooperation between all constitutional powers, as well as to dialogue with supranational institutions, including judicial ones; and a particular attention to criminal matters and to the rights of persons subject to restrictions on personal freedom.

Silvana Sciarra joined the Constitutional Court on November 11, 2014, she was appointed Vice-President in January 2022, and was elected President on September 20, 2022, thus becoming the 46th President since the Court's inception, and the second female. She completed her term on November 11, 2023[87]. We recall that Sciarra was the first (and until now the only) female justice to be elected by Parliament: with 630 votes, sixty more than the prescribed quorum (3/5 of the components). Such a vote indicates a transversal appreciation by different parliamentary forces. After she left the Constitutional Court, she was elected by the High Council of the Judiciary as a member of the board of the Superior School of the Judiciary. The board, unanimously, nominated her as President of the School (first woman in that role), for the term 2024–2028.

She was born in Trani on July 24, 1948, and thereafter lived in Bari, where she received her education. She is Professor Emeritus of labor law and European social law at the University of Florence (she became full professor in 1985). In this academic field, she was the first woman to become a constitutional justice, and the first to be elected President. Since March 2024, she has been President of the Superior School of the Judiciary.

Her scholarly profile is very high; her academic career took place in various university venues; her training and scholarly activity were intense and characterized by a strong European and international outlook; and her mentor was Gino Giugni (1927–2009), a historical figure in Italian labor law and a reformist known among other reasons for having drafted the so-called Workers'

86 https://www.cortecostituzionale.it/documenti/relazione_cartabia/2_sintesi.pdf

87 Her presidency coincided, among other things, with the appointment of Giorgia Meloni as the first female Prime Minister in Italian history.

Statute (Law No. 300 of 1970). The list of fellowships and professorships she held in U.S. and European universities is extensive. From 1994 to 2003, she was the chair of labor law and European social law at the European University Institute in Fiesole, where she was also Director of the Department of Law (1995–1996) and coordinated the gender studies program (2002–2003). She collaborated with the European Commission in many research projects and was for several years co-editor of the renowned legal journal *Giornale di Diritto del Lavoro e di Relazioni Industriali*, as well as member of several editorial boards.

Sciarra's judicial style was energetic and passionate. At the beginning of her presidency, she was able to give new impulse to a tradition—which first started with President Paolo Grossi—whereby constitutional justices visit schools and engage in discussions with students on relevant issues related to the Court's activities. The end of the pandemic also meant that the presence of the Court's President in institutional and international occasions was again feasible. To give at least a couple of examples of her intensive activity, it is important to mention her intervention during the celebration of the seventy years of the Court of Justice of the European Union in 2022[88], and her 2023 intervention at the yearly solen hearing of the European Court of Human Rights, where for the first time, two female presidents (herself and the president of the ECtHR, Siofra O'Leary) sat together[89].

To enhance collegiality, she reintroduced the rule that, in chambers, each case is discussed by all justices in ascending order of seniority. In her view, this guaranteed full opportunities to take the floor, with less hesitation by the ones who had most recently joined the Court.

Despite the impossibility of univocally linking this or individual decisions to individual justices, it can be suggested that Sciarra has been the rapporteur of very important judgments on social rights, labor law, social security law, EU law, and family law

[88] European Court of Justice, *Une justice proche des citoyens* (Luxembourg 2022), 31 https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-05/actes_colloque_70ans.pdf

[89] https://www.echr.coe.int/documents/d/echr/Speech_20230127_Sciarra_JY_ENG

(among many of them one can recall Judgments Nos. 70 and 178/2015, 32/2021, 54 and 67/2022)[90].

The two female presidents shared a particular "era" of the Court, made up of judgments that have been very significant for several reasons: their impact on the public budget, the functioning of the institutions, individual rights, and equality; the new-found protagonism of the Court in transnational legal discourse; the dialogue with international and supranational courts; and the issues that Parliament had failed to find the political synthesis necessary to correct the legislation in force[91]. In this situation, both have found themselves vested with, and have felt, a particularly great responsibility, and have sometimes even contributed, for example, to postponement decisions, in order to increase the time for dialogue, listening, and reflection, inside and outside the Court. Both have relied to the maximum extent on the collegiality of the Court's work, despite the fatigue and self-denial that this entails, to leave maximum room for everyone's contributions of wisdom and sensitivity, including those that come from women's experience, sensitivity, and perseverance. We agree with Erin Delaney and Rosalind Dixon when they recall in this book's Introduction that female chief justice send a powerful signal of inclusion; they serve as a broader role model for women and help promote more gender inclusive practices within a courtroom or judicial deliberation process[92].

---

[90] See also S. Sciarra, *Social Rights Before the Italian Constitutional Court – A Voice from the Bench*, 9 Soziales Recht 285 (2019). Many of the judgments recalled are discussed in D. Tega, *Rights and Duties in the Italian Constitution*, in D. Tega, G. Repetto, G. Piccirilli, S. Ninatti (eds.), *Italian Constitutional Law in the European Context* (2023); D. Tega, *The Italian Court of Cassation and dual preliminarity*, 15 Italian Journal of Public Law 1 (2023); G. Repetto, *Judgment no. 269/2017 and dual preliminarity in the evolution of the jurisprudence of the Italian Constitutional Court*, 15 *Italian Journal of Public Law* 1 (2023).

[91] D. Tega, G. Repetto, G. Piccirilli, S. Ninatti (eds.), *Italian Constitutional Law in the European Context* (2023).

[92] See Erin Delaney and Rosalind Dixon, 'Constitutional Heroines and Feminist Judicial Leadership', in Erin Delaney and Rosalind Dixon (eds), this book. See also, in the same vein, R. Hunter and E. Rackley, *Lady Hale: A Feminist Towering Judge*, in R. Abeyratne, I. Porat (eds.), *Towering judges. A comparative study of Constitutional Judges* (2021), 94; R. Dixon, *Towering versus Collegial Judges: A Comparative Reflection*, ivi, 326.

8. Conclusion

No doubt, much progress has been made since the constituents with a refined legal culture declared themselves convinced of women's inability to judge. In particular, as Maria Rosaria San Giorgio recalls when speaking of Judgment No. 33/1960[93], one of them, Giuseppe Cappi, who would later become the third president of the Constitutional Court, argued that "in women[,] sentiment prevails over reasoning, while in the function of the judge, reasoning must prevail over sentiment."

The wall built on those words and beliefs has been crumbling very slowly yet inexorably. Women's delay in accessing the judiciary gave men a strong advantage—so much so that, even today, although among ordinary judges there are more women than men, top positions are still mostly held by men[94]. And the same can be said within national academia.

A truly execrable exemplification of the above is the delay with which women came to the Constitutional Court—in many cases, also breaking other glass ceilings during their previous careers—and the smallness of their presence. We could synthetize the delay and the recovery with these words: "from tokenism to minority while the move towards parity is still to achieve"[95].

In order to fulfill constitutional adjudication in a pluralist constitutional environment such as the Italian one—which guarantees even deeply conflicting values—women's presence on the bench has long represented the main breaking point in a monocultural society as not deemed necessary or a priority.

Of course, increasing the presence of female judges is first and foremost an end in itself: women should have access to the judicial branch of government regardless of what they do with this tool of influence. This is crucial because it sends a message of inclusion[96]. It is also important because the judiciary needs to be reflective of the diversity of the society it serves[97]. Different voices add variety and depth to all decision-making[98]. But how do female

[93] See note 75.
[94] See data at the end of Section II.
[95] M. Caielli uses these exact words in *Why do women in the judiciary matter? The struggle for gender diversity in European courts*, 5 Federalismi 172 (2018).
[96] See E. Delaney, R. Dixon, *Constitutional Heroines and Feminist Judicial Leadership*, in E. Delaney, R. Dixon (eds.), this book.
[97] See M. Cappelletti, *Giudici legislatori?* (1984), 94.
[98] See Lady Brenda Hale Equality in the Judiciary, Kuttan Menon Memorial Lecture, 21 February 2013, 20, available at <www.supremecourt.uk>. She argues

judges affect discussions in chambers and enrich the content of decisions?

In contrast with the long exclusion of women from the constitutional bench, the first woman who "intruded" upon the ItCC, Contri, openly stated that the arrival of women justices permitted the Court to reach a closer representation of the different underlying interests of legal norms. In her opinion, the cultural and legal debate that animates the moment of the collegial decision benefitted evidently from the knowledge, experience, and perspective of female justices[99].

Bertha Wilson, the first woman named to the Supreme Court of Canada and one of the most memorable female justices globally, once said, "If women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they will make a difference. Perhaps they will succeed in infusing the law with an understanding of what it means to be fully human"[100].

As far as Italian constitutional justice is concerned, it is almost impossible to disguise a gendered orientation. The secrecy of deliberation and the nonexistence of separate opinions makes it impossible to understand the role that a justice plays in deciding a certain issue[101]. More could be understood if the same justice, during her tenure, was constantly appointed to write pronouncements concerning the same topic; this would probably mean that the Court recognizes her special expertise and gives her the opportunity to imprint more of her own style on that strand of rulings. This was the case with Maria Rita Saulle on the issue of disability. But this does not happen very often, because Court's presidents, while valuing the expertise of each justice, must also avoid leaving the same topic in the same hands over and over again, as it risks impoverishing the richness of the value of collegiality.

---

that 'So I agree with Professor Paterson, that what a person can 'bring to the mix' is an important component of his or her merit, at least in a collegiate court where decisions are made in panels. Everyone brings their own "inarticulate premises" to the business of making the choices inevitably involved in judging'.

[99] See note 61.

[100] Madame B. Wilson, *Will Women Judges Really Make a Difference?*, 28 Osgoode Hall Law Journal 507-522 (1990).

[101] It is something pointed out also regarding the EU Court of Justice, see M. Caielli, *Why do women in the judiciary matter? The struggle for gender diversity in European courts*, 5 Federalismi (2018).

Furthermore, we cannot ignore the cultural evolution of society (and of the justices themselves, regardless of gender diversity)—let's think of the Court's two decisions on female adultery—as well as the evolution that legislation played and still plays a significant role in the evolution of the Court's jurisprudence.

Yet, all the female justices who have been interviewed have testified that they feel they have brought something new to the bench. At present, however, we cannot give a definition of what this "something new" is. We suspect that one element of it may be that female constitutional justices are less fearful and more open to propose innovative and even breakthrough solutions. But even this claim would need to be substantiated, at the very least, by further research and specific examples.

We can only give the floor to the female justices that were interviewed. They unanimously expressed the feeling that they brought something new to the understanding of facts and to the resolution of issues, as they were filtered through their experience that, we would add, differs in many ways from that of their male colleagues. It differs in cultural and legal background, in age, and in the life experience which they bear[102]. They pointed out that the female approach sheds a different light on issues discussed in chamber, as it highlights the human dimension of the interests: the suffering, the expectations. It brings a more empathic, concrete, experiential dimension of reasonableness. This contribution—which goes far beyond family issues, thus impacts many fields, such as criminal matters, public finance, tax burden, and economics[103]—also encouraged male justices to embrace a new perspective by revealing to them that there was a flaw in male reasoning.

[102] See S. Cecchi, *Il principio femminile*, 4 giudicedonna.it 7 (2017), referring to the Italian context: women are required to play many roles, switching with flexibility between one another, as they ensure different kinds (i.e., within the family, the society, the work environment) of interpersonal relationships.

[103] For example, consider that de Pretis was the rapporteur of the decisions concerning the structure of cooperative banks and credit union banks (Judgment Nos. 99/2018 and 287/2016); the judgment on the limitation period on the lira-euro exchange rate (No. 216/2015); the judgment on the consequences arising from the Bank of Italy's capital increase (No. 198/ 2023). Cartabia was the rapporteur of Judgment No. 10/2015 which provided for the illegitimacy of a tax law, but postponed the temporal effects of the decision starting from the date of its publication, and not *ex tunc* as is usually the case to avoid a potentially massive adverse effect on the Italian State budget.

We would like to close this first Italian attempt to assess the role of female justices in the ItCC by quoting the words of Gabriella Luccioli, one of the eight women who won the 1965 first competition for the judiciary open to women, with which she tried to define the female contribution to the work of adjudication:

> [P]rofessional experience has long shown me that each judge, in the moment of judging, brings with her own culture, sensitivity and history, and that in the history of women, marked by a long exclusion from the places of power, but recently enriched by the widespread awareness of their gender specificity, finds cause and root in the value of difference: the difference that women can express in the exercise of jurisdiction lies in bringing to it the resource of a specific sensitivity, attention and perspective in the matters to be judged[104].

[104] G. Luccioli, *Diario di una giudice. I miei cinquant'anni in magistratura* (2016). Among other things, Luccioli recounts that the President of the section of the Supreme Court where a woman – she herself – first arrived, in 1990, notified her that she would be assigned mainly family appeals. Luccioli soon developed an interest for the subject. It strikes us, however, that the President of the Court of Cassation – Renato Granata – would later become, in 1996, the 22nd president of the Constitutional Court. If, for Cappi, women were unfit to judge, for Granata they performed better on family issues: a clear example of the persistence of prejudice.

MANAGING POST-PANDEMIC RECOVERY. THE NORMALISATION OF EMERGENCY SOCIO-ECONOMIC MEASURES IN DIFFERENT EUROPEAN [CONSTITUTIONAL] LANDSCAPES

Stefano Civitarese Matteucci[*], *Virginia Campigli*[**], *Alfredo Cartone*[***] *Melania D'Angelosante*[****], *Gianlorenzo Ioannides*[*****], *Mara Maretti*[******]

Abstract

This article expounds on the findings of European-financed research concerning how different States grappled with the socio-economic consequences of the pandemic and to what extent one can envisage non-marginal institutional and policy change towards the post-pandemic phase. The article investigates any connection between what the States are promising and the social impact of the COVID-19 crisis, appraising the general orientation of social policy reform in terms of institutional design and 'philosophical' inspiration. By the latter, we mean a social rights-based approach and an active social policy approach, also termed social investment. Therefore, rather than only seeing how policies impact the socioeconomic situation, we also detect how the socioeconomic situation impacts the general political response. To this end, the article analyses a set of national jurisdictions against the backdrop of a piece of supranational legislation, such as the Recovery and

Finanziato dall'Unione europea NextGenerationEU

The article is part of the project financed by the European Union - NextGenerationEU, program "MUR-Promotion and Development Fund - DM 737/2021", "Managing Post-Pandemic recovery. The normalisation of emergency socio-economic measures in different European constitutional landscapes - PPR19".

[*] Full Professor of Public and Administrative Law, University of Chieti-Pescara
[**] Research Fellow, University of Florence and Chieti-Pescara
[***] Research Fellow, University of Chieti-Pescara
[****] Associate Professor of Administrative Law, University of Chieti-Pescara
[*****] Research Fellow, University of Chieti-Pescara
[*****] Full Professor of Sociology, University of Chieti-Pescara

Resilience Facility (RRF), intended to bring about essential change. The approach is interdisciplinary, involving legal and sociological analysis, and uses much reliable information to chart specific policy patterns valuable for decision-makers.

TABLE OF CONTENTS

1. Introduction. Active social policy vs social rights?

It is acknowledged that the COVID-19 pandemic intensified existing social problems, resulting in new social risks, particularly for the most vulnerable groups[1]. Although European welfare systems are deemed better equipped to face crises, they have still struggled to respond to the situation caused by the COVID-19 pandemic[2]. In addition, the EU Member States and the UK, which

[1] See: Organisation for Economic Co-operation and Development, *COVID-19: Protecting People and Societies*, available at https://www.oecd.org/inclusive-growth/resources/COVID-19-Protecting-people-and-societies.pdf (2020); United Nations, *COVID-19 and Human Rights: We Are All in This Together*, available at https://unsdg.un.org/resources/covid-19-and-human-rights-we-are-all-together (2020).

[2] I. Casquilho-Martins, H. Belchior-Rocha, *Responses to COVID-19 Social and Economic Impacts: A Comparative Analysis in Southern European Countries*, 11(2) Soc. Sci. 1 (2022).

exited the Union amid the pandemic, have different welfare regimes. It is also relevant to contextualise the pandemic crisis and the current political strategies, considering the marks left by the previous 2008 financial crisis[3], which affected the Southern European States more harshly. It has become clear that austerity policies reduced social spending and increased inequalities, causing new risks[4]. In 2014, the European Commission acknowledged that the financial crisis had a clear impact, particularly on employment and poverty levels[5]. Nonetheless, austerity was justified as a pitiful necessity, even though it questioned the principles of equity and social integration on which the European welfare model has been built.

However, during the pandemic crisis, a new anti-austerity narrative has emerged, epitomised by the massive public spending guaranteed by the EU Recovery and Resilience Facility (€ 723 billions to invest in reforms and projects at 2022 prices, of which € 385 billions of funds in loans and € 338 in grants, according to the EU official site[6]). The crucial question is to what extent such a narrative corresponds to a strategy that brings a structural change in social policy. In other words, problematising is paramount if transition means reorganising social policy to boost equality and societal resilience rather than returning to the status quo. Put in such terms, the question is quite generic, though.

How to measure change in social policy is a disputed issue. One of the standard ways is to interrogate statistical data over time regarding, on the one hand, social expenditure and, on the other hand, information such as income, poverty, etc. In particular, the drawbacks of 'welfare effort', that is, social spending as a percentage of GDP, have often been highlighted[7]. This was not,

[3] S. Civitarese Matteucci, S. Halliday, *Social Rights, the Welfare State and European Austerity*, in S. Civitarese Matteucci, S. Halliday (eds.), *Social Rights in an Age of Austerity: European Perspectives*, 3 (2017).

[4] S. Civitarese Matteucci, S. Halliday, *Constitutional Law and Social Welfare After the Economic Crisis*, in F. Merloni, A. Pioggia (eds.), *European Democratic Institutions and Administrations. Cohesion and Innovation in Times of Economic Crisis*, 149 (2018).

[5] European Commission, *Austerity and Poverty in the European Union*, available at http://www.europarl.europa.eu/studies (2014).

[6] See https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en.

[7] J. Olaskoaga, R. Alaez-Aller, P. Diaz-De-Basurto-Uraga, *Beyond Welfare Effort in the Measuring of Welfare States*, 15(3) J. Comp. Policy Anal.: Res. Pract. 274 (2013).

however, the primary endeavour of this study, whose focus was to detect the general orientation of policy reform in terms of institutional design and 'philosophical' inspiration. By the latter, we mean two broad approaches to social policy encompassing several more nuanced characters: a social rights-based approach and an active social policy approach, also termed social investment.

Although not the primary concern of this research, we nonetheless considered social expenditure in the empirical analysis (see Section 3) to develop a specific social indicator – the Expenditure for Social Protection – by combining various expenditure indexes, such as those for welfare, education, healthcare, expenditure borne by families, and pensions. This indicator reflects the social rights-based approach in opposition to the active social policy approach (social investment), for which we identified a different social indicator, Opportunity and Activation.

While the idea of social rights is linked to an unconditional entitlement to certain benefits, social investment emphasises 'activation' vis-à-vis passive universal benefit delivery. The objective of policies oriented towards social investments is to improve the opportunities and abilities of individuals to face *the social risks of post-industrial economies ex-ante* while ensuring high levels of training and employment necessary to sustain the 'carrying capacity' of the Welfare State. Early childhood education and care, lifelong vocational training, active labour market policies, and work-life balance policies such as parental leave and long-term care are activation policies that exceed the logic of the passive welfare policies of the post-World War II period and embody the active social policy approach[8].

It has been noticed[9] that active social policy can be considered a centrist policy that simultaneously appeals to and raises conflict in both the right and left camps. This leads to the tension between Social Democrats' affection for unconditional social rights and the attractiveness of promoting access to employment to help disadvantaged people. Policies that foster human capital development and its efficient use are essential to social investment, such as early childhood education, lifelong training, and active labour market services[10]. Notably, a social

[8] A. Hemerijck, *Towards a European Union of Social Investment Welfare States*, 58(5) Intereconomics 235 (2023).
[9] G. Bonoli, *The origins of active social policy*, 177 (2013).
[10] G. Bonoli, *The origins of active social policy*, cit. at 9, 17.

investment approach has buttressed the Lisbon Agenda, which the European Union adopted in 2000 to make Europe "the most dynamic and competitive knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion, and respect for the environment". Strictly linked to this in the EU Commission's view was the modernisation of social policies to give activation measures a more prominent role. To achieve this aim, "support schemes should provide an exit strategy, so they should in principle be temporary".

A methodological caveat is apposite to the point. As mentioned, policy change is a complex and controversial field, and whether and to what extent change in the law implies policy change is an under-investigated question[11]. However, we assumed that changing the law must be part of this broader picture. This is why we analysed a set of national jurisdictions (see below) against the backdrop of a piece of supranational legislation, such as the Recovery and Resilience Facility (RRF), intended to bring about essential change. Article 4.1 of the relevant EU Regulation (2021/241 of the European Parliament and of the Council of 12 February 2021) reads that "in the context of the COVID-19 crisis, the general objective of the Facility shall be to promote the Union's economic, social and territorial cohesion by improving the resilience, crisis preparedness, adjustment capacity and growth potential of the Member States, *by mitigating the social and economic impact of that crisis, in particular on women, by contributing to the implementation of the European Pillar of Social Rights*…" (added emphasis)[12].

This passage proves the importance of investigating the connections between what the States are promising and the actual

[11] A large amount of data over a sufficiently long period and a counterfactual analysis with a set of norms as independent variables would be necessary to determine such an output, and, however, after accepting certain presuppositions. To our knowledge, there are no attempts of this sort. Only partially similar is the idea of impact evaluation of public policies via the counterfactual analysis, which aims to measure the "causal effect of a policy on outcomes of interest, on which it is expected to have an impact", according to M. Loi, M. Rodrigues, *A note on the impact evaluation of public policies: the counterfactual analysis* (2012), 4.

[12] Through the RFF, the Commission raises funds by borrowing on the capital markets (issuing bonds on behalf of the EU), then made available to the Member States. The latter are expected to address the challenges identified in country-specific recommendations under the European Semester framework of economic and social policy coordination.

situation caused by the COVID-19 crisis. Therefore, rather than only seeing how policies impact the socioeconomic situation, we are also interested in how the socioeconomic situation impacts the general political response.

To this end, after sketching out in Section 2 some basic remarks about the methodological issues, describing the choice of the sample (Section 2.1) and what we searched for in the recovery and resilience plans (Section 2.2), in Section 3 we analyse the two selected Social indicators – *Expenditure for Social Protection* and *Opportunity and Activation* – explaining how they reflect, respectively, the social rights-based approach and the active social policy approach. In Section 4, we engage with the fundamental orientation of policy reform to explain and contextualise some of the implications of the case law survey findings. By combining the information from the recovery and resilience plans (and some relevant social policy legislative measures) with the data obtained from the empirical analysis to investigate any connection between what the States are committing themselves and the social consequences of the COVID-19 crisis – we specifically focus on different issues: the impact of Covid (Section 4.1), as revealed by the empirical analysis; the structure of the sampled national plans and social tools (Section 4.2); the impact of resources intended for social use (Section 4.3), with particular regard to fighting poverty (Section 4.4), social inclusion and work policies (Section 4.5). Section 5 concludes.

2. Methodological issues

We adopted three more analytical tools to refine our analysis, entailing further epistemological assumptions. First, a quantitative study was carried out regarding socioeconomic and social protection indicators through secondary data[13] using the statistical office of the European Union – the Eurostat portal. The ensuing framework aims not primarily to deduce possible social policy effects but to link social policy reform legislation (traceable to one or the other of the two mentioned orientations) to the said indicators (see Sections 3 and 4).

[13] On social research and data analysis see N. Blaikie, *Analyzing Quantitative Data* (2003).

Second, we wanted to discuss such policies against the backdrop of the archetypal classification of welfare regimes in 'families'[14] like other authors have recently done to make sense of social policy measures to tackle the Pandemic[15]. This classification uses the notion of decommodification as opposed to the market forces to shape social relations to cluster the different jurisdictions. The justification for such an approach resides in the idea – well established in the literature – of a path-dependency of successive social policy reforms. We will analyse the States from the point of view of the welfare regime under which they are classified, and, considering this classification, we will question how their social policy is being reformed.

Third, we grouped the selected countries according to their constitutional structure regarding welfare rights. Following a report commissioned by the European Parliament[16], a comparison of the then-28 Member States revealed three models of incorporating social rights in constitutions: a liberal model, a southern European model, and a moderate model. These models overlap to some extent with the welfare regime typology classification, as we will see in the next Section.

The underlying assumptions of what precedes are that specific responses to the problem of welfare normalisation could be expected based on the socioeconomic or welfare-constitutional regime. Such perspectives may align with each other or lead to conflicting outcomes. Nevertheless, our findings show that welfare-constitutional models make little difference since, in the end, contingent political choices give the direction.

As hinted above, a significant part of the measures implemented in the European plans through the RRF aims to tackle social exclusion and poverty. For example, the Italian Recovery and Resilience Plan (2021) deals with such issues in different components, including investments and reforms. Regarding Employment Policies, the plan expressly states that they address the priorities identified by the European Commission in the Country Reports for Italy in 2019 and 2020 reading, respectively, that "active labour market and social policies are effectively

[14] Based on the theories developed by Gøsta Esping-Andersen: see G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990).
[15] S. Börner, M. Seeleib-Kaiser Martin (eds.), *European Social Policy and the COVID-19 Pandemic. Challenges to National Welfare and EU Policy* (2023).
[16] See M.E. Butt, J. Kübert, C.A. Schultz, *Fundamental social rights in Europe* (2000).

integrated and reach out notably to young people and vulnerable groups" (Recommendations COM/2019/512 final, 21 – n. 2) and that "the employment impact of the crisis" should be mitigated, "including through flexible working arrangements and active support to employment" (Post-Covid Recommendations COM/2020/512 final, 9 – n. 2).

Within the "inclusion and cohesion" Policy area, the component "Social infrastructures, families, communities and third sector" "aims to tackle social exclusion, reaching out to vulnerable population groups, mainly through social housing solutions, a strengthened role of national social services and greater access to sports disciplines. Mainly, it supports the national strategy for active inclusion and the fight against the different forms of the vulnerability of the population, worsened because of the epidemiological emergency from COVID-19, through the strengthening of integrated social services, the adoption of innovative models of social housing, the development of the resilience capacity of the most vulnerable subjects, also through the dissemination of the culture of sport".

These two recommendations immediately point to two different constellations. Whether a social right or an activation trajectory prevails depends on the Member State's concrete choices.

2.1 The choice of the sample. Welfare Worlds and Constitutional Commitments to Social Rights

Regarding the choice of the sample, we used two main criteria deriving from the analytical tools discussed above, from which two constraints followed. The first constraint was constituted by the RRF, which, as seen in the previous Section, represents a (supposedly) main driver of the welfare reforms we wanted to chart. The only exception was including the UK in the analysis, given its traditional leading role in Europe regarding the birth and evolution of the welfare state (the Beveridge/Marshall universalistic ideal) and the uniqueness of its case due to the occurrence of the exit from the EU during the pandemic. A specific choice (then not a constraint) regards the fact that we opted for those countries which were included in the research project COVID-19 (https://lexatlas-c19.org/), published open access by Oxford University, as Section V of each country report deals with Social and Employment Protection Measures.

The second constraint was to choose jurisdictions representative of different welfare worlds. Based on this classification, the sample and number of cases under study were selected according to the criteria of an intentional theoretical sample[17]. The selection of cases that are expected, according to their level, to generate new ideas based on beforehand established criteria supported this selection.

As well known, Scandinavian countries are at the furthest end of the decommodification range. Sweden represents this world of welfare in our sample because it simultaneously constitutes the quintessential Nordic welfare state and a country that has long engaged with active social policy[18].

France and Germany traditionally embody the corporatist (Bismarckian) welfare regime. This regime, sometimes labelled conservative, conceives of welfare essentially as a mediator of group-based mutual aid and risk pooling, relying mainly on contributions from potential benefit recipients. Entitlement is based on contributions by the members of the social insurance system. Relatively strict rules of employment protection tend to offer security for inside workers. Among the corporatist regime sits the bulk of the EU Member States, presenting, in turn, various situations regarding social rights entitlements, constitutional structure, and attitude towards active social policies. Belgium, Austria, and the Netherlands show soundly such a variety.

The liberal regime, which includes the UK, is based on the priority of the market, where the state is expected to play a subsidiary welfare role. One of its typical features is that social benefits are usually subject to a means test and targeted at those falling behind in the labour market's competitive environment. Alongside the UK, only Ireland, albeit with caveats (which also apply to the UK), represents the welfare liberal family[19].

[17] See U. Flick, *An Introduction to Qualitative Research* (2009).

[18] G. Bonoli, *The origins of active social policy*, cit. at 9, 71.

[19] Ireland is ambiguous, being in the liberal category based on its low decommodification score but with medium scores on Esping-Andersen's conservatism index: see C. Deeming, *The Lost and the New 'Liberal World' of Welfare Capitalism: A Critical Assessment of Gøsta Esping-Andersen's The Three Worlds of Welfare Capitalism a Quarter Century Later*, 16(3) Soc. Policy Soc. 408 (2017).

According to Ferrera[20] and Sapir[21], countries such as Portugal, Spain, and Italy have a social protection model based on a mixed type of coverage (Bismarkian and Beveridgean) in which pensions represent most social expenditure. They are characterised by high youth unemployment, low female employment and gender inequality, and an imbalance in social protection that is generous for some groups but limited for others[22]. This Southern regime is distinguished by the crucial role of family support systems and can take some elements of any other regimes classified by Esping-Andersen[23]. Labour market policies are poorly developed and selective. The benefits system is uneven, minimalist, and lacks a guaranteed minimum income provision[24].

A partly similar account – in the sense of their ideal-type indeterminacy – applies to ex-communist countries. However, the literature tends to trace Eastern European countries back to the Central European roots they partook of before entering Soviet orbit[25]. Hungary and Poland offer valuable examples of a trajectory that, in the transition from communism to capitalism, presents a mixed picture regarding the return to a corporatist regime and attempts towards a more pronounced commodification.

As mentioned in the previous Section, another criterion for grouping the States in our sample was their constitutional approach to incorporating social rights.

The moderate model compounds liberal stances with a variable degree of commitment to protecting rights, whether as individual rights, as general goals of the State or as a policy to undertake. All the countries labelled corporatist belong to the moderate model, of which France and Germany are the traditional benchmarks. Although fundamental social rights are not explicitly referred to in the German constitution (Grundgesetz-GG), as the

[20] M. Ferrera, *The "Southern Model" of Welfare in Social Europe*, 6(1) J. Eur. Soc. Policy 17 (1996).
[21] A. Sapir, *Globalisation and the Reform of European Social Models*, 44(2) J. Common Mark. Stud. 369 (2006).
[22] M. Ferrera, *The "Southern Model" of Welfare in Social Europe,* cit. at 20 and A. Sapir, *Globalisation and the Reform of European Social Models*, cit. at 21.
[23] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, cit. at 14.
[24] S. Civitarese Matteucci, S. Halliday, *Constitutional Law and Social Welfare After the Economic Crisis*, cit. at 4, 152.
[25] C. Aspalter, K. Jinsoo, P. Sojeung, *Analysing the Welfare State in Poland, the Czech Republic, Hungary and Slovenia: An Ideal-Typical Perspective*, 43(2) Soc. Policy Adm. 170 (2009), 183.

constituent fathers refrained from setting out a specific social programme, the social state principle enshrined in Article 20 GG is meant to require an intervention of the State to guarantee social safety and a subsistence minimum. It is still controversial whether one can speak of social rights as proper human rights or whether such an expression is just used to refer to social policies necessary to make the social state principle somehow concrete[26]. The French constitution of 1958 does not refer to social rights either. Then, one must turn to the Preamble of the 1946 constitution, cited in the Preamble of the 1958 constitution, to look for such rights. We do not find a clear welfare right conferment or a social State clause. However, several provisions of the 1946 constitution are interpreted as enhancing social rights, such as rights to labour, health, social assistance, and education. Viz they are often intended as bringing about indirect effect – that is to say, used as principles either to assess the legality of administrative decisions or as a parameter for the balancing with other values – but not directly judicially enforceable to have the state obliged to positive actions.

The liberal model, including the UK and Austria, according to the cited report, assumes that a liberal stance towards economy and politics is ill at ease with acknowledging constitutional social rights. This position is well expressed in the Joint Committee on Human Rights report, "A Bill of Rights for the UK?" of August 2008, regarding whether and to what extent to include economic and social rights in a Bill of Rights. It purports that there are several reasons why economic and social rights are aspirational policy goals rather than enforceable legal rights[27].

[26] The Constitutional Court recently deduced from the Constitution a right to a dignified minimum existence, coalescing the principle of dignity with the social principle. Still, it is debated whether social rights in Germany can be depicted as directly enforceable in court, while they can be used as a parameter to assess legislation or its administrative implementation: see S. Civitarese Matteucci, G. Repetto, *The expressive function of human dignity: A pragmatic approach to social rights claims*, 23(2) Eur. J. Soc. Sec. 129 (2021).

[27] Such reasons reflect the basic concerns about the protection of social rights, which feature the universal debate on the matter. The first is the imprecision and general formulation of such rights in the charters, which make them unsuitable for court consideration. The second is that the incorporation of social rights would allow the courts to interfere with the functions of the democratically legitimised decision-makers. The third, somehow connected to the second, is that the courts would be inappropriately involved in public resource allocation. Hence, even though social rights found their place in a bill of rights, this could

Finally, the "Southern European model" is distinguished by ample recourse to provisions conferring social rights on individuals, usually covering the various needs to live a decent life, such as income, education, healthcare, social housing, social security, etc. Of course, the meaning and way of implementation of such rights are disputed. However, in the literature, the idea prevails that they should be interpreted as enforceable in court.

We can notice, to a certain extent, a symmetry between the welfare regime typology and how social rights are either entrenched in the constitution or not (see tab. 1). One expects that liberalism is wary of positive rights. Corporatism would instead protect the dynamics favouring mutual inter-class assistance rather than promote individual social rights. As for the Southern model, the strong commitment to social rights is difficult to assess in abstract terms. However, the symmetry reverses in asymmetry here as constitutions entail a transformative function of an underdeveloped welfare regime.

The following table recaps the sampled jurisdictions grouped according to their welfare/constitutional regime.

Tab. 1. Welfare/constitutional regimes of the sampled countries

Welfare regime	*Liberal*	*Nordic*	*Corporatist*	*Southern*
	Ireland, UK	Sweden	Germany, France, Belgium, Austria, the Netherlands, Hungary, Poland	Italy, Spain, Portugal

happen only in a way which avoids bestowing the courts with the power to adjudicate such rights. So, discussing three possible models of "constitutionalising" social rights – the fully justiciable and legally enforceable rights, the directive principles of State policy, and the one called "a duty of progressive realisation of economic and social rights by reasonable legislative and other measures, within available resources" – the Committee endorses the latter as one which can combine the advantages of the other two models whilst avoiding their main drawbacks. In this third model, implementation of the basic commitments spelt out in the Bill of Rights is still primarily through democratic processes rather than the courts. So "there is scope for some judicial role in enforcing the constitutional provision, but the caveats surrounding the definition of the rights mean that there is very little scope indeed for judicial interference with the setting of priorities".

Constitutional social rights	*Liberal*	*Moderate*	*Southern*	
	Austria, UK	Germany, France, Belgium, Netherlands Hungary, Poland	Italy, Spain, Portugal	

Interestingly, the Southern countries end up in the same category under both criteria.

It is healthy to reiterate that this modelling has a relative heuristic value; one finds many variations and contradictory elements. For example, Austria and the United Kingdom provide wide-ranging social safeguards. However, both have a liberal approach regarding constitutional entrenchment of social rights, and the UK belongs to the liberal cluster of welfare families.

2.2 What we searched for in the Recovery and Resilience plans

As previously said (see Section 2), the implementation of national recovery and resilience plans (NRRPs) represents a significant tool of the policy to manage the pandemic crisis and a (supposedly) main driver of the welfare reforms we intended to outline. The Recovery and Resilience Facility (RRF) is the centrepiece of Next Generation EU[28], developed to allow EU Member States to recover from the socio-economic consequences of the COVID-19 pandemic. For our purposes, it finances investment projects and reforms to be implemented until 2026, and it is mainly focused on structural reforms from the perspective of managing

[28] On NGEU as a "new mode of EU policymaking" see L. Schramm, U. Krotz, B. De Witte, *Building 'Next Generation' after the pandemic: The implementation and implications of the EU Covid Recovery Plan*, 60 J. Common Mark. Stud. 7 (2022). On the revival of the European integration process through NGEU, see A. Sandulli, *Economic Planning and Administrative Transformations in the NGEU and NRRP: A Paradigm Shift*, 14(1) Italian Journal of Public Law 3 (2022). For a critical perspective, see P. Leino-Sandberg, M. Ruffert, *Next Generation EU and its Constitutional Ramifications: A Critical Assessment*, 59 Common Mkt. L. Rev. 433 (2022), stressing how NGEU determines a "large-scale and nearly unconditional redistribution of public money among the Member States", with the risk of circumventing the EU Balanced Budget Principle. On these topics, see also R. Crowe, *The EU Recovery Plan: New Dynamics in the Financing of the EU Budget*, in G. Barrett, J.-P. Rageade, D. Wallis, H. Weil (eds.), *The Future of Legal Europe: Will We Trust in It?* Liber Amicorum *in Honour of Wolfgang Heusel* (2021), 117.

post-pandemic recovery. In most cases, these reforms constitute a condition for receiving further funds for investments. The RRF can, therefore, be described as a performance-based tool whereby the disbursement of funds is conditional on the achievement of "milestones" and "targets".

The purpose of our national recovery and resilience plan analysis was then to synthesise information necessary to investigate what reforms introduced by the NRRPs are to achieve, considering the socio-economic asset.

Furthermore, we intended to combine the data collected by studying the NRRPs with those deriving from the statistical analysis. To compare the situation emerging from these statistics with national reforms introduced and implemented through recovery plans, we sorted out specific fields of investigation. We therefore built a table with the following categories:

- **Impact of Covid**. The pandemic has caused different consequences for different population segments, strongly affecting the most vulnerable and disadvantaged. We used the "risk of exclusion" as a reference indicator to measure the impact of Covid. We aimed to investigate to what extent this impact was related to existing (or non-existing) labour and social policies, as well as to what extent this impact is being mitigated by the introduction and/or implementation of new reforms.
- **Structure of the national plans and parts dedicated to social tools (compared to the Next Generation EU approach)**. The intent was to carry out a broader system analysis of the structure and welfare approach of the Next Generation EU scheme by investigating how the individual national plans deal with social issues.
- **Impact of resources intended for social use**. As part of the Next Generation EU funding strategy, the Union raises the RRF funds collectively on capital markets. The distribution of RRF funds is governed by the EU Regulation establishing the RRF (Regulation EU 2021/241 of 12 February 2021). It considers the differences among countries in the severity of the impact of COVID-19 and the capacity of each country to recover. The 70% of grants were allocated for 2021-2022 according to three criteria: the size of a Member State's population, the inverse of its gross domestic product (GDP) per capita, and the average unemployment rate in 2015-2019.

For the remaining 30%, allocated for 2023, the unemployment criterion was replaced by the change in real GDP observed over 2020 and by the aggregated change in real GDP over 2020-2021 (Regulation EU 2021/241)[29]. Because of these criteria, Southern and Central-Eastern Member States received higher shares of grants relative to their gross national income (GNI) and compared to Nordic countries[30]. All Member States have requested the disbursement of grants to the Commission, but only some have requested loans to be reimbursed with relatively low interest rates after 2028.

- **Poverty Fighting (main measures)**. A worrying factor is that income for the lowest groups has collapsed after the COVID-19 pandemic, leading to a significant increase in the percentage of subjects below the extreme poverty threshold. Poverty has significantly increased among the countries we have analysed due to the pandemic crisis. We consequently searched for measures to contrast poverty in the recovery and resilience plans.
- **Social inclusion (main measures)**. The exclusion caused by the COVID-19 pandemic has affected different dimensions. Exclusionary processes impressively resulted in the economic dimension, such as unemployment or precarious employment and consumption capacity, due to the decline in income. Another critical issue is how exclusion affected other dimensions, with processes leading to material deprivation that can directly affect living conditions and access to social rights that form the basis of citizenship. Taking the interconnection of these factors into account in the recovery and resilience plans, we tried to detect an approximate picture of exclusion caused by the crisis and, mainly, the measures adopted to counter this phenomenon.
- **Work policies (main measures)**. The increase in unemployment is a sign of the seriousness of the social effects of a crisis. It is a cause for great concern, frequently

[29] On this allocation see M.D. Guillamón, A.M. Ríos, B. Benito, *An Assessment of Post-COVID-19 EU Recovery Funds and the Distribution of Them among Member States*, 14(11) J. Risk Financ. Manag. 549 (2021).

[30] P. Bisciari, P. Butzen, W. Gelade, W. Melyn, S. Van Parys, *The EU budget and the Next Generation EURecovery Plan: a game changer?*, 2 NBB Economic Review 29 (2021), 34.

monopolising most analyses on the social impact of a crisis. According to Fana et al.[31], young and low-skilled workers have been the most negatively affected by the COVID-19 pandemic, as their fragile labour market position worsened because of redundancies and job losses. Due to COVID-19, Member States faced a protracted youth employment crisis that called for new policy responses[32]. Female workers have been seriously affected by the pandemic, too, being generally overrepresented in economic activities that are most at risk of being disrupted and less transposable to teleworking modality, thus facing an increased probability of falling into poverty[33]. The countries under analysis tried to compensate for the increase in unemployment by introducing support mechanisms for the private sector, allowing the exemption of contributions or the temporary suspension of activity, with the condition that no worker was to be dismissed. As for unemployed workers, unemployment subsidies were granted, new special ones were created, and unemployment benefits were extended. In addition, new hiring, mainly in the health sector, was reinforced, aiming at minimising the effects of the pandemic on employment rates. We chose to include the analysis of work policies because of their connection to the archetypal classification of welfare regimes. Those systems that are more engaged in employment policies assume that this kind of social policy is preferable to implementing income redistribution policies. We questioned how many measures adopted to counter unemployment were introduced or implemented by reforms linked to the recovery plans and what kind of welfare regimes they represent.

In summary, although the information collected was heterogeneous, depending on each recovery and resilience plan's priorities, volumes and impact, a systematic analysis was carried

[31] M. Fana, S. Tolan, S. Torrejon Perez, M.C. Urzi Brancati, E.F. Macias, *The COVID confinement measures and EU labour markets* (2020).

[32] See European Commission, *Joint Employment Report. As adopted by the Council on 9 March 2021* (2021).

[33] P. Profeta, X. Caló, R. Occhiuzzi, *COVID-19 and its economic impact on women and women's poverty*, Study Requested by the FEMM committee, European Parliament, available at http://www.europarl.europa.eu/supporting-analyses (2021).

out based on the above categories. This allowed us to summarise the set of reforms for each country, presenting an exploratory description of countries' policy responses to the socioeconomic impact of the pandemic and evaluating the primary orientation of policy reform. Our research, referring to a continuously evolving picture, photographs the recovery and resilience plans progress in the studied countries until April 2024.

3. Social indicators. *Expenditure for Social Protection* (social rights-based approach) and *Opportunity and Activation* (active social policy approach)

In the first stage of the research, we aimed to examine and compare social expenditure and the conditions of opportunity and well-being in the analysed European countries, using data provided by Eurostat in 2018 and 2021. The data concerned the macro-sectors of welfare, education, and healthcare spending—the selected indicators defined two composite dimensions: *Expenditure for Social Protection* and *Opportunity and Activation*.

The first dimension – Expenditure for Social Protection – combines various expenditure indexes, such as welfare, education, healthcare, family expenditures (out-of-pocket spending), and pensions. This indicator also reflects families' housing conditions (see tab. 2).

The second dimension—opportunity and Activation—is linked to the population's opportunities and socio-economic conditions. It includes data on adult learning, youth employment, digital skills, labour transition (from temporary to permanent employment), tertiary attainment, and the gender employment gap (see tab. 3).

Tab. 2. Indicators of *Expenditure for Social Protection*

Indicator	Description	Source	Occurrence	Unit of measure
Severe Housing Deprivation	It measures the percentage of population living in conditions of severe housing deprivation, considering factors such as overcrowding and poor domestic equipment.	EU-SILC	Annual	%
Government Expenditure by Function	Government expenditure on specific socio-economic functions (health, education, and social protection).	COFOG	Annual	% of GDP

Indicator	Description	Source	Occurrence	Unit of measure
Out-of-Pocket Healthcare	Direct payments by families for health goods and services, recorded at the time of purchase or use of the services.	System of Health Accounts	Annual	% of current healthcare spending
Aggregate Replacement Ratio	Ratio between individual pensions for the 65-74 age group and individual earnings for the 50-59 age group, excluding other social benefits.	EU-SILC	Annual	%

Tab. 3. Indicators of *Opportunity and Activation*

Indicator	Description	Source	Occurrence	Unit of measure	Age
Adult Learning	It measures the participation of adults (25-64 years) in formal or non-formal training in the four weeks preceding the survey.	EU-LFS	Annual	%	25-64 years old
NEET	Percentage of young people (15-29 years) not employed or involved in educational or training courses.	LFS	Annual	% total population	15-29 years old
Digital Skills	Percentage of individuals (16-74 years old) with basic or advanced digital skills.	ICT Survey	Annual	% individuals	16-74 years old
Labour Transition	Percentage of people (16-64 years) on temporary contracts who move to permanent contracts in one-year, three-year average.	EU-SILC	Annual	%	16-64 years old
Tertiary Attainment	Percentage of population (30-34 years) with completed tertiary education (ISCED levels 5-6).	EU-LFS	Annual	%	30-34 years old
Gender Employment Gap	Difference between employment rates of men and women (20-64 years).	EU-LFS	Annual	Difference %	20-64 years old

The data were collected from official sources, namely Eurostat and the OECD database. When the data concerning the United Kingdom were not available and homogeneous with the European classifications, imputation techniques based on historical series analysis were used to implement the available data up to 2019. This occurred particularly for AROPE (see below for the description of AROPE).

In the proposed model, the Expenditure for Social Protection dimension represents the choice of public authorities to intervene directly with economic contributions to support the population in

poor conditions. It *represents a social rights-based approach*, that is, a policy of institutional redistribution aiming to support the categories of the population at risk in a social security logic.

On the other hand, the Opportunity and Activation dimension expresses the analysed countries' tendency to favour activities in line with the perspective of "inclusive and sustainable growth"[34], which is the typical idea of the Social Investment Paradigm.

After defining the social rights-based approach and the active social policy approach based on the selected indicators, we wanted to deeply understand how the policies implemented during the pandemic period adhered to the socio-economic situation of the population. To do so, we set out a set of indicators capable of measuring the risk of poverty and social exclusion in the selected countries. We used AROPE for that purpose, allowing us to calculate the percentage of people at risk of poverty or social exclusion (see tab. 4).

Tab. 4. AROPE 2018-2021 for the countries under study

Country	Arope_2021	Arope_2018
Germany	21,1	18,7
Ireland	20,7	21,1
Spain	26	26,1
France	21	17,4
Italy	24,4	27,3
Hungary	18,4	19,6
Netherlands	16,5	16,7
Austria	17,5	17,5
Poland	15,9	18,9
Portugal	20,1	21,6
Sweden	18,6	18
United Kingdom	23	23,1

The final step was to develop two Cartesian plots (see Fig. 1 and Fig. 2), in which we represented the two social dimensions emerging from the principal social indicators (the Expenditure for Social Protection dimension on the abscissas and the Opportunity

[34] On this perspective see OECD, *Economic Policy Reforms 2018: Going for Growth Interim Report*, available at http://dx.doi.org/10.1787/growth-2018-en (2018).

and Activation dimension on the ordinate axis). The colour represents the intensity of the AROPE indicator. This allowed us to combine the two social dimensions emerging from the principal social indicators (tabs. 2 and 3) and the AROPE index (tab. 4) for 2018 and 2021, providing a graphical, synthetic, and comparative description of social protection expenditures, measures to promote equal opportunities and activation, and the risk of poverty or social exclusion in the selected countries.

Fig. 1. Cartesian plot of social dimensions in 2018

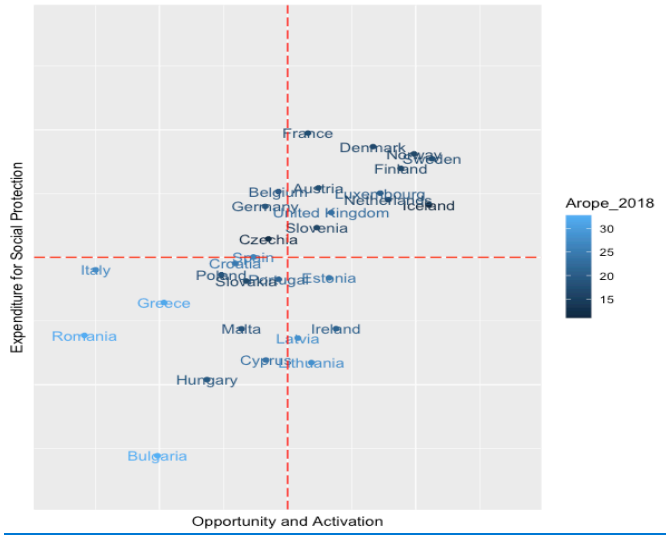
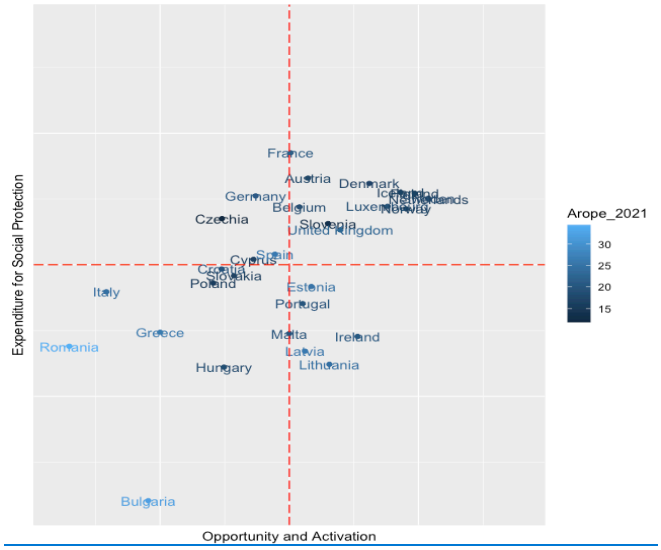


Fig. 2. Cartesian plot of social dimensions in 2021



4. The fundamental orientation of policy reform

We compared information extracted from the recovery and resilience plans (and some relevant social policy legislative measures) with the data obtained from the empirical analysis to investigate whether there is a connection between the States' promises and the social impact of the COVID-19 crisis. By focusing on the primary orientation of policy reform, we wanted to investigate how the socio-economic situation may impact the general political response.

4.1 The impact of Covid

The first question we had to tackle (see Section 2.2 for all the main issues investigated) was the **impact of COVID-19**, which we took on by discussing the empirical analysis's results.

Starting from the two Cartesian plots under Figures 1 and 2, we observed (in the upper right quadrant) that Finland, Denmark, Iceland, Norway, and – as sampled countries in our study – Sweden, Austria, the Netherlands, and the UK are countries with high scores for both Expenditure for Social Protection and Opportunity and Activation dimensions and have a low risk of poverty or social exclusion (low AROPE, colours clear). Nordic countries have thus confirmed their traditional approach to investing more effectively in terms of social protection and activation (presenting a low risk of social exclusion). In addition, it should be stressed that Austria, the Netherlands, and the UK performed well in terms of social protection, and opportunity and activation.

In the lower right quadrant, countries with high scores on the provision of activating services (Opportunity and Activation) but lower than average for Social Protection, with various AROPE risk intensities, are located. We are referring to Ireland and some Eastern European countries. Portugal is more centrally located between the bottom two quadrants.

In the upper left quadrant, we can find countries with high scores on the Expenditure for Social Protection dimension axis but lower scores on the Opportunity and Activation axis, again with various risk intensities AROPE. Among the most significant countries for our study, we can mention Germany and, although in a more central position, France, Belgium, and Spain.

The last quadrant, at the bottom left, contains countries with low Expenditure for Social Protection and Opportunity and Activation scores. Such countries tend to have a higher AROPE risk (darker colours). These countries spend less than the EU average and have a lower impact on preventing poverty, material deprivation, and social exclusion. Among these countries, we must note the presence of Italy, Greece, and several Eastern European countries.

4.2 The structure of the sampled national plans and social tools

However, a strong focus on social issues emerges if one considers the **social policies in the national plans**. This concerns not only, as expected, the countries in the upper right quadrant, with high scores for both expenditures for social protection and opportunity and activation dimensions. As an example, we can mention the Swedish NRRP, marked by measures that impact social rights, directly or indirectly, in all the reforms and investments envisaged (though the most relevant parts for active social policies are described in section 2.2, about "education and transition", and in section 2.5, about "investments for growth and housing"). The same attention towards social issues interestingly characterises (at least on paper) the countries (in the bottom left quadrant) with low scores for Expenditure for Social Protection and Opportunity and Activation.

In Italy, a significant part of the NRRP is linked to social policies, highlighting the interconnections between the strategic and the specific goals and actions. It sets three transversal goals, which are essential from a social policy perspective: gender equality, protection and educational empowerment of young people, and territorial socio-economic cohesion. In November 2023, the European Commission positively assessed[35] the Italian NRRP, including the additional REPowerEU chapter. The Commission has stated that the plan focuses on reforms and investments to improve Italy's growth potential, labour market conditions and social

[35] Commission Staff Working Document, *Analysis of the recovery and resilience plan of Italy Accompanying the document Proposal for a Council Implementing Decision Amending Implementing Decision (EU) (ST 10160/21; ST 10160/21 ADD 1 REV 2) of 13 July 2021 on the approval of the assessment of the recovery and resilience plan for Italy*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023SC0392).

resilience, addressing a significant subset of the economic and social challenges outlined in the Country Specific Recommendations (CSRs) adopted by the Council in 2020[36]. The Italian recovery plan's massive size seems to respond to the challenges of a country whose debt mainly stems from a lack of growth[37].

Portugal, located in the bottom left quadrant in 2018 and moving towards the bottom right quadrant in 2021, has adopted an NRRP that, by leveraging the post-pandemic juncture to affect reforms, responds to the main structural challenges in terms of social and educational needs, as well as healthcare and housing policies, as they interlock with the climate and digital transitions. Overall, the country's movement in the plot might indicate a positive impact of the plan, at least in activation.

Another interesting case is the Polish plan, which includes six components to increase economic development and productivity and support digital and green transitions. Key macroeconomic challenges concern low labour market participation of women and disadvantaged groups, poor health services and the need to improve investments. To this end, the plan: *i)* strengthens economic and social resilience with measures to develop further childcare and long-term care, which should facilitate women's participation in the labour market (thus introducing important activation policies); *ii)* supports the accessibility and effectiveness of the Polish healthcare system; *iii)* finally, includes a comprehensive reform of the disciplinary regime applicable to Polish judges, in terms of judicial independence (which is, actually, one of the primary concern of the plan, being the strengthening of the Rule of Law a central issue).

[36] See https://www.consilium.europa.eu/en/press/press-releases/2020/07/20/european-semester-2020-country-specific-recommendations-adopted/.

[37] In the 2023 CSRs, among other points, the Council recommended that Italy ensure an effective governance, to allow for a steady implementation of its recovery plan. In this context, the European Commission assessed the implementation of Italy's NRRP as under way, albeit with increasing risk of delays: for the 2023 CSRs see www.consilium.europa.eu/en/press/press-releases/2023/06/16/european-semester-2023-country-specific-recommendations-agreed/.

4.3 The impact of resources intended for social use

Given that almost all national plans focus on social issues, the data concerning the conditions of opportunity and well-being in 2021 were a helpful source to measure the (real) impact of resources intended for social use. Evidence shows that what matters is not the level of social spending but its composition and effectiveness[38]. Examining the Cartesian plots in Figures 1 and 2 for the two different periods under investigation (2018 and 2021), we can infer that the movements of the countries in the plots are not significant. The values for *spending on transfers to support poverty conditions* are almost unchanged. However, one notes the movement of nearly all the sampled countries towards the activation paradigm.

Reading the Cartesian plots in light of the welfare regime classification (see Section 2.1), one notes that Nordic countries are distributed evenly in the upper right quadrant. A high level of universal social benefits still characterises the welfare systems of countries such as Denmark, Iceland, Norway, Finland, and Sweden. The upper right quadrant is characterised by high values in social spending and investment in activating services and a low risk of poverty or social exclusion. However, among our sample, Sweden shows a minimal contraction in spending on social protection and activation services between 2018 and 2021.

Regarding corporatist regimes, countries such as Germany, France and Belgium sit at the centre of the graph, suggesting *a balance between spending on social protection and activation services* with lower investments than Northern European countries. Austria and the Netherlands performed well in spending on social protection and activation services, being in the same upper right quadrant of the Nordic countries (although the Netherlands, just like Sweden, showed a minimal contraction in social spending between 2018 and 2021). Germany and France significantly worsened the risk of poverty and social exclusion (AROPE) in 2021 compared to 2018.

On paper, liberal regimes should provide relatively low levels of social spending, with a system of benefits often conditioned by a means test and oriented towards impoverished citizens. These countries are distributed in the right-hand

[38] A. Hemerijck, *Towards a European Union of Social Investment Welfare States*, cit. at 8, 234.

quadrants, which show *high values in investment in activation services but are positioned differently on the axis of social protection spending.* The United Kingdom appears in the Nordic countries' quadrant, while Ireland is in the bottom right quadrant.

Southern European countries and Eastern European countries performed differently. Spain sits in a central position in the graph, while Italy, Hungary, Poland, and partly Portugal share the bottom left quadrant. In these countries, *the activation paradigm does not seem to have significantly penetrated national welfare, although there is a trend in this direction from 2018 to 2021*. This indicates a positive correlation between the Recovery and Resilience Facility goals and the NRRPs, which all essentially emphasise the activation-based approach[39].

4.4 Fighting poverty

Regarding the principal measures for fighting poverty, Italy is a paradigmatic example of the emphasis on the activation-based approach since the two main measures introduced to face poverty based on a social protection approach – the Citizenship Income and the Emergency Income – have been cancelled. More precisely, the Citizenship Income, introduced as the national basic income in 2019 to fight poverty, showed its positive effects during the COVID-19 pandemic, alleviating the socio-economic consequences due to the emergency period. However, it was not enough to cope with the increasing number of impoverished individuals and families. Consequently, in 2020, an extraordinary and temporary antipoverty measure – the Emergency Income – was introduced to face relative and absolute poverty increases. Adopting a complementary antipoverty measure initially made the case for

[39] A caveat is apposite to this statement, which particularly concerns Southern European countries, while for Eastern European countries the RRF funds have been released by the European Commission only more recently (because of the conditionality regulation). However, though by the reading of the respective NRRPs the activation paradigm seems to characterize Hungary and Poland too, at least for Hungary it has been critically noted that the approach to social and labour protection policies has been mainly negligent so far (a mere 3% of the budget) and that "All in all, it has emerged that social and labour objectives were not of high importance for the Hungarian government in the elaboration of the Recovery and Resilience Plan": T. Gyulavári, *National Recovery and Resilience Plan: Hungary*, 15(Special Issue 1) Italian Labour Law e-Journal 12 (2022).

readjusting antipoverty policies towards more equitable distribution and effectiveness[40].

Nevertheless, the Emergency Income was cancelled at the end of 2021. Following this, the Budget Law 2022 did not introduce any structural change to antipoverty policies. Citizenship Income suffered the same fate more recently, having been definitively cancelled on 1 January 2024 (according to Law no. 85 of 2023). This *unveils how a paradigmatic shift towards universalism in fighting poverty is still far from occurring*.

On these topics, the debate has recently been raised in Germany concerning *Bürgergeld* (Citizens' income), planned from 1 January 2023 to replace "Hartz IV" as a social security benefit that people who have worked in Germany can apply for if they have been on unemployment benefits for a prolonged period and have still not been able to find a new job, or if they have worked but need a top-up to their low wage. The raising of the standard rates for subsistence is currently at the forefront of the debate because since 1 January 2024, owing to the substantial rise in the cost of living, the standard rates of *Bürgergeld* have increased by 12%, despite German budget difficulties and the sharp criticism of those who see *Bürgergeld* as an expression of a change away from the concept of strict market-activation.

Nonetheless, though it may seem that Germany is moving towards universalism, the Ministry of Labour recently proposed tightening penalties for *Bürgergeld* recipients who do not comply with their activation obligations. Another proposal, to save budget, was to cancel the bonus for training courses.

4.5 Social inclusion and work policies

Considering the main measures in the national plans regarding social inclusion and work policies, there are significant differences among the sampled countries.

Those belonging to the Nordic regime (Sweden in our study) are spending more on welfare and have more robust social protection and activation achievements. In response to the COVID-19 pandemic, the eligibility criteria for unemployment benefits (including obligations for job search and participation in activation

[40] On the poverty phenomenon and anti-poverty policies in Italy see F. Maino, C.V. De Tommaso, *Fostering Policy Change in Anti-Poverty Schemes in Italy: Still a Long Way to Go*, 11(8) Soc. Sci. 327 (2022).

programmes) were suspended or relaxed in all the Nordic countries, enabling access to income security in case of job loss for many part-time workers, fixed-term workers and other atypical workers[41]. Specific measures were also introduced to support freelancers, entrepreneurs, artists and solo self-employed, as groups often excluded (Norway) or only partially covered (Sweden, Denmark, Finland, Iceland) by the ordinary income protection systems[42]. Though the social protection spending, including labour market spending, was curbed between 2020 and 2021[43], this did not jeopardise the social investment component of Nordic income protection. Active labour market policy spending remained comparatively high (0.95% of GDP in Sweden), complementing unemployment benefits[44]. The social investment component in Nordic active labour market policies is essential in securing a highly skilled workforce. Overall, the Nordic countries have thus proved flexible and robust in managing the pandemic, continuing to sustain social investment[45].

To these countries, we should add Austria and the Netherlands, which are marked by a corporatist regime, and the United Kingdom, which has a liberal regime, proving good both in terms of social protection and activation. This shows how the models (the Nordic, the corporatist and the liberal ones) are not such a relevant factor in investigating current social policies

[41] According to T.P. Larsen, A. Ilsøe, *COVID-19 and Atypical Workers in Times of Crisis*, in T.P. Larsen, A. Ilsøe (eds.), *Non-standard Work in the Nordics. Troubled waters under the still surface* (2021) 192, 210.

[42] See T.P. Larsen, A. Ilsøe, *Nordic Relief Packages and Non-standard Workers: Towards Expanded Universalism and Institutional Inequalities*, 13 Nordic Journal of Working Life Studies 7 (2022), 26 and A. Hedenus, K. Nergaard, *Freelance companies in Norway and Sweden*, in A. Ilsøe, T.P. Larsen (eds.), *Non-standard Work in the Nordics. Troubled waters under the still surface*, cit. at 41, 141. Regarding the system of non-standard work and self-employment in Sweden before COVID-19 crisis see J. Kolsrud, *Sweden: Voluntary unemployment insurance*, in OECD, *The Future of Social Protection: What Works for Non-standard Workers?* (2018), 197.

[43] According to Eurostat, *Government expenditure on Social Protection 2021*, Online database (2023b).

[44] T. Bredgaard, S. Rasmussen, *Dansk arbejdsmarkedspolitik* (2022).

[45] For this analysis of the social investment component of Nordic income protection, remained comparatively high, see C. de la Porte, T. Larsen, *The Nordic Model: Capable of Responding to the Social Side of Crises and Sustaining Social Investment?*, 58(5) Intereconomics 245 (2023), 246.

compared with specific political choices, given that corporatist and liberal countries have had the same results as the Nordic ones.

To offer a more detailed insight, a specific analysis of the Swedish (as an example of the Nordic regime), Austrian (for the corporatist model) plans, and United Kingdom employment-related measures follows.

In the Swedish plan, among the measures for social inclusion, we can mention an investment to support rental housing and student accommodation, as well as several reforms concerning social housing (including the provision that public housing apartments should be distributed between different residential buildings to promote social mixing). Measures for education and training, then, aim to increase job opportunities for the unemployed. This will be done by facilitating structural change, particularly adaptation to the increasingly digital society, through workforce training, greater flexibility in the labour market and increased opportunities. These objectives will be achieved through *i)* reforming labour law and more significant investment opportunities, *ii)* resources in regional adult vocational education, and *iii)* resources for universities. Finally, a specific aim is to guarantee elderly people access to care and healthcare.

In the Austrian plan, instead, as far as work policies are concerned, among the primary measures, we can find: *i)* one education bonus (to reduce school dropouts) as an additional benefit to unemployment benefits; *ii)* a specific financing line for retraining and improving skills; *iii)* measures to support the labour market, strengthening primary education and child support measures; *iv)* further measures regarding long-term assistance; *v)* measures to rebalance the age of access to the labour market and the retirement age of men and women. Reforming the pension system is also connected to work policies, in terms of *i)* the early starter bonus, which is an economic incentive consisting in the increase in pension treatment for periods of work in the 15–20-year age group; *ii)* pension splitting: automatic splitting for young couples with children; *iii)* access to support services and institutions for long-term unemployment.

As for the United Kingdom, the response to the pandemic contained aspects of originality and a commitment to existing policies implemented to face the COVID-19 emergency. The government introduced the Coronavirus Jobs Retention Scheme (CJRS, or "furlough") for those who could not work because of stay-

at-home orders. Under the furlough scheme, the UK government agreed to fund 80% of the gross salary of retained workers. A separate scheme was rolled out for self-employed people, providing equivalent levels of support. While furloughed workers received generous provisions outside the social security system, those who lost jobs relied on a much less generous provision via the government's flagship means-tested social security payment, Universal Credit. Anyway, three changes were made to implement Universal Credit, increasing the generosity of awards[46]. First, the standard allowance for Universal Credit was increased by £20 to £94 per week for 2020 and 2021. Second, Local Housing Allowance, which determines the level of support for housing costs within Universal Credit, was increased. Third, the Minimum Income Floor, which limited awards for self-employed people, was scrapped. These changes temporarily increased the generosity of support the social security system provides.

As for the other sampled countries, the prevalence of the activation paradigm is confirmed by many measures concerning social inclusion and work policies in the analysed plans.

To give some examples, in the French NRRP, active labour market policies play a central role in the measures to fight unemployment. Regarding investments to support education and employment, essential interventions for developing digital skills are planned, such as training programs for updating and reskilling the workforce. Investments favouring young people include supporting educational achievement, strengthening apprenticeships, vocational education and youth employment[47].

In Portugal, following temporary measures such as the "Extraordinary Support to the Maintenance of Employment Contracts", the "Support for Progressive Recovery", and the "Extraordinary Support for the Reduction of Economic Activity" (all introduced in 2020 to immediately cope with the COVID-19 crisis), the NRRP is now providing for the strengthening of assistance to the population with a low inclusion rate and of the

[46] On the UK income support package, centred on the newly created Job Retention Scheme as well as an enhanced Universal Credit for people who became unemployed, see R. Hick, M.P. Murphy, *Common shock, different paths? Comparing social policy responses to COVID-19 in the UK and Ireland*, 55 Soc. Policy Adm. 312 (2021), 315.

[47] See C. Crepaldi, *Un confronto tra quattro Recovery Plan europei*, in Welforum.it (2021).

national strategy for the inclusion of people with disabilities; is strengthening digitalisation as a tool for inclusion; is promoting reform of teaching and professional training. In terms of work policies, the NRRP provides financial incentives for the stabilisation of employment relationships and to defeat precarious employment.

Similarly, in the section concerning socio-economic recovery, the Irish plan mainly focuses on activation strategies, promoting measures to support job reintegration, address skills gaps and prepare the workforce for the green and digital transition, and strengthen higher education and training (which matches the traditional approach of liberal welfare regimes).

Also, the Hungarian NRRP stresses an approach based on activation strategies, as proved by its Component B (on the labour market), aiming at promoting a well-educated and competitive workforce (in line with the Country Specific Recommendations in 2019 and 2020) through the following reforms: *i)* modernisation of higher education infrastructure to meet the needs of the labour market; *ii)* renewal of vocational training; *iii)* promotion of innovation based on higher education institutions. These measures include improving practice-oriented higher education infrastructure, human capacity and innovation, vocational training institutions, digital training materials and establishing a new network for innovative research. As for other relevant social aspects, the plan aims to promote the catching-up of poor villages by fighting poverty in housing and improving living conditions, with a strategy based on supporting public services, community and employability (albeit with inadequate resources[48]).

In Italy, the tools to support workers can only operate if integrated with active policies. The measures within Mission 5, "Inclusion and Cohesion" of the NRRP have thus the objective to reform the system of active labour and professional training policies to introduce and implement essential levels of benefits and promote the employability of workers, with particular attention to the so-called vulnerable subjects, as well as the social inclusion of people in conditions of extreme fragility[49]. As far as social inclusion

[48] According to T. Gyulavári, *National Recovery and Resilience Plan: Hungary*, cit. at 39, 12.

[49] More exactly, the planned reforms and investments are distinguished by component: M5C1 (Component C1 - "Employment policies"), divided into Reforms (Reform of active labour market and professional training policies;

is concerned, a specific resistance against universal and unconditional social systems is confirmed by the legislative reform for not self-sufficient elderly people care provided by Mission 5 - Component 2 ("Social infrastructures, families, communities and third sector"), in the framework of the "European Care Strategy"[50]. The reform process started in October 2022, and the enabling law was approved in March 2023 (law 23 March 2023, no. 33). the Legislative Decree was passed on 15 March 2024, no. 29. Coming to the crucial point for our purposes, while the enabling law wanted a universal benefit – graduated according to need, allowing the non-self-sufficient older adult to opt between a monetary transfer or specific personal services – Decree no. 29/2024 instead introduced an economic benefit (a fixed sum of €850/month, not graduated according to need), based on the principle of *strict selectivity in access*[51].

5. Conclusions

Our comparative analysis suggests two main upshots.

First, one needs to find measures such as direct support without conditions. During the pandemic, regardless of the regime to which they belong, countries generally enacted emergency measures to expand and/or supplement existing social policy instruments. The budgetary rules of the Stability and Growth Pact were suspended, and Member States could spend for social purposes without considering deficits and debt. From this point of view, assessing recovery policies that EU countries developed and

Introduction of a national plan to contrast undeclared work) and Investments (Strengthening of employment centres; Strengthening of the Dual System); M5C2 (Component C2 - "Social infrastructures, families, communities and third sector"), divided into reforms (Introduction by legislative provision of an organic system of interventions in favour of non-self-sufficient elderly people) and Investments (Support for vulnerable people and prevention of the institutionalization of non-self-sufficient elderly people; Independence paths for people with disabilities; Temporary housing and post stations for homeless people; Integrated Urban Plans for overcoming illegal settlements in agriculture).

[50] See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European care strategy*, 7 September 2022, COM/2022/440 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0440.

[51] People under 80 will not be able to benefit from it, and only those over 80 with an ISEE of less than € 6.000 and very serious healthcare needs will be potential recipients.

detecting the relevant socioeconomic criteria applied, our findings can also contribute to further developing the existing debate in the literature on whether the socioeconomic criteria adopted in the distribution of funds after the COVID-19 pandemic have been appropriate[52].

Nonetheless, regardless of the regime they belong to, once the emergency phase was over, there was a return towards activation mechanisms in all countries. In these terms, we can say that welfare models make little difference because, ultimately, contingent political choices give the direction. At the same time, we can stress the limited impact of the respective constitutional programmes on the evolution of welfare regimes. Instead, this kind of evolution was prompted – just in a temporary way – by the pandemic emergency. This raises the question of whether and to what extent constitutions can shape welfare policy[53]; a crucial point is the (limited) potential for constitutional provisions to have an indirect rather than directly enforceable impact on securing social entitlements[54].

Our second conclusion is that the reverse can be said regarding national policy legacies: they help explain differences in the design of the policies adopted in response to COVID-19.

One should note that in the liberal welfare regime of the United Kingdom, the policy response has been quite discontinuous with previous policy legacies. Still, these discontinuities can be explained by considering that the low payment rate of pre-existing social protection schemes required a different response once the pandemic broke out, as the lockdown resulted in the loss of

[52] On this debate on whether the socioeconomic criteria adopted in the distribution of funds have been appropriate (or whether other criteria, such as those of a health nature, should have been considered) see M.D. Guillamón, A.M. Ríos, B. Benito, *An Assessment of Post-COVID-19 EU Recovery Funds and the Distribution of Them among Member States*, cit. at 29.

[53] J. King, *Social rights in comparative constitutional theory*, in G. Jacobsohn, M. Schor (eds.), *Comparative Constitutional Theory* (2018), 144 who situates "thinking about social rights in the broader tradition of constitutionalism" by examining how constitutions have an indirect rather than a directly enforceable impact on securing social entitlements.

[54] From this point of view, the report by the European Parliament cited in Section 2.1 (M.E. Butt, J. Kübert, C.A. Schultz, *Fundamental social rights in Europe*, cit. at 16, 30-31) candidly expresses that "from the wide-ranging social safeguards in Austria and the United Kingdom, however, it is clear that fundamental social rights do not need to be enshrined in the constitution for the public to be assured of basic social services".

employment income for many middle-income workers. That required Covid response programmes to be much more generous than previously existed. In Germany, France and Belgium, existing social insurance systems were expanded temporarily, with a balance between spending on social protection and activation services but lower investments compared to Northern European countries (Germany and France are also suffering a risk of poverty worsening) and a prevalence in the respective NRRPs for activation measures, while in Austria and the Netherlands levels comparable to those of the Nordic systems have been reached. The plans of Poland and Hungary contain measures aimed at social issues, too. However, the primary focus is respecting the Rule of Law[55], albeit with differences between these two countries[56], significantly depending on political opportunities and constraints in political developments[57]. In the Nordic welfare States, institutional continuity proved strong as existing job-retention schemes were temporarily expanded. In Ireland, although the traditional liberal

[55] On the safeguard of the Rule of Law in those countries, it is fitting to mention the two 'twin' rulings of 16 February 2022, lastly adopted by the European Court of Justice (ECJ) on the two actions for annulment brought before the Court by Hungary and Poland, concerning the request for the Court to adjudicate on the compliance with the Treaties of the conditionality mechanism, introduced in the EU legal order through Regulation (EU) 2020/20922 to protect the EU's budget from infringements of the Rule of Law: ECJ, C-156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97; ECJ, C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98. For some comments, see R. Mavrouli, *The Dark Relationship Between the Rule of Law and Liberalism. The New ECJ Decision on the Conditionality Regulation*, 7 European Papers 275 (2022); V. Borger, *Constitutional Identity, the Rule of Law, and the Power of the Purse: The ECJ Approves the Conditionality Mechanism to Protect the Union Budget: Hungary and Poland v. Parliament and Council*, 59 Common Mkt. L. Rev. 1771 (2022). On this topic, see G. della Cananea, *On Law and Politics in the EU: The Rule of Law Conditionality*, 13(1) Italian Journal of Public Law 1 (2021). See also the contributions published in the Volume of the *Italian Journal of Public Law* dedicated to the Rule of Law (Vol. 12, Issue 2, 2020), and particularly: G. della Cananea, *The Rule of Law in Europe: a Contested, but Essential Concept,* 12(2) Italian Journal of Public Law 131 (2020); G. Halmai, *The Fall of the Rule of Law in Hungary and the Complicity of the EU,* 12(2) Italian Journal of Public Law 204 (2020).

[56] On these differences see A. Dudzińska, G. Ilonszki, *Opposition Discourse About National Recovery and Resilience Plans. Poland and Hungary Compared*, 1 Studia Europejskie 37 (2023).

[57] Following the outcomes of R. Csehi, E. Zgut, *'We won't let Brussels dictate us': Eurosceptic populism in Hungary and Poland*, 22(1) Eur. Politics Soc. 53 (2021), identifying different political opportunities and constraints in Hungarian and Polish political developments.

approach of preference towards activation seems confirmed by the NRRP, it cannot be overlooked that the most relevant measures have been taken outside the plan, therefore remaining decisive national policy legacies and choices: first, because the Irish plan does not directly address access to quality and affordable childcare, reserving this issue for Government different actions; second, because as for social housing – one of the most pressing social problem in Ireland –, the two legislative acts mentioned in the plan (the "Affordable Housing Bill 2021" and the "Land Development Agency Bill 2021") had both been proposed in Parliament even before the NRRP was presented to the Commission. As for Italy, we should emphasise the political choice to cancel the Citizenship Income and the Emergency Income, the two main measures introduced to face poverty based on an approach of social protection.

A related point concerns the role embodied by constitutional provisions in the interplay between existing national policy legacies and the courts. From a normative and empirical perspective, despite the recurring idea that social rights are mere programmes for governments to pursue, they are tools to set out a debate between the legislature, the people, and the courts. Normatively, constitutionalising social rights is essential as long as such rights become justifiable at a constitutional level. Empirically, there is enough evidence that well-structured and complex welfare legislation can develop independently from a formal constitutional mandate and that social rights adjudication comes to the fore when adverse political choices or holes in the legislation emerge. It is therefore not surprising that during the pandemic crisis and in its aftermath, such use of the rights discourse in courts has increased, but whether judges should directly enforce subjective social rights claims remains a question of public policy that can only admit national answers[58].

[58] J. King, *Social rights in comparative constitutional theory*, cit. at 53, 144. The role of supranational courts in directly enforcing subjective social rights claims is disputed. The European Court of Justice has somewhat contributed to the interplay between existing national policy legacies and the courts, allowing for some room for specific social rights to guarantee the internal market's correct functioning. For healthcare, a reference is often made to the Watts case about the obligation of the competent national institution to authorise a patient registered with a national health service to obtain, at that institution's expense, hospital treatment in another Member State (the case concerned the reimburse of the cost

Ultimately, the weight of national policy legacies remains strong, while constitutional welfare traditions did not have a decisive impact on how States faced the pandemic emergency. Simultaneously, the fact that all the countries under consideration reacted swiftly to the crisis suggests that economic shocks can trigger some level of social policy convergence. However, in the case of COVID-19, this convergence has only been temporary. Nonetheless, we do believe this awareness of the enduring weight of national policy legacies, on one side, as well as of the impact of economic crises on social policy development, on the other, should facilitate a deeper understanding of both national convergence and divergence in social policy responses to global crises.

of hospital treatment received in France by Mrs. Watts, who resided in the United Kingdom): ECJ (Grand Chamber), C-372/04, *Yvonne Watts v. Bedford Primary Care Trust, Secretary of State for Health*, 16 May 2006, EU:C:2006:325. Nonetheless, the definition of healthcare services as economic services deducible from that judgment risks undermining the conception of healthcare services as universally guaranteed benefits: for this perspective, see S. Civitarese Matteucci, *Servizi sanitari, mercato e «modello sociale europeo»*, 1 *Mercato concorrenza regole* 179 (2009). There are more recent cases where the ECJ has ensured the protection of social rights, such as: ECJ (Fifth Chamber), C-585/19, *Academia de Studii Economice din Bucureşti*, 17 March 2021, EU:C:2021:210, concerning minimum safety and health requirements for the organisation of working time; ECJ (Grand Chamber), C-112/22 and C-223/22, *Procedimento penale a carico di Procura della Repubblica, Tribunale di Napoli e a.*, 29 July 2024, EU:C:2024:636, requiring equal treatment between third-country nationals who are long-term residents and nationals of the Member States in terms of social security, social assistance and social protection. See also ECJ (Fifth Chamber), judgment of 25 November 2020, C-303/19, *Istituto nazionale della previdenza sociale* (Family benefits for long-term residents), EU:C:2020:958. However, the drivers of such case law are always other principles that underpin the internal market construction rather than direct application of the European Social Pillars, the European Social Charter, and the Charter of Fundamental Rights of the European Union.

GLOBAL LAW AND NATIONAL LAW IN LIFE SCIENCES AND TECHNOLOGY: SELECTED INSIGHTS AND PERSPECTIVES

Federico Gustavo Pizzetti[*]

Abstract

The essay briefly addresses dynamics emerging at the crossroads between legal phenomenon and life sciences. In particular, will be explored: the increasing "multilevel" and "transnational" dimension of the law applied to the questions posed by the biosciences; the evolution of the elements used to qualify the juristic personhood as a result of bioengineering in intervening at the beginning and at the end of human life and in creating synthetic organisms; the rethinking of the fundamental values (in Europe and in the U.S.) of autonomy, dignity, and pursuit of happiness facing the powerful capabilities provided by life-sciences in a "disenchanted world" where both the pluralism of moral thoughts flourished and the individualism in respect of one's life-choices bloomed. Finally, a reference will be made also to the "social dimension" of the autonomous health choices: a perspective once tarnished but now rediscovered as the consequence of the fight against the Covid-19 pandemic.

TABLE OF CONTENTS

[*] Full Professor of Constitutional and Public Law, University of Milan.

1. Introduction

This brief essay aims to present some introductory remarks about the multiple intersections between global law and national law under the specific perspective of the advance of life sciences[1].

In particular, three points will be addressed (and a "follow up" will be lastly added): a) the multilevel and transnational characters of the legal phenomenon applied to life science; b) the vagueness of the contours of human legal personhood that the advancement in life sciences contribute to determining; c) the relationship between the principles of autonomy, human dignity and pursuit of happiness as applied to the new potentialities discovered by life science in realizing individual desires and expectations.

Of course, many other aspects of the interaction between life sciences and the law might be opportunely analyzed, including, for example, the rules on scientific and technological research and patenting or the reflection on how the scientific expertise might be relevant in the law-making process for adopting new statutes on the displacement of biomedical technologies or on compelling health interventions, such as vaccination (the so-called "scientific limit" to the parliamentary political discretion: Italian Council of State, No 7045/2021).

This essay, therefore, has no claim to completeness or exhaustiveness. Therefore, the reader is asked to be quite indulgent. Though, the relationship between law and the sciences of life is so complex and multisided, that rivers of ink would not be enough to cover it entirely and thoroughly.

2. The Emerging of the "Biolaw" at the Crossroads between the Law and the Life Sciences

Just to start, it is quite obvious how the disruptive progress of the life sciences (and their related technologies), joined with the

[1] The text roughly draws and in many points adjourn and complements what has been told orally during the panel: "*Science, Technology and the Law*", within the 1st "*Italian-American Dialogues on Constitutionalism of the 21st Century – Global Law vs. National Law?*", under the aegis of the University of California at Berkeley, the University of Bologna and the University of Parma (October 10-11th 2019).

development of the information and digital sciences (and their related technologies) has deeply changed the world we are living in. The human being disposes, today, of many possibilities of choices to intervene in manipulating living processes, human and non-human, at the beginning and the end of life (and also in every other stage of the living existence).

In the contemporary era, society is experiencing various transitions, two of which have significant implications for human health: the "biomedical transition" and the "digital transition". These transformations are reshaping the landscape of healthcare and influencing the ways in which health is understood, monitored, and managed.

For example, today, in intensive care facilities, we may use powerful devices able to resuscitate and to sustain vital functions in bodies, which, in a not too far past, would have become corpses quickly. We may also use different *in vitro* techniques to generate new babies for the benefits of parents affected by situations of insuperable infertility just a few decades ago. New genetic techniques, such as CRISPR/Cas9's, or new genetic products, like OGMs or synthetic DNA, are opening unprecedented capability of tailor-manipulating the very code of life. The neurosciences are trying to understand profoundly and, eventually, to change radically the same human brain — one of the most complex "object" of the Universe and the organ that contributes to making us humans — opening the path to possible, futuristic reprogramming of the neural circuits of memory, cognition, emotions. New tridimensional clusters of cells, cultivated by engineered stem cells (embryonic or induced by adult stem cells), are manufactured to recreate portions of tissues — the so-called "organoids" — which are able to mimic the corresponding *in vivo* organ. They may be used for sophisticated experiments or auto-transplants. Biocomputing, powered by artificial intelligence, may open the way to individualized medicine, while new types of nanomaterials will realize highly sophisticated implants making possible forms of "*cyborgs*," which where before no more than sci-fi imaginations. Brain-computer interfaces (BCI), such as the well-known "*Neuralink*", and brain implants, like deep brain stimulators (DBS), are creating new possibilities for treating neurological impairments or disorders — including communicative, cognitive, and motor

challenges — within the medical field; additionally, these technologies are enhancing the capabilities of individuals without health issues, enabling advancements in activities such as piloting, gaming, working, and home automation, among others. And the examples might continue.

If the life sciences and technologies are so impacting the human existence, realizing a new era, where artificial and natural components are so closely intertwined, the law, precisely as a phenomenon created by the humans for the humans and their environment ("*Cum igitur hominum causa omne ius constitutum sit*" in Digesta, 1.5.2, *Hermogenianus*), could not remain unaffected. Indeed, a new area of legal studies and practices has been developed — the so-called the Biolaw — dedicated to regulate the development and the use of sciences and techniques in genetics, biochemistry, cell biology, reproductive biology, evolutionary biology, ecology, neuroscience, and the behavioral sciences.

3. The Multilevel and Transnational Dimensions of Biolaw

One of the remarkable aspects of the Biolaw seems to be its *multilevel* and *transnational* "constitutional" dimension (where, of course, here "constitutional" refers not only to the sources of law formally considered as "constitutions" — which are not present at supranational level — but also to those principles, values, rights, general rules that are of "constitutional nature" and which composes the emerging trends of global constitutionalism).

Of course, also the *national level* cannot be underestimated in the evolution of Biolaw. It is up to the *national* Constitutions and legal traditions, indeed, to define the fundamental framework within which the case-law, the legal debate, and the new legislative provisions must evolve in the matter of life sciences. The cultural traditions, roots, and values involved in the bioethical questions find primarily in the *national law* their legal environment in terms of legal structures.

In Italy, for example, the Constitution (precisely: Article 2, Personalist principle, and general recognition of human rights; Article 3, Equality principle; Article 13, personal liberty; Article 32, right to health) has been one of most relevant sources of Biolaw (jointly with the Civil Code: Article 5, about the ban on auto-mutilations, or Articles

1218 or 2043 *et seq*., about the breach of contract and tort in the medical relationship, and the Criminal Code: Articles 575 *et seq*., about the crimes of assisted suicide, mercy killing, medical malpractice; and of course jointly also with the other provisions about informed consent and advance directives: Act No 219/2017, or about *in vitro fertilization*: Act No 40/2004, or about transplants: Act No 91/1999, or about the legal criterion of death: Act No 578/1993, and so on…).

However, the same phenomenon, we see in other legal areas nowadays, due to the present globalized world — i.e., the development of general or harmonized rules at the international and global level —is also present in Biolaw.

Indeed, biomedicine does not vary from one country to another one (except, of course, in terms of financial resources or types of medical devices, but that is a matter of national economy and state budget, and not of life sciences). Moreover, the same scientific enterprise is, more and more, connected across the national boundaries by the multiple forms of cooperation between different research groups displaced in several Countries. There are practices, like "*bio-dumping*" — the intentional lowering of ethical or legal standards in one country as to unfairly increase, in that specific country, the research potentials in biology and medicine — and of "*bio-tourism*" — the opportunity to travel abroad, just to find the place where the rules are more favorable to the satisfaction of personal desires in using biomedical technologies — which creates socially unsustainable inequalities. There are complex issues of worldwide magnitude, even more in a structurally globalized world, such as scientific competition between superpowers, the spread of diffusive diseases, human genomics, environmental issues, and so on. There is also the sensitive question of ensuring, by an outside cogent legal framework, the adoption and the respect of human rights face to face the most sensitive types of scientific research or usages of life technology's powers, in those countries where there are not adequately democratic regimes or the rights of the individual are undervalued or not effective.

All these factors have pushed and still push for the development of legal rules at the *supranational* and *international* level, on biological and medical sciences and technologies.

As for the *supranational level*, in Europe, it is noteworthy the European Union Charter of Fundamental Rights (2000), which Articles

1 and 2 protects human dignity and life (preeminent, of course, in the legal debate on life sciences and technologies), and which Article 3, sect. 2 regards the biomedicine explicitly. Many are the EU regulations applicable concerning the life sciences and technologies. Just to provide a couple of examples, the European Union has adopted uniform rules for clinical trials (Regulation No 536/2014) and medical devices (Regulation No 745/2017) or for health data (which are foremost sensitive: Regulation No 679/2016, GDPR). It might also be mentioned the European Convention on Human Rights (1950), which Article 2 — that protects the right to life — and Article 8 — that safeguards right to privacy, intended as the right of each person to be respected in her individual autonomy against state's intrusions, except in narrowed and qualified cases of compelling state interests — had been applied in many cases involving embryos, *in vitro* fertilization, freedom of scientific research, end-of-life issues. The same Council of Europe, which takes the responsibility to implement the ECHR, also promoted the adoption of a Convention on Human Rights and Biomedicine (1997), dedicated explicitly to the definition of standard protection for human rights in the field of medical and biological developments. Numerous are the resolution adopted by the Parliamentary Assembly of the Council of Europe on matters involving life sciences (such as, for example, the Resolution No 613/ 1976 and the Recommendation No 779/1976 on the rights of the sick and dying, or the Recommendation No 1418/1999 about the Protection of the human rights and dignity of the terminally ill and the dying, or the Resolution No 1859/ 2012 about euthanasia).

For the *international level* it is worthy of mention, for example, the so-called Nuremberg Code (1947), where the universal principle of clinical ethics, based on the informed consent of the individual were reaffirmed in the aftermath of the II World War, following the atrocious experiments conducted by the Nazi doctors. The World Health Organization's Constitution (1946) contains no less than the universal definition of the same "health," intended as a state of complete wellbeing also social and relational, and not only as of the absence of illness or infirmity. The United Nations Universal Declaration of Human Rights (1948) contains provisions referable also to the life sciences' field, such as the principle of human dignity and liberty (Article 1), the right to life and liberty (Article 3), the right to be

recognized as a "legal subject" vested of rights and deserving of protection (Article 6). The UN International Covenant on Civil and Political Rights (1966) affirms the right of health (Article 12). Also, the United Nations Organization for Education, Science, and Culture (UNESCO) has adopted relevant — even if not full binding — declarations specifically devoted to promoting the protection of human rights face the advance of life sciences: the Universal Declaration on Human Genome and Human Rights (1997), the International Declaration on Human Genetic Data (2003), the Universal Declaration on Bioethics and Human Rights (2005).

However, the relationship between life sciences and legal phenomena should not be considered as limited only to those aforementioned legal sources. Indeed, in parallel with the above *multilevel dimension* (international, supranational, national legal rules on life sciences and technologies), the Biolaw is also characterized by a sort of "*transnational*" dynamic, which is flowing and flowering "horizontally" across the nations' porous boundaries, making a country permeable to legal solutions invented and adopted abroad.

As aforesaid, the advance of life sciences and technologies does not differ too much across the developed areas of the world. As a consequence, when, in a certain country, arise a case that happened akin in another country, the legal (and ethical) questions might be the same. And if the two countries share a similar, or converging system of juridical values and rights, the resemblance of the case happened in one country spur the state powers (mainly, the judges, also encouraged by the activity of the lawyers and the legal doctrine) to have a look outside the national frontiers, trying to find in the other country's legal framework tips and solutions. In cases involving the usage and the limits of biomedical resources (such as transplants, genetic engineering, end-of-life decision-making process, *in vitro* fertilization, neuroscientific pieces of evidence), the courts are favorable to cite legal principles affirmed or shaped by other courts in different jurisdictions. For example, in Italy, the Court of Cassation, No 21748/2007, has cited the judgments of the United States Supreme Court, *Cruzan v. Missouri Department of Health*, 497 US 261 (1990) and of the New Jersey Supreme Court, *In re Quinlan*, 70 NJ. 10, 355 A.2d 647 (NJ 1976) in an Italian case regarding the end-of-life decision-making process of an incompetent patient, and in a subsequent case regarding the crime of assisted

suicide in a medical context, the Italian Constitutional Court, No 135/2024 has widely cited the precedents of other European and non-European Supreme or Constitutional Courts, such as the German *BundesVerfassungsGericht*, 26 February 2020, No 2 BvR 2347/15 (*et seq*.), the Austrian *VerfassungsGericht*, 11 December 2020, No G 139/2019-71, the Spanish *Tribunal Constitucional*, 22 March 2023, No 4057/2021, the Supreme Court of Canada, *Carter v. Canada*, 2015 CSC 5, or the UK Supreme Court, *R (Nicklinson et al.) v. Ministry of Justice*, [2014] UKSC 38.

The "intra-circulation" of legal solutions and rules across the national boundaries, which contributes to the *transnational* dimension of the Biolaw, is also encouraged by other types of rules, adopted outside the traditional circuit of the political lawmakers, or the judiciary. Those rules, in the form of ethical codes, best practices, clinical guidelines, are shaped, in the first place, by the same professionals (physicians, scientists, researches, …) through their associations which are representatives of many different Countries, and therefore "transnational". Afterward, those rules, born originally outside the legal framework, become *formants* or *components* of the same legal framework, as *soft-law*: a flexible form of regulation, subject to revision by physicians and health professionals, and used by the courts as to interpret as instruments to interpret open-clauses (such as "health," or "good clinical practices," or "physical integrity," or "autonomy") in current laws or Constitutions.

About those "transnational" documents, one may refer to the statements adopted by the World Medical Association: the Declaration of Geneva, (1948, latest rev.: 2017), based on the Hippocratic Oath, the International Code of Medical Ethics (1949, latest rev.: 2006), on physicians' duties, the Declaration of Helsinki (1964, latest rev. 2013) on clinical trials, the Declaration on euthanasia and physician-assisted suicide which have banned those interventions. Other documents that might be cited are the *Belmont Report* (1979), drafted by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, which has posed the ethical principles of respect for the integrity and of balancing risk/benefits, or the Good Clinical Practice, detailed by the International Council for Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use, which has inspired EU legislation. The Steering

Committee on Bioethics (CDBI) of the Council of Europe have promoted general ethical guides, such as the Guide for Research Ethics Committee Members (2010), the Guide on the decision-making process regarding medical treatment in end-of-life situations (2014), the Guide for the implementation of the principle of prohibition of financial gain with respect to the human body and its parts from living or deceased donors (2018). There are also the Codes of Medical Ethics adopted by national medical associations (in Italy, FNOMCeO, 2014, latest rev. 2020) and the reports and guidelines approved by the national bioethical committees.

4. The Blurring Contours of the Legal Personhood in Biolaw

The advance of life sciences and techniques, precisely because of its capacity to artificially create or sustain human life, at the beginning and the ending, it is having a tremendous impact on the traditional boundaries of human legal personhood.

For centuries, the natural boundaries of human life, in its intimate components, remained without any notable change. Therefore, at least until recent decades, it was still acceptable to argue that the boundaries of human life — the birth as well as the death — should be considered, by the legal phenomenon, nothing more than mere natural events in respect of which nothing particularly complicated had to be established by the same law ("*Der Tod als die Grenze der natürlichen Rechtsfähigkeit ist ein so einfaches Naturereignis, daß derselbe nicht so wie die Geburt eine genauere Feststellung seiner Elemente nötig macht*": Carl Frederich von Savigny, *System des heutigen Römischen Rechts* (1840), vol. II, § 63).

On the contrary, today, for example, the death could be avoided — of course not always (we are still mortal beings…) — by life-saving and life-sustaining supports, making the prolongation of life something "artificial." That has brought the law to adopt, over the last decades, different definitions of death, and therefore of cease of legal personhood, according to the same intensive care's evolution in resuscitating and recovering patients.

For example, the traditional definition of death, adopted by the classical thanatology, and based on the cessation of the breath, became outdated after the invention of the artificial ventilator that made it

possible to support the lungs indefinitely. The definition of death based on the irreversible cardiac-arrest becomes questioned when there were invented and applied the cardio-pulmonary machine, the extracorporeal circulation, the transplant of heart. All those advances in biomedicine, in fact, made it possible to support vital functions, prolonging life, even when the hearth has been stopped or has to be transplanted. Therefore, it has been deemed appropriate to identify in the brain, the organ whose irreversible and total failure implies having crossed the border of death (*Ad Hoc Committee of the Harvard Medical School to Examine Brain Death*, 1968). However, also this last criterion is today sometimes disputed. For someone, the legal criterion of death should be anchored exclusively to the irreversible shutdown of a portion only of the brain: the cortex, as the unique seat of our higher typical human features, like consciousness. They argue that because the individuals, who do not have any possibility of self-awareness, are continuing to function only in their "metabolism," thanks to machines, they might be considered, at least legally, as dead. For someone else, on the contrary, we cannot be sure that the persons without an active brain-cortex — the so-called "*vegetative state*" — cannot have "feelings," and the same diagnosis of that condition is sometimes very difficult. And, in any case, they argue that the human being cannot be reduced "only" to his higher cognitive functions.

In any case, whatever the outcome of this debate, and the reflexes that discoveries on the brain by neurosciences could have in the next future, all this shows how the ultimate boundary of the human legal person (*death*), once "natural" and "indisputable," has "moved" following the advance of biomedicine.

And there is even more. Italian Act No. 10/2020, which addresses the donation of cadavers for scientific research and medical education, explicitly establishes that the deceased body is, in itself, a subject of legal protection. This marks a significant shift, as it indicates that current legislative efforts recognize that even after life has ended, a human being, though having lost *legal personhood*, retains a form of "*subjectivity*." It is this *legal subjectivity* that ensures the corpse is not merely perceived as an "*object*," but rather that it holds an inherent *status* connected to the individual it represents, thereby deserving protection from misuse.

Even birth is no more just a simple natural occurrence. It might be, in fact, the result of the precise choice of intervention that uses manipulative genetics. The process of generation has become, in some instances, mostly artificial. The *in vitro fertilization* procedures have made it possible to make manipulations on the embryos in various ways, opening the moral and the legal question of their status and the protection those embryos might deserve since the conceiving.

That has dragged, of course, the problem of when and under which conditions, the legal personhood might commence, even before the traditional moment of birth — as the detach of living, even if not lively, fetus from the uterus — and therefore, what should be the legal status of the embryo.

For example, the European Court of Human Rights affirmed the principle that human embryos *cannot be reduced to mere "possessions,"* according to Article 1 of Protocol I of the same convention (European Court of Human Rights, No 46470/11, *Parrillo*). Therefore, according to the Court, even if they might not be appropriately considered as vested of legal personhood, the embryos should certainly not be regarded as mere "objects." The Court of Justice of the European Union reiterated the principle that to consider a specific entity a human embryo — *not* patentable in light of the dignity principle according to the Article 6, Sect. 2 (c) Directive n. 98/44/EC and to the Article 1 of the EU Charter of Fundamental Rights — it is necessary the cells possess the inherent capacity of developing into a human being (EU Court of Justice, No C-36/13, *International Stem Cell Corporation* and No C-34/10, *Oliver Brüstle*). Under that point of view, not *all* the results of genetic manipulations using human re-engineered cells might be considered embryos and, therefore, worthy of dignity as human beings are. The Italian Constitutional Court has considered the embryo as an entity that has, in itself, the origin of life and, consequently, has dignity and some constitutionally relevant rights under Article 2 of the Italian Constitution (although in a stage of development not yet defined by law and that has not been unanimously ascertained by scientists: Italian Constitutional Court, No 84/2016). The same Court also affirmed that an embryo has a certain level of legal subjectivity related to the genesis of life inside it (Italian Constitutional Court, No. 229/2015). At the same time, the legal safeguarding of the fetus (and of the embryo) cannot be considered equivalent to the legal protection

of the mother. According to the Italian Constitutional Court, the fetus (and the embryo) is not yet a full legal person, whereas, on the contrary, the woman holds full legal personhood (Italian Constitutional Court, No 27/1975). An analogous argument — that the fetus is not a "person" even if it is not an "object" — has been used, as known, by the U.S. Supreme Court in Roe v. Wade (410 U.S. 113 (1973)), before the overruling by *Dobbs v. Jackson Women's Health Organization* (597 US 2015 (2022)), and by the Supreme Court of Canada in *Tremblay v. Daigle* ([1989] 2 S.C.R. 530).

All those cases seem to reveal a sort of tendency in favor of the recognition of the dignity and of a degree of legal "subjectivity," even if *not full legal personhood*, also to not-yet-born human entities. At least, if those not-yet-born entities possess the principle of human life, and if they have a recognizable capability to self-develop into a human being (of course, with the support of a uterus or an incubator).

All the above reveals how the boundaries of human legal personhood, also for the beginning (*pre-birth*), are now "moving."

But there is even more.

Although it might be just futuristic, indeed, one shall not underestimate the results of some other experiments in life sciences, that might pose further questions about the legal personhood of certain biological entities.

Apart from the case of chimeras or hybrids (generally forbidden by the law) and of artificially intelligent machines (which are *not biological entities*), is the creation of the "organoids" that is opening a problematic scenario. In particular, it is one type of organoid that could pose the most difficult questions: the *cerebral organoid*. It is true that, until today, the development of these human brain organoids has not yet reached the threshold of any form of sophisticated human sensitivity or intelligence. However, one side, the brain organoids today realized, are already able to generate some brainwaves, which are quite similar to human brainwaves at a particular stage of fetus' development; and we cannot exclude for sure that they might "feel" forms of suffering in the near future. In the far future, the cerebral organoids might be let evolving until to became authentic pieces of "human brain," of course only in a Petri dish, but living and "sentient": "something" that, for sure, cannot be reducible to simple "object." As a consequence, one might pose the question of whether or not we have

to recognize some "status" to these "organoids." It could be a legal status different from the one of mere "possessions" (or "objects"). It would be difficult, in fact, to qualify those active and "sentient" pieces of human brain, just mere "things." At the same time, even if these organoids go so far, as to become extremely sophisticated, they would be, in any case, different from a human being. A human being, in fact, is not composed "only" of brain cells. Therefore, they should not be equated to a human body of course; either, they should not be compared to the embryos, which are able to develop into a "complete" human being (a fetus first, a baby after) and not just into a "piece of the brain." Consequently, one cannot argue, for sure, to assign any full "legal personhood" to the living brain cells of the organoid. However, it cannot be excluded that a further debate might arise about how about legally consider these "mini-brains" and if they might be vested of some "legal subjectivity" (lower than legal personhood). That will boost, of course, the complexity of the scenario related to the boundaries of the "legal personhood" far beyond the problems posed today by the embryos.

However, the debate on the frontiers of the legal personhood does not cover the human being solely (or the human cells, like embryos or cerebral organoids).

It is far from dormant the debate whether or not "a sort of" legal personhood shall also be recognized to non-human animals, at least those who seem to have higher cognitive capabilities (and sufficient neural architecture to "feel" pain).

Under this point of view, there are philosophical doctrines that argue the opportunity to "create" a new "category" of entities, in between the "subject" (human being) and the "object" (the "possessions" or "things"): the category of "*ethical objects*."

The formula reveals the "intermediate" nature of those entities, which are floating above the sharp distinction between mere "objects," which does not possess any moral status, and the persons, who, of course, do possess a full moral status.

Under a certain aspect, this new formula might not be limited just to the bioethical debate. Indeed, the recognition of "moral status" to the "ethical objects" may lead the pathway to a modification of the same legal category of "legal personhood" we are familiarized with, eventually by the recognition of some forms of "legal subjectivity" (if

not the recognition of a form of proper "legal personhood") to these "living entities." And this category might encompass, for example, also the "brain organoids."

All the brief considerations above — about the canons for the definition of death, at the end of life; about the uncertain status of the embryo (admittedly, not a "thing," perhaps a "subject" but not a "legal person") at the beginning of life; and about the status of some non-human "entities" (cerebral organoids, animals) at a specific high stage of development (sensitivity to pain, for example) — show how the evolution of life sciences opens up complex and uncertain scenarios in respect of the once much more stable legal concepts of "person," "subject," and "object." The aforesaid changing contours of juridical personhood status about "living entities" have also to cope with the "parallel" debate about attributing, or excluding, some form of legal position to "non-living" entities which show some peculiar characteristics of "autonomous" and self-adaptive behavior, as the result of deep-learning algorithmic activity. Obviously, this refers to the wide realm of sophisticated Artificial Intelligence's devices, which development is increasing rapidly. It is well known that there was a legal initiative to establish a new form of juridical personhood for robots and A.I.: a sort of "electronic personhood" (*Recommendation to the European Commission on Civil Law Rules on Robotics*, adopted by the EU Parliament on 16 February 2017 ((2015/2103(INL)). However, this initiative was rebutted by a subsequent vote of the same EU House ("*Recommendations to the Commission on a civil liability regime for artificial intelligence*" on 20 October 2020 (2020/2014(INL)). As a matter of fact, the newest EU Regulation No 2024/1689 ("AI Act") does not recognize any form of juristic personhood to AI's devices. In Italian Law, robots and the A.I. systems, despite their eventual higher technological sophistication, and even if they possess some form of deep learning capability or autonomy (in terms of ability to self-infer new solutions for variant operational contexts), are still considered "tools" and, therefore, "legal objects" (not "subjects").

5. Autonomy, Dignity, and Pursuit of Happiness as Principles of Biolaw

The advance of life sciences and technologies during the last decades took place in a "disenchanted world," where ideological, cultural, and ethical pluralism bloomed.

The dissolution of the authority's principle and the sunset of common moral ground in the society have progressively determined new ways to conceive society and authority. The external authorities (such as the State, or the physicians) were no more being credited as the "sole mentors" (under a "paternalistic" point of view) of the individual "health" and "wellbeing." What constitutes "health" or "wellbeing" of each individual — it has been affirmed — shall be decided by the same individual, according to her identity, moral preferences, and values.

As a consequence, the principle of personal autonomy became central in the juridical approach to questions regarding life sciences and technologies. Those questions, in fact, are strictly intertwined with the concept of health and psychophysical integrity. They are also so dependent to the different "life choices" (and "life projects") made possible by the opportunities opened by the same biomedicine and biology.

The rise of the individual liberty in respect of choices regarding biology and medicine has been reinforced by the national constitutions and supranational/international charters adopted at the different levels of government. Those documents, in fact, coherently with the paradigm of the pluralistic democracy grounded on the rule of law (spread all over the West and in many cases also outside the West, since the aftermath of the II World War), do widely protect self-determination and allow the intervention of the state only under the law, solely for compelling public interests and strictly within the boundaries of proportionality and reasonability.

For example, the principle of self-autonomy (and of the informed consent) has been recognized and guaranteed by Article 6 of the UNESCO Universal Declaration on Bioethics and Human Rights (2005); by Article 3, paragraph 2, of the EU Charter of Fundamental Rights; by the Article 8 of the European Convention on Human Rights; by the Article 5 of the Convention on Human Rights and Biomedicine; by the Articles 2, 13 and 32 of the Italian Constitution, and so on. The

rule of informed consent has been rooted in U.S. since the cases of *Mohr v. Williams* [104 Minn. 261, 116 N.W. 351 (1908)] and *Schloendorff v. Society of N.Y. Hospital* [211 N.Y. 125, 105 N.E. 92 (1914)]. In China, Article 109 of the Civil Code (2020) states that the personal liberty of an individual has to be safeguarded by law. Regarding life-sciences in particular, the Chinese Civil Code adopts the principle of informed consent in medical treatments (Article 1219), in clinical trials (Article 1008), in organ donation (Article 1006).

Today, Biolaw will face tremendous challenges in safeguarding autonomy of the individual moving from the realm of bodily integrity ("*habeas corpus*") up to the "*sancta sanctorum*" of the same mental/brain integrity ("*habeas mentem*"). New bio-technologies, like bran-computer interfaces (BCI), combining also Artificial Intelligence devices, are able to establish powerful and reliable bridges between the cerebral activity *in vivo* and the outside. The OECD Recommendation on "Responsible Innovation in Neurotechnology", adopted on Dec. 11, 2019, defines "neuro-technologies" as devices and procedures used to access, monitor, analyze, evaluate, manipulate, and/or emulate the structure and functioning of the neuronal systems of natural persons. These include brain-computer interfaces, neuroimaging techniques, and neuro-stimulation devices. The opportunities they present for health and personality development, especially for people with disabilities, are immense. However, it's crucial to acknowledge that they also pose potential risks that need to be carefully addressed. This requires establishing a robust regulatory framework that aligns with the principle of the centrality of the human person and safeguards fundamental rights. These fundamental rights encompass evolved freedoms such as "cognitive freedom," which ensures that individuals maintain complete and autonomous conscious control over their mental states and cognitive functions when using those type of technologies. In the U.S., Colorado and California have enacted laws classifying "neural data" — information from the nervous system treated by a device — as "sensitive personal information". This designation subjects such data to strict standards, including consumer consent, data collection limits, and individuals' rights to access and delete data (Section 1798.140 of California Civil Code; Section 6-1-1303 of Colorado Revised Statutes). In Spain, the non-statutory (and not legally binding) Charter of Digital Rights ("*Carta de Derechos Digitales*")

establishes "neuro-rights" emphasizing personal autonomy and data security related to neural processes (Article XXVI). Chile's constitutional reform mandates the protection of brain signals under the right to physical and psychological liberty, promoting individuals' integrity and well-being (art. 19, 1st sect. Constitution of Chile). While, there are some sector-specific rules (such as those governing privacy, AI, medical devices, and products), that might also apply to neuro-devices aiming to protect human dignity and personal rights, a comprehensive legal framework, at international or supranational level, specifically addressing neuro-technologies "as such" is still not effective. As a matter of fact, there is a significant doctrinal and political debate at the supranational level to enshrine "neuro-rights" into legal acts. UNESCO's Ad Hoc Group is developing a "Recommendation on the Ethics of Neurotechnology" to establish ethical and legal guidelines for developing and using neuro-technologies. This recommendation will be deliberated and adopted during the 53rd session of the General Conference in November 2025.

Besides the principle of autonomy, it is also ubiquitous in Biolaw the principle of (human) dignity.

The human dignity has had different meanings throughout history, and it would be out of the limits of these brief remarks, to plunge into the details of a so complex and multilayered philosophical, bioethical and legal concept. In the Roman era, Cicero referred the idea of dignity to differentiation and hierarchy in honor and public virtue between the individuals; on the contrary, the dignity it has been evaluated as a quality inherent to the human being, and therefore linked with the principle of equality, because of his own ontological status and therefore identical for all, in the Christian thought. Also, in the secular thought, human dignity has been conceived as a common quality of every man, starting from the Renaissance, by Pico della Mirandola, and then during the Enlightenment, by Kant, in relation to the man as a being entity endowed with conscience and reason. For Proudhon, and his economic-political thinking during the Industrial Revolution, dignity is linked to the need to ensure everyone, through appropriate social interventions, a dignified existence as free from misery, and therefore could be the base of substantive equality principle social rights.

Although there are no codified definitions of dignity in legislative texts, dignity is generally recognized as a universal, inviolable, inalienable principle of value which pertains to every human being (subject) and which constitutes the very basis, the very substance, of fundamental rights, as well as the (metaphorical) "balance" on which are weighted the fundamental rights.

In the aftermath of the II World War, the principle of dignity has been solemnly proclaimed, in legal forms at various levels, international, supranational, and constitutional.

The human dignity has been stated in the Preamble and Article 1 of the UN Universal Declaration of Human Rights; in the Articles 1 and 2 of the UNESCO Universal Declaration on Bioethics and Human Rights; in the Article 10 of the International Covenant on Civil and Political Rights; in the Article 13 of the International Covenant on Economic, Social and Cultural Rights; in the Article 1 of the Convention on Human Rights and Biomedicine; in the Preamble and Article 1 of the EU Charter of Fundamental Rights. The Italian Constitution refers to the fundamental principle of human dignity in the Article 2 and in the Article 3 where it is stated connected with social equality, and it identifies the respect for human dignity as both a limit to the freedom to conduct business, in the Article 41, and as an objective to be protected in the employment relationships, in the Article 38. In China, human dignity has been recognized as a personality right, to be protected by law against any infringement, by the Civil Code (Article 109 and Article 1002).

In Biolaw, the principle of "human dignity" has often been used to support and reinforce the principle of autonomy.

For example, in end-of-life situations, it has been argued that exercising personal autonomy in refusing a life-sustaining treatment, or in asking to receive a medical aid to die, is a way to autonomously decide when and how to leave "with dignity" her own life, a way to close autonomously an existence that, accordingly to the same individual perception, is no worthier living. Under that point of view, in Italy, the Court of Cassation has used the human dignity's argument to support the recognition of personal freedom to choose for the refusal of life support treatment coherently with the individual's vision of the dignity of existence in certain pathological conditions (Italian Court of Cassation No 21748/2007, followed by the Italian Council of State, No

4460/2014). The Italian Constitutional Court also nodded to the right to obtain a death deemed by the subject to be dignified in asserting the possibility of requesting the help of doctors to die more quickly after it has been decided to stop or give up a medical life-support device (Italian Constitutional Court, No 242/2019). Many of the U.S. states' statutes that have introduced physician-assisted suicide have been motivated by safeguarding the principles of autonomy and dignity of the terminally ill people.

However, there have also been cases in which the "human dignity" has been invoked as a limit to the choices that the individual alone (adult, competent) can make, following her own will and personality.

For example, the human dignity's argument has been spent on preventing adults from participating in a bloodless role-playing game, whose modalities has been considered not respectful of human dignity insofar makes the players sort of human targets (EU Court of Justice, No C-63/02, *Omega*). The same argument has been used in order to ban the exercise of the art of the circus to subjects of short stature, who performed by being thrown by the public (dwarf-tossing: French *Conseil d'État*, 27 October 1995). Indeed, this practice, although consciously and voluntarily accepted by the artist, was considered detrimental to human dignity because it reduces the man to a projectile. In Italy, prostitution has been considered harmful to human dignity, even when it is entirely the result of free choice (Italian Constitutional Court, No 141/2019), and surrogacy has been stigmatized against human dignity even if undertaken in a free manner and without any constraint or economic gain (Italian Constitutional Court, No 272/2017).

The presented examples show how the value of human dignity, which is paramount in the Biolaw (as well as in the other areas of the law), might have a twofold, ambiguous nature. On one side, human dignity emphasizes the *biographical dimension* of the individual and, therefore, her freedom (autonomy and privacy) in making choices (dignity as an "*empowerment*"); on the other side, emphasized the *ontological* dimension of the same individual, and therefore limits those choices that are perceived as *self-disqualifying* (dignity as a "*constraint*") (that amphibological character of human dignity has been pointed out recently by the Italian Constitutional Court No 135/2024).

Of course, if protecting the *inherent character* of human dignity may not result *only* in limiting the *same individual in the choices which affect uniquely the individual* (like the examples mentioned above), the same character constitutes, *a fortiori*, a limit in respect of the choices that regards *other individuals*.

In fact, whatever may be the meaning to be attributed to the formula of "human dignity" used in those documents, it is generally accepted that the "reification," humiliation, degradation, mortification, existential discrimination (and mockery) of an individual should be regarded as wounds to dignity. Consequently, the Biolaw has the responsibility to rule the access and the usage of life sciences and technologies by an individual to avoid that this access or use determines one of the aforementioned breaches to the dignity of another individual.

Particular protection, moreover, has to be dedicated to vulnerable persons. In fact, in the mentioned above bio-legal documents (such as the Universal Declaration on Bioethics and Human Rights, or the Convention on Human Rights and Biomedicine, or the EU Charter of Fundamental Rights, or the same Italian Constitution), dignity is affirmed as a universal attribute of every human being, notwithstanding the specific health or social conditions in which is living. Therefore, human dignity shall not diminish according to any particular personal situation, such as age, illness, minority, disability, and so on. That implies an equal and full recognition and protection of human dignity even for those persons who are not able to exercise self-autonomy. The protection, respect, and care towards its weakest and vulnerable citizens are one of the state's obligations and one of the key-point of social justice.

Furthermore, it seems to be worthy of consideration also the principle *of pursuit of happiness* even if it is not mentioned in European sources of Biolaw, because it has been, on the contrary, extensively debated in one of the very well-known reports about American Biolaw, approved by the influential American President's Council of Bioethics: *Beyond Therapy: Biotechnology and the Pursuit of Happiness* (2003).

The pursuit of happiness constitutes — as well known — one of the inalienable rights, recognized by the American constitutionalism since its foundations.

Of course, the right to the "pursuit of happiness" goes hand-in-hand with the right of self-determination. The idea is that the "wellbeing" of the subject — "happiness" in the precise sense of satisfaction of one's desires according to personal "*life project*" — should not be determined by any others, except the same individual (and, at the very dawn of the American Revolution, this idea was revolutionary compared to the enlightened paternalism of European sovereigns).

From this point of view, the right to the pursuit of happiness militates in favor of the individual freedom of choice whether or not to use life sciences and technologies.

There is no doubt, in fact, that the opportunities opened up by biomedicine — we may think, for example, to the *in vitro* fertilization — often realize individual life projects — such as that of parenting for people who naturally could not have children — and therefore contribute to the "happiness" (as "self-realization") of the same individual. The right to the pursuit of happiness could also justify an unrestrictive legal regulation of human enhancement if the recourse to enhancers contributes to a better self-empowerment.

However, firstly, the present postmodern culture has sometimes exaggerated the value and goals of individual aesthetics and welfare, consequently exalting a sort of possibility of human "perfection" and hidden the more authentic truth that human nature is fragile. The pursuit of happiness that passes through the search, at all costs, for forms of hedonistic or mental perfection, therefore risks generating either inauthenticity or dissatisfaction and disappointment.

Moreover, one cannot underestimate that the consequences of personal choices regarding life sciences and technologies (as well as in other cases, of course) are not lonely (at least, not always). Other subjects might be involved in those choices.

One could take, for example, the choices about genetic manipulation on germinal lines, which — of course — have an impact over the descendants; or, one might also keep in mind the choices about the exploitation or the manipulation of biodiversity, which may also affect future generations; or, one might also refer to the capability of neurosciences and pharmaceuticals to "alter," by enhancing or by flattering, neural correlates of the memory, which may change the

relationship of the individual with her spouse, parents, relatives, and so on.

These risks are mentioned extensively in the international bio-legal documents, such as in the UNESCO Universal Declaration on Bioethics and Human Rights (Preamble and Articles 16 and 17), or the Convention on Human Rights and Biomedicine (Preamble, and Article 13, for example).

The satisfaction of an excessive aspiration of enhancement thru unregulated access to future enhancing biotechnologies (and therefore just dependent by the economic needs of the individuals, the wealthiest of whom, will take the opportunity of having the enhancers), might determine a sort of eventually "perfect" being which might threaten all the other "not-enhanced" human beings, especially those who are most vulnerable.

In those cases, the overestimating of the right to pursue happiness, using the power of life sciences and technologies, might cause harm or disadvantages.

An excess of individualism, in fact, may undermine the rights and, even, the dignity of other individuals, or may determine a deeper loosing of social ties in respect to a quick satisfaction of personal needs according to strongly individualized life plans, or may impede preservation of sufficient resources for the future generations.

6. The COVID-19 "stress test" and Beyond: Solidarity, Self-Responsibility and Health Literacy

The life sciences, and their related technologies, of course, were widely involved in the COVID-19 pandemic (declared by OMS as a public health international emergency on 30 January 2020, but the first notice of a new type of coronavirus was reported by WHO China County Office on 31 December 2019).

It was, in fact, clinical biomedicine that was asked to save the lives affected by the SARS-Co-V2 virus, also through life support instruments, and experimental biomedicine that was asked to find remedies to limit the current contagion and prevent new ones.

The pandemic has determined a huge "stress test" also on the legal system, in particular on the fundamental rights in democratic countries. The protection of individual health and life, and the

sustainability of the public health service, has led to restrictions on many civil liberties (assembly, circulation, creed, enterprise, and so on). Many debates arose how to ensure the dignity for the dying persons in a condition of forced, but necessary, separation from their beloved ones to prevent further infections. Tremendous questions where posed, in terms of justice and human dignity as inherent quality of everyone, notwithstanding the age or the illness, in respect to the possibility to make "tragic choices" in selecting persons to be saved if the intensive cares would become full.

The counteract against the pandemic involved the intervention of the entire multilevel system of legal and political response: international and supranational institutions (like the WHO or the European Union) were involved in adopting scientific, or economic support, or in implementing restrictive measures in international transportation; the national governments took several decisions of "lock-down" and other health and social measures; in regional or federal states, the central government had to deal also with local governments; guidelines and protocols for physicians and nurses involved in the assistance to the hospitalized COVID-19's patients have circulated at transnational level; compulsory vaccination has been introduced by law in some States, at least for specific categories of individuals (in Italy, Constitutional Court No 12/2022 considered the quarantine not in contrast with the article 16 of the Italian Constitution, safeguarding freedom of movement; Constitutional Court No 14-15/2023 evaluated the compulsory vaccination measures adopted by the Italian legislature as compliant with the Constitution, insofar they have been determined, at least in the identification of the pathology, they have adopted by a legislative provision, they were scientifically grounded and proportionated, they were necessary to safeguard public health and did not harm the individual sanity, the State foresaw a compensation in case of damages eventually correlated).

Some health measures against SARS-CoV-2, such as vaccination and mask use, continued to be "*recommended*" (*not* compulsory) after the peak of the pandemic's most severe crisis. It is significant to note that, according to the Italian Act No 119/2017, other vaccinations against pathogens (seasonal flu, human papillomavirus, measles, rubella, chickenpox, mumps) are not compulsory but recommended.

Even when a vaccination is *not* imposed by law but just recommended by health authorities, the choice to be vaccinated is up to individual autonomy and is not a state obligation. This establishes a "pact of mutual solidarity" between the State and the individual (Italian Constitutional Court No 181/2023). By being immunized, the individual protects herself and contributes to the herd immunity of other people. Obeying a compulsory health measure is fulfilling a "vertical social duty" of solidarity, as the behavior is (legally) imposed by the State to protect the general welfare. Accepting to follow a recommended health measure is a "horizontal civic duty" of solidarity, as the state power does not obligate the behavior. However, it is self-responsibly accepted by the citizen to protect herself and others mutually.

During the COVID-19 outbreak, the WHO strongly outlined the risks of the so-called "infodemic," considering it as a sort of parallel "challenge" concerning the disease itself. The neologism identifies an excessive amount (an "overabundance") of information online or offline, some accurate and some not (non-malicious: *misinformation* or malicious: *dis-information*) during an epidemic, which makes it challenging for people to find reliable sources and guidance. This "*infodemic*" is not just a problem of information overload, but a severe threat to public health. It can lead to the spread of accurate and inaccurate information, creating confusion and hindering public health responses, costing, at last, human lives (i.e., without appropriate information, diagnostic tests might go unused, or immunization campaigns might not meet their targets). In the document "*Managing the COVID-19 infodemic: Promoting healthy behaviors and mitigating the harm from misinformation and disinformation*", released on 23 September 2020, the same WHO urges the States to put into effect action plans to address the "infodemic" by increasing the offering of appropriate public health education, especially for the most vulnerable groups. From this perspective, COVID-19, as the first pandemic of the digital age in a world fully covered by extended social-media platforms, has been a significant "catalyst" for the open debate about "*health literacy*" (a term used for the first time in 1974). Broadly assumed, "health literacy" should be considered as the ability acquired by the individual to find, understand, and use information and services to make health-related decisions and actions for themselves and others.

As mentioned, "autonomy" might be considered a fundamental principle in Biolaw: yet, in order to allow the individual to enjoy her right of self-determination in health decisions, the same individual has to be "*aware*" — *not just merely "informed"* — of the consequences of the choice adopted for the wellness of herself but also, in a broad dimension, for the public health (as the pandemic has clearly shown). This kind of awareness could be reached if the individual has a various background and skills (cognitive, social, motivational, educational …). It is by virtue of this "*health literacy*," in fact, that the individual might become able, firstly, to avoid the risks of misinformation, disinformation, or rumors while navigating the vast sea of digital resources, and, secondly, to use the accurate and appropriate information received in ways which promote and maintain good health for herself and then for other members of the community.

The COVID-19, being a contagious disease, has also contributed to "*rediscover*" the intimate *relational* and *social* dimension of the individual. Everyone, in fact, was faced with the immediate consequences of her personal choices for the others. Self-protecting from the virus (by wearing masks or keeping social distancing or washing hands, or going thru vaccinations, even if they are not compulsory but recommended) became a way to protect the others, and vice versa.

Also the proactive and self-responsible behavior to remain adequately and properly informed about health individual countermeasures against COVID-19 became *not only a way* to self-protect against the illness but also to protect the others health.

This peculiar relational and social dimension of individual life, rediscovered during the time of the COVID-19 pandemic, might contribute to the *revaluation* of the same principle of "*solidarity*," according to which the *satisfaction of the individual rights* — i.e., in the case of a pandemic, the same, very basic, rights to life and health — should never be untied from the *individual duties and responsibilities to the benefit of the other members of the political community* — i.e., in the case of a pandemic, the duty and responsibility to act as to avoid the spread of the contagion, also by self-acquiring a proper level of *health literacy*.

This meaning of the principle of solidarity is the one stated in the Article 1 of the UN Universal Declaration of Human Rights, where it is written that "All human beings… should act towards one another

in a spirit of brotherhood" and repeated in the subsequent Article 29, where it is affirmed that: "Everyone has duties to the community in which alone the free and full development of his personality is possible." The principle is also mentioned in the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998), and in the preamble of the International Covenant on Economic, Social and Cultural Rights. It is a principle recalled, even a little bit generally, by the Convention on Human Rights and Biomedicine (Preamble: "Wishing to remind all members of society of their rights and responsibilities"), and by the UNESCO Universal Declaration on Bioethics and Human Rights (Preamble: "Also recognizing that decisions regarding ethical issues in medicine, life sciences and associated technologies may have an impact on individuals, families, groups or communities and humankind as a whole"). The same principle is also embodied in the Italian Constitution, at the Article 2, where it is solemnly affirmed that the Italian Republic, as well as it recognizes and guarantees the fundamental *rights* of the men, as an individual, and as a component of those social groups where human personality flourishes, expects the fulfillment, by the *same individual*, of the fundamental *duties* of political, economic and social solidarity.

7. Conclusive notes

This essay does not seek to draw a specific conclusion but will instead provide a few final observations. The legal landscape surrounding the life sciences is in a state of constant evolution, mirroring the changes occurring within the life sciences and in society at large (see *supra*, § 2). Thus, it is only the future — albeit somewhat vaguely defined in an ever-changing world — that will offer definitive insights and unveil new possibilities.

However, to tie up the discussion, the interplay between law and the life sciences confronts a tapestry of intricate and evolving challenges, three of which might be finally highlighted here.

Firstly, there is a constant resurgence of cultural and ideological diversity at the national level, a backlash against globalization, and growing geopolitical fractures between the West and East. There is also

increasing distrust towards international organizations in health (such as the WHO) or culture (like UNESCO), which complicates efforts to establish a "global" framework of principles and rules for life sciences. Conversely, at the supranational level, the European Union has ramped up its regulatory efforts in recent years, promoting greater uniformity among the legal systems of member states across several areas of life sciences (such as clinical trials, responses to pandemic threats, medical devices, the circulation of clinical data, and the deployment of digital and AI services for both individual and public health). The EU's growing influence in establishing regulations for technological applications in life sciences could give rise to a "*Brussels effect*," impacting legal frameworks globally. Such a trend may play a significant role in harmonizing the legal landscape within the biosciences sector. An integrated set of principles and rules established at either the international or transnational level would facilitate the advancement of life sciences and technologies within a framework that upholds human rights and dignity. As research and technological advancements in life sciences increasingly rely on networks of public and private institutions across various countries, a more standardized regulatory environment will foster collaboration among researchers and developers, transcending national borders. Moreover, a more consistent set of regulations in biosciences and biotechnologies would deter states from creating legal frameworks that promote unfair competition in life sciences research and development, driven by geopolitical or economic motivations. However, it is also important to acknowledge that "political sovereignty" — particularly within the Western democratic model — is still represented mainly by *national* elected bodies with lawmaking powers (with the exception of very few supranational entities, like the EU, which do possess legislative chamber elected by citizens). Consequently, regulations established at the national level by political bodies that reflect the will of their constituents cannot be easily disregarded. This consideration is particularly significant in a world characterized by resurgent national identities and political divisions.

Neglecting to address this issue adequately could impose a precarious "clamp" on democratic frameworks — particularly in the West. On one side, there is the challenge for national bodies, which are accountable to the electorate, to effectively regulate life technologies

while also respecting constitutional and cultural identities. This challenge often leads to a fragmented legal landscape that struggles to manage technological advancements, which frequently have international implications. On the other side, although international and transnational governance may be preferred, the formulation of "global" rules governing life technologies faces obstacles related to political legitimacy and a shared cultural identity, hindering their successful implementation within national contexts.

As a result, both elements of "global law" and "national law" appear necessary to regulate the development of life sciences and technologies. Therefore, a foundational principle of a "*loyal cooperative relationship*" between various institutional bodies (such as courts, legislative branches, and political forums) is essential in Biolaw.

Concluding this first final remark, the intricate interplay (or "prism") of multilevel and transnational factors, coupled with a significant national component, aptly illustrates the current and foreseeable systems of legal sources in Biolaw (see *supra*, § 3).

Secondly, neither the European Union (including its Member States) nor the United States has established a clearly defined a *new* concept of legal subjectivity, apart from legal personality, that can be applied to unborn human entities, advanced artificial intelligence systems, or certain synthetic forms of biological life, such as organoids. Nonetheless, one could argue that the question of legal "*subjectivity*" — separated from legal "*personhood*" — is a crucial issue that Biolaw must address, both on a global scale and at the national level.

It is reasonable to suggest that the resistance to the introduction of novel forms of" "electronic legal subjectivity" (often referred to as "*e-personhood*") stems from an anthropocentric perspective. This resistance is fueled by challenges in imputing legal relations to artificial entities, in the concerns about "humanizing" the AI system by giving them "subjectivity", and in the several uncertainties surrounding civil liability when an AI system becomes a subject, legally responsible for torts. These factors will likely continue to hinder the development of new forms of "legal subjectivity" for artificial intelligence systems.

In the different context of recognizing legal personality for embryos and fetuses — essentially unborn human entities — the debate becomes intertwined with discussions surrounding the

extension or limitation of voluntary interruption of pregnancy and medically assisted procreation. Granting full legal personhood for embryos or fetuses would likely lead to more restrictive limitations on technical procedures that could potentially infringe their rights to life and development. Therefore, re-framing the legal status of the embryo or of the fetus must be balanced against the rights related to individual autonomy, parenthood, and health of the woman involved.

The depicted scenario suggests a gradual "unbundling" of the "intertwining" of natural legal personhood, dignity, and the status of human beings as a born and living entity.

A more "nuanced" spectrum must be accepted regarding different forms of legal standing: it ranges from entities that are whole legal persons (such as human beings from birth to death without any discrimination) to entities that are legal *subjects* but *not* whole *persons* (like the embryos and the fetuses, or the corpses), to entities that are legal *agents* (such as AI algorithms capable of deep learning and autonomous behaviors), and finally to entities that are merely legal objects ("*res*").

Ending this second remark, the re-evaluation of legal personhood and the associated notions of subjectivity is likely to remain a central point of contention in Biolaw discussions throughout the coming decades of the 21st Century (see *supra*, § 3).

Thirdly, a "global law" pertaining to the life sciences must be grounded in fundamental principles of human dignity, individual autonomy, and the "pursuit of happiness.".

As previously indicated, human dignity, despite its inherent ambiguity, is firmly anchored in international law. It has been recognized as a fundamental right within the European legal framework and has been designated as a personality right in China. Furthermore, the principle of individual autonomy is acknowledged across various legal systems, including international law, U.S. constitutional and statutory law, European charters on fundamental rights, and the Chinese Civil Code (even, if following the Confucian cultural and religious heritage, the most important decisions about health and the body are taken in dialogue with the components of the family).

Principles of human dignity and autonomy are especially pertinent — today — when evaluating emerging intrusions into deeply

personal realms, such as the neuro-technology (which, along with AI, represents one of the most significant areas of legal intervention both now and in the future).

However, these established principles in Biolaw must be harmonized with the principle of "individual responsibility." This principle applies to the exercise of rights regarding biotechnologies. It emphasizes an increased responsibility similar to that invoked in environmental law, where solidarity in using natural resources and preserving living conditions for future generations is crucial.

To put it in other terms, rooted in the cultural revolution of the Sixties, bioethics (first) and Biolaw (after) have advocated the claim to set free the individual from authoritative (paternalistic) bio-power. That is why, until today, Western bioethics and Biolaw have posed so much increased attention to the broadest effectivity possible of the rights of individual self-autonomy in choices regarding the body and healthcare. While this "liberation" is commendable — allowing for a recognition of each individual autonomy and happiness — a deformed self-autonomy and pursuit of happiness — where individuals are perceived exclusively as right-holders, without acknowledging their roles as duty-bearers — may jeopardize the social bonds that tie them to the "political community" (i.e., the "Republic" as "*res publica*").

This means that the principles of the pursuit of happiness and autonomy should not be viewed as absolute. They require a reasonable balance and proportionality, which may necessitate legal intervention, particularly in relation to the future development of biotechnology. From this perspective, as one considers the future developments of Biolaw, at both global and national levels, it's essential to remember that in a political community, the rights to self-determination and the pursuit of happiness should not give rise to excessive and "solipsistic" individualism.

Finishing this third remark, the 21st Century Biolaw cannot escape the research on a delicate equilibrium between the "right of autonomy" and "duty of responsibility." (see *supra*, §§ 5 and 6).

As we look toward the horizon of our journey, it becomes that the "constitutional" dimension of Biolaw, at global and national level, encompasses a variety of noteworthy elements. These elements, which include legal interpretations, ethical considerations, and societal implications, will play a crucial role in shaping the direction and

effectiveness of Biolaw in navigating the high seas of biotechnological challenges.

EXCEPTIONS TO THE ORDINARY RULES FOR AWARDING PUBLIC CONTRACTS: THE VOLCANIC RISK PARADIGM

Marco Calabrò[*] *& Alessandro Di Martino*[**]

Abstract

The issue of exceptions to the ordinary public contracts rules in the management of risks and emergencies resulting from volcanological phenomena allows for numerous considerations. This topic can be analysed through an interdisciplinary approach, focused on the relationship between technology and law. In order to verify the legitimacy of the application of derogatory rules (Article 140, d.lgs. n. 36/2023, Italian Public Contracts Code) it is essential to consider the three-phase structure of volcanic risk: risk assessment, hazard assessment and mitigation of the event. The centrality of the technical issues requires firstly an examination of the legal profiles involving the use of Article 140 in the case of volcanic phenomena. The first aspect concerns the delimitation of both the concept of "paramount urgency" - a prerequisite for derogating from the ordinary legislation - and which events (whether those that have already occurred or those that have not yet occurred) are susceptible to be included in the field of that provision. In this context, the investigation focuses on the practices of individual local authorities that make use of Article 140, from which a significant interpretative and methodological distance emerges. A further profile of interest is certainly the one concerning organisational issues: up to now, the legislation provides that not only Regions, but also metropolitan cities and municipalities can carry out emergency works under Article 140.

[*] Full Professor of Administrative and Public Law, University of Campania Luigi Vanvitelli

[**] Assistant Professor of Administrative Law, University of Naples Federico II

Issues and contents of this article were largely discussed and shared by the Authors. Paras 1 and 2 are written by Marco Calabrò; Paras 3, 3.1, 4 and 5 are written by Alessandro Di Martino; Para. 6 is co-authored.

This paper intends to examine the benefits deriving from a centralisation of competences in the responsibility of the Regions, from two point of view. The first one concerns an attempt to reduce potential corruptive phenomena that could occur in territories where unforeseeable maintenance events occur frequently. The second one is based on the consideration that leaving the competence to the individual local administrations could mean that one municipality could deem the conditions of 'paramount urgency' to exist, while another municipality, possibly a neighbouring one, could deem them not to exist in the exercising of its own discretionary power. Centralisation would thus move in the direction of uniformity of decision. Two other aspects deserve further in-depth analyses. The first one concerns the necessity of an *ex-post* control activity, linked to the centrality of the assessment of the conditions of extreme urgency, and which runs the risk of not being effective considering the extremely restricted time profiles. The second one, seeks to understand whether the exception to the procurement regime also drags in the regime of landscape authorisations or environmental impact assessments: if this were not the case, and if the ex-ante intervention were therefore still necessary, the simplification process of economic operators activities would be inevitably frustrated.

TABLE OF CONTENTS

1. Urgency and emergency between administration and law

The in-depth analysis of the formal and substantive aspects of emergency and civil protection procedures, specifically in cases of volcanic risk, cannot ignore a brief examination of the concepts of urgency and emergency. A latitude that makes their systematic framing within the logic of public powers complex characterizes these concepts. Traditionally, reflection revolved around the attribution of 'urgent' measures to the principle of legality[1], as well as the identification of legal instruments (such as emergency ordinances) that could promptly satisfy the protection of public interests, without following the typical legal framework prescribed by the law for that specific situation[2].

Despite the emergence of numerous enabling provisions regarding the exercise of extraordinary powers and the use of alternative procedures, doctrine has nonetheless considered urgency (as well as emergency[3]) as an opaque notion, far from achieving a clear recognition[4], leading to its categorization as "indeterminate legal concepts."[5]. The difficulty in concretely defining urgency and emergency is compounded by the ontological impossibility of typifying individual calamitous events that would justify the use of derogatory procedures. This reasoning, conducted on emergency management, is also extendable by analogy to cases of urgency. In this regard, it has been argued that the legislator's attention should focus on delineating a series of risks that allow recourse to alternative procedures, certainly more effective in responding to 'urgent' contingencies than ordinary ones[6].

---

[1] *Ex multis*, cfr. M.S. Giannini, *Potere di ordinanza e atti necessitati*, in II *Scritti* 950 ff. (2002).

[2] This issue has been investigated, among others, by C. Marzuoli, *Il diritto amministrativo dell'emergenza: fonti e poteri*, in *Il diritto amministrativo dell'emergenza. Annuario 2005* 5-7 (2006), which underlines that the occurrence of 'emergency' events undermines the ordinary relationship between fact and rule.

[3] Recently, G. Bottino, *L'Amministrazione dell'Emergenza*, in 1 *Ceridap* 9 (2024) reasoned on the impossibility, as well as on the inappropriateness, of perimeterising the 'emergency' definition.

[4] M. Gnes, *I limiti del potere di urgenza*, in 3 *Riv. trim. dir. pubbl.* 645-646 (2005).

[5] L. Gianniti, P. Stella Richter, *Urgenza (diritto pubblico)*, in XLV *Enc. Dir.* 901 (1992).

[6] G. Bottino, *L'Amministrazione dell'Emergenza*, cit. at. 5, criticises the classification of individual calamitous events, as opposed to a typification of the interventions, means and powers at the disposal of public authorities to deal with emergency situations.

In the past, the approach considered most functional for legitimizing such prerogatives was essentially formalistic, concentrating on the power of ordinance as a "safety valve", provided by the legal system to address the rigid conditions imposed by the law in emergency situations[7]. On the contrary, contemporary reflections, as will be seen later, focus on the proceduralization of public powers' actions in cases of urgent necessity. This is achieved through the provision of time and economic limits, as well as subsequent control powers aimed at assessing the compatibility of the factual situation with the use of derogatory procedures.

Setting aside the deeper examination of the provision allowing the awarding of public contracts for reasons of urgent necessity (art. 140, Legislative Decree no. 36 of 2023), it may be useful to argue that the aforementioned provision should be read in relation to others, such as that regulated by Article 54, par. 4 and 4 bis, of the Consolidated act on the government of local authorities (Legislative Decree no. 267/2000). Indeed, while the latter provision generally attributes to the Government Official the power to adopt urgent measures aimed at "preventing [...] serious dangers threatening public safety and urban security", Article 140 of the Public Contracts Code specifically outlines the procedural pathway that public administrations must adhere to for the awarding of public contracts in cases of urgent necessity, where "events of unexpected or unforeseeable damage or danger capable of causing actual harm to public and private safety" occur.

Furthermore, within the proceduralising of public powers' prerogatives in cases of 'urgent' activities, transparency and publicity obligations of these administrations also fall under a profile of maximum accountability. This is especially true if they intend to resort to derogatory procedures compared to ordinary ones. The occurrence of calamitous events, whether unpredictable or not addressed through ordinary active administrative tools, necessitates enhanced transparency of public administration activities, as provided for by Article 42 of Legislative Decree no. 33 of 2013. This provision requires all administrations to make public all measures adopted in cases of natural disasters or other emergencies, which may also include those related to volcanic

[7] This is the reconstruction made by M.S. Giannini, *Lezioni di diritto amministrativo* 267 (1993).

events. Among the various obligations placed on public powers, there is firstly the need to justify the reasons for departing from 'ordinary' legal provisions, as well as indicating the time limits for urgent activities and the costs that administrations must bear to carry out such activities.

Regardless of the formal and procedural issues underlying the advancement of emergency administration and acknowledging the complexity of pinpointing a precise definition thereof, it is undeniable that one of the fundamental corollaries of urgency lies in the duty to intervene promptly to remove the harmful event or prevent its occurrence[8]. This is with the finalistic perspective of protecting public interest entrusted by law to a specific administrative body. Promptness, which evidently enables the use of derogatory procedures and powers, does not constitute the ultimate "result" for which different legal schemes are followed from those generally provided by law. This is because the purpose of any administrative function, whether 'ordinary' or 'extraordinary,' must necessarily be attributed to the protection of the public interest[9]. This observation, besides allowing the framing of promptness as a general duty of public powers, regardless of the urgent nature of the event[10], opens the way to another characteristic of emergency administration, found in risk management, aimed at "adopting a precautionary approach that allows framing the event in a context of normalcy"[11]. In this context, it is certainly useful to include aspects related to the "technicization" of administrative[12] action, now necessary due to the emergence of (legally and) technically qualified interests requiring a pragmatic approach to solving problems caused by unforeseeable events[13]. These are

[8] L. Gianniti, P. Stella Richter, *Urgenza*, cit. at. 902.

[9] In these terms, F. Giglioni, *Amministrazione dell'emergenza*, in VI *Enc. Dir.* Annali 44 ff. (2013).

[10] L. Gianniti, P. Stella Richter, *Urgenza*, cit. at. 906.

[11] L. Giani, *Dalla cultura dell'emergenza alla cultura del rischio: potere pubblico e gestione delle emergenze*, in L. Giani, M. D'Orsogna and A. Police (eds.), *Dal diritto dell'emergenza al diritto del rischio* 16 (2018).

[12] S. Civitarese Matteucci, L. Torchia, *La tecnificazione dell'amministrazione*, in S. Civitarese Matteucci, L. Torchia (eds.), *La tecnificazione*, in L. Ferrara, D. Sorace (directed by), *A 150 anni dall'unificazione amministrativa italiana* 10 (2016).

[13] R. Ferrara, *Etica, ambiente e diritto: il punto di vista del giurista*, in R. Ferrara, M.A. Sandulli (directed by), *Trattato di diritto dell'ambiente* 30-31 (2014), according to which evolution has led science to "grope too often in the dark" when, on the other hand, one would have expected "certain, reliable and even stable and definitive answers" from the modern conception of science.

useful not only to "overcome that exceptional event/extraordinariness of intervention", but to manage the complex situation through exceptional instruments already provided for within our legal system[14].

This approach evidently not only prevents the image of a "parallel administration" whenever public powers are required to address situations of extreme or urgent necessity, but also reverses the formula of the "normalization of emergency," through which doctrine has criticized the constant recourse to derogatory powers due to the stabilization of emergency circumstances occurring in today's legal system. On the contrary, a purpose of this work is to seek instruments aimed at normalizing emergencies from a radically opposite perspective. It is necessary, from a perspective of legitimizing power, to enhance the precautionary principle of administrative activity as a key element to enable administrations to resort to derogatory and extraordinary powers, which are nevertheless consistent with the principle of substantive legality.

2. The "multiform" concept of urgency in the Public Contracts Code

The issue of urgency in public procurement procedures has long been particularly felt by the Italian legislature, which addressed this aspect in two provisions of Legislative Decree no. 50/2016, the regulatory text that contained, until March 2023, the national discipline on public contracts. The most interesting profiles of these provisions will be examined below (both substantially confirmed by the current Public Contracts Code, Legislative Decree no. 36/2023). The first rule (Article 76) referred to the negotiated procedure without publication of a contract notice

[14] L. Giani, *Dalla cultura dell'emergenza alla cultura del rischio*, cit. at. 19-20. Also case law, with specific regard to the mayor's possibility of exercising the ordinance power provided for in Article 54 of Legislative Decree No. 267 of 2000, has held that there are circumstances, caused by volcanic activity, that do not allow the application of special procedures and the exercise of derogatory powers. The administrative judge argued that the volcanic activity of Stromboli was characterised, in 2016, as that normal and typical of an always active volcano. So it must be considered that such activity was absolutely ordinary and concers constant phenomena so it could and should be dealt with (also by way of prevention) through the ordinary instruments contemplated by the law. In this sense, T.A.R. Sicilia, Catania, Sez. IV, 22.01.2018, n. 150, in *www.giustizia-amministrativa.it.*

and expressly provided in par. 2, letter c) that the use of this procedure was allowed if, for reasons of "extreme urgency" arising from unforeseeable events not attributable to the contracting authority[15], the deadlines for ordinary procedures cannot be met. It was obviously an option that the legislature offered to the contracting authorities, as an "escape" from the stricter rules set by the Public Contract Code[16]; but it represented therefore a residual option compared to the using of selecting procedures more in line with the principle of competitiveness[17]. The character of extreme urgency, however, does not imply that resorting to the negotiated procedure without publication of a contract notice is equivalent to a direct award. This aspect, in fact, emerges both from the last par. of Article 76 - under which the contracting authorities had to select at least five suitable economic operators to consult based on their qualifications, in compliance with the principles of transparency, competition and rotation[18] - and from Article 36, par. 2, letter a), which regulates an hypothesis of direct award for amounts below €40,000 even without prior consultation of two or more economic operators[19]. The evaluation of "extreme urgency", as is evident, implies a considerable margin of discretion for the contracting authorities, who can choose the economic operators to be involved

[15] According to the administrative judges decisions, the urgency must be the consequence of the occurrence of unforeseeable events, while the administration must not be blamed in any way for a lack of adequate organisation or planning or for its inertia or responsibility. In this sense, Cons. Stato, Sez. V, 10.9.2009, n. 5426, in *www.giustizia-amministrativa.it*.

[16] For example, a negotiated procedure without a call for tenders issued by a contracting authority for the performance of a particular cleaning service was declared unlawful where, however, requirements of the urgency 'unforeseeability' that characterises the use of such a procedure were not met. In this sense, T.A.R. Lazio, Roma, Sez. I, 4.9.2018, n. 9145, in *Foro amm. (Il)*, 2018, 9, 1514.

[17] T.A.R Campania, Napoli, Sez. I, 10.5.2021, n. 3106, in *Foro amm. (Il)*, 2021, 5, 848.

[18] Critical of this provision, especially regarding a comparative assessment with the previous regulations, cfr. F. Gambardella, *Le regole del dialogo e la nuova disciplina dell'evidenza pubblica* 143-144 (2016), according to which, regardless of the name 'negotiated procedure', in this case the spaces for negotiation are inexistent due to the actual legal framework.

[19] In these terms, T.A.R. Puglia, Lecce, Sez. III, 13.3.2020, n. 326, in *www.giustizia-amministrativa.it*, which clarifies how the main difference can be found in the provision of a specific and punctual motivation obligation for the use of the negotiated procedure without a call for competition, which is absent in cases of direct award under the Article 36 of the former Public Contracts Code.

in awarding procedures without a specific motivational burden that clarifies the criteria used for the choice.

However, following the approval of the Italian National Recovery and Resilience Plan (PNRR), Article 48, par. 3 of Legislative Decree no. 77/2021 allowed contracting authorities to use negotiated procedures without publication of a notice not only in the "ordinary" cases provided for in Article 63, paragraph 2, letter c), but also when compliance with the terms of ordinary procedures may compromise the achievement of goals or compliance with the implementation times of the PNRR and the related National Plan for complementary investments (PNC). While this provision allows for accelerating the public procurement award procedure, ensuring compliance with programme implementation times and the achievement of planned goals, it also extends the latitude of the concept of urgency and exposes some critical issues. In fact, the provision constitutes an implicit admission that the current system is unable to achieve the goals imposed by the PNRR through ordinary procedures, which is why the "procedural delays" are sought to be overcome through a forced interpretation of "extreme urgency" extending it to scenarios that are far from unpredictable.

Nowadays, a provision that confirms the legislature's attention to cases where the use of ordinary award procedures would not allow for a timely resolution of the problem is Article 140 of the current Public Contracts Code (Legislative Decree no. 36/2023). In cases of "extreme urgency" that do not allow for any delay - despite the absence, unlike Article 76, of any reference to the predictability of the occurrence[20] - the responsible for the procedure "may order [...] the immediate execution of the work within the limit of €200,000 or whatever is necessary to remove the state of prejudice to public and private safety"[21].

---

[20] See Cons. Stato, att. Norm., 19.12.2017, n. 2647, in 12 *Foro amm. (Il)* 2414 (2017), who argues that derogating activities do not include those that can be planned in time and do not justify recourse to emergency procedures. For example, the break in an embankment allows the use of the most urgent procedure provided for by Article 163; on the other hand, the purchase of a vehicle that will be used in the future for civil protection action does not allow recourse to derogatory procedures, just as there is no reason to 'act in derogation' if the event for which the work is to be carried out was programmable for time.

[21] See a Council of State judgment, according to which the urgency that exceptionally justifies the early execution of works, services or supplies must be understood as qualified and not generic urgency. Urgency, therefore, must imply

At first glance, the scope of Articles 76, par. 2, letter c) of the former Public Contracts Code, and 140 of the current Code would seem to be substantially the same, with no apparent distinction between the "extreme urgency" that allows for the application of negotiated procedures without notice and the "extreme urgency" that characterizes civil protection contracts. In this regard, Opinion No. 464/2016 of the Council of State maintains that "compared to Article 76, the contracts referred to in Article 140 must be considered further exceptional (according to a 'progression of exceptionality'), and therefore this last provision must be interpreted and applied in a rigorous and restrictive sense. And, in fact, the provision of the delegated legislature ('with the exception of individual circumstances connected to particular needs related to emergency situations') does not seem to anchor the exceptionality to the mere emergency situation but rather to the (additional and peculiar) particular needs related to emergency situations"[22].

Article 140 of the Italian Public Contracts Code is characterized by its proximity to the direct award model, as the immediate execution of works is ordered upon the occurrence of an event[23]. However, an effective ex-post control mechanism must be activated to ensure compliance with the emergency situation (art. 140, para. 7). It is also important to emphasize that the legislator (art. 140, para. 8) states that this type of direct award cannot be allowed for contracts worth equal to or greater than the European threshold. This provision is extremely relevant in the context of balancing the guaranteed regime provided by the Code rules with the procedural simplification for the realisation of works in faster and more efficient ways than ordinary ones. Indeed, arguing that this provision cannot be applied to procedures with a value above the European threshold does not exclude the obligation for

---

that postponing the intervention during the time required to complete the ordinary procedure would compromise, with serious prejudice to the public interest, the timeliness or effectiveness of the intervention itself (Cons. Stato, Sez. VI, 21.2.2017, n. 775, in *www.giustizia-amministrativa.it*).

[22] Concerning the difference between extreme urgency, governed by Article 76 of the Public Contracts Code, and extreme urgency, governed instead by Article 140 - even though the paper referred to the former discipline - see G. Delle Cave, *Le procedure "d'urgenza" al tempo della pandemia: alcune riflessioni sugli artt. 63 e 163 del Codice dei contratti pubblici*, in 4 *AmbienteDiritto* 1 ff. (2020).

[23] N. Berti, *Art. 140. Procedure in caso di somma urgenza e di protezione civile*, in R. Villata, M. Ramajoli (eds.), *Commentario al codice dei contratti pubblici* 710 (2024).

contracting authorities to consider and respect the principles underlying the Public Contracts Code in other scenarios.

In March 2023, the new Italian Public Contracts Code, Legislative Decree no. 36/2023, was approved. Regarding the subject matter of these reflections, the regulation appears to be substantially unchanged. Article 76, in fact, confirms the previous provision in its entirety, except for para. 7, which provides for the consultation of three (rather than five) economic operators based on information regarding economic and financial, technical and professional qualifications, in compliance with the principles of transparency and competition.

Similarly, Article 140 of the new Code has not modified the various and graded urgency cases already provided for in Article 163 of the previous Code, nor its detailed provisions. Among the few novelties, regarding situations of extreme urgency and civil procedure, the threshold for works that can be immediately executed to remove prejudice to public utility has been raised to €500,000. Therefore, the legislator appears not to have deemed significant changes to the previous framework necessary. However, a systematic examination of Legislative Decree no. 36/2023 reveals a general change in perspective that will also affect the emergency works procurement. This refers to the introduction of the principle of result as the cornerstone of the entire public procurement sector, meaningfully included in Article 1 of the new Public Contracts' Code[24].

Consequently, despite having the same legal basis (i.e., European Directives 23/24/25 of 2014), the vision of the new Italian Public Contracts Code has changed. Competition is no longer the only guiding light of procurement procedures, but rather a means to achieve a further goal: the selection of the best private contractor and the consequent realisation of the public work in a timely manner and in compliance with high-quality standards. Nevertheless, regardless of the circumstance of the ideological primacy of achieving specific goals, the principle of result is now destined to guide the exercising of discretionary powers. Nowadays, in general, but much more in emergency context, it is

[24] Recently, M.R. Spasiano, *Dall'amministrazione di risultato al principio di risultato del Codice dei contratti pubblici: una storia da riscrivere*, in 9 *Federalismi.it* 206 ff. (2024). The relationship between the result principle and administrative simplification has also recently been highlighted by M. Macchia, *The new public procurement Code: a way to simplify?*, in 1 *It. Journ. Pub. Law* 69 ff. (2024).

an extremely delicate task for the administration to balance the outcome of the tender procedures with the correct exercise of power, in compliance with the principles established for the awarding of public contracts.

3. Volcanic risk in the age of uncertainty

Volcanic risk has been defined as "the product of the probability of an eruptive event occurring and the damage that could result from it" [25]. The fundamental corollaries for assessing volcanic risk are essentially three: a) hazard, which is the probability that a phenomenon of a certain intensity will occur in a certain interval of time and in a certain area; b) vulnerability, which consists of the propensity to suffer damage as a result of the stresses induced by an event of a certain intensity; c) exposure, which essentially describes what is exposed to danger on the territory (number of people, number and type of buildings, etc.).

From a legal point of view, it could be argued that volcanic risk implies – due to the relationship between technique and law[26] - the exercise of "mixed" discretion for public administrations[27]:

---

[25] According to M.L. Longo, *Vivere nel rischio. Popolazione, scienziati e istituzione di fronte all'attività vulcanica nei Campi Flegrei (1970-1984)*, in 3 *Quaderni Storici* 808 (2018), risk should be understood as "anticipation of the future".

[26] R. Ferrara, *Scienza e diritto nella società del rischio: il ruolo della scienza e della tecnica*, in 1 *Dir. e proc. amm.* 64 (2021), underlines how "this relationship, not always peaceful and virtuous, represents a kind of systemic constant in the history of mankind".

[27] W. Marzocchi, G. Woo, *Principles of volcanic risk metrics: Theory and the case study of Mount Vesuvius and Campi Flegrei, Italy*, in 114*Journal of Geophysical Research* 1 (2009), confirmed that Volcanic risk plays a fundamental role between society and volcanology, as it is one of the main points of contact between science and public powers. In case law, see Cons. Stato, Sez. VI, 28.1.2011, n. 654, in *www.giustizia-amministrativa.it*, argues that 'volcanism' is one of those geomorphological structures that makes the evaluation of the emergency state widely discretional, limited by the existence of a factual situation that is actually or potentially dangerous, not otherwise effectively dealt with, and therefore even if the situation is not entirely new and/or unforeseeable. It is therefore sufficient '...the subsistence of the current necessity and urgency to intervene in defence of the interests to be protected, regardless of both the foreseeability and the very imputability to the Administration or third parties of the dangerous situation that the measure is intended to remove...', with the motivational burden reduced when it concerns the extension of a state of emergency already declared, which can make use '...of the preliminary inquiries already previously carried out by

firstly, an assessment is carried out by technically competent parties on the evaluation of risk through monitoring activities and data collection; secondly, the discretionary power, typical of the decision-making process, is exerted during the risk mitigation phase, as public administrations will have to make a political assessment of the specific ways in which they intend to operate on the territory (e.g. the responsibility of urban planning choices in the event of volcanic risk does not fall on technical subjects, but on the public authorities). The evaluation of risk is undoubtedly a complex activity[28], as the probability of a volcano erupting must also be considered based on its past history. Precursor phenomena should only be considered as indicators of a process in progress, adequately studied, analyzed, and monitored to identify any anomalies.

These parameters are measured through networks of stations installed on active volcanoes and observed with different methodologies, such as satellite, direct field inspections, or digitalization tools. However, even if these phenomena are studied and monitored punctually, it is not possible to predict with certainty when and how a volcanic eruption will occur[29].

The evaluation of volcanic risk, as all technical-scientific evaluations, has always been the subject of debate regarding its degree of reliability. Some consider it a predictable risk because they believe that precursor phenomena (earthquakes, ground fractures, volcanic edifice deformations) can be recognized and measured, announcing the rise of magma towards the surface[30]. On the other hand, based on those who accept - also in the general theory of law - the uncertain nature of science (and, therefore, in

---

the Administration'. In these terms, see also Cons. Stato, Sez. IV, 21.11.2013, n. 5528, in *www.giustizia-amministrativa.it*.

[28] F. Barberi, M.S. Davis, R. Isaia, R. Nave, T. Ricci, *Volcanic risk perception in the Vesuvius population*, in 172 *Journal of Volcanology and Geothermal Research* 224 ff. (2008), consider that the approach to volcanic risk management is an extremely complex activity, as it requires multidisciplinary skills not only with regard to the history - past, present and future - of the volcano, but also knowledge of the territory and the socio-cultural context within which the volcano itself lies.

[29] I. Alberico, L. Lirer, P. Petrosino and R. Scandone, *A methodology for the evaluation of long-term volcanic risk from pyroclastic flows in Campi Flegrei (Italy)*, in 116 Journal of Volcanology and Geothermal Research 64 (2002).

[30] I. Alberico, L. Lirer, P. Petrosino and R. Scandone, *A methodology for the evaluation of long-term volcanic risk from pyroclastic flows in Campi Flegrei (Italy)*, cit. at. 63 ff.

this case, of volcanic risk), there are those who argue that it is extremely complex to attribute an epistemic value to the data provided[31]. It is worth noting that in the field of volcanology, there is also a discussion on the "quantification of uncertainty" because it depends on several factors: physical variability of the volcanic system, i.e. its intrinsic randomness; epistemic uncertainty, which includes uncertainty in choosing the statistical model with which to obtain predictions and uncertainty about the data used to set the parameters of the statistical model. Epistemic uncertainty has often been addressed with expert dialogue methods, which, however, does not necessarily imply a unitary perspective in evaluation (and, therefore, mitigation of risk) due to the not-exact nature of science, which can be the subject of theories and arguments that are radically opposed[32].

Although monitoring activities (both qualitative and quantitative) have significantly progressed over the years, risk assessment models, no matter how sophisticated, always and only provide probabilities, and it is always possible that the measures taken turn out to be excessive. For this reason, it is necessary to abandon the scientific approach that aims at zero risk and instead move towards a culture of acceptable risk[33], which confirms the close relationship between technology and law also (and especially)

[31] As pointed out, *ex multis*, by A. Barone, *Il diritto del rischio*, Milano, 2006, 155 ff. M. Tallacchini, *Sicurezze e responsabilità in tempi di crisi*, in 4 *Riv. Dir. alim.* (2012) according to which "the intrinsic uncertainty of contemporary scientific knowledge does not depend solely on the increase in situations of risk or unpredictability associated with the progress of knowledge, but on the intrinsic incompleteness and indeterminacy of science with regard to the need to define social choices, public policies and legal decisions".

[32] Very interesting is the example reported by P. Gasparini, *Il rischio vulcanico: dall'empirismo al probabilismo*, in 4 *Ambiente Rischio Comunicazione* 16-17 (2012), who refers to the episodes of the eruptions of the La Soufriére volcano on the island of Guadaloupe in the French Antilles in 1976. In particular, the author recalls the circumstance that the island's Prefect approached experts from the Institute de Physique du Globe in Paris, and yet 'the opinions were diametrically opposed'. One group of experts believed that the probability of a large volcanic eruption was very high (close to 100 per cent), and another group of experts claimed that the probability of the activity evolving into larger eruptions was very low'.

[33] P. Gasparini, *Il rischio vulcanico*, cit. at. 20.

in the exercise of public powers aimed at dealing with damage arising from volcanic risks[34].

However, volcanic risk, which is becoming increasingly central to urban planning and is closely related to territorial governance issues, should not be considered solely in the risk assessment. Another aspect of interest concerns the mitigation of volcanic risk, which includes a complex of interventions aimed at lowering the risk itself in a specific area, by acting on one or more "risk factors". Mitigating volcanic risk on the hazard factor involves building according to cautionary seismic technical standards (there are, in fact, safety coefficients that consider the seismic mapping of the entire country), or solutions can be designed to develop seismic dampers in social infrastructure in order not to compromise their operation.

Mitigation of risk that acts, instead, on the exposed values factor often occurs through the relocation of infrastructure and buildings to remove specific risky situations for the community. In such circumstances, the administration usually has two options: to intervene with authoritarian measures, without any involvement of the community, or to try to build a shared solution, through informal democratic participation procedures. This is a particularly complex aspect because, especially in homogeneous contexts at the foot of the volcano, while such circumstances can bring about the well-known Nimby syndrome[35], which significantly slows down the process of implementing infrastructure, only through consensus-building techniques, typical of planning in sensitive contexts, could an adequate scientific knowledge of the problem be ensured and the affected citizens sensitised.

Finally, mitigating the risk on the vulnerability factor involves challenging economic and social policy choices, as the

[34] We agree with the opinion of L. Giani, *Dalla cultura dell'emergenza alla cultura del rischio*, cit. at. 26, where she argued that the culture of risk acceptance emphasises the close connection between scientific complexity and legal rationality.

[35] L. Torchia, *La sindrome Nimby: alcuni criteri per l'identificazione di possibili rimedi*, in F. Baldassone, P. Casadio (eds.), *Le infrastrutture in Italia: dotazione, programmazione, realizzazione* 357 ff. (2011); previously, this aspect has also been analysed by L. Casini, *La partecipazione nelle procedure di localizzazione delle opere pubbliche. Esperienza di diritto comparato*, in A. Macchiati, G. Napolitano (eds.), *È possibile realizzare le infrastrutture in Italia* 139 ff. (2010).

reinforcement of existing buildings[36], and, at the same time, the inability to build in an area with a high volcanic risk[37].

3.1 Volcanic risk as a condition for the application of the procedure for awarding works on an urgent basis

Considering that Article 140 of the current Public Contracts Code, refer to even more exceptional cases than those justifying the use of negotiated procedures without a call for tender, the volcanic risk - or, in any case, the damage caused by events attributable to volcanic activity - is certainly a suitable hypothesis to justify direct allocation, albeit for a limited time.

In the past, this procedure was used for the removal of volcanic material fallen in the territory of the Municipality of Giarre following the paroxysmal events of Mount Etna in Sicily, which caused enormous inconvenience to road traffic and inevitable repercussions on the municipal territory, prejudicing public and private safety, as well as essential public services and private economic activities.

In cases like this, the objective prerequisites of "urgent work that leaves no time for timely intervention", which are difficult to achieve through ordinary procedures for awarding works, clearly exist. As well as the timing aspects are also respected, as the duration of the work (less than a month) confirms that the procedure was used exclusively to eliminate the

[36] As emerges, for example, in Campania Regional Law No 16 of 2004, as modified by Campania Regional Law No 26 of 2018, which introduces Article 12-bis, lett. e), which lays down rules on interventions and public works of strategic regional interest 'aimed at improving the conditions of active and passive accessibility of the Red Zone for volcanic emergency of Vesuvius and the Phlegraean Fields (construction and/or adaptation of functional infrastructures to improve the escape routes and logistics facilities provided for in the Plan for the removal of the population residing in the Red Zone)'. The Constitutional Court has also pronounced on this regional law, insofar as this provision would be detrimental to the administrative autonomy constitutionally guaranteed to the municipalities in matters of territorial and urban planning, which could be reduced by the regional law only according to a supra-national interest, punctually identified and contained within limits. See Corte cost., 24.7. 2019, n. 198.

[37] For example, with regard to the Campania Region, within one of the lands falling within the so-called Red Zone, as also confirmed by administrative jurisprudence: T.A.R. Campania, Sez. III, 16.10.2020, n. 4551, in *www.giustizia-amministrativa.it*, which concerned an application for regularisation of an unauthorised building constructed in an area of high volcanic risk.

damaging/dangerous situations for the community. The characteristic of volcanic events, as mentioned, despite their constant monitoring, is systemic uncertainty: in Giarre case, since the allocation of the works, there have been further subsequent paroxysmal events that have partly compromised the works already carried out, aggravated the existing criticalities in the territories, and therefore made it necessary to continue the activities even beyond the initially established deadline for the conclusion of urgent works (removal of volcanic material accumulated in the streets and public spaces).

Another example, which also comes from Sicily, concerns the volcanic activity of Mount Etna between 16 February and 2 March 2021, which produced paroxysmal phenomena with the emission of pyroclastic material and the main fallout of sand and lapilli in the Municipality of Nicolosi. In this case, given the safety issues highlighted by the heavy state of discomfort and danger to the population, the urgent procedures were used to immediately prepare interventions for sweeping and clearing interventions of the ash and lapilli that had fallen on the streets and public spaces. In this circumstance as well, a provision characterized by compliance with all legitimizing prerequisites was immediately declared effective and enforceable: possession of the requirements provided for by the economic operators, respect for the deadline for the completion of the works, and their value.

These two cases briefly illustrated confirm, always following the direction of the principle of result, how it is necessary for the awarding administrations to be able to resort to a derogatory tool of the ordinary procedures.

On the regulatory context, particularly noteworthy is the recent decree-law no. 140/2023 (commonly known as the Campi Flegrei Decree), which introduces urgent measures to address the ongoing bradyseism phenomenon in the Campi Flegrei area. This statement broadly confirms what has been affirmed by volcanologists' studies, according to which most of the information received by the inhabitants of the Phlegraean Fields occurs during bradyseismic crises[38]. Regarding this profile, which is not of a procedural nature but more specifically relates to the role of citizenship in risk situations, it has also been argued that

[38] T. Ricci, F. Barberi, M.S. Davis, R. Isaia, R. Nave, *Volcanic risk perception in the Campi Flegrei area*, in 254 *Journal of Volcanology and Geothermal Research* 121 (2013).

bradyseismic phenomena show that the fear of the community lies in the fear connected to the loss of material and immaterial values, but not certainly for the risk due to a possible eruption[39]. This provision, for the purposes of this work, proves to be extremely useful because it allows for the practical application of the theoretical coordinates mentioned in the introduction: rules and objectives are identified in the specific case to effectively counter the phenomenon in question, with explicit reference to emergency measures and procedures. It is highly beneficial to mention Article 6 of decree-law no. 140/2023, which is the only provision expressly authorizing the use of emergency and civil protection procedures, now governed by Article 140 of the Public Contracts Code, to implement what is necessary following the assessment of needs.

4. An efficient ex-post control activity as an essential requirement for the sustainability of the system

The use of urgency procedures for awarding contracts, given the significant margin of discretion recognized in favour of the awarding authorities, requires effective controls over the existence of the prerequisites and, more generally, the legitimacy of the contracting entity's activities. As is evident, the control activity in question must necessarily be subsequent, due to the need to start work as soon as possible, to prevent the occurrence of damage that would be difficult to contain if the ordinary procedure for awarding the work were followed.

In this regard, the legislator provides for a dual control power, one relating to subjective aspects, and the other to objective ones. As for the subjective aspect, Article 140, paragraph 7, of the new Public Contract Code assigns the exercising of the control power to the same awarding authorities, to verify whether the economic operator selected meets the participation requirements provided for the awarding of contracts of equal value by ordinary procedure. This is a power/duty (in the sense that it is mandatory) that must be exercised within a reasonable period, compatible with the management of the emergency in question, and, in any case, not exceeding sixty days from the awarding. If, because of the control activity, the requirements are found to be absent, the contracting

[39] M.L. Longo, *Vivere nel rischio. Popolazione, scienziati e istituzione di fronte all'attività vulcanica nei Campi Flegrei (1970-1984)*, cit. at. 814.

entity withdraws from the contract, subject to payment for the value of the work already carried out and reimbursement of any expenses incurred for the execution of the remaining part.

On the rationale of the provision - which essentially reiterates what was already provided for by Article 163 of the previous Code – the administrative judge[40] argued that awarding procedures, even if urgent, cannot derogate from the requirement that economic operators meet the moral requirements prescribed by the law and the *lex specialis*. This prevents unreliable subjects, affected by serious causes for exclusion, from contracting with the administration, exploiting the emergency to profit from it and enjoy generalized immunity. Case law also states that the balance between public interest and that of the private contractor - who may already have partially fulfilled and initiated instrumental activities for the performance - is reached at the time of any negative verification of the requirements. In this case, the administration is required to withdraw from the contract and pay the contractor for the value of the work already carried out and reimburse any expenses already incurred for the execution of the remaining part, within the limits of the benefits obtained, after the necessary cancellation of the award.

In summary, this withdrawal and the previous control activity constitute the exercising of a binding power, as the contracting entity is completely devoid of discretion, both in the "whether" and in the "how". In this case, therefore, the withdrawal represents an ontologically different remedy compared to the ordinary withdrawal provided for by the Civil Code and Article 123 of the new Public Contracts Code, as it is not based on a right of reconsideration, but is justified by the authoritative posthumous assessment of a cause for exclusion.

Regarding this matter, there are those who consider that such withdrawal is similar to that one governed by Article 11, paragraph 4, of Law no. 241 of 1990[41], concerning agreements between private individuals and public administrations. If this were the case, another critical issue concerning the jurisdiction of the administrative judge, whether it exists or not, would be resolved since it would be a withdrawal based causally on the

[40] T.A.R. Lazio, Roma, Sez. II, 4.1.2021, n. 3; T.A.R. Lazio, Roma, Sez. II, 22.5.2020, n. 5436, in *www.giustizia-amministrativa.it*.

[41] M. Gigante, *Procedure in caso di somma urgenza e protezione civile*, in L.R. Perfetti (ed.), *Codice dei contratti pubblici commentato* 1366 (2017).

finding of the illegitimacy of the award in favour of the economic operator [42]. In fact, the circumstance that any dispute should be referred to the rules of public law, and therefore to the jurisdiction of the administrative judge, would find further confirmation in the substantial binding nature of the act under discussion; it is only apparently "internal" to the contract, but instead focused on the genetic defect of the award made in favour of an economic operator lacking participation requirements.

The issue of subsequent control activity cannot be limited to the mere verification of the subjective participation requirements. After publishing on its institutional website the measures relating to the direct award, indicating the reasons that did not allow the use of ordinary procedures, the contracting authority is also required to send the same measures to the National Anti-Corruption Authority (ANAC), in order to allow what the legislator defines a "competence controls", aimed at concretely evaluating the existence of the objective prerequisites justifying the use of the emergency procedure[43].

The control power exercised by this Authority is profoundly different from that examined in relation to the verification of the subjective requirements of the economic operator. Firstly, in this case the control power is exercised not by the same contracting authority but by an external one, meeting the impartiality (independence) requirement and having the necessary technical competence. These elements also contribute to justify the different nature of the control exercised, to the extent that ANAC is called

[42] In accordance with the same principles of the Council of State's Plenary Meeting's ruling No. 14/2014, where it exempts from the abrogation of the relationship conformed as a private potestative right, certain peculiar hypotheses in which the withdrawal is based in a binding manner on a previous public power; see, for example, the paradigmatic hypothesis of the contractual withdrawal operated at the outcome of an anti-mafia interdiction. Cons. Stato, Ad. plen., 20.6.2014, n. 14, in 6 *Foro amm. (Il)* 1671 (2014).

[43] On Anac's intervention supervision, the category under which the control power governed by Article 140 of the new Public Contracts Code also falls, see G. Soricelli, *Il sistema della governance nel nuovo codice dei contratti pubblici. Profili disciplinari ed organizzativi tra potenzialità e limiti*, in 4 *Resp. Civ. prev.* 1370 ff. (2018). On the transversal nature of the control functions attributed to the ANAC, see F. Di Lascio, *Anticorruzione e contratti pubblici: verso un nuovo modello di integrazione tra controlli amministrativi?*, in 3 *Riv. trim. dir. pubbl.* 804 ff. (2019). W. Giulietti, *La vigilanza dell'A.N.A.C. in materia di contratti pubblici tra potere ispettivo e speciale legittimazione ad agire in giudizio*, in 2 *Riv. giur. edil.* 99 ff. (2022), underlines the peculiarity of this control power exercised by ANAC.

upon to carry out an activity essentially like that exercised by the administrative judge on the exercising of discretion power, despite obviously not having the same consequences from the point of view of effects produced.

As mentioned, the motivations (published on the institutional website of the contracting authority) that led to the use of the emergency procedure are also provided to ANAC, which analytically examines them to verify whether the administrations derogated from ordinary procedures in the presence of an emergency context. If the control activity has a negative outcome, however, the legislator does not provide for any sanction, at least not in terms of invalidating the procedure and the related award. Therefore, it is a control that is only apparently invasive; although only in this evaluation is it possible to verify whether the principle of competition has been legitimately (and correctly) sacrificed on the altar of speed in the name of actual and imminent dangers to the public safety of the community, or whether the use of the emergency procedure was instead a way to circumvent the protective rules provided for by the Public Procurement Code.

From the practice, it emerges that the control carried out by ANAC does not solely fulfill a function related to verifying the legitimacy of a single procedure, but also serves as guidance regarding future (possible) scenarios in which a contracting station intends to resort to the urgent procedure pursuant to Article 140 of the Public Contracts Code. In a recent case reviewed by this Authority, in which a distorted use of the provision was revealed - illegitimately used for completion works related to the recovery and maintenance of a building, without presenting any connection with the removal of a state of danger - the guidance function emerges precisely where the same Authority invites the awarding municipal administration to duly take into account what was specifically noted and considered in order to avoid the same criticalities being found in future assignments[44].

Regarding Article 140, paragraph 7, of the new Public Contracts Code, and more specifically concerning those hypotheses in which the work or the service is not subsequently authorised by the administration, if it is true that on the one hand the rule provides that the person who started the work must receive a sort of indemnity for the amount invested to carry out the work, it is

[44] Anac 28.10.2020, n. 922, in *www.anticorruzione.it*.

equally true that there is a risk of generating a vacuum of protection, especially from the public finances, for the 'authorising' official. For this reason, it may be useful to retrieve some statements of constitutional jurisprudence that, while referring to Article 191 of the Consolidated Law on Local Authorities, refers to a case of entrusting public works in the event of extreme urgency.

In this case, the Constitutional Court considers that "the third party contractor, in agreeing to carry out works of "extreme urgency" [...] cannot ignore the fact that, if subsequently there is no authorisation by the body, the contractual relationship must be considered to have been entered into directly with the official (or administrator) and therefore voluntarily assumes the risk resulting from the final identification of the contracting party (and patrimonial responsibility)". However, the same Court subsequently ruled that "since the contractual relationship exists exclusively between the third party contractor and the official (or administrator) who authorised the execution of the works of extreme urgency, if on the one hand it is true that the third party can bring the contractual action only against the official (or the administrator) to obtain the consideration for the works, it is also true that the latter, while it is exposed to suffer in its own assets the impoverishment caused by the exercise against it of the other contractor's right to obtain the price, has no specific action to bring against the entity in whose assets the enrichment occurred".

On the one hand, therefore, the conditions exist in favour of the official (or administrator) for him to be able to exercise the action under article 2041 of the Civil Code against the body within the limits of the enrichment obtained by the latter; on the other hand, and as a consequence, the private contractor is legitimated, *utendo iuribus* of the official (or administrator) who is his debtor, to act against the public administration - also at the same time as the application for payment of the price is made against the latter - by way of subrogation under article 2900 c.c. "to ensure that his reasons are satisfied or preserved" when the assets of the official (or administrator) do not offer adequate security [. ..] And since, in the final analysis, the body, within the limits of its enrichment, is obliged to pay compensation, and the private contractor is entitled to obtain, within the same limits, compensation for the decrease in assets suffered, it follows that it appears unfounded, in the terms in which it was put forward, the criticism of the unreasonableness of the provision complained of, which - in the context of a more

complex set of rules intended to restore the finances of local authorities in distress - is designed to ensure strict application of the accounting rules and thus strict control of expenditure'[45].

5. Emergency response procedures, volcanic risk, and urban planning: seeking balance for administrative simplification

As previously mentioned, volcanic risk can be addressed by using data obtained from monitoring past events, such as the occurrence of anomalous seismic activity. While one of the goals of volcanology is to try and predict an eruption, in terms of territorial planning, predictability of the event is important for making precautionary and preventative choices for damage control[46], safeguarding people and assets, organizing rescue efforts[47], and responding to emergencies[48].

Urban planning tools can play a pivotal role in public policies for risk prevention and (potential) infrastructure development[49] associated with volcanic risk[50]. To understand the advantages and limitations of planning tools, it can be helpful to

---

[45] M. Ventricini, *Servizi amministrativi e responsabilità del pubblico funzionario*, in 7-8 *Giust. civ.* 283 ff. (2007).

[46] T.A.R. Campania, Napoli, Sez. IV, 9.3.2020, n. 1041, in *www.giustizia-amministrativa.it*, according to which the decision refusing to issue the single permit including the building permit for the construction of a new roadside petrol station is lawful, since this activity would affect the so-called Red Zone of the Phlegraean Fields, characterised by a high volcanic risk.

[47] In this sense, T.A.R. Campania, Napoli, Sez. III, 4.2.2019, n. 609, in *www.giustizia-amministrativa.it*, underlines that there are several provisions - Article 3 of Campania Regional Law No 10/2004 and Article 5 of Campania Regional Law No 21/2003 laying down town-planning rules for municipalities in volcanic risk zones in the Vesuvian area - which do not provide for a suspension of the determination of the requisite authorisations (permits or amnesties), as a safeguard measure, but rather impose a prohibition, for which the rejection of the application for amnesty is clearly justified.

[48] This aspect was emphasised, in particular, by F. De Leonardis, *Il principio di precauzione nell'amministrazione del rischio*, Milano, 2005.

[49] In this regard, although the author refers to seismic risk (and not volcanic risk), we fully agree with the observations made by M. Dugato, *Terremoto, ricostruzione e regole degli appalti*, in 3 *Munus* 485 ff. (2017).

[50] In doctrine, the question arises about the reason why, notwithstanding the various regulatory prescriptions, the process of urbanisation even at the slopes of active volcanoes is constantly ongoing, cfr. S. Peppoloni, *I rischi naturali: conoscerli per difenderci*, in 4 *Nuova informazione bibliografica* 824 (2015).

briefly analyze a rather emblematic case, such as the planning choices made in the aftermath of several events that affected the Vesuvius area in the Campania region.

The current National Plan for Vesuvius Risk divides the area surrounding Vesuvius into three zones: the Red Zone, the Blue Zone, and the Yellow Zone. The Red Zone is that area that could be destroyed by pyroclastic flows and mudslides and must therefore be completely evacuated starting ten days prior to the expected eruption date. The Yellow Zone, which covers approximately 1,125 square kilometers, is the surface area on which (depending on atmospheric conditions and the direction of high-altitude winds) ash, pumice, and lapilli could deposit in quantities exceeding the limit of roof collapse for buildings, and from which only part of the population is planned to be evacuated later. The Blue Zone, covering approximately 98 square kilometers and located in the northern part of the Yellow Zone, is the area that could be affected by floods and mudslides due to the morphology of its terrain.

The Plan provides that citizens fleeing from the Red Zone be directed and housed in other regions of Italy (all except Sardinia, Trentino-Alto Adige, and of course Campania), each of which is "twinned" with one of the eighteen municipalities involved. The distance of some destinations from the area of origin and, above all, the dispersion throughout the national territory of a community characterized by a strong identity, such as the Vesuvian one, appear to be elements that are not very appropriate, and even less effective, for the Plan. An additional critical aspect is represented by the planned complete evacuation of the Red Zone with 10 days' advance notice before the expected eruption. Such notice does not allow for a decision to be made in a situation of reasonably contained uncertainty about the probability of the eruption occurring or not. It should also be emphasized that the danger of a false alarm, which would have serious consequences for the economy and the lives of citizens, is equal to 50%.

Despite measures being dated, it is very interesting to note that in 2002, the Campania Region approved the 'Guidelines for regional land planning', which address volcanic risk as one of the aspects of environmental risk management within the context of land management issues. The focus is particularly on mitigation policies aimed at discouraging any permanent residential and productive urbanization, aiming to transform the Vesuvian territories into a tourist-environmental area over a 30-year time

frame. Above all, the aim is to obtain a settlement decompression through the relocation of the currently resident population with consensual policies to alleviate the problem of a possible evacuation.

Thirty years later, while it is true that the urban planning tools of the municipalities located in the Red Zone have not allowed for an increase in residential construction[51], it is also true that, despite numerous incentives for relocation, citizens continue to accept the risk, which remains anything but unexpected but can still be monitored thanks to the verification by the scientific community and civil protection. The target pursued, consisting of a slow and non-conflictual "preventive evacuation" has therefore simply translated into bringing the risk to an acceptable level, trying to reconcile the assessments of experts with the desires and expectations of residents.

6. Conclusions

Considering the examination of the Italian regulations on emergency works in the context of volcanic risk, a few brief considerations emerge. The significant margin of discretion granted to contracting authorities in the use of exceptional award procedures, as well as the substantial ineffectiveness of the control activity provided for, has often led in the past to an abuse of the urgent procedures. This risk of improper use of the emergency procedure has recently been fueled by Legislative Decree no. 56/2017, which expressly provided that the emergency procedure should be used not only in the case of natural disasters that may lead to the declaration of a state of emergency of national relevance, but also in cases of emergencies of a limited territorial scope that must be addressed with extraordinary powers, or even cases of events that can be dealt with "ordinarily" by single authorities. This choice has been expressly criticized by the Council of State, which

[51] T.A.R. Campania, Napoli, Sez. III, 3.1.2020, n. 31, in *www.giustizia-amministrativa.it*, which states that in such circumstances the increase of building for residential purposes by means of an increase in the habitable volumes and urban loads deriving from settlement weights is prohibited, excluding mere functional and hygienic-sanitary adaptations of existing buildings. In these terms, see also T.A.R. Campania, Napoli, 15.5.2020, n. 1806, in *www.giustizia-amministrativa.it*, and T.A.R. Campania, Napoli, Sez. III, 11.11.2014, n. 5788, in *www.giustizia-amministrativa.it*.

in its opinion on the legislative measure denounced how such dilatation tends "on the one hand to make it possible to use extraordinary procedures even to overcome situations or inconveniences of limited scope that are currently dealt with by ordinary means, and on the other hand to detach the urgency requirement from the issuance of an order by civil protection authorities".

At the same time, the pivotal role that could be played by territorial governance planning tools has not yet been adequately valued by the national (and regional) legislator. A comprehensive territorial planning, combined with an effective delocalization process, would indeed make it possible to define in advance the areas and settlements where urban and building renovation interventions, environmental redevelopment and recovery, as well as enhancement of historic centers fagarcould be carried out through a rethinking of the role of cities [52]. However, in this regard, the need arises to resort to consensual planning models, to avoid delocalization investments that, in the absence of adequate "compensation" or without the consent of the community, would not be feasible[53]. Notwithstanding the tripartition of volcanic risk assessment, it is necessary, in the context of the relationship between public powers and the community, to apply certain strategies aimed at enhancing the centrality of risk perception for the community[54]. In this regard, it seems useful to recover the paradoxical difference between the perception of risk that the community has for the potential eruption of the volcano Etna and that of Vesuvius. In fact, even though it is well known that the eruption of the former would certainly have fewer negative effects than the latter, Sicilian citizens have more information than those

[52] G. Gardini, *Alla ricerca della "città giusta". La rigenerazione come metodo di pianificazione urbana*, in 24 *Federalismi.it* 44 ff. (2020), argues how the current era is characterised by policies of reuse and preservation of the existing rather than 'expansion' building and urban planning.

[53] This aspect is correctly underlined by M. De Donno, *Il principio di consensualità nel governo del territorio: le convenzioni urbanistiche*, in 5 *Riv. giur. edil.* 279 ff. (2010), according to which the principle of consensus in urban planning choices would empty the relationship between administration and citizen of 'authoritativeness' and would allow for a higher level of social control through popular participation in the choices that have the greatest impact on the community.

[54] M.S. Davis, T. Ricci, L.M. Mitchell, *Perceptions of Risk for Volcanic Hazards at Vesuvio and Etna, Italy*, in *The Australasian Journal of Disaster and Trauma Studies* 1 (2005).

in Campania affected by the volcano[55]. Regarding this information gap, one proposed solution relates to the formalisation of informative meetings, coordinated by the regional Civil Protection, which should make the community understand the importance of developing risk mitigation strategies with respect to the specific area concerned, taking into account the specific characteristics of individual volcanoes[56].

[55] F. Barberi, M.S. Davis, R. Isaia, R. Nave, T. Ricci, *Volcanic risk perception in the Vesuvius population*, in *Journal of Volcanology and Geothermal Research*, cit. at. 254, According to a sample collection of data and information gathered by interviewing the community, they claim that most of citizens received insufficient information regarding the effects of the Vesuvius potential eruption.
[56] According to F. Barberi, M.S. Davis, R. Isaia, R. Nave, T. Ricci, *Volcanic risk perception in the Vesuvius population*, in *Journal of Volcanology and Geothermal Research*, cit. at. 245, with specifically regard to Vesuvius, there has been a lack of attention paid to public communication and information during periods of long-term volcanic inactivity, which has negatively affected knowledge of the potential risks underlying the volcano's eruption.

EXTERNAL DIMENSIONS OF EU DATA PROTECTION LAW: THE LEGAL AND THE POLITICAL

*Alessandro Petti**

Abstract

The external dimensions of EU data protection law are manifold. The provisions of EU data protection law envisage a scope of application that goes beyond the territory of the Union. Moreover, EU data transfer rules govern the mechanisms by which data could be transferred to foreign jurisdictions. In addition to this, EU law influences the development of international law in data privacy through the amendment of relevant Council of Europe Conventions and the conclusion of trade agreements. This article addresses these different external aspects of EU data protection with a focus on the relationship between law and politics. It unravels the extent to which the status of data privacy as a fundamental right in the Union comes to terms and often collides with different legal-political preferences and realities in foreign jurisdictions. It finally considers the recent initiatives of data localisation to protect EU data subject rights.

Table of Contents

1. Introduction

The reach of EU law beyond the Union's borders is a distinctive characteristic of the EU's posture as an international

legal actor. Article 3(5) TEU bestows upon the Union a constitutional mandate to uphold and promote its values and interests and contribute to the protection of its citizens in the wider world.[1] In the EU's proximity, pursuant to Article 8 TEU, such a mandate could be construed as a legal commitment on the part of the EU to shape its neighbourhood according to its values and interests.[2] The foregoing constitutional mandates have universalist drives as they are predicated on the assumption of the exportability of the EU model in the wider world. Yet, these assumptions are increasingly under strain in the current times of geopolitical fragmentation where the universality and the exportability of the EU model are put in question.

In the external dimension of EU data protection law,[3] two interrelated dynamics are at play. On the one hand, the EU overtly aspires at becoming a world leader in data protection law, possibly shaping global regulatory convergence towards its General Data Protection Regulation (GDPR).[4] On the other hand, and more importantly, the external dimension of EU data protection law serves to operate a EU-wide re-bordering outside the EU's borders. It aims at extending globally what has been powerfully described as a 'domestic utopia', that is 'a space allowing European data subjects to be at home everywhere and their personal data to flow in such a regulated and protected way that it avoids any disruption'.[5]

The article examines these joint dynamics by addressing several dimensions of the outer reach of the EU data protection law in the interplay of law and diplomacy. It brings to the fore different

* Research Fellow, Centre for European Law, University of Oslo.

[1] See also Article 21 TEU. On the reach of EU law beyond the EU's borders see M. Cremona and J. Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (2019).

[2] C. Hillion, *The Neighbourhood Competence under Article 8* TEU, Notre Europe Policy Paper, 2013; A. Petti, *EU Neighbourhood Law: Wider Europe and the Extended EU's Legal Space* (2024).

[3] C. Kuner, *Internet and the Global Reach of EU Law*, in M. Cremona and J. Scott, cit at 1.

[4] European Commission, 'Stronger Protection, New Opportunities -Commission Guidance on the Direct Application of the General Data Protection Regulation as of 25 May 2018', COM(2018) 43 final, 5. On these issues see also A. Bradford, *The Brussels Effect : How the European Union Rules the World* (2020).

[5] Editorial Comments, *Europe Is Trembling. Looking for a Safe Place in EU Law*, 57 Common Mkt. L. Rev 1675 (2020) 1681.

ways in which the GDPR and its antecedent directive influences foreign jurisdictions and international law. First, the article discusses the provisions of the territorial scope of the GDPR. The emphasis is placed on the interpretation of these provisions by the CJEU in its landmark de-referencing rulings (section 2). Then, the article examines the GDPR rules governing data transfer to third countries. It focusses on adequacy schemes, whereby the EU recognises that a foreign jurisdiction ensures a comparable level of protection of personal data to the EU (section 3). In that regard, the Article examines the arrangements with the US (section 3.1) and with Japan (section 3.2), with a view to appreciating the variety in the EU's engagement with foreign jurisdictions. After that, the article considers how EU law interacts with international law in the domain of data protection. After an examination of the European Economic Area (EEA) and EU-UK international law arrangements (section 4), the Article addresses the EU's involvement in the Globalisation of the Council of Europe Convention 108 (section 4.1) and discusses the interactions and frictions between the GDPR and trade regimes. Finally, the Article draws some conclusions on the dynamics of the outer reach of EU data protection law. A reflection is offered on the recent outlooks of data localisation in the EU to respond to geopolitical fragmentation.

2. The territorial scope of EU data protection law: the de-referencing rulings

The global reach of EU data protection law and the ensuing broad territorial scope of application is grounded in the EU Treaty framework. In EU law, the protection of personal data is a fundamental right enshrined in Article 8 of the EUCFR. The right to the protection of personal data is also enshrined in Article 16 of the TFEU which entrusts the European Parliament and the Council to adopt rules in the data privacy domain. The General Data Protection Regulation was adopted pursuant to both Article 8 ECFR and Article 16 TFEU.[6] Compared to the antecedent Directive

[6] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] O.J, L 119/1.

95/46/EC,[7] the GDPR features a stronger focus on the wider reach of its application. The provisions of the GDPR, and especially Article 3, make it clear that the scope of EU data protection law goes beyond the EU territory for the processing activities of data subjects who are in the Union, even when the controller or the processor is not established within the EU.

The application of EU data protection law beyond the EU borders has been clarified in several CJEU's rulings. De-referencing rights, widely known as the 'the right to be forgotten', have inspired a landmark line of CJEU's pronouncements defining the scope of application of EU data protection law. In *Google Spain*,[8] the Court fostered an extensive interpretation of the scope of application of the EU data protection law and of the territoriality test required by Article 4(1)a of the Directive. The case concerned an EU data subject who asked Google Inc and Google Spain to remove the personal data relating to him. Entering his name on the search engine would provide links to a newspaper article where he had appeared for a real estate auction concerning repayments of social security debts.

The Court held the activities of the operator (Google Inc.) and those of the establishment situated in the Member State (Google Spain) were 'inextricably linked' because advertisement in Spain rendered the engine profitable and the engine itself constituted the means for the performance of this activity.[9] The ECJ highlighted that the display of personal data, which constitutes processing of such data, was accompanied by the display of advertising which was linked to the search term. In the words of the Court's, it was 'clear that the processing of personal data in question was carried out in the context of commercial advertising activity of the controller's establishment' on the territory of Spain.[10] The Court highlighted how the 'particularly broad territorial scope' of the Directive was designed by the EU legislature to 'prevent individuals from being deprived of the protection guaranteed by the directive'.[11] If the 'processing of personal data carried out for the purposes of the operation of the search engine [were to] escape

[7] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] O.J. L 281/31.
[8] Case C-131/12, *Google Spain vs AEPD* ECLI:EU:C:2014:317.
[9] Ibid. para 56.
[10] ibid para 57.
[11] ibid para 54.

the obligations and guarantees' envisaged by the Directive, the 'effective and complete protection of the fundamental rights and freedoms' of EU data subjects would be compromised.[12]

What has been called the CJEU's 'limited territoriality'[13] approach in the domain of EU data protection law, has been arguably further fostered in the *Weltimmo*[14] and *Amazon*[15] cases. Although concerning intra-EU disputes, in these rulings the Court clarified the interpretation of Article 4(1)a of the Directive with arguments that could be easily applied to third-countries contexts.[16] The extensive reading of Article 4(1)a of the Data Protection Directive has led to a situation whereby its application requires a rather shallow territorial trigger, namely 'a somewhat tangible physical establishment on EU territory whose supporting activity shows at least a tiny (online) link to the actual processing activity of the third country processor'.[17] The foregoing rulings have informed the design of Article 3 GDPR. In *Google Spain,* the Court put forward an understanding whereby the wider territorial application of EU data protection law is predicated upon an interpretation informed by elements of teleological and an *effet utile* nature. [18]

In *Google v CNIL*,[19] the Court was more prudent regarding the effects of data protection law outside the Union. The case concerned a litigation initiated by Google against the French Data Protection Authority, the CNIL,[20] to contest a fine imposed by CNIL on Google Inc. for its failure to apply de-listing worldwide. Google's refusal to comply with the French Authority's formal notice imposed a penalty of one hundred thousand euros. Subsequently, Google lodged an application with the *Conseil d'État*

[12] ibid para 58.
[13] M. Gömann, *The New Territorial Scope of EU Data Protection Law: Deconstructing a Revolutionary Achievement*, 54 Common Mkt. L. Rev 567 (2017).
[14] Case C-230/14, *Weltimmo vs Nemzeti* ECLI:EU:C:2015:639.
[15] Case C-191/15, *Verein für Konsumenteninformation vs Amazon* ECLI:EU:C:2016:612.
[16] C. Kuner, *Internet and the Global Reach of EU Law*, cit. at 3.
[17] M. Gömann, *The New Territorial Scope of EU Data Protection Law*, cit. at 17, 574.
[18] See along the same lines S. Francq, *The External Dimension of Rome I and Rome II: Neutrality or Schizophrenia* in M. Cremona and H.W. Micklitz, *Private Law in the External Relations of the EU* (2016), 97–8. She posits: '[t]he (territorial) scope of application of EU secondary law stems from its policy objectives: a direct correlation can be established between the achievement of EU policies and the potential need to cover situations partly located in third states'.
[19] Case C-507/17, *Google vs CNIL* ECLI:EU:C:2019:772.
[20] CNIL stands for : *Commission nationale de l'informatique et des libertés*.

contesting the adjudication that resulted in the imposition of the fine. The French Court's preliminary reference revolved around the territorial scope of the Directive 95/46 and of the de-referencing rights on the basis of its provisions enshrined in its Articles 12(b) and Article 14(1)a. The ECJ adjudicated the case by not only interpreting the Directive but also the GDPR, which in its Article 17, governs the 'right to erasure'.[21]

In *Google v CNIL,* the Grand Chamber had to reconcile different approaches and rationales with respect to the outer reach of EU data protection law. A first teleological rationale,[22] predicated upon the objectives of the EU data protection law,[23] led the Court to find an EU competence and justification for a global de-referencing on all the versions of an operator's search engine.[24] While this first rationale would suggest a wider interpretation of the reach of EU data protection law, other considerations pertaining to the legal and political realities outside the EU suggested circumscribing of the application of EU data protection law. In this respect, the ECJ clarifies that the 'right to the protection of personal data is not an absolute right' and should be balanced against other fundamental rights in accordance with the proportionality principle'.[25] For instance, while benchmarks and organisational mechanisms allow for the balancing of public interest and data protection within the EU,[26] outside the Union these mechanisms may not be present.[27] In *Google v CNIL*, thus the Court found that when the search engine operator grants a delisting request in pursuance of EU data protection law, the operator 'is not required to carry out that de-referencing in all versions of the search engine, but on the version of that search engine corresponding to all the Member States'. This would be sufficient also in light of the

[21] *Google vs CNIL*, cit. at 19, para 46.
[22] Ibid, paras 54–55
[23] Especially those apparent from recital 10 of the Directive 95/46, cit at 7, and recitals 10,11, and 13 of the GDPR, cit. at 6.
[24] *Google vs CNIL*, cit. at 19, paras 57–58.
[25] Ibid, para 60.
[26] Case C-136/17, *GC and Others v CNIL,* ECLI:EU:C:2019:773, para 59. New developments in the balancing between the right to privacy enshrined in Articles 7 and 8 of the EUCFR and the right to information pursuant to Article 11 EUCFR, within the Union has come from the Grand Chamber Ruling in Case C-460/20 *TU, RE v Google LLC*, ECLI:EU:C:2022:962 regarding the obligation of de-referencing with regard to inaccurate information.
[27] *Google vs CNIL*, cit. at 19, paras 61-63

techniques of 'geo-blocking' that prevent or at least discourage users from accessing the links for which the de-referencing request has been submitted.[28]

Political motives lie behind the limitation of the territorial scope of EU data protection law. While evoked by the Advocate General, such motives were not explicitly mentioned by the Court. In fact, Advocate General (AG) Szpunar alluded to the political risks that global de-referencing orders issued by EU law would have on the possibility for individuals in third countries to have access to information. Moreover, the AG signalled that this would make third countries' regimes liable to become part of a 'race to the bottom, to the detriment of freedom of expression, on a European and worldwide scale'.[29] Arguably, the Court's favour towards a restriction of de-referencing in the EU seems also to respond to the need to prevent international frictions with the US system. Here, the constitutional architecture grants special protection to the right to free speech, as provided for in the First Amendment to the US Constitution.[30]

The Court's approach has left EU data protection law with a fundamental ambivalence. If on the one hand, the Court established the existence of the EU competence to impose de-referencing to all the versions of a search engine to meet EU law data protection objectives, on the other hand, it subjects the exercise and the calibration of this competence to considerations of an ultimate political nature[31] pertaining to the conduct of international relations. Such a fluctuation can be also found in the text of the judgment which reads that 'while […] EU law does not currently require that the de-referencing granted concern all versions of the search engine […] it does not prohibit such a practice'. It is therefore left to the national data protection authorities to balance data privacy with the freedom of information with the possibility 'to order, where appropriate, the operator of that search engine to

[28] ibid 65; 73.

[29] Opinion of AG Szpunar, Case C-507/17, *Google vs CNIL* ECLI:EU:C:2019:15, para 61.

[30] J. Globocnik, *The Right to Be Forgotten Is Taking Shape: CJEU Judgments in GC and Others (C-136/17) and Google v CNIL (C-507/17)*, 69 GRUR International 380 (2020), 386.

[31] Editorial Comments, *Europe Is Trembling. Looking for a Safe Place in EU Law*, cit. at 5 1680.

carry out a de-referencing concerning all the versions of that search engine'.[32]

The foregoing calibration is not an isolated approach in the realm of EU internet law. A similar attitude has been endorsed in the case of the e-Commerce Directive[33] whereby the Court established that the design of the directive and the injunction measures to be taken by national courts pursuant to Articles 15 and 18 of the Directive, do 'not preclude those injunction measures to have effects worldwide'. The Court found that it is 'up to Member States to ensure that the measures which they adopt and which produce effects worldwide take due account' of rules applicable at the international level.[34] In *Glawischnig-Piesczek v Facebook*, the Court established that Article 15 (1) of the E-commerce Directive 'must be interpreted as meaning that it does not preclude a court of a Member State from […] ordering the host provider to remove information covered by the injunction or to block access to that information worldwide within the framework of the relevant international law'.[35]

Some days before the delivery of the *Google v CNIL* pronouncement by the Grand Chamber, the Third Chamber of the ECJ had arguably taken a different stance in *Glawischnig-Piesczek v Facebook*. In this case the Court's decision actually established the worldwide deletion of unlawful content. Yet, its reasoning was similar to the one of *Google v CNIL*. While recognising also in this case the competence derived from EU law to order the worldwide deletion, the ECJ left the national courts with a margin for manoeuvre to order the deletion of unlawful content pursuant to Article 15(1) of the Directive.[36] This line of reasoning also suggests that EU data protection law may be applied globally along the lines of what the Court found in *Google Spain*.

In *Google Spain*, the Court had linked the scope of application of the Data Protection Directive to a primarily teleological interpretation of EU law. In *Google v CNIL*, the Court qualified the perimeter of the *effet utile* of EU law calibrating the teleological approach adopted in *Google Spain* with a proportionality-based

[32] *Google vs CNIL*, cit. at 19, para 62.
[33] Directive 95/46/EC cit. at 7.
[34] Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited* ECLI:EU:C:2019:821, paras 51–52.
[35] ibid 53.
[36] J. Globocnik, *The Right to Be Forgotten Is Taking Shape*, cit. at 3o, 387 fn 82.

assessment. This responds to the design of Article 52 EU Charter of Fundamental Rights (EUCFR). Indeed, although not explicitly mentioned, in *Google v CNIL*, the approach taken by the Court suggests a limitation of the exercise of the rights and principles of EU law as provided for in Article 52 (1) of the EUCFR.[37] The Charter envisages limitations to the rights it safeguards insofar as 'they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. Crucially, the Court limited the territorial scope of de-referencing rights of EU data by simultaneously mandating a broader territorial application to the limitations envisaged by Article 52 (1) of the EUCFR. This ambivalence found a composition in the principled and pragmatic attitude of the Grand Chamber in *Google CNIL*. On the one hand, the Court intimates that de-referencing can possibly be applied globally as this would be within the competences granted by EU law. On the other hand, it recognises that an EU-wide de-referencing combined with geo-blocking is sufficient to safeguard the *effet utile* of EU law while adapting it to different political contexts.

3. The law and politics of data transfer: the adequacy decisions

The external dimension of the GDPR is not limited to its territorial scope ranging outside the EU in pursuance to the provisions of its Article 3. A crucial aspect of the cross-border data protection of the GDPR pertains to the data transfer rules detailed in chapter V of the Regulation. In that regard, the tripartite structure allowing for data transfer outside the Union (adequacy, appropriate safeguards, exceptions) envisaged by the antecedent Directive has been broadly replicated in the Regulation.[38] First, data transfer from the EU to third countries is allowed in the case of an adequacy decision. In those decisions, the Commission recognises that the country at issue offers an adequate level of protection of EU data privacy, comparable to that accorded by EU law. Adequacy decisions may be construed as entailing an extension of the EU's

[37] This was instead rendered explicit in Case C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* (*Schrems II*) ECLI:EU:C:2020:559.

[38] See further C. Kuner, *Internet and the Global Reach of EU Law*, cit. at 3.

legal space as they trigger convergence to EU law. In making the adequacy assessment, the Commission considers factors such as the rule of law and respect for human rights and fundamental freedoms (Article 45 GDPR). Secondly, data transfer is allowed subject to appropriate safeguards provided by the data controller or the data processor (Article 46) such as Standard Data Protection Clauses (SDPC) and Binding Corporate Rules (BCRs) recognised by Member States' competent supervisory authorities (Article 47). An additional venue for data transfer consists in specific derogations such as consent by the data transfer, performance of a contract, or reasons of public interest (Article 49).

Data transfer rules are crucial in understanding the relationship between the EU with foreign jurisdictions and the interplay of law and diplomacy. The data transfer rules of the GDPR display more evidently diplomatic elements: they often entail a differentiation in the relationship with third countries that is typical of international relations. The factors that the Commission needs to consider when issuing the adequacy decision are detailed in Article 45 GDPR. Arguably adequacy decisions are a synthesis of different ways in which EU data protection law influences and interacts with foreign jurisdictions.

In the mechanisms highlighted by Kuner whereby EU data protection law influences foreign jurisdictions, adequacy decisions mainly pertain to 'coercion and conditionality'.[39] While there is not a veritable coercion, conditionality is at play in so far abidance by EU (or equivalent) standards is rewarded with EU market access. Political elements are usually factored in the framework of adequacy talks. While the Commission maintains for instance that 'EU data protection rules cannot be the subject of negotiations in a free trade agreement',[40] it recognises that although 'the protection of personal data is non-negotiable, [..] the EU regime on international data transfers […] provides a broad and varied toolkit to enable data flows in different situations'.[41] Especially in the past, there have been instances where adequacy determinations became 'entangled in political issues', also engendering frictions with third countries deemed to have not been treated equally in the

[39] Ibid.
[40] European Commission, 'Exchanging Personal Data in a Globalised World' COM(2017) 7 final, 9.
[41] ibid 6.

assessment of their legal systems.[42] For instance, the EU adequacy determination in Argentina has been described as amounting to a 'reward for adopting an EU-style data protection law at a time when such legislation had not yet spread throughout Latin America, let alone the world'.[43]

EU data transfer rules largely follow a geographic approach. As noted by Kuner, such an approach is predicated upon the jurisdiction to which the data are to be transferred. In that context, adequacy decisions serve to determine whether the foreign jurisdiction importing data ensure adequate standards of protection both in the design and the implementation of the relevant data protection law. This stands in contrast to an organisational approach whereby the 'data exporters [are made] accountable for ensuring the continued protection of personal data transferred to other organizations no matter what their geographic location'.[44] The following sections will illustrate how the geographic approach of adequacy decisions is hardly monolithic. There are different articulations of adequacy frameworks in different jurisdictions.

3.1 EU data protection in the US

Three frameworks for data transfer have been negotiated between the EU and the US. Two have been invalidated by the EU Courts, a third is currently under scrutiny by the CJEU. The *Safe Harbour* was a first arrangement allowed the transfer and processing of data on the basis of a set of voluntary principles and practices upheld by US companies adhering to it. The delicacy of the negotiations principally arose from the different EU and US approaches to the matter. While the US's preferences 'remained

[42] C. Kuner, *Transborder Data Flows and Data Privacy Law* (2013) He writes: 'in July 2010 the government of Ireland delayed an EU adequacy decision for Israel based on alleged Israeli government involvement in the forging of Irish passports. In addition, members of the Article 29 Working Party have told the author that politics entered into that group's decision to approve Argentina as providing an adequate level of data protection, and a failed bid for adequacy by Australia in the early 2000s caused tensions between that country and the EU', 66.
[43] P.M. Schwartz, *Global Data Privacy: The EU Way*, 94 N.Y.U. L. Rev. 771 (2019).
[44] C. Kuner, *Transborder Data Flows and Data Privacy Law*, cit. at 42, 64.

markedly anti-regulation',[45] EU as its Member States were 'extremely sceptical of the very notion of industry self-regulation'.[46] An additional contentious issue pertained to the effectiveness of enforcement schemes for effective protection of individuals' privacy (primarily demanded by the EU) and the formulation of a predictable legal framework (as advocated by the US). Notwithstanding some objections by the European Parliament, the Commission eventually established that the *Safe Harbour* would be in compliance with EU adequacy criteria.[47] After the invalidation of the arrangement in *Schrems I*, the EU negotiated a second arrangement the *Privacy Shield* that resulted in a second adequacy determination. This second framework mirrored the first in many respects, although the enforcement mechanisms were strengthened, and reassurances were given with respect to the fact that the data transferred under the *Privacy Shield* would not be subject to programmes of mass surveillance.[48]

In its dismissal of the *Safe Harbour* scheme, the Court maintained that '[US] legislation permitting public authorities to have access on a *generalised basis* to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter'.[49] Moving away from the Advocate General's suggestions, [50] the Court noticed significant flaws the principles of the *Privacy Shield* in favour of US interests and rules.

---

[45] European Commission, Press Release - Speech by Mario Monti- "The Information Society: New Risks and Opportunities for Privacy" (Brussels, 18 October 1996).

[46] D. Heisenberg, *Negotiating Privacy : The European Union, the United States, and Personal Data Protection* (2005) 87.

[47] Commission Decision (EC) 2000/520 of 26 July 2000 pursuant to Directive 95/46/EC on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441), [2000] OJ L 215/7.

[48] US Administration, 'Letter from Robert S. Litt, General Counsel, Office of the Dir. of National Intelligence, to Justin S. Antonipillai, Counselor, U.S. Department of Commerce, and Ted Dean, Deputy Assistant Security, International Trade Administration.' (22 February 2016).

[49] Case C-362/14, *Maximillian Schrems v Data Protection Commissioner (Schrems I)* ECLI:EU:C:2015:650, para 94 emphasis added.

[50] Opinion of AG Saugmandsgaard Øe, Case C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* ECLI:EU:C:2019:1145, paras 174–186.

Limitations on data protection of EU data subjects were, in fact, still envisaged when 'necessary to meet national security, public interest, or law enforcement requirements in the US'.[51] Besides, the domestic law of the US[52] was considered by the CJEU to be unsatisfactory with regards to the guarantees of proportionality in establishing limitations on the protection of personal data. The proportionality of these limitations was mandated by EU constitutional requirements enshrined in Article 52(1) of the ECFR.[53] Shortcomings were also found with respect to the lack of effective remedies pursuant to Article 47 of the Charter. In fact, the Commission itself had noticed the possible unlawful surveillance of EU data subjects for US national security purposes.[54]

In both *Schrems I* and *Schrems II* the Court attempted to insulate the negotiated adequacy framework from political interferences at both sides of the negotiating tables. The empowerment of EU national data protection authorities operated by the Court in *Schrems I* at the expenses of the Commission[55] can be read as an attempt to separate political negotiations from legal monitoring and assessment on the EU side. In adequacy decisions, in fact, the Commission both designs the negotiations of the data protection framework and monitors the adequacy. In the words of Azoulai and van der Sluis, in *Schrems I*, the Commission was 'regarded by the Court as a political body and not as a technical body responsible for the oversight of Union law'.[56] The independence of the data protection framework from political influences on the US side was a crucial motive of the *Schrems I* and *Schrems II* rulings. In *Schrems II*, the Court found the remedies to the Ombudsperson Mechanism introduced by the US authorities insufficient. The Court expressed reservations with regard to the political role of the Ombudsperson: although the Ombudsperson is considered as 'independent from the Intelligence Community', she was described as '[reporting] directly to the Secretary of State and

[51] *Schrems II* (n 43) para 164.
[52] In particular the Foreign Intelligence Surveillance Act, notwithstanding the limitations prescribed by the Presidential Privacy Directive (PPD)- 28.
[53] Case C-311/18, *Schrems II,* cit. at 37, paras 168–185.
[54] Ibid, paras 190–191.
[55] Case C-362/14, *Schrems I*, cit. at 49, paras 44–45.
[56] L. Azoulai and M. van der Sluis, *Institutionalizing Personal Data Protection in Times of Global Institutional Distrust: Schrems*, 53 COMMON MKT. L. REV. 1343 (2016), 1359.

is an integral part of the US State Department'. Besides, the appointment and the dismissal of the Ombudsperson was not accompanied by guarantees of her independence from the executive and there was 'nothing in [the *Privacy Shield* Decision] to indicate that ombudsperson has the power to adopt decisions that are binding on [the] intelligence services'.[57]

The CJEU's endeavours to safeguard the EU's data protection standards from the interferences of the political process has constitutional significance. In the foregoing rulings, the Court has established that limitations to the scope and intensity of application of EU data protection law in the third country context is regulated by Article 52(1) of the EUCFR. The EUCFR is not intended to be territorially limited. Data transfer of EU data subjects outside the EU must thus occur within the same protection and safeguards accorded internally by the EU legal order. The assessment of the 'essential equivalence' to be carried out by the Commission when negotiating with third countries needs thus to be undertaken at the level of EU primary law.[58]

On 10 July 2023 the Commission adopted a new adequacy decision for the US. In its annexes, the decision encloses the EU-US Data Privacy Framework (DPF) issued by the US Department of Commerce. The DPF is the product of the US's last attempts to set up legal arrangements compliant with the EU data privacy rules to promote trade. As the previous decisions, the Commission's DPF-related adequacy decision is 'partial' insofar as it covers the processing of personal data only of those US organisations that voluntary decide to certify under the EU-US DPF. Arguably the timing of the EU-US adequacy framework has been influenced by geopolitical events, not least the war in Ukraine. The adequacy determination, indeed, become entangled with the political need to show a united front against Russian aggression also in the sensitive domain of internet and data privacy.[59]

The renewed EU-US Data Privacy Framework endeavours to address the main reservations put forward by the ECJ in *Schrems*

---

[57] Case C-311/18, *Schrems II,* cit. at 37, paras 194–197.

[58] S. Yakovleva, *Personal Data Transfers in International Trade and EU Law: A Tale of Two "Necessities"*, 21 The Journal of World Investment & Trade 881 (2020), 913.

[59] 'US Eyes Breakthrough on Data Dispute with EU as Biden Visits Brussels' (*POLITICO*, 24 March 2022) <https://www.politico.eu/article/us-eyes-breakthrough-on-data-dispute-with-eu-biden-visit-privacy-shield-ukraine/> accessed 27 August 2024.

II which elicited an overhaul of US data privacy rules. President Biden's Executive Order (EO) 14086 better articulates the objectives to be pursued by intelligence activities with respect to the Presidential Policy Directive 28 issued by the Obama administration, whose critical points regarding EU privacy law had been highlighted by the ECJ's in *Schrems II*. Yet, the definition of some of the objectives remain nebulous and it has been noted how the EO does not modify the existing US intelligence legislation, which allows for the surveillance of non-US citizens abroad.[60] Moreover, with regard to the right to an effective remedy and fair trial as provided for in Article 47 ECFR, the European Data Protection Board casted doubts on whether the 'rules set forth in EO 14086 and its supplemental provisions, in particular those designed to foster the DPRC's independence, are fully implemented and are functioning effectively in practice'.[61] The resolution of the European Parliament has been even more critical by affirming that the EU-US Data Privacy Framework 'fails to create essential equivalence in the level of protection' of data. The attention of the European Parliament Resolution focused on the scarce independence of the DPRC in light of the appointment and revocation rules of its members. The Resolution noted how the DPRC is 'part of the executive branch and not the judiciary'. In the European Parliament view, the DPRC does not meet the standards of independence and impartiality of Article 47 of the EU Charter. [62]

It remains to be seen whether the new EU-US DPF will pass the tests of the CJEU. New episodes of the EU-US data transfer judicial saga are in the making, with cases on the validity of the EU-US adequacy framework pending before the CJEU.[63] The constitutional rigidity of the EU data protection framework does not only pertain to the US frameworks, but it can be also evinced

[60] S. Batlle and A. van Waeyenberge, *EU–US Data Privacy Framework: A First Legal Assessment*, 15 Eur. J. Risk Regul. 191 (2024), 195.

[61] European Data Protection Board, 'Opinion 5/2023 on the European Commission Draft Implementing Decision on the adequate protection of personal data under the EU-US Data Privacy Framework', 28 February 2023, 46-47.

[62] European Parliament Resolution, Adequacy of the protection afforded by the EU-U.S. Data Privacy Framework, P9_TA(2023)0204, point 9

[63] Case T-553/23, *Latombe v Commission*, Order of the President of the General Court.

from the CJEU's invalidation of the Passenger Name Record (PNR) agreement negotiated with Canada.[64]

3.2 EU data protection in Japan

The EU-Japan free trade area is an additional example of the level to which EU regulatory autonomy in data privacy is upheld to protect the EU's constitutional fabric. In 2019, the EU and Japan announced a mutual adequacy framework that was acknowledged as the world's largest area of safe data flows.[65]The Commission Communication heralding the achievement of the adequacy arrangement somewhat recognised the underlying asymmetry of the framework. In fact, it was for Japan to introduce 'additional safeguards to guarantee that data transferred from the EU [would] enjoy protection guarantees in line with European standards'.[66] The process of alignment of Japanese law to EU standards resulted in amendments to the Japanese Act on the Protection of Personal Information (APPI) and the Personal Information Protection Commission (PPC). These instruments and bodies were modelled along the lines of the EU national data protection authorities.[67] It should be noted how the adequacy scheme pertains only the private sector. At the time of the granting of the adequacy decision, the public sector, including the law enforcement and the national security agencies, was governed by a separate regime, which does not envisage the supervision of the PPC.[68]

The adequacy arrangement with Japan rests upon the Supplementary Rules featured in the Annex of the Adequacy

---

[64] Opinion 1/15, *PNR EU-Canada* ECLI:EU:C:2017:592.

[65] European Commission, Press Release, 'European Commission Adopts Adequacy Decision on Japan, Creating the World's Largest Area of Safe Data Flows' (*European Commission*)<https://ec.europa.eu/commission/presscorner/detail/en/IP_19_421>.

[66] ibid.

[67] Y. Miadsvetskaya, *What Are the Pros and Cons of the Adequacy Decision on Japan?* CITIP *blog -KU Leuven, Law* 2019, <https://www.law.kuleuven.be/citip/blog/what-are-the-pros-and-cons-of-the-adequacy-decision-on-japan/>.

[68] H. Miyashita, *The EU-Japan Relationship*, *blogdroiteuropéen* (2020), 4 <https://blogdroiteuropeen.com/wp-content/uploads/2020/06/miyashita-redo.pdf>.

determination.[69] These 'Supplementary Rules', under the Act on the Protection of Personal Information for the Handling of Personal Data Transferred from the EU, were adopted by the Japanese PCC on the basis of Article 6 of the Act on the Protection of Personal Information. Supplementary Rules implement additional requirements on the processing and transfer of the data of EU data subjects. In the words of the Commission, they 'were put in place to bridge certain relevant differences between the APPI and the GDPR'.[70] The requirements at issue are more stringent than those envisaged by Japanese legislation for Japanese data subjects.[71] For instance, supplementary Rules 'ensure that data subject rights will apply to all personal data transferred from the EU, irrespective of their retention period'.[72] Instead, domestically, the Japanese legal system envisages that data subject rights do not apply to personal data which are intended to be deleted within a period of six months.[73] Moreover, the PPC agreed to broaden the scope of the categories of sensitive data to also include sexual orientation.[74] In light of the foregoing, the different regimes could thus lead to discrimination between EU and non-EU data subjects within the Japanese jurisdiction.[75]

Different philosophies underlie data protection rules in the EU and Japan. While in the Union data protection law is primarily informed by fundamental rights rationales, in Japan it is predicated upon WTO requirements.[76]As a matter of fact, the Japanese data protection system remains primarily premised upon business interests more than on a rights-based attitude.[77] The adequacy

[69] Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation EU 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information [2019] OJ L 76/1. See text to fn 79 of this article for the developments in the public sector.

[70] European Commission, 'Report on the first review of the functioning of the adequacy decision for Japan', COM(2023) 275 final, 1.

[71] See Commission Implementing Decision (EU) 2019/419, cit. at 69, Annex I.

[72] European Data Protection Board, 'Opinion 28/2018 Regarding the European Commission Draft Implementing Decision on the Adequate Protection of Personal Data in Japan', adopted on 5 December 2018, 5.

[73] ibid.

[74] ibid.

[75] H. Miyashita, *The EU-Japan Relationship*, cit. at 68, 5.

[76] ibid 13.

[77] F. Wang, *Cooperative Data Privacy: The Japanese Model of Data Privacy and the EU-Japan GDPR Adequacy Agreement*, 33 Harv. J.L. & Tech. (2020), 688.

determination in Japan has been recently confirmed by the EU.[78] A welcomed development has been the transformation of the 'APPI into a comprehensive data protection framework covering both the private and public sector, subject to the exclusive supervision of the PPC'.[79]This could extend the scope of the EU-Japan adequacy framework to cover also the areas of regulatory cooperation and research. With regard to enforcement, it has been questioned whether Supplementary Rules are enforceable by the Japanese Courts.[80] At the times of the review of the EU-Japan adequacy decision, the PPC reported that it had received no complaints concerning compliance with the Supplementary Rules and that it was considering, on its own initiative, random checks to ensure compliance, an announcement welcomed by the Commission.[81]

4.The GDPR and the interface between EU law and international law

The interface between EU law and international law is key in understanding the protection and projection of EU data rules between the EU's borders. The EU has a constitutional mandate to uphold its values and interests in the wider world.[82] This mandate is arguably stronger in the EU's proximity[83] and pertains also the diffusion of the EU data protection model. A key arrangement for the extension of EU law in the Union's proximity is the European Economic Area Agreement. The Agreement aims at a 'continuous and balanced strengthening of trade and economic relations between the Contracting Parties' on the basis of 'the respect of the same rules'.[84] In force between the EU and its Member States on the one hand, and Norway, Iceland and Liechtenstein on the other hand, the EEA Agreement is a dynamic association agreement that

[78] European Commission, 'Report on the first review of the functioning of the adequacy decision for Japan', COM(2023) 275 final, 6.
[79] Ibid. 4.
[80] H. Miyashita, *The EU-Japan Relationship*, cit. at 68, 6.
[81] European Commission, 'Report', cit. at 78, 5.
[82] See Articles 3(5), 21 TEU.
[83] Article 8 TEU. See also A. Petti, *EU Neighbourhood Law*, cit. at 2.
[84] Article 1 European Economic Area Agreement, [1994] OJ L1/3.

evolves with the substantive evolution of EU secondary law.[85] The GDPR has been incorporated in the EEA Agreement through a Decision of the Agreement's Joint Committee.[86] In pursuance to the principle of homogeneity,[87] in both in the EU and in the EEA-EFTA pillar of the EEA data subjects and undertaking will have the same rights and obligations. Yet, the constitutional setup of the EEA Agreement is different from the one of the EU. The EU Treaties have a status of a constitutional charter.[88] The EEA, instead, has been characterised by the ECJ as an international treaty 'which essentially, merely creates rights and obligations as between Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up'. [89]A key difference in terms of primary law between the EU and the EEA-EFTA pillar rests on the fact that the EUCFR is not part of the EEA Agreement. While the legal effects of the GDPR are the same in the EU and EEA EFTA-pillar, the sources of law are different. This is reflected in the preamble of the GDPR and the corresponding legal act incorporated into the EEA Agreement. The GDPR makes several references to the GDPR both in the preamble as it regards the legal basis and in the body of the Regulation. However, while the adapted EEA act recognises the fundamental rights nature of data protection, it does not evince this from the EU Charter but from 'various international human rights agreements'.[90] The references to the EU Charter are deleted from the text.[91]

Remaining in the EU's proximity, the new EU-UK relations are governed by the Trade and Cooperation Agreement (TCA), which is an Association Agreement like the EEA Agreement. It should be noted, however, that the purposes and the scope of the EEA Agreement are different from those of the EU-UK TCA. Only the former is predicated upon the extension of EU law to the EEA

[85] M. Cremona, *The "Dynamic and Homogenous" EEA: Byzantine Structures and Variable Geometry*, 19 Eur. L. Rev. (1994) 508.
[86] European Economic Area, Joint Committee Decision No 154/2018, [2018] OJ L 183/23.
[87] See *inter alia*, Article 1 and Chapter 3 EEA Agreement, cit. at 84.
[88] Case 294/83, *Les Verts*, EU:C:1986:166, para 23
[89] Opinion 1/91, *EEA Agreement*, ECLI:EU:C:1991:490.
[90] Recital 2, European Economic Area, Joint Committee Decision No 154/2018, cit. at 86.
[91] Ibid, Article 1(i) with regard to Article 58(4) GDPR.

EFTA states.[92]The EU-UK TCA is based on international law and does not envisage the extension of EU rules.[93]The data transfer between the EU and the UK is currently based on an adequacy decision granted by the Commission in 2021.[94] In its assessment of the UK legal framework, the Commission grounded its decision on the fact that GDPR forms in its entirety part of 'retained EU law'.[95] As the Commission highlights on the basis of the UK legislation, unmodified retained EU law must be interpreted in accordance with the CJEU case law and the general principles of EU law.[96] The general framework of the EU-UK association pursuant to the TCA remains crucial, as this is based on the continuous protection of human rights and fundamental freedoms, including the protection of personal data.[97] The Commission will thus continuously monitor the application of the UK legal developments in the adequacy framework.[98] As recently pointed out by the ECJ's Grand Chamber, the withdrawal of the UK from the EU has dispelled the presumption of mutual trust which is proper to EU membership and extended through the special legal relationships between the EU and the EEA EFTA states.[99]This makes the continuous monitoring even more necessary.

4.1 The globalisation of CoE Convention 108

The use of international law to indirectly promote convergence to EU law is one of the mechanisms through which the EU influences foreign jurisdiction and promotes the development of international law. This is not a novelty in EU external relations law, and it emerges here in the relationship between the GDPR and

[92] See in this respect the seminal findings of the CJEU in Case T- 115/94, ECLI:EU:T:1997:3.
[93] For a problematisation see A. Petti, *EU Neighbourhood Law*, cit. at 2, chapter 7.
[94] European Commission, Implementing Regulation 2021/1772, [2021] OJ L360/1.
[95] UK, European Union Withdrawal Act 2018, available at the following link: https://www.legislation.gov.uk/ukpga/2018/16/contents
[96] European Commission, Implementing Regulation 2021/1772, cit. at 94, point 13.
[97] This is especially the case of Part III of the TCA on Law Enforcement and Judicial Cooperation in criminal matters, particularly Articles 524, 525, 692 EU-UK Trade and Cooperation Agreement [2021] OJ L 149/10.
[98] Article 3 European Commission, Implementing Regulation 2021/1772, cit. at 94, point 13.
[99] See Case C-202/24 [*Alchaster*], EU:C:2024:649.

Convention 108 of the Council of Europe and its additional Protocol. First, the adoption of Convention 108 of the CoE by third countries serves as a prerequisite for obtaining EU adequacy decisions.[100] Convergence to EU law is then mediated by international law instruments. Secondly, via the participation of its Member States in the Convention, the EU contributes to the substantive development of international law instruments in accordance with EU law and the Union's policy preferences. Clearly, the ensuing dual process is beneficial for the EU as it amounts to a promotion of its interests, and the safeguarding of its citizens' rights.

The EU's influence over the 108 CoE Convention illustrates how the EU masters international negotiations to extend the reach of its law and its standards. As early as 2001, the Convention was amended with the adoption of its Additional Protocol that brought the Convention closer to the Directive 95/46/EC then in force.[101] The Protocol introduced the obligation to appoint a data protection authority and the mandatory requirement of restrictions for data export. The Convention thus borrowed EU law's paradigms of export restriction. Further attempts to bridge the gap between EU law and Convention 108 have been undertaken in the process of the 'modernisation' of the Convention which ran in parallel to the design of the GDPR. The relevant negotiations were concluded on 18 May 2018, a few days before the GDPR entered into force. On the substantive level, the 'Modernised Convention' (Convention 108+)[102] incorporates the fundamental principles of the GDPR including additional restrictions on some sensitive processing systems (Art. 8bis (2)), limitations on automatic decision-making, and the right to object to processing on legitimate grounds (Article 8(a-c)).[103]

---

[100] See Recital 105 and Article 45(2)c of the GDPR and European Commission, 'Exchanging and Protecting Personal Data in a Globalised World' cit. at 40, 11.

[101] G. Greenleaf, *A World Data Privacy Treaty? "Globalisation" and "Modernisation" of Council of Europe Convention 108*, in D. Lindsay and others (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (2014) 96.

[102] Council of Europe, 'Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data', adopted by the of Ministers at its 128th Session of the Committee of Ministers, Elsinore, 18 May 2018.

[103] G.Greenleaf, *Renewing Convention 108: The CoE's "GDPR Lite" Initiatives* (Social Science Research Network 2016) SSRN Scholarly Paper ID 2892947 3 <https://papers.ssrn.com/abstract=2892947>.

The Convention's process of modernisation was intertwined with the initiative of its membership enlargement to non-European countries. This was done utilising the latent provision of Article 23(1) of the Convention. It is worth mentioning that, the law enforcement cooperation dimension was a key driver in the EU's engagement in the globalisation of the convention. In fact, the adoption of the Convention is considered by the EU as a 'reassurance that international protection standards are met' also with a view to international cooperation with Eurojust and Europol.[104]

In the EU-UK TCA, the Article on the Protection of personal data[105] in the context of law enforcement cooperation is located immediately after that on the sources of law on the protection of human rights and fundamental freedoms that assigns a prominent role to the ECHR. The safeguarding of data protection rights features prominently in the agreement especially with respect to Part III on law enforcement and judicial cooperation in criminal matters. Here, 'in the event of serious and systemic deficiencies within one Party as regards the protection of personal data, including where those deficiencies have led to a relevant adequacy decision ceasing to apply', the other Party is entitled to suspend this part of the agreement.[106]

In its engagement in the negotiations of the Convention, the EU managed to carve out some exceptions with a view to safeguarding the autonomy of the EU legal order. In the relevant Protocol, an exception was created for groups of states, such as the EU, which could enjoy an advantageous status within the Convention regime. Regional organisations such as the EU were allowed to set higher standards to be fulfilled than those established by the Convention. As highlighted by Greenleaf: 'what previously appeared to be only "maximum" allowed standards in the old Convention has now become another "minimum" required in the new one, but only where it is a standard adopted by a group of

[104] ibid 5; L.A. Bygrave, *The "Strasbourg Effect" on Data Protection in Light of the "Brussels Effect": Logic, Mechanics and Prospects*, 40 Comput. L. & Sec. Rev. (2020).
[105] Article 525 EU-UK TCA, cit. at 97.
[106] See Article 693(2) EU-UK TCA, cit. at 97. See Also Part I. A. 7 of the EU-UK Political Declaration in 2019: 'The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the European Convention on Human Rights (ECHR)'.

parties'.[107] This may be regarded as a manifestation of EU exceptionalism in international law. In fact, EU law is insulated from the relevant international law regime with a view to safeguarding its legal autonomy. It should be noticed, however, how these mechanisms allowing for an accommodation between the EU and the CoE regime are also in themselves a driver for the globalisation of the Convention.

Thanks to the relative flexibility of the Convention, its globalisation arguably results in the globalisation of the EU model of data protection law. In this respect, Mantelero highlighted that 'it is more important to define a global standard [Convention 108+] than a golden one [GDPR]' as only the former 'can be fully effective in those countries unable to reach the golden standard'.[108] The Convention is also the sole binding international law instrument in which membership is virtually not geographically limited.[109] Indeed, other international agreements on data protection are either of a soft law nature (OECD Guidelines and Asia-Pacific Economic Cooperation (APEC) framework) or contemplate only regional membership (EU GDPR or the supplementary Act on Personal Data Protection within the ECOWAAS).[110]

It is worth noticing how adherence to the Convention standards is seen as conducive to facilitating the adequacy process. For instance, Morocco was among the first non-CoE countries to join the 108 Convention and its Additional Protocol.[111] Morocco's achievement was a product of CoE neighbourhood Partnership in 2018-2021. This programme, financed also by the EU, aimed at consolidating democratic changes and the respect of human rights and the rule of law.[112] Adherence to Convention 108 CoE thus is thought to play a propaedeutic role for access to the EU's legal space on data protection. In the words of the then president of the

[107] G. Greenleaf, *Renewing Convention 108: The CoE's "GDPR Lite" Initiatives*, cit. at 103, 2.
[108] A. Mantelero, *The Future of Data Protection: Gold Standard vs. Global Standard*, 40 Comput. L. & Sec. Rev. (2021), 4.
[109] S. Kwasny, A. Mantelero and S. Stalla-Bourdillon, *The Role of the Council of Europe on the 40th Anniversary of Convention 108*, Comput. L. & Sec. Rev. (2021), 1.
[110] G. Greenleaf, cit. at 101, 94–5.
[111] See section 4.1 of this Article.
[112] Council of Europe, Neighbourhood Partnership with Morocco 2018-2021, Document approved by the by the Committee of Ministers of the Council of Europe on 21 March 2018 (CM/Del/Dec(2018)1311/2.3).

Moroccan Data Protection Authority, accession was regarded as 'an important step in the [EU] adequacy process'.[113]

4.2 Trade regimes and EU data protection law

The interaction between EU data protection law and international law is not only limited to the protection of human rights but also the regulation of international trade. The EU's institutional discourse emphasises that the intersection between human rights and trade in data protection law has a twofold dimension. On the one hand, the protection of personal data is considered as a 'competitive differentiator and a selling point on the global marketplace'.[114] On the other hand, common standards with a wide territorial reach contribute to 'creating a level playing field with companies established outside the EU'.[115]

EU data protection law and particularly the GDPR affects trade in services falling within the remit of the WTO General Agreements on Trade in Services (GATS). As a matter of fact, the GDPR governs the transfer of personal data beyond the EU. It applies to cross-border transactions in services entailing the transfer of personal data of EU data subjects even in cases where the processing of data occurs outside the EU and the EEA.[116]

Yakovleva and Irion[117] identify several points of friction between EU data protection law and GATS. First, adequacy decisions issued by the Commission might be considered to be in breach of the most-favoured-nation treatment (MFN)[118] as the EU

---

[113] 'Données personnelles: Le Maroc adhère à la Convention 108' (*L'Economiste*, 11 June 2019) <https://www.leconomiste.com/article/1046086-donnees-personnelles-le-maroc-adhere-la-convention-108>.

[114] European Commission, 'Data Protection as a Pillar of Citizens' Empowerment and the EU's Approach to the Digital Transition - Two Years of Application of the General Data Protection Regulation', COM(2020) 264 final, 3.

[115] ibid 9.

[116] S. Yakovleva and K. Irion, *Toward Compatibility of the EU Trade Policy with the General Data Protection Regulation*, 114 AM. J. INT'L L. 10 (2020), 10–11.

[117] Ibid.; S. Yakovleva and K. Irion, *The Best of Both Worlds? Free Trade in Services and EU Law on Privacy and Data Protection,* 2 Eur. Data Prot. L. Rev. 191 (2016); K. Irion, S. Iakovleva and M. Bartl, *Trade and Privacy: Complicated Bedfellows? How to Achieve Data Protection-Proof Free Trade Agreements*, (2016). Available at SSRN: <https://ssrn.com/abstract=2877166 or http://dx.doi.org/10.2139/ssrn.2877166>.

[118] GATS Article II.1 which reads: 'With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to

grants a more favourable regime of data transfer to countries that have obtained an adequacy determination.[119] Moreover, EU data protection law could potentially be found to be in breach of the national treatment obligation.[120] Indeed, provision of services and service suppliers established in countries which have not been granted an adequacy determination will have to comply with the stringent GDPR requirements. This may entail an authorisation by EU Member States' national data protection authorities to transfer EU data subjects' data abroad (Article 46(3) GDPR).[121] Such an authorisation may constitute an 'additional requirement' to be fulfilled by service suppliers established in countries that do not benefit from adequacy decisions. More generally, unlike EU service providers, those established in third countries may still need to comply with GDPR rules on cross border data transfer beyond the EU if they wish to gather Europeans' data for legitimate business interests.[122]

These GDPR restrictions for service providers of countries not benefiting from adequacy determinations may be construed as falling under the exception enshrined in Article XIV(c)(ii) GATS. This exception allows the establishment of measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: […] the protection of the privacy of individuals in relation to the processing and dissemination of personal data'. Although the 'right to regulate' stemming from Article XIV(c)(ii) GATS generally allows for protection of data privacy to limit transfer of data, such limitation should be non-discriminatory and

services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country'.

[119] S. Yakovleva and K. Irion, cit. at 116, 29; C.L. Reyes, *WTO-Compliant Protection of Fundamental Rights: Lessons from the EU Privacy Directive,* 12 Melb. J. INT'L L. 141 (2011), 153–56.

[120] See for instance GATS Article SVII.1 'In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers'.

[121] F. Velli, *The Issue of Data Protection in EU Trade Commitments: Cross-Border Data Transfers in GATS and Bilateral Free Trade Agreements*, 2019 4 European Papers 881 (2019), 886; S. Yakovleva and K. Irion, *The Best of Both Worlds? Free Trade in Services and EU Law on Privacy and Data Protection*, cit. at 117, 204.

[122] S. Yakovleva, *Personal Data Transfers in International Trade and EU Law*, cit. at 58, 893.

non-ambiguous in nature.[123] Yet, as highlighted by Kuner, the Commission at times 'prioritises discussions with third countries based on political factors' for the negotiation of adequacy decisions.[124]

Moreover, it is doubtful whether the design and the implementation of EU data protection law premised upon adequacy decisions may pass the 'least trade-restrictive' test required by WTO law when assessing Article XIV(c)(ii) GATS limitations.[125] The 'accountability approach' used in Canada can be seen as more compatible with GATS in so far as it is less restrictive on trade. As a matter of fact, the Personal Information Protection and Electronic Documents Act (PIPEDA)[126] does not distinguish between domestic or international data transfer requirements. The data exporter will respond to the accountability principle according to which the transferring organisation remains responsible for the protection of the information transferred to a third party.[127] When compared to the Canadian approach, the EU's approach thus marks more clearly the distinction between internal and external legal regimes when it comes to data transfer. This is also due to the importance that the EU attaches to the protection of its internal regulatory autonomy.

The distinctiveness of EU data protection law and its friction with the GATS scheme also emerges in comparisons with provisions on data protection and trade in different bilateral trade agreements. Other jurisdictions address data protection in a manner that is arguably more consistent with the WTO's principles. For instance, the United States-Mexico-Canada Agreement on

---

[123] N. Mishra, 'Privacy, Cybersecurity, and GATS Article XIV: A New Frontier for Trade and Internet Regulation?' (2020) 19 World Trade Review 341, 352.

[124] C. Kuner, 'Internet and the Global Reach of EU Law' (n 3) 136.

[125] S. Yakovleva and K. Irion, *The Best of Both Worlds? Free Trade in Services and EU Law on Privacy and Data Protection*, cit. at 116, 13–14.

[126] Canada, Personal Information Protection and Electronic Documents Act (PIPEDA) (S.C. 2000, c. 5), Act current to 2021-01-10 and last amended on 2019-06-21, https://laws-lois.justice.gc.ca/ENG/ACTS/P-8.6/page-11.html#h-417659

[127] See ibid. PIPEDA schedule 1, 4.1, 4.1.3, 4.5, and OneTrust DataGuidanceTM and Edwards, Kenny & Bray LLP, 'Comparing Privacy Laws: GDPR v. PIPEDA' 24 <https://www.dataguidance.com/sites/default/files/gdpr_v_pipeda.pdf> accessed 1 February 2021; C. Kuner, D*eveloping an Adequate Legal Framework for International Data Transfers*, in S. Gutwirth, Y. Poullet, P. De Hert, C. de Terwangne, S. Nouwt, (eds) *Reinventing Data Protection?*, (2009).

Trade (USMCA) contains a generic provision that preserves the parties' rights to regulate that largely mirrors the GATS exception enshrined in Article XIV(c)(ii). In fact, its Article 19.11 (2) reads:

> This Article does not prevent a Party from adopting or maintaining a measure inconsistent with paragraph 1 that is necessary to achieve a legitimate public policy objective, provided that the measure: (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and (b) does not impose restrictions on transfers of information greater than are necessary to achieve the objective. [128]

Differently from what happens in trade agreements concluded by other entities, in EU trade agreements, the approach is again more focused on preserving the autonomy of the EU legal order and the protection of the constitutional fabric of the EU's data privacy law. This approach stems from the fact that data protection of EU data subjects' privacy is a fundamental right. Indeed, in the new generation of trade agreements, the EU proposes clauses which aim to protect its regulatory autonomy. The provisions at issue insulate the EU data protection regime from external influences arising from its trade relations. The EU-UK TCA relevant provision reads:

> Each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. *Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards*.[129]

These two approaches highlight different visions of the relationship between data protection and trade. As perceptively pointed out by Yakovleva, they are informed again by different

[128] Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S. (USMCA), 10 December 2019, Article 19.11(1),

[129] European Commission, 'Horizontal Provisions for Cross-Border Data Flows and for Personal Data Protection in EU Trade and Investment Agreements', 31 January 2018, 3 (emphasis added). See also Article 202 EU-UK TCA, cit. at 97: 'Nothing in this Agreement shall prevent a Party from adopting or maintaining measures on the protection of personal data and privacy, including with respect to cross-border data transfers, provided that the law of the Party provides for instruments enabling transfers under conditions of general application for the protection of the data' transferred.

regulatory understandings of trade in services entailing data flows. In the US, 'even when some degree of privacy and data protection *are* factored into this discourse of digital trade, the protection of these interests is often presented as an *economic* necessity, a precondition for free trade rather than a fundamental right and societal value beyond its economic utility'.[130] In this understanding, the clauses in trade agreements which possibly allow for restrictions on trade for data privacy reasons are limited and circumstantiated in their scope. In the trade agreements concluded by the EU, instead, the clauses protecting regulatory autonomy on data privacy are absolute and take the form of non-affectation clauses. In other words, while in the US trade and data privacy discourse on data protection is considered primarily in an instrumental fashion to increase consumer trust and enhance trade; in the EU, although this aspect is present,[131] the principal rationale is that of protecting and safeguarding the constitutional rights of individuals.[132]

In EU law, the attention is on whether cross-border data transfer should be allowed and under what conditions to maintain constitutional and human rights safeguards. In international trade law, instead, the attention is placed on circumscribing the cases in which transfer should be limited. [133] It is worth stressing that the absolute character of the clauses protecting data privacy and regulatory autonomy of the EU serve to insulate the specific characteristics of EU data privacy from international trade regimes.

5. Conclusions

Data protection in the EU has a constitutional nature as a fundamental right. Based on Article 8 of the EU Charter of Fundamental Rights and Article 16 TFEU, the GDPR is an expression of this. EU primary law also enshrines a mandate to

[130] S. Yakovleva, *Governing Cross-Border Data Flows: Reconciling EU Data Protection and International Trade Law* (2024), chap 3.

[131] See for instance Article 202(1) EU-UK TCA: 'Each Party recognises that individuals have a right to the protection of personal data and privacy and that high standards in this regard contribute to trust in the digital economy and to the development of trade'.

[132] S. Yakovleva, *Governing Cross-Border Data Flows*, cit. at 130, 169-174.

[133] S. Yakovleva, *Personal Data Transfers in International Trade and EU Law*, cit. at 58, 912.

project EU law beyond EU membership.[134] The wider reach of EU data protection law reflects both the constitutional tenor of data protection in the EU and the Union's constitutional mandate to engage with foreign jurisdictions by upholding its values, interests and, ultimately, its laws. The joint combination of the wide territorial reach of EU data protection law and EU data transfer rules contribute to the nurturing of a 'domestic utopia' for EU data subjects. Such a legal construction is premised on the classical posture of EU law, which has been critically and powerfully described as a 'new legal and conceptual order' which floats above "political disorder"'.[135]Yet, in the encounter with foreign jurisdictions, EU law cannot help dealing with political realities in the international arena.[136]

There are tensions in the interface between EU data protection law and the political context. The encounter of the EU's domestic utopia with political realities beyond the EU may mitigate the global reach of EU data protection law. In *Google v CNIL*, although the full application of EU data protection law could have mandated for a global de-referencing, the political context beyond the EU and the effects of geo-blocking suggested a de-referencing in EU Member States only. Tensions between law and politics arise also in the context of data transfer. In the case of the EU-US adequacy scheme, risks of political interferences in the monitoring of the law led the CJEU to invalidate adequacy frameworks. These included shortcomings in the political independence of the bodies responsible for remedies to possible violation of data protection and the overall safeguards to data protection vis à vis the political process. In adequacy decisions, the interplay between the political and the legal is apparent from the fact that the Commission is both the 'political' negotiator of adequacy schemes and the institution in charge to monitor the adequate protection of data in foreign jurisdictions. The empowerment of EU national authorities in *Schrems I* by the CJEU could be construed as an attempt to insulate

[134] See for instance Article 3(5), Article 8 and Article 21 TEU.
[135] L. Azoulai, *Structural Principles in EU Law: Internal and External*, in M. Cremona (ed), *Structural principles in EU external relations law* (2018) 38. For a problematisation see also F. de Witte, *Interdependence and Contestation in European Integration*, 3 European Papers (2018).
[136] See also in this sense L. Azoulai, *Structural Principles*, cit. at 134.

the monitoring of the data protection law from the political process of the adequacy determinations.[137]

In the ideal global domestic utopia promoted by EU data protection law, adequacy frameworks are a way to insulate the protection of EU data subjects from different legal-political preferences and processes in foreign jurisdictions. Adequacy decisions are indicative of the deference to EU regulatory choices by third countries. As a matter of fact, especially the Japan case illustrates how adequacy decisions could be loosely compared to the disconnection clauses that the EU utilises to protect EU membership law from the relevant international regime to which the EU and /or its Member States are parties. [138]Disconnection clauses can be construed as a manifestation of the structural dimension of the principle of autonomy[139] intended to safeguard the special relationship intercurrent between the EU and its Member States from international law mechanisms. Similarly, adequacy frameworks create a special regime for EU data subjects. In that light, the insulation of the legal the regimes applicable to EU data subjects from those in place for other data subjects in foreign jurisdictions arguably appears to question the paradigm of the 'Brussels effect' premised upon a 'unilateral regulatory globalisation'.[140] Indeed, as the US adequacy saga also demonstrates, the variety of data protection arrangements promoted by the EU is somewhat resistant to change in the data protection systems of EU partners with more developed domestic

[137] L. Azoulai and M. van der Sluis, *Institutionalizing Personal Data Protection*, cit. at 56.

[138] For instance, Article 26.3 of the Council of Europe Convention on the Prevention of Terrorism signed in Warsaw on 16 May 2005 reads: 'Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.' See further M. Cremona, *Disconnection Clauses in EC Law and Practice,* in C Hillion and P. Koutrakos (eds), *Mixed agreements revisited : the EU and its member states in the world* (2010).

[139] M. Cremona, *Structural Principles and Their Role in EU External Relations Law*, in M. Cremona (ed), *Structural principles,* in M. Cremona, cit. at. 135.

[140] A. Bradford, *The Brussels Effect*, 107 Nw. U. L. Rev., 5.

preferences. This signals that different cultural approaches to data protection law are likely to remain.[141]

The framing of EU data protection law as a fundamental right is evident in the drafting of EU trade agreements. Such a framing stands in contrast to other approaches in trade law whereby the trade and economic considerations related to data protection are paramount. Since, EU law frameworks hardly lead to less restrictive trade arrangements,[142] some frictions may thus arise between the EU approach to data protection and the GATS.

The constitutional rigidity of EU data protection law mainly arises from the fact that limitations to data privacy in the EU can only be governed at the level of EU primary law.[143] The attempts to preserve the constitutional protection of data privacy have animated the EU's engagement to shape international law according to its values and interests: the globalisation of the Council of Europe Convention 108 is a case in point. In turn, the size and the clout of the EU market and trade opportunities are a driver for third-countries convergence to EU rules and standards.[144]

The EU's domestic utopia in data protection law, however, is emblematic of the reality deficit of EU law, which attempts to disconnect from the legal and political realities. This is reflected in the 'enforcement deficit' of the GDPR,[145] both within[146] and outside the EU.[147]The ineffectiveness of the provision of the scope of application of the GDPR (Article 3) with regard to enforcement suggests that EU data transfer rules are considered more reliable in

[141] For Japan, see F. Wang, *Cooperative Data Privacy: The Japanese Model of Data Privacy and the EU-Japan GDPR Adequacy Agreement*, cit. at 77; P.M. Schwartz, *Global Data Privacy: The EU Way,* cit. at 43.

[142] For a problematisation of the relationship between trade and protection of personal data see also M. Słok-Wódkowska and J. Mazur, *Between Commodification and Data Protection: Regulatory Models Governing Cross-Border Information Transfers in Regional Trade Agreements*, 37 Leiden J. Int'l L. 111 (2024).

[143] S. Yakovleva, *Governing Cross-Border Data Flows: Reconciling EU Data Protection and International Trade Law* (2024) ch 2.

[144] A. Bradford, *The Brussels Effect*, cit. at 4.

[145] C. Kuner, *Protecting EU Data Outside EU Borders under the GDPR*, 60 Common Mkt. L. Rev. 98 (2023).

[146] Giulia Gentile and Orla Lynskey, 'Deficient by Design? The Transnational Enforcement of the GDPR' (2022) 71 International & Comparative Law Quarterly 799.

[147] B. Greze, 'The Extra-Territorial Enforcement of the GDPR: A Genuine Issue and the Quest for Alternatives' (2019) 9 International Data Privacy Law 109.

this respect.[148] Yet, it should be noted that the adequacy schemes of data transfer rules are hardly a complete solution for upholding the EU's values and interests abroad. It has been shown that the EU-US arrangements have been of voluntary nature, subject to the adhesion of the companies. In turn, the EU-Japan mutual adequacy framework does not cover the public sector. As the Schrems saga demonstrate, moreover, these arrangements may be invalidated by the CJEU.

In times of geopolitical fragmentation, a process of EU-wide re-bordering is occurring.[149] In data protection, this takes the form of data localisation: a preference is arising for data to remain in the EU and not be transferred beyond the Union. Several commentators put forward that the prospect of data localisation are lurked behind the *Schrems II* judgment.[150] New developments in EU digital sovereignty are thus coming to the fore whereby, as perceptively put forward by Fahey, the 'Digital Markets Act, AI Act and the Digital Services Act, combined with data localisation measures, they cumulatively could amount to a litany of measures to develop a de facto and *de jure* European firewall'.[151] The localisation trend has some of its origins in CJEU case law[152] and it is being put forward in different policy areas. Pursuant to this rebordering in data protection, in the health domain, the European Data Protection Board and the European Data Protection supervisor have suggested that the Proposal on the European Health Data Space should include an obligation 'on controllers and processors established in the EU processing personal electronic health data within the scope of the Proposal […] to store this data in the Union'.[153] The new geopolitical fragmentation is hence redesigning the balance

[148] C. Kuner, *Protecting EU Data Outside EU Borders*, cit. At 145, 97.
[149] A. Petti, *EU Membership in a Geopolitical Era*, paper presented at the Common Mkt. L. Rev. 60th anniversary conference, Leiden, June 2023, article forthcoming.
[150] Indeed, this was a solution suggested by Schrems himself after the delivery of the judgment, on this see Anupam Chander, 'Is Data Localization a Solution for Schrems II?' (2020) 23 Journal of International Economic Law 771. See more generally Christopher Kuner, 'Data Nationalism and Its Discontents' (2015) 64 Emory L. J. Online 2089.
[151] E. Fahey, *Does the EU's Digital Sovereignty Promote Localisation in Its Model Digital Trade Clauses?*, 8 European Papers 503 (2023).
[152] See for instance C-203/15, *Tele2 Sverige AB*, EU:C:2016:970, para 122.
[153] EDPB-EDPS, 'Joint Opinion 03/2022 on the Proposal for a Regulation on the European Health Data Space', 12 July 2022, 28. See on this S. Yakovleva, *Governing Cross-Border Data Flows*, cit. at 130, 73.

between protectionism and liberalism in EU data protection law predicated on the nature of data privacy as a fundamental right which may be more difficult to uphold in foreign jurisdictions.

STILL TOWARDS 'AN EVER-CLOSER UNION'? RISE, DECLINE AND TRANSFIGURATION OF THE *PLANUNGSVERFASSUNG* ARGUMENT IN THE INTERPRETATION OF UNION LAW

Giuliano Vosa[*]

Abstract

In a decade of multiple crises, the European Union seems uncertain about its own destiny, as the integration through law project exposes multiple fragilities and the integration proceeds fast, yet randomly, due to the several incumbent emergencies. This work aims to uncover the origins of a doctrine – the *Planungsverfassung*, or 'constitution-to-be' – that has given overwhelming force to the 'original intent' argument in the interpretation of Union law to endow the latter with applicative priority *vis-à-vis* national law. The key benefit this concept offers is to elucidate the ties between the political-constitutional settlements reached within the Member States after World War II and the gradual implementation of the European project. This insight may contribute to a better understanding of the increasing constitutional conflicts that perturb the Union, especially as the Court of Justice wishes to severe the link with the national constitutions as both repositories of conceptual tools and sources of authority. In this regard, claims for a value-based primacy are accounted for in light of the *transfiguration* of the *Planungsverfassung* construct, as a result of which textual arguments bringing morally-neutral elements to Union law are being gradually marginalised.

[*] Tenure-Track Researcher in *Constitutional Law*, University of Catania

TABLE OF CONTENTS

1. Introduction & Research Question

The increasing constitutional conflicts between the Union and the States have taken the Union to a dead end[1]. Suitable way-outs are commonly described as two. Either the Union shows 'constitutional maturity'[2] and accepts primacy as unrestrained while subscribing to the 'unconfined power' conferred on the Union institutions,[3] or the whole edifice would crumble away, *Brexit* being but the first of many other painstaking farewells. Yet – the narrative proceeds – in eerie times of military confrontation it is time to stand together in defence of common values[4] and to set aside for good the trivial conflicts characterizing the immature phases of the integration project[5].

However, although wars obviously obliterate moderate political positions, this should not happen for lawyers: they are tightened to the 'ought', rather than to the 'is', and stick to the difficult, yet crucial task of discerning what is legally binding and

[1] M. Dani, J. Mendes, A.J. Menéndez, M.A. Wilkinson, H. Schepel, *At the End of Law. A Moment of Truth for the Eurozone and the EU* (15 May 2020) in *Verfassungsblog.de.*

[2] R.D. Kelemen, *On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone*' 2 *Maastricht Journal of European & Comparative Law*, (2016) 136-150.

[3] Critically, D. Chalmers, *The Unconfined Power of European Union Law* 1:2, *European Papers* 405-437 (2016).

[4] See P. Mengozzi, *I valori dell'Unione europea ed il controllo della Corte di giustizia sulla legittimità degli atti PESC*, 2 *Il Diritto dell'Unione Europea*, 1-81, 21f. (2024)

[5] *Inter alia*, the Speech delivered by the European Commission's President Ursula von der Leyen at the European Parliament Plenary on 'Strengthening European defence in a volatile geopolitical landscape', 26 February 2024.

what is no more than partisan *wish* backed by rampant, outweighing force. Indeed, should the latter be identified with law *tout court*, the result would steer the Union away from its original blueprint; and this would lead to question what do we as Europeans are to exactly defend under the rather pompous name of 'common values'.

In this light, answers need to be provided to the following, urgent question: if, and how, the Union can survive the ongoing emergencies without losing its distinctive signs, *i.e.*, those special characteristics that have made Europe a place in which peace, equality and liberty have thriven to a quite unprecedented extent in the history of mankind.

The paper presented hereby is part of a more comprehensive work aiming to uncover the transformation of primacy. The answer it tries to give rests on the following assumption: these specialties stem from the *post*-WWII constitutional legacy and find in the European project the solidest bulwark against the rise of authoritarian aggressive regimes. This was, in fact, the idea of the early ages as it results from legal texts and from the arguments deployed to account for primacy, *i.e.*, to back the claim for prior application of the emerging Community law. Should this be the case, to establish a link between primacy and the *post*-WWII constitutional legacy would deliver the desired outcome.

In the general accounts of the integration, it is commonly understood that, as the Community was given birth by States resting on those very constitutions, the link just mentioned exists, and builds on a presumption – that is, whatever the European integration process attains is presumptively held in line with the national constitutional projects. Thus, the question is twofold: first, how and why this presumption has worked; then, if and why it has ceased to work or, anyway, has lowered in effectiveness – which leaves room for the autonomy of Union law to make a step forward[6].

This paper seeks to answer to this twofold question. In this light, the focus shifts to one of the moments of the transformation of primacy: the evolution of the textual argument based on voluntarism. In other words, whereas in the immediate aftermaths of WWII the old riddle still went as 'what the States want, is law;

[6] See J. Lindeboom, R.A. Wessel, *The Autonomy of EU Law, Legal Theory and European Integration*, 8(3) *European Papers* 1247-1254 (2023).

what they do not want, is not law', the landscape changed as the rise of the Communities conveyed the establishment of *supranationalism*. This peculiar concept is based on the idea that 'what the States wanted' was to melt themselves into a new form through a process of 'putting in common' certain sectors of their national economies and legal orders. This idea has eventually materialized into a legal argument paving the way to a smooth evolution from textual voluntarism to moral teleologism in the interpretation of Community law.

In this light, the work aims to tell the story of this argument, and of the ideal and dogmatic construct that has underpinned it. The added value it brings is twofold. First, it highlights the link between primacy and the defence of the national constitutional legacy, understood as the core of liberal social democracy underpinned by popular sovereignty. Second, it highlights how the affirmation of an unrestrained primacy entails the abandonment of textual arguments and the marginalisation of written law, which seriously undermines legal certainty. In this light, the core concept of this work – the *Planungsverfassung* doctrine and the argument it offers – is both the object of a brief historical reconstruction and the instrument to cast new light on the line of reasoning that the Court of Justice has maintained in a conspicuous array of controversial cases. In the first case, the historical account points to the subversion of positivist logics until then dominant in the interpretation of international law, and the replacement thereof with logics based on utmost *preferability* of the presented objective – which has permitted the expansion of the Community law's applicative scope, as it has offered a common ground to the hermeneutical toolkit the Court has deployed. In the second case, the *Planungsverfassung*'s decline and transfiguration are understood as backing arguments against the claims for unrestrained primacy, for the latter is presented as unrelated to written law and disrespectful of the national constitutional legacy.

2. Back to Beginnings: Plan of the Work

'Determined to establish the foundations of an ever-closer union among the peoples of Europe', six States whose constitutions revealed unprecedented signs of pluralist-democratic ambition created a European Economic Community by means of an

international instrument[7]. Such instrument, in the same vein, has revealed unprecedented ambitions, too[8]. In comparison with previous treaties furthering European integration, the new approach signposted a radical turn[9]. Whereas the ECSC simply aims to lay the grounds of 'a *de facto* solidarity' by building up 'shared bases of economic development', the EEC Treaty triggers a seemingly irreversible process towards a federal-like integration[10].

Among the many theoretical constructs aiming to account for this process, the choice here is to look at a corner so far not fully explored by most scholars. While building on the *ever-closer union* clause laid down in the TEEC Preamble[11], the doctrine analysed hereby offers a wide-ranging, prospective view of the integration process by means of a novel concept – *Planungsverfassung* – and of an argument that seems to explain how Community law, as an international law of a new kind, has been able to initiate its relentless expansion *vis-à-vis* national law[12].

According to the former, the Treaties were presented as *constitutions-to-be* that enshrined the seeds of a future unitary polity[13]. In this view, the Treaties offer a structure for the *post*-WWII social, political and economic compromises enshrined in the Member States' constitutions to be developed on a shared plane: they provide a legal-political framework for the *post*-WWII constitutional legacy to be perpetually secured[14]. In this light, links

---

[7] European Parliament – I-Pol Directorate – Study: *National Constitutional Law and European Integration* (PE 432.750: 2011) 3-226.

[8] A. Stone Sweet, T.L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92(1) *American Political Science Review* 63-81 (1998).

[9] See A.-T. Norodom, *Entre droit international et droit constitutionnel : le métissage du droit de l'Union européenne*, 2 *Revue des affaires européennes* 229-238 (2016).

[10] W. Phelan, *Goodbye to All That:* Commission *v.* Luxembourg & Belgium *and European Community's Law Break with the Enforcement Mechanisms of General International Law*, in F. Nicola, B. Davies (eds.) *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (2017) 121-133, 129.

[11] R. Bieber, J.-P. Jacqué, J.H.H. Weiler, *An Ever Closer Union. A critical analysis of the draft Treaty establishing a European Union* (Luxembourg-Bruxelles, 1985) 7-18.

[12] L.-J. Constantinesco, *La specificité du droit communautaire*, 1 *Revue Trimestrielle de Droit Européen* (1966) 1-30.

[13] Paul Reuter, 'Juridical and Institutional Aspects of the European Regional Communities' (1961) 26 *Law & Contemporary Problems* 381-399.

[14] Christian Grabenwarter, 'National Constitutional Law Relating to the European Union', in Armin von Bogdandy and Jürgen Bast (eds.) *Principles of European Constitutional Law* (2nd edition, Oxford-Portland: Hart 2009) 83-129.

with national constitutions could not be just fictitious: it was each national constitutional project, endowed with unprecedented ambitions of pluralist democracy, what was to be unfolded on a common path in order to fulfil those ambitions. This correspondence surrounded the European project with an allure of moral *preferability* which was crucial for the pro-Europe narratives to reach national audiences with some impact.

The latter makes Community law's textual-voluntarist reading equivalent to a systematic-teleological one, as any improvement towards the *ever-closer union* goal was allegedly covered by the will of the Founding States. Since the States wrote they wanted an 'ever closer union', then whatever interpretation expanded the 'applicative scope'[15] of Community's measures marked a step ahead towards the much-coveted objective.

The *Planungsverfassung*, in other words, succeeded in a twofold task. First, it linked Community law's superior morality with some national constitutional legacy to be defended, which has made the integration process an end '*per se*'. Second, it applied this superior morality to legal hermeneutics, which has been crucial for the development of the abundant constitutional toolkit that the Court of Justice has deployed to further the integration.

In other terms, the *Plannungsverfassung*, while putting the first brick of the presumption of coherence between national and supranational laws, has caused the first creep in the wall of legal positivism – and the combined action of the two has paved the way to the expansion of Community law's applicative scope to the detriment of national law.

Pursuant to a turbulent decade culminated in the 2008 crisis, fear and distrust have disrupted the political narrative and the legal edifice underpinning the *Planungsverfassung* construct. As for the narrative, the moral preferability of Community law has departed from the *irenic* logics of mutual common benefit through perpetuation of the national constitutional legacy to embrace a model of 'integration through fear'[16] while pointing at the Union as a *catechontic* power[17]. As for the argument, it has been overtly

[15] M.E. Bartoloni, *Ambito di applicazione del diritto dell'Unione europea e ordinamenti nazionali. Una questione aperta* (2018) 54.

[16] J.H.H. Weiler, *Integration Through Fear*, Guest Editorial, *European Journal of International Law* 23:1, 1-5 (2012).

[17] See M. Cacciari, *Il potere che frena* (2013) 44.

reverted and instrumentally recycled. In *Pringle*[18], the Court of Justice held that, for the ESM Treaty to be held in line with Union law, the latter's scope is to shrink following the States' will as it is *today* – not to broaden in light of their special original will: at polar opposites with what the *Planungsverfassung* postulates.

Throughout the recent crises, the decline of the latter has become apparent in many respects; nonetheless, the Court has not ceased to deploy all the concepts tied to the argument concerned, yet in a transfigured guise. Then, such argument has been used in support of pure teleological assertions (as in EMU cases[19]) or genuine value judgements, like in the battle for the alleged protection of the rule of law[20]. This transfiguration infuses Union law with powerful ideological claims yet in the lack of written provisions in their support; and such claims, by virtue of the presumption the *Planungsverfassung* construes, are regarded as virtually undisputable even when contrary to sensitive national constitutional claims.

Thus, unveiling the roots of the *Planungsverfassung* doctrine brings at least two outcomes. First: it casts further light on the special link between Union law and the will of the States as formalized in their constitutions – which sets external *ab initio* limitations to Union law's autonomy and specialty[21]. Second: it accounts for the current unbalance between moral teleologism and voluntarist positivism in interpreting Union law, the latter element being progressively marginalized to the advantage of the former[22].

Pursuant to such an account, the question 'whether the Union can survive the current emergencies without losing its distinctive traits' finds some suitable arguments for an answer. Perhaps frightened by gloomy military confrontations and increasing Euro-criticism, often depicted as 'populism' whatever this label may

---

[18] CJEU, C-370/12, *Thomas Pringle* v *Republic of Ireland*, 27 November 2012, ECLI:EU:C:2012:756.

[19] See C. Kaupa, *Has (Downturn-) Austerity Really Been 'Constitutionalized' in Europe? On the Ideological Dimension of Such a Claim*, 44:1 *Journal of Law and Society* 32-55 (2017).

[20] See J.-W. Müller, 'The EU as a militant democracy, or: are there limits to Constitutional mutations within EU member States?' 165 *Revista de Estudios Políticos* 141-162 (2014).

[21] See J.H.H. Weiler, U.R. Haltern, *The Autonomy of the Community Legal Order – Through the Looking Glass*, 37:2 *Harvard International Law Review*, 411-488 (1996).

[22] G. Campanini, *Ragione e volontà nella legge* (1964) 25, 127.

contain[23]. teleological-systematic arguments have virtually ousted textual-voluntarist ones. The consent of States, and peoples, is increasingly regarded as given *una tantum* at the time of the Treaty's stipulation, and irrelevant from then onwards – whatever legal norm allegedly follows from the stipulation – with decreasing, to say the least, consideration for the textual wording of the legal bases concerned.

This is certainly not in line with national constitutions, which all lay down the principle of people's sovereignty as instrumental to rights been recognized, not *octroyés* in the guise of liberal, single-class constitutions. Today,

Were there binding means to require that, especially in cases of clear sensitivity, such consent be reinforced, so that acts of commensurate political responsibility underpin the additional consequences to be derived from the Treaty, then the ties with national constitutions would be restored in full, both as a political reference and a legal ground – which would enhance both Union law's political support and legal legitimacy. In this light, one may argue that the arguments backing Union law's claim for primacy need to be measured against their initial constitutional background[24] to avoid loopholes in the constitutional continuity from States to the Union[25]. Then, the oft-abused *motto* 'back to beginnings' would point to a refreshed exam of the relation that Union law entertains with the ever-closer union clause – still today, one of the most emblematic, though enigmatic formulas of the European integration[26].

Yet, these last assumptions are a fast-forward of the whole story; as far as this work is concerned, it is only the first chapter of the novel what is going to be presented here.

---

[23] See, *ex multis*, C.J. Bickerton, C. Invernizzi Accetti, *Technopopulism: The New Logic of Democratic Politics* (2021) 39, *passim*, and G. Martinico, *Filtering Populist Claims to Fight Populism. The Italian Case in a Comparative Perspective* (2023) 63, *passim*.

[24] *Ex multis*, S. Ramírez Pérez, *European Trade Unions from the Single European Act to Maastricht: 1985-1992*, 62(1) *Studi Storici: Rivista trimestrale della Fondazione Gramsci* 211-245 (2021), and M. Rasmussen, *Towards a Legal History of European Law* 6(2) *European Papers* 923-932(2021).

[25] On the continuity principle, with special regard to the legal order's continuity, M. Ferrara, *Continuità e politica estera. Appunti preliminari*, in *Il Filangieri – Quaderno 2022*, 79-94, 82 (2022).

[26] J.H.H. Weiler, '*Fin-de-siècle* Europe' in R. Dehousse (ed.) *Europe After Maastricht. An Ever-Closer Union?* 203-216 (1994).

The work is structured as follows. Section 3 compares the ECSC and the EEC Treaty as attesting to the supranational turn of the 'ever closer union' project. Section 4 introduces the *Planungsverfassung* doctrine as built on the latter's enhanced teleology; Section 5 describes the argument following thereby as the prime matrix of the 'integration through law' toolkit. Sections 6 and 7 account for the *Planungsverfassung*'s decline and transfiguration; the *Conclusions* aim to contextualize the achievements of the work.

3. The 'Ever Closer Union' Project: Enhanced Teleology

It has been aptly noticed that the peculiar *telos* of the European integration as enshrined in the *ever closer union* clause unleashes a process whose completion may never be achieved, which points to a European *Sonderweg*[27] infusing the Community with an *ethos* of 'constitutional tolerance'.[28] Implications of this *telos* have regarded the emergence of a European *demos* as a necessary *a-priori* for a European constitution to exist[29]. Yet, what may need further account is the link between this *telos* and the legal consequences that consolidate in the passage from the ECSC to the EEC Treaty. A brief recall may give the reader a better picture of the magnitude of such a change.

As for the institutional framework, TECSC (Articles 3-4) gives the institutions the powers to act 'in the common interest' of the Member States. Certain conditions held instrumental to a common market are imposed, while others are forbidden. Institutions are assigned the task of 'carry[ing] out activities' such as those listed by Article 5 in 'close cooperation with the parties concerned', with a 'limited measure of intervention' and 'a minimum of administrative machinery'. A little variety of legal acts is available to the High Authority for the execution of its tasks (Article 14: decisions, recommendations, opinions) whereas the Council ensures 'harmonisation' with national measures. The High

[27] J.H.H. Weiler, 'In defence of the *status quo*: Europe's constitutional *Sonderweg*' in J.H.H. Weiler, M. Wind (eds.) *European Constitutionalism beyond the State* (2003) 7-24.

[28] Joseph H.H. Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' 3:2-3 *International Journal of Constitutional Law* 173-190 (2005).

[29] D. Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, 21:4 *European Law Journal* 460-473 (2015).

Authority deliberates by absolute majority (Article 13); the Council acts according to Article 28, which does not always envisage a vote.

On the other hand, the TEEC confers on the institutions the power to pursue common objectives in broad policy areas under the guide of 'principles' provided for in 'Part One', whereas Member States are bound by a set of obligations in the form of objective Community law ('*Bases of the Community*'). For each area, specific procedures supply the inter-institutional bargaining (see *inter alia* Articles 43, 48, 70, 100) with an enriched normative framework; multiple legal acts are available as far as Article 189 is concerned (Regulations, Directives, Decisions, Recommendations).

As for constitutional ambitions, pursuant to Article 2 TECSC, the core 'task' of the elder Community is 'to contribute to economic expansion, growth of employment and a rising standard of living in the Member States'. This task is conducted 'in harmony with the general economy of the Member States and through the establishment of a common market'. The aim is to 'progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States'. Thus, the ECSC enucleates specific objectives that are part of the overall constitutional arrangements of each Member State, to the completion of which they are instrumental[30].

Conversely, the EEC Treaty does not shy away from reshaping the constitutional settlement of each Member State into a common framework. Though addressed to the States, the *Bases of the Community* are generally phrased in the language of 'liberal' rights and liberties – see Article 48, *Free Movement of Workers*; Article 52, *Right of Establishment*. On the other hand, in light of Article 5, Member States are bound by a twofold general obligation: 'to take all general or particular measures which are appropriate… to facilitate the achievement of the Community's aims' and to 'abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty'. Such an obligation gives the EEC's institutions free room to penetrate the layers of the national societies until the boundaries policed by the highest constitutional

[30] P. de Visscher, *La Communauté Européenne du Carbon et de l'Acier et le États Membres*, in *Actes Officiels*, II (1957) 7.

principles[31]– a supranational, pluralistic *constitutional mosaic* gradually emerging by virtue of that process[32].

Hence, the teleology underpinning the respective political projects reminds that, as far as Article 1 is concerned, the TECSC is 'founded upon a common market, common objectives and common institutions'. The *Preamble* highlights that this commonality derives from the awareness of Europe's most recent past and aims to 'safeguard world peace', to maintain 'peaceful relations' and to substitute for the age-old rivalries the merging of… essential interests' of the Member States concerned. Hence, as far as this declaration of intents goes, Europe is to be construed 'through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development'.

The EEC Treaty turns this retrospective approach into a prospective one, the above-said declaration of intents becoming a fully-fledged integration plan[33]. In light of Article 2, the common market is a means to 'promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated rising of the standard of living and closer relations between its Member States'. Overall, the teleology of the integration points at a *prospective* unity: as the *Preamble* openly declares, the Member States are 'determined to establish the foundations of an ever closer union among the European peoples'.

This comparative picture renders the idea of an upgraded integration project whose law-making mechanisms undergo a slight but significant mutation encompassing the scope and density of the law produced. This mutation – in the view presented here – is so peculiar that it amounts to a *qualitative*, rather than *quantitative* one: in fact, different models can be construed to account for either separately.

---

[31] A. Tizzano, *Lo sviluppo delle competenze materiali della Comunità europea*, 21:2 *Rivista di Diritto Europeo* 139-210, 154 (1981).

[32] C. Mac Amhlaigh, *The European Union's Constitutional Mosaic: Big 'C or Small 'c', Is that the Question?*, in N. Walker, S. Tierney (eds.) *Europe's Constitutional Mosaic* (2011) 21-48.

[33] M. Udina, 'Articolo 1', in R. Quadri, R. Monaco, A. Trabucchi, B. Conforti (eds.) *Trattato istitutivo della Comunità Economica Europea: commentario*, I (1965) 5.

In the 'task-attribution' template provided in the ECSC Treaty, the institutions act as *multinational* organs[34]: they are set to perform certain activities in the common interest of the States. Thus, they exercise the attributed tasks within the sphere of control of the States, as an implementation of the States' purposes. Consequently, the link between the original consent of the States themselves and the normative measures the ECSC institutions adopt is, in principle, solid enough to ensure that law-making fits the intergovernmental circuit[35].

In the 'power-conferral'[36] model enshrined in the EEC Treaty, institutions are truly *supranational* organs: they are recognised substantive institutional capacity – hence, political autonomy – in view of a fully-fledged common project whose destiny is to create a single entity out of the plurality of States. Rather than fences, the once specific tasks look like open ways toward the attainment of the common objectives listed in the Treaty. Therefore, EEC institutions are set to re-write, in concrete, what the common purposes of the States amount to, and to pursue it via the multiple agreements they reach within and among themselves according to the *règles d'engagement* provided for in the legal bases.

Consequently, the ties with the original consent of the States slightly incline towards a *fictio juris*, as normative measures are taken at the initiative of the institutions and represent *their* positions, rather that the positions of the States. This is certainly the case for the so-called independent institutions – the Commission, the Bank[37] – but can be safely held for the whole EEC law-making inasmuch as the unanimity rule in Council is disregarded.

Conclusively, it seems possible to argue that the EEC Treaty plants the seeds of a political-constitutional project built on enhanced teleology, and sets the scene for a 'new' legal order that

---

[34] See G. della Cananea, *Cooperazione e integrazione nel sistema amministrativo delle Comunità europee: la questione della "comitologia"'* 3 *Rivista trimestrale di diritto pubblico* 655-702 (1990).

[35] P. Kirchhof, 'Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland', in P. Kirchhof, H. Schäfer, H. Tietmeyer J. Isensee (eds). *Europa als politische Idee und als rechtliche Form*, 63-101 (1993).

[36] Confront the account of such norms offered by G. Tusseau, *Theoretical Deflation: The EU Order of Competences and Power-Conferring Norms Theory*, in L. Azoulai (ed.) *The Question of Competence in the European Union* 39-63 (2014).

[37] See A.J. Menéndez, *¿Qué clase de Unión es ésta? A vueltas con la saga* Gauweiler, 116 *Revista Española de Derecho Constitucional* 269-299 (2019).

departs from the national-international law dichotomy in view of accomplishing this project [38].

4. The Legal Concept: A Planned 'Constitution-To-Be'

The match between the enhanced teleology of the ever-closer union project and the demise of the just cited dichotomy points to the core of *supranationality*[39] as the 'new idea' undergirding the European integration[40]. Certainly, this idea did not go unnoticed in the literature: Francis Rosenstiel nicely captured the concept's potential in view of a *neutralisation* of political conflicts[41], something that Carl Schmitt himself grasped[42].

General debates on supranationality have entered two separate channels, both displaying a strong teleological element in the construction of the polity and in the application of the law concerned.

On one hand, the teleological element has emerged as a distinctive feature of the Community in the long-lasting scholarly dispute on the latter's nature, as equally distant from a State but also from average international organisations[43]. In early decades, several works assimilated the Communities to a *Bundesstaat*, or a

[38] P. Pescatore, *International Law and Community Law. A Comparative Analysis*, 7(2) *Common Market Law Review* 167-183 (1970).

[39] V. Constantinesco, *En torno a la supranacionalidad*,) 49 *Teoría y realidad constitucional* 105-120 (2022).

[40] R. Schuman, *Préface* à Paul Reuter, *La Communauté Européenne du Charbon et de l'Acier* (1953) IV. See also J.-M. Dehousse, *Essai sur le concept de supranationalité* 22(2) *Chronique de politique étrangère*, 183-203 (1969), and J.-L. Iglesias Buhigues, *La noción de supranacionalidad en las Comunidades Europeas* (CECA, CEE, CEEA)' (1974) 1(1) *Revista de Instituciones Europeas* 73-120.

[41] F. Rosenstiel, *Le principe de supranationalité. Essai sur les rapports de la politique et du droit* (1962) 1-146.

[42] According to G. Itzcovich, *Teorie e ideologie del diritto comunitario* (2004) 97 (fn 30) and 425 (fn 10) Carl Schmitt looked with great interest at the supranationality idea and personally suggested to Rosenstiel a subtitle for the German edition of his book (*Supranationalität. Eine Politik des Unpolitischen* (translated by F. Becker, 1962).

[43] R. Barents, *The Autonomy of Community Law* (2004) 29, 33.

Staatenbund[44], or, else, to a *quasi*-federal *sui generis* international organisation[45].

On the other hand, the teleological element arises in debates on Community's competences, which are more recent: Armin von Bogdandy and Jürgen Bast recall that, until late '90s – set aside the *implied powers* provided for by Art. 235 TEEC (308 TEC)[46] – there was 'astonishingly little research on the vertical competences'[47]. Discussions have flourished throughout the 2000's and beyond;[48] particularly, experts in comparative law have unveiled the semantic ambiguity of the term *Kompetenz* as a translation for the English 'powers'[49]. Such a translation, indeed, does not help to understand the difference between the two law-making models reported hitherto: 'attribution of tasks' *versus* 'conferral of powers'.

The link between enhanced, supranational teleology and Community law's ever-enlarging applicative scope was obvious in the eyes of Community lawyers during the first decades. However, apart from wishful thinking[50] and political endorsements[51], their arguments in favour of the Community law's applicative priority did not bring much more than teleology itself: they were regularly phrased as the urgency 'to get things done' and to follow 'the teaching of the Court of Justice'[52] while emphasising the need to

---

[44] See G. Jaenicke, *Bundesstaat oder Staatenbund* in *Völkerrechtliche und Staatsrechtliche Abhandlungen – Carl Bilfinger zum 75. Geburtstag* (1954) 71-108.

[45] A recall in J. Klabbers, '*Sui Generis*? The European Union as an International Organization' in D. Patterson and A. Södersten (eds.) *A Companion to European Union Law and International Law* (2016) 1-15.

[46] See R. Schütze, *Organised change towards an "ever closer union": Art. 308 EC and the limits to the Community's legislative competence*, 22(1) Yearbook of European Law 79-115 (2003).

[47] A. von Bogdandy, J. Bast, *The Vertical Order of Competences*, in Armin von Bogdandy and Jürgen Bast (eds.) *Principles of European Constitutional Law* – II ed., English, 335-372, 336 (2006).

[48] L. Azoulai, '*Introduction: The Question of Competence*', in L. Azoulai (ed.) *The Question of Competence in the European Union*, cit. (fn 38 *supra*).

[49] O. Beaud, *The Allocation of Competences in a Federation – A General Introduction,* in L. Azoulai (ed.) fn. 38, 19-38.

[50] As an example, see P. Gori, *'A quando anche l'Italia? Per un deciso riconoscimento del diritto comunitario'* 18 *Rivista di diritto civile* 186-204 (1972).

[51] See R. Lecourt, *L'Europe des juges* (1967) 235; A. Segni, *Norme comunitarie*, 1 *Rivista di Diritto Europeo* 363-366 (1961).

[52] N. Catalano, *Portata dei Trattati istitutivi delle Comunità europee e limiti dei poteri sovrani degli Stati membri*, 4 *Il Foro Italiano* 153 (1964).

escape 'the trap of internal-external State law dichotomy'[53]. Beyond the rhetoric of a commonality of intents and destiny[54], such arguments clearly lacked legal bite and could hardly counter the legal positivism that dominated national and international law. In fact, the core of such arguments may be epitomised by the *nobility* of the *European cause*, which was presented as a synonym of general progression, civilisation and well-being. In order to achieve these utterly desirable goals, law was regarded as the main driver of supranationality, so that integration through law could precede, and foster, integration through politics[55].

To be sure, such an argument, yet weaker than positivist-voluntarist positions, was not deprived of legal background. Rooted in the profound, shared awareness of the dramatic World War II events, this argument claimed to bridge the ECSC with the EEC project to stand in defence of the post-war constitutional achievements – universal suffrage, human dignity, rights, liberties – deployed against a comeback of aggressive authoritarian nationalisms. Such a background was common to the *post*-WWII instruments of international law, too: it possibly stems from the narrative of the post-war Trials such as Nuremberg and Tokyo[56], as a new legal era was said to be at dawn whose core – to be defended at all costs – was the dignity of human persons as equals[57] .

Therefore, the 'integration through law' was supported by a claim of moral substance, whose ultimate support was the *new* ethics proclaimed as a source of inspiration for both national and international law in the immediate aftermaths of World War II[58].

---

[53] A. Trabucchi, *Un nuovo diritto*, 9 *Rivista di diritto civile* 259 (1963).

[54] J.H.H. Weiler, '*Europe in Crisis – On 'Political Messianism', 'Legitimacy' and 'Rule of Law'* 1 *Singapore Journal of Legal Studies* 248-268 (2012).

[55] J. H.H. Weiler, *The Community System: The Dual Character of Supranationalism*, 1(1) *Yearbook of European Law*, 267-306 (1981).

[56] B.E. Simma, *The Impact of Nuremberg and Tokyo: Attempts at a Comparison*, in N. Andō (ed.) *Japan and International Law. Past, Present and Future: International Symposium to Mark the Centennial of the Japanese Association of International Law*, Springer, The Hague, 1999, 59-84.

[57] M.R. Saulle, *Il senso della legalità nel processo di Norimberga*, in A. Tarantino, R. Rocco, R. Scorrano (eds.) Il *processo di Norimberga a cinquant'anni dalla sua celebrazione*, Atti del Simposio internazionale (Lecce, 5-7 dicembre 1997) (1998) 35; see also S. Glaser, *The Charter of the Nuremberg Tribunal and New Principles of International Law*, in G. Mettraux (ed.) *Perspectives on the Nuremberg Trial* (2008) 55-70.

[58] See Luigi Ferrajoli, *La democrazia nell'età della globalizzazione*, in Id., Principia juris. *Teoria del diritto e della democrazia* (2007) 487. Yet, this construct did not entail

However, this view had still to confront the well-rooted State-centred scholarship and the unchallenged precedence of positivist-voluntarist arguments over moral-teleological arguments.

This is the context in which *Planungsverfassung* comes in, as said above, without making too much noise in the relevant debates. Two were the main fields that this theory intercepted.

First, *Planungsverfassung* linked the common policy planning provided in the Treaties with the legal, socio-economic and political arrangements enshrined in the constitutions of the Member States: it promised a shared path of enduring consolidation for the achievements that those constitutions aimed to defend.

Second, *Planungsverfassung* generated a legal argument paving the way to Community law's priority-in-application in an ever-expanding array of cases, which unleashed the potential of the Community's 'conferral of powers' law-making model.

The definition of the Founding Treaties as *Planungsverfassungen* – which in German echoes the twofold meaning of 'constitutions engaged in planning' and 'planned constitutions', or 'constitutions-to-be' – was apparently coined by a German scholar, Carl Friedrich Ophüls. He was active in the *Frankfurt School*[59], worked as a professor of international and trademark law and was a key member of the Germany's team that contributed to the drafting of the very Community Treaties.

This definition is spelt out with clarity in a contribution to a volume edited by Joseph Heinrich Kaiser after a *Symposium* on 'Planning', published by *Nomos* in 1965[60].

The background to this collective work deserves attention, too. In the German legal-economic scholarship of that time, whether the State should prepare and implement a 'plan' for any of

---

the demise of the State as the key political form for representative democracy, but its maintenance in view of a consistent homogeneity between national and international law. See P. De Sena, *Dignità umana in senso oggettivo e diritto internazionale*, 11 *Diritti umani e diritto internazionale* 573-586 (2017) and Y. Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and his Rights* in D. Kretzmer, E. Klein (eds.) *The Concept of Human Dignity in Human Rights Discourse* (2012) 1-18.

[59] S. Kadelbach, *Frankfurt's Contribution to European Law*, in R. Hofmann, S. Kadelbach (eds.) *Law Beyond the State. Pasts and Futures* (2016) 49-70, 51, 54.

[60] C.F. Ophüls, *Die europäischen Gemeinschaftsverträge als Planungsverfassungen*, in J.H. Kaiser (ed.) *Planung I – Recht und Politik der Planung in Wirtschaft und Gesellschaft* (1965) 229-245.

the sectors of national economy was matter for a heated debate;[61] more generally, the point was whether interference between law and economics should ever occur at all[62]. In fact, as much as in other Member States (like Italy) whatever attempt to manipulate the economy by the public side was seen as divisive, and looked at with suspicion by the most fervent liberals[63] – a vast majority of them being fervent advocates of the European project, too[64]. Furthermore, in Germany such debate carried the supplementary weight of the salient influence exercised by 'evil scholars' such as Carl Schmitt[65] – particularly, as regards the still alive-and-well fascination of the Total State[66], which was, to be sure, inherited from legal, socio-political and economic scholars who backed the rise of the *Dritte Reich*[67].

The work that Kaiser coordinated aimed to prudently circumvent that debate, and it did so in two respects. First, it observed that, in any event, a certain 'planning' is intrinsic to good practices of government and must be accomplished in all the actions referring to the State authority. Hence, the concept was 'freed' of its socialist legacy and deployed as a neutral field for debate[68]. In this line, as pointed out by Ulrich Scheuner in another

---

[61] A. Predieri, *Pianificazione e Costituzione* (1964) spec. 105f., *passim*.

[62] See E.-U. Petersmann, *German and European ordo-liberalism and constitutionalism in the post-war development of international economic law*, in *EUI Working Papers* 2020/01, 1-21 (2020).

[63] A. Arena, *From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of* Costa *v.* ENEL, 40(3) *European Journal of International Law* 1017-1037 (2019).

[64] C. Ribolzi, *La nazionalizzazione dell'energia elettrica in Italia e la Comunità Economica europea* 5 *Foro Padano* 29 (1964); see, more generally, G. Mori, *La nazionalizzazione in Italia: il dibattito politico ed economico*, in *La nazionalizzazione dell'energia elettrica: L'esperienza italiana e di altri paesi europei*: *atti del convegno internazionale di studi del 9-10 novembre 1988 per il XXV anniversario dell'istituzione dell'Enel* (1989) 91-115.

[65] See C. Schmitt, *Starker Staat und gesunde Wirtschaft* (1932) English ed.: *Strong State in Sound Economy*, in R. Cristi (ed.) *Carl Schmitt and authoritarian liberalism: strong state, free economy* (1998) 213-232.

[66] E. Forsthoff, *Der Totale Staat* (1933) 29; cfr. R. Laleff Ilieff, *Schmitt y la paradoja del Estado Total*, in *Discusiones filosóficas*, 33-47 (2015).

[67] W. Bonefeld, *Authoritarian Liberalism: From Schmitt via Ordoliberalism to the* Euro, 43 *Critical Sociology* 747-761 (2017).

[68] See H. D. Fangmann, *Staatliche Wirtschaftsplanung und Staatsrechtsideologie*, 5:1 *Kritische Justiz* 1-15 (1975).

chapter of the same volume[69], '*Planung*' referred to a legal concept of constitutional relevance that was to be regarded as fundamental for all State's activities, as it possessed a twofold side: on one hand, the collective dimension of the pre-ordinated planning of activities directed at the satisfaction of *Leistungsrechte*[70]; on the other hand, the individual dimension of rights and liberties thriving in a constitutionally protected European space[71].

Within this context, the project enshrined in the Community Treaties echoed the 'French-imported' idea of a supranational *Plan* cited by Robert Schuman; also, simultaneously, it repaired in the same constitutional concepts underpinning national *Planung*. Thus, '*Planung*' came to be a concept of constitutional lineage and, at the same time, one that was deeply entrenched in supranationality.

Against this background, Ophüls earned free room to argue that the Treaties were similar to constitutions in that respect – *i.e.*, as the basic founding charters of such planning – and to tie this conclusion to the special intent of the Founding Member States. In fact – he underscored – those States had undertaken to engage in a common project of high constitutional ambition. Such project, pursuant to the action of common institutions, envisaged the common planning of entire sectors of the respective national economies, and did it in light of the initial will of the Member States aiming at an ever closer union. Accordingly, the national planning efforts in those sectors, as part of the national constitutional settlement, were to converge towards a single plan to be developed by common institutions.

Thereby, the *Planungsverfassung* concept outlines a theory to account for the Communities as both a constitutional entity and as an 'entity in the making', in relation to which emphasis should be put on the future perspective, rather than on the (then) current state of integration. While reinforcing the constitutional tone of the Community planning as functional to an ever-closer union, this

[69] U. Scheuner, *Verfassungsrechtliche Probleme einer zentralen staatlichen Planung*, in J.H. Kaiser (ed.) *Planung I*, fn. 61, 67-90.

[70] P. Häberle, *Grundrechte im Leistungsstaat*, in P. Häberle, W. Martens, *Grundrechte im Leistungsstaat. Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung*, in *VVDStRL*, 30 46 (1972); see G. Ferrara, *Lo «Stato pluriclasse»: un protagonista del «secolo breve»*, in S. Cassese, G. Guarino (eds.) *Dallo Stato monoclasse alla globalizzazione* (2000) 74-92.

[71] See F. Álvarez-Ossorio Micheo, '*Europa como espacio integrado de libertad*, 3:5 *Araucaria – Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales*, 93-122 (2001).

theory also possessed a political background: it offered a common ground to the socialist-liberal battle on the Western general political orientation, which was to incline towards the latter but could not completely set aside the former[72]. In this regard, the European project acted as the tool for neutralisation and de-politicisation[73] of the conflicts arising in national areas[74]. Most crucially, the *constitution-to-be* showed potential in reducing the left-wing scepticism toward the Community's progress:[75] if accounted for in the seductive, yet illusionary perspective of a soon-to-be-achieved fully-fledged integration[76], advancements in economic areas (solely) could be taken as temporary gains in view of a cosmopolitan construct[77] of Kantian flavour[78]. As a result, the left-wing battle towards constitutional change could be either postponed forever or canalised into a prohibitive battle for *euro-constitutionalism*[79].

Whether this idea got close to what Rosenstiel had foreseen, and Schmitt subscribed to, is in fact matter for an ongoing debate.[80] Yet, put in this way, the neutralisation carried by the *Planungverfassung* concept was legally tied to the promised

---

[72] R. Bin, *Nuove strategie per lo sviluppo democratico e l'integrazione politica in Europa* – Speech at Catania University, 30-31 May 2014, in A. Ciancio (ed.) *Nuove strategie per lo sviluppo democratico e l'integrazione politica in Europa* (2014) 497-512.

[73] The quote comes from Carl Schmitt, *Die Europäische Kultur im Zwischenstadium der Neutralisierung* – Speech at *European Cultural League* Meeting, Barcelona, 12 October 1929, republished as *Das Zeitalter der Neutralisierung und Entpolitisierung*, in C. Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Korollarien* (1963) 79-95. See also F. Rosenstiel, *Le principe de supranationalité*, fn. 42, cited by the very Carl Schmitt in his last-quoted work (at fn 2) as regards the 'attempt to achieve the unity of Europe by means of neutralisations (so-called integration)'.

[74] M.A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (2021) 81, 95.

[75] P. Gerbet, *La genèse du Plan Schuman. Des origines à la Déclaration du 9 mai 1950*, 6(3) *Revue Française de Sciences Politiques* 525-553 (1956).

[76] M.S. Adesso, *Il consenso delle sinistre italiane all'integrazione europea (1950-1969)*, 9:1 *Diacronie. Studi di Storia Contemporanea* IV-14 (2012).

[77] A. Stone Sweet, *A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe*, 1(1) *Global Constitutionalism* 53-90 (2012).

[78] I Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795) 20.

[79] More in G. Vosa, *Sull'equilibrio costituzionale dell'Unione europea. La costituzione "nata dal cambiamento" e i limiti alla priorità applicativa del diritto sovranazionale*, 3 *Costituzionalismo.it*, 1-45 (2021).

[80] René Barents, cit. fn. 44, 39. See T. Molnar, *The Interplay between the EU's Return* Acquis *and International Law* (2021) 15 and the bibliography cited therein.

development of the social, political and economic planning enshrined in the constitutions of the Member States. In this line, the European project matched, and perpetuated, national constitutional projects: both pointed to the protection and perpetuation of the fragile equilibrium between different groups and ideologies whose pacific co-existence Member States had formalized in their constitutions.

The combination of these two lines worked as a platform for the construction of an argument whose influence on the 'integration through law' toolkit has been remarkable.

5. The Rise of the *Planungsverfassung* Argument

In the early 60s', international law was still dominated by positivist views, according to which limitations to national sovereignty should be expressly consented upon by the contracting States. An oft-quoted, terse statement frequently cited even in recent times reported that 'where there is State will, there is international law: no will, no law'[81]. The *Lotus* case, dating back to the interwar period, put the question in the simplest terms:

> 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed'[82].

After the war, in spite of some scholars' constructivist temptations[83], *Lotus* remained a landmark case[84] and a milestone as for the arguments admitted in international law.[85] Still in 1959, Bin Cheng's work on *General Principles of Law as applied by International*

[81] A. Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 26 *Australian Yearbook of International Law* 22-53, 22 (1988-'89).

[82] P.C.I.J., *Lotus*, 1927 (ser. A) No. 10, 18.

[83] J.-L. Brierly *The 'Lotus' Case*, 44 *Law Quarterly Review* 154-155 (1928).

[84] L. Henkin, *International Law: Politics, Values and Functions*, in *Collected Courses of The Hague Academy of International Law*, IV, I-416, 278 (1989).

[85] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005) 255.

Courts began with a thorough examination of *Lotus*[86]; in the same years, Hersch Lauterpacht admitted that the 'state of international integration has not allowed the Court [of International Justice] to attain the goals which the drafters of the Statute had set'[87].

A sort of vicious circle emerged: so long as there was no sufficient international integration, there could be little or no constructivism by the side of the courts; but without a more courageous constructivist approach taken by the courts, no sufficient international integration would have ever taken place.

The *Planungsverfassung* assumption attacks this circularity. As far as this theory is concerned, the special commitment expressed by the Member States in setting the elements of a 'constitution-to-be' – that is, in the common planning of entire sectors of their national economies towards common objectives to be pursued by common institutions – endows Community law with a background that marks a step ahead *vis-à-vis* international law as regards legal interpretation.

The concerned argument goes as follows: since the Community Treaties issue a planning that is to be unfolded by common institutions, the law stemming from these institutions is to be interpreted in a way that furthers the unfolding of that planning, because such an interpretation would be the most faithful translation of the original intent of the Member States[88].

Therefore, Community law is entitled to claim applicative priority *vis-à-vis* national law in an ever-expanding range of cases, for such an expansion would amount to pursuing the 'ever closer union' project in accordance with the will of the contracting States[89].

As a result, the *Planungsverfassung* leads to overthrowing the *Lotus* doctrine without formally contesting it: in fact, it looks like a feasible evolution thereof. Accordingly, limitations to national sovereignty not only *can*, but also *must* be presumed: for this was the supposed will of the Member States as they decided, in their

---

[86] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1959) 29.

[87] H. Lauterpacht, *The Development of International Law by the International Court* (1958) 3.

[88] C.F. Ophüls, *Report*, in *Zehn Jahre Rechtsprechung des Gerichtshofs der europäischen Gemeinschaften* (Institut für das Recht der europäischen Gemeinschaft, Köln, 24-26 April 1963 (1965) 213.

[89] C. Ribolzi, *Problemi costituzionali concernenti i Trattati delle Comunità Europee*, IV *Il Foro Padano* 41-42 (1965).

sovereign freedom, to agree on the common planning enshrined by the Treaties[90]. Hence, the wording of the Treaties, as well as of all the legal measures issued on the basis thereof, is to be understood in light of this enhanced teleology, which operates as an implicit *pro-Europe* bias influencing textual reading[91]. Thus, the original intent argument finds itself decoupled from the textual argument and results in a teleological argument aiming at further integration.

This passage decisively conditions the interpretation of the Treaties. In fact, the vicious circle that prevented judicial constructivism is broken without formally undermining the supremacy accorded to the 'sovereign will' of the States, the 'Masters of the Treaties'. Moreover, the claim for the nobility of the European cause, which in the earliest years of the Community was falling short of legal grounds, found in the *Planungsverfassung* construct what it needed to vest the 'ever closer union' project with a constitutional allure: the constitutional *acquis* of the Member States was to be defended by mutual neutralisation of the national institutions.

Eventually, the strong *Europeanism* infusing the approach of early Community lawyers – to the extent that an Italian legal philosopher accused them, playing with Kelsen's words, of confusing the 'wish' with the 'ought'[92] – found a juridical ground to challenge the hegemony of legal positivism, as national institutions were to be tamed in the name of the cited neutralisation – which was tantamount to establishing Community law's applicative priority on national laws[93], and to do so through the judiciaries[94].

Consequently, a complex, balanced intertwining of voluntarism and moralism rests at the core of the *Planungsverfassung* argument, which indeed contains two separate

---

[90] A. Miaja de la Muela, *La primacía sobre los ordenamientos jurídicos internos del Derecho internacional y del Derecho Comunitario europeo*, I:3 *Revista de Instituciones europeas* 987-1029 (1974).

[91] See J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgarantien der richterlichen Entscheidungspraxis* (1970).

[92] R. Treves, *Introduzione*, in Id., *Diritto delle Comunità europee e diritto degli Stati membri* (1969) 15.

[93] H. Rasmussen, *On Law and Policy in the European Court of Justice* (1986) 379.

[94] M. Cappelletti, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato* (1968) 6; see J.H.H. Weiler, D. Lustig, *Judicial review in the contemporary world – Retrospective and prospective*, 16(2) *International Journal of Constitutional Law* 315-372 (2018).

propositions. One builds on *formal* reasoning and applies a teleological argument, although disguised as an original intent one in light of the ever-closer union clause. The other relies on *substantive* reasoning to endorse a value-based argument tied to an alleged moral superiority of the ever-closer union project as the best option to perpetuate the political-constitutional settlement enshrined in the national constitutions. One builds on the Member States' *special commitment* to engage in a common planning towards an ever-closer union; the other one refers to such an 'ever closer union' project as the ultimate defender of a noble, morally preferable cause. The idea was that a sound balance between ethics and will should have been stricken to defend and perpetuate the constitutional *acquis* of the European States in the aftermaths of World War II, and to make sure that no such tragedy would ever happen again[95].

The combination of these propositions has silently worked to overturn the very same reasoning that had hitherto governed legal interpretation. Suffice it to consider the rationale of the *effet utile*[96], labelled a 'meta-rule'[97] as foundational to a *modus cogitandi* that slightly subverts the logics of legal positivism. In the name of the States' original intent, it allows a given Community law measure to find application 'otherwise it could not attain its objective'[98]. Noticeably, in positivist logics, this reasoning makes little sense: a legal measure is able to attain its objective only once its applicability is formally confirmed[99]. The attainment of the objective is the

[95] See P. Ridola, *I diritti di cittadinanza, il pluralismo e il tempo dell'ordine costituzionale europeo. Le "tradizioni costituzionali comuni" e l'identità culturale europea in una prospettiva storica*, in Id., *Diritto comparato e diritto costituzionale europeo* (2010) 51-75.

[96] U. Šadl, *The Role of* Effet Utile *in Preserving the Continuity and Authority of European Union law*, 8 *European Journal of Legal Studies* (2015) 18-45; see A. von Oettingen, Effet utile *und individuelle Rechte im Recht der Europäischen Union* (2010) 25, and I. Ingravallo, *L'effetto utile nell'interpretazione del diritto dell'Unione europea* (2017) 24.

[97] S. Mayr, *Putting a Leash on the Court of Justice? Preconceptions in National Methodology* v Effet Utile *as a Meta-Rule*, 5(2) *European Journal of Legal Studies* 8-21 (2012).

[98] See J. Lindeboom, *The Autonomy of EU Law: A Hartian View*, 13(1) *European Journal of Legal Studies* 271-307, 284 (2021).

[99] G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (2012) 52, 117, 201.

consequence – *effect* – of prior application, and it could not be at the same time the *cause* thereof.

It is worth to highlight that all the numerous concepts deployed to enforce Community law's priority-in-application in an ever-expanding array of cases seem to revolve around this double-decked idea: Community law is both a legal order of a new kind based on the Member States' special original will, and at the same time one that *ought* to be implemented as *preferable*[100]. Hence, a strong moral argument overlaps the 'original intent' and decouples it from the wording of the legal texts: voluntarism is no longer assumed as coincident with textualism, but with enhanced teleologism.

Yet, this coincidence presents as an inherent condition that the European project be oriented at the defence of the socio-political constitutional settlements enshrined in national constitutions. In fact, the defence of this settlement was precisely what urged the *Master of the Treaties* to set in motion the European project. Such link is not only an ideal-political one, but has legal repercussions, as displayed in the twofold proposition of the theory that paves the way to Europe's legal integration.

The point is that such a condition could be rightfully presumed to exist during the late decades of the XX century, that is, along the road taking to the European Constitutional Treaty. After the latter's demise, conflicts have emerged in a way that seemingly renders such a presumption misleading, or mistaken altogether.

6. Decline

If the reasoning followed hitherto is accepted, a link emerges between national constitutions and the 'ever-closer union' project. This link points to the perpetuation of the core national political-constitutional settlement with a view to neutralising the alleged authoritarian inclination of sovereign Nation-States.[101] Due to this link, Community law entered the domain of national constitutional

[100] P. Pescatore, *Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice*, in *Studia ab discipulis amicisque in honorem egregii professoris W. J. Ganshof van der Meersch* (1972) 325, 345.
[101] A. S. Milward, *The European Rescue of the Nation State* (1992: 2nd ed. 2000) 21, 121.

law to create a European constitutional law of principles[102], albeit not exempt from constitutional conflicts[103], Nowadays, this latter view, aptly dubbed *irenic*,[104] of the integration leaves room to more disenchanted comments.[105] In recent literature, works that express critical considerations on the European integration being in line with *post*-WWII constitutions surface with increasing frequency.

Unsurprisingly, several of them display as a point of departure for the investigations concerned a refreshed view of certain segments of Europe's institutional history. Amedeo Arena, in a careful historical survey of *Costa* v *ENEL*, unveils the monarchic (prior fascist) sympathy of the animator of the case, Mr. Stendardi – a skilled lawyer himself, and an expert in the field of the relations between national and international law, who knowingly enforced Community law's primacy to defend liberal views against the nationalisation of electricity[106]. More generally, just to quote few scholars, Morten Rasmussen[107] has provided valuable examples of how history needs to enter the realm of legal analysis as regards the European integration[108]; Stefan Vogenauer and Sigfrido Ramírez have presented a project of an oral history of the Court of Justice itself[109].

Such examples are less frequent, but present, in previous times. Just to give other two examples: some twenty years ago, Christian Joerges and Navraj Singh Ghaleigh cast light on the 'dark side' of the European Union's constitutional legacy by elucidating

---

[102] *Adde* F. Balaguer Callejón, *Derecho Constitucional Europeo*, in Id. (ed.) *Manual de Derecho Constitucional* (2020) 202-275.

[103] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (2022) 106.

[104] M. Luciani, 'Costituzionalismo irenico e costituzionalismo polemico' 51:2 *Giurisprudenza costituzionale*, 1644-1669 (2006).

[105] C. Amirante, *Costituzionalismo e Costituzione nel nuovo contesto europeo* (2003) 15; see also C. Joerges, M. Weimar, *A Crisis of Executive Managerialism in the EU: No Alternative?*, in G. de Búrca, C. Kilpatrick, J. Scott (eds.) *Critical Legal Perspectives on Global Governance:* Liber Amicorum *David M. Trubek* (2014) 295-321.

[106] A. Arena, fn. 64, 1022.

[107] M. Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, 4:2 *Journal of European Integration History* 77-98 (2008).

[108] A. Boerger, M. Rasmussen, *Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993*, 10(1) *European Constitutional Law Review* 199-225 (2014).

[109] S. Ramírez Pérez, S. Vogenauer, *Using Oral Methods for European Legal History: Methods, Sources, Projects*, 29 *Rechtsgeschichte - Legal History* 154-156 (2021).

ties with certain legal, political and economic concepts arisen in the twilights of Weimarian Germany[110]. Even before, David Dyzenhaus pointed to Weimar's experiences as a paradigm for democratic response to fundamental challenges, opening the door to a comparison with more recent events[111].

However, it is only pursuant to the 2008 crisis that the eerie analogies between the current times and the Weimar age have been accepted as part of the debate. Correspondences with Herman Heller's diagnosis of 'authoritarian liberalism'[112] have been found[113] in political[114], social[115], economic[116] and legal terms[117]. Regulatory asymmetries between the two poles of the (common) market – capital *v* labour – have been traced as elements of a *diagonal conflict*[118] entailed by the integration project, the solution of which escapes the operational range of both national and supranational institutions[119]. Such accounts, alongside many others, prove a sham the idea of 'justice through market'[120]: the

[110] C. Joerges, *Europe a* Großraum*? Shifting Legal Conceptualisations of the Integration Project*, in C. Joerges, N. Singh Ghaleigh (eds.) *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe and Its Legal Traditions* (2003) 167-191.

[111] D. Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons*, 91(1) *American Political Science Review* 121-134 (1997).

[112] H. Heller, *Autoritärer Liberalismus?*, 44 *Die neue Rundschau* 289-298 (1933); see English ed. (S. Paulson), *Authoritarian Liberalism*, 21(3) *European Law Journal* 295-301 (2015).

[113] A. J. Menéndez, *Hermann Heller NOW* (Editorial), 21(4) *European Law Journal* 284-294 (2015).

[114] M.A. Wilkinson, *Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?*, 21(3) *European Law Journal* 313-339 (2015).

[115] C.E. Mattei, *The Guardians of Capitalism: International Consensus and Fascist Technocratic Implementation of Austerity* (2017) 44(1) *Journal of Law and Society* 10-31.

[116] F.W. Scharpf, *Monetary Union, Fiscal Crisis, and the Pre-emption of Democracy*, MPIfG Discussion Paper 11/2011, 1-40.

[117] C. Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, 15(5) *German Law Journal*, 985-1028 (2014)

[118] C.I. Nagy, *The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation* à l'européenne, 21:5 *German Law Journal*, 838-866 (2020).

[119] M. Dani, *Il diritto pubblico europeo nella prospettiva dei conflitti* (2013) 151.

[120] A. Guazzarotti, *Crisi dell'euro e conflitto sociale. L'illusione della giustizia attraverso il mercato* (2016) 27.

'spectre of authoritarian liberalism'[121] envisages a 'liberty without liberation'[122] which turns Europe's 'constitutional dream' into Goya's *Sleep of Reason*[123].

Undeniably, the European Council's *Conclusions* adopted on 10-12 December 2008 offer arguments in support of such analogies, as they provide evidence of two points.[124] First, the Union's Heads of State and Government openly refused to assume political responsibility for the crisis and admitted that they had met in Washington to discreetly agree on certain measures whose quick implementation the institutions were requested to carry. Then, soon afterwards, that blatant derogation to established procedures led to the establishment of the 'secular triptych'[125] in support of the newly shaped EMU, as well as to the signature of the notorious ESM Treaty and to the likewise famous ECB's 'whatever it takes' strategy – all measures whose compatibility with Union law is as doubtful as politically sensitive[126].

At that juncture, the presumption backing the constitutional continuity between national constitutions and the European project turned untenable. As the narrative portraying the European integration as the best option to perpetuate the national constitutional legacy with benefits for all the States and peoples involved faded away, the continuity between the post-war constitutional achievements and the applicative priority accorded

---

121 M.A. Wilkinson, *The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union*, 14(5) *German Law Journal* 527-560 (2013).

122 M. Benvenuti, *Libertà senza liberazione. Per una critica della ragione costituzionale dell'Unione europea* (2016) 36.

123 J.L. Requejo Pagés, *El sueño constitucional* (2016) 204.

124 European Council, *Conclusions*, Bruxelles, 11-12 December 2008, Point 5 – see at: https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/104692.pdf

125 P. Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, in M. Adams, F. Fabbrini, P. Larouche (eds.) *The Constitutionalization of European Budgetary Constraints* (2014) 19-42.

126 C. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, 35:2 *Oxford Journal of Legal Studies*, 325-353, 338 (2015); see also R.A. Lorz and H. Sauer, *Ersatzunionsrecht und Grundgesetz. Verfassungsrechtliche Zustimmungsgrundlagen für den Fiskalpakt, den ESM-Vertrag und die Änderung des AEUV*, 15 *Die öffentliche Verwaltung*, 573-581 (2012) and C. Kilpatrick, *The EU and its Sovereign Debt Programmes: The Challenges of Liminal Legality*, 70 *Current Legal Problems*, 337-363, 348 (2017).

to Union law on an ever-expanding range of cases fell under severe question, too. The *Planungsverfassung*, as a consequence, exposed multiple creeps in both the argumentative line and the outcomes delivered.

In this regard, the reasoning that the Court of Justice deployed in *Pringle* offers good, tangible evidence.[127]

The facts are renowned. With the multiple preliminary questions submitted to the Court of Justice, the Irish Supreme Court essentially seeks an answer to the following point: whether the ratification of the ESM Treaty violates Union law.

As a first question, the Court is called to decide on whether ESM affects monetary policy; should it be the case, the ESM Treaty would enter a field of Union's exclusive competence.[128]

The Court outlines both 'economic policy' and 'monetary policy' in pure teleological fashion: it argues that the TFEU contains neither a definition nor any guideline in this respect, but 'objectives'[129] and concludes that 'the primary objective of the Union's monetary policy is to maintain price stability'.[130] Then it comes to assess 'whether or not the objectives to be attained' by the ESM and the 'instruments provided to that end fall within monetary policy'.[131] The answer is in the negative; anyhow, the scrutiny the Court carries is limited to a quote of what the ESM Treaty itself provides in that regard, and this response – the judges add – would stand even if evidence were provided of certain ESM measures concretely affecting price stability, thus entering the realm of monetary policy as designed by the Court itself.

> Even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro.[132]

Along this line, a restrictive interpretation of the boundaries of Union law – *i.e.*, of the powers conferred on by the Treaty – is confirmed, but with no argument other than a reference to

[127] CJEU, C-370/12, *Pringle* (n. 19).
[128] *Ibid.*, 52.
[129] *Ibid.*, 53.
[130] *Ibid.*, 54.
[131] *Ibid.*, 55.
[132] *Ibid.*, 56.

definitions provided by the Member States in the ESM Treaty. Yet, apparently, this 'sovereign will' is interpreted in a manner that runs contrarily to the *Planungsverfassung* argument. According to the latter, Union law must have priority *vis-à-vis* national law in an ever-expanding applicative scope due to the twofold proposition elucidated above. But this is *not* what the Court states: quite the opposite. In light of the reasoning deployed in *Pringle*, Union law must abdicate before the will of the Member States as expressed in the wording of ESM. Nothing is said on the moral *preferability* of the European project in comparison with the many novelties the ESM introduces[133]: it is the simple *today's* will of the *Master of the Treaties* as resulting from the ESM itself what abruptly reverses the trend of the ever-closer union. On that basis, a restrictive reading of Union law as regards its scope of application is endorsed while surrendering applicative priority to national law[134]. Teleology applies, but in a direction that runs contrarily to an expansion of the Union law's applicative scope: it applies to reduce that scope.

Hence, the moral pro-integration rationale changes: if worded, it would no longer sound like 'an expansion of Union law's applicative scope is the best way to pursue the European project that corresponds to the original will of the States as enshrined in their constitutions' but rather something like 'reducing the scope of Union law is, in this moment, the best way to pursue the integration project'.

To the reader's utter bemusement, *Pringle* contains another line of reasoning that, conversely, leads to a seeming half-restauration of the *Planungsverfassung* construct but is, in fact, another nail in the coffin thereof, and another menace to the constitutional compatibility of the measures in question. As it comes to decide whether the *no-bailout clause* laid down in Article 125 TFEU is compatible with ESM, the Court builds on a teleological interpretation of the States' original intent by resorting, *inter alia*, to the Maastricht's *travaux préparatoires*.[135] Nonetheless, it is worth to note that, as a consequence of this reading, the scope of Article 125 TFEU is *reduced*, rather than expanded – again, conversely to what the *Planungsverfassung* argument assumes. In fact, as far as the

---

133 P. Craig, Pringle*: Legal Reasoning, Text, Purpose and Teleology*, 20:1 *Maastricht Journal of European and Comparative Law* – Guest Editorial 3-11 (2013).

134 P.-A. van Malleghem, Pringle*: A Paradigm Shift in the European Union's Monetary Constitution*, 14:1 *German Law Journal* 141-168 (2013).

135 CJEU, C-370/12, *Pringle*, fn. 19, 136.

Court is concerned, Article 125 TFEU would only apply to *bailouts* 'as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished'[136]; thus, other *bailouts* – such as those envisaged in the ESM Treaty – fall outside the applicative scope of that Union law provision[137].

To sum up: after the demise of the European Constitutional Treaty, an age of crises has perturbed the integration project, which has affected the European narrative and undermined the *Planungsverfassung* construct. More specifically, in *Pringle*, this doctrine is contradicted in two respects. First, the related argument is overturned: the will of the States as it was at the time of the foundation needs to be replaced by the will of the States as it was today. Second, this replacement backs a teleological-systematic interpretation of Union law aiming to restrict the latter's applicative scope. Eventually, no reason is offered for this turn: the judges accept as a fact that the argument is to be deployed, so to say, opportunistically. Thus, Union's law and constitutional architecture, like a cane in the wind, bend before the (executives of the) Member States and the goals they declare to (be willing to) pursue.

This loophole in the reasoning of the Court accounts for the ignited conflict that, in times of gruesome crises, undermines the European edifice.[138] As a result, unsurprisingly, increasing rates of uncertainty affect the communicative capacity of judicial arguments.[139] The Luxembourg judges have, on one hand, confronted tenacious resistances from the side of national capitals while coming to support, on the other hand, even more ambitious, and further enhanced, claims for prior application of Union law. Eventually, the decline of the *Planungsverfassung* as a constitutional theory and as a legal argument unleashes the transfiguration of both.

---

[136] *Ibid*.

[137] A. Aguilar Calahorro, 'La decisión *Pringle* en el proceso de constitucionalización de la Unión Europea', 101 *Revista española de Derecho constitucional* 337-380 (2014).

[138] D. Chalmers, *The European Redistributive State and a European Law of Struggle*, 18(5) *European Law Journal* 667-693 (2012).

[139] P.J. Martín Rodríguez, *A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis*, 12(2) *European Constitutional Law Review* 265-293 (2016).

7. Transfiguration

In principle, the yet evident decline of the *Planugsverfassung* has not entailed a retreat of the Union's normative claim *vis-à-vis* national law. Expansive priority in application regularly leans on a robust teleological pedestal,[140] and the claim in favour of such a priority enhancing the defence of common values is raised with reinforced vigour.[141] Nonetheless, the ties with the original consent of the States look no longer solid, sometimes even purely fictitious – to the extent that sensitive national interests are hurt yet in the name of their original will. Formal and substantive discriminations among Member States as for the application of Union law have started to occur quite routinely.[142]

A formal discrimination happens when a Member State manages to get away with the non-application of certain measures of Union law, while other States must comply with it. Examples in this respect are abundant, yet diverse among each other.

On a first plane, the argument raised by the Hungarian Constitutional Court in the 2016 case on migrations[143] signpost an attack to supranationality *as such*[144]*:* Union law is downgraded to the rank of 'mere' international law in light of an *introvert* concept of national identity that echoes Schmitt's[145].

On a second plane, a slightly more dialogued approach has been endorsed by the Spanish Supreme Court in a case concerning the right to compensation as a remedy against abuse of temporary

---

[140] A. Śledzińska-Simon, P. Bárd, *The* Telos *and the Anatomy of the Rule of Law in EU Infringement Procedures*, 11 *Hague Journal on the Rule of Law* 439-445 (2019).

[141] See, *inter alia*, K. Lenaerts, J.A. Gutiérrez-Fons, *Epilogue*. High Hopes*: Autonomy and the Identity of the EU*, 8(3) *European Papers* 1495-1511 (2023).

[142] G. Zaccaroni, *Equality and Non-Discrimination in the EU. The Foundations of the EU Legal Order*, (2021) 8f. Recently, for an apparently moral-biased conception of equality, F. L. Gatta, *La legge (dell'Unione europea) è uguale per tutti: il principio di uguaglianza degli Stati membri davanti ai Trattati*, 1 *Il Diritto dell'Unione Europea*, 1-41, 37f., 38, fns 134-135 (2024).

[143] Hungarian Constitutional Court, Decision 22/2016 (xii 5) ab. (30 November 2016).

[144] See G. Halmai, *Abuse of Constitutional Identity: The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law*, 43(1) *Review of Central and East European Law* 23-42, 25 (2018).

[145] Law being ‚a unity of order and localization' (*Einheit von Ordnung und Ortung*): Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950) 13.

employment contracts (*de Diego Porras*)[146] and by the Italian Constitutional Court as for the defence of the legality principle as applicable to penal prescription (*Taricco*)[147]. The *Tribunal Supremo* was more successful than the *Tribunal Constitucional* in opposing Union's priority claim[148]: it managed to grant national authorities wider room to decide on the merits, which was denied in *Melloni*[149]. Likewise, the *Corte costituzionale* has prompted the Court of Justice to swallow a similar pill in *Taricco*[150]. More than that[151], the Italian judges have claimed jurisdiction on the Union law's applicative scope *vis-à-vis* national supreme principles 'whenever the rights of

[146] CJEU, C-596/14, 14 September 2016, ECLI:EU:C:2016:683 (preliminary question issued by the *Tribunal Superior de Justicia de Madrid*, and C-619/17, 21 November 2018, ECLI:EU:C:2018:936 (preliminary question issued by the *Tribunal Supremo*) 84; see A. de la Puebla Pinilla, *Principio y fin de la doctrina «de Diego Porras», o de cómo, en ocasiones, «el sueño de la tutela multinivel produce monstruos»*, 7 *Revista de información laboral* 17-38 (2018).

[147] Italian Constitutional Court, Order No. 24/2017, 26 January 2017, at 6; see C. Rauchegger, *National constitutional rights and the primacy of EU law:* M.A.S., 55(5) *Common Market Law Review* 1521-1547 (2018), and G. Repetto, *Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court*, 16(6) *German Law Journal*, 1449-1470 (2015).

[148] J. I. Ugartemendía Eceizabarrena, S. Ripoll Carulla, *Del recato de la jurisprudencia del Tribunal Constitucional sobre la tutela judicial de los DFUE y de las cuestiones y problemas asociados a la misma (a propósito de la STC 26/2014, de 13 de febrero)* 50 *Revista Española de Derecho Europeo* 105-149 (2014).

[149] CJEU, C-399/11, *Stefano Melloni* v *Ministerio Fiscal*, 26 February 2013, ECLI:EU:C:2013:107; see F.J. Donaire Villa, *Supremacía de la Constitución versus primacía del Derecho de la UE en materia de Derechos fundamentales: concordancias y discordancias entre el Tribunal Constitucional y el Tribunal de Justicia de la UE en el asunto* Melloni, 39 *Teoría y Realidad Constitucional* 637-654 (2017).

[150] *Corte costituzionale*, Judgment n. 269/2017, 14 December; see D. Gallo, 'La Corte costituzionale chiude la "saga *Taricco*" tra riserva di legge, opposizione *de facto* del controlimite e implicita negazione dell'effetto diretto' (2018) 3(2) *European Papers* 885-895 and G. Piccirilli, 'The '*Taricco* Saga': the Italian Constitutional Court continues its European Journey' (2018) 14(4) *European Constitutional Law Review* 814-833.

[151] See M. Cartabia, 'Of Bridges and Walls: The 'Italian Style' of Constitutional Adjudication' 8:1 *Italian Journal of Public Law* 37-55 (2016). A recent, wide-ranging analysis in F. Saitto, *Giurisdizione costituzionale e protezione dei diritti fondamentali in Europa. I sistemi accentrati di fronte alle sfide della legalità costituzionale europea* (2024); on the last constitutional case-law concerning the relations among legal orders, critically R. Mastroianni, *La sentenza della Corte costituzionale n. 181 del 2024 in tema di rapporti tra ordinamenti, ovvero la scomparsa dell'articolo 11 della Costituzione*, 1 *Quaderni AISDUE* 1-29 (2025).

the persons' come at stake[152]. Soon afterwards, this approach was followed in *DB*[153], and a practice has been established consistently, as later demonstrated by a referral on a highly sensitive topic – the minimum income guaranteed by the State[154] – concerning an alleged infringement of the non-discrimination principle. This route has suffered only minor variations, as highlighted in the scholarship[155].

On a third plane, the Danish Supreme Court in *Ajos*[156] claimed that Union law, in imposing prior application on national law in a case of non-discrimination on grounds of age[157], violated a structural principle pertaining to the national constitutional *acquis*: legal certainty[158]. In this view, all binding norms of Union law must present *sufficient ties* to the powers conferred by the Treaty on the law-making institutions, as they are express in the wording of the concerned acts; otherwise, they would amount to unpredictable legal consequences to a certain conduct, thus in breach of legal certainty. The *BVerfG*, too, has walked that path and defended a structural constitutional principle protecting, in the name of human dignity, the 'substantive content of the right to vote'[159] – *i.e.*, to democratically decide on the content of one's own rights[160] – that is

---

[152] *Corte costituzionale*, Judgment n. 269/2017, *Cons. dir.* 5.2.

[153] CJEU, C-481/19, *DB*, 3 February 2021, ECLI:EU:C:2021:84, 43f., 57.

[154] Milan Court of Appeal – Labour Section – Order No. 100, 31 May 2022.

[155] D. Gallo, G. Piccirilli, *Dual Preliminarity, Today. Evaluating the Impact of Judgment No. 269/2017 of the Italian Constitutional Court*, 15:1 *Italian Journal of Public Law* 1-7 (2023); compare G. della Cananea, *The Italian Legal Order and the European Union: an Evolving Relationship*, 15:2 *Italian Journal of Public Law* 165-199 (2023) and the other articles published in that *Issue*. The Italian Constitutional Court's *Servizio Studi* has published a *Dossier* on the topic: *Il rinvio pregiudiziale della Corte costituzionale alla Corte di giustizia dell'Unione europea*, in www.cortecostituzionale.it, 1-304, including as the last document Order No. 161, 7 October 2024.

[156] Danish Supreme Court, Judgment No. 15/2014, 6 December 2016.

[157] CJEU, C-441-14, *D.I. – Dansk Industri*, 19 April 2016, ECLI:EU:C:2016:278.

[158] M.R. Madsen, H.P. Olsen and U. Šadl, *Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the* Ajos *Case and the National Limits of Judicial Cooperation*, 23(1-2) *European Law Journal* 140-150 (2017).

[159] See A. Steinbach, *The Lisbon Judgment of the Federal Constitutional Court – New Guidance to the Limits of European Integration?*, 11(4) *German Law Journal* 367-390, 381 (2014).

[160] G. Vosa, *Early Traits of an Essentiality Principle: A (Counterintuitive) European Lesson from Karlsruhe?*, 68 *Revista de Derecho Comunitario Europeo* 113-155 (2021).

at the core of the post-war constitutions[161]. Most recently, other courts have depicted the relation between the national and the Union's order in a similar fashion: Portugal,[162] Poland[163] and Rumania[164] have attempted to construe their argument in defence of a threefold line that goes from legal certainty to the legality principle and, hence, to parliamentarism as the bulwark of pluralist democracy.

A substantive discrimination occurs when a certain measure of Union law applies in all States though it affects interests referring to political-constitutional structure (under Article 4(2) TEU) of some of them while bringing advantages, even conspicuous, to others. The Court of Justice has more often than not stated that, in such cases, the interest referring to Union law's primacy is the utmost, even when fundamental rights are at stake.

In the above-cited *Melloni*, Union law's uniform application prevailed on the claim referring to a fundamental right that national law protected; the argument concerned treated the 'equivalent standard clause' laid in Art. 53 of the Union Charter of Fundamental Rights as *tout court* subordinated to primacy[165].

In other cases, the reasoning deployed by the Court of Justice has been even more laconic. In *ESMA*[166], a secondary legal basis creating an independent body for the surveillance of the financial markets and entrusting it with the power to adopt uniform rules if necessary was based on Article 114 TFEU (approximation of the laws for the attainment of the common market)[167]. The Court contradicted the *Opinion* of Advocate General Niilo Jääskinen (who argued for the inadequacy of the legal basis)[168] and settled a *counterintuitive*, so to say, equivalence: 'approximation' of national

[161] M. Luciani, *La "Costituzione dei diritti" e la "Costituzione dei poteri". Noterelle brevi su un modello interpretativo ricorrente*, in *Scritti in onore di Vezio Crisafulli* – II (1985) 497.

[162] *Tribunal Constitucional*, *Acórdão* 422/2020, 15 July 2020.

[163] *Trybunał Konstytucyjny*, Judgment No. K-3/21, 7 October 2021.

[164] *Curtea Constituțională*, Judgment No. 390/2021, 8 June 2021.

[165] A. Torres Pérez, Melloni *in Three Acts: From Dialogue to Monologue*, 10(2) European Constitutional Law Review 308-331 (2014).

[166] CJEU, C-270/12, *United Kingdom* v *Council*, 'ESMA', 22 January 2014, ECLI:EU:C:2014:18.

[167] See J. Mendes, *Discretion, care and public interests in the EU administration: probing the limits of law*, 53(1) *Common Market Law Review* 419-452 (2016).

[168] *Opinion* of Advocate General Niilo Jääskinen, 12 September 2013, ECLI:EU:C:2013:562, 37.

laws was held a synonym for 'replacement' thereof. In *Gauweiler*[169], it has been noticed that the Court read monetary policy in pure teleological terms, somehow symmetrically to *Pringle*[170]: an equally 'featherweight review', as commented in the literature[171]. As a result, the ECB was granted the power to interpret its own mandate according to what it deemed, in its *independence*, the *right way* to pursue the objectives laid down in the Treaty.[172] A similar account emerged in *Weiss*[173], which has triggered the caustic *BVerfG*'s reply in *PSPP*[174] and, in the yet understandable heat of counter replying, a number of awkward reactions in the literature[175].

As a further example: in *Rimšēvičs*[176], the Court cancelled a measure issued by a Latvian administrative authority which suspended from office the Governor of the national Central Bank (member of the ECB's *Board of Governors*) due to bribery accusations. The Kirchberg judges went as far as to read the provision laid down in Article 14(2) of the SECB Statute as a fully-fledged protection of 'the functional independence of the governors of the national central banks'[177]. On this ground, they claimed 'jurisdiction to hear and determine an action brought against a measure'[178] such as the one at debate, and denied jurisdiction to the national authorities that were competent to act under Latvian law. Most notably, the Court's response went farther than the ECB and

---

[169] CJEU, C-62/14, *Gauweiler* et alt. v. *Deutscher Bundestag*, 16 June 2015, ECLI:EU:C:2015:400

[170] See F. Munari, *Da* Pringle *a* Gauweiler*: i tormentati anni dell'unione monetaria e i loro effetti sull'ordinamento giuridico europeo*, 4 *Il Diritto dell'Unione europea* 723-755 (2015).

[171] M.A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, (2017) 7 *ARENA Working Paper* 1-28, 7.

[172] A. Hinarejos, Gauweiler *and the* Outright Monetary Transactions *Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union*, 11(3) *European Constitutional Law Review* 563-576 (2015).

[173] C-493/17, *Weiss*, 11 December 2018, ECLI:EU:C:2018:1000.

[174] *BVerfG*, 2 BvR 859/15, "PSPP", 5 May 2020. See S. Doroga, A. Mercescu, *A Call to Impossibility: The Methodology of Interpretation at the European Court of Justice and the* PSPP *Ruling*, 13(2) *European Journal of Legal Studies* 87-120 (2021).

[175] See the discussion in F. Fabbrini, *Suing the BVG*, in *Verfassungsblog.de*, 15 May 2020.

[176] CJEU, Joined Cases C-202/18 and C-238/18, *Ilmārs Rimšēvičs and European Central Bank* v *Republic of Latvia*, 26 February 2019, ECLI:EU:C:2019:139.

[177] *Ibid*., 48.

[178] *Ibid*., 62.

the Governor themselves[179] had asked when referring the case to Luxembourg.

Another highly conflictive field points to the threats to the *rule of law* occurring in Central-Eastern Member States. Particularly, the abundant case-law on judicial independence displays at least five controversial lines of reasoning.

First: the overstretched application of Article 19(2) TEU has been meticulously, but pretentiously, prepared by the Court in the *obiter dicta* of a different case, which amounts to a critical self-construction of legal arguments[180].

Second: it is unclear whether the principle of effective judicial protection laid down in Art. 19(1) TEU is a pre-condition, or an effect, of the principle of fair cooperation, as the former has undergone a significant alteration in nature, meaning and scope that may result in profound modifications of the relationship between national law and Union law[181].

Third, a 'systemic deficiencies' concept is alleged to account for breaches of Union law that are not concerned with actual violations of specific measures of Union law, which highlights a problematic re-construction of the 'infringement' as a notion and of the judicial procedure concerned *ex* Article 258 TFEU[182].

Fourth, to set aside national laws due to alleged contrast with the rule of law takes for granted a straightforward correlation between the 'values' enshrined by Article 2 TEU and the 'rules' that form the object of an infringement scrutiny – a correlation that is, nevertheless, far from obvious[183].

---

179 D. Sarmiento Ramírez-Escudero, 'Crossing the Baltic Rubicon', *Verfassungsblog*, 4 March 2019.

180 See CJEU, C-64/16, *Associação Sindical dos Juízes Portugueses* v *Tribunal de Contas*, 27 February 2018, ECLI:EU:C:2018:117, 29ff.; comments in M. Krajevski, Associação Sindical dos Juízes Portugueses*: The Court of Justice and Athena's Dilemma*, (3(1) *European Papers* 395-407 (2018); M. Bonelli, M. Claes, *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16,* Associação Sindical dos Juízes Portugueses, 14(3) *European Constitutional Law Review* 622-643 (2018).

181 M.E. Bartoloni, *La natura poliedrica del principio della tutela giurisdizionale effettiva ai sensi dell'art. 19, par.1, TUE*, 2 *Il Diritto dell'Unione europea* 245-259 (2019).

182 A. von Bogdandy, *Principles and Challenges of a European Doctrine of Systemic Deficiencies*, *MPIL Research Paper* 2019-14, 1-33.

183 *Ibid*., 13-14; compare M. Schmidt, P. Bogdanowicz, *The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU*, 5(4) *Common Market Law Review* 1061-1100 (2018), and M. Rodríguez-Izquierdo Serrano, *Los derechos fundamentales en el procedimiento por incumplimiento y la adecuación*

Fifth, primacy is grounded on an alleged commonality of values (despite the evidence of radical constitutional conflicts) and builds on mutual trust; yet, the latter is caught in an ambiguous relation with the former. Is mutual trust the consequence of common values, or the cause[184]? If it were the cause, primacy, as grounded on such values, would be tied to a fully political unit of measurement, certain infringements of Union law being allowed to governments that enjoy the trust of their fellows in Bruxelles, but not to those who lack that trust. In this case, the Union would look more like a *club* of political *élites* than like a union of States, let alone of peoples, regulated by law[185].

Eventually, the judgments concerning the 'rule of law conditionality', as well as the Rumanian *saga* on judicial independence, expose the profound, 'structural'[186] transformation of Union law from a 'tolerant' to a 'militant' paradigm[187]. On one hand, primacy rests on a purely moral basis as Art. 2 TEU supplies the principle of effective judicial protection with the *status* to set aside all national laws, even in matters of national competence[188]. On the other hand, 'mutual trust' among the members of the Union

constitucional de las actuaciones de los Estados miembros, 61 *Revista de Derecho Comunitario Europeo* 933-971 (2018).

[184] See CJEU, C-619/18, *European Commission* v *Poland*, 24 June 2019, ECLI:EU:C:2019:531, at paras. 42-43: 'As is apparent from Article 49 TEU, […] the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, […] EU law being based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values […] That premiss both entails and justifies the existence of mutual trust between the Member States and, in particular, their courts that those values upon which the European Union is founded, including the rule of law, will be recognised, and therefore that the EU law that implements those values will be respected'. This construct's compatibility with the conferral principle laid down in Art. 4(1) TEU seems doubtful, unless the latter is simply neglected and eventually ousted when it comes to police the divide between national and Union law.

[185] See D. Chalmers, *The European Union and the re-establishment of democratic authority*, 1 *European Law Journal* – Early View 2022, 1-20.

[186] A. von Bogdandy, *Strukturwandel des öffentlichen Rechts. Entstehung und Demokratisierung der europäischen Gesellschaft* (2022) 21, 37.

[187] M. Ovádek, *Has the CJEU just Reconfigured the EU Constitutional Order?*, *Verfassungsblog.de*, 28 February 2018.

[188] A. Favi, *La dimensione "assiologica" della tutela giurisdizionale effettiva nella giurisprudenza della Corte di giustizia in tema di crisi dello Stato di diritto: quali ricadute sulla protezione degli individui?*, 4 *Il Diritto dell'Unione Europea* 795-821 (2020).

club has been presented as the ultimate ground for the Union law's very legitimacy, which is instrumental to severing the link with national constitutions as well as with the Member States' initial (and actual) effective intent[189].

Conclusively, this twofold transfiguration of the *Planungsverfassung* seems to bring about two effects.

First, as it comes to applying Union law, strictly legal reasons leave the floor to *other* grounds. The actual interests at stake, the institutional strategy deployed by the Court(s), the bargaining tactics, and, finally, the political-economic weight of the States involved enter the rationale of the final decision, something which has been aptly accounted for as 'all the Courts are equal, but some are more equal than others'[190].

In these cases, the two propositions of the *Planungsverfassung* argument apply randomly, as Union law sometimes accepts national law divergences but, some other times, diversities of similar range and extent are rejected. Hence, neither the Union's project can be regarded as morally preferable because it protects the Member States' constitutional legacy, nor can it be held any longer to correspond to their will, initial or actual: simply, the logics of politics outweigh the reasons of law in the attempt to keep running the Union's business.

Second, when the Union is utterly determined to impose its own law, it has no fear of resorting to self-established value judgments disguised as law. Such judgments, yet presented as a consolidation of the political, economic, and social arrangements protected by the national constitutions, entertain with them purely virtual relations[191]: they apply straightforwardly, with little or no balancing process from 'value' to 'rule'[192].

Thus, the *Planungsverfassung* argument does no longer sustain a teleological reading of the States' original intent as laid down in

---

[189] L. Boháček, *Mutual Trust in EU Law: Trust "In What" and "Between Whom"?*, 14(1) *European Journal of Legal Studies* 103-140 (2022).

[190] M.A. Wilkinson, *Economic Messianism and Constitutional Power in a 'German Europe': All Courts are Equal, but Some Courts are More Equal than Others'*, 26 *LSE – Law, Society and Economy Working Papers* 1-33 (2014).

[191] CJEU, C-156/21, *Hungary* v *Parliament & Council*, 16 February 2022, ECLI:EU:C:2022:97, 234. See A. Baraggia, M. Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, 23(2) *German Law Journal* 131-156 (2022).

[192] *Ex multis*, G. Zagrebelsky, *La legge e la sua giustizia* (2nd ed., 2017) 223.

written provisions. For rude it may be, it simply backs no predictable construction. When deemed necessary, the conferral is simply neglected as a criterion for Union law to respect, whereas the autonomy of the latter presumptively relies on the defence of values reported as 'common'. As a result, the cited argument comes to overlap with a moral claim presenting the ever-closer union project as an end *per se* that *ought to* be pursued at any cost.

Needless to say, whether one agrees with the moral judgments envisaged by such claim is not part of the scope of this work. What must fall under question instead is whether the *Planungsverfassung* argument and its corollaries survive intact in their legal bite as their moral part is utterly emphasised while the other, voluntarist in nature, and ethically neutral, is progressively abandoned.

8. Conclusions: Still Towards an 'Ever Closer Union'?

The analysis attempted aims to illustrate how the ever-closer union formula laid down in the TEEC Preamble has fostered a theory and a legal argument based on the following idea: the European project aims to protect and perpetuate the after-war constitutional legacy agreed within and among the Member States. In this view, the Community's purpose is to establish a supranational legal, institutional and political layer capable of neutralising the once sovereign Nation-States, which helps defending their new-born constitutions against the possible comebacks of aggressive nationalisms.

The *Planungsverfassung* doctrine is instrumental to this project in two respects. First, it supplies it with a constitutional perspective, yet *in fieri*, which gives it a definitive moral *preferability* in light of the utmost desirability of its purpose. Second, it backs the same project with an expansive teleological argument presented as fulfilling the Member States' initial will: as the latter is to be seen as directed at an ever-closer union, then the law that implements the ever-closer union project must be given prior application over national laws. Apparently, this idea lays at the core of the whole legal toolkit deployed by the Court of Justice to broaden Community law's applicative scope – from *effet utile* to the others.

During the multiple crises of the last decade, such a prior, ever-expanding application has been severely contested, and challenged in manifold respects. However, the Court of Justice has

not ceased to make use of the legal toolkit based on the same argument; to the contrary, claims for unrestrained primacy in areas external to the Union's competence have been raised with enhanced vigour. Yet, under the mutated circumstances, to deploy the same line of reasoning, even pushing it one step ahead, entails a transfiguration of the original argument.

Such a transfiguration does not come without consequences. Cutting off the ties between the *Planungsverfassung*'s two propositions has a twofold effect. First, it renders the 'ever-closer union' project definitively independent from the socio-political and constitutional settlement Member States were determined to share on a common plane. Second, it makes the moral argument based on the European project's *preferability* definitively independent from the argument based on the wording of legal texts[193].

This could pave the way to constitutional changes in the name of contingent ideologies, and could deprive law of a sufficiently thick, ethically neutral voluntarist substrate – something that in modern times has invariably been held as an essential component thereof, from Kelsen's 'pure' theory[194] onwards[195].

Eventually, one should wonder whether this overall *motus* is consistent with the idea that once backed Europe's project: *i.e.*, that perpetuating the legacy of national constitutions was the best option to avoid the comeback of aggressive regimes. Should the answer be in the negative, it would rather amount to a shift back to earlier XX century times, in which war was well-present within the range of suitable options – along with some conceptions of the individual and of power that Europe was set to leave for good.

Such a question is left to the appreciation of the reader.[196] However, what a constitutional scholar has to do[197] is twofold. First, to suggest that the prospected scenario may be incompatible with national constitutions. Second, that those constitutions, being

[193] G. Azzariti, *Diritto o barbarie. Il costituzionalismo moderno al bivio* (2021) 15, 58, 206.

[194] H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1934; 2008) 25.

[195] N. Bobbio, *La teoria pura del diritto e i suoi critici* (1954) in Id., *Diritto e potere. Saggi su Kelsen* (ed. T. Greco, 2014) 13-74.

[196] G. Azzariti, *Per un costituzionalismo critico*, *Costituzionalismo.it* 3, 1-28, 11 (2024).

[197] G. Zagrebelsky, *Tempi difficili per la Costituzione. Gli smarrimenti dei costituzionalisti* (2023) *passim*.

obviously rigid[198], are still in force, and cannot be reported as tacitly revoked, or silently mutated, or anyhow impotent when new-old kinds of crypto-authoritarian regimes[199] deploy Union values as a narrative *escamotage* to prepare the ground for a comeback.

[198] A. Pace, *I limiti alla revisione costituzionale nell'ordinamento italiano ed europeo*, 1 *Nomos*, 1-6 (2016) and the bibliography quoted thereby.

[199] L. Carlassare, *Diritti e garanzie nel riaffiorare dei modelli autoritari* (2009) 1 *Costituzionalismo.it* 1, 1-15 (2010).

A TRANSPARENT DECISION-MAKING IN THE DIGITAL AGE

Camilla Ramotti[*]

Abstract

The aim of this paper is to focus on the ways in which the use of algorithms in public decisions affects the administrative proceedings, in relation to compliance with the principle of transparency. Algorithms, especially machine learning ones, possess an inherent dose of obscurity: a linguistic, legal, and structural opacity. Since these algorithms are not inspired by a precise logic, but generate and create new paths, they have been defined as black boxes within which it is difficult to peer. Given this basic opacity, which makes the functioning of the algorithms potentially knowable even if not always comprehensible, the insufficiency of the exercise of the right of access to the source code to achieve an adequate and sufficient level of transparency is evident. Considering these premises and taking into account the positions of jurisprudence and doctrine, it is clear how the concept of transparency that is hypothetically compatible with the use of algorithms in public decision-making processes changes.

TABLE OF CONTENTS

[*] Postdoctoral research fellow, Luiss Guido Carli University

1. Introduction

Digital transformation is also revolutionising the public administration and the main place where it conducts its business and its privileged relations with citizens. That is the administrative procedure, which is no exception to the challenges of innovation it must embrace and respond to.

The aim of this essay is to focus on the due observance of one of the cardinal principles that inspire and govern administrative action: transparency. For a procedure to culminate in a fair decision, it is in fact necessary for the procedure – in addition to guaranteeing the participation of private parties – to be transparent. The interested parties must know about transparency and understand the methods and logics guiding the administration in the privileged seat of its decisions. Any measure that harms the right or interest of these parties is also to be familiar with. Transparency is fundamental and bears inevitable repercussions on the resulting measure and on its motivation.

The questions we will attempt to answer, therefore, concern the effectiveness and efficacy of the transparency principle under current legislation with regards to algorithmic decisions. It will be imperative to ask whether the regulatory provisions – especially those concerning the exercise of the right of access – are sufficient to guarantee the necessary transparency within the algorithmic administrative procedure, so that an impartial decision can be reached. In other words, we must ask whether the regulation of the right of access alone a necessary and sufficient condition for the algorithmic procedure is to comply with canons of effective transparency.

Subsequently, we will describe how the algorithmic administration faces the challenges of transparency. This will be done by distinguishing between decisions taken with model-based algorithms and those taken with the use of machine learning algorithms, analysing the problem of the so-called black boxes. It will be possible, subsequently, to move on to case-study analysis, more precisely decisions of the Italian administrative judge about access to the algorithm's source code. Concrete examples of algorithmic applications will follow, such as the use of algorithms by the Italian tax administration. A few considerations are to tie up this paper.

Through the study of current legislation, including some practical applications of algorithms to public decisions, we will

attempt to outline the directions that transparency takes in the face of digital transformation. It will be possible to assess whether the level of transparency necessary to make the algorithmic procedure and the subsequent measure valid and compliant with the keystones of administrative action can be considered effectively achieved.

2. The evolution of transparency: from official secrecy to the administration as a glass house

The principle of transparency[1], as a general principle of administrative law, has a peculiar relevance within the

[1] Regarding the transparency of public administration and the evolution of the notion itself, the writings are numerous. See, *ex multis*: R. Villata, *La trasparenza dell'azione amministrativa*, 4 Diritto processuale amministrativo 528 ff. (1987); G. Virga, *Trasparenza della p.a. e tutela giurisdizionale del diritto di accesso agli atti amministrativi*, 19-20 Nuova rassegna di legislazione, dottrina e giurisprudenza 2118 ff. (1989); G. Arena, *Trasparenza amministrativa e democrazia*, 97-98 Studi parlamentari e di politica costituzionale 25 ff. (1992); F. Patroni Griffi, *Un contributo alla trasparenza dell'azione amministrativa: partecipazione procedimentale e accesso agli atti (legge 7 agosto 1990, n. 241)*, 1 Diritto processuale amministrativo 56 ff. (1992); L. Cannada Bartoli, *A proposito di tutela della riservatezza e trasparenza amministrativa*, 3 Diritto processuale amministrativo 725 ff. (1999); M. Clarich, *Trasparenza e protezione dei dati personali nell'azione amministrativa*, 12 Foro amministrativo-T.A.R. 3885 ff. (2004); E. Carloni, *Nuove prospettive della trasparenza amministrativa: dall'accesso ai documenti alla disponibilità delle informazioni*, 2 Diritto pubblico 573 ff. (2005); E. Carloni, *La "casa di vetro" e le riforme. Modelli e paradossi della trasparenza amministrativa*, 3 Diritto Pubblico 779 ff. (2009); M. Bombardelli, *Fra sospetto e partecipazione: la duplice declinazione del principio di trasparenza*, 3-4 Istituzioni del federalismo 1 ff. (2013); F. Patroni Griffi, *La trasparenza della Pubblica Amministrazione tra accessibilità totale e riservatezza*, 8 federalismi.it 1 ff. (2013); M. Savino, *La nuova disciplina della trasparenza amministrativa*, 8-9 Giornale di diritto amministrativo, ff. 795 (2014); B. Neri, *"Il Big Bang della trasparenza"*, 3 Rivista trimestrale di diritto pubblico ff. 1142 (2015); M. Savino, *Il FOIA italiano. La fine della trasparenza di Bertoldo*, 2016 Giornale di diritto amministrativo 593 ff. (2016); E. Carloni, *Alla luce del sole. Trasparenza amministrativa e prevenzione della corruzione*, 3 Diritto amministrativo 497 ff. (2019); E. D'Alterio, *Pubbliche amministrazioni in crisi ai tempi della trasparenza*, 4 Giornale di diritto amministrativo 511 ff. (2018); A. Moliterni, *La via italiana al "FOIA": bilancio e prospettive*, 1 Giornale di diritto amministrativo 24 ff. (2019); D. Bolognino, *Anticorruzione e trasparenza: ridisegnarne l'ambito soggettivo di applicazione?*, 6 Giornale di diritto amministrativo 704 ff. (2020); C. Colapietro, *Il complesso bilanciamento tra il principio di trasparenza e il diritto alla "privacy": la disciplina delle diverse forme di accesso e degli obblighi di pubblicazione*, 14 federalismi.it 64 ff. (2020); M.A. Sandulli, L. Droghini, *La trasparenza amministrativa nel FOIA italiano. Il principio della conoscibilità generalizzata e la sua*

administrative procedure, even though it is not exhausted within the same[2].

In fact, the concept of transparency, characterised by changing and constantly shifting boundaries, takes on both a static and a dynamic significance within the public administration: in its static quality, it captures the condition of the administration at a given moment, making it visible from the outside; in its dynamic value, it becomes an objective itself and, thus, an end to which a legal system tends[3]. Transparency means the knowability and comprehensibility of administrative action from the outside[4]. This is the reason why the principle of transparency is primarily enshrined within law no. 241 of August 7, 1990. Before the introduction of the Italian procedural law, the relationship between citizens and the administration was guided by secrecy[5]. According to the provisions of art. 15 of the Statute of the Civil Servants of the State – d.P.R. no. 3 of January 10, 1957 – employees were required to maintain official secrecy and prohibited from circulating information about administrative measures or operations, except for those who were exceptionally entitled to it.

As a result of having established the guarantees relevance to voice and participation, jurisprudence and legislation have also given prominence to «vision», leading to the possibility of making public administration documents accessible and knowable[6]. As it is well known, the evolution of the right of access to administrative documents contributes to generating a change of course in the interpretation of the very idea of public administration. Indeed, today the latter must be considered – unlike in the past and especially thanks to the new developments around transparency –

difficile attuazione, 19 federalismi.it 401 ff. (2020); F. Lorè, *La trasparenza amministrativa, tra conoscibilità e tutela dei dati personali*, 4 federalismi.it 206 ff. (2021); E. Carloni, *Il paradigma trasparenza. Amministrazione, informazione, democrazia* (2022).

[2] B.G. Mattarella, *Il procedimento*, in S. Cassese (ed.), *Istituzioni di diritto amministrativo* (2012), 314.

[3] E. Carloni, *Il paradigma trasparenza. Amministrazione, informazione, democrazia*, cit. at 1, 23 f.

[4] For this definition, A. Corrado, *Il principio di trasparenza e i suoi strumenti di attuazione*, in M.A. Sandulli (ed.), *Princìpi e regole dell'azione amministrativa* (2020), 123.

[5] A. Averardi, P. Rubechini, *L'amministrazione trasparente*, in L. Torchia (ed.), *La dinamica del diritto amministrativo. Dieci lezioni* (2017), 232.

[6] M. D'Alberti, *Lezioni di diritto amministrativo* (2019), 51.

accessible, knowable, and transparent, in the same way as a «glass house»[7].

As a matter of fact, art. 1, par. 1, l. no. 241/1990, provides that the administrative activity pursues the ends determined by law and is guided by a series of principles, which are – in addition to those of European law – the criteria of cost-effectiveness, effectiveness, impartiality, publicity, and transparency. The original version of the rule, however, did not include the principle of transparency, which was only enshrined in Italian procedural law following the amendments made to the paragraph in question by art. 1, par. 1, lett. a), l. no. 15 of February 11, 2005. Although the principle of publicity found regulatory recognition in l. no. 241/1990 on its very onset, transparency did struggle to take hold. The concept of transparency is, in fact, an idea that is both less penetrating and broader than publicity. If publicity is to be understood as knowledge of what is public as uncovered by secrecy, transparency is a less penetrating principle because it is limited to the shadowy areas represented by what can be defined as non-public, obscure, secret. At the same time, the principle of transparency has a broader scope because, in a way, it absorbs publicity, thus making areas that are generally non-public and unknown potentially knowable by some. In other words, transparency refers to a full knowledge because it can be extended beyond the boundaries of publicity: a complete – even if potential – knowability, and therefore abstractly capable of allowing an adequate understanding of phenomena[8]. Transparency is, in this way, both knowledge and understanding[9].

Transparency of administrative action – which is attained not only through the participation of the interested parties in the proceedings and in the motivation of the measure, but also and above all through the exercise of the right of access – is a fundamental tool to achieve a direct and effective relationship between the governors and the governed. In fact, it allows a conscious participation of the latter and a full control of the

[7] According to the fortunate definition used as early as 1908 by Filippo Turati during a speech in the Chamber of Deputies, which then entered into common usage.

[8] Of this opinion, E. Carloni, *Il paradigma trasparenza. Amministrazione, informazione, democrazia*, cit. at 1, 25 ff.

[9] G. Arena, M. Bombardelli, *Il diritto di accesso ai documenti amministrativi*, in V. Cerulli Irelli (ed.), *La disciplina generale dell'azione amministrativa. Saggi ordinati in sistema* (2006), 411.

correspondence of administrative action to the interests of the community and to regulatory precepts[10]. If we begin by assuming there can be no true transparency without right of access, we also concluded that the regulation of the latter is an important parameter of the actual degree of transparency of a given legal system[11]. Administrative transparency is not directly backed up by the Constitution, although certain foundation for it within the impartiality principle in art. 97 of the Constitution can be detected. On the administration end, impartiality presumes an evaluation, which requires the participation of citizens and, therefore, knowledge of the data and information held by the administration[12].

The enshrinement of the principle of transparency within procedural law is expressed through the provision of the so-called cognitive access, provided for in arts. 22 ff. of the same law[13]. This type of access is supplemented by the so-called civic access provided for in d.lgs. no. 33 of March 14, 2013, subsequently amended by d.lgs. no. 97 of May 25, 2016[14]. The latter decree

[10] In this sense, M.A. Sandulli, *Accesso alle notizie e ai documenti amministrativi*, in 4 Enciclopedia del diritto (2000).

[11] In these terms, P. Alberti, *L'accesso ai documenti amministrativi*, in P. Alberti, G. Azzariti, G. Canavesio, C.E. Gallo, M.A. Quaglia, *Lezioni sul procedimento amministrativo* (1992), 126.

[12] A. Moliterni, *La trasparenza amministrativa: recenti tendenze e prospettive future*, special issue Rivista italiana per le scienze giuridiche 481 (2014).

[13] Among the main contributions since the introduction of l. no. 241/1990: G. Arena, *L'accesso ai documenti amministrativi* (1991); V. Italia, M. Bassani (dirs.), *Procedimento amministrativo e diritto di accesso ai documenti (Legge 7 agosto 1990, n. 241)* (1991); M. Clarich, *Diritto d'accesso e tutela della riservatezza: regole sostanziali e tutela processuale*, 3 Diritto processuale amministrativo 430 ff. (1996); A. Scognamiglio, *Il diritto di accesso nella disciplina della l. 7 agosto 1990 n. 241 e il problema della legittimazione*, 1 Rivista trimestrale di diritto pubblico 93 ff. (1996); M.A. Sandulli, *Accesso alle notizie e ai documenti amministrativi*, cit. at 10; F. Merloni (ed.), *La trasparenza amministrativa* (2008).

[14] On civic access, among many, see: V. Torano, *Il diritto di accesso civico come azione popolare*, 4 Diritto amministrativo 789 ff. (2013); D.-U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del D.Lgs. n. 33/2013*, 5 federalismi.it 1 ff. (2016); S. Villamena, *Il c.d. FOIA [Freedom of Information Act] (o accesso civico 2016) ed il suo coordinamento con istituti consimili*, 23 federalismi.it 1 ff. (2016); A. Averardi, P. Rubechini, *L'amministrazione trasparente*, in L. Torchia (ed.), *La dinamica del diritto amministrativo*, cit. at 5; M. Filice, *I limiti all'accesso civico generalizzato: tecniche e problemi applicativi*, 4 Diritto amministrativo 861 ff. (2019); M. Lipari, *Il diritto di accesso e la sua frammentazione dalla legge n. 241/1990 all'accesso civico: il problema delle esclusioni e delle limitazioni oggettive*, 17 federalismi.it 1 ff. (2019); A. Moliterni,

provided for the introduction of so-called generalised civic access, which allows anyone (without the need for a direct, concrete, and current interest to exist) to access data, documents and information held by public administration. The set of rules to be analysed adds to making the core of protection of what is now considered a true «right to administrative transparency»[15], constituted by the set of cognitive faculties recognised and protected by the system, of which it constitutes the overall condition of visibility[16].

The citizens' right to know is in fact articulated in three levels of guarantee[17]. The first, governed by procedural law, lets the applicant access documents owned by public administration toward which the private individual can claim a qualified interest. The second level of protection is represented by publication obligations (so-called simple civic access), whereby information on the organisation and activity of the administration is disclosed. The third and broader level of protection is represented by the so-called generalised civic access, which allows *erga omnes* accessibility to the administration's data and documents, regardless of a specific interest claimed by the applicant.

3. Algorithmic transparency

There is a close link between transparency and digitization that is difficult to ignore. In fact, digitisation is at the same time the objective, driver, and tool of every transparency project, while it remains a challenge for public administrations that are revolutionised by it[18].

La natura giuridica dell'accesso civico generalizzato nel sistema di trasparenza nei confronti dei pubblici poteri, 3 Diritto amministrativo 577 ff. (2019); A. Corrado, *L'accesso civico generalizzato, diritto fondamentale del cittadino, trova applicazione anche per i contratti pubblici: l'Adunanza plenaria del Consiglio di Stato pone fini ai dubbi interpretativi*, 16 federalismi.it 48 ff. (2020); A. Moliterni, *Pluralità di accessi, finalità della trasparenza e disciplina dei contratti pubblici*, 4 Giornale di diritto amministrativo 505 ff. (2020).

[15] These are the words of the Constitutional Court, decision no. 20, February 21, 2019.

[16] E. Carloni, *Il paradigma trasparenza. Amministrazione, informazione, democrazia*, cit. at 1, 157 f.

[17] On the three levels of protection, see A. Averardi, P. Rubechini, *L'amministrazione trasparente*, in L. Torchia (ed.), *La dinamica del diritto amministrativo. Dieci lezioni*, cit. at 5, 233.

[18] In these terms, T. Alti, C. Barbieri, *La trasparenza amministrativa come strumento di potere e di democrazia*, 2 Rivista trimestrale di diritto pubblico 816 (2023).

The instruments that the legal system makes available to exercise rights and to make administration act as a glass house are not by themselves sufficient, as we said, to ensure the effectiveness of transparency within the State itself. For this to happen, on the one hand, the means provided by law need to be efficient and effective and, on the other, the concept of transparency must evolve (normatively and otherwise) together with the changes in society, culture and in the very idea of administrative activity.

The technological revolution that is sweeping public administration requires a considerable adaptation of transparency to the new means used by public administration to carry out its activities. The degree of opacity of algorithms makes it complex to reconcile these intelligent systems with the concept of transparency. The main problems arising from the use of algorithms in public decision-making processes are mainly two: (i) the use of big data, whose volume, variety and velocity make the decision-making process difficult to understand and trace; (ii) the ability of algorithms – especially machine learning – to carry out their own decision-making processes that are difficult to predict[19]. It follows that transparency is once again among the issues that pertain to algorithm use in public decision making. Transparency declined, on the one hand, as verification of the quality of the data entered and, on the other, as transparency of the decision-making processes and, therefore, of the decision taken[20]. It has also been pointed out that, even if it was possible to eliminate any margin of opacity, it would be difficult, if not impossible, to control and prevent intelligent systems from being error-free[21] (although it is likewise utopian to think that a human decision-maker – precisely as such – cannot claim the right to make mistakes).

This is clearly reflected onto the rights of the addressees of the decision, which concern in addition to the aspects linked to the possibility of accessing the acts of an algorithmic procedure and even the source code of the algorithm itself, the possibility of challenging and defending oneself against the decisions taken by

[19] On this point, again, E. Carloni, *Il paradigma trasparenza. Amministrazione, informazione, democrazia*, cit. at 1, 291 f.

[20] A. Corrado, *La trasparenza necessaria per infondere fiducia in una amministrazione algoritmica e antropocentrica*, 5 federalismi.it 197 (2023).

[21] This further element is highlighted by E. Longo, *I processi decisionali automatizzati e il diritto alla spiegazione*, in A. Pajno, F. Donati, A. Perrucci (eds.), *Intelligenza artificiale e diritto: una rivoluzione?* (2022), 354 f.

the administration through algorithms[22]. This is only possible – and this is where transparency in the sense of the exercise of access rights comes into play – by understanding the rationale behind a given decision, as in the case of measures taken by human decision-makers.

It is therefore imaginable to distinguish between two types of transparency: on the one hand, «fishbowl transparency» and, on the other, «reasoned transparency»[23]. The first type of transparency, as suggestively expressed by the term used to describe it, relates to the ability of interested parties to peek inside the administration and obtain information on what it does. It can be translated, in other words, into the exercise of rights of access to data, documents and information held by public administrations. Conversely, reasoned transparency relates to the reasons why the administration acts in a certain way, the rationale behind the decisions taken and, in other words, the reasons given by the administration itself. Although these are two different types of transparency, they are intrinsically linked, since in order for it to be possible for the administration to explain the rationale and the logical *iter* followed in making a certain decision, it is first necessary for it to make knowable what underlies the decision itself.

In the case of algorithmic procedures, certain fundamental principles come into play, specifically linked to the knowability and comprehensibility of the process used, and the decisions taken by the administrations. These principles – which have also been adopted by the Italian administrative courts – are also present within the GDPR. To have a closer look, this is the combined reading of art. 13, par. 2, lett. f) and art. 14, par. 2, lett. g), of the GDPR. By reading the two articles together, it can be inferred that the data controller – whether they obtained the data directly from the data subject – must provide the data subject. The aim is to ensure fair and transparent processing with information on the existence of an automated decision-making process, the logic used, and the consequences envisaged. By splitting the provisions, it is possible to draw the existence of two principles: a principle of knowability, according to which there is an obligation on the data controller to

[22] With a related obligation for the administration to give reasons for such decisions. On this point, C. Colapietro, *Gli algoritmi tra trasparenza e protezione dei dati personali*, in 5 federalismi.it 157 (2023).

[23] On this distinction, see in particular C. Coglianese, D. Lehr, *Transparency and Algorithmic Governance*, in 71 Admin. L. Rev.18 ff. (2019).

inform the data subject of the existence of an automated decision-making process concerning their personal data; and a principle of comprehensibility demanding data controllers be obliged to explain to the data subject the working logic of algorithm and the envisaged consequences[24].

Art. 15 GDPR completes the picture of the transparency rules set out in the Regulation. This article enshrines the data subject's right to obtain from the data controller confirmation that data relating to him is being processed, as well as access to an array of information[25].

It should be noted at this point that the scope of application of art. 15 is different from that of arts. 13 and 14. The latter, in fact, refer to a moment prior to the start of processing, whereas art. 15 legitimises the request for further and subsequent information[26]. Transparency, therefore, affects all stages of the procedure and is expressed in the sense of both knowability and comprehensibility of the logic and the resulting decision.

These principles are then intertwined with national legislation and the tireless work of administrative jurisprudence, which in turn has produced relevant guidelines on algorithmic transparency. The correct starting assumption is that the future will certainly be digital, but it does not mean it will be, as such,

[24] On whether or not a real *right of explanation* exists in the GDPR, see the contrasting positions of: S. Wachter, B. Mittelstadt, L. Floridi, *Why a right to explanation of automated decision-making does not exist in the General Data Protection Regulation*, in 2 Int'l Data Priv. L. 76 ff. (2017); G. Malgieri, G. Comandè, *Why a right to legibility of automated decision-making exists in the General Data Protection Regulation*, in 7 Int'l Data Priv. L. 243 ff. (2017).

[25] Among this information, pursuant to art. 15, par. 1, GDPR: the purposes of the processing; the categories of personal data concerned; the recipients or categories of recipients to whom the personal data have been or will be disclosed, in particular if recipients in third countries or international organisations; where possible, the period for which the personal data is to be retained or, if this is not possible, the criteria used to determine this period; the existence of the data subject's right to request from the controller the rectification or erasure of personal data or the restriction of the processing of personal data concerning him or her or to object to its processing; the right to lodge a complaint with a supervisory authority; where the data is not collected from the data subject, all available information as to its source; the existence of automated decision-making, including profiling, and meaningful information on the logic used, as well as the importance and the envisaged consequences of such processing for the data subject.

[26] These insights have been highlighted by C. Colapietro, *Gli algoritmi tra trasparenza e protezione dei dati personali*, cit. at 22, 160.

automatically more transparent and democratic. Indeed, that will be possible only if governed with the appropriate tools[27]. In the following paragraphs, we will move on to analyse the types of algorithms and the transparency questions they pose. Subsequently, an attempt will be made to assess whether the means made available by the legal system to guarantee the transparency of public decision-making processes are adequate and sufficient for that purpose, in the light of an administration that is already digital and is likely to become increasingly so.

3.1. Traditional and machine learning algorithms: the problem of black boxes

This section is to be introduced by making a few initial considerations. It has been said that transparency must follow not so much and not only the legislative dictate but the evolution of society to be considered effective and efficient. An evolution that irreversibly leads towards the digitisation of many activities, including administrative activities. Public administration often employs intelligent tools such as algorithms to make decisions. Algorithms, as described above, are not all the same nor do they have the same capabilities, nor do they all pose the same questions. In this point of the research, we need to consider the sometimes-incendiary relationship between algorithms and transparency.

To do so, the logical starting point is based upon certain assumptions concerning the inherent opacity of algorithms. Three specific issues arise: (i) all algorithms are characterised by a certain «linguistic» opacity due to being programmed in informational language rather than in legal rules; (ii) many of these, whose contents may be subject to intellectual property rights with the consequent secrecy of the source codes, feature some percentage of «legal» opacity; (iii) machine learning or deep learning algorithms – whose functioning remains impenetrable even to the programmers themselves - are characterised by a «structural» opacity[28].

These profiles have been and will be discussed in the remainder of this work. The keystone from which we must start, however, relates to the last of the aspects highlighted above: the

[27] T. Alti, C. Barbieri, *La trasparenza amministrativa come strumento di potere e di democrazia*, cit. at 18, 816 f.

[28] For these considerations, see G. Lo Sapio, *La trasparenza sul banco di prova dei modelli algoritmici*, 11 federalismi.it 243 f. (2021).

difference in opacity between model-based and machine learning algorithms[29].

Indeed, model-based algorithms are programmed to execute a given command under certain conditions. Such algorithms, in other words, obtain results determined directly by the computer rules, which in turn are dictated by a human programmer. By responding to an «if/then» logic, model-based algorithms come to predictable conclusions that humans can explain by retracing the logical path followed by such powerful computers. This is because the logical sequence that characterises such algorithms somehow resembles legal reasoning: when a rule is set, certain consequences are produced when certain conditions are met.

Machine learning algorithms, instead, consist of two distinct components, which are the source code and a model: the former, as with model-based algorithms, is intelligible, while the latter is composed of numerical parameters to be used in the execution phase and is generated during the training phase. The model, which is not directly comprehensible to humans, is derived from the learning phase, a moment that is fundamental for the representations[30] used later on to make decisions. The goal of the algorithm in the training phase is thus to find representations of a known dataset, based on which unknown data can then be analysed and a reliable result produced. To better put it, by calculating the extent to which the new unknown data is in line with the representation of the known data evaluated in the training phase, the system can make a reliable evaluation of the analysed data. For this second type of algorithm, there is no direct and obvious link between input and output, which makes it difficult for humans to understand and thus explain how and why the algorithm achieves certain results.

Machine learning algorithms are implemented with artificial neural networks. These mimic what happens in biological neurons through the information exchange of synapses, the process that enables human brain to learn. In these intelligent systems, it is possible to distinguish an input layer connected to sensors that perceive the information to be processed, which may be located in

[29] The reference on the precise distinction between the different types of algorithms is, again, to G. Carullo, *Decisione amministrativa e intelligenza artificiale*, in 3 Diritto dell'informazione e dell'informatica 434 ff. (2021).

[30] Representations are mathematical-numerical abstractions capable of representing a pattern.

several hidden layers, and an output layer that transmits the results of the processing[31]. It follows that the reconstruction of the logical path followed is arduous: neural networks, in fact, collect data from experience and re-process them within non-visible developments, within which the calculations are performed: the so-called black boxes[32].

In other words, while model-based algorithms leave much of the work to humans, the same cannot be said for machine learning algorithms. In the former case, humans specify which input variables of the dataset are to be considered and how they are to be combined to obtain a prediction. In contrast, for machine learning algorithms, it is not humans who define how certain variables combine, but rather this is done directly by the machine. Humans still hold the power to select the training data to be processed and to evaluate the work of the algorithms[33].

Given that artificial intelligence with its black box has already silently entered the glass house of the administration[34], as brilliantly pointed out, we must attempt to define what these black boxes are and if and how the opacity generated by them can be remedied[35]. By black box, we mean the highest level of opacity that

[31] For such a reconstruction, E. Falletti, *Decisioni automatizzate e diritto alla spiegazione: alcune riflessioni comparatistiche*, in 2 Il diritto dell'informazione e dell'informatica 174 f. (2020).

[32] On algorithms and black boxes, among others: F. Pasquale, *Black box society. The secret algorithms that control money and information* (2015); C. Coglianese, D. Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, in 6 Geo. L. Rev. 1147 ff. (2017); G. Lo Sapio, *La black box: l'esplicabilità delle scelte algoritmiche quale garanzia di buona amministrazione*, 16 federalismi.it 114 ff. (2021); A. Masucci, *L'automatizzazione delle decisioni amministrative algoritmiche fra "big data" e "machine learning". Verso l'"algocratic governance"?*, 2 Diritto e processo amministrativo 265 ff. (2022); E. Troisi, *Automated Decision Making and right to explanation. The right of access as ex post information*, in 1 European Journal of Privacy Law & Technologies 181 ff. (2022); S. Foà, *Intelligenza artificiale e cultura della trasparenza amministrativa. Dalle "scatole nere" alla "casa di vetro"?*, 3 Diritto amministrativo 515 ff. (2023).

[33] For more on this point, see C. Coglianese, D. Lehr, *Transparency and Algorithmic Governance*, cit. 23, 14 ff.

[34] Litterally, «*l'intelligenza artificiale (con la sua "scatola nera") è già entrata silenziosamente nella "casa di vetro" dell'Amministrazione, senza bussare, senza chiedere autorizzazioni*». These are the words of P. Otranto, *Riflessioni in tema di decisione amministrativa, intelligenza artificiale e legalità*, 7 federalismi.it 204 (2021).

[35] On the relationship between transparency and algorithms employed by the public administration, among others, E. Carloni, *Transparency within the artificial*

characterises certain types of algorithms – machine learning and deep learning – and which renders the functioning mechanism and the path followed in the input-to-output processing inscrutable even to programmers and developers: a black box is configured when it is not possible for human beings to reconstruct the logical procedure followed by the machine to reach the assigned objective[36]. To better specify this statement, we can say that machine learning algorithms are often described as those capable of transforming inputs into outputs through a black box, into which humans cannot look to understand how the transformation occurs and describe it with the same causal language applied to traditional algorithms: this is different from saying that machine learning algorithms are irreversibly opaque[37].

As mentioned, the demand for transparency ends up in both fronts of the so-called fishbowl transparency and reasoned transparency: the former meaning the possibility to obtain information on what the administration does; and the latter meaning the possibility of obtaining information on how the administration acts and why. It is evident that the main problem with machine learning algorithms relates to the second type of transparency, which is made difficult by the existence of black boxes.

The questions that need to be asked, therefore, relate to the previously mentioned profiles concerning the linguistic, legal, and structural transparency of the algorithms. Among these profiles, the most complex is certainly related to the structural transparency (or rather, opacity) of certain systems, especially machine learning and deep learning.

Abiding by the principles enshrined in the GDPR, in Italy, as we shall see, the administrative judge has tried to unravel the knots in the tangle. Some of the considerations made by the judge, are then confirmed by supranational regulatory activity. The following paragraphs will analyse the profiles just outlined and attempt to answer the fundamental question that this chapter intends to answer: is algorithmic administrative activity compatible with the

administrations, principles, paths perspectives and problems, 1 Italian Journal of Public Law 8 ff. (2024).

[36] For this description, G. Lo Sapio, *La black box: l'esplicabilità delle scelte algoritmiche quale garanzia di buona amministrazione*, cit. at 32, 117.

[37] C. Coglianese, D. Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, cit. 32, 1206 f.

principle of transparency, to which administrative action must be directed?

3.2. Access to source codes: the lack of transparency

To be able to function, algorithms need humans to provide them with data (input) that can be transformed into other data (output). For this to be possible, it is necessary for software to possess a source code, represented by the text of a calculation algorithm in programming language, which defines how the programme itself is executed. The source code, in other words, provides the instructions according to which the programme works[38].

It is immediately apparent how knowledge and understanding of the source code – achieving fishbowl transparency – is propaedeutic and necessary to understanding how and why the administration acts – allowing the requirement of reasoned transparency to be also considered guaranteed.

The issue has been addressed in Italy by the administrative judge, in the context of teachers' mobility[39]. In the case at hand, the applicants had requested, *inter alia*, access to the source code of an algorithm that managed the teacher assignment procedure, committing macroscopic errors. Following the application for access submitted by the applicant to the administration, the latter refused to grant access to the source code based on two arguments: the source code would not be an administrative document and would, therefore, not be accessible[40]; the actual prejudice would put

[38] Programming language – to be understood by the computer – must be transformed into machine language by an interpreter or compiler.

[39] This is the judgment of the T.A.R. Lazio, no. 7526/2020. For comments on the decision, among others: I. Forgione, *Il caso dell'accesso al software MIUR per l'assegnazione dei docent*i, in 5 Giornale di diritto amministrativo 647 ff. (2018); E. Prosperetti, *Accesso al software e al relativo algoritmo nei procedimenti amministrativi e giudiziali. Un'analisi a partire da due pronunce del TAR Lazio*, in 4-5 Il diritto dell'informazione e dell'informatica 979 ff. (2019); F. Bravo, *Trasparenza del codice sorgente e decisioni automatizzate*, in 4-5 Il diritto dell'informazione e dell'informatica 693 ff. (2020).

[40] In fact, the source code could not be traced back to one of the forms in which the administrative act referred to in art. 22, par. 1, lett. d), l. no. 241/1990, could manifest itself. This is because only documents drafted and held by a public administration could be considered administrative acts, so that acts of a private nature – such as the text of an algorithm drafted by a private company – would automatically have to be excluded from the list of accessible ones. On this point, L. Previti, *La decisione amministrativa robotica* (2022), 212.

the freedom and secrecy of the information in danger, so much as the economic and commercial interests of the software owner (CINECA).

The administrative judge found arguments unfounded, stating for the first time that there are no legal obstacles to recognising the right of access to the source code of an algorithm used within an automated process[41].

Starting from the first profile and from the configurability of the source code as an administrative document within the meaning of art. 22, par. 1, l. no. 241/1990, the court found that the notion is broad and capable of expansion, also encompassing internal acts relating to activities in the public interest. It, therefore, questioned whether the algorithm used in the case at hand could fall within this broad definition, taking its starting point from the functions performed in the proceedings. In particular, the software allowed users to view the questions and provide the answers, as well as to save, collect and encrypt them for the availability of the examining boards.

As a result, the role played by the algorithm is framed in a context of undoubted public relevance, such as that of a public competition. The software, due to the characteristics of the case at hand, becomes instrumental in concretising the final will of public administration, affecting individual legal situations[42]. Since the rationale of access is to make the documents used by the administrations for the care of public interests knowable to the legitimised persons, the acts that contribute to concretising the will of the administration must also be considered accessible, even if they are drawn up by private subjects[43].

It follows that, in the judge's opinion, adhering to the argument put forward by the administration that the source code should be inaccessible would end up legitimising the obscuration of acts affecting the administrative activity relating to the management of public competitions and, in the final analysis,

---

[41] Among the precedents in which the administrative court has, instead, denied the right of access in similar cases: T.A.R. Lazio, sez. III bis, March 21, 2017, no. 3742; T.A.R. Lazio, sez. III bis, 22 marzo 2017, no. 3769. Preliminarily, the panel found that, since a cumulative request for access had been submitted by the applicants (and therefore as cognitive access or generalised civic access), this issue had to be settled.

[42] On this point, see the considerations of I. Forgione, *Il caso dell'accesso al software MIUR per l'assegnazione dei docenti*, cit. at 38, 655.

[43] L. Previti, *La decisione amministrativa robotica*, cit. at 39, 214.

undermine transparency. Moreover, this would generate what the college defines as a «double track», such that transparency lose significance in proceedings managed by IT tools compared to traditional ones. The source code can therefore be configured as an accessible administrative document.

The second argument against the right of access to the source code concerns the potential harm that recognising such a right could pose to the confidentiality of information and the economic interests of the software-producing company. On this point, which is less important for the purposes of this work, the judge noted that knowledge of the source code does not imply a vulnerability of the security of the programmes used by the administration. Moreover, the configurability of the source code in terms of an administrative document outweighs any economic profiles relevant to the developer[44].

The administrative judge's decision represents an important precedent, the first to legitimise accessibility to the source code in the case of decisions taken by the administration through the use of algorithms. Faced with a discretionary choice of the administration to manage the procedure by means of software, deemed legitimate by the judge, the latter nevertheless specified the need for this not to correspond to a retreat of protections and guarantees[45]. The judge's intention and the innovative scope of the decision appear immediately evident, paving the way for stakeholders to familiarise with the decisional tools of the administration.

It is necessary, however, to ask whether this extensive interpretation[46] of the right of access is alone sufficient for the guarantees to achieve effective transparency. In other words, we must ask the question of whether access to source codes is sufficient to enable the achievement not only of fishbowl transparency – what the administration does – but also of reasoned transparency – how and why it does it. If the first of both transparency concepts can conceivably be protected in part through the exercise of the right of access, since this allows the private individual to at least know that

[44] This is because, since the activity in question is in the public interest and constitutionally protected - a public competition being in evidence - such considerations outweigh any economic interest of the private operator.

[45] In this sense, P. Otranto, *Decisione amministrativa e digitalizzazione della p.a.*, 2 federalismi.it. 18 f. (2018).

[46] These are the terms used by L. Previti, *La decisione amministrativa robotica*, cit. at 39, 218.

the administration is acting through algorithms and of what kind, important doubts remain in relation to compliance with the second type of transparency. It does not seem, *prima facie*, possible that the interested party could be aware of the logical *iter* followed by the algorithm and, ultimately, understand the reasons leading to a particular decision on the sole basis of the text of a calculation algorithm.

First, it should be noted that the source code, as such, is not normally intelligible in an autonomous manner by a person lacking the technical skills necessary to fully understand how the algorithm works and, therefore, how the administration acts[47]. It follows that recognition of accessibility to such code does not have a direct correspondence with greater transparency in terms of comprehensibility.

Again, access to the source code allows for the possible knowledge of the algorithm's programming language and not that of the intermediate steps that led to the definition of the software instruction[48].

Finally, in order for an interested party to understand how and why the administration arrived at a certain result by means of the algorithm, it is necessary for the source data (input) to be known[49] beside the source code.

These considerations only confirm that granting the right of access to the source code of an algorithm used in a public decision-making process does not achieve the sufficient degree of transparency for it to be considered effectively protected.

Indications as to what characteristics an algorithmic decision-making process must possess to be considered truly transparent come, once again, from the administrative judge[50]. In the decisions considered, the importance of compliance with the principle of knowability and comprehensibility of the algorithmic

[47] L. Torchia, *Lo Stato digitale. Una introduzione* (2023), 128 f. The person concerned will therefore need the help of an expert capable of deciphering and interpreting the language in which the programme was written.

[48] For further discussion, L. Previti, *La decisione amministrativa robotica*, cit. at 39, 220.

[49] An operation made even more complex when using big data. See G. Avanzini, *Decisioni amministrative e algoritmi informatici. Predeterminazione, analisi predittiva e nuove forme di intelligibilità* (2019), 146 f.

[50] These are the already cited: Cons. Stato, sez. VI, decision no. 2270, April 8, 2019; Cons. Stato, sez. VI, decision no. 8472, December 13, 2019; Cons. Stato, sez. VI, decision no. 881, February 4, 2020.

rule was again affirmed. These principles are attested as a reinforced declination of the principle of transparency, to be understood as the full knowability of a rule expressed in a language different from the legal one (a knowability that evidently cannot be satisfied by mere access to the source code). A knowability that branches out into all the phases and aspects of the procedure, so as to be able to verify that the criteria, prerequisites and outcomes of the same comply with the law and so that the modalities and rules of the procedure itself are clear. A knowability that attains, therefore, comprehensibility even of the logical procedure used by the machine to make the decision, such that both fishbowl transparency and reasoned transparency can be said to be realised. It would thus be possible to see light beyond the opaque glass of the algorithmic decision.

At the European level, the Artificial Intelligence Act[51] – in addition to the GDPR itself – is consistent with this approach. Within the Regulation, in fact, AI practices are divided into three levels of risk, to which a different degree of protection corresponds. There

[51] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).
For some comments: G. Finocchiaro, *La proposta di regolamento sull'intelligenza artificiale: il modello europeo basato sulla gestione del rischio*, 2 Il diritto dell'informazione e dell'informatica 303 ff. (2022); D. Messina, *La proposta di regolamento europeo in materia di Intelligenza Artificiale: verso una "discutibile" tutela individuale di tipo "consumer-centric" nella società dominata dal "pensiero artificiale"*, 2 MediaLaws 196 ff. (2022); G. Resta, *Cosa c'è di "europeo" nella Proposta di Regolamento UE sull'intelligenza artificiale?*, 2 Il diritto dell'informazione e dell'informatica 232 ff. (2022); G. Lo Sapio, *L'"Artificial Intelligence Act" e la prova di resistenza per la legalità algoritmica*, 16 federalismi.it 265 ff. (2024).

are thus AI systems that generate unacceptable risk[52], others that generate high risk[53], and still others low or minimal risk[54].

Comprehensibility, on the other hand, is dealt with in a specific rule for high-risk systems, to be found in art. 13 of the proposal. In this case, the systems themselves must be designed and developed in such a way to ensure that their operation is sufficiently transparent, so that users are able to interpret the output and use it appropriately. Such systems are also accompanied by instructions for use, which include concise, complete, correct, clear, relevant, accessible, and understandable information for users[55]. In other words, Article 13 mandates that high-risk AI systems must be designed with transparency to ensure that users can understand and utilise them effectively. These systems must be accompanied by clear and comprehensive instructions, which should include:(i) information about the provider of the AI system; (ii) details regarding the system's capabilities and limitations; (iii) an outline of any potential risks associated with its use. Additionally, the instructions must clarify how to interpret the system's outputs, account for any pre-determined modifications to the system, and provide guidance on its maintenance. Where applicable, they should also address the procedures for collecting, storing, and interpreting data logs.

As it has been correctly emphasised[56], the reference is no longer merely to the logic of automated processing – as provided

[52] These practices are prohibited and consist of systems that manipulate human behaviour, using subliminal techniques; systems that exploit people's vulnerability due to age or disability; systems that assess the reliability of individuals on the basis of their social behaviour or personal characteristics; real time biometric identification practices in places open to the public, except for reasons of public security.

[53] Systems posing a high risk to the health and safety, or fundamental rights of natural persons are the subject of the entire Title III of the proposed regulation. High-risk systems are described in art. 6, par. 1 and Annex III to the proposed regulation. These systems represent the fundamental core of the entire regulation.

[54] These include virtual assistants and video games.

[55] The information to be provided includes: the identity and details of the supplier; the characteristics, capabilities, and performance limits of the artificial intelligence system (including its purpose, level of accuracy, performance...); any modifications made to the system; human surveillance measures; the expected lifetime and maintenance measures.

[56] G. Lo Sapio, *La black box: l'esplicabilità delle scelte algoritmiche quale garanzia di buona amministrazione*, cit. at 32, 126.

for in arts. 13 and 14, GDPR – but to the interpretability of the same, thus guaranteeing protection in terms of comprehensibility and not mere knowability of the functioning of intelligent systems.

The administration is, therefore, required to understand the language, operation, and logic of the algorithms itself, so that it can enable those concerned to do the same. Only in this way can the principle of comprehensibility be considered achieved as enunciated in case law and at supranational level. This means, in other words, that access to the components of the algorithm – although it is certainly a necessary condition – is insufficient to guarantee the degree of transparency that systems of this type require to be considered compliant with the principles governing administrative action. For the right of access and transparency to find practical application, comprehensibility must be ensured in addition to mere knowledge of what the algorithm does and how it does it, in order to obviate the danger of «knowing without understanding»[57].

Meanwhile, in Italy, a bill concerning artificial intelligence is currently under consideration. The purpose of the bill, entitled «Provisions and Delegation to the Government on Matters Concerning Artificial Intelligence», is to establish regulatory criteria capable of balancing the opportunities and risks arising from the use of this technology. The objective is to improve citizens' quality of life, enhance social cohesion, and concurrently provide risk mitigation solutions. These solutions are primarily based on a vision that places human decision-making at the centre, within the contexts of experimentation, development, adoption, research, application, and use of artificial intelligence systems and models.

Moreover, the problem of ensuring sufficient transparency of machine learning algorithms remains unresolved, considering that making the logical processes performed by them comprehensible – obscure even to programmers and developers – is still a difficult nut to crack.

[57] Literally, «sapere senza capire». In this terms, L. Torchia, *Lo Stato digitale. Una introduzione*, cit. at 46, 155.

4. Tax algorithms: the Italian case

The Italian tax authorities have been overwhelmed by the digital transformation[58]. At the very centre of this significant transition is the Agenzia delle entrate (the Italian Revenue Agency), which performs the functions concerning state tax revenues that are not assigned to other public administrations and has the task of pursuing the highest level of tax compliance through assistance to taxpayers and controls aimed at countering tax non-compliance and tax evasion[59].

With the precise aim of promoting tax compliance, the Indici Sintetici di Affidabilità Fiscale (ISA) – synthetic indexes of fiscal reliability – were established in 2017[60]. These are indicators that provide a value summary useful to verify the normality and consistency of the professional or business management of taxpayers by means of statistical-economic methods, data, and information relating to several tax periods. The ISAs allow economic operators to independently assess their own position, verifying the degree of reliability on a scale of values ranging from 1 to 10 and allowing self-employed workers and businesses that are reliable to

[58] On this point, see the considerations of V. Bontempi, *L'amministrazione finanziaria dello Stato. La gestione della finanza pubblica in un sistema di governo multilivello* (2022), 217 ff.

[59] The Revenue Agency is regulated by art. 62, d.lgs. no. 300, July 30, 1999. Since 2012, the same Agency has incorporated the Agenzia del territorio and absorbed its functions (d.l. no. 95 July 6, 2012, converted by l. no. 95, August 7, 2012). The Revenue Agency is flanked by three other tax agencies: the Agenzia delle dogane e dei monopoli, which carries out services relating to the administration, collection and litigation of customs duties and internal taxation in international trade, excise duties on production and consumption, excluding those on manufactured tobacco (art. 63, d.lgs. no. 300/1999); the Agenzia del demanio (art. 65, d.lgs. no. 300/1999), which administers the State's immovable property, rationalising and enhancing its use, as well as confiscated property; the Agenzia delle entrate-Riscossione, an instrumental body of the Revenue Agency, subject to the operational guidance and control of the same and with the task, among others, of collecting the tax or property revenues of local authorities (art. 1, d.l. no. 193, October 22, 2016, converted by l. no. 225, December 1, 2016,).

[60] Synthetic Indices of Tax Reliability. Art. 9 bis, d.l. no. 50, April 24, 2017, converted by l. no. 96, June 21, 2017. These indices are applied as of the tax period in progress as of 31 December 2018. On the Isa see: M. Macchia, *Lo statuto giuridico dell'algoritmo amministrativo*, in *Osservatorio sullo Stato digitale*, Irpa (2020) (www.irpa.eu/lo-statuto-giuridico-dellalgoritmo-amministrativo/); A. Mascolo, *Intelligenza artificiale e amministrazione fiscale: non tutti gli algoritmi sono uguali*, in *Osservatorio sullo Stato digitale*, Irpa (2021) (www.irpa.eu/intelligenza-artificiale-e-amministrazione-fiscale-non-tutti-gli-algoritmi-sono-uguali/).

access significant bonus benefits[61]. The taxpayer «report card» is produced by means of an algorithm developed by the company Soluzioni per il sistema economico s.p.a. (SOSE), in which the Ministero dell'economia e delle finanze (Ministry of Economy and Finance) – MEF (88%) and Banca d'Italia – Bank of Italy – (12%) participate[62].

ISA's pose problems similar to black boxes, since it is unclear who are the subjects required to respond to taxpayers in the event of inconsistent outcomes[63], or what kind of interaction can be established with the subjects concerned[64]. These are, therefore, rigid and strictly predefined procedures, which lack cross-examination and feature significant uncertainties concerning the very imputability of the decision. There follows that difficulties emerge in identifying the parties responsible for providing the necessary explanations on the functioning and conclusions of the algorithm.

Another use of artificial intelligence by the Agency is the application called Verifica dei Rapporti finanziari (VERA)[65], also

[61] For this and further information on the indices, Agenzia delle entrate, *Gli Indici Sintetici di Affidabilità Fiscale*, update of January 2023, visible at the following link: www.agenziaentrate.gov.it/portale/documents/20143/233439/Gli_indici_sintetici_di_affidabilita_fiscale_2023.pdf/157b9f4e-8ce3-4693-5630-098dffb08f89#:~:text=Gli%20ISA%20sono%20particolari%20strumenti,dell'applicazione%20di%20singoli%20indicatori. The benefits the taxpayer can access are set out in art. 9 bis, par. 1, d.l. no. 50/2017.

[62] On the other hand, the Revenue Agency is supported in its use of indexes by the Società generale di informatica s.p.a. (Sogei), a wholly owned subsidiary of the Mef. For this data, V. Bontempi, *L'amministrazione finanziaria dello Stato. La gestione della finanza pubblica in un sistema di governo multilivello*, cit. at 57, 221 f.

[63] The SOSE, when asked about the criteria adopted for the Isa, has indicated the MEF and the Revenue Agency as the subjects in charge of answering, since it would have limited itself to working on the project on their behalf. On this point, M. Gabanelli, A. Marinelli, *Tasse, ecco come un algoritmo difettoso ti fa pagare di più di quanto devi*, (2019) *Corriere della Sera*, November 10 (www.corriere.it/dataroom-milena-gabanelli/tasse-isa-ecco-come-algoritmo-difettoso-ti-fa-pagare-piu-quanto-devi/77bbc760-03dd-11ea-a09d-144c1806035c-va.shtml).

[64] M. Macchia, *Lo statuto giuridico dell'algoritmo amministrativo*, cit., points out how in the case of the ISA no relief comes to the aid of taxpayers, given that the algorithmic rule represents a rigid, almost predetermined procedure. The fact that it is not possible to indicate the factors that affect income, complicates, therefore, the ordinary management of the relationship with the tax administration, considering that the Isa concerns approximately six million taxpayers.

[65] Art. 1, pars. 681-686, l. no. 160, December 27, 2019, (legge di bilancio per il 2020), which was implemented by a decree of June 28, 2022, of the MEF.

aiming to contribute to the analysis of the risk of evasion. At the basis of this system is an algorithm, which makes it possible to make integrated use of the data in the Anagrafe tributaria and the information communicated by financial operators to the Archivio dei rapporti finanziari[66].

To explain how this operates to prevent and combat tax evasion, the Revenue Agency has issued guidelines in a memo as of June 2022[67]. The same memo specifically states that «the control strategy must be marked by a significant identification of the most insidious forms of fraud and evasion, making the selection of positions to be subjected to control in such a way as to combine the principle of fairness with that of profitable administrative action»[68].

The memo of the Agency was followed by an opinion of the Italian Data Protection Authority (Garante per la protezione dei dati personali – GPDP), dated July 2022[69], related to the impact assessment of the processing operations carried out by the Agency. The subject matter included the analysis of the risks and evasion/avoidance phenomena, using the data in the financial relations archive and their cross-referencing with other databases available to the Agenzia delle entrate. The GPDP emphasised the importance that the principles of knowability, non-exclusivity of the algorithmic decision and algorithmic non-discrimination be respected when using algorithms. It also stressed that transparency and fairness in decision-making processes based on automated processing constitutes one of the necessary safeguards in the use of AI systems in the context of administrative action, which may contribute to the containment of related risks that may arise, including discriminatory ones. Overall, the GPDP authorised the

[66] The Anagrafe tributaria is governed by d.P.R. September 29, 1973, no. 605 and, according to art. 1 of the same decree, it collects and organises on a national scale the data and information resulting from the declarations and complaints submitted to the offices of the financial administration and from the relevant assessments, as well as the data and information that may be relevant for tax purposes. The tax archive is, on the other hand, established by art. 7, par. 6 of the same decree.

[67] Agenzia delle entrate, circular no. 21/E of June 20, 2022.

[68] Literally, «la strategia del controllo dovrà essere improntata ad una significativa individuazione delle forme più insidiose di frodi ed evasioni, effettuando la selezione delle posizioni da assoggettare a controllo in modo da coniugare il principio di equità con quello di proficuità dell'azione amministrativa».

[69] This is GPDP opinion of July 30, 2022, no. 276.

Agency to initiate the processing operations, but ordered it, *inter alia*, to: collect the opinions of the subjects involved in various capacities in the processing operations under consideration; publish an extract of the data protection impact assessment, omitting the annexes and the parts that could compromise the security of the processing operations; adopt processes to verify the quality of the analysis models used, documenting periodic reports of the metrics employed, the activities carried out, any critical issues encountered, and the resulting measures adopted.

Most recently, the Agency drew up a document[70] that sets out the information elements concerning the methodologies of risk analysis activities based on data use from the Archivio dei rapporti finanziari[71]. Risk analysis is broken down into several stages[72], within which human intervention is always guaranteed (no fully automated decision-making processes are in place). In the document, the Agency also describes the types of analysis that algorithms adopt: namely, deterministic and stochastic analysis. The first type of analysis features the set of models and analysis techniques based on the comparison and processing of data, referring to one or more taxpayers or to one or more tax periods. Its aim is to verify the occurrence of a tax risk, wholly or partially definable before the analysis is initiated, by means of selective criteria based on non-probabilistic relationships. The second type of analysis, on the other hand, is substantiated by the set of models

[70] Agenzia delle entrate, *Informativa sulla logica sottostante i modelli di analisi del rischio basati sui dati dell'Archivio dei rapporti finanziari*, May 19, 2023 (www.agenziaentrate.gov.it/portale/documents/20143/5316839/Documento+illustrativo+della+logica+degli+algoritmi.pdf/672a3ef3-8cbf-a442-3b19-de910e751666).

[71] Risk analysis is defined in the same document as the analysis encompassing the techniques, procedures and IT tools used to identify taxpayers who present a high tax risk, understood as the risk of operating, or having operated, in violation of tax regulations or contrary to the principles or purposes of the tax system. Once the tax-risk positions have been identified, they are forwarded to the organisational units in charge of controls, which carry out further investigations and assessments in order to identify the persons against whom investigations should be initiated.

[72] The steps in the risk analysis process are identification of the reference audience; choice of databases; provision of databases; quality analysis; definition of the risk criterion; choice of analysis model; verification of the correct application of the model and risk criterion; extraction and identification of subjects; testing of a sample of the reference sub-platea; preparation of selective lists.

and analysis techniques which exploit artificial intelligence or inferential statistics solutions and make it possible to isolate tax risks. Albeit unknown *a priori*, tax risk assessment can be used for the elaboration of autonomous selective criteria once identified, i.e. they make it possible to attribute a certain probability of occurrence to a known tax risk. An analysis of an example of the application of the logic of the algorithms used by the Agency follows in the technical annex to the document.

Tax administration is, therefore, no exception to the transparency considerations that generally apply to algorithmic administration. Indeed, the technological tools used by the Revenue Agency pose the same problems in terms of opacity and must also respond to the same principles of knowability, non-exclusivity and algorithmic non-discrimination.

5. Conclusions

This paper has focused on the ways in which the use of algorithms in public activity affects the administrative procedure, in relation to compliance with the principle of transparency. The main question the paper has attempted to answer concerns, in particular, the guarantee of effective procedural transparency in the case of use of algorithms. The starting assumption relates to the imperative need for transparency for a procedure to result in an impartial and adequately motivated measure.

To answer these questions, we discussed that the rules of transparency in Italy are fragmented and, *prima facie*, overabundant. They have been – if one may say so – «ordered» by the decisions of the administrative courts, including the subject of algorithmic decisions. With regards to the latter, access to the source code of software is a necessary but not sufficient condition for reasoned transparency, which concerns the logical process and motivations of the administration for using decision-making algorithms.

Algorithms, especially machine learning algorithms, are intrinsically obscure, affected by a linguistic, legal, and structural opacity. With special regards to this last component, the knots to untangle are multiple and complex. Since these algorithms are not inspired by a precise logic, but rather they generate and create new paths based on the input they have at their disposal, they have been defined as black boxes that are difficult to peer into. Given this basic

opacity, which makes the functioning of algorithms knowable even if not always comprehensible, the exercise of the right of access to the source code to achieve an adequate and sufficient level of transparency is blatantly insufficient.

The administrative judge has sought a solution to this problem, affirming, on the one hand, the need for interested parties to be able to access the source code and, on the other hand, a large number of additional guarantees. These are aimed at ensuring that the technical rule is translated into a legal rule that is knowable and comprehensible, that the data entered into the algorithm is knowable, and that the functioning of the decision-making mechanism is knowable: that it is possible, in other words, to obtain any information useful to understand how an algorithm works and how it reached certain results. The result is, therefore, a strengthened declination of the right of access and transparency that goes beyond the regulations in force, but which does not seem fully satisfactory for the effective compliance with the principle of transparency. A transparency that remains on paper, that may formally be respected, but which can hardly be so in substance. A transparency that clashes with the natural obscurity of some intelligent software.

If it is true that the concept of transparency must evolve in step with changes in society, culture, and the very idea of administrative activity, it is not as certain that this can be concretely achieved at the regulatory level. On one hand, the legislator clashes with a phenomenon that is constantly evolving and difficult to contain; on the other, with a skills deficit that affects more broadly the Italian public sector. Public administration, for its own part, fits into a master-servant dynamic, in which it masters the algorithm by governing and bending it for the sake of simplification and speed, while also seeming crushed by the algorithm's own logic, which is beyond human control and comprehension.

THE PERSPECTIVE OF A TRANSNATIONAL CONSTITUENCY FOR THE EUROPEAN PARLIAMENT AND ITS EFFECTS ON THE VERIFICATION OF CREDENTIALS

Alberto Di Chiara[*]

Abstract

The essay analyses the impact that the introduction of a Union-wide electoral constituency would have on the verification of credentials of MEPs. The case law of the CJEU confirms that verification of credentials of members of the legislature has to be considered as an integral part of electoral rights. However, although addressed also by EU law and CFREU, the protection of these rights has been so far entirely left to the Member States. The claim is that the introduction of a Union-wide electoral constituency would impress a decisive shift in the protection of electoral rights in the European Union, dwelling on the powers that would fall to the future European Electoral Authority.

TABLE OF CONTENTS

[*] Post-doc, Department of Law – LUISS Guido Carli (Rome).

1. Introduction

On 16 July 2024, the European Parliament met in the first plenary session of the 10th legislature, following the European elections held between 6 and 9 June. As is well known, even in the current legislature the European Parliament was elected on the basis of the national laws of the Member States, harmonised by the few common principles set out in the Electoral Act: the last amendment approved during the previous legislature was limited to increasing the number of seats and redistributing them among certain Member States[1].

However, it is worth remembering that on 3rd May 2022 the European Parliament approved a proposal for a regulation on the election of its members that would have completely rewritten the Electoral Act and subsequent decisions, introducing a transnational electoral constituency, elected on the basis of a uniform electoral procedure[2]: as we shall see, this aim has long been at the centre of the political and doctrinal debate on the reform of the European elections legal framework, and it is reasonable to assume that the issue will be revisited also in the present legislature, raising the question of its impact on the verification of the credentials of those elected in a transnational constituency.

Until now, attention has so far mainly focused on the impact that the introduction of a transnational electoral constituency would have on the right to vote for the European

[1] The European Council Decision (EU) 2023/2061 of 22 September 2023 establishing the composition of the European Parliament seems to have put an end to the possibility of amending the 1976 Act, as it merely increased the number of seats from 715 to 720, with the 15 additional seats distributed among 12 Member States.

[2] European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision (2020/2220(INL) – 2022/0902(APP)).

Parliament and on political representation in the European Union[3]: as we will try to show in these pages, this proposal is also bound to have significant effects on the right to be elected and on the verification of credentials.

Moreover, it must be stressed that the last proposal on the subject was drafted during a legislature occupied with complex events concerning the verification of the credentials of the Catalan Independence MEPs, the origin of which stems precisely from the lack of homogeneous regulation not only of the right to vote, but also of the successive phases of the electoral process.

The aim of this contribution is, therefore, to analyze the impact that the introduction of uniform electoral legislation would have on the verification of credentials of the European Parliament. As will be discussed in more detail, to date the European Parliament carries out the verification of credentials, based entirely on the work carried out in the Member States. The introduction of a transnational electoral constituency would have at least two effects. First, it would represent a step forward in the construction of a genuine European political representation, detached from the context of individual national elections, in which European elections are no longer a mere summation of national election results, but competition between genuinely transnational European parties. Secondly, as far as the verification of the credentials of MEPs is more closely concerned, it would become necessary to attribute this competence to the supranational level: this could help to standardize the level of protection of candidates and would be decisive in marking a strengthening of the European Parliament both in relation to the

[3] See, A. Duff., *Electoral Reform of the European Parliament. Proposals for a uniform electoral procedure of the European Parliament to the Intergovernmental Conference of the European Union 1996, Report of the European Movement*, The Federal Trust for the European Movement (1996); L. Cicchi, *Europeanising the elections of the European Parliament - Outlook on the implementation of Council Decision 2018/994 and harmonisation of national rules on European elections*, Study for the European Parliament's Committee on Citizens' Rights and Constitutional Affairs, PE 694.199. https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694199/IPOL_STU(2021)694199_EN.pdf; O. Costa, *The history of European electoral reform and the Electoral Act 1976: Issues of democratisation and political legitimacy*', Historical Archives of the European Parliament – European Parliament Research Service, European Union History Series (2016); O. Costa, *Can the Conference on the Future of Europe unlock the EU elections reform? Reflections on transnational lists and the lead-candidate system*, 26(5-6) *European Law Journal* (2020), 460-471.

EU Member States and to the other European institutions. In the background, there is the question of striking a balance between two seemingly contradictory requirements, represented by the need to democratize the European electoral process, on the one hand, and to safeguard the principle of autonomy still recognized by the Member States of the European Union, on the other.

2. The European legal framework on the verification of credentials

The Electoral Act[4], introducing the election of the European Parliament by universal and direct suffrage, devotes few but significant provisions to the verification of credentials.

First of all, according to the German doctrine developed since the 19th century, the verification of credentials refers to two distinct activities: on the one hand, the control of the regularity of the electoral process and, on the other hand, the verification of capacity to acquire and retain a parliamentary seat, in order to ensure the absence of causes of ineligibility or incompatibility of the candidate, whether initial or subsequent.

According to Article 12, «[t]he European Parliament shall verify the credentials of members of the European Parliament»; «it shall take note of the results declared officially by the Member States and shall rule on any disputes which may arise out of the provisions of this Act other than those arising out of the national provisions to which the Act refers»: the Strasbourg Parliament thus decides on the cases of incompatibility governed by Article 7 of the Electoral Act, with the Member States having the competence to declare further cases of incompatibility and ineligibility.

Article 13, on the other hand, regulates the events that may occur after the election of the individual MEP, by providing that each Member State shall have special procedures if a seat becomes vacant during the parliamentary term, with the specification that if this occurs due to a cause of disqualification provided for in

[4] More precisely, we refer to the Act concerning the election of the members of the European Parliament by direct universal suffrage, published in the Official Journal of the European Communities on 8 October 1976, l. 278. This Act was subsequently amended by Council Decision 93/81/Euratom, ECSC, EEC and finally by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002.

national law, the parliamentary term shall expire in accordance with the latter.

Looking at parliamentary sources, Rule 3 of the Rules of Procedure of the European Parliament deals specifically with the verification of credentials, stating that following general elections, the President shall invite the competent national authorities to notify Parliament of the names of the elected Members[5].

In short, the system of verification of credentials outlined by the Electoral Act and the Rules of Procedure of the European Parliament provides that the latter, when verifying credentials, merely takes note of the results proclaimed by the Member States in accordance with their respective national rules, being able to autonomously review only the grounds of ineligibility or incompatibility set out in the Electoral Act.

As can be deduced from the legal framework reconstructed above, the lack of uniform electoral legislation – which also covers the electoral procedure and the regulation of the grounds of ineligibility and incompatibility – has led to a fragmentation of the activity of verification of credentials and, more generally, of litigation on elections to the European Parliament. Given, therefore, the competition of different actors in the resolution of the same type of disputes, it is not difficult to imagine how conflicts can arise between the different levels on which verification of credentials moves.

In the following pages, we will analyse a number of cases relating to the verification of credentials, with particular reference to the proclamation of elected members. This segment of the electoral process is of particular interest because, together with the validation of the elections, it is a characteristic feature of all parliamentary assemblies; secondly, this phase represents the interface between the national and European dimensions, from which the disputes we are going to analyse have emerged; finally, the proposals for the introduction of a transnational constituency all intervene in the context of the proclamation of elected representatives.

[5] Rule 3(1), Rules of Procedure of the European Parliament.

3. The Donnici vs. Occhetto case: a first attempt by the European Parliament to take over the verification of the credentials of its members

The first interesting case about verification of credentials concerns the renunciation – and its revocation – of the parliamentary mandate, and the consequent take-over (or exclusion) of the first of the unelected candidates. In the 2004 European elections, the list "Di Pietro-Occhetto Civil Society" obtained two seats in total in two different constituencies. At first, Mr Occhetto, who was elected in both, renounced his election, but then, two years later, revoked his previous renouncement when Mr. Di Pietro who had been elected to the Italian Parliament in the meantime resigned: the Italian Electoral Office then proclaimed him elected to replace Mr. Di Pietro. Donnici, who was excluded from the election, first lodged an appeal with the Lazio Regional Administrative Court (TAR)[6] and then with the Council of State[7], which overturned the first instance ruling, annulling the proclamation of Mr. Occhetto.

The European Parliament, on the other hand, came to the opposite conclusion: although it had been informed of Donnici's complaints, the Committee on Legal Affairs unanimously confirmed the election of Mr. Occhetto, rejecting the complaint on the grounds that it was based on a national electoral law. However, because of the Council of State's ruling, the Italian electoral office could only take note of the annulment of Occhetto's election and therefore proclaimed Donnici elected. The Strasbourg Parliament, for its part, urged by Mr. Occhetto, confirmed his mandate by decision of 24 May 2007. This act was then challenged in an action for annulment before the Court of Justice of the European Union, which was upheld by the judgment in Joined Cases C-393/07 and C-9/08.

Before the Luxembourg judges, therefore, there were two alternative arguments. On the one hand, Donnici pointed out that the European Parliament should have confined itself to taking note of the proclamation made by the Italian Electoral Office[8]. On

[6] TAR Lazio, judgment no. 6232 of 2006. See S. Rossi, *Parlamento europeo vs. Italia: il caso Occhetto,* Forum di Quaderni costituzionali, Euroscopio - Note dall'Europa, 2-3.

[7] Council of State, sentence no. 7185 of 2006. See S. Rossi, *Parlamento europeo vs. Italia*, cit., 3-4.

[8] CJUE, Joined Cases C-393/07 and C-9/08, ECLI:EU:C:2009:275, paras. 33-34.

the other hand, the European Parliament and Mr. Occhetto argued that the proclamation made by the national authorities had to be respectful of Community law in general. According to the respondents, there was a minimum standard of protection thatshould have been guaranteed by the European Parliament to avoid any distortion resulting from the diversity of national electoral rules. If, on the contrary, the Parliament had had to limit itself to the examination of incompatibility under Article 7 of the Electoral Act, the scope of the verification of credentials vested in it would have been almost emptied of meaning. Faced with a manifest violation of the fundamental principles laid down in the Act – one of which is the prohibition of mandatory mandates, enshrined in Article 6 – the European Parliament would have the duty to act on such a violation[9].

From a subjective point of view, according to the Parliament, Article 6 would also represent a guarantee with respect to the candidate in the ranking list of the unelected, to ensure protection for cases such as Mr. Occhetto's resignation, based on a mere agreement between candidates that would prevent the realization of the mandate conferred by the voters[10]. This teleological interpretation would be corroborated by Article 2 of the Statute for Members of the European Parliament[11], as well as by Article 3 of the Additional Protocol to the European Convention on Human Rights[12].

The Court of Justice first excludes the applicability of the prohibition of compulsory mandate in Article 6 of the Electoral Act to unelected candidates.[13]

Excluding the confirmation of Mr. Occhetto's mandate based on Article 6 of the Electoral Act, the Court examines Article 12, invoked as the legal basis for the verification of the European Parliament's powers. The provision cited identifies two limits:

[9] CJEU, Judgment in Joined Cases C-393/07 and C-9/08, ECLI:EU:C:2009:275, paras. 35-36.
[10] Ibidem, para. 37.
[11] «1. Members shall be free and independent. (2) Any agreement to resign from office before the expiry or at the end of the parliamentary term shall be null and void.»
[12] «The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature».
[13] CJEU, Judgment in Joined Cases C-393/07 and C-9/08, ECLI:EU:C:2009:275, paras. 41-46.

first, «European Parliament […] shall take note of the results declared officially by the Member States»; second, the competence to decide on challenges is limited to those «may arise out of the provisions of this Act other than those arising out of the national provisions to which the Act refers». For the Court, the Parliament could not have considered Community law in its entirety but, on the contrary, should have confined itself to taking note of the proclamation made by the Italian Electoral Office as a result of the judgment of the Council of State[14].

For the above-mentioned reasons, the contested decision is annulled, with the consequent invalidity of Mr. Occhetto's mandate.

The annulment judgment of the Court of Justice, however, is not convincing, with particular regard to the restrictive interpretation of Article 6, according to which the prohibition of compulsory mandates should be limited only to elected Members who intend to resign their seat on account of commitments previously entered into (Rule 4(3) of the Rules of Procedure) or to those who, having been elected, intend to resign (Rule 3(5))[15]. As we have seen, the Court notes that Rule 6 expressly refers to Members of Parliament; it cannot therefore also apply to candidates on the non-elected list. If that were the case, however, it would be inconsistent with the aforementioned articles of the Rules of Procedure: Rule 3(5) also protects those who are not yet Members of the European Parliament; Rule 4(3), on the other hand, lays down the formal requirements for resignation or renunciation of the parliamentary mandate.

The Court, in interpreting the above provisions in a strictly literal sense, did not take into account either the "spirit" of the Act, explicitly referred to in both articles, or, more generally, the Rules of Procedure of the European Parliament. It would not have been, contrary to what was claimed, a hermeneutical reversal but, more simply, a teleological interpretation of the principle of the free parliamentary mandate.

It is to be noted, then, that these provisions, while forming part of an internal legislative act, contribute to specifying and implementing the *ratio* of the general and hierarchically superordinate rule expressed in Article 6, concretizing its

[14] Ibidem, para. 55.

[15] See S. Curreri, *Ancora sul caso Occhetto: finale di partita?,* (2009) 3 *Forum di Quaderni costituzionali,* 2.

meaning and scope. Indeed, there is more: the interpretation proposed by the European Parliament, if the comparison is permissible, could be said to be "constitutionally oriented", if one considers the principles of independence and freedom of the parliamentary mandate as values acquired in the European constitutional heritage. Through it, inessence, it would have been possible to remedy the infringement of these principles by the national authorities, which, in the domestic election validation procedure, did not consider the aforementioned values, justifying the intervention of the European Parliament[16]. Nor, on the other hand, does the Court's reference to the Le Pen case[17] appear pertinent: in that case, in fact, it was a simple acknowledgement of a disqualification that had already occurred, due to ineligibility following the loss of passive electoral capacity, because of a criminal conviction, in accordance with the provisions of Article 13(3) of the Electoral Act[18].

4. The saga of the Catalan independentist MEPs: the picture in the aftermath of the European elections on 26 May 2019

The most recent case on the verification of credentials in the European Parliament that deserves to be analyzed concerns, in a nutshell, the moment of acquisition of the office of MEP trough the proclamation of elected candidates, and the subsequent operation of parliamentary immunity. The facts take as their starting point the election to the European Parliament settled on July 2, 2019, of some of the leaders of the Catalan independence parties.

In facts, Spanish legislation provides[19], as the last stage of the electoral process, that those elected to the European Parliament, when accepting their mandate, must swear an oath

[16] See S. Curreri, *Ancora sul caso Occhetto,* cit., 4.

[17] CJEU, Judgment in Joined Cases C-393/07 and C-9/08, ECLI:EU:C:2009:275, para. 55.

[18] See S. CURRERI, *Ancora sul caso Occhetto,* cit., 3.

[19] This obligation has no direct basis in the Spanish Constitution of 1978. Article 70 states that the requirements for access to the status of deputy are the validity of the verification of credentials and the absence of causes of incompatibility. The obligation to take an oath is in fact regulated by Articles 108 and 224(2) of the *Ley organica del regimen electoral general* (LOREG) of 19 June 1985, as well as by Article 20(1)(3) of the *Reglamento del Congreso de los diputados*.

on the national Constitution[20] before the *Junta Electoral Central* in Madrid[21]. Here the first problem arises: Carles Puigdemont i Casamajó, former Catalan president in exile in Belgium and newly elected to the European Parliament, had he returned to Spanish territory, would likely have been arrested, as he would have been charged with rebellion and sedition for the events that took place in Catalonia at the end of 2017, culminating in the unilateral declaration of independence. In addition to Puigdemont, former Councilor for Health Antoni Comín i Oliveres, who is also in exile in Belgium, and former Catalan Vice-President Oriol Junqueras i Vies, in pre-trial detention in Spain and accused (and subsequently convicted) before the *Tribunal Supremo*, were also elected.

The official electoral results were published on the Boletin Oficial de Estado on 13 June 2019 – including the names of the Catalan independents – and the swearing-in before the *Junta Electoral Central* took place on 17 June, in the absence of the three Catalan MEPs: as a result, that body communicated to the European Parliament the definitive list of those elected, comprising only fifty-one names, compared to the fifty-four seats due to Spain. Consequently, the three excluded candidates wrote to the President of the European Parliament, Mr Tajani, to have their status as MEPs recognized: the President, invoking Article 12 of the Electoral Act, which requires the Strasbourg Parliament to take note of the election results proclaimed in the Member States, referred the decision on the legality of the electoral rules and procedures to the national legislation.

Puigdemont's and Comín's lawyers brought an action before the General Court of the European Union against the refusal of the President of the European Parliament to admit the appellants to the reception service for newly elected members and to recognize the appellants' status as MEPs[22].

At the same time, the *Tribunal Supremo*, before which the

[20] See E. Gonzales Fernandez, *Juramento y lealtad a la Constitución*, 60 Revista de derecho politico (2004) p. 185; A. Basurto Barrio, *"Por imperativo legal": el acatamiento de la Constitución por diputados y senadores,* in hayderecho.expansion.com (24 maggio 2019).

[21] This body, part of the electoral administration, is composed of most magistrates of the Supreme Court (8 members) and professors in the fields of law, political science or sociology (5 members).

[22] CJEU 1 July 2019, Case T 388/19 R, *Carles Puigdemont i Casamajó e Antoni Comín i Oliveres v European Parliament*, ECLI:EU:T:2019:467.

criminal proceedings against Junqueras were pending, raised a reference for a preliminary ruling to the Court of Justice of the European Union concerning the content and limits of the immunity arising from the European parliamentary mandate[23]. Shortly afterwards, the *Junta Electoral Central* definitively ruled that, in the absence of an oath, the three Catalan Independents cannot acquire the status of MEPs.

4.1. The verification of credentials of MEPs between national and European dimensions

According to the Court that examined the appeal brought by Puigdemont and Comín, the expression «takes note of the results officially proclaimed by the Member States» means that, in the context of the verification of the credentials of its Members, the Parliament must rely on the declarations made by the competent national authorities in accordance with the procedures laid down at national level by each Member State, without any margin of discretion[24].

The crux of the matter therefore seems to be as follows: the results officially proclaimed by the Member States referred to in Art. 12 of the Electoral Act, on the basis of the results of the elections of 26 May, must be identified in the list of candidates proclaimed elected by the national authorities and published in the *Boletin Oficial de Estato* on 13 June 2019, or, alternatively, must they be identified in the list of elected candidates that each Member State sends to the European Parliament, which in the Spanish case is the list of candidates of 17 June sent after the oath of allegiance to the Spanish Constitution, in which the names of the Catalan independence MEPs do not appear[25]?

According to the Court, the publication of the results of the elections of 13 June cannot be regarded as the official declaration referred to in Article 12, which constitutes an intermediate act in the electoral process[26]. Similarly, it is not for the European Parliament to determine whether the national authorities should have allowed the applicants to take the oath on the Spanish

[23] *Tribunal Supremo de Madrid*, II Section, Appeal 20907/2017, Order of 1 July 2019.
[24] CJEU 1 July 2019, Case T 388/19 R, *Carles Puigdemont i Casamajó e Antoni Comín i Oliveres v European Parliament*, ECLI:EU:T:2019:467, para. 33.
[25] Ibidem, paras. 36-37.
[26] Ibidem, paras. 39-44.

Constitution in an alternative way[27].

In the light of the foregoing, the General Court concludes that the Strasbourg Parliament had no reason to verify the applicants' credentials or to grant them provisional admission pending the resolution of any disputes: in the absence of a *prima facie* case, the applicants' application for interim measures is dismissed[28].

4.2. The Court of Justice's response: Judgments C-502/19 and C-646/19

The Court of Justice responds to the questions raised by the Spanish court by emphasizing first of all that, pursuant to Article 10(1) TEU, the functioning of the Union is based on the principle of representative democracy, which is the concrete expression of the democracy referred to in Article 2 TEU: in application of this principle, Article 14(3) TEU provides that the members of the institution of the Union constituting the European Parliament are to be elected by direct universal suffrage, in complete freedom and by secret ballot, for a period of five years. It follows from this provision that the status of Member of the European Parliament derives exclusively from election by direct universal suffrage, in free and secret ballot[29].

According to the Court, it follows from Article 8(1) and Article 12 of the Electoral Act that the Member States remain competent to regulate the electoral procedure and officially proclaim the election results. For its part, the European Parliament does not have the general power to call into question the lawfulness of the proclamation of those results or to verify their conformity with European Union law[30].

---

[27] Ibidem, paras. 45-46.

[28] Ibidem, paras. 52-55.

[29] CJEU 19 December 2019, Case C-502/19, *Oriol Junqueras i Vies*, ECLI:EU:C:2019:1115, paras. 64-65. See, C. Fasone, N. Lupo, *The Court of Justice on the Junqueras saga: Interpreting the European parliamentary immunities in light of the democratic principle,* 57 Common Market Law Review (2020), p. 1527 at p. 1554; S. Hardt, *Fault Lines of the European Parliamentary Mandate: The Immunity of Oriol Junqueras Vies*, 16 European Constitutional Law Review (2020), p. 170 at p. 185.

[30] The case arose from the withdrawal of the resignation of a candidate elected to the European Parliament, Mr Occhetto, whose election was confirmed by the European Parliament despite the fact that the national authorities had proclaimed Mr Donnici elected: in this case, the ECJ clarified for the first time that the European Parliament can only take note of proclamations made at

According to the Luxembourg court, it follows from that legal framework that, since it had to take note of the results of the elections officially proclaimed by the Member States, the candidates officially proclaimed elected thus became merely Members of the European Parliament: the status of Member of the European Parliament would therefore be achieved by the mere proclamation of the election results[31]. In this way, the Court of Justice on the one hand seems to neutralize the obligation to swear an oath to the Spanish Constitution and, on the other, does not contradict its own previous orientation, continuing to affirm that European Parliament limits itself to taking note of the results proclaimed by the Member States.

The guarantee of parliamentary immunity thus operates from that moment and, if the elected Member is in a state of pre-trial detention, the competent court has a duty to lift that measure or, if it considers that it should be maintained, it must immediately apply to the European Parliament for the waiver of parliamentary immunity[32].

A similar principle to the Junqueras ruling also applied in the dispute concerning Puigdemont and Comín[33]: on the day following the delivery of the judgment in Case C-502/19, the Court of Justice set aside the order challenged by the appellants Puigdemont and Comín[34].

This order is of great interest for the subject under analysis, as it specifically addresses the verification of the credentials of Members of the European Parliament.

As seen above, the President of the General Court, in assessing the existence of the conditions for the granting of precautionary measures, had considered, prima facie, that the publication of the election results of 13 June constituted an intermediate step within the electoral process, and not the official proclamation[35]: that act was therefore to be found in the communication sent by the Spanish authorities to the European

national level, without any margin of discretion in this matter.

[31] CJEU 19 December 2019, Case C-502/19, Oriol Junqueras i Vies, ECLI:EU:C:2019:1115, paras. 68-71.

[32] Ibidem, paras. 87-92.

[33] CJUE 1 July 2019, Case T 388/19 R, *Carles Puigdemont i Casamajó e Antoni Comín i Oliveres v European Parliament*, ECLI:EU:T:2019:467.

[34] CJUE 20 December 2019, Case C-646/19, *Carles Puigdemont i Casamajó and Antoni Comín i Oliveres v European Parliament,* ECLI:EU:C:2019:1149.

[35] Ibidem, paras. 39-43.

Parliament on 17 June, following the swearing-in of the Spanish Constitution.

The court hearing the appeal emphasized the connection between Articles 14(3) TEU, 223(1) TFEU, 39 of the Charter and 1 of the Electoral Act in order to reaffirm that the elections to the European Parliament are based on the principle of free and secret universal suffrage: that being the case, the court of first instance could not prima facie exclude that the final act of the electoral process had to be identified in the publication of the election results of 13 June 2019[36].

What deserves to be underlined about the order under review is that, although it intervenes in an appeal against the rejection of a precautionary measure, it represents the first application of the principles formulated in the Junqueras judgment.

As has been explained in more detail, at first no margin of discretion was recognised in the decision by the Parliament or the judge in Luxembourg. With the two rulings under review, however, for the first time the Court reviews the decision of a national authority on the acquisition of MEP status: the Court of Justice, however, does not openly disregard its own established case-law, but reinterprets the applicable national provisions by identifying the moment of acquisition of the office of MEP as the proclamation of the election results. This solution has the advantage of avoiding the need for the Court to express an opinion, even if only incidentally, on the compatibility with European Union law of the national provision linking the acquisition of the status to the taking of an oath on the Spanish Constitution.

In this first new phase of the Court's jurisprudence, the balance between the expression of the will of the people and the rules of the electoral process seemed to favour the former. By stating that the proclamation of the election results alone is sufficient for an MEP to be considered elected, the Court had two consequences. Firstly, it gives direct weight to the will expressed by the electorate with regard to the subsequent stages of the electoral process. Secondly, it is clear how the discretion of states in regulating the of states in regulating the electoral process has been inevitably eroded by the by the direction that has just been

[36] Ibidem, para. 74.

taken, since it is only by proclamation that one becomes a member of the European Parliament[37].

Considering the two judgments that have just been analyzed, during its sitting of Monday 13 January 2020, the European Parliament took note of the election of the three Catalan independence MEPs as of 13 June 2019, but it did not at the same time verify the credentials of the three newly elected MEPs[38].

4.3. The backwardness of ECJ case law and the continuing uncertainty of the status of Catalan MEPs

As mentioned above, in the aftermath of former European Parliament President Tajani's refusal to recognise the status of MEPs to the newly-elected Catalan independence activists, they brought an action for annulment before the General Court concerning this refusal[39]: although it was declared inadmissible, the ruling is of particular interest, as it represents the first occasion for European case-law to return to the subject of the verification of credentials after the Junqueras case, but analysing the issue in question independently of parliamentary immunity[40].

The General Court refers to certain passages from the judgment in Case C-502/19 Junqueras Vies (EU:C:2019:1115), on which the applicants' defence is based. In that judgment, the European Court of Justice drew a distinction between the acquisition of the status of Member of the European Parliament and the exercise of the corresponding mandate: whereas the former was acquired at the time of the proclamation of the election results, the latter did not begin until the opening of the first session of the European Parliament[41]. According to the Court, the official proclamation of the Spanish election results was that of 17 June, in the light of the oath of allegiance to the Spanish Constitution, while recognising that parliamentary immunity took effect from the proclamation of 13 June, based

[37] In the same sense, see S. Hardt, *Fault Lines of the European Parliamentary Mandate: The Immunity of Oriol Junqueras Vies*, cit., p. 177.
[38] Plenary session of the European Parliament of 13 January 2020 (P9 PV(2020)01-13 - PE 646.597).
[39] CJUE 1 July 2019, Case T 388/19 R, *Carles Puigdemont i Casamajó e Antoni Comín i Oliveres v European Parliament*, ECLI:EU:T:2019:467.
[40] CJUE 6 July 2022, Case T-388/19, *Carles Puigdemont i Casamajó e Antoni Comín i Oliveres v European Parliament*, ECLI:EU:T:2022:421.
[41] Ibidem, paras. 85-86.

solely on the electoral data[42].

The General Court, reconstructing the system of competences in relation to the verification of the credentials of members elected to the European Parliament, dwells on the meaning of the expression "take note"[43]. As analyzed above with reference to the order of 1 July 2019, this expression indicates the total lack of discretionary power on the part of the European Parliament, as it is the national electoral authorities that designate the elected candidates according to the electoral process regulated by each Member State[44].

As the General Court observes on the basis of the Opinion of Advocate General Szpunar in the Junqueras case[45], numerous events may result in a candidate officially proclaimed elected not assuming office such as, for example, the finding of the existence of a ground of ineligibility or incompatibility[46]. Similarly, several parliamentary systems provide for the fulfilment of formal requirements following the proclamation of the election results. Such appears to be the case in the Spanish system: on the other hand, it was not for the former President of the European Parliament to verify the justification for the exclusion of certain candidates from that list, since it reflected the officially proclaimed election results, after any disputes had been resolved at national level[47].

Of particular interest for the issue of the verification of credentials is an aside inserted by the General Court in the reasoning of the rejection of one of the applicants' arguments. According to the judge, the fact that the three Catalan MEPs were authorized to sit in Parliament does not call into question the rules on the verification of the credentials of their respective members, which, therefore, can only be based on the results officially communicated by the national authorities[48]. In support of this conclusion, the ruling recalled that the European Parliament, during the hearing, specified that following the

[42] Ibidem, paras. 87-91.
[43] Ibidem, paras. 98-100.
[44] Ibidem, paras. 102-103.
[45] CJEU 19 December 2019, Case C-502/19, *Oriol Junqueras i Vies*, ECLI:EU:C:2019:1115, para. 53.
[46] CJEU 6 July 2022, Case T-388/19, *Carles Puigdemont i Casamajó e Antoni Comín i Oliveres v European Parliament*, ECLI:EU:T:2022:421, paras.107-108.
[47] Ibidem, 117-118.
[48] Ibidem, para.121.

Junqueras judgment, it had indeed authorised the applicants to sit in the European Parliament but had not verified their credentials, in the absence of the necessary notification by the competent national authorities[49].

Among the effects that the applicants attribute to the former President of the European Parliament's refusal to recognise them as MEPs, the vacancy of the relevant seats would also fall. Although the judgment ruled out this consequence, it is interesting to note that the Kingdom of Spain specified during the hearing that, in the absence of the oath, those seats would not become vacant, but that the possibility for the elected members to occupy them would be suspended; they would therefore be reserved for the elected candidates for the duration of the legislature, until the holders take the oath.

The appeal judgment of the Court of Justice confirmed the judgment of the General Court, following the same reasoning. It reaffirmed that the European Parliament has no discretionary power in the designation of elected MEPs, which is the sole responsibility of the national authorities[50]. Furthermore, the list of MEPs cannot be challenged even if it does not correspond to the officially announced results[51]. If this were not the case, the European Parliament would be granted the right to verify the conformity of national electoral procedures with European Union law and, consequently, the results of the elections it regulates, contrary to the division of competences laid down in the Electoral Act[52].

On 22 September 2022, the President of the European Parliament contacted the *Junta Electoral Central*, inviting the Kingdom of Spain to designate without delay the number of persons corresponding to the number of seats allocated to it.

In its sitting of 3 November 2022 (Resolution No. 561/89), the *Junta* acknowledges that the Catalan Independents were proclaimed elected on 13 June 2019 but, as they had not fulfilled their obligation to take the oath of allegiance, their seats were temporarily declared vacant, also suspending their prerogatives. The resolution emphasises, albeit incidentally, the constitutive

[49] Ibidem, para.122.
[50] CJEU 26 September 2024, *Puigdemont i Casamajó e Comín i Oliveres c. Parlamento*, ECLI:EU:C:2024:803, paras. 64-65.
[51] Ibidem, para. 67
[52] Ibidem, para. 68.

nature of the fulfilment of this obligation, from which the acquisition of the status of MEP would derive. Consequently, the MEPs in question would not have acquired the office of MEP «for all purposes».

In the light of the above-mentioned statements and acts, it is possible to formulate some reflections on recent developments in the verification of the credentials of Members of the European Parliament. In general terms, the most recent rulings seem to be a step backwards compared to the Junqueras case in terms of the enhancement of the principle of popular sovereignty expressed in the European elections, on the one hand, and the autonomy of the European Parliament, on the other.

The limitation of the principles elaborated in the Junqueras ruling to the sole acquisition of parliamentary immunity (and not to the status of MEP *tout court*) was then exploited by the *Junta Electoral Central* to support its own conclusion, firm in holding that in the absence of an oath to the Spanish Constitution, Catalan MEPs have not acquired full parliamentary status.

A combined reading of the July 2022 ruling and the subsequent decision of the electoral *Junta* reveals a dichotomy between the immunity due to MEPs, which is acquired when the election results are proclaimed, and the full parliamentary status, which would only exist with the announcement of the candidates elected to the European Parliament. This inhomogeneity was then reflected in the uncertainty of the status of the Catalan MEPs, lasted for the whole legislature: the Kingdom of Spain made it clear during the hearing before the General Court that the three seats would not be vacant, but would remain available for the entire legislature should the MEPs in question decide to take the oath; the *Junta*, in its deliberation of 3 November, declared that these seats would be temporarily vacant if they were not sworn in[53]. The situation was further complicated by the

[53] It should be noted that Advocate General Spzunar, in his Opinion in the Junqueras case, pointed out that, once they have acquired the status of MEP, Members of the European Parliament have a mandate under which the Member States may not withdraw or restrict without express authorisation deriving from that law. Apart from cases of resignation or death, the only hypothesis in which the term of office of a Member of the European Parliament ends before its normal expiry date is that of disqualification, which may be the result of the application of national law or the occurrence of a cause of incompatibility. Consequently, national laws cannot suspend the mandate of MEPs, who retain this status from the proclamation of the election results and for the duration of

circumstance that although they have been admitted to the European Parliament by virtue of the Junqueras ruling, their credentials were not verified for the duration of the legislature.

As has been pointed out, this double track generates paradoxical consequences, as we may have elected MEPs who enjoy parliamentary immunity, but whose credentials cannot be verified in the absence of an official proclamation by the electoral authorities of the Member States: the most correct course of action seems to be to follow the path started with the 2019 judgment, by enhancing the political sovereignty expressed in the elections to the European Parliament and by identifying in the proclamation of the election results the moment of acquisition of the office of MEP for all purposes, and not only for the limited purpose of the enjoyment of parliamentary immunity. This, on the other hand, would not be in contradiction with the need to strengthen the role of the European Parliament in the exercise of the verification of powers: it is true that, in the present case, the most correct solution, with the legal framework unchanged, is to enhance the proclamation of the election results of 13 June, precisely because it respects the sovereignty of the people expressed through the vote, rather than the rules on the Spanish electoral process.

5. The introduction of uniform electoral legislation and its impact on the verification of the European Parliament's credentials

As has been pointed out, the cases that have just been analyzed mostly stem from the coordination between the national dimension of the verification of the European Parliament's credentials and the supranational one, with regard to the last phase of the electoral process, coinciding with the proclamation of elected candidates.

To this end, the introduction of a uniform electoral law that also covers the right to vote could resolve many of the issues addressed above: think, for example, of the peculiarities of the Spanish electoral procedure, from which the case of the Catalan independence MEPs originated, which would be neutralized by a

the parliamentary term. Opinion of Advocate General Spzunar, paras. 66-70. C. Fasone, N. Lupo, 'The Court of Justice on the Junqueras saga: Interpreting the European parliamentary immunities in light of the democratic principle', cit., 1533.

common discipline on these aspects[54].

On its part, the introduction of a transnational electoral constituency would raise several issues from the point of view of the verification of credentials, starting with the competent body before which candidatures should be presented, elected persons proclaimed, and electoral disputes resolved.

The first proposal to this effect was contained in the 1998 Anastassopoulos report, which, however, did not consider the verification of the credentials of elected members[55].

The 2009 Duff report, in proposing the introduction of a transnational electoral constituency in which to elect twenty-five MEPs, in point 2 «proposes that an electoral authority be established at EU level in order to regulate the conduct and to verify the result of the election taking place from the EU-wide list»[56]. Consequently, article 12 of the Electoral Act would also have been amended: «The European Parliament shall verify the credentials of the Members of Parliament on the basis of the results declared officially by the electoral authority referred to in Article 2b(2) and the Member States».

Resolution 2035/2015 is the third act submitted to the European Parliament that proposed the introduction of a uniform electoral constituency. Here too, the creation of an electoral authority was proposed, but the tasks of this body are different from the previous hypothesis, since the resolution does not mention the verification of credentials and the electoral dispute for the uniform constituency, although it contains several references to the latter[57].

The report 2020/2220, adopted on 3 May 2022 by the European Parliament, contains a number of provisions aimed at boosting electoral participation in the member states: to this end,

---

[54] On the development of the electoral system for the European Parliament, see O. Costa, *The history of European electoral reform and the Electoral Act 1976,* cit.

[55] Report on a proposal for an electoral procedure incorporating common principles for the election of Members of the European Parliament, A4-0212/1998.

[56] Report on a proposal to amend the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 A7-0176/2011, point 2. The second Duff report also proposes, at the same point 2, the introduction of a European electoral authority A7-0027/2012.

[57] European Parliament resolution of 11 November 2015 on the reform of EU electoral law (2015/2035(INL)), Recital AB.

it is proposed to extend the right to vote to 16-year-olds, without prejudice to existing constitutional orders stipulating a minimum voting age of 18 or 17 and to persons with disabilities, irrespective of their legal capacity[58]; as well as citizens residing in third states, for prisoners, disabled and homeless persons[59]. In the same perspective is the need to regulate postal, electronic or internet voting[60]. Furthermore, to delineate the identity of a pan-European electoral process, it is proposed to establish a single European Election Day common to all member states on 9 May[61].

The most important innovation of the recently approved proposal concerns the creation of a transnational constituency for the election of 28 MEPs, whose candidates would include *Spitzenkandidaten*[62]. For this purpose, each voter shall be provided with two ballot papers, one for the election of candidates in national constituencies and one for the election in the supranational constituency[63]. Each European political entity may therefore present a transnational list, and each national party may be associated with only one list, it being understood that only the symbol and name of the European entity will appear on the ballot papers for that constituency[64].

To ensure geographical, demographic and gender balance, providing that smaller Member States are not at a competitive disadvantage compared to larger ones, it is necessary to introduce «binding geographical representation in the lists for the Union-wide constituency, and encourages European political parties, European associations of voters and other European electoral entities to appoint candidates in the Union-wide lists

[58] Proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that decision, (2020/2220(INL) – 2022/0902(APP)), art. 4.
[59] Ibidem, art. 6.
[60] Ibidem, art. 8.
[61] Ibidem, para. 34.
[62] Proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that decision, (2020/2220(INL) – 2022/0902(APP)), art. 15.
[63] Ibidem, art. 12.
[64] Ibidem, art. 15, para. 4 e para. 5.

coming from all Member States»[65].

The proposal deals in detail with the establishment of a European electoral authority, resulting from the introduction of a transnational constituency. Regarding the composition of this body, the proposal provides that each member state shall appoint one member, chosen from «professors of law or political science and other experts in electoral systems on the basis of their professional qualities and respecting gender balance»[66], laying down specific provisions to ensure their independence and impartiality[67]. Their five-year term of office is once renewable[68].

This body would have a number of powers of great relevance for the verification of credentials, which can be divided into two distinct groups: regulatory activities, ensuring the correct application of the regulation, defining the procedure applicable under Article 10(2) for the electoral constituency at Union level and regulating the challenges that may be raised under the regulation; and the management of the electoral process at Union level, from the submission of the lists to coordination with the contact authorities of the Member States, up to the publication of the election results. The European electoral authority may also aid in case of difficulties related to the interpretation of the lists submitted by the national authorities[69].

In addition to the European Electoral Authority, the proposal invites Member States to designate individual national contact authorities, whose main function would be the mutual exchange of information on the compilation of national electoral rolls, to avoid the phenomenon of "double voting"[70].

Looking in detail at the powers of the European Electoral Authority, of utmost relevance to this subject is the competence attributed to it concerning the proclamation of the election results, both in the supranational constituency and in the national ones, after notification of the contact authorities[71]: it is worth recalling that the current legal framework provides since the time

[65] Ibidem, para. 18.
[66] Ibidem, art. 28, para. 4.
[67] Ibidem, art. 28, para. 4.
[68] Ibidem, art. 27, para. 4.
[69] Ibidem, art. 28.
[70] Ibidem, art. 18.
[71] Ibidem, art. 20.

of the direct election of the European Parliament that the elected persons are proclaimed by the competent national authorities according to the domestic law. The proposal explicitly mentions the proclamation of the results of the elections and not of the elected candidates: it could therefore be assumed that it intends to grant the status of Member of the European Parliament on the basis of the election results declared by the Member States and proclaimed by the European electoral authority, thus neutralising all the post-election formalities provided for by some national laws.

Consequently, the draft regulation also modifies the legal framework on the verification of credentials, stating that this will continue to be carried out by the European Parliament on the basis of the results officially declared by the Member States and proclaimed by the European Electoral Authority.

Equally interesting are the provisions on the vacancy of seats because of death or resignation. The draft regulation stipulates that in such a case the President of the European Parliament shall inform the competent authority of the Member State concerned, as well as the European Electoral Authority[72]. In the event of a vacancy occurring in the seat of an MEP elected in the transnational constituency, the President of the European Parliament shall only inform the European electoral authority, which shall proclaim the next candidate on the electoral list[73].

6. Open questions concerning the verification of credentials

The competences attributed to the European electoral authority could reshape the structure of the verification of the European Parliament's credentials with regard to the proclamation of elected members, the phase of the electoral procedure from which most of the cases analyzed in this work stemmed, resolving some of the problems highlighted and, however, leading the way to new problematic scenarios.

Regarding pre-election litigations, of great interest is the competence of Article 28(1)(b), according to which the European electoral authority will have to define the procedures for lodging complaints for non-compliance with democratic procedures,

[72] Ibidem, art. 27, para. 5.
[73] Ibidem, art. 27, para. 6.

transparency and gender equality before the same authority or the competent national authorities, in accordance with Article 10(2). As can easily be guessed, this is no small competence, since it would have a decisive impact on the electoral litigation system of the Member States and would also call into question the system of candidate selection and the internal democracy of both European and national political parties.

The proclamation of elected members is the main problem that this proposal seeks to resolve by centralizing the attribution under consideration in the European electoral authority, which would proclaim the list of elected members on the basis of the results provided by the contact authorities of the individual Member States and see to the publication of the complete list of elected members in the Official Journal of the European Union: as seen above, it would appear that the European electoral authority should proceed to proclaim the election results on the basis of the results transmitted by the national authorities, but it is not clear whether this means the election results alone or the list of candidates elected on the basis of the national electoral procedures. If the first interpretation is accepted, a situation like that of the Catalan MEPs – who were elected considering the election results but were not proclaimed by the *Junta* – could not happen again. It is true that, in that case, the problem was resolved by the first judgment of the Court of Justice which, in fact, neutralized the effectiveness of any national provision that required further formalities for the acquisition of the office of MEP, the proclamation of the election results having been deemed sufficient for that purpose. However, if this proposal were to be approved, the expression of the will of the people would be given priority over an express regulatory choice. If the second interpretation were to be valid, little would change with respect to the current situation and, therefore, national electoral laws would continue to play a decisive role in the selection of elected candidates.

Related to the previous point, a further problem that would remain open even with this proposal concerns the acquisition of the office of MEP (and the resulting parliamentary immunity). According to the wording of Article 20 of the proposal, the election results are proclaimed by the European electoral authority, on the basis of the information transmitted by the contact authorities: it therefore seems to be possible to

assume that this status is acquired only with the publication of the election results (as established by the December 2019 ruling). However, Article 23 – devoted to the verification of the credentials of elected members – seems to distinguish two distinct moments, when it states that the European Parliament verifies the credentials of elected members on the basis of the results *declared* by the member states and *proclaimed* by the European electoral authority. Notwithstanding this apparent inconsistency between the various provisions, it is reasonable to assume that, in line with what the Court of Justice decided in the Catalan Independence MEPs cases, the status of MEP is acquired at the moment of the declaration of the election results in the Member State of election and, in the case of those elected in the supranational constituency, from the moment of the publication of the election results: again, there is a risk of introducing a different regime for MEPs elected in the transnational constituency[74].

Even in the case of the replacement of a MEP who has resigned or died the same inconsistency seems to arise. According to Article 27(5), if a seat becomes vacant, the President of the European Parliament shall inform the competent authorities of the Member State and the European authority: it is not clear from the wording of the provision which of the two bodies is responsible for identifying the successor and proclaiming the relevant election, since situations of conflict between the European and national dimensions could also arise in the future. In this case, the conflict would arise between the newly established European electoral authority and the national authorities: compared to the previous arrangement in which the European Parliament, by express provision of the Electoral Act, could only take note of what was decided at national level, the introduction of an ad hoc European authority could lead to a strengthening of the supranational dimension. Indeed, it is true that the election results will continue to be announced by the authorities of each member state, but they will be proclaimed by an autonomous authority that is distinct from both the European Parliament and the national authorities.

The most relevant issue in view of the introduction of a

[74] O Costa, C. Fasone, *The law and politics of electoral reforms*, in M. Ceron, T. Christiansen (eds.), *The Politicization of the European Commission's Presidency:* Spitzenkandidaten *and Beyond*, (Palgrave 2024).

supranational constituency that is not touched upon by the proposal analyzed is a uniform regulation of the rules on candidacy and eligibility, a requirement that has actually been present for a long time in view of the possibility of standing as a candidate for the European elections in the Member State of residence, even if different from the Member State of citizenship: this aspect becomes even more stringent when it is proposed to introduce a transnational constituency, in which citizens from all EU Member States will stand as candidates.

In the light of the analyzed proposal, one might wonder whether it has introduced a uniform electoral procedure for the election of the European Parliament in addition to the seats allocated to the transnational constituency. On the one hand, one cannot help but notice how the proposal under scrutiny would lead to a centralization of the proclamation of election results, which was previously left to the individual national systems. As has been discussed in more detail, it will be the contact authorities that will transmit the election results in each Member State; however, only the application of the rules in question will tell whether the national dimension will prevail or whether, on the contrary, it will be the European electoral authority that will consolidate and expand its role, leading the electoral authorities to follow increasingly similar procedures for the announcement of election results.

For the time being, therefore, it cannot be said that the last proposal has introduced a uniform electoral law on electoral procedure and litigation, even though it has centralized the phase of candidate proclamation on the European electoral authority.

The possibility of introducing uniform provisions also in this area in the future would therefore remain open: it is worth recalling that, according to Article 223 TFEU, amendments to the Electoral Act must be unanimously approved by the Council and transposed by each Member State according to their respective constitutional rules, in the same way as an international treaty.

The introduction of a transnational electoral constituency could represent a moment of constitutional value for the European Union, since not only would it be a first and important step towards the construction of a genuinely supranational political representation, but it would also lead to the conduct of the entire electoral process in the European legal system, untying it from the national dimension: the actual legal framework clearly

outlines a vision of European elections – and, consequently, of supranational political representation – as a summation of the election results of the individual member states, configuring the Strasbourg Parliament almost as an assembly composed of national delegates and, therefore, more representative of the member states than of the citizens of the European Union[75].

Since this is an innovation of constitutional rank, even if introduced by means of an amendment to the Electoral Act, the opinion of those who consider that the introduction of a transnational constituency would first of all require an amendment to the Treaties, insofar as it provides that the allocation of seats in the European Parliament to the Member States must be based on the principle of degressive proportionality, thereby favouring the political representation of those Member States with a smaller population, does not seem to be without foundation. However, it became apparent that several proposals seemed to give way to this requirement by providing for a minimum representation, divided on a national basis, even within the transnational lists, even though this would be partially at odds with a supranational logic, because it would continue to emphasise the element of national citizenship of the candidates.

The construction of a European political representation will depend on overcoming the European elections as the summation of the results of individual national elections, an objective that will depend on the introduction of a uniform and transnational electoral law and by a strengthening of the transnational character of the regulation of European political parties: in this perspective, it will be necessary to overcome the principle of allocating seats on a basis that is digressively proportional to the population of the member states, a rule that underlies the current construction of the European elections and whose overcoming would entail a rethinking of the mechanism for allocating seats in the various constituencies, while balancing the objective of strengthening the democratic nature of the European Parliament through the transnational character of its election with the role of

[75] K. Reif, H. Schmitt, *Nine Second-Order National Elections. A Conceptual Framework for the Analysis of European Election Results,* 8 *European Journal of Political Research* (1980), p. 3; S.B. Hobolt, J. Wittrock, *The second-order election model revisited. An experimental test of vote choices in European Parliament elections*, 30(1) *Electoral Studies* (2011), p. 29.

the Member States in the electoral process[76].

One of the characteristics of directly elected parliamentary assemblies is that they are – at least in part – judges of the validity of the titles of their members, quite apart from the role of the electoral authorities and possible judicial review. In the case of the European Parliament, on the other hand, both conditions are lacking: not only is this body not the holder of a full verification of credentials, but electoral litigation takes place in a different system – the national one – and outside the European dimension.

However, in the light of the numerous failures the proposal aiming to the introduction of a transnational constituency has met with, it is essential to make the most of the existing legal framework, which would allow the European Parliament to claim the exercise of its parliamentary prerogatives, starting with the verification of credentials, as demonstrated by the position upheld in the dispute between Occhetto and Donnici, in which the parliamentary assembly sought to obtain the validation of the former, by balancing the verification of credentials with the protection of the freedom of the parliamentary mandate. The same did not happen in the case of the Catalan Independence MEPs, where it would have been legally tenable to recognise their status as MEPs from the beginning of the legislature, relying on the proclamation of the election results.

If the European Parliament were to become more aware of the exercise of the verification of powers, its role as a parliamentary assembly vis-à-vis both the other EU institutions and the Member States would be strengthened, helping to detach the parliamentary debate in Strasbourg from the national dimension, starting with the very issue of validating the elections of its members.

To date, much of the public and doctrinal debate on the rules for the election of the European Parliament has focused almost exclusively on the right to vote, rather than on the

[76] On the compatibility of a seat allocation mechanism on a digressively proportional basis in relation to the population of the Member States even in the presence of a transnational constituency, see J. Habermas, *Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the* Pouvoir Constituant Mixte, 55(2) *Journal of Common Market Studies* (2017), p. 171-182.

procedure and the stages following the election: nevertheless, as we have tried to highlight in these pages, the verification of credentials of the European Parliament constitutes the instrument for certifying the regularity of the electoral process, the maintenance of the eligibility requirements of those elected and, ultimately, the correct expression of the will of the people, contributes to the legitimisation of the European legal system and, in the future perspective, will represent a fundamental building block for the construction of a genuinely supranational political identity.

THE REDUCTION OF LAND CONSUMPTION AND THE ROLE OF URBAN REGENERATION AS A LAND-USE FUNCTION

*Federica Ciarlariello**

Abstract

The contribution, analysing the different possible interpretations of urban regeneration, focuses on the legal and regulatory framework regulating, at national, regional and European level, macro-regeneration as a tool to reduce land consumption. The reconstruction is useful to analyse two profiles of the relationship of the urban regeneration function: *i.* the relationship with private interests - first of all the proprietary ones; *ii.* the connection with public interests, in particular with reference to the protection of differentiated interests. The objective of the contribution is to verify the compatibility between the current Italian system of land governance and the realisation of the objectives of reducing land consumption through regeneration policies.

TABLE OF CONTENTS

* Research fellow, University of Roma Tre.

1. Introduction

Reducing land consumption and urban regeneration have been effectively defined as two sides of the same coin[1], so much so that urban regeneration has also been qualified at the regulatory level as a strategic alternative to land consumption[2].

Soil, in fact, is not consumed, but is sealed, i.e., covered with materials that prevent the passage of water (think asphalt or concrete), diminishing many of the beneficial effects of soil and posing serious hydro-geological risks[3].

In order to counter the negative environmental impact of sealing, it seemed logical to change the paradigm according to which town planning responds to the changing needs expressed by using the land. In this sense, expansion town planning, which has made Italian cities widespread or infinite, has been countered by the model of urban regeneration, based on the redevelopment of the built environment[4].

The principle of reducing soil consumption, in this sense, aims at limiting the use of undeveloped land for new buildings and infrastructure and promotes the redevelopment and reuse of already built-up areas. The objective is based on the need to protect soil as a non-renewable resource and to safeguard ecosystems, biodiversity and the landscape by counteracting the progressive urbanisation and sealing of land.

If, therefore, on the one hand, urban regeneration becomes a tool to achieve the lowest possible land consumption, on the

---

[1] F.F. Guzzi, *Il contenimento del consumo di suolo alla luce delle tecniche di rigenerazione urbana e di valorizzazione dell'esistente,* in E. Fontanari, G. Piperata (eds.), *Agenda Re-Cycle. Proposte per reinventare la città* (2017).

[2] The reference is to art. 125 L.R. Toscana 10 November 2014, no. 65.

[3] Among the many documents, please refer to the report of the European Commission, *Guidelines on good practices to limit, mitigate and compensate soil sealing,* 2012, available at the link: https://www.legambiente.emiliaromagna.it/stopalcemento/wp-content/uploads/ENV-12-009_MEP_IT_final_LR-pdf.pdf

[4] "the so-called. planning of the existing, which presupposes the need to use already built-up land as a priority, ceases to be an auxiliary tool outside the ordinary planning content, but begins to become the main means by which to achieve the objective of reducing soil consumption (...) which in turn is the tool for achieving sustainable urban development", so P. Chirulli, *La pianificazione urbanistica tra esigenze di sviluppo e riduzione del consumo di suolo: la riqualificazione dell'esistente*, 4 Rivista Giuridica di Urbanistica (2015); K. C. Fritzsche, L. Jahrmarkt, Y. Li, *Soil Protection Law*, in I. Härtel (ed.), *Handbook of Agri-Food Law in China, Germany, European Union* (2018).

other hand, the same regeneration is reconnected with further objectives, tools and aims, capable of questioning the general system of urban planning and land governance.

Given that there is currently no clear normative, jurisprudential and doctrinal direction regarding the legal nature of urban regeneration, in the present research work we have leaned towards its qualification as an administrative function, for the reasons explained below.

In the following analysis an attempt was made to distinguish between what urban regeneration is today, according to the Italian regulatory framework and in vertical comparison with the European one, and what regeneration should (or rather, could) be, if it were regulated according to the qualities and objectives we have recognised. The study therefore conformed to an *Is-ought problem* approach.

As is well known, urban planning is primarily an activity of evaluating the interests involved in the orderly organisation of the territory. For this reason, the question arose as to how the function of urban regeneration impacts on private interests and the balance between different public interests, with a view to so-called differentiated protection.

The following arguments, therefore, will have the ambition to contribute to answering some general questions: is today's regulation of urban regeneration adequate to the aims it intends to pursue? What space can be given to urban regeneration to realise, among others, the objective of reducing soil consumption? Can the function of regeneration be considered coherent with the basic choices of our urban planning system or does it induce rethinking in a more general context?

2. The elusive characters of regeneration

In order to be able to investigate the potential that urban regeneration offers to the objectives of reducing land consumption, it is first necessary to define what is meant by urban regeneration.

As is well known, there is no unitary definition of urban regeneration and different interpretations and a plurality of

perspectives remain[5]. It is, however, an accepted fact in doctrine that so-called expansion urban planning has now come to an end[6], having given way to the need to regenerate the built environment without further land consumption[7]. On the other hand, "the last 70 years have seen the progressive erosion of the countryside and the welding together of built-up areas. Megalopolises have sprung up, in which the old nuclei and urban centres are now united in a continuous and uninterrupted fabric of neighbourhoods, social housing, intensive building, and industrial warehouses, in which the dominant element, the real interstitial glue, is urban *sprawl*, in its typical, ut anonymous and insignificant degradation of architectural quality"[8].

In this context, it is possible to distinguish two main interpretations of the so-called "macro-regeneration"[9], related to the main purposes to which it is referred[10]. On the one hand, regeneration has to do with the ambition to fight inequalities and social exclusion phenomena in the urban dimension and to protect the environment and landscape[11]; on the other hand, it can only

[5] G.F. Cartei, E. Amante, *Strumenti giuridici per la rigenerazione*, in M. Passalacqua, A. Fioritto, S. Rusci (eds.), *Ri-conoscere la Rigenerazione - Strumenti giuridici e tecniche urbanistiche* (2018).

[6] The same government of the territory is now far from the concept of "building increase in built-up areas and urban development in general", as recalled by G. Morbidelli, *Il governo del territorio nella Costituzione*, in G. Sciullo (ed.), *Governo territorio e Autonomie territoriali* (2010).

[7] P. Stella Richter, *La generazione dei piani senza espansione,* Proceedings of the 17th Conference of the AIDU (Italian Association of Urban Law), 26-27 September 2014 (2015).

[8] P. Carpentieri, *Il "consumo" del territorio e le sue limitazioni. La "rigenerazione urbana"*, Report at the XXXV Conference in Varenna, 19 September 2019, published at www.giustizia-amministrativa.it;

[9] Macro-regeneration refers to the strategic dimension of regeneration, in which spatial planning plays a major role, as opposed to "micro-regeneration", corresponding to a dimension in which planning plays a less central role, and instead institutions linked to social partnership and horizontal subsidiarity emerge. See R. Dipace, *La rigenerazione urbana a guida pubblica*, 2 Rivista quadrimestrale dell'ambiente (2022); M. Pieterse, *Corporate power, urban governance and urban law*, 131 Cites (2022); C. Iaione, *Urban sustainable development and innovation partnerships*, 2 Italian Journal of Public Law (2022).

[10] This reconstruction is taken up by L. De Lucia, *Il nuovo testo unificato sulla rigenerazione urbana. Osservazioni critiche*, 2 Rivista quadrimestrale di diritto dell'ambiente (2022).

[11] See, in this sense, Article 1, co. 42, of Law No. 16013 of 27 December 2019, where it is provided that urban regeneration projects are "aimed at reducing

have as its object the building aspects of improvements in run-down neighbourhoods and the stimulation of real estate economic activities[12].

From this last point of view, however, it is worth emphasising that the word urban regeneration, although frequently juxtaposed with apparently synonymous terms (recovery, requalification, renovation, rehabilitation, etc....) has, in reality, an autonomous meaning. Regenerate is not a mere synonym of restore or requalify, since far from returning an object to its pre-existing condition, regeneration creates a different function for that object, with new "essential and distinctive features"[13]. While "urban requalification" is primarily a project of a disciplinary, urban planning and architectural nature[14], urban regeneration is an objective of a social and economic nature, within which a series of interconnected dimensions must be considered, including settlement, energy, environmental, economic, landscape, social and institutional dimensions[15].

Understood in this way, urban regeneration is a tool through which the territory regains its functional vocation to the interests and expectations of its society[16]. It can be defined, to borrow the words of Prof. Edoardo Chiti, as "an administrative

phenomena of marginalisation and social degradation, as well as improving the quality of urban decorum and the social and environmental fabric".

[12] C. Cellamare, *La Rigenerazione senza abitanti*, in G. Storto (ed.), *Territorio senza governo. Tra Stato e regioni: a cinquant'anni dall'istituzione delle regioni* (2020).

[13] A. Bianchi, *La rigenerazione urbana: un nuovo modo di pensare la Città*, 1 Rivista giuridica del Mezzogiorno (2020).

[14] P. Chirulli, *La pianificazione urbanistica tra esigenze di sviluppo e riduzione del consumo di suolo: la riqualificazione dell'esistente*, cit. at. 4, 68; P. Di Biagi (ed.), *Laboratorio Città Pubblica, Città Pubbliche. Linee Guida per la riqualificazione urbana* (2010).

[15] P. Galuzzi, P. Vitillo, *Città contemporanea e rigenerazione urbana. Temi, azioni, strumenti*, 1 Equilibri (2018); R. Paddison, *Housing and Neighbourhood Quality: Urban Regeneration*, International Encyclopedia of Housing and Home (2012); Hao, Z., Wang, Y. *Evaluation of socio-economic-ecological environmental benefits of urban renewal projects based on the coupling coordination degree*, 30 Environmental Science and Pollution Research (2023).

[16] G. Piperata, *Rigenerare i beni e gli spazi della città: attori, regole e azioni,* in E. Fontanari, G. Piperata (eds.), *Agenda Re-Cycle. Proposte per reinventare la città* (eds.), cit. at 1, 1.

function typical of a specific model of public action"[17].

It is well to underline, in this sense, that the reconstruction offered by Prof. Chiti derives from the analysis, primarily, of the "Municipal regulations for the management of urban commons". In relation to these sources, in fact, the author recognises how urban regeneration has the same aims, the same tools and corresponds to entirely similar interests, in all the different regulations. Well, purposes, instruments and interests are precisely the elements through which the theory of law identifies a function.

If the reconstruction of regeneration as a function is convincing, it cannot but remain so even when we turn our gaze from so-called micro regeneration to the different instrument of macro regeneration. On the other hand, both dimensions of urban regeneration are part of the broader function of territorial government, and for the realisation of macro regeneration, as we will soon see, the regions have established completely overlapping instruments.

Regeneration, therefore, can acquire the capacity to contribute to the function of urban planning[18] by removing it from the conception related to the expansion of urbanised territory.

3. The current regulatory framework of urban regeneration

3.1 The national regulatory framework

Compared to the above reconstruction, the urban regeneration tools provided by the national legislator are certainly less ambitious, as they seem to respond to the need to redevelop and recover (rather than regenerate) the urban fabric[19].

In fact, urban planning regulations have mostly introduced instruments specifically dedicated to the recovery of the pre-existing building and urban heritage. This locution (urban

[17] E. Chiti, *La rigenerazione di spazi e beni pubblici: una nuova funzione amministrativa?*, in F. Di Lascio, F. Giglioni (eds.), *La rigenerazione di beni e spazi urbani* (2017).

[18] In the sense of function, administrative activity understood in its "macro" aspects, rather than in its procedures and measures, and characterised by specific purposes, attributions, addressees and interest structures.

[19] E. Boscolo, *La riqualificazione urbana: una lettura giuridica*, *Working papers,* 1 Rivista online di Urban@it (2017).

recovery), if read in a purely legal sense, contemplates various meanings. Firstly, actions on individual buildings, carried out autonomously by private subjects, must be considered. Secondly, there are specific legal institutions whose purpose lies in the urban redevelopment of territorial areas of varying size. In these cases, the action is not restricted to individual buildings, but stands as a reorganisation of the city.

Most of the instruments introduced by the national legislator have punctual effects, they are, in fact, of an implementation nature, so that they are not able to affect the general urban plan: thus the recovery plan[20], the urban recovery programmes[21] and the rehabilitation programmes[22].

Such devices, therefore, can provide a useful contribution in reference to limited and specific contexts and projects, but they cannot be considered adequate in reference to the general planning of the territory, so that they may not be suitable to ensure the realisation of the objectives set by the regeneration in order to the overall transformation of the cities[23]. The only

[20] Introduced through Title IV of Law no. 457 of 5 August 1978, *Norme per l'edilizia residenziale*. For further study: E.M. Marenghi, *Il recupero del patrimonio edilizio ed urbanistico esistente* (1982); A. Corsetti, *Piano di recupero*, in A. Azara, E. Eula (eds.), *Novissimo digesto italiano* (1984); P. Bonaccorsi, G. D'Angelo, *Il recupero del patrimonio edilizio nella L. n. 457 del 1978*, 2 Rivista giuridica dell'edilizia 3 (1979); S. Amorosino, *I piani di recupero nel sistema dei piani urbanistici*, 2 Rivista Giuridica dell'Edilizia 244 (1990).

[21] Disciplined by art. 11 of Law Decree no. 398 of 5 October 1993, converted with amendments into Law no. 4931 of 4 December 1993. For a commentary: G. Piperata, *I programmi di recupero urbano*, in S. Battini, L. Casini, G. Vesperini, C. Vitale (eds.), *Codice di edilizia e urbanistica* (2013); S. Civitarese Matteucci, *Territorio e politiche locali*, in M. Cammelli (ed.), *Territorialità e delocalizzazione nel governo locale* (2007).

[22] Introduced by Article 27 of Law No 166 of 1 August 2002. For further information: G. D'Angelo, *Diritti dell'edilizia e dell'urbanistica* (2004); D. Antonucci, *Manuale di diritto urbanistico: pianificazione urbanistica e disciplina dell'attività edilizia* (2004).

[23] Consider, in this regard, that art. 21 of legislative decree no. 152 of 2021, converted with amendments into law no. 233 of 29 December 2021, which regulates the integrated plans of the building industry, has been approved by the Council of Ministers. 233, which regulates the integrated plans financed with PNRR funds, identifies the programme's objectives as "favouring better social inclusion by reducing marginalisation and situations of social decay, promoting urban regeneration through the eco-sustainable recovery, renovation and refunctionalisation of building structures and public areas, the energy and water efficiency of buildings and the reduction of soil consumption, including through demolition and reconstruction operations aimed at reducing the

instrument that has the function of detailed planning is the integrated intervention programme, which, however, can also be adopted for new constructions and is characterised by a high degree of consensuality between public and private (so that it risks being applicable only when there is private capital interested in its realisation).

To further confirm these reflections, it should be noted that there are no appreciable differences in the activities and purposes assigned to the administration between the implementation plans described above and the PRUSST[24], the neighbourhood contracts[25] and the redevelopment programmes[26]. The latter do not qualify as urban planning instruments (since they are not introduced by a source of law), but rather as mere financing plans for specific projects.

In addition, national legislation on urban regeneration continues to be lacking, despite the fact that in application of the commitments made when adopting the National Recovery and Resilience Plan, the government has provided for the approval of "a law on land consumption, which affirms the fundamental principles of reuse, urban regeneration and limitation of land consumption, supporting with positive measures the future of construction and the protection and enhancement of agricultural activity"[27].

Both bills currently under discussion (DDL nos. 29 and 761 on urban regeneration[28]), as well as the previous ones filed in previous legislatures, although not exempt from criticism on their merits, have been welcomed by the doctrine. It can be recognised, in fact, that there is a general opinion on the need for a state intervention in the matter that, following the various regional initiatives, would establish the general principles and connecting

sealing of soil already consumed with changes to urban shapes and layouts, as well as supporting projects related to smart cities, with particular reference to transport and energy consumption".

[24] Established by the Ministerial Decree of 8 October 1998 of the Minister of Public Works.

[25] Established by the Ministerial Decree of 22 October 1997 of the Minister of Public Works.

[26] Introduced by Ministerial Decree of 21 December 1994 of the Ministry of Works.

[27] PNRR ITALY, available at www.italiadomani.gov.it, p. 85. See link: https://www.senato.it/attualita/archivio-notizie?nid=82825.

[28] See link: https://www.senato.it/attualita/archivio-notizie?nid=82825.

discipline on urban regeneration.

On this point it is first of all necessary to recall that the regulation of the government of the territory is of concurrent competence, *pursuant to* Article 117, paragraph 3, of the Constitution, according to which it is for the state law to lay down the principles of a matter and for the regional law to deal with the detailed regulation, admitting that, in the absence of the former, the regions may legislate in compliance with the general principles. At the same time, the matter of private property is an exclusive state competence (insofar as it belongs to the civil order, which *under* Article 117, paragraph 2, letter *l) is a matter* of state competence) and, consequently, any intervention by the regional legislature regulating aspects and forms of property would be unconstitutional[29]. Lastly, urban regeneration, far from being limited to the regulation of urban planning in the strict sense, intertwines the issues of environmental and landscape protection (just think of the application of the principle of less land consumption), matters that are also the exclusive competence of the State, *pursuant to* Article 117, paragraph 2, letter *s) of* the Constitution[30].

In the light of these brief considerations, the intervention of the state legislator in the field of regeneration would be necessary. These elements, however, in the writer's opinion, should be read in conjunction with the antiquity of the current general law on town planning which, despite regulating a subject that is by definition subject to sudden changes and transformations, remains anchored (despite the many amendments) to the system provided for in 1942.

It is not peregrinatory to ask oneself, therefore, whether it would be more appropriate for the national legislator to promote a new general town planning law that would put the regeneration function at the centre. On the other hand, the draft laws currently under discussion seem rather timid and based on a deductive relationship with regional regulations, rather than inductive and guiding.

---

[29] Regarding these last two considerations, see G. Pagliari, *Governo del territorio e consumo del suolo. riflessioni sulle prospettive della pianificazione urbanistica*, 5 Rivista Giuridica dell'Edilizia 325 (2020).

[30] See in this regard P. Urbani, *A proposito della riduzione del consumo di suolo*, 3 Rivista Giuridica dell'edilizia 227 (2016).

3.2 Fourth-generation regional laws

Due to the legislator's inertia with regard to a new national urban planning law, the challenges of land use planning have been taken up by the regions, which have adopted new regulations on the subject[31]. These measures introduce adjustments to existing urban planning instruments with the aim of enhancing the pursuit of two emerging goals: the reduction of soil consumption and urban regeneration[32].

The above-mentioned laws are heterogeneous[33], but, despite the differences in their approach and instruments, they show a common profile: urban regeneration is in fact assumed as a general principle that informs the whole policy of territorial government and is an alternative, priority instrument with respect to land consumption[34], in accordance with the European objectives[35]. Together with the objective of reducing (or, at least, not increasing) the area of built-up land, regional regulations entrust regeneration to consensual models, such as recovery plans or integrated intervention plans, and tend to regulate specific instruments of private participation, as it happens in the hypothesis of temporary use[36].

The Emilia-Romagna regional law[37], for example, introduced an innovative model of territorial planning by competence that replaced the previous system of structural plans,

---

[31] The doctrine refers, in this regard, to "fourth" generation regional laws: see P. Stella Richter (ed.), *Verso le leggi regionali di IV generazione. Studi dal XXI Convegno nazionale* (2019), which takes up the reconstruction by generations of urban planning laws made by G. Campos Venuti, *La terza generazione dell'urbanistica* (1990).

[32] E. Boscolo, *Verso le leggi regionali di IV generazione,* in P. Stella Richter (ed.), *Verso le leggi regionali di IV generazione,* cit. at 31, 19.

[33] The reference, in particular, is to the urban planning laws of: Abruzzo, L.R. 13 October 2020, No 29; Lombardy, L.R. 26 November 2019, No 18; Calabria, L.R. 16 April 2002, No 19; Emilia-Romagna, L.R. 21 December 2017, No 24; Sicily, L.R. 13 August 2020, No 19; Tuscany, L.R. 10 November 2014, No 65; Umbria, L.R. 21 January 2015, No 1

[34] M. Dugato, *L'uso accettabile del territorio*, 2 Istituzioni del federalismo 599 (2017).

[35] The 2006 Thematic Strategy for Soil Protection already included the goal of zero soil consumption by 2050. The same goal was reiterated in 2011 with the Roadmap to a Resource Efficient Europe.

[36] G. Torelli, *La rigenerazione urbana nelle recenti leggi urbanistiche e del governo del territorio,* 1 Istituzioni del federalismo 651 (2017).

[37]Law no. 24 of 21 December 2017, to which the monographic issue of 2 Rivista Giuridica dell'Urbanistica (2020) is dedicated.

municipal operational plans, implementing urban plans, and urban building regulations with only the General Urban Plan (PUG)[38]. This act is assigned a planning role rather than a merely executive one[39]. The PUG is mainly based on a "zoning"[40], with markedly simplified characteristics, since the territory is substantially divided into urbanised and rural. To the former are dedicated the instruments for the improvement of urban and environmental quality, for territorial and infrastructural endowments, for the public services deemed and, finally, for the possible uses and transformations; to the latter are referred the disciplines of urban and building uses and transformations functional to agro-silvo-pastoral activities. In this way, new building is a subsidiary option, exceptional with respect to regeneration. Precisely because of this, the concrete implementation of the Plan is delegated to implementation plans of public initiative and, for the most part, to operational agreements with private parties.

The Emilian law presents some similarities with the older law of the Tuscany Region 10 November 2014 no. 65, which "dictates the rules for the government of the territory in order to guarantee the sustainable development of activities with respect to the territorial transformations induced by them also avoiding new land consumption"[41]. In fact, the cited provision expressly forbids the building of rural areas or scattered and discontinuous built-up areas, so much so that the text clarifies that "transformations involving the use of undeveloped land for settlement or infrastructure purposes are permitted exclusively within urbanised territory"[42]. Exceptions are only permitted for building for productive, infrastructural or large-scale distribution purposes. In such cases, however, new land consumption is subject to a special procedure, in which the municipalities concerned as "vast area", the province and the Region itself are also involved, in any

[38] A. Giusti, *La rigenerazione urbana tra consolidamento dei paradigmi e nuove contingenze*, 2 Diritto Amministrativo 439 (2021).
[39] G. Pagliari, *La legge regionale Emilia-Romagna 22 dicembre 2017, n. 24 tra vecchi e nuovi modelli pianificatori: una legge di transizione e per la transizione*, 2 Rivista Giuridica di urbanistica 260 (2020).
[40] G. Pagliari, G*overno del territorio e consumo del suolo. Riflessioni sulle prospettive della pianificazione urbanistica*, cit. at. 29, 325.
[41] Containing "Provisions for the reduction of soil consumption and the redevelopment of degraded soil".
[42] Art. 4, par. 2, L.R. Toscana cit.

case where "there are no alternatives for the reuse and reorganisation of existing settlements and infrastructures"[43].

A partially different set-up seems, on the other hand, to emerge from Lombardy Regional Law No. 18 of 26 November 2019[44] which introduces further amendments, in addition to those provided for by Regional Law No. 31 of 24 November 2014, to the general discipline contained in Lombardy Regional Law No. 12 of 11 March 2005. The amendment affects the general objectives of planning, among which is now included the reduction of soil consumption and urban and territorial regeneration, for the realisation of a "sustainable territorial development model"[45]. The law in question stipulates that the aim of reducing land consumption is to be put into practice by the regional level, with the relevant territorial government plan, and that an environmental assessment of the effects of the implementation of territorial plans is required, taking into account the respect of environmental sustainability and the limitation of land consumption. Indeed, Lombardy's urban planning law cannot be said to be exempt from criticism, so much so that it has been considered extraneous to the so-called fourth-generation laws, in the region of the generality of the declared intentions against the lack of suitable instruments to realise them[46].

As can already be seen from these first hints, the new urban planning laws propose differentiated objectives, policies and actions depending on the spaces - urbanised or not - of intervention, and they mainly perform two functions: a custodial one, of environmental protection, and one of settlement efficiency, which ensures development that is no longer horizontal and dissipative[47].

4. The influence of European policies

As far as European law is concerned, this has for some time

[43] Art. 4, par. 8, L.R. Toscana, cit.

[44] For a comment see P. Lombardi, *Il governo del territorio in Lombardia dopo la l.r. n. 18/2019*, 4 Rivista Giuridica di Urbanistica 840 (2020).

[45] Art. 1, paragraph 3-bis, Lombardy Regional Law no. 12 of 11 March 2005.

[46] The reference is to E. Boscolo, *Verso le leggi regionali di IV generazione*, cit. at. 32, 30.

[47] P. Urbani, *A proposito della riduzione del consumo di suolo*, 3 Rivista Giuridica dell'Edilizia 234 (2016).

now assumed full prominence among the sources, particularly in the field of environmental protection, within which the issue of reducing soil consumption and urban regeneration also falls[48]. In fact, the plans and programmes that have followed one another over time in order to incentivise the redevelopment of the territory have for the most part related to environmental matters rather than to urban planning[49], assigning States concrete objectives for sustainable development[50].

The most recent measures include the Soil Strategy 2030, the New Leipzig Charter and the Ljubljana Agreement on the New European Urban Agenda.

As for the former, it is part of the Green Deal[51] and promotes measures - both voluntary and binding - to protect soil at the same level as other environmental resources such as water and air. This requires societal involvement, adequate financial resources and eco-friendly practices for food production, nature and climate, with medium (2030) and long-term (2050) targets, including achieving zero net land consumption[52]. The approach

[48] P. Urbani, *A proposito della riduzione del consumo di suolo*, cit. at. 48, 234; A. Felli, F. Zullo, *The importance of urban regeneration actions: European and Italian legislative framework analysis*. *SUPTM 2024 conference proceedings*, ", available at the link: https://repositorio.upct.es/server/api/core/bitstreams/0887b7f2-1a2f-4cae-a971-ba47f83bcd1a/content.

[49] On this point see V. Molaschi, *Le agenzie per la protezione dell'ambiente tra diritto interno e diritto comunitario*, in R. Ferrara, P.M. Vipiana (eds.), *I "nuovi diritti" nello Stato sociale in trasformazione* (2003).

[50] Among the many initiatives are: *the Charter of European Cities for Durable and Sustainable Development* (the so-called Aalborg Charter), adopted in 1994 by the European Conference on Sustainable Cities and Towns; the Bristol Accord, concluded in 2005 at the Informal Ministerial Meeting on Sustainable Communities in Europe, under the British presidency; *the Leipzig Charter*, signed in 2007 by the assembly of European ministers responsible for urban areas; the Marseilles Declaration, deliberated on 25 October 2008 at the informal meeting of ministers responsible for urban development; *the Toledo Declaration* "On integrated urban regeneration and its strategic potential for smarter, sustainable and more inclusive urban development in European cities", adopted in Toledo on 2 June 2010 by the European Ministers responsible for urban development; and, finally, the *Urban Agenda for the European Union,* better known as the "Amsterdam Pact", adopted in 2016.

[51] European Commission, COM(2019) 640 final of 11 December 2019.

[52] The goal of "zero net land take" by 2050 is also included in the Seventh Environmental Action Programme (Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a general programme of Union action on the environment up to 2020 "*Living well within the limits of our planet*"). A. Decoville, *Can the 2050 zero land take objective of the*

follows the "soil consumption hierarchy": limit, mitigate, compensate[53]. Member States should set national, regional and local targets by 2023 to significantly reduce soil consumption by 2030, integrating this hierarchy into greening and environmental protection plans.

The New Leipzig Charter, whose motto is "the transformative power of cities for the common good"[54], was adopted at an informal meeting of the Ministers for Urban and Territorial Development of the EU Member States on 30 November 2020. The Charter, while fully in line with previous major European and international interventions[55], is distinguished by the consideration given to the impact of the COVID-19 pandemic on cities and small towns, as a result of which inequalities between territories have increased, further necessitating an integrated and multilevel governance approach[56]. The Charter sets the ambitious goal of striking a balance between the three main aims of European cities and towns: to increase productivity, to generate wealth and employment in cities and regions, and to ensure a fairer distribution of wealth among citizens, while improving the quality of the environment.

EU be reliably monitored? A comparative study, 11 Journal of Land Use Science (2016).

[53] Communication from the commission to the european parliament, the council, the european economic and social committee and the committee of the regions eu Soil Strategy for 2030, Reaping the benefits of healthy soils for people, food, nature and climate, SWD(2021) 323 final.

[54] New Leipzig Charter - The transformative power of cities for the common good, 12/12/2020 https://ec.europa.eu/regional_policy/en/newsroom/news/2020/12/12-08-2020-new-leipzig-charter-the-transformative-power-of-cities-for-the-common-good.

[55] Indeed, the Leipzig Charter opens with the statement that its principles are built on a long series of European and international documents, including: *17 Global Goals, Habitat III, European Green New Deal, European Digital Strategy, European Pillar of Social Rights, Renovation Wave and New European Bauhaus Initiative.*

[56] On the pandemic effects in ordina to urban composition, let us refer to: F. Ciarlariello, *La crisi pandemica e l'impatto sulle città: le risposte del Piano Nazionale di Ripresa e Resilienza,* in F. Di Lascio, I.M. Delgato (eds.), *Crisi di Sistema e Riforme Amministrative* (2023); C. Incaltarau, K. Kourtit, G. C. Pascariu, *Exploring the urban-rural dichotomies in post-pandemic migration intention: Empirical evidence from Europe*, 111 Journal of Rural Studies (2024).

The Ljubljana Agreement, signed on 26 November 2021 by the EU ministers responsible for urban issues, kicked off the new development phase of the European Urban Agenda[57]. The Agreement aims to improve regulation, financing and knowledge on urban/environmental issues. The first pillar includes, in particular, the objectives of aligning the Urban Agenda's policies with the rest of the European legal system to ensure greater effectiveness at both national and supranational levels; the pillar referring to "better financing" guarantees the expansion of financing, the simplification of awarding procedures in favour of small municipalities and the implementation of financing control tools. Finally, in the last pillar - "better knowledge" - instruments are devised to encourage the more frequent exchange of knowledge and experience, particularly with regard to public-private partnerships, also with a view to involving more public actors.

It is evident that in European cohesion policy, recognition of the environmental value of soil is considered central to urban planning.

The analysis of the impact of European policies on urban spatial management allows us to grasp a further confirmation of the expansive *vis* that seems to characterise the Union's order[58]. There is, in fact, a progressive expansion of the areas in which the European system, though not having direct competences, undertakes to direct the internal policies of the member states, even with non-binding acts[59].

In the area of land governance, as far as urban regeneration processes and reduction of land consumption are concerned,

[57]The full text is available at https://eurocities.eu/wp-content/uploads/2021/11/Ljubljana-Agreement.pd

[58] This element was already analysed twenty years ago, see in this regard M.P. Chiti, *Il ruolo della Comunità europea nel governo del territorio*, 3 Rivista giuridica dell'edilizia 91 (2003).

[59] J.B. Auby, *Europe's administrative rights: a convergence towards common principles?*, in G. Falcon (ed.), *Il diritto amministrativo dei paesi europei, tra omogenizzazione e diversità culturali* (2005); G. Della Cananea, C. Franchini, *I principi dell'amministrazione europea* (2013); J.B. Auby, J. Dutheil de la Rochère, *Traité de droit administratif européen* (2022); M. P. Chiti, *Diritto amministrativo europeo* (2011); R. Chieppa, *Le nuove forme di esercizio del potere e l'ordinamento comunitario*, 6 Rivista italiana di diritto pubblico comunitario 319 (2009); S. Cassese, *Diritto amministrativo europeo e diritto amministrativo nazionale: signoria o integrazione?*, 5 Rivista italiana di diritto pubblico comunitario (2004).

Europe's role seems to translate into mostly coordination activities[60], which rely, in fact, on the spontaneous adhesion of Member States, while respecting the differences of each social and territorial context[61].

While the multilevel nature of urban policies, which seem to be combined with an organic and integrated approach, cannot be disputed, the choice of the concrete instruments to be used is the responsibility of individual states. It is up to the latter not only to govern the territory in the public interest, but also to protect the private interests involved in regeneration: first and foremost those of property owners.

5. Urban regeneration to the test of (public and private) interests

5.1 The relationship with private interests: ownership.

In the area of land governance, as has been effectively pointed out, "public decisions reach the highest level of conflictuality, due to the presence [on land] of innumerable interests"[62]. Planning, in fact, necessarily affects land, which, on the one hand, is a scarce resource but, on the other, is a necessary element for the exercise of multiple rights and interests that are recognised as having legal value within society[63]. Interests, therefore, regardless of their nature, tend to "make space", in the literal meaning of occupying land for a given purpose and in the figurative meaning of asserting themselves in administrative choices, with the effect of inevitable conflicts[64]. Urban planning, therefore, is the place to address this inescapable factual situation,

[60] E. Carloni, M. Vaquero Pineiro, *Le città intelligenti e l'Europa. Tendenze di fondo e nuove strategie di sviluppo urbano,* 4 Istituzioni del Federalismo 865 (2015); E. Mariotti, *Lo schema di sviluppo dello spazio europeo. Linee guida per un diritto urbanistico europeo*, 5 Rivista giuridica ambiente 775 (1999); G. Soricelli, Il *"Governo del Territorio": nuovi spunti per una ricostruzione sistematica?*, 6 Rivista giuridica dell'edilizia 663 (2016).

[61] L. Torchia, *Il governo delle differenze. Il principio di equivalenza nell'ordinamento europeo* (2006); F. Giglioni, *Governare per differenza. Metodi europei di coordinamento* (2012).

[62] This opens the contribution by L. Casini, *L'equilibrio degli interessi nel governo del territorio* (2005).

[63] F. Salva, F. Teresi, *Diritto urbanistico* (1986); G. D'Angelo, *Cento anni di legislazione urbanistica*, 2 Rivista giuridica dell'edilizia 121 (1965).

[64] P. Stella Richter, *Profili funzionali dell'urbanistica* (1984).

since the administration must recompose and balance the conflicting interests for the purpose of the orderly organisation of the territory[65]. It is inescapable, in this sense, that the administration should give preference to some interests and sacrifice others, making a choice[66].

In this sense, if it is true that the powers assigned by law to the Public Administration are moulded according to the relative administrative function[67], it is then possible to ask how urban regeneration can affect the powers of government of the territory; at the same time, if it is true that the legal situation of interest is nothing more than the mirror of the exercise of a given power[68], then it is possible to investigate how the powers to be attributed to urban regeneration relate to private interests. In the first place, urban regeneration seems to broaden, on the one hand, and better specify, on the other, the range of purposes to which the function of territorial government is dedicated, exerting a centripetal force on public interests[69], aimed at reuniting and interconnecting[70]. As for the private interests involved in regeneration activities, they do not seem to be identifiable as "new" compared to those emerging in general urban planning. Nevertheless, it is nevertheless possible

[65] G. Pastori, *Governo del territorio e nuovo assetto delle competenze statali e regionali,* in B. Pozzo, M. Renna (eds.), *L'ambiente nel nuovo titolo V della Costituzione* (2004); S. Campbell, *Green cities, growing cities, just cities?: Urban planning and the contradictions of sustainable development*, 62 Journal of the American Planning Association (1996).

[66] G. Morbidelli, *Modelli di semplificazione amministrativa nell'urbanistica, nell'edilizia, nei lavori pubblici (ovvero della strada verso una sostenibile leggerezza delle procedure)*, in L. Vandelli, G. Gardini (eds.), *La semplificazione amministrativa* (1999).

[67] The well-known reference is to the reconstruction by M. Nigro, *Studi sulla funzione organizzatrice della pubblica amministrazione* (1966).

[68] F.G. Scoca, *L'interesse legittimo storia e teoria* (2018).

[69] On public interests, see M.S. Giannini, *Diritto amministrativo* (1967) who qualifies them as legal positions of which a subjective figure is the bearer that the rules qualify as public; as well as G. Corso, *Manuale di diritto amministrativo* (2003), where it is clarified that the public interest is "institutionally codified in a rule or policy or measure that are in force. It is not so much its content that is relevant as the fact that it has been crystallised in a determination of the public powers"; and F.G. Scoca, *Il coordinamento e la comparazione degli interessi nel procedimento amministrativo*, in VV. AA., *Convivenza nella libertà. Scritti in onore di G. Abbamonte* (1999), where public interest is defined as "concrete (legally relevant) purpose that the power must, through its exercise, allow to be achieved".

[70] We will return to this point in the next paragraph

to investigate how they are affected by the new function. As a preliminary remark, it is worth remembering that the doctrine's general distinction between individual and collective private interests does not lose its validity[71].

These abstract categories can well be dropped into the field of territorial governance understood, for our purposes, as the legal space where the function of urban regeneration is exercised[72].

On the one hand, in fact, urban regeneration itself seems to have found legitimacy precisely because of the emergence of widespread interests that were no longer adequately reflected in classical planning. In other words, those interests that are the expression of social rights and so- called performance rights, the implementation of which necessarily depends on public intervention to realise their claim, have become increasingly important[73].

On the profile of individual interests, at the same time, economic and proprietary interests clearly emerge.

With regard to the first profile, it should be noted that liberalisation processes have progressively led to limiting the effects of planning on economic and commercial activities[74]. This

---

[71] On this point, D. Donati, *Stato e territorio* (1924); M.S. Giannini, *Diritto amministrativo*, cit. at. 70, 113.

[72] On the relationship between space in the material sense and legal space, see: F. Di Lascio, *La regolazione amministrativa degli spazi urbani,* 2 Munus 315 (2016); B. Sordi, *Il tempo e lo spazio dell'attività amministrativa nella prospettiva storica*, 32 Quaderni fiorentini (2003); N. Irti, *Norma e luoghi. Problemi di geo-diritto* (2006).

[73] P. Mantini, *Le trasformazioni del diritto urbanistico* (2012); C. Lamberti, *Piano regolatore e principio di imparzialità*, in P. Stella Richter (ed.), *La perequazione delle diseguaglianze: tra paesaggio e centri storici. Studi dal XX Convegno nazionale* (2018). By performance rights is meant, as is well known, that particular category of social rights whose fulfilment requires public intervention that guarantees their realisation, think of education or the right to health. *Ex multis*: P. Grossi, *Qualche riflessione per una corretta identificazione e sistemazione dei diritti sociali,* in VV.AA, *Studi in onore di Mario Grandi* (2005); G. Corso, *I diritti sociali nella Costituzione italiana*, 3 Rivista trimestrale di diritto pubblico 758 (1981); V. Crisafulli, *Le norme "programmatiche" della Costituzione,* i V. Crisafulli (ed.), *La Costituzione e le sue disposizioni di principio* (1952); L.R. Perfetti, *Pretese procedimentali come diritti fondamentali. Oltre la contrapposizione tra diritto soggettivo e interesse legittimo*, 3 Diritto processuale amministrativo (2012).

[74] A. Travi, *Attività commerciali e strumenti urbanistici: ovvero, "il diritto preso sul serio"*, 1 Urbanistica e appalti 97 *(*2014); T. Bonetti, *Pianificazione del territorio e attività commerciali*, Urbanistica e informazioni 66 (2012); E. Dallari, *Potere di pianificazione urbanistica ed attività economiche*, in VV.AA., *Diritto amministrativo e società civile* (2019); T. Bonetti, *Pianificazione urbanistica e regolazione delle attività*

does not mean that any impact of urban regeneration policies on economic interests should be excluded. The territory necessarily remains the terminal of commercial, industrial and tertiary activities, and "the insertion in urban planning instruments of forecasts pertaining to economic activities is, in any case, fully compatible both with the ultimate purpose of urban planning - which is to reconcile the various interests regarding the use of the territory, among which are to be included, in a certainly not residual position, also the interests in the use of this for economic purposes - and with the typical and usual contents of urban planning"[75].

In other words, the freedom of establishment from a European source cannot be read as the absolute primacy of companies "to exercise economic activity at all times and in all cases, having to deal with the urban planning power of settlements, including productive and commercial ones"[76].

---

commerciali nei centri storici, 3 Rivista giuridica di urbanistica 386 (2017); E. Boscolo, *La Liberalizzazione del commercio e limiti urbanistici,* 1 Urbanistica e appalti 101 (2017); P. Urbani, *Governo del territorio e delle attività produttive. Tra regole, libertà d'iniziativa economica e disciplina della proprietà*, 12 Urbanistica e appalti 1309 (2016); M. Dugato, *Gli strumenti territoriali come strumenti di programmazione economica*, 2 Istituzioni del federalismo 261 (2009); P.L. Portaluri, Primauté *della pianificazione urbanistica e regolazione delle attività commerciali*, www.giustizia-amministrativa.it (2013); A. Lolli, *Pianificazione urbanistica, interessi economici e pianificazioni commerciali*, in M. Cammelli (ed.), *Territorialità e delocalizzazione nel governo locale* (2007); G. Caia, *Governo del territorio e attività economiche*, 4 Diritto amministrativo 707 (2003); G. Morbidelli, *Rapporti tra disciplina urbanistica e disciplina del commercio*, Rivista giuridica urbanistica 160 (1990).

[75] G. Caia, *Governo del territorio e attività economiche,* cit. at. 75, 708.

[76] Cons. Stato, sec. IV, 20 July 2017, no. 3574. On this point, see F. Dallari, *Vincoli espropriativi e perequazione urbanistica. La questione della discrezionalità*, (2018), in particular footnote no. 167, where it is clarified that "according to constant case law: the internal process of liberalisation of economic activities pursued through the above-mentioned legal provisions (to which must be added those contained in Legislative Decree 26 March 2010, no. 59, implementing Directive 2006/123/EC on services in the internal market - so-called "Bolkestein Directive". "Bolkestein Directive"), although it moves in the direction of a broader recognition of the right of economic initiative and the simultaneous reduction of the possible limits to its exercise, nevertheless still legitimises the provision of limits in function of the pursuit of further and different purposes of general interest, requiring that the opposing needs be balanced according to the limits of proportionality, reasonableness and the minimum means (most recently in this sense, Cons. Stato, V, 17 November 2016, No 4794, 13 September 2016, No 3857, 22 October 2015 No 4856; see also Corte cost, 19 December 2012,

With respect to economic interests (apart from individual potential disputes related to specific planning choices) the regeneration function is by no means neutral. In this respect, the positive and distributive economic effects of urban regeneration interventions have been demonstrated when they have led to a *tourn over of* economic activities, which have become more numerous and innovative, an increase in the resident population and related commercial activities and, finally, a general increase in the value of real estate[77].

Regeneration also has positive effects on the economic profile even if the reading of the data is detached from individual interests and brought back to a "macro" vision. Demolition and reconstruction activities, in fact, directly involve the building sector, which is able to activate (directly and indirectly) 86% of economic sectors[78].

In conclusion, the land shows a natural economic vocation, within which at least three use profiles can be recognised. Firstly, the territory is a resource to be directly exploited for agricultural, breeding, mining, construction, etc. purposes; secondly, it is a fundamental space for economic and production processes, essentially the place where these activities take place; finally, the territory is made up of multiple variables that determine the level of competitiveness and attractiveness of regions, thus influencing the social and economic development of the communities living there[79].

Alongside economic interests, as already mentioned, proprietary interests acquire a central profile, i.e. the interests of those who enjoy real rights over real estate, in relation to which

---

no. 291, 20 July 2012, no. 200)', so Cons. Stato, sec. V, 13 February 2017, no. 603)".

[77] C. Agnoletti, C. Bocci, *Gli effetti economici e distributivi degli interventi di riqualificazione urbana*, available at the link: http://www.irpet.it/storage/eventoallegato/1381_Paper.pdf; Dossier Studi Camera dei Deputati - Servizio Studi, Dipartimento ambiente, *Le politiche di rigenerazione urbana - Prospettive e possibili impatti*, June 2022, available at the link: https://documenti.camera.it/leg18/dossier/pdf/am0036d.pdf?_1663759571309; J.N. Berry, N.G. Deddis, W.S. McGreal, *Urban RegenerationProperty investment and development* (1993).

[78] F. Monosilio, A. Bimbo, G. Altieri, E. Riccardelli (eds.), *L'industria delle costruzioni: struttura, interdipendenze settoriali e crescita economica* (2015).

[79] T. Bonetti, *Il diritto del "governo del territorio" in trasformazione. Assetti territoriali e sviluppo economico* (2011).

the relationship with public interests is of particular complexity[80]. The law attributes to the administration the power of conformity over real estate, understood under the dual profile of the determination of the use of land and the delimitation of the content and enjoyment of property, for the purposes of social utility[81]. The general regulatory plan or the implementation plans therefore contain different instruments affecting property rights. The two classic devices are those of zoning[82] and the affixing of constraints for expropriation purposes; while the former affect, in a variable manner, the *ius aedificandi*, the latter are predetermined to the acquisition of the property by the public and affect the value of the property[83].

The basic problem in this field has always been that "of the competition and therefore of the opposition between the powers of the owner and the powers of the Public Administration, i.e. of the expectation that the same property generates, of satisfaction of the individual interest and of compliance with the general interests"[84]. Keeping aside the very wide debate on the nature of constraints and its effects[85], which is extraneous to the purpose of this contribution, it is worth pointing out that in the instruments of urban regeneration it seems to be relevant, in particular, the so-

[80] A. Predieri, *Pianificazione e costituzione* (1963); N. Blomley, *Land use, planning, and the "difficult character of property"*, 18 Planning Theory & Practice (2017).

[81] M.S. Giannini, *Introduzione sulla potestà conformativa del territorio*, in L. Barbiera (ed.), *Proprietà, danno ambientale e tutela dell'ambiente* (2006); P. Urbani, *Il contenuto minimo del diritto di proprietà nella pianificazione urbanistica*, available at the link: https://www.pausania.it/wp-content/uploads/files/cont.%20mnimo%20dir.%20propr..corretto.pdf; A.N. Niyazova, M.K. Suleimenov, K.M. Ilyassova, G.T. Kaziyeva, *Land proprietary rights and limitations in private and public interests*, 7 Land Proprietary Rights and Limitations in Private and Public Interests (2016).

[82] For a general reconstruction: D.R. Mandelker, M.A. Wolf, *Land Use Law* (2015).

[83] P. Urbani, *Urbanistica solidale* (2011).

[84] P. Stella Richter, *Proprietà immobiliare e pianificazione urbanistica*, Rivista giuridica di urbanistica 579 (1991).

[85] And on which we refer, *ex multis*, to: M.S. Giannini, *Introduzione sulla potestà conformativa del territorio*, cit. at. 82; P. Stella Richter, *Proprietà immobiliare e pianificazione urbanistica*, cit. at. 84, 579; P. Urbani, *Conformazione della proprietà, diritti edificatori e moduli di destinazione d'uso dei suoli*, 8 Urbanistica e appalti 905 (2006); A.M. Sandulli, *Natura ed effetti dell'imposizione di vincoli paesistici* (1963).

called mixed conformative constraints[86], with public or private initiative[87]. These are provisions "that impose a destination (even of specific content) that can be realised by private initiative or promiscuous public-private initiative, that do not necessarily entail expropriation or interventions at the exclusive public initiative and therefore can also be implemented by the private subject and without the need for prior ablation of the property"[88]. This may be the result of a planning policy choice whenever the general interest objectives of providing the territory with facilities and services are deemed feasible also through private economic initiative - albeit accompanied by convention instruments.

The emergence of this new category seems to respond to the ongoing transformation of the relationship between power and property. In fact, urban planning, even at the regional level[89], is increasingly characterised by compensatory and equalising instruments, also due to the now structural financial shortages faced by municipal administrations[90]. Compared to the affixing of classic conformative or expropriative constraints, in the

[86] On the difference between conformative and expropriative constraints, see, among the most recent, Cons. Stato, Sec. VI, 30 January 2020, 783.

[87] P. Urbani, *Urbanistica solidale*, cit. at. 83, 30; P. Urbani, *Il tema del contenuto minimo del diritto di proprietà nella pianificazione urbanistica,* cit. at. 82, 335. Such constraints are to be considered as merely conforming and, to that effect, not subject to compensation in favour of the private party, thus, for example, Cons. Stato, Sec. V, 31 March 2016, no. 1268; TAR Puglia Lecce, Sec. III, 12 February 2014, no. 416.

[88] Point 5 of the consideration in law, Corte cost., judgment 20 May 1999, no. 179, 1 Foroit. 1705 (1999). Among the numerous comments on this judgement: S. Bonatti, *Palinodia della Corte costituzionale in tema di indennizzabilità dei vincoli d'inedificabilità, alla luce della Giurisprudenza della Corte europea dei diritti dell'uomo*, 3 Rivista italiana di diritto pubblico comunitario 881 (1999); S. Civitarese Matteucci, *La reiterazione dei vincoli urbanistici decaduti come misure "sostanzialmente espropriative"*, 4 Le Regioni 804 (1999); D. De Pretis, *I vincoli di inedificabilità di nuovo al vaglio della Corte costituzionale: aggiornamento della categoria e indennizzo per la reiterazione*, Rivista giuridica di urbanistica 289 (1999); P. Stella Richter, *A proposito dei vincoli a contenuto sostanzialmente espropriativo*, 7 Giustizia civile 2597 (1999).

[89] L. Giani, *Il sistema dei diritti edificatori tra mercato, equità ed evidenza pubblica. La perequazione urbanistica nell'esperienza regionale lucana,* 1 Rivista amministrativa degli appalti 29 (2011).

[90] On this point, M.A. Quaglia, *Pianificazione urbanistica e perequazione* (2000); V. Cerulli Irelli, *La soggezione della proprietà immobiliare al potere di pianificazione*, in P. Urbani (ed.), *Le nuove frontiere del diritto urbanistico* (2013), where he considers obsolete the affirmation that the jus aedificandi is inherent to the typical, minimum content of real estate property.

hypotheses of public/private collaboration, property relates differently to administrative action, since we are witnessing a process of dematerialisation of the *jus aedificandi*[91], its components being freely exchangeable on the market regardless of the ownership of the property.

Indeed, there is no shortage of criticism in doctrine regarding the effectiveness of the path followed by regional legislation, but also national legislation, of giving preference to negotiated or contracted town-planning tools[92], since they translate into punctual interventions, circumscribed and not always consistent, applicable only on the basis of the willingness of the private party to intervene and, also for these reasons, limited to areas that offer opportunities for gain[93].

There are also general doubts as to whether building rights should be fully negotiable, even between private individuals and administrations. Where a private party's building right is established on the basis of a negotiated deed, one of the classic powers of territorial government becomes inexercisable, namely the possibility of modifying planning choices already made, i.e. of changing the destinations previously assigned to individual portions of land[94].

5.2 The coordination of public interests

The issues of soil consumption and urban regeneration pose complex questions that unite various areas of relevance for the law, from the environment to town planning, from agriculture to

[91] The concept is taken up by T. Bonetti, *Il diritto del "governo del territorio" in trasformazione. Assetti territoriali e sviluppo economico* 71 (2011).

[92] The reference is to L. De Lucia, *Il contenimento del consumo di suolo nell'ordinamento italiano*, in F. Cartei, L. De Lucia (eds.), *Contenere il consumo del suolo. Saperi ed esperienze a confronto* (2014), where it is clarified that "it should be noted, however, that land saving presupposes the abandonment of counterproductive instruments. This is the case of the institutes of compensation and equalisation, which, moreover, have seduced a large part of the country's urban, legal and political culture"; P. Maddalena, *Il consumo di suolo e la mistificazione dello* ius aedificandi, available at the link: http://www.salviamoilpaesaggio.it/blog/2014/02/il-consumo-di-suolo-e-la-mistificazione-dello-ius-aedificandi/.

[93] S. Rusci, *La città senza valore* (2021).

[94] V. Cerulli Irelli, *La soggezione della proprietà immobiliare al potere di pianificazione*, cit. at. 90, 80.

the landscape[95]. The regulatory framework, however, is far more fragmented than this consideration, since while urban planning is assigned the strict task of the orderly organisation of the territory, the protection of the so-called differentiated interests is assigned to autonomous disciplines[96]. In our legal system, in fact, there remain numerous matters that are considered differentiated, i.e. aimed at regulating specific aspects of land use, responding to public interests considered to be of particular constitutional value. These disciplines, which affect a single material object (the territory[97]), not only come from "distinct legislative power [...], but, at the level of administrative function, are regulated by their own procedures and often even report to different authorities than those in charge of the urban planning function"[98]. The reference is obviously to the protection of the landscape, which can be achieved by means of the landscape plan[99], to soil and water protection (including from pollutants), which is instead the subject of the basin plan or excerpts thereof[100], and, finally, to the regulation of national or regional parks, which is entrusted to the park plan[101].

---

[95] G.A. Primerano, *Il consumo di suolo e la rigenerazione urbana. La salvaguardia di una matrice ambientale mediante un strumento di sviluppo sostenibile* (2022).

[96] The expression differentiated interests is due, as is well known, to V. Cerulli Irelli, *Pianificazione urbanistica ed interessi differenziati*, 2 Rivista trimestrale di diritto pubblico 386 (1985). On this point see also: S. Civitarese Matteucci, *Sulla dinamica degli interessi pubblici nella pianificazione urbanistica*, 2 Rivista giuridica dell'edilizia 155 (1992); E. Picozza, *Il piano regolatore urbanistico comunale* (1983). This term refers to particular strong interests, considered as limits to urban planning, since the law provides that they are the subject of specific and autonomous competences.

[97] M. Cafagno, *Principi e strumenti di tutela dell'ambiente come sistema complesso, adattativo, comune,* (2007), recalls that "the regulations functional to the care of the town-planning interest usually consciously look at the territory as an indivisible good but rival in consumption".

[98] P. Stella Richter, *I principi del diritto urbanistico* (2018).

[99] The landscape plan was envisaged since Law no. 1497 of 29 June 1939, Protection of Natural Beauties (repealed by article 166, paragraph 1, of Legislative Decree no. 490 of 29 October 1999), now a regional competence, pursuant to Legislative Decree no. 42 of 22 January 2004.

[100] Law 18 May 1989, no. 189, now Legislative Decree 3 April 2006, no. 152.

[101] Regulated by Law 19 October 1991, no. 349 and the various regional laws. For an in-depth study: N. Gullo, *Il coordinamento tra la pianificazione dei parchi e delle aree naturali protette e la pianificazione urbanistica*, 1 Rivista giuridica di urbanistica 235 (2012); Torelli G, *Il sistema dei parchi della Val di Cornia: una*

The legal system provides for the protection of these, special, interests in two distinct ways. In the first hypothesis, protection is satisfied by means of a measure to ascertain the characteristics of certain assets, as a result of which there are restrictions on use. This method has two main consequences: «(a) physical changes in such areas are subject to an authorisation separate from the title authorising building; (b) the regulation of the use of those locations, by the municipality, can only be established through an agreement with the administration that has the care of the differentiated interest. In the second type, on the other hand, the differentiated interest is the subject, in turn, of an act of territorial planning, with which urban planning in the strict sense must be coordinated»[102].

As is well known, the provisions contained in the "differentiated" plans also have conformative effects on property and, since the plans are positioned in hierarchy with each other, the content of the superordinate plan prevails over the provisions of the subordinate plans[103].

Town planning, in the light of this hierarchical scheme, seems to have been greatly weakened, since its function is largely reduced by planning on differentiated and prevailing interests, assumed by autonomous administrative authorities[104]. As noted by authoritative doctrine[105], the instruments for the protection of differentiated interests have proved to be stronger and more effective than planning, mainly for two reasons: firstly, these interests have been deemed by the law itself to be "primary and absolute"; secondly, the conformative effect on property deriving

significativa esperienza di valorizzazione ambientale e culturale da recuperare, 2 Aedon (2021).

[102] P. Urbani, S. Civitarese Mattucci, *Diritto urbanistico. Organizzazione e rapporti* (2003).

[103] A. Bartolini, *Pianificazione e depianificazione*, 2 Quaderni della Rivista giuridica dell'edilizia 151 (2014).

[104] From the outset, in fact, authoritative doctrine had found that "the content and object of territorial policy, and in particular of the function of general territorial (urban) planning, are limited by the fact that a series of activities (with territorial impact) and certain species of immovable property, insofar as they express public interests differentiated from the (general) policy of the territory, are in turn the object of public functions differentiated from the latter and attributed to subjects or bodies expressly assigned by law to their care", V. Cerulli Irelli, *Pianificazione urbansitica ed interessi differenziati*, cit. at. 96, 441.

[105] P. Conforti, *Il "consumo' del territorio e le sue limitazioni. La Rigenerazione Urbana"*, available at: www.giustizia-amministrativa.it.

from sector plans does not entail any obligation to compensate the private property concerned and has no deadline[106].

At one time, indeed, the protection of differentiated disciplines was ensured by means of "exceptions" to the primacy of town planning: certain areas considered sensitive were excluded from planning, since they were subject to different protection by other administrations[107]. Urban planning, which at the time was certainly about expansion, could not but be in conflict with the protection of the environment, landscape and cultural heritage, which required maintaining the *status quo.* In relation to differentiated rights, therefore, external limits were placed on urban planning power[108]. In other words, the dynamism of planning was contrasted with the static nature of environmental and landscape protection[109].

Recently, however, the picture, while complex, seems to have changed. Not only has the aim of land development (if understood as the expansion of building activities) become recessive, but alongside it, together with the emergence of the objectives of regeneration and limiting land consumption, the protection of values such as the environment, the landscape and the safety of the territory has become increasingly prominent[110].

At the same time, over the last forty years, as is well known, alongside the vertical articulation of levels of administration, "there has been a horizontal crowding of powers that «invade» the government of the territory, and pressurise traditional urban planning power. This crowding, and competition, is being attempted to be remedied in regional legislation by multiplying, on paper, the mechanisms of co-planning, coordination and

---

[106]These characteristics derive from the conformative and not expropriative nature of the constraints, as established by the famous Constitutional Court rulings no. 55 and no. 56 of 1968, an extensive reconstruction, also in terms of doctrinal contributions, regarding the effect of these pronouncements can be found in S. Moro, *Il governo del territorio e le situazioni proprietarie*, (2017), in particular Chapter I, *Le limitazioni amministrative alla proprietà edilizia nel periodo antecedente alle sentenze nn. 55/1968 e 56/1968 della Corte costituzionale,* 1-31.

[107] V. Cerulli Irelli, *Pianificazione urbanistica e interessi differenziati,* cit. at. 96, 104, 413.

[108] P. Chirulli, *Urbanistica e interessi differenziati: dalle tutele parallele alla pianificazione integrata*, 1 Diritto Amministrativo 62 (2015).

[109] V. Cerulli Irelli, *Urbanistica e interessi differenziati,* cit. at. 96, 104, 107, 386, defines "static" differentiated interests.

[110] *Idem*.

agreement. This warp, not always coherent, of heterogeneous conventional forms risks «being a Penelope's web» if all the parties present in the public arena do not come to an agreement, as frequently happens"[111].

As could be expected, the proliferation of sectoral plans, or thematic plans, has made it necessary to introduce innovative instruments for coordination and integration between the different spatial governance competencies. For example, environmental interests have been introduced directly into the planning process[112].

In order to ensure the compatibility of spatial planning with environmental protection, in fact, strategic environmental assessment (SEA) has been made a prerequisite for the validity of the plan itself[113]. Environmental protection is thus integrated into the veryprocess of evaluating interests for planning purposes, instead of being just an external element that applies to specific

[111] S. Amorosino, *Retaggi della legge urbanistica e principi del governo del territorio*, 3 Rivista giuridica di urbanistica (2018).

[112] S. Civitarese Matteucci, *Governo del territorio e paesaggio*, in G. P. Rossi (ed.), *Diritto dell'ambiente* (2011); P.L. Portaluri, *L'ambiente e i piani urbanistici*, in G.P. Rossi (ed.), *Diritto dell'ambiente* (2021); B. Caravita di Toritto, *L'ambiente e i suoi confini*, in B. Caravita di Toritto, L. Casetti, A. Morrone (eds.), *Diritto dell'ambiente* (2005).

[113] The SEA is an institute of European derivation (it was introduced by Directive 2001/42/EC) incorporated into the Environmental Code, aimed at integrating the analysis of the effects of human activity on the environment into the planning process. On this point, in the context of a very broad doctrine, we point out: F. Fracchia, F. Mattassoglio, *Lo sviluppo sostenibile alla prova: la disciplina di VIA e di VAS alla luce del D.Lgs. n. 152/2006*, 1 Rivista trimestrale di diritto pubblico 121 (2008); E. Boscolo, *La valutazione ambientale strategica di piani e programmi*, 1 Rivista giuridica dell'edilizia 3, (2008); R. Ursi, *La terza riforma della parte II del Testo unico ambientale*, 1 Urbanistica e Appalti 13 (2011); M. Mazzoleni, *La Valutazione Ambientale Strategica: applicazione pratica e giurisprudenza tra i ripensamenti del Legislatore*, 11 Ambiente e Sviluppo 8, (2010); F. Doro, *La Valutazione Ambientale Strategica nella giurisprudenza amministrativa, costituzionale e comunitaria: profili sostanziali e implicazioni processuali*, 1 Rivista giuridica urbanistica 141 (2013); D.M. Traina, *Problematiche applicative e rapporti tra le procedure di VAS, VIA e AIA*, 13 Federalismi 224 (2023); G. Delle Cave, *La Valutazione Ambientale Strategica: ratio, caratteristiche e peculiarità (nota a Consiglio di Stato*, Sez. *II, 01 September 2021, n. 6152)*, available at https://www.giustiziainsieme.en/en/environment-and-security/2019-the-strategic-environmentalassessment-ratio-characteristics-and-peculiarities-note-a-council-of-state-sez-ii-01-september-2021-n-6152; G. Fonderico, *La "codificazione" del diritto dell'ambiente in Italia: modelli e questioni*, 3 Rivista trimestrale di diritto pubblico 613 (2006).

geographical areas. With reference to the landscape, on the other hand, the distinction between differentiated protection and the town-planning function is more complex[114], since two distinct authorities find themselves exercising autonomous powers, with adjoining purposes, with reference to the same territory. The plurality of planning instruments, in fact, does not always allow, in practice, the integration and complementarity that the abstract legislation would like to outline: "integration between different levels of urban planning has, in fact, clear theoretical justifications, but concrete experience shows how difficult its translation into reality is, despite and against the relevant legislative provisions"[115]. Differentiated interests, as mentioned, came into tension with urban planning because while the former required a conservative approach to the territory, the latter had a transformative effect[116]. That is, the dynamism of planning was contrasted with the static nature of environmental and landscape protection[117].

On this point, theoretically, the function of urban regeneration could involve a mitigation of this tension. In fact, the concept of regeneration fully encompasses the protection of the landscape, respect for the ecosystem, the enhancement of environmental and cultural assets, and the implementation of public services. Urban regeneration, if correctly interpreted and regulated as an administrative function, could have the capacity to

---

[114] Pursuant to Article 131 of Legislative Decree no. 42 of 22 January 2004, the Cultural Heritage and Landscape Code, this is defined as "the territory that expresses identities, the character of which derives from the action of natural and human factors and their interrelationships". It is therefore not easy to draw a clear distinction between the protection of the landscape, thus understood, and the orderly organisation of the territory. On this point, among many: A. Predieri, *Paesaggio*, in VV.AA., *Enciclopedia del diritto* (1981); A. Predieri, *Urbanistica, tutela del paesaggio, espropriazione* (1969); G. Sciullo, *I vincoli paesaggistici ex lege: origini e ratio*, 1 Aedon (2012); S. Amorosino, *Dalla disciplina (statica) alla regolazione (dinamica) del paesaggio: una riflessione d'insieme*, in E. Casetta, A. Romano, F. G. Scoca (eds.), *Studi in onore di Leopoldo Mazzarolli* (2007).

[115] G. Pagliari, *Pianificazione urbanistica e interessi differenziati*, 2 Quaderni della Rivista giuridica dell'edilizia 199 (2014).

[116] S. Amorosino, *Dalla disciplina (statica) alla regolazione (dinamica) del paesaggio: una riflessione di insieme*, in E. Casetta, A. Romano, F. G. Scoca (eds.), *Studi in onore di Leopoldo Mazzarolli* cit. at. 113, 143.

[117] V. Cerulli Irelli, *Pianificazione urbanistica e interessi differenziati*, cit. at. 96, 104, 107, 109, 386, defines differentiated interests as "static".

give new "lymph" to the government of the territory, with a view to integral town planning, understood as a global discipline of land use[118].

In this sense, however, the approach that sees incentives and rewards to private individuals as the only, or prevalent, regeneration tools should be overcome. Such options, in fact, cannot but entail a risk of contradiction with respect to differentiated protections, especially when they take the form of derogations from urban planning/building regulations. The regional legislation that ensures private individuals wishing to engage in regeneration the increase of cubage or the possibility of exceptions to the regulation of maximum heights and distances between buildings, also providing for simplified procedures for the spending of bonuses, risks conflicting with the protection of the landscape.

Even for the purposes of urban regeneration, an evolution of the traditional parallel protections may therefore be considered desirable, «towards a "multi-scalar integrated" system, within which the municipal town planning plan becomes the instrument of expression at the local scale of sectoral policies»[119].

On the other hand, the differentiation of protections is not an insuperable principle, but a simple legislative technique, according to which some rights are isolated from the general context, to become the object of differentiated public functions[120].

The function of regeneration, on the other hand, on the basis of the characteristics we have identified, could not have effective results if it did not have the capacity to reunite the public interests connected to the general government of the territory, recomposing the currently fragmented interests and, to the effect, also the relative plans.

---

[118] E. Sticchi Damiani, *Disciplina del territorio e tutele differenziate: verso un'urbanistica "integrale"*, in VV. AA., *L'uso delle aree urbane e la qualità dell'abitato* (2000).

[119] E. Boscolo, *Il piano regolatore comunale*, in S. Battini, L. Casini, G. Vesperini, C. Vitale, *Codice di edilizia e urbanistica* (2013), 191; P. Chirulli, *Urbanistica e interessi differenziati: dalle tutele parallele alla pianificazione integrata,* cit. at. 107, 51.

[120] E. Cardi, *La ponderazione degli interessi nel procedimento di pianificazione urbanistica*, 3 Foro Amministrativo 865 (1989).

6. Concluding reflections

The reflections set out so far have started from the assumption that "avoiding new soil consumption becomes a strategic objective to be pursued through urban regeneration"[121], and have led to the belief that the realisation of these objectives calls for a paradigm shift in the system of land governance, in particular on two essential profiles of town planning, which are deeply interconnected: the relationship between planning power and private property and the choice of differentiated protection.

As to the first profile, urban regeneration, due to its characteristics of intervention on the built-up area, cannot but affect dominical rights, but encounters difficulties intrinsic to urban planning[122]. Historically, in fact, the public power of conformation has been distinguished between land conformation and property conformation, where the former pertains to general planning acts and the latter - generally if not exclusively - to implementation measures[123].

While the conformation of the territory entails the affixing of conforming constraints, which are not subject to a time limit and cannot be indemnified, the affixing of a specific conforming constraint has an essentially expropriatory nature and, as a result, it lapses or, if reiterated, imposes an indemnity on the private party[124]. Well, it is not entirely clear what type of constraint is affixed by urban planning instruments that pursue urban regeneration purposes. Even recently, in fact, jurisprudence has clarified that the allocation of an area for collective use imposed by the urban planning instrument where it aims to identify specific assets for the creation of a non-built up area entails the

---

[121] R. Dipace, *Le politiche di rigenerazione dei territori tra interventi legislativi e pratiche locali*, 3 Istituzioni del Federalismo 630 (2017).

[122] Davy's reflection starts from the same considerations, which makes it clear that "planning interventions in property can only be successful if planners and policymakers have a clear idea about the link between planning and property", B. Davy, *Land Policy. Planning and the Spatial Consequences of Property* 3 (2012).

[123] P. Stella Richter, *Conformare*, 1 Il Diritto processuale amministrativo 165 (2020).

[124] For a general reconstruction L. Piscitelli, *Potere di pianificazione e situazioni soggettive* (1990); C. Tucciarelli, *Vincoli conformativi e sostanzialmente espropriativi. Appunti, relazione al Corso di aggiornamento e formazione per magistrati amministrativi - "Le procedure espropriative, a venti anni dall'entrata in vigore del D.P.R. n. 327 del 2001"*, available at the link: www.giustiziaamministrativa.it.

imposition of substantially expropriatory constraints[125]. A different path, on the other hand, seems to have been taken by the category of so-called recognitive constraints, linked to the protection of differentiated interests, the affixing of which does not envisage any term of effectiveness nor does it entail any obligation of compensation in favour of private individuals[126] . For these reasons, too, landscape plans have prevailed over urban planning plans. Indeed, it may prove difficult to trace a difference in the theoretical profile between the two types of constraint, conformative and recognitive. It seems, rather, that constitutional jurisprudence has recognised a particular value that the law assigns to the environment and landscape, such that their defence must be ensured even at the expense of the rights of owners. Thus, through the introduction of the category of reconnaissance constraints, the administration has the possibility of conforming the territory even in the absence of the financial resources to protect the position of private individuals[127]. In the light of these premises it is natural, then, to question the nature of the constraints that would allow the realisation of regeneration objectives, in order to verify whether these would entail a

[125] Court of Cassation, Sec. I Civil, Order (ud. 24 June 2022) 22 December 2022, no. 37574.

[126] *Ex multis*: G.F. Cartei, *La disciplina dei vincoli paesaggistici: regime dei beni ed esercizio della funzione amministrativa*, 1 Rivista giuridica dell'edilizia 18 (2006); F. Pagano, *Vincoli ablativi e ricognitivi nella pianificazione territoriale ed urbanistica*, 6 Rivista giuridica dell'edilizia 255 (2001); M. Renna, *Vincoli alla proprietà e diritto dell'ambiente*, 4 Il Diritto dell'economia (2005); G. Iacovone, *Interesse proprietario e interesse pubblico alla trasformazione del territorio*, 4 Rivista giuridica dell'edilizia 231 (2002); M. Immordino, *Vincolo paesaggistico e regime dei beni* (1991); P. Urbani, *Vincoli paesaggistici e vincoli di settore a qualificazione ambientale: i rapporti con la tutela della proprietà e la necessità di un loro riordino*, 1-2 Rivista giuridica di urbanistica 75 (2008).

[127] F.G. Scoca, *Relazione di sintesi*, in P. Urbani (ed.*), La disciplina urbanistica in Italia. Problemi attuali e prospettive di riforma* (1997), 159 that in general "it is undeniable that the category of "recognitive" constraints has been devised ad hoc by the Constitutional Court; that is, it is a mere "legal construction" (lacking a substantial substratum that actually exists) built by the Court precisely to avoid the indemnifiability of the sacrifices produced by such measures ordered by administrative action. In my opinion, the crux of this problem lies neither at the level of the constitution nor at the level of general theory and not even, probably, at the level of substantive justice: if, in fact, we examined the problem of indemnifiability under these points, it would be possible to find a positive solution. The only real problem remains that of finding financial resources".

limitation of the jus utendi such as to substantially empty the content of property rights, or whether the constitutional values that regeneration pursues allow a different interpretation. In other and simpler terms: could the urban regeneration tools of urban planning lead to the imposition of recognitive constraints on property? The realisation of urban regeneration objectives, on the other hand, cannot be understood as autonomous with respect to the care of differentiated interests and, while it cannot be limited to single, specific projects, neither can it be reduced to a legislative discipline that measures the permitted amount of soil consumption[128]. Regeneration requires a rethinking of urban planning "as a necessary part of a more complex function, which summarises and embraces the different components, economic, social, environmental and landscape of the territory"[129] . The horizon that these reflections draw, therefore, is that of greater integration, if not reunification, of the protection of the environment, the landscape, the territory and the interests that reside in them. The containment of soil consumption and regeneration objectives, finally, consolidate the need to make a political decision upstream, "whether to strengthen public intervention and try to recover the idea of rational land planning (ordered on the new and strong motivations of reduced soil consumption and urban regeneration) or whether to definitively abandon this enlightenment-rationalist idea and move definitively to so-called negotiated town planning by projects, focusing on equalisation and compensation as an alternative land management model to that of constraint and expropriation"[130]. The integration of the urban regeneration function into the planning system seems to prove more resilient when implemented through "public-led" instruments. The equalisation system, based on the division between actual and only potential building, which is also expressed in building compensations and in cases of building premiums, is in fact coherent only if the building potential has a spendable value in the market of "building

[128] P. Roberts, *The Evolution, Definition and Purpose of Urban Regeneration*, in P. Roberts, H. Sykes (eds.), *Urban Regeneration: A Handbook* (2008).
[129] P. Chirulli, *La pianificazione urbanistica tra esigenze di sviluppo e riduzione del consumo di suolo: la riqualificazione dell'esistente*, cit. at. 4,14,. 614.
[130] P. Mantini, *La perequazione urbanistica nel tempo della rigenerazione urbana*, in P. Stella Richter (ed.), *Studi del XX Convegno nazionale AIDU 29-30 settembre 2017 (Udine), La perequazione delle ineguaglianze tra paesaggio e centri storici* (2018).

credits"[131]. What can be the margins of compatibility between equalisation instruments and the new town planning aimed at zero land consumption and the simultaneous protection of the environment and landscape?

Equalisation, as is well known, is one of two ideological options arising from the inherent discriminatory nature of planning. In planning, the choice of zoning involves economic advantages for some and serious disadvantages for others. Faced with this element, there are only two possible options left: "to reserve the right to build to the municipality, thus equalising the ownership positions «downwards», or to distribute the advantages of building fairly through an equalisation system"[132].

Compared to the phase in which the systemic choice that led us down the road of equalisation was made, much has changed[133]. In fact, the legislator of regeneration and zero soil consumption has the burden of configuring planning instruments that primarily ensure the protection of land, the environment and other natural elements. In fact, buildability should become an exception to the general impossibility of building, planning would be directed to the transformation of the built-up area and not of the territory, and the right to build in relation to land ownership would disappear[134].

These considerations do not necessarily entail the opportunity to re-evaluate and update the content of the Sullo bill[135], but they certainly require a creative effort from the jurist, even before the legislator, which is indispensable for governing the territory and its changes.

---

[131] D.M. Traina, *Lo* ius aedificandi *può ritenersi ancora connaturale al diritto di proprietà*?, 5 Rivista Giuridica dell'Edilizia 258 (2013).

[132] P. Stella Richter, *Diritto urbanistico. Manuale breve* (2022).

[133] P. Chirulli, *Cosa rimane della pianificazione urbanistica*, 3 Rivista giuridica di urbanistica 484 (2021).

[134] G. Pagliari, *Governo del territorio e consumo del suolo. Riflessioni sulle prospettive della pianificazione urbanistica,* cit. at. 29-40, 346.

[135] From the name of the Minister of Public Works who in 1962 presented a proposal of urban reform in which it was foreseen, in extreme synthesis, the separation between the ownership of the areas of the territory affected by planning, which remained in public hands, and the right to build on them, which was granted to private citizens through auction mechanisms. On this point, *ex multis*: A. Becchi, *La legge Sullo sui suoli*, 3 Meridiana 107 (1997); E. Salzano, *Fondamenti di urbanistica. La storia e la norma* (2003); F. Oliva, *L'uso del suolo: scarsità indotta e rendita,* in F. Barca (ed.), *Storia del capitalismo italiano dal dopoguerra a oggi* (1997).

NOTES

AUTOMATED DECISIONS IN PUBLIC ADMINISTRATION PROCESSES: THE CASE OF THE AUSTRIAN PUBLIC EMPLOYMENT SERVICE ALGORITHM

Angela Ferrari Zumbini[*] *& Paola Monaco*[**]

Abstract

This article examines the complex legal issues surrounding the use of artificial intelligence and algorithmic decision-making by public administrations, focusing on the Austrian Public Employment Service's (AMS) algorithm, the *Arbeitsmarktchancen-Assistenzsystem* (AMAS). The study investigates the growing reliance on automated decision-making systems for enhancing administrative efficiency and objectivity, while highlighting significant risks to individual rights, such as data protection, transparency, and procedural fairness.

Through a detailed analysis of the AMS case, the article explores the application of Article 22 of the General Data Protection Regulation (GDPR), which governs automated individual decision-making and profiling. Central to this discussion is the interpretation of what constitutes an 'automated decision' under the GDPR, particularly in light of the landmark SCHUFA judgment by the Court of Justice of the European Union (CJEU).

[*] Professor of Administrative and Public Law, University of Naples Federico II

[**] Tenure-Track Researcher of Comparative Private Law, University of Trieste

Sections 1, 3.2, and 7 are co-authored. Paola Monaco is the author of the other sections.

This article is part of the project funded by the Italian Ministry of University and the European Union NextGenerationEU, PRIN Project n. E53D23006810006 – The Dark Side of Algorithms under the Comparative Lens: Automated Administrative Decisions between Efficiency and Due Process – AutAD.

TABLE OF CONTENTS

1. Introduction

It is abundantly clear that even the smallest aspects of our lives are increasingly governed (or at least could be) by Artificial Intelligence (AI). This can occur through the use of algorithms, which are expanding every day and in every area of our lives, whether simply by handling our smartphones or just walking down the street in areas monitored by surveillance cameras. While the opportunities and benefits arising from the use of AI are evident and easily encountered, it cannot be denied that its widespread use can create notable risks in various aspects. The impact and damage caused by AI in general are diverse, ranging from personal data breaches to physical injury caused by self-driving cars and purely economic losses resulting from the false information generated by AI systems.

With regard to this scenario, the article focuses on one specific area, namely the use of algorithms and AI technologies by public administrations and the need to ensure the protection of personal data.

Automated administrative decisions, i.e., those made by algorithms, are increasingly being used in many legal systems worldwide. It is generally recognised that automation can bring important benefits in terms of efficiency (the use of algorithms can lead to faster decisions and reduce subjective bias, thereby fostering objectivity). Still, automated administrative decisions pose new threats to many individual rights such as data protection and the

procedural rights of affected individuals, as well as to transparency[1].

The current legal debate seeks to offer analysis and solutions to the new problems and the questions raised by the impact on our lives of the use of AI systems by public administrations[2]. In this regard, several judicial decisions on the matter have been delivered at both national and European levels. These decisions are both significant and interesting, also because they represent an initial test case for identifying and highlighting the problems and risks arising from Automated Administrative Decision Making (ADM) as well as for considering possible solutions, both *de iure condito* and *de iure condendo*. One of these is that of the Supreme Administrative Court of Austria (*Verwaltungsgerichthof* - VwGH) of 21 December 2023[3].

To this end, after outlining the context of the use of algorithms in the public sector (§ 2), we will present the decision of the VwGH concerning the legitimacy of the Austrian Public Employment Service (*Arbeitsmarktservice Österreich* – AMS) using an algorithm to categorise jobseekers (§ 3). We will then examine the key aspects of the judgment, starting with the implications of Article 22 of the General Data Protection Regulation (GDPR) (§ 4), followed by a focus on the landmark *SCHUFA* Judgment by the Court of Justice of the European Union, which the Austrian court had been waiting for in order to resolve the case (§ 5). Lastly, we will apply the principles of Article 22 GDPR and those stemming

[1] See for example H.C.H. Hofmann, *Automated Decision-Making (ADM) in EU Public Law*, in H.C.H. Hofmann, F. Pflücke (eds), *Governance of Automated Decision-Making and EU Law* (2024); S. Schäferling, *Governmental Automated Decision-Making and Human Rights. Reconciling Law and Intelligent Systems* (2024) 93 ff.; L. Tangi et al., *AI Watch. European landscape on the use of Artificial Intelligence by the Public Sector* (2022); K. Yeung, *Why Worry about Decision-Making by Machine?*, in K. Yeung and M. Lodge (eds), *Algorithmic Regulation* (2019); L.A. Bygrave, *Minding the Machine v2.0: The EU General Data Protection Regulation and Automated Decision-Making*, in Yeung and Lodge (eds), *Algorithmic Regulation* (2019).

[2] See *ex multis* H.C.H. Hofmann, F. Pflücke (eds), *Governance of Automated Decision-Making and EU Law* cit. at 1; Issue 1/2023 of the *Journal Ceridap*, entirely dedicated to ADM, and especially the article by F. Merli, *Automated Decision-Making Systems in Austrian Administrative Law*, pp. 41 ff; B. Marchetti, *La garanzia dello human in the loop alla prova della decisione amministrativa algoritmica*, 2, BioLaw Journal, 367ff (2021); M. Infantino, W. Wang, *Algorithmic Torts: A Prospective Comparative Overview*, 28 Transnat'l L. &. Contemp. Probs., 309 (2019).

[3] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11.

from the *SCHUFA* case to the AMS algorithm (§ 6), which will allow us to draw some final conclusions (§ 7).

2. Public administrations and algorithms

The use of algorithmic tools by public administrations and governments is growing exponentially, both for governance functions and in the management of public programmes, where they serve as a means of allocating resources or providing assistance in policy decision-making[4]. On the one hand, it is clearly a precious instrument for collecting and analysing vast amounts of data, representing an important tool for improving the decision-making process. The advantages with respect to inefficient and time-consuming 'paper-based' decision making are evident[5].

While these AI tools can deliver accurate and efficient results, their potential drawbacks are many and varied. Suffice it to mention the lack of transparency in computer codes, the bias and discrimination arising from algorithms designed according to specific preferences, or even the lack of accountability in cases of incorrect implementation of an algorithm itself[6]. Last but not least, one of the most significant issues associated with the use of AI by public administrations relates to potential violations of data protection.

This was the issue at stake in the case addressed by the Austrian Supreme Administrative Court in the AMS case. As we will see in the next section, the dispute concerned the legality of the Austrian Public Employment Service's (*Arbeitsmarktservice Österreich* – AMS) use of an algorithm to categorise job seekers, specifically whether the AMS' process could be classified as an 'automated decision' subject to the restrictions of Article 22 of the

[4] On the increasing use of AI systems in the public sector, see among many M. Bussani, M. Infantino, *The Law of the Algorithmic State in Central and Eastern Europe. Introduction to the Special Issue*, Italian Journal of Public Law (2025) forthcoming; A. Ferrari Zumbini, M. Conticelli, *The Law of the Algorithmic State in Central and Eastern Europe. Concluding Remarks*, Italian Journal of Public Law (2025) forthcoming; H.C.H. Hofmann, F. Pflücke (eds), *Governance of Automated Decision-Making and EU Law* cit. at 1; J. Boughey, K. Miller (eds), *The Automated State. Implications, Challenges and Opportunities for Public Law* (2021); A. Bradford, *Digital Empires. The Global Battle to Regulate Technology* (2023); M.E. Kaminski, J.M. Urban, *The Right to Contest AI*, 121 Columbia L. Rev. 1957 (2021).

[5] R. Gupta and S.K. Pale, *Introduction to Algorithmic Government* (2021).

[6] Ibid.

General Data Protection Regulation (GDPR). In this regard, as we will see, the definition of the nature of the process is crucial. With the exponential growth in the use of AI technologies by public administrations, the need for clearer interpretations of what actually constitutes an automated decision makes the difference when distinguishing between processes subject to the GDPR and those exempt from its restrictions, and consequently in determining what is lawful – and what is not – under the Regulation. However, before examining the specific issue considered by the Austrian Supreme Administrative Court, the following section will outline the relevant facts of the dispute.

3. The *AMS* case: the facts

In 2021, the AMS developed an algorithm called the *Arbeitsmarktchancen-Assistenzsystem* (AMAS), i.e., the Labour Market Opportunity Assistance System, to support its counsellors in helping jobseekers enter the labour market. The system was not intended to find jobs for jobseekers but only to calculate the probability of their future labour market prospects. Using various categories, such as age, gender, education, health impairment, care responsibilities, employment history, and the regional market situation, the algorithm classified jobseekers into three different groups: individuals with high, medium, or low market opportunities[7]. The results produced by the AMAS were to have been used as useful information for the counselling process, facilitating discussions with jobseekers about their potential and obstacles and helping to define strategies for entering or re-entering the labour market[8]. The classification system was specifically designed to assist the centre's counsellors in prioritising their efforts. Rather than focusing on clients likely to secure a job on their own or those with minimal chances despite support, the system aimed to identify those in the middle ground. These were individuals for whom the centre's guidance and resources could significantly improve their likelihood of finding a job, thereby maximising the impact of their intervention[9]. After the Austrian Data Protection Authority opened an investigation into the

[7] For a more detailed analysis of AMAS see § 6 below.
[8] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 7.
[9] F. Merli, *Automated Decision-Making Systems in Austrian Administrative Law*, cit. at 1, esp. 46.

application of the GDPR[10], the AMS was essentially barred from using the AMAS for two reasons. Firstly, as a public authority, the AMS was not explicitly authorised to perform data profiling[11]. Secondly, the AMAS's activity could be considered automated individual decision-making and therefore restricted under Article 22 GDPR. In fact, even though the data were processed by AMS employers, the results of the algorithm could still influence final decisions, which were only regulated by non-binding internal guidelines.

As we will see in the next section, the AMS appealed the decision of the Public Authority to the Federal Administrative Court (*Bundesverwaltungsgericht* - BVwG).

3.1 The Decision of the Federal Administrative Court

The Federal Administrative Court annulled the Austrian Data Protection Authority's decision[12].

First, the BVwG declared that there was indeed a legal basis for the AMS's activities[13]. Since the task of the AMS is to efficiently place suitable workers in jobs that correspond as closely as possible to the jobseeker's wishes, and also to mitigate the effects of circumstances that might prevent direct placement, the AMS was, in the view of the BVwG, acting in the public interest.[14] Data processing was therefore permitted under Article 9(2)(g) GDPR. If Article 9 GDPR prohibits the "processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation", Article 9(2)(g) GDPR

[10] Under Article, 57, 1(h), Article 58, 1(b) and 2(a) GDPR in conjunction with Article 22 of the Regulation itself.

[11] According to Article 4(4) GDPR "'profiling' means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements".

[12] *Bundesverwaltungsgericht*, 18 December 2020, Zl. W256 2235360-1/5E.

[13] The legal base was found in § 1 (2) DSG, BGBl. I Nr. 165/1999 idF BGBl. I Nr. 14/2019, relating to data processing by public authorities.

[14] Pursuant to § 29 Para. 2 AMSG. *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 11.

exempts cases where data processing is necessary for reasons of substantial public interest[15].

Furthermore, according to the BVwG, Article 22 GDPR on automated individual decisions was not applicable, as the AMAS algorithm was only used as a source of information for a decision by AMS employees, who had the final say on the jobseekers' opportunities[16].

In the light of the above, the BVwG declared that the AMS processed personal data in compliance with the principles of lawfulness, fairness and transparency set out in Article 5 GDPR and therefore declared the appeal admissible.

The decision was appealed by the Austrian Data Protection Authority to the Supreme Administrative Court (*Verwaltungsgerichtshof* - VwGH), whose decision will be examined in the next section.

3.2 The Decision of the Supreme Administrative Court

The *Verwaltungsgerichthof* examined three main issues.

The first decision concerned the nature of the AMS's activity, which was allegedly private in the view of the Austrian Data Protection Authority but public in that of the AMS. The VwGH stated that in order to qualify a public authority activity as *Hoheitsverwaltung* it is irrelevant that the authority in question performs a "public function", since not everything that is "public" is to be carried out in a sovereign manner. The fact that the authority in question works with public funds in connection with the task to be performed is also not decisive with regard to the question of sovereign activity, because the State also acts with public funds in the context of private-sector administration. The only decisive factors are the legal means provided by the legislator, i.e. whether a legal authorisation to act in a sovereign capacity exists, and whether such authorisation is used in a specific case[17]. The Supreme Administrative Court stated that the activity of assisting jobseekers was to be considered as belonging to the field

[15] Under Article 9 (2)(g) GDPR: "processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject".

[16] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 2.

[17] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 38.

of the AMS' private activity because of the lack (at least in this field) of coercive powers. Therefore, the Austrian provisions on confidentiality of personal data by public authorities (Section 1 (2) of the Austrian Data Protection Act - *Datenschutzgesetz*, DSG) could not apply[18].

The second issue examined by the VwGH concerned the lawfulness of data processing in general[19]. The Court confirmed the lawfulness of AMS's data processing under Articles 6 (personal data) and 9 (sensitive data) of the GDPR [20]. With regard to the processing of personal and sensitive data under Articles 6 and 9, the task must be carried out in the public interest (which becomes substantial in the case of sensitive data), and this task must be defined by clearly and specifically defined by law. In this case, the Court held that the public interest in the advice provided by the AMS (in the light of the functioning of the labour market) was clear, and that the Austrian Labour Market Service Act (*Arbeitsmarktservicegesetz* – AMSG) described the task of the AMS and the purpose of the data processing with sufficient clarity and certainty.

The third issue under scrutiny by the VwGH is the most important for our analysis. The Court addressed the question of whether or not the AMS counselling activity – based on the labour market opportunities calculated by the AMAS algorithm – constituted an automated decision in individual cases, which is prohibited by Article 22(1) GDPR. This Article prohibits decisions based solely on automated processing – including profiling – that produce legal effects concerning data subjects or similarly affect

[18] § 1 para. 2 DSG requires a statutory basis for interference with data protection confidentiality: "(2) Insofar as personal data are not used in the vital interest of the data subject or with the data subject's consent, restrictions of the right to secrecy are permitted only to safeguard overriding legitimate interests of another person, namely in the case of interference by a public authority only on the basis of laws which are necessary for the reasons stated in Article 8 para. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Federal Law Gazette No 210/1958. Such laws may provide for the use of data that, due to their nature, deserve special protection only in order to safeguard substantial public interests and, at the same time, shall provide for adequate safeguards for the protection of the data subjects' interests in confidentiality. Even in the case of permitted restrictions, a fundamental right may only be interfered with using the least intrusive of all effective methods".

[19] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, §§ 33-34. Point 5.2.

[20] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 62.

them in a significant way[21]. To answer this question, the Austrian Administrative Court referred to the *SCHUFA* decision of the Court of Justice, the judgment of 7 December 2023, C-634/21 – which will be analysed in § 4 below – and clearly states that it awaited this decision in order to resolve the AMS's appeal[22].

First of all, in the light of the outcome of *SCHUFA*, the VwGH emphasised that the activity of the AMAS algorithm was undoubtedly to be understood as a profiling activity, as defined by Article 4(4) GDPR. According to this interpretation, the likelihood of integration into the labour market generated by the AMAS consisted in an 'automated decision' under Article 22(1) GDPR, as it was capable of influencing the allocation of the jobseekers in the market, which had a legal effect on them[23]. Even the fact that the final decision on the allocation in a group lay with AMS employees did not prevent the classification of the AMAS process as an automated decision under Article 22(1) GDPR. Again, according to the CJEU in *SCHUFA*, profiling constitutes an 'automated decision in individual cases' insofar as the decision of the third party to whom the results of the algorithm are sent is 'strongly' influenced by this value[24]. In this context, the BVwG's statement that instructions were given to AMS employees to ensure that the result of the algorithm was not accepted unquestioningly did not, in itself, exclude the possibility that the AMAS results were the final and decisive instrument for categorising jobseekers[25].

Lastly, the VwGH found that the use of the AMAS could be permitted and legitimate, provided that one of the exceptions under Article 22(2), (3), and (4) GDPR applies. More specifically, Article 22(2)(b) GDPR envisages the adoption of an automated individual decision if national legislation authorises it, provided that appropriate measures are in place to safeguard the rights, freedoms, and legitimate interests of the data subject. However, no

---

[21] Article 22(1) GDPR: "The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her."

[22] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 74.

[23] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 79.

[24] In the *SCHUFA* case, the ECJ stressed how, when a consumer sends a loan application to a bank, an insufficient probability value will most likely lead the bank to reject it: Judgment of the Court (First Chamber) of 7 December 2023, C-634/21, § 48. See *infra* § 5.

[25] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 80.

such legal basis existed for the application of the AMAS under the AMSG[26].

For all of these reasons, the case was referred back to the BVwG for reconsideration of the legal aspects of the case in the light of the principles set by the CJEU in *SCHUFA*. The BVwG decision is still pending.

From all the above, it clearly emerges that the decision raises many interesting points. However, the core of the AMS case lies in the implications of the use of an AI system by the public administration. Specifically, as the next section will detail, the question was whether the AMS algorithm could be considered as an automated decision or profiling subject to the limitations of Article 22 of the GDPR.

4. 'Automated decision-making and profiling' under Article 22 GDPR

Prior to the landmark decision in *SCHUFA* by the Court of Justice of the European Union[27], which was explicitly taken into account in the AMS case[28], there had been very few national court decisions concerning Article 22 GDPR[29], but no ruling by the Court of Justice on the issue. As a result, there were very few guidelines regarding the conditions whereby an algorithm qualifies as an automated decision-making system under Article 22 GDPR.

Although the GDPR was adopted in 2016 – eight years before the AI Act[30] – it contains a few provisions concerning the protection of personal data in relation to emerging and new technologies. Article 22 GDPR is one of the most important examples, as it

[26] Nor was the issue examined by the BVwG, as the lower Administrative Court based its decision on the assumption that the AMAS did not provide an automated decision within the meaning of Article 22(1) GDPR.

[27] Judgment of 7 December 2023, C-634/21.

[28] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 74. See also § 3.2 above.

[29] See for example these decisions under Directive 95/46 (Data Protection Directive): Cour de Cassation, Chambre criminelle, audience publique du 24 septembre 1998, No. de pourvoi 97-81.748, Publié au bulletin; Bundesgerichtshof, Urteil vom 28.1.2014, VI ZR 156/13.

[30] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

prohibits decisions based solely on automated processing, including profiling, that have legal effects on the data subject[31]. This restriction applies only when three conditions are met: there must be (1) a decision (2), it must be based solely on automated processing or profiling, and (3) the decision produces legal effects concerning the data subject or similarly affects them to a significant degree. On the contrary, the automated decision-making process may be lawfully carried out if one of the three exceptions of the second paragraph of Article 22 applies, i.e. in the case of a contract (when the decision "is necessary for entering into, or performance of, a contract between the data subject and a data controller"[32]), statutory authority (when the decision is "authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests"[33]) and consent (when the decision "is based on the data subject's explicit consent"[34]). Moreover, even in the case of a contract or consent, the data subject should be given "at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision"[35].

As evidenced by the case description[36], the central issue before the Austrian court concerned the applicability of Article 22 GDPR to the AMAS algorithm. To find a solution, the VwGH referred to the CJEU's judgment in *SCHUFA*, delivered on 7 December 2023. Since the VwGH clearly declared that it was waiting for the judgement in order to resolve the AMS case, a concise overview of the key aspects of this seminal CJEU decision

---

[31] L. A. Bygrave, *Article 22. Automated individual decision-making, including profiling*, in C. Kuner, L. A Bygrave, C. Docksey, L. Drechsler (eds.), *The EU General Data Protection Regulation (GDPR): A Commentary*, 522 ff. (2020); L.A. Bygrave, *Minding the Machine v2.0: The EU General Data Protection Regulation and Automated Decision-Making*, in Yeung and Lodge (eds), *Algorithmic Regulation*, 248 ff. (2019); G. Malgieri & G. Comandé, *Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation*, 7 Int'l Data Privacy L., 246 (2017). On the impact of artificial intelligence on the General Data Protection Regulation (GDPR) see for example G. Sartor, F. Lagioia, *The impact of the General Data Protection Regulation (GDPR) on artificial intelligence* (2020).

[32] Article 22(2) a.

[33] Article 22(2) b.

[34] Article 22(2) c.

[35] Article 22(3).

[36] See § 3 above.

is necessary for a comprehensive understanding of the Austrian Supreme Administrative Court's subsequent judgment[37].

5. The *SCHUFA* Judgment

In *SCHUFA*, a consumer was denied a loan by a bank based on a negative score provided by SCHUFA, a private company that calculates and provides information on the creditworthiness of third parties. Following the consumer's request to access her personal data held by SCHUFA and to delete inaccurate information, SCHUFA disclosed her score but provided only a very general explanation of the underlying scoring methodology, citing trade secrets as justification for the limited disclosure.

The consumer subsequently lodged a complaint with the German supervisory authority, seeking enforcement of her request for access to information and deletion of incorrect data. Following the rejection of her complaint, the consumer appealed to the *Verwaltungsgericht Wiesbaden* (Administrative Court, Wiesbaden, Germany)[38]. The central legal question before the Court was whether the establishment of a probability value of creditworthiness could be interpreted as an automated individual decision under Article 22 GDPR. If so, such processing would only be lawful if one of the exceptions stipulated in Article 22 GDPR applied, such as the decision being authorised by Union or Member State law to which the controller is subject (Article 22(2)(b) GDPR). Since the German court had doubts about the possibility of applying Article 22(1) GDPR to the activities of companies such as SCHUFA, it referred the case to the CJEU by order of 1 October 2021 with a request for a preliminary ruling under Article 267 TFEU on the interpretation of Article 22 (1) GDPR. In particular, the Wiesbaden Administrative Court asked if Article 22(1) GDPR was to be interpreted "as meaning that the automated establishment of a probability value concerning the ability of a data subject to service a loan in the future already constitutes a decision based solely on automated processing, including profiling, which produces legal

[37] For a commentary on *SCHUFA*, see for example: Sümeyye Elif Biber, *Between Humans and Machines: Judicial Interpretation of the Automated Decision-Making Practices in the EU*, in Herwig C H Hofmann, Felix Pflücke (eds), *Governance of Automated Decision-Making and EU Law*, cit. at 1, 206 ff.

[38] Judgment of the Court (First Chamber) of 7 December 2023, C-634/21, §§ 19-27.

effects concerning the data subject or similarly significantly affects him or her, where that value, determined using the personal data of the data subject, is transmitted by the controller to a third-party controller, and the latter draws strongly on that value for its decision on the establishment, implementation or termination of a contractual relationship with the data subject"[39].

Before the CJEU, it was established that the scores generated by SCHUFA met two of the three criteria of Article 22, i.e. that the processing was automated and that it produced legal effects or significantly affected the data subject[40]. What was uncertain was whether SCHUFA's activity constituted a decision within the meaning of the provision. The central issue was that the information provided by SCHUFA did not represent the final determination regarding the granting or denial of credit, but rather constituted data supplied to third-party commercial actors who ultimately made that determination.

Drawing upon the Advocate General's Opinion, the CJEU observed that, while the GDPR does not explicitly define 'decision' within the meaning of Article 22, the concept of 'decision' represented is broad enough to encompass "the result of calculating a person's creditworthiness in the form of a probability value concerning that person's ability to meet payment commitments in the future"[41]. The fact that when a consumer applies for a loan from a bank, a low probability score provided by SCHUFA almost invariably leads to the denial of the application prompted the CJEU to define the SCHUFA scoring as a decision, and therefore subject to the restrictions set out by Article 22[42].

What emerged from the *SCHUFA* Judgment is that whether profiling can be qualified as a decision largely depends on how the data is used. Profiling may serve as the sole basis for a decision, or it may merely constitute one factor among several in the final determination. As discussed in the following section, these were the same points under scrutiny by the VwGH, which had to determine whether the AMAS algorithm constituted a "decision" within the meaning of Article 22 GDPR.

---

[39] Judgment of the Court (First Chamber) of 7 December 2023, C-634/21, § 27.
[40] Judgment of the Court (First Chamber) of 7 December 2023, C-634/21, §§ 47 and 48. Recital 71 GDPR lists as an example of a process creating legal effects the "automatic refusal of an online credit application".
[41] Judgment of the Court (First Chamber) of 7 December 2023, C-634/21, § 46.
[42] Judgment of the Court (First Chamber) of 7 December 2023, C-634/21, § 75.

6. The AMAS Algorithm: a decision under Article 22 GDPR?

By applying the principles laid down by the CJEU in the SCHUFA case, the VwGH sought to determine whether the AMAS algorithm constituted a decision based solely on automated processing. Consequently, a brief analysis of the key characteristics of this algorithm is necessary.

In 2021, the AMS launched the *Arbeitsmarktchancen-Assistenzsystem* (labour market opportunities assistance system - AMAS) to classify jobseekers into groups according to their expected chances of integration or reintegration into the labour market. A statistical model calculated the expected chance of (re)integration of AMS clients into the primary labour market and, on this basis, assigned them to one of three groups: 'H' for high (*hohe Reintegrationschancen*), 'M' for medium (*mittlere Reintegrationschancen*), and 'N' for low (*niedrige Reintegrationschancen*) chances of reintegration[43]. This model aimed to introduce criteria for the distribution of financial resources in programmes for entering or re-entering the job market. In other words, classification into one of these three groups served the purpose of offering jobseekers different financial support: those belonging to the 'H' group received more subsidies to support their high chances of entering the labour market[44].

The main criticism of the AMAS algorithm concerns the criteria used to classify jobseekers. It uses data such as gender, age, and health conditions. For instance, a data entry "Gender: Female" resulted in an automatic deduction of points, so that a woman was assigned to the group with less support for integration into the labour market on the basis of sex alone[45]. The public administration

[43] J. Gamper, G. Kernbeiß, M. Wagner-Pinter, *Das Assistenzsystem AMAS. Zweck, Grundlagen, Anwendung*, SYNTHESISFORSCHUNG, p. 63 (2020), available at https://www.ams-forschungsnetzwerk.at/downloadpub/2020_Assistenzsystem_AMAS-dokumentation.pdf.

[44] D. Allhutte, F. Cech, F. Fischer, G. Grill and A. Mager, *Algorithmic Profiling of Job Seekers in Austria: How Austerity Politics Are Made Effective*, 3, *Front. Big Data*, 2 (2020).

[45] P. Lopez, *Reinforcing Intersectional Inequality via the AMS Algorithm in Austria* (2019) p. 289-290. The author stresses that here, as in many other cases, it is clear that the discrimination produced by algorithms – in our example, gender discrimination – is produced by the bias in the training data of the AI systems themselves, which have no other effect but to reinforce inequalities.

– and in particular the Ministry for Social Affairs, Health, Welfare and Consumer Protection – asserted that the idea behind this model was to objectively reflect the labour market opportunities "as realistically as possible" ("*so realitätsnah wie möglich*") to ensure the most efficient allocation of the existing resources. Furthermore, the system was also intended to take into account the individual needs and problems of each single jobseeker by implementing tailor-made strategies on a case-by-case basis.[46]

With this clarification, the VwGH ruled that the AMAS decision constituted a determination based solely on automated processing that produced legal effects on jobseekers under Article 22 GDPR[47].

First, the AMS algorithm was deemed to constitute a decision producing legal effects on the data subject. The Court did not explain its reasons in detail, but simply referred to the CJEU in *SCHUFA*, stating that automated data processing, such as profiling, inherently constitutes an 'automated decision in individual cases' where the outcome of that processing is decisive for the actions of a third party that are 'significantly guided' by the algorithm's profiling and thus have a substantial impact on the data subject[48].

Second, the key issue under scrutiny by the VwGH was whether the decision had to be taken *solely* on the basis of automated processing, which is also the specific criterion that distinguished the BVwG's decision from that of the VwGH[49]. At first glance, this criterion, stemming from Article 22, appears to suggest that even minimal human involvement in the decision-making process would exclude the applicability of Article 22. However, the Article 29 Working Party clarified that a 'token gesture' of human involvement is not sufficient to satisfy this criterion. Instead, there should be a real and meaningful oversight over the process[50]. In the same way, the VwGH argued that even if the final decision on the grouping of the jobseekers rested with AMS employees, this did not prevent the AMAS being classified as

---

[46] *Volksanwaltschaft Österreich*, *Volksanwaltschaftsbericht 2018. Technical report*, 99 (2019), available at https://volksanwaltschaft.gv.at/downloads/72sag/PB-42-Nachpr%C3%BCfend.pdf.

[47] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 80.

[48] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 75.

[49] See § 3 above.

[50] Article 29 Data Protection Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, 3 October 2017, 17/EN WP 251, p. 10.

an automated decision under Article 22 GDPR. As the CJEU ruled in *SCHUFA*, also in this case the Austrian Supreme Court emphasised that even if the final decision is made by a human being, the process may still involve automated decision-making, especially if the automated process significantly influences the outcome. In other words, even if AMS employees had internal guidelines and were trained not to accept algorithmic results without question, this does not necessarily mean that the group assignments were not primarily based on the AMAS. The only way to justify the AMAS was to find a legal basis under Article 22(2)(b), which provides that exceptions to the restriction of the rule are permitted when authorised by Union or Member State law[51]. However, the AMSG did not justify the use of instruments such as AMAS, and no other legal basis was examined by the BVwG, to which the decision was then referred back.

7. Conclusions

The Austrian Supreme Administrative Court decision adds another (small) piece to the puzzle of defining the limits and boundaries of AI technology use by public administrations, especially in relation to the protection of personal data. As noted, the Austrian court underlined that the algorithm used by AMS in the counselling process could have a negative impact on jobseekers by categorising them in ways that limit their opportunities. The Court's interpretation of Article 22 GDPR appears very broad, potentially drawing attention to the risks to individual rights posed by profiling and automated categorisation. It classifies the AMAS as an automated decision under Article 22 GDPR without

[51] Just to provide a few examples, such rules have been adopted in both Germany and France. The first with § 35a of the *Verwaltungsverfahrensgesetz* (Administrative Procedure Act) of 1977, by stating that an administrative act can be issued entirely through automated systems, provided that this is permitted by the law (as long as neither discretion nor a margin of assessment is involved), and the latter with Article 47(2) n. 2, Law n. 78-17 of 6 January 1978 (*Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés* - Law related to information technology, files, and civil liberties). Here, after stating that no decision producing legal effects with respect to a person or significantly affecting her may be made on the exclusive basis of automated processing of personal data, including profiling, it adds the exception of individual administrative decisions made under the conditions set out in Article L. 311-3-1 of the Public Relations Code by the administration.

providing a clear rationale. Instead, it focused repeatedly on the need to identify a legal basis for the process in national and EU law and highlighted the importance of a final human contribution in any public decision-making process involving automation. The Court also emphasised that less complex AI systems, where the output is controlled by humans, fall outside the restrictions imposed by the GDPR.

One main question remains unresolved. Whereas the difference on paper between a fully automated decision (*voll-automatische Entscheidung*) and a decision made with reference to a recommendation made by an algorithm (*Entscheidungsempfehlung)* appears straightforward, this difference is not so clear cut in practice. A decision entirely made and delivered to the affected individuals by AI is clearly fully automated. However, the real-world processes are much more complex, since there are a multitude of different processes and decisions, in which the input of artificial intelligence intervenes at different times, in different ways, and with different degrees of influence on public officials. In this case, the Austrian *Verwaltungsgerichtshof*, following the Court of Justice of the European Union on this point, ruled that the AMS's decisions should fall within the scope of Article 22 GDPR even though the final decision was ultimately made by a human being, albeit based on profiling by the AI. At present, defining the precise boundaries of decisions "based solely on automated processing, including profiling" remains a complex and uncertain task. Such decisions inevitably have legal effects on individuals or a similarly significant impact. Numerous factors must be taken into consideration and examined, including the (potential) liability for public officials who choose not to follow AI-generated recommendations, particularly if the algorithm's recommendation actually turns out to be more accurate than the human decision that diverged from it. Moreover, since AI does not (currently) deliver the 'best' decision, but only provides the most 'probable' answer, distinctions should also be made based on the level of probability underlying the AI model. Lastly, the psychological profile of the human in the loop must also be considered (spanning the spectrum from an uncritical acceptance of the AI's response, assuming it to be inherently superior, to a consistently sceptical stance).

The case serves as a reminder of the legal challenges posed by AI technologies in public administration, where the need to balance the efficiency of automation with the rights of individuals

is fundamental. In this context, the search for meaning offered by the courts is not just an exercise in interpretation, as judicial decisions delineate the boundaries between what is lawful and what is not. Consequently, the establishment of clear and precise rules and boundaries in this field – drawn up by legislators, courts, and academics alike – is an urgent requirement.

THE LEGALITY OF CONFISCATION ORDERS OF STOLEN CULTURAL PROPERTY: THE FANO ATHLETE CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

*Elena Scudeler**

Abstract

The present work aims to analyze the judgment delivered by the ECHR on May 2, 2024, in the case of J. Paul Getty Trust v. Italy. This judgement examines various aspects concerning the circulation of cultural property and sheds particular light on the Court's interpretations in relation to its own case law.

TABLE OF CONTENTS

1. The Fano Athlete case

On May 2, 2024, the European Court of Human Rights issued a judgement regarding a confiscation order issued by the Italian authorities concerning the statue of the 'Young Victorious', also known as the 'Fano Athlete'[1]: a life-sized bronze statue by the Greek

* Apprentice notary public in Trieste

sculptor Lysippos, dated between the 4th and 2nd centuries BCE. This Greek bronze statue of the classical period was discovered in 1964 by an Italian fishing vessel in the Adriatic Sea near Fano (Italian municipality in the province of Pesaro and Urbino, Marche Region). Today, it is in the possession of the J. Paul Getty Trust (hereinafter 'the Trust'), a non-profit entity established by Mr. J. Paul Getty Sr. in Los Angeles, California, and registered in the United States in 1953, which purchased the statue in 1977 for $3,950,000.

As we will see, the J. Paul Getty Trust argued before the ECHR that the adoption of a judicial confiscation order by the Italian Court of Cassation constituted a violation of the right to the peaceful enjoyment of possessions of the claimant, as guaranteed by Article 1 of Protocol No. 1 to the European Convention of Human Rights and Fundamental Freedoms of 1950[2]. According to the ECHR, the request is unfounded: Italy has the right to confiscate the statue from the J. Paul Getty Villa Museum, where it is now held. To understand the ECHR decision, we need first to summarize the facts of the case (section 2) and then to examine the different issues solved by the Court (section 3), highlighting how the court reasoned both for assessing the admissibility of the claim and the merits of the case. Conclusions (section 4) will ensue.

2. The facts of the case

After the discovery of the statue in 1964, the Fano Athlete was acquired by private buyers who kept it in Gubbio. The following year, however, the statue was sold to unknown parties, after which its whereabouts remained unknown[3]. The statue resurfaced in Munich at the beginning of the 1970s in the gallery of a private collector, who was holding it on behalf of a company

[1] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, 2 May 2024.

[2] Article 1 Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

[3] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 1-3.

registered and based in Liechtenstein. In 1973, the Italian authorities contacted the German police, aiming to inform them of the circumstances surrounding the statue's export[4]. While the statue was still in Germany, negotiations began for its acquisition by the Trust. However, due to concerns raised by J. Paul Getty's legal counsel regarding the statue's lawful provenance and the validity of its title, the Trust requested the seller further information. On July 27, 1976, the Trust purchased the statue through a contract concluded in the United Kingdom. The statue was then transported to the United States in 1977 and, since 1978, it has been on display at the Getty Villa in Malibu, California[5].

Numerous attempts were made by the Italian state to recover the statue, both through domestic civil and criminal proceedings (section 2.1) and through requests for international judicial cooperation (section 2.2).

2.1. Criminal and civil proceedings

After the purchase of the statute by private buyers in 1964, the Italian state brought criminal proceedings against them, accusing them of receiving a stolen cultural artifact, classified as an archaeological asset belonging to the Italian state. In 1970, the defendants were however acquitted, as the court found no direct evidence of the statue's discovery or location within Italian territorial waters[6].

Following the transfer of the statue in Germany, a second investigation was launched by the Public Prosecutor's Office of Gubbio for the illicit export of a cultural asset. New inquiries were conducted, and testimonies were gathered anew from the captains of the fishing vessels and the fishermen who had discovered the statue, in addition to an inspection of the marine area where the discovery occurred, in an attempt to definitively establish the

[4] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §16.
[5] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §37; for some other details of the case, see also L. Solaro, *Case Review: Getty v. Italy*, Center for Art Law, 2024, at https://itsartlaw.org/2024/07/24/case-review-getty-v-italy-2024.
[6] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §10, 14; see also A. Visconti, *La Corte EDU si pronuncia sulla confisca obbligatoria di beni culturali illecitamente esportati nella vicenda dell'atleta vittorioso*, in Dir. pen. cont., 45 (2024) at www.sistemapenale.it/it/articolo/visconti-la-corte-edu-si-pronuncia-sulla-confisca-obbligatoria-di-beni-culturali-illecitamente-esportati-nella-vicenda-dellatleta-vittorioso.

location of the find. However, these investigations proved inconclusive, with the authorities unable to determine the exact location of the discovery. As a result, an acquittal was again issued in 1978[7].

In 2007, following a petition filed by some activists seeking the return of the bronze statue, the Prosecutor's Office of Pesaro opened a third investigation against the captains of the fishing vessels who had discovered the statue, the private Italian buyers, and other unknown individuals, charging them with the unauthorized export of a cultural asset, failure to report the find to the relevant authorities, and violations of border controls[8]. This investigation was closed in 2007, resulting in the opening of criminal proceedings. In 2010, the criminal court of Pesaro ordered the confiscation of the statue according to Article 174, paragraph 3 of Decree No. 42/2004 (also known as the Cultural Heritage and Landscape Code) "wherever it may be located", on the assumption that the statue was a cultural asset that belonged and that had been exported from Italy without the required license and without the payment of the associated duties[9].

The confiscation order was later upheld by the Court of Cassation in 2019, with ruling no. 22 of January 2, 2019[10]. The Court considered the confiscation order under the Cultural Heritage and Landscape Code to be a non-criminal sanction of compensatory nature (although connected to a criminal offense) that could be enforced even in the absence of a criminal verdict and even against persons who were not involved in the offence. The Court of Cassation also noted that the Italian domestic legislation mandates the confiscation of cultural assets exported illegally without the necessary license and the payment of the related duties. Furthermore, the Court recognized that the Trust had been negligent in its purchase, agreeing with the assessment previously

[7] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 45-54.
[8] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 67-68.
[9] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 73-74. It should be noted that Article 174 of the Cultural Heritage and Landscape Code was abrogated in 2022 and replaced by Article 518-undecies of the Criminal Code (Legge 9 Marzo 2022 n. 22). On this reform, see also A. Visconti, *Problemi e prospettive della tutela penale del patrimonio culturale* (2023); L. Mazza, *Le Disposizioni in materia di reati contro il patrimonio culturale. Una prima lettura* (2023).
[10] Court of Cassation, 2 January 2019, n. 22, § 2.3; on the Italian decision, see T. Scovazzi, *Un atleta non ancora giunto a destinazione*, Riv. Dir. Int. 511-518 (2019).

made by the Pesaro criminal court[11]. In addition, the Court determined that the location was irrelevant in establishing the ownership of the statue, as the latter had been found by a vessel sailing under the Italian flag. Furthermore, it was affirmed that there is a connection between the statue and the Italian state, considering "the existence of a continuum between Greek civilization, imported into Italian territory, and the subsequent Roman cultural experience"[12].

2.2. International Cooperation

At the same time, numerous attempts were made by the Italian state to recover the statue, primarily by requesting the cooperation of foreign authorities.

First, in 1973, an official from the Italian Ministry of the Interior wrote to the police in Munich informing them of the statue's presence in the city and asking them to take action to prevent its resale[13]. The German authorities questioned the gallerist, who stated that he had no reason to doubt the validity of the purchase title held by the Luxemburg's company, that had appointed him as their representative in the negotiations and custodian of the statue. Charges were later brought against the gallerist, but these charges were dismissed as it was not possible to prove the offense of receiving stolen property with the certainty required for a trial[14]. The following year, after the opening of new investigations into the illegal export of cultural assets, under Article 66 of Italian Law no. 1089/1939 on the protection of cultural property, a Magistrate of the city of Gubbio sent a rogatory request to the German authorities, asking for the statue's seizure. This request was rejected by the Prosecutor's Office in Munich, which again closed the investigation.

A second attempt to recover the statue through international cooperation occurred after the arrival of the statue in the United States. In 1977, Italian customs authorities contacted the U.S.

[11] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 93-96.
[12] Court of Cassation, 2 January 2019, n. 22, § 18.2, 18.3; ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 99; see also M.S. de Clippele, *Who owns art over time? The judicial saga of the Statue of Victorious Youth in Getty Trust v. Italy*, Strasbourg Observers, 2024, https://strasbourgobservers.com/2024/08/16/who-owns-art-over-time-the-judicial-saga-of-the-statue-of-victorious-youth-in-getty-trust-v-italy/.
[13] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 16.
[14] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 18-19.

Customs Service in Washington D.C., requesting an investigation into the way the statue was introduced into the U.S. The request was forwarded to the Los Angeles authorities, who, after conducting some inquiries, concluded that the statue's entry into the state followed local laws. In 1978, U.S. authorities contacted the Italian Ministry of Cultural Heritage, sending a request to clarify whether, under Italian law, the statue was protected and whether it had been illegally exported from Italy; however, the Ministry did not follow up the request[15].

In the same year, the Gubbio Magistrate (the same office that started the investigation about the export of the statute to Germany) sent a rogatory request to the British authorities, as the last sale contract for the statue was concluded in the United Kingdom. The British authorities were asked to assist in investigating the circumstances of the statue's purchase and its transit through British territory. The authorities provided information regarding the statue's transit through the UK but not regarding its purchase, noting that they were not part of the 1970 UNESCO Convention concerning the measures to prevent the illegal import, export, and transfer of ownership of cultural property[16].

Still in 1978, Gubbio Magistrate sent a request for judicial assistance to United State's authorities concerning the statue's entry into the U.S. and its seizure. The request however was rejected, based on a 1976 circular from the U.S. Secretary of State which stated that a request for judicial assistance could not result in the confiscation of an asset in U.S. territory without a rogatory request. For this reason, Italian authorities were advised to initiate the proceedings before U.S. authorities in accordance with domestic law[17]. Instead of doing so, in the 1980s the Italian Ministry of Cultural Heritage made numerous attempts to recover the statue through diplomatic channels, but none of these attempts led to positive results. On these occasions, the Trust claimed that the refusal to return the statue was due to the lack of a connection between the statue and the Italian state[18]. Another diplomatic effort made in 1995 by the Italian consul in Los Angeles to negotiate the return of the bronze failed, after the curator of the Getty Museum stated that the alleged crimes were time-barred and that the Trust

[15] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 40-44.
[16] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 49.
[17] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 50-51.
[18] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 60.

had purchased the statue in good faith. Between 2006 and 2007, the Trust negotiated with the Ministry of Cultural Heritage regarding the return of numerous archaeological artifacts to the Italian state, agreeing to postpone negotiations concerning the return of the statue[19].

Finally, in July 2019, following the confiscation order issued by the Court of Cassation, the Italian Ministry of Justice sent another rogatory request to U.S. authorities seeking the recognition and enforcement of the order under the prevailing international treaties between the United States and Italy[20]. To date, the procedure is still in the preliminary phase, and the request awaits submission to the competent domestic court for review[21].

3. The ECHR decision

As noted, the claimants in the present case argued that the confiscation order issued by the Italian state had violated their right to peaceful enjoyment of their own possession under Article 1 of Protocol No. 1 to the Convention. Before deciding the merit, the Court had to decide whether the Trust could be considered a 'victim' under the ECHR and whether it could assert the presence of a financial interest of its own. As we will see in sub-section 3.2, the Court answered these questions in the affermative.

As to the merit, there were three major issues at stake. The first one concerned whether the confiscation order issued according to the Article 174, paragraph 3 of Decree No. 42/2004 was legal, considering that the purchase of the statute occurred many years before the adoption of the Cultural Heritage and Landscape Code. The second issue centered on the possibility of considering the statue as part of the Italian cultural heritage, and the related question of the applicability of the 1970 UNESCO Convention concerning measures to prohibit and prevent the illicit import, export, and transfer of ownership of cultural property. The third issue concerned the question of whether the measure in question

[19] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 63-65.
[20] Treaty of Mutual Assistance in Criminal Matters between Italy and United States of America, signed on 9 November 1982, supplemented by the Unites States of America – European Union Treaty signed on 3 May 2006 and United Nations Convention against Transnational Organized Crime. Adopted by the General Assembly on 15 November 2000.
[21] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 103-104.

was proportionate to the aim of protecting a public or general interest.

3.1. The ECHR case law

Most of these issues were not new to the Court. On several previous occasions the Court had been asked to determine the conditions under which applicants could be considered 'victims' under the ECHR, particularly regarding a violation of their right to the peaceful enjoyment of their possessions. The Court had also already developed significant case law on the requirements that applicants must fulfil to claim the existence of their property rights. This concept is interpreted autonomously by the Court to cover not only the ownership of physical goods but also legitimate expectations based on domestic law to acquire a property right. The interpretation is very broad, inasmuch as it extends the concept of 'possessions' to any proprietary interest without regard to domestic legal concepts, which significantly facilitates the filing of claims before the Court[22].

In cultural heritage law, the need to protect property rights is often linked to the circulation of works of art and is primarily discussed with regard to stolen cultural objects in disputes between their original owner and their current possessor. The 1995 UNIDROIT Convention on stolen or illegally exported cultural property provides for the restitution of stolen cultural objects, prioritizing the property rights of the original owner, even against a good-faith purchaser[23]. However, the issue is often whether an individual's ownership right can be limited in order to protect cultural heritage. Several international conventions aimed at protecting various forms of cultural heritage explicitly recognize that the protection of individual property rights must sometimes yield to the general interest of protecting cultural heritage, and, as such, property rights may be subject to certain limitations. This approach reflects, to some extent, the solution provided by Article 1 of Protocol No. 1 of the ECHR, which, in addition to guaranteeing

[22] ECHR, *Beyeler v. Italy* (GC), no. 33202/96, 5 January 2000; ECHR, *Depalle v. France* (GC), no. 34044/02, 29 March 2010; ECHR, *Hamer v. Belgium*, no. 21861/03, 27 February 2008; ECHR, *Mkhitaryan v. Russia*, no. 54700/12, 7 February 2017.

[23] 1995 UNIDROIT Convention on stolen or illegally exported cultural objects, art. 6 at https://www.unidroit.org/instruments/cultural-property/1995-convention/status/

the right to property, acknowledges the possibility of limiting that right in the general interest. For instance, it is well established under Article 1 of Protocol No. 1 of the ECHR, that good-faith possessors who have exercised due diligence in acquiring a cultural heritage object may not acquire ownership of the object but content themselves with fair and reasonable compensation[24]. These issues will be further examined in section 3.2.

The Court had also previously ruled on the applicability of the ECHR to events occurring only after its ratification[25]. For this reason, in several cases, applicants have sought to devise strategies to bring their disputes under the *ratione temporis* jurisdiction of the CourtHR. They challenged decisions that fell within the jurisdiction of the Court, even if the source of the dispute dated back to a period before the ratification of the ECHR and Protocol No. 1[26]. The issue will be examined further in section 3.2.1, where we will have a look at the solution devised to the Court to this specific point.

Another issue extensively addressed by the Court concerns the respect for the principle of proportionality, essential for reconciling conflicting values and interests or resolving conflicts between two sets of norms. It is an analytical procedure used to assess whether a state's intervention, despite the exercise of a constitutionally guaranteed right, is justified when undertaken in defense of important public interests. This principle is widely applied to resolve disputes between an individual, or a state holding a right, and a state adopting measures to protect a public interest, despite those measures infringing the holder's right. The 'suitability' of the measure under review must be assessed, evaluating whether the choice of certain means of action is proportionate to the pursued objective, based on an aim deemed legitimate by domestic or international sources. It is essential that the state's intervention be the least burdensome possible for the subject affected ('necessity'). The final evaluation is that of 'proportionality in the narrow sense', which involves comparing the benefits of the act to the sacrifice imposed on the right holder

[24] T. Szabados, *Right to Property and Cultural Heritage Protection in the Light of the Practice of the European Court of Human Rights*, Vol. 3 No. 2 Cent. Eur. j. comp. law 173 (2022).
[25] ECHR *Syllogos ton Athinaion v. United Kingdom*, no. 48259/15, 31 May 2016; EHCR *Potomska and Potomski v. Poland*, no. 33949/05, 29 March 2011.
[26] T. Szabados, *Right to Property and Cultural Heritage Protection in the Light of the Practice of the European Court of Human Rights*, cit. at 24, 172.

('proportionality in the narrow sense')[27]. The issue will be further explored in section 3.2.3, in which we will see how the Court approached proportionality in the Fano Athlete case.

3.2. The admissibility of the case

As said, for the Court to examine the merit of the case, it was necessary to verify that the case fell under the jurisdiction of the Court. To determine whether the challenge was admissible, the Court therefore had to check whether the Trust could be deemed a "victim" under the Convention and whether it had a financial interest of its own to pursue the action.

On the one hand, the applicant claimed that the confiscation order constituted an interference with its right to the peaceful enjoyment of its possession. According to the Trust, the J. Paul Getty Trust had a relationship with the statue equal or anyway comparable to the one of an owner, as the same Italian Court of Cassation had recognized; therefore, the Trust claimed he could legitimately be considered a victim under the Convention due to the attempts to seize the statue and to obtain the recognition and execution of the confiscation order in the United States. Furthermore, according to the Trust's opinion, the Trust had the standing to act as a victim even if the measure was already not carried out, inasmuch as the measure had already had significant repercussions on the Trust's professional activities[28].

On the other hand, the Italian government argued that the applicant could not be considered a victim under the Convention since the contested measure (the confiscation order) was not yet executed. Moreover, even if the order had been executed, it would have not been attributable to the Italian authorities, but rather to the US ones. Since violations of the Convention are only attributable to the state that interferes with the relevant rights, and since in this case the interfering state would have been the United States, which of course is not part to the ECHR, the Court's jurisdiction would have been lacking[29]. Finally, the Italian government argued that the applicant, being a trust, did not have a financial interest in the

[27] A. Stone Sweet and G. della Cananea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to José Alvarez*, 46 N.Y.U. J. Int'l L. & Pol. 911 (2014).
[28] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 218-219.
[29] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 209-212.

statue that met the requirements for protection under Article 1 of Protocol No. 1 to the Convention[30].

The Court found that the applicant had provided evidence of being affected by the measure adopted by the Italian state even before its execution and therefore could be recognized as a victim under the Convention, for the violation of Article 1 of Protocol No. 1 to the Convention[31]. Moreover, the Court held that the Italian State could be held responsible for the interference with the trust's right to the peaceful enjoyment of its possession. In this regard, the Court reiterated that the exercise of jurisdiction is a necessary condition for responsibility to exist under the ECHR. According to the international understanding of the term, the jurisdiction of a state is primarily territorial, but the Court also reminded that, as an exception to the principle of territoriality, acts that are carried out or produce effects outside of the territorial jurisdiction can still be considered as an exercise of jurisdiction if they are attributable to the state that adopted the measure, rather than to the territorial state that is affected by the measure – a principle fully consistent with the Court's previous case law[32]. The fundamental principle applied is that an act, initiated by the requesting country based on national laws and executed by the requested country, in accordance with its obligations under international treaties, can be attributed to the requesting country. Therefore, since in this case the order was adopted by the Italian state, that also requested the United States to enforce it on the basis of judicial cooperation agreements, the Court concluded that the Italian state can be held responsible for the measure[33].

Finally, the Court also concluded that the applicant's financial interest in the statue had been recognized by Italian law in the domestic proceedings in which the Trust had been invited to participate[34]. The Court noted that the applicant had uninterrupted

---

[30] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §258; on the point of eligible property interest for protection under Article 1 of Protocol No. 1 see ECHR, *Beyeler v. Italy* (GC), no. 33202/96, cit. at 22, §§ 99-100.

[31] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 230.

[32] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 232. As to ECHR's previous case-law, see ECHR *H.F. and Others v. France*, no. 24384/19 and 44234/20, 14 September 2022, § 185; ECHR, *M.K. and Others v. Poland* no. 40503/17, 23 July 2020, § 128; ECHR, *Carter v. Russia*, no. 20914/07, 21 September 2021, §124.

[33] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 237-238.

[34] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 264.

possession of the statue since 1977, the year of purchase, which led to the conclusion that there existed a financial interest in the peaceful enjoyment of the statue, falling within the definition of 'property' under Article 1 of the Convention[35]. The Court therefore considered the applicability of Article 1 of Protocol No. 1 to the Convention to be sufficiently established in this case. Based on this analysis, the Court declared the application admissible[36].

3.3. The merit of the case

As said above, once the Court decided it had jurisdiction on the case, it went on to assess the merit of the case, with particular regard with three main issues: the lawfulness of the confiscation order (section 3.3.1), the applicability of the 1970 UNESCO Convention (section 3.3.2) and the proportionality of the measure adopted (section 3.3.3).

3.3.1. The legality and applicability ex post facto of confiscation orders

On the assessment of whether the confiscation order complies with the principle of legality, the Trust raised a significant objection concerning the applicability of Italian domestic norms. While the Trust acknowledged that Italian law required authorization for the export of cultural property, it argued that the provision invoked in this context – that is, Article 174, paragraph 3 of Decree No. 42/2004 (also known as the Cultural Heritage and Landscape Code) –, was not in force neither at the time in which the statue had been found, nor at the time in which the statue was purchased. Additionally, the Trust argued that, at the time of the statue's export, it was believed that the confiscation of cultural property could not be applied if the property was located outside of Italy. Moreover, even assuming the application of the Cultural Heritage and Landscape Code, the Trust pointed out that, according to Articles 77 and 78 of the same Code, there is a three-year time limit to request action, which begins from the moment the requesting state becomes aware of the location of the property. The

[35] For the notion of "property" under Article 1 of the Convention, see *mutatis mutandis*, ECHR, *Beyeler v. Italy* (GC), no. 33202/96, cit. at 22, § 104; ECHR, *Depalle v. France* (GC), no. 34044/02, cit. at 22, § 68; ECHR, *Hamer v. Belgium*, no. 21861/03, 27 February 2008, § 76; ECHR, *Mkhitaryan v. Russia*, no. 54700/12, 7 February 2017, § 63.

[36] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 268.

Trust also raised the issue of the time limit under the 1995 UNIDROIT Convention on stolen or illegally exported cultural objects[37], which has been ratified by Italy (but not by the United States)[38].

The Italian government maintained that there had been no retroactive application of the law in an unfavorable way, as the Legislative Decree No. 42/2004 did nothing but codify the existing law at the time of the events with the aim of coordinating national provisions on cultural heritage. The only legislative novelties brought by the Decree – the Italian government insisted – were favorable to the claimant, as they introduced in the legislation the possibility (affirmed since a 1974 ruling by the Italian Constitutional Court[39]) of proving that the owner of stolen cultural property was "unaware of the crime". As for the objection related to the impossibility of applying the measure outside of Italy, the government pointed out that the interpretation defended by the Trust was supported solely by academic opinions, and had been repeatedly rejected by domestic courts[40].

On this point, the Court started by reiterating the necessary respect for the principle of legality and then moved on to the assessment of the applicability of Article 174, paragraph 3 of Decree No. 42/2004. In this regard, the Court adopted the Italian government's interpretation, considering the provision nothing more but a restatement of Article 66 of the Law no. 1089/1939 that was in force at the time of both the statue's discovery and its purchase by the Trust. It was further recognized that the Cultural Heritage and Landscape Code was adopted to harmonize domestic provisions on cultural heritage[41]. The Court also held that the possibility for the Trust to prove that it was a "person unconnected to the crime", established by the Cultural Heritage and Landscape Code, was a novelty that resulted in a more favorable position for the claimant[42].

---

[37] 1995 UNIDROIT Convention on stolen or illegally exported cultural objects, at https://www.unidroit.org/instruments/cultural-property/1995-convention/status/.

[38] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, §§ 283, 284, 285, 286.

[39] Constitutional Court, 29 December 1974, 202 Giur. Cost. 2130 (1974).

[40] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 287, 288, 290, 291; see also P. Cipolla, *Sulla obbligatorietà della confisca dei beni culturali appartenenti allo Stato illecitamente esportati*, Giur. mer. 2197 (2011).

[41] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 297.

[42] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 299, 304.

Since the confiscation order was adopted by the Italian state in accordance with the Article 174, paragraph 3 of the Italian Cultural Heritage Code, the Court also considered the issue of negligence in the Trust's purchase, as this would affect whether the Trust could be considered a "person unconnected to the crime"; this provision establishes that confiscation cannot be ordered against such persons. Regarding the level of diligence required for the purchase, Italian domestic case law had specified that the confiscation order cannot be applied to individuals who are unconnected to the crime, meaning individuals who were unaware of the crime and had not facilitated it (e.g., through smuggling) due to a lack of vigilance. According to the Court, the provision therefore allowed the Trust to demonstrate that it acquired the property in good faith, unaware of its illicit origin[43].

The Court's assessment of the legality of the measure also considered other fundamental aspects raised by the claimant, such as the imposition of the measure despite the statute of limitations for the crime. The Court found that the confiscation measure could be ordered even if the illegal export of cultural property had been committed by someone other than the property owner, and even if the crime had expired under the criminal statute of limitations, given its broader function. According to the court, the confiscation order in cultural property cases is not a punitive measure, even when it is imposed by a criminal court; rather, the confiscation order bears greater resemblance to administrative measures typically aimed at recovering the property for the public interest. The Court therefore concluded that the confiscation order could be imposed even on third-party owners of the property who had not participated in the criminal proceedings, had not been convicted, and had not been accused of any crime, once the illicit acquisition of the property is objectively established[44]. The Court noted that, at

[43] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 300, 125; see also G. Pioletti, *Articolo 127*, in M. Cammelli (ed.), *La nuova disciplina dei beni culturali e ambientali* (2000).

[44] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 310, 311, 312; for the nature of confiscation order, see also ECHR, *Ulemek v. Serbia*, no. 41680/13, 2 February 2021, § 55-58; contrast with ECHR, *Welch v. the United Kingdom*, no. 17440/90, 9 February 1995, §§ 28, 35 (that qualified the mesure as a penalty). On the same issue, see Tribunal of Pesaro, Sezione Ufficio Indagini Preliminari, decision of 10 February 2011, confirmed by Court of Cassation, 2 January 2019 n. 22; see also P. Cipolla, *Sulla obbligatorietà della confisca dei beni culturali appartenenti allo Stato illecitamente esportati*, cit. at 40, 2197.

the time of the Trust's purchase, Italian domestic case law was clear about the possibility of imposing confiscation on third parties in possession of goods subject to smuggling, provided that their negligence was demonstrated. The Court concluded that the measure was not linked to the commission or participation in the crime. It therefore ruled that the confiscation could be applied even if the time-limit for pursuing the crime had expired[45].

The Court also addressed whether the absence of a time limit within which the confiscation must be ordered under the Italian Cultural Heritage Code could impact the foreseeability of the measure. As has been stated by the ECHR on numerous occasions, there can be a lack of foreseeability when domestic laws do not specify a deadline within which national authorities must exercise certain powers or actions. However, the Court considered that sufficient procedural safeguards must be evaluated considering various factors, such as the nature and extent of the interference. In the context of cultural heritage protection, there is broad discretion granted to states, as the goal of cultural protection measures is to recover unique and irreplaceable assets. The Court observed that the absence of provisions regarding the statute of limitations in this field is a characteristic feature of the cultural protection legislation of several countries. For this reason, the Court concluded that the absence of a time limit for confiscation could not lead to the conclusion that the interference was incompatible with the principle of legality[46].

Finally, the assessment of legality of the confiscation order also considered the possibility of imposing confiscation when the property is located outside the national state. The Court concluded that the confiscation order was not only possible in these cases, but also necessary to request international judicial assistance to recover the property located abroad[47].

---

[45] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §306, 311, 315.

[46] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §321, 322, 323, 324; in relation of foreseeability and the absence of a time limit see also ECHR, *Beyeler v. Italy* (GC), no. 33202/96, cit. at 22, § 109; ECHR, *Béla Németh v. Hungary*, no. 73303/14, 17 December 2020, §40.

[47] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §318.

3.3.2. The application of 1970 UNESCO Convention

An additional criticism raised by the claimant concerned whether there was a public or general interest that could justify the adoption of the confiscation order. While the legitimacy of protecting cultural heritage is a reason acknowledged under Article 1 of Protocol 1 to the ECHR for limiting private property, the claimant contested the statue's inclusion in the cultural heritage of the Italian state. The key argument put forward by the Trust in support of this claim was related to the application of the UNESCO 1970 Convention concerning measures to prohibit and prevent the illicit import, export, and transfer of ownership of cultural property[48]. The Trust argued that the UNESCO Convention could not be applied retroactively and therefore was not applicable to the case at hand. Additionally, it argued that the statue did not belong to the cultural heritage of the Italian state under Article 4 of the UNESCO 1970 Convention[49].

A clarification is necessary here: the United States, in accordance with the provisions of Article 21 of the UNESCO Convention, which states that the Convention enters into force three months after the deposit of the instrument of ratification or acceptance, had made a declaration at the time of depositing the ratification. The declaration stated that Article 13 of the Convention on requests for international assistance would not be applied retroactively, specifying that the provision would only apply to cultural property that left the country after the Convention entered into force for the contracting states concerned[50].

The link to Italian cultural heritage was contested primarily on the grounds that the statue could not be considered a work of the 'individual or collective genius' of citizens from the Italian state,

[48] UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, at https://whc.unesco.org/en/conventiontext/.Specifica.

[49] Under art. 4 (b) of the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, "[t]he States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State: a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; b) cultural property found within the national territory".

[50] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 153.

as it was a work of the Greek sculptor Lysippus, and there was no evidence that it had been created in Italy. The lack of evidence regarding the discovery of the statue in Italian territorial waters was also highlighted, with the claimant arguing that the link drawn by the domestic courts, based on the "continuum" between Greek and Roman civilizations, was irrelevant under both the UNESCO 1970 Convention and under general international law[51].

The Italian government, on the other hand, argued that the statue was part of Italy's cultural heritage under the UNESCO 1970 Convention, specifically Article 4, letter b), which recognizes that cultural property found within a country's territory forms part of that state's cultural heritage. The government also pointed out that the domestic courts had already sufficiently established that the statue was found in Italian territorial waters and noted that the claimant had not raised this issue either in their appeal to the Italian Court of Cassation or in the claim before the ECHR. Regarding the possibility of excluding the statue from Italy's cultural heritage based on Article 4, letter a) of the UNESCO 1970 Convention, the Italian government argued that it could not be definitively established that the statue was created by Lysippus, but, even if this were the case, it was likely that Lysippus had lived in southern Italy. It also reiterated that the theory regarding the statue's Greek origin was unsupported by any evidence and that the claimant's objections failed to consider the concept of "continuum" embraced by the Italian Court of Cassation[52].

Regarding the applicability of the UNESCO 1970 Convention to the case, the Court started by reminding that the European Convention must be interpreted in harmony with general principles of international law, considering the 1969 Vienna Convention on the Law of Treaties and any relevant international law provisions applicable to the parties, in accordance with the Court's interpretation[53]. In this light, the Court highlighted that Article 13 of the UNESCO 1970 Convention recognizes the inalienable right of each contracting state to classify or declare certain cultural property inalienable and to prohibit its export[54].

---

[51] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 327.
[52] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 330, 331, 332.
[53] For the relevant judgments, see G. Ulfstein, *Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties*, 24 Int'l J. Hum. Rts. 971 (2020).
[54] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §3 52.

3.3.3. The proportion to the aim pursued

The last objection by the claimant concerned the allegation that the confiscation order was not proportionate to the aim pursued, especially considered that the Italian government failed to act in good time[55]. The Italian government argued that the measure was proportionate to the aim pursued and requested that the assessment about whether Italy acted in good time should be done by taking into account the conduct of the domestic authorities, including the repeated attempts by the Italian state to seize the property before and after it reached the United States[56].

In assessing the proportionality of the measure taken, the Court considered several factors, including whether the Trust had acted with the necessary diligence, whether the domestic authorities had acted consistently and promptly, and whether the claimants were burdened with an excessive charge due to the absence of a compensatory remedy.

Regarding the first point, the Court held that the level of diligence required by the Trust was clear and predictable based on domestic law, and that the unique nature of the operation justified a very high level of diligence in this specific case, in accordance with various international law provisions on the circulation of cultural property[57]. Furthermore, Italian domestic authorities had already established that the Trust's purchase was at least negligent, as no adequate investigation had been conducted regarding the legitimate provenance of the statue. The Trust was found to have a duty to take all reasonably reliable measures to investigate the provenance of the statue before purchasing it. By contrast, the Trust bought the statue by relying on the seller's assurances only. The concerns expressed by Mr. J. Paul Getty Sr. before his death were also considered by the Court, as Mr. J. Paul Getty Sr. had raised doubts about the legitimate provenance of the statue. The Court

[55] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 361-362.
[56] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 369.
[57] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 379, 380, 381, 383. The Court cited the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (in particular art. 4) and the EU Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (in particular art. 10 § 2).

thus found that the assessment regarding the Trust's negligence was not arbitrary or manifestly unreasonable[58].

Regarding the actions of the domestic authorities, the Court noted that there was no doubt about Italy's intent to recover the property. The evaluation focused mainly on whether the Italian authorities acted promptly, starting from the moment they learned of the statue's exportation. On this point, the Court considered that the Italian authorities had acted diligently and promptly and had made numerous attempts to recover the statue through international cooperation efforts. The fact that these attempts were not successful could not be attributed to the Italian authorities, as they were operating in a legal vacuum, with no binding international legal instruments in force at the time of the statue's exportation and purchase, which would have allowed them to recover it or, at least, to obtain full cooperation from the foreign authorities[59].

Another issue the Court considered to determine whether the measure was proportionate was the absence of compensation. In the context of the general provision of Article 1 of Protocol 1 of the Convention, the lack of compensation was a factor to consider, although it could not by itself lead to a violation of the same provision[60]. Considering the finding of negligent purchase, the Court held that the Trust could not have been unaware, in light of domestic case law, that the confiscation of illicitly exported cultural property could be ordered even against third-party owners who were not involved in the offense, thereby excluding the possibility of receiving compensation due to the negligent behavior. The Court found that the claimant had purchased the statue with full awareness of Italy's claims, and that by making the purchase, the claimant had implicitly accepted the risk of the statue being confiscated. The Court concluded that the mere absence of

---

[58] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 384, 385, 388, 389, 390.

[59] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 391, 392, 398.

[60] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 378; on the way in which the lack of compensation may contribute to a finding of violation of Article 1 of Protocol I to the ECHR, see also ECHR, *Depalle v. France* (GC), no. 34044/02, cit. at 22 §91; ECHR *Berger-Krall and Others v. Slovenia*, no. 14717/04, 12 June 2014 §199; ECHR, *McCarthy Mussel Development Ltd. v. Ireland*, no. 44460/16, 7 June 2018, §124.

compensation could not determine a lack of proportionality in the adoption of the measure[61].

Overall, the adoption of the confiscation measure aimed at recovery appeared proportionate and did not conflict with Article 1 of Protocol 1 of the Convention.

4. Some concluding remarks

Under many points of view, the Fano Athlete decision is fully in line with the Court's well-known position on issues such as extraterritorial application of the ECHR, on the relationships between the ECHR and general internal law, on the crucial role played by the principle of legality and by the proportionality test. The decision no. 35271/19 confirms the extraterritorial application of the Convention, whenever a state exercises its jurisdiction, directly or indirectly, in the territory of another states. The decision confirms the need of reading the ECHR in combination with other provisions of international law, including EU law. It confirms the Court's long-standing interpretation of the principles of legality, certainty of the law and prohibition of ex post facto laws, while also applying the proportionality test as the fundamental recipe for balancing rights.

The main novelty of the decision lies elsewhere, in its defence of the specialty of rules on protection of cultural property and in the distinction drawn between criminal measures for the restitution of stolen property and quasi-administrative measures for the recovery of stolen cultural heritage. This is particularly noteworthy since the 1950 ECHR does not explicitly acknowledge cultural heritage rights.

While the ECHR lacks an express provision on cultural heritage, the Court has repeatedly interpreted its norms in ways that implicitly protect it, highlighting the importance of preservation concerns in multiple instances. For instance, in the Fano case the ECHR referred to its earlier decision in *Beyeler v. Italy* (no. 33202/96) a case involving a Swiss national who sought to sell

[61] ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 402, 403, 404; In relation to the fact that the lack of compensation cannot in itself constitute a violation of Article 1 of Protocol No. 1, see also ECHR *Brosset-Triboulet and Others v. France* (GC), no. 34078/02, 29 March 2010, §94; ECHR, *Dzirnis v. Latvia*, no. 25082/05, 26 January 2017 §91, 95.

a painting to the Peggy Guggenheim Collection in Venice[62]. Italy exercised its right of preemption at a price below market value, prompting the claimant to allege a violation of property rights. In *Beyeler*, the Court found that Italy's interference, though justified by cultural heritage legislation, ultimately failed the proportionality test. This decision highlights the ECHR's nuanced approach: while the protection of cultural heritage justifies certain restrictions on property rights, those restrictions must not impose disproportionate burdens[63].

But the Fano Athlete decision does not only emphasise the value of cultural heritage norms; it also endorses the interpretations provided to national and international principles on the matter by other actors, be they national courts or international organizations. This is shown by the ECHR's confirmation of the validity of both the decision by the Italian Court of Cassation and the UNESCO's regime for protection of cultural property. In this regard, it is worth noting that, in the Fano Athlete decision, the ECHR makes reference to the Report on the Evaluation of UNESCO's Standard Settings of the Culture Sector (2014). The Report emphasizes that, under Article 13(d) of the 1970 UNESCO Convention, member states must recognize each State's inalienable right to classify certain cultural assets as non-exportable and facilitate their recovery when illicitly exported. The Report further acknowledges that, while undiscovered cultural property may, in some jurisdictions, remain private property, most states have established public ownership of such heritage.

The Fano Athlete decision by the ECHR should therefore be read as a confirmation of the growing sensitivity towards the protection of cultural heritage, a sensitivity which is also demonstrated by significant legislative activity at the national level and increased interaction among international regulatory regimes. Over time, cultural assets have gained recognition and protection as a distinct category of goods, contributing to the development of the modern concept of 'cultural heritage'. This development stems largely from a shift in the perspective from which cultural property is seen and protected. As the Fano Athlete decision stresses, cultural property should be looked at in the human rights perspective,

[62] ECHR, *Beyeler v. Italy* (GC), no. 33202/96, cit. at 22.
[63] T. Szabados, *Right to Property and Cultural Heritage Protection in the Light of the Practice of the European Court of Human Rights*, cit. at 24, 162.

recognizing its social value as meaningful element of a cultural community and an expressions of its creative spirit and identity[64].

[64] See F. Francioni, *Public and Private in the International Protection of Global Cultural Goods*, 23(3) Eur. J. Int. Law 722 (2012).

THE "PRIOLO CASE" IN THE LIGHT OF THE 2022 ITALIAN CONSTITUTIONAL REFORM: HISTORIC JUDGMENT OR DEADLOCK FOR THE PROGRESSION OF ENVIRONMENTAL LAW?

*Marta Pecchioli**

Abstract

This article examines the Constitutional Court ruling no. 105, issued in June 2024, which pronounced for the first time on the 2022 constitutional amendment in environmental matters on the occasion of the preventive seizure of the IAS S.p.A. depurator, located in Priolo Gargallo. It first analyses the scope of the constitutional reform, arguing that although it brought about some positive changes, it did not generally introduce significant novelties to the Italian legal system. Subsequently, it relates the reform to the Court's ruling, in order to refute the idea of it being a historical decision. It argues, on the contrary, that environmental protection considerations were only marginally addressed, and that no interpretation or application of the new constitutional provisions was offered by the judges. Showing excessive deference to political power, the Court issued a ruling that echoes that of the previous Ilva case and once again sacrifices environmental interests on the altar of economic ones, ignoring both the important role of constitutional jurisprudence in the evolution of the law and the obligations deriving from international and Community law, albeit recalled.

TABLE OF CONTENTS

* Phd Candidate, Scuola Superiore Meridionale.

1. Introduction

In June 2024, the Italian Constitutional Court (henceforth "CC" or "the Court") ruled for the first time on the constitutional amendment made by Law no. 1/2022, which introduced, in Article 1, the first constitutional revision in the part concerning fundamental principles[1] and, in Article 2, the first amendment to the provisions on the so-called "Economic Constitution"[2]. Firstly, the constitutional reform has openly stipulated that among the duties of the States falls the protection of the environment (and that of animals[3], which, however, will not be discussed here), specifying that it must also be safeguarded in the interest of future generations. Secondly, it established the environment as an explicit limit to the freedom of private economic initiative.

The occasion for the Court's pronouncement was the preventive seizure, in May 2022, of a purification plant forming part of the Syracuse petrochemical complex by the Examining Judge (henceforth "EJ") in the context of criminal proceedings alleging the crime of aggravated environmental disaster. This was followed by a government decree-law aimed at circumventing the EJ's decision and allowing the industrial activity to continue in light of its national strategic importance. Subsequently, the EJ raised the issue of constitutionality before the CC, claiming that, since the legislative intervention sanctioned the prevalence of the economic interest over the right to health and a sound environment, a violation of Articles 2, 9, 32 and 41(2) of the Constitution had occurred.

This article relates the constitutional reform to the ruling of the Constitutional Court, to answer the question of whether the former had significant consequences on the latter, i.e. whether the case under examination was decided innovatively compared to the precedents concerning the Ilva affair by virtue of the application of

[1] Articles 1 to 12.
[2] Articles 41 to 47.
[3] In this sense, the Constitution has been aligned with what is already enshrined in Article 13 of the Lisbon Treaty.

the reformed Articles 9 and 41 of the Constitution. The first part examines the scope of the constitutional reform and highlights the positive legal consequences that result from it. However, it rejects the thesis that the amendment introduced new concepts into the Italian legal system and effectively "constitutionalised" environmental protection. The second part reconstructs the main factual and legal considerations of the judgment. The third part offers a critical analysis of the ruling. Here it is argued that, betraying the expectations of many, the Court only marginally addressed the issue of environmental protection and that the constitutional reform played no real argumentative role in resolving the case. In the fourth and final part, the article relates the constitutional reform to the ruling, asserting that the non-innovative nature of the constitutional amendment is only partially responsible for the Court's disappointing judgment. It concludes by arguing that the Court, by showing excessive deference to the Government and essentially limiting itself to summarising the content of the reform, missed the opportunity to recognise that since 2022 the way has been paved for environmental protection interests to take precedence over the right of private economic initiative, thus failing to contribute to the development of environmental law in a more protective direction.

2. The constitutional reform of 2022: the environment "enters" the Constitution

The 2022 constitutional reform intervened on two articles of the Italian constitutional charter, namely Articles 9 and 41. In particular, a third paragraph was added to Article 9, which previously dealt only with the protection of the landscape, under which «[the Republic] protects the environment, biodiversity and ecosystems, also in the interest of future generations»[4]. It was then included that «[t]he law of the State regulates the ways and forms of animal protection». As regards the amendment to the "Economic Constitution", the reform intervened on Article 41 by adding in the second paragraph, after the word «damage» the words «to health, the environment» and at the end of the third paragraph the words «and environmental». Thus, the new Article 41, after establishing the freedom of private economic initiative, states that such freedom

[4] This translation, together with the others in the article, is by the Author.

«cannot be carried out in conflict with social utility or in such a way as to cause damage to health, the environment, security, freedom and human dignity» and that «[t]he law determines the appropriate programmes and controls so that public and private economic activity may be directed and coordinated for social and environmental purposes».

That of 2022 was not the first intervention made on the constitutional text by the legislator. In 2001, the reform of Title V by Law no. 3/2001 inserted for the first time the words «environment» and «ecosystem» into the Italian Constitution, entrusting their protection to the State on an exclusive basis[5]. In truth, even before such amendment, environmental protection was valued by doctrine and, starting in the 1980s, by case law, especially the constitutional one[6]. The latter guaranteed the protection of the environment indirectly, thanks to the combined provisions of Articles 9 and 32 of the Constitution[7] and qualified it as a fundamental constitutional value with a transversal character[8].

[5] Art. 117(2), *s.*

[6] The Court of Cassation has also affirmed the right to a healthy environment: Cass., SS.UU., 9 March 1979 no. 1463 and SS.UU. 6 October 1979, no. 5172. As for constitutional jurisprudence, the first rulings date back to the 1970s (Const. Court, 26 April 1971, no. 29; 17 February 1972, no. 30; 4 July 1974, no. 203). The turning point came in the 1980s: it started with Order no. 184 of 22 June 1983, which explicitly mentioned environmental protection, and was followed by rulings no. 167 and 191 of 1987. However, the most important judgement is considered to be Const. Court, 28 May 1987, no. 210, where express reference is made to the constitutional value of the environment. From sentence no. 617 of 30 December 1987 onwards, the environment has permanently been qualified as a primary good and an absolute value constitutionally guaranteed to the collective (see Const. Court, 30 December 1987, no. 641; 14 July 1988, no. 800; 15 November 1988, no. 1029). In this regard, M. Greco, *La dimensione costituzionale dell'ambiente. Fondamento, limiti e prospettive di riforma*, 41 Quad. cost. 285-286 (2021) says that these rulings of the Court blur the purely anthropocentric dimension typical of the environmental conception, orienting it towards a greater ecocentrism, in the sense that «the object of protection no longer seems to be humankind, as abstractly understood, but its constantly evolving relationship with the surrounding environment; in other words, the value of existence that nature has for humankind and its exsistence».

[7] For a reconstruction of the evolution of environmental protection in the Italian Constitution prior to the 2022 reform, as well as an in-depth analysis of the relationship between Art. 9 and 32 of the Constitution, see C. Della Giustina, *Il diritto all'ambiente nella Costituzione italiana*, 1 *AmbienteDiritto.it* 192 (2020).

[8] See Const. Court, 10 July 2002, no. 407 and the case law cited therein.

However, as has been correctly observed, that of jurisprudential creation is a constitutional right that

> «suffers all the weaknesses and uncertainties of the law of praetorian formation, i.e. of a right inevitably characterised by fragmentation, precariousness and incompleteness that derive from its casuistic origin»[9].

Although the express mention of the word "environment" in the Constitution represented a significant moment in the pathway towards the constitutionalisation of environmental protection, it too was not sufficient in itself to establish what weight should be given to environmental protection in the balance with other constitutionally protected rights[10]. In other words, in the absence of a «noted violation of precise constitutional or ordinary regulatory parameters»[11], the Court was precluded from assessing the merits of the content of the norms, being limited to the sole review on the grounds of manifest unreasonableness of the choices made by the legislator. It must be noted, however, that a high level of environmental protection was in any case imposed both by the obligations of international law and by the constraints deriving from European Union law. The latter, in particular, since the introduction of the Single European Act, functions as a benchmark to assess the validity of Member States' environmental policies[12], dictating both substantive and procedural obligations. With regard to the former, the most relevant provisions are Article 3, paragraphs 3 and 5[13] TEU, Article 191, paragraphs 1 and 2 TFEU (which

[9] M. Cecchetti, *La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune*, 3 Forum Quad. cost. 296 (2021).

[10] D. Porena, *Sull'opportunità di un'espressa costituzionalizzazione dell'ambiente e dei principi che ne guidano la protezione. Osservazioni intorno alle proposte di modifica dell'art. 9 della carta presentate nel corso della XVIII legislatura*, 14 federalismi.it 320 (2020).

[11] M. Cecchetti, *Le politiche ambientali tra diritto sovranazionale e diritto interno*, 7 federalismi.it 109 (2020).

[12] As also noted in EU case law: see the Opinion of Advocate General Y. Bot, delivered on 8 May 2013, Joined Cases from C204/12 to C208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt*, para. 97.

[13] «The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance»; «In its relations with the wider world, the Union shall uphold and promote its values

respectively dictate the objectives and the principles to be followed by the Union in implementing its environmental policy) and Article 37 of the Charter of Fundamental Rights of the European Union[14], to which the Lisbon Treaty of 2009 accorded the same legal value as the Treaties. With regard to the latter, Article 191, paragraph 3 TFEU (which establishes the parameters of EU's environmental policy) Article 192 (concerning the actions to be taken to achieve the objectives set out in Article 191) and Article 114, paragraph 3[15] are particularly important.

In any case, a new constitutional intervention was deemed opportune in light of the changes in sensitivity towards environmental issues that have occurred over the last 20 years and in order not to "leave behind" the Italian legislation compared to that of other countries, both European and non-European, which had already included the protection of the environment and of future generations in their primary legal sources[16]. In this sense, one of the reasons behind the 2022 amendment can also be found in the desire to achieve greater legitimacy for Italy at an international level and to demonstrate more concrete efforts under the European Green Deal. As proof of the urgency of the reform, which was felt

---

and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter».

[14] «A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development».

[15] «The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking into account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective».

[16] It is the Report of the 1st Permanent Commission (Constitutional Affairs, Presidency of the Council and Interior Affairs, General Order of the State and Public Administration) (Rapporteur: Ms Maiorino) on the proposal for the constitutional amendment itself to state that the constitutional amendment is inspired by Art. 20a of the German *Grundgesetz*. Similar references can also be found in the Constitutions of Norway (Art. 110b), Poland (Art. 5), Portugal (Art. 66), Spain (Art. 45), Switzerland (Art. 73), Belgium (Art. 7a) Albania (Art. 59), Argentina (Art. 41) Brazil (Art. 225) and many others: see D. R. Boyd, *The status of constitutional protection for the environment in other nations*, 4 David Suzuki Foundation (2013).

as a shared need by all political parties (and, it could be argued, also of its value-neutral scope) it is significant to note that it was approved by the Lower House after the second reading with a 2/3 majority, thus without waiting for the deadline to request a constitutional referendum.

a. Lights and shadows of the constitutional reform

The reform has been received in different ways by the doctrine. Basically, two opposing currents of thought can be distinguished. On the one hand, some have emphasised its innovative character, believing that it owes the merit of having made the environment a constitutionally protected right and oriented economic activity towards the principle of sustainable development. On the other hand, some maintain that the reform did not bring any significant novelty to the Italian legal system, since the environment was already recognised as a constitutional value thanks to the primacy of EU law over domestic law and that at no time even before the constitutional amendment was it permitted to perform economic activity to the detriment of environmental interests.

In particular, as for the first stance, it has been claimed that the amendment to Article 9 is oriented towards an «ecocentric, almost Franciscan»[17] view of the relationship between man and nature. Although this is a hyperbolic and, in my opinion, also erroneous expression, it is undeniable that the reform is a sign of a gradual shift from a merely anthropocentric conception of such relationship to one that could be described as «integrated anthropocentrism»[18], according to which mankind demands protection as much as animals, plants and every element that makes up an ecosystem. At the same time, human beings (or more accurately, citizens) while remaining at the centre of the legislator's concerns, are seen «no

[17] R. Fattibene, *Una lettura ecocentrica del novellato articolo 9 della Costituzione*, 20 (2022). A more moderate position is taken by F. Fracchia, *L'ambiente nell'art. 9 della Costituzione: un approccio in "negativo"*, 68 Dir. econ. 150 (2022), who speaks of «temperate ecocentrism», while M. P. Poto, *La tutela costituzionale dell'ambiente, della biodiversità e degli ecosistemi, anche nell'interesse delle future generazioni*, (2022), refers to it as «integrated ecocentrism».

[18] In this vein, see M. Delsignore, A. Marra, & M. Ramajoli, *La riforma costituzionale e il nuovo volto del legislatore nella tutela dell'ambiente*, 1 Riv. giur. amb. (2022) and C. Tripodina, *La tutela dell'ambiente nella Costituzione italiana: tra interessi delle generazioni future e responsabilità della generazione presente*, 1 Riv. quad. dir. amb. (2023), according to whom the reform, while enhancing every natural entity, keeps the citizen at the centre of protection.

longer as predators, but as protectors».[19] In other words, the constitutional amendment marks a turning point in the transition from the "anthropocentrism of rights" to the "anthropocentrism of duties", with nature no longer understood as an object of exploitation, but of care. The explicit recipient of such duty of care is the Italian Republic, i.e. all the state and regional bodies, as well as the legislative, executive and judiciary powers[20]. The implicit recipients are, according to the prevailing doctrine, ordinary citizens, by virtue of the «spiritual vocation»[21] of Article 9 that would allow it to be linked not only to the principle of solidarity enshrined in Article 2 of the Constitution[22], but also to Article 4(2), under which «[e]ach citizen has the duty to perform, according to his or her possibilities and choice, an activity or a function that contributes to the material or spiritual progress of society».

Moreover, the reform is said to have untied environmental safeguarding from landscape protection by making it autonomous and by expanding the list of protected subjects not only to the environment but also to biodiversity and ecosystems[23]. With regard to the first point, scholars have pointed out for some time that the concept of landscape protection was such as to also include that of the environment[24]. However, it could perhaps be said that the advantage of having added the reference to the environment in Article 9 was that of determining an inversion of concept, in the sense that it is now in the broader notion of "environment" that that of "landscape" can be considered to be included, rather than the other way around. In this sense, it has been argued that the amended constitutional discipline would impose a new point of equilibrium between the aesthetic and biological dimensions[25] of

[19] Ibid, C. Tripodina, *La tutela dell'ambiente nella Costituzione italiana,* 345.
[20] R. Bifulco, *Primissime riflessioni intorno alla l. cost. 1/2022 in materia di tutela dell'ambiente*, federalismi.it 6 (2022).
[21] F. Fracchia, *L'ambiente nell'art. 9 della Costituzione*, cit. at 17, 147.
[22] See R. Fattibene, *Una lettura ecocentrica del novellato articolo 9 della Costituzione*, cit. at 17 and E. Longo, *Corte costituzionale, diritti e doveri*, Corte costituzionale e sistema istituzionale (2011).
[23] Interestingly, the amendment left untouched the body of Article 117 of the Constitution, which not only contains no reference to the environment and biodiversity but also refers to the «ecosystem», in the singular form.
[24] F. Merusi, *Art. 9*, In G. Branca (ed.), *Principi fondamentali* (1975).
[25] G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.*, 2 Forum Quad. Cost. 467 (2021).

nature[26]. In short, it would have opened the door to the possible balancing of environment and landscape, which arises, for example, with the construction of wind energy infrastructures. With regard to the second point, one might instead wonder what the usefulness of the tripartition is, since the word "environment" also includes the concepts of biodiversity and ecosystem. However, it cannot be overlooked that the Report of the First Permanent Commission on the constitutional reform itself states that such choice «emphasises the need for the legislator to always adopt, in the environmental field, a comprehensive outlook»[27] and that it actually represents «the effort to think of the territory in a non-traditional way, attentive to the depth and volumes, the dynamism and variability of the spaces of sovereignty»[28].

The real novelty of the amendment to Article 9, however, would be the reference to the interests of future generations, which shows the Italian legislator's awareness that the consequences of climate change risk might be irreversible. The amendment requires not only the political-administrative power but also constitutional jurisprudence to take into consideration the «peculiar intertemporal declination»[29] that decisions that may compromise environmental conservation may entail. In truth, and as acknowledged in judgment no. 105/2024[30], the CC has for many years taken into account the interests of future generations, especially in its rulings on water resources and renewable energy. The reform, however, is credited with making the principle of intergenerational equity a «substantive parameter of constitutional legitimacy», which requires judges to assess not only the non-arbitrariness of political choices but also their compliance with the proportionality test[31]. The choice of the term "interest" rather than "right", which would presuppose ownership by a subject whose

[26] See A. Predieri, *Significato della norma costituzionale sulla tutela del paesaggio*, Studi per il ventesimo anniversario dell'Assemblea costituente 38 (1969) in which it is stated that «if the landscape is the form of the country, the environment is the form (and substance) of our existence».

[27] Report of the 1st Permanent Commission, cit. at 16.

[28] R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, 21 Anal. giur. econ. 18 (2022).

[29] M. Greco, *Il diritto costituzionale dell'ambiente dopo la riforma: alcune conferme e qualche (inattesa) novità nella sentenza della Corte costituzionale n. 105/2024*, (2024).

[30] Par. 4.5.

[31] M. Cecchetti, *La revisione degli articoli 9 e 41 della Costituzione*, cit. at 9, 311.

existence has not yet materialised, can also be deemed appropriate. The same can be said of the adverb "also", which makes us understand that the protection is addressed, first and foremost, to the present generations, who, in addition to being holders of a right, also have a duty to preserve the environment for generations to come[32]. Moreover, this expression enshrines an implicit reference to the principle of sustainable development which, according to its most famous definition provided in the so-called "Bruntland Report", consists in a «development that meets the needs and aspirations of the present without compromising the ability to meet those of the future»[33]. As is well known, sustainable development calls for inter- and intra-generational solidarity and puts two ideas at the centre of its definition: the first one is that of needs, particularly the essential needs of the world's poor; the second one is that of limits, i.e. the idea that the environment cannot satisfy all present and future demands. Last, but not least, one cannot fail to observe that since the environment has been included among the values that constitute the hard core of the Constitution, with respect to which no retreat is possible[34], the constitutional legislator, while being very careful not to mention it, seems to have indirectly accepted the existence of a principle of environmental non-regression.

Instead, with regard to the amendment of Article 41, enthusiasm is more restrained. It has been observed that, having placed a limit on economic initiative and a "finalisation" on both public and private economic activity, the reform has struck at the heart of the model of growth on which the Italian legal system, like all Western ones, has long been hinged[35]. It has also been claimed that the amendment in paragraph 3 has revived a provision that had originally been introduced to ensure the possibility of public power intervention in the economy, which had then been substantially "killed off" following Italy's accession to the European Economic

[32] F. Fracchia and S. Vernile, *Lo sviluppo sostenibile oltre il diritto ambientale*, 50 Le Regioni 25 (2022) hold that the environment remains predominantly a matter of duties, rather than rights.
[33] WCED, *Our common future*, (1987), Ch. 2.
[34] In this vein, see also M. CECCHETTI, *La revisione degli artt. 9 e 41*, 3 Forum quad. cost. 285 ff. (2021) and D. PORENA, *«Anche nell'interesse delle generazioni future». Il problema dei rapporti intergenerazionali all'indomani della revisione dell'art. 9 della Costituzione*, 15 federalismi.it 124 (2022).
[35] R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, cit. at 28, 23.

Community[36], based on an open market with free competition. Although the provision had been partly revived thanks to the EU's declared commitment to the circular economy, which requires economic development to be directed and programmed towards its sustainability dimension[37], the fact that the legislator had intervened directly in this paragraph would in any case be an important signal for domestic law. In this sense, the new Article 41 could have the power to direct the market towards greener forms of consumption and production, thus presenting environmental protection no longer as a cost, but as a positive constraint[38]. Whether one agrees with this thesis or not (in fact, Article 41(3) of the Constitution does not only legitimise plans in the Soviet sense), one must in any case recognise that the amendment seeks to overcome the traditional antagonism that characterises the right to private economic initiative and that to a healthy environment[39] by imposing on the State, public administrations[40] and private individuals[41] a clear mandate to ensure that economic activity is carried out with respect for environmental protection. It is also significant that the insertion of the words «health and environment» in paragraph 2 comes first, before «security, freedom and human dignity», as if to indicate that there is a hierarchy between the negative limits to the freedom to excercise private economic initiative[42].

---

[36] F. De Leonardis, Il diritto dell'economia circolare e l'art. 41 Cost., 1 Riv. quad. dir. amb 67 ff. (2020).

[37] *Ibidem*.

[38] *Ibidem*, stating that the limits laid down in Article 2 are negative constraints, thus representing a cost.

[39] On the "antagonistic" nature of environmental protection interests, see A. Bonomo, *Governare la transizione ecologica: tra nuovi interessi e nuovi conflitti*, 3 Riv. trim. dir. pubbl. (2024).

[40] By virtue of the extension to paragraph 2 of what is stipulated in paragraph 3, under which limits on private economic initiative can only be imposed by ordinary laws and administrative acts that specify them: see M. Delsignore, A. Marra, & M. Ramajoli, *La riforma costituzionale e il nuovo volto del legislatore nella tutela dell'ambiente*, cit. at 18, 26.

[41] *Ibidem*, 35, according to whom the most profound meaning of the reform of Article 41 lies in the valorisation of private individuals as protagonists in the overall system of economic relations, as they contribute to the realisation of the environmental goals endorsed by the legal system in line with the requirements of Articles 2 and 4 of the Constitution.

[42] In this vein, also L. Cassetti, *Salute e ambiente come limiti "prioritari" alla libertà di iniziativa economica?*, 16 federalismi.it 4 (2021).

As anticipated, not all commentators agree with the positive scope of the reform, often not without reason. Some criticisms have been particularly heated: the constitutionalisation of the environment has been described as «useless, perhaps harmful, even stupid»[43], arguing that environmental protection is not and cannot be an autonomous right, since it exists only if balanced with the provisions of the Economic Constitution and, in any case, it was already amply guaranteed by constitutional jurisprudence. With regard to Article 9, some have noted that a change in fundamental principles represents a dangerous precedent[44] and, consequently, that the amendment should have been operated on a different part of the Constitution[45]. Again, it has been said that the protection of landscape is not always compatible with that of the environment, especially when the former is understood in industrialist terms[46], and that the expression «also in the interest of future generations» could have been better, as it «seems almost an unnecessary appendix to the rest of the constitutional provision»[47]. These remarks are subject to several objections[48] and are,

[43] G. Di Plinio, *L'insostenibile evanescenza della costituzionalizzazione dell'ambiente*, 16 federalismi.it 2 (2021). This is a very strong criticism, based on the (not acceptable) conviction that environmental law is a vacuous term, which indicates a discipline without scientific autonomy.

[44] T. E. Frosini, *La Costituzione in senso ambientale. Una critica*, federalismi.it 3 (2021) and F. Rescigno, *Quale riforma per l'articolo 9*, 13 federalismi.it 2 (2021).

[45] G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.*, cit. at 25, 481.

[46] G. Severini and P. Carpentieri, *Sull'inutile, anzi dannosa modifica dell'articolo 9 della Costituzione*, Giustizia Insieme (2021). The reference is mainly to renewable energy sources: «there looms with all seriousness the risk that the constitutional amendment may cause, as its immediate tangible effect, that of subordinating landscape protection to the overflowing spread of industrial plants producing energy from renewable sources».

[47] G. Sobrino, *Le generazioni future «entrano» nella Costituzione*, 42 Quad. cost. 140 (2022).

[48] See R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, cit. at 28, who correctly points out, about Di Plinio's criticism, that he shows «an overly submissive attitude towards constitutional jurisprudence»; sbout Rescigno's claim, he observes that a problem could only arise in the case of revision or modification of the fundamental core of principles, and that the mere addition of the principle of intergenerational equity in the Constitution does not fall into the category; on the criticism of Severini and Carpentieri, he notes that the constitutional amendment moves in the direction of giving autonomy to the concepts of environment and landscape. Instead, R. Fattibene, *Una lettura ecocentrica del novellato articolo 9 della Costituzione*, cit. at 17, in contrast with Sobrino's point, appreciates the wording «also in the interest of future generations», arguing it only grammatically relates to future generations, as

consequently, scarcely endorsed. This does not mean, however, that the constitutional reform could not have been improved. I support the thesis of those who argue that behind an apparently innovative, almost "revolutionary" reform, no significant novelties are to be found in the Italian legal system. If we think of intergenerational equity, now enshrined in Article 9, we cannot ignore the fact that such principle was already known to the legislator, who certainly had it in mind when he introduced the concept of budgetary balance[49] (Art. 81 of the Constitution), drafted the Italian pension system[50] and, above all, explicitly included it in a source of primary rank. Indeed, Article 3-*quater* of the Italian Environmental Code (Legislative Decree no. 156/2006) states that

> «every legally relevant human activity under this code must comply with the principle of sustainable development, in order to ensure that the satisfaction of the needs of present generations cannot compromise the quality of life and opportunities of future generations».

In any case, the doctrine considers that the principle was already inferable from Article 2 of the Constitution, which imposes the duty of solidarity[51]. Moreover, the strong degree of integration between national, international (to which we owe much of the development of environmental law) and European law, enshrined in the Constitution itself in Articles 11[52] and 117(1)[53], as well as in Article 1 of the Administrative Procedure Act (Law no. 241/1990), cannot be overlooked. The latter, in particular, imposes compliance by the public administration with the principles established at the EU

conceptually it takes into account three different interests that coincide in a renewed framework of sustainable development: these are the interest to today's environmental balance, and the interests of present and future generations.

[49] As recognised also in Const. Court, 5 December 2019, no. 18.

[50] See G. Amoroso, *L'«interesse delle future generazioni» come nuovo parametro costituzionale*, 22 Riv. dir. sic. soc. (2022).

[51] F. Fracchia and S. Vernile, *Lo sviluppo sostenibile oltre il diritto ambientale*, cit. at 32; M. Greco, *La dimensione costituzionale dell'ambiente,* cit. at 6; E. Longo, *Corte costituzionale, diritti e doveri*, cit. at 22.

[52] Which allows the Italian Republic to accept limitations to its sovereignty by virtue of adherence to the international legal order.

[53] «Legislative power is exercised by the State and the Regions in compliance with the Constitution, as well as with the constraints deriving from Community law and international obligations».

level, which include not only sustainable development[54], but also all the other principles of environmental law that derive from it. It follows that the 2022 reform alone cannot be credited with having constitutionalised environmental protection.

Even by looking at Article 41, it can be noticed that the reform did not produce any notable changes[55]. In fact, the protection of health and the environment was already subsumed by case law under the limits set forth in paragraph 2[56] and considered to be a source of positive obligations for the State under the notion of «social ends» in paragraph 3[57]. Furthermore, given the growing importance of environmental protection policies at EU level, even in the absence of the amendment one might have expected increasing public control or planning interventions to protect natural resources[58]. However, in view of the new formulation of the provision, it remains, in any case, in the hands of the legislator to carry out the balancing act between the freedom of economic initiative and its limits[59], provided that such choices can then be reviewed by constitutional judges.

All for nothing, then? I do not think so. The reform deserves the praise of having enshrined in the supreme legislative source of the Italian legal system the need to steer the development model towards greater farsightedness and solidarity, requiring efforts from all components of the Republic, from public authorities to ordinary citizens. But above all, it is my opinion that it has laid the foundations to give greater weight to environmental protection in the balance with other constitutionally protected rights, placing it at the top of the hierarchy of values, together with the right to life, dignity and health, to which it is inseparably linked. In this vein,

---

[54] In addition to the provisions enshrined in the primary EU sources referred to in § 1, some derived sources impose compliance with sustainable development, such as the European Green Deal and the Next Generation EU plan.

[55] For an extended discussion in this regard, see E. Mostacci, *Proficuo, inutile o dannoso? Alcune riflessioni a partire dal nuovo testo dell'art. 41*, 52 DPCE online 52 (2022) who, among the various criticisms he makes of the constitutional reform, also includes the failure to address the other articles of the Economic Constitution, such as Article 44.

[56] Const. Court, 9 April 2013, no. 85, discussed below.

[57] *Ex multis*, Const. Court, 6 June 2001, no. 190 and 23 May 2018, no. 158.

[58] In this vein, see also L. Cassetti, *Salute e ambiente come limiti "prioritari" alla libertà di iniziativa economica?*, cit. at 43.

[59] R. Bin, *Che cos' è la Costituzione?*, 27 Quad. cost. 23 ff. (2007).

the reform has supported the increasingly widespread opinion that the environment should be understood as «a prerequisite for all other rights» that, as such, «constitutes a challenge to the entire structure of what, on the basis of the constitutions born in the second half of the last century, can be defined as the constitutional State»[60]. Indeed, by virtue of its public interest nature, the idea of a prevalence of the right to a healthy environment over private rights had already been put forward by some scholars[61]. However, it had been widely contested, not least by the Constitutional Court itself, which had stated that

> «[t]he fundamental rights protected by the Constitution are in a relationship of reciprocal integration and it is therefore not possible to identify one of them that has absolute prevalence over the others [...]. If this was not the case, an unlimited expansion of one of the rights would occur, which would become a "tyrant" over the other constitutionally recognised and protected values»[62].

Indeed, the constitutional amendment paves the way to the possibility of modifying this approach. In particular, the combined reading of the two articles affected by the reform seems to suggest that, at least where a balance must be struck between environmental and economic interests, there is no longer room for uncertainty[63]: the latter must succumb.

[60] S. Grassi, *Ambiente e costituzione*, 3 Riv. quad. dir. amb. 1 ff. (2017).

[61] G. LIGUGNANA, *Corte di giustizia, interessi ambientali e principio di proporzionalità. Considerazioni a margine della sent. 21 luglio 2011, C-2/10*, in Riv. it. dir. pubbl. comunit. (2011), according to whom Community law is quite clear in finding, as a matter of principle, that the interest in the protection of the flora and fauna present in certain sites prevails over all other elements that are not of overriding public interest; D. Sorace, *Tutela dell'ambiente e principi generali sul procedimento amministrativo*, In S. GRASSI and M.A. SANDULLI (eds.), *Trattato di diritto dell'ambiente* 25 (2014), who states that «it is primarily with the environmental interest that other interests must be compared».

[62] Paragraph 9 of the Court's legal reasoning in judgment no. 85/2013.

[63] Indeed, by comparing judgment no. 85/2013 with judgment no. 58/2015, both concerning the Ilva case, it can be observed that in the former, economic interests prevail, while in the latter, environmental ones do.

3. The Priolo case

A. *Facts*

The case concerns the Syracuse petrochemical cluster, which extends between the municipalities of Syracuse, Priolo, Melilli and Augusta, with a crude oil production capacity of approximately one-third of national demand. The dispute originated following the preventive seizure, on 13 May 2022, of the purification plant operated by Industria Acqua Siracusana (IAS S.p.a.), located in Priolo Gargallo, into which flowed, in addition to civil waste, the waste deriving from oil refining, the transformation of its derivatives and the production of energy generated by large industries in the area, namely ISAB S.r.l., Sonatrach Raffineria Italiana S.r.l. and Versalis S.p.a. This took place in the context of criminal proceedings against these companies during which, among other offences, the crime of aggravated environmental disaster under Article 452-*quater* of the Italian Criminal Code was alleged. A judicial administrator was then appointed with the task of limiting the operation of the plants to the purification of civil waste only. Later, on 5 January 2023, Law Decree no. 2/2023 (the so-called "Priolo Decree") was issued, introducing several «[p]rovisions on criminal matters relating to plants of national strategic interest». In particular, Article 6 provided for the introduction in Article 104-*bis* of the implementing rules of the Code of Criminal Procedure of paragraph 1-*bis*, which provides that

> «when the [preventive] seizure concerns industrial establishments or parts thereof declared to be of national strategic interest pursuant to Article 1 of Decree-Law no. 207 of 3 December 2012, converted, with amendments, by Law no. 231 of 24 December 2012[64], or plants or infrastructures necessary to ensure their continuity of production, the judge shall order the continuation of the activity with the aid of a judicial administrator [...]».

The next sentence requires that

> «[w]henever it is necessary to strike a balance between the need to ensure the continuity of the productive activity and preservation of employment and the

[64] Pursuant to which, in order to be qualified as a nationally strategic plant, it is necessary that (i) the plant has employed not less than 200 workers for at least one year and (ii) there is an absolute need to safeguard production and employment.

> protection of workplace safety, health, the environment and any other legal assets harmed by the offences committed, the judge shall dictate the necessary prescriptions, also taking into account the content of the administrative measures adopted to that end by the competent authorities».

These provisions do not apply «when the continuation may result in a concrete danger to public health or safety or to the health or safety of workers that cannot be avoided by any prescription». The fifth sentence, which, as will be seen, was censured by the Constitutional Court, provides instead that

> «the judge shall authorise the continuation of the activity if, as part of the procedure for the recognition of national strategic interest, measures have been adopted by which it has been deemed feasible to strike a balance between the requirements of continuity of production activity and preservation of employment and the protection of workplace safety, health and the environment and any other legal assets damaged by the offences committed. In any case, the measures issued by the judge pursuant to the preceding sentences, even if negative, are transmitted, within forty-eight hours, to the Presidency of the Council of Ministers, to the Ministry of Enterprises and Made in Italy and to the Ministry of the Environment and Energy Safety».

Consequently, the Decree of the Prime Minister of 3 February 2023 conferred the status of «industry of strategic national interest» on the plant owned by ISAB S.r.l. and that of «infrastructure necessary to ensure continuity of production» on the purification plant owned by IAS S.p.a. On 11 July 2023, the Department of the Environment issued an Integrated Environmental Authorisation (henceforth "IEA") containing a series of prescriptions for IAS S.p.a., but nevertheless directed at the continuation of the purification of waste by the petrochemical plant. The inter-ministerial Decree of 12 September 2023, issued under the jurisdiction of the Ministry of Enterprises and Made in Italy, in agreement with the Ministry of the Environment, then indicated the balancing measures prescribed by the fifth sentence of Article 104-*bis*, paragraph 1-*bis*, as amended by Decree-Law no. 2/2023. However, the inter-ministerial Decree allows the discharge into the purification plant managed by IAS S.p.a. of effluents containing certain pollutants at a considerably

higher concentration than that generally provided for by Tables 3 and 5 of Annex 5 to the third part of Legislative Decree no. 152/2006. Therefore, the Syracuse EJ, deeming that the plant was still unsuitable to ensure the adequate treatment of wastewater, ordered the adoption of a timetable for the safe interruption of its delivery. Moreover, he raised the issue of constitutionality before the CC, complaining that the set of norms introduced by the legislator following the preventive seizure to ensure the continuation of the activity would have severely limited his precautionary powers and asserting that the fifth sentence of the amended Art. 104-*bis*, paragraph 1-*bis*, would have established the «prevalence of the continuity of the productive activity [...] over the legal goods of environment and health, both of workers and of the population residing near the areas affected by pollution», thus violating Articles 2, 9, 32 and 41, paragraph 2, of the Italian Constitution. The three companies of the Syracuse industrial area then entered an appearance together with the Prime Minister, defended by the State Attorney's Office, as predictable on the basis of the last part of the fifth sentence of Article 104-*bis*, paragraph 1-*bis*.

B. *Law*

After rejecting all the objections presented by the defendants and the Prime Minister as groundless, the CC made a general preliminary remark, noting the close connection between the genesis of the legislative amendment to Article 104-*bis* and the judicial proceedings that led to the preventive seizure of the purification plant. It clarified that this was a general and abstract provision that could be applied in all similar cases. Moreover, the legislative intervention was intended to fill the gaps in the previous discipline, laid down in the so-called "Ilva Decree" (Decree-Law no. 207/2012), which referred only to plants of national strategic interest (and not also to those necessary to ensure their continuity of production) and presupposed the review of the IEA by the Ministry of the Environment alone.

Turning to the examination of the merits of the case, firstly, the CC confirmed the correctness of the EJ's interpretative assumption: the wording «the judge shall authorise» in the fifth sentence of paragraph 1-*bis* is peremptory and, operating together with the provisions of the sixth sentence, it represents «in the logic – indeed, not quite transparent – of the legislator [...] a sort of emergency

brake» when the EJ orders a halt to industrial activity. That is to say, it indicates the impossibility for the EJ to carry out an «autonomous balancing of the interests at stake», obliging him to passively accept the balancing measures established by the Government even where he recognises a concrete danger to health or the environment.

Secondly, referring to judgment no. 85/2013 on the "Ilva Decree", repeatedly mentioned by the referring party, the Court notes that the case under review differs from it for two fundamental reasons. The first: that judgment claimed the infringement of different articles of the Constitution[65], relating to the alleged undue impact of the "Ilva Decree" on judicial measures already entered into force through rules lacking generality and abstractness and to its alleged derogation to the constitutional principles of criminal liability and exercise of criminal action[66]. The second: although a violation of Articles 4 and 32 of the Constitution was also raised in judgment no. 85/2013, the Court notes that this was issued prior to the constitutional amendment of 2022. On the one hand,

> «[t]he 2022 reform directly enshrines in the Constitution the mandate to protect the environment, to be understood as a unitary good [...] but autonomously recognised with respect to the protection of landscape and human health, despite being naturally connected to them; thus, it explicitly binds all public authorities to take action towards its effective defence».

In addition, the CC notes that the amendment has extended protection also to future generations, while acknowledging that in its own case law the interests of the unborn were safeguarded even before the reform[67]. On the other hand, the Court observes that the reform provides that private economic initiatives may not harm the environment. It therefore states that

> «these clear indications of the constitutional legislator – read also through the prism of the European and international obligations on the matter – must be taken in punctual account by this Court in assessing the petitioner's complaints».

The CC's judges conclude that the EJ correctly concluded that the «point of balance» enshrined in Article 1 of Decree-Law no. 207/2012, assessed in ruling no. 85/2013, had not been reached in

[65] Namely, Articles 3, 101, 102, 103, 104, 107 and 111 of the Constitution.
[66] Articles 25, 27 and 112 of the Constitution.
[67] Paragraph 5.1.2.

the Priolo case. Indeed, Article 1 of such Decree-Law provided that the continuation of the production activity subject to seizure was possible upon revision of the IEA by the Ministry of the Environment, to be carried out through a procedure open to the effective participation of the public, aimed at ensuring compliance with the principle of prevention by adopting of the best available technologies and at guaranteeing «the most adequate protection of the environment». Furthermore, the duration of the continuation should in any case not exceed a 36-months period.

According to the CC, the provision under scrutiny differs. First, it contains no reference to the authority responsible for adopting the balancing measures. However, the Court admits in that regard that that authority is indirectly identifiable in the Prime Minister. Second, it does not give any indication as to the procedure to be followed in identifying such balancing measures. In this sense, it ends up

> «shaping a system of environmental protection parallel to the ordinary one, by entrusting it to a provision with entirely generic contours: as such, this [system] is unsuitable for ensuring that, when fully operational, the exercise of the activity of the factories and plants is carried out without harming health and the environment».

This originates a conflict with the principles of transparency, public participation, the use of the best available techniques and the need to submit the authorisation of the activity to a careful analysis of the factual situation, as required by Decree-Law no. 207/2012. Moreover, it not only disregards the provisions of the Aarhus Convention and the European Convention on Human Rights (ECHR), but also the relevant case law. It is no coincidence that in this passage the CC cites the recent *Verein KlimaSeniorinnen Schweiz* case in which the European Court of Human Rights, in line with its previous rulings[68], has most recently reaffirmed that the right to a healthy environment is among the values that enable the concretisation of the right to private and family life under Article 8 ECHR.

[68] *Ex multis*: ECtHR, *Powell and Rayner v. United Kingdom*, 21 February 1990, Application no. 9310/81; *Lopez Ostra v. Spain*, 9 December 1994, Application no. 16798/90; *Guerra and Others v. Italy*, 19 February 1998, Application no. 14967/89; *Taskin and Others v. Turkey*, 10 November 2004, Application no. 46117/99; *Di Sarno v. Italy*, 10 January 2012, Application no. 30765/08; *Dees v. Hungary*, 9 November 2010, Application no. 2345/06.

However, the constitutional judges, at this point, surprisingly proceed to "rescue" the part of the provision where a generic and unspecified reference to the measures to be taken is made: thanks to what is defined as a «constitutionally oriented interpretation», they contend that the measures legitimately adoptable by the Government during crises to temporarily allow the continuation of activities of national strategic interest «must, if anything, be functional to the objective of gradually bringing the activity itself, in the shortest possible time, within the sustainability limits generally established by law».

It is on the third point of the Court's reasoning, therefore, that the constitutional censure focuses. The Court notes that Art. 104-*bis*, paragraph 1-*bis*, unlike Art. 1 of Law Decree no. 207/2012, does not prescribe any final term for the continuation of the activity of the purification plant,

> «thus ending up allowing, potentially without any time limit, a mechanism based on an authorisation coming directly from the national Government, whose effect is to indefinitely deprive the judge responsible for the seizure of any power to assess the adequacy of the measures to protect the environment and public health, and human life itself».

The provision at hand should therefore be declared unconstitutional under Articles 9, 32 and 41 of the Italian Constitution. Indeed, according to the latter Article 41, the continuation of a dangerous economic activity may continue only as long as it is «strictly necessary to carry out the necessary environmental remedial measures and reactivate the ordinary procedural mechanisms provided for by Legislative Decree no. 152/2006».

4. Some comments on the Court's ruling

The ruling was hailed as «historic»[69] for having for the first time provided the authoritative interpretation and application of the reformed Articles 9 and 41 of the Constitution. It has been said that with this judgment the CC clarified the layout of the new constitutional mandate, introducing a «direct constraint for all public authorities and an equally direct limit for all economic

[69] Rete dei Comuni sostenibili, *Costituzione e ambiente: sentenza storica della Corte costituzionale per la prima volta con i nuovi principi contenuti negli art. 9 e 41*, at www.https://www.comunisostenibili.eu/, 17 June 2024.

activities, both public and private»[70]. Indeed, the CC, after recalling its jurisprudence prior to the reform which had already identified the environment and the interests of future generations as goods worthy of constitutional importance, declared its intention to take into account the «clear indications of the constitutional legislator [...] read also through the prism of European and international obligations on the matter [...]», thus raising hopes for a possible greater weight attributable to the environment in the balancing with the other interests at stake[71]. On closer inspection, however, it appears evident how the following considerations on the new constitutional discipline are almost incidental, the Court's argumentation being mainly aimed at establishing the boundary between the powers of the judiciary and those of the political-administrative power in cases where the suspension of production activity is decided. In other words, in reaffirming that the balancing of the interests at stake is the judge's task, not the Government's (except crisis situations[72]), the Court seems more concerned with ensuring the balance between the powers of the State, rather than dictating the future course of action to ensure the protection of environmental interests. Indeed, in its reasoning concerning the conservation of the environment, on the one hand, the Court refers back to previous case law, reconfirming that the environment is a unitary value and a «fundamental right of the individual and a fundamental interest of the collective». In this respect, by no means does the Court add anything new. On the other hand, in emphasising the reasons in light of which the case at hand must be decided differently from the previous ruling no. 85/2013, it essentially limits itself to stating the obvious, namely that the

[70] M. Carducci, *Il duplice "mandato" ambientale tra costituzionalizzazione della preservazione intergenerazionale,* neminem laedere *preventivo e fattore tempo. Una prima lettura della sentenza della Corte costituzionale n. 105 del 13 giugno 2024*, DPCE Online 3 (2024).

[71] In this sense, see also C. Ruga Riva, *Il conflitto tra ambiente e attività produttiva strategica: ogni cosa al suo posto? La Corte costituzionale sul c.d. decreto Priolo*, Sistema Penale (2024).

[72] The judgment, at paragraph 5.4.1, states that «in a crisis determined by the need to ensure continuity of production of a plant of national strategic interest subject to criminal seizure, the provision of a mechanism allowing the national government itself to intervene to dictate, on a transitional basis, measures enabling such risks to be contained as far as possible in the immediate future, while at the same time binding the court to allow the continuation of the activity, cannot be considered *per se* incompatible with the Constitution».

constitutional amendment has taken place in the meantime. In this regard, it would have been more appropriate to emphasise that the main difference between the present case and the Ilva one lies in the outdatedness of what was stated in paragraph 9 of the 2013 judgment, according to which one constitutionally guaranteed right can never prevail over another. Moreover, if the constitutional amendment was merely intended to suggest the need for an additional motivational burden in cases where environmental protection is compromised for the sake of other interests[73], it would provide no additional value beyond what is already outlined in the second paragraph of Article 3-*quater* of the Environmental Code.

It seems, therefore, that no real interpretation of the reform has been offered, with two exceptions. The first one concerns Article 41: the Court states that the protection of the environment, being a limitation to the freedom of private economic initiative, is «in the interest [...] of individuals and the collective at present, as well as of the unborn». In this sense, it seems to link the intergenerational dimension of the reformed Article 9 to Article 41, suggesting that the expression «to cause damage» of Article 41 refers not only to current damages but also to future ones[74]. The second one is inherent in the expression «fundamental right of the individual and fundamental interest of the collective», which belies the observation made by the doctrine according to which the constitutional amendment would have eliminated the subjective dimension of protection[75], showing that the latter has only been supplemented with the collective one[76]. In general, however, the Court missed the opportunity to acknowledge, *apertis verbis*, that the 2022 reform opened the way for environmental interests to prevail over economic ones. To be fair, an attempt in this sense can be found in the statement that the 2022 constitutional amendment resulted in the «change [...] of the constitutional parameters based

[73] F. Fracchia and S. Vernile, *Lo sviluppo sostenibile oltre il diritto ambientale*, cit. at 32, 31.

[74] M. Greco, *Il diritto costituzionale dell'ambiente dopo la riforma,* cit. at 29.

[75] This is the observation made by M. Cecchetti, *La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente*, at 9, 307-308, who asserts that if the protection of the environment is considered as a subjective right, the question remains as to what the object of the protection actionable by individuals might be, even though the protection of the environment is dependent on that of other legally relevant interests of individuals.

[76] Although in only one judgment had the Court qualified environmental protection as a subjective right: Const. Court, 28 May 1987, no. 210 (para. 4.5).

on which this Court's scrutiny must be conducted». The use of the term «change», rather than "supplement" or "addition", seems to signal an awareness on the part of the judges that the amendment in question should alter their approach to the provisions under scrutiny towards an enhanced level of protection. Nevertheless, this is an overly timid assertion by the Court, which does not explain what this change should consist of and which is, in any case, not emphasised in the remainder of its reasoning.

Overall, the constitutional judges appear to have betrayed the expectation placed on them to decide the case in light of the new discipline delineated by the 2022 legislator and the obligations under European and international law. These were referred to by the Court but played no role in the resolution of the case. Indeed, the Court did not censure the whole of the fifth sentence of paragraph 1-*bis* of Article 104-*bis*, but only the part in which no time limit is set for the continuation of the plant's activity[77]. This is, firstly, unreasonable, especially if one considers that the Court had found that the provision did not contain any reference to the procedural obligations and principles to be followed in identifying the balancing measures, which derive from European and international law. What was the point of recalling the necessary adherence to the principles of transparency, public participation and prevention in the environmental sphere if it then avoids censuring the entire provision under review, limiting itself to evoking the need for an «adequate preliminary investigation activity» and a «congruous motivation» pursuant to Article 3(1) of Law no. 241/1990[78]? Secondly, it could represent a dangerous precedent. The Court does not emphasise the fact that the requirements set out in the revised IEA represent an «indispensable element»[79] of the authorisation for the continuation of the activity, the compliance of which conditions its validity. Indeed, compliance with the obligations enshrined in the IEA ensures sustainable

[77] In this respect, see also R. Bin, *Il "caso Priolo": scelta politica vs. bilanciamento in concreto (in margine alla sent. 105/2024)*, 3 Consulta Online (2024).
[78] M. Ceruti, *Bilanciamento governativo degli interessi e sindacato giurisdizionale per gli impianti industriali di interesse strategico. Le due facce della prima pronuncia della Consulta sulla riforma degli artt. 9 e 41 della Carta*, 57 RGA online (2024).
[79] E. Frediani, *Decisione condizionale e tutela integrata di interessi sensibili*, 1 *Dir. amm.* 485 (2017).

protection for the entire life of the plant[80], since it «takes as its logical starting point, not an activity (to be circumscribed as to its effects) but a value: that of guaranteeing health and the "natural foundations" of life»[81]. Moreover, the Court disregards the fact that the balancing measures are drawn up by the Ministry of Enterprises and Made in Italy, «in agreement» with the Ministry of the Environment. This differs from the "Ilva decree", which required these measures to be adopted during the revision of the IEA by the Ministry of the Environment alone. Paradoxically, the Court constantly refers to the IEA revision obligations dictated in the Ilva case but fails to point out that in the Priolo case the Ministry of the Environment is relegated to a marginal role, secondary to that of the recently established Ministry of Enterprises and Made in Italy whose main concern, as its very name says, is the promotion of business interests. As a matter of fact, the inter-ministerial Decree raised certain threshold values for the treatment of effluents, thereby choosing to «sacrifice environmental interests on the altar of national economic, employment and business needs linked to the Priolo petrochemical plant, with a genuinely political assessment»[82]. On this point too, however, the Court remains silent. Indeed, it envisages the possibility of "saving" the provision under scrutiny by means of a *reductio ad legitimitatem*, to be accomplished by introducing a maximum time limit to the duration of the economic activity.

Further criticism can be made of the ruling. The Court dwells at length on the previous judgment no. 85/2013, but fails to devote due attention to another precedent, also related to the Ilva affair, namely judgment no. 58 of 2018. The latter had declared incompatible with Article 41 of the Constitution (as well as Articles 2, 3, 4 and 32), Articles 3 of Decree-Law no. 92/2015 and Articles 1(2) and 21-*octies* of Decree-Law no. 83/2015 for letting the economic interest prevail over the other constitutionally relevant values in a disproportionate and unreasonable way. The background was the deadly accident of a worker at the Ilva plant,

[80] See S. Vernile, *L'Autorizzazione Integrata Ambientale tra obiettivi europei e istanze nazionali: tutela dell'ambiente vs. semplificazione amministrativa e sostenibilità socio-economica*, 6 Riv. italiana di dir. pubb. com. (2015).
[81] E. Frediani, *Decisione condizionale e tutela integrata di interessi sensibili*, cit. at 79, 210.
[82] C. Ruga Riva, *Il conflitto tra ambiente e attività produttiva strategica: ogni cosa al suo posto?*, cit. at 71.

which had been followed by the preventive seizure of the plant and the consequent adoption of Decree-Law no. 92/2015, later censured by the Constitutional Court, which authorised the continuation of the company's activity provided that the conditions set out therein were met. The provisions had been condemned, in particular, insofar as they provided that the continuation of the business activity for twelve months was conditional solely on the arrangement, within thirty days, of an (even provisional) plan by the same private party affected by the seizure, without requiring the participation of other public or private entities, the removal of the dangers to the security of workers and without any reference to laws related to occupational safety or to alternative organizational and prevention models.

This shows, firstly, that it should not be the mere application of a time constraint the reason for saving a provision from a declaration of unconstitutionality. Secondly, that the Court's intent is not that of issuing a ruling that would mark a turning point in environmental protection. Quite the opposite. Indeed, the 2018 judgment shows that the Court is more rigorous in evaluating provisions that risk posing a danger to the safety of workers, so much so that the 12-month time limit is insufficient to avoid a declaration of unconstitutionality. Rather, when environmental protection comes into play, the censure rests solely on the absence of such a deadline. This not only could suggest that, in the Court's view, the protection of workers' lives demands greater attention than the preservation of environmental soundness, but also an amnesia on the part of the constitutional judges (who had just before recalled Article 8 ECHR) that the safeguarding of the life and health of individuals is also carried out through the protection of the environment. Yet, the 2018 ruling had already been pointed out as significant « to dismantle the much-vaunted, as much as fictitious, contrast between the rationale of the economy and that of the law, or rather, of the rights of individuals»[83]. In short, it seemed to mark the beginning of a rethinking of the approach adopted in

[83] R. De Vito, *Health, work, judges*, Questione Giustizia online (2018), adds that the importance of Article 8 ECHR is that the protection of the life and health of individuals is also carried out through that of the environment. Although this ruling had already been pointed out as a significant «fictitious contrast because it had already been resolved by the constituent legislator, even if we sometimes ended up neglecting or removing such information». The reference is to the fact that the Constitution only qualifies the right to health as expressly fundamental.

case no. 85/2013. Nevertheless, the Court omitted to deal with it, merely recalling such judgment where it asserts that

> «promptly removing hazardous elements to the health, safety and life of workers constitutes [...] a minimum and indispensable condition for a productive activity to be carried out in harmony with constitutional principles, which are always primarily concerned with the basic needs of individuals»[84].

Ultimately, the Court's decision has the effect of taking responsibility away from the Government by legitimising unwise choices on its part, on the sole condition that these can later be subjected to judicial scrutiny. It has been pointed out in this sense that

> «what the Court leaves untouched (apart from the addition of a defined term) is a political decision that suspends the balancing act and provides for a hierarchy of interests at stake in a control-free arena»[85].

It might be possible to raise an objection in this regard in light of the fact that the Court recognises that the balancing measures «must, if anything, be functional to the objective of gradually bringing the activity itself, in the shortest possible time, within the sustainability limits generally established by law». However, this statement remains sterile as the Court does not shed any light on which path to follow[86]. What should the EJ do after the judgment? Should he abide by the ruling, issuing the authorisation and refraining from intervening for 36 months? Or should he waive the inter-ministerial Decree? The Court gives no indication on this matter. The choice of the second option was thus mainly attributable to EJ's caution. Indeed, the chronicles tell us that the EJ of Syracuse waived the inter-ministerial Decree and denied the authorisation. In response, the State Attorney's Office appealed to the Rome Review Court, which, without entering into the merits and without suspending the effectiveness of the EJ's decision, referred the question of territorial jurisdiction to the Constitutional Court, which will rule on the issue in the coming months. However, despite the various judicial vicissitudes, the plant's activity has

[84] Paragraph 3.3.
[85] R. Bin, *Il "caso Priolo"*, cit. at 77.
[86] *Ibidem*.

never stopped since it was seized[87], continuing to pose real risks to the safety of individuals and the territory. This is even more serious if we consider that, as in the case of Ilva (which, however, has gained much more media attention) the Syracuse petrochemical plant has been carrying out a silent slaughter[88] for years, with the tacit consent of politics and the support of organised crime[89]. In the years of malfunctioning, polluting and dangerous substances have been discharged into the sea and released into the atmosphere, with disastrous consequences for human health: it is no coincidence that the provinces of Augusta, followed by those of Priolo, Syracuse and Melilli, have the highest cancer incidence rates in the region[90]. Under these conditions, it is regrettable that the Court would have accepted the Government's decision to continue the dumping under the sole condition of setting a deadline.

In other words, the Court showed excessive deference to political power. Given the acknowledgement that in crisis situations the executive enjoys a certain freedom in deciding whether to ensure the continuity of production at a plant of national strategic interest, it would have been possible for the judges to interfere more in the Government's powers, not in the sense of overstepping them, but of directing them, by, for example, drafting obligations to which it must be subjected that are additional and/or different from those referred to in judgment no. 85/2013[91]. This would have been all the more necessary considering that, in the aftermath of the enactment of Decree-Law no. 207/2012, many concerns had already been raised by scholars, which, however, did not find comfort following the Court's ruling. In particular, with regard to the Decree-Law, it was observed that it was such that the

[87] Siracusa Post, *Ias, incontro urgente a Roma ma l'attività di depurazione non si è mai fermata*, 8 December 2024.

[88] See F. Lo Verso, *Il mare colore veleno: indagine su uno dei più grandi disastri ambientali del paese* (2023).

[89] A. Fraschilla, *La vergogna senza fine del petrolchimico di Siracusa: «Da 40 anni il depuratore non funziona: tutto va in aria e in mare»*, L'Espresso, 12 September 2022; S. E. Cutuli, *Polo petrolchimico di Siracusa, una storia di mala politica tra immobilismo e disastro ambientale*, Italia che cambia, 10 April 2024.

[90] S. E. Cutuli, *Il mare colore veleno: tutto ciò che non sappiamo sul dramma del polo petrolchimico di Siracusa*, Italia che cambia, 15 January 2024.

[91] This was also recognised in the *Urgenda* case: when the protection of the life and health of citizens (Articles 2 and 8 ECHR), exercisable through environmental protection, is at stake, such interference is justifiable in the light of the prevalence of EU law over domestic law. See C. Ramotti, *La tutela dell'ambiente e delle generazioni future: il caso Urgenda*, 3 Riv. trim. dir. pubbl. (2024).

economic interest took precedence over that of health and the environment[92] and that the later addition of Article 1 had been made specifically to avoid the doubts of constitutional legitimacy that would arise from the regulatory and concrete character of such Decree-Law, had it been sewn (as seemed evident) on the specific case of the Ilva plant[93]. Again, it was pointed out that the Decree-Law laid the foundations for the expropriation of the judicial function by the Government, albeit not definitively[94]. It was also argued that the Decree-Law constituted an «improvised and partial»[95] solution, since the judge who decides to implement the preventive seizure of plants is not exercising his own impartial law enforcement power but seeks to prevent future crimes, thus performing a task that resembles that belonging to political-administrative authorities in that it abandons the objective enforcement of the law and promotes a public purpose, to be understood as the preservation of the environment and its inhabitants. In short, this argument suggested the need to redefine the relationship between the two powers, not in a competitive and antagonistic sense, but in a collaborative direction, since they are oriented (at least in theory) to the same end. In addition, it was noted that since Article 3 was a norm instead of a regulatory provision, it conflicted with Articles 24 and 113 of the Constitution, under which the choice of plants of national strategic interest should have been made using an administrative measure, and not by a decree of the Prime Minister[96]. This is without prejudice to the fact that the existence of the requirements of necessity and urgency legitimising recourse to the Decree-Law could in any event be considered dubious, especially because for several years the Taranto plant had raised concerns for the threats it posed to the

[92] F. Di Cristina, *Gli stabilimenti di interesse strategico nazionale ei poteri del Governo*, *Giorn. dir*. 377 (2013).

[93] See G. Arconzo, *Note critiche sul "decreto legge ad Ilvam", tra legislazione provvedimentale, riserva di funzione giurisdizionale e dovere di repressione e prevenzione dei reati*, Dir. pen. cont. (2012).

[94] *Ibidem*.

[95] R. Bin, *Giurisdizione e amministrazione, chi deve prevenire i reati ambientali? Nota alla sentenza "Ilva"*, Giur. cost. 1505 (2013), who proposed an amendment to Article 321 of the Code of Criminal Procedure concerning preventive seizure.

[96] G. Sereno, *Alcune discutibili affermazioni della Corte sulle leggi in luogo di provvedimento*, 3 Giur. cost. (2013).

environment[97]. Although in its ruling the Court had, at some point, observed that Article 3 was an administrative measure, it then went on to label it as a norm, leading to negative consequences also for judicial review[98]. Similar considerations had been made concerning the 36-month time limit, which was not indicated in the IEA (the administrative act[99] on the review of which the authorisation to continue the activity depends), it being mentioned only in the Decree-Law under Article 3[100]. Some commentators also maintained that the Court had not adopted a particularly prudent stance, since it had accepted the lawfulness of the undertaking's activity as long as it complied with the revised IEA[101], with the consequence that only the authorisation's invalidity could have led to the unlawfulness of the continuation of the business activity, even if that constituted an offence and posed risks to the environment or health[102]. About the time limit, it was then

[97] See S. D'Angiulli, *Caso Ilva di Taranto: adesso o mai più*, 217 Ambiente e Sviluppo (2013), who noted that as early as 2005 the company's top managers had already been definitively convicted of the offence under Article 674 of the Criminal Code, for the spillage of dust containing iron and other minerals from the plants.

[98] As first observed in Const. Court, 24 November 1958, no. 61 and then reiterated in subsequent judgments, the diversity of the guarantees offered by the legal system between administrative and legislative acts makes it all but irrelevant whether a given measure is adopted in one form rather than the other.

[99] G. Arconzo, *Note critiche sul "decreto legge ad Ilvam", tra legislazione provvedimentale, riserva di funzione giurisdizionale e dovere di repressione e prevenzione dei reati*, Dir. pen. cont. (2012): he suggests that the IEA referred to in Article 3(2) is not an administrative measure but rather has statutory force. In fact, it is the Court itself that establishes that the IEA was not made into a law.

[100] G. Sereno, *Alcune discutibili affermazioni della Corte sulle leggi in luogo di provvedimento*, cit. at 96, who notes that Article 3(1) imposes a maximum time limit of 36 months, whereas Article 3(3) speaks only of a «period of 36 months».

[101] L. Geninatti Satè, "*Caso Ilva": la tutela dell'ambiente attraverso la rivalutazione del carattere formale del diritto (una prima lettura di Corte cost., sent. n. 85/2013)*, Forum Quad. Cost. Rassegna (2013), states that: «This implies [...] the shifting of evaluations regarding the material harmfulness of conduct to the level of the validity of the measures that make it permissible» and that «[t]aking the formal character of law as a dogmatic attitude thus leads to the recognition of the closed character of legal systems, and hence to reverting conflicts between conduct and norms to conflicts between acts and norms».

[102] The Court seems to acknowledge this to some extent in stating that the discipline outlined in the "Ilva Decree" «does not render lawful *a posteriori* what was previously unlawful», but «traces a path of environmental clean-up», the deviation from which «implies the emergence of precise criminal, civil and administrative responsibilities, which the competent authorities are called upon to enforce according to ordinary procedures». However, as correctly noted by L.

questioned whether the period of 36 months was congruous, given that the seizure order issued by the EJ required the *immediate* adoption of all measures aimed at averting the persistence of the hazardous situation[103]. Moreover, it had been correctly suggested that of the two criteria for identifying a plant as being of national strategic interest, the second enjoyed a wide margin of discretion from the political power and, therefore, it needed to be reviewed[104]. However, the Court did not accept these claims: it concluded, to the disappointment of many, that the Decree-Law under its scrutiny had struck the correct balance between the constitutional values at stake.

Against a situation that raises very similar concerns to those of the Ilva case and a new Decree-Law that appears to be even more problematic (it must be recalled that it is the CC itself that points out that the partially censured provision does not reach the «point of balance» of Art. 1 of Decree-Law no. 207/2012), it is surprising that the Court, more than ten years after judgment no. 85/2013 and following a constitutional reform that has placed environmental protection at its centre, has not felt the need to rethink its approach[105]. On the contrary, it continually refers to the Ilva Decree-Law, ignoring the criticisms that were raised following its enactment and that would largely still apply today. It is especially striking that the Court reiterates that 36 months is the appropriate maximum time limit for the continuation of the activity, without going further into considerations as to its appropriateness for the case at hand. In this sense, the Court could perhaps have prompted

Geninatti Satè, "*Caso Ilva": la tutela dell'ambiente attraverso la rivalutazione del carattere formale del diritto*, cit. at 101, «[t]his systematic interpretation [...] does not escape the principles of horizontal coherence and does not constitute a real exception to the assumption of the formal character of the law», since the Court continues in its argumentation by claiming in fact that compliance with the requirements of the IEA entails, in any case ,the legitimacy of the continuation of the business activity.

[103] G. Arconzo, *Note critiche sul "decreto legge ad Ilvam"*, cit. at 93, 19.

[104] G. Sereno, *Alcune discutibili affermazioni della Corte sulle leggi in luogo di provvedimento*, cit. at 96: he recalls the Court's own words according to which «the national strategic interest in one type of production, rather than another, is a variable element, as it is linked to economic circumstances and another series of factors that cannot be predetermined».

[105] See R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, cit. at 28, 24, who wondered precisely whether judgment no. 85/2013 could have been decided differently in the light of the reformed Article 41.

the Government to revise such deadline[106] or to introduce a stricter procedure in the elaboration of the balancing measures so as to maximise efforts to ensure that the continuation of industrial activity takes place without the risk of further damage to the territory and its inhabitants.

5. The relationship between the constitutional reform and the Court's ruling

At this point, one might wonder whether the reason behind the unsatisfactory constitutional pronouncement is due to a certain superficiality on the part of the Court, or to the insufficiently pregnant scope of the constitutional reform, and to what extent. It has already been observed that the reform, although generally positive, has essentially limited itself to transposing the "law in action" into the "law in the books"[107], thus refraining from taking more disruptive and necessary steps, also in the wake of the insights given by comparative law. With the exception of the principle of intergenerational equity, now enshrined in Article 9, no reference has been made in the Italian Constitution to the principles of environmental law, first and foremost those of precaution and prevention, which, given their responsibilizing force, are believed to facilitate the coordination with other constitutional values, as is the case at EU level[108]. This is certainly regrettable, especially if we consider that among the rejected proposals for amending the Constitution was the idea of mentioning the principle of sustainable development[109] (now only indirectly inferable from the wording of Article 41), and recalling the principles of prevention and precaution in the body of Article 9[110]. Those who maintain that this

[106] Also in light of the fact that rather than of a "maximum term", one could speak of an "effective term", as it is unrealistic for a business activity to cease before the 36-month deadline.

[107] This phrasing is by E. Mostacci, *Proficuo, inutile o dannoso?*, cit. at 55, 1124.

[108] M. Greco, *La dimensione costituzionale dell'ambiente,* cit. at 6.

[109] Proposal no. 1632 by Senator Bonino; no. 938 by Senator Collina and others; no. 1203 by Senator Perilli; no. 2160 by Senators Calderoli and others (in Art. 41).

[110] Proposal no. 212, by Senators De Pretis and others: «In Article 9 of the Constitution, the following shall be added after the second paragraph: 'The Republic shall protect the environment, biodiversity and ecosystems. The Republic shall pursue the improvement of the conditions of the air, water, soil and territory, as a whole and in its components. The protection of the environment, biodiversity and ecosystems constitutes a fundamental right of the

was not necessary in light of the fact that these principles are already widely rooted at the international, EU and national levels[111], are, in my opinion, mistaken. Upholding such observation would lead to the conclusion that the reform itself was also useless, as it has included in the Constitution concepts that were familiar to the domestic legal system and that, in any case, were already imposed by supranational law. Similarly, I do not agree with the viewpoint that it is to be welcomed that the legislator avoided adding references to principles derived from sustainable development since they would have had the effect of causing the constitutional text to «prematurely age»[112]. Indeed, principles are, by definition, general and abstract and, consequently, susceptible to evolutionary interpretation. Therefore, if one wishes to avoid too invasive an intervention on the constitutional text, the best option could have been to add a new paragraph to Article 9 referring the discipline of environmental protection to an *ad hoc* source, to be drafted in deference to the environmental obligations sanctioned at the EU level and which could thus have imposed itself as a parameter for the validity of ordinary legislation[113]. In essence, it would be a matter of drawing up an environmental charter with constitutional value, following the French model.

However, although a certain «renunciatory attitude»[114] on the part of the 2022 legislature in contributing to the development of EU environmental law is undeniable, I believe that this is only to a minor extent responsible for the result achieved by the CC in its

individual and the collective and is based on the principles of precaution, preventive action, responsibility and correction, primarily at the source, of damage caused to the environment. The Republic shall promote the necessary conditions to make this right effective [...]'»; Proposal no. 83 by Senators De Petris and Nugnes: «In Article 9 of the Constitution, the following shall be added after the second paragraph: 'It shall protect the environment and ecosystems as a fundamental right of the individual and the collective, by promoting the conditions that make this right effective. It pursues the improvement of the conditions of the air, water, soil and territory, as a whole and in its single components, protects biodiversity and promotes respect for animals. Environmental protection is based on the principles of precaution, preventive action, responsibility and correction, primarily at source, of damage caused to the environment'».

111 F. Fracchia, *L'ambiente nell'art. 9 della Costituzione*, cit. at 17, 148.

112 See R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, cit. at 28, 21.

113 M. Cecchetti, *La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente*, cit. at 9, 313.

114 G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.*, cit. at 25, 467.

ruling. It has already been pointed out that the Court's case law had begun to define the contours of the regulation on environmental protection together with its substantive and procedural obligations well before the constitutional amendment. In this case, however, the Court seems to have forgotten the important role played by its own jurisprudence in shaping the law[115], thus disappointing that part of the doctrine that saw in the constitutional reform a great opportunity for interpreters (first and foremost the Constitutional Court[116]) to clarify its scope also through the enunciation of the more precise positive and negative obligations imposed on public powers and to strengthen the weight of environmental protection in the balancing operations with other constitutionally protected values[117].

The Court does none of that. Hence, it could be argued that constitutional judges have not fully understood the significance of the aforementioned *KlimaSeniorinnen Schweiz* judgment, according to which

> «the [European] Court [of Human Rights] considers it essential to emphasise the key role which domestic courts have played and will play in climate-change litigation, a fact reflected in the case law adopted to date in certain Council of Europe member States, highlighting the importance of access to justice in this field. Furthermore, given the principles of shared responsibility and subsidiarity, it falls primarily to national authorities, including the courts, to ensure that Convention obligations are observed»[118].

Invoking its previous case law, the CC states that the protection of the environment requires «the preservation, rational management and improvement of natural conditions», but does not openly mention the principle of progressive protection, nor that of non-regression, understood as the prohibition of lowering the guaranteed level of protection. If these principles had been taken

---

[115] The case-law is, indeed, one of the legal formants identified by R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 Am. J. Comp. L. (1991).

[116] F. Fracchia, *L'ambiente nell'art. 9 della Costituzione*, cit. at 17, 157 says that the constitutional codification of the principle of environmental protection can be an opportunity for the Constitutional Court and other institutional actors to initiate development paths.

[117] G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.*, cit. at 25 and C. Tripodina, *La tutela dell'ambiente nella Costituzione italiana*, cit. at 18.

[118] Para. 639.

into due consideration, also in light of the need to offer an «increasingly modern interpretation»[119] of the constitutional provisions, it might have been possible to reach a different conclusion to the case, avoiding continual reference to the provisions of Decree-Law no. 207/2012. Even the precautionary principle, which requires one to refrain from an activity when there is uncertainty or reasonable doubt as to the existence or extent of risks to people's health, has not been adequately emphasised. Had it been, this would probably have resulted in the IAS plant being prohibited from continuing its activity. Similarly, the Court recalls the importance of the three pillars underlying the Aarhus Convention, namely access to information, public participation and access to justice in environmental matters, but censures the fifth sentence of Article 104-*bis*, paragraph 1-*bis* solely for not having provided for a maximum final deadline[120]. Further, it recognises that future generations have the right to be preserved from the consequences of man's harmful actions on the environment, but at no time, not even when it insists on the importance of the 36-month time limit, does it mention the potential irreversibility of those consequences[121]. In short: the balancing of constitutionally protected values, being carried out on a case-by-case basis, is not objective and, inevitably, it involves a moral judgment. It is also for this reason that the pronouncement under comment is disappointing. Indeed, it tells us something about the sensitivity of the Constitutional Court with respect to the protection of environmental interests, which not only does not seem to have increased since the constitutional reform but also still appears to result in the subjection of such interests to the economic demands put forward as imperative by the political power.

[119] Const. Court, 28 May 1987 no. 207, para 4.5.

[120] See R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, cit. at 28, 16, who, in the aftermath of the reform, stated: «Nor can we exclude a procedural use of the provision in the sense of a strengthening of judicial actions, also by associations and collective subjects, initiated because of the violation of the duties placed on public subjects by Article 9(3) of the Constitution».

[121] By contrast, this concept was referred to in the ruling of the German Federal Constitutional Court of 24 March 2021, based on Art. 20a, which is the provision that inspired the Italian legislator when reforming the Constitution.

6. Conclusion

This paper argued that in ruling no. 104 of last June, the first in which the Constitutional Court was called upon to rule on the constitutional amendment on environmental matters that took place in 2022, there was, contrary to what some have argued, neither interpretation nor application of the new constitutional discipline. The manner in which the case was decided demonstrates the Court's reluctance to recognise the constitutional reform's power to determine concrete consequences in cases where environmental interests are pitted against economic ones, in the sense of giving the former greater weight in the balance with the latter. In this vein, the not particularly innovative scope of the constitutional reform is only partially the cause of the Court's attitude. In issuing such a ruling, the CC ultimately renounces the creative and interpretative force of its case law, which is capable of going beyond the literal interpretation of the norms and contributing to their evolution in a more guaranteeing direction.

Be aware: this paper is not intended to suggest that the protection of the environment and health must always take precedence over other constitutionally guaranteed rights, such as the right to work, which would undeniably be seriously compromised by the immediate closure of the plants. The aim is, in fact, to show how, following the constitutional reform, the words of the EJ of Taranto in the Ilva's order of preventive seizure are even more irreproachable:

> «In the case we are dealing with, a different reasoning would lead to the legal absurdity of making comparisons between the number of acceptable deaths and that of ensurable jobs. [...] it will never be possible to speak of technical or economic unfeasibility when what is at stake is the protection of fundamental assets of constitutional importance, such as the right to health, to which Article 41 of the Constitution conditions free economic activity»[122].

The intent is to highlight, therefore, that if the constitutional amendment is to be recognised as having any reformative capacity, this must be understood as imposing a renewed drive and attention towards environmental protection. This cannot result in the confirmation and re-proposal of the criteria developed by the 2012

[122] EJ of Court of Taranto, Preventive Seizure Order of 25 July 2012, no. 5488/10.

legislator to ensure the continuity of production of plants of national strategic interest, nor, even less so, in a ruling that censures a provision merely because it does not set a time limit, despite having found that the procedural requirements to ensure the satisfactory balancing of the interests at stake are equally missing.

Today, new considerations and increased awareness are being imposed on both the public and private sectors and, with them, more radical and courageous choices are required. And the constitutional judges should know this. Instead, they criticise the Government's discipline rather weakly, showing a certain reverence for the political-administrative power, especially in times of crisis. In this regard, it should be borne in mind that

> «when it is debated whether a given future activity, even if it is hypothetically compliant with the specific prescriptions dictated by law, produces or may produce effects that endanger rights or interests protected by the legal system, the boundary [between the judicial and political power] becomes blurred, all the more so when such effects do not concern individual, clearly identified subjects, but are collective in nature»[123].

From this statement, which was made in 2013 in connection with the first Ilva case, it was inferred that

> «it is not for this reason that we can think that a judge is given the ultimate power to declare that the level of danger is such as to impose the immediate cessation of this or that activity [...] instead, the political powers – both legislative and administrative – can and must be urged to promote appropriate measures and precautions to best address environmental and health risks»[124].

Today, instead, also in the light of the constitutional reform, one could draw the conclusion, firstly, that an expansion of the judicial power towards greater meddling in the merits of political choices can (perhaps must) be authorised if the latter, which is often enslaved to the logic of consensus, fails to outline the way to «best address» health and environmental dangers. Secondly, that the ruling of judgment no. 105/2024 is unsatisfactory as it has not taken

[123] V. Onida, *Un conflitto fra poteri sotto la veste di questione di costituzionalità: amministrazione e giurisdizione per la tutela dell'ambiente*, 3 Giur. Cost. (2013).
[124] *Ibidem*. This statement led to praise for the Court for issuing a ruling that struck the right balance between the two powers.

any steps forward compared to the past. In fact, it ended up once again favouring economic interests, giving the impression of a lack of awareness on the part of the constitutional judges that the plant's activities had already been taking place for many years to the detriment of the environment, workers and citizens. Therefore, it seems that the Court has not fully grasped the meaning of what it itself had already stated in judgment no. 58/2015 on Article 41, in a passage also recalled in the ruling under comment: namely, that economic activity must *always* be carried out in such a way as not to cause damage to security, freedom and human dignity; that factors endangering the health, safety and life of workers must be *promptly* removed; and that the safety and life of workers constitute the *minimum and indispensable conditions* for productive activity to be carried out in harmony with constitutional principles, which are «always attentive *first and foremost* to the basic needs of the person».

JOURNALS REVIEW

U.S. LAW REVIEWS: A FOCUS ON ADMINISTRATIVE LAW

Marco Lunardelli[*1]

From this issue on, the present review, aimed at conducting an inspection of U.S. law reviews and journals from an administrative law perspective, will be following a new approach. Instead of analyzing in detail some essays, previously singled out, it will mention – as if they were included in a footnote – as many administrative law articles published in most law reviews and journals throughout the United States as are deemed significant. Since the number of essays and notes identified in the way just described will be large, they will be divided into classes, ordered by subject. The purpose is to provide the reader with a global overview of the main administrative law issues, as well as of some topics strictly related to administrative law, which U.S. law reviews and journals addressed after the last review came out in the Italian Journal of Public Law.

Major Questions Doctrine

Administrative Law — Major Questions Doctrine — Eleventh Circuit Applies the Major Questions Doctrine to a Delegation to the President. — Georgia v. President of the United States, 46 F.4th 1283 (11th Cir. 2022), 136 Harv. L. Rev. 2020 (2023)

Administrative Law — Federal Reserve — U.S. Monetary Policy Shows the Major Issues With the Major Questions Doctrine. — Federal Reserve Interest Rate Hike on March 22, 2023, 136 Harv. L. Rev. 2028 (2023)

[1] * Contract Professor of Civil Protection Legislation, University of Pisa, qualified as an associate professor of Administrative Law.

Clean Water Act — «Waters of the United States» — Sackett v. EPA, 137 Harv. L. Rev. 390 (2023)

Daniel T. Deacon, Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009 (2023)

Evan C. Zoldan, *The Major Questions Doctrine in the States*, 101 Wash. U. L. Rev. 359 (2023)

Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 Ohio St. L. J. 191 (2023)

Curtis A. Bradley, Eric A. Posner, *The Real Political Question Doctrine*, 75 Stan. L. Rev. 1031 (2023)

Timothy Meyer, Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 Mich. L. Rev. 55 (2023)

Matt Donovan, *Ripple Effect: The SEC's Major Questions Doctrine Problem*, 91 Fordham L. Rev. 2309 (2023)

Samantha Jumper, *Fair Questions, Major Answers: Rooting Fair Housing in an Incentive-Based Approach to Avoid Major Questions Concerns*, 50 Fordham Urb. L. J. 505 (2023)

Kyle Pasucci, *Drawing a Line: How Energy Law Can Provide a Practical Boundary for the Rapidly Expanding Major Questions Doctrine*, 91 Geo. Wash. L. Rev. 1360 (2023)

Environmental Law — Climate Change — Fourth Circuit Holds Bycatch Regulation Would Be Major Question. Held v. State, No. CDV-2020-307 (Mont. Dist. Ct. Aug. 14, 2023), 137 Harv. L. Rev. 1491 (2024)

Ling Ritter, *Elephants in Mouseholes: The Major Questions Doctrine in the Lower Courts*, 76 Stan. L. Rev. 1382 (2024)

Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 Cal. L. Rev. 899 (2024)

Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 Fla. L. Rev. 251 (2024)

Michaela Gines, *Hostility Against the Administrative State: What the New "Major Questions Doctrine" Means for SEC Climate Reform*, 57 U.C. Davis L. Rev. 3133 (2024)

David M. Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?*, 2024 U. Ill. L. Rev. 1177 (2024)

Curtis Bradley, Jack Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, 172 U. Pa. L. Rev. 1743 (2024)

Jack M. Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation, Chevron, and More*, 65 Wm. & Mary L. Rev. 1265 (2024)

Sarah A. Schmoyer, "*Major" Challenges for Lower Courts: Inconsistent Applications of the Major Questions Doctrine in Lower Courts After* West Virginia v. Environmental Protection Agency, 92 Fordham L. Rev. 1659 (2024)

Anita S. Krishnakumar, *What the New Major Questions Doctrine Is* Not, 92 Geo. Wash. L. Rev. 1117 (2024)

Nathaniel Schwamm, *The Mathematical Question: Defining "Relatively Easy" Political Questions*, 92 Geo. Wash. L. Rev. 1182 (2024)

Brian Chen, Samuel Estreicher, *The New Nondelegation*, 102 Texas L. Rev. 539 (2024)

Administrative Discretion, Technical Assessments and Expertise In Agency Action, Legitimation of Agencies

Gary Lawson, *The Ghosts of* Chevron *Present and Future*, 103 B.U. L. Rev. 1647 (2023)

Thomas W. Merrill, *Response:* Chevron*'s Ghost Rides Again*, 103 B.U. L. Rev. 1717 (2023)

Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083 (2023)

Thomas W. Merrill, *The Demise of Deference — And the Rise of Delegation to Interpret?*, 138 Harv. L. Rev. 227 (2024)

Christopher J. Walker, Neena Menon, *Chevron's 51 Imperfect Solutions*, 2024 Wis. L. Rev. 1585 (2024)

Brian D. Feinstein, *Legitimizing Agencies*, 91 U. Chi. L. Rev. 919 (2024)

Bijal Shah, *Administrative Subordination*, 91 U. Chi. L. Rev. 1603 (2024)

Lisa Schultz Bressman, *The Ordinary Questions Doctrine*, 92 Geo. Wash. L. Rev. 985 (2024)

Gabriel Scheffler, Daniel E. Walters, *The Submerged Administrative State*, 2024 Wis. L. Rev. 789 (2024)

Stavros Gadinis, Chris Havasy, *The Quest for Legitimacy: A Public Law Blueprint for Corporate Governance*, 57 U.C. Davis L. Rev. 1581 (2024)

Sharon Jacobs, *The Challenges of Participatory Administration*, 58 U.C. Davis L. Rev. 323 (2024)

Administrative Law — Deference — First Circuit Deems Agency Action Not an Interpretation of Law. — Melone v. Coit, 100 F.4th 21 (1st Cir. 2024), 138 Harv. L. Rev. 883 (2025)

Rulemaking, Rules, Policymaking, and Policies

Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 Yale L. J. 1320 (2023)

Caroline Cecot, *Efficiency and Equity in Regulation*, 76 Vand. L. Rev. 361 (2023)

Yoon-Ho Alex Lee, *Beyond APA Section 553: Hayek's Two Problems and Rulemaking Innovations*, 91 Geo. Wash. L. Rev. 1215 (2023)

Ming Hsu Chen, Daimeon Shanks, *The New Normal: Regulatory Dysfunction as Policymaking*, 82 Md. L. Rev. 300 (2023)

Quinn Yeargain, *Administrative Capacity in Direct Democracy*, 57 U.C. Davis L. Rev. 1347 (2023)

Anthony M. Ciolli, *Needful Rules and Regulations: Originalist Reflections on the Territorial Clause*, 77 Vand. L. Rev. 1263 (2024)

Christopher S. Havasy, *Radical Administrative Law*, 77 Vand. L. Rev. 647 (2024)

Joshua D. Blank, Leigh Osofsky, *Democratizing Administrative Law*, 74 Duke L. J. 1615 (2024)

Abe Eichner, *Agency Use of Indirect Benefits to Justify Regulation*, 122 Mich. L. Rev. 1687 (2024)

Rachel E. Sachs, W. Nicholson Price II, Patricia J. Zettler, *Rethinking Innovation at FDA*, 104 B.U. L. Rev. 513 (2024)

Due Process, Adjudication, and Administrative Procedure in General

Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 Va. L. Rev. 749 (2023)

Richard Lorren Jolly, *The Administrative State's Jury Problem*, 98 Wash. L. Rev. 1187 (2023)

Jack May, Wrong or (Fundamental) *Right?: Substantive Due Process and the Right to Exclude*, 98 Wash. L. Rev. 1355 (2023)

John M. Golden, Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudication*, 98 Notre Dame L. Rev. 1113 (2023)

Christopher J. Walker, Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 Notre Dame L. Rev. 1963 (2023)

Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 Notre Dame L. Rev. 1997 (2023)

Kristin E. Hickman, Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 Notre Dame L. Rev. 2071 (2023)

Jill E. Family, *A Lack of Uniformity, Compounded, in Immigration Law*, 98 Notre Dame L. Rev. 2115 (2023)

Noah A. Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 Notre Dame L. Rev. 2143 (2023)

Evan D. Bernick, *Movement Administrative Procedure*, 98 Notre Dame L. Rev. 2177 (2023)

William N. Eskridge Jr., John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 Notre Dame L. Rev. 1893 (2023)

Emily S. Bremer, *The Administrative Procedure Act: Failures, Successes, and Danger Ahead*, 98 Notre Dame L. Rev. 1873 (2023)

Diana Newmark, *The Illusion of Due Process in School Discipline*, 32 Wm. & Mary Bill Rts. J. 343 (2023)

Angélica Cházaro, *Due Process Deportations*, 98 N.Y.U. L. Rev. 407 (2023)

Max McCullough, *Quick Hearings as a Strike Against Bureaucratic Delay: An Alternative Administration Procedure for 10(j) Cases Before the NLRB*, 98 N.Y.U. L. Rev. 1406 (2023)

Gary S. Lawson, Joseph Postell, *Against the* Chenery II *"Doctrine"*, 99 Notre Dame L. Rev. 47 (2023)

Daniel T. Deacon, Chenery II *Revisited*, 92 Geo. Wash. L. Rev. 1050 (2024)

Haiyun Damon-Feng, *Administrative Reliance*, 73 Duke L. J. 1743 (2024)

Christopher J. Walker, David Zaring, *The Right to Remove in Agency Adjudication*, 85 Ohio St. L. J. 1 (2024)

Judicial Review of Administrative Action

Matthew B. Lawrence, *Second-Class Administrative Law:* Lincoln v. Vigil*'s Puzzling Presumption of Unreviewability*, 101 Wash. U. L. Rev. 1029 (2023)

Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 Notre Dame L. Rev. 2037 (2023)

Natalie R. Schmidt, Chaney *Step Zero: Judicial Review of FEC Deadlock Dismissals*, 85 Ohio St. L. J. 307 (2024)

Hunter Dominick, *Nondelegation and the Legislative Versus Administrative Exactions Divide: Why Legislatively Imposed Exactions Do Not Require a More Searching Standard of Review*, 92 Fordham L. Rev. 2195 (2024)

Eitan Sirkovich, *Judicial Review of Agency Noncompliance with Presidential Administrative Orders and OMB Circular A-4*, 92 Geo. Wash. L. Rev. 1163 (2024)

Halting Administrative Action in the Supreme Court, 137 Harv. L. Rev. 2016 (2024)

Access to Agency Records, Transparency, and Secrecy

Cat Reid, *Shading Sunshine: The Proliferation of Exemptions to State Open Records Laws*, 73 Duke L. J. 425 (2023)

Katrina Hauprich, *The "Sole Shareholder" Shield: How the Supreme Court of North Carolina Narrowed the Scope of the Public Records Act and Limited Government Accountability*, 101 N.C.L. Rev. 1245 (2023)

Camilla A. Hrdy, Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements that Act Like Noncompetes*, 133 Yale L. J. 669 (2024)

Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters, Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 Duke L. J. 99 (2024)

Michael Fussell, *"Heads Up": Combating Government Secrecy and Corporate Meddling in the Public's Right to Know*, 85 Ohio St. L. J. 81 (2024)

Rebecca Green, *FOIA-Flooded Elections*, 85 Ohio St. L. J. 255 (2024)

David L. Schwartz, Kat M. Albrecht, Adam R. Pah, Christopher A. Cotropia, Amy Kristin Sanders, Sarath Sanga, Charlotte S. Alexander, Luís A.N. Amaral, Zachary D. Clopton, Anne M. Tucker, Thomas W. Gaylord, Scott G. Daniel, Nathan Dahlberg, *The SCALES Project: Making Federal Court Records Free*, 119 Nw. U. L. Rev. 23 (2024)

Caitlin Glass, Kat M. Albrecht, Perry Moriearty, *Prosecutorial Data Transparency and Data Justice*, 119 Nw. U. L. Rev. 193 (2024)

Reagan Leverett, *Is Sunlight the Best Disinfectant? The Role of Regulation in Addressing Cybersecurity Concerns*, 77 Vand. L. Rev. 1935 (2024)

Ryan W. Miller, *Ending Exemption 5 Expansion: Toward a Narrower Interpretation of FOIA's Exemption for Inter- and Intra-agency Memorandums*, 92 Fordham L. Rev. 1613 (2024)

First Amendment

Helen Norton, *What Twenty-First-Century Free Speech Law Means for Securities Regulation*, 99 Notre Dame L. Rev. 97 (2023)

Bryan Y. Baniaga, *Congress Shall Make No Law, so Someone Else Should: Why the First Amendment's "Free Speech" Promise Does Not*

(and Should Not) Extend to Social Media Companies, 57 U.C. Davis L. Rev. 2869 (2024)

Paul Gowder, *Standpoint Epistemology, the First Amendment, and University Affirmative Action*, 32 Wm. & Mary Bill Rts. J. 979 (2024)

Lucy Williams, Mason Spedding, *The First Amendment and Constitutive Rhetoric: A Policy Proposal*, 99 N.Y.U. L. Rev. 1338 (2024)

Matthew D. Weiner, *Destined to Deceive: The Need to Regulate Deepfakes with a Foreseeable Harm Standard*, 122 Mich. L. Rev. 771 (2024)

Mackenzie Austin, Max Levy, *Speech Certainty: Algorithmic Speech and the Limits of the First Amendment*, 77 Stan. L. Rev. 1 (2025)

Big Data, Algorithms and AI In Administrative Action

Ifeoma Ajunwa, *Automated Governance*, 101 N.C.L. Rev. 355 (2023)

Ari Ezra Waldman, *Gender Data In the Automated Administrative State*, 123 Colum. L. Rev. 2249 (2023)

Ngozi Okidegbe, *To Democratize Algorithms*, 69 UCLA L. Rev. 1688 (2023)

Joshua D. Blank, Leigh Osofsky, *Automated Agencies*, 107 Minn. L. Rev. 2115 (2023)

Benedict Sheehy, Yee-Fui Ng, *The Challenges of AI Decision-Making in Government and Administrative Law: A Proposal for Regulatory Design*, 57 Ind. L. Rev. 665 (2024)

Brian Chen, *Big Data and* Brady *Disclosures*, 99 N.Y.U. L. Rev. 1754 (2024)

Matthew Sag, *Fairness and Fair Use in Generative AI*, 92 Fordham L. Rev. 1887 (2024)

Talin Ghazarian, *We Built This City: Generative AI, Copyright, and the Built Environment*, 51 Fordham Urb. L. J. 1227 (2024)

Executive Power

Aditya Bamzai, Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756 (2023)

Saikrishna Bangalore Prakash, *Deciphering the Commander-in-Chief Clause*, 133 Yale L. J. 1 (2023)

Alan Z. Rozenshtein, *The Virtuous Executive*, 108 Minn. L. Rev. 605 (2023)

Shalev Gad Roisman, *The President's Subjective and Objective Legal Obligations*, 91 Fordham L. Rev. 2195 (2023)

Andrea L.R. Pillai, *Hawks and Doves: Evaluating Presidential Powers and Duties Against Congress's Power to Declare War*, 73 Duke L. J. 389 (2023)

Andrea Scoseria Katz, *Noah A. Rosenblum, Becoming the Administrator-In-Chief:* Myers *and the Progressive Presidency*, 123 Colum. L. Rev. 2153 (2023)

Dan Maurer, *Congress and the Operational Disciplining of the Use of Armed Force: Are Rules of Engagement Within the Preclusive Core of the President's War Powers?*, 84 Ohio St. L. J. 1393 (2024)

Nick Candido, "*Facet" or "Facets" of Executive Privilege in Oklahoma?* Vandelay*'s Unclear Outcome*, 76 Okla. L. Rev. 837 (2024)

Cristina Rodríguez, *Presidential Authority to Decline to Follow Supreme Court Opinions*, 102 N.C.L. Rev. 1411 (2024)

Tucker Ring, *Presidential Power Over Defense Contracts: How an Existing Statute Authorizes the Executive Branch to Recoup Profits from Defense Contractors*, 99 N.Y.U. L. Rev. 405 (2024)

Chris Mirasola, *Appropriations Law and the Statutory Foreign Affairs Presidency*, 172 U. Pa. L. Rev. Online 105 (2024)

Ashraf Ahmed, Lev Menand, Noah A. Rosenblum, *The Making of Presidential Administration*, 137 Harv. L. Rev. 2131 (2024)

Scott Bloomberg, Alexandra Harriman, Shane Pennington, *Re/Descheduling Marijuana Through Administrative Action*, 76 Okla. L. Rev. 517 (2024)

Jed Handelsman Shugerman, *Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 Notre Dame L. Rev. 213 (2024)

Administrative Organization, Agency Internal Action, and Independent Agencies

David T. Zaring, Jeffery Y. Zhang, *The Federal Reserve's Mandate*, 108 Minn. L. Rev. 333 (2023)

Gabriel L. Levine, *Beyond "Big Government": Toward New Legal Histories of the New Deal Order's End*, 121 Mich. L. Rev. 1003 (2023)

Anya Bernstein, Cristina Rodríguez, *The Accountable Bureaucrat*, 132 Yale L. J. 1600 (2023)

Adam B. Cox, Emma Kaufman, *The Adjudicative State*, 132 Yale L. J. 1769 (2023)

Andrew T. Levin, Christina Parajon Skinner, *Central Bank Undersight: Assessing the Fed's Accountability to Congress*, 77 Vand. L. Rev. 1769 (2024)

Catherine M. Sharkey, Daniel J. Kenny, *FDA Leads, States Must Follow*, 102 Wash. U. L. Rev. 155 (2024)

Jean Galbraith, *The Organs of U.S. Foreign Affairs*, 172 U. Pa. L. Rev. 1893 (2024)

James J. Park, *The SEC as an Entrepreneurial Enforcer*, 119 Nw. U. L. Rev. 689 (2024)

Emergency Powers

David Landau, *Rethinking the Federal Emergency Powers Regime*, 84 Ohio St. L. J. 603 (2023)

Amanda L. Tyler, *Judicial Review in Times of Emergency: From the Founding Through the Covid-19 Pandemic*, 109 Va. L. Rev. 489 (2023)

Paul A. Diller, *Emergency Rule: A New Paradigm for State and Local Governance?*, 50 Fordham Urb. L. J. 723 (2023)

Elena Chachko, Katerina Linos, *Emergency Powers for Good*, 66 Wm. & Mary L. Rev. 1 (2024)

Aditya Bamzai, *Sanctions and the Emergency Constitution*, 172 U. Pa. L. Rev. 1917 (2024)

Christine N. Coughlin, Ana S. Iltis, *Declaring and Terminating Public Health Emergencies: Performative Utterances That Can Change the World*, 83 Md. L. Rev. 402 (2024)

Land Use, Cities, Housing, and Property

Emma Sargent, *Boulder is for People: Zoning Reform and the Fight for Affordable Housing*, 94 U. Colo. L. Rev. 857 (2023)

Aziz Z. Huq, *Property against Legality: Takings after* Cedar Point, 109 Va. L. Rev. 233 (2023)

Lee Anne Fennell, *Residents Against Housing: A Response to Professor Infranca's 'Differentiating Exclusionary Tendencies'*, 72 Fla. L. Rev. F. 171 (2023)

Ken Stahl, *Reparations for Gentrification?: A Response to Professor Infranca's 'Differentiating Exclusionary Tendencies'*, 72 Fla. L. Rev. F. 190 (2023)

Sarah L. Swan, *Public Duties for the New City*, 122 Mich. L. Rev. 309 (2023)

Douglas A. Pinheiro, *Monogamy Zoning: Single-Family Zoning and the Exclusion of Polyamorous Relationship Groups*, 2023 U. Ill. L. Rev. 279 (2023)

Felipe Ford Cole, *Unshackling Cities*, 90 U. Chi. L. Rev. 1365 (2023)

Kate Gehling, *The Fair Housing Act After* Inclusive Communities*: Why One-Time Land-Use Decisions Can Still Establish a Disparate Impact*, 90 U. Chi. L. Rev. 1471 (2023)

Sam Kalen, *Public Land Management's Future Place: Envisioning a Paradigm Shift*, 82 Md. L. Rev. 240 (2023)

Nestor M. Davidson, Alan R. Romero, *Law in Place: Reflections on Rural and Urban Legal Paradigms*, 50 Fordham Urb. L. J. 201 (2023)

Nicholas Blomley, Alexandra Flynn, Marie-Ève Sylvestre, Nicholas Olson, *Law, Urban Space, and Precarious Property: The Governance of Poor People's Possessions*, 50 Fordham Urb. L. J. 201 (2023)

Egor Shakhnovskiy, *Reimagining Community Input: Past, Present and Future of New York City Community Boards*, 50 Fordham Urb. L. J. 557 (2023)

Claire Johnson Raba, *Forfeiting Due Process: How Adjudicative Reform Fails Property Owners*, 51 Fordham Urb. L. J. 299 (2023)

Sam Spiegelman, *Rent Controls and the Erosion of Takings-Clause Protections: A Sordid History with Recent Cause for Optimism*, 51 Fordham Urb. L. J. 357 (2023)

Michael Fine, *Climate Adaptation and the Need for a National Land Use Policy*, 103 B.U. L. Rev. 1843 (2023)

Michael Allan Wolf, *Superfluous Judicial Activism: The Takings Gloss*, 91 Geo. Wash. L. Rev. 287 (2023)

Joshua Braver, Ilya Somin, *The Constitutional Case Against Exclusionary Zoning*, 103 Texas L. Rev. 1 (2024)

Armen H. Merjian, *Housing Discrimination Is as Dangerous as Defective Stairs: The Nondelegable Duty to Obey State and Local Housing Discrimination Laws*, 85 Ohio St. L. J. 145 (2024)

Patrick E. Reidy, *Churching NIMBYs: Creating Affordable Housing on Church Property*, 133 Yale L. J. 1254 (2024)

Clayton P. Gillette, *The Subdivided City*, 133 Yale L. J. 2701 (2024) Gillette

Noah Austin, *Resolving Land Use Conflicts Without Zoning*, 99 Notre Dame L. Rev. Reflection 349 (2024)

Adam Cowing, *Equity and Ownership in Affordable Housing*, 2024 U. Ill. L. Rev. 399 (2024)

Jessica A. Shoemaker, *Re-Placing Property*, 91 U. Chi. L. Rev. 811 (2024)

Jonathan Sarnoff, *The Information Costs of Exclusion*, 91 U. Chi. L. Rev. 1021 (2024)

Christopher Serkin, *Climate Zoning*, 99 Notre Dame L. Rev. 1093 (2024)

Maria Ponomarenko, *The Small Agency Problem in American Policing*, 99 N.Y.U. L. Rev. 202 (2024)

Andrew Darcy, *New York City's Public Housing Preservation Trust: The Case for Cautious Optimism, Necessity, and Racial Justice*, 51 Fordham Urb. L. J. 745 (2024)

David Dante Troutt, *Urban Renewal's Grandchildren: Remedying the Persistent Effects of Post-War Race Planning*, 52 Fordham Urb. L. J. 91 (2024)

Albert C. Lin, *Rationing Public Lands*, 104 B.U. L. Rev. 345 (2024)

Robert B. Keiter, *Response: Law, Politics, and Outdoor Recreation on Public Lands: An Addendum to Professor Lin's Access Analysis*, 104 B.U. L. Rev. 421 (2024)

Lydia Culp, *Education from Condemnations: Learning from State and Federal Reforms for a More Efficient and Just Eminent Domain*, 73 Duke L. J. 905 (2024)

Eric T. Freyfogle, *Public Rights in Illinois Waterways Under Federal and State Law*, 2024 U. Ill. L. Rev. 229 (2024)

Cultural Heritage

Zoe Creamer, *Decommodifying Cultural Heritage: A Linguistic Unpacking of "Cultural Property"*, 65 Wm. & Mary L. Rev. 1203 (2024)

Troy A. Rule, *Preserving Sacred Sites and Property Law*, 2024 Wis. L. Rev. 129 (2024)

Elena Baylis, *Looted Cultural Objects*, 124 Colum. L. Rev. Forum 183 (2024)

Environment and Climate Change

Allegra M. McLeod, *Abolition and Environmental Justice*, 69 UCLA L. Rev. 1536 (2023)

Seema Kakade, *Environmental Evidence*, 94 U. Colo. L. Rev. 757 (2023)

Bronson J. Pace, Barbara A. Cosens, *Environmental Assessment in a Time of Rapid Change and High Uncertainty: The Addition of Resilience Assessment to NEPA*, 47 Wm & Mary Envt'l L. & Pol'y Rev. 317 (2023)

Jon Paul Suttile, *SEParating Litigation: How SEPs Demonstrate the Need for Centralized Environmental Civil Litigation*, 47 Wm & Mary Envt'l L. & Pol'y Rev. 317 (2023)

Cameron Krause, *Foreword to International Environmentalism: A Global Approach to Global Challenges*, 47 Wm & Mary Envt'l L. & Pol'y Rev. 589 (2023)

Randall S. Abate, Nadine Nadow, Hayley-Bo Dorrian-Bak, *Litigation to Protect the Marine Environment: Parallels and Synergies with Climate Litigation*, 47 Wm & Mary Envt'l L. & Pol'y Rev. 595 (2023)

Rebecca J. Davis, Justin Blount, *Regulating CO2 Emissions Post*-West Virginia v. Environmental Protection Agency, 48 Wm & Mary Envt'l L. & Pol'y Rev. 29 (2023)

J. Gray Whitsett, *Disaster Districts: Mid-Decade Redistricting in the Face of Climate Change*, 48 Wm & Mary Envt'l L. & Pol'y Rev. 151 (2023)

M. Logan Campbell, Board of County Commissioners of Boulder County v. Suncor Energy (USA) Inc.*: A Future for Climate Litigation?*, 47 Harv. Envt'l L. Rev. 605 (2023)

Maxine Sugarman, *Following the Science: Judicial Review of Climate Science*, 98 Wash. L. Rev. 1405 (2023)

Danielle Spiegel-Feld, Katrina M. Wyman, *Local Action, Global Problem: Why and How New York City Is Tackling Climate Change*, 50 Fordham Urb. L. J. 1187 (2023)

Amy E. Turner, *The Legal Case for Equity in Local Climate Action Planning*, 50 Fordham Urb. L. J. 1245 (2023)

Rachel Rothschild, *Unreasonable Risk: The Failure to Ban Asbestos and The Future of Toxic Substances Regulation*, 47 Harv. Envt'l L. Rev. 407 (2023)

Anthony Moffa, *From Comprehensive Liability to Climate Liability: The Case for a Climate Adaptation Resilience and Liability Act*, 47 Harv. Envt'l L. Rev. 473 (2023)

Evan Matsuda, *Incorporating the Social Cost of Greenhouse Gases into the Federal Procurement Lifecycle*, 91 Geo. Wash. L. Rev. 224 (2023)

Sara A. Colangelo, *Bridging Silos: Environmental and Reproductive Justice in the Climate Crisis*, 112 Cal. L. Rev. 1255 (2024)

Annie Brett, *Rethinking Environmental Disclosure*, 112 Cal. L. Rev. 1535 (2024)

Alyse Bertenthal, *Toxic Narratives, Toxic Communities, and Enforcement of Environmental (In)justice*, 99 Wash. L. Rev. 1053 (2024)

Benjamin G. Manahan, *An Elephant Too Big to Hide: Why SEC Environmental Disclosures Will Not Survive a Legal Challenge*, 57 Ind. L. Rev. 701 (2024)

Lev E. Breydo, *Inequitable Infrastructure: An Empirical Assessment of Federalism, Climate Change, and Environmental Racism*, 102 N.C.L. Rev. 1035 (2024)

Samantha Bingaman, *Nothing at Stake but Life's Essentials: How Sole Reliance on New Textualism Endangers Clean Water, Environmental Justice Communities, and Environmental Law (and a Judicial Framework to Fix It)*, 83 Md. L. Rev. 1313 (2024)

David M. Driesen, Michael A. Mehling, *Pricing, Decarbonization, and Green New Deals*, 48 Wm & Mary Envt'l L. & Pol'y Rev. 211 (2024)

Craig Anthony (Tony) Arnold, Resilience Justice Project Researchers, *Environmental Justice, Resilience Justice, and Watershed Planning*, 48 Wm & Mary Envt'l L. & Pol'y Rev. 553 (2024)

Mark Nevitt, *The Legal Crisis Within the Climate Crisis*, 76 Stan. L. Rev. 1051 (2024)

Michael Pappas, *The Structure of U.S. Climate Policy*, 83 Md. L. Rev. 347 (2024)

Dulaney Marsh, Sackett v. EPA *and the Future of Wetland Protections*, 66 Wm. & Mary L. Rev. 215 (2024)

Olivia Venus, TransUnion LCC v. Ramirez *and the Fight to Protect Climate Change Standing*, 92 Geo. Wash. L. Rev. 949 (2024)

Paul Blakeslee, *"Certain Remedy Afforded for Every Wrong": State Constitutional Right-to-Remedy Provisions as a Vehicle for Climate Litigation*, 104 B.U. L. Rev. 1829 (2024)

Isaac Lunt, *Toward Distributed Nature: The Afforestation Easement and a Regenerative Land Ethic*, 124 Colum. L. Rev. 993 (2024)

Law Enforcement, Police and Public Safety

Zoë Robinson, Stephen Rushin, *The Law Enforcement Lobby*, 107 Minn. L. Rev. 1965 (2023)

Nadia Banteka, *Unconstitutional Police Pretexts*, 2023 Wis. L. Rev. 1871 (2023)

Noah Smith-Drelich, *Funding the Police*, 84 Ohio St. L. J. 717 (2023)

Lauren Giles, *Police Officers, Policy, and Personnel Files: Prosecutorial Disclosure Obligations Above and Beyond* Brady, 92 Fordham L. Rev. 683 (2023)

Ava Ayers, *The Impossibility of Local Police Reform*, 50 Fordham Urb. L. J. 609 (2023)

Zachary D. Kaufman, *Police Policing Police*, 91 Geo. Wash. L. Rev. 353 (2023)

Adam A. Davidson, *The Shadow of the Law of the Police*, 122 Mich. L. Rev. 1035 (2024)

Farhang Heydari, *The Invisible Driver of Policing*, 76 Stan. L. Rev. 1 (2024)

Brenner M. Fissell, *Police-Made Law*, 108 Minn. L. Rev. 2561 (2024)

National security

Harold Hongju Koh, *The 21st Century National Security Constitution*, 91 Geo. Wash. L. Rev. 1391 (2023)

Alexandra B. Dakich, *The State Secrets Privilege: An Institutional Process Approach*, 117 Nw. U. L. Rev. 1625 (2023)

Caitlyn N. Galvin, *Overlooked Orders: The National Security Council as a Tool of Presidential Administration*, 99 N.Y.U. L. Rev. 2130 (2024)

Margaret Hu, Eliott Behar, Davi Ottenheimer, *National Security and Federalizing Data Privacy Infrastructure for AI Governance*, 92 Fordham L. Rev. 1829 (2024)

Ashley S. Deeks, *(Sub)Delegating National Security Powers*, 172 U. Pa. L. Rev. 2053 (2024)

Matthew S. Erie, *Property as National Security*, 2024 Wis. L. Rev. 255 (2024)

Requiem for a Heavyweight: Nondelegation, Presidential Intelligence, and Covert Action, 138 Harv. L. Rev. 631 (2024)

Welfare State and Public Utilities

Gabriel Scheffler, *The Ghosts of the Affordable Care Act*, 101 Wash. U. L. Rev. 791 (2023)

Dan Tarlock, *The Evolution of Municipal Water Service: From Providers to Comprehensive Water Managers*, 50 Fordham Urb. L. J. 1441 (2023)

Arjuna Dibley, *When does "Leviathan" Innovate? A Legal Theory of Clean Technological Change at Government-Owned Electric Utilities*, 47 Harv. Envt'l L. Rev. 135 (2023)

Alison Gocke, *Pipelines and Politics*, 47 Harv. Envt'l L. Rev. 207 (2023)

Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 Va. L. Rev. 885 (2023)

Cass R. Sunstein, *Welfare Now*, 72 Duke L. J. 1643 (2023)

Alison Gocke, *Public Utility's Potential*, 133 Yale L. J. 2773 (2024)

Dave Owen, *The Water District and the State*, 134 Yale L. J. 1 (2024)

Amy L. Stein, *Rejecting Public Utility Data Monopolies*, 112 Cal. L. Rev. 1321 (2024)

Judicial Power and Standing in Court

Lori A. Ringhand, *The Court and the Constitution*, 2023 Wis. L. Rev. 547 (2023)

Grant Christensen, *Article III and Indian Tribes*, 108 Minn. L. Rev. 1789 (2024)

Chad M. Oldfather, *Single-Subject Rules and the Nature of State Judicial Power*, 2024 Wis. L. Rev. 1513 (2024)

Richard H. Fallon Jr., *Non–Article III Federal Tribunals: An Essay on the Relation Between Theory and Practice*, 99 Notre Dame L. Rev. 1691 (2024)

Zachary D. Clopton, *Power and Politics in Original Jurisdiction*, 91 U. Chi. L. Rev. 83 (2024)

Jack Brake, *Effective Removal of Article III Judges: Case Suspensions and the Constitutional Limits of Judicial Self-Policing*, 91 U. Chi. L. Rev. 1111 (2024)

Stephen I. Vladeck, *A Court of First View*, 138 Harv. L. Rev. 533 (2024)

Zachary D. Clopton, Nadav Shoked, *Suing Cities*, 133 Yale L. J. 2540 (2024)

Nabil Shaikh, *Surveillance Class Actions: Reconstructing a Federal Data Privacy Private Right of Action*, 172 U. Pa. L. Rev. 865 (2024)

Separation of Powers and General Theory of Law

Z. Payvand Ahdout, *Separation-of-Powers Avoidance*, 132 Yale L. J. 2360 (2023)

Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke L. J. 545 (2023)

Richard Briffault, *States of Emergency: COVID-19 and Separation of Powers in the States*, 2023 Wis. L. Rev. 1633 (2023)

Ann Woolhandler, *State Separation of Powers and the Federal Courts*, 31 Wm. & Mary Bill Rts. J. 633 (2023)

Taisu Zhang, John D. Morley, *The Modern State and the Rise of the Business Corporation*, 132 Yale L. J. 1970 (2023)

The Presumption Against Novelty in the Roberts Court's Separation-of-Powers Case Law, 137 Harv. L. Rev. 2034 (2024)

Bijal Shah, *A Critical Analysis of Separation-of-Powers Functionalism*, 84 Ohio St. L. J. 1007 (2024)

Shalev Gad Roisman, *Balancing Interests in the Separation of Powers*, 91 U. Chi. L. Rev. 1331 (2024)

Kathleen Claussen, Timothy Meyer, *Economic Security and the Separation of Powers*, 172 U. Pa. L. Rev. 1955 (2024)

Public Law and Economics

Eric D. Chason, *Regulating Crypto, On and Off the Chain*, 64 Wm. & Mary L. Rev. 1011 (2023)

James Grimmelmann, A. Jason Windawi, *Blockchains as Infrastructure and Semicommons*, 64 Wm. & Mary L. Rev. 1097 (2023)

Christina Parajon Skinner, *The Monetary Executive*, 91 Geo. Wash. L. Rev. 164 (2023)

Jessica Ke, *Multilevel Madness: Regulating Unfair Business Practices in Multilevel Marketing*, 91 Geo. Wash. L. Rev. 537 (2023)

Executive Power — Foreign Investment Controls — Executive Order Restricts U.S. Outbound Investment Into Sensitive Technology Sectors In China. — Exec. Order No. 14,105, 88 Fed. Reg. 54867 (Aug. 11, 2023), 137 Harv. L. Rev. 1525 (2024)

James J. Park, *Securities Regulation and Big Business*, 58 U.C. Davis L. Rev. 489 (2024)

Max N. Helveston, *Regulating Economic Opportunism in Postdisaster Markets*, 102 N.C.L. Rev. 811 (2024)

Eloise Pasachoff, *Modernizing the Power of the Purse Statutes*, 92 Geo. Wash. L. Rev. 359 (2024)

Doug Whelan, *Laboratories of Antimonopoly: A Blueprint for Unfair Methods of Competition Rulemaking in the States*, 52 Fordham Urb. L. J. 427 (2024)