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EUROPE'S CRISIS-LAW AND THE WELFARE STATE – A CRITIQUE[1]

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I. INTRODUCTION

The great economic crisis – the worst and longest at least since the post-war period, which is still holding a large part of Europe in an unequal grip – has a constitutional dimension that has certainly been overlooked, compared to other more direct and visible repercussions. In recent years the measures put into force by supranational institutions, both outside and within the traditional channels of EU law, to counteract the sovereign debt crisis by deeply modifying the economic governance of the Union, have in fact ended up questioning some of the most established paradigms that have historically forged – and constitutionally legitimised – the process of 'integration through law'. According to the most credible hypothesis, European integration should be conceived – particularly in its foundation – as a political project, the implementation of which is essentially left to economic processes mediated by the law. The German 'Ordoliberal' theorists

[1] Paper presented on June 13, 2014, at the Summer School of the Dottorato di Scienze giuridiche, Università degli Studi di Perugia.

were the group that grasped the meaning of this project better than others,[2] identifying the constitutional anchorage of the newly-born European Economic Community (EEC) with the fundamental economic freedoms and with the system of undistorted competition established by the 1957 Treaty of Rome. Economic and monetary Union (EMU) would have had to refine this project by bringing it to completion; but as is well known the foundation of the whole edifice started to erode soon after its construction (§ 2).

The financial and sovereign debt crisis has dramatically revealed the fragility of the EMU and the substantial erroneous basis of the constitutional premises on which it was built according to the Maastricht Treaty, with a fundamental decision to create a 'currency without a sovereign' (Fitoussi 2013, pp. 120 ff.).[3] The response to the crisis pursued by the EU unsuccessfully aimed at compensating these original defects of construction, by introducing regulatory mechanisms which, in practice, have deprived national democratic institutions (primarily parliamentary) of their budgetary powers at least in the debtor-States) and removing the residual autonomy of the Euro-zone Member States as to their choices regarding fiscal and social policies. The most vulnerable countries are now subjected to unsustainable semi-permanent austerity constraints, set by European level mechanisms according to an ideologically uniform approach (a rigid 'one-fits-all-approach'), that consequently increases the powerfully divisive effects of the economic crisis[4], at the risk of (political) disintegration.

[2] The influence of German 'Ordoliberalism' on the European constitutional constellation has been masterfully (and critically) examined by JOERGES 2004. More recently cf. JOERGES and GIUBBONI 2013, from which this paper has taken its starting point, expanding on some of its arguments.

[3] That is, to institutionalise a monetary policy fully withstanding the principle of price stability (whose management is to be entrusted to a fully independent central bank), although not supported by the creation of an adequate central (federal) budget (and therefore of a political fiscal-union).

[4] The crisis has re-emphasized the already large economic disparities, especially within the Euro-zone, mainly burdening the debtor countries and advantaging the creditors and Germany in particular (*e.g.* see QUADRIO CURZIO 2014). Indeed, it has resulted in a massive redistribution of wealth, but in an exact reverse sense to the one accredited by the *clichés* of the austerity supporters, given that the flow of such transfer clearly goes from the Southern countries to the Northern ones. Hence, as effectively observed, a transfer-Union has actually operated in these years in the Euro-zone: 'though contrariwise, and the Northern countries are the main beneficiaries' (FITOUSSI 2013, p. 123).

The new European crisis-management-law, therefore, triggers apparently contradictory processes that actually coalesce into a questioning of the original constitutional assumptions of European integration. On one hand (§ 3), we are witnessing a shift in the locus of core decisions regarding essential aspects of State public policies from the national to the supranational level. The Treaty on Stability, Coordination and Governance of the economic and monetary Union (an unprecedented example of *Ersatzunionrecht*[5]) has firmly placed at its core the new 'golden rule' of a balanced-budget. On the other hand (§ 4), the very same process of 'dethroning politics',[6] has been entrusted to governance-mechanisms – broadly defined outside the perimeter of the classic Community-method and even of EU law –, which hand over decisions to be taken by opaque and unaccountable technocratic élites and which, by definition, evade the traditional constraints of Community rule of law by putting it beyond the reach for an effective judicial review.

A double (and only apparently contradictory) process of de-politicisation and de-regulation is therefore taking place within a new EU constitutional setting. The technocratic acquisition of fundamental political decisions, which in the European constitutional model was reserved to national democratic processes, especially with reference to affecting the Welfare State systems (Giubboni 2006 and 2012), takes place within an institutional framework that has moved away from the Union's governance structures and functioning. The formula coined by Habermas (2011) of a 'post-democratic executive federalism' effectively depicts this dual dimension of the new European crisis-management-law. The category of 'authoritarian managerialism' evoked by Joerges[7] is even more *tranchante* in denouncing the non-democratic traits (and the Schmittian ascendancy) of the new European economic

[5] That is, an international-intergovernmental surrogate of EU law, according to the figurative expression used by the German Constitutional Court, although in a different context, in its decision of 7 September 2011 on the measures of financial assistance to Greece (2 BvR 987/10 – 2 BvR 1485/10, 2 BvR 1099/10).

[6] As SUPIOT 2010, p. 33, wrote evoking the famous Hayekian expression.

[7] Cf. JOERGES 2012. The similarity with the term 'authoritarian liberalism', coined by HELLER (1933) in the midst of the Weimar crisis is evident – and sought after. Also in similar terms cf. WILKINSON 2013, p. 548 ('executive emergency constitutionalism').

governance. But regardless of the redolant power that these expressions or other similar ones have,[8] what we want to highlight here is the emergence of a new phenomenon that we might explain as a constitutional paradigm-change underlying the new European economic governance, which goes beyond the seeming emergency requirements of the austerity policies of fiscal consolidation conducted in recent years. In this new framework, the original 'Ordoliberal' normative ideal of a formal constitutional order of the European economy is disregarded at the very moment in which the ineffective answers given to the economic-financial crisis through the 'neo-monetarist medieval medicine of austerity' (Countouris and Freedland 2013a, p. 5) contribute to undermine the very democratic legitimacy of the Union, openly questioning the constitutional embedding of the several *Sozial-Staat* democratic traditions on which, in the mid-fifties, the Communities were originally rooted.

The crisis of the so-called 'European social model' has constitutional roots in the new economic governance of the Union: a constitutional dimension which is it is worth exploring in more depth before attempting to set out some concluding remarks on the uncertain prospects of the Welfare State in Europe (§ 5).

II. "INTEGRATION THROUGH LAW" AND ITS CRISIS

The term 'Community of law', which has been adopted over a long period by the case law of the Court of Justice, owes its success to the first president of the European Commission (Hallstein 1969). In a Community based on law, it represents, at one and the same time, 'the object and the agent'[9] of the integration process. Since the very beginning of this process there was, without doubt, a decisive reliance on law and on its resources, especially for the building of the common market: the founding stone of the entire Community project.

The celebrated formula of 'integration through law', established in the 1980s as a successful motto due to the seminal work of the most influential scholars on

[8] See now STREECK 2013, p. 119 ff., speaking of technocratic neutralization of politics and of a new fiscal-consolidation-State in Europe.

[9] DEHOUSSE and WEILER 1990, p. 243.

the European scene[10], has represented the most proficient and advanced attempt to rationalise the whole European project, as it synthesised (better than through any other conceptualisation) the specific balance between law, politics and economy – on which the whole integration process was built in its founding stage. The constitutionalisation of the Treaties – carried out by the Court of Justice through the *invention* of a new type of autonomous legal order, distinct both from the law of the Member States and from international law – was a key concept within this paradigm.

Nevertheless, on the long path that travelled from the Community of 1957 towards an ever closer union among its people, Europe has continuously renewed what Ipsen (1987) called its *Wandelverfassung*. And along this path, some of the main tenets of the 'integration through law' paradigm have been progressively weakened and eroded. The actual integrity of those principles is now being challenged, as never before, by the Union's 'existential crisis' (Menéndez 2013). Upon a closer inspection, we might assume that even the original plan for a monetary union, as had been envisioned under the Maastricht Treaty, appears to be incompatible with the fundamental principles of the role of law within the European integration process, as conceived under that model.

Monetary union was not conceived as a political union; on the contrary, it was bound to a rigid system of supranational legal rules which were aimed at compensating for the void of political solidarity among the Member States. Monetary policy was thus entirely subjected to the European constitutional rules and, at the same time, almost entirely isolated from the political process. And this could fit the normative requirements of an 'Ordoliberal' European economic constitution. However, from the outset, this construction reveals a crucial difference compared to the classic paradigm of 'integration through law'. The essential difference, with respect to the function assigned to law in the European integration process, is that, in that conceptualisation, supranational law and

[10] It is an obvious reference to the seminal reconstruction by WEILER 1981, followed by the no-less fundamental collective research directed by CAPPELLETTI, SECCOMBE and WEILER 1986 (*et seq.*) at the European University Institute at Florence.

intergovernmental policy-making must maintain a balance. The 'dual character' (Weiler 1981) of the Community system in that model implies a necessary dynamic equilibrium between law and politics in the European integration process. Supranational law neither should nor could have entirely replaced the political process, given that, in such a theoretical framework, the overall balance of the Community system depends on the mechanisms of adaptation and mutual balancing among the two subsystems.

The monetary union conceived by the Maastricht Treaty, instead, disrupts this balance. Beneath the dominant function assigned to law in the implementation of this political project we can in fact retrace the legacy of another categorisation of the Community system, the one attributable to the German 'Ordoliberal' tradition, much more demanding and prescriptive regarding the functions of European economic law. The EMU's constitutional architecture was actually meant to comply with these prescriptions by giving the EMU a configuration capable of immunising it once and for all from possible Keynesian distortions in the European macro-economic management. Nevertheless, the reforms of the economic and monetary governance of the EMU, introduced as of 2010 onwards in an attempt to mitigate the effects of the financial crisis which had spread to the sovereign debts of the Member States of the Euro-zone's periphery, have come to sever the ties also within this normative tradition, when Europe's new crisis-law entered the unexplored constitutional territories of 'post-democratic executive federalism' (Habermas 2011).

III. DE-POLITICISATION, LOSS OF NEUTRALITY OF THE EUROPEAN ECONOMIC CONSTITUTION AND DE-SOCIALISATION PROCESSES

Evidently, the European economic and monetary Union – as it was devised in Maastricht – was not able to cope with the devastating effects produced by the financial crisis: it had been founded on assumptions that did not contemplate such a systemic crisis and, more importantly, it did not have the tools to manage it (cf. *e.g.* Fitoussi 2013). That is why, at the beginning of 2010 the reaction to the crisis had begun in an unusually rapid way with respect to the usual slow pace of the

Community decision-making process, although nevertheless with a delay compared to what would have been necessary to ease the tensions originating from the unruly financial markets. This was carried out with unprecedented and ever more inventive regulatory techniques that became necessary and urgent – or at least were justified as such – due to the concrete risk of the imminent tightening of the crisis with the possible breakdown of the Euro-zone.

A quick chronology of events can remind us of the hectic pace eventually taken by the emergency measures adopted by the Union: 'Europe 2020' strategy (March 2010); European semester (May 2010); framework agreement on the establishment of a European stability fund (June 2010); Euro-Plus Pact (March 2011); Six Pack (December 2011); Two Pack (proposed by the European Commission on November 2011 and adopted with Regulations n° 472 and 473 of 2013); European Stability Mechanism (February 2012); Fiscal Compact (March 2012). The cornerstone of this complex weaving of emergency tools is the Fiscal Compact, which introduces the previously evoked clause of the public debt-brake, modelled on the German constitutional experience, compliance to which is eventually left to a sort of *extra-ordinem* supervision of the Court of Justice as it is designed outside its ordinary jurisdictional competence under EU law (cf. Seifert 2014, p. 313 ff.). Access to financial support given by the European Stability Mechanism (MES) is only permitted to those Member States of the Euro-zone that have signed the Fiscal Compact and have therefore transposed into national law – preferably at constitutional level – the golden rule of balanced budgets.

At the same time, in order to provide a less questionable legal basis than the one outlined by the Treaties at the time of the negotiation of these tools, the simplified revision procedure, introduced by the Lisbon Treaty, was activated, as provided for in Art. 48, paragraph 6 of the TEU, with the addition of a new paragraph 3 based on Art. 136 of the TFEU that permits – as of 2013 – the establishment of (conditional) mechanisms of financial emergency, similar to the ones that have already been implemented. From a strictly technical-legal standpoint, these measures offer a wide range of areas for debate, and not surprisingly the debates on the limits of action guaranteed to the Union by the Treaties, especially

prior to the amendment of Art. 136 of the TFEU, are still ongoing, and among many legal scholars there has been a growing criticism and a questioning of the overall legality of this creative institutional infrastructure (see especially Guarino 2012). However, the true issue here is not so much the occurrence of more or less flexible interpretations of the text of the Treaties, as much as the deep constitutional change that has taken place around these reforms, so that the legal paths determined by the classic canons of Community rule of law are to an ever greater extent, being superseded by discretionary measures marked by contingency and conditionality that are entrusted to the discretionary governance of an intangible multilateral administrative scrutiny. These measures revolve around some sort of new-fangled supranational functional administration, apparently fashioned on the model of independent agencies, but intended to take action in areas that fall outside the sphere of the formal competences of the Union and characterized by a wide-ranging political discretion.

However, before addressing this issue, it is necessary to focus to a greater extent on the other side of the coin of this constitutional transformation realised by the new European crisis-management-law which has culpably ignored a myriad of national public opinion. Considered together, these measures assault the Euro-zone with binding detailed rules aimed at limiting and – more or less strictly – conditioning the sphere of macroeconomic discretion left to the Member States. As has been observed in practice, the reason why 'the Euro-zone is governed by rules is that few of its Member-States – least of all its wealthier North European States – have any appetite for fiscal union. Crudely, rules (*governance*) exist because common fiscal institutions (*government*) do not. And tighter rules do not amount to greater fiscal integration. The hallmark of fiscal integration is mutualisation – a greater pooling of budgetary resources, joint debt assistance, a common backstop to the banking system, and so on. Tighter rules are not so much a path to mutualisation, as an attempt to prevent it from happening'.[11]

This massive juridification, resulting from the appropriation by the new European crisis-law of the (already heavily constricted) sphere of discretion of

[11] TILFORD and WHITE 2011, p. 2.

macro-economic governance by Member States in the Euro-zone, occurs in the context of an attempt to the technical neutralization of the political decisions regarding very delicate redistribution-issues – now placed precisely inside the sharp-eyed mechanisms for the surveillance and punishment of economic governance of the Union (Chalmers 2012) –, which is clearly anything but neutral in its consequences. The pervasive juridification of decisive aspects of macroeconomic governance, along with the juxtaposition of rules and sanctions to 'intelligent discretion' (Salvati 2013, p. 567), which national governments were previously permitted to apply (at least partially) has resulted in a permanent loss of neutrality for the economic constitution of the EMU.[12] This results in the incorporation of neo-monetarist guidelines into European higher law, causing highly asymmetrical impacts on the very different economies of the Euro-zone's countries. Rules of this kind, in fact, not only refute the prospects of a greater fiscal integration and of a political solidarity on occasion (and futilely) evoked in these past years, but they actually establish a regime from which the 'virtuous' and wealthier Northern countries, led by Germany (Beck 2013), systematically benefit compared to the Southern ones, especially when – as in Italy – these bear the historical burden of high public debt.

Although in a highly asymmetrical way and depending on the starting point of the Member States of the Euro-zone, the 'constitutionalisation of austerity' (De Witte 2013) deriving from the new European crisis-law, and particularly form the Fiscal Compact, has deep and in some cases direct implications for national Welfare State systems. In fact, it establishes a sort of permanent constitutional pressure towards a flexible (*i.e.*, de-regulated) labour market (both in terms of fostering the use of non-standard types of employment and reducing protection in the event of dismissal, especially with regard to economic lay-offs), a decentralised collective bargaining system (specifically encouraged by the Euro Plus Pact) and consequently a downgrading of the overall weight and role granted to public social security and

[12] On the matter cf. COUNTOURIS and FREEDLAND 2013a, p. 6, who emphasise how 'the monetarist dogma of fiscal austerity is being institutionalised and entrenched in the European constitutional framework with provisions such as the Euro Plus Pact and the new Treaty on Stability, Coordination and Governance in the EMU'.

in particular pension systems (see Deakin and Koukiadaki 2013). Such a constitutional grounding of the most ideal-typical neo-liberal political and economic doctrines (Crouch 2013) installs the logic of permanent competition within the system between single national social models, creating a situation in which the Member States of the Euro-zone are urged to manage their disparities and gain efficiency and competitiveness by basically utilising the only leverage remaining, which is, broadly speaking, the 'structural reform' of their own welfare systems.

Naturally I am aware that this sketchy and stylised description of the new neo-liberal economic constitution of the EMU deliberately emphasises a singular determinism that in the real world is hopelessly lacking. The reality is obviously much more complex and intricate, and the mechanisms of resilience variously activated by single national systems – especially by the industrial relations sub-systems – show how the legislative responses given by the Member States do not follow a logic of linear and deterministic de-structuring of those widespread and deep-rooted social and labour protection arrangements that we usually encapsulate in the – increasingly less evocative – formula of the 'European social model' (cf. Treu 2013 and Carrieri and Treu 2013). However, we cannot deny the presence of very strong forces towards a de-regulative competition (in the sense of a 'race to the bottom'[13]): Deakin and Koukiadaki 2013, p. 163) between systems of labour law and social security in the Member States (not only) in the Euro-zone and the occurrence of a significant acceleration in what Baccaro and Howell (2013) called the convergence towards a common 'neo-liberal trajectory' of the collective bargaining systems.

IV. DE-LEGALISATION OF THE ECONOMIC AND MONETARY GOVERNANCE OF THE UNION

[13] DEAKIN and KOUKIADAKI 2013, p. 163. See also MARSHALL 2014.

As already mentioned, the constitutional direction given to the Union by the new European crisis-law is not even compatible with the classical precepts of German 'Ordoliberalism', fundamentally because it extends the sphere of the European economic constitution to areas that we may define as ontologically imbued with a concentrated dose of political discretion and therefore not likely to be reducible to immediately definable and legally predetermined rules of action that are capable of being 'subjected to constraints by constitutional rules based on justiciable criteria' (Mestmäcker 1972, p. 97). In the 'Ordoliberal' constitutional ideal, those rules may (and in fact must) be confined to the sphere of the formal-rational prerequisites for the functioning of the common market (including the institutionalization of the fundamental economic freedoms, of unrestrained competition and of the principle of monetary stability entrusted to the technocratic government of an independent central bank that is isolated from political pressure), but they cannot go as far as to touch the sphere of macroeconomic policies that presuppose contingent and discretionary decisions. This sphere must remain a prerogative of national governments and their parliaments, as it has not been possible to remove them from democratic political debate.

For this same reason, in the original constitutional framework of the Treaties establishing the European Community, and fully consistent in this regard with the requirements of 'Ordoliberalism', social policy was to remain restricted to national democratic sovereignty, in particular so as to ensure the necessary respect for the private-collective autonomy of trade unions. The underlying reason for this choice of maintaining a distinct functional separation (the 'de-coupling' according to Scharpf 2010, p. 221) between the building of the common market, within the remit of the Community economic constitution, and the sphere of social policies, a prerogative of national democratic political and social processes, evidently lies in the fact that the latter belong to the realm of discretionary-politics.

None of this can be observed in the complex regulatory machine of the new European economic governance which, on the contrary, can claim to be intruding deeply into the sphere of the discretionary politics of the Member States, typifying notions that are characterized – beyond the effort of introducing 'objective'

numerical parameters[14] – by an compelling ambiguity and insufficient elasticity (we can just think of concepts such those of serious or excessive macroeconomic imbalance). In such a context, the role of judicial review, entrusted by EU law (Article 263 of the TFEU) to the Court of Justice, becomes so crucial in theory but unfeasible in practice. Firstly, it is not very likely that those defined as the interested parties by paragraph 2 of that provision– namely the Member States, the European Parliament, the Council, and the Commission – might effectively question those measures in which they themselves are so deeply involved, especially in the likelihood of an economic-financial crisis such as the current one, and that the Court may, then, effectively exercise its review functions. But, perhaps, what is most important is the fact that the Court would find itself adjudicating exclusively political issues and consequential decisions made in light of elastic and indeterminate notions which cannot be scrutinised, as such, within the parameters of a properly defined judicial review. The two very well-known disputes on the ESM so far deliberated upon before the German Constitutional Court[15] and the Court of Justice[16] have visibly demonstrated the essentially untreatable nature of these issues before the courts, revealing that the European economic constitution is dangerously lacking in a 'guardian'[17] (Everson and Joerges 2013; Joerges and Giubboni 2013).

On the other hand, the answers given by the Court of Justice within preliminary-ruling-proceedings by which some judges of the debtor-States of the Euro-zone have raised questions of the compatibility of the austerity measures adopted by their Member States in implementing supranational commitments with

[14] See the fine deconstructive critique by JUBÉ 2011.

[15] *Bundesverfassungsgericht*, decision of 12 September 2012 and ruling of 18 March 2014.

[16] Court of Justice of the European Union, 27 November 2012, case C-370/12, *Thomas Pringle v. Ireland*.

[17] Moreover, the methodological nationalism of the German Constitutional Court prevents it from being a guardian of the European constitution and particularly a guarantor for what RÖDL (2008) may call the interdependence of labour constitutions of the Member States. The Court of Karlsruhe – beyond the commitments towards a 'European openness' – may actually play an effective role only in the protection of the German social and democratic constitution (Art. 20 and 79 of the *Grundgesetz*). A clear evidence of this is the German Constitutional Court's preliminary reference to the Court of Justice on 14 January 2014 on the OMT (Outright Monetary Transactions) programme enacted by the BCE. See BVerfG, 2 BvR 2728/13 of 14.1.2014.

the Troika with the EU Charter of fundamental rights have to date at best been elusive. So far, the Court has rather easily and hastily managed to declare that it does not have jurisdiction to rule on such matters,[18] thus avoiding having to make a decision on inadmissibility, a review on the merit of the (obviously problematic) relations between these measures of fiscal consolidation and the fundamental principles of European social law, as enshrined in the Charter of Nice/Strasbourg. We do not know the extent to which the Court will maintain this elusive strategy (depending for the most on how the preliminary reference will be formulated); nonetheless, we are not confident that the Luxembourg judges will actually be able to consider the merits of these untreatable political issues reaffirming the constitutional logic of fundamental social rights.

On the whole, this case law demonstrates a fairly accurate picture of the new European constitutional constellation in times of crisis. The philosophy of the prohibition of bail-out, along with its appeal to Member States' autonomy and responsibility, is replaced by a new system of collective governance in situations of crisis. However, the law delegates the management of these situations to unaccountable supranational technocratic authority, without worrying about the problems of democratic legitimacy arising from the new decision-making processes, especially those that take place within the ESM. This generates an apparent contradiction: on one hand, the new crisis-management-law over-regulates European economic governance in order to tighten the macroeconomic and fiscal conduct of the Member States within a dense and constrained texture of rules, assisted by a strong semi-automatic supranational sanctioning system. On the other hand, we are witnessing a creeping de-regulation, in so far as the key concepts of the new governance – starting with notions like excessive deficit or serious imbalance – create the space for discretionary political evaluations made by the post-democratic technocratic bodies in charge of their implementation.[19] The first facet is only apparently in line with the 'Ordoliberal' requirements of an economic

[18] The best known of these preliminary rulings is the one decided by the Court of Justice in case C-128/12, *Sindicato dos Bancários do Norte et al.*, For a complete listing of these cases and for a careful recognition of the limits of the Court's case law, cf. BARNARD 2013.

[19] Cf. JOERGES 2008.

policy that is bound by legal rules. In contrast, the second is openly in contradiction with such a normative ideal-type in that it recalls the Schmittian propensity to replace law with the sheer, unrestrained governmental political-discretionary decision.[20]

V. THE UNCERTAIN SCENARIOS OF THE WELFARE STATE IN EUROPE

The European crisis-law has thus deeply modified the economic constitution of the EMU. At the same time it is evident that the crisis of the European social model has itself a precise constitutional dimension in this new context. The link between these aspects is very evident: the impact caused by the measures adopted by the Member States of the Union, and especially of the Euro-zone, over national systems of labour law and social security, for the implementation of policies that are more or less directly attributable to the pervasive deployment of the new economic governance of the crisis, already offers plentiful confirmation of this tight relationship.[21] Nor is it a coincidence that the ambitious agenda for re-socialising Europe, suggested by the eminent group of European intellectuals gathered in London by Nicola Countouris and Mark Freedland (2013b), pleads for a substantial inversion of the constitutional trajectory imprinted on the Union by the new management-crisis-law.

These proposals for re-socialising Europe contain indeed a very detailed and path-breaking programme for reforms (also cf. Supiot 2013) and there is not the space in this article to give appropriate attention to their technical-legal aspects. In line with the general and critical analysis carried out so far, we would rather like to suggest a more modest attempt to set out the possible scenarios for the Welfare

[20] Again cf. JOERGES 2012.

[21] The *Memoranda of understanding* negotiated with the Troika by the countries that made recourse (to varying degrees and in different ways) to European financial aid (Ireland, Greece and Portugal) all provide for obligations for radial reforms of the national labour law and social security systems according to a 'crude, unreconstructed neo-liberalism' (Crouch 2013, p. 41). Spain and Italy offer examples of more indirect, but not less relevant, impact of such politics of austerity *cum* conditionality. Cf. DEAKIN, KOUKIADAKI 2013 and COSTAMAGNA 2012; for Italy, GIUBBONI, LO FARO 2013 and JESSOULA 2012.

State in Europe, in the light of models of economic and social constitution that are available or may be simply foreshadowed (or desirable).

The scenario that Deakin and Koukiadaki (2013, p. 186) effectively define of 'regulated austerity' is the mere projection of the existing one, with some timid tempering of the harshness of austerity/conditionality policies constitutionalised by the 'Stability Compact', for example through the flanking of (moderate) policies for growth and employment, a bit more effective than those foreshadowed by the anaemic 'Growth Compact'.[22] This scenario would essentially confirm the current trends towards de-regulative competition and internal devaluation through a (further) flexibilisation of labour markets and the reduction of wage levels by means of the marginalisation of the role (especially national) of collective bargaining. In this kind of scenario, any encouragement of practices of social dialogue, even at European level, would constitute hardly more than a 'travesty of the real thing' (Carrieri and Treu 2013, p. 24), as its value would essentially be functional to the strengthening of the strategies of 'competitive solidarity' among national systems[23] (Streeck 1999 and 2013, pp. 138 and 209 ff.).

Not even the scenario of a 'two-speed Europe' as defined by the same authors – with a division of the Euro-zone in a core group of virtuous Northern European countries led by Germany and a Southern periphery of weak economies, which are intended to go along the downside routes of competitiveness, based on the systematic compression of labour costs – evidently gives rise to optimistic outlooks on the possible dynamics of the Welfare State in the new European constitution framework. A very different scenario is the one that Deakin and Koukiadaki (2013, p. 187) term as 'solidaristic integration', to which the two authors attribute (along with their explicit normative preference) a degree of probability that is more or less equivalent to the one defined as 'regulated austerity'. Therefore, attention must be drawn to this scenario, in order to outline a possible strategy of the re-constitutionalisation of social Europe that follows a path that is the opposite of the

[22] On the total inconsistency of the so called Growth Compact emphatically launched by the European council of 28-29 June 2012, but actually remained unaccomplished, see TREU 2013, p. 610.

[23] The 'competition trap' that GALLINO (2012, p. 81) refers to.

(de-legalised and de-socialised) one enshrined in the new economic governance of the EMU.

Deakin and Koukiadaki (2013, p. 187) suggest three convergent routes for such a re-socialisation, based respectively: a) on the expansion of the European central-budget in order to perform tasks of fiscal-transfer re-directed in favour of peripheral countries and actually adjusted to meet their needs (thus accessible beyond the suffocating conditionality requirements contemplated today by the ESM); b) on replacing the regime-competition among national labour law systems with new social harmonisation policies (or rather, more likely, with the fixing a minimum floor of social and labour standards);[24] c) on the rethinking of the role of the ECB, with the assignment of a broader mandate that explicitly takes into account (and therefore systematically balances) price stability, employment growth and social cohesion.

'*Vaste programme*' – one might say –, in relation to which it is hard to foresee who might be the social and political actors (the 'material forces', to use an old-fashioned expression) that can operate with realistic prospects of (even just partial) success.[25] However, the merit of this proposal is to clearly put into evidence how an effective prospect of the Union's re-socialisation implies, on one hand, a greater *political* investment in the new 'European social question' (De Witte 2013), and on the other, a *constitutional* reform of the Union. We could say it implies a re-politicisation and a re-constitutionalisation of the social issue on a European and transnational scale at the same time.

Defensive responses at national level – basically a return to the original division of accountability between the Union and the Member States that returns national welfare policies to the narrow boundaries of national social sovereignty – appear simply illusory. Certainly, this does not mean that there is no need to restore a greater margin of autonomy into the hands of the Member States for the determination of their social and labour policies.[26] However, in order to do so, it is

[24] Cf. GIUBBONI 2013, chap. I and II.

[25] A less ambitious perspective was outlined in JOERGES and GIUBBONI 2013.

[26] In this sense, cf. GIUBBONI 2012, p. 78 ff., and JOERGES and GIUBBONI 2013. In equal terms, RÖDL 2008, p. 164, who emphasises how a 'European labour constitution should not

necessary to re-construct a European social policy, both by establishing minimum protection standards, which would channel regulatory competition among the national legal systems above a common floor of rights, and also by strengthening transnational social solidarity ties, for example through auxiliary legislation aimed at fostering and coordinating autonomous collective bargaining processes at European level (cf. Carrieri and Treu 2013, pp. 33 ff.).

Time will show how much of this scenario is wishful-thinking or if it has even a minimal possibility of being pursued in a future European political agenda.

BIBLIOGRAPHY

L. BACCARO – C. HOWELL, 2013, *Il cambiamento delle relazioni industriali nel capitalismo avanzato: una traiettoria comune in direzione neoliberista*, in M. Carrieri, T. Treu (eds.), *Verso nuove relazioni industriali*, ASTRID - Il Mulino, Bologna, pp. 189 ff.

C. BARNARD, 2013, *The Charter in Time of Crisis: A Case Study of Dismissal, Entrenching Neo-liberalism: The Current Agenda of European Social Policy*, in N. Countouris, M. Freedland (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge University Press, Cambridge, pp. 250 ff.

U. BECK, 2013, *Europa tedesca. La nuova geografia del potere*, Italian translation, Laterza, Rome and Bari.

M. CAPPELLETTI – M. SECCOMBE – J. H. H. WEILER, 1986, *Integration Trough Law*, De Gruyter, Berlin - New York.

M. CARRIERI – T. TREU, 2013, *Introduzione. Le relazioni industriali italiane ed europee: innovazioni da completare e convergenze da affinare*, in Id. (eds.), *Verso nuove relazioni industriali*, ASTRID - Il Mulino, Bologna, pp. 7 ff.

D. CHALMERS, 2012, *The European Redistributive State and a European Law of Struggle*, in *European Law Journal*, vol. 18, n. 5, pp. 667 ff.

simply reflect the competitive framework for labour in Europe as it currently does, but should serve to re-increase the autonomy of national labour constitutions *despite* the persistence of integrated markets. In other words, a European labour constitution should support the autonomy of national labour constitutions against the pressures of the European single market' (as well as those of the new economic governance of the EMU).

F. COSTAMAGNA, 2012, *Saving Europe 'Under Strict Conditionality': A Threat to EU Social Dimension?*, Centro Einaudi – Laboratorio di Politica Comparata e Filosofia Pubblica, Working Paper n. 7/2012.

N. COUNTOURIS – M. FREEDLAND, 2013a, *Introduction - The Myths and Realities of «Social Europe»*, in Id. (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge University Press, Cambridge, pp. 1 ff.

N. COUNTOURIS – M. FREEDLAND, 2013b, *Epilogue: Resocialising Europe – Locking Back and Thinking Forward*, in Id. (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge University Press, Cambridge, pp. 493 ff.

C. CROUCH, 2013, *Entrenching Neo-liberalism: The Current Agenda of European Social Policy*, in N. Countouris, M. Freedland (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge University Press, Cambridge, pp. 36 ff.

S. DEAKIN – A. KOUKIADAKI, 2013, *The Sovereign Debt Crisis and the Evolution of Labour Law in Europe*, in N. Countouris, M. Freedland (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge University Press, Cambridge, pp. 162 ff.

R. DEHOUSSE – J. H. H. WEILER, 1990, *The Legal Dimension*, in W. Wallace (ed.), *The Dynamics of European Integration*, Pinter, London, pp. 242 ff.

F. DE WITTE, 2013, *EU Law, Politics and the Social Question*, in *German Law Journal*, vol. 14, n. 5, pp. 581 ff.

M. EVERSON – C. JOERGES, *Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?*, London School of Economics and Political Science, LES Europe in Question Discussion Paper Series - LEQS Paper No. 63/2013.

J.-P. FITOUSSI, 2013, *Il teorema del lampione, o come mettere fine alla sofferenza sociale*, Italian translation, Einaudi, Torino.

L. GALLINO, 2012, *La lotta di classe dopo la lotta di classe*, interview ed. by P. Borgna, Laterza, Rome and Bari.

S. GIUBBONI, 2006, *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective*, Cambridge University Press, Cambridge.

S. GIUBBONI, 2012, *Diritti e solidarietà in Europa. I modelli sociali nazionali nello spazio giuridico europeo*, Il Mulino, Bologna.

S. GIUBBONI – A. LO FARO, 2013, *Crisi finanziaria,* governance *economica europea e riforme nazionali del lavoro: quali connessioni?*, in AGI, *Nuove regole dopo la legge n. 92 del 2012: competizione* versus *garanzie?*, Giappichelli, Turin, pp. 41 ff.

G. GUARINO, 2012, *Cittadini europei e crisi dell'euro*, Editoriale Scientifica, Naples.

W. HALLSTEIN, 1969, *Der unvollendete Bundesstaat. Europäische Erfahrungen und Erkenntnisse*, Econ Verlag, Düsseldorf - Wien.

J. HABERMAS, 2011, *Questa Europa è in crisi*, Italian translation, Laterza, Roma - Bari.

H. HELLER, 1933, *Autoritärer Liberalismus*, in *Die Neue Rundschau*, vol. 44, pp. 289 ff.

H.-P. IPSEN, 1987, *Europäische Verfassung – Nationale Verfassung*, in *Europarecht*, pp. 195 ff.

M. JESSOULA, 2012, *Like in a Skinner Box: External Constrains and the Reform of Retirement Eligibility Rules in Italy*, Centro Einaudi – Laboratorio di Politica Comparata e Filosofia Pubblica, Working Paper n. 4/2012.

C. JOERGES, 2004, *What is Left of the European Economic Constitution? A Melancholic Eulogy*, in *European Law Review*, pp. 461 ff.

C. JOERGES, 2008, *A New Alliance of De-legalisation and Legal Formalism? Reflections on the Responses to the Social Deficit of the European Integration Project*, in *Law Critique*, pp. 235 ff.

C. JOERGES, 2011, *Will the Welfare State Survive the European Integration?*, in *European Journal of Social Law*, pp. 4 ff.

C. JOERGES, 2012, *Europe's Economic Constitution in Crisis*, ZENTRA Working Paper in Transnational Studies No. 06/2012, Bremen - Oldenburg.

C. JOERGES – S. GIUBBONI, 2013, *Diritto e politica nella crisi europea*, in *Rivista critica del diritto privato*, pp. 343 ff.

S. JUBÉ, 2011, *Droit social et normalisation comptable*, L.G.D.J., Paris.

S. MARSHALL (2014), *Shifting Responsibility: How the Burden of the European Financial Crisis Shifted Away from the Financial Sector and onto Labor*, in *Comparative Labor Law & Policy Journal*, vol. 35, pp. 449 ff.

J. A. MENÉNDEZ, 2013, *The Existential Crisis of the European Union*, in *German Law Journal*, vol. 14, n. 5, pp. 453 ff.

E.-J. MESTMÄCKER, 1972, *Macht – Recht – Wirtschaftsverfassung*, in *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, n. 137, pp. 97 ff.

I. PERNICE, 1999, *Multilevel Constitutionalism and the Treaty of Amsterdam. European Constitution-Making Revised?*, in *Common Market Law Review*, pp. 704 ff.

A. QUADRIO CURZIO, A., 2014, *Quei vincoli di Bruxelles pagati dai giovani*, ne *Il Sole 24 Ore* of Sunday 12 January 2014.

F. RÖDL, 2008, *Constitutional Integration of Labour Constitutions*, in E.O. Eriksen, C. Joerges, F. Rödl (eds.), *Law, Democracy and Solidarity in a Post-national Union. The Unsettled Political Order of Europe*, Routledge, London - New York, pp. 152 ff.

M. SALVATI, 2013, *Troppe regole, nessun governo. Un ragionamento realistico sul futuro dell'euro e dell'Europa*, in *Il Mulino*, n. 4, pp. 567 ff.

F. W. SCHARPF, 2010, *Community and Autonomy. Institutions, Policies and Legitimacy in Multilevel Europe*, Campus Verlag, Frankfurt - New York.

A. SEIFERT,(2014), *European Economic Governance and the Labor Laws of the E.U. Member States*, in *Comparative Labor Law & Policy Journal*, vol. 35, pp. 311 ff.

W. STREECK, 1999, *Competitive Solidarity: Rethinking the «European Social Model»*, Max Planck-Institut für Gesellschaftsforschung, Working Paper 99/8.

W. STREECK, 2013, *Tempo guadagnato. La crisi rinviata del capitalismo democratico*, Italian translation, Feltrinelli, Milano.

A. SUPIOT, 2010, *L'esprit de Philadelphie. La justice sociale face au marché total*, Seuil, Paris.

A. SUPIOT, 2013, *Towards a European Policy on Work*, in N. Countouris, M. Freedland (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge University Press, Cambridge, pp. 19 ff.

S. TILFORD – P. WHITE, 2011, *Why Stricter Rules Threaten the Eurozone*, Centre for European Reform – Essays, in www.cer.org.uk/.

T. TREU, 2013, *Le istituzioni del lavoro nell'Europa della crisi*, in *Giornale di diritto del lavoro e di relazioni industriali*, pp. 597 ff.

J. H. H. WEILER, 1981, *The Community System: the Dual Character of Supranationalism*, in *Yearbook of European Law*, n. 1, pp. 257 ff.

M. A. WILKINSON, 2013, *The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union*, in *German Law Journal*, vol. 14, n. 5, pp. 527 ff.

BIOTECHNOLOGICAL INVENTIONS AND LIMITS OF PATENTABILITY BETWEEN RECENT EVOLUTIONS IN THE US CASE LAW AND THE EU PERSPECTIVE OF FUNDAMENTAL RIGHTS: MOVING TOWARD A COMMON "WESTERN APPROACH"?

ANDREA STAZI

The paper analyzes the forms and limitations of patent protection recognition for biotechnological inventions. In this perspective, the paper compares the American model, traditionally based on technical evaluations, and the European model, inspired by fundamental rights.
Intellectual property law, and especially biotechnological patent law, in fact, often involves and/or faces off with the exercising of fundamental rights. In particular, the issues analyzed and the considerations proposed highlight how the regulation of biotechnological inventions should guarantee a fair balance between protection of investment and access to information which is essential for research and innovation.
In this framework, the recent US Supreme Court decision in Myriad and Mayo (and the subsequent USPTO Patent Eligibility Guidance), along with the European ECJ's decision in Brüstle and that of the EPO in WARF, appears to lead toward a common "Western approach" to the regulation of biotechnological inventions, with specific regard to the limits of patentability.
Such an approach could be based, indeed, on the balance of fundamental rights and public and private interests, which are relevant on a case-by-case basis, resorting to the criteria of hierarchy and proportionality in order to regulate value-based choices and functional interactions between them.
Finally, the same approach would be particularly relevant to the current perspective, which is aimed at enhanced transatlantic cooperation on the matter of intellectual property, specifically within the framework of the "Transatlantic Trade and Investment Partnership"(TTIP) that is presently being negotiated.

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I. THE LIMITS OF PATENTABILITY OF BIOTECHNOLOGICAL INVENTIONS: FROM *CHAKRABARTY* TO *MYRIAD*.

In the US Supreme Court leading case *Chakrabarty*[1], the central issue regarding the patentability of biotechnological inventions was faced in relation to the distinction between living organisms existing in nature and those produced by human ingenuity, recognizing patentability only in the latter case.

As a consequence, the subsequent case law[2] on both sides of the Atlantic, as well as various international agreements and declarations and European legislation[3], held that DNA in its natural state may not be patented, while DNA which has been isolated and purified or significantly modified may be patented, given that it is the result of human ingenuity[4].

Thus, the fundamental question still asked today is in relation to the criteria on the basis of which the subject of protection may consist in a product of human ingenuity, and not instead in a product of nature[5].

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[1] US Supreme Court, *Diamond v. Chakrabarty*, 447 U.S. (1980).

[2] According to a broad concept of case law which includes the decisions of patent offices, in that – especially in the biotechnology field – they are the creators of law. Concerning the relevance of the analysis of the different "formants" of legal rules, see: R. SACCO, "Legal Formants: A Dynamic Approach to Comparative Law (I-II)", 39 American Journal of Comparative Law 1 et seq. and 343 et seq. (1991); P.G. MONATERI, "Methods in Comparative Law: An Intellectual Overview", in: *Id.* (ed.), "Methods of Comparative Law" 7 et seq. (Edward Elgar, Cheltenham 2012). Regarding the importance of the use of comparative method with respect to intellectual property as a whole, see recently: I. CALBOLI, "The Role of Comparative Legal Analysis in Intellectual Property Law: From Good to Great?", in: G.B. DINWOODIE (ed.), "Methods and Perspectives in Intellectual Property" 3 et seq. (Edward Elgar, Cheltenham 2014).

[3] In particular, the UNESCO "Universal Declaration on the Human Genome and Human Rights" of 1997 prohibited profiting from the human genome in its natural state, the "European Patent Convention" of 1973 stated that biological materials and processes may be patented if they are the result of an inventive step, and directive no. 98/44/EC provided that natural plant varieties, animals and processes may not be patented, while biological material which has been isolated from nature and purified may be.

[4] *See* D.B. RESNIK, "DNA Patents and Scientific Discovery and Innovation: Assessing Benefits and Risks", 7 Science and Engineering Ethics 29 et seq. (2001); M. SAGOFF, "DNA Patents: Making Ends Meet", in: A.R. CHAPMAN (ed.), Perspectives on Gene Patenting. Religion, Science, and Industry in Dialogue, 245 et seq. (American Association for the Advancement of Science, Washington, DC 1999); J.J. DOLL, "The Patenting of DNA", 280 Science 689 et seq. (1998).

[5] In this sense, *see* D.B. RESNIK, "Owning the Genome. A Moral Analysis of DNA Patenting" 83 (State University of New York Press, New York 2004).

In this regard, it was held that DNA produced in a laboratory is *not* structurally or functionally identical to that existing in nature. According to this position, during the process of isolation and purification of natural DNA, organic mutations would take place, such that would make it differ from its natural form. Researchers, further, may introduce specific mutations, for example by removing or adding DNA sequences[6]. What is more, even where researchers do not make changes to isolated and purified DNA, it would not be, in its purified form, identical to natural DNA, given that in nature it exists in an impure form.

On the basis of such an assumption, according to which isolated and purified DNA constitutes a patentable invention while that occurring in nature does not, then, it shall be guaranteed that exclusive patent right claims cannot exist for DNA existing in nature, so that anyone can study it. Therefore, a patent concerning DNA shall be interpreted to guarantee the inventor exclusive rights for its isolated and purified form, but no right over the natural form[7].

This reconstruction was recently brought under discussion, within the US system itself[8], by recent Supreme Court interventions regarding the *Mayo* and *Myriad* cases, in March 2012 and in June 2013. In the ruling of the first case[9], a patent concerning a method to optimize the therapeutic efficacy of a medicine for the treatment of a gastrointestinal illness was declared invalid, holding that the claims in effect concerned the "laws of nature" underlying the method itself, in

[6] In practice, on one hand, to produce cDNA sequences which do not codify for protein are removed; on the other hand, researchers can add sequences of nucleotides to the DNA in order to induce modifications in the proteins produced.

[7] In this regard, *see again* D.B. RESNIK, "Owning the Genome. A Moral Analysis of DNA Patenting", supra note 5, at 89.

[8] Contrarily, in Europe "it has generally been the case that if the methods used to isolate a DNA sequence are routine and the starting materials are available, there will be no inventive step": S.A. JAMESON, "A Comparison of the Patentability and Patent Scope of Biotechnological Inventions in the United States and European Union", 35 AIPLA Quarterly Journal 193 et seq., at 222 et seq. (2007). This, further, is with the possibility of acknowledging the patentability should isolation be particularly difficult; see: A. MCCOY, "Biotechnology and Embryonic Stem Cells: A Comparative Analysis of the Laws and Policies of the United States and Other Nations", 8 Loyola Law and Technology Annual 63 et seq., at 80 (2009).

[9] US Supreme Court, *Mayo Collaborative Services, DBA Mayo Medical Laboratories, et al. v. Prometheus Laboratories, Inc.*, 566 U.S. (2012).

particular regarding a "*well-understood, routine, conventional activity previously engaged in by scientists in the field*". This mutation of the approach with respect to the previous one on the matter appeared immediately likely to give rise to significant implications for the patentability, not only of isolated genes, but more generally of purified natural products and other innovations based on biological matter existing in nature.

As a consequence, the Supreme Court itself intervened a few days later on the *Myriad* controversy – concerning genes used for tests related to the inheritability of breast and ovarian cancer – through the granting of a *certiorari* and by referring the case to the Federal Circuit, so that it might reconsider its decision in light of the aforementioned *Mayo* ruling. In fact, as was shown also later in an *amicus brief* filed by the Department of Justice in June 2012[10], the *Mayo* sentence seemed to provide important indications with respect to the issue of whether the difference between isolated and natural DNA is significant enough to make the first considerably different from the second, for the purposes of 35 U.S.C. § 101.

According to the criteria outlined in *Mayo*, in the *Myriad* case the Federal Circuit could have held that the information codified in DNA was a "law of nature", that DNA was a "product of nature", and that the isolation of DNA consisted in a process which was already well known and predictable at the moment of the application; and thus, isolated DNA was not patentable, given that the claims would have concerned, in effect, a "law of nature" and a "product of nature". On the contrary, in August 2012, the Federal Circuit Court of Appeals confirmed the validity of Myriad's patents on "isolated" genes related to breast and ovarian cancer[11].

[10] "Brief for the United States as amicus curiae in support of neither party", No. 2010-1406, June 15, 2012.

[11] More specifically, the Federal Circuit upheld Myriad's composition claims to isolated DNA (reversing the District court), invalidated Myriad's method claims for comparing or analyzing gene sequences (affirming the District court), and upheld Myriad's method claims for screening potential cancer therapeutics (reversing the District court); *see* M. TEXTOR, "Gene Patents at Home and Abroad: Should the WTO Take Action in Light of Myriad?" 9 (available at http://ssrn.com/abstract=2282676, May 2013).

Thus, in June 2013 the Supreme Court confirmed that Myriad's DNA claim falls within the law of nature exception, and so is not patentable[12]. According to the Court's decision, in fact, Myriad did not create or alter either the genetic information encoded in the BCRA1 and BCRA2 genes or the genetic structure of the DNA. It found important and useful genes[13], but innovative or brilliant discovery alone does not satisfy the U.S.C. § 101 requirement.

However, the Court specified that the decision does not include, on one hand, cDNA, which is not a "product of nature." Thus, it is eligible for a patent under § 101, as its creation results in a not naturally occurring exon-only molecule[14]. On the other hand, the decision itself does not cover method claims, patents on new applications of knowledge about the BRCA1 and BRCA2 genes, or the patentability of DNA in which the order of the naturally occurring nucleotides has been altered[15].

Therefore, every patent drafted similarly to Myriad's broadest claim – an isolated DNA code for a specific protein – is now invalid. Vice versa, claims related

[12] In this sense, the Court recalled the wording used lastly in Mayo decision, according to which: "laws of nature, natural phenomena, and abstract ideas"…"'are basic tools of scientific and technological work'" that lie beyond the domain of patent protection. As the Court had held there, in fact, without this exception, there would be considerable danger that the grant of patents would "tie up" the use of such tools and thereby "inhibit future innovation premised upon them"; this consequence, evidently, would be at odds with the very point of patents, which as known exist to promote creation. In this respect, it is worth noting how a recent study affirmed that sequence patents would already cover the entire human genome; *see* J. ROSENFELD & C.E. MASON, Pervasive sequence patents cover the entire human genome", 5 Genome Medicine 27 et seq. (2013).

[13] In fact, Myriad's principal contribution was uncovering the precise location and genetic sequence of the BRCA1 and BRCA2 genes within chromosomes 17 and 13.

[14] This distinction has its roots mainly in the decision of the case Amgen v. Chugai (927 F.2d 1200, 18 USPQ 2d 1016, 1991), where the Federal Circuit focused the subject matter of the claim on a purified and isolated DNA sequence encoding human erythropoietin, interpreting the term "purified" as meaning essentially only the coding regions, that is, only the novel purified and isolated sequence which coded for EPO (see, also for the other relevant precedents: M. TEXTOR, "Gene Patents at Home and Abroad: Should the WTO Take Action in Light of Myriad?", supra note 11, at p. 23-26; D.M. GITTER, "International Conflicts over Patenting Human DNA Sequences in the United States and the European Union: An Argument for Compulsory Licensing and a Fair-Use Exemption", 76 New York University Law Review 1623 et seq., 2001).

[15] US Supreme Court, *Association for Molecular Pathology et al. v. Myriad Genetics Inc. et al.*, 569 U.S. (2013).

to cDNA versions of genes continue to pass the threshold test, though they are still subject to scrutiny under all the other patentability requirements[16].

In March 2014, then, the USPTO issued a memorandum titled "Guidance For Determining Subject Matter Eligibility Of Claims Reciting Or Involving Laws of Nature, Natural Phenomena, & Natural Products"[17]. The Guidance implements a new procedure to address changes in the law relating to subject matter eligibility under 35 U.S.C. § 101 in view of the above-mentioned *Myriad* and *Mayo* decisions[18].

II. THE AMERICAN "TECHNICAL" APPROACH

Thus, in the light of the above mentioned developments in case law, a particularly interesting profile for the purposes of policy regarding biotechnological inventions[19] concerns the issues – inherent to the collective well-being, as well as

[16] As far as concerns Myriad, in particular, about three-quarters of its BRCA-related patents haven't been invalidated, including claims to cDNA and some of its methods. Moreover, the invalidated patents would have begun to expire in the next year. Last but not least, Myriad's most valuable asset may be the proprietary database it has built up through its testing monopoly: this database consists of test results, i.e. DNA sequences, and associated health outcomes, and gives Myriad a relevant advantage in interpreting BRCA gene mutations, especially the lesser-known one (see: J. CONLEY, "Myriad, Finally: Supreme Court Surprises by not Surprising", 2013 Genomics Law Report 1, available for consultation at http://www.genomicslawreport.com/index.php/2013/06/18/myriad-finally-supreme-court-surprises-by-not-surprising , 18 June 2013; and, also for an interesting analysis of the previous European decisions and related developments concerning Myriad's patents: G. Matthijs, I. Huys, G. Van Overwalle & D. Stoppa-Lyonnet, "The European BRCA patent oppositions and appeals: coloring inside the lines", 31 Nature Biotechnology 704 et seq., especially 709, 2013). In this respect, then, a new episode of the "Myriad saga" before antitrust authorities could be projected (regarding the profiles involved in the relationship between access to databases and antitrust, and the relative case law, see among others: D. LIM TZE WEI, "Regulating Access to Databases Through Antitrust Law: A Missing Perspective in the Database Debate", 2006 Stanford Technology Law Review 7 et seq.; E. DERCLAYE, "The IMS Health decision: a triple victory", 27 World Competition 397 et seq., 2004; D.M. GITTER, "Strong Medicine for Competition Ills: The Judgment of the European Court of Justice in the IMS Health Action and Its Implications for Microsoft Corporation", 15 Duke Journal of Comparative & International Law 153 et seq., 2004).

[17] USPTO, "2014 Procedure For Subject Matter Eligibility Analysis Of Claims Reciting Or Involving Laws Of Nature/Natural Principles, Natural Phenomena, And/Or Natural Products (March 2014)", available at http://www.uspto.gov/patents/law/exam/examguide.jsp .

[18] Regarding the industry's criticism and the ongoing debate on the Guidance, see: "Life sciences special", 240 Managing Intellectual Property 30 et seq. (June 2014).

[19] Patent protection for biotechnological inventions, as known, is justified in order to guarantee adequate incentive and return on the huge investments which are necessary to do research in the field. For an overview of the economic studies in this regard, and the related acknowledgment of the patent's incentive function, at least in the biotechnological, pharmaceutical and chemical sectors (as characterized by high risk research projects), *see especially*: B. HALL & D.

of useful pursuit for competition – raised by them in regards to the profile of access to findings by third parties, subsequent innovators or patients, consumers, et cetera[20].

In this perspective, it has been already widely highlighted how in the biotechnology sector, characterized by the cumulative effect of the innovative process, often based on the use of well-known techniques or materials, there are, on one hand, the problem of anticommons[21], on the other hand, that of the high

HARHOFF, "Recent Research on the Economics of Patents", 4 Annual Review of Economics 541 et seq. (2012); E. MANSFIELD, "Patents and Innovation: An Empirical Study", 32 Management Science 173 et seq. (1986). In fact, the subject matter protected by patents is basically information, as such not rivaled or easy to copy: so, without a system of protection which enables innovators to charge a price for innovative products above the marginal cost, they would not be effectively motivated to either bear the research and development expenses and to innovate or disclose innovation, to the detriment of the public welfare; *see* T. EGER, P. EBERMANN & P. RAMANUJAM, "Incremental Innovation and Patent Protection for Pharmaceutical Products in India", in: P.G. BABU, T. EGER, A.V. RAJA, H.B. SCHÄFER & T.S. SOMASHEKAR, Economic Analysis of Law in India, 128 et seq., especially 146 (Oxford University Press, New Delhi 2010). However, as known, patent protection also gives rise to relevant social costs, which are due basically to: a) the static welfare losses due to the above mentioned mark up on the marginal cost of producing the result of the invention; b) the possible waste of resources originating from the patent race and related litigation; c) the increased cost of secondary innovation, that is especially relevant in the biotechnology framework, where innovative activity is to a large extent a cumulative process, with present innovations which are mostly incremental, depending on past innovations; *see* V. DENICOLÒ, "Do patents over-compensate innovators?", 22 Economic Policy 679 et seq. (2007); S. SCOTCHMER, "Innovation and Incentives" *passim* (MIT Press, Cambridge - USA 2004); for an heterodox point of view, *see also* M. BOLDRIN & D. LEVINE, "The case against intellectual property", 92 American Economic Review, 209 et seq. (2002).

[20] In this regard, *see especially* G. GHIDINI, "Innovation, Competition and Consumer Welfare in Intellectual Property Law", *passim* (Edward Elgar, Cheltenham - Northampton 2010). In healthcare, patients are not customers who can choose whether or not to be consumers; patients do not have the same freedom of choice as costumers do when choosing to purchase any other good, and some people in society need more healthcare than others (*see*, among others, N. HAWKINS, "An Exception to Infringement for Genetic Testing - Addressing Patient Access and Divergence Between Law and Practice", 43 IIC 641 et seq. (2012).

[21] Term used, as known, to highlight that the granting of exclusive rights for basic research risks hindering subsequent research, so called "downstream". The main instrument through which an anticommon may arise is constituted by the Reach Through License Agreement (RTLA), clauses which are inserted into the licensing contracts through which the owners of patents for research tools are ensured rights for subsequent innovation, rights which may consist in royalties on the profits of the final product, a license on the product or in an option to buy such a license. On the theme of the "tragedy of anticommons," and the "gridlock economy" which arises from it, *see especially* A. MUSSO, "Grounds of protection: how far does the incentive paradigm carry?", in: A. Ohly (ed.), Common principles of European intellectual property law 33 et seq. (Mohr Siebeck, Tubingen 2012); M. HELLER, "The Gridlock Economy. How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives" *passim* (Basic Books, New York 2008), and *Id.*, "The Tragedy of Anticommons", 111 Harvard Law Review 621 et seq. (1998); M. HELLER & R.S.

transaction costs needed for negotiations with multiple patent owners for genes or other basic elements which are needed for the development of a biotechnological invention (so called patent thicket)[22].

In this framework, according to the traditional "technical" approach of the American model, the criteria for identification of the patentability requirements of non-obviousness and industriality are particularly significant.

The former, according to the restricted reading provided by the US Court of Appeals for the Federal Circuit in the decision *In re Kubin*[23], must be held to be excluded wherever there is a wide knowledge about the protein a target gene encodes plus general knowledge of the techniques for isolating and sequencing the same gene.

The requirement of industriality needs the identification of specific methods of use for the finding, and so allows the limitation of the patent exclusive only for a specific application of the invention[24].

EISENBERG, "Can Patent Deter Innovation? The Anticommons in Biomedical Research", 280 Science 698 et seq. (1998).

[22] The concept indicates, as known, "'an overlapping set of patent rights' which require innovators to reach licensing deals for multiple patents from multiple sources", with the possible result of obstructing entry to some markets and so impeding innovation, with effects which damage not only the producers of innovation but also the licensees of inventions and the consumers of the final product; *see* I. HARGREAVES, "Digital Opportunity. A review of Intellectual Property and Growth. An independent report by Professor IAN HARGREAVES", 18 and 56 et seq. (available at http://www.ipo.gov.uk/ipreview.htm , 2011), who recalls C. SHAPIRO, "Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting", in: A.B. Jaffe, J. Lerner & S. Stern (eds.), Innovation Policy and the Economy (Volume 1) 119 et seq. (MIT Press, Cambridge - USA 2001). On the theme, *see also* V. FALCE, "Innovation in the new technological industries: looking for a consistent cooperative model", in: E. Arezzo & G. Ghidini (eds.), Biotechnology and Software Patent Law: A Comparative Review of New Developments, 40 et seq., especially 42 et seq. (Edward Elgar, Cheltenham - Northampton 2011); F.M. SCHERER, "The Economics of Human Gene Patents", 77 Academic Medicine 1348 et seq. (2002); R.S. EISENBERG, "Bargaining over the Transfer of Proprietary Research Tools: Is This Market Failing or Emerging?", in: R. Dreyfuss, H. First, & D. Zimmerman (eds.), Expanding the Bounds of Intellectual Property: Innovation Policy for the Knowledge Society 209 et seq. (Oxford University Press, New York 2001); with respect to the implications in terms of an antitrust, *see also* M. GANSLANDT, "Intellectual Property Rights and Competition Policy", in: K.E. Maskus (ed.), Intellectual Property, Growth and Trade (Frontiers of Economics and Globalization, Volume 2) 233 et seq. (Emerald Group, Bradford 2009); D.L. RUBINFELD & R. MANESS, "The Strategic Use of Patents: Implications for Antitrust", in F. Lévêque & H.A. Shelanski, Antitrust, Patents and Copyright: EU and US Perspectives 85 et seq. (Edward Elgar, Cheltenham - Northampton 2005).

[23] 561 F.3d 1351 (Fed. Cir. 2009).

[24] Therefore, for instance, it is held that under the Kubin standard many of the single gene patents that Myriad has foreclosed would have gone down on obviousness grounds anyway. What is more, such a standard is likely having a similar effect on cDNA patents as well, undercutting the

Moreover, as far as the extension of patent protection for biotechnological inventions is concerned, according to the traditional approach of the American model, the distinction between patents for inventions of products and processes is still fundamental.

In principle, as is well known, the patent for a product is held to provide protection for the product regardless of how it is obtained and for all its possible uses.

With regard to biotechnological inventions, however, under the first profile, considering their peculiarity of being living and self-replicating matter, the opinion of those who state that the patent grants exclusive production rights for the finding only when it is produced through the process described in the patent application seems convincing[25].

Under the second profile, then, in the field of genetics the inventions are linked to the identification of the function of the gene, which is usually not the only function it may carry out: in this context, extending protection to all possible functions of the gene appears excessive, given that the contribution to scientific and social progress by the inventor concerns solely one specific function of the identified gene[26]; in this perspective, subsequent inventions regarding the same gene may be considered dependent on the first only when they are to some degree logically connected to its technical teaching.

In the patent for a process, the exclusive covers, in fact, the process, even if it does not lead directly to the product but satisfies in any case industrial interests, or, should it lead to the creation of a product, with the possibility of extension also

significance of the Court allowing them to survive as patentable subject matter (*see* J. CONLEY, "Myriad, Finally: Supreme Court Surprises by not Surprising", supra note 16, at 2).

[25] In this sense, *see* V. DI CATALDO, "Fra tutela assoluta del prodotto brevettato e limitazione ai procedimenti descritti ed agli usi rivendicati", 2004 Rivista di diritto industriale 111 et seq., at 117.

[26] *See* D.M. GITTER, "International Conflicts over Patenting Human DNA Sequences in the United States and the European Union: An Argument for Compulsory Licensing and a Fair-Use Exemption", supra note 14, at 1670 et seq.

to the product created through that process, where it is the direct and necessary result of it.

The extension of protection for the process to the product, within the limits indicated, allows third parties to be granted patent protection for an identical product as long as it was obtained through a different process, or with instruments coming from the first process unless the product is directly derived from it (that is a so called product-by-process claim).

These approaches in regards to biotechnological inventions of products or processes are based, evidently, on the desire to avoid that subsequent innovation be needlessly hindering.

As a consequence, the invention which improves the execution of the same type of use with a solution which perfects the previous invention shall be dependent on it, while the invention which – though it uses elements which are the subject of other exclusive rights – combines them in such a manner as to give rise to a new useful result which could not be obtained through the first, shall not be dependent on it. Similarly, the invention which transfers previously existing ideas to a different and distant sector of use, producing a new useful result, shall not be dependent[27].

Furthermore, another technical approach which appears useful regarding the limits of patentability of biotechnological inventions could be defined as being "technology specific".

It is based on: a) the accurate definition of the context of the extension for innovations "upstream"; b) the cost-benefit analysis, with specific regard to the various circumstances in which they may arise – for instance, therapeutic proteins, diagnostic methods and research tools, et cetera – with different evaluations depending on their particular respective characteristics.

[27] *See again* G. GHIDINI, "Innovation, Competition and Consumer Welfare in Intellectual Property Law", supra note 18, 69 et seq. Thus, the patent of a certain segment of DNA aimed at producing a protein covers its commercial uses which are aimed at the production of the protein, but if it later emerges that the protein can carry out other functions, or that its functions may increase when it is associated with other structures, the subsequent inventor can patent the different use or the different characteristics of the protein without the first being able to oppose it. Still, the owner of the patent on the protein obtained through a certain process may not claim an exclusive right for the production of the protein through different methods, which should be the subject of an independent patent.

So, the rules on the matter should be interpreted, or detailed, in favor of or against the patentability of the findings, according to the specific category of scientific research in question[28].

In the United States, however, these approaches in practice face relevant limitations, because of some peculiar aspects of patent law.

In particular, among such peculiarities, it is necessary to remember those regarding: a) the narrowness of exceptions for experimental use[29]; b) the failure to use the tool of the compulsory license (except for the hypothesis, till now only "on the books", of the so called "march-in right")[30]; c) the broadness with which patent protection has traditionally been granted, independently from the specific indication of the function concretely carried out by the molecule of DNA in the patent application (a principle which, rather, is specifically provided for in more recent European legislation on the subject, such as in German and Italian legislation)[31].

[28] In this sense, *see* A. LAUER, "The Disparate Effects of Gene Patents on Different Categories of Scientific Research", 25 Harvard Journal of Law & Technology 179 et seq., especially 183 et seq. (2011); C.J. SHIU, "Of Mice and Men: Why an Anticommons Has Not Emerged in the Biotechnological Realm", 17 Texas Intellectual Property Law Journal 413 et seq., at 442 et seq. (2009).

[29] Now strictly limited to use "for amusement, to satisfy idle curiosity, or for strictly philosophical inquiry"; *see especially* Federal Circuit, Roche Products, Inc. v. Bolar Pharmaceutical Co., 733 F.2d 858, 1984, and Madey v. Duke University, 307 F.3d 1351, 2002.

[30] Which, according to the "Bayh-Dole Act", would permit the federal government to require a federally-funded patentee to grant licenses under his patent to third-party applicants where the patent holder has failed to achieve sufficient practical application of the invention, or to alleviate health or safety needs which are not reasonably satisfied by the contractor, assignee or their licensees (35 U.S.C. § 203(1)(a)-(b), 1994).

[31] According to the US "Utility Examination Guidelines", in fact, "(a) patent on a composition gives exclusive rights to the composition for a limited time, even if the inventor disclosed only a single use for the composition" ("Guidelines", January 2001, 66 Fed. Reg. 1092, 1095). However, US law allows an inventor who develops a new use for a patented compound to get a process patent for that new use, notwithstanding that the DNA is itself patented; *see* M. TEXTOR, "Gene Patents at Home and Abroad: Should the WTO Take Action in Light of Myriad?", supra note 11, at 28-29; D.M. GITTER, "International Conflicts over Patenting Human DNA Sequences in the United States and the European Union: An Argument for Compulsory Licensing and a Fair-Use Exemption", supra note 14, at 1666. Regarding these issues, among others, *see also* W. LESSER, "Myriad & Prometheus, Laws & Products of Nature: Are the Courts Considering an Economic Non-Statutory Subject Matter Exclusion?", 53 IDEA - The Intellectual Property Law Review 173 et seq. (2013); H.C. WEGNER, "Mayo v. Prometheus Patent-Eligibility: Whither Myriad and Gsk v. Classen" *passim* (available at www.grayonclaims.com/hal, 2012); C.A.

III. THE EUROPEAN (BUT WITH CORRESPONDING DEVELOPMENTS IN RECENT US CASE LAW) "VALUE-BASED" APPROACH

In order to deal with the multiple and constantly changing issues posed by biotechnological inventions, in the European model the American technical approach to the regulation of related patents appears to be complementary to one which can be defined as "value-based", inspired to balance the interests at play.

The European approach is based, in particular, not only on tools – still of a technical nature but used, as noted, in a different perspective – such as those just recalled of the greater wideness of the exception for experimental use[32], of the use of the compulsory license[33], and of the limitation of the protection to the function specifically indicated, but also – especially – on the above mentioned balance of interests in light of the relevant fundamental rights on the matter[34].

In this sense, the relation between intellectual property and the system of fundamental rights – in the current framework of technological and economic developments – is more and more evident[35]. There are always more frequently, in

FOWLER, "Ending Genetic Monopolies: How the TRIPS Agreement's Failure to Exclude Gene Patents Thwarts Innovation and Hurts Consumers Worldwide", 25 American University International Law Review 1073 et seq., especially 1091 and 1097 et seq. (2010).

[32] *See* S. AYMÉ, G. MATTHIJS E S. SOINI, "Patenting and licensing in genetic testing – Recommendations of the European Society of Human Genetics", in 16 European Journal of Human Genetics, 2008, p. S3 et seq., especially p. S7, and *Iid.*, "Patenting and licensing in genetic testing: ethical, legal and social issues", *ibidem*, p. S10 et seq., especially p. S27.

[33] *See again* S. AYMÉ, G. MATTHIJS E S. SOINI, "Patenting and licensing in genetic testing: ethical, legal and social issues", supra note 30, p. S27 et seq.

[34] *See* D. WIELSCH, "Zugangsregeln. Die Rechtsverfassung der Wissensteilung", 8 and 66 et seq. (Mohr Siebeck, Tubingen 2008); C. GEIGER, "'Constitutionalising' Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union", 37 IIC 371 et seq. (2006).

[35] *See especially* C. GEIGER, "Fundamental Rights as Common Principles of European (and International) Intellectual Property Law", in: A. Ohly (ed.), Common principles of European intellectual property law, supra note 19, at 223 et seq.; L.R. HELFER & G.W. AUSTIN, "Intellectual Property: Mapping the Global Interface" 1 et seq. (Cambridge University Press, Cambridge 2011); W. GROSHEIDE (ed.), "Intellectual Poperty and Human Rights: A Paradox" *passim* (Edward Elgar, Cheltenham - Northampton 2010); P.L.C. TORREMANS, "Intellectual Property and Human Rights" *passim* (Kluwer Law International, Alphen aan den Rijn 2008); P. YU, "Reconceptualizing

fact, cases in which the courts are called to evaluate the legitimacy of the granting or the use of intellectual property rights in regards to a fundamental principle of constitutional status considered to be antagonistic to them, such as the right to health, freedom of scientific research, human dignity, et cetera[36].

In the biotechnology field, such a "dialectic of goals" has been crucial, for instance, in the EU Court of Justice rulings on the validity of directive no. 98/44/EC in light of the principles of human dignity and non-patentability of discoveries[37], and in the *Brüstle* case regarding the compatibility with the principles of human dignity and integrity of processes which allowed for the obtainment of neural progenitor cells from human embryonic stem cells (given that they implied the destruction of the embryo)[38].

Similarly, the EPO Enlarged Board of Appeal in the *WARF* case, regarding a patent application presented by the Wisconsin Alumni Research Foundation on a method for obtaining cultures of embryonic stem cells from embryos of primates (man included), and on the cultures themselves, rejected the application because

Intellectual Property Interests in a Human Rights Framework", 40 UC Davis Law Review 1039 et seq. (2007); L.R. HELFER, "Toward a Human Rights Framework for Intellectual Property", *ibid.* 971 et seq., and *Id.*, "Human Rights and Intellectual Property: Conflict or Coexistence?", 5 Minnesota Intellectual Property Review 47 et seq. (2003); A.R. CHAPMAN, "A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science", in: WIPO, Intellectual Property and Human Rights - WIPO Publication No. 762(E) *passim* (WIPO, Geneva 1999).

[36] In this regard, *see* C. GEIGER, "'Constitutionalising' Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union", supra note 32, at 371 et seq.; T. BRAEGELMANN, "The Constitutional Scope and Limits to Copyright Law in the United States, in Comparison with the Scope and Limits Imposed by Constitutional and European Law on Copyright Law in Germany", 27 Cardozo Arts & Entertainment Law Journal 99 et seq. (2009).

[37] EU Court of Justice, *The Kingdom of the Netherlands v. European Parliament and Council*, case C-377/98 (2001) ECR I-07079.

[38] EU Court of Justice, *Oliver Brüstle v. Greenpeace eV*, 18 October 2011, case C-34/10. For comments on the decision and on the relations between biotechnological patents and bioethics, *see* M.I. SCHUSTER, "The Court of Justice of the European Union's Ruling on the Patentability of Human Embryonic Stem-Cell-Related Inventions (Case C-34/10)", 43 IIC 626 et seq. (2012); S. BURKE, "Interpretive Clarification of the Concept of "Human Embryo" in the Context of the Biotechnology Directive and the Implications for Patentability: Brüstle v Greenpeace eV (C-34/10)", 34 European Intellectual Property Review 346 et seq. (2012); A. STAZI, "Innovazioni biotecnologiche e brevettabilità del vivente. Questioni giuridiche e profili bioetici nei modelli statunitense ed europeo" 230 et seq. (Giappichelli, Turin 2012, forthcoming in English).

the invention could be developed only through the destruction of human embryos[39].

In US case law, then, similar issues of balance of interests at play have been relevant in the recent Supreme Court decisions in the *Myriad* and *Mayo* cases, regarding the relationship between patents for genes, freedom of research and the right to health[40],

Thus, such Supreme Court decisions seem likely to produce significant consequences toward the introduction of a systematic and accurate evaluation of the above mentioned balance in the scrutiny of the patentability of biotechnology innovations[41].

IV. CONCLUSION

Intellectual property law, and especially biotechnological patent law, often involves and/or faces off with the exercising of fundamental rights.

The issues analyzed and the considerations proposed highlight how the regulation of biotechnological inventions should guarantee a fair balance between

[39] EPO Enlarged Board of Appeal, *Use of embryos/WARF*, 25 novembre 2008, G 2/06. The "whole content approach" adopted by the EPO, then, has been restated by the European Parliament in the "Resolution of 10 May 2012 on the patenting of essential biological processes (2012/2623(RSP)", which at point 6 "(w)elcomes the recent decision of the European Patent Office in the WARF case and of the European Court of Justice in the Brüstle case, as they appropriately interpret Directive 98/44/EC and give important indications on the so-called whole content approach", and "calls on the European Commission to draw the appropriate consequences from these decisions also in other relevant policy areas in order to bring EU policy in line with these decisions".

[40] *See* J. ROSENFELD & C.E. MASON, "Pervasive sequence patents cover the entire human genome", 5 Genome Medicine 27 et seq. (2013); T. MINSSEN & D. NILSSON, "Standing on shaky ground: US patent-eligibility of isolated DNA and genetic diagnostics after AMP v USPTO - Part I", 1 Queen Mary Journal of Intellectual Property 223 et seq. (2011), "Part II", 2 Queen Mary Journal of Intellectual Property 136 et seq. (2012), "Part III", 2 Queen Mary Journal of Intellectual Property 225 et seq. (2012), and "Part IV", 3 Queen Mary Journal of Intellectual Property 118 et seq. (2013); A. LAUER, "The Disparate Effects of Gene Patents on Different Categories of Scientific Research", 25 Harvard Journal of Law & Technology 179 et seq. (2011).

[41] More specifically, currently potential competitors results legitimate to enter the market affording less risks of being rightfully sued for infringement, patients seem allowed to obtain the availability of a second-opinion testing, and basic researchers are free to do research with isolated genomic DNA (while as said in the US there is no effective research exemption to patent infringement, even in the nonprofit sector); *see* J. CONLEY, "Myriad, Finally: Supreme Court Surprises by not Surprising", supra note 16, at 1.

protection of investment and access to information which is essential for research and innovation.

In this framework, the recent US Supreme Court decision in *Myriad* and *Mayo* (and the subsequent USPTO Patent Eligibility Guidance), along with the European ECJ's decision in *Brüstle* and that of the EPO in *WARF*, appears to lead toward a common "Western approach" to the regulation of biotechnological inventions, with specific regard to the limits of patentability.

Such an approach could be based, indeed, on the balance of fundamental rights and public and private interests, which are relevant on a case-by-case basis, resorting to the criteria of hierarchy and proportionality in order to regulate value-based choices and functional interactions between them[42].

Finally, the same approach would be particularly relevant to the current perspective, which is aimed at enhanced transatlantic cooperation on the matter of intellectual property, specifically within the framework of the "Transatlantic Trade and Investment Partnership" (TTIP) that is presently being negotiated.

[42] In this perspective, *see amplius*: G. GHIDINI, A. STAZI, "Freedom to Conduct a Business, Competition and IP", in: C. Geiger (ed.), "Research Handbook on Human Rights and Intellectual Property" (Edward Elgar, Cheltenham forthcoming); G. GHIDINI, "Exclusion and access in copyright law: the unbalanced features of the European Directive 'on information society'", 2013 Rivista di diritto industriale 5 et seq.; A. STAZI, M. MARZETTI, "Synergetic Interaction Between Intellectual Property and Consumer Protection: A Pragmatic Proposal to Rebalance Incentives and Access", in: D. Beldiman (ed.), "Access to Information and Knowledge: 21st Century Challenges in Intellectual Property and Knowledge Governance" 189 et seq. (Edward Elgar, Cheltenham 2013).

FISCAL FEDERALISM AND COMPARATIVE LAW

GIULIANA GIUSEPPINA CARBONI[1]

This paper aims to set a general framework within which a study on fiscal federalism could be developed. The term "fiscal federalism" stems from American economic schools. The natural tendency of economic science to cross national boundaries allowed fiscal federalism theory to spread to all liberal-democratic States and affect legal studies. The legal analysis of fiscal federalism concerns rules that regulate the allocation of economic and financial powers between layers of government to understand how these powers achieve common values. The interaction between principles of fiscal federalism and sources of law gives rise to a plural system of fiscal intergovernmental relations, which can be ordered into different patterns or models. Some States protect territorial autonomy more than equality, but others guarantee equal conditions for citizens more than a differentiation of territories. The choice between equality and territorial autonomy depends on the social Constitution. In fact, the coordination between taxing and spending, which are both related to equalisation, is essential for the realisation of the welfare State.
From a comparative law perspective, the study of the balance of powers highlights the conditions and limits of the fiscal constitution, which, in conjunction with an institutional context, defines the constitutional field of fiscal federalism.

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I. INTRODUCTION

Fiscal federalism is in vogue in comparative studies because it is one goal of reforming policy in contemporary democracies. Scholars of fiscal federalism are supposed to assist lawmakers in the reformation of fiscal relationships between levels of governments. Academics fail to set a common theoretical approach to the issue, and therefore, they draft many different versions of the same theme. For this reason, a study on fiscal federalism is essentially a conceptual one.

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Most comparatists believe that fiscal federalism involves the power to levy taxes[2]. According to this theory, the power to tax is the keystone to building fiscal relations between central and sub-national governments. Both central and state levels can levy and collect taxes, and these powers have to be constitutionally guaranteed.

From a broader perspective, fiscal federalism in a free internal market includes principles and rules that concern relationships between levels of government, particularly taxing and spending, debt, accountancy, budgeting, the commerce clause, labour market, and financial institutions[3].

The all-inclusive theory is too broad and difficult to apply to different systems because it encompasses from fiscal and commercial rules to market labour and accountancy laws.

This paper aims to set a general framework in which a study of fiscal federalism could be developed. This study would choose from economic principles that are most directly related to "the financial territorial constitution"[4]. This expression refers to the overlap of territorial and fiscal constitutions. The former expression contains rules that govern vertical divisions of power in national territories. The latter expression refers to rules regulating financial flow and budget policies.

Fiscal constitution covers some aspects of the economic sovereignty of States and Federations, which also encompass market and monetary legislation, and several government interventions in the economy[5].

If we restrict research to financial territorial constitution, we will compare legislation of fiscal federalisms, i.e., the regulation of powers distributed between

[2] G. BIZIOLI, C. SACCHETTO (Eds.), *Tax Aspects of Fiscal Federalism*, IBFD, Amsterdam, 2011.

[3] G.F. FERRARI, *Il federalismo fiscale nella prospettiva comparatistica*, in ID. (Ed.), *Federalismo, sistema fiscale, autonomie*, Donzelli, Roma, 2010, 5.

[4] M. MEDINA GUERRERO, *Financiación autonómica y control de constitucionalidad (Algunas reflexiones sobre la STC 13/2007)*, in *Revista d'Estudis Autònomics i Federals*, 2008, 6, 92 ss.

[5] G. DI PLINIO, *La costituzione economica europea e il progetto di Trattato costituzionale*, in *www.unich.it/scigiur/wrkpapers/* .

different vertical layers of authority, particularly: 1) the power to tax; 2) the power to spend; and 3) the power to equalise territorial differences.

We will assess similarities and differences between legal systems to classify them based on this functional repartition. American history demonstrates that the exercise of these three powers causes conflicts between layers of government in a federation of States, which drove the founding fathers of liberal democracies to establish rules on fiscal relationships[6].

In some legal systems, these rules also involve local governments, which are usually governed by States or other regional authorities.

Notably, rules on fiscal federalism are not entirely enshrined in codified Constitutions because some rules stem from so-called natural economic laws, which, as we will see, are accepted by institutions.

Statements and rules governing fiscal relationships are, or could be, the consequences of economic events that lead to a flexibility of rules on the economic aspects of federalism, as one of the first scholars of federalism realised[7]. Events (e.g., growth of public debt) call for a response (e.g., debt limits) that could be legislative, political or judiciary, depending on which forms are adopted by authorities.

Therefore, a survey on fiscal federalism should analyse rules of territorial constitution, how economics and economic theories influence the development of relationships between territorial governments and how economic constitutions influence fiscal relationships.

From a methodological perspective, legal research on fiscal federalism is influenced by quantitative and statistic data, which can afford to evaluate the efficiencies of territorial and fiscal organisations.

[6] J.P. MEEKISON, H. TELFORD, H. LAZAR, *The Institution of Executive Federalism: Myths and Realities*, in ID. (eds.), *Reconsidering the Institution of Canadian Federalism*, McGill-Queen's University Press, Montreal, Quebéc; Ithaca [N.Y.] 2004, 19 ss. P. LESLIE, R.H. NEUMANN, R. ROBINSON, *Managing Canadian Fiscal Federalism*, in J.P. MEEKISON, H. TELFORD, H. LAZAR (Eds.), *Reconsidering the Institution of Canadian Federalism*, cit., 213 ss.

[7] K.C. WHEARE, *The Federal Government*, London and New York, Oxford University Press, 1946.

This article begins by outlining the birth of fiscal federalism notions in different areas of economic studies[8]. The article then examines the manner by which the economic theory of fiscal federalism became a legal theory.

Finally, this article considers the sources of law regarding fiscal relationships between levels of government and attempts to develop a model to classify them.

II. THE ECONOMIC THEORY OF FISCAL FEDERALISM

The term "fiscal federalism" was first used by a group of American scholars to define a decentralisation theory in the public sector in the United States of America. The natural tendency of economic science to cross national boundaries allowed fiscal federalism theory to spread to all liberal-democratic States[9]. The term was quickly given a wider meaning, which has been used to illustrate intergovernmental fiscal relationships in States with different levels of government[10]. In this sense, fiscal federalism has formed a fundamental key for the study of relationships between central and sub-national governments, and contributed to the elaboration of operational models for composite States[11].

The economic theory of fiscal federalism is more recent than the phenomenon it describes, which started with the first federal Constitutions in the eighteenth century. When the United States Federation was born, the term "federal finance" was used to indicate fiscal relationships between central and sub-national governments.

[8] G.G. CARBONI, *Il federalismo fiscale: dalla nozione economica a quella giuridica*, in *Diritto pubblico comparato ed europeo*, 2009, IV, 1417 ss.

[9] On this diffusion L. GRECO, *Federalismo fiscale: una nozione economica*, in *Federalismo fiscale*, 2007, 39 ss.; D. FAUSTO, *Note sulla teoria economica del federalismo fiscale*, in D. FAUSTO, F. PICA (Ed.), *Teoria e fatti del federalismo fiscale*, Il Mulino, Bologna, 2000, 103 ss.

[10] R. BIFULCO, *Le relazioni intergovernative finanziarie negli Stati composti tra Costituzione, politiche costituzionali e politiche di maggioranza*, in V. ATRIPALDI, R. BIFULCO (Eds.), *Federalismi fiscali e Costituzioni*, Giappichelli, Torino, 2001, 16 ss.

[11] The financial relations have established a pattern of "attraction" for all centre-periphery relations (administrative, legal, political), which have been named and described with words and concepts from economics: competitive federalism, cooperative, concurrent, etc.

Federal finance was inseparably linked to the federal State and the revendication of the financial independence of central government towards state government. However, fiscal federalism was used to describe fiscal relations within all composite and/or decentralised States.

This transformation was determined by the development of the State, which became responsible under Keynesian impulse for providing functions that were previously supplied by the free market, such as delivering goods and services unavailable to all citizens and guaranteeing the social and economic conditions for participation in public life. The objective of public finance is threefold: governmental effects on (1) efficient allocation of resources, (2) distribution of income, and (3) macroeconomic stabilisation[12].

Government is expected to reallocate resources from some groups to others in times of financial crisis to guarantee this macroeconomic stabilisation. In this case, public expenditure is directed to the transfer of income from rich to poor people.

The birth of the welfare State and the rising federal commitment in wealth redistribution have produced a change in taxing and spending policies[13]. Taxing has increased enormously to finance income redistribution and stability policies supported by central government. Spending has increased to the benefit of all levels of government, which are requested to exercise a wide variety of functions.

The theory of fiscal federalism proposed by public finance scholars has tried to develop an optimal distribution model of these tasks for different levels of government by taking account of the three fundamental functions of public finance (goods and services allocation, income distribution, and economic stability).

The search for the most efficient model of task delivery included sectors linked to the financing and spending of sub-national governments, and all economic public sectors generally related to the welfare State[14].

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[12] R. MUSGRAVE, *The Theory of Public Finance*, McGraw-Hill, New York, 1959.

[13] R. BOWIE, C. FRIEDRICH, *Studies in Federalism*, Little, Brown & Company, Boston, Toronto, 1954.

[14] R. MUSGRAVE, P. MUSGRAVE, *Public Finance in Theory and Practice*, MacGraw-Hill, New York, 1989, 613 ss.; W.E. OATES, *Fiscal Federalism*, Harcourt Brace, New York, 1972,

The costs and benefits of decentralisation have been compared, and irregularities and differences in the distribution of economic activities in the territorial context and the differential effects produced by public policies have been considered.

The "fiscal federalism" theory has been used to justify both the decentralisation of some functions and the centralisation of others.

In this view, the allocation of goods and services should be attributed to local governments, which can ask their citizens to pay related costs, unless these citizens benefit from the services of other territories (i.e., defence).

Indeed, local government should be able to allocate goods and services at a lower cost to better satisfy people's needs and promote democratic decisions[15].

The economic theory of fiscal federalism assigns the management of redistribution policies, which are directed to guarantee minimal equity conditions[16], and policies focused on economic balance and financial stability to central government.

Decentralisation of these functions to sub-national governments would be a disadvantage to citizens due to the inadequate size of local government compared to the tasks to be performed and the costs of the division of functions, which can be developed at an optimal level by a central government[17].

One risk of decentralisation is that territorial governments behave opportunistically and make decisions that require economic efforts by central government (e.g., spending and borrowing) against the necessity for stability[18].

Another group of academics who are associated with the "Public Choice" school has criticised the economic theory of fiscal federalism. These academics

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passim

[15] M. TIEBOUT, *A Pure Theory of Local Expenditure*, in *The Journal of Political Economy*, 1956, V. 64, n. 5, 416 ss. W.E. OATES, *Fiscal Federalism*, cit., passim

[16] It should be remembered that equalisation is addressed to the territories in Europe, but it is often granted to individuals within specific programs in the USA. W.E. OATES, *An Essay in Fiscal Federalism*, in *Journal of Economic Literature*, 1999, 1127.

[17] R. MUSGRAVE, P. MUSGRAVE, *Public Finance in Theory and Practice*, cit., 623 ss.

[18] J.A. RODDEN, G.S. ESKELAND, J. LITVACK, *Fiscal Decentralization and the Challenge of Hard Budget Constraints*, The MIT Press, Cambridge, 2003.

highlighted the limitations of a purely economic and efficiency dialogue on task allocation between public administrations[19]. According to these scholars, the decentralisation of public policies does not necessarily have good results *per se;* conditions and institutional constraints have to be imposed to pursue the public good through the democratic process of decision, and fiscal relations have to be adequate for an efficient system of fiscal relationships.

The different approach of the Public Choice school does not revise the conclusions of the Public Finance school, for which the fiscal federalism theory is adaptable to all States with different levels of government. Research into federal finance is replaced by studies of fiscal federalism, a category that allows us to confront a greater number of States.

III. FISCAL FEDERALISM AND SOCIAL SCIENCE

Economists and other social scientists have studied the decentralisation of economic tasks. Jurists, political philosophers and scientists of federal political systems initiated the study of federal finance from the birth of the first American constitution. Nevertheless, it was necessary to wait until the second half of the nineteenth century to witness a massive development in comparative studies on federal finance. Research in this field from different disciplines has provided comparative studies with a basic knowledge of the theme, which prompted public law researchers to give greater attention to the rules of the allocation of financial tasks[20].

The circulation of the economic theory of fiscal federalism into political and juridical sciences occurred on the basis of two important premises: the shift from a static to a dynamic theory of federalism and the idea of considering economics as the main pillar of the relationship between central and sub-national governments[21].

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[19] J. M. BUCHANAN, G. TULLOCK. *The Calculus of Consent: Logical Foundations of Constitutional Democracy*. Ann Arbor: University of Michigan Press, 1962.

[20] G. BOGNETTI, *Lo spirito del costituzionalismo americano. Breve profilo del diritto costituzionale degli Stati Uniti. La costituzione democratica.* II, Giappichelli, Torino, 2000, 150 s.

[21] G.G. CARBONI, *Il federalismo fiscale: dalla nozione economica a quella giuridica*, in *Diritto pubblico comparato ed europeo*, cit.

A new scope for studies stems from the need to adapt comparative studies to transformations of contemporary States. On the one hand, traditional unitary States started decentralisation processes without renouncing the central feature of the State, and regional States shifted to federal organisation. On the other hand, federal States adapted their organisation to be appropriate in the new context[22].

States that originated from political and geographic transformations in the late twentieth century have the form of a composite State, but not always the form of a federal State[23].

The diffusion of new organisation models led to the abandonment of the concept of a federal State because it was conceived between the eighteenth and nineteenth centuries and the implementation of new forms of State, such as the Autonomic State in Spain and the Devolved State in the UK.

From a theoretical point of view, the diffusion of new territorial organisation models and the circulation of federal institutions weakened the efficacy of previous criteria to differentiate the form of the State. The traditional classification has become insufficient and unsuitable.

In modern federalism, the traditional distinction between unitary, regional and federal States (alongside confederations and international organisations) is complimented by a distinction based on the federalising process, which considers decentralisation and centralisation as territorial re-organisation processes of the State[24].

The consideration of economics as a main pillar of intergovernmental fiscal relationships developed before the idea of the federalising process.

At the end of the twentieth century, federalism and fiscal federalism obtained a very broad meaning, which does not necessarily coincide, because there could be a federal State with a limited application of fiscal federalism and a unitary State that realises a deep decentralisation of fiscal power. However, there is no doubt that the

[22] L. PEGORARO, A. RINELLA, *Diritto pubblico comparato*. Profili metodologici, Cedam, Padova, 2009, 178 ss. R. SCARCIGLIA, *Introduzione al diritto pubblico comparato*, Il Mulino, Bologna, 2006, 84 s.

[23] D.J. ELAZAR, *Exploring Federalism*, Tuscafoosa: University of Alabama Press, 1987.

[24] C.J. FRIEDRICH, *Trends of Federalism in Theory and Practice*, Praeger, New York, 1968.

economic-fiscal aspect of federalism affects the development of relationships between the central State and sub-national governments, and these relationships simultaneously influence fiscal federalism.

The mutual interdependence between economic and institutional aspects of the federalising process has been clear since economic terms and concepts first appeared in juridical language. Economists have long held that institutional aspects are necessary to understand fiscal intergovernmental relationships, and constitutional guarantees are essential to distinguish autonomy from decentralisation.

Studies on federalism have recorded these theoretical and institutional transformations. These studies were previously interested in the cultural and political bases of federalism, but now their attention has moved to the question of the financing and sustainability of federal systems[25]. These new studies demonstrate a widespread belief that fiscal federalism entrenches a set of principles that regard getting and spending more efficiently and equally for citizens[26].

Fiscal decentralisation has been reformed in unitary States, such as France and the United Kingdom, regional States, such as Italy and Spain, and federal States, such as Germany.

Reformers have been convinced to promote fiscal decentralisation for the same reasons elaborated by economists to sustain the theory of fiscal federalism: the chance to better satisfy citizens' expectations, the benefits that stem from competition for public goods, and the checks of power obtained through political and financial responsibility[27].

The process of reforms that affected European democracies, some Anglo-American States and developing countries, caused a further stage of studies on fiscal federalism, regarding its applicability to different institutions and contexts.

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[25] R.L. WATTS, *The Historical Development of Comparative Federal Studies*, in *www.queensu.ca*, 7 ss.

[26] T. E. FROSINI, *The Gamble of fiscal Federalism in Italy*, in *Italian Journal of Public Law*, n. 1, 2010, 124 ss.

[27] U. THIEßEN, *Fiscal Decentralisation and Economic Growth in High-Income OECD Countries*, in *Fiscal Studies*, 2003, 24/3, 237 ss.

Aside from economists[28], political scientists who considered the allocation of fiscal resources and powers as one of the most important elements to compare federal systems have been the most active players in this field [29].

The latter research has supported trends that emerged from scientific studies in the 1960s and 1970s: the separation of the territorial financial system from the "federal principle" [30], whereby there was a division between revenue and expenditure powers, which were allocated to a certain level of government, and administrative and legislative powers, which were attributed to another level.

Fiscal federalism has become a model that can entrench different legal orders with different institutions and political systems, be organised on two or more levels and have distinct allocations of power regardless of the dynamic of intergovernmental relations[31].

IV. COMPARATIVE PUBLIC STUDIES

The history of comparative public law is a very recent one, and this partly explains why the study of fiscal and economic phenomena in modern States has not developed with an appropriate method or in a systematic manner.

Fiscal power and its allocation to different levels of government has long remained an unexplored aspect of State organisation. Public law science has preferred studies on normative, administrative and constitutional reform powers, for which it elaborated patterns of State classification and studied relationships between territorial governments.

In recent years, there has been more awareness of the necessity for research into the fiscal aspects of federalism. The first comparative studies on fiscal

[28] T. TER-MINASSIAN (Ed.), *Fiscal Federalism in Theory and Practice*, IMF, Washington,1997. P. Moländer (ed.), *Fiscal Federalism in Unitary States*, Kluwer, Boston, 2003.

[29] R.L. WATTS, *Comparing Federal System*, McGill-Queens Univ. Press, Kingstone, 2008,6 s. ID., *The Spending Power in Federal Systems: A Comparative Study*, Queen University, Kingston, 1999.

[30] K.C. WHEARE, *Federal Government*, cit., 1.

[31] G. ANDERSON, *Fiscal Federalism, a Comparative Introduction*, Oxford University Press, Oxford, 2010, 2 s.

federalism were interested in federal States, but subsequent studies included non-federal States, following other sciences.

The fiscal federalism of economists is different from that of jurists, and this difference was really understood by researchers who first questioned the link between federal process and fiscal federalism[32].

The difference primarily involves the objective. For economists, it is important to analyse the economic effects produced by a plurality of decision makers. However, it is important for jurists to evaluate the effects of decisions and the degree to which territorial governments participate in the decision-making process to verify in which ways and through which guarantees financial decisions are made and know the control procedures of these decisions.

The specificity of legal studies is to define institutional conditions for fiscal decentralisation. Legal analyses try to identify States with similar financial legal orders and classify them into comparable types[33].

Without a common institutional context, the analysis of financial power and its allocation among levels of governments makes sense from an economic perspective, but much less so from a juridical one. Examining economic data is useful to evaluate the efficiency of the system but not the democratic performance.

Comparative studies primarily considered liberal-States that have a democratic organisation of powers because it was into this fiscal framework that federalism was born. Even within such a limited context, comparisons of fiscal federalisms are an arduous task because they are the result of notions and categories from different disciplines.

There is no correspondence between public powers and functions as laid out by law or their classifications made by the economic school of public finance. The allocation of one function to a certain level of government (e.g., education) depends more on State constitutional history and legal tradition than on considerations of economic performance.

[32] F. PALERMO, *Comparare il federalismo fiscale: cosa, come, perché*, in F. Palermo, M. Nicolini (a cura di), *Federalismo fiscale in Europa. Esperienze straniere e spunti per il caso italiano*, ESI, Napoli, 2012, 1 ss.

[33] L. PEGORARO, A. RINELLA, *Diritto pubblico comparato*, cit., 87 ss.

This consideration explains why most legislative decisions are made on the basis of equity rather than efficiency.

Scholars of constitutional law have focused on equity in particular and also on how fiscal federalism conforms to the Constitution, the legal order and liberal-democratic principles in a certain State[34].

The constitutional analysis of fiscal federalism concerns rules that regulate the allocation of economic and financial powers between layers of government to understand how they achieve common values.

The affirmation of the values of equity and solidarity that is shared by modern liberal democracies influences the taxing and spending policies of all governments. Nevertheless, every State has a different legal order that sets rules on levying taxes, voting expenses, budget approvals, etc.

The definitions of legal principles regarding economic and financial fields have been based on economic principles provided by the theory of fiscal federalism. This theory identified the best tax assignment, the optimal allocation of government resources, and the best way to coordinate the economic activities of different levels of governments.

Regarding tax assignment, the theory of fiscal federalism assumes that sub-national governments should be responsible for the collection and allocation of resources to finance public services. Therefore, regional and local differences could be taken into account, and more efficient policies would be favoured by citizens having more influence.

This principle has rarely been accepted by constitutional democracies. Some democracies allocate a portion of tax revenue to regional and local governments. Nevertheless, only the central State (usually the Parliament) has the power to tax. In a few States, sub-national governments have this power, and we can see that legal rules comply with the economic theory of fiscal federalism in these cases.

The older federations put the fiscal autonomy of sub-national governments into practice, but other composite States do not. In these States, fiscal autonomy is

[34] G. LOMBARDI, *Premessa al corso di diritto pubblico comparato. Problemi di metodo*, Giuffrè, Milano, 1986, 74.

limited to a guarantee of an equal standard of services to all citizens, so that fiscal federalism is overlapped by fiscal centralisation. Centralisation is the rule in Europe, and decentralisation is the exception (e.g., Switzerland).

Between the full tax power of a decentralised authority (i.e., the right to introduce or abolish a tax) and the right to share tax revenues, there is a third group of States (e.g., most regional States) where sub-central governments have the right to set tax rates, define the tax base, or grant tax allowances or reliefs to individuals and firms.

If we consider the spending power, the theory of fiscal federalism upholds that the expenditure of a certain level of government should be financed by its taxes to guarantee the autonomy of government decisions.

This principle is generally accepted by decentralised States. When expenditures are financed by grant revenues, the central government exercises controls over it. The problem is to establish a level of intervention by the central government that has the power to coordinate sub-national governments and uphold macroeconomic stabilisation.

In contemporary democracies, government expenditure is specifically intended to develop solidarity, because legislation supports social programs.

When the role of economic stabilisation belongs to the central government, economic and legal theories agree, which occurs in federal and regional States in a similar manner as unitary States.

V. SOURCES OF LAW

Principles and rules of fiscal federalism come into existence from sources of law, which are approved by different authorities at different levels of government. There are many sources of law in any society. Laws of fiscal federalism can be written in the country's Constitution, be passed by the legislator (usually the Parliament) or come from long social traditions. Every State establishes fiscal federalism through a particular combination of multiple sources of law that

allocates economic and financial powers among levels of government and regulates them.

Some rules, which we will call rules for static coordination, aim to apply and explain the Constitutional design, define and limit the power of every level of government and establish the necessary guarantee to respect these limits. Other rules, which we will call rules for dynamic coordination, create links between functions and defined sectors to ensure the effective operation of fiscal federalism.

Rules of the first group outline the constitutional distribution of powers and the relationships between powers and stat which government is responsible for a function. Rules of the second group explain how fiscal federalism works. These rules could be common or civil laws, legislative or customary rules.

This approach is particularly appropriate to comparative law because it tends to dissociate the linguistic use of law (declamation) from practiced law. However, sources of laws are essential for the identification of binding rules, alongside which other rules of the same field exist.

In some States, constitutional rules of static coordination occupy fields that are regulated by legislative rules of dynamic coordination in other States. In recent years, matters such as budget constraints switched from legislative to constitutional jurisdictions due to the financial crisis. Nevertheless, the constitutional cover does not guarantee more efficiency. The distinction between rules of static and dynamic coordination concerns the function, not the type, of the source of law.

The interaction between principles of fiscal federalism and sources of law gives rise to a plural system of fiscal intergovernmental relations, which can be ordered into different patterns or models.

The division of relationships into groups allows us to classify legal systems, identify links between aspects of different models and detect the order that governs these aspects.

It is necessary to classify relationships between taxing, spending and equalisation powers to understand which of these factors prevail in the building fiscal intergovernmental relations and establish models of the functioning of fiscal federalism.

Models of fiscal federalism are built on the basis of the prevalence of one of these three powers. They are outlined by rules that define matters and competences (of static coordination) and especially by rules that address fiscal federalism in action (of dynamic coordination).

According to this combination of factors (rules and powers), it is possible to identify a constitutional model of fiscal federalism and its functioning in a particular system.

Some States protect territorial autonomy more than equality, but other States guarantee equal conditions for citizens more than a differentiation of territories. The choice depends on the social Constitution. In fact, the coordination between taxing and spending, which are both related to equalisation, is essential to realise the welfare State[35].

From a comparative law perspective, studying the balance of powers highlights conditions and limits of the fiscal constitution, which define the constitutional field of fiscal federalism in conjunction with the institutional context[36].

It should be noted that the three models of fiscal federalism have been developed on the basis of one or more original experiences, which were used as an archetype. There is a different range of implementation of the principles that are used to build every model.

VI. CONCLUSION: A PROPOSAL FOR A FRAMEWORK

The first model to be considered is "concurrent fiscal federalism", which assigns taxing and spending powers to the Federation and State. The principle prevailing in intergovernmental fiscal relations is the autonomy of each level of government to decide tax rates within areas assigned to their responsibility by the Constitution. Every State establishes the level of its taxation and expenditures, has

[35] M. NICOLINI, *Principio di connessione e metodo comparato*, in F. Palermo, E. Alber, S. Parolari (a cura di), *Federalismo fiscale: una sfida comparata*, Cedam, Padova, 2011, 97 ss.

[36] F. PALERMO, *Per un quadro normativo del federalismo fiscale*, in F. Palermo, E. Alber, S. Parolari (a cura di), *Federalismo fiscale: una sfida comparata*, cit., 407 ss.

a budget, and can borrow money without exceeding the limits imposed by federal and state Constitutions.

This model uses the United States as an archetype, but older Federations, such as Canada and Switzerland, are part of the model[37]. In these legal systems, Constitutions set out the fundamental rules of financial powers and their allocation between levels of government, which provides a class of fields within which they have autonomy (i.e., static coordination).

The federal government has the power to coordinate and support fiscal relationships between national and sub-national governments.

The financial duality between autonomy and coordination is an expression of the federal principle of division of power between governments, which are each independent within a sphere. The distribution of responsibility for taxing and spending to different levels of government, and for different public services provided by these governments, is not always rigid. Overlapping and trespassing between levels are possible. Nevertheless, each government is supposed to defend its power through political and legal processes.

In this model, intergovernmental fiscal relations are dominated by the power to tax. Parliaments of States have the taxing power because they represent citizens of their territories. Therefore, they can decide how to spend their money to provide goods and services and better satisfy citizens' preferences. The federal Parliament has the power to levy taxes to provide goods and services when they affect the entire country or there is a national concern (e.g., defence).

Federation and States also have the spending power, but fiscal decentralisation is based on the taxing power. This means that all fiscal relations have been built and organised on the basis of the power to levy taxes. Sources of law guarantee the tax aspect of fiscal federalism, which is the *condicio sine qua non* for the independence of States.

[37] In their study on federal States, R. Bowie, C. Friedrich, *Studies in Federalism*, cit. 361 ss., defined as "concurrent" a system that allocates the fiscal power both to Federation and States.

Every State has a particular system and applies the model in a different way. The most important difference regards the third pillar, redistribution. The United States is an original and extreme example of concurrent fiscal federalism because it does not allow federal Parliament to equalise economic differences between States, even if it can fund States for specific projects (grants in aid) to support the equal accessibility of citizens to certain services, like education and health care. The stability of public finance is assured by economic budget constraints, some of which are entrenched in federal and state Constitutions.

Canada and Switzerland have Constitutions that provide a framework of rules regarding equalisation, which establish how to reduce, but not eliminate, economic differences and the negative effect of competition between States.

The search for balance between fiscal autonomy and equalisation policy represents a common denominator of Swiss constitutional reforms and Canadian federal policies. These two countries try to realise the same aim, matching the advantages of differentiation with unity through an optimal distribution of responsibilities and resources.

The second model that we will consider is the "cooperative fiscal federalism", within which all sub-national governments coordinate their financial operations to realise the purposes of a social-democratic State.

Intergovernmental fiscal relationships are dominated by the principle of financial equalisation, which compels Federations and States to contribute their resources to maintaining the national economic stability.

Taxing and spending are essential powers of the Federation and States/Länder, but the most important linkage of the federal pact is the economic balance between territories. The constitutional principle by which fiscal federalism is driven is the equality of the condition of citizens and Länder.

Germany is certainly the most interesting example of cooperative fiscal federalism. It was a model for Austria and Belgium, and all three countries share the redistributive and interventionist role of State. Australia, which has a different geographic and cultural condition, also belongs to this group.

States that assume this model have a federal organisation. States and Federation are considered independent although fiscal powers are concentrated into federal hands, so that the federal principle is neglected.

In cooperative fiscal federalism, financial decisions are the outcome of integration between state and federal decision-making processes. The Länder and Federation act within a common political and institutional system to achieve mutual aims.

In fiscal matters, all of these countries have a consortium whereby the Federation controls revenue to finance the Länder. The spending power of States and Länder provides for executive competences. The federal government uses its powers to aid States, for example matching their expenses for public goods and services, because resources are generally inadequate.

The role of sub-national governments is not merely executive. In Germany, Länder take part in the decision-making process through a constant dialogue with the federal administration. In Austria, the institutional position of Länder is weak, but their role is enforced by the fact that they contribute to the providing of services and goods on the basis of a private deal within which the Federation and Länder are in the same position. In Belgium, analysis of intergovernmental relations is an inextricable mosaic of competences that are developed by different authorities to represent the diverse territories and nations that form the State. Finally, Australia is a particular and original example of cooperative fiscal federalism where States have an important role in enacting federal policies, and for this reason, claim more financial powers.

Due to the existence of intergovernmental transfer revenue, the federal power of equalisation is particularly important, and it needs to be continually adapted by norms of dynamic coordination.

The function of financial coordination has become very complicated for EU States, such as Germany, Austria and Belgium. The control of public expenditure and public finance must comply with a series of rules, which require regional and local governments to follow budget and political constraints.

"Regional fiscal federalism" is a model that stems from regional experiences wherein fiscal relationships between central and sub-national governments are based on the assignment of a large extensive spending power to regional and local authorities and the exclusion of any fiscal competition.

Spain, Italy and the United Kingdom are examples of this model. although the latter country realised a unique form of decentralisation that is not entirely comparable to other regional States.

Regional States have at least three levels of government: central, regional and local. The regional level has political autonomy, but it is not independent from the central level, which has a primacy in the exercising of fundamental functions. The institutional situation of sub-national governments influences financial relations with the central government, which is at a higher level.

The Constitution of regional States sets the principles of autonomy and fiscal self-sufficiency without providing specific guarantees to defend regional attributions. However, it also establishes limits to financial autonomy.

Central States make the most important financial decisions unilaterally in Italy and the United Kingdom, where the financial requests of sub-national governments are represented by advisory bodies that have political influence. Spain has a different history because Autonomic Communities manage to affirm their financial autonomy through the reform of Statutes.

Within principles and sources of fiscal federalism, unitary interests prevail over autonomic interests.

Fiscal federalism of regional States is based on the central role of the power of expenditure in regional-state financial relationships. Regions have a weak taxing power (tax deduction, reduction in tax, etc.), and they are funded by state revenues. The central government decides how many resources to transfer to sub-national governments on the basis of general principles.

The main funding resources of regional governments stem from tax sharing. The equalisation power supports expenditures of territorial governments instead of acting to balance regional differences. In regional States, equalisation and territorial balancing are generally established by state law, which aims to coordinate

regional and national interests. Constitutional provisions of equalisation powers are so vague that it is impossible to identify a specific model of income redistribution.

The efficiency of different models of solidarity intervention is discussed for several reasons. The first reason is that the institutional weakness of regional governments, which have no opportunity to participate in financial decision-making processes. Second, there are few resources for equalisation because they are absorbed by expenditures. Finally, these States must comply with the European Stability and Growth Pact. Therefore, their budgets are subjected to strict rules that prohibit excessive expenditure and deficit.

European States are requested to implement fiscal policies that aim for each country to stay within the limits on government deficit and debt set by the EU. Central governments are responsible for national finance, and they control the budget of all public administrations and territorial governments. Regional authorities must respect European budget and financial constraints without being responsible for the budget and financial decisions. They perceive limits as a cause of justification of a new state centralism.

The economic theory of fiscal federalism is useless to allocate financial powers and competences between levels of government. However, it lays principles that can be applied differently and can be used to value the economic efficiency.

Likewise, an analysis of legal rules concerning fiscal federalism helps to value legal efficiency to ensure good institutional functioning.

In a legal system that assigns the aim to realise constitutional principles to different governments, the role of fiscal federalism is to favour an optimal financial allocation connected to competences. Balanced fiscal federalisms can guarantee the sustainability of public functions and the social State.

Fiscal federalism succeeds in making institutions work well if it satisfactorily and stably balances the three components of financial power, regardless of the model of fiscal relations. In a concurrent fiscal federalism, the decentralisation of tax power can be combined with different financial equalisation systems with more or less great federal spending power. In cooperative fiscal federalism, the mutual assistance between governments can be shared with a diverse degree of financial

autonomy. In regional fiscal federalism, financial equalisation and taxing powers have a secondary role, and the balance of power is difficult to obtain.

BIBLIOGRAPHY

G. ANDERSON, *Fiscal Federalism, a Comparative Introduction*, Oxford University Press, Oxford, 2010.

R. BIFULCO, *Le relazioni intergovernative finanziarie negli Stati composti tra Costituzione, politiche costituzionali e politiche di maggioranza*, in V. Atripaldi, R. Bifulco (Eds.), *Federalismi fiscali e Costituzioni*, Giappichelli, Torino, 2001.

G. BIZIOLI – C. SACCHETTO (Eds), *Tax Aspects of Fiscal Federalism*, IBFD, Amsterdam, 2011.

G. BOGNETTI, *Lo spirito del costituzionalismo americano. Breve profilo del diritto costituzionale degli Stati Uniti. La costituzione democratica*. II, Giappichelli, Torino, 2000.

R. BOWIE – C. FRIEDRICH, *Studies in Federalism*, Little, Brown & Company, Boston, Toronto, 1954.

J. M. BUCHANAN – G. TULLOCK, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*. Ann Arbor: University of Michigan Press, 1962.

G. G. CARBONI, *Il federalismo fiscale: dalla nozione economica a quella giuridica*, in *Diritto pubblico comparato ed europeo*, 2009, IV.

G. DI PLINIO, *La costituzione economica europea e il progetto di Trattato costituzionale*, in www.unich.it/scigiur/wrkpapers/ .

D. J. ELAZAR, *Exploring Federalism*, Tuscafoosa: University of Alabama Press, 1987.

D. FAUSTO, *Note sulla teoria economica del federalismo fiscale*, in D. Fausto, F. Pica (Eds.), *Teoria e fatti del federalismo fiscale*, Il Mulino, Bologna, 2000.

G. F. FERRARI, *Il federalismo fiscale nella prospettiva comparatistica*, in ID. (Ed.), *Federalismo, sistema fiscale, autonomie*, Donzelli, Roma, 2010.

C. J. FRIEDRICH, *Trends of Federalism in Theory and Practice*, Praeger, New York, 1968.

T. E. FROSINI, *The Gamble of fiscal Federalism in Italy*, in *Italian Journal of Public Law*, n. 1, 2010.

L. GRECO, *Federalismo fiscale: una nozione economica*, in *Federalismo fiscale*, 2007.

P. LESLIE – R. H. NEUMANN – R. ROBINSON, *Managing Canadian Fiscal Federalism*, in J.P. Meekison, H. Telford, H. Lazar (Eds.), *Reconsidering the Institution of Canadian*

Federalism, McGill-Queen's University Press, Montreal, Quebéc; Ithaca [N.Y.] 2004.

G. LOMBARDI, *Premessa al corso di diritto pubblico comparato. Problemi di metodo*, Giuffrè, Milano, 1986.

M. MEDINA GUERRERO, *Financiación autonómica y control de constitucionalidad (Algunas reflexiones sobre la STC 13/2007)*, in *Revista d'Estudis Autònomics i Federals*, 2008, 6.

J. P. MEEKISON – H. TELFORD – H. LAZAR, *The Institution of Executive Federalism: Myths and Realities*, in ID. (Eds.), *Reconsidering the Institution of Canadian Federalism*, McGill-Queen's University Press, Montreal, Quebéc; Ithaca [N.Y.] 2004.

P. MOLÄNDER (Ed.), *Fiscal Federalism in Unitary States*, Kluwer, Boston, 2003.

R. MUSGRAVE – P. MUSGRAVE, *Public Finance in Theory and Practice*, MacGraw-Hill, New York, 1989.

R. MUSGRAVE, *The Theory of Public Finance*, McGraw-Hill, New York, 1959.

M. NICOLINI, *Principio di connessione e metodo comparato*, in F. Palermo, E. Alber, S. Parolari (a cura di), *Federalismo fiscale: una sfida comparata*, Cedam, Padova, 2011.

W. E. OATES, *An Essay in Fiscal Federalism*, in *Journal of Economic Literature*, 1999.

W. E. OATES, *Fiscal Federalism*, Harcourt Brace, New York, 1972.

F. PALERMO, *Comparare il federalismo fiscale: cosa, come, perché*, in F. Palermo, M. Nicolini (a cura di), *Federalismo fiscale in Europa. Esperienze straniere e spunti per il caso italiano*, ESI, Napoli, 2012.

F. PALERMO, *Per un quadro normativo del federalismo fiscale*, in F. Palermo, E. Alber, S. Parolari (a cura di), *Federalismo fiscale: una sfida comparata*, Cedam, Padova, 2011.

L. PEGORARO – A. RINELLA, *Diritto pubblico comparato*. Profili metodologici, Cedam, Padova, 2009.

J. A. RODDEN – G. S. ESKELAND – J. LITVACK, *Fiscal Decentralization and the Challenge of Hard Budget Constraints*, The MIT Press, Cambridge, 2003.

R. SCARCIGLIA, *Introduzione al diritto pubblico comparato*, Il Mulino, Bologna, 2006.

T. TER-MINASSIANT (Ed.), *Fiscal Federalism in Theory and Practice*, IMF, Washington,1997.

U. THIEßEN, *Fiscal Decentralisation and Economic Growth in High-Income OECD Countries*, in *Fiscal Studies*, 2003, 24/3.

M. TIEBOUT, *A Pure Theory of Local Expenditure*, in *The Journal of Political Economy*, 1956, V. 64, n. 5.

R. L. WATTS, *Comparing Federal System*, McGill-Queens Univ. Press, Kingstone, 2008,6 s.

R. L. WATTS, *The Historical Development of Comparative Federal Studies*, in *www.queensu.ca*.

R. L. WATTS,*The Spending Power in Federal Systems: A Comparative Study*, Queen University, Kingston, 1999.

K. C. WHEARE, *The Federal Government*, London and New York, Oxford University Press, 1946.

COMMONS: PRACTICES OF SPACES AND SOCIAL CHANGE

ELISABETTA CANGELOSI

TABLE OF CONTENTS

I. INTRODUCTION

The debate about common pool resources and the commons is not new (as demonstrated not only by the very well-known researches by E.Ostrom[1] but also an article of Ciriacy-Wantrupp and Bishop in 1975[2]), however their role in today political context has changed and the topic is becoming more and more relevant. In fact in various European Countries several are the specific actions oriented to the protection and the care of the commons.

However the political and juridical content remains to be defined, especially for its interaction with the concepts of public and private. In certain domains the political and theoretical thinking about the commons is stronger than in others, therefore the contribution they can offer to the debate is particularly interesting. In this perspective the study focuses on urban spaces and the role played by social movements in their definition. In fact no legislation in Europe recognizes the commons as a legal category and most of the social and political thinking about is part of grassroots engagement. The lack in legislation however doesn't imply a lack of interest among law scholar nor among institutions: the proceedings of the

[1] E. OSTROM, *Governing the commons: the evolution of institutions for collective action*, Cambridge University Press, Cambridge- New York, 1990.

[2] S. V. CIRIACY-WANTRUP, R. C. BISHOP, *Common Property as a concept in natural resources policy,* in *Natural Resources Journal 15*, pp.713-ss. 1975.

Rodotà Commission[3] in Italy in 2007 (aiming to include the *commons* in the classification of goods in the civil code) and the researches and publications sponsored by the Social Cohesion Division of the Council of Europe[4] (highlighting the importance of a legal recognition of the commons to protect them) are two consistent examples of this attention and provide focused views and approaches to the topic. According to the study of the Council of Europe, for example, the recognition and protection the commons would contribute to the eradication of poverty and the protection of human rights. In fact for grassroots movements focusing on social and economic alternatives the use of the definition of the commons is particularly relevant as a form of resilience against the crisis. Furthermore among the same grassroots movements an interest for legal aspects and legal implications is raising and it could contribute to the definition of the framework[5], where different components and different levels of awareness are blended.

Both the documents also support the idea of a legal framework, functional and flexible, which recognizes the commons as a category of goods and tributes an outstanding role to local communities and activists involved.

To frame the debate some aspects are particularly relevant. First of all, their definition, compared with the dichotomy public/private as well as with the traditional common-pool resources studied by E. Ostrom; secondarily the political, economic and social function of the commons. It can be generically affirmed that the commons are nowadays considered as a theoretical and practical tool against poverty, for more fair and just societies where people can enjoy their social and economic rights. Indeed the definition of the commons and the practices of defence and re-appropriation are strongly interlinked. As for their definition many

[3] Established in 2007 by the Ministry of Justice the Commission was in charge of the modification of the legislation concerning public goods. It takes its name by Stefano Rodotà, law scholars who officiated it. The legal proposal was presented to the Senato but was never discussed. According to this proposal the commons were to be included as a legal category (see hereinafter)

[4] Vivre en dignité au XXIeme siècle, Conseil de l'Europe, Fév. 2013.

[5] M. R. MARELLA, Pratiche del comune, Per una nuova idea di cittadinanza, in Lettera Internazionale n. 116, II trimestre 2013, pp. 40-44. In particular, the session "Le nuove occupazioni e la 'lotta per il diritto'".

scholars (from different perspectives though[6]) underlined that a common goes beyond public and private, State and market. The existence of a further dimension, as a third option, is somehow implicit while some comparisons might be done from an historical perspective.

Economic perspectives are usually predominant in the domain of goods but when it comes to the commons social aspects occur to be much more relevant. The most famous scholar who dealt with the commons mentions a set of characteristics to define a common: defined borders, collective agreements, monitoring, progressive sanctions, conflict resolution systems[7]. Much older models focus on the idea of reciprocity and responsibility inside the community[8]. In general in order to discuss about a common good a community of reference is needed. Even though commons remain excluded from a juridical framework, a few cases that can be relevant for a juridical analysis exist, such as California and New Jersey Supreme Court decisions dealing with the free speech rights inside malls[9]; a case that challenges the distinction between public and private but doesn't explicitly refer to the commons.

Part of the fascination of the debate about the commons is their contribution in reshaping spaces and social relations: in fact, as the two cases studied demonstrate, practical aspects remain prevalent over the theoretical ones. Compared with the traditional common pool resources the commons have less economic definition but strong social implications: governing these commons is also defining them, and it implies social and political effects.

More and more attention is paid to the topic as a whole, from different perspectives, in various disciplines and in several Countries, as demonstrated,

[6] E. OSTROM, *Neither market nor State: governance of common-pool resources in the twenty-first century*, IFPRI Lecture Series, Lecture presented June 2 1994, International Food Policy Research Institute, Washington DC, 1994.

[7] E. OSTROM, *Neither market nor State: governance of common-pool resources in the twenty-first century*, IFPRI Lecture Series, Lecture presented June 2 1994, International Food Policy Research Institute, Washington DC, 1994. pp.4-11.

[8] E. CANGELOSI, *Publica e Communis, Acqua, mondo romano e beni comuni*, Aracne, 2014.

[9] Pruneyard Shopping Center vs. Robins. See S. G. OPPERWALL, *Comment, Shopping for a Public Forum: Pruneyard Shopping Center v. Robins, Publicity used Private Property, and Constitutionally Protected Speech Case*, 21 Santa Clara L. Rev. 801 (1981).

among others, by the list of contributors of Wealth of Commons, directed by D. Bollier and S. Helfrich[10]. However because of their specificities and of the variety of disciplines possibly involved the topic tends to remain quite marginal in academia while it becomes to be becoming more and more present among social movements. The bizarre result of this situation is a sort of gap between the literature about the commons (since the very first studies up to the most recent publications) and the practices of creating (or protecting) the commons. It is very rare that people involved in the practice of the commons are aware of the social, economic and political literature dealing with topic. Even more weird the topic is becoming more and more present in the vocabulary of social movements (even if, relatively often, a deeper analysis of the actual meaning would not lead to concrete results) but in a number of contexts the practice goes beyond the political analysis. Stated differently: among social movements some people might talk about the commons, although quite vaguely, while others do not even mention the concept, but they practice it.

II. COMMONS: REWRITING A CONCEPT

The commons might have a revolutionary role in the society of crises but a definition of the framework analysed here is needed. In fact, and as already stressed, the commons are a cross-disciplinary topic involving disciplines as law, economics, politics, social sciences and different combination of those (such as political economy and political ecology). From certain perspectives environmental sciences, anthropology and urbanism can be also involved. Awareness of this variety is fundamental to follow any analysis dealing with this topic.

In fact the first theoretical discussion on the commons was made by a biologist, G. Hardin. In 1968, in his article titled "The tragedy of the commons", Hardin aims to discuss overpopulation and does it on the bases of a comparison with common pastures before the adoption of enclosures system in England. Core

[10] D. D. BOLLIER, S. SILKE HELFRICH (Ed.), The Wealth of the Commons: A World Beyond Market and State Levellers Press, 2012.

of the theory is that lacking any private property delimitation land was to be overused, leading to a tragedy, i.e. the impossibility to feed the stock.

The theory was promptly adopted by the theoreticians of the prevalence of private property (and market) but since 1978 two political ecologists (Ciriacy-Wantrup and Bishop[11]) highlighted a crucial misleading aspect of Hardin's theory: the pastures he described were not "commons" nor even "common pool-resources", rather being "open access resources". A bit more than 10 years later (in 1990) the political economist E. Ostrom eventually published the outcomes of studies conducted over years demonstrating that the "commons" can be governed without occurring in any tragedy[12].

However Ostrom's studies remained very sectorial at least until 2009, when she obtains the Nobel Prize for Economics. Furthermore her research is much more relevant for the approach it promotes than for the cases studied, the latter being specific categories of common-pool resources with characteristics that can barely be applied or reproduced outside specific contexts. However it is important to note a few aspects E. Ostrom considers particularly relevant: social organisation and cultural approach which are, on the contrary, replicable and can contribute to the description and explanation of the commons from a theoretical perspective independently from physical specificities of the resource, the space or the good which is considered as "common".

From the legal perspective, as mentioned before, it is only in 2007 that we encounter a first attempt of legal definition of the commons, made in Italy by the Commissione Rodotà[13] which proposed the commons as a third category beside public and private goods on the base of three characteristics: connection and interaction with human rights, duties towards future generations and prevailing of

[11] S. V. CIRIACY-WANTRUP, R. C. BISHOP, *Common Property as a concept in natural resources policy*, in Natural Resources Journal 15, pp.713-ss. 1975.

[12] E. OSTROM, *Governing the commons: the evolution of institutions for collective action*, Cambridge University Press, Cambridge- New York, 1990.

[13] Commissione Rodotà - per la modifica delle norme del codice civile in materia di beni pubblici (14 giugno 2007) - Proposta di articolato.

use over property[14] . Some of these aspects are consistent with Ostrom's analysis while others go beyond, toward a more elaborated approach. It appears however extremely clear that such a debate involves more than classic economic or legal definitions.

The two cases analysed in this article present different level of political thinking and elaboration about the commons, but share a strong component of practice of the commons. Compared with other studies about the commons and the struggles to protect or define them the peculiarity of these two examples is that they are not based in closed urban contexts or in rural areas but are developed in urban open spaces. Extremely different one from the other for what concern their location (small plots vs. squares and parks), their background (locally based and focused vs international and broad activism) and political visibility (local vs. worldwide) both the cases present the commons as about people much more than about spaces.

III. PEOPLE AND VEGETABLES: REDEFINING GREEN URBAN SPACES

Urban gardens are usually studied from the perspective of urbanism (and history of urbanism) or, more rarely, in the framework of history of ecologist movements. The most relevant typologies of urban gardens studied belong to different historical contexts. On the one hand urban gardens used to be established in the United States and United Kingdom during the World War I and World War II under the name of Liberty and Victory Gardens with the specific aim of increasing food self-production in times of war[15]. On the other hand, more recently urban gardens have been created, mainly as an American phenomenon, during the

[14] "Previsione della categoria dei beni comuni, ossia delle cose che esprimono utilità funzionali all' esercizio dei diritti fondamentali nonché al libero sviluppo della persona. I beni comuni devono essere tutelati e salvaguardati dall' ordinamento giuridico, anche a beneficio delle generazioni future. Titolari di beni comuni possono essere persone giuridiche pubbliche o privati. In ogni caso deve essere garantita la loro fruizione collettiva, nei limiti e secondo le modalità fissati dalla legge".

[15] Something similar and with a slightly similar intent, even though more oriented to healthiness of the urban living context, occurred between the end of the XIX and the beginning of the XX Century when some garden-cities (Cités-Jardins) were established as 'green neighbourhoods' in French and Belgian cities.

green, ecologist wave in the 70ies. In particular the most famous, and traditionally considered the "first" community garden was the Liz Christy Garden created in Manhattan in 1973 (and still existing). In this case the goal was to resist to over-urbanisation of the area from an ecological perspective where neighbours coordinated themselves to create this kind of space with the support of green activists (in this case the Green Guerrillas). Similar experiences took place during all the seventies (and part of the eighties) in United States, UK, Australia and Canada). Somehow, for a long period, urban gardening used to be an 'Anglo-Saxon' tradition, which might also explain why the great majority of the studies conducted about this phenomenon come from these Countries.

However, ten or maximum fifteen years ago the phenomenon took a new path and new characteristics. Its political and social component became more relevant and several new gardens started appearing in urban areas. They have a lot in common but also some differences. In fact some specification is needed about the definition of these gardens not only in order to understand the rationale of this tradition but also to analyses these new experiences, which are definitely far from their ancestors, even though they maintain some elements of them. These differences are what we aim to focus on in this article on the base of a field research conducted in Brussels where these experiences are particularly well-established.

In terms of definitions language differences are relevant (for example in French speaking countries there is a difference between "jardins" and "potagers" based on the importance given to the food-production component) because adjectives and nouns used to define these gardens, whose common characteristic is to be in urbanised areas, may vary accordingly to the aspect the people involved want to stress. Some may be occupied abandoned plots while others are officially held in trust to the group who manage them (either by a public entity or by a private owner). Some are defined as *social* (particularly in Spain and in Italy), some are *collective*, some are *shared*, some belong to the *community* or to the *neighbourhood*. In each case a reference is made to a specific vision or approach. What is particularly interesting is that the idea of the commons seems at a first sight completely absent

from the framework; though the research conducted in Brussels shows that it is much more present than it seems to be.

However the original feeling of subtracting space to urbanisation is present in every case. Resistance against commodification of the space is getting in fact more and more relevant. These gardens might be more or less inclusive but theory of change and social engagement seems proportional to the level of inclusivity of the experience. However even gardens established at a neighbourhood level can have high social effectiveness, especially when they are based in areas with high social tension. Indeed in at least one case a garden was established in order to create social links and interactions in context of reciprocal isolation[16], rather than just to rescue an abandoned area.

In fact a survey conducted among urban gardeners, all of them based in Brussels, shows that social motivation for taking part in these activities is somehow stronger than motivations related to food production, contrarily to what one could expect. Producing health and safe food of course has a non-negligible value among the participants to the survey, as it is for ecological approach, however interaction with neighbours, creation of networks, reciprocal learning and resistance against urbanisation are considered equally or more important. Green areas, subtracted from abandon and cement, either they are unused spaces, public or private, plots to be used for new buildings or a roof become a meeting place to share knowledge and create opportunities for social growth. And this is explicitly part of the framework. Even when an urban garden implies individual parcels (which makes it more oriented to food production) collective participation to the management appears as the most relevant interest in participating. It can therefore be affirmed that the creation of alternative social dynamics is intrinsic to the practice of urban gardening.

Although spontaneous references to the idea of commons are very few in the structured interviews and the debate itself is almost not present in their discourses

[16] That's the case of the Marjorelles garden, created by people living in passive house built in a public housing area in order to create a good relationship with the neighbours who were not particularly happy with their presence. A specific set of interviews have been conducted with the activists involved in this garden.

(sometime some of them are not even aware of the debate itself) the approaches used by the activists are consistent with the framework about the commons. The internal political debate about gardens in the Brussels' network doesn't mention the commons almost at all (also because of different level of engagement); this absence is consistent with a generic distance of the topic from the main interests and political vocabulary of social movements in Brussels[17]. However all the interviews show that alternative social dynamics, community participation and responsibility are fundamental in urban gardening practices; furthermore when asked to mention three concepts or items related to the idea of commons almost all the informants mention the gardens and a certain number of goods, traditionally considered as public but often cited also in the debate about the commons (such as water or parks). When discussing about management of the gardens, personal motivations and approaches other ideas come out such as collective responsibility, mutual support, social relationships, social change, alternative economy. Although not mentioned the idea of the commons seems to be present. Creating an artificial community based on sharing (land, time, knowledge and space) is considered fundamental and all the gardens mention collective and equal decision making about the activities accordingly with key words such as *trust*, *responsibility* and *organisation*.

Even though some conflict with the local administration might rise when a garden is established (especially when the aim of the activists is to resist against further urbanisation, usually supported by municipalities) or to create space for food production and knowledge sharing (usually consistent with governments policies) urban gardens in Brussels never had to face strong opposition from the Government and sometimes they even obtained official support (funds or property concessions). As a result there is almost no bottom-up legal elaboration in the case of Brussels' gardens since these experience can take advantage of specific administrative and financial programs which somehow support these initiatives,

[17] It is only in 2012/2013 that a small group of activists, related to the Community Land Trust project, or involved with neighbourhood associations and movements involved in water and food sovereignty campaigns begins a discussion on the commons, with a special focus on city-related issues, abandoned spaces and housing rights.

depending on our radical they are. Despite certain predictable bureaucratic constraints both gardens settled on publicly and privately-owned areas are technically a sort of concession (through specific agreements case by case) to the gardeners who take the responsibility of their management. Ownership is in this case clearly much less relevant than access and use, and this is one of the fundamentals of the theory of the commons.

Urban gardens are practices of collective, communitarian and participatory management and represents solid alternatives to over-urbanisation and lack of social bonds within the communities; even if gardeners don't take active part in the debate, these experiences could be compared with the common-pool resources studied by E. Ostrom (where there wasn't any strong political and theoretical thinking neither) since they put in practice mechanisms, tools and rules built case by case by the community involved. "Governing the Commons" presents examples of traditional and customary rules of dealing with common resources; urban gardens experiment modern mechanisms and new practices for conscious, responsible and participatory management of resources and spaces. Being experiments, based on the variety of community members' experiences and approaches, they are also reproducible.

IV. OCCUPY: COMMONS, SQUARES AND PARKS

The second branch of this study focuses on a different social and political movement, less defined than urban gardening but with two relevant points in common with it: on the one hand the re-elaboration of old practices from a new perspective and, on the other hand, some key approaches that make it relevant for the debate about the commons. This part of the analysis will take advantage of a large amount of materials since the so-called 'Occupy movement' attracted an international interest of media and academia because of its different components, as well as because of its specificities in terms of political instances and methodologies.

Exploded in 2011, the movement takes its international denomination 'Occupy' from the first occupation occurred in the United States ('Occupy Wall Street') in September but the roots of the movement are in Spain, where several thousands of people occupied squares with tents from May 15 onward (which gave the name 15M to the movement) protesting against the economic and social crisis and lack of political representation. Their indignation against the current social, economic and political model valued them another name used to define the movement, '*indignados'*.

The movement was extensively studied and pictures of the most relevant phases (May-December 2011) were published several times, showing occupied squares in Europe (Spain, UK, France, Belgium, Greece) and US (New York-Zuccotti Park-, Chicago), as well as several US Campus (Harvard, Yale, Berkeley). At a first sight the movement has coherent claims, where commons are of course definitely less present than economic and social crisis. The key words of the movement are 'default', 'austerity' and (in Europe) 'troika'. Furthermore both the most famous slogans, "we are the 99%" and "no hay pan para tantos chorizos", express a total lack of trust in representative democracy and point out the responsibilities of governments and financial lobbies for the economic crisis. However beside these main topics, largely known even outside the movement, other aspects are, more or less consciously, even closer to the debate about the commons.

The slow but progressive interest of the Occupy Movement for the commons is positively commented by David Bollier, American writer and activist and co-founder of the Commons Strategy Group who wrote in its blog over the commons in February 2012 that it was "the beginning of a beautiful relationship"[18]. The reference is to a forum hosted by Occupy Wall Street on the same month with the meaningful title "Making worlds: A forum on the Commons" whose explicit goal was to introduce the discussion about the commons into the debate within the Occupy Movement creating new connections and bonds with other movements.

[18] http://bollier.org/occupy-commons-beginnings-beautiful-relationship.

In a context where, Bollier writes, "many of the familiar distinctions between "public" and "private," and between "economic" and "social" just don't make sense in this new world […] the Occupy world and commoners, by contrast, assert a larger, more integrated vision of human development"[19].

Although the commons are definitely not the main political topic of the Occupy Movement (not in Europe nor in the States), as it is the case for the urban gardens, practices are strongly related. It is not just a matter of managing the occupied squares (or sometimes streets and parks) in a communitarian and collective way: the action of occupying these areas produces a transformation (temporary though) of a 'public' space in a 'common' space. Furthermore decision-making tools (such as the consensus), inclusiveness, reciprocal support within the group and external support from the community represent further elements that link this movement to the commons from a theoretical perspective.

Strangely, even if they were not the main topic when the Occupy movement was, in its different forms, particularly interesting for media, the commons became more am more important just after the attention decreased. Therefore we encounter the relatively rarely used expression "occupy the commons"[20] and the Forum, held in New York in 2012, represent a sort of land-mark for the inclusion of the commons in the Occupy Movement political vocabulary. In this perspective a group of activists under the denomination of FoO (Future of Occupy) Collective[21], started focusing on this topic: most of them are British and from the States but they stress the importance of international connection and interaction within social movements [22] and provide materials on local struggles for the commons at an international level.

[19] http://bollier.org/occupy-commons-beginnings-beautiful-relationship.

[20] In fact a similar expression "Occupying the commons" was used in Italy (and not in the United States) as title for a project for a documentary trying to link the occupation of the Teatro Valle (a particularly well known case of political reflection about the commons in Italy) with Occupy Wall Street. The project seems to be still in progress (http://www.commonssense.it/s1/?page_id=938). However the point of view of the authors seems to be more oriented towards theatres occupation than actually linked to the Occupy Movement approach and background.

[21] http://thefutureofoccupy.org/about/what-we-do/.

[22] http://thefutureofoccupy.org/foo-magazine/the-commons-issue/contents/#unique-identifier3.

Once again it is not a matter of considering the topic relevant but rather a matter of actual everyday practices of protecting and experimenting the commons. In a very specific case, particularly well-known because of its political context and because of the reactions it provoked, taking space back, managing it collectively and share responsibility are explicitly connected both with the idea of the Occupy Movement and of the commons. That's the case of Gezi Park.

The most famous episode of a the demonstrations occurred in Turkey in 2013 is indeed related to the broader movement 'Occupy', even though claims were much more focused. Gezi Park is at the same time the topic (or better the 'excuse') for the protest, the place where it started and the name used to represent it inside and outside Turkey ('Occupy Gezi[23]). The occupation was in this case explicitly intended to subtract the occupied space from commodification and market: the area, a relatively small park close to the very central Taksim Square in Istanbul was supposed to be transformed in a commercial centre so that the very first symbol of the demonstration were the trees. But, of course, there is much more than that!

In fact a project on 'Mapping the commons' was launched in Instanbul in 2012[24]. Its aim was to identify the commons and place them on virtual map of the city in order to protect them from exploitation and private interests. The first implication of this exercise was that commons still needed to be defined, identified and recognised. Both theoretical analysis and practical aspects interacted in this process: the idea of common itself was dealt with in a first step, notably on the bases of the theories elaborated by Hardt and Negri used as a theoretical background[25]. Different parameters[26] were used for the selection of the commons, including the number of actors involved (size of the community,

[23] The nexus was created by Turkish activists and was spread through the hashtag #occupygezi by social networks. See http://occupygezipics.tumblr.com/ or https://www.facebook.com/OccupyGezi.

[24] The project (https://mappingthecommons.wordpress.com/) includes maps of Istanbul, Rio de Janeiro and Athens.

[25] M. HARDT, A. NEGRI, *Commonwealth*, Belknap Press of Harvard University Press, Cambridge (MA), 2009. In this book, in the framework of a trilogy including Empire (2000) and Moltitude (2004), the authors deal with new models of living in the era of globalization and argue for the idea of "common" as an alternative to the private and public models.

[26] http://mappingthecommons.wordpress.com/category/methodology/

peculiarities of the group and interaction systems among them), kind of common (cultural or natural, new or traditional) and eventually the level of conflict. Other data such as the location and the history of each common were also included in the mapping. Besides a more general definition including cultural spaces, water, riverbanks, woods and public squares[27] a number of specific places were identified during the workshops: the Galata Tower, Golden Horn riverbanks, the Ayvansaray area and Gezi Park (or Taksim square). Therefore protecting the trees in the park, recognized as commons, against privatization and exploitation easily became the fuse of the protest.

Both the content and the methodology of the protest can be seen in connection with Occupy movement. It corresponds to an imagery that proposes an alternative economic and social model. Even though just a few articles and analysis[28] focused on the connection between the protests in Turkey and the fight against the privatization of the commons, the idea of re-appropriation of a space, mixed with the participatory decision making and the consciousness of being practising something completely new[29] definitely support this connection. Taksim square protests, in fact, had almost nothing to do with the trees in the park, they rather belong to the broader framework of resistance against an economic, social and political model considered wrong. This is what N. Chomsky sustained at the University of Beirut in June 2013: "the struggle to defend the commons takes many forms. In microcosm, it is taking place right now in Turkey's Taksim Square, where brave men and women are protecting one of the last remnants of the commons of Istanbul from the wrecking ball of commercialization and gentrification"[30].

In fact the debate about the commons has definitely moved from a strictly economic context to a wider political, social and legal arena and now catalyses actions aiming at the construction of an alternative model. It remains to be analysed

[27] Complete list at: https://mappingthecommons.wordpress.com/category/theory/.
[28] See, for example: https://www.eldiario.es/turing/privatizacion-comunes-encendio-Primavera-Turca_0_139986455.html.
[29] http://www.dinamopress.it/news/taksim-square-and-gezi-park-occupation-practicing-commons.
[30] http://espoirmolenbeek.blogspot.it/.

if the variety of backgrounds of people who joined the movement, in Istanbul[31] is a consequence or rather a cause of this redefinition of the approach to the commons. However, as the movement in Istanbul clearly demonstrates the renewed interest for the debate is related with the outbreak of privatization of the last fifteen years and of the worsening of the crisis (economic, social and political). Mapping the commons can be considered as a very first step to prevent their expropriation or any misuse that does not fit with the needs and the interests of the community. Similar mapping experiments are indeed ongoing in Europe and the Mediterranean area and demonstrate how crucial this topic will be in the near future both in terms of controversies between opposite political, social and economic models and in terms of engagement of individuals. The commons seem to be at the heart of the creation of a future model where peoples' rights are more important than neoliberal development strategies.

Occupations of open spaces (parks, streets and squares) reclaiming them as commons is a very visible protest at a communication level (for example because of the physical presence of the tents) but they did not last for long time; however they offered an opportunity to experiment horizontal and inclusive decision making practices and management tools. Participation, horizontality, consensus and inclusion that are the key concepts of these movements and of the debate about the commons. Occupations become places for social and political elaboration and reveal , with their simple existence, the possibility for a different use of space traditionally considered as public but too often subjected to commodification.

V. Conclusions

Creating the commons

The already mentioned publication supported by the Social Cohesion Division of the European Council presents the concept of "commonisation"[32]: a

[31] www.domusweb.it/content/domusweb/en/architecture/2013/06/1/gezi_park_occupation.html).

[32] Vivre en dignité au XXI eme siècle, Conseil de l'Europe, Fév. 2013. p.189.

process through which a good (or a place) changes its status from public (or private) to 'common'. That good's uses and functions are redefined by the community (some consider it as a re-appropriation). The most relevant step in this mechanism is the recognition of the change occurred in terms of function or, in few cases, the re-establishment of a previous function neglected in recent times (in this case recognizing that place or good as common means giving it back to the community). The practices described in this study, whatever the level of political and philosophical engagement in the debate about the commons, are practices of change: their goal is to make something common, either something that was not before or something that used to be but is not anymore. The practice itself is what produces the commonisation. This explains why the property status paradoxically represents a minor issue: in making something common the crucial point is about management tools, use, access and participation of the community. "Commonising" is a process with a number of components, and their different combination is what differentiates one practice from another.

Some experiences have a longer history and are largely widespread, as it is the case of urban gardens, but are less focused on the topic, while other experiences are more recent but also more focused. However they are similar as it is the rationale behind. For example, the redefinition of urban spaces, characteristic of the urban gardens, is definitely consistent with the struggle for the commons; there is therefore an high likelihood that this socio-political imagery takes a role and becomes present in the practices of redefinition of urban spaces through the creation of gardens. On the other hand, the occupy movement experiences showed some interest for the debate about the commons, but this component remained relatively marginal. Even though the occupy practices could be considered as a sort of opposite of the urban gardens in terms of stability and structure (a few cases with a lot of participants vs a lot of cases with small group involved, short time vs long-lasting experiences, high visibility vs low visibility) they share an essential component for the debate about the common: the involvement of the community and the share of responsibilities.

Despite the differences both the experiences are strongly embedded in the social and economic context. Both can be considered as reaction to the systemic crisis and represent forms of resistance or of resilience; in this framework the idea of the commons can offer a contribution to their elaboration and foresee future approaches. In fact, as underlined by M. Castells and other scholars involved in the Aftermath project[33], societies are currently in a crucial moment for the creation of an aftermath, where one of the consequences of crisis is likely to be a new interaction between society and the political system[34] to be based on the creation of new paradigms. And the commons, irrespective of the level of theoretical elaboration, are a practice and a social self-organised and grassroots response to the crisis.

Creating a community

A community is essential to govern and manage the commons, as underlined by all the scholars who dealt with this topic; but the structure and the process of creating it may vary as the two cases presented perfectly show. The experiment of the commons is first of all an experiment of creation of what is defined as a "community of reference": the group of people, whose size and composition, is defined case by case. The context where each experience is developed is particularly relevant since it affects the criteria put in place for the creation of the community and for the process to join it.

The two cases analysed represent quite different options: the community involved in urban gardens appears, at least for the case of Brussels, as somehow pre-established, since agreements on the use of the space are made with the formal owner; on the contrary the community involved in the occupation of squares or parks, as demonstrates the case of Gezi Park, is created contextually with the occupation itself. Both are inclusive communities but the first implies a formal adhesion while the second is based on the physical presence on the place. Furthermore a substantial difference exists in terms of size: very small the first, very

[33] www.aftermathproject.com.
[34] See M. CASTELLS, J. CARACA, G. CARDOSO, *Aftermath*, Oxford University Press, 2013.

big the second. Urban gardeners know each other very well while the occupiers of Gazi Park might even don't recognise one another (probably with the exception of a few individuals). However, it is to be stressed, some of the occupations, including GeziPark, produced a further effect such as the creation of smaller groups which keep being involved in the promotion of the experience on a smaller size (less participants, in practice) focusing on participation and alternative social and economic system.

Of course these cases represent only two options, and two extremes, but they perfectly show the variety of possibilities in creating a community which recognise itself as it and takes the responsibility of dealing with the commons.

Practices in practice

Despite their differences these cases present several elements can be identified as key points of the debate about the commons and contribute to the interpretation of the role played by the commons as tool of resilience in the current crisis. The analysis demonstrates how their definition has to be based on concrete experiments.

Before and beyond legal analysis and approach we deal here with practices that contribute to the re-definition, re-appropriation and re-imagination of urban spaces. Spaces that are recognised as common independently from their property regime and somehow given back to the community.

Each of these experiences provides interesting starting points for social analysis: occupations of squares and parks worldwide, with different claims and modalities of interaction, reinforce the issue of the importance of the commons as a tool to fight against the crisis; urban gardens, even though they don't mention the commons explicitly, represent a real and solid example of artificial foundation of a commons and of a community of reference.

From a juridical perspective each experience is different but, once again, there is some coherence among them. In the case of urban gardens, even though the situation might present relevant differences, agreements exist in most of the cases between the gardeners and the owner of the plot, whatever public or private.

As a consequence, in most of these cases the practice prevails over the legal claim and over the theoretical elaboration of the idea of commons. Parks and squares occupation focus on the social and political recognition of their actions, omitting completely the juridical issues, since most of them focus on the symbolic value of redefinition and re-appropriation of public space.

Key words of this analysis are not only reciprocity, responsibility and sharing, but also practice (creative, conflicting, innovative, collective) and, of course, space (urban, cultural and eventually social).

Book Review

GINSBURG, T., MONATERI, P.G., ET PARISI, F. (EDS.), CLASSICS IN COMPARATIVE LAW, CHELTENHAM: EDWARD ELGAR, 2014, 4 VOLL., PP. 2800

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The term 'classic', when employed in the broad sense, usually designates a prominent example, a product of mastery, in other words something which can serve as role model for its perfection, beauty and authority.

Looking at the recent anthology edited by Tom Ginsburg, Pier Giuseppe Monateri and Francesco Parisi, the first impression is surely this one.

In a huge work of recollection (4 volumes, 2800 pages in all), we assist at the reunion of the most influent milestones in the study of comparative law, with a time span ranging from 1903 to our days. This avant-garde anthology contains indeed more than 70 articles written by the most prominent legal scholars around the globe, all categorized in branches logically connected together and with the remarkable merit of putting in communication the old masters of law with most recent ones.

The contents included in the four volumes vary from private and public law, to legal institutions and methodological approaches, providing in a single view the most eminent articles ever written. Obviously, even if completeness could not have been the realistic scope, the survey gives still an insightful spectrum of the modern era of comparative legal studies.

Volume I, for example, begins emphatically with the 1903 article by Pollock entitled "The History of Comparative Jurisprudence" (even if the First International Conference was held only 2 years before in Paris), followed by critical discussions about major themes like "legal transplants" (Watson; Legrand), "legal hybrids" (MacDonald; Yiannopoulos) and cultural evolution of legal rules (Hobel; Posner; Parisi; Geertz). Volume II faces directly the basic notion of "legal families" (Stein), showing how comparative law can clarify our misunderstandings about legal families (Lawson; Monateri; Ruskola). Then, it approaches the main, classical distinction between 'civil law' and 'common law', showing the great role of precedent in both legal traditions

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(Cappelletti; Goodhart), ending naturally with an in-depth analysis of the role of Courts in political context (Ramseyer; Sweet; Shapiro). Volume III, taking into exam the substantive differences in private law, hosts essays principally about property law (Rose; Banner; Demsetz; Gordley and Heller), contract law (Atiyah; Von Mehren; Lorenzen; Farnsworth), and tort law (Parisi), with a significant variety of approach from the 'law and economics' field (Levmore) to the historical one (White; Watson). Finally, Volume IV consists of a selection of public law both from a theoretical (Elster; Horowitz; Garbaum) and nation-specific point of view (Kommers; Theodore de Bary), with essays about 'judicial review' (Kelsen) and civil/criminal procedure (Metzger; Chase; Damaška; Langer).

Anyway, apart from this short and necessarily incomplete sketch, a substantial question might arise: How can comparative law help us to answer the compelling issues posed by contemporary politics?

First, giving reason of the multifaceted interests which animate from the inside this subject, the Authors underline the particular breath of comparative law, which encourages by nature to pose particular attention to 'macro-level' legal issues. In this way, to assume a transnational perspective becomes both essential and fruitful in order to catch the global evolution of legal systems and domestic traditions. It must be note, yet, that over time comparative law has not been only a descriptive device, able simply to provide plain descriptions (or predictions) about how the law acts. Historically, comparative law has served as the most powerful tool to create juridical and political identities. This 'purposive' character—as brilliantly noted—constitutes then the real beginning of comparative law as discipline, a sort of political strategy finalized to define the cultural shape of a nation. Also from this enriching methodological perspective, the selected essays show their deep importance, reminding the dutiful use of a particular kind of deconstructionism oriented to dispel legal myths and fictions.

Another pleasant factor, as it could be said using a pun, is that making 'comparison' inside 'comparativism' the essays selected by the Editors outline a subtle genealogy about the whole subject. As explained in the Introduction, the approach followed during the recollection was precisely to look back at the existing literature in order to "identify a canon". This literary notion is of extremely importance to understand the limits and the passages of the discipline. The exciting aspect of comparative legal studies is precisely the never-ending challenge of their own

boundaries, that is, the everlasting effort of including, rather than excluding, new perspectives. In this way, academic bounds become not a limit, but the premises for a newer form of enquiry.

Thinking in pictures, indeed, we could consider comparative law as a 'prism' with many multi-faceted layers, each of them representing a particular perspective that sheds new light upon the entire figure. Anthropology, philosophy, sociology, political science and obviously jurisprudence are all essential components of this major task and none of them should be lost.

Observing in a critic manner our discipline, we could also say that every form of comparison is, actually, a sort of creation. Legal identities, in this way, show their fictitious and purposive grounds. The task of comparative law, then, is precisely to regain consciousness about this fact, undertaking a sort of 'alethic' operation—as Prof. Pier Giuseppe Monateri argues—finalized to dismantle the ideological veil shared by the most conventional views.

Despite all this, a huge and nihilistic objection has been moved against comparative law, that is, the radical impossibility of communication between legal frameworks. Proudly, the present anthology testifies rather the opposite. Proclaiming the death of comparative studies—a position frequently taken by British legal scholars—is nothing but a shortsighted standpoint, which shows immediately its inadequacy. Products of mind and of creativity, as comparative legal studies are, can never die.

As the Editors reveal at the end of their preface, this recollection of essays aims to constitute a "path through the wilderness of comparative law", a sort of new beginning oriented to unleash the "boundless potential" of an approach not yet expired.

Just observing the versatile manifestations of law which nowadays inhabit our societies, we can surely argue that there's still a long, fascinating way to go.