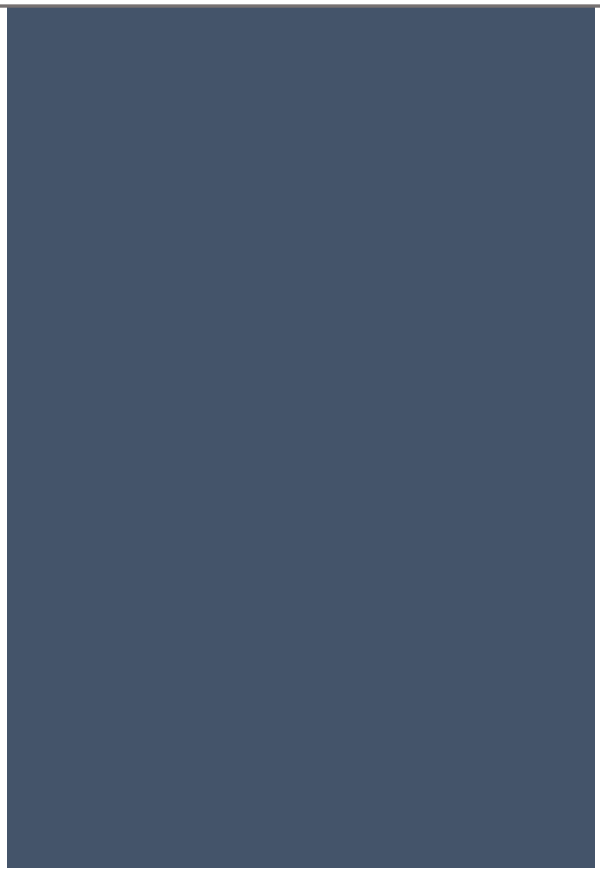

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THE PANDEMIC OF AUTHORITARIANISM

Günter Frankenberg

TABLE OF CONTENTS

I. UNCERTAINTY AND EXPERTISE

Law does not tolerate doubt. Rulings have to convince so as to be accepted as authoritative. Interpretations are meant to provide determinate, at least plausible, results. Legal education and practice are geared toward certainty. And later, the opinions of legal experts – merchants of certitude – often cloak the interests of the client behind a screen of definite assumptions and conclusions. Uncertainty, so much seems certain, is not a matter for the legal profession.

The Corona crisis teaches lawyers neither to comfortably issue coercive decrees nor to make gutsy judgments, but to learn what the pandemic is all about. Legal consultants need to find their place in the dispute of the faculties – virology, epidemiology, medicine, etc. They have yet to define their role as advisors while all the time operating in a "floating" terrain that offers little factual positiveness, leaves open many questions, requires from experts to constantly check and revise their tentative prognoses, to process new data and changing criteria. Throughout all societies, the pandemic is spreading and with it the uncertainty of how and with which legal means and legal measures to contain and control it. So far, lawyers have been assiduously following the diverse and unstable assessments delivered from the intellectual laboratories of virology, epidemiology and medicine. They find comfort in their lagging legal contributions to "flattening the curve", reducing the "rate of the reproduction of infections", limiting hot spots, and more. And, generally, they are satisfied with contributing to prevent the intensive care capacities from being overburdened. But what exactly do they contribute?

There are some aspects of the pandemic that are or seem to be certain: Corona can only be compared with earlier influenza viruses at the price of great inaccuracy. The virus is highly infectious, that is why it is spreading rapidly as a droplet infection. COVID-19, the actual infection, selectively threatens especially the old and those who have an underlying health condition, notably of the respiratory tract. Many of the infected remain asymptomatic.

Then there are approximate estimates with low half-lives for COVID-19 diseases, mortality rates, reproduction rates, and infection chains. Little is known about the average duration of required

intensive care treatment, and even the benefit of protective masks is controversial. Like a mantra, politics and the media spread flat infection curves and infection rates < 1. Like a monstrance, the numbers of people already cured are exhibited on a daily basis, notwithstanding that the body count does not mean much as long testing is sporadic and the cohorts of those who are and have been infected can only be estimated.

In the dispute of the faculties one witnesses, during these definitely post-Kantian weeks and months, how the voices from the natural sciences are heard first, followed by economists forecasting damages, insolvencies and unemployment. Even psychologists who warn about the effects of shutdowns, social distancing and isolation, and or social workers who report an increase in domestic violence and suicides receive more attention in the concert of experts. In contrast, law comes as also-ran. Legal experts who should "rule by argument and assertion"[1] do not seem to have much purchase in this concert of crisis. Politicians are not bent on lending an ear to jurists when it comes to strategies of how to confront the pandemic. As a matter of fact, legal expertise is traded in very small coins, rarely in large bills. Lawyers talk about what is or might be unconstitutional or illegal, which means should be deemed at least not proportionate.

Caution suggests that the legal expert should not "bend over the relevant legal norms" and ask whether the relevant norms "even give away what has been imposed on us".[2] Instead, legal scholars and judges may start to wonder why their authority and expertise rank so low in these times of pandemic. They might realize that the old recipes don`t work, the customary doctrines and methods do not "fly" when law has to cope with extraordinary uncertainty. When almost everything is or could be different, then law must tune in to difference and, more importantly, must start to learn under conditions of uncertainty as quickly as possible, especially since the profession missed the chance to prepare for the pandemic in the early months of 2020 or long before when warnings of a pandemic had already been out[3], and Corona will have to be reckoned with for quite a while because a "magic bullet"[4], i.e. a vaccine, is not likely to solve the problems in the near future[5] if one considers the complicated and extended search for a vaccine against Dengue, HIV and other viruses as well as the probability that Sars-CoV-2 might have mutations in store[6].

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[1] D. Kennedy, (2016), *A World of Struggle. How Power, Law, and Expertise Shape Global Political Economy*, Princeton: Princeton University Press, 135.

[2] G. Lübbe-Wolff,(2020), "Geschlossene Gesellschaft", in: *Frankfurter Allgemeine Zeitung*, 24 March.

[3] R. Marantz Henig, in: *The National Geographic*, 6 April 2020 - https://www.nationalgeographic.com/science/2020/04/experts-warned-pandemic-decades-ago-why-not-ready-for-coronavirus/> (accessed 12 June 2020) with further referfences.

[4] For the metaphor and its history see A. M. Brandt, (1985), *No Magic Bullet. A Social History of Venereal Disease in the United States since 1980*, New York: Oxford University Press, esp. 161 ff.

[5] On the grim, albeit more realistic immunization aspects see *The Guardian* - https://www.theguardian.com/world/2020/may/22/why-we-might-not-get-a-coronavirus-vaccine/> and *The Conversation*, 13 May 2020 - https://theconversation.com/south-africas-covid-19-strategy-needs-updating-heres-why-and-how-138368/> (both sources accessed: 12 June 2020).

[6] W.R. Fleischmann, jr. (1994), "Viral Genetics", in: S. Baron, (ed.), *Medical Microbiology*, 4th ed., Galveston TX: University of Texas Press, Ch. 46; N.J. Cox,T. L. Brammer, H. L. Regnery,(1994), "Influenza: global surveillance for epidemic and pandemic variants", in: 10 European Journal of Epidemiology, 467 ff.

II. Security Law and Conventional Legal Learning

For selective, case by case learning, the security laws of many countries traditionally worked with and processed information according to the danger-to-safety scheme in order to defuse threatening situations. To cushion the consequences of hazardous technologies, Ulrich Beck's study on the "risk society"[7], that reads like a commentary on Chernobyl (1986), generalized the police law concept of danger and offered "risk" instead as a more abstract, statistical category to comprehend and contain disaster. Under the banner of the "fight against terrorism" or organized crime, the rule-of-law matrix – threats to security trigger proportionate measures – morphed into a pattern for averting risks. While the dynamic and attractive (because more abstract) category of risk took the lead, danger receded into the background. In consequence, the threshold for police action became vague and was significantly lowered. In turn, police law took on the character of a flexible, hyper-preventive security law, which insatiably collected and hoarded data and brought them to bear in the face of imperceptible, information-dependent and cross-border threats. Above all, eavesdropping and surveillance measures, that is interventions that have a wide scope and reach far beyond any clear and present danger zone, signal the transition to a special police law in which "actual clues", "situation assessments" and "experiences" furnished by the police force guide their interventions.[8] Would this security law qualify as a "learning law"? Rather a "danger invention law" that produces self-reflexively its own information and is hardly open to data from the outside which unsettles "settled knowledges". While conventional security laws at best learn from case to case, firmly entrenched in their law-rule categories, the new security law incorporates the emergency and therefore runs the risk of constantly seeing the world in a state of exception.

In many democracies, control and containment of epidemics either come under emergency law or follow the regulatory pattern of conventional police or security law, some including normalized emergency provisions as the following examples show. All of them limit learning processes according to their regulatory scheme prompted by concepts of order. Usually these laws have a friendly title, like the South African National Health Act or the Australian Guidelines for the Prevention and Control of Infection in Healthcare (2019), the Consolidated Health Laws in Italy[9] or the (German and Argentine) Infection Protection Acts.[10] As a rule they are tough on the matter, because they process the collective traumas produced by past epidemics, like the plague, cholera, typhoid fever, the Spanish Influenza – and leave little room for adapting the law to the new challenge.[11] Moreover,

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[7] U. Beck, (1987), "The Anthropological Shock: Chernobyl and the Contours of the Risk Society", in: 32 *Berkeley Journal of Sociology,* 153 ff.

[8] For a detailed analysis see G, Frankenberg, (2013), *Political Technology and the Erosion of the Rule of Law. Normalizing the State of Exception*, Cheltenham UK: E. Elgar, Ch. I, V – VI.

[9] See the report "Italy: Legal Responses to Health Emergencies", https://www.loc.gov/law/help/health-emergencies/italy.php/ (accessed 30 May 2020).

[10] In 2001 the Infection Protection Act (IfSG) updated rather than modernized the 1961 statute regulating contagious diseases.

[11] From the fascinating literature on the history of epidemics and pandemics see W. H. McNeill, (1976), Plagues and Peoples, New York: Anchor Press; J. Ruffié, J.-C. Sournia, (1984), *Les Épidémies dans l'histoire de l'homme,* Paris:

they normalize the state of exception by introducing extraordinary measures into the law in the guise of ordinary regulations.[12]

The Consolidated Health Laws establishes that the Minister of Health may issue a list of infectious and communicable diseases that are subject to special procedures and measures. The Italian statute sets up a system of reporting, provides for preventative measures, necessary assistance, mandatory medical treatment, and disinfection interventions. For epidemics or pandemics it complements the regulatory scheme by authorizing the Minister of Health to issue special orders for the inspection and disinfection of premises, the organization of special services and medical assistance, and the adoption of protective measures against the spread of such diseases.

The German Infection Protection Act[13] corresponds to the danger prevention design of the Italian Consolidated Health Laws but complements and intensifies it by providing for emergency measures that are normalized – which is to say treated as the standard modus operandi, though: Always already leaning to public health with an eye to the state of exception, the recent revision during the COVID-19 crisis quite openly introduced extraordinary measures. Notably it empowered the Federal Minister of Health[14] to sidestep laws and rule by decree once the Federal Diet had declared an "epidemic situation of national importance" (§ 5 IfSG). The regime of containing the further spread of an infection thus installed is reminiscent of the infamous emergency ordinances, which contributed to the decline of the Weimar Republic and the erosion of its constitution.[15] Furthermore, the corona ordinances and general decrees of the *Länder* (member states of the Federal Republic) extensively exhaust the authorization framework offered by the IfSG. They authorize "the necessary protective measures" "to the extent and for as long as necessary to prevent the spread of communicable diseases". In addition to reporting obligations, surveillance, bans on activities or the closure of communal facilities, the IfSG provides, among other regulations, for the obligation of sick or dangerous persons "not to leave the place where they are located or not to enter certain places". If necessary a compulsory quarantine can also be imposed. Fines and prison sentences for offences are more draconian than those provided by standard infection protection acts:[16] A fine of up to 5000 € or a maximum imprisonment of five years is not chicken feed. Federal and State governments have agreed on extremely strict measures that were gradually eased. Others, such as mobile phone tracking and surveillance by drones, are on the horizon.

Flammarion; M. Vasold, (2008), *Grippe, Pest und Cholera. Eine Geschichte der Seuchen in Europa,* Stuttgart: Franz Steiner Verlag; J. Attali, (1979), *L'ordre cannibale*, Paris: Glénat.

[12] See above Ch. IV and for a detailed discussion of "normalization": Frankenberg, *Political Technology and the Erosion of the Rule of Law,* Ch. 1.

[13] For a critique: https://www.zm-online.de/news/politik/wissenschaftlicher-dienst-kritisiert-soeders-infektionsschutzgesetz/> (accessed: 12 June 2020)

[14] § 5 para. 2 IfSG.

[15] Se Art. 48 para. 2 Weimar Constitution (1919): "If public security and order are seriously disturbed or endangered within the German Reich, the President of the Reich may take measures necessary for their restoration, intervening if need be with the assistance of the armed forces. For this purpose he may suspend for a while, in whole or in part, the fundamental rights provided in Articles 114, 115, 117, 118, 123, 124 and 153."

[16] See §§ 28 - 30 IfSG.

III. Corona States of Exception and Learning

So far, national infection prevention schemes do not show any signs that they are irritated by the Corona uncertainties or that there is a significant willingness to address and learn more about its peculiar features. Declaring the state of exception, disaster or emergency seemed to be a standard response from France to Russia, Tunisia to South Africa, Japan to the Philippines, Venezuela to Argentina. It reveals the global desire to break away from law-rule to personal rule and a preference for decision rather than learning.[17]

In her first speeches to the nation, German Chancellor Merkel seemed to pursue a different strategy. Rather than clearly framing social distancing and staying at home as decrees, ordinances or administrative acts, with a touch of vagueness she referred to "guidelines", "instructions for action", "rules" and most recently "standards". By avoiding to name definite "directives" and stressing that the Corona rules are not mere "recommendations", she relies on the semantics of approximation. It may very well be that vagueness currently may be a virtue by appropriately communicating the uncertainty surrounding the pandemic. Admittedly, in the decrees and ordinances issued primarily by states' and local authorities, infection protection steps out of Angela Merkel's shadow of a gentle prerogative and shows its blades.

Or would the Chancellor, in conjunction with other decision-makers at state level, have had to declare a state of exception, if only for reasons of clarity? In fact, a state of emergency could have distracted from the question of whether the enabling norms of the IfSG or the ordinances they support, for example, such as a nationwide lockout (for the whole or parts of the population) or shutting down plants, but above all the special powers of the Federal Minister of Health are compatible with the Basic Law.

But what state of exception could the Chancellor have possibly declared? An "epidemiological situation of national importance" (§ 5 para. 1 IfSG) had to be (and was) announced by parliament. Moreover it appears to be a kind of spurious state of emergency, which lets the Minister of Health off the hook, following the unfortunate example of the Weimar Constitution for threats to the public order. The "epidemiological situation of national importance" is a bogus state of exception, its wording carefully avoiding "exception" and "emergency". With less caution one might consider it unconstitutional as far as it can be assumed that this "situation" disrupts the typical states of exception enumerated in the Basic Law. Admittedly, the typical states of emergency the Basic Law offers do not fit in with a pandemic: The situation of a legislative emergency is certainly far off. The suppression of armed insurgents (who break out of house arrest or protest against the Corona measures?) is not to be feared, nor is it likely that cross-border battles (over protective clothing, test kits or respiratory equipment?) will measure up to a "case of tension" or "defense" of the Basic Law. Disasters and

[17] J. M. Casal Hernández and M. Morales Antoniazzi, (2020), *"States of Emergency without Rule of Law: The Case of Venezuela", VerfBlog,* 2020/5/22.

catastrophes under Article 35 (3) of the Basic Law are tailored to the inter-state deployment and cooperation of police and armed forces. One may infer that all the Basic Law has learned is history today, and that it is rather strictly focused on the dangers associated with an executive branch cut loose from parliamentary and judicial control and on the dangers of military operations within the country.

By the same token, a decent democratic governor, like the German Chancellor, certainly would not want authoritarian leaders to prompt her to declare a state of exception. At any rate, most autocrats launched their anti-Corona measures after declaring a state of exception of calamity because they habitually operate in this mode, in order to prevent the possible emergency that they might lose power. To list a few examples: President Rodrigo Duterte of the Philippines ordered the shooting of quarantine violators. Indian Prime Minister Modi initially recommended Ayurveda and homeopathic treatment to manage the COVID-19 disease, later he commanded, with little advance warning, a national lockdown and condoned police brutality against people suspected of violating quarantine rules. While Jarosław Kaczynski would generally have no qualms declaring the state of emergency and has demonstrated repeatedly his willingness to normalize extraordinary powers, at present he and his government avoid declaring the state of exception in Poland in order not to endanger the presidential elections (his party's candidate is likely to win) scheduled for the beginning of May.

Some autocrats used the Corona crisis as a Machiavellian moment to gain power premiums by loosening parliamentary controls and striking down the opposition.[18] Until mid-March of 2020 neither "comprehensive restrictive steps" nor additional powers were on the agenda of President Erdoğan's anti-Corona policy. The Turkish President did not need donate himself emergency powers, as he had already accomplished that after the coup in 2016. Journalists and members of the opposition continue to be targeted. In Hungary Viktor Orbán took a significant step to consolidate his autocracy by removing parliamentary control of his decrees and turning criminal law against the opposition with a statute that holds a prison sentence of up to five years for spreading "false information" about COVID-19.[19] The Corona crises hit the regime in Algeria at a very unfortunate moment: With the oil prices falling and tourism suffering, it has no convincing argument to contain the still lively protest movement undaunted by COVID-19.[20] By proxy, Xi Jinping cracked down on the protest movement in Hong Kong.[21] The government of Bhutan went down the Swedish path, at least held a middle ground between denial and state of exception. It ordered a quarantine and surveillance of the closely controlled borders, without declaring the state of emergency.

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[18] "Would-be autocrats are using covid-19 as an excuse to grab more power", in: *The Economist*, 23 April 2020.

[19] "Hungary: Law to fight coronavirus creates 'uncertainty' for journalists", In: *Deutsche Welle*, https://www.dw.com/en/hungary-law-to-fight-coronavirus-creates-uncertainty-for-journalists/a-53027631/ (accessed 30 March 2020). G. Halmai, G. Mészáros,. K. L. Scheppele, (2020), *"From Emergency to Disaster: How Hungary's Second Pandemic Emergency will Further Destroy the Rule of Law", VerfBlog,* 2020/5/30.

[20] *The Africa Report*, 6 April - https://www.theafricareport.com/25365/coronavirus-in-algeria-a-countrys-last-warning/> (accessed 12 June 2020).

[21] A. Ramzy, and E. Yu, (2020), "Under Cover of Coronavirus, Hong Kong Cracks Down on Protests Movement", in: *The New York Times*, 21 April.

After trivializing the virus and the COVID-19 disease, Brazil's President Jair Bolsonaro appeared to follow the lead of municipal and state authorities and finally asked Congress to approve the government decree declaring public calamity so as to be able to spend beyond the limit of the Fiscal Responsibility Law and face the emergency situation.[22] His erratic, male chauvinist course of action cannot be trusted though. The question remains whether he will be held responsible for the increasing death rates in Brazil. Not to forget "Europe's last dictator" (his own words): Alexander Lukashenko remains one of the last outliers who remain in denial and shun any serious anti-Corona measures, still believing that being in a good mood and doing rural work (the "tractor therapy") will do the job.[23]

Under the sign of the pandemic, some democratically elected heads of state appear to be bent on joining the phalanx of their openly authoritarian colleagues. Their practices illustrate that states of emergency are not tailored to legal learning experiences, but swift action (South Africa, Tunesia, Argentina) and to reward authoritarian gestures and stabilize autocracies: One of them, Emmanuel Macron, narcissistically offended by having to fear not being re-elected, vainly and foolishly declared war on the virus: "Nous sommes en guerre."[24] The other, Donald Trump, fluctuates erratically between denial, idiotic statements that reveal ignorance and lack of concern, and dramatization.[25] Finally, after the situation had become really dramatic in the US, he arrived at war rhetoric and declared a state of emergency, while simultaneously suggesting that "things got better" and the economy would be "opened again" soon as well as holding China and the WHO responsible for the pandemic.[26]

The Italian practice is different but also neither suitable for imitation nor learning. The state of emergency and the blockade imposed on the country showed signs of despair over a disaster the government and its administration were unable to control especially in Lombardy.[27] The cascade of measures released under its umbrella cut deeply into civil liberties.[28] Certainly, Article 77 of the Italian Constitution entitles the government to take extraordinary action on its own responsibility in cases of urgency and necessity. For a national curfew, however, this cloak of legality seemed both thin and short. But who asks about the law when death is on the doorstep?

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[22] B. Grillo, (2020), "Municipal, state-level authorities declare a state of emergency", in: *The Brazilian Report*, 17 March.
[23] A. Simmons, (2020), "In Belarus, Everyday Life is much the Same as Coronavirus Spreads", in: *The Wall Street Journal*, 27 April.
[24] French President Emmanuel Macron, addressing the Nation and calling for a "general mobilization", in: *Le Monde*, 17 March 2020.
[25] H. Stevens and S. Tan, (2020), "From 'It's going to disappear' to 'We Will Win this War', in: *The Washington Post*, 31 March.
[26] https://www.merkur.de/welt/coronavirus-usa-donald-trump-zahlen-infizierte-lockerung-china-tote-covid-19-twitter-zr-13775220.html/ (accessed 30 May 2020).
[27] See the detailed analysis in *Il Post*, https://www.ilpost.it/2020/05/07/two-months-that-shook-lombardy-to-the-core-coronavirus/ (accessed 30 May 2020).
[28] "Italy announces fines of up to 3000 € for breaking quarantine rules", in: *The Local*, 24 March 2020.

IV. THE MISERY OF BALANCING CORONA ENDS AND MEANS?

Lawyers will probably have to do that, even if the world were to end. However, they should be prepared for uncertainty on a global and previously unknown scale. It is quite inadequate to continue what ministers of public health (worse: heads of state) have been doing in the past and what may account for the irrelevance of law and lawyers in the corona dispute of faculties: namely to pick up the conventional legal cutlery for handling the law on epidemics, check whether its present use is proportionate and rush to balance Corona means and Corona ends. It is almost tragic to what extent the legal analyses circle around the proportionality of social distancing, lockdowns, shutdowns and other interventions that have far reaching consequences for society, the economy, politics, psychological dispositions, women's burden and children's hearts and minds. Lawyers seem not to realize that anti-Corona measures not only infringe freedoms but transform everyday lives and disrupt the social tissue.

First, the principle of proportionality had to leave feathers in the already mentioned conversion of police laws into a generalized security (risk) law. With the reduced density of judicial controls, the judicial examination of police interventions thinned out the principle of proportionality.

Second, in the wake of the COVID-19 pandemic, the currently prevailing social conditions have been completely disrupted. And an end of the disruption is not in sight. How and for which purposes can such desolate relations provide a measure? World-wide flat curves of new infections, national herd immunity or low reproduction rates of the infection ($R < 1$) and local upper limits for regional hotspots are likely candidates as legitimate epidemic-hygienic *ends*. Under conditions of uncertainty these candidates lose their glamor – and normative weight.

Third, the pandemic has meanwhile globalized the *goals* and *means* that are used to control and contain COVID 19-infections. Flat curves, herd immunity, declining number of new infections, transmission rate ($R < 1$), hot spots, etc. have to be assessed and weighed against the consequences of social distancing and isolation, lockdowns and shutdowns of factories and businesses, schools and day-care facilities. Lawyers and judges have dutifully complied with the ever-changing virological and epidemiological prognoses and shifting targets, and have fitted them into the simplified schema of proportionality, often taking them as raw material and not even translating them into legal categories and criteria of proportionality).

Fourth, balancing has always been open-ended and unpredictable, more a metaphor than a stringent method. In times of Corona, balancing has to identify and "factor in" a sheer endless number of items, such as bankruptcy, unemployment, domestic violence, depression, disrupted educational careers, social isolation, the cumulative negative impact on women working under precarious, dangerous conditions, children being deprived of their life chances, the Kawasaki syndrome, and more. Is it proportionate to lock up the elderly – against their will – in residential care facilities even if they would prefer to see their relatives and accept the risk of death? Is it proportionate to keep day

care institutions and schools closed even if children (who are not Corona's prime targets) develop serious symptoms of social isolation? Is it proportionate to order a nation-wide lockdown with barely any time for preparation (as happened in India)?

Balancing faces the obvious dilemma to identify all the aspects of an overly complex situation and to weigh them properly. To reduce complexity some authors opt for one or the other highest value – life, health, dignity (and here included death in dignity), rather than the protection of "mere" health or "naked life".[29] Thus they escape from the demands of an exigent balancing method and avoid the mechanics of proportionality that have ossified in routine and amount to little more, during a pandemic, than testing the evident rationality of infection protection.

V. Law, Security, Experiments

The Corona virus and the COVID 19 infection call for a step towards a law with a more flexible, open texture that integrates new ideas and fresh perspectives, and that allows for experimenting and learning, rather than relying on more or less centralized command and control structures. In addition, co-determination and voluntariness need to be introduced as (new) principles without which even the prohibition-supported and compulsively enforced, imperative protection against the infection ultimately cannot work. Washing one's hands, staying at home and also social distancing at work places, in public spaces and educational institutions cannot be reliably supervised and enforced by an authoritarian regulatory model as maintained by standard police laws, exacerbated by the normalized state of exception or, in particular, its crude version.

In contrast to conventional and extraordinary schemes of infection protection, uncertainty demands that other sources of information be tapped. There is no good reason to assume that individuals who want to protect themselves, their families, workplaces and businesses have nothing to contribute to containing the pandemic, if properly supervised by public health authorities. On the contrary, groups have already proven capable of organizing public assemblies strictly obeying the rules of social distancing. Shop owners who want to do business in times of a pandemic can be required to work out practical concepts of how to protect their customers and staff. Supermarkets have demonstrated how to meet this expectation. Schools and universities organize learning processes, so they might as well organize ways and means of self- and other-protection. Societies do not need law's omnipresent, yet fairly powerless COVID-19 autocracy but can be trusted instead, like markets, doctor's offices, bakeries, repair shops and others, to participate in the social Corona laboratory where they learn how to work out rules and develop plans to prevent contagion.

According to practical reason, laws that are meant to protect from infection could and would have to change their modality: from coercion (which chafes with time) to incentives, from penalties (which

[29] U. Volkmann, (2020), in: *Frankfurter Allgemeine Zeitung*, 1 April; Agamben, G. (2020), *Neue Zürcher Zeitung*, regarding the anti-Corona measures - https://www.nzz.ch/feuilleton/coronavirus-giorgio-agamben-zum-zusammenbruch-der-demokratie-ld.1551896/> (accessed: 12 June).

might lose their edge once people die by the thousands) to trial and error, and from infection paternalism to co-determination and a modicum of solidarity[30]. With "rules" that instruct (how to work out security plans) rather than provisions that prohibit, with (legal) education and consultation instead of deterrence, experiments (not the easy exit!) could be dared to approach Corona with a supply-oriented law, not a law that condones violence, but one that is geared toward participation of those who are affected. The new law regulating how to cope with a pandemic as a societal experiment would advise, as in the past, everyone – especially the most vulnerable – to protect themselves. (This is where public funds could be used which no longer need to be called upon to support ailing businesses.) The law could focus on supporting those who need special assistance by offering social services. Volunteers can be reckoned with, as the willingness to help refugees in 2015 teaches, provided that civil society is no longer placed under house arrest and demobilized by ordinances and decrees, but is involved in the discussion about and the actual doing of what the pandemic requires.

If this experiment founders because people do not "play along"? Then the state may have lost some time but would have gained valuable knowledge about people's behavior (other than abstract models can provide), and could have concentrated meanwhile on procuring protective clothing and respiratory equipment, supplying tests kits, promoting the search for vaccines and medication, and in particular actively supporting medical treatment and health care services.

Society would have learned painfully that a pandemic requires all of us to cooperate and participate in developing protection concepts, unless we do not mind the country to be run like a leprosy ward and its inhabitants being driven by virus-scare into a state of disorientation they acquiesce in and take to be "proportionate".

And the law? It is rarely any wiser than the society whose collective behavior it is supposed to regulate. As long as its application occurs in a situation of uncertainty, there is no choice: it simply must learn. One may hope that its staff has already learned: sovereign is she who does *not* declare a state of exception. And who does *not* normalize it under the flag of epidemics control.

[30] Which might be the components of Chancellor Merkel's program – or not and seems to be the guiding principle of Sweden's approach. See I. Tharoor, (2020), "Sweden's coronavirus strategy is not what it seems", in: The Washington Post, 12 May - https://www.washingtonpost.com/world/2020/05/12/swedens-coronavirus-strategy-is-not-what-it-seems/> (accessed 30 May).

ISLAMIC RITES AND CEREMONIES IN THE PANDEMIC EMERGENCY

BETWEEN PARALLEL LEGAL ORDERS

Alessandra Pera

TABLE OF CONTENTS

The essay investigates how some religious Islamic rules have been accommodated in front of the Covid emergency in some European countries and religious communities, highlighting the different and interconnected dimensions involved in this process of accommodation. The author uses the word country, having regard to the state-territorial legal order; and the word religious community, referring to the Islamic rule of law-religion model, based on a personal law conception. In particular, after some conceptual definition on some peculiar issues involved (para. 1), the analysis goes through some rules on funeral rites and ceremonies (para. 2) and on the sacred pilgrimages (para. 3).
The conclusive remarks (para. 4) underline how the Covid 19's emergency has given a chance for forms of virtuous reasonable accommodation, looking forward areas of middle ground between parallel legal systems.

I. INTRODUCTION

In the last months I went back to some authors and books: Gabriel García Márquez, who wrote *Love in the Time of Cholera;* Axel Munthe, a Swedish doctor, who published his *Letters from a Mourning City*, describing his experience in Naples, in 1884 during the cholera epidemy. In both books the epidemy is the scenario for deeply human stories. Both invites the reader to reflect on how life can be lived during an epidemy, as witnesses of human suffering, as actors of helps to weakly and needy individuals. Also, *I promessi sposi* by Alessandro Manzoni (1827), offers a portrait of the black plague, which afflicted the north of Italy between 1629-1931. Albert Camus, in *The plague* (1947), throws us in the plague tragedy occurring in Algeria (1849), investigating about the fragile nature and condition of human beings. In times of cholera, plague and Covid 19, we all ask ourselves who are we, how do we live, what is the profound reason which can explain what's going on? While searching for answers, it emerges a strong need for care and, in particular, for care of poor and vulnerable people, which is a universal value common amongst many culture, religions and populations. Many existential questions come around, especially having regard to the social, cultural and political conditions of people, which should be taken into serious account, when discussing about health, because many different dynamics affect health and wellness of people. Any social factor can impact on health: family, education, work, home, infrastructure, religion and rites, etc.

The current global pandemic, which continues to spread within affected nations and infect people in many States, asks us to pay attention on how our personal and collective life, in its more ordinary dimensions, is changing.

Our behaviors are influenced, modified and regulated differently. The virus, with its ways of contagion, determines how we interact with family members, work colleagues, neighbors and believers in religious celebrations; how we avoid touching our faces, shaking hands and kissing each other; when we are "at a safe distance" from those around us. We rush to wash our hands and face, if someone coughs or sneezes near us. We have limited our travel by bus, train, ship and plane. We have moved or cancelled conferences, games, concerts, travels, business meetings, dinners, cruises holidays, movie nights, and even lessons in schools and universities, preferring virtual ways of meeting and teaching.

This brief overview investigates how some religious Islamic rules have been accommodated in front of the Covid emergency in some European and non-European countries and religious communities. I deliberately use the word country, having regard to the state-territorial legal order; and the word religious community, referring to the Islamic rule of law-religion system, based on a personal law conception.

In particular, after some conceptual definition, in order to give cardinal points of sharia doctrine on some peculiar issues involved (para.1), I will go through some rule on funeral rites and ceremonies (para. 2) and sacred pilgrimage (para. 3).

Generally speaking, Islamic religion and rules brought in Europe by migrants' communities demand for recognition in the legal systems of the European host countries. This leads the States to pay attention to the new rules, principle, private and public behaviors induced by social and immigration modern needs.

Among the various rules and behaviors, which seems to expand more and more, the most significant number of conflicts usually involves the Muslim ones, both because they constitute, almost in Europe, the majority of migrants, and because the institutions of the Islamic faith are sometimes discordant with the culture of the European rights.

European legal systems anyway all ensure religious freedom, the exercise of religious rights and recognize wide margins of autonomy and privacy to the different believers, within a framework of legal and social values shared by the countries following the western legal tradition.[31] Those legal and shared values constitute also many barriers to the reception of conflicting ethnic and religious

[31] On the concept of Western legal tradition, J. M. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America* (1969), 2; according to the Author, *"A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective"*. See also M.A. Glendon, M.W. Gordon, P.G. Carrozza (eds.), *Comparative Legal Traditions* (1994), 6, 8; P. Stein, J. Shand (eds.), *Legal Values in Western Society* (1974); Peter Stein, *Legal Insititution. The Development of Dispute Settlements* (1984); H. P. Glenn, *Legal Traditions of the World. Sustainable Diversity in Law,* (5th ed., 2014), 127 ff.; P. G. Monateri, "Black Gaius. A Quest for the Multicultural Origins of the Western Legal Tradition", 51 *Hastings Law Journal* (2000), 479, 555; A. Somma, "Giochi senza Frontiere. Diritto Comparato e Tradizione Giuridica", 37 *Boletin Mexicano de Derecho Comparado* (2004), 169, 205.

models.

The increasing circulation and diffusion of the heterogeneous religious and legal models imported into Europe by immigrants, especially by those of Islamic faith, has started to create relevant issues, especially because of the differences between the peculiar Islamic schools and doctrines. Since - mainly as regards the personal status of Muslims - Islamic law does not accept the separation between law and religion, which on the contrary characterizes all Western legal systems, it is easy to guess that interpersonal relationships are the most affected by the influence of the religious requirements. The progressive increase in the number of immigrants in Europe has begun to generate significant impact on the structure and functioning of the legal systems of European countries, and in the medium term it will likely imply a change of both.

That comfortable charm of the absoluteness,[32] embodied in the image of a legal system based on a national society which is compact, homogeneous and internally undifferentiated, has been replaced by a diversified society, in which is felt a need to assess whether - and to what extent - Western legal systems can give space to the peculiarities of individuals belonging to minority religions and cultures bearers of autonomous values. It is therefore crucial to understand whether the recognition of such cultures can, in some way, put national identity into crisis, undermining the principle of the validity of general rules applicable to all citizens.

Such a transformation requires consequently a change in the approach to the theme in Western legal systems, that are called today, not only to take into account these new structures of personal relationships, but especially to give answers to the requests for recognition and protection coming from the individuals involved in such relationships.

It has been shown that after an initial phase of isolation aimed at finding a job, immigrants arriving in Europe tend to join to their own communities, by ensuring that immigration turns from "individual" to "family and community". This stabilization of immigrants, resulting in the formation of families and communities, feeds the tendency to re-create the institutions of the communities of origin in a foreign land, to apply both the traditional rules and practices, thus making the foreign community bearer of new and/or traditional legal models.

Liberal versions of multiculturalism suggest the need to adopt legal solutions to the recognition and support of minority groups, thus the recognition of cultural or collective rights, which must meet though certain limitations and precautions to protect the freedom of individuals within groups.

Immigration inevitably leads to a change in the character of the host society, since immigrants, though ready for the dialogue and the acceptance of the regulations of the country where they have decided to settle down, will never give up their form of cultural life, i.e. their rules.

In relation to possible conflicts between the rules of the indigenous community and those of the hosted one, situations may arise in which the conflict can be easily solved through spontaneous

[32] R. Bartoli, "Multiculturalismo: Disincanto o Disorientamento del Diritto?", in G.A. De Francesco, C. Piemontese, E. Venafro (eds.), *Religione e Religioni: Prospettive di Tutela, Tutela delle Libertà* (2007), 94.

adaptation mechanisms on the part of migrant communities. There are cases, however, where the intervention of the state law is essential.

What has happened, in times of Covid 19 in Europe, is that forms of accommodation and adaptation have occurred, overpassing the difficulties which arise from the peculiarity that Islamic people are part of a certain community in which the rule of law coincides with the religious one, so religion become the model of social control and organization of the group.[33]

The Islamic legal system can be ascribed to the *rule of religion* model, where there is a substantial coincidence between the religious rules and the law norms, which are substantiated in both Sharia and its sources (*Quran, Sunna, Umma, Igma, Qiyas*…).[34]

Sharia is the way shown by God that believers are called to follow. It consists of all the precepts and rules of conduct, which the good Muslim must obey to and on the basis of which the Muslims are judged both by the members of their community and by God. The Sharia's system is based on the precepts revealed by God to men in order to discipline their behavior.[35]

According to Menski the Islamic immigrants live the second phase of adaptation, in which operates a new hybrid law, a form of legal pluralism in action[36]: at this stage, they understand that the domestic system is the dominant one, but do not wish to abandon their traditions. In this way, they are becoming – once again in Menski's words – *"skilled legal navigators of pluralism, rather than assimilated monoculturalists*".[37]

This inherent and profound feature, which constitutes the very essence of the Islamic legal tradition, along with many other elements,[38] must be the starting point for the rest of this analysis,

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[33] On the classification into legal families based on the distinction between *rule of law*, *rule of religion/tradition* and *rule of politics*, conceived as instruments of social control, see U. Mattei, P. G. Monateri, *Introduzione Breve al Diritto Comparato* (1997), 51,79.

[34] For an overview of the sources of Islamic law, M. Hashim Kamali, "Source, Nature and Objectives of Sharia", 33 *The Islamic Quarterly* (1989), 223; N. J. Coulson, *A history of Islamic Law* (1964); Hamid Rez Kusha, *The Sacred Law of Islam* (2002), 13, 50; F. Rahman, *Islam* (1979), 30, 42; J. Burtonm, *The Sources of Islamic Law. Islamic Theories of Abrogation* (1990), 1, 14; H. P. Glenn, *supra* note 2, 182, 186. In the Italian literature, see A. Gambaro, R. Sacco, *Sistemi Giuridici Comparati* (1996), 464 ff.; G. Vercellin, *Istituzioni di Diritto Musulmano* (2002); M. Papa, A. Lorenzo, *Sharia. La Legge Sacra dell'Islam* (2014).

[35] There is a vast literature on the concepts of religion and law revealed. For an historical analysis, N. J. Coulson, *supra* note 4 (1964); N. J. Coulson, "Islamic Law", in J.D.M. Derrett (ed.), *An Introduction to Legal Systems* (1968); Maxime Rodison, *Muhammad* (2002), 73 ff.; Malise Rothven, *Islam in the World* (1984), 85, 87; K. Amstrong, *Islam. A Short History* (2000), 3, 23; W. B. Hallaq, *Shari'a: Theory, Practice, Transformation* (2005); Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (2003), 20, refers to the gradual nature of revelation; Bernard G. Weiss, *The Spirit of Islamic law* (1998), 25,30. In the Italian literature, A. Gambaro, R. Sacco, *supra* note 4, 461 ff. and the bibliography cited therein.

[36] W. F. Menski, "Law, Religion and Culture in Multicultural Britain", in R. Mehdi et al. (eds.), *Law and Religion in Multicultural Societies* (2008), 83 ff.; W. F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2006), 301.

[37] W. F. Menski, *supra* note 6, (2006), 302.

[38] On the complexity of the items, information, attitudes and concepts, produced by history and coming from the past and, therefore, present, that make a legal tradition, see the metaphor proposed by Glenn by recourse to the figure of the *bran-tub*, H. P. Glenn, *supra* note 2, 13, ff.; on the historicity of the tradition and the importance of the past, see also A. W. B. Simpson, *Invitation to Law* (1988), 23; on the idea of tradition as something passing almost physically from one person to another and from one generation to another, following the idea of the Latin *traditio brevi manu*, see Hans Georg Gadamer, *Truth and Method* (1988), 131; as set of ideas aware and transmitted in time, see Mark Salber Phillips, Gordon Schochet (eds.), *Questions of Tradition* (2004), XI; see also the concept proposed by John Merrymen as explained *supra* note 1.

which aims at focusing its attention on the way religious law competes with the State and secular law. It is a model based on the fusion between religious and legal rule, where concepts, categories and precepts derived from the law of God, which is at the same time a guide for religious and social behaviors, for both the spiritual and temporal life.

Different institutions, Mosques and Councils implement a form of social control based on the rule of religion, which has therefore a place in the Western context that, for centuries, has known the separation between Church and State, between legal rule and religious rule, since it is based on the principle of laity, understood in two different accepted meanings,[39] which will be described very briefly.

The first is attributable to the concept of rule of law, as used in modern comparative law's theories, following which the systems governed by the rule of law have experienced two important divorces: the first between law and politics, so that the time for political decisions or government ones (macro-choices) is separated from that of the legal technical choices (micro-choices); the second between law and tradition or religion, so that the rule of law and the jurist need not a sacred or traditional legitimacy, the one to be considered binding and the other to have the authority required to exercise its functions.[40]

In the second accepted meaning of the principle of laity,[41] a "truly lay" State cannot impose the dictates of a particular moral, albeit largely dominant, over any citizen. The lay State does not own any of the possible conceptions of "good" or of "good life", but it creates the conditions and sets the rules on the basis of which all these ideas can grow and communicate with each other. The lay State, in short, builds the "neutral" field where individuals, agencies, associations, etc., can freely interact. Actually, to build this "empty space" is not itself a neutral choice, because it is an evaluatively connoted option in favor of the fundamental principles of freedom of conscience, autonomy and individual responsibility, which are embodied in both the formal and material Constitutions of many States.[42] This choice can therefore be characterized as "neutral" only under

[39] For a brilliant and exhaustive analysis of the different meanings of *rule of law* and laity in comparative Italian literature see Luigi Moccia, "Glossario per uno Studio della Common Law", in Peter Stein, John Shand, *I Valori Giuridici della Civiltà Occidentale* (1981), 458. The reference is to the Italian translation of P. Stein, J. Shand (eds.), *Legal Values in Western Society* (1974), where Moccia quotes, among others, to the studies of Albert Venn Dicey, *Introduction to the Study of the Constitution,* (9th ed. 1956), 183, ff. Dicey identifies three meanings properly attributable to the expression *rule of law*: firstly as *"the guarantee of freedom of the single individual and its goods (…)"*, in this sense *"rule of law is opposed to any system of government based on the exercise by the authority - whatever it is – of wide, arbitrary or discretionary restrictive powers"*; the second meaning is based on the idea of *"equal subjection of all, both private and public authorities, to the common law of the realm, applied by the ordinary courts of justice"*; the third is based on the fact that in the English experience *"the general principles of the Constitution (such as the right to personal freedom, or the right to public assembly) are (…) the result of judicial decisions determining the rights of private individuals in the single particular cases brought before the courts; while in many foreign legal systems the protection (whatever it may be) given to individual rights results, or at least seems to result, from the general principles of the constitution"*.

[40] U. Mattei, P. G. Monateri, *supra* note 3, 66-70; A. Gambaro, "Il Successo del Giurista", 5 *Foro It*. (1983), 85, 93.

[41] For such interpretation of the principle of laity, see V. Villa, "Alcune Osservazioni sulla Nozione di Laicità", in *Quaderni Laici*. *Supplemento*. *Le due Italie* (2010), 183, 193.

[42] See G. Marini, "La Giuridificazione della Persona. Ideologie e Tecniche dei Diritti della Personalità", 1 *Riv*. *Dir*. *Civ*. (2006), 359, ff.; Giorgio Resta, *Autonomia Privata e Diritti della Personalità* (2005).

this specific profile, and because none of the ethical concepts or visions of the world that are available in that context is privileged; but it is not "intrinsically neutral", as it is founded on the values of freedom and autonomy of the person, which are also guaranteed by the Constitutions of many States and represent a common heritage of the Western legal tradition.

The principles of the rule of law and of laity is intended as the best guarantee of respect for cultural and religious diversity. By calling to adopt national and international sources of law, which enshrine the prohibition of racial and religious discrimination, admitted the existence and legitimacy of parallel legal and religious systems.

In States where Sharia is not the law of the territory it is possible to identify two different ways to pose the relationship between State law and Islamic law: the first guarantees the Islamic law the formal status of Muslim law; the second, dominant in the Western States, is characterized by the exclusivity of the State sources of law and by the denial of personal statuses. The approach varies depending on how the sources of law are organized and on how the legal formants[43] weight on the structure of the single system. The non-State law can be recognized, but there is a certain resistance to acknowledge the religious right in peculiar "hard cases".

For what concern the relationship between parallel legal orders, the territorial one and the personal-Islamic one, during the Covid 19' emergency, it is important to underline that the State law, government decrees, laws or other sources, have all their main fundamental reason in protecting public health and people lives, which are considered everywhere paramount value and rights, both in state constitutions (where existing) and in fundamental rights international Charters, on one hand, and in religious thoughts and texts, on the other hand. Thus, some emergency measures are justified because of the protection of values which are shared by the western legal tradition and the Islamic one and considered superior in comparison to religious freedoms.

II. Sharia Funeral Rites in time of Corona Virus in Europe

The Grand Mufti of Bosnia Herzegovina, Husein Kavazović, has issued a *fatwa* on the rites on how to clean and dress up the dead *(Ghusl Mayyit)* and the subsequent funeral prayer *(Janazah)* in cases of infectious disease.

The *fatwa* is a pronouncement by an expert, the *mufti*, who is a sort of jurisconsult. It (the *fatwa*) has the nature of an authoritative assertion, coming from a person to whom the community recognizes a leader function, who possesses the useful knowledge and analytical ability to interpret the sacred sources.[44] The *mufti's* activities and the production and collections of *fatwas* are the most effective

[43] On the concept of legal formant, see R. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law", 39 *Am. Journ. Comp. Law* (1991), 343, 401.

[44] W. B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (2001), 199, ff.; W. B. Hallaq, "From Fatwas to Furu: Growth and Change in Islamic Substantive Law", 1 *Islamic Law and Soc*. (1994), 29. In particular, on the importance of fatwahs in the shi'ite tradition, see Muhammad Khalid Masud et al. (eds.), *Islamic Legal Interpretation: Mufties and their Fatwas* (1996); Norman Calder, *Islamic Jurisprudence in the Classical Era* (2010), 92, 160.

means of brining vast amounts of law to bear on highly particular cases and hard situations.[45] *Fatwas* are object of collections and of systematic incorporation into the doctrinal works, called *furu*, in a continuous going on process. Thus, Islamic religious and law rules can hold their primary sources subject to the interpretative power of the later sources, to the explanation of the *Quran* and the *Sunna*,[46] as determined by *ijma*.[47]

Generally speaking, a *fatwa* become stronger, more persuasive and binding, if there is on it the general consent of the community, which is called *Umma*.

To be clearer, many scholarly writings has showed the importance of *fatwas* in legal change, and how their incorporation into doctrinal law was and is something which took and takes place through centuries, giving room for human development. But this, according to the leading form of the Islamic tradition, could occur only through consensus (*my People will never agree on error*)[48] and not through on-going individual effort.[49] This consensus can be, at first, doctrinal and, afterword, more generalized and communitarian.

In particular, the *fatwa* here mentioned has been recognized and has received the assent of the EULEMA (European Muslim Leaders' Majlis), which is the Council of European Muslim leaders and has been proposed to the attention of some European governments, such as Germany, UK, Ireland, Portugal, Slovenia, Denmark, Lithuania and Norway.

Another assent has been formulated by a Council held in the University of Al-Azhar, in Cairo, and by the Muslim Council of Britain (MCB).[50]

According to the *fatwa*, in the case of death from a serious infectious disease, the *Tayammum* (dry ablution)'s rules should be applied instead of the *Ghusl* (wet ablution with water)'s ones and moreover the person who celebrate the rite has the duty to wear personal protective equipment (gloves, masks and sterile coverall). In the event that the deceased arrives in the purification building in a mortuary sack or coffin, to avoid the spreading of the infection, the deceased must not be removed from the latter. The mortuary sack and coffin can no longer be opened. The funeral

[45] See H. Patrick Glenn, *supra* note 2, 189.

[46] Sunna literally means the path taken or trodden by the Prophet himself. The content of the Sunna is found in *hadith*, or tradition, which are statement transmitted in a continuous chain of communication by the Prophet himself to present adherents to the tradition to other and successive ones, at first orally and then in written forms. A hadith necessarily contains two parts: the normative statement and, as proof of its legitimacy, the chain (*isnad*) of the transmission, which it has followed. See M. Ali Maulana, *A manual of hadith* (1977); M. G. Simms Hodgson, *Venture of Islam* (1974), 64; A. Rahman I. Doi, *Shari'ah: The Islamic Law* (1984), 24, ff.

[47] *Ijma* is doctrinal consensus and is the third level of the pyramid of Islamic sources of law, after the Quran and the Sunna. It is constituted by a common religious conviction, "*but commonality, or consensus, id difficult to establish and, once established, may resist its own dissolution"*, according to H. P. Glenn, *supra* note 2, 185. In fact, consensus presupposes debate and discussion and after that a widespread agreement in the community of reference, in order to avoid long-standing division within the Islamic doctrine. Such objective is not obvious, especially if we think to different Islam schools of thought. See M. Hashim Kamali, *supra* note 5 (2003), 240.

[48] S. Ibn Majah, from his collection of Hadiith, 'Fitan' section. On line at https://ahadith.co.uk/ibnmajah.php, retrieved 20 April 2020.

[49] See H.P. Glenn, *ibid* (2014), 201.

[50] See the Comunità Religiosa Islamica Italiana (COREIS) institutional web site, https://www.coreis.it/international/articolo/preghiere-islamiche-durante-la-pandemia-e-disposizioni-per-onorare-la-sepoltura-in-europa/., retrieved 20 April 2020.

prayer must be carried out according to the rules given by the official government institutions regarding public meetings, and the prayer will be carried out only by a single imam and family members.

In Italy, the D. Lgs. n.19, 25th March 2020, systematizes the different and numerous measures that the government entered in force between February and March, in order to contrast the wide spreading of the epidemy. In particular, art. 1 gives to the Prime Minister the power to enact specific measure through future decrees.

Letters g) and h) of that art. 1 provide specifically on religious ceremonies ad rites, compressing the religious freedom to different extents: g) limitation or suspension of manifestations or initiatives of various nature, events and any form of meeting in public or private places, even with cultural, playing, sports, fun and religious aim; h) suspension of civil and religious ceremonies, limitations in the access to religious places.

Coherently, the guide lines adopted by the Centro Islamico Culturale d'Italia (CICI) of the Mosque of Rome indicate that, whereas the sanitary circumstances and the public health cannot consent neither the cleaning rites with water or the *tayammum*, it is possible to proceed only laying the shroud on the deceased, even if the dead is wearing other dresses.[51]

The COREIS (Comunità Religiosa Islamica Italiana) has complied with the rules enacted by the Italian Government on the prohibition of celebrating funerals. Thus, in order to avoid people crowd, it has indicated to its believers to organize only a small funeral prayer, at the presence of one imam and one member of the family, respecting the security distances between people and adopting all the precautional measures provided by the Italian law to avoid contagion. The ritual ceremony with family and friends will take place in a future moment, after the end of the epidemic restrictive measures.

Generally speaking, it is relevant to clear that the rituals rules on mortuary toilettes, ablution and bandage of the dead are intended to purify the dead, to preserve her the way to Allah and paradise.

For what concern the ablution of the victim's body, the COREIS has suggested to its community to suspend the *Ghusl* (wet ablution with water) and the bandage of the body with the shroud (*kaffan*), substituting these with the dry ablution and by a specific bag for dead, inviting the Italian Institutions to consent to those symbolic acts, even in the complying of the security measures adopted by the state-lay's authorities.

In France, The Haut Conseil de la Santé Publique (HCSP) issued an opinion, on the 18th of February, on the management of the body of a deceased patient infected with Covid-19, according to which the body of the deceased is potentially contaminating, and standard precautions must be

[51] See the institutional Facebook pages at https://www.facebook.com/pages/Moschea-di-Roma/157011067650854?fref=pb&hc_location=profile_browser&rf=143085269041507; and at https://www.facebook.com/centroislamicoculturale/, retrieved 20 April 2020.

applied when handling it.[52]

Considering that in principle the risk of contamination is the same in a deceased patient as in the living patient, the HCPS recommends to funeral staff, that the body, previously wrapped in a hermetically sealed watertight cover and then covered with a sheet, is transferred to the death room; the cover must remain closed; standard precautions are applied when handling the cover; the body is placed in a simple coffin that the definitive closing of the coffin be carried out without delay; no act of thanatopraxis (body conservation care) can be performed.

The decree of the 15th of March 2020 stated that places of worship are allowed to remain open, but any gathering or meeting of more than 20 people within them was prohibited until the 15th of April 2020, with the exception of funeral ceremonies. This has been prorogated until the emergency is still in.

The Conseil Français du Culte Musulman (CFCM), on the 17th of March, has confirmed its consent to the same arguments arising from the above mentioned *fatwa,* issuing an opinion relating to the taking in charge of the body of a deceased Muslim patient infected with the coronavirus (Covid-19),[53] setting out what Muslim law allows or does not allow in these circumstances, both in terms of mortuary toilets and prayer to the deceased (*salat janaza*).

Even in France, the management of the bodies of deceased and uninfected people with coronavirus continues to take place under normal conditions. However, the safety and prevention instructions regarding gatherings must be observed. Thus, with the suspension of mortuary toilets and the adaptation of Islamic funeral rites to the coronavirus epidemic.[54]

With regard to the bodies of people who died because of Coronavirus, it should be noted that the protocol recommended by the HCSP leaves very little room for intervention by funeral personnel before the coffin of the deceased. In fact, many manipulations, such as wearing a protective suit and removing it, require training and the execution of precise protocols. These recommendations in no way oppose the provisions of Muslim law, which, while respecting the dignity of the deceased, naturally give priority to the health of the living.

Regarding elements of Muslim law, taking care of the funeral is a collective obligation (*fard kifâya*):[55] if part of the community takes care of it, the rest will be exempt. Thus, in cases of emergency and for extraordinary reasons, even only one Muslim can provide for it. In particular, for what concern the ablutions, the case of the mortuary washing of a deceased person who died from a contagious disease was exposed a few years ago with SARS. Scientists have responded to this subject based on the principles and foundations of Muslim law: if it is impossible to wash the body, then it could be

[52] Available on the institutional web site at https://www.hcsp.fr/explore.cgi/Accueil, retrieved 20 April 2020.

[53] See https://www.saphirnews.com/Coronavirus-que-dit-le-droit-musulman-sur-la-prise-en-charge-des-morts-d-une-epidemie_a26986.html?print=1., retrieved 20 April 2020.

[54] See https://www.saphirnews.com/Coronavirus-avec-la-suspension-des-toilettes-mortuaires-les-rites-funeraires-islamiques-s-adaptent-avec-l-epidemie., retrieved 20 April 2020.

[55] For the communitarian nature of the Islamic legal tradition and for the idea of collective obligation inside it, see H. Patrick Glenn, *supra* note 2, 203, 215.

used pouring water on it; if the water cannot be poured, dry ablutions (*tayammum*) must be made.
Some scholars admit also that *tayammum* is not a substitute for compulsory washing since washing is established for cleaning and not for ritual purity (*tahâra*). According to them, the deceased can be buried without washing or *tayammum*. Thus, if expert doctors prohibit contact with the deceased including washing and *tayammum*, it is possible to pray over the deceased directly without washing or *tayammum*. However, this exemption is consented to the limits of said necessity. Thus, expert doctors define the limits within which someone is allowed to wash the infected deceased. This is why the washing or *tayammum* exemption is not used until after taking into account the protective measures of the scrubbers in order to safeguard them from contracting the disease. Washers should also be experienced with precautionary measures and not take them lightly.
The HCSP, actually, recommends that the body be washed only in the room in which it was cared for, using disposable gloves without water. In other words, neither of the two forms of ablution under Muslim law (*ghusl* and *tayammum*) is possible in France. In this emergency situation, the ablutions lose their obligatory character.
Regarding the body bandage by a shroud, the HCSP recommends that the body be wrapped in a hermetically sealed watertight body cover. This cover can act as a shroud, since the purpose of the envelope is to safeguard the dignity of the deceased. The shroud can be placed on the cover which must never be opened.
Regarding the mortuary prayer (*salat janaz*a), it may take place directly in the cemetery, respecting the safety and instructions concerning gatherings and the maintenance of the deceased's body.
Prayer can be done, if the situation requires, on the grave after the burial. If the funeral prayer is organized in a mosque, it is advisable to privilege the mosques having an outside space and allowing there the access of the vehicle carrying the coffin. In this case too, the safety and instructions concerning gatherings must be observed. The coffin may remain in the vehicle.[56]
Another difficulty is added for the Muslim undertakers: that of not being able to respect the wishes of certain deceased to have their bodies repatriated to their countries of origin such as Algeria, Morocco, Tunisia, Turkey, because these countries have suspended air links from and to France for an indefinite period, unless they set up exceptional convoys.
Moreover, the prophetic tradition is to bury people in the area where they died and as quickly as possible (just after the funeral prayer). Thus, in France and in many other western countries, there already have Muslim cemeteries and Muslim squares. Consequently, it is unnecessary and inappropriate to repatriate the body to a country of origin, especially in these specific cases of pandemic and the difficulties caused.[57]
For the bodies of the deceased and uninfected with the coronavirus (Covid-19), their management

[56] See https://www.saphirnews.com/Coronavirus-que-dit-le-droit-musulman-sur-la-prise-en-charge-des-morts-d-une-epidemie_a26986.html?print=1 2/3, retrieved 20 April 2020.
[57] The CFCM opinion is available on the institutional website at https://www.cfcm-officiel.fr.

continues to take place under normal conditions. However, for the funeral prayer, it is necessary to respect the safety and prevention instructions concerning the gatherings in term of number of participants and space of more than one meter between each other.

In the context of an epidemic, the difficulty of ascertaining with sureness the absence of contamination by the coronavirus (Covid 19) obliges health personnel to take no risk for the life of funeral personnel and the family of the deceased. It was by applying this precautionary principle that hospitals made this decision, which has no other purpose than the protection of the living and which in no way clashes with the provisions of Muslim tradition in such a context. Respect for the dignity of the deceased and accompanying their bodies to their homes, as well as supporting their families during these difficult times, can be accomplished without endangering the lives of others. Also Mohammed Moussaoui, President of the CFCM, asked to his community to accept the measures adopted by the health authority, arguing that certain ritual provisions such as the mortuary toilet, the placing of the body of the deceased in a shroud and the mortuary prayer can be arranged taking into account the principle of the preservation of the life of the one who performs the funeral ritual. Mr. Moussaoui specifies that, in the Muslim tradition, the deceased in period of epidemic whose bodies are exempted from all mortuary toilet are *"raised to the rank of martyrs"*.

"The Prophet Muhammad wanted to bring the necessary comfort to families faced with the pain of mourning and the difficulties they may encounter in carrying out this rite", said the CFCM President, who asked the bereaved families *"to accept in the peace and serenity the measures taken by the health authorities and the health personnel of the State"*.[58]

The Islamic community has demonstrated to be aware of the dangers, to respect the barrier gestures and confinement, trying to accommodate their rules and their religious values with the emergency, respectfully and complying with lay-state's law rules. The sharia in such situations invites its community to wisdom, patience, discipline, benevolence and spiritual elevation, for the good of all. A communitarian approach has been shared by many mosques and institutions in Europe, who have decided to suspend the ritual toilets in the face of the serious health situation that all Europe is going through. The suspension has been generalized due to the impossibility of defining with certainty, for each case, the causes of death and, above all, because of the body protection measures today systematically imposed on health and funeral personnel. These measures, as exceptional as it is provisional, which aim to overcome the coronavirus pandemic, take into account the opinion of the Muslims Councils in different countries and the opinion of the most part of the imams, for whom the protection of the living (medical personnel, funeral agents and families) is in all superior. Thus, the consent of the Islamic community, *id est* the scholars' elites (imam, mufti, and institutions) is converging.

Islamic funeral rites in Europe seems to be oriented by an approach which aims at conciliation

[58] *Ibid*.

through adaptation. This is confirmed if we look at the hypothesis regarding the Ramadan.

The containment measures, which have begun on February and March to stop the spread of the coronavirus, are expected to last several weeks. They have disrupted Christian and Jewish religious holidays as well as, most likely, the beginning of Ramadan 1441/2020 during the months of April and May. In many European countries, as long as the confinement continues, all future religious celebrations must take place without assembly. This has been the case for Holy Week and Easter, which Christians had celebrated from the 6th of April to the 13th; for Passover, which the Jews had celebrated from the 9th of April to the 16th; and for the month of Ramadan, already begun on the 24th April. During this blessed period for Muslims, the mosques are normally very crowded in the evenings after the breaking of the fasting meal, and more particularly during the *Tarawih* prayers. It is of fundamental importance to encourage collectively to build intelligent strategies to better protect people, while continuing to rigorously observe the barrier gestures and the confinement rules in force.

III. A GAZE A LITTLE BIT FARER AWAY: HAJJ AND UMRAH PILGRIMAGES

Even where the rule of religion is the law for all, or for nearly all, the Kingdom's Minister of Hajj and Umrah, Mr. Mohammad Saleh bin Taher Benten, said that Saudi Arabia was ready to receive and serve pilgrims at any time, but that the priority is currently placed for everyone's safety, so that Muslims around the world must be patient and delay their plans for the Hajj and Umrah pilgrimages.[59]

In times of Covid 19, Saudi Arabia, to fight the spread of the pandemic contagion, suspended all prayers in the outer courtyards of the Two Holy Mosques in Mecca and Medina and stopped all nationals and residents from visiting those sacred places.[60]

The Hajj pilgrimage to Mecca is one of Islam's five pillars, which all Muslims, who are economically and physically able, must comply with, at least once in their lifetime. Unfortunately, and probably, the next one, which is scheduled for end of July2020, will be cancelled.

In the last decades, because of an easier free movement of people, a certain rising prosperity and availability of airplane's travel, the number of pilgrims has increased remarkably. In order to manage the massive flow of believers, since the end of the '80s, the Saudi's authorities introduced a quota system, assigning to each country one visa per thousand inhabitants.[61]

This means that pilgrims, who managed to obtain a hajj visa for 2020, may have waited decades for it. Moreover, it is customary for Muslims to postpone the hajj until they are ready to take leave of '*al-dunya*' (worldly concerns), so that, looking forward to meeting Allah, many elderly believers have spent their life savings money for their pilgrimage to Mecca. For those elderly Muslims, the

[59] See https://english.alarabiya.net/en/News/gulf/2020/04/01/Saudi-Arabia-urges-countries-to-defer-Hajj-Umrah-plans-amid-coronavirus-Minister.html, retrieved 21 April 2020.

[60] See https://english.alarabiya.net/en/News/middle-east/2020/02/27/Saudi-Arabia-suspends-entry-for-Umrah-pilgrimage-due-to-coronavirus, retrieved 21 April 2020.

[61] Some countries distribute the quota of hajj visa through a lottery system, while others organize waiting lists.

cancellation of the 2020's hajj increases the risk of dying before, both, complying with their duty and making the wish come true.

Moreover, if the pandemic causes enormous anxiety amongst religious and non-religious people in the all world, it has to be said that for Muslims this feeling is aggravated by a peculiar interpretation of a hadith, according to which *"The Hour (Day of Judgment) will not be established until the Hajj (to the Ka'ba) is abandoned"*.[62] In other words, the possible cancellation of the hajj is a sign that the world is coming to an end. Such interpretation is neglected, however, by scholars who attempt to distinguish incidental cancellation of the hajj for health reasons from the abandonment of the hajj by the community of the believers, which will determine the end of the Islamic tradition.[63]

Moreover, the historical analysis shows us some precedents of hajj pilgrimage's cancellations. A documented and famous one was in the tenth century, when a religious sect, the Qarmatians, sacked Mecca in 930 CE and banned hajj for several years.

Other epidemics accidents, such as cholera and typhus, have occurred and involved also pilgrims in Mecca. The cholera outbreak in 1865 killed 15,000 of the 90,000 pilgrims and, even if indirectly, the pilgrims contributed to the spreading of cholera to Europe, in particular through the "Indian route". As a reaction, the British and the Dutch colonial regimes imposed sanitary rules for the journey, exercising their power and sovereignty: the steamships, where the pilgrims were traveling to the hajj were to have tops to shield the upper deck pilgrims against the sun; Western-educated doctors were on board to monitor and treat pilgrims; all arriving pilgrims were cleaned in Lysol at quarantine stations at the entry port of Jeddah, on Kamaran Island and at al-Tor in the Sinai Peninsula. The colonial regimes were controlling also the religious ritual and this interference was highly unpopular among pilgrims. Colonial sanitary control was really pervasive: the Dutch kept comprehensive reports of their health interventions on Kamaran Island. Such sanitary strategy gave them also the chance to avoid the spreading out of civil unrest and anti-Western Islamic movements.

More recently, Islamic authorities have reformed certain hajj rites, expanding the time slot during which the stoning rite should be carried out and permitting believers to perform the sacrificial rite by proxy. Unfortunately, suggestions to expand the hajj season in order to limit the number of pilgrims who are simultaneously present in Mecca have so far been rejected.

IV. CONCLUSIVE REMARKS

This brief overview, without any claim for completeness, have had the intention to show how, within the course of the past few months, the pandemic has upturned daily lives and challenged

[62] Narrated by Shu'ba, The Prophet said: *"The Hour (Day of Judgment) will not be established until the Hajj (to the Ka'ba) is abandoned"* Sahih Bukhari.

[63] For the end of a legal tradition see H. P. Glenn, *supra* note 2, 33, 39. Other scholars underlines that it was narrated by Abu Said Al-Khudri, The Prophet said: *"The people will continue performing the Hajj and 'Umra to the Ka'ba even after the appearance of Gog and Magog"* Sahih Bukhari.

self-evident truths. It is too early to assess how societies and cultures will consequently be reshaped, but probably it could be a chance for intercultural and religious dialogue, accommodation and adaptation, a chance to look for common-middle-grounds between parallel legal systems.

The idea of a *reasonable accommodation* becomes the legal argument to achieve a form of legal pluralism that enhances respect for religious and cultural diversity, and enables individuals to fully practice their faith, even when the legal rule coincides with the religious precept, but respecting the constitutional framework and the founding principles of the State legal system.

Therefore, as mentioned above, the Islamic communities within States in the western area try to maintain their culture and protect their tradition and identity, building a *"home away from home"* a "*desh pardesh*", through the application of Muslim law, or, however, *"overarching meta-norm approximating to the rule of law"*.[64]

The analysis leads us to address the issue of parallel legal systems: the first is the expression of a cultural and religious minority, who poses and manifests itself as a true *legal order*, albeit being a minority, with its strong component of identity, of normativity, and its need for conservation of the legal tradition, of the dogmatic categories and its own rules; the second is the state system, organized according to the principle of territoriality of the law, which hosts the minority.

The historical analysis shows that this is not a new phenomenon, neither for the western legal systems or for Islamic ones. For the first, just think of the competition between *ius civile* and *ius gentium* in Roman times,[65] the barbaric concept of *waregang*[66] or the legal pluralism in medieval Europe;[67] for the second, reference can be made to the system of the *millet*, during the Ottoman Empire.[68]

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[64] D. McGoldrick, "Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws", 9 *Human Rights Law Review* (2009), 605. The author believes that this is because to live according to the Sharia is not simply a matter of adhering to its precepts, but also and above all it is a psychological and behavioral individual attitude.

[65] See A. Schiavone, *Ius. L'Invenzione del Diritto in Occidente* (2005), 123, ff.; and also G. Lombardi, *Ricerche in tema di ius gentium* (1946); Id., *Sul concetto di ius gentium* (1947); M. Talamanca, "Ius gentium da Adriano ai Severi", in E. Dovere (ed.), *La Codificazione del Diritto dall'Antico al Moderno* (1998), 191.

[66] In the Edict of Rotari the *waregang* is the stranger, who enjoys a regular statute within the realm, and is protected by the sovereign (*sub scuto potestatis nostrae*). Such status should relate to the legal condition that any foreigner acquires the moment it arrives in the kingdom of the Lombards, regardless of the reasons. See G. Princi Braccini, "Waregang (Rotari 367): Straniero sotto il Mundio Regio?", 18 *Filologia Mediolatina. Studies in Medieval Latin Texts and Transmission. Rivista della Fondazione Ezio Franceschini* (2011), 109, 124.

[67] On the theme of legal pluralism at the time of *ius commune*, see J. M. Merryman, *supra* note 1; P. G. Monateri, *supra* note 1, 490, ff.; U. Mattei, P. G. Monateri, *supra* note 4, 47, ff.; H. P. Glenn, "La Tradition Juridique Nationale", 55 *Revue Internationale de Droit Comparé* (2003), 263, ff.; B. Markesinis, *The Gradual Convergence. Foreign Ideas, Foreign Influences, and the English Law on the Eve of the 21st Century* (1994); G. Gorla, "La Communis Opinio Totius Orbis", in M. Cappelletti, *New Perspectives for a Common Law of Europe* (1978), 45, ff.; G. Gorla, L. Moccia, "A Revisiting of the Comparison between Continental Law and English Law (16th to 19th century)" 2 *Journal of legal History* (1981), 143, ff.; M. Lupoi, *Alle Radici del Mondo Giuridico Europeo* (1994), A. Watson, *Roman law and comparative law* (1991).

[68] The term *millet* means religious denomination. The reference is to the legal status recognized to some non-Muslim religious communities residing in the territory of the Ottoman Empire and to the system of administrative government of these communities. This is an evolution of the *dhimma*. On the territory of the Empire resided many non-Muslim communities: Christians, Jews, Yazidis, Zoroastrians. They all were under the Islamic law, for which the unbelievers had a less favorable legal treatment. The Christian and Jewish communities (People of the Book), unlike the other, were not persecuted. Their status was, in fact, of *dhimmi* (protected), they did not participate in the city government and could be exempted from military service by paying a tax (*jizya*); they also paid a land tax (*kharaj*). Notwithstanding these distinctions directly deriving from Sharia, the Ottoman Empire recognized non-Muslim

The examples could be many, but, for the sake of brevity, those mentioned above are enough to show that the historical perspective allows us to better understand that *minority legal orders* are constant elements in the civil and legal life of a given community.

Today, however, the context in which the dialogue, the contrapuntal exchange, takes shape is significantly different. Certainly, even migration flows are not historically a novelty,[69] but there is a significant change in the attitudes of social management of diversity. The scale and intensity of the global movement of people have both become more severe. The flows follow, more than in the past, a movement from non-western into western, so the Western legal systems have to deal with the issues that arise from the diversity of these minority legal orders.

The question is understanding to what extent the state system can tolerate the principle of personality of law and the Muslim minority legal order and to what extent can Islamic law authorize the adhesion of Muslims to a non-Islamic law.

It has been pointed out how they adhere to local state law while continuing to maintain an Islamic identity[70]. However, in these contexts, those who hold power within the minority legal order often manage to impose models and solutions, which, when selected by an authority (such as the Sharia or Muslims' Councils, Islamic Centres, Imams, Mufti…) considered legitimate by the great majority of the community to which it belongs, gain the dignity of regulatory discipline, of legal (and religious) rules able to bound behaviors. This would open the way for the transformation of a social minority into a political minority.[71]

Within the multicultural society, which therefore have complex characters, multiple standards coexist belonging to different legal systems that can ignore, neutralize or clash each other. In the West and in the global world, the religious law challenges the state and secular monopoly of law and the systems of religious communities compete with the State one.

The idea to consent them to exercise their power and competences inside the boundaries of the state legal systems, and of its fundamental values and laws, gives the chance to exercise a certain degree of control on their decisions.

A limit to the recognition could be identified where human rights are understood as a shared set of

religious communities as a "nation" (*millet*); the head of each community coincided with the religious leader, who exercised both religious and secular functions (Patriarch for Christians; Chief Rabbi of Constantinople for the Jews). Once the religious leader had received confirmation of his investiture by the Sultan, he could exercise its functions and, within certain limits, the *millet* was politically and legally autonomous. In fact, he collected taxes, dispensed justice in matters of family and civil law in general; he represented his community before the Sultan and his administration. See A, Hourani, *A history of the Arab Peoples* (1991), 21; H. Patrick Glenn, *supra* note 2, 54, 225.

[69] Many scholars speak of new diaspora and of cyclical transhumances, H. P. Glenn, *ibid*., 107, ff.; and specifically of Islamic diaspora *ibid*., 366, ff.

[70] On the obligation to obey the local law, as enshrined in the Sharia, see Tariq Ramadan, *Western Muslims and the future of Islam* (2004), 95, 96. Such obligation is declined differently by the various Sharia schools according to D. Pearl, W. F. Menski, *Muslim Family Law* (3rd ed., 1998), 2, 65. See also H. P. Glenn, *On Common Laws* (2005), 134; R. Aluffi Beck-Peccoz, "Cittadinanza ed Appartenenza Religiosa nel Diritto Internazionale Privato. Il Caso dei Paesi Arabi", 9 *Teoria Politica* (1993), 97.

[71] F. Colom Gonzales, "Entre el Credo y la Ley. Procesos de Integralidad en el Pluralismo Jurìdico de Base Religiosa", 157 *Revista de Estudios Politicos* (2012), 83, 103.

landmarks that can help the dialogue between the competing authorities.[72] If a common ground is not found on human rights, it appears, in fact, difficult to deal with the discussion related to multiculturalism.

Clearly these phenomena imply far-reaching social changes, are reflected in the legal world and give rise to inter-sectorial processes.[73] In fact, globalization has led to the thinning of boundaries and de-territorializing in various fields of social life including law and religion. In spite of this and because of its nature, law cannot cease to be the instrument to find answers to the needs of a community, albeit changing, multi-faceted and ever changing.

This model accepts a certain degree of cultural and religious diversity, which can be expressed in the public space, providing the compliance with State law and the rules established by the democratic method.

State intervention towards immigrants should not be directed to assimilation, but rather to the respect for ethnic specificity and to the recognition of ethnic and religious groups and their institutionalization.

Individuals and groups, within the law, are free to organize themselves to keep their culture and their identity alive. In order to ensure the principle of substantive equality, an ethnic group is also recognized a differentiated legal treatment. For example, at the legislative level this model has resulted in the adoption of certain rules, which provide for exceptions, exemptions or special legal regimes when belonging to a particular ethnic group.

However, it is clear that the European debate on the integration of immigrants and on the conflict between the rules of the host country and those imported from ethnic minorities has developed different models.

In reconstructing the reference standards of a community, a scholar should not limit to analyze the national legislation of her countries of origin, but much more often have to add the specificities resulting from the customs or from the religion of such ethnic affiliations.

The processes of sedimentation of power, which were determined also by separate jurisdictions, have often favored the disengagement from power and state authority, transferring it within the religious community and its leaders.[74] In particular, during the Covid emergency the converging directions of State authorities and Muslims religious leaders and institutions has been crucial and virtuous, ensuring that Muslim people in Europe can feel respectfully of their personal law following the State one.

Diverse societies are fragile and more exposed to inter-conflicts. Therefore, creating a common ground, whenever possible, is the only method for diverse societies to keep the peace. The commonality, here, is civic-based rather than a cultural-based, creating a framework of citizenship, where the common feature for all is the fact that we are all humankind. Three main pillars can be

[72] M. Ignatieff, *Human Right as Politics and Idolatry* (2003), 30.
[73] As observed by G. Marini, "Diritto e Politica. La Costruzione delle Tradizioni Giuridiche nell'Epoca della Globalizzazione", 1 *Polemos* (2010) 31, ff..
[74] See M. Ricca, *Oltre Babele, Codici per una Democrazia Interculturale* (2008), 504.

indicated: integral freedom, equality and solidarity. With the three principles of freedom for all; equality for all, and solidarity, citizenship is no longer confined to the typical definition and occupy a broader meaning.

Inclusive societies or decent societies[75] come as a respond for exclusive societies (indecent society): *"Beyond that level of citizenship individuals, groups and communities can live their religious or cultural particularities, with respect for the common platform for all as citizens of a common political complex".*[76]

Of course, there are fields of law where finding a common ground is hard, or even impossible, because the clash between diverging fundamental values and rights is irreconcilable.

It is worth to mention some western values, such us the moral and legal equality between men and women[77], the equal freedom and dignity of the spouses[78], self-determination and freedom of action of each individual, in all their life choices (health, work, friendships), and in particular in the marriage decision[79].

In addition, all Western legal systems show to join an exclusively monogamous model of union. None of the European legal systems allow exceptions to the monogamous model of family, even where both heterosexual or homosexual de facto unions are admitted, or where marriages between same-sex spouses are authorized. Bigamy and polygamy, in many European countries, remain a crime[80].

Most of the issues above mentioned originate from the close connection between legal, social and religious rules that characterizes Islams. Since - especially as regards the personal status of Muslims - Islamic law does not accept the separation between law and religion, which on the contrary characterizes all Western legal systems, it is easy to guess that family relationships are the most affected by the influence of the religious requirements. In particular, since the Qur'an itself rules explicitly and in detail these relationships, Islamic family law has most resisted the secularization and the modernist trends[81]. This is due to the fact that the institutions of Islamic

[75] A. Margalit, *The Decent Society* (1996).

[76] R. Pinxten, "Separation, Integration and Citizenship, reply to Glenn", 3 *Netherlands Journal of Legal Philosophy* (2006), 246.

[77] EHRC art. 23.

[78] EHRC Additional Protocol, VII art. 5.

[79] The right to marry is precisely recognized as a fundamental right enshrined in art. 12, ECHR7, which guarantees the freedom to marry, to both man and woman.

[80] As an example, in Italy bigamy is forbidden by art. 556 c.p., in Frence by art. 433-20 of the Code Penal. In particular, the EU Parliament has requested to the Member States to adopt measures that provide for effective and dissuasive sanctions against different forms of violence on women and children, such as forced marriage, polygamy, honor killings and mutilations. See Resolution of the European Parliament on Female Immigration: Role and Condition of Women Immigrants in the European Union. 2006/2010(INI) point 35, available at www.eur-lex.europa.eu. For a critical perspective on polygamic relationship and the law at the crossroad of diverse legal traditions, see Elisabetta Grande-Luca Pes (eds.), *Più cuori e una capanna* (2018).

[81] For an analysis of Islamic family law see D. Pearl, and W. Menski, *MuslimFamily Law*. London: Sweet & Maxwell, 1998;M. A. Anies, "Study of Muslim Woman and Family: A bibliography." *Journal of Comparative Family Studies* 20, 2 (1989): 263-274; F. Pahman, "The Controversy over the Muslim Family Law." *South Asian Politics and Religion.* Ed. Smith., D. E. Princeton: Princeton University Press, 1966. 414-427. In the Italian literature,R. Aluffi Beck Peccoz, *La modernizzazione del diritto di famiglia nei paesi arabi*. Milano: Giuffrè, 1990; V. Abagnara, *Il matrimonio nell'Islam*. Naples: Edizioni Scientifiche Italiane, 1996; A.A. Abu-Sahlieh, "*Il diritto di famiglia nel mondo arabo: tradizioni e sfide*". I musulmani nella società europea. Turin: Edizioni della Fondazione Agnelli, 1994.

family law are those most at odds with the values of Western culture, mainly for the obvious difference of treatment between the sexes, for the strong discrimination against women and the patriarchal setting of the family. For example, the right of a man to have up to four wives, to be able to divorce his wife for no reason, the ban for a Muslim woman to marry a non-Muslim man, the non-existence of age limits for marriage.

Personal status and family law appear to be significantly related to issues concerning multi ethnicity. In this field real legal irritants arise.

However, it should be clarified that they are sometimes accidental and unintended, and sometimes strategic and intentional, in order to protect the belonging legal tradition. In other words, some incidents of lack of communication serve to ensure supremacy and spaces to a certain religious or legal culture, either that of the minority legal order or that of the majority one, because each legal system in some matters considers some values or legal interests as essential to its legal tradition. So, in order to protect and promote such values, it identifies and applies instruments for *superiores* (or concurrent) *non recognoscere*, especially if its legal tradition is characterized by a high rate of normativity[82].

In the Western legal tradition these values are protected through the concept of unavailability of rights or statuses and the concept of public order[83], as well as though the limits of mandatory rules and morality, the principles of secularism, equality and rule of law, expression of those core values discussed above.

However, the content of the basic values, of the inalienable and non-negotiable rights within the different legal traditions varies, and each tradition recognizes some that others do not recognize, or it excludes some that others instead protect. On this land take place both the "contrapuntal exchanges" and the circulation of legal models.

[82] On the concept of normativity see H. P. Glenn, Legal Traditions of the World. Quoted. 365 et seq.
[83] On the role of public order, see A. Miranda, *Lo "stingimento" delle regole giuridiche tra diritti e limiti nell'era dei flussi migratori e della crisi delle nazioni*, in *Cardozo Electronical Law Bulletin*, 2018, pp. 19-23-24.

THE NOTION OF CAUSATION AND THE TORT OF NEGLIGENCE (COMMON LAW) / EXTRA-CONTRACTUAL PERSONAL LIABILITY (CIVIL LAW) IN CANADA: A COMPARATIVE LEGAL STUDY

Marel Katsivela *

TABLE OF CONTENTS

The purpose of this study is to present the principles that govern causation in both legal traditions in Canada. In this regard, we seek to identify the similarities and differences specific to this notion. Given the complexity of the subject matter and the comparative aspect of the study, the analysis presents several challenges. In both legal traditions, causation is proven by the claimant on a balance of probabilities and not with scientific precision. Usually, causation is not subject to lengthy judicial commentary as it is easily established by the facts. The present study aimed to identify these similarities and differences. Despite the divergence and convergence of applicable rules, causation remains an area where judicial discretion is very present and constitutes a source of legal uncertainty as to the applicable rule.

I. INTRODUCTION

This article focuses on the comparative analysis of causation in the context of extra-contractual personal liability in Quebec civil law (article 1457 CCQ[84]) and the common law tort of negligence in Canada[85]. Causation is a common concern in both legal traditions.

In order to study causation in common law we must examine factual causation and remoteness. Factual causation establishes the relationship between the wrongful act and the damage suffered by the victim; it is a question of fact[86]. Several terms (i.e. causation, *causa sine qua non*, *cause in fact*) are used to qualify it. Remoteness does not render the defendant liable for any damage, even remote, related to negligence but only for the damage which has a legal relationship with it[87]. Several terms (i.e.

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[84] It is in 1955 that the Duplessis government commences the reform of the *Civil Code of Lower Canada*. Réseau Juridique du Québec, « Une vue d'ensemble du nouveau Code civil du Québec » online: http://www.avocat.qc.ca/public/iiccqvachon.htm#. The CcQ enters into force on January 1st 1994.

[85] The present study will use the term 'causation' in common law with respect to factual causation and remoteness in order to make the comparison with civil law. We will also use the terms 'injury' and 'damage' interchangeably. The elements of the tort of negligence are: the duty of care, the standard of care, factual causation, remoteness and damage where as those of the personal extra-contractual liability are: fault, causation, damage.
In civil law, written laws constitute the primary source of law, case law is a secondary source. C. de Secondat Montesquieu, *Esprit des Lois*, Paris, Firmin Didot, 1845, p. 327. On the contrary, common law common law is marked by the doctrine of precedent. Common law**:** D. Poirier, A.-F. Debruche, *Introduction Générale à la Common Law* (Cowansville, Canada : Yvon Blais) pp. 394, 353-354.

[86] *Snell c. Farrell*, [1990] 2 R.C.S. 311(*Snell*) cited by common law and civil law.

[87] For an illustration of this legal relationship see B. Franklin, "A little neglect may breed great mischief," in *Poor Richard's Almanack* (1758) :
"For want of a nail, the shoe was lost.

immediate cause, *causa causans*, proximate cause) are used in case law to qualify it. Remotenesse is a question of law[88].

Civil law makes no distinction between factual causation and remoteness[89]. Article 1457 CCQ requires the presence of a causal link between the injury and fault without specifying its content, leaving this task to case law and doctrine. Case law tends to use different expressions to describe the cause of damage - *causa proxima* (proximate cause), *causa causans* (direct cause), necessary, decisive, certain, determining cause -[90]. The causal link is a question of fact[91]. However, according to eminent writers, causation is, in fact, a mixed question of law and fact: when it comes to physical causation alone - determining the facts that constitute the material cause of the injury - it is a question of fact[92]. When reference is made to legal causation and the standards applicable in law in order to demonstrate the existence of the causal link, then it is a question of law[93].

In both legal traditions, causation is proven by the claimant on a balance of probabilities and not with scientific precision[94]. Usually, causation is not subject to lengthy judicial commentary as it is easily established by the facts.

The purpose of this study is to present the principles that govern causation in both legal traditions in Canada. In this regard, we seek to identify the similarities and differences specific to this notion.

For want of a shoe, the horse was lost.
For want of a horse, the rider was lost.
For want of a rider, the battle was lost.
For want of a battle, the kingdom was lost,
And all for the want of a horseshoe nail."
This excerpt poses the question of whether the negligence of a black-smith **(**causing the loss of a nail**)** was, in legal terms, the cause of the loss of the kingdom. This encompasses justice and policy considerations such as the fear of opening the floodgates of litigation, the presence of indeterminate liability, the need to compensate the victim, dissuasion, equity, the nature of the injury, the parties' characteristics.

[88] R. M. Solomon, M. McInnes, E. Chamberlain and S. G.A. Pitel, *Cases and Materials on the Law of Torts* 9me ed. (Toronto: Carswell, 2015) p. 635. There is an approximation between remoteness and the duty of care. Both constitute a mechanism of liability limitation and a question of law. The principal tool of liability limitation today constitutes the duty of care.

[89] Nevertheless, there is a distinction between material causation (causalité « matérielle ») based on facts and legal causation (causalité « juridique ») which is more restricted and underlines the determining cause of damage. Jusrisclasseur, Fasc. 21 'Lien de Causalité', para 2.

[90] J.-L. Baudouin, P. Deslauriers and B. Moore, (BDM), *La responsabilité civile*, 8th ed, Vol 1, (Cowansville : Yvon Blais, 2014) p.719-720. According to the authors, the use of multiple terms constitutes a serious obstacle in the study of causation.

[91] *St-Jean c. Mercier*, [2002] 1 RCS 491 (*Mercier*) para 98 cited, in general, in common law.

[92] V. Karim, *Les Obligations,* vol 1, (Montréal : Wilson & Lafleur Lté, 2015) p. 1214.

[93] *Ibid.* According to Pr. Tancelin, nothing in *Mercier* allows to conclude that causation is a question of fact. Proof by presumptions of fact constitutes a mode of proof which raises a question of law. M. Tancelin, *Des Obligations en Droit Mixte du Québec*, 7th ed, (Montréal : Wilson & Lafleur, 2009) p. 567.

[94] Civil law: *Mercier, supra* note 8 para 28, *Laferrière c Lawson*, (1991) 1 SCR 541 (*Lafarrière*) cited by common law and civil law. Both decisions cite *Snell* in common law. Common law : *Snell supra* note 3.

Given the complexity of the subject matter and the comparative aspect of the study, the analysis presents several challenges. For this reason, we do not aspire to cover all aspects of causation or to be exhaustive in our remarks[95].

In undertaking this study, we join the line of comparatists who opine that the responsibility of comparative law is to make clear to what extent the convergence of applicable rules is present[96]. From this point of view, the convergence of applicable rules in tort and extra-contractual liability is not the objective to be attained. Rather, examining the rules applicable in the two legal traditions and determining the degree of convergence or divergence of these rules is what needs to be examined. This will lead to a better understanding of the rules applicable at the national level and will allow to better function in a world that is increasingly seeking the interaction of the rules of law in different legal systems.

II. FACTUAL CAUSATION (COMMON LAW) AND CAUSATION IN CIVIL LAW.

In order to establish factual causation in common law, the "but for" test (sometimes referred to as *sine qua non* criterion) is mainly used[97]: 'but for' the breach of the standard of care by the defendant, would the damage have occurred? If yes, the negligence is not the cause of the damage. If not, factual causation is established. In *Kauffman v Toronto Transit Commission (Kauffman)*[98] the court did not hold the defendant liable since 'but for' its negligence – the fact that it did not place a rubber handrail on an escalator - the injury of the plaintiff would probably have occurred. The advantage of this criterion is that it is easy to apply[99]. It has, however, been criticized for inviting speculation and for being, at times, over-inclusive[100]. Despite criticism, it constitutes, at present, the main tool for establishing factual causation in common law in Canada[101].

In civil law, case law analysis reveals that the permanent feature of all Québec decisions is that the

[95] We are not going to examine in detail, for example, *novus actus interveniens,* independent sufficient causes or the *thin skull* rule.
[96] A.T. von Mehren, "The Rise of Transnational Legal Practice and the Task of Comparative Law" (2001) 75 Tul.L.Rev. 1215 p. 1215, 1216.
[97] *Clements (Litigation Guardian of) c Clements*, 2012 CSC 32 para8, 9s (*Clements*) cited in common law and in civil law (for the latter the citation is general).
[98] [1959] OR 197 (ON CA) confirmed by the Supreme Court of Canada (1960) 22 DLR (2e) 97 (CSC).
[99] *Sacks v. Ross*, 2017 ONCA 773 para 45.
[100] *March v. E. & M.H. Stramare Proprietary Ltd.*, (1991) 171 C.L.R. 523 (Austl.) paras 22- 23.
[101] *Clements*, *supra* note 14.

injury must be the logical, direct and immediate consequence of the fault (direct link)[102]. Different legal theories may establish this causal link[103]. Among these, and even though it is a common law requirement, the "but for" test is regularly used by Quebec courts[104]. It was, thus, held that had it not been for the absence of a handrail or a ramp along the stairs of a building creating a dangerous situation, the victim would not have been involved in an accident[105]. The liability of the defendant was retained in this case.

The equivalence theory, which constitutes a jurisprudential trend in civil law to establish causation in medical liability cases (i.e. in the case of lack of information of the patient by the doctor), also approximates the *but for* test in common law[106]. This theory considers as causal any occurrence without which the damage would not have taken place: if, among the occurrences which contributed to the realization of the damage appears the fault of a person (condition *sine qua non*), the causal link is established[107]. Civil courts may thus hold a doctor liable if, but for the lack of information provided to the patient regarding the proposed treatment or procedure, the patient would not have consented to the proposed treatment[108]. The advantage of this theory lies in its simplicity: it considers as causal any fact without which the damage would not have occurred. Critics criticize it for failing to make a qualitative and quantitative selection of the causes of the injury, a criticism similar to the one of the *but for* criterion in common law[109].

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[102] Articles 1457, 1607 CcQ. *Caneric Properties Inc c Allstate, compagnie d'assurances*, [1995] RRA 296 (QCCA)(*Caneric*), *Promutuel Dorchester c Automobiles Île-Perrot Inc.*, 2003 CanLII 25829 (QCCS) para 13, 15 citing doctrine. BDM, *supra* note 7 p. 720. The term 'immediate'does not refer to the chronological order of things but to the close relationship that must be established between he damage and the fault. *Promutuel Bagot, société mutuelle d'assurances générales c. Boutique du foyer de Saint-Hyacinthe inc*., 2014 QCCA 1314 para 32.

[103] BDM, *ibid* pp.720-721.

[104] L. Khoury, Jurisclasseur, Fascicule 21 (lien de Causalité) para 14.1.

[105] *Jobin c Union canadienne, Cie d'assurances*, 2004 CanLII 17594 (QCCQ) para 10. *Desbiens c Casino de Montréal*, 2002 CanLII 29307 (QCCQ), to compare with *Kauffman* in common law, *supra* note 15.

[106] *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé* 2019 QCCA 358 para 667 (*Tobacco WL*) : the «but for » criterion constitutes an application of the equivalence theory. For this test in civil law: BDM, *supra* note 7 p. 722, 714. Jurisclasseur, *supra* note 6 paras 6, 45s. However, in general, this theory is rejected in civil law. In effect, in retaining all the conditions *sine qua non* as the cause of the injury, it does not reflect the criterion of the direct causal link.

[107] BDM, *ibid* p. 714, 722. *Langevin c. Ross*, 2009 QCCQ 1302 para 123 citing BDM, *Deguire Avenue c Adler*, [1963] BR 101 - - the fault of the painters who failed to connect the gas stove to the supply pipe in an apartment, and the fault of the janitors who, more than a month later opened the meter which directed the gas in the feeding pipe causing, soon after, an explosion and wounding inhabitants in the adjacent apartment, are, both, causes that contributed to the production of the damage -. This case mentions the equivalence theory.

[108] *Pelletier c. Roberge*, 1991 CarswellQue 190 (CA) which cites common law cases (Hopp c. Lepp, [1980] 2 R.C.S. 192 and Reibl c. Hugues, [1980] 2 R.C.S. 880) but which nuances also its position.

[109] BDM, *supra* note 7 p. 714. *Supra* notes 17 and accompanying text for the common law.

However, the approximation or convergence of the criteria used in common law and in civil law is only relative. Indeed, in civil law, the theories mentioned do not establish factual causation as their correspondents in common law but the causal link in general (different conception of causation)[110]. In addition, several theories - and not just the two described so far - exist to establish causation in civil law[111]. Civil law judges may also not rely on a theoretical foundation or a logical explanation, but, rather, on their sovereign and subjective appreciation, as well as the application of their *bon sens* (common sense)[112]. Cases may refer to the cause ("real", "determining" etc.) of injury without applying a specific criterion of causation[113]. While having the advantage of being flexible, this subjective evaluation of causation creates uncertainty[114]. As such, it contrasts the *but for* criterion as the basic tool for establishing factual causation in common law which creates more legal certainty as to the applicable rule in this legal system.

Inference (unfavorable) of causation (unfavourable inference) (common law): in some complex, technical cases, factual causation may be inferred in common law on the basis of "very little affirmative evidence on the part of the plaintiff" and in the absence of evidence to the contrary[115]. Inference is consistent with the *but for* test[116] and occurs when the latter criterion is difficult to apply. For example, in *Snell*[117], Ms. Snell's loss of vision in her right eye months after an eye surgery could not, following the but for test, be attributed to medical negligence. The court could, however, infer causation on the basis of the plaintiff's limited evidence (i.e., the negligent continuation of the surgery after the retro-ocular

Another causation theory with sporadic application is the *proximate cause* theory. This theory retains as causal the event that arises last in time and which could have objectively sufficed to produce the total damage. It poses a strict, injust rule for the victim. BDM p. 715-716.

[110] *Supra* note 6 and accompanying text.

[111] See *infra* notes 70s and accompanying text for the primary tests.

[112] L. Khoury, « The Liability of Auditors Beyond their Clients : a Comparative Study » (2001) 46 MCGLJ 413, 452. Jurisclasseur, *supra* note 6 para 5. As the author notes, this reality is criticized. This reality is magnified by the plurality of tests present for establishing causation in civil law and the fact that these tests are not always attributed the same importance in civil law.

[113] This was the case of *Volkert c Diamond Truck Co.* [1940] SCR 455 (*Volkert*)- a case that would be governed today by the *Automobile Insurance Act* RLRQ, c A-25 article 108 : no fault liability -, *Kenneth Cavanagn c Bibeau* (1975) CA 239. In the case of medical negligence, the application of the equivalence theory in *G.M. v Pinsonneault* (2014) QCCS 1222 para 361s is not as evident as the use of the *but for* criterion in a similar case in common law : *MacGregor v Potts,*180 ACWS (3d).

[114] Khoury, *supra* note 29.

[115] *Snell supra* note 3.

[116] *Clements, supra* note 14 para 10 confirming *Snell.*

[117] *Supra* note 3.

bleeding occurred, favored the production of the injury)[118]. In terms of inference of causation, the burden of proof is always on the claimant but it is less onerous[119]. The discretion left to the judge to infer causation is considerable.

In civil law, causation may be proven by presumptions[120], a mode of proof with an established theoretical framework, contrary to common law. According to article 2846 CCQ: "A presumption is an inference drawn by the law or the court from a known fact to an unknown fact.**"**. In the case of presumptions in civil law, the burden of proof falls on the plaintiff but his/her task is less onerous[121]. There is a distinction between legal presumptions[122] and presumptions of fact. The latter are left to the discretion of the court - judicial discretion is very present in this area - which must take into consideration those which are serious, precise and concordant (article 2849 CcQ). According to case law, presumptions are serious when the relation of the known fact to the unknown fact is such that the existence of one establishes, by a powerful induction, the presence of the other; are precise, when the inductions which result from the known fact tend to establish directly and particularly the unknown fact; are concordant, when, whatever their origin, they tend, as a whole, to establish the

[118] *Ibid*.The presence of factual presumptions in common law is a related concept to the inference of causation and depends on the frequence of the occurrence. Lara Khoury, *Uncertain causation in Medical Liability* (Québec, Yvon Blais, 2006) p.40, 41. The author favors these notions which allow for flexibility in establishing causation (p. 226) in medical liability.

[119] In *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 para 15, 38 (*Fraser*) – cited by common law/civil law – the plaintiffs were technicians who worked in a hospital laboratory. They were diagnosed with breast cancer and were compensated on the basis of exposure to cancer genic substances in the work place, to which was added the statistically important group of breast cancer cases of laboratory personnel. According to experts each of these elements does not, in itself, establish causation. To compare with *Benhaim,* in civil law see *infra* note 41.

[120] *Laferrière, supra* note 11.

[121] Presumptions do not reverse the burden of proof and do not overrule the traditional rules of proof of causation which are based on the balance of probability. Tancelin, *supra* note 10 p. 442-443, 567.

[122] According to 2847 CcQ : « A legal presumption is one that is specially attached by law to certain facts; it exempts the person in whose favour it exists from making any other proof. ». Legal presumptions will not retain our attention. For an example in civil law see article 1465 CcQ. Legal presumptions also exist in common law. Lynda Collins, "Material Contribution to Risk and Causation in Toxic Torts" (2001) 11 J. Env. L. & Prac. 105, 131; Khoury, *supra* note 35. Proof of causation by presumption also refers to the violation of a law or regulation that contains an elementary standard of care - i.e. defective red light on the left rear wing of a tractor forcing the vehicle in the back to make a maneuver producing an injury - immediately followed by an accident that the law or regulation seeks to prevent. In this case, the court may presume causation in the absence of proof to the contrary. *Morin c Blais*, [1977] 1 RCS 570 – case cited in common law and which would be governed today by *Automobile Insurance Act*, RLRQ, c A-25/no fault liability in civil law-. Karim, *supra* note 9 p. 1217 for another example. This type of presumption is rare and does not create a new liability regime. Jurisclasseur, *supra* note 6 para 30. To our knowledge, there is no similar presumption in common law.

fact that should be proven[123]. In *Cohen v. Coca-Cola Ltd.* (Coca-Cola[124]) - a case cited in common law and in civil law - the liability of the manufacturer of bottles of carbonated beverage was established with regards to the injury of a restaurant employee who, while handling a bottle normally, it burst spontaneously injuring his eye. On the basis of presumptions of fact (i.e. no mishandling of the bottle by the employee, a defective bottle could easily pass inspection control) the court found that the defective bottle was the probable cause of the injury.

Presumptions of fact in civil law are the equivalent of the (unfavorable) inference of causation in common law[125]. As the above-mentioned cases (Snell/common law-Coca-Cola/civil law) affirm, both mechanisms establish the cause of injury on the basis of factual evidence and alleviate the burden of proof of the claimant. Similar judicial conclusions in this area are not lacking. Thus, in quoting *Snell*, common law and civil law courts conclude that statistical evidence is one of the evidence to be considered in inferring causation, but not a conclusive evidence in itself[126]. Despite the convergence of judicial findings in some cases, the discretion left to judges to establish presumptions of fact in civil law/ inference of causation in common law creates legal uncertainty. For example, the criterion of the increased risk of harm that some common law decisions seem to favor in medical cases in the post-*Snell* period, has not been consistently followed by common law or civil law courts[127].

Material Contribution Test (common law): In common law, *Clements* did not only assert the overriding role of the common law *but for* test in establishing factual causation. It also noted that the latter could exceptionally be established by the material contribution test, - where the defendant's negligence makes a material, that is to say, more than a minimal contribution to the injury sustained-[128] according

[123] *Investissements Mont Écho Inc. c. Banque Nationale du Canada,* 2008 QCCA 315 para 60s.
[124] [1967] SCR 469. Some common law decisions citing it mention the inference. In *Lacasse c. Octave Labrecque ltée*, 1995 CanLII 5539 (QC CA) the court inferred causation based on the facts present. In a more recent case, *Benhaim c St Germain* 2016 SCC 48 (*Benhaim*) – cited by common law and civil law cases – the Supreme Court of Canada refused to infer medical causation on the basis of statistical evidence. On their own, statistics do not establish causation. – For a similar conclusion in common law see *supra* note 36.
[125] *Benhaim, ibid* para 59.
[126] Common law: *Fraser, supra* note 36. Civil law: *Benhaim, ibid*.
[127] Khoury, *supra* note 35 p. 164-174.
[128] *Athey c Leonati*, (1996) 3 RCS 458 (*Athey*) paras 15, 44 (the court concluded that a 25% contribution to a herniated disc is more than *de minimis*). The test is based on considerations of policy (equity, justice) allowing the plaintiff to be compensated even if he/she cannot establish the causal link based on the *but for* test. Before *Clements* - *supra* note 14- this test had a relatively limited impact on the causation analysis. Solomon et al, *supra* note 5 p. 602-603. Cases that marked the evolution of this test before *Clements* are: *Cook c Lewis,* [1951] R.C.S. 830 (*Cook*)- said to

to criteria[129] which recall the facts of *Cook v Lewis*[130]. In this case, two hunters fired simultaneously on the plaintiff hit by a single bullet. Being unable to determine which of the hunters caused the injury, the court held the two hunters jointly and severally liable towards the victim.

Although some civil law cases refer to the test of material contribution to assess causation, one may doubt its usefulness in civil law[131] which bases causation on the principle of direct causal link. Despite this fact, the type of situations evoked by *Cook* in common law finds an equivalent in civil law, originally in case law and later in article 1480 CCQ. which provides:

> 1480. Where several persons have jointly participated in a wrongful act or omission which has resulted in injury or have committed separate faults each of which may have caused the injury, and where it is impossible to determine, in either case, which of them actually caused the injury, they are solidarily bound to make reparation therefor.

Although the language used by article 1480 CcQ (civil law) and the criterion of material contribution described in *Clements* (common law) differ, - more formal and abstract in the civil code, more pragmatic in common law -, the similarity of the applicable rules is obvious. In both cases, there are several negligent authors and the cause of the damage cannot be identified. In both cases, we refer to an equitable solution and to a burden of proof favoring the claimant[132]. However, in civil law it is the code that establishes a rule which has an impact on causation and not precedent that prescribes the criteria or theories establishing factual causation as is the case in common law.

In total, similarities exist between the *but for* test (common law, civil law)/equivalence theory (civil law); inference of causation (common law)/presumptions of fact (civil law); the criterion of the material contribution under *Clements*/article 1480 CcQ. The importance of the noted comparisons remains, however, relative because of the different conception of causation in the two legal systems

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be at the root of this test-, *Walker Estate c York Finch General Hospital*, 2001 1 CSC 647 (*Walker*), *Resurfice Corp. c Hanke*, 2007 CSC 7 (*Resurfice*).

[129] *Clements, supra* note 14 para 46 on the criteria to be followed: « (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone"**.**

[130] *Supra* note 45. See a similar commentary: *Book Reviews and Review Essays* (2017) 59 CBLJ 245 under 3. *Cook* operates a reversal of the burden of proof: *Hollis v. Birch*, 1995 CarswellBC 967 para 85, 86.

[131] Jurisclasseur, *supra* note 6 para 15.

[132] More specifically, we talk about a reversal of the burden of proof in common law and in civil law. Common law, *supra* note 47. Civil law : *Mercier*, *supra* note 8 para 118 where the court approximates *Cook* (common law) and civil law cases.

(i.e. the distinction between factual causation/remoteness in common law does not exist in civil law), the different sources of law[133], the different emphasis given to the criteria chosen to govern causation in the two systems (i.e. the importance of the *but for* test in common law in relation to the civil law) and the considerable judicial discretion present. The latter creates legal uncertainty as to the applicable rule.

III. Remoteness (Common Law) and Causation in Civil Law

Another element of the tort of negligence establishing a close link between the injury and negligence is remoteness. General policy considerations (i.e. fairness, compensation, the fear of opening the floodgates of litigation) shape judicial reasoning regarding this element[134]. In addition, courts use the following criteria to establish remoteness without choosing necessarily one of them as being the best one[135]: reasonable foreseeability (*Wagon Mound No.1*), foreseeability of the type of damage (*Hughes*) and the foreseeability of the real risk of damage (*Wagon Mound No.2*). The first criterion (*Wagon Mound No.1*) is quoted most often by the courts[136].

In the English case *Overseas Tankship (UK) Ltd. c Dead Dock & Engineering Co Ltd.* (*Wagon Mound No.1*)[137] dock owners commenced an action against the charterers of Wagon Mound because its employees dumped a large amount of fuel into the water which caught fire, damaging the dock of the plaintiff. By adopting the reasonable foreseeability test - the defendant can only be held liable for the reasonably foreseeable consequences of his/her actions (foreseeability of the sequence of events)[138] - the court rejected the direct link criterion proposed by *Re Polemis & Furness, Withy & Co*[139]. A direct

[133] *Supra* note 2.
[134] *Supra* note 4.
[135] L. Bélanger-Hardy, « Les délits » in Louise Bélanger-Hardy et A. Grenon, dir, *Éléments de common law canadienne : comparaison avec le droit civil québécois*, Toronto: Thompson Carswell, 2008, p. 403. Also, courts may decide causation without name the criterion used. Solomon et al, *supra* note 5 p. 640.
[136] M. Linden, Allen, B. Feldthusen, *Canadian Tort Law,* 9th ed, (Toronto: LexisNexis Butterworths, 2011) p. 375 (LF).
[137] (1961) AC 388 (CP).This case serves as precedent in Canada. In this case, the employees of the plaintiff stopped welding work with the dumping of the oil but restarted their work soon after, when the supervisor informed them that there was no danger. A piece of molten metal fell into the water and ignited a rag which ignited the oil and the fire started**.**
[138] G. HL Fridman, *The Law of Torts in Canada,* 2e ed, (Toronto, Ont: Carswell, 2002) p. 424.
[139] (1921) 3 KB 560 (C.A. Ang).

injury may not be foreseeable and an indirect injury may be foreseeable. According to the court, it would be unfair to hold the defendant liable in the first case and not liable in the second case. As, at that time, the defendant did not know and could not reasonably know that combustion oil could ignite when spread over water, foreseeability could not be established.

The reasonable foreseeability test was diluted[140] by the English decision *Hughes v Lord Advocate*[141]. In this case, two children (eight and ten years' old) explore the unsupervised site of a post office with a lamp they find on the spot. One of the children stumbles on the lamp that breaks and the vaporized paraffin produces an explosion resulting in more severe burns to the children than those that could reasonably be expected. The court holds the defendant liable because the damage is of the same type - burns in our case – that a reasonably prudent person could foresee.

Another qualification of the *Wagon Mound No. 1*[142] was put forward by *Wagon Mound No.2*[143], a case based on the same facts as *Wagon Mound No. 1* except that in this case the plaintiffs were not owners of the nearby dock - as in *Wagon Mound No. 1* - but owners of the boats moored nearby. When the spilled oil caught fire, the boats were damaged. In the ship owners' action against the *Wagon Mound*'s charterers, the Privy Council decided that it was necessary to establish the foreseeability of a real risk - a possible, real, not farfetched risk - of damage. In this case, the plaintiffs provided evidence allowing the court to conclude that the fire hazard was a possibility that could only be realized in very exceptional circumstances: the foreseeability of a real risk of damage was established and the defendants were held liable[144].

Some authors criticize *Wagon Mound No.2*, claiming that it extended the foreseeability requirement

[140] LF, *supra* note 53 p. 366.

[141] [1963] 1 All ER 705 (Ch.L). See also *Assiniboine South School Division No. 3 c Greater Winnipeg Gas Co.*, (1971) 4 W.W.R. 746 (C.A.Man) – apportionment of liability between a negligent gas company and a negligent child who lost control of his snowmobile and hit a gas pipe resulting in an explosion causing material damage -. A reasonable person could foresee the type of damage that occurred.

[142] LF, *supra* note 53 p. 373.

[143] (1966) 2 All ER 709 (CP). The court noted that the limits of an action based on nuisance and on negligence are the same.

[144] As the court noted, in *Wagon Mound No. 1*, the plaintiffs were dock owners and it was not in their interest to insist on the foreseeability of the injury because if the injury was foreseeable for the defendants it would also be foreseeable for the plaintiffs which would render them liable since contributory negligence at that time was a complete defense. In *Wagon Mound No. 2* the plaintiffs had not contributed to the production of the damage. Consequently, they could insist on its foreseeability by producing additional proof allowing the court to adopt a different holding.

and reinstated the *Re Polemis*' direct link test[145]. However, recent case law cites it[146]. It follows that the real risk of damage test and the multiplicity of foreseeability criteria to establish remoteness offer considerable discretion to judges but lead also to confusion[147].

Quebec civil law makes no distinction between factual causation and remoteness[148]. Moreover, in this legal tradition, causation is the main tool for restricting extra-contractual personal liability whereas in common law it is the duty of care that plays the corresponding role and, incidentally, remoteness[149]. In civil law, the injury must be the logical, direct and immediate consequence of the fault (direct link)[150]. This criterion is similar to remoteness in common law[151]. Indeed, the two criteria seek to establish the cause (s) most closely related to the injury. However, causation in civil law is stated by the CCQ and is specified by case law whereas in common law the two elements of the tort of negligence (factual causation, remoteness) are established by precedent[152]. Further, common law has rejected the direct link criterion (*Wagon Mound No.1*) in favor of the reasonable foreseeability one to establish remoteness unlike civil law which uses the direct causal link as the basic standard of

[145] See, for example, H. Glasbeek, "Wagon Mound II - *Re Polemis* Revived: Nuisance Revised" (1967) 6 U.W.O.L. Rev. 192 aux 199-200.
[146] The *Wagon Mound No. 2* criterion was affirmed, for example, by *Mustapha c Culligan,* (2008) 2 SCR 114 and other cases. LF, *supra* note 53 p. 375-376. On *Mustapha* in common law and in civil law see M.Katsivela, « La notion du dommage dans le cadre du délit de négligence (common law) et de la responsabilité extracontractuelle du fait personnel (droit civil) au Canada: une étude en droit comparé » (2018) 96 Rev du B Can. 605.
[147] Some authors propose a new approach to remoteness : the negligent author should be exonerated only if the result of his negligence is freakish, far-fetched, fantastic or highly improbable, 'one in a million'. LF, *supra* note 53 p. 377s.
It is interesting to note that the notion of reasonable foreseeability is found in the duty of care, the standard of care, and in remoteness in common law. According to the Australian case *Minister administering an Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd.* (1983) 2 N.S.W.L.R. 268, 295-296 (C.A .) the test serves different functions for the different elements of the tort of negligence : "[…]The proximity upon which a *Donoghue* type duty rests, depends upon proof that the defendant and plaintiff are so placed in relation to each other that it is reasonably foreseeable as a possibility that careless conduct of *any kind* on the part of the former may result in damage of *some kind* to the person or property of the latter…The breach question requires proof that it was reasonably foreseeable as a possibility that the *kind of carelessness* charged against the defendant might cause damage *of some kind to the plaintiff's* person or property…The remoteness test is only passed if the plaintiff proves that *the kind of damage* suffered by him was foreseeable as…[an] outcome *of the kind of* carelessness charged against the defendant».
[148] *Supra* note 6.
[149] Civil law : *Elliott v Entreprises Cote-Nord Ltee,* [1976] AZ-76011170 [1976] C.A. (*Elliott*), *CSL Group c St-Lawrence Seaway Authority,* 1996 CarswellQue 1110 (CA) para 124, *Canadian National Railways Co. V Norsk Pacific Steamship Co.(Norsk),* [1992] 1 SCR 1021 p. 1143-4, a common law case commenting on civil law. Jean Louis Baudouin, « La Responsabilité civile comparée: droit civil et common law » Rev. Jur. Thémis 2014 48 R.J.T. 683 p. 692 (JLB). Common law: *supra* note 5. It is also to be noted that cases with similar facts may be decided in civil law at the level of causation (*Volkert, supra* note 30) and in common law under the duty of care [*Rankin (Rankin's Garage & Sales) c. J.J.*, 2018 CSC 19]. See also *infra* note 86 (*Hercules, Wittingham*).
[150] *Supra* note 19.
[151] Mariève Lacroix, «La relativité aquilienne en droit de la responsabilité civile — analyse comparée des systèmes germanique, canadien et québécois» (2013) 59 :2 McGill L.J 427, 446.
[152] *Supra* note 2.

causation.

The causation criteria which are in line with the principle of direct causal link and mostly followed by civil law cases in order to establish it are adequate causality and reasonable foreseeability[153]. The objective of the adequate causality theory is to identify the true cause(s) of injury by removing those which are incidental (mere opportunities or circumstances)[154]. This means that occurrences that contribute to the realization of the injury, in other words, causes *sine qua non* (without which the damage would not have occurred) are not necessarily adequate causes[155]. An adequate cause makes objectively possible the production of the damage or, in the ordinary course of events, substantially increases the likelihood of the occurrence of the damage[156]. In *Caneric*[157], both the fault of the owner of a building who did not act as a prudent and diligent landlord at the time of the incident, and the fault of city officials who could have prevented the infiltration of water in the neighbor's basement, were deemed adequate to produce the damage (infiltration), leading to apportionment of liability. A third general maintenance fault of the owner of the building was not considered a direct cause of the damage.

In determining causation in *Caneric*, the judge did not only rely on the theory of adequate causality but also on the theory of reasonable foreseeability. The latter establishes a causal link between the fault and the damage where the type of injury produced is ordinarily foreseeable by the person whose liability is under scrutiny[158]. This criterion is used by case law independently[159] or in conjunction with[160] the theory of adequate causality. In the latter case, the question is to determine the occurrence that objectively caused the damage and, when the occurrence is linked to a fault, to determine whether

[153] *Caneric, supra* note 19*, Gaudreault c Club de Neiges Lystania* [2000] RRA 904 affirmed on appel : 2002 CarswellQue 535(*Lystania*). *Fortin c Mazda Canada Inc.*, 2016 QCCA 31 para 158, BDM, *supra* note 7 pp. 720-721. For other applicable theories see *supra* notes 21-26 and accompanying text.
[154] BDM, *supra* note 7 p. 714-715. This theory is frequently used. *Tobacco, supra* note 23, para 666.
[155] *Ibid* (BDM) p. 715. Following this theory, the evaluation of the adequacy of the causal link is made in a manner that is more restrictive than under the equivalence theory. Jurisclasseur, *supra* note 6, para 9.
[156] *Ibid* (BDM). This theory contains a dose if uncertainty. Determining what could happen in the normal course of events contains a good deal of arbitrariness. BDM, *supra* note 7 p.715.
[157] *Supra* note 19.
[158] BDM, *supra* note 7 p.716.
[159] *Automobile Cordiale ltée c. DaimlerChrysler Canada inc.*, 2010 QCCS 32 paras 123-124, *Vidéotron ltée c Bell Expressvu lp*, 2015 QCCA 422, 2015 CarswellQue 1731 paras 27, 75-76. In these cases, mention is made of the adequate causality test but the emphasis is put on the reasonable foreseeability.
[160] *Caneric, supra* note 19, *Lystania, supra* note 70. *Laval (Ville de) (Service de protection des citoyens, département de police et centre d'appels d'urgence 911) c. Ducharme*, 2012 QCCA 2122 para 156.

its consequences were reasonably foreseeable[161]. In *Lystania*[162], two spouses rode a snowmobile in the defendant's premises, on a trail that was not closed to snowmobilers due to the negligence of the defendant. Given the state of the trail, one of the spouses fell off the snowmobile and died shortly after being struck by the other spouse (plaintiff) who was driving with excessive speed and little visibility. The latter spouse was also seriously injured. Applying the adequate causality theory coupled with that of reasonable foreseeability test, the court found that the defendant's negligence made the accident objectively possible and that the defendant could foresee the consequences. There was, however, an apportionment of liability because of the plaintiff's fault.

Similarly to the adequate causality test, the reasonable foreseeability criterion is not exempt from criticism. It has been mostly criticized for analyzing the conduct of an individual leading, indirectly, to the identification of the fault itself[163]. In addition, reasonable foreseeability presupposes the presence of a fault and, consequently, it cannot apply in its absence, for example, in the presence of a force majeure event[164].

Apart from the approximation of the direct causal link (civil law) to remoteness (common law)[165], an approximation seems to exist between the criterion of reasonable foreseeability in determining causation in civil law and the notion of foreseeability (remoteness) in common law. Indeed, despite the multiplicity of foreseeability tests for establishing remoteness in common law, the notion of foreseeability constitutes their common denominator but also one of the criteria for establishing the direct causal link in civil law. It is interesting to note, in this regard, that the direct causal link criterion, rejected in common law in establishing remoteness, is adopted by civil law to establish the causal link and can be proven by the reasonable foreseeability test that compares with the notion of foreseeability in common law in establishing remoteness. Thus, the foreseeability criterion may sanction the direct causal link (civil law) or be distinct from it (common law-remoteness).

Despite the noted approximations, one may not draw general conclusions regarding the convergence

[161] BDM, *supra* note 7 p 725. As the authors note, case law uses the two tests as two separate filters of causation.
[162] *Supra* note 70.
[163] BDM, *supra* note 7 p. 717. For the criticism of the adequate causality test see *supra* note 73.
[164] *Ibid.* With respect to the presence of a fault and force majeure see also *infra* notes 94s and accompanying text.
[165] *Supra* note 68 and accompanying text.

of causation (civil law)/remoteness (common law) rules in the two legal traditions except, perhaps, to note that the discretion left to judges remains considerable in both legal traditions. On the one hand, in civil law, there is only one reasonable foreseeability criterion and not three as is the case in common law. On the other hand, there are criteria to establish causation in civil law which do not have an equivalent in common law (i.e. adequate causality). Further, as we have mentioned, causation in this legal culture is often not based on any theoretical basis but, rather, on a subjective assessment of facts based on common sense[166].

In this respect, a final point is worth noting: in common law, policy considerations underline the remoteness analysis[167]. In civil law, as honorable justice Baudouin notes, policy considerations are implicitly contained in the judge's analysis of causation[168]. In this way, a civil law judge may invoke a legal criterion (i.e. the direct causal link) to establish or not causation without having to resort to policy considerations[169]. This further highlights the discretion left to judges in both legal traditions to restrict, if needed, the scope of liability[170]. The judicial discretion renders more relative the approximations regarding causation noted in the two legal cultures and does not promote legal clarity.

[166] *Supra* note 29 and accompanying text.
[167] *Supra* note 4.
[168] JLB *supra* note 66 p.692. The approach in civil law remains conceptual, which does not render necessary any policy-oriented discussion. L. Khoury, *supra* note 29 p. 470 on the auditors' liability and *supra* note 35 p. 70. M.Katsivela, *supra* note 63 on this point.
[169] This was the case of *Wightman c Widdrington (Succession de),* 2013 QCCA 1187 (*Widdrington*) – leave to appeal refused - (direct causal link analysis), a case regarding auditors' liability towards investors which refused to follow *Hercules Managements Ltd c Ernst & Young*, [1997] 2 RCS 165 (*Hercules*-duty of care analysis) in common law but which reached – at least in part – the same conclusion on the basis of causation and not policy considerations as was the case in *Hercules*. These cases regarding similar facts were also decided on the basis of different elements of liability (duty of care in common law- causation in civil law), which renders more relative any approximation regarding causation between the two legal cultures. See also *Rankin, Volkert, supra* notes 66, 30 and accompanying text for cases based on similar facts in the two legal traditions but decided at different levels of liability. See also *Compagnie Miron ltée* c. *Brott (Brott)* (1979) C.A. 255, par. 11 **(**civil law) where the defendant at the root of an electricity failure producing a damage more important than one that could reasonably be foreseen due to the strike of Hydro-Québec delaying the repair for 10 days, was held entirely responsible for the damage. The court insisted on the direct causal link between the fault and the damage, also favoring an equitable solution in retaining the defendant's liability.
Further, civil law tribunals may help the victim in the analysis of causation as in the case of the hunters who fire simultaneously on the victim hit by a single bullet (case codified by article 1480 CcC). *Supra* notes 48s and accompanying text, BDM, *supra* note 7 pp. 718-719. As the authors note it (p. 719) case law is also influenced by the nature and the intensity of the fault in order to establish causation. The more serious the fault, the less the court will be demanding in establishing a causal link. *Beauchesne c Bélisle*, (1964) CS 171 paras 20-21 – the owner of a car who rents it knowing that the brakes are defective assumes liability -.
[170] Causation constitutes the principal tool of restriction of liability in civil law and one of the tools restricting liability in common law *Supra* note 66 and accompanying text.

IV. MULTIPLE CAUSES (COMMON LAW) (CIVIL LAW)

In both common law and civil law, there are several causes that can be at the root of a damage. Common law distinguishes between independent insufficient causes and independent sufficient causes producing an injury. Depending on the category, different causation criteria apply[171]. Within this distinction others follow, such as the one between tortious factors and non-tortious factors. For example, the negligence of an employee who did not disclose his health problem to the employer and the negligence of the employer who did not put any safeguards in place to protect the employee's injury while working at a height, are tortious causes insufficient in themselves to produce an injury (death of the employee in this case) but necessary to do so (*Cork c Kirby Maclean Ltd*)(*Cork*)[172]. In the presence of such causes, the criterion of factual causation and that of remoteness are applied to each one of them. In *Cork*, the negligent actions of the employee and the employer were found to be the cause of the damage which led to an apportionment of liability. In the presence of a tortious (negligence of the defendant) and a non-tortious cause (i.e. thunderbolt, infancy, predisposition of the victim) insufficient but necessary to produce an injury, the negligent author may not rely on the non-tortious cause to avoid or reduce its liability[173]. In this case, the negligent defendant must assume responsibility.

In civil law, there is no distinction between independent insufficient causes and independent sufficient causes or a sub-distinction between tortious or non-tortious causes. If there are multiple faults, the above-mentioned principles, i.e. the direct causal link established by the adequate causality theory applied, as the case may be, in conjunction with the reasonable foreseeability test, will probably

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[171] In the presence of independent sufficient causes to produce an injury, the 'but for' test cannot apply because 'but for' the negligence (sufficient cause of damage), the injury would occur due to other independent sufficient cause(s). (factual causation**)**. This would lead to an absence of liability. To avoid this injust result, judges have recourse to the material contribution test to establish factual causation for each defendant. R. M. Solomon et al. *supra* note 5 p. 626s. This is the case of two motorcyclists who overtake a horse-drawn carriage on a public road. *Corey c Hanever*, 182 Mass 250 (C.S. 1902)(american decision) which notes that if the defendants contribute to the injury this suffices to render them liable. See also *Lambton v Mellish,* (1894) 3 Ch. 163. In the present study, independent sufficient causes will not retain our attention.

[172] (1952) 2 E.R. 402.

[173] *Athey, supra* note 45 – case cited on other grounds in Québec (i.e. the *crumbling skull* or *thin skull* rule also applicable in civil law): *D.S. c Giguère*, 2007 QCCQ 3847 para 55-. In *Athey*, the non-tortious cause was the predisposition of the victim.

take effect[174]. This was the case in the above-mentioned *Caneric* and *Lystania* cases[175] which reached a similar result to *Cork*[176] in common law (presence of faults - apportionment of liability). In the presence of a fault and of a *force majeure*[177] event at the root of an injury in civil law, there may be - according to a case law trend – co-existence of the causes of damage and a subsequent apportionment of responsibility. Thus, if the negligent defendant does not install well a nature-proof shelter and a strong wind assimilated to a force majeure event injure third parties, one may identify two causes of injury (negligence - force majeure) and a subsequent apportionment of liability between them[178]. A similar conclusion would probably not be reached in common law because in this legal tradition the apportionment of liability between tortious and non-tortious causes (*Athey*) is not allowed[179]. However, according to another case law trend in civil law, the notion of force majeure and fault are mutually exclusive**,** something that excludes an apportionment of liability[180]. In this way, in *Daudelin c Roy (Daudelin)*[181] the defendant, a negligent trucker, completely compensated a six-year-old victim non endowed with reason who rushed to the street and whose conduct was assimilated to a force majeure event because of his young age[182]. There was no apportionment of liability in this case,

[174] Karim, *supra* note 9 p.1224, *supra* note 70s and accompanying text.
In the presence of multiple faults causing an injury, solidarity – according to which each person liable must pay the totality of the sum to the victim – plays a role in the evaluation of the damage. For instance, in the presence of simultaneous faults such as the case of hunters who fire simultaneously on the victim hit by a single bullet (article 1480 C.c.Q, *supra* note 49 and accompanying text); contributory faults where one or several faults contribute to a single injury as in *Caneric* (*supra* note 19) ; or in the presence of common faults where two or several persons commit the same error/fault causing an injury to the victim (article 1526 C.c.Q.), solidarity applies. Solidarity does not apply in the presence of successive faults because these distinct faults cause separate injuries without, however, being able to determine the extent of the damage caused by each fault. In this case, case law aids the victim by attributing liability contributions (quotes-parts de responsabilté) to the persons at fault based on the circumstances. *Franc c Lacroix*, (1997) RRA 866 (C.Q.), 1997 CarswellQue 798 (CQ).
[175] *Supra* note 19, 70 and accompanying text.
[176] *Supra* note 89.
[177] Article 1470 para 2 CcQ defines force majeure as: «Superior force is an unforeseeable and irresistible event, including external causes with the same characteristics.»**.** In civil law, not every event may qualify as force majeure. This civil law concept approximates, without being identical to, the non-tortious causes in common law. On this civil law concept and its common law equivalent see M. Katsivela, "Canadian Contract and Tort Law: The Concept of Force Majeure in Québec and its Common Law Equivalent" (2012) 09:1 R du B Can 69.
[178] *Saint-Martin c Cournoyer,* (1962) C.S. 42, *Ethier c Lelarge,* (1968) CS 136 paras 9-12, *Parker c Corp du Canton de Hatley*, (1908) 33 C.S. 520. BDM, *supra* note 7 p. 748-749, Maurice Tancelin, Daniel Gardner, *Jurisprudence Commentée sur les Obligations* 12e ed (Montréal : Wilson & Lafleur Lté, 2017) p. 780. Contrary to other causation theories, reasonable foreseeability may not apply in the presence of a force majeure event. *Supra* note 81 and accompanying text.
[179] *Athey, supra* note 45 and accompanying text. However, *Athey* would probably be decided in the same way in civil law. *Supra* note 90.
[180] According to this trend, force majeure cannot co-exist with a fault – predominant case law trend under the C.c.B.C. – BDM *supra* note 7 pp. 96, 748-749.
[181] [1974] C.A. 95.
[182] For the cut-off age of no liability for children (more or less 7years of age in civil law and 6 years in common law see M.Katsivela, "Le manquement à la norme de diligence et la faute dans le cadre du délit de négligence (common

something that seems consistent with the conclusion in *Athey* in common law (combination of tortious & non-tortious causes). In a similar case in common law, *Williams (Guardian Ad Litem of) v. Yacub*[183], a negligent driver who hit a 3-year-old child, was held entirely responsible for the damage. Even though the court did not equate the child's behavior to a force majeure case- as was the case in civil law/*Daudelin* - her conduct did not give rise to liability**.** This position is consistent with the conclusion in *Athey* (common law) which held that there is no apportionment of liability between tortious and non-tortious causes.

The presence of similar judicial conclusions does not, however, imply convergence of the applicable rules regarding causation. We have seen divergent judicial findings at the level of multiple causes of damage in both legal cultures (i.e. presence of tortious and tortious causes). This, combined with the different conception of multiple causes and causation in general in common law and in civil law as well as the judges' discretion to establish causation in the two legal cultures makes the approximation of applicable rules and judicial conclusions relative.

V. Conclusion

Causation is a common concern in both Canadian legal cultures. Regarding the rules governing it, there are similarities and differences of treatment in civil law and in common law. The present study aimed to identify these similarities and differences. Despite the divergence and convergence of applicable rules, causation remains an area where judicial discretion is very present and constitutes a source of legal uncertainty as to the applicable rule. This, combined with the different conception of causation and tort/extra-contractual liability, the presence of diverging judicial findings and the different sources of law, render relative any approximation identified of the applicable rules.

law) et de la responsabilité extracontractuelle du fait personnel (droit civil) au Canada: une étude comparée" (2017) 95 R du B Can. 535.

[183] (1994), 1994 CarswellBC 2965 (B.C. S.C.); affirmed on appel (1995), 27 C.C.L.T. (2d) 282 (B.C.C.A.).

THE NOMOPHYLACTIC FUNCTION OF THE EUROPEAN COURT OF JUSTICE IN TAX MATTERS WITHIN THE ITALIAN AND GERMAN EXPERIENCE. POSSIBLE DISPUTE SETTLEMENT SOLUTIONS FOR THE MEMBER STATES.

*Carloalberto Giusti *- Filippo Luigi Giambrone***

TABLE OF CONTENTS

This article pursues the goal to highlight, through some case law examples, the role of the ECJ, which has defined the fundamental dialectic of Community tax law, identifying positive and negative elements of the path of development of tax liberalization consistent with the aims of European integration. It can be affirmed however, that the main object of the decisions of the European Court of Justice regards the application of the principle of non-discrimination and non-restriction of Community freedoms, and in particular cases where the exercise of tax power by individual States may impede the system of competition and thus alter the functioning of the common market. The examination, in this paper, of the case law of Italy and Germany shows that the Italian legal system can transpose the judgments of the Court of Justice making them immediately applicable by its courts while the German legal system manifests legal difficulties in the automatic transposition of the judgments of the European Court of Justice. Furthermore, the EU approach also involves a further weak profile of the current system, namely the difficult settlement of the dispute between states. The friendly procedures (Mutual Agreement Procedure, so-called 'MAP'), exhausted in the direct consultation between the tax administrations of the contracting countries, do not seem in fact sufficient to settle the very copious dispute over double taxation, also due to the absence of a result constraint. More effective, however, is the recent Directive 2017/1852/EU of 10 October, whose territorial scope (EU territory) is, however, less extensive than that of the MAPs

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[184] Article 23 GG was introduced in its present form before the ratification of the Maastricht Treaty in order to make this possible because the view had previously prevailed that the original text of the German Constitution did not allow such an extensive transfer of sovereign powers to another supranational entity. Art. 23 codified the substance of the 'Solange II' judgment: at present, the protection of fundamental rights guaranteed by the European Union corresponds(va) in its essential features to that guaranteed by grundgesetz. At the same time, Article 23 placed limits on the future development of the Union, primarily as regards the safeguarding of the democratic state, the rule of law, the welfare state and the federal principle. See CH. Hillgruber, Art. 23, in: Schmidt-Bleibtreu/ Hofmann/ Henneke, 2017.

I. THE PRINCIPLE OF FINANCIAL BALANCE AND THE NEW EUROPEAN FINANCIAL GOVERNANCE.

The need to contain public expenditure and to meet the huge public debt has heavily influenced the financial choices of recent years by imposing various measures, which have profoundly redesigned constitutional frameworks and relations between state powers.[185] In this context, Constitutional Law No 11 of 20 April 2012 raised the principle of financial equilibrium to a constitutional rank, committing both central and territorial authorities through the new Articles 20 of the Treaty. 81, 97 and 119 Cost.2 More precisely, the new paragraph 1 of Art. 97 Cost., in fact, requires that all public administrations "in accordance with the order of the European Union, ensure the balance of budgets and the sustainability of public debt". The new Art. 119 Cost. grants local and regional authorities autonomy of entry and expenditure, albeit 'respecting the balance of the relevant budgets' and 'respecting the economic and financial constraints arising from the European Union's legal order'. In addition to recalling the principle of balance between revenue and expenditure in its budget and not that of balance envisaged at European level)[186], the new wording of Article 3 of the Treaty does not provide for the need for a balance between revenue and expenditure in the budget. The third paragraph of Article 81 of the Constitution provides that any law with financial effects, including the budget law, can no longer be limited to indicating the means of covering new and increased expenditure but must provide for them directly (and no longer only to indicate the resources necessary to cover expenditure)[187]. The constitutional provisions referred to are part of the new economic and financial governance which, by compressing the fiscal sovereignty of the nation states, has provided for budgetary constraints, instruments for controlling national accounts and public deficits and debts[188]. The legislative instruments adopted (six regulations and one directive, so-called Six pack) provide for a set of measures which can be summarized in the following commitments:[189] 1) obligation

[185] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

[186] E. De Mita observes, The conflict between contribution capacity and the financial balance of the State, in Rass. Trib., 2016, page 563, according to which "the replacement of the expression < budget balance> with that of <equilibrio> represents the intention of the legislator to allow flexibility in the management of public finance that would otherwise be precluded. It should be recalled that Article 10 of the Directive does not state whether, in the light of the 5 of Constitutional Law No 1/2012, which provides for the allocation to the Chambers, respecting the relative autonomy of an independent body to which to assign tasks of analysis and verification of developments in public finance and observation of budgetary rules. Article 10 of the Directive is applicable to the Article 5 of the 1975 1970s regulates in detail the criteria which must be observed and which exclude the possibility that budgetary verification can be reduced to the mere consideration of the amount of a single tax. Budgetary balance is an overall assessment which invests, first of all, expenditure and which is directed, mainly to the government, it cannot be limited to a single item, that of a tax, even if high, detached from an overall assessment of revenue and expenditure".

[187] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

[188] For a deeper understanding of incurring debt capacity of local authorities in Austria and Germany cfr., Cfr. Ch. Smekal, *Verschuldungsbeschränkungen und Verschuldungsverhalten der Gebietskörperschaften*, p. 72 ff, in, G. Kirsch/ Ch. Smekal/ H. Zimmermann, Beiträge zu ökonomischen Problemen des Föderalismus.

[189] A.F. Uricchio, *Sovranitá impositiva e vincoli del diritto europeo*, p. 9, in, Selected Issues on EU tax law.

on Member States to converge towards the objective of balancing the budget with an annual improvement in balances of at least 0.5%; (2) obligation on countries whose debt exceeds 60% of GDP to take measures to reduce it at a satisfactory rate, to the extent of at least 1/20 of the surplus above the 60% threshold, calculated over the last three years; (3) obligation to include in its internal legal systems, including with constitutional rules, the principle of budgetary balance and a commitment to coordinate debt issuance plans with the Council and the European Commission; 4) new semi-automatic procedures for imposing sanctions on countries that violate the rules of the Pact (sanctions are presumed approved by the

Council unless it rejects it by qualified majority vote - so-called "reverse majority" of euro area states with the exception of the vote of the State concerned).Further rules (so-called "two packs") were also adopted to strengthen the economic and budgetary surveillance of Member States facing or threatened by serious difficulties for their financial stability.[190] One of the main obligations of the Member States is to appoint an independent budgetary control body to monitor budgetary developments and to publish its budgetary programmes, based on macroeconomic forecasts provided by that independent body. The new model of governance of European budgetary policies takes the form of Art. 119, paragraph 3, of the Treaty on the Functioning of the European Union (TFEI) which require stable and sustainable fiscal policies oriented towards a prudent management of public affairs so-calling sound fiscal policy or one.[191] The subsequent Articles 121 and 126 of the Treaty on the Functioning of the European Union are also cornerstones of European economic governance in the field of multilateral surveillance and the excessive deficit procedure respectively192. Article 10 of the Directive is applicable to the Amendments No 121, in the third paragraph, provides for multi-level control measures aimed at ensuring closer coordination of economic policies and lasting convergence of member states' economic performance. To this end, the Council, on the basis of reports submitted by the European Commission, monitors economic developments in each of the Member States and the coherence of economic policies. This control shall be based on the transmission to the Commission of information concerning the relevant measures taken by them in the context of their economic policy. Article 10 of the Directive is applicable to the Article 126 of the TFEI, on the other hand, prohibits excessive public deficits by providing for specific sanctions in the event of infringement. The implementing provisions, which have been the subject of recent amendments and additions to give a greater level of detail in the implementation of the aforementioned TFEI provisions, have regulated the so-called preventive arm based on the surveillance of fiscal policies and the so-called

[190]Cfr. A. F. Uricchio, *Manuale di diritto tributario*, p. 115 ff.
[191] Cfr. Ch. Smekal, Verschuldungsbeschränkungen und Verschuldungsverhalten der Gebietskörperschaften, p. 72 ff, in, G. Kirsch/ Ch. Smekal/ H. Zimmermann, Beiträge zu ökonomischen Problemen des Föderalismus.
[192] Cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

corrective arm aimed at correcting excessive deficits[193]. On the basis of these TFEI provisions, a unitary body of stability rules common to all Member States in the field of public accounts, known as the Euro Plus Pact, has been defined, with which European governance has been consolidated, strengthening financial stability through common fiscal policies.[194]

II. THE ROLE OF THE CASE LAW OF THE COURT OF JUSTICE AND ITS POSITION WITHIN EUROPEAN TAX SYSTEM

The Court of Justice of the European Union has the function of ensuring uniform interpretation and application of European rules in each of the Member States (nomophylactic function).[195] In particular, the European Court of Justice is called upon to give preliminary rulings on the interpretation of European law and thus to carry out a work of hermeneutic reconstruction of the rules and principles expressed in the Treaty and the legislative acts of secondary European law. Indeed, even if national courts are normally required to implement European rules of national law, since European law is directly applicable in the Member States, they may raise questions referred for a preliminary ruling on the interpretation of European rules or on the compatibility of rules of national law with European law. In particular, the Court of Justice is called upon to rule on the question juris, defining the meaning of the European rule relevant to the judgment, while the national court is required to rule on the facts, so as to reach a decision on the specific case by applying the relevant rules (including the European one).[196] The content of the Decision of the European Court of Justice concerns not only the reconstruction of the European standard (and therefore interpretation in the strict sense) but also often the compatibility of internal rules with the European parameter. The historical fact tends to point out in the judgment of the Court of Justice as a delimitation of the thema decidendum, especially in order to determine the applicability or otherwise of European law (and therefore the jurisdiction of the European court).[197] The mechanism of reference for a preliminary ruling - also referred to as a European interpretative preliminary ruling - is a faculty for the various national courts and becomes an obligation only for judges of last instance[198]. Through this mechanism, national courts present themselves as a kind of instrument of the process of European integration: in order to promote uniformity and the correct application of European law, thus preventing the courts of the various

[193] Cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.
[194] A.F. Uricchio, *Sovranitá impositiva e vincoli del diritto europeo*, p. 10, in, Selected Issues on EU tax law.
[195] A. F. Uricchio, *Das geltende italienische Steuersystem*, in, A. F. Uricchio/ F. L. Giambrone, *Neue Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses.*
[196] C. Smekal, *Die Flucht aus dem Budget*, Institut für angewandte Sozial- und Wirtschaftsforschung, Jupiter Verlag 1977.
[197] A. F. Uricchio, *Manuale di diritto tributario*, Cacucci Editore, 2020, p.118.
[198] Cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

Member States from forming a case law conditioned by local legal traditions, the interpretative reference leads to judicial cooperation between separate yet coordinated legal systems and appears destined to produce centralized and European case law on the European legal order, in respect of which the contributions of national courts[199] are valued as impulses coming from separate legal systems that come together in a single ordinal context. The interpretative judgments delivered by the Court of Justice following the reference for a preliminary ruling have a binding effect on the national court which requested them (and on the subsequent grades of the same judgment). Moreover, they are intended to extend their effects beyond the judgment to which they relate, since they relate to legal questions of general application, in that sense it can be argued that interpretative judgments are binding in relation to national courts and public administrations.[200] As regards the temporal effect of judgments of the Court of Justice, the general rule of ex tunc effectiveness applies in principle, with recognition of the latitude of interpretation and the validity of the Community rule from the treaty of origin. Moreover, this criterion has often been balanced with requirements of legal certainty and the protection of the undue custody of third parties; In economic and financial matters in particular, the European Court of Justice has recognized the ex-nunc effectiveness of interpretative judgments where they interfere with the behaviour of good faith third parties who relied on the scope of national legislation before the judgment given by European Justice.[201]

III. The role of the case law of the Court of Justice in the system of sources of European tax law.

The European Court of Justice has clarified the dimensions and boundaries of Community law through a constant work of reading and recognizing the various legislative acts issued by the Community institutions. In doctrine, it has often been pointed out that the Court of Justice has made a substantial contribution to the definition of the Legal System of the European Union, including through creative contributions, so as to make up for the lack of reference standards in the European regulatory fabric.[202] The creative function has been seen, in particular, in the autonomous creation of legal norms and in the integration of European law, primary and secondary, and in any case in the continuous search for general principles that could define the axiological horizon of the regulatory discipline. From this point of view, it has been repeatedly observed that the case law of the European

[199] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[200] P. Boria, *Diritto tributario europeo*, Giuffré editore, p. 121 ff.
[201] Cfr. A.F.Uricchio, *Autonomia regionale differenziata tra criteri di riparto delle funzioni e perequazione finanziaria*, in F. Pastore (a cura di), Il regionalismo differenziato, atti del convegno di Cassino del 5.4.2019, Wolters Kluwer – Cedam, Padova, 2019.
[202] A. F. Uricchio, *Classificazioni tradizionali e classificazioni innovative die tributi*, p. 283, in, A. F. Uricchio -V. Peragine- M. Aulenta, *Manuale di scienze delle finanze, diritto finanziario e contabilitá üubblica*, Nel diritto editore 2018.

Court of Justice has made a decisive contribution to the development of Community law, also affecting the regulatory activity of the European institutions[203] through the indication of the general lines emerging from the current system and the constant comparison with the fundamental aims of supranational integration[204]. It is therefore essentially peaceful to give the case law of the Court of Justice a major role in defining the system of sources in the various areas of European law[205]. The main guidelines followed by Community case law on taxation. The essentially cognitive nature of Community case-law on VAT. The area in which the European Court of Justice takes the most decisions is undoubtedly concerned with value added tax, given the typically European nature of the tax. It is also significant that the Court of Justice is showing an essentially recognisive tendency in this area of the tax system to renounce the development of general principles of cross-cutting importance[206]. The cognitive attitude is thus expressed through the precise examination of the rules laid down in European secondary legislation acts (particularly in the DIRECTIVES on VAT) and the clarification, by way of interpretation, of the semantic

latitude assumed by the rules themselves.[207]It is true that European jurisprudence has made a decisive contribution to the definition of the basic features of VAT on the basis of the rules laid down in the various directives: the legal nature of the levy as a consumption tax has thus been recognized; the key elements of European discipline have been identified in the generality of taxation on commercial transactions, in the proportionality of the rate, in the nature of multi-phase tax and in the neutrality determined by the imposition of value added; the tax case has been pointed out both in the objective elements and in the subjective elements.[208]Moreover, the reconstruction of the qualifying features of the European tax rules is often the guiding principle of European case-law also in the definition of the application and interpretative profiles of the rules laid down by the directives for the implementation of VAT,[209] as well as in the identification of the derogatory cases permitted by the internal rules. At times, the Court of Justice's cognitive aptitude to VAT discipline is diminished to leave room for regulatory reconstructions clearly of creative value. Thus, in relation to the issue of the

[203] Ch. Smekal/ R. Sausgruber, *Determinants of Foreign Direct Investment in Europe*, in, Jr. Chen, Foreign Direct Investment, 33-42, Houndmills: McMillan Press.

[204] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

[205] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

[206] For a specific introduction to the role of territorial self- government in the light of the principles of subsidiarity and proximity Cfr. U.Villani, Il ruolo delle autonomie territoriali alla luce dei principi di sussidiarietà e di prossimità, in La costruzione di un'Europa "unita nella diversità". Il ruolo delle autonomie regionali e locali (a cura di M. Cardia), Aipsa Edizioni, Cagliari, 2015, p. 37 ss.;

[207] Cfr. Ch. Smekal/ Jr. Chen, *International Tax Competition: A Case for International Cooperation in Globalization*. Transition Stud Rev 11, 59–76 (2004).

[208] Lupoi, *Riflessioni comparatistiche sulla funzione creativa della giurisprudenza*, in Studi in onore di V. Uckmar, II, Padova, 1997, 811 ff.

[209] A. F. Uricchio, *Complessitá e criticitá dell´ attuazione del federalismo fiscale*, in, A. F. Uricchio, Federalismo fiscale: evoluzione e prospettive, Collana della II Facoltá di Giurisprudenza – Sede di Taranto, 2012, p. 41

possible duplication of taxation on the same basis, the Court of Justice has defined the principle of a ban on double taxation than on the principle of a ban on double taxation. finds an express regulatory reference.[210] Also with regard to the issue of the right to reimbursement of tax due to an undue payment, the European Court of Justice has developed a guideline which,[211] even in the absence of specific rules in the directives, is to reconstruct in an interpretative way the scope of individual rights and to limit the unreasonable compressions made by internal discipline.[212]Mention should also be made of the case of the abuse of the right, which was originally formulated with reference to the VAT discipline to counter the artificial negotiating constructions carried out by taxpayers in order to obtain unfair tax savings.[213]This creative attitude, however, occupies a marginal area of Community case law in the field of VAT, since the main questions raised for the attention of the courts are resolved by reconstructing the existing European framework in case studies and analysis[214].

IV. THE CONFLICT BETWEEN EUROPEAN UNION LAW AND NATIONAL LAW IN ITALY.

It is now useful to focus on the relationship between the union's legal order and the internal order. Two basic theses emerged: that of the integration of the two systems and that the same remain separate, albeit coordinated. The first argument has always been put forward by the Court of Justice, according to which the European legal order is integrated into the legal order of the Member States[215], so that the Latter cannot allow a further unilateral measure to prevail against an order which they have accepted under conditions of mutuality (such as the Community one), which cannot be opposed to the common order. In a first fundamental decision (judgment *of 05.02.1963[216] in Case C-26/62 Van Gend & Loos* on a tax issue)[217] The

European Court of Justice observes that the European Economic Community constitutes a new legal order in the field of international law in favour of which the Member States have given up, albeit in limited areas[218], their sovereign powers and to which not only the Member States are subject, but also

[210] Sentenza del 05.05.1982, causa C-15/81, Schul, sentenza del 25.02.1988, causa C-299/86, Drexl.
[211] A. F. Uricchio, *Manuale di diritto tributario*, p. 120.
[212] Sentenza del 06.07.1995, causa C-62/93, BP Soupergaz c. Grecia; sentenza del 02.12.1997, causa C- 188/95, Fantask.
[213] Sentenza del 21.02.2006, causa C- 255/02, Halifax.
[214] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[215] Cfr.A.F.Uricchio, *Autonomia regionale differenziata tra criteri di riparto delle funzioni e perequazione finanziaria*, in F. Pastore (a cura di), Il regionalismo differenziato, atti del convegno di Cassino del 5.4.2019, Wolters Kluwer – Cedam, Padova, 2019.
[216] Judgment of 05.02.1963 in Case C-26/62 Van Gend & Loos.
[217]Van Gend & Loos judgment, p. 23. In doctrinal v., per tutti, U. Villani, Una rittura della sentenza "Van Gend en Loos" dopo cinquant anni, in Studi sull'integrazione europea, 2013, pp. 225-237. It is also permissible to refer to the considerations expressed in A. Arena, Curia non facit saltus: origins and evolution of the principle of primacy before the Costa c. Enel judgment, in E. Triggiani et al. (edited by), Dialoghi con Ugo Villani, Bari, 2017, p. 949 ss.
[218] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

their citizens. The judgment of the Court of Justice of *the European Union of 15 July 1964, C-6/64, Costa v. Enel*[219]*,* is the starting point for an important development of case law, which ensured the effective protection of rights protected by supranational legislation, preventing the scope of these rights from differing in different parts of the territory of the Union itself and structurally preventing a conflict with the national laws of the Member States. Among the fundamental principles of primary Community law are the prohibition of the imposition of customs duties on the goods of the Member States and the principle of harmonizing internal rules[220] on indirect taxes, both of which are instrumental to the general principle of the free movement of goods, capital, and services. The case was raised by the lawyer Costa who, challenging the Italian law on the nationalization of electricity, L. 1643/1962, had appealed to the conciliatory court of Milan finding that certain provisions of the Treaty of Rome had been violated and implicitly of Art. 11 of the Italian Constitution. The Italian Constitutional Court had already ruled on this question and, in its judgment of 7 March 1964, No. 14, rejected Mr. Costa's action by establishing the legality of the Law on the State Monopoly based on the principle of *lex posterior derogat priori* (since the laws of ratification of the Treaty had taken place by means of an original law prior to the Monopoly Act). In detail, the Constitutional Court ruled that Community law should give way to a State law whenever the principle of succession of laws applied over time, inevitably affecting the validity and effectiveness of the new legal system[221]. That aporia was also raised by the Court of Luxembourg, which was brought before the Court of Justice by Mr. Costa by means of the reference for a preliminary ruling provided for in Article 10 of the Directive. 177 EEC[222], which had the opportunity to establish a founding principle for the nascent order and in consequential line with Van Gend. The Court ruled that the creation of a new and integrated system with the different legal systems was a choice desired by the Member States in the entry into force of the Treaty of Rome and, consequently, no legislative act, even of constitutional rank, could impose itself on it without jeopardising the uniform application of Community law[223]. The consistency between the rules of the two legal systems is therefore not resolved within the supranational one by applying the criterion of lex superior, but it still manages to prevent a national rule, even when issued after the supranational one, from derogating from the

latter. The Court continues to affirm the same principle by drawing a distinction from the traditional

[219] Judgment of the Court of Justice, Costa v ENEL, Case 6/64 (15 July 1964).

[220] In this regard cfr., Ch. Smekal/ R. Sausgruber, *Determinants of Foreign Direct Investment in Europe*, in, Jr. Chen, Foreign Direct Investment, 33-42, Houndmills: McMillan Press.

[221] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017); U. Villani,Tutela dei diritti fondamentali nel 'dialogo' tra corti europee e giudici nazionali, in Diritti fondamentali e Cittadinanza dell'Unione Europea (a cura di L. Moccia), FrancoAngeli, Milano, 2010, p. 115 ss., e, con il titolo La cooperazione tra i giudici nazionali, la Corte di giustizia dell'Unione europea e la Corte europea dei diritti dell'uomo, in La cooperazione fra Corti in Europa nel tutela dei diritti dell'uomo (a cura di M. Fragola), Editoriale Scientifica,

[222] Article 10 of the Directive. 177 EEC.

[223] Cfr. Ch. Smekal/ Jr. Chen, *International Tax Competition: A Case for International Cooperation in Globalization*. Transition Stud. Rev. 11, 59–76 (2004).

internationalist approach: unlike the common international treaties, the EEC Treaty established its own legal order, integrated into the legal order of the Member States when the Treaty entered into force and which national courts are required to observe. By establishing a community without limits of duration, with its own bodies, personality, legal capacity, capacity for representation at international level, and of effective powers having a limitation of competence or a transfer of powers of the States to the Community,[224] they have limited, albeit in limited fields, their sovereign powers and thus created a set of law binding on their citizens and for themselves. Furthermore, the Court of Justice itself continues, the transfer made by the Member States to the Community legal order, to the rights and obligations corresponding to the provisions of the Treaty, therefore implies a definitive limitation of their sovereign powers; Consequently, the obligation imposed on the Member States of the EEC Treaty is integrated into the legal order of the Member States[225], has an imperative value in them and directly concerns their citizens, to whom it confers individual rights which national courts must protect[226]. The use of the term transfer in relation to the transfer of powers from the Member States to the European Community is significant in that it indicates that Community competences retain the same character and nature as those previously belonging to the States, thus configuring themselves as sovereign rights. The position of the Court of Justice in these two decisions has remained largely unchanged over time. On the contrary, some argumentative passages have been taken up and developed: so, it has been explicitly argued that the foundation and the strength of persuasion of this rule (of the superiority of Community law) emerges from the principle of unity and functional capacity of European law. The validity of Community law can only be judged in accordance with Community law, since it is created by the founding Treaty, so that it cannot be left out by a rule of national law on the basis of Community law, so that it derives from an autonomous legal source if the legal basis of the Community itself is not to be called into question *(judgment of 17.12.1970 in Case C-11/70 International Handelsgesellschaft).*[227] The Court then goes so far as to state expressly the superiority of the Community rule over the internal rule, whether pre-existing or later, considering that the primacy of Community law is an indispensable condition for the functioning and, in some respects, for the very existence of the European Community[228]. In line with this approach, the Court of Justice has even

[224] A. F. Uricchio, *Percorsi di diritto tributario*, p. 55.

[225] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

[226] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

[227] Judgment of 17.12.1970 in Case C-11/70 International Handelsgesellschaft.

[228] For a better understanding oft the protection related to fundamental rights in the dialogue between European courts and national courts cfr. U. Villani, Tutela dei diritti fondamentali nel 'dialogo' tra corti europee e giudici nazionali, in Diritti fondamentali e Cittadinanza dell'Unione Europea (a cura di L. Moccia), FrancoAngeli, Milano, 2010, p. 115 ss., e, con il titolo La cooperazione tra i giudici nazionali, la Corte di giustizia dell'Unione europea e la Corte europea dei diritti dell'uomo, in La cooperazione fra Corti in Europa nel tutela dei diritti dell'uomo (a cura di M. Fragola), Editoriale Scientifica.

gone so far as to classify the Treaty of Rome as a basic Constitutional Charter capable of establishing a community of autonomous law independent of the legal systems of the Member *States (judgment of 23.04.1986 in Case C-294/83 Le verts).*[229] The effective recognition of the automatic precedence of Community rules on incompatible national law, without any need for a receptive act or even the repeal or annulment of conflicting national rules, it has been established by the Court itself that << the national court, which is responsible for applying, within the scope of its jurisdiction, the provisions of Community law, has an obligation to ensure the full effectiveness of those rules, disapplying, if necessary, on its own initiative, any conflicting provision of national law, without having to request or wait for its prior removal by legislative or other constitutional procedure>> *(judgment of 09.03.1978 in Case C-106/77 Simmenthal).*[230]

V. RELATIONSHIP BETWEEN THE PRIMACY OF COMMUNITY LAW AND STABILITY OF NATIONAL JUDGEMENT IN ITALY

The question has recently come to the attention of the Court of Justice, which is called upon to rule on the holding of the national judgment contrary to a rule of the Union. There are two principles that are highlighted: the primacy of the law of union; the certainty of legal relations, underlying the stability recognized to the judgment. The question concerns the inapplicability of Article 2909 of the Civil Code[231] as an internal rule aimed at establishing the principle of the authority of the judge, in cases where the judicial assessment, which has become final, is contrary to an EU rule.[232]The analysis postulates the need to balance the duty of loyal cooperation, which is incumbent on the Member States bound by respect for and implementation of Union law, and the principle of procedural autonomy of the States themselves[233]. The Court of Justice accepts a guideline which can be summarized in three essential points: the stability of the national judgement is bound to prevail specifically with regard to its so-called internal effects: the judgment cannot be called into question with regard to the legal relationship now defined, even if an idea of conflict with Union law is highlighted;[234] the primacy of Union law, on the other hand, returns to operate with regard to the so-called external effects of the judgment: the effectiveness of the judgment concerns a different process, even if it is pending between the same parties and in which the same legal relationship is highlighted[235],

[229] Sentenza del 23.04.1986, causa C- 294/83, Le Verts, in Racc., 1986, 1339.

[230] A. F. Uricchio, *Percorsi di diritto tributario*, p. 55.

[231] Cfr. C.A. Giusti, *La coprorate governance delle societá a partecipazione pubblica*, G. Giappichelli editore; From the same author compare, C.A.Giusti, *La gestione delle sopravvenienze contrattuali, rinegoziazione e intervento giuridico,* Edizione Scientifiche Italiane.

[232] A.F. Uricchio, *Italien der Autonomien. Sanfte Entwicklung und Föderalismus (Zusammenfassung*), in A.Uricchio, F.L.Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* Cacucci editore, 2020.

[233] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

[234] R. Garofoli/ G. Ferrari, *Manuale di diritto amministrativo*, 2020, p. 25 ff.

[235] cfr. U.Villani, *Istituzioni di Diritto dell'Unione europea, Bari,* Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

therefore the need to safeguard legal certainty in the national legal system cannot be established; the need to ensure the primacy of Union law once again prevails;[236]the primacy of EU law operates, in any event, in the field of State aid, also in the face of a national judgment which is incompatible with it: the conflict of the national judgment with EU law determines the disapplication of Article 2909 civil code,[237] in so far as the application of that provision prevents the recovery of State aid granted contrary to Community law (in this case, a Commission decision)[238]. The primary precedence of the union rule over the final judgment is justified by the exclusive nature of the jurisdiction assigned to the Union in this field: the judgment of the national court, which has become final, has in fact been taken in an area exceeding the competence of the Member States.[239]The Court of Justice has made it clear that the principle of the primacy of Community law has such force that it also imposes itself on the national judgment, so, where it has been formed contrary to the Community law[240], it must even be disapplied. Reference is made to the judgement Lucchini (Court of Justice, 18 July 2007, C- 119/05).[241]The case concerned the decision taken by the Public Administration to withdraw in self-protection the measure granting aid granted as State aid, as well as to recover the sums paid, in order to comply with the content of the decision taken by the European Commission which had declared the aid granted for the benefit of the company incompatible with the common market. The Administration had not considered the judgment formed internally prior to the adoption of the Decision of the European Commission, concerning the assessment of the legitimacy of the measure by which the Administration had originally ordered the granting of the aid to the company[242]. According to the Court, Community law is not the application of a provision of national law, such as Article 2909 of the Italian Civil Code,[243] which is designed to establish the principle of the authority of what is judged, in so far as the application of that provision prevents the recovery of State aid granted contrary to Community law and whose incompatibility with the common market has been declared by a Commission

[236] A. F. Uricchio, *Manuale di diritto tributario*, Cacucci Editore, 2020, p. 120,
[237] Article 2909 Civil Code.
[238] In this regard cfr., Ch. Smekal/ R. Sausgruber,*Determinants of Foreign Direct Investment in Europe*, in, Jr. Chen, Foreign Direct Investment, 33-42, Houndmills: McMillan Press.
[239] Corte Cost. 7 marzo 1964, n. 14.
[240] For a better understanding oft the protection related to fundamental rights in the dialogue between European courts and national courts cfr. U. Villani, Tutela dei diritti fondamentali nel 'dialogo' tra corti europee e giudici nazionali, in Diritti fondamentali e Cittadinanza dell'Unione Europea (a cura di L. Moccia), FrancoAngeli, Milano, 2010, p. 115 ss., e, con il titolo La cooperazione tra i giudici nazionali, la Corte di giustizia dell'Unione europea e la Corte europea dei diritti dell'uomo, in La cooperazione fra Corti in Europa nel tutela dei diritti dell'uomo (a cura di M. Fragola), Editoriale Scientifica.
[241] Corte Giust., Grande sezione, 18 luglio 2007 C-119/05.
[242] Ch.Smekal / H.Winner, *Außerbudgetäre Finanzierung und verdeckte Staatsverschuldung. Eine finanzwissenschaftliche Betrachtung vor dem Hintergrund der monetären Integration in Europa*. politicum, 74, 37-45.
[243] Article 2909 of the Italian Civil Code.

decision which has become final.[244]Subsequently, however, the Court of Justice (Cort. Giust. EC, Sez. II, 3 September 2009, Omniclub Bankruptcy)[245] watered down the scope of the Lucchini decision, stating that Community law does not require a national court to disapply the internal procedural rules which give authority to what is judged on a decision, even where that would enable an infringement of Community law[246] by that decision to be remedied. This is because, in order to ensure both the establishment of law and legal relations and the proper administration of justice[247], it is important that judicial decisions which have

become final after the exhaustion of the available remedies or after the expiry of the time limits laid down for these appeals can no longer be called into question (*judgment of 30 September 2003 in Case C-224/01 Köbler).*[248] In express reference to the Lucchini judgment, the Court of Justice, in part by distancing itself from it, states that it is not designed to call into question the analysis carried out above, since that judgment concerned a very special situation in which the principles governing the division of powers between the Member States and the Community in the field of State aid were at issue, given that the Commission of the European Communities has exclusive competence to examine the compatibility of a national State aid measure with the common market. Against this premise, however, the Omniclub judgment contains several statements which nevertheless mitigate the so-called external effectiveness of the judgment (i.e., the effectiveness of the judgment of a different trial, always pending between the same parties).[249] According to national case-law, where two judgments between the same parties refer to the same legal relationship, and one of the two has been settled by a final judgment[250], the assessment thus made with regard to the legal situation or the answer of questions of fact and law relating to a fundamental point common to both cases, forming the essential logical premise of the statute contained in the provision of the judgment with authority of what is judged, precludes the review of the same point of law established and resolved, and even if the subsequent judgment has a

[244] R. Garofoli/ G. Ferrari, *Manuale di diritto amministrativo*, Nel diritto editore,2020, p. 26 ff.

[245] Cort. Giust. EC, Sez. II, 3 September 2009, Omniclub Bankruptcy; Cfr. C.A. Giusti, *La coprorate governance delle societá a partecipazione pubblica*, G. Giappichelli editore; From the same author compare, C.A.Giusti, *La gestione delle sopravvenienze contrattuali, rinegoziazione e intervento giuridico,* Edizione Scientifiche Italiane; Cort. Giust. EC, Sez. II, 3 September 2009, Fallimento Omniclub.

[246] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

[247] A.F. Uricchio, *Italien der Autonomien. Sanfte Entwicklung und Föderalismus (Zusammenfassung*), in A.Uricchio, F.L.Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* Cacucci editore, 2020.

[248] Judgment of 30 September 2003 in Case C-224/01 Köbler; A. F. Uricchio/ F. L. Giambrone, *European Finance at the Emergency Test*, Collana del Dipartimento Jonico in: Sistemi giuridici ed Economici del Mediterraneo: societá, ambiente e cultura, Cacucci editore, 2020, p. 277.

[249] Cfr. Ch. Smekal, *Finanzausgleich- Föderalismus- Gemeindeautonomie*, 371, in: Andreas Kohl und Alfred Strinemann (Hrsg.), Österreichisches Jahrbuch für Politik, München, Wien 1979.

[250] Cfr. C.A. Giusti, *La coprorate governance delle societá a partecipazione pubblica*, G. Giappichelli editore; From the same author compare, C.A.Giusti, *La gestione delle sopravvenienze contrattuali, rinegoziazione e intervento giuridico,* Edizione Scientifiche Italiane.

finality other than those which constituted the purpose and petitum of the first[251]. This principle is also considered to be derogated from in respect of the legal relations of duration and the periodic obligations which may constitute its content, on which the court gives an assessment of a present case but with consequences which will continue to be expressed in the future, so that the authorization of the judgment prevents the review and deduction of questions aimed at a new decision on those already resolved by final decision, which, therefore, is effective even in the time following its adoption, with the sole limitation of a fact or legal occurrence, which changes the material content of the report or amends its Regulation.[252]In Omniclub, the Court of Justice ordered that this principle be exceeded, stating that the judgment held to be contrary to Community law, although it could not be called into question as to the report on which it has given its opinion, cannot, however, explain external effects (i.e. be considered binding in other judgments, between the same parties in which the same duration ratio is inferred). Such an interpretation of the principle of the judgment, in the Court's view, ultimately results in the consequence that, where the judicial decision which has become irrevocable is based on an interpretation contrary to Community law[253], the incorrect application of those rules would be reproduced

with regard to each new period, without it being possible to correct that misinterpretation.[254] So, ultimately, it has to be considered, in the opinion of the Court of Justice, that although, in the absence of a Community matter in this field, the procedures for implementing the principle of the authority of what is judged fall within the national legal order of the Member States in accordance with the principle of procedural autonomy in which they enjoy, however, they cannot be structured in such a way as to render in practice impossible or excessively difficult the exercise of the rights conferred by the Community legal order (principle of effectiveness). It can therefore be concluded that a distinction must now be made between internal and external effects in the face of a judgment which is contrary to Community law.[255] The internal effects remain firm (the issue decided cannot be called into question), except in the case of State aid, in which the European Union has exclusive competence; external effects, on the other hand, must be excluded where the judgment to be invoked is contrary to Community law, since otherwise it would make it excessively difficult to exercise the right conferred by European law. In this case, the need to ensure the primacy of Community law, which would otherwise be undermined, prevails if the erroneous interpretation of the VAT rules, formulated by the Member State in terms different from the principles expressed in community intervention following

[251] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[252] Cass. N. 16959/2003; Cass n. 9685/2003; Cass n. 19426/2003; Cass.n. 15931/2004 e S.U.n. 13916/2006.
[253] Cfr.G. Corasaniti, *L'eliminazione della doppia imposizione nell'ordinamento italiano e nell'ordinamento federale tedesco*, in Dir. prat. trib., 1997, III, 433-453.
[254] In this matter, see, Chiné/ Fratini/ Zoppini, manuale del diritto civile, Roma 2020.
[255] A. F. Uricchio, *Manuale di diritto tributario*, Cacucci Editore, 2020, p. 120.

the formation of the judgment, could be reproduced for each new tax year.[256] The Court of Justice therefore mitigates the external effectiveness of the national judgment by imposing the primacy of Community law, which results in the disapplication of Article 2909 of the Civil Code[257]. These limitations on the external effects of the judgment were promptly transposed by the Court of Cassation with the judgment of Sez. trib., 10 May 2010, n. 12249.[258] Again on the relationship between Community law and the judgement it should also be noted the Community jurisprudence according to which the Public Administration has the obligation to review an administrative act adopted in violation of Community law, even if there is now a judgment that has ruled out the illegality of the measure itself.[259] An important stage in the evolution of the relationship between domestic law and Community law was with the recent ordinance of the Constitutional Court (15 April 2008, n.103)[260], which for the first time admitted in the constitutionality judgment of the laws the possibility of making the preliminary reference to the Court of Justice, pursuant to Art. 267 TFEU.[261] In this order, the Constitutional Court does not deny its previous case law aimed at circumventing the legitimacy to raise the question of a preliminary ruling in the courts in an incidental way - where a national judge exists - but admits it only in the judgments in the main proceedings, where the Court itself is a judge not of last, but even of the only instance.[262] The order in question shows that, as regards the existence of the conditions for this Court to raise a question before the EC Court of Justice[263] on the interpretation of Community law, it should be noted that the Constitutional Court, although in its particular position as the supreme constitutional guarantee body in national law, constitutes a national jurisdiction, in particular a jurisdiction of a single body, it is therefore in the judgments of constitutional legitimacy, unlike those promoted incidentally, this court is the only judge called upon to rule on the dispute; that consequently, if, in the judgments of constitutional legitimacy promoted in the main way, it is not possible to make the reference for a preliminary ruling referred to in Art. Article 234 of the EC Treaty[264] would affect the general interest in the uniform application of

[256] Cfr. Ch. Smekal/ R. Sendlhofer/ H. Winner, *Einkommen vs. Konsum.Ansatzpunkte zur Steuerreformdiskussion.*

[257] Cfr. C.A. Giusti, *La coprorate governance delle societá a partecipazione pubblica*, G. Giappichelli editore; From the same author compare, C.A.Giusti, *La gestione delle sopravvenienze contrattuali, rinegoziazione e intervento giuridico,* Edizione Scientifiche Italiane.

[258] Court of Cassation with the judgment of sez. trib., 10 May 2010, n. 12249.

[259] Cfr. Lang/Rust/Owens/Pistone/Schuch/Staringer/Storck/Essers/Kemmeren/Öner/Smit, *Tax Treaty Case Law around the Globe 2019*, IBFD und Linde 2020

[260] Constitutional Court 15 April 2008, n.103.

[261] Cfr. A. F. Uricchio, *Die zwischen der Haushaltsaufsicht den ausserordentlichen Finanzinstrumenten und der sogenannten Windfall taxes anfallenden Kosten der Sozialrechte*, p.131ss, in, A. F. Uricchio/ F.L.Giambrone, *Entwicklunegn im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses.*

[262] On this subject, Gnes, *il contenzioso*, in Giorn. Dir. amm., 2013, 5, 479.

[263] Lang/ Pistone/ Rust/ Schuch/ Staringer/ Storck, *CJEU, Recent Developments in Direct Taxation 2019*, Linde 2020

[264] For an in- depth study of European Union law cfr. U. Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

Community law[265], as interpreted by the ECJ.[266]A turning point towards the monist conception seems, however, to be carried out by the Constitutional Court which, by judgment *of 28 January 2010, no. 28,* declared the illegality of a law conflicting with a Community rule not directly applicable, after having taken note of the impossibility of disapplying it or adopting a compliant interpretation.[267] To this end, the Court has stated that the verification of compliance with internal legislation with Community rules is functional to the recognition of the self-implementing nature of EU rules[268], in particular community waste directives[269]. In support of this outcome, the Court defined the Community rules as binding and superordinate to ordinary laws in Italian law by means of Articles 11 and 117(1) of the Constitution. The Consulta thus seems to distance itself from positions that appear increasingly reargued in the face of repeated rulings by the Court of Justice aimed at encouraging an increasingly penetrating impact of Union law on the Italian legal system.[270]

VI. A VIEW TO GERMANY. CONCEPT OF THE EU AS A UNION OF STATES AND CONSTITUTIONS FROM A GERMAN POINT OF VIEW. EU AS A DYNAMIC INTEGRATION ASSOCIATION

Article 1(2) TEU describes the European Union as a new stage in the achievement of an ever-closer Union among the peoples of Europe. The wording underlines that the objective of dynamically progressive densification and deepening of integration should not yet be completed with the Maastricht Treaty and the creation of the EU. On the contrary, it emphasizes the dynamic development process of the Union's own[271], which, expressed in the contractual preambles, shaped its self-image as a special purpose association of functional integration from the outset[272], which is consistent with the intention of the founders. It has always been typical of the Union to develop the political and legal interdependence of the Member States, which, in contrast to the major allegations, has proved successful time and again in practice and which has earned the EU[273] the appropriate name

[265] Cfr. for possible solutions regarding tax hermonization: Ch. Smekal- E. Thöni, *Tax Harmonization vs. Tax Competition. The case of indirect taxation in the European Community*, in, J.R. Chen- Ch. Smekal- Economic Effects of Regional integration in Europe and North America, Veröffentlichungen der Universität Innsbruck, p. 131 ff.
[266] Cort. Cost., ord.n. 103/2008.
[267] Art. 183, paragraph 1, paragraph n), of the Environmental Code (legislative decree of 3 April 2006, n. 152), in the text preceding the amendments introduced by art. 2, paragraph 20, d.lgs. 16 January 2008, No 4.
[268] A. F. Uricchio, *Percorsi di diritto tributario,* Prefazione di Franco Gallo, Cacucci editore 2017.
[269] Cfr. Ch. Smekal, *Stabilisierungspolitik im Bundesstaat*, Wirtschaftsdienst, Verlag Weltarchiv, Hamburg, Vol. 58, Iss. 5, pp. 231-235.
[270] Cfr. Mengozzi, *Il diritto comunitario e dell´ unione europea*, in Trattato di diritto commerciale e di diritto pubblico dell´ economia, diretto da Galgano, Padova, 1997, XV, 143 ff; Capotorti, *Corte di Giustizia della Comunitá europea, in Enc. Giur. Treccani, IX, Roma, 1988.*
[271] Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmayer/ G. Seilerd/ Ch. Smekal, *Probleme des Finanzausgleichs II*, Duncker & Humboldt, 1980 Berlin.
[272] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[273] Cfr. A. F. Uricchio, *Die zwischen der Haushaltsaufsicht, den ausserordentlichen Finanzinstrumenten und der sogenannten windfall taxes anfallenden Koten der Sozialrechte*, p. 131 ff., in, A. F. Uricchio/ F.L.Giambrone, Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses, 2020.

for the Integration Association. With the dynamism of the basic treaties in order to achieve the objectives of the Treaty, the then EC has made integration its constitutional principle. In this sense, the EU is still in a constant process of communitarisation,[274] which is reflected in changes in quality towards a new, hitherto unknown form of organization, based on the model of a European federal state.[275] In the Maastricht decision[276], the Federal Constitutional Court described the EU as a union of the peoples of Europe and a dynamic network of democratic states based on the international basic treaties and politically on the adherence to the treaties of the individual Member States.[277] According to the Federal Constitutional Court, however, the Member States remain carriers of the sovereignty in this group of states. In its Lisbon decision, too, the Court of First Instance uses, for the legal classification of the current state of Integration of the EU, the concept of a union of states, which is shaped by the Maastricht judgment, which covers a close, long-term link between sovereign states, which exercises public authority on a contractual basis, but whose basic order is subject solely to the decision of the Member States and in which the peoples - that is, the national citizens - of the Member States remain the subjects of democratic legitimacy.[278]In German literature, there have long been various currents that seek an alternative classification of the EU. Among the many conceptual reprints with which the EU is to be covered, the approaches based on the concept of the network appear to be the most meaningful. In this respect, the approach developed by Pernice as a counter-draft to the group of states, according to which the primary law of the EU[279] and the constitutions of the Member States have merged into a single constitutional network, comes into focus.[280] The concept of the Constitutional Association[281] starts with the individual, the citizens of the Union: with the help of a functionally determined post-national concept of the constitution, the constitution of the European Union as a political community of the citizens of the Member

States who define themselves as citizens of the Union should be addressed without implying statehood.[282] The citizens are thus subjects of legitimacy, but also addressees of their national law and

[274] With regard of the future of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.
[275] Cfr. M. Draghi, *Stabilisation policies in a monetary union*, Speech by Mario Draghi, President oft he ECB, ath the Academy of Athens, 2019.
[276] BVerfG, 12 ottobre 1993, Az. 2 BvR 2134, 2159/92, BVerfGE 89, 155.
[277] Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform*, 1999, S. 9ff.
[278] A.F. Uricchio, *Italien der Autonomien. Sanfte Entwicklung und Föderalismus*, in, A.F. Uricchio/ F.L.Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* Collana del Dipartimento Jonico in Sistemi Giuridici ed Economici del Mediterraneo: societá ambiente, culture, 2020, p. 197.
[279] Cfr. A. F. Uricchio/ F. L. Giambrone*, European Finance at the Emergency Test,* Collana del Dipartimento Jonico in: Sistemi giuridici ed Economici del Mediterraneo: societá, ambiente e cultura, Cacucci editore, 2020, p. 277.
[280] Cfr. Ch. Smekal, *Verschuldungsbeschränkungen und Verschuldungsverhalten der Gebietskörperschaften. Ein Vergleich zwischen der Bundesrepublik Deutschland und Österreich*, p.71 ff, in, G.Kirsch/ Ch. Smekal/ H. Zimmermann, *Beiträge zu ökonomischen Problemen des Föderalismus.*
[281] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[282] Cfr. Lang/ Rust/ Owens/ Pistone/ Schuch/ Staringer/ Storck/ Essers/ Kemmeren/ Öner/ Smit, *Tax Treaty Case Law around the Globe 2019*, IBFD und Linde 2020.

common European standards. As formal, but related, orders form a material unit. The concept of the Constitutional Association (Verfassungsverbund) has found, although not always with the same content, at least conceptually diverse followings. In recent literature, there is also an attempt to work out the federal features of the EU and thus give a more federal character to the concept of the association of states. Federation of States as a starting point.[283] The concept of a union of states derives from the controversial Maastricht judgment of the Federal Constitutional Court, in which the EU is described as the Union of the Peoples of Europe (Article 1(2) TEU) and as a dynamic ally of democratic states.[284]It is to Kirchhof[285], the judge-rapporteur in the Maastricht judgment, that the now famous concept of the European Union as the "Union of States" ("Staatenverbund")[286] is due, a form of integration to be placed between a mere confederation of states and a real international organization. For Kirchhof, in other words, it was important to ensure that states, despite the dynamic process of integration also based on the implied powers referred to in the flexibility clause contained in Art. 352 TFEI, remained in a position of control over the "integration programme" dictated by the national parliaments, because only in this way could the democratic principle be preserved. According to the constitutional judge Paul Kirchhoff, the Association of States is based on a legal and active Community of independent States, on a European Unity in regional diversity. In this group of States, the Member States remain carriers of the sovereignty, but to what extent is disputed. However, this emphasis does not adequately capture the dynamic process in which the open constitutional State finds itself. Insufficient account is taken of the change in the statehood of the Member States in the context of European integration. The substantive specification of the concept of the association of states can therefore only succeed if it does not adhere indiscriminately to the classical concept of the concept of the nation-state. Accordingly, the focus is more on the alliance element, the union of states.[287] First, this is a perfectly correct expression of the fact that the EU is no longer just a loose federation of sovereign states, but rather a union.[288]

[283] Cfr. A. F. Uricchio, *Die zwischen der Haushaltsaufsicht den ausserordentlichen Finanzinstrumenten und der sogenannten Windfall taxes anfallenden Kosten der Sozialrechte*, p.131ss, in, A. F. Uricchio/ F.L.Giambrone, *Entwicklunegn im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses.*

[284] F.C. Mayer, *Auf dem Weg zum Richterfaustrecht?: Zum PSPP-Urteil des BVerfG*, *VerfBlog*, 2020/5/07, *https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht/.*

[285] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

[286] For an in- depth study of the future of the European Union cfr. M. Draghi, *Europas streben nach einer perfekten Union*, Rede von Mario Draghi, Präsident der EZB, Malcom Wiener Lecture in international Political Economy, bei der Harvard Kennedy School, Cambridge, 9. Oktober 2013.

[287] W. Schön, *Einordnung der neuen Regelungsvorschläge in die internationale und deutsche Steuerarchitektur* (Pillar 1/2) DIHK-Fachtagung zum OECD-Projekt „Besteuerung der digitalisierten Wirtschaft“, Virtuell, November 2020.

[288] Ch. Smekal/ E. Theurl, *Finanzkraft und Finanzbedarf von Gebietskörperschaften. Analyse und Vorschläage zum Gemeindefinanzausgleich in Österreich,* Böhlau Verlag, p. 30.

VII. BRIEF INTRODUCTION TO THE SAFEGUARD CLAUSE OF THE AR. 23 PARAGRAPH 1 P. 3 OF THE FUNDAMENTAL LAW AS A LIMIT TO INTEGRATION. ITS CONSTITUTIONAL IDENTITY AND GUARANTEE OF ETERNITY (EWIGKEITSKLAUSEL).

Article 23. Paragraph 1 p. 3 of the Fundamental Law, with the possibility of enacting constitutionally amending integration laws, links the substantive legal barrier of Article 79(3) of the Basic Law[289]. The integration laws must not affect the division of the confederation into Länder, their fundamental participation in legislation, or the principles of Articles 1 and 20 of the Basic Law. In contrast to the structural safeguard clause of Article 23 sec. 3 in conjunction with Article 79(3) of the basic standard, which is coined on the conditions of integration, does not only intrusively show integration-limiting effect: it is the defensive ness of the Basic Law, in which it expressly protects its core holdings also against interference with integration. The safeguard clause can therefore be described as a barrier to integration about the German constitutional order and thus to the transferring subject. While the structural safeguard clause concerns the European Union[290] as such, the safeguard clause takes up its importance for the basic legal order.[291]At first glance, the concept of constitutional identity corresponds to the provision of Article 4(2) TEU. However, it is unclear what the term means in detail and in what relation it relates to the guarantee of eternity of Art. 79 sec. 3 GG and to Article 4(2) TEU. Although constitutional identity[292] has not only been the central concept of integration borders since the Lisbon ruling of the Federal Constitutional Court, its potential significance has been developed to a very large extent there.[293]The constitutional identity already served as a barrier to integration in the Solange I decision of the BVerfG in 1974. However, the existence of such a barrier was not simply established.[294] However, there was no exact normative location and reference to the guarantee of eternity. So, it was unclear what would result from the constitutional identity as a barrier to integration. The fact that it was itself taken from the integration authorization of Article 24(1) of the Fundamental Law suggests the following wording: but Article 24 of the Fundamental Law limits this possibility by failing to amend the Treaty[295], which would abolish the identity of the current Constitution of the Federal Republic of Germany by breaking into the constituent structures. Already in this context the question arising as to whether the concept of constitutional identity must be understood further in terms of content than the guarantee of eternity under Article 79(3) of the Basic

[289] W. Schön, *Einordnung der neuen Regelungsvorschläge in die internationale und deutsche Steuerarchitektur* (Pillar 1/2) DIHK-Fachtagung zum OECD-Projekt „Besteuerung der digitalisierten Wirtschaft", Virtuell, November 2020.
[290] Cfr. A. F. Uricchio/ F. L. Giambrone*, European Finance at the Emergency Test,* Collana del Dipartimento Jonico in: Sistemi giuridici ed Economici del Mediterraneo: societá, ambiente e cultura, Cacucci editore, 2020, p. 277.
[291] Breuer, NVwZ 1994, 417, 422
[292] Cfr. Ch. Smekal, *Verschuldungsbeschränkungen und Verschuldungsverhalten der Gebietskörperschaften. Ein Vergleich zwischen der Bundesrepublik Deutschland und Österreich*, p.71 ff, in, G.Kirsch/ Ch. Smekal/ H. Zimmermann, *Beiträge zu ökonomischen Problemen des Föderalismus.*
[293] BVerfGE 123, 267, 353f.
[294] For a deeper understanding concerning the instruments related to a comparison see, J.M.Rainer, *Introduction to Comparative Law.*
[295] Cfr. A. F. Uricchio/ F. L. Giambrone*, European Finance at the Emergency Test,* Collana del Dipartimento Jonico in: Sistemi giuridici ed Economici del Mediterraneo: societá, ambiente e cultura, Cacucci editore, 2020, p. 277.

Law. In addition to the protective content of the latter, for example, the part of the fundamental right (and not only in its core stock) was regarded as a barrier. There is also talk of an identity which cannot be modified without amending the constitution, but in verse by amending the constitution. However, this integration-limiting content, which goes beyond Article 79(3) of the Fundamental Law[296], was limited in subsequent decisions of the Federal Constitutional Court. Thus, in the Eurocontrol I decision, the fundamental right part was replaced as a benchmark by the fundamental legal principles, which are recognized and guaranteed in the fundamental rights of the Basic Law.[297]

VIII. Integration by constitutional replacement in accordance with Article 146 of the Fundamental Law. – 9. PSPP judgment of the BVerfG of 5.5.2020

If the controversial integration limit under Article 23(1) sentence 3 has been reached in conjunction with Article 79(3) of the Basic Law, the Federal Constitutional Court appears to still have the possibility of replacing the Basic Law with a new constitution. However, a constitutional amendment could be limited to the amendment of the norms of the Basic Law that prevent integration, but could otherwise be taken over. The Basic Law itself, with its last norm, contains a provision which is concerned with its replacement by a new constitution. However, the regulatory content of Art 146 GG is disputed. The spectrum of opinions ranges from the classification as an unconstitutional constitutional right to the accusation of content abuse to the legal form of constitutional rewriting[298]. The question, which was not clearly answered by the Federal Constitutional Court in the Lisbon judgment, is then of decisive importance as to whether the constitutional amendment in accordance with Article 146 is also subject to the substantive restrictions of Article 79(3).[299]If this is affirmed, Article 146 of the Basic Law does not, in any event, provide materially with a far-reaching possibility of integration. It is true that the Federal Constitutional Court has mentioned several times in the Lisbon judgment the possibility of constitutionally replacing integration (BVerfGE 123, 267, 343 and 347, 364), but without going into further details on their conditions and modalities[300]. While in the Maastricht judgment there is still a binding of the constitutional power by Article 79 sec. 3 GG itself

[296] Cfr. F. L. Giambrone, *Finanzföderalismus als Herausforderung des Europarech*ts, p. 135 ff; With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

[297] P. Hilpold, Da Solange a PsPP: alla ricercar delle radici di un dialogo tra Corti naufragato in un incomprensibile soliloquio.

[298] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

[299] Canpenhaus/ Unruh, in, v. Mangoldt/ Klein/ Starck (Hrsg.(, GG, Bd 3, Art. 146; Dreier, Gilt das Grundgesetz ewig? 2009, p. 90; Isensee,in: Ders/ Kirchof (Hrsg.), HStR, Bd. VII, 1992, § 166, Rn. 61; Kirchof, Brauchen wir ein neues Grundgesetz?, 1992, S. 15.

[300] For an in- depth study of the future of the European Union cfr. M. Draghi, *Europas streben nach einer perfekten Union*, Rede von Mario Draghi, Präsident der EZB, Malcom Wiener Lecture in international Political Economy, bei der Harvard Kennedy School, Cambridge, 9. Oktober 2013.

or even its contents as an over-positive right also in the context of a constitutional amendment material binding effect: Whether this binding of the eternity clause applies even to the constitutional power because of the universality of dignity, freedom and equality, that is to say, in the event that the German people, in free self-determination, but in a continuity of legality to the rule of the Basic Law, gives themselves a new constitution. can remain open. (Federal Constitutional Court 123, 267, 343). There is no explicit reference to Article 146 of the Fundamental Law, so that the General Court's view of its regulatory content, as to whether a constitutional replacement to be subsumed under Article 146 of the Basic Law is subject to the bindings of Article 79(3), is unclear.[301] However, the appeal to the continuity of legality could be based on the interpretation of Article
146 GG as a normative bridge between the Basic Law and a new all-German constitution.[302] According to that provision, the provision would also have a certain regulatory effect in the context of a constitutional amendment.[303]In addition, the Court also addresses standards for accession to a European federal state[304] under the abandonment of the Basic Law: <<If, on the other hand, the threshold for the federal state and the renunciation of national sovereignty were exceeded, which in Germany presupposes a free decision of the people beyond the current validity of the Fundamental Law, democratic requirements would have to be complied with at a level that would meet the requirements for the democratic legitimacy of a state-organized ruling association. This level of legitimacy could then no longer be required by national constitutional regulations >> (BVerfGE 123, 267, 364).[305] What is to be the result of this standard of democratic legitimacy remains open. If a referral of the Federal Constitutional Act to post-constitutional questions is permissible, jurisdiction could extend to the transition to a European federal state.[306]

IX. PSPP JUDGMENT OF THE BVERFG OF 5.5.2020.

The ruling of the Federal Constitutional Court, announced on 5.5.2020, has provoked strong reactions in politics, the media, and the public. It attests to the potential to shake the foundations of the European Union (EU), since it partly disregards a preliminary ruling of the ECJ[307] which was given in

[301] Cfr. Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmeyer/G. Seilerd / Ch. Smekal, *Probleme des Finanzausgleichs II*, Duncker & Humboldt, 1980 Berlin.
[302] P. Hilpold, Da Solange a PSPP: alla ricercar delle radici di un dialogo tra Corti naufragato in un incomprensibile soliloquio.
[303] Dreier, in: Ders (Hrsg.), GG, Band III, Art. 146 Rn. 23 sowie zur Gegenansicht Lerche, in: Isensee/ Kirchof (Hrsg.), HStR, Bd VIII, 1995,§ 194 Rn. 63f.
[304] For a deeper understanding and analysis in this regard see, A.F. Uricchio/ F.L..Giambrone, *Schlussfolgerungen,* in A.F.Uricchio/ F.L.Giambrone, Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses, Cacucci editore, 2020.
[305] (BVerfGE 123, 267, 364.
[306] Cfr. A. F. Uricchio/ F. L. Giambrone*, European Finance at the Emergency Test,* Collana del Dipartimento Jonico in: Sistemi giuridici ed Economici del Mediterraneo: societá, ambiente e cultura, Cacucci editore, 2020, p. 277.
[307] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

the referral procedure under Article 267 TFEU.[308] In the quite varied history of the relationship between the two courts, the BVerfG has, for the first time, activated the ultra-vires reservation[309] which it had conceived in its decision on the Maastricht Treaty as a control of 'breaking acts' and which, in the judgment on the Lisbon Treaty,[310] had been more conceptually understood, although much remained vague in this decision[311]. This applies not least to the relationship between the protection of the constitutional core (identity control) in order to protect compliance with the fundamental distribution of competences between the EU and the Member States (ultra-vires control).[312] Although confirmed on various occasions and elaborated in more detail in the conditions, notably in the Honeywell decision, the reservation has in fact never been applied before.[313] Now it has applied it in two directions: (I) the decision of the ECJ of 11.12.2018 (paragraph 118 et seq.)[314] and (ii) the decisions of the Governing Council (paragraphs 165 et seq.) establishing and implementing a programme for the acquisition of sovereign debt, Public Sector Purchase Programme – PSPP.[315]As a result, the BVerfG (partially) has negated the binding effect of a decision of the ECJ.[316] It is feared that the shocks

[308] Cfr. A. F. Uricchio, *Die zwischen der Haushaltsaufsicht, den ausserordentlichen Finanzinstrumenten und der spgenannten windfall taxes anfallenden Kosten der Sozialrechte,* p. 131, in, A.F. Uricchio/ F.L.Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses*, 2020.

[309] Cfr. Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmayer/ G. Seilerd/ Ch. Smekal, *Probleme des Finanzausgleichs II,* Duncker & Humboldt, 1980 Berlin.

[310] BVerfGE 123, 267 (353 f., 399 f.) = NJW 2009, 2267 = EuZW 2009, 552 Ls.

[311] For an in- depth study of the future of the European Union cfr. M. Draghi, *Europas streben nach einer perfekten Union*, Rede von Mario Draghi, Präsident der EZB, Malcom Wiener Lecture in international Political Economy, bei der Harvard Kennedy School, Cambridge, 9. Oktober 2013.

[312] Restrictively, a "sufficiently qualified infringement" was required and a referral to the ECJ was required, see BVerfGE 126, 286 = EuZW 2010, 828 paragraphs 60 f., 101 f.; Calliess in LA-Stein, 2015, 446 (460 ff.).

[313] Thiele, VB vom Blatt: Das BVerfG und die Büchse der ultra-vires-Pandora, 5.5.2020, verfassungsblog.de/vb-vom-blatt-das-bverfg-und-die-buechse-der-ultra-vires-pandora/.

[314] EuGH, ECLI:EU:C:2018:1000 = EuZW 2019, 162 – Weiss.

[315] Beschluss (EU) 2015/774 der Europäischen Zentralbank v. 4.3.2015 über ein Programm zum Ankauf von Wertpapieren des öffentlichen Sektors an den Sekundärmärkten (Public Sector Asset Purchase Programme, EZB/2015/10, ABl EU 2015 L 121, 20); geändert durch Beschluss (EU) 2015/2101 der Europäischen Zentralbank v. 5.11.2015 zur Änderung des Beschlusses (EU) 2015/774 über ein Programmzum Ankauf von Wertpapieren des öffentlichen Sektors an den Sekundärmärkten (EZB/2015/33, ABl EU 2015 L 303, 106), Beschluss (EU) 2015/2464 der Europäischen Zentralbank v. 16.12.2015 zur Änderung des Beschlusses (EU) 2015/774 über ein Programm zum Ankauf von Wertpapieren des öffentlichen Sektors an den Sekundärmärkten (EZB/2015/48, ABl EU 2015 L 344, 1), Beschluss (EU) 2016/702 der Europäischen Zentralbank v. 18.4.2016 zur Änderung des Beschlusses (EU) 2015/774 über ein Programmzum Ankauf von Wertpapieren des öffentlichen Sektors an den Sekundärmärkten (EZB/2016/8, ABl EU 2016 L 121, 24) und Beschluss (EU) 2017/100 der Europäischen Zentralbank v. 11.1.2017 zur Änderung des Beschlusses (EU) 2015/774 über ein Programm zum Ankauf von Wertpapieren des öffentlichen Sektors an den Sekundärmärkten (EZB/2017/1, ABl EU 2017 L 16, 51).

[316] Vgl. Mayer, Das PSPP-Urteil des BVerfG vom 5.5.2020, Thesen und Stellungnahme zur öffentlichen Anhörung, Deutscher Bundestag, Ausschuss für die Angelegenheiten der Europäischen Union am 25.5.2020, Ausschussdrucksache 19 (21)103, S. 2 Nr. 8, S. 17 Nr. 8.

caused by this, which could not only bring down the entire (fragile) architecture of European unification[317], but would also serve as a model for the disobedience of the Member States of Poland and Hungary, who are often suspected in this regard.[318] This approach is methodologically and systematically questionable and is in clear contradiction to one's own jurisprudence and to the almost unanimous handling in (German) literature.[319] In substance, however, the concerns expressed in the context of the proportionality test can be essentially accepted. This applies to the rejection of the wide-ranging, non-verifiable margins of manoeuvre that the ECJ grants to the ECB and the Euro-system as a whole, and the observance of the economic effects of the PSPP. However, these are not questioning of proportionality, but the enforcement of a decision by the legislator on the distribution of powers that the legislator deliberately took in the Maastricht Treaty. If a measure no longer moves within the scope of the assigned tasks, competences, and powers, it is illegal for that reason alone and the result of a proportionality test is no longer relevant. The question of competence is logically a priority.[320]Through the PSPP judgement it is to be hoped that the cooperation relationship between the courts will become a genuine relationship of cooperation. In this respect, the PSPP ruling could lead to a salutary catharsis. It should be used constructively for the self-reflection of the main actors as well as for a new beginning with the aim of a partnership-dialogue complementarity. [321]"Business as usual" can no longer exist. Even more so, an infringement procedure proposed by some, still in categories of absolute primacy and hierarchy, would be the wrong way to go, since it would not change the basic problem, but it would harden the fronts practically irreparably and, in the end, leave only losers behind.[322] There is no way around this: the ECJ must take the task of maintaining competences in relations between Member States and the EU more seriously than before. The ECJ should be less confrontational and more restrained in terms of safeguarding national constitutional identity.[323]In its PSPP judgment[324], the highest German court, as in several previous decisions, urges compliance with the distribution of powers between the European Union and the Member States. It considers that the purchase programme risks a de facto extension of the competence of monetary union without the

[317] Cfr. Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmayer/ G. Seilerd/ Ch. Smekal, *Probleme des Finanzausgleichs II,* Duncker & Humboldt, 1980 Berlin.

[318] Siekmann, *Gerichtliche Kontrolle der Käufe von Staatsanleihen durch das Eurosystem*(EuZW 2020, 491).

[319] Cfr. A.F.Uricchio/ F.L.Giambrone, *European finance at the Emergency test*, 2020.

[320] Weiter Zilioli in FS f. H. Siekmann, 2019, 257 (261 f.) unter Berufung auf auf neuere Rechtsprechung des EuGH, allerdings in anderem Zusammenhang.

[321] Cfr. Ch. Smekal, *Standortpolitik vor globalen Rahmenbedingungen,* p.259 ff, in, Ch. Smekal/ T. Theurl, Globalisierung, Mohr Siebeck.

[322] Cfr. Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmeyer/ G. Seilerd/ Ch. Smekal, *Probleme des Finanzausgleichs II*, Duncker & Humboldt, 1980 Berlin.

[323] According to Streinz in Sachs, GG, 8th ed. 2018, Article 23, paragraph 102, the ECJ already contributes in part to the consideration of constitutional peculiarities through its Rspr. That is true, but there is still considerable potential for optimisation.

[324] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

amendment of the Treaties necessary for the extension of competences (paragraph 110)[325]. This view may be misguided. However, effective monitoring of compliance with the order of competence is essential in a structured community such as the European Union. Allowing the institution concerned to determine to a significant extent where the limits of its tasks and responsibilities are is problematic. The BVerfG has criticized the ECJ's handling of the delimitation of competences in unusually strong words. However, the handling of the procedure, as is the case by the ECJ, runs the risk that the 'principle of limited individual authorization under Articles 5 I and II TEU will in fact be 'empty'. Finally, the constitutional bodies are obliged to cooperate and protect each other[326]. In the interests of constitutional organization compliance, it is essential that the other constitutional bodies protect the BVerfG.[327]Some cooperative ways out of the impasse could bring to life the mutual consideration, since the duty of loyalty of Article 4 III subparagraph applies to all parties involved. 1 TEU. At European level, the ECB could, first, provide the justification required by the BVerfG, which would address more the economic policy implications of the purchase programmes. The ECJ[328] would also limit the ECB's broad discretion and carry out evidence control. Even the legal methodology requires the justification of a decision as the legitimacy of the court towards the citizen and the legislature. In the case of executive actions, the ECJ[329] has emphasized that the statement of reasons must be so clear and unambiguous that the competent court can exercise its power of review. It is therefore understandable to now reflect this in national law: because the ECB is beyond direct control by democratically legitimized representatives because of its independence, the principle of democracy and the principle of popular sovereignty of Articles 20 I, II GG require stricter judicial control.[330] There have already been cases in the past in which the ECJ has explicitly denied the competence of European institutions to adopt legal acts. A stronger substantive examination of the principle of the limited individual authorization of Article 5 I TEU[331] could also lead to the ECJ requesting the Treaty amendment procedure in the future. Secondly, the Member States, but above all the BVerfG, are also called upon. In a cooperative network of jurisprudence with mutual consideration, one should refrain

[325] For an in- depth study of the future of the European Union cfr. M. Draghi, *Europas streben nach einer perfekten Union*, Rede von Mario Draghi, Präsident der EZB, Malcom Wiener Lecture in international Political Economy, bei der Harvard Kennedy School, Cambridge, 9. Oktober 2013.

[326] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

[327] BVerfGE 142, 123 = NJW 2016, 2473 Rn. 187 ff. = EuZW 2016, 618 Ls.; BVerfGE 146, 216 = NJW 2017, 2894 Rn. 61; BVerfG, NJW 2020, 1647 Rn. 143; zu den demokratietheoretischen Einwänden vgl. Issingin FS H. Siekmann, 2019, 129 (133 f.).

[328] Cfr. Lang/ Rust/ Owens/ Pistone/ Schuch/ Staringer/ Storck/ Essers/ Kemmeren/ Öner/ Smit, *Tax Treaty Case Law around the Globe 2019*, IBFD und Linde 2020.

[329] A. F. Uricchio, *Percorsi di diritto tributario,* Prefazione di Franco Gallo, Cacucci editore 2017.

[330] Cfr. Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmayer/ G. Seilerd/ Ch. Smekal, *Probleme des Finanzausgleichs II,* Duncker & Humboldt, 1980 Berlin.

[331] Article 5 I TEU.

from polemics – it falls back on oneself. The BVerfG is not a European legislator[332], nor is it responsible for economic policy. It should therefore not, in principle, decide on the future of Europe. It may therefore also initiate a preliminary ruling procedure in the same case for a second time in order to clarify ambiguities. For this purpose, the Ultra-vires violation must be defined narrowly, i.e., on a narrow understanding of the eternity guarantee of Art. 23 I 3 in conjunction with 79 III GG. If the ECJ increases the test density, the BVerfG may withdraw its. Ideally, the BVerfG would row back sharply, comparable to the Solange II decision, which recognized the ECJ's exclusive examination competence in the examination of fundamental rights.[333] This would also reduce the risk of other courts emulate the PSPP[334] ruling and declare judgments of the ECJ to be non-binding.[335] Thirdly, the Member States are the masters of the Treaties. The principle of individual authorization and the catalogue of competences aims to prevent the competences of the Member States from gradually diminishing. This calls on the Federal Government at European level to fight for its positions politically and legally. The Treaty amendment procedure of Article 48 TEU[336] provides the right way to do this. Then the Euro area Member States could unanimously cede further powers to complete monetary union with an economic union.[337] The European Council is the right institution to decide on the future of the European Union and, ultimately, the distribution of competences between the EU and the Member States.[338] If all parties are willing to contribute cooperatively and constructively to the future of the European Union, the ideal of dialectical synthesis recommended by Huber would have been taken into account and the way out of the impasse would have been achieved.[339]

X. THE BVERFG´S INVASION OF EU LAW.

With regard to the use of checks in the terms outlined above, resulting from the case law of the Italian Constitutional Court[340] – which seems to us to be in accordance with a correct model of balance between national and Union law and the division of tasks between their Supreme Courts – the

[332] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.
[333] Möllers, *Ibid.*, 503.
[334] Cfr. P. Hilpold/ Piva, Da "Solange" a "PSPP": alla ricerca delle radici di un "dialogo tra Corti" naufragato in un incomprensibile soliloquio; F.C. Mayer, Auf dem Weg zum Richterfaustrecht?: Zum PSPP-Urteil des BVerfG, VerfBlog, 2020/5/07, https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht
[335] W. Schön, *Einordnung der neuen Regelungsvorschläge in die internationale und deutsche Steuerarchitektur* (Pillar 1/2) DIHK-Fachtagung zum OECD-Projekt „Besteuerung der digitalisierten Wirtschaft", Virtuell, November 2020
[336] Art. 48 TEU.
[337] Möllers, Ibidem.
[338] Cfr. A. F. Uricchio/ F. L. Giambrone, *European Finance at the Emergency Test,* Collana del Dipartimento Jonico in: Sistemi giuridici ed Economici del Mediterraneo: societá, ambiente e cultura, Cacucci editore, 2020, p. 277.
[339] Cfr. Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmeyer/G. Seilerd/ Ch. Smekal, *Probleme des Finanzausgleichs II*, Duncker & Humboldt, 1980 Berlin.

[340] For an in- depth study of the future of the European Union cfr. M. Draghi, *The international dimension of monetary policy,* Speech, ECB Forum on Central Banking, Sintra, 28 June.

judgment of 5 May 2020 of the German Constitutional Court appears to be an anomalous application of the theory of controls, resulting in an "exorbitant" competence of the Constitutional Court itself[341]. It is true that, in the first place, it recognizes (of course) the competence of the Court of Justice to interpret EU law and to judge the legality of its acts[342]. However, in the course of its reasoning, the BVerfG carries out its own review of the exercise of the jurisdiction of the Court of Justice, in the light of EU law, and concluded that the judgment of 11 December 2018 is ultra vires in relation to Article 100a of the Treaty. 19, par. 1, TUE. By acting in this way, the German Constitutional Court does not, therefore, confine itself to defining the interpretation[343] of the provisions and principles of its Grundgesetz, as would be entirely correct; In many respects, however, it carries out a "field invading" in EU law. First, by its judgment, it ultimately establishes the interpretation of Article 10of the Treaty. In the present case, it is for the national court to establish that, in issuing its preliminary ruling, article 19(1) TEU has exceeded the limits of its jurisdiction. Consequently, it also considers that judgment to be flawed (ultra vires) and, therefore, devoid of effect (at least vis-à-vis Germany and its bodies and judges).In fact, moreover, the BVerfG overlaps with the Court of Justice in assessing the legality of the contested decision of the ECB, also here under EU law, in particular Article 100a of the Treaty. 123, paragraph 1, TFEI, carrying out a thorough and elaborate investigation into compliance with

the principle of proportionality. It seems to emerge, in the german court's view, a kind of substitute power vis-à-vis the Court of Justice when, in BVerfG's own opinion, it does not exercise its judicial control properly and appropriately. This 'substitute power' also appears to be more intense than that conferd by the European Treaties on the Court of Justice. Firstly, it is doubtful whether it would have the power to order the ECB to provide a supplementary statement of its decision. Secondly, the detailed and mischievous review which the German Constitutional Court carries out with regard to the proportionality of the decision ends up being a judgment of substance, no longer mere legality, which would be foreclosed to the Court of Justice; and this judgment involves not only an invasion of UNION law, but a break-in into the regulatory and administrative powers of an independent institution such as the ECB and within its discretion[344].

[341] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

[342] Si vedano la citata sentenza della Corte di giustizia del 5 dicembre 2017, causa C-42/17, e quella della Corte costituzionale del 31 maggio 2018 n. 115.

[343] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

[344] For an in- depth study of the future of the European Union cfr. M. Draghi, *The international dimension of monetary policy,* Speech, ECB Forum on Central Banking, Sintra, 28 June.

XI. THE DEBATE ON THE TAXATION OF VIRTUAL CURRENCIES WITHIN BOTH THE US AND THE EUROPEAN UNION.

The spread of so-called virtual currencies has given rise to numerous application doubts, in particular with regard to anti-money laundering regulations and fiscal discipline. The issue of tax issues resulting from the use and holding of virtual currencies has given rise to numerous interpretative doubts which, in the absence of specific regulation and regulatory discipline, cannot be definitively dissolved. The basis of any interpretative reconstruction requires a complete qualification of the legal nature of the so-good virtual currencies, which at present is not universally recognized. The basic question, which is still under discussion and has no definitive answer, is whether virtual currencies should be considered and treated fiscally as a form of (non-monetary) property, or as a genuine form of currency.[345] Issues related to the taxation of virtual currencies in the USA, and related problems were first mentioned in a report published in May 2013 by the Government Accountability Office of the United States, addressed to the Senate Finance Committee, called "Virtual Economies and Currencies: Additional IRS guidance could reduce Tax Compliance Risks", in which the IRS (Internal Revenue Service) was urged to issue a Guide to Virtual Currencies in order to eliminate the possibilities taxpayers' error. The IRS responded on March 15, 2014 with the "Notice 2014-21" and, on that occasion, in a diametrically opposed direction to what is currently happening in Italy, it considered the tax regime provided for the properties to be applicable to VCs (Virtual Currencies)[346].As mentioned above, it does not seem easy to identify a legal qualification of virtual currencies that can be said to be universally recognized. With Resolution 2016/2007 (NI) of 26 May 201633, the European Parliament stressed that virtual currencies are likely to contribute positively to the well-being of citizens and economic development also in the financial sector, in many respects, stressing the need for taxation not to be avoided or circumvented. The European Union has often dealt in recent years with the phenomenon of virtual currencies, in particular to regulate their aspects for the purposes of anti-money laundering legislation[347], lastly, parliament adopted the resolution on the proposal for a Directive amending EU Directive 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing and amending Directive 2009/101/EC, the text of which, adopted on 19 April 2018 at first reading, also frames and defines the phenomenon of virtual currencies.[348]The debate on the taxation of virtual currencies in the European Union. As mentioned above, it does not seem easy to identify a legal qualification of virtual currencies that can

[345] A. F. Uricchio/ G. Selicato, *Il contributo del diritto europeo alla prevenzione e composizione del conflitto tra giurisdizioni fiscali*, p. 71, in, Selected Issues of EU Tax law as EU law.

[346] For a in depth analysis of a possible WTO taxation competence with regard of digital economy see, Ch. Smekal, *Should WTO deal with tax issues in the digital economy*? Wirtschaftspolitische Blätter (Economic Policy Papers), Vienna , 283–290.

[347] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

[348] A. F. Uricchio/ G. Selicato, *La fiscalitá delle valute virtuali*, in, *Selected issues of EU tax Law*, p. 163 ff.

be said to be universally recognized. With Resolution 2016/2007 (NI) of 26 May 2016[349], the European Parliament stressed that virtual currencies are likely to contribute positively to the well-being of citizens and economic development also in the financial sector, in many respects, stressing the need for taxation not to be avoided or circumvented. The European Union has often dealt in recent years with the phenomenon of virtual currencies, in particular to regulate their aspects for the purposes of anti-money laundering legislation, lastly, the Parliament adopted the resolution on the proposal for a Directive amending EU Directive 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing and amending Directive 2009/101/EC, the text of which, adopted on 19 April 2018 at first reading, also frames and defines the phenomenon of virtual currencies.[350] The European Court of Justice, in its Judgment of 22 October 2015 in Case C-264/1437, concluded that Article 2(1)(c) of Council Directive 2006/112/EC must be interpreted as constituting services provided for consideration, transactions consisting of the exchange of traditional currency against units of the virtual currency bitcoin and vice versa, made against payment of a sum corresponding to the margin constructed by the difference between the price at which the operator concerned buys the currencies and the price at which he sells them to his customers[351] and that such transactions must be considered exempt from value added tax within the meaning of Article 135(1)(c) of that Directive[352].

XII. The debate on the taxation of virtual currencies in Italy and the position of the Revenue Agency

The case dealt with by the European Court of Justice does not, of course, exhaust all aspects relating to the taxation of virtual currencies. The Financial Administration, taking on board the orientation expressed by the Court of Justice in the Hedqvist judgment mentioned above, would seem to combine the tax treatment of virtual currencies with that of foreign currencies, but these conclusions do not appear to be entirely satisfactory[353]. The judgment cited, in fact, establishes the equivalency between

[349]See:http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0228+0+DOC+XML+V0//IT

[350] The consolidated text of the Resolution is available at the following Link: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0178+0+DOC+XML+V0/EN. Among other things, the aforementioned Resolution also contains the following definition of virtual currency: "a representation of digital value which is not issued or guaranteed by a central bank or a public body, is not necessarily linked to a legally established currency, does not have the legal status of currency or currency, but is accepted by natural and legal persons as a means of exchange and can be transferred, stored and exchanged electronically.".

[351] For a in depth analysis of a possible WTO taxation competence with regard of digital economy see, Ch. Smekal, *Should WTO deal with tax issues in the digital economy*? Wirtschaftspolitische Blätter (Economic Policy Papers), Vienna , 283–290.

[352] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

[353] The equating of virtual currencies with foreign currencies for tax purposes leads to these consequences: (a) capital gains from futures disposals certainly give rise to a 26% replacement levy within the meaning of Article 67(1)(b.c b of the Tuir; (b) spot disposals, including in the form of drawings from the relevant accounts or deposits, give rise to

virtual currencies and currencies in a procedure concerning VAT[354] problems, in relation to a specific case and provides, finally, a solution only if and to the extent that virtual currencies "have been accepted by the part of a transaction as an alternative means of payment to legal means of payment and have no other purpose than that of a means of payment". The Revenue Agency, with Resolution No. 72/E of 02 September 2016, provided in response to a tax ruling, on the tax treatment applicable to companies that carry out services activities related to virtual coins, has excluded the subjection to VAT of bitcoin exchange transactions[355], assimilating them to foreign currencies for tax purposes. The abovementioned resolution, issued in response to a request

for clarification from a contributor, could not, according to the tax discipline, have a binding effect and extended to a generalized audience of taxpayers, but, nevertheless, could be considered indicative of an orientation of the Revenue Agency. Answer No. 956-39/2018 by the Revenue Agency - Taxpayers Division - Regional Directorate of Lombardy available online in full, seems to confirm this assimilation. The conclusion reached by the Revenue Agency, however, does not seem entirely satisfactory from a dogmatic and doctrinaire point of view and corresponds, perhaps, more to a practical need.[356]

XIII. CONCLUDING ASPECTS: THE CONTRIBUTION OF EUROPEAN LAW TO THE PREVENTION AND SETTLEMENT OF CONFLICT BETWEEN TAX JURISDICTIONS.

All these recommendations and measures describe a complex system, in continuous ferment, stubbornly aimed at reducing the distances that still exist in the approaches of the different tax authorities. European law, for its part, makes a special contribution in this direction by making the harmonisation process[357] faster and more effective. Moreover, the EU approach also involves a further weak profile of the current system, namely the difficult settlement of the dispute between states. The friendly procedures (Mutual Agreement Procedure, so-called 'MAP'), exhausted in the direct consultation between the tax administrations of the contracting countries, do not seem in fact sufficient to settle the very copious dispute over double taxation, also due to the absence of a result

taxable capital gains provided that, during the tax period, the total deposit and current accounts held by the taxpayer, calculated on the basis of the exchange rate at the beginning of the reference period, exceeds EUR 51,645.69 for at least seven consecutive working days, by virtue of the combined provisions of paragraphs 1 , lit.c-ter), and par. 1-ter, of art. 67 of the Tuir; (c) since these are other financial assets, the amount of deposits at the end of each year is subject to fiscal monitoring; (d) that amount is not subject to IVAFE, since it is a tax intended to affect only bank accounts and deposits.

[354] Cfr. Lang/ Rust/ Owens/ Pistone/ Schuch/ Staringer/ Storck/ Essers/ Kemmeren/ Öner/ Smit, *Tax Treaty Case Law around the Globe 2019*, IBFD und Linde 2020.

[355] For a in depth analysis of a possible WTO taxation competence with regard of digital economy see, Ch. Smekal, *Should WTO deal with tax issues in the digital economy*? Wirtschaftspolitische Blätter (Economic Policy Papers), Vienna, 283–290.

[356] A. F. Uricchio/ G. Selicato, *La fiscalitá delle valute virtuali*, in, Selected issues of EU tax Law, p. 163 ff.

[357] Cfr. Lang/ Rust/ Owens/ Pistone/ Schuch/ Staringer/ Storck/ Essers/ Kemmeren/ Öner/ Smit, *Tax Treaty Case Law around the Globe 2019*, IBFD und Linde 2020.

constraint[358]. More effective, however, is the recent Directive 2017/1852/EU of 10 October, whose territorial scope (EU territory) is, however, less extensive than that of the MAP. The latter, having been the source of the widespread model convention against double taxation and being referred to in Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in the event of adjustment of the profits of associated undertakings (so-called 'Arbitration Convention'), can be activated in a greater number of cases.[359]The directive in question (soon to be transposed into the European Delegation Law of 2018) provides for a 'double track', i.e. a friendly procedure not too dissimilar, in substance, from that provided for in the MAP (Article 3) and a subsequent and possible procedure for resolving the dispute entrusted to an advisory committee (Article 14). Significant traits of originality of this discipline, both for the provision of a completely outdated hypothesis, in this matter, of silence-acceptance, in the event that the tax authority concerned does not take any decision on the rejection or acceptance of the taxpayer's complaint in the six months following its receipt; both for the possibility of the failure of the procedure being amended by a Commission composed of between three and five independent arbitrators and a maximum of two representatives of each Member State[360]. This is an important development of the law settlement institute, since the Member States concerned must reach agreement within six months of the Commission's proposal. This understanding may also differ from the Commission's opinion but which, if not reached, will expose the States to the binding effect of that opinion, provided that the parties concerned accept it and renounce the use of internal means of appeal[361]. This is not the place to dwell on the merits and shortcomings of the European procedure[362], but certainly within the Union's borders, both in the

[358] For an in- depth study of the future of the European Union cfr. Cfr. M. Draghi, *The international dimension of monetary policy,* Speech, ECB Forum on Central Banking, Sintra, 28 June.
[359] A. F. Uricchio/ G. Selicato, *Il contributo del diritto europeo alla prevenzione e composizione del conflitto tra giurisdizioni fiscali*, in, Selected Issues of EU Tax law as EU law, p. 71ff.
[360] For a in depth analysis of a possible WTO taxation competence with regard of digital economy see, Ch. Smekal, *Should WTO deal with tax issues in the digital economy*? Wirtschaftspolitische Blätter (Economic Policy Papers), Vienna , 283–290.
[361] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[362] In the first comments, particular emphasis was placed on the particularly long time taken to conclude the procedure. On this subject, see. t. Wiertsema, Council directive on double taxation dispute resolution mechanisms: "resolving companies' areas of concern?, in IBFD Journal Articles, Derivatives & Financial Instruments, online publication of 13 October 2017, as well as a. Comelli, The harmonisation (and rapprochement) of taxation between the "single European vat area", the Council directive "against tax avoidance practices" and abuse of the right, in Dir. Mr Prat. Trib., 2018, p. 1417, according to which: "The overall assessment calibrated on this Directive is positive with regard to the widened extent of cases of double taxation within the EU which may give rise to activation, by the parties concerned, of a dispute settlement procedure in tax matters, also in relation to Arbitration Convention No 90/436/EEC, which has not so far been abolished and whose application was (and still is) limited to a typologically limited number of disputes. However, considering that the number of disputes in question is set to increase further in the near future, the time-lacing provided for in Directive 2017/1852 does not seem to ensure a sufficiently rapid and predictable resolution of the disputes in question and could (and perhaps should) have further compressed the timetable provided for therein."

administrative and in the tentious phase[363], more favourable conditions are affirmed for the elision of the remaining differences between the tax authorities in the field of double taxation. The directives and recommendations described so far therefore qualify a European dimension[364] of the TP, which is more complex and mature than the international one[365]. This does not allow full symmetry[366] in the estimation and possible challenge of the consequences of transfer prices within European jurisdictions but certainly offers instruments of alarm, knowledge, audit and definition of the most effective and wide-ranging disputes (because they are designed to operate symmetrically on the territory of the 28 Member States), thus returning centrality to European law on a subject that, in recent years, has , has been at the heart of developments in international law.[367]Furthermore the German Constitutional Court, in the final analysis, demonstrates an abnormal and arbitrary use of the controls, which is not justified even in the light of a 'dualist' – if correctly understood – relationship between national and EU law[368]. Indeed, its judgment invades the union's legal order, distorts its cornerstones, starting with the essential role of the Court of Justice, to which the Constitutional Court itself ends up being the ultimate judge of that right; and the latter seems almost to degrade to an external public right, echoing the distant conception of Georg Jellinek[369]. It is particularly worrying, in the judgment in question, the attack on the prestige and authority of the Court of Justice, at a time when the Court of Justice, thanks in part to an 'alliance' with national judgments, is taking decisive action to protect the rule of law, demanding the independence of judges on the basis of Article 19(1)(2) TEU, according to which The Member States establish the judicial remedies necessary to ensure effective judicial protection in areas governed by Union law[370]. There would be very little left of the case law of the Court of Justice on this matter if, in the name of a misunderstood concept of national identity, due to a domino effect, even its judgments relating to Poland were considered ultra vires and worthless in

[363] A. F. Uricchio/ G. Selicato, *Il contributo del diritto europeo alla prevenzione e composizione del conflitto tra giurisdizioni fiscali,* p. 71, in, Selected Issues of EU Tax law as EU law.
[364] For a in depth analysis of a possible WTO taxation competence with regard of digital economy see, Ch. Smekal, *Should WTO deal with tax issues in the digital economy*? Wirtschaftspolitische Blätter (Economic Policy Papers), Vienna , 283–290.
[365] For an in- depth study of European Union law cfr. U.Villani, *Istituzioni di Diritto dell'Unione europea*, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[366] Cfr. Lang/ Rust/ Owens/ Pistone/ Schuch/ Staringer/ Storck/ Essers/ Kemmeren/ Öner/ Smit, *Tax Treaty Case Law around the Globe 2019*, IBFD und Linde 2020.
[367] A. F. Uricchio/ G. Selicato, *Il contributo del diritto europeo alla prevenzione e composizione del conflitto tra giurisdizioni fiscali,* p. 71, in, Selected Issues of EU Tax law as EU law.
[368] U.Villani, *Sul controllo dello Stato di diritto nell´ Unione europea*, in *Freedom, Security &Justice: European Legal Studies*, 2020, p.10 ss.
[369] Cfr. Cfr. M. Draghi, *The international dimension of monetary policy,* Speech, ECB Forum on Central Banking, Sintra, 28 June.
[370] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

that State because they were contrary to supposed democratic principles, which express themselves, within the framework of an 'illiberal democracy', with judicial reforms restricted to the independence of judges.

DATA CIRCULATION AND LEGAL SAFEGUARDS: A EUROPEAN PERSPECTIVE

Andrea Stazi[*]

TABLE OF CONTENTS

The collection, analysis and circulation of data are revolutionizing many sectors of our society and economy, including communication, healthcare, education, transport and safety.
For businesses, data analysis and processing offer new opportunities, increasing efficiency and productivity. For the public sector, better use of data enables more efficient, transparent and personalized services. For scientists, open data and open results allow new ways to share, compare and discover new fields of research. For citizens, data are carriers of more information and more advanced services and applications.
From a legal point of view, the collection, analysis and circulation of data raise complex questions regarding ownership, transfer and access to data, and legislators and regulators are looking for effective approaches to guarantee fundamental rights such as the protection of personal data, consumers and competition.

I. DATA REVOLUTION AND DATA-DRIVEN ECONOMY

Nowadays, information technology, internet networks and the connections that are established between these and material things, allow private and public entities to collect, analyze and circulate large amounts of data, and this phenomenon has been summarized in the "big data" expression[1].

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[1] See: OECD, Big Data: Bringing Competition Policy to the Digital Era, October 2016, available at: https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf, p. 5, according to which: "Big Data is the information asset characterized by such a high volume, velocity and variety to require specific technology and analytical methods for its transformation into value". In doctrine, see: VM Schönberger, T. Ramge, Reinventing Capitalism in the Age of Big Data, Basic Books, New York, 2018, p. 1 ff.; VM Schönberger, K. Cukier, Big Data. A Revolution That Will Transform How We Live, Work, and Think, John Murray, London, p. 3 ff. A. De Mauro, M. Greco, M. Grimaldi, A formal definition of Big Data based on its essential features, in Library Review, 2016, vol. 65, no. 3, p. 122 ff. Big data differs from "small data" in what are their characteristics, summarized in the so-called 5V, that is, volume, variety, speed, value and veracity. See: ME Stucke, AP Grunes, Big Data and Competition Policy, Oxford University Press, Oxford, 2016, p. 16 ff.; A. Gandomi, M. Haider, Beyond the hype: Big data concepts, methods and analytics, in International Journal of Information Management, 2015, vol. 35, no. 2, p. 137 ff.; T. Lukoianova, VL Rubin, Veracity Rodmap: Is Big Data Objective, Truthful and Credible?, Advances In Classification Research Online, 2014, vol. 24, no. 1, p. 4 ff. In particular, according to the Authors, the 5Vs are the: 1) volume of available data, which is enormous and coincides with the overall size of the phenomenon; 2) variety of data and unstructured data sets, or heterogeneity of sources and formats; 3) speed with which the databases are fed, and the high frequency with which the data circulate from a point of origin to a collection point; 4) value of the data, which depends on the economic potential and the social value that can be attributed to the data as new production factors; 5) veracity of the data, or their authenticity and reliability.

In fact, the emphasis should rather be placed on the concept of "smart data", that is data analyzed using innovative and advanced analysis techniques such as predictive analytics, data mining and data science, which make use of technologies such as cloud computing, sensors of the internet of things, machine learning, artificial intelligence, etc.[2].

The volume of data produced in the world is growing rapidly, from 33 zettabytes in 2018 to 175 zettabytes expected in 2025[3]. Data collection can take place, offline or online[4], through three main channels. First of all, some data are offered voluntarily, that is, intentionally provided by an individual-user of services or products. Secondly, there are the observed data, or behavioral data acquired automatically by the activities of users or machines. Finally, some data are deduced, transforming in a non-trivial way data provided voluntarily and/or observed while they are still in relation with a specific individual or machine[5].

Currently, the data thus collected can be used in four different forms: i) data at individual level used in a non-anonymous way, relating to specific individuals-users or machines and typically aimed at providing services to individuals themselves; ii) data collected at an individual level used anonymously, for example preferences used for collaborative filtering in the context of film recommendation systems; iii) aggregate data, such as profit and loss information; iv) contextual data, such as for maps or satellite data. Furthermore, data can be generated at different frequencies and access to them can relate to historical or real-time data[6].

Hence, data is structured and organized through computation - human or automatic - in information,

[2] In this regard, see: R. Gellert, Data Protection and Notions of Information: A Conceptual Exploration, 2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3284493, p. 2 ff.; A. Gandomi, M. Haider, Beyond the hype: Big data concepts, methods and analytics, cit., p. 140, according to whom: "Big data are worthless in a vacuum. Its potential value is unlocked only when leveraged to drive decision making. To enable such evidence-based decision making, organizations need efficient processes to turn high volumes of fast-moving and diverse data into meaningful insights".

[3] See: European Commission, Communication "A European Strategy for Data", Brussels, 19.2.2020, COM(2020) 66 final, p. 2; IDC, Data Age 2025: The Digitization of the World From Edge to Core, 2018, available at: https://www.seagate.com/it/it/our-story/data-age-2025, p. 3.

[4] Data collection can take place offline, for example, through loyalty programs, credit cards, lotteries and even through purchases. However, consumers use more and more the internet to make purchases or searches, thus continually leaving traces of their needs or preferences. Sometimes user data is also transferred only to be able to use a certain service. In other circumstances, the data is transferred or put online to define the users public identity and compose together with the other tracks left by them on the web their virtual image. See: J. Sylvestre Bergé, S. Grumbach, V. Zeno-Zencovich, The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance, in European Journal of Comparative Law and Governance, 2018, vol. 5, no. 2, p.149 ff., who distinguish the data, according to the way in which they were created, in: 1) data that are the result of the "datification" of real life objects, which has so far been one of the most common ways in which data were created; 2) data that are created from the outset as such, being the result of intellectual activity or the representation of non-material entities and thus of the information dating (news, information, research results); 3) data produced by people, which are almost entirely digitized since most of the information relating to their activities, past and present, is stored in digital format, and even their physical characteristics are also recorded, collected and processed; 4) data that are automatically generated by digital technologies and that are an evolution of the previous cases.

[5] See: European Commission, Competition policy for the digital era - A report by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, April 2019, available at: http://ec.europa.eu/competition /publications/reports/kd0419345enn.pdf, p. 24 f.

[6] In this regard, see again: European Commission, Competition policy for the digital era, cit., p. 25 ff.

which in turn is interpreted and used as knowledge. Here new value chains emerge, in which data are organized into information through the use of tools and processing methods, and this information is then interpreted, used and circulated as knowledge through the use of attention[7].

Through big data analysis, companies and public bodies can obtain information in order to make informed decisions or to develop better products and services, capable of simplifying the daily life of individuals and organizations. In this perspective, the data analysis activity becomes a key factor of economic and social development: it is the so-called "data-driven innovation"[8].

Data analysis facilitates the optimization of processes and decisions, innovation and the prediction of future events by different economic and social actors, giving rise to the provision of personalized advertising, services or products and the creation or improvement of goods, services and processes in all industrial sectors[9].

The data-driven innovation, therefore, does not limit itself to involving the areas of information and communication technologies and the high-tech industry. In the medical field, universities and research hospitals can revolutionize healthcare through genetics, diagnostics and personalized medicine. For scientists, open data and open results allow new ways to share, compare and discover new fields of research[10].

As recently highlighted by the European Commission, the data is and will increasingly revolutionize the way we produce, consume and live. The benefits will be perceived in every single aspect of our

[7] See: R. Gellert, Data Protection and Notions of Information: A Conceptual Exploration, cit., p. 3 ff.; C. Ronquillo, LM Currie, P. Rodney, The Evolution of Data-Information-Knowledge-Wisdom in Nursing Informatics, in Advances on Nursing Science, 2016, vol. 39, no. 1, p. E1, available at: https://www.ncbi.nlm.nih.gov/pubmed/26836997; RL Ackoff, From Data to Wisdom, in Journal of Applied Systems Analysis, 1989, vol. 16, p. 3 ff. Regarding such new value chains, or "dynamic value networks", see: HR Varian, Beyond Big Data, in Business Economics, 2014, vol. 49, no. 1, available at: people.ischool.berkeley.edu/~hal/Papers/2013/BeyondBigDataPaperFINAL.pdf, p. 27 ff.; J. Drexl, Designing Competitive Markets for Industrial Data - Between Propertisation and Access, Max Planck Institute for Innovation & Competition, Research Paper No. 16-13, October 2016, available at: https://ssrn.com/abstract=2862975, p. 17.

[8] In particular, the OECD defined data-driven innovation like that trend involving both companies and governments for which "techniques and technologies for processing and analyzing large volumes of data, which are commonly known as 'Big Data', are becoming an important resource that can lead to new knowledge, drive value creation, and foster new products, processes, and markets". See the OECD report, Data-driven Innovation for Growth and Well-being. Interim Synthesis Report, October 2014 cit., p. 4; OECD again, in the final data-driven innovation report: Big Data for Growth and Well-Being, October 2015, cit. stated that data-driven innovation "refers to the use of data and analytics to improve or foster new products, processes, organisational methods and markets".

[9] See: European Commission, Communication "A European Strategy for Data", COM (2020) 66, cit., p. 1 ff.; Id., Communication "Towards a common European data space", Brussels, 25 April 2018, COM (2018) 232 final, p. 2 ff.; Id., Communication "Building a European data economy", Brussels, 10.1.2017, COM (2017) 9 final, p. 2 ff.; Federal Trade Commission, Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues, January 2016, available at: https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf., p. 5; White House Council of Economic Advisers, Big Data and Differential Pricing, February 2015, available at: https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/docs/Big_Data_Report_Nonembargo_v2.pdf, p. 4.

[10] See: OECD, Data-Driven Innovation for Growth and Well-Being, 2014, cit. pp. 18-21; D. Lupton, Digital Health Technologies and Digital Data: New Ways of Monitoring, Measuring and Commodifying Human Embodiment, Health and Illness, in F. Xavier Olleros, Majlinda Zhegu (eds.), Research Handbook on Digital Transformations, Edward Elgar, Northampton, 2016, available at: https://ssrn.com/abstract=2552998, p. 2 ff.; W. Nicholson Price, Big Data, Patents, and the Future of Medicine, in Cardozo Law Review, 2016, vol. 37, p. 1401 ff.

life, ranging from the consumption of more conscious energy and from the product, material and food traceability, to a healthier life and better health care[11].

From an economic point of view, scholars have defined data as non-rival public goods in consumption, non-perishable and by their nature renewable[12].

In the data-driven economy, most economic operations are characterized by the presence of a computer that allows the collection and analysis of data, the personalization of products or services, continuous experimentation at limited costs, the internationalization and commercial and contractual innovation[13].

The benefits of such dynamics can positively affect the creation and improvement of companies' products and services. On the one hand, this result is achieved through so-called learning effects, as in the case of search engines that increase the quality of search results through data from previous searches[14].

Similarly, many software installed on personal computers or smartphones collect detailed information on the use made of these products, and many websites collect detailed information during user navigation, and use this information in order to identify those parts of the webpages that have been consulted more frequently or to minimize the technical problems[15].

One of the clearest examples of a data-driven industry is perhaps represented by the financial and insurance sector, in which credit institutions, through the exploitation of customer data, can transform their business, create new revenue opportunities, better manage risks and strengthen the fiduciary relationship with customers[16].

Thus, data is considered as a resource of fundamental importance and has become one of the key factors driving the development of the digital economy, so much so as to require organizations to become increasingly data-driven and to lead to support the need to "reinvent the capitalism "[17].

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[11] See again: European Commission, Communication "A European Strategy for Data", COM (2020) 66, cit., p. 2.

[12] In this regard, see: A. Lambrecht, CE Tucker, Can Big Data Protect a Firm from Competition ?, in Competition Policy International, 2017, no. 1, available at: https://www.competitionpolicyinternational.com/wp-content/uploads/2017/01/CPI-Lambrecht-Tucker.pdf, p. 1 ff.; DS Tucker and HB Wellford, Big Mistakes Regarding Big Data, in Antitrust Source, December 2014, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2549044, p. 2 ff.; C. Hess, E. Ostrom, Introduction: An Overview of the Knowledge Commons, in IIdd. (eds.), Understanding Knowledge as a Common, MIT Press, Cambridge, 2007, p. 9; HR Varian, Beyond Big Data, cit., p. 27 ff.; JE Stiglitz, Information and the Change in the Paradigm in Economics, in The American Economic Review, 2002, vol. 92, no. 3, p. 460 ff.; C. Shapiro and HR Varian, Information Rules: A Strategic Guide to the Network Economy, Harvard Business School Press, Boston, 1999, p. 24.

[13] In this perspective, see again: HR Varian, Beyond Big Data, cit., p. 27.

[14] See: D. Sokol, R. Comerford, Does Antitrust Have A Role to Play in Regulating Big Data?, in R. Blair, D. Sokol (eds.), The Cambridge Handbook of Antitrust, Intellectual Property, and High Tech, Cambridge University Press, Cambridge, 2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2723693, p. 4.

[15] This information can be used, for example, to extend those parts of the site that have been read most frequently or to speed up the most used functions.

[16] In this regard, see: Accenture, Exploring Next Generation Financial Services: The Big Data Revolution, 2016, available at: https://www.accenture.com/t20170314T051509__w__/nl-en/_acnmedia/PDF-20/Accenture-Next-Generation-Financial.pdf, p. 3 ff.

[17] See: VM Schönberger, T. Ramge, Reinventing Capitalism in the Age of Big Data, cit., p. 87 ff., according to whom the fusion between big data and artificial intelligence will bring a new type of data-driven capitalism, which will

However, although data collection, analysis and circulation allow to improve the quality of the products and services offered, while also increasing economic efficiency, this practice raises a number of complex legal challenges.

In this perspective, in particular, it is necessary to refer to the issues, widely debated in recent years, relating to data ownership and data transfer, and to the legal safeguards for the protection of personal data and competition.

II. LEGAL ISSUES OF DATA CIRCULATION

II.1. *Data ownership*

With regard to the question of who can own the data, three different perspectives have emerged: i) the identification of a new property right on the data, in a private law sense; ii) the framework for the circulation of data within the category of intellectual property; iii) the insertion of the transfer of data in the context of a contract concerning the provision of a service, that is based on data or that takes the form of access to data, perhaps in real time[18].

These perspectives are not mutually exclusive, but resolving the issue of data ownership through one of the aforementioned hypotheses means automatically influencing the circulation and access regime of the related information.

This question is also affected by the contrast between the two legal models that developed in the Western legal tradition in relation to property law[19].

In the civil law tradition, the right of property is rooted in the material possession of a physical object on which to exercise an exclusive right.

In common law, the right of property is not limited to the form of a legal relationship existing between a given entity and a material object, but includes all the legal relations having an economic value for

involve many new challenges for operators and regulators.

[18] On the subject see, among others: European Commission, The economics of ownership, access and trade in digital data, JRC Digital Economy Working Paper 2017-01. https://ec.europa.eu/jrc/sites/jrcsh/files/jrc104756.pdf, p. 12 ff., where the main positions in the German doctrine, in which the debate originated, are recalled; as well as, among others: F. Padovini, T. Pertot, M. Schmidt-Kessel (eds.), Rechte an Daten, Mohr Siebeck, 2020, in particular G. Resta, Towards a unified regime of data-rights? Rapport de synthèse, p. 231 ff.; PB Hugenholtz, Against 'data property', in H. Ullrich, P. Drahos, G. Ghidini (eds.), Kritika: Essays on Intellectual Property, 2018, vol. 3, p. 48 ff.; V. Zeno Zencovich, Do "data markets" exist?, in MediaLaws - Law and Policy of the Media in a Comparative Perspective, 2019, no. 2, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3367406, p. 4 ff.; M. Becker, Rights in Data - Industry 4.0 and the IP Rights of the Future, in Zeitschrift für geistiges Eigentum, 2017, vol. 9, p. 253 ff.; C. Berger, Property Rights to Personal Data? An Exploration of Commercial Data Law, ivi, p. 340 ff.; as well as the essays collected in: S. Lohsse, R. Schulze, D. Staudenmayer (eds.), Trading Data in the Digital Economy: Legal Concepts and Tools, Nomos, Baden-Baden, 2017, in particular the essays of PB Hugenholtz, Data Property in the System of Intellectual Property Law: Welcome Guest or Misfit?, p. 75 ff., W. Koerber, Rights on Data: The EU Communication 'Building a European Data Economy' from an Economic Perspective, p. 109 ff., and F. Mezzanotte, Access to Data: The Role of Consent and the Licensing Scheme, p. 159 ff.; N. Purtova, Illusion of Personal Data as No One's Property, in Law, Innovation, and Technology, 2015, vol. 7, no. 1, p. 83 ff.

[19] See: J. Sylvestre Bergé, S. Grumbach, V. Zeno-Zencovich, The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance, cit., p. 156.

the private parties[20].

As regards the data specifically, the aforementioned models show further differences.

In the United States, the approach used since the Computer Software Act[21] has been extremely protective of all creative and commercial activities implemented through digital technologies. Data, although considered as a resource, has been left substantially free in terms of appropriation, so that the companies have been able to collect it with very few limitations and at very low costs.

From an economic point of view, the result was to encourage companies to develop new services, being able to concentrate their efforts on how to collect and process data without having to worry about the costs associated with the related resources[22].

The European approach has been considerably different, given that since the Enlightenment the State intervened actively in the industrial sector and in economic activities in order to bring them into line with general welfare policies.

In this context, the data were not considered as a freely obtainable "raw material" and the legislation that has been adopted over the years, from an economic point of view, has produced a limitation of access to this resource. In some circumstances, in fact, marketability was excluded, while in others the costs associated with data management increased considerably[23].

On top of that, it should be noted that, among the various types of data used for computational purposes, or to derive automatically from the information gathered from the derived knowledge, personal data stand out, which since the beginning at European level have been placed among the rights of personality[24].

Since the Charter of Nice[25], then, the right to the protection of personal data is considered as a fundamental right and gives its owner the possibility to claim that her data are processed by third parties only in compliance with the rules and principles established by law[26]. This classification entails the automatic subjection of personal data to a rule of inalienability as for the other person's

[20] According to: J. Rifkin,The Age of Access: The New Culture of Hypercapitalism, Where all of Life is a Paid-For Experience, TarcherPerigee, New York, 2001, p. 3 ff., this is the reason why common law has been able to adapt more easily to the economic context that has developed since the seventies of the last century. whose wealth has shifted from goods to dematerialized services and relationships and from property to access.

[21] HR 6934 - 96th Congress: Computer Software Copyright Act of 1980, available at: https://www.congreff.gov/bill/96th-congress/house-bill/6934.

[22] See, among others: J. Sylvestre Bergé, S. Grumbach, V. Zeno-Zencovich, The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance, cit., p. 159.

[23] In this regard, see: P. Pałka, Data Management Law for the 2020s: The Lost Origins and the New Needs, forthcoming in Buffalo Law Review, available at: https://ssrn.com/abstract=3435608, p. 1 ff.

[24] See: FS Gady, EU/U.S. Approaches to Data Privacy and the "Brussels Effect": A Comparative Analysis, in Georgetown Journal of International Affairs, 2014, International Engagement on Cyber IV, p. 12 ff.; J. Sylvestre Bergé, S. Grumbach, V. Zeno-Zencovich, The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance, cit., p. 160 f.

[25] Charter of Fundamental Rights of the European Union, 2012/C 326/02, GU C 326 26.10.2012 (revised version of the Charter proclaimed on 7 December 2000).

[26] On this point, see: F. Fabbrini, The EU Charter of Fundamental Rights and the Rights to Data Privacy: The EU Court of Justice as a Human Rights Court, in S. de Vries, U. Bernitz, S. Weatherill (eds.), The EU Charter of Fundamental Rights as a Binding Instrument. Five Years Old and Growing Hart Publishing, Oxford, 2015, p. 261 ff.

attributes[27].

However, the digital economy is characterized by a thriving market which has as its object the commercial exploitation of the attributes of the person, from the name, to the image, to the data[28].

In this new framework, a first perspective, faithful to the traditional approach which denies the nature of alienable goods to personal data, considers any calculation hypothesis of the right a liability for an illicit fact, rendered inoperative by virtue of the consent of the right-holder[29].

A second and different reading of the phenomenon, instead, points out the commercial value assumed by the attributes of the personality and specifically by the personal data, and assimilates them to the goods in a legal sense, commerciable through the contractual instrument. In this perspective, those who acquire the consent of others to the processing of data do not acquire the consent of the entitled person but the specific information[30].

This reading appears more coherent with the economic value that the data has assumed and is reflected, moreover, not only in the business strategies, with respect to which the wealth of information is increasingly considered as a fundamental asset, but also in the assessments made on the point by the EU legislator[31].

However, the possibility of processing personal data as "tradable commodities" entails, in fact, a whole series of further consequences. From a legal point of view, the data would be destined to be marketed by the original right-holder and it is not clear whether the latter is actually authorized to transfer her data.

In the event that the data is protected by legal rules, as occurs in relation to personal data or information protected by intellectual property law, marketability automatically entails the possibility

[27] In this regard, see eg: G. Malgieri, R.I.P.: Rest in Privacy or Rest in (Quasi-)Property? Personal Data Protection of Deceased Data Subjects between Theoretical Scenarios and National Solutions, in R. Leenes et al. (eds.), Data Protection and Privacy: The Internet of Bodies, Hart, Oxford, 2018, p. 300 ff.

[28] See: European Commission, The economics of ownership, access and trade in digital data, cit., p. 4 ff.; D. Ciuriak, M. Ptashkina, Towards a Robust Architecture for the Regulation of Data and Digital Trade, CIGI Paper no. 240, Centre for International Governance Innovation, Waterloo, 2020, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3423394, p. 1 ff.; PB Hugenholtz, Data Property in the System of Intellectual Property Law: Welcome Guest or Misfit?, cit., p. 75 ff.

[29] In this regard, see among others: B. Van Alsenoy, Liability under EU Data Protection Law From Directive 95/46 to the General Data Protection Regulation, in Jipitec, 2017, vol. 7, no. 3, p. 271 ff.; AD Moore, Privacy, Interests and Inalienable Rights, in Moral Philosophy and Politics, 2018, vol. 5, no. 2 p. 327 ff. On the relation with competition, see: N. Economides, I. Lianos, Restrictions on Privacy and Exploitation in the Digital Economy: A Competition Law Perspective, CLES Research Paper Series 5/2019, available at: https://www.ucl.ac.uk/cles/sites/cles/files/cles-5-2019.pdf, p. 1 ff. For empirical studies on access rights in practice, see: J. Ausloos, P. Dewitte, Shattering One-Way Mirrors. Data Subject Access Rights in Practice, in International Data Privacy Law, 2018, vol. 8, no. 1, p. 4 ff.; M. Borghi, F. Ferretti, S. Karapapa, Online Data Processing Consent Under EU Law: A Theoretical Framework and Empirical Evidence from the UK, in International Journal of Law and Information Technology, 2013, vol. 21, no. 2, p. 109 ff.

[30] With regard to the personal data economy, and also to the related pay for privacy model that requires consumers to pay an additional fee to prevent their data from being collected and mined for advertising purposes, see among others: SA Elvy, Paying for Privacy and the Personal Data Economy, in Columbia Law Review, 2017, vol. 117, no. 6, p. 1369 ff.; V. Zeno-Zencovich, Do "data markets" exist?, cit., p. 1 ff.

[31] See eg: Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136 22.5.2019, whereas 24-25 and art. 3.

for the right-holder to enter into data contracts. This circumstance determines the existence of secondary markets, or the possibility for the successor in title to resell the acquired data[32].

Moreover, the difficulty emerges of applying the traditional proprietary model to entities such as data, which takes as a reference the asset as a material thing that can be the subject of rights and, through the contractual instrument, a circulatory affair[33].

Digital entities can be reproduced without limits, a circumstance that makes the idea of exclusivity modeled on the concept of property of tangible objects rather illusory. To speak of property in the Romanistic sense of the term appears, therefore, particularly difficult for both conceptual and comparative reasons[34].

If we consider the dynamics of the data economy, which is characterized by the use of specific techniques for big data analysis and information processing practices based on artificial intelligence, the situation is further complicated. In this context, in fact, an individual's decision about the possibility of processing her data inevitably falls on others, producing network effects[35].

The hypothesis that the individual can actually exercise control over her data, or that she can manage to protect her property right, appears difficult to configure. This is partly due to the approach adopted at European level regarding the definition of personal data, given that the latter depends on the context of reference. This circumstance makes the configuration of a property right that can be transparent very complex both in terms of object and ownership[36].

In particular, the claim by the owner to exercise the rights attributed to her is considered illusory, since those data once acquired can be used, transferred, processed, transferred, sometimes even without her knowledge and in other parts of the globe.

Whatever the relationship between personal data and the traditional category of personality rights, in the context of big data it is substantially impossible to be able to trace and control data once it is mixed with other data[37].

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[32] See: G. Malgieri, B. Custers, Pricing Privacy: The Right to Know the Value of Your Personal Data, in Computer Law & Security Review, 2018, vol. 34, no. 2, p. 289 ff.; H. Zech, Data as a Tradeable Commodity, in A. De Franceschi (ed.), European Contract Law and the Digital Single Market. The Implications of the Digital Revolution, Intersentia, Cambridge, 2016, p. 51 ff.

[33] Furthermore, the data, being intangible entities, have an intrinsic link more with telecommunications networks than with a specific territory, which is why they cannot even be rooted in the territory, and therefore in the law, of a single State. In this regard, it should be borne in mind that in some legal systems, in particular in the German one, the possibility of qualifying an entity as an asset is normally linked to the corporeality of the object. On such issues, see among others: G. Resta, Towards a unified regime of data-rights? Rapport de synthèse, cit., p. 231 ff.; V. Zeno Zencovich, Do "data markets" exist?, cit., p. 4 f.

[34] Thus: J. Sylvestre Bergé, S. Grumbach, V. Zeno-Zencovich, The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance, cit., p. 161 ff.

[35] See: N. Purtova, Do Property Rights in Personal Data Make Sense after the Big Data Turn?, Tilburg Law School Legal Studies Research Paper Series, n. 21/2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3070228, p. 1 ff.

[36] See J. Sylvestre Bergé, S. Grumbach, V. Zeno-Zencovich, The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance, cit., p. 162 f.; N. Purtova, Do Property Rights in Personal Data Make Sense after the Big Data Turn ?, cit., p. 13 f.

[37] In this regard, see again: N. Purtova, Do Property Rights in Personal Data Make Sense after the Big Data Turn ?, cit., p. 11 f.

In relation to these entities, therefore, it would be more plausible to envisage a generic "ownership" of the data, which attributes to the subject, in the wake of the consolidated tradition of intangible assets, a series of rights of use and exclusive exploitation of the information, and correlatives limits and remedies to deal with unauthorized use or injury[38].

However, the traditional conception of property rights as the exclusive right by which one exercises the right to enjoy and dispose of things fully and exclusively does not seem to fit properly in the context of the data economy.

Therefore, other scholars deem preferable the creation of a fluid and relational property right, that is, a "quasi-property" expressed on the data through the use of the regulation of trade secrets[39]. This approach would seem more flexible and able to meet the challenges posed by the need to take advantage of the user data in the new economic context[40].

Another part of the doctrine, in line with this, believe that the regulation of the ownership of personal data could also be traced back to the rules on the circulation of intangible assets, and included in the system of exclusive property rights[41].

In this regard, on the other hand, the production of data, unlike entities traditionally protected by intellectual property, is due to natural phenomena or human behavior that exist regardless of the existence of an incentive provided by a exclusive right, which is the reason why the introduction of such a right would have no reason to exist[42].

In particular, as concerns personal data, the fact that the data is not a creation of the interested party but leaves aside an act of the individual leads to exclude its possible inclusion among the exclusive rights on intangible assets[43].

However, the decisive argument against the introduction of data exclusivity appears, in the

[38] In this perspective, see again: J. Sylvestre Bergé, S. Grumbach, V. Zeno-Zencovich, The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance, cit., p. 161 f.

[39] In this sense, the application of a commercial license regime on personal data could also be considered, which would be treated as one's trade secrets.

[40] See: G. Malgieri, R.I.P.: Rest in Privacy or Rest in (Quasi-)Property? Personal Data Protection of Deceased Data Subjects between Theoretical Scenarios and National Solutions, cit., p. 300 ff.; Id., "Ownership" of Customer (Big) Data in the European Union: Quasi-Property as Comparative Solution?, in Journal of Internet Law, 2016, vol. 20, no. 5, p. 3 ff.; S. Balganesh, Quasi-Property: Like, but not Quite Property, University of Pennsylvania Law Review, 2012, vol. 160, p. 1889 ff.; SG Davies, Re-engineering the Right to Privacy: How Privacy Has Been Transformed from a Right to a Commodity, in PE Agre, M. Rotenberg (eds.), Technology & Privacy: The New Landscape, MIT Press, Cambridge, 1997, p. 125 ff.

[41] See, eg: L. Trakman, R. Walters, B. Zeller, Is Privacy and Personal Data Set to Become the New Intellectual Property?, in IIC - International Review of Intellectual Property and Competition Law, 2019, vol. 50, no. 8, p. 937 ff.

[42] On this point, see: H. Zech, A legal framework for a data economy in the European Digital Single Market: rights to use data, in Journal of Intellectual Property Law & Practice, 2016, vol. 11, no. 6, p. 460 ff.

[43] A substantial difference between intellectual property rights and rights on personal data relates to the fact that, while the former presuppose the manifestation of a human activity aimed at the creation of the intangible asset, which then also constitutes the title of the exclusivity, in the case of personal data the entity subject to protection is not created by the interested party, but it is simply referable to her and the title of belonging consists in this connection with the person. Therefore, if the purpose of intellectual property is to encourage such creations of human activity, the protection of personal data ends up remaining extraneous to this system. See: J. Drexl, Designing Competitive Markets for Industrial Data - Between Propertisation and Access, Max Planck Institute for Innovation & Competition, Research Paper No. 16-13, October 2016, available at: https://ssrn.com/abstract=2862975, p. 23.

perspective of computational innovation, the impact that such a regulation could have on the circulation of knowledge, innovation and competition[44].

The introduction of an exclusivity would reduce the spaces of free appropriation of the information currently available, while the presumption that this reduction would be compensated by the greater aptitude for negotiating circulation appears arbitrary[45].

From an economic point of view, therefore, the introduction of a new type of exclusive right on data does not seem to find justification, especially since it could bring in fact an obstacle to the functioning of the digital economy, given that in this context the free access to data is extremely important in order to guarantee the development of innovation and the correct functioning of the markets[46].

In the same perspective, the introduction of a protectionist regime on the algorithms used to analyse the data could also result in a limitation of the freedom of economic initiative. Therefore, it does not seem necessary to strengthen the *sui generis* regulation of the directive 96/9/EC on the protection of databases[47].

II.2. *Data transfer*

The circulation of personal and non-personal data can take place in different ways from the transfer of an asset, rather focusing on the provision of a service.

This happens, for example, in relation to the service offered by Google Maps, which is based on the data that Google collects and analyzes by circulating the related information at a later time. In this case, Google does not exchange the data directly, simply analyzing it and then subsequently offering a service based on the information collected[48].

Another possibility coincides, then, with the collection of data and the offer of an access service to the same, sometimes in real time. In this case, from a legal point of view, it will not be a matter of

[44] See, among others: W. Kerber, A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis, in Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil (GRUR Int), 2016, vol. 65, no. 11, p. 989 ff.; J. Drexl, Designing Competitive Markets for Industrial Data - Between Propertisation and Access, cit., pp. 30-33.

[45] See: J. Drexl, RM Hilty, L. Desaunettes, F. Greiner, D. Kim, H. Richter, G. Surblytė, K. Wiedemann, Data Ownership and Access to Data - Position Statement of the Max Planck Institute for Innovation & Competition of 16 August 2016 on the Current European Debate, available at: http://ssrn.com/abstract=2833165, pp. 2-8. A further argument against the provision of an exclusive right on data would be that relating to the violation of the principle of the *numerus clausus* of real rights and intellectual property rights. On the subject, see: G. Ghidini, Rethinking Intellectual Property. Balancing Conflicts of Interests in the Constitutional Paradigm, Edward Elgar, Cheltenham, 2018, p. 2 ff.; in a comparative-critical key, see: NM Davidson, Standardization and Pluralism in Property Law, in Vanderbilt Law Review, 2008, vol. 61, p. 1658 ff.

[46] In this sense, see: J. Drexl, RM Hilty, L. Desaunettes, F. Greiner, D. Kim, H. Richter, G. Surblytė, K. Wiedemann, Data Ownership and Access to Data, cit., p. 2 ff.

[47] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77 27.3.1996. In relation to this provision, it has been asked, rather, whether the existence and exercise of copyright on databases could constitute excessive barriers to the entry into the market of new actors in contexts characterized by the presence of few companies. See: V. Falce, Copyrights on data and competition policy in the Digital Single Market Strategy, in Rivista Italiana di Antitrust, 2018, no. 1, available at: http://iar.agcm.it/article/view/12871, p. 32 ff.; J. Drexl, RM Hilty, L. Desaunettes, F. Greiner, D. Kim, H. Richter, G. Surblytė, K. Wiedemann, Data Ownership and Access to Data, cit., p. 4.

[48] In this regard, see: H. Zech, Data as a Tradeable Commodity - Implications for Contract Law, cit., p. 3 f.

transferring data but of offering a service based on access to the relative information.

Upstream marketing, that is at the data collection level, is a topic that has been addressed by the European legislator in the Directive 96/9/EC. Today, however, the data collected in the databases are not marketed or licensed, while the provision of services based on access to the various databases is much more frequent[49].

In certain circumstances, the data access service could also concern raw data, for example in cases where real-time access to a measuring device that generates data is offered. This hypothesis has been confirmed by the European Commission, which, in order to facilitate the circulation of data between companies, has promoted the use of models designed to guarantee an improvement in the conditions of access to data and the related analysis[50].

From a regulatory point of view, at European level, as part of the Digital Single Market Strategy, in the Regulation 2018/1807 on the free flow of non-personal data[51], the original option of introducing a new property right on the data seems to have been abandoned, in favor of the identification of a set of principles to regulate the access and circulation of information available in innovation markets[52].

Thus, as already noted in the previous paragraph with regard to the issue of ownership and the GDPR provisions on personal data, the attempt to apply traditional legal doctrines to exchanges concerning data does not seem to adapt to these cases adequately. In such circumstances, in fact, not only there is uncertainty about the applicable law, but also about what the rights claimed by the parties are and how these rights can circulate.

The relevant data in the current context are presented, in fact, as entities partially protected by a series of different rules, similar to property law or property-related interests, such as the regulation on intellectual property or trade secrets, and by rules that limit their marketing, such as privacy or consumer protection[53].

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[49] See again: H. Zech, Data as a Tradeable Commodity - Implications for Contract Law, cit., p. 5.

[50] See: European Commission, Communication "A European Strategy for Data", COM (2020) 66, cit., p. 6 ff.; Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on the opening of data and the re-use of public sector information (recast), OJ L 172 26.6.2019; Communication "Towards a common European data space", COM (2018) 232 final, cit., as well as the measures proposed together with the aforementioned Communication which form part of the package on the common data space and include: the Recommendation (EU) 2018/790 of 25 April 2018 on access to and preservation of scientific information, C/2018/2375, OJ L 134 31.5.2018; the Guidance on sharing private sector data in the European data economy, 25 April 2018, SWD (2018) 125 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2018:125:FIN; and before the Communication "Building a European data economy", 10 January 2017, COM (2017) 9 final, cit., p. 9 f.

[51] Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, OJ L 303 28.11.2018.

[52] See: J. Drexl, Legal Challenges of the Changing Role of Personal and Non-Personal Data in the Data Economy, in A. De Franceschi, R. Schulze (eds.), Digital Revolution - New Challenges for Law, Intersentia, Cambridge, 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274519, p. 3 ff.; V. Falce, Copyrights on data and competition policy in the Digital Single Market Strategy, cit., p. 33.

[53] See: C. Wendehorst, N. Cohen, S. Weise, Feasibility Study ALI-ELI Principles for Data Economy, Draft Framework for Discussion, 25 August 2017, available at: https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/Data_Economy/Feasibility_of_ALI-ELI_Principles_for_a_Data_Economy_2017-08-25__002_.pdf, p. 2; J. Drexl, Designing Competitive Markets for

In this scenario, it seems desirable to introduce a series of common principles at transnational level to facilitate the creation of new contractual models, or specific provisions that the parties can use on a voluntary basis in the context of the relative negotiations. These principles could also be used as a source of inspiration and guide for the work of legislators, regulators and courts, as well as for co-regulatory or self-regulatory approaches[54].

In order to proceed in this direction and facilitate the circulation and transfer of data, however, some considerations must be kept in mind. First of all, the right of access is not a right that can be assimilated to property or to another real right since by definition it does not necessarily have to be of an exclusive nature.

The right of access is not transferred, only granted. This entails the possibility for a multiplicity of subjects to access the same data simultaneously, without prejudice to the hypothesis in which the exclusivity derives from the secrecy of the information or from technical protection measures[55].

Moreover, the distinction between the various negotiation cases aimed at the circulation of data cannot be anchored to the criterion of the transfer of factual power. In some cases the counterparty could be authorized to access the data exclusively, but in others the granting of access to the data could be part of a delivery service in progress, or it could be in the offer of a simple access service. In these latter circumstances, the criterion of transfer of factual power is inapplicable[56].

The progressive growth of online contracts based on the exchange and processing of data, in particular personal data, shows that the data itself is often becoming the object of the performance. In relation to this hypothesis, as noted above, the basic approach that underlies the data protection rules, based on personality rights, does not seem to conflict.

In such a perspective, then, the question arises whether the data transfer contract relates to a service consisting of the provision of personal data or rather the authorization to process them[57].

Industrial Data - Between Propertisation and Access, cit., p. 19 ff.

[54] In this sense, see: European Commission, Guidance on sharing private sector data in the European data economy, SWD (2018) 125 final, cit.; C. Wendehorst, N. Cohen, S. Weise, ALI-ELI Feasibility study Principles for Data Economy, Draft Framework for Discussion, 25 August 2017, cit., p. 3.

[55] See: H. Zech, Data as a Tradeable Commodity - Implications for Contract Law, cit., pp. 6 and 11; J. Rifkin, The Age of Access, cit., p. 6 ff., according to whom the age of access is the change that involves the transition from an economy dominated by the market and the concepts of goods and property, towards an economy dominated by values such as culture, information and relationships. In such a new age, in which markets give way to networks, what differentiates user-consumers is the possibility or not of accessing the network, that is, of entering the virtual world that the Internet offers and thus being able to take advantage of the various services. In this scenario, it is no longer a question of owning goods, but rather of having experiences.

[56] In this regard, see: H. Zech, Data as a Tradeable Commodity - Implications for Contract Law, cit., p. 6; J. Rifkin, The Age of Access, cit., pp. 7-9, who highlights that on the network the suppliers do not sell, but maintain ownership of the things, so that the user accesses what she wants in a non-fixed way and only for a certain period of time.

[57] See: P. Hacker, Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive, forthcoming in S. Lohsse, R. Schulze, D. Staudenmayer (eds.), Data as Counter-Performance: Contract Law 2.0?, Hart/Nomos, 2020, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3391772, p. 1 ff.; L. Drechsler, Data As Counter-Performance: A New Way Forward or a Step Back for the Fundamental Right of Data Protection?, in Jusletter IT February 2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3329345, p. 1 ff.; A. Metzger, Data as Counter-Performance What Rights and Duties do Parties Have?, in Jipitec, 2017, vol. 8, no. 1, p. 2 ff.

In relation to these types of relations, US scholars stated that the contracts by which data are provided for goods or services should be seen in the context of an exchange of services each with its own value.

In particular, the contractual paradigm should no longer be that of "data as alienable goods" but rather that of "data services". Thus, the subject of the exchange would be: a) access to personal information, in exchange for b) access to the services provided by the data aggregator[58].

III. DATA CIRCULATION AND LEGAL SAFEGUARDS

III.1. *Protection of personal data*

In the data economy, legislators, regulators and companies are looking for effective instruments to guarantee fundamental rights such as the protection of personal data, consumers and competition[59].

From the analysis of big data, in addition to the positive effects mentioned above, potential violations of the private sphere of individuals could also derive. The use of personal data for the creation and analysis of large data sets has revealed a series of problematic aspects that do not seem to have been solved even after the entry into force of the GDPR[60].

The current technological development, according to some scholars, would require conceptual and practical changes that the GDPR does not take into consideration. In fact, in relation to big data, the classic data protection principles enshrined at European level would no longer apply, including for example that of "data minimization" or the limitation of data collection for specific purposes, appearing incompatible with the reference context[61].

Moreover, according to other scholars, the need felt by the European legislator to guarantee respect for fundamental rights and in particular the privacy of individuals, would clash with the market practice for which personal data are increasingly "treated as a 'de facto' property"[62]. As already noted in the previous paragraph, however, there are no justifications that from an economic point of view appear convincing in order to introduce a new exclusive right to data.

In the opposite direction, other scholars highlight how the protection of the fundamental rights of the individual should not necessarily be pursued through a de-capitalization of the data and legal acts that determine their circulation, but through a precise control of the acts of private autonomy aimed

[58] See: AM Matwyshyn, Privacy, the Hacker Way, in Southern California Law Review, 2013, vol. 87, no. 1, pp. 3-5.

[59] For an overview of such issues, see among others: M. Bakhoum, B. Conde Gallego, M. Mackenrodt, G. Surblytė-Namavičienė, Personal Data in Competition, Consumer Protection and Intellectual Property Law. Towards a Holistic Approach ?, Springer, Berlin, 2018.

[60] See, among others: C. Crawford, J. Shultz, Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms, in Boston College Law Review, 2013, vol. 55, no. 1, p. 93 ff.

[61] See: TZ Zarsky, Incompatible: The GDPR in the Age of Big Data, in Seton Hall Law Review, 2017, vol. 47, no. 4 (2), p. 995 ff.

[62] In this regard, see: G. Malgieri, "Ownership" of Customer (Big) Data in the European Union: Quasi-Property as Comparative Solution ?, cit., p. 6.

to ensure the protection of the incompressible values of the personality[63].

Thus, the GDPR rules on consent freely given by the interested party can be key. In particular, the so-called consent granularity would allow not only the exchanges between personal data and other services, but also the processing of data for purposes other than those related to the execution of the main service.

If personal data are considered as the actual counter-performance for the service, all the relationship established between the parties can be based on a consent not only of an authorization type, but rather a negotiating one, that is to say constituting legal relations with patrimonial content. The monetization of personal data would not have anything unseemly or legally illicit in itself, provided that the consent in question represents an effective expression of the power of self-determination[64].

In such a perspective, now, according to the Directive 2019/770 on the supply of digital content and services, content or services violating the GDPR would trigger the remedies for non-conformity with the contract under the Directive[65].

III.2. *Protection of competition*

The issues related to data protection in certain circumstances also give rise to possible overlaps with those on competition, so that both in Europe and in many countries is a growing debate has developed about the opportunity of use or review antitrust regulation to counter the risks associated with the collection and use of users' personal data[66].

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[63] See: G. Resta, Towards a unified regime of data-rights? Rapport de synthèse, cit., pp. 239-241; C. Langhanke, M. Schmidt-Kessel, Consumer Data as Consideration, in EuCML - Journal of European Consumer and Market Law, 2015, no. 6, p. 218 ff.

[64] In line with this, the GDPR rule of the constant revocability of consent - which cannot be derogated by the private autonomy - in the onerous circulation of personal data could also be read in the sense that the principle of the legal force of the contract gives way to the need to maintain the power of self-determination in relation to the attributes of one's personality. The GDPR was adopted, in fact, following a long regulatory process, at a crucial moment for the development of the digital ecosystem, since on the one hand the risks associated with the protection of individuals' fundamental rights and freedoms emerge, but on the other hand there are great opportunities to create value, promote collective well-being and improve various social aspects. See, in addition to what has been highlighted so far: TZ Zarsky, Incompatible: The GDPR in the Age of Big Data, cit., p. 996 ff.

[65] Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, cit., art. 14. See: L. Drechsler, Data As Counter-Performance: A New Way Forward or a Step Back for the Fundamental Right of Data Protection?, cit., p. 7 f.; G. Spindler, Contracts For the Supply of Digital Content – Scope of application and basic approach – Proposal of the Commission for a Directive on contracts for the supply of digital content, in European Review of Contract Law, 2016, vol. 12, no. 3, p. 183 ff. (194 f.).

[66] See: European Commission, The economics of ownership, access and trade in digital data, cit., p. 19 ff.; in Italy: Autorità garante della concorrenza e del mercato - Autorità per le garanzie nelle comunicazioni - Garante per la protezione dei dati personali, Indagine conoscitiva sui big data, February 2020, available at: https://www.agcm.it/dotcmsdoc/allegati-news/IC_Big%20data_imp.pdf; in the United Kingdom: Unlocking digital competition, Report of the Digital Competition Expert Panel, so-called Furman Report, March 2019, available at: https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel; in Germany: H. Schweitzer, J. Haucap, W. Kerber, R. Welker, Studie zur "Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen" - Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie, September 2018, available at: https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2018/20180904-kartellrechtliche-missbrauchsaufsicht-fit-fuer-internetgigant-machen.html; in the United States, vice versa: BA Nigro Jr (Deputy Assistant Attorney General Antitrust Division US Department of Justice), "Big Data" and Competition for the Market, December 2017, available at: https://www.justice.gov/opa/speech/file/1017701/download, p. 1 ff. In doctrine, see ex multis: M. Bakhoum, B.

In particular, some scholars have highlighted how the exchanges of data in the current context occur more and more frequently for free services, and this practice can violate the law on the protection of personal data in such a subtle way as to make consumers unaware of the same violation, or induce them to neglect the protection of their privacy and to ignore the value of their data[67].

The use of algorithms and artificial intelligence for big data analysis and user-consumer profiling, therefore, could jeopardize the control that they should have over the confidentiality of their private sphere, as well as their preferences and consumer habits[68].

The decision on the Facebook case taken in February 2019 by the German Competition Authority, for example, stated that the conduct as a result of which companies collect personal data can be not only harmful to privacy, but also abusive as unfair and unjustifiably burdensome[69].

In the context of the data economy, therefore, a growing debate concerns the possibility of extending

Conde Gallego, M. Mackenrodt, G. Surblytė-Namavičienė, Personal Data in Competition, Consumer Protection and Intellectual Property Law. Towards a Holistic Approach?, cit., p. 121 ff.; J. Drexl, Designing Competitive Markets for Industrial Data - Between Propertization and Access, cit., p. 41 ff.; G. Pitruzzella, Big Data and antitrust enforcement, in Rivista italiana di Antitrust, 2017, no. 1, p. 77 ff.; G. Colangelo, M. Maggiolino, Big data, data protection and antitrust in the wake of the Bunderskartellamt case against Facebook, ivi, p. 104 ff., and IIdd., Big Data as Misleading Facilities, in European Competition Journal, 2017, vol. 13, no. 2, available at: https://ssrn.com/abstract=2978465, p. 1 ff.; DL Rubinfeld, MS Gal, Access Barriers to Big Data, in Arizona Law Review, 2017, vol. 59, p. 339 ff.; X. Boutin, G. Clemens, Defining "Big Data" in Antitrust, in Competition Policy International: Antitrust Chronicle 2017, vol. 1, no. 2, p. 22 ff.; DD Sokol, R. Comerford, Antitrust and Regulating Big Data, in George Mason Law Review, 2016, vol. 23, no. 5, p. 1129 ff.; JD Wright, E. Dorsey, Antitrust Analysis of Big Data, in Competition Law & Policy Debate, 2016, vol. 2, no. 4, p. 35 ff.; A. Lambrecht, CE Tucker, Can Big Data Protect a Firm from Competition?, cit., p. 1 ff.

[67] See: G. Colangelo, M. Maggiolino, Big data, data protection and antitrust in the wake of the Bunderskartellamt case against Facebook, cit., p. 105; IIdd., Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the U.S., in International Data Privacy Law, 2018, vol. 8, no. 3, p. 224 ff.; K. Kemp, Concealed Data Practices and Competition Law: Why Privacy Matters, UNSW Law Research Paper No. 19-53, 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3432769.

[68] On the problematic issues related to the use of big data and algorithms in consumer relations, such as discrimination, collusion, etc. - which do not fall within the scope of this essay - see: OECD, Algorithms and Collusion: Competition Policy in the Digital Age, 2017, available at: http://www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm; J. Miklós-Thal, C. Tucker, Collusion by Algorithm: Does Better Demand Prediction Facilitate Coordination Between Sellers?, 2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3261273, p. 1 ff.; I. Graef, Algorithms and Fairness: What Role for Competition Law in Targeting Price Discrimination Towards End Consumers?, in Columbia Journal of European Law, 2018, vol. 24, no. 3, p. 541 ff.; A. Ezrachi, ME Stucke, Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy, Harvard University Press, Cambridge (Mass.), 2016.

[69] The Bundeskartellamt, with a ruling of 6 February 2019, stated that Facebook abused its dominant position in the market of social networks by imposing some terms and conditions for the collection of user data in violation of the privacy law. More specifically, the German Authority considered that the extent to which Facebook collects, merges and uses data in user accounts through Facebook-owned services such as Instagram or WhatsApp, but also third-party websites that include interfaces such as "like" or "share" buttons, constitutes an abuse of a dominant position; see:
https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07/07_02_2019_Facebook.pdf?__blob=publicationFile&v=2. In doctrine, see: G. Colangelo, M. Maggiolino, Antitrust über alles. Whither competition law after Facebook ?, in World Competition, 2019, vol. 42, p. 355 ff.; VHSE Robertson, The Theory of Harm in the Bundeskartellamt's Facebook Decision, in Competition Policy International, March 2019, available at: https://www.competitionpolicyinternational.com/wp-content/uploads/2019/03/EU-News-Column-March-2019-Full-1.pdf. Furthermore, the question remains open as, first, in August 2019 the Düsseldorf Regional Court resolved the suspension of the decision, considering that the disputed data policy did not cause any significant competitive damage (OLG Düsseldorf, 26 August 2019, Case VI-Kart 1/19 (V); for a comment, see: G. Colangelo, Facebook and the Bundeskartellamt's Winter of Discontent, in Competition Policy International, September 2019, available at: https://www.competitionpolicyinternational.com/facebook-and-bundeskartellamts-winter-of-discontent/#_edn2), and, then, the Bundeskartellamt appealed to the Federal Supreme Court.

the scope of intervention of the antitrust authorities by incorporating the possession of large amounts of data in the context of the criteria for analyzing mergers and any anti-competitive practices[70].

This is mainly to verify whether the control of large amounts of data can offer companies an unfair advantage over competitors, allowing them to use the relative market power to harm consumers and competitors[71].

The fact that a company is in possession of big data, in fact, does not seem to necessarily imply that it has power in the markets for generating and collecting that data. Similarly, it would not seem possible to establish a real causal link between the company's possession of big data and the fact that the same company can exercise power in the markets that are located downstream of the generation and collection of data[72].

The issue of the possibility that data could contribute to increase market power, however, is at the heart of institutional assessments and academic debates, which essentially rest on two opposite poles: on the one hand, there are those who are in favor of the competition law as a solution to regulate the

[70] The European Commissioner for Competition Margrethe Vestager, in a speech at the DLD Conference in Munich of 17 January 2016, available at: https://ec.europa.eu/competition/speeches/index_2016.html, stated that the fact that companies can analyze large amounts of data to improve services is not a problem. On the other hand, according to the Commissioner, if few companies control the data necessary to satisfy customers and reduce costs, this could give them the power to expel competitors from the market, with the risk that there are not enough incentives to continue using Big Data to better serve customers. "If a company's use of data is so bad for competition that it outweighs the benefits, we may have to step in to restore a level playing field". However, having a lot of information does not necessarily equate to having greater competitive strength because the value of this information can vary over time: "It might not be easy to build a strong market position using data that quickly goes out of date. So we need to look at the type of data, to see if it stays valuable - explained the Commissioner - We also need to ask why competitors couldn't get hold of equally good information. What's to stop them from collecting the same data from their customers, or buying it from a data analytics company?". See also, with reference to the merger operations: M. Vestager, Big Data and Competition, EDPS-BEUC Conference on Big Data, Brussels, 29 September 2016, available at: https://ec.europa.eu/commission/commissioners/2014-2019/Vestager/announcements/big-data-and-competition_en; in doctrine, see: A. Giannaccari, The Big Data Competition Story: Theoretical Approaches and the First Enforcement Cases, EUI Department of Law Research Paper No. 2018/10, available at: https://papers.ssrn.com/sol3 /papers.cfm?abstract_id=3244419, p. 8 ff.

[71] In this regard, see among others: J. Kennedy, The Myth of Data Monopoly: Why Antitrust Concerns About Data Are Overblown, in Information Technology & Innovation Foundation, March 2017, available at: http://www2.itif.org/2017-data-competition.pdf, p. 1 ff.; G. Colangelo, M. Maggiolino, Big Data as Misleading Facilities, cit., p. 5 ff.; T. Körber, Is Knowledge (Market) Power? - On the Relationship Between Data Protection, "Data Power" and Competition Law, in NZKart 2016, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3112232, p. 1 ff.; DL Rubinfeld, MS Gal, Access Barriers to Big Data, cit., p. 11 ff.; DD Sokol, R. Comerford, Antitrust and Regulating Big Data, cit., p. 1140 ff. With regard to the intersection between possession of big data and consumer protection from unfair commercial practices, the Italian Antitrust Authority, with a decision of 29 November 2018, stated that Facebook, on the one hand, in violation of artt. 21-22 of the Italian Consumer Code, had misleadingly induced users-consumers to register on the platform, not informing them adequately and immediately during the activation of their account of the activity of collection with commercial intent of the data provided by them, and more generally of the remunerative purposes that underlie the provision of the social network service, emphasizing the only gratuity. On the other hand, the Authority considered that the platform, in violation of artt. 24-25 of the Consumer Code, implemented an aggressive practice consisting of an undue influence on registered consumers, who underwent without express and prior consent the transmission of their data from Facebook to third party websites or apps and vice versa for commercial purposes (see: http://www.agcm.it/media/comunicati-stampa/2018/12/Uso-dei-dati-degli-utenti-a-fini-commerciali-sissioni-per-10-milioni-di- EUR-to-Facebook). Subsequently, the administrative court of appeal TAR Lazio, with the decision no. 261 of 10 January 2020, confirmed the aforementioned provision for the first part relating to misleading commercial practice, while the court amended the second part relating to aggressive practice.

[72] See: T. Körber, Is Knowledge (Market) Power? - On the Relationship Between Data Protection, 'Data Power' and Competition Law, cit., p. 5 ff.; DS Tucker, H. Wellford, Big Mistakes Regarding Big Data, in Antitrust Source, 2014, available at: https://ssrn.com/abstract=2549044, p. 1 ff.

collection and use of data; on the other, those who consider antitrust as an inappropriate instrument and propose the adoption of a regulation based on the rules regarding data protection or consumer protection[73].

In relation to the above, it should also be noted that in the decisions of the European Commission[74] and some of the competition authorities operating at national level[75], no particular criteria have so far been established that can be applied to evaluate big data[76].

However, some scholars have noted how in the data economy a merger in related markets can also determine effects at both vertical and conglomerate level, if it contributes to increase or incentivize the ability of a large company to limit access to data for competitors operating upstream or downstream[77]. In such contexts, competition problems would seem more likely, as it is more difficult for competitors to be able to replicate the information extracted from the data.

In this perspective, the post-merger combination of the parties' datasets could affect the market power of the entity resulting from the merger and/or the obstacles associated with the entry or expansion on the market for current or potential competitors[78].

From the Communication for a European Data Economy of January 2017[79] to the most recent Communication on a European Data Strategy of February 2020[80], the European Commission has addressed a number of data-related issues, including in particularly that of the availability of data and the concentration of large quantities of them by a limited number of "big techs" and the related risk of reducing incentives for data-driven companies to emerge, grow and innovate[81].

Consequently, the Commission has foreshadowed, in general, the creation of a common European data space[82], and in particular, the adoption of regulatory measures including the introduction of

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[73] See L. Holková Lubyová, Big Data in the EU Competition Law, Charles University in Prague Faculty of Law Research Paper No. 2018/I/1, February 2018, available at: https://ssrn.com/abstract=3128400, p. 1 ff.

[74] See, for example, the following cases: Google/DoubleClick, COMP/M.4731, decision 11/3/2008; Microsoft/Yahoo! Search Business, COMP/M.5727, decision 2/18/2010; Facebook/WhatsApp, COMP/M.7217, decision 3/10/2014.

[75] See: German Bundeskartellamt and French Autorité de la concurrence, joint report on Competition Law and Data, 10 May 2016, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html.

[76] In this regard, see among others: L. Holková Lubyová, Big Data in the EU Competition Law, cit., p. 4 ff.

[77] See B. Lasserre, A. Mundt, Competition Law and Big Data: the enforcer's view, in Italian Antitrust Review, 2017, no. 1, available at: http://iar.agcm.it/article/view/12607, p. 88 ff. (92).

[78] In this regard, see: G. Pitruzzella, Big data and antitrust enforcement, cit. p. 81.

[79] See: European Commission, Communication "Building a European Data Economy", COM (2017) 9, cit.

[80] See: European Commission, Communication "A European Strategy for Data", COM (2020) 66, cit.

[81] In this sense, see: European Commission, Communication "A European Strategy for Data", COM (2020) 66, cit., p. 3, where, from a comparative perspective, it is also noted that "competitors such as China and the US are already innovating quickly and projecting their concepts of data access and use across the globe. In the US, the organization of the data space is left to the private sector, with considerable concentration effects. China has a combination of government surveillance with a strong control of Big Tech companies over massive amounts of data without sufficient safeguards for individuals". Therefore, the Commission believes that: "In order to release Europe's potential we have to find our European way, balancing the flow and wide use of data, while preserving high privacy, security, safety and ethical standards".

[82] See in particular: European Commission, Communication "A European Strategy for Data", COM (2020) 66, cit., pp. 4-6 and 21-22, where the project of a European common data space is declined in support for the creation of nine sectoral common spaces: industrial-manufacturing data, Green Deal data, mobility data, health data, financial data,

specific non-personal data sharing obligations for companies that hold a dominant position[83].

Following the recent initiatives of the European Union, and the analyses underway on the matter in several Member States[84], there is an ongoing debate, as mentioned, about the possibility of using antitrust law as a tool aimed at imposing dominant companies to share their datasets.

In particular, regulators and scholars wonder, on the one hand, whether in order to obtain better products and services the knowledge derived from big data can give rise to a competitive advantage and at the same time be considered as a barrier to entry; on the other, if the data can be considered as essential inputs in some markets and therefore if the essential facility doctrine can also be applied in relation to them[85].

With regard to these issues, in the face of those who said that barriers to accessing big data may exist[86], other authors noted that the markets for the generation and collection of digital data are not characterized by the presence of barriers to access, nor does it appear configurable the existence of the requirements of the essential facility doctrine with regard to the refusal to provide data[87].

The refusal to share data, in fact, in order to be correctly framed within the scope of art. 102 of the TFEU, requires the verification of a set of circumstances of which the difficult configurability in relation to big data has been highlighted[88].

In particular, it should be ascertain whether the refusal to contract implies a strategy of monopolization of the market and to verify the existence of a series of requirements that have been recalled in particular in the Magill and the Microsoft cases[89].

The refusal to contract within the framework of the essential facility doctrine refers, first of all, to a product or service that is indispensable for the exercise of a specific activity in a connected secondary market. Secondly, the refusal to contract should rule out effective competition in the related market, as well as prevent the emergence of a new product or service for which there is a demand from

energy data, agriculture data, data for public administration and skills data.

[83] In this regard: J. Mordall, Antitrust risks and big data, 2017, available at: https://ssrn.com/abstract=3059598, p. 9, pointed out that in this way it would go beyond the remedies hitherto recognized in the antitrust context, and imposing such a wide access obligation could slow down innovation and reduce investments in a critical period in the evolution of the data economy.

[84] See in particular the joint report of the German and French competition authorities on Competition Law and Data, May 2016, cit., p. 3 ff., and the Studie zur "Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen" - Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie, September 2018, cit.; see also: B. Lasserre, A. Mundt, Competition law and Big Data: The Enforcers' View, cit., p. 88 ff.

[85] See among others mentioned above: G. Colangelo, M. Maggiolino, Big Data as a Misleading Facility, cit., p. 1 ff.; J. Drexl, Designing Competitive Markets for Industrial Data - Between Propertization and Access, cit., p. 41 ff.; G. Pitruzzella, Big Data and antitrust enforcement, cit., p. 77 ff.

[86] In this regard, see: DL Rubinfeld, MS Gal, Access Barriers to Big Data, cit., p. 339 ff.

[87] Thus: J. Drexl, Designing Competitive Markets for Industrial Data - Between Propertisation and Access, cit., p. 42 ff.

[88] See: T. Schrepel, Predatory Innovation: The Definite Need for Legal Recognition, in SMU Science & Technology Law Review, 2018, vol. 21, no. 1, p. 55 ff.; J. Drexl, RM Hilty, L. Desaunettes, F. Greiner, D. Kim, H. Richter, G. Surblytė, K. Wiedemann, Data Ownership and Access to Data, cit., p. 9 f.

[89] Microsoft v. Commission, T-201/04, ECLI: EU: T: 2007: 289, [2007] ECR II-3601; ITV c. Commission ('Magill'), C-241/91 P and C-242/91 P, ECLI: EU: C: 1995: 98, [1995] ECR I-74.

consumers. Finally, the refusal to contract should not be objectively justified[90].

In relation to the aforementioned circumstances, the problem of the substitutability of data sets also emerges. The fact that the data is unrivaled and so can be part of different sets would lean against the hypothesis of dominance[91]. As noted by another doctrine, however, exclusivity would imply neither essentiality nor monopolistic power on a secondary market[92].

The assessment of dominance in the context of big data using the concepts of substitutability and essentiality for access to connected markets, therefore, appears somewhat complex. Having large amounts of data is not a problem in itself and is unlikely to be an obstacle when other companies are able to obtain the same or similar data, by collecting them from their users or by purchasing them from other operators[93].

On the other hand, the legal notion of essentiality goes beyond simply recognizing the relevance that big data can have in the competitive process. Even in those circumstances in which big data can constitute a significant source of advantage by determining a barrier to entry, antitrust law does not necessarily require companies to provide the data collected to their competitors.

In relation to such circumstances, it was found that the imposition of a supply obligation would constitute a strong disincentive to invest in those activities through which big data are collected and analyzed, which could bring benefits to consumers in the forms of innovative services.[94].

From a different point of view, with regard to mergers, it is necessary to evaluate the role of big data in relation to market power and the potential damages related to the combination of large datasets[95].

Analyzing the impact of mergers on competition in markets could also involve data protection. In this sense, it has been observed that if consumers consider the protection of privacy as a desirable characteristic of a service, a reduction of the same will be equivalent to a reduction in the quality of the service provided.

Antitrust and data protection laws could therefore find a point of convergence where the reduction of privacy is qualified as a reduction of the quality of the goods and services offered. In this perspective, an antitrust intervention could aim at sanctioning any strategies likely to give rise to this

[90] On essential facility and big data, see among others: J. Drexl, Designing Competitive Markets for Industrial Data - Between Propertisation and Access, cit., p. 47 ff.; G. Colangelo, M. Maggiolino, Big Data as a Misleading Facility, cit., p. 1 ff.

[91] So, again: J. Drexl, Designing Competitive Markets for Industrial Data - Between Propertisation and Access, cit., p. 46.

[92] In this sense, see: G. Colangelo, M. Maggiolino, Big Data as a Misleading Facility, cit., p. 7.

[93] See: G. Pitruzzella, Big Data and antitrust enforcement, cit., p. 79 f.; T. Körber, Is Knowledge (Market) Power? - On the Relationship Between Data Protection, 'Data Power' and Competition Law, cit., p. 5 ff.

[94] See again: J. Drexl, Designing Competitive Markets for Industrial Data - Between Propertisation and Access, cit., p. 61 f.; G. Pitruzzella, Big Data and antitrust enforcement, cit., p. 80.

[95] See: J. Modrall, N. Rose, Big Data and Merger Control in the EU, in Journal of European Competition Law & Practice, 2018, vol. 9, no. 9, p. 569 ff.; B. Holles de Peyer, EU Merger Control and Big Data, in Journal of Competition Law & Economics, 2017, vol. 13, no. 4, p. 767 ff.; G. Pitruzzella, Big Data and antitrust enforcement, cit., p. 81, according to whom the control carried out by the competition authorities on the mergers in which big data appear as the central element, constitutes the context in which, in the near future, the same authorities could have a greater influence on the evolution of the digital markets.

reduction[96].

Moreover, concerns raised about the risks of exclusion and abuse relating to big data can be highlighted from a further point of view. The high degree of transparency that characterizes online markets as regards prices and the widespread use of algorithms for determining them can have an impact on the collusive behavior of businesses.

While the ability of both consumers and businesses to compare prices online has increased, this information can be used by companies to identify the best positioning of their offer on the market and possibly to facilitate the achievement, monitoring and compliance with collusive agreements[97].

With reference to big data, then, the hypothesis that reproduces the oligopolistic interdependence, that is, the hypothesis for which each operator arrives to practice a collusive price although it developed its own algorithm autonomously and independently, is also of concern[98].

In this framework, then, the impact that price discrimination could have on consumer welfare also depends on various factors, including, in particular, the degree of competition in the market[99].

Recently, with regard to the issues concerning the relation between antitrust and data, an important contribution came from the report on "Competition policy for the digital era" published by the

[96] For example, when there are multiple opportunities to collect and analyze relevant user data that can be used as inputs to provide certain services, big data are less likely to constitute a barrier to entry and an index of market power. Similarly, while market efficiency could increase when companies are able to recommend products or services in line with individual consumers' preferences, social segregation and polarization may worsen when people are exposed only to certain opinions and news. In this regard, see: G. Pitruzzella, Big Data and antitrust enforcement, cit., p. 79; CR Sunstein, Divided Democracy in the Age of Social Media, Princeton University Press, Princeton, 2017, and Id., The law of group polarization, in Journal of Political Philosophy, 2002, vol. 10, no. 2, p. 175 ff.

[97] A key question in the aforementioned hypotheses, therefore, concerns the possibility of extending the traditional notion of responsibility to the development and use of price determination algorithms. In this sense, see: OECD, Algorithms and Collusion: Competition Policy in the Digital Age, 2017, available at: http://www.oecd.org/daf/competition/Algorithms-and-colllusion-competition-policy-in-the-digital-age.pdf, p. 18 ff.; German Bundeskartellamt and French Autorité de la concurrence, joint study on Algorithms and Competition, 6 November 2019, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.html?nn=3591568, p. 4 ff.; see also: JE Gata, Controlling Algorithmic Collusion: Short Review of the Literature, Undecidability, and Alternative Approaches, 2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334889; K. Lee, Algorithmic Collusion & Its Implications for Competition Law and Policy, 2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3213296; G. Pitruzzella, Big Data and antitrust enforcement, cit., p. 83 f.

[98] On this point, which is beyond the scope of this paper, see.: K. Hansen et al., Algorithmic Collusion: Supra-Competitive Prices via Independent Algorithms, CEPR Discussion Paper No. DP14372, 2020, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3535457, p. 1 ff.; E. Calvano et al., Artificial Intelligence, Algorithmic Pricing and Collusion, 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304991, p. 1 ff.; T. Klein, Assessing Autonomous Algorithmic Collusion: Q-Learning Under Short-Run Price Commitments, Amsterdam Law School Research Paper No. 2018-15, 2018, available at: https://papers.ssrn.com/sol3/ papers.cfm? abstract_id = 3195812, p. 1 ff.; U. Schwalbe, Algorithms, Machine Learning, and Collusion, 2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232631, p. 1 ff.; on the related issue of consumers making their purchase decisions via algorithms: M. Gal, N. Elkin Koren, Algorithmic Consumers, in Harvard Journal of Law and Technology, 2017, vol. 30, no. 2, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2876201, p. 1 ff.

[99] In this regard, see again: G. Pitruzzella, Big Data and antitrust enforcement, cit., p. 80, who notes that it is not obvious that discrimination by oligopolistic companies has an impact similar to that put in place by a monopolist; as well as: PG Picht, G. Loderer, Framing Algorithms - Competition Law and (Other) Regulatory Tools, Max Planck Institute for Innovation & Competition Research Paper No. 18-24, 2018, available at: https://papers.ssrn.com /sol3/papers.cfm?abstract_id=3275198, p. 1 ff.

European Commission[100].

The Report, in particular, given that the importance of data and access to it for competition always depends on an analysis of the peculiarities of a given market, the type of data and their use in a specific case[101], analyses specifically the profiles relating to access to personal data, access to data pursuant to art. 102 TFEU, and the data sharing or data pooling agreements, with particular attention to the opening of the related secondary markets (so-called aftermarkets).

> With regard to access to personal data, it is noted that the GDPR can facilitate the transition between data-driven services through data portability[102]. However, this will also depend on the ways in which the right to data portability will be interpreted and implemented[103].

Since data portability in the GDPR has been outlined as a right to receive a copy of some accumulated past data, it can facilitate the transfer of data from one service to another, while it has not been drafted to facilitate the multi-homing[104] or offering complementary services that often rely on continuous and potentially real-time access to data.

More demanding data access regimes, including interoperability, could be imposed through sector regulation, especially to open secondary markets for complementary services[105], or pursuant to art. 102 TFEU regarding dominant companies[106].

With respect to access to data ex art. 102 TFEU, an in-depth analysis will be necessary to verify whether such access is actually indispensable, distinguishing between different forms of data, access levels and uses of the same, and taking into consideration the legitimate interests of both parties.

In cases where it is necessary to impose obligations to access data and possibly interoperability, for example to the service of complementary or after-sales markets, the competition authorities or the courts will have to specify the conditions of access.

> This can happen where access requests are relatively standard and access conditions

[100] European Commission, Competition policy for the digital era, April 2019, cit.

[101] With regard to which see above, at paragraph I.

[102] Art. 20 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, entered into force on 25 May 2018.

[103] In particular, from the perspective of the risk-based approach adopted in the GDPR, it is assumed that a more stringent data portability regime can be imposed on a dominant company to overcome particularly pronounced lock-in effects.

[104] Network configuration that gives rise to the possibility for the consumer-user to use multiple platforms through the interconnection between them; regarding the effects of multi-homing, see among others: SP Anderson, Ø. Foros, HJ Kind, The Importance of Consumer Multi-Homing (Joint Purchases) for Market Performance: Mergers and Entry in Media Markets, in Journal of Economics & Management Strategy, 2019, vol. 28, no. 1, p. 125 ff.; JC Rochet, J. Tirole, Platform Competition in Two-Sided Markets, in Journal of the European Economic Association, 2003, vol. 1, no. 4, p. 990 ff.

[105] As happened with the Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337 23.12.2015.

[106] Thus: European Commission, Competition policy for the digital era - A report by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, cit., p. 77 ff.

> substantially stable. Conversely, where a dominant company should be required to grant continuous access to data, for example to ensure interoperability, regulation may be required, which will sometimes have to be sectoral[107].

Agreements for sharing or pooling data can often be pro-competitive: they can allow companies to develop new or better products or services or to train algorithms on a broader and more meaningful basis[108].

On the other hand, sometimes these agreements can become anti-competitive, for example in the case in which competitors are denied or granted access to less favorable conditions, or if the sharing of data gives rise to an exchange of anti-competitive information, etc. Therefore, an assessment of the scope of the different types of data sharing and their pro-competitive or anti-competitive effects will be required[109].

In any case, it is worth remembering that antitrust law is an important component of the broad set of policy instruments that can be used for public intervention with respect to the regulation of digital markets. The various regulatory tools used for this purpose include, among others, the rules on data protection, freedom of expression, media pluralism, intellectual property and consumer protection.

Such instruments, as shown in the European Union's approach, for example in the package of measures adopted by the Commission in 2018 on access to data[110], must be used in a complementary way in order to simultaneously guarantee the pursuit of a series of common objectives, which, in addition to the antitrust goals of consumer welfare and protection of competition and innovation[111], include the protection of the fundamental rights mentioned above[112].

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[107] See again: European Commission, Competition policy for the digital era - A report by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, cit., p. 98 ff.

[108] Regarding coopetition and data sharing or pooling, see: X. Zhang et al., Compete, Cooperate, or Coopete? The Strategic Role of Data Analytics in Targeted Advertising, 2020, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3549642, p. 1 ff.; Y. Gu, L. Madio, C. Reggiani, Data Brokers Coopetition, 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3308384, p. 1 ff.; G. Ghidini, A, Stazi, "Coopetition: the role of IPRs, in D. Beldiman (ed.), Innovation, Competition and Collaboration, Edward Elgar, Cheltenham, 2015, p. 15 ff.

[109] See, also for the indication of different intervention options: European Commission, Competition policy for the digital era - A report by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, cit., p. 92 ff.

[110] See the Communication "Towards a common European data space", COM (2018) 232, cit., as well as other contextual measures including the Guidance on sharing private sector data in the European data economy, SWD (2018) 125 final, cit., inspired by the balance of the different fundamental rights and interests at stake.

[111] On the debate on antitrust purposes, see recently: AL Nielson, The Paradox of Discretionary Competition Law, in CoRe - European Competition and Regulatory Law Review, 2018, vol. 2, no. 3, p. 156 ff.; A. Douglas Melamed, N. Petit, The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets, in Review of Industrial Organization, 2019, vol. 54, no. 4, p. 741 ff.; GJ Werden, Back to School: What the Chicago School and New Brandeis School Get Right, 2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247116, p. 1 ff.; L. Khan, The New Brandeis Movement: America's Antimonopoly Debate, in Journal of European Competition Law & Practice, 2018, vol. 9, no. 3, p. 131 ff.; G. Ghidini, Rethinking Intellectual Property. Balancing Conflicts of Interests in the Constitutional Paradigm, cit., p. 331 ff.

[112] In this regard, see: G. Pitruzzella, Big Data and antitrust enforcement, cit., p. 84 f.; A. Daly, A. Carlson, T. Van Geelen, Data and fundamental rights, in V. Mak, E. Tjong Tjin Tai, A. Berlee (eds.), Research Handbook on Data Science and Law, Edward Elgar, Cheltenham, 2018, p. 378 ff.; A. Savin, Regulating Internet Platforms in the EU - The Emergence of the 'Level Playing Field', in Computer Law and Security Review, 2018, vol. 34, no. 6, p. 1215 ff. G. De Gregorio, Freedom of Expression and ISP Liability in the Digital Single Market, in CoRe - European Competition and Regulatory Law Review, 2018, vol. 2, no. 3, p. 203 ff.

IV. CONCLUSION

Despite the issues mentioned so far, the generalized acquisition of large amounts of data often appears to be a necessary strategy to maintain the competitiveness of companies and at the same time introduce innovative products. With a view to consumer welfare, it was found that if companies had not been able to acquire large quantities of data, there would have been an impediment in the process of technological evolution.

For example, Tesla's self-driving technology, IBM Watson's ability to diagnose medical diseases, and the Weather Company's weather forecast would have been impossible without large amounts of data. Data is also the resource through which Waze calculates the best route to facilitate car drivers or Facebook connects people with lost friends. These examples represent only some of the advantages that user-consumers now consider acquired in everyday life[113].

Sometimes competition in the markets is limited by the difficulties encountered by users in changing providers or in using a different service. In some cases there may even be a corporate strategy aimed at preventing users from transferring their data to a competitor so as not to lose customers[114].

It is not by chance, therefore, that among the most relevant provisions introduced by the GDPR there is that relating to the right to data portability[115]. This right is aimed specifically at obtaining our personal data in a structured, commonly used and readable form from any electronic device, and to request its transfer, free of charge and without hindrance, to another service provider.

The right to portability, therefore, gives its owner the possibility not only to access her personal data, but also to transfer them for further, and potentially different, purposes than those for which they were initially collected, by a service provider to another. The introduction of this principle has a significant scope, as it traces a clear way for the resolution of the problems connected to the passage of data between different service providers, forcing the latter to renounce the technology lock-in[116].

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[113] In this regard, see: J. Kennedy, The Myth of Data Monopoly: Why Antitrust Concerns About Data Are Overblown, cit., p. 25.

[114] See: WA Günther et al., Debating big data: A literature review on realizing value from big data, in Journal of Strategic Information Systems, 2017, vol. 26, no. 3, p. 191 ff. (200 ff.).

[115] This is also the vision of the European Commission, which in the impact assessment of the GDPR underlined that data portability is "a key factor for effective competition". See: Commission Staff Working Paper - Impact Assessment accompanying the General Data Protection Regulation and the Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data ("Impact Assessment report"), SEC (2012) 72 final, p. 28. As regards the implementation of this right, then, in the Communication "A European Strategy for Data", COM (2020) 66, cit., p. 20, the Commission noted the importance of strengthening the right to data portability pursuant to art. 20 of the GDPR, offering people greater control over who can access and use the data generated by the machines, for example through stricter requirements on the interfaces for accessing data in real time and obligations of mechanically readable formats for the data of certain products and services, such as those from smart appliances or wearable devices.

[116] In this perspective, in July 2018 Facebook, Google, Microsoft and Twitter - later joined by Apple and other companies - launched the "Data Transfer Project", an open source initiative dedicated to the development of tools that will allow user-consumers to transfer their data directly from one service to another, without the need to download them and then proceed with a new upload. Moreover, data portability can also provide benefits for user security, by allowing them to back up or store important information, organize information across multiple accounts, recover data from account violation or from outdated services.

From an economic point of view, unlike what is sometimes stated in the debate on the subject[117], data is not a scarce resource. Conversely, over time the amount of data in circulation increases exponentially. In addition, data is not consumed. On the contrary, users can transfer it to different service providers. Finally, data is an unrivaled asset in consumption, as it can also be used by multiple subjects simultaneously[118].

Therefore, while if there is no data even a minimum quantity is useful, as the quantity of data increases their usefulness begins to decrease: it is the so-called "tragedy of big data", where more data will involve spurious or even insignificant correlations and significantly higher costs for identifying significant correlations[119].

While the value of the data in itself is small, they acquire value when they are organized in such a way as to obtain information and knowledge. This, of course, is also relevant from the point of view of the analysis of the value of the data from the point of view of competition[120].

If only raw data is taken into consideration, the value to which it can instead give rise if properly analysed is not found. The key to extracting value from data is having innovative ideas on how to take advantage from it and using or developing effective artificial intelligence software and systems to derive useful information, for example in the form of intuitions or trained models, as enablers for the development and use of services or products[121].

In such a perspective, then, a possible competitive advantage of a company compared to competitors could be based, more than on the amount of data, on the programming and processing skills, on the rhythm of learning and on the ability to combine data analysis, machine learning and human learning in the best possible ways to develop innovative services or products[122].

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[117] With claims that the data is "the new oil". See eg: N. Newman, Search, Antitrust and the Economics of the Control of User Data, cit. p. 436; AV Lerner, The role of Big Data in online platform competition, cit., p. 3.

[118] See A. Gandomi, M. Haider, Beyond the hype: Big data concepts, methods, and analytics, cit., pp. 137-144; Hal R. Varian, Beyond Big Data, cit., p. 28 ff.; J. Drexl, Designing Competitive Markets for Industrial Data - Between Propertisation and Access, cit. p. 28.

[119] In this regard, see: NN Taleb, Antifragile: Things That Gain from Disorder, Random House, 2012.

[120] As noted above, especially at parr. I and III.2. See again: European Commission, Competition policy for the digital era, cit., p. 27 ff.; G. Pitruzzella, Big Data and Antitrust enforcement, cit., p. 80.

[121] See, also for an appropriate framework in the context of the information economy: European Commission, Competition policy for the digital era, cit., pp. 27-29; JE Stiglitz, The contributions of the economics of information to twentieth century economics, in Quarterly Journal of Economics, 2000, vol. 115, no. 4, p. 1441 ff.; RL Ackoff, From Data to Wisdom, cit., p. 3 ff. To this end, machine learning and deep learning do not necessarily require a lot of data, and sometimes they even get better results with less data, as shown by the case of AlphaGo Zero, a game software for the ancient Chinese game Go. AlphaGo Zero is based on a machine learning model built by the company DeepMind without using data from human matches, which also eliminated the 300,000 games used to educate the original AlphaGo and became more effective by an order of magnitude (see: https://deepmind.com/research/alphago). In this scenario, therefore, the fundamental challenge appears to be the creation of a learning society, that is, the design of social learning through human learning and machine learning. How we do this will affect the labor market, social inequalities, climate change and other complex challenges of the present. In this regard, see: JE Stiglitz, BC Greenwald, Creating a Learning Society: A New Approach to Growth, Development, and Social Progress, Columbia University Press, New York, 2014.

[122] All these learning processes, however, are domain-specific, as we still seem far from designing a system capable of learning, for example, to optimize automotive production and use this knowledge to understand how to produce more effective drugs. See: A. Thierer, AC O'Sullivan, R. Russell, Artificial Intelligence and Public Policy, Mercatus Center George Mason University, Arlington, 2017, available at:

The data revolution requires a regulation that, as recently stated by the European Commission, favors an ecosystem of public bodies, businesses, civil society and private individuals, creating new data-based products and services[123].

Public policies, highlighted the Commission, can increase such a data-driven supply and demand, both by increasing the capacity of the public sector to use data for decision making and public services, and by updating sectoral rules to reflect opportunities offered by data and ensure that there is no disincentive to its productive use[124].

Thus, data regulation has to face a twofold challenge: on the one hand, it must allow and protect the collection and circulation of data through clear and open mechanisms, also with regard to the international flow of data[125]. At the same time, relevant fundamental rights must be safeguarded, such as the protection of personal data, consumers and competition[126].

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3021135, p. 1 ff.; C. Eldred, J. Zysman, M. Nitzberg, AI and Domain Knowledge: Implications of the Limits of Statistical Inference, BRIE/WITS Technology Briefing#2, October 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479479, p. 1 ff.; S. Sneha, R. Beschi, A Conceptual Overview and Systematic Review on Artificial Intelligence and Its Approaches, in International Journal of Emerging Technology and Innovative Engineering, 2019, vol. 5, no. 12, p. 821 ff.

[123] See: European Commission, Communication "A European Strategy for Data", COM (2020) 66, cit., p. 5.

[124] In this perspective, it is also worth mentioning the debate on big data as an instrument or threat for equality. In the face of increasing unease about the asymmetry of power and economic inequality between big data collectors and users pointed out by some scholars, others consider big data a possible means through which equality can be promoted in a new and more effective way, thanks to their unique ability to distinguish different situations and people. In this sense, the main challenge for legislators and regulators would be to facilitate the distinctions between agents located in different positions and at the same time limit illegitimate discrimination. Thus, the data would make it possible to use personalized legal rules and could also guarantee in the future a mitigation of economic inequalities. See: P. Hacker, B. Petkova, Reining in the Big Promise of Big Data: Transparency, Inequality, and New Regulatory Frontiers, in Northwestern Journal of Technology and Intellectual Property, 2017, vol. 15, no. 1, p. 1 ff. (13 ff.).

[125] In this regard, see: F. Casalini, J. López González, Trade and Cross-Border Data Flows, OECD Trade Policy Papers No. 220, OECD Publishing, Paris 2019, available at: https://www.oecd-ilibrary.org/trade/trade-and-cross-border-data-flows_b2023a47-en; V. Zeno-Zencovich, Free flow of data. Is international law the appropriate answer?, forthcoming in: F. Fabbrini, E. Celeste, J. Quinn (eds.), Data Protection Imperialism and Digital Sovereignty, Hart Publishing, Oxford, 2020; D. Ciuriak, M. Ptashkina, Towards a Robust Architecture for the Regulation of Data and Digital Trade, cit., p. 8 ff.

[126] See: European Commission, Communication "A European Strategy for Data", COM (2020) 66, cit., p. 4 ff.; and in the same perspective, on the interaction between data and artificial intelligence: European Commission, White Paper on Artificial Intelligence - A European approach to excellence and trust, Brussels 19.2.2020 COM(2020) 65 final, available at: https://ec.europa.eu/info/files/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en, p. 10 ff.

RETHINKING THE NEXUS OF LAW, SPACE AND JUSTICE: PROTECTING THE PROPERTY INTERESTS OF THE POOR IN THE LATE CAPITALIST CITY

Veronica Pecile

TABLE OF CONTENTS

This paper follows up on an article entitled 'La tutela degli interessi dei poveri nella città tardo-capitalista', part of a volume collecting the proceedings of a conference organised at University of Ferrara, Department of Law in October 2018. Its aim is to offer a theoretical framework as well as an array of legal mechanisms protecting the interests of the urban poor in the late capitalist urban context. After introducing touristification as a widespread mode of value extraction from contemporary cities, the approach of Critical Legal Studies is taken into consideration, as it allows to frame law as a battleground for social conflict and urban space as a scenario in which it is possible to reclaim a common property interest of the have-nots. The following section includes a set of legal mechanisms available in private, public, and hybrid private-public law, which can be used to protect the property interests of the poor. In the conclusion, the potential of urban planning as an arena in which the urban poor's prerogatives can shape policy- and law-making is investigated through the analysis of a case study.

I. INTRODUCTION: TOURISTIFICATION AS PARAMOUNT MODE OF CAPITALIST ACCUMULATION IN CONTEMPORARY CITIES

Among the modes of capitalist accumulation opposed by social struggles in the current conjuncture, touristification stands out for its frequent adoption by local élites as a privileged economic model to be implemented in urban contexts. This process takes place at two levels: from a discursive point of view, a narrative in support of a kind of urban transformation that prioritises the demands of investors and tourists is supported, to the detriment of other users' needs; from an operational point of view, urban scenarios are spatially reorganised in ways that materialise the requests of the real estate and tourism sectors, ultimately leading to the expulsion of the most disadvantaged users to the urban outskirts.[1]

[1] S. Stein, 'Il turismo. Un'ideologia e una strategia di accumulazione', in L. Tozzi (eds), *City Killers – Per una critica del turismo*, Roma: Libria/Campo, 25–32 (2020).

Italian cities were heavily struck by the 2008 economic crisis, which was followed by a widespread promotion of tourism-based urban economies by local élites as a way to cope with the consequences of recession. In these scenarios, the form of living of the urban poor has often become the main object of capitalist accumulation: especially in Southern Italy, the daily practices of the popular classes inhabiting the city centres have been transformed into the core of cities' attractiveness for tourists and real estate investors. Hence, urban poverty has been either removed by historic neighbourhoods – to transform the latter into spaces of consumption and sightseeing – or opportunistically exposed by local élites for the sake of folklorisation – extracting value from the inhabitants' 'authenticity'.[2]
The aim of this paper is to investigate how law can be helpful in protecting the property interests of the poor in the current context of increasingly touristified cities. In the first part, I will turn to Critical Legal Studies as a theoretical background allowing to conceptualise urban space as battleground among different property interests, in which the balance of power relations can be shifted in favour of the urban poor through the adoption of legal arrangements taking into account their prerogatives. In the second part, I will outline an array of legal mechanisms that are available both in private law and in public law to protect the property interests of the urban poor, also suggesting an emerging hybrid legal realm at the crossroads between private and public law. Finally, in the last section I will look at urban planning as a significant arena for social struggles aiming at influencing the law- and policy-making processes shaping urban space.

II. PROTECTING THE URBAN POOR'S PROPERTY INTERESTS: THE APPROACH OF CRITICAL LEGAL STUDIES

The identification and protection of the urban poor's property interests is a useful tactic to oppose touristification and other processes of capital accumulation extracting value from urban contexts. Recent scholarship in legal geography sheds light on the legal tricks adopted by the urban poor to build a 'common' proprietary claim over the urban space able to challenge the hegemony of public-private proprietary claims. In particular, Nicholas Blomley analyses the case of a community of vulnerable subjects in Vancouver which, by virtue of a long-standing custom of collective use of spaces, reclaimed the whole area of a popular neighbourhood – streets, parks, squares – as a political and moral commons, justified and realised through a vocabulary of rights and justice.[3] Indeed, a legal framework capable of protecting the social fabric of popular neighbourhoods from the consequences of touristification should take into account the property interests of the poor as a priority. In other words, legal tools should be deployed in order to grasp the complex modes – exuberating from the strict fences of civil society and its normative practices – through which popular classes use and access urban space. As postcolonial scholarship reminds us, the vast majority of the world population

[2] V. Pecile, 'Gli urban poor ai tempi della turistificazione neoliberale delle città', in L. Coccoli (eds), *La voce dei poveri*, Roma: Ediesse (2021).
[3] N. Blomley, 'Enclosure, Common Right and the Property of the Poor', *Social & Legal Studies*, *17*(3), 311–331 (2008).

does not access the social and economic structures through formal channels; in fact, this large group does not fit into the predetermined parameters of Western civil society, and represents a 'political society' whose non-legal acts often represent the only option for survival.[4]

To imagine these legal tools, the tradition of Critical Legal Studies (CLS) is an extremely helpful point of depart. This intellectual movement developed in the United States in the 1970s and 1980s and grounded its analysis on the heritage of 1930s American legal realism and its critique of law. Challenging the perspective of formalism, predominant at the time, realists questioned the idea that law is an intrinsically consistent system, and shifted the focus on how law is actually deployed – on what judges 'actually do'.[5] This approach highlighted how each legal rule has exceptions and indeterminacies, and that it should be studied by thoroughly taking into account its objectives and effects on society.[6]

Decades later, CLS update realists' intuitions on the indeterminacy of the legal system and deploy them to conduct a critique of the relations between law and power. In particular, 'the Crits' highlight how law is made of tools, hardware, twines and nails, whose application is contingent to specific circumstances, and how it can be exploited to pursue different political projects, implying different allocations of resources in society. The language of law, then, is neither universal nor univocal: it can be used for radically different purposes than capitalist domination and subordination.

In such perspective – which strongly opposes orthodox Marxist approaches dismissive of law – all existing legal institutions can be reframed to allow wealth redistribution and social justice. Property is one of them.[7] The realist thought, and Wesley Newcomb Hohfeld in particular, had already disarticulated the conventional, monolithic notion of ownership into a 'bundle of rights' that can be distributed to a variety of subjects and are tied to different interests on the same thing or space. Property thus becomes 'a complex aggregate of jural relations' and is deprived of any substantive character.[8] What the CLS add to this theoretical move is a strong emphasis on the non-legal (moral, political, social) contents that fundamental legal conceptions such as property are infused with; there is an irreducible non-legal character of law, which forces us to pay attention on the socio-political consequences that jural relations produce. Law thus becomes the 'scene of conflict'[9], once the different stakes at play have been identified.[10]

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[4] P. Chatterjee, *The Politics of the Governed: Popular Politics in Most of the World*. New York: Columbia University Press, 2004.
[5] R. A. Shiner, 'Legal realism', in R. Audi (eds), *The Cambridge Dictionary of Philosophy*, New York: Cambridge University Press (1995).
[6] K. Llewellyn, 'Some Realism about Realism: Responding to Dean Pound', *Harvard Law Review*, *44*(8), 1222–1264 (1931).
[7] M.R. Marella, 'The Law of the Urban Common(s)', *South Atlantic Quarterly*, *118*(4), 877–893 (2019).
[8] W. N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal*, *26*, 710–770 (1917).
[9] P. Schlag, 'How to Do Things with Hohfeld', *Law and Contemporary Problems*, *78*(185), 185–234 (2015).
[10] D. Kennedy, 'The Stakes of Law or Halen and Foucault!', *Legal Studies Forum*, *XV*(4), 328–341 (1991).

The relational approach to property conceived as bundle of rights – in which property title and use can be disentangled, for instance – allows reimagining urban space as a fluid context in which different property interests – related to different possible uses of spaces – entertain a dialectic, at times clashing relation with each other. If we embrace the perspective of CLS, we can go as far as to argue that space and law coincide: our social life is permeated of jural relations in such a way that it is impossible to conceive an 'outside' to law. The latter is not, then, a technique crystallising existing power relations, even though it is often employed to consolidate the status quo; it is rather a 'battleground' in which conflict can be articulated.[11] The underlying presumption is that diverse property interests can insist on the same spaces, and which one prevails is an exquisitely political matter – it has to do with the contingent power relations. The crucial issue, then, is to analyse the different legal regimes from the perspective of the distributional effects they create in society. This line of investigation – in our case, concerning legal arrangements in the urban space – is much more relevant, both theoretically and politically, than other kinds of inquiry that could be carried out at its place: for instance, the one concerning the formality or the informality of legal arrangements adopted in different urban settings. The analysis of the distributional effects – or distributive analysis – rests on the idea that poverty and socioeconomic inequalities are not plagues affecting humanity as unavoidable 'facts', nor just negative externalities generated by the trajectory of late capitalism. Instead, they are the outcome of a specific set of institutional and legal arrangements adopted in specific political and historical conditions that are produced and reproduced globally, and which could be designed in different ways to allow radically different patterns of resources and wealth distribution in society.

III. LEGAL MECHANISMS TO PROTECT THE URBAN POOR'S PROPERTY CLAIMS

If, as CLS argue, 'there is no outside' to law, then it is possible to protect the urban poor's property claims by resorting to already available legal arrangements. What follows is a non-exhaustive list of mechanisms available in existing legal systems that exemplify how social struggles reclaiming the prerogatives of communities on urban spaces could immediately exert a counter-hegemonic use of law to pursue their aims of social justice. The first realm that can be considered is the one of public law arrangements. The Italian movement for the commons active after the 2008 economic crisis has extensively resorted to public law regulations in the attempt of building a collective model of self-government in occupied spaces. This tactic draws on the category of *beni comuni* famously conceived by the Rodotà Commission in 2007, and in particular on the idea that the commons are such because of their function – their use, which allows the exercise of fundamental rights in an intergenerational perspective – and not of their property title – which remains public or private, as established by the

[11] M. Xifaras, 'The Role of the Law in Critical Theory. The case of Property and the Commons (As a Commentary on the first chapter of Negri and Hardt's Commonwealth)', *Critique and Praxis 13/13* (2018), available online: http://blogs.law.columbia.edu/praxis1313/mikhail-xifaras-the-role-of-the-law-in-critical-theory-the-role-of-property-in-the-commons/

Italian Constitution.[12] Regulations for the shared management of the commons have been consistently adopted since 2014 in Italian municipalities, and they have been exerting an ambivalent function reflecting the malleability of law to diverging political projects and ideas of social organisation. In some cases, these regulations have succeeded in turning the political praxis of the movement into open, inclusive forms of self-government, fuelling the creativity of social struggles; in other cases, these instruments have been exploited by local administrations as a disciplinary tool to tame the movement for the commons and its radical critique of property and urban inequalities into bureaucratic frameworks.[13] These two diverging uses of public law regulations highlight how the commons as such do not automatically bear an emancipatory potential. Rather, this political and legal category remains open to different social and political conceptions, up to a point that it is possible to identify a clash between *conservative* and *transformative* commons: the former tend to create enclosed urban spaces and consolidate exclusive, formalised communities, whereas the latter foster the collective use and access to spaces by open, inclusive collectivities.[14]

An example of the former tendency is the Regulation for the participation to the government of the commons adopted in Chieri (in the province of Turin) in 2014, at the peak of the Italian mobilisation for the commons.[15] In this document it is established that communities taking care of spaces are the designated subject for the identification of the commons as such, and they can also be informal in nature. Hence, the belonging to a community of users has an open and non-codified character: it is not necessary for users to unite into any formalised group to be held responsible of the self-government of occupied spaces. [16]

An example of the second tendency is the 'Regulation on the collaboration between citizens and administrations for the care, regeneration and shared management of urban commons' promoted by the Labsus (Laboratory for Subsidiarity) association since 2014 and adopted in about two hundred city administrations at the national level.[17] This initiative has the aim of promoting the principle of horizontal subsidiarity enshrined in Article 118 of the Italian Constitution, and on such basis to build a specific administrative function enacting a shared management of the commons between the municipality and citizens. The definition of commons provided in this regulation echoes the notion of the commons elaborated by the Rodotà Commission, but also considers Article 118 as its legal

[12] Rodotà Commission Bill, *Relazione per la modifica delle norme del codice civile in materia di beni pubblici* (2007), available online: http://www.senato.it/service/PDF/PDFServer/DF/217244.pdf.
[13] V. Pecile, 'Beni comuni e discorso della legalità. Il caso di Palermo', *Sociologia del diritto*, 3, 139–155 (2019).
[14] M.R. Marella, 'The Commons as a Legal Concept', *Law and Critique*, *28*(1), p. 70 (2017).
[15] The Chieri regulation is available online: http://www.euronomade.info/wp-content/uploads/2015/01/regolamento-BENI-COMUNI-CHIERI-emendato-n-105-del-24_11_2014.pdf.
[16] C. Angiolini, 'Possibilità e limiti dei recenti regolamenti comunali in materia di beni comuni', in A. Quarta e M. Spanò (eds), *Beni comuni 2.0. Contro-egemonia e nuove istituzioni*, Milano-Udine: Mimesis, 147–156 (2016).
[17] The prototype of the Labsus regulation is available online: https://www.labsus.org/wp-content/uploads/2017/04/Regolamento-Labsus.Definitivo.pdf.

basis, and appoints public administration as the actor in charge to recognise the commons as such. The risk, here, is that the administration leaves out certain spaces from the list of potential commons for eminently political and discretionary reasons[18]. This legal arrangement thus displays clear disciplinary effects, and is sustained by a legalistic narrative on the commons that reframe citizens as volunteers acting as the State's handmaiden in a context of withdrawing State welfare.[19]

Secondly, the realm of private law offers several solutions allowing to protect the property interests of the urban poor against capitalist dispossession. Available legal mechanisms in this domain include Limited Equity Cooperatives, a tool designed to realise low-income housing solutions and based on the bundle of rights approach. In this configuration, used in North-American contexts, the land is owned by a non-profit entity, whereas the buildings constructed on it are owned by a cooperative entity, whose shares are owned by the residents. The first of these three subjects receives the amounts resulting from the appreciation on cooperative shares, which are then subtracted from the shareholders; such mechanism thus guarantees a continuous affordability of housing units. It has been highlighted how this instrument turns communities into active subjects in the social transformation of the area, and how allocations become functional to realising a social function of property. In the Italian context, a similar experimentation was recently carried out in the town of Pescomaggiore, near L'Aquila, where a property configuration was implemented in which access to housing units for disadvantaged subjects – who lost their households during the 2009 earthquake – was disentangled from ownership as a whole.[20]

Thirdly, legal solutions to protect the property interests of the marginalised of the city can be found in a hybrid realm between public and private law, made available by the on-going expansion of legal scholarship and jurisprudence on the broad issue of the 'rights of nature' and the object as holder of rights. The theoretical and political potential of this emerging field is mainly due to a radical questioning of the subject/object dichotomy: what is traditionally considered as an object in the modern Western legal thought can be turned into a legal person with rights and entitlements.[21] The Ecuadorian and Bolivian Constitutions adopted in 2008 and 2010 have already moved significant steps in this direction, establishing that 'all persons, communities, peoples and nations call upon public agencies to enforce the rights of nature'.[22] In assonance with these texts, US mobilisations have been active to enshrine the rights of nature in local constitutions[23]. Importantly, jurisprudence is also starting to embrace this vision. In 2017, three rivers in India and New Zealand were given legal personhood by Courts' decisions and by virtue of their significance for indigenous communities[24].

[18] C. Angiolini, *op. cit.*
[19] V. Pecile (2019), *op. cit.*
[20] M. R. Marella, *op. cit.*
[21] M. R. Marella, *op. cit.*
[22] Article 71 of the 2008 Constitution of the Republic of Ecuador.
[23] P. Burdon, 'The Rights of Nature: Reconsidered'. *Australian Humanities Review*, *49*, 69–89.
[24] O'Donnell and J. Talbot-Jones, 'Creating legal rights for rivers: lessons from Australia, New Zealand, and India'. *Ecology and Society*, *23*(1), (2016).

The same circular relation between the subject and object is at the core of *partecipanze agrarie*, a pre-modern legal mechanism still enshrined in Italian legislation as a residual form of ownership, which used to be regulated by customary law before being transformed into legal persons.[25]

IV. Conclusion: urban planning as a battleground to rethink the nexus of law, space and justice

This paper suggested some theoretical and empirical tools to undermine the processes of capitalist accumulation through which subjects living at the margins of the city are excluded from urban space. The perspective of Critical Legal Studies as well as the outline of a series of legal arrangements available both in private and public law provided evidence that it is possible, here and now, to foster a dimension of social justice able to rearticulate the relation of law and space in a more just direction. As a conclusion, and in addition to the legal instruments presented in the previous paragraph, it is worth mentioning how urban planning can turn out to be an essential 'battleground' in which the property interests of the urban poor can be reclaimed. The idea suggested here is that in order to oppose the speculative processes carried out by an alliance of public and private actors on the urban space, social movements would benefit from participating to planning, as they could structurally change the policies that perpetuate symbolic violence against the urban poor. Far from representing a merely technical or bureaucratic matter, urban planning is a crucial realm in which the property interests that prevail in determining urban transformations are represented and gain hegemony. Hence, understanding urban planning means to grasp an essential *modus operandi* of contemporary capitalism in urban contexts. Planners play a unique role in urban governance, and position themselves at the heart of the nexus between capital, State and communities.[26] Indeed, their task is to turn social needs into material space.[27] If it is true that real estate's prerogatives tend to prevail in the neoliberal conjuncture, this does not mean that such tendency cannot be subverted. When communities make their voice heard, urban planning becomes a battlefield to structurally rethink the relation between law, space and justice. An evidence of this possibility is the case of New York, where grassroots movements started reclaiming the city also in the arena of urban planning negotiations, in an exasperated context of skyrocketing rents, increasingly enclosed public spaces, and unbearable costs of living for the majority of the population. When the people who 'make' the city can no longer afford to live in it, bringing their stakes into the act of planning can significantly disrupt the processes of gentrification and displacement.[28]

An example of how important it can be for social struggles to enter the realm of urban planning to slow down dispossession and correct urban configurations perpetuating inequality is the one of

[25] M. R. Marella, *op. cit.*
[26] S. Stein, *Capital City: Gentrification and the Real Estate State*. London: Verso Books, 2019.
[27] H. Lefebvre, *The production of space*, Oxford: Blackwell, 1991.
[28][28] S. Stein, *op. cit.*

Palermo. In this city, just as in many other urban contexts of Southern Italy, over the past years the organisation of urban space has been a contested process, conducted by actors bearing clashing visions of the city: the local élite aims at turning the urban economy into a tourism-based one, whereas the movements have been trying to protect the most vulnerable population from the dynamics of exclusion triggered by touristification. While activists mobilise to protect the urban poor, major players of platform capitalism and real estate have been exerting an immense power in determining the value rise of the historic centre and the regularisation of vast areas in the name of urban decorum, ultimately carrying out a neoliberal restructuring of the city's economy and society.[29] Movements have obtained from the administration some measures in favour of the poor's property interests, such as the expansion of public housing in the historic centre, but they have not managed to structurally undermine the modes in which urban space is organised so as to reproduce inequalities and hierarchies among groups. They have succeeded in diminishing the symbolic violence exerted by urban policies against the poor, but they do not have the means to systematically address and uproot its causes.

Since 1992, the urban space of Palermo has been governed according to the 'Piano Particolareggiato Esecutivo del Centro Storico di Palermo', also known as plan Cervellati after the name of Pier Luigi Cervellati, who had also been in charge of Bologna's urban planning. Its aim was to prioritise the care of existing buildings and public spaces in order to fix the effects of the previous plan – adopted in 1962 – that had allowed for decades a systematic plunder of the urban space, known as 'sack of Palermo' (*sacco di Palermo*). The goal was to stop the process of real estate speculation that had covered in concrete the city during the previous years, and that relied on the collusion between sectors of the public administration and the mafia organisation.[30] The Cervellati plan wanted to realise a 'soft gentrification' enabling the lower-middle class to re-inhabit the historic centre and its social fabric. This ambition – to promote the protection of both the artistic and the social heritage of Palermo – is significantly put into question by the ongoing processes of touristification and real estate speculation affecting parts of the historic centre. It is perhaps time to imagine a new urban planning whose negotiation cannot take place without the involvement of activists and inhabitants of popular neighbourhoods. Only tacking the issues of power and resource redistribution it will be possible to imagine a just city.

[29] Signs of this tendency are the urban requalification of the Danisinni popular neighbourhood, conducted through a partnership between the municipality an Air Bnb; and the attempt of regularisation of a flea market in the area of Ballarò which excludes unauthorised subjects from selling, coupled with anti-hawkers measures in the whole historic centre.

[30] For an ethnography of Palermo's public space and an analysis of its symbolic role for the antimafia movement, see J. Schneider and P. Schneider, *Reversible Destiny: Mafia, Antimafia, and the Struggle for Palermo*, Berkeley (CA): University of California Press, 2003.