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Il concepito e l'aborto: una comparazione critica tra Italia e Perù

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Sommario:

Il profondo e storico dialogo fra la tradizione giuridica e culturale italiana e quella peruviana trova, nell'elaborazione del codice civile del Peru del 1984, uno dei suoi simboli iconici.
Il modello italiano ha, come noto, inciso fortemente su molteplici istituti codicistici, eredi di una contaminazione tra i due sistemi giuridici che, nel confronto, hanno preservato una loro identità di percorsi e spazi valoriali divergenti, liberi da inesistenti passati coloniali e, al contempo, avvicinati da forti somiglianze delle due lingue, l'italiano e lo spagnolo, entrambe neo-latine, evocative di una latinitas anche giuridica'.
L'art. 1 del codice civile peruviano e la sua recente evoluzione rappresenta un esempio, anch'esso simbolico, del dialogo, della contaminazione ma anche delle distinte traiettorie seguite dai due paesi rispetto alla rilevanza giuridica del concepito, alla nozione di soggetto di diritto e di capacità, ed alle sue implicazioni sociali con riguardo alle politiche riproduttive e, dunque, al tema, assai sensibile e sensibilizzato nello scenario globale attuale, dell'aborto.
In particolare, l'analisi dello status giuridico del concepito e dei regimi dell'aborto nell'ordinamento peruviano e nell'esperienza italiana, condotta attraverso una comparazione critica, contestualizzata e attenta alle posture socio-culturali domestiche, ha rivelato il persistente potere 'selettivo' ed escludente della categoria del soggetto giuridico. Una tutela assoluta e unidirezionale del nasciturus, infatti, ostacola qualsiasi ragionevole bilanciamento con il diritto all'aborto legale e sicuro che secondo il lessico dei regimi internazionali 'dovrebbe' rappresentare un diritto umano e fondamentale.

The rich historical dialogue between the Italian and Peruvian legal and cultural traditions is symbolized effectively in the drafting of Peru's 1984 Civil Code. The Italian model had a strong influence on the Peruvian civil code as a result of cultural contamination between the two legal orders. Nevertheless, both systems have preserved their distinct identities, partly due to the absence of any past colonial relationship.
The article addresses issues related to the legal status of the conceived, its social implications in reproductive politics and, above all, access to abortion. Article 1 of the Peruvian Civil Code and its recent evolution represents an example (also symbolic) of the dialogue and preservation of the differences between the two legal systems. In particular, this analysis of the legal status of the conceived and the abortion regimes in the Peruvian legal system and the Italian experience, conducted through a critical, contextualized comparison attentive to domestic socio-cultural postures, reveals the persistent 'selective' and exclusionary power of the category of the legal subject. The absolute and unidirectional protection of the nasciturus, in fact, hinders any reasonable balancing with the right to legal and safe abortion, which, according to the lexicon of international regimes, ought to be a human and fundamental right.

Keywords: aborto – concepito – giustizia riproduttiva – codice civile peruviano – soggettività giuridica

I. Il dialogo tra Italia e Perù sulla soggettività del concepito nel quadro di una 'libera' *latinitas* giuridica

Il profondo e storico dialogo fra la tradizione giuridica e culturale italiana e quella peruviana trova, nell'elaborazione del codice civile del Perù del 1984, uno dei sui simboli iconici[1].

Il modello italiano ha, come noto, inciso fortemente su molteplici istituti codicistici, eredi di una contaminazione tra i due sistemi giuridici che, nel confronto, hanno preservato una loro identità di percorsi e spazi valoriali divergenti, liberi da inesistenti passati coloniali e, al contempo, avvicinati da forti somiglianze delle due lingue, l'italiano e lo spagnolo, entrambe neo-latine, evocative di una *latinitas* anche giuridica[2].

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La disposizione in questione, innovando rispetto al codice civile del 1936, grazie al suo redattore Carlos Fernandez Sessarego, accoglie la teoria della soggettività del concepito, prevedendo che «*[l]a persona humana es sujeto de derecho desde su nacimiento. La vida humana comienza con la concepción. El concebido es sujeto de derecho para todo cuanto le favorece. La atribución de derechos patrimoniales está condicionada a que nazca vivo*». Il soggetto di diritto è nozione meta-inclusiva che ingloba, nel diritto privato nazionale, il concepito, la persona fisica, la persona giuridica e le associazioni non riconosciute. Il richiamo alla dottrina italiana è dichiarato[3], e pur tuttavia il discostamento dal modello di riferimento e da molti altri sistemi giuridici è marcato. Proprio in relazione al *concèptus*, infatti, ecco che emerge l'anima iberica, che rifiuta la teoria della finzione giuridica e, focalizzandosi sul valore della vita umana, giunge

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[1] Fernández Sessarego, Carlos e Cárdenas Quirós, Carlos, "Estudio preliminar comparativo de algunos aspectos del Código civil peruano de 1984 en relación con el Código civil italiano de 1942", in El Código civil peruano y el Sistema jurídico latinoamericano, Lima: Cultural Cuzco, 1986, p. 107 ss.

[2] Nicolussi, Andrea e Troncoso, María Isabele, "Efectos de la resolución del contrato por incumplimiento: restituciones e indemnización por daños en una perspectiva de comparación dentro de la latinidad jurídica", in Ius et veritas, 2023, pp. 9-29.

[3] Fernández Sessarego, Carlos and Cárdenas Quirós, Carlos, de algunos aspectos del Código civil peruano de 1984 en relación con el Código civil italiano de 1942", cit., p. 109; Espinoza Espinoza, Juan Alejandro, "Remembering Carlos Fernández Sessarego", in The Italian Law Journal, 2019, p. 389 s.

ad una concettualizzazione astratta ma unificante, perché capace di proteggere l'essere concreto del nascituro, il quale è centro di riferimento e di imputazione di tutte le situazioni soggettive che lo favoriscono, non soltanto di quelle previste dalla legge (come invece si desume dalla lettera dell'art. 1 del codice civile italiano del 1942). Le situazioni giuridiche esistenziali sono riferibili al concepito senza alcuna condizione. Per contro, i diritti patrimoniali sono sottoposti alla condizione risolutiva della non nascita.

Un profilo assai singolare è che il tempo della riforma del codice civile peruviano coincide con l'esplosione in Italia del dibattito sull'aborto. Alla fine degli anni '70, infatti, viene approvata la legge sull'interruzione volontaria di gravidanza, che ha stimolato nella dottrina domestica una intensa riflessione sulla condizione giuridica/soggettività del feto rispetto alla situazione giuridica della donna autorizzata, a certe condizioni procedurali e sostanziali, a ricorrere all'aborto. La negazione della soggettività del concepito, accolta da una parte considerevole della letteratura nazionale tradizionale[4] (ancorata alle regole codicistiche che attribuiscono diritti solo di natura patrimoniale al concepito dimenticando i diritti umani), di fronte agli interrogativi posti dalla nuova legge sull'aborto, accoglieva una concezione 'realistica'. La semantica giuridica che ruota attorno al nascituro, in linea con l'approccio realista, parla di 'persona in formazione' data l'indisponibilità del 'principio della vita', di valore unitario della vita umana sin da suo inizio o, di soggetto che merita la massima protezione[5]. La semantica si giustifica, nel contesto italiano, sempre alla luce dei principi costituzionali, quali la dignità della persona e l'eguaglianza tra tutti gli individui, e delle aperture alla protezione del nascituro individuabili anche nell'argomentazione delle decisioni della Corte costituzionale italiana di quegli anni.[6]. La legge sull'interruzione di gravidanza si presenta, per alcuni, come un testo contraddittorio: la legge menziona, nel suo *incipit*, la tutela della vita umana sin da suo inizio, il valore sociale della maternità e l'impegno dello Stato verso un diritto alla procreazione cosciente e responsabile; al contempo, però, consente l'interruzione di gravidanza, sia pur a certe condizioni e con crescenti limitazioni, a seconda che siano o meno trascorsi 90 giorni dall'inizio della gestazione. Così come contraddittorio è considerato l'art. 1 del cod. civ. it. che subordina la soggettività e l'acquisto della capacità giuridica al momento della nascita.

Questa parte della dottrina italiana ha influito sulla redazione dell'art. 1 del codice peruviano. Tuttavia, tale influsso si combina con una matrice culturale locale del tutto

[4] Emblematica la posizione di Coviello, Leonardo jr., "Capacità a succedere a causa di morte", in Enciclopedia del diritto, VI, Milano, Giuffré, 1960, p. 56, dove si riferisce al concepito una situazione giuridica di «attesa… dipendente dall'attuale inesistenza del soggetto destinatario», dovendosi attendere la nascita per l'acquisto della capacità a succedere e a ricevere per donazione (artt. 462 comma 1 e art. 784, comma 1 cod. civ. it.).

[5] Fernández Sessarego, Carlos e Cárdenas Quirós, Carlos, "Estudio preliminar comparativo", cit., pp. 109-110. Il richiamo è, in particolare, al pensiero di Massimo Bianca, Francesco Busnelli, Giorgio Oppo, Guido Biscontini, i quali, a vario titolo, propendevano per una concezione realistica della qualità giuridica del concepito: Bianca, Cesare Massimo, Sub art. 1, I, in Bianca, Cesare Massimo e Busnelli, Francesco Donato (a cura di), Commentario alla l. 22 maggio 1978, n. 194, in Nuove leggi civili commentate, 1978, p. 1593 ss.; Oppo, Giorgio, "L'inizio della vita umana", in Rivista di diritto civile, 1982, p. 500 ss.; Biscontini, Guido, "Interruzione della gravidanza e tutela della maternità", in Rassegna di diritto civile, 1983, p. 85 ss.

[6] Cfr. il *leading case* Corte cost., 18 febbraio 1975, n. 27, recuperato da *https://giurcost.org/*, che ha aperto la strada al legislatore nazionale per la l'approvazione della legge sull'interruzione di gravidanza: per questa evoluzione rinviamo a Crea, Camilla, "Conscientious Objection and Abortion: The Italian Pseudo-Exceptionalism?", in FIU Law Review, 2024, vol. 18, no. 4, pp. 755-796.

peculiare. La produzione di una norma che attribuisce la soggettività al concepito quale centro di imputazione di diritti sia patrimoniali sia non patrimoniali, infatti, trova fondamento nella centralità del diritto alla vita accolta nella visione filosofica umanistica domestica. Questa filosofia, a sua volta, poggia su un rifiuto della normatività monolitica di stampo kelseniano, da un lato, e sull'accoglimento di una concezione non astratta, né formalistica del diritto: il diritto non può che avere una natura complessa, tridimensionale nella quale si combinano inscindibilmente realtà fattuale, logica, e sistema di valori. Siffatta teoria tridimensionale implica, dunque, una considerazione della vita umana come progetto e offre così il presupposto per un'analisi rinnovata e originale dei diritti della persona (*rectius*: del soggetto di diritto) e della loro tutela[7].

L'interazione tra i due formanti dottrinali, italiano e peruviano, si somma ad un fattore normativo peculiare, ossia l'adesione alla Convenzione americana sui diritti umani, ratificata in Perù nel 1978, ove all'art. 4, comma 1 si afferma espressamente che il diritto alla vita inizia con il concepimento[8].

Il nuovo articolo 1 del codice civile del 1984, grazie soprattutto all'apporto politico e culturale del maestro Carlos Fernández Sessarego[9], si pone in discontinuità rispetto al codice del 1936, il quale ignorava la vita prenatale e subordinava l'acquisto della qualifica di 'persona naturale' ('*persona fisica*') al momento della nascita.

II. Dal codice alla Costituzione e viceversa. Soggetto di diritto *vs* persona?.

La normativa peruviana sul concepito si connette strettamente alla tradizione di *civil law* che riconosce fin dall'epoca romanistica diritti patrimoniali in capo al nascituro. In questo solco, si inserisce l'approccio dei padri del diritto civile sudamericano, i quali riprendono il pensiero dell'Europa continentale ma con un evidente spostamento di prospettiva.[10] Assistiamo qui ad una importante narrativa del diritto sudamericano che vuole riconoscersi nella tradizione di *civil law* e, al contempo, afferma le sue specificità[11]. Il concepito è "*una*

[7] Fernández Sessarego, Carlos, *Il diritto come libertà Lineamenti per una determinazione ontologica del diritto*, trad. in italiano a cura di V. Barba, Qu0dlibet, Macerata, 2022 (opera originaria: *Bosquejo para una determinación ontológica del derecho*, 1950).

[8] Convención Americana sobre Derechos humanos (Pacto de San José), San José, Costa Rica, 1969. Per queste riflessioni v. Busnelli, Francesco Donato, "L'inizio della vita umana*"*, in Rivista di diritto civile, 2004, I, p. 540; Id., "Il problema della soggettività del concepito a cinque anni dalla legge sulla procreazione medicalmente assistita", in Nuova giurisprudenza civile commentata, 2010, II, p. 185 ss.; Id., "Persona umana e dilemmi della bioetica: come ripensare lo statuto della soggettività*"*, in Diritti umani e diritto internazionale umani, 2007, I, p. 245 ss.

[9] Sessarego, 2009, p. 222; e, per la ricostruzione di questo iter, e per un utile quadro comparativo sul tema v. Agurto Gonzàles, Carlos Antonio e Abanto, Juan Pablo*,* "La protección jurídica del concebido: desde los aportes de los padres fundadores del derecho de América del Sur a la Ley N.° 31935", in Doctrina Practica, 2024, 2024, p. 53.

[10] Sulla ricostruzione della specificità sudamericana in relazione allo *status* del concepito, Agurto Gonzàles, Carlos Antonio e Abanto, Juan Pablo, "La protección jurídica del concebido", cit., p. 41, i quali mostrano la volontà dei padri fondatori del diritto sudamericano di rimanere all'interno della tradizione romanistica pur affermando le peculiarità della loro tradizione giuridica. Nello stesso senso, Castán Vásquez, José María, "El articulo 1 del codigo civil Peruano y su criterio sobre el Comienzo de la vida humana*,* Themis", in THEMIS Revista De Derecho, (30), 1994, pp. 49-56.

[11] Sui rapporti tra la tradizione giuridica dell'Europa continentale e la tradizione sudamericana, le narrative e le finzioni che legano e dividono una dall'altra in un processo continuo, Esquirol, Jorge L., *Ruling the Law, Legitimacy and Failure in Latin American Legal Systems*, Cambridge: Cambridge University Press, 2020.

persona por nacer", secondo la lettura offerta da Texeira de Freitas,[12] il più autorevole civilista brasiliano del XIX secolo. Mentre per i Romani e poi per Savigny l'acquisizione dei diritti avveniva esclusivamente con la nascita, Teixera de Freitas fornisce una lettura nuova delle fonti del diritto romano, dando luogo a una interpretazione "sudamericana" che si contrappone alla visione tedesca.

Di questa tradizione dell'America latina fa parte a pieno titolo il Perù in cui, a partire dal codice civile del 1852, si qualifica il concepito come una persona "*por nacer*", lasciando intendere implicitamente che l'esistenza umana inizia già nel periodo di vita intrauterina. Il codice civile peruviano del 1936 si distacca da questa impostazione e afferma che il concepito diventa soggetto di diritto al momento della nascita. Successivamente, la riforma del 1984, con l'art. 1 c.c. ritorna alla visione tradizionale: la persona umana diventa soggetto di diritto con la nascita ma, allo stesso tempo, nel comma secondo, è affermato chiaramente che la vita umana comincia con il concepimento.

La nuova disposizione individua, dunque, una soggettività *sui generis*, speciale, del concepito che merita la massima protezione[13], parificando, sia pur nelle specificità di ciascuno, la persona fisica (quale soggetto esistente nella realtà materiale, dopo la nascita) e il concepito quale soggetto/essere umano che esiste anche prima della nascita e distinto dalla soggettività giuridica della madre. Tale innovazione appare assai rilevante per una comparazione tra le codificazioni civili.

La modifica della legislazione codicistica è stata seguita, nel 1993, da un emendamento alla *Constitución Política* che ha riconosciuto espressamente la soggettività giuridica del concepito (art. 2 Cost. Per.). Ma già prima di questa riforma, anche in assenza di un riconoscimento esplicito e testuale, la giurisprudenza costituzionale interna ammetteva la soggettività del nascituro [14].

La storia della tutela del *nasciturus* si muove secondo una traiettoria unidirezionale e lascia fuori dal quadro la gestante i cui diritti non sono esplicitati né nel codice civile, né nella Costituzione, diversamente dai diritti del concepito.

Il percorso peruviano appare in certo senso inverso rispetto a quello italiano: all'interno dell'esperienza giuridica italiana si è registrato un «declino del soggetto» in concomitanza con l'«ascesa della persona»[15], grazie alla costituzionalizzazione delle regole del codice civile del 1942[16] ed anche all'influsso dei diritti umani e fondamentali, giacché soggetto e

[12] Texeira de Freitas, Augusto, *Consolidação das leis civis,* Editorial del Senado Federal, 2003.

[13] Varsi-Rospigliosi, Enrique, *Tratado de derecho de las personas*, Lima: Universidad de Lima - Gaceta Jurídica, 2014, p. 169; v., inoltre, Santillán Santa Cruz, Romina, *La situación jurídica del concebido en el Derecho civil peruano. Una interpretación histórico-legislativa y teleológica*, Lima: Motivensa, 2014.

[14] Llaja Villena, Jeannette, "El Derecho a la vida del concebido: la regulación constitucional del aborto. Una mirada al proceso constitucional de 1979 y 1993", Justicia de Género, DEMUS, *Estudio para la Defensa de los Derechos de la Mujer*, Jr. Caracas 2624 - Jesús María 4631236 Lima, 2009.

[15] Oppo, Giorgio, "Declino del soggetto e ascesa della persona", in Rivista di diritto civile, 2002, p. 830 s.

[16] La costituzione italiana del 1948 è postuma rispetto alle regole del codice civile del 1942, approvato durante il regime fascista. Sulla centralità della persona e del personalismo quale criterio di legittimazione degli istituti e delle categorie del diritto civile letto alla luce della Costituzione, v. Perlingieri, Pietro, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, V, 4ª ed., Napoli: ESI, 2020, p. 371; già Id., *La personalità umana nell'ordinamento giuridico*, Napoli: ESI, 1972. Per la transizione transizione verso la stagione del costituzionalismo del diritto dei privati, si rinvia a Id., "Norme costituzionali e rapporti di diritto civile", in Rassegna di diritto civile, 1980, p. 90 ss., tradotta, nella versione inglese, "Constitutional Norms and Civil Law Relationships", in 1 The Italian Law Journal, 2015, p. 17 ss.

soggettività appartengono all'ordine statuale, ma non esauriscono il concetto di persona e personalità che operano nell'ordine sociale e che, superando la logica riduzionista ed escludente del formalismo e del positivismo, si fondano sul «codice dell'eguaglianza» sostanziale in antitesi con la soggettività astratta[17]. Per contro, il linguaggio della soggettività, così come sotteso all'art. 1 del cod. civ. peruviano, sembra avere una *vis* espansiva atta ad includere il paradigma categoriale della persona; sembra superare l'astrazione formalistica per guardare all'individuo concreto (a prescindere dal dato 'fisico' della nascita). E' il codice, in questo contesto, dunque, a trainare la costituzione.

Entrambi i due 'significanti' categoriali, persona da un lato e soggetto giuridico dall'altro, si appoggiano su un substrato minimo comune, la dignità, quale matrice profonda per la protezione dell'essere umano «nella sua essenza ultima che mai deve essere alterata»[18]; entrambi aspirano al superamento della logica patrimonialistica, abbracciando una prospettiva di umanizzazione. Tuttavia, il concetto di persona, nel lessico culturale e giuridico italiano e nella sua dimensione 'costituzionalizzata', ha una funzione non soltanto di concretizzazione dell'individualità, ma anche di inclusività sociale, nella quale la persona, lungi dal tradursi in una pericolosa 'maschera' categoriale, consente di dare rilievo a tutti gli aspetti dell'individuo nel suo essere nel mondo (secondo un processo di concretizzazione soggettiva) e, dunque, di sopperire ad una «perdita di rappresentatività sociale» del soggetto di diritto della legislazione civile del codice, che pure continua a coesistere. La persona è un dispositivo, almeno potenziale, di condivisione, là dove, invece, lo schema del 'soggetto astratto' di diritto è stato oggetto di severe critiche, specie da parte degli studi femministi, perché cognitivamente incapace di inglobare, come noto, le differenze di genere[19].

Nel 2023, è stata approvata in Perù, dopo un lungo *iter* normativo, una legge che mira al riconoscimento dei diritti del concepito (artt. 1 e 2, Ley N.° 31935, 16 Novembre 2023), fondati sul valore primario della dignità, e in attuazione del menzionato art. 2 della costituzione domestica che, a sua volta, è stato preceduto dal codice. La lista delle situazioni giuridiche soggettive comprende il diritto alla vita, salute, integrità morale, psicologica e fisica, identità, libero sviluppo e benessere e, più in generale, tutti i diritti che favoriscono il nascituro in quanto soggetto di diritto.

Il testo entrato in vigore, che è stato accolto con grande favore dagli esponenti del mondo cattolico[20], non sembra aver apportato significativi cambiamenti nell'ordinamento giuridico nazionale, sia sul piano delle regole e dei principi, sia sotto il profilo

[17] Rodotà, Stefano, "Dal soggetto alla persona. Trasformazioni di una categoria giuridica", in Filosofia politica, 2007, p. 368.

[18] Marella, Maria Rosaria, Antropologia del soggetto di diritto. Note sulle trasformazioni di una categoria giuridica, in Bilotta Francesco, e Raimondi Fabio (a cura di), Il soggetto di diritto. Storia ed evoluzione di un concetto nel diritto privato, Napoli: Jovene, 2020, p. 59 (in dialogo con Rodotà, Stefano, "Antropologia dell'homo *dignus*", in Rivista critica del diritto privato, 4, 2010, p. 547-564) e *ivi* una analisi della persistente tensione tra universalismo e frammentazione insita nel concetto di soggetto di diritto.

[19] Rodotà, Stefano, "Dal soggetto alla persona. Trasformazioni di una categoria giuridica", cit., p. 369.

[20] "Perú: La Iglesia saluda la ley sobre los derechos al concebido", recuperato da https://www.vaticannews.va/es/iglesia/news/2023-11/peru-la-iglesia-saluda-la-ley-sobre-los-derechos-al-concebido.html; "Comunicato della Conferenza episcopale peruviana", recuperato da https://iglesia.org.pe/2023/11/21/conferencia-episcopal-peruana-saluda-ley-que-reconoce-los-derechos-al-concebido/.

interpretativo.[21] In ogni caso, la nuova legge ha aperto un notevole dibattito nella dottrina, poiché, qualora dovesse ritenersi idonea ad integrare la condizione giuridica del nascituro già contenuta nel codice civile, potrebbe rappresentare un ulteriore passo avanti nel processo di decodificazione, ossia di perdita della centralità del codice civile,[22] in atto da tempo all'interno dell'esperienza domestica, e che trova un parallelo nel pensiero giuridico e nel trend normativo italiano a partire dalla fine degli anni '90.

Ma se ciò è vero, se è vero che il legislatore nazionale si è rivelato, in questa occasione, un uomo comune e non straordinario, asistematico, ignorante e incoerente[23], è altrettanto vero che il legislatore non è un comune cittadino e che anche il suo mero *dicere*, anche una sua semplice azione, sebbene priva di effettivo significato in termini di innovazione giuridica, ha un senso politico ed istituzionale. E' davvero possibile, dunque, affermare che il soggetto di diritto, così come inteso dal sistema giuridico peruviano, non ha alcun potere selettivo ed escludente? Lo *status* del concepito, accolto nel sistema giuridico peruviano, in quanto soggetto di diritto al quale viene espressamente riconosciuto, tra gli altri, il diritto alla vita, incide, infatti, sull'accesso all'interruzione di gravidanza delle donne. E il diritto all'aborto legale e sicuro, secondo il lessico dei regimi internazionali, dovrebbe rappresentare un diritto umano e fondamentale.

Per rispondere a questa domanda appare pertanto utile offrire una analisi della regolamentazione dell'aborto e della 'postura' normativa e socio-culturale che è emersa all'interno delle due esperienze giuridiche, italiana e peruviana, promuovendo l'idea di una funzione, in un certo senso sovversiva, della comparazione, utile ad una riflessione contestualizzata e, al contempo, critica del diritto[24].

III. IL REGIME DELL'ABORTO IN PERÙ: STATO DI CRIMINALIZZAZIONE, ECCEZIONI DISATTESE E REGOLE INFORMALI

In Perù l'aborto è da sempre fortemente criminalizzato, salvo poche eccezioni, tendenzialmente interpretate in modo restrittivo e formalistico[25]. *De facto*, vige un divieto di accesso all'interruzione di gravidanza.

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[21] Agurto Gonzàles, Carlos Antonio e Abanto, Juan Pablo, "La protección juridíca del concebido", cit., p. 63 i quali sottolineano che questa legge non ha recepito le proposte, emerse durante il dibattito parlamentare, relative ai diritti della gestante.

[22] Bustamante Oyague, Emilia, "Recensione Romina Santillán Santa Cruz, La situación jurídica del concebido en el derecho civil peruan*o"*, in Revista Actualidad Jurídica Iberoamericana, 2024, n. 20, pp. 1622-1629; per il versante italiano, v. Irti, Natalino, *L'età della decodificazione*, Milano: Giuffré, 1999.

[23] Per queste critiche e per un confronto con tra il testo approvato e il testo iniziale, v. Agurto Gonzales, Carlos Antonio e Abanto, Juan Pablo, "La protección juridíca del concebido", cit., pp. 55 ss., spec. p. 63.

[24] Muir Watt, Horatia, "La fonction subversive du droit comparé ", in Revue internationale de droit comparé, 2000, pp. 503-527.

[25] Appare per certi versi paradossale come il Perù criminalizzi l'aborto pur avendo ratificato la Convenzione sull'eliminazione di ogni forma di discriminazione nei confronti della donna (CEDAW), soprattutto cosiderando che le fonti internazionali sono vincolanti all'interno del sistema giuridico domestico: Valega Chipoco, Cristina e Benavides Reverditto, Ximena, "The Ambivalent and Hetero-Cis-Normative Peruvian Constitutional Jurisprudence of the Twenty-First Century", in Pou Giménez, Francisca, Rubio Marín, Ruth e Undurraga Valdés, Verónica (a cura di), Women, Gender, and Constitutionalism in Latin America, Oxon, New York: Routledge 2024, p. 210; Gianella Camila e Alvarez, Brenda, "Judicial Lawfare: Analysis of Legal Arguments against Aboriotion Rights in Peruvian Courts", in Revista DireitoGV, 2021, p. 1, considerano "puzzling" il caso del Perù, paese preso ad esempio per l'alto numero di interventi delle Corti sovranazionali in tema di aborto le cui vittorie non hanno avuto reali ripercussioni all'interno del paese.

Il dato normativo primario è contenuto nel codice penale: l'aborto, infatti, è un reato. L'art. 114 del codice penale stabilisce una pena di due anni o l'affidamento ai servizi sociali per la donna che abortisce, anche con l'ausilio di terze persone. L'art. 115 prevede una pena di un massimo di quattro anni per coloro che aiutano la donna ad abortire. Se poi sopravviene la morte della gestante, la pena è di un massimo di cinque anni. L'art. 116 si occupa del procurato aborto da parte di un terzo, contro la volontà della gestante, sancendo una pena detentiva da tre a cinque anni.
Sono poi previsti degli aggravi di pena per determinati soggetti, quali medici, ostetriche e qualunque esercente le professioni sanitarie che eseguano la procedura di interruzione di gravidanza: per questi, oltre alla pena detentiva, vige il divieto dell'esercizio dell'attività professionale per un determinato periodo di tempo. Il codice penale ha, quindi, esteso un cordone intorno alla gestante per impedirle di abortire: la donna o le persone cui si possa eventualmente rivolgere incorrono in un reato, con tutte le conseguenze che nella vita privata e lavorativa una condanna penale può comportare. La criminalizzazione dell'interruzione di gravidanza è un deterrente potente per dissuadere non solo le donne ma chiunque possa o voglia supportarle in questo difficile percorso.
Il codice prevede delle eccezioni alla perseguibilità penale, che in astratto consentirebbero spazi per l'accesso all'interruzione di gravidanza. L'art. 119, infatti, disciplina l'aborto terapeutico, entro le 22 settimane dall'inizio della gestazione, e stabilisce la non punibilità del medico che pratica un aborto quando questo è "el único medio para salvar la vida de la gestante o para evitar en su salud un mal grave y permanente". Tuttavia, l'interpretazione formalistica, riduzionista e conservatrice sviluppata dalle corti domestiche ha, nella sostanza, disinnescato le potenzialità di questa eccezione.
Accanto all'aborto terapeutico, il codice penale individua ipotesi, certamente non minori, in cui è sensibilmente ridotta la pena per il medico. Così, l'art 120 indica una pena detentiva di tre mesi per l'interruzione di una gravidanza frutto di stupro, se perpetrato al di fuori del matrimonio, oppure derivante da una inseminazione artificiale non consentita. Per poter ottenere la pena ridotta, però, il personale sanitario ha l'obbligo di denunciare gli abusi alle autorità di polizia, imponendo alla vittima di violenza lo stress psicologico di una indagine penale. L'art. 120 prevede anche una pena ridotta per il medico che esegue l'interruzione di una gravidanza qualora il feto presenti gravi malformazioni.
Lo snodo per comprendere il funzionamento e il portato politico della normativa penale è quindi l'applicazione da parte dei medici e degli ospedali della eccezione dell'aborto terapeutico, quale unico rimedio per salvare la salute o la vita della gestante. L'aborto terapeutico è legale in Perù sin dal 1924, anche se non erano specificate le condizioni di accesso alla procedura. Il vuoto normativo ha permesso lo sviluppo di regole informali per negare l'aborto: i medici, infatti, dovendo prendere decisioni sulla vita delle gestanti nel timore di commettere un reato, hanno sempre preferito non procedere agli interventi abortivi.[26] La paura di una condanna penale ha favorito un ricorso limitato alla interruzione

[26] Valega Chipoco Cristina e Benavides Reverditto, Ximena, "The Ambivalent and Hetero-Cis-Normative Peruvian Constitutional Jurisprudence of the Twenty-First Century", cit., p. 203, con i dati delle azioni penali portate avanti contro le donne che hanno chiesto aiuto per interrompere la gravidanza e contro coloro che le hanno aiutate. Le condanne sono in numero decisamente inferiore rispetto alle azioni intraprese ma la paura di essere oggetto un processo penale spinge le gestanti e i terzi, inclusi gli operatori sanitari, a limitare

della gravidanza nei casi di pericolo per la salute della gestante, lasciando alla discrezionalità, spesso di un singolo medico o operatore sanitario, la decisione finale.
Per ovviare al vuoto normativo sull'applicazione dell'art. 119, nel 2014 il Ministero della Salute Perù ha adottato le linee guida per l'accesso all'aborto terapeutico[27] il cui scopo è appunto rendere chiare e trasparenti le condizioni di accesso all'aborto terapeutico. Le linee guida indicano una serie di patologie in presenza delle quali il personale medico può procedere all'aborto terapeutico (art. 6.1) e le procedure da seguire all'interno delle strutture sanitarie (art. 6.4).
L'adozione delle linee guida è il risultato di un intervento delle corti internazionali, promosso, a sua volta, dall'attivismo di organizzazioni non governative. I due casi simbolici che hanno maggiormente inciso sul governo locale sono L.C. v. Peru[28] e K.L. v. Peru[29] . Le pronunce sono state sollecitate in reazione a due casi nei quali è stato negato l'aborto terapeutico nelle strutture sanitarie senza che il diniego fosse supportato da precise linee guida, e senza alcuna possibilità, per le gestanti, di contestare la decisione presa dai medici di fronte ai tribunali o ad altro comitato, entro le ventidue settimane stabilite per l'aborto terapeutico. In entrambe le decisioni, il Perù è stato riconosciuto deficitario rispetto alla tutela dei diritti umani della donna con conseguente necessità di adottare delle linee guida nazionali per consentire l'accesso all'interruzione di gravidanza. Il ricorso alle corti internazionali è stato il risultato di una precisa strategia dei movimenti femministi che si sono attivati per il riconoscimento del diritto all'aborto su più livelli: oltre che di fronte ai due diversi comitati dell'ONU, i movimenti hanno promosso una *litigation* domestica, ed hanno stilato delle linee guida ad uso interno delle strutture ospedaliere, anche se non giuridicamente vincolanti.[30]
Sebbene le linee guida del 2014 siano state salutate come l'inizio di una nuova era[31], la loro implementazione è stata al centro di un acceso dibattito. Le critiche sono state formulate

gli interventi di interruzione di gravidanza. Cfr., anche, per un quadro empirico, Távara Orozco, Luis, Macharé, Pilar, García Angulo, Segundo, Guevara, Enrique, Cabrera, Santiago, Aguilar, Julio, Ramírez, Ysoé, Orderique, Luis, Silva, Carlos, Sánchez Sixto, Leveau, Walter, e Burela, Jhonny, "Barriers to Access to Safe Abortion in the Full Extent of the Law in Peru", in Revista Peruana de Ginecología y Obstetricia, 2016, p. 153.

27 Ministerio de Salud. Resolución Ministerial 486. Guía Técnica Nacional para la Atención Integral de la gestante en la Interrupción Voluntaria, por Indicación Terapéutica, del embarazo menor de 22 semanas, con consentimiento informado en el marco de lo dispuesto en el Artículo 119 del Código Penal, Lima: Ministerio de Salud, Junio 2014.

28 Cedaw /C/50/D/22/2009. L.C. Il caso riguardava una bambina di 13 anni, ripetutamente abusata dall'età di undici anni da un uomo adulto, la quale rimane incinta, cade in stato di depressione e si getta nel vuoto nel tentativo di suicidarsi. Dalla caduta deriva una lesione alla spina dorsale e il rischio di una disabilità permanente. È quindi necessaria una operazione chirurgica immediata impedita, però, dalla presenza della gravidanza. L'operazione è quindi rimandata attendendo la decisione dell'ospedale sulla praticabilità dell'aborto terapeutico. Nel frattempo L.C. abortisce spontaneamente per la gravità della sua condizione di salute, ma il ritardo di quattro mesi nell'intervento chirurgico comporta la paralisi definitiva della bambina.

29 CCPR/C/85/D/1153/2003. K.L. In questa vicenda K.L. rimane incinta all'età di 17 anni. Le analisi mediche mostrano una importante anomalia del feto, la anencefalia, che non permette la sopravvivenza dopo la nascita. La ragazza non ha avuto accesso alle procedure di interruzione di gravidanza ed è stata costretta a partorire. Il bambino ha vissuto solo 4 giorni dopo la nascita.

30 Gianella, Camila e Alvarez, Brenda, "Judical Lawfare: Analysis of Legal Arguments against Abortion Rights in Peruvian Courts", cit., p. 4.

31 Amanda Klasing, "Dispatches: New Abortion Rules in Peru", recuperato da https://www.hrw.org/news/2014/07/01/dispatches-new-abortion-rules-peru.

su diversi piani. Così, il Ministero della Salute è rimproverato il mancato monitoraggio della loro attuazione[32], così come la mancata formazione del personale sanitario deputato ad applicarle [33].

I medici, poi, non hanno accolto con favore le linee guide, anzi si sono opposti alla loro applicazione, ritenendo che fossero incerte e poco chiare e, quindi, incapaci di proteggerli dal rischio di una condanna penale. Il risultato è stato una sorta di ritorno alle regole informali che di fatto limitano l'accesso per le donne all'aborto ogni volta in cui si presenta la possibilità, anche remota, di una azione penale per il personale sanitario.

Le linee guida hanno inoltre omesso di prendere posizione rispetto alla salute mentale della gestante. Il danno di cui all'art. 119 c.p. concerne la salute fisica e non anche quella psichica, [34] che invece rileva fortemente in presenza gravidanze non volute, e specie quando la gestante è minorenne o vittima di abusi.

In conclusione, la normativa penale in vigore e la sua applicazione intrappolano la gestante all'interno di uno spazio chiuso in cui spesso l'unica via di uscita è il mercato parallelo clandestino[35].

IV. Le linee guida sull'aborto terapeutico al vaglio delle Corti. L'argomento dell'assolutezza della tutela concepito.

Dopo l'adozione delle linee guida, le organizzazioni antiabortiste hanno fatto ripetutamente ricorso ai giudici per limitare il già ristretto accesso all'interruzione di gravidanza. I casi sono stati portati all'attenzione della Corte Costituzionale e delle giurisdizioni civili e penali. I ricorsi presentati hanno mobilitato, inoltre, le organizzazioni pro-aborto, spesso intervenute in giudizio. L'analisi di tre casi strategici aiuta a selezionare e comprendere le argomentazioni utilizzate dai diversi attori sociali su un tema divisivo, sul piano morale oltre che normativo, quale è l'aborto.

Le associazioni antiaborto hanno immediatamente cercato di impedire l'adozione delle linee guida, temendo che la loro implementazione avrebbe moltiplicato i casi di aborto nelle strutture sanitarie. Nel 2014, infatti, una ONG peruviana, Accion de Lucha

[32] Sono quindi mancati i dati sul numero di richieste di aborto terapeutico e sui tempi adottati nelle strutture sanitarie per garantire le relative procedure. Inoltre, i dati raccolti in diversi studi indipendenti mostrano una disparità di accesso all'aborto tra la capitale, Lima, dove sono eseguite la maggior parte interventi, e il resto del paese, dove gli aborti sono in numero visibilmente minore. Alcuni dati sul numero di aborti, il livello economico e l'istruzione delle gestanti sono stati raccolti da una ricerca dell'associazione Promsex (vedi: https://promsex.org/wp-content/uploads/2019/02/EncuestaAbortoDiptico.pdf). Sempre Promsex ha pubblicato uno studio approfondito sull'aborto terapeutico a 10 anni dall'entrata in vigore delle linee guida: Juárez, Elisa e Villalobos, José, "Abortos terapéuticos realizados en el Perú entre el 2014 y 2023" recuperato da https://promsex.org/wp-content/uploads/2024/07/AbortosTerapeuticosRealizadosEnElPeruEntreEl2014y2023.pdf.

[33] Gianella, Camila e Alvarez, Brenda, "Judical Lawfare: Analysis of Legal Arguments against Abortion Rights in Peruvian Courts", cit., p. 5-6; Távara Orozco, Luis, Macharé, Pilar, García Angulo, Segundo, Guevara, Enrique, Cabrera, Santiago, Aguilar, Julio, Ramírez, Ysoé, Orderique, Luis, Silva, Carlos, Sánchez Sixto,, Leveau, Walter, e Burela, Jhonny, "Barriers to access to safe abortion in the full extent of the law in Peru", cit. , p. 154.

[34] Come è stato messo chiaramente in evidenza nei casi L.C. v. Peru, Cedaw /C/50/D/22/2009 e K.L. v Peru, CCPR/C/85/D/1153/2003 che configurano le ripercussioni sulla salute mentale in seguito al mancato aborto come una violazione dei diritti umani della gestante.

[35] Niamh Duffy, Deirdre Freeman, Cordelia e Rodríguez Castañeda, Sandra, "Beyond the State: Abortion Care Activism in Peru", in Signs: Journal of Women in Culture and Society, vol. 48, no. 3, 2023, p. 609.

anticorrupcion "Sin componenda", con azione a tutela dei diritti fondamentali (*amparo*), si è rivolta al Tribunal Constitucional per impedirne l'adozione denunciando come le linee guida costituissero una violazione dei diritti del concepito [36]. Nel 2019, i giudici costituzionali hanno respinto il ricorso della ONG sulla base dei seguenti argomenti: il diritto alla vita non è assoluto ma incrementale; le linee guida sono espressione dei principi di proporzionalità e ragionevolezza necessari per proteggere la salute, la vita e la dignità della donna; e, da ultimo, le linee guida sono conformi alle raccomandazioni internazionali rivolte al Perù nei casi K.L. v Peru e L.C. v Peru. Accion de Lucha ha poi impugnato la decisione del Tribunal Constitutional che è stata confermata, anche se con argomenti di natura meramente procedurale e non sostanziale. Al termine di cinque anni di *iter* giudiziario, le linee guida sono state ritenute legittime.

Una seconda mobilizzazione delle associazioni anti abortiste contro le linee guida è avvenuta nel 2018. L'Associazione Tommaso Moro, sostenuta da gruppi cattolici, ha promosso un'azione popolare di fronte alla giurisdizione civile per chiedere l'abolizione. L'associazione sosteneva che la decriminalizzazione dell'aborto terapeutico non richiedesse anche una sua regolamentazione. Secondo l'associazione, l'esistenza stessa delle linee guida avrebbe violato il diritto alla vita del feto, all'eguaglianza, alla non discriminazione e alla salute; avrebbe violato, altresì, tutti gli altri diritti del concepito e impedito ai genitori la possibilità di accedere a una genitorialità responsabile nel rispetto della vita nascitura. Il fine ultimo dell'azione popolare era il ritorno alla situazione di vuoto regolamentare che, facendo leva sul timore dell'azione (e della condanna) penale, di fatto favoriva il rifiuto del personale sanitario all'aborto terapeutico. In risposta all'azione popolare, si è avuta una forte reazione delle organizzazioni a tutela delle donne e l'associazione PROMSEX, in particolare, è intervenuta nel giudizio per difendere l'applicazione delle linee guida. Il caso è stato esaminato dal Tribunale Civile di Lima, il quale non ha accolto l'azione popolare, ma anche in questo caso la motivazione si è basata su questioni procedurali: lo strumento scelto per adire i giudici, l'azione popolare appunto, non è stato considerato adatto per ottenere una pronuncia sulla costituzionalità dell'art. 119 del codice penale. La regolamentazione dell'aborto terapeutico attraverso le linee guida è stata, dunque, considerata legittima ed in linea con le raccomandazioni degli organismi internazionali. Nella sostanza, però, è mancata una decisione sul merito.[37] L'Associazione Tommaso Moro ha continuato la sua battaglia giudiziaria senza successo. Nel 2023 la Sala Constitucional y Social de la Corte Suprema ha definitivamente rigettato le istanze della Associazione Tommaso Moro[38], confermando la legittimità delle linee guida.

Un terzo caso emblematico riguarda l'applicazione delle norme penali sul reato di aborto. La vicenda di E.M.D., una studentessa di 17 anni, si inserisce in questa cornice di forte

[36] EXPEDIENTE JUDICIAL N° 31583-2014. Per reperire i principali provvedimenti e relativi commenti si rinvia al seguente link dell'associazione PROMSEX: https://promsex.org/wp-content/uploads/2020/04/PROCESO-DE-AMPARO-CONTRA-EL-PROTOCOLO-DE-ABORTO-TERAP%C3%89UTICO.pdf.

[37] Resolución N° 25 de fecha 10 de diciembre de dos mil diecinueve (2019).

[38] Corte Suprema de Justicia de la República Sala de Derecho Constitucional y Social Permanente, PROCESO DE ACCIÓN POPULAR EXPEDIENTE N° 8933-2020 LIMA. Per una analisi esaustiva dell'*iter* dell'azione popolare e delle ulteriori argomentazioni utilizzate per respingerla v., sempre sul sito di PROMSEX, https://incidenciainternacional.promsex.org/casos/aborto-terapeutico/.

criminalizzazione. La minorenne, infatti, aveva assunto il misoprostolo per porre termine ad una gravidanza di sei settimane e si era poi rivolta ad una struttura sanitaria per le cure post aborto. Data la minore età, la somministrazione delle cure doveva essere autorizzata dal Tribunale della Famiglia e dal Pubblico Ministero. Questi rilasciarono sì l'autorizzazione ma, allo stesso tempo, venne aperto un procedimento penale nei suoi confronti per procurato aborto. La ragazza fu condannata in primo grado e poi assolta in secondo grado. Nel corso del giudizio emersero tratti della vita della ragazza: studentessa esemplare, con voti altissimi che le permettevano di accedere ad una borsa di studio prestigiosa e necessaria. Questi tratti positivi della ragazza non furono, però, considerati con favore dal Pubblico Ministero il quale, invece, sottolineò l'egoismo della giovane donna che, pur di continuare a studiare, era disposta anche ad abortire.[39]

I tre casi mostrano l'attivismo delle associazioni anti aborto che, in assenza di un auspicato intervento del Congresso per limitare ulteriormente l'accesso all'aborto, utilizzano le corti come veicolo per dare voce alle loro istanze repressive. Allo stesso tempo, le corti peruviane si rivelano formalistiche e non innovative, ritenendo che spetti al potere esecutivo o legislativo decidere sulla materia.[40] In questo contesto, le associazioni anti aborto hanno quindi avuto facilità nel proporre argomenti che si basano su una interpretazione letterale della normativa esistente, già fortemente avversa all'aborto.

Gli argomenti che i gruppi cristiani e conservatori propongono alle corti si articolano su quattro piani e sono tutti presenti nei tre casi emblematici analizzati sinora.

I movimenti anti aborto, nelle varie azioni giudiziarie, si appoggiano costantemente alla normativa civilistica che tutela la vita umana fin dal concepimento. Questo argomento viene presentato come un tratto caratteristico della realtà dell'America Latina, in virtù dell'art. 4.1 della Convenzione Americana sui Diritti Umani che trova anche la declinazione locale nell'art. 1 del codice civile del Perù[41]. È piuttosto evidente che questo tipo di argomentazioni ha un peso importante nelle lotte contro l'aborto. In questo contesto, sono state peraltro evocate posizioni sovraniste, in cui il *favor* per l'aborto è descritto come un "business" di attori globali, non in linea con le specificità del pensiero locale[42].

Un secondo ordine di argomentazioni, utilizzato sovente dalle organizzazioni antiabortiste, fa leva sulla preminenza dei diritti del concepito rispetto alla posizione giuridica della donna. Il *nasciturus* è considerato come un essere umano[43]; da ciò deriva la

[39] Il caso è riportato in Gianella, Camila e Alvarez, Brenda, "Judical Lawfare: Analysis of Legal Arguments against Abortion Rights in Peruvian Courts", cit., p. 11.

[40] Molte proposte di legge sono state presentate alla discussione del Parlamento peruviano, sia per decriminalizzare l'aborto che rafforzare lo stato di criminalizzazione. Nessuna delle proposte è stata approvata: Gianella, Camila e Alvarez, Brenda, *o.u.c.*, pp. 6-9.

[41] Bergallo, Paola, Jaramillo Sierra, Isabel Cristina e Juan Marco Viaggione (a cura di), *El aborto en América Latina: estrategias juridicas para luchar por su legalizacion y enfrentar las resistencias conservadoras*, Buenos Aires: Siglo 21, 2018.

[42] Cfr. Tribunal Constitucional, Pleno. Sentencia 268/2023 EXP. N.° 00098-2022-pa/tc Lima ong Centro de romoción y defensa de los derechos sexuales y reproductivos [promsex] che riguarda un caso di pubblicazione di articoli in cui i gruppi cattolici hanno denunciato i legami di associazioni locali pro aborto con Planned Parenthood da cui avrebbero ottenuto un consistente finanziamento.

[43] Gianella, Camila e Alvarez, Brenda, "Judicial Lawfare: Analysis of Legal Arguments against Abortion Rights in Peruvian Courts", cit., p. 17, usano la parola "bambino" che risulta, in questo contesto, particolarmente evocativa.

sua assolutezza e primarietà. La superiorità della vita del concepito rispetto ad altre "esigenze" della donna impedisce, dunque, ogni operazione di bilanciamento tra i diritti del feto e quelli della gestante.

A favore delle posizioni antiabortiste, gioca poi un ruolo fondamentale la criminalizzazione dell'aborto. È chiaro che una legge penale deve essere applicata e costituisce una base sicura per perseguire la donna che intende abortire, seppure in autonomia, e le persone, medici o personale sanitario che la supportano.

Un'ultima serie di argomenti messi in campo riguarda la configurazione dell'aborto terapeutico. Per le associazioni antiabortiste, il ricorso all'aborto terapeutico deve essere limitato e non deve diventare una scappatoia o una copertura per sfuggire alla chiarezza della legge penale. D'altra parte, affermano le organizzazioni contrarie all'aborto, la scienza ha fatto degli enormi progressi dal 1924, quando è stato introdotto l'aborto terapeutico, e la medicina è ormai in grado di salvare sia la vita della madre che del feto, rendendo inutile, nella maggior parte dei casi, l'interruzione di gravidanza per esigenze di salute della madre.

Di fronte a queste argomentazioni, variamente presenti nei tre casi esaminati, i giudici hanno respinto le richieste dei movimenti antiabortisti. Tuttavia, le motivazioni delle decisioni si sono basate su vizi di tipo procedurale, senza dare chiare indicazioni di merito e, dunque, lasciando aperta la strada per ulteriori istanze di repressione.

Il formalismo praticato dalle corti peruviane è, invero, politicamente orientato e strumentale ad una particolare visione restrittiva dell'interruzione di gravidanza. Il richiamo alla tutela della vita del codice civile in simbiosi con la criminalizzazione dell'interruzione della gravidanza contenuta nel codice penale permette ai giudici di non prendere in considerazione i diritti della gestante, escludendo ogni possibilità di bilanciamento. Il risultato sociale della scarsa possibilità di accesso all'interruzione di gravidanza si risolve in un ampio ricorso all'aborto clandestino, ma anche nella creazione di "*infrastructures of abortion care*", ossia reti alternative allo Stato, nate con lo scopo di fornire un servizio di cura e supporto alle donne che vogliano o debbano abortire. [44]

V. LA STRADA ITALIANA. IL BILANCIAMENTO COSTITUZIONALE IMPERFETTO E LA LIBERALIZZAZIONE DIFETTOSA

L'aborto è un tema simbolico, *locus* critico portatore di distinte ed opposte visioni del mondo, che induce ad una profonda riflessione sulla natura umana, sulla cittadinanza delle donne, sul controllo bio-politico della sessualità e del corpo femminile e, più in generale, sulle complesse dinamiche sociali tra individui e tra individui e stato. E' innegabile che, quanto più si estende l'assolutezza dei diritti del concepito, tanto più un sistema normativo vieta e criminalizza l'aborto, tanto maggiore è la compressione della libertà di autodeterminazione delle donne nelle scelte riproduttive e il rischio per la loro salute. L'esclusione dell'accesso all'interruzione di gravidanza, dovuta ad una persistente criminalizzazione, produce e giustifica una etero-imposizione della maternità e una etero-gestione del corpo e della sessualità femminile.

[44] Niamh Duffy, Deirdre Freeman, Cordelia e Rodríguez Castañeda, Sandra, "Beyond the State: Abortion Care Activism in Peru", in Signs: Journal of Women in Culture and Society, vol. 48, no. 3, 2023, p. 609, in cui è descritto l'"*acompañamiento*", quale "a feminist political praxis that constructs transformation orientated "infrastructures of abortion care" (p. 611).

E', inoltre, innegabile che la sacralità inviolabile della vita umana sin dal concepimento è un dogma della Chiesa cattolica romana e una norma intoccabile del diritto canonico[45]. L'aborto è da sempre considerato un crimine, un atto abominevole[46]. Sia il Perù, sia l'Italia condividono un marcato influsso della cultura cattolica nel tessuto sociale nazionale; in entrambi i paesi la costruzione sociale dell'aborto si fonda su una diffusa cultura della vita e della famiglia, stratificata nell'immaginario collettivo, e che produce e alimenta processi di stigmatizzazione, sia sociale, sia istituzionale. I movimenti cattolici, con il supporto di gruppi politici locali conservatori hanno stabilmente ostacolato la legalizzazione dell'interruzione di gravidanza, anche se con intensità ed effetti differenti nei due paesi a seconda dei momenti storici oggetto di valutazione. Qualunque fattore di somiglianza esistente tra i due sistemi richiede, infatti, una analisi profonda e soprattutto contestualizzata e storicizzata.

Le barriere socio-culturali ostili al riconoscimento della libertà di autodeterminazione della donna nelle scelte riproduttive, qui solo sommariamente accennate, sono state la base delle battaglie condotte in Italia dai movimenti femministi negli anni '70, che hanno faticosamente portato all'approvazione della legge nazionale sull'interruzione di gravidanza[47].

La disciplina ha liberalizzato le procedure di aborto all'interno di un sistema sanitario nazionale, pubblico e gratuito.

Il testo è il frutto di un compromesso con il mondo cattolico che emerge già nel titolo della legge ('Norme per la tutela sociale della maternità e sull'interruzione volontaria di gravidanza') e nei suoi primi articoli. L'aborto si configura quale servizio sanitario riservato agli ospedali pubblici, e si colloca nel quadro di valori prioritari quali la procreazione cosciente e responsabile, il valore sociale della maternità, e la «tutela della vita umana sin da suo inizio»[48]. In nessun caso, inoltre, l'interruzione di gravidanza può tradursi in un dispositivo di controllo o limitazione delle nascite. Lo stato e le regioni, i sistemi sanitari e i consultori familiari sono tenuti ad impegnarsi per promuovere una scelta consapevole delle donne e, in sostanza, a scoraggiare l'interruzione della gravidanza.

Non c'è, dunque, nella trama normativa, un diritto soggettivo all'aborto libero e su richiesta[49], se per diritto soggettivo si intende una situazione giuridica soggettiva atta ad esprimere una piena signoria del volere delle donne. E' più facile e più corretto parlare di una 'concessione' legislativa condizionata (*i.e.*: in presenza di alcuni limiti temporali e di requisiti - procedurali e/o sostanziali - l'interruzione di gravidanza diviene legale), o

[45] Can. 1397-8, Codice di diritto canonico, reperito da *www.vatican.va*.
[46] Crea, Camilla, "Conscientious Objection", cit., pp. 770-772.
[47] Legge, 22 maggio 1978, n. 194.
[48] Art. 1, Legge 194/1978.
[49] Navarretta, Emanuela, *Il danno ingiusto*, in *Diritto civile* Lipari-Rescigno, vol. IV, Milano: Giuffrè, 2009, p. 175 s.; Monateri, Pier Giuseppe, "Il danno al nascituro e la lesione della maternità cosciente e responsabile", in Corriere giuridico, 2013, pp. 59, 64 (commento a Cass., sez. III, 2 ottobre 2012, n. 16754). Sullo schema giuridico del diritto soggettivo e la sua evoluzione nel sistema giuridico domestico, v., in particolare, Graziadei, Michele, Diritto soggettivo; potere; interesse, in AA.VV., *Il diritto soggettivo*, in *Trattato di diritto civile* Sacco, Torino: Utet, 2001, pp. 3-104.

discorrere di un modello di aborto «per giusta causa»[50], dovendosi necessariamente bilanciare l'interesse della gestante e quello del concepito. La violazione dei requisiti di legge, infatti, produce una regressione allo stato di criminalizzazione[51], essendo previste sanzioni sia amministrative, sia penali. In ogni caso i servizi di aborto si inseriscono, in teoria, in un sistema nazionale sanitario pubblico, universale[52] e gratuito, che dovrebbe essere garantito a tutte le donne.

L'espressione 'diritto all'aborto' - secondo il significato, accolto dal pensiero liberale, di paradigma di autonomia e autodeterminazione della donna nelle scelte procreative - si è radicata nel dibattito femminista domestico ma ha una accezione essenzialmente politica, non giuridica. Non c'è un diritto all'aborto, ossia un diritto di libera scelta della donna, nella legge, né nella Costituzione[53]. Si riconosce una copertura costituzionale della interruzione volontaria di gravidanza ma, per lo più, questa copertura resta confinata nelle anguste maglie del diritto alla salute psico-fisica della donna.

In linea con un approccio di parziale legalizzazione, è possibile chiedere e ottenere un aborto volontario, entro i primi 90 giorni, ma a condizione che ci sia un serio pericolo per la salute fisica o psichica della donna derivante dalla prosecuzione della gravidanza.

In realtà, il legislatore del 1978 ha richiamato diverse tipologie di problematiche che possono giustificare la richiesta di interruzione: questioni di natura strettamente medica, anomalie o malformazioni del concepito, ma anche situazioni economiche, sociali o familiari della donna, nonché specifiche 'circostanze in cui è avvenuto il concepimento' (*i.e.*, una sorta di aborto sociale). Tuttavia, ognuna di queste circostanze/eventi deve sempre essere causalmente ricondotta all'interno del meta-requisito di 'un serio pericolo' per la salute psico-fisica della donna[54]. In sostanza, dunque l'aborto volontario possibile sembra essere solo quello terapeutico, perché soltanto in caso di minaccia alla salute o alla vita della donna il sistema giuridico italiano concede il sacrificio del feto[55].

Inoltre, sia la gravidanza, sia la volontà della donna di procedere alla sua interruzione richiedono l'attestazione di un medico, del consultorio o della struttura sanitaria, nella quale si invita la donna, ad un periodo di riflessione di sette giorni [56] (*mandatory waiting time*). Centrale è il ruolo di assistenza, informazione e sostegno affidato ai consultori familiari pubblici. Le gestanti minori d'età, per accedere al servizio abortivo devono avere l'assenso preventivo di chi esercita la responsabilità genitoriale o, in mancanza, del giudice tutelare[57].

Seguendo un approccio di gradualità della 'gravità' dell'aborto, dopo 90 giorni dall'inizio della gravidanza, l'aborto è in ogni caso autorizzato laddove sussista un 'grave' pericolo

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[50] Moscarini, Lucio Valerio, "Aborto. Profili costituzionali e disciplina legislativa", in Enciclopedia giuridica, I, Roma: Treccani, 1988, p. 2 s.; D'Atena, Antonio, Commento all'art. 9, in Bianca, Cesare Massimo e Busnelli, Francesco Donato (a cura di), Commentario alla l. 22 maggio 1978, n. 194, cit., p. 1650 ss.

[51] Art. 19, l. 194/1978.

[52] Iadiccio, Maria Pia, *Procreazione umana e diritti fondamentali*, Torino: Giappichelli, 2020, p. 115.

[53] Niccolai, Silvia, "La legge sulla fecondazione assistita e l'eredità dell'aborto", recuperato da *www.costituzionalismo.it*, 2, 2005.

[54] Art. 4, l. 194/1978.

[55] Hanafin, Patrick, *Conceiving Life: Reproductive Politics and the Law in Contemporary Italy*, Farnham: Routledge, 2007, p. 6.

[56] Artt. 5 e 6, l. 194/1978.

[57] Art. 12, l. 194/1978.

per la vita della donna o per la sua salute, data in particolare, la presenza di processi patologici accertati tra i quali anomalie o malformazioni del feto[58].

All'interno di questo quadro normativo si colloca la disposizione sull'obiezione di coscienza, che rappresenta la più paradigmatica espressione dell'influenza della chiesa cattolica e dei suoi dogmi sulle politiche riproduttive in Italia. L'art. 9 della legge sulla interruzione di gravidanza legittima il personale sanitario[59] a sottrarsi dal compimento delle procedure e delle attività «specificamente e necessariamente dirette a determinare l'interruzione della gravidanza». L'esonero non si estende alle attività di assistenza antecedenti o successive all'intervento abortivo. In ogni caso, l'obiezione riguarda il singolo medico, non la struttura ospedaliera pubblica, che è obbligata a garantire questo servizio sanitario universale, poiché è vietata la c.d. obiezione di struttura o *institutional conscientious objection*. L'obiezione, inoltre, non può operare se, data la particolarità delle circostanze, l'intervento del personale medico o ausiliario «è indispensabile per salvare la vita della donna in imminente pericolo».

VI. Segue. *Law in action* vs. *law in the books*. Le barriere all'accesso all'interruzione di gravidanza di là dalla soggettivazione del concepito.

La regolazione dell'aborto nel contesto italiano soffre di un divario sostanziale tra *law in action* e *law in the books*[60], tra regole formali e regole operazionali. Il sistema giuridico ha infatti legalizzato, dal 1978, l'interruzione di gravidanza, stabilendo una serie di condizioni e procedure per l'accesso a questo servizio sanitario. Tuttavia, sin dall'approvazione della legge si è assistito ad un processo di sabotaggio sostanziale, dovuto ad una molteplicità di fattori legati all'interpretazione e implementazione concreta della legge. Pertanto, l'impatto della normativa non può essere valutato attraverso un mero *black-letter approach*.

I periodi di attesa obbligatori per la donna sono tra i più lunghi d'Europa; i centri sanitari pubblici che offrono il servizio di interruzione di gravidanza sono mal distribuiti a livello regionale; i consultori familiari, creati per supportare la maternità, sono fortemente legati ai movimenti pro vita e pro famiglia. La più forte barriera è[61], in particolare, la pratica diffusa dell'obiezione di coscienza da parte del personale sanitario. L'esenzione dall'obbligo di prestazione del servizio abortivo è giustificata da un imperativo etico/religioso riconosciuto dal legislatore. La disciplina prevede, dunque, una esplicita interferenza di sistemi discorsivi altri dal diritto: la morale e la religione, infatti, nonostante la secolarizzazione culturale del paese, incidono sulla effettività dell'accesso all'aborto che

58 Art. 6, l. 194/1978.

59 Come noto, all'interno del personale sanitario solo personale specializzato in ginecologia o ostetricia, che opera in strutture pubbliche, può praticare aborti. Una categoria professionale, dunque, assai limitata: Minerva, Francesca, "Conscientious Objection in Italy", in Journal of Medical Ethics, vol. 41, 2015, pp. pp. 170-73.

60 Pound, Roscoe, "Law in Books and Law in Action", in American Law Review, vol. 44, 1910, p. 12 s.

61 Per questi aspetti, v. Caruso, Elena, "Abortion in Italy: Forty Years On", in Feminist Legal Studies, vol. 28, 2020, p. 92; Busatta, Lucia, "Abortion Law in Italy: A Pluralist Legislation Lacking Effectiveness?", in Portier-Le Cocq, Fabienne (a cura di), Debates Around Abortion in the Global North, New York: Routledge, 2022, pp. 97, 102; Brunelli, Giuditta, "L'interruzione volontaria della gravidanza: come si ostacola l'applicazione di una legge (a contenuto costituzionalmente vincolato)", in AA.VV., *Scritti in onore di Lorenza Carlassare. Il diritto costituzionale come regola e limite al potere*, Napoli: Jovene, 2009, p. 815 ss.

di fatto, grazie alla presenza di un numero considerevole di obiettori, è negato in molteplici aree regionali del paese.

Il Comitato Europeo dei Diritti Sociali (CEDS) ha denunciato in più occasioni le criticità dell'Italia: nel 2014, a seguito di una denuncia collettiva della ONG *International Planned Parenthood Federation-European Network* (IPPF EN) [62], ha affermato che l'obiezione di coscienza nelle procedure di aborto viola il diritto alla tutela della salute e alla non discriminazione sanciti nella Carta Sociale Europea (art. 11, § 1, da solo e in combinato disposto l'art. E), data la mancanza di professionisti non-obiettori negli ospedali pubblici, che limita illegittimamente l'accesso all'interruzione di gravidanza. Le donne, infatti, sono costrette a trasferirsi in altre regioni o all'estero, il che significa aumentare sia i rischi per la loro salute mentale o fisica, sia i livelli di disuguaglianza, che derivano anche dalla combinazione di fattori socio-economici e geografici (*i.e.*: discriminazione intersezionale e multipla) [63]. La legge nazionale sull'aborto, secondo il CEDS, è, dunque, inefficace in quanto il suo art. 9, comma 4. obbligherebbe tutte le strutture sanitarie pubbliche a fornire i servizi di aborto 'in tutti i casi', anche quando il numero di obiettori di coscienza è elevato.

Ancora, nel 2016 [64], dopo un reclamo collettivo presentato, questa volta, dalla Confederazione Generale Italiana del Lavoro (CGIL), il Comitato ha sottolineato ancora una volta che l'accesso all'aborto è quasi impossibile in alcune regioni del paese. In questa seconda decisione è stata altresì rilevata una violazione dell'art 1, § 2 della Carta sociale, che tutela le condizioni di lavoro, in ragione del trattamento differenziato esistente tra operatori sanitari obiettori e non obiettori, nonché una violazione dell'art. 26, § 2 (dignità del lavoro), poiché il governo italiano non avrebbe posto in essere adeguate misure preventive di formazione o sensibilizzazione per proteggere il personale non obiettore dalle molestie morali e dalla discriminazione che subisce nei contesti lavorativi.

Da allora nulla è realmente cambiato, nonostante si registri un formale calo nazionale del numero di aborti negli ultimi decenni.

I dati riportati nelle relazioni annuali del Ministero della salute, anche i più recenti, rilevano le medesime criticità[65]. Ciò che più allarma è che molti ginecologi e anestesisti dichiarano che l'opzione per l'obiezione di coscienza nasce dall'esigenza di evitare un lavoro sporco, monotono e ripetitivo, o un carico di lavoro troppo impegnativo, considerando che il numero di non obiettori è assai ridotto; o, ancora, dal desiderio di potersi dedicare a prestazioni sanitarie diverse e maggiormente gratificanti sul piano professionale. In tutti

[62] Collective Complaint, International Planned Parenthood Federation-European Network (IPPF-EN) v. Italy, No. 87/2012, (ECSR, Sept., 3 2012); Resolution CM/ResChS(2014)6, ECSR, International Planned Parenthood Federation-European Network (IPPF-EN) v. Italy, No. 87/2012 (Apr. 30, 2014). V. sul punto, D'Amico, Marilisa, "The Decision of the European Committee of Social Rights on the Conscientious Objection in Case of Voluntary Termination of Pregnancy (Collective Complaint No. 87/2012)", in D'Amico, Marilisa e Guiglia, Giovanni (a cura di), *European Social Charter and the Challenges of the XXI Century*, Napoli: Edizioni Scientifiche Italiane, 2014, p. 219 ss.

[63] Lukas, Karin e Ó Cinnéide, Colm, "Gender Equality Within the Framework of the European Social Charter", in Cook, Rebecca J. (a cura di), Frontiers of Gender Equality: Transnational Legal Perspect*ives*, Philadelphia: Univ. of Penn Press, 2023, pp. 219, 232.

[64] Resolution CM/ResChS(2016)3, ECSR, Confederazione Generale Italiana del Lavoro (CGIL) v Italy, Complaint No 91/2013.

[65] *Amplius*, Camilla, Crea, "Conscientious Objection", cit., p. 790.

questi casi appare evidente che non c'è alcuna coscienza o convincimento etico-religioso da tutelare.

L'azione opportunistica degli obiettori è animata, sovente, anche da puri interessi personali. Ma il paradosso, in ogni caso, è che il sistema normativo legittima anche i falsi obiettori, ai quali è consentito di esercitare il diritto al rifiuto senza alcun obbligo di motivazione della propria scelta e senza alcuna conseguenza giuridica o sociale.

La regolazione dell'interruzione di gravidanza resta cristallizzata in quel bilanciamento individuato, nel 1975[66], dalla Corte costituzionale, la quale ha affermato che la protezione del feto non può avere una priorità assoluta sulla vita e la salute della madre (art. 32 cost.) se messe in pericolo dalla continuazione della gravidanza. Inoltre, ha dichiarato che «non esiste equivalenza fra il diritto non solo alla vita ma anche alla salute proprio di chi è già persona, come la madre, e la salvaguardia dell'embrione che persona deve ancora diventare». E siffatto bilanciamento, per quanto ancorato ad una logica oppositiva imperfetta tra concepito e donna gestante, è rimasto inalterato[67]. La Corte costituzionale non ha mai più inciso sulla materia, assegnando un potere di modifica della disciplina dell'aborto al legislatore.

Il legislatore, a sua volta, non è mai intervenuto sulla legge relativa l'interruzione di gravidanza, né *in melius*, né *in peius*.

Al contempo, le proposte e i disegni di legge promosse da gruppi cattolici e conservatori che, negli ultimi anni[68], hanno provato a rafforzare la posizione del concepito, per riconoscergli una piena soggettività giuridica (emendando l'art. 1 cod. civ. it.) non hanno avuto seguito.

Quel bilanciamento imperfetto delineato dalla Corte costituzionale prima, e dal legislatore poi, rimane un compromesso inadeguato e, tuttavia, capace, nonostante le molteplici barriere all'accesso all'aborto in Italia[69], una via normativamente giustificata per tutelare la libertà di autodeterminazione della donna e i diritti riproduttivi.

VII. Conclusioni

L'analisi dello *status* del concepito nel sistema giuridico peruviano, in comparazione con l'esperienza italiana, ha mostrato il persistente potere 'selettivo' ed escludente della

[66] Corte cost., 18 Febbraio 1975, n. 27.

[67] Corte cost., 1 febbraio 1981, n. 26, recuperato da *https://giurcost.org/*.

[68] Disegni di legge ad iniziativa parlamentari e senatori di provenienza conservatrice, in supporto di movimenti pro vita nazionali: Gasparri, 'Modifica dell'articolo 1 del codice civile in materia di riconoscimento della capacità giuridica del concepito', Senato della Repubblica, XIX Legislatura, n. 165, 13 ottobre 2022; Menia, 'Modifica dell'articolo 1 del codice civile in materia di riconoscimento della capacità giuridica ad ogni essere umano', 13 Gennaio 2023, XIX Legislatura, n. 464; Gasparri, Quagliariello, Mallegni e Gallone, 'Modifica dell'articolo 1 del codice civile in materia di riconoscimento della capacità giuridica del concepito', XVIII Legislatura, 20 Novembre 2018, n. 950; nonché, la Proposta di legge, Carlucci, 'Modifica dell'articolo 1 del codice civile, concernente il riconoscimento della personalità giuridica ad ogni essere umano', XVI Legislatura, 18 febbraio 2011, n. 4099; Proposta di legge, Volonté, 'Modifica dell'articolo 1 del codice civile in materia di riconoscimento della capacità giuridica ad ogni essere umano', XVI Legislatura, 29 aprile 2008, n. 363, che riprende una proposta di legge di iniziativa popolare, promossa per la prima volta nel corso della XII legislatura, 20 luglio 1995, sostenuta dal 'Forum delle famiglie' e da esponenti del mondo accademico.

[69] Erdman, Joanna N. e Cook, Rebecca J., "Decriminalization of Abortion - A human Rights Imperative", in Best Practice & Research Clinical Obstetrics & Gynaecology, vol. 62, 2020, pp. 11-24.

categoria del soggetto giuridico. Una tutela assoluta e unidirezionale del *nasciturus*, infatti, ostacola qualsiasi ragionevole bilanciamento con i diritti delle gestanti.
La criminalizzazione dell'aborto in Perù, in chiara violazione del diritto umano all'aborto legale e sicuro, si giustifica, sul piano normativo e giurisprudenziale, sulla base dell'assolutezza dei diritti del concepito, del suo diritto alla vita e sul paradigma, statualistico, della soggettività giuridica, stratificata e consolidata nella tradizione culturale peruviana, nel codice civile, nella costituzione, e nella postura formalistica e riduzionista assunta dalle corti domestiche.
In Italia, il sistema normativo ha liberalizzato, sin dalla fine degli anni '70, l'interruzione di gravidanza, stabilizzando un bilanciamento tra la tutela del feto e la tutela della salute psico-fisica della donna. Questo bilanciamento assiologico imperfetto, talvolta accusato di paternalismo, si è cristallizzato nella legge nazionale e nelle decisioni della Corte costituzionale. Vero è che non può parlarsi, nel contesto italiano, di un diritto soggettivo all'aborto sicuro, effettivo ed eguale, poiché sussistono molteplici problemi di implementazione e interpretazione della legge, barriere e disparità nell'accesso alla procedura sanitaria. E', però, altresì vero che un bilanciamento difettoso è pur sempre un bilanciamento. L'assenza di soggettività giuridica del concepito, il suo non essere 'ancora persona' (secondo il lessico della Corte costituzionale) continua a preservare uno spazio di compromesso minimo a tutela della condizione femminile e della libertà di autodeterminazione riproduttiva.

Nel paese sudamericano si registra una maggiore reazione delle istituzioni nazionali agli impulsi sovranazionali. Tale reazione, confluita nelle linee guida sull'aborto terapeutico, non è però riuscita a scalfire l'impianto domestico di generale criminalizzazione. L'Italia, a sua volta, si è mostrata assai meno reattiva alle raccomandazioni sovranazionali, preferendo una strategia di resistenza passiva, e conservando religiosamente quel compromesso politico e giuridico faticosamente conquistato alla fine degli anni '70. D'altro canto, questa differente postura dei due paesi, si comprende, alla luce di una riflessione: tanto più i regimi dell'aborto sono repressivi, tanto maggiori sono le reazioni sia 'interne', giacché la criminalizzazione produce sistemi sociali e parastatali di gestione alternativa delle pratiche di interruzione di gravidanza, come le infrastrutture del c.d. *acompañamiento*[70]; sia 'esterne', poiché all'eccesso di repressione dei diritti e delle libertà riproduttive delle donne si accompagna un più intenso intervento degli attori internazionali a tutela dei diritti umani e la necessità, almeno formale, di agire da parte dei governi e delle istituzioni nazionali.
In una visione comparatistica emerge, inoltre, che in entrambi gli ordinamenti è fortemente presente l'influenza di ideologie religiose e politiche[71] conservatrici, che hanno inciso, con diversa intensità a seconda dei vari momenti storici, sulle politiche riproduttive nazionali. Si tratta, verosimilmente, di formanti impliciti, o crittotipi (secondo il lessico di

[70] Duffy, Deirdre Niamh, Freeman, Cordelia e Rodríguez Castañeda, Sandra, "Beyond the State: Abortion Care Activism in Peru", cit., p. 611.
[71] Kennedy, Duncan, "Political Ideology and Comparative Law", in M. Bussani e U. Mattei (a cura di), The Cambridge Companion to Comparative Law, Cambridge: Cambridge University Press, 2012, pp. 35, 38.

Rodolfo Sacco[72]), ma anche di tralatizie narrazioni, consolidate nei contesti sociali dei due paesi, che perpetuano processi di stigmatizzazione dell'aborto, in quanto contrario all'archetipo della donna-madre, al modello della famiglia tradizionale e alla cultura della vita. Le narrazioni, d'altro canto, hanno una incidenza significativa nella analisi comparata dei regimi abortivi. Le narrazioni sono, infatti, parte costitutiva di ciascuna tradizione giuridica, secondo una concezione ampia della normatività. Le narrazioni costruiscono relazioni di senso tra l'universo materiale e normativo e, soprattutto, aiutano a comprendere quell'insieme di azioni normative che possono essere collegate con schemi di significato estratti, a loro volta, da schemi di significato del passato[73].

[72] Sacco, Rodolfo, "Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)", in American Journal of Comparative Law, vol. 39, 1991, pp. 343, 384–87.
[73] Cover, Robert, "Foreword: Nomos and Narrative", in Harvard Law Review, vol. 97, 1983, pp. 4, 7, 9.

CERTIFICATIONS AND PROTECTION OF PERSONAL DATA: AN IN-DEPTH ANALYSIS OF A POWERFUL COMPLIANCE TOOL

*Paolo Guarda – Razmik Vardanian**

TABLE OF CONTENTS:

The aim of this article is to provide an analysis of the general framework for data protection and privacy certification, also from a comparative perspective. The paper begins by considering data protection certification as an effective tool for demonstrating compliance with the General Data Protection Regulation. In particular, the essay explores the requirements for the development, approval, and attribution of certification according to the GDPR. Moreover, this contribution briefly explores the main features of the certification schemes currently approved in the EU. In the second part, the article delves into the regulatory frameworks of the UK, Canada, US and PRC legal systems concerning certification in data protection and online privacy. The comparison with these experiences highlights the impact of integration with the EU and examines the nuances of each country's approach. The paper underscores the differences and similarities in their certification processes. The conclusion recaps the key remarks of the paper, emphasising the effects and advantage of data protection and privacy certifications.

Keywords: data protection – certification – accountability – GDPR – co-regulation

I. ACCOUNTABILITY AND CERTIFICATIONS

There is one concept among others that represents the true novelty of the European discipline on personal data protection as provided by Regulation (EU) 2016/679 (General Data Protection Regulation; hereinafter: GDPR)[1]: the so-called "accountability" that has assumed a pivotal role within the European approach. The evaluation of the context and the choice of solutions aimed at mitigating risks are completely up to those who carry out, and are in charge of, the data processing (i.e. the data controllers). Art. 5, par. 2, therefore, states: "*The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability')*". Art. 24 relating to the responsibilities of the data controller is even more explicit in paragraph 1: "*Taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary*". The importance of such recording activities - indispensable to fulfil the obligations of art. 24 - is also emphasised elsewhere in the

* Paolo Guarda (Faculty of Law - University of Trento) authored paragraphs 1 and 4; Razmik Vardanian (Law Graduate - Faculty of Law – University of Trento) authored paragraphs 2 and 3.

[1] 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.

GDPR, and is linked to newly introduced requirements, such as the register of processing activities (art. 30), the Data Protection Impact Assessment (art. 35), etc.

Accountability finds its first operational expression in the so-called "data protection by design" approach. Art. 25, par. 1, thus requires to incorporate the principles and rules regarding the protection starting from the design phase of the processing, also and above all at the level of IT solutions. This provision is recapped and explained in Recital no. 78: the data controller is required to adopt internal policies and measures that address the principles of data protection by design and by default (e.g. minimisation of data use, pseudonymisation, greater transparency on processing, etc.). Data protection by design is connected to so-called "data protection by default", which aims at fostering the adoption of adequate technical and organisational measures to guarantee that only the personal data needed for each specific purpose of the processing are processed (art. 25, par. 2, GDPR)[2].

The attention that is paid to the data controllers and their ability to carry out a proper risk analysis taking into account a series of parameters that the Regulation itself indicates thus becomes the founding aspect of the proactive European approach. The output of this activity must correspond to the adoption of adequate measures aimed at reducing and, if possible, eliminating the risk linked to the processing of personal data.

This is the context for understanding the new (powerful) tool provided by arts. 42 and 43 GDPR: certification. Despite not yet being properly emphasised by commentators or popularised at the level of practice, certifications have the potential to become the fundamental support to the data controller for managing the security of the processing, both in the risk assessment phase and in its mitigation; it also represents a very useful and valuable documentary instrument[3].

Certifications represent a voluntary (contractual) instrument, accessible following a specific transparent procedure. Member States, supervisory authorities, the European Data Protection Board and the Commission encourage the establishment of data protection certification mechanisms as well as data protection seals and marks with the aim of demonstrating compliance with European data protection legislation. The data controller or data processor who submits the processing to the certification mechanism shall provide the certification body or competent supervisory authority with all the information and access to the processing activities necessary to carry out the certification procedure (art. 42, para. 6).

It appears evident that certifications represent important steps in the unification of the rules on the protection of personal data: they do not meet the limits of legal rules as they are not affected by individual national traditions and are identical for all Member States[4].

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[2] See G. Bincoletto, D*ata protection by design in the e-health care sector. Theoretical and applied perspectives*, Luxembourg Legal Studies, Baden-Baden, Nomos Verlagsgesellschaft mbH & Co. KG, 2021; L. A. Bygrave, *Article 25. Data protection by design and by default*, in C. Kuner, L. A. Bygrave, C. Docksey, L. Drechsler (eds.), *The EU General Data Protection Regulation: a Commentary*, Oxford, Oxford University Press, 2020, 571-581.

[3] See G. M. Riccio, *Commento art. 42-43 GDPR*, in R. D'Orazio, G. Finocchiaro, O. Pollicino, (eds.), *Codice della privacy e data protection*, Bologna, Giuffré, 2021, 602-615; R. Leenes, *Article 42. Certification and Art. 43. Certification bodies*, in C. Kuner, L. A. Bygrave, C. Docksey, L. Drechsler (eds.), *The EU General Data Protection Regulation: a Commentary*, Oxford, Oxford University Press, 2020, 732-754; S. Sileoni, *I codici di condotta e le funzioni di certificatore*, in V. Cuffaro, R. D'Orazio, V. Ricciuto (eds.), *I dati personali nel diritto europeo*, Torino, Giappichelli, 2016, 946-977.

[4] G. M. Riccio, *Commento art. 42-43 GDPR*, cit., 607.

Furthermore, in general terms, and considering market dynamics, the certifications should ensure greater reliability for consumers (i.e. users/data subjects). Associated with the use of icons, they could generate trust and transparency in data processing[5]. These are reasons why institutions at all levels should place great emphasis on creating an appropriate culture regarding these tools and their limits.

Precisely to stimulate reflection on this still unexplored but important topic, this paper aims at delving deeper into this relevant tool also from a comparative perspective by taking into account mechanisms provided in other relevant legal frameworks. The focus concerns the regulation on personal data protection, that will be our point of reference for dealing with this topic. Other aspects and possible legal issues, relevant from a general perspective, will be mentioned and taken up when needed, but not analysed in detail as they do not fall within the main scope of this paper. Following this introduction, in the second paragraph ample space will be dedicated to the rules and requirements needed for the establishment, creation, approval and assignment of certification schemes, identifying their scope of application on the basis of articles 42 and 43 GDPR. The third paragraph will be dedicated to the analysis of the certification tool in a comparative perspective. The European discipline, directly explored in paragraph 2, will be deployed as the point of reference. But the paragraph specifically aims to go beyond the EU borders to verify how certification schemes work in different legal frameworks, with a focus on the United Kingdom - especially after Brexit – Canada, the United States and the People's Republic of China. In the final remarks we will summarise the juridical-conceptual approaches to the issue.

II. Certification mechanisms in the General Data Protection Regulation

2.1 Purpose of the data protection certifications and entities involved

The GDPR certification mechanism constitutes a voluntary compliance tool that data controllers and processors may adopt for managing the security issues inherent in any data processing, allowing data subjects to quickly assess the level of data protection of relevant products and services[6]. However, the process of certification detailed by the GDPR is complex and involves multiple actors: the EU Commission, the Member State, the national supervisory authorities (SAs), the European Data Protection Board (EDPB), the national accreditation bodies in Reg. (EC) 765/2008, the Certification Bodies (CBs) and the scheme owners. The following describes only the main features of the seals and the certification process provided under articles 42 and 43 GDPR[7].

The scope of the certification is broad, encompassing all data processing activities carried out by a data controller or processor. However, it excludes additional parties, such as Data Protection Officers (DPOs) or individuals acting under the authority of the controller or

[5] See S. Grabner-Kraeuter, *The role of consumers' trust in online-shopping*, in *Journal of Business Ethics,* 2002, vol. 39, 43-60.

[6] See L. Bolognini, *Art. 42 – Certificazione*, L. Bolognini, E. Pelino, I. M. Alagna (eds.), *Codice della disciplina privacy*, Giuffré, Milano, 2019, 297.

[7] See F. Pezza, *Art. 42 – Certificazioni and Art. 43 – Organismi di certificazione*, in E. Belisario, G. M. Riccio, G. Scozza (eds.), *GDPR e Normativa Privacy*, Wolters Kluwer, Milano, 2020, 475-476.

processor, as stated in art. 29 GDPR[8]. Regarding the material scope, art. 42 states that any processing of personal data related to a product, process, or service may be certified. In particular, according to the EDPB, three basic elements should be taken into account when evaluating the processing operations: the personal data processed, the technical infrastructure or the systems used for the processing and the organisational processes and procedures related to the data processing[9]. Such guidance provides ample flexibility in identifying the scope of certifications. Specifically, the object ('target of evaluation') of a certification can be either generic (the certification scheme can be deployed for any data processing), or specific (the certification scheme is aimed at a particular category of data or at certain legal requirements).

The object of certification is also evidently reflected in the development of certification criteria. These are the technical and organisational requirements and controls with which entities seeking certification must comply in order to obtain the certification mark.

2.2 Approval of certification criteria and accreditation of Certification Bodies

According to art. 42 GDPR, the scheme owner has to obtain the approval of the certification criteria from the competent SA or the EDPB in order to make the scheme operational[10]. The Regulation does not provide additional specific methods for identifying and drafting criteria for a scheme, but the EDPB has emphasised in its guidelines that the certification criteria should reflect GDPR requirements and principles. More specifically, its document refers to the rules governing the principles of processing (arts. 5-11), risk analysis of processing (arts. 33-35), security obligations (art. 32) and the concepts of data protection by design and by default (art. 25)[11]. The development of certification criteria should therefore focus on the verifiability, relevance, and suitability of these elements, taking into account their practical application and, above all, the scope of the certification[12]. The national SA must consider all of these characteristics when approving certification criteria in accordance with art. 42, par. 5[13].

As mentioned above, the certification criteria can also be approved by the EDPB, resulting in a common certification, the European Data Protection Seal. The evaluation of the

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[8] By reserving the certification only to data controllers and data processors (as well as sub-processors), it is reasonable to assume that data subjects - in the Digital Single Market - will increasingly choose services offered by certified data controllers. Moreover, when dealing with data processors, data controllers will look exclusively for certified ones, as they are more trustworthy thanks to the compliance system adopted. See D. Poletti, M. C. Causarano, *Autoregolamentazione privata e tutela dei dati personali: tra codici di condotta e meccanismi di certificazione*, in E. Tosi (eds.), *Privacy digitale: riservatezza e protezione dei dati personali tra GDPR e nuovo Codice Privacy*, Giuffré, Milano, 2019, 395-397.

[9] See EDPB, *Guidelines 1/2018 on certification and identifying certification criteria in accordance with Articles 42 and 43 of the Regulation*, 2019, available at: https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-12018-certification-and-identifying_it.

[10] According to the Irish Data Protection Commission, the scheme owner is the "*person or organisation responsible for developing and maintaining a specific certification scheme. A scheme owner can be a certification body, a governmental authority, a trade association, a group of certification bodies or others*". See DPA, *Guidance Note: GDPR Certification*, 2020, 7, available at: https://www.dataprotection.ie/sites/default/files/uploads/2020-09/GDPR%20Certification%20Guidance_0.pdf.

[11] See EDPB, *Guidelines 1/2018*, cit., 17; L. Bolognini, *Art. 42 – Certificazione*, cit., 296.

[12] On this point, the Guidelines list a number of general characteristics that need to be taken into account in the development and subsequent approval of the criteria. See EDPB, *Guidelines* 1/2018, cit., 22-24.

[13] See *ibid.*, 24 ff.

Board is based on the criteria's scope and the ability to serve as a common standard applicable among Member States, while taking into account the different data protection requirements that exist in each of them[14]. Awarding a recognisable mark in different Member States is likely to increase individuals' trust in certified processing, given the prior verification activities by independent experts and the approval of the criteria by the EDPB. As a result, the certified organisation may gain a competitive advantage[15].

Upon completion of the certification criteria approval process, certifications can be issued by accredited CBs under art. 43 GDPR or by national SA. However, it is not advisable for the latter authority to be involved, as its main responsibility is to monitor compliance with certification and GDPR requirements[16]. Conversely, CBs must be accredited by a national accreditation body or the competent SA (or by a combination of these two) in order to carry out their tasks. The process of accreditation certifies that the CB meets the independence, impartiality, and competence requirements, not only concerning the protection of personal data in general but also regarding the operation of certification criteria as outlined in art. 43 GDPR[17]. Additionally, CBs must adhere to a set of technical and operational requirements, such as establishing suitable procedures to manage the certification process and compliance with the technical standard ISO/IEC 17065:2012[18]. This standard outlines the requirements for bodies certifying products, processes, and services, and CBs must respect its requirement as further supplemented by additional criteria devised by SAs[19]. The accreditation is valid for five years but can, in any case, be suspended or withdrawn by the national accreditation body or the competent SA in case of violations of accreditation requirements or GDPR obligations.

After completing the accreditation process, a controller or processor can apply one or more processing operations (related to the target of evaluation) to the certification mechanism for a maximum of three years. This period can be renewed under the same conditions, provided that the relevant criteria are still met. However, in the event of a breach of the GDPR provisions or certification criteria, certification may be withdrawn by the CB or SA[20].

[14] See F. Pezza, *Art. 42 – Certificazioni*, cit., 479.
[15] See L. Bolognini, *Art. 42 – Certificazione*, cit., 297.
[16] This is because of the risk of the excessive mixing of roles at the head of the national SA. As even pointed out by the EDPB, where an SA chooses to conduct certification, it shall exercise its functions in a transparent manner, paying special attention to the separation of investigative and enforcement powers in order to avoid any potential conflict of interest. See EDPB, *Guidelines 1/2018*, cit., 7.
[17] See R. Leenes, *Article 43. Certification bodies*, cit., 747-751.
[18] Art. 43, par. 1.
[19] See EDPB, *Guidelines 4/2018 on the accreditation of certification bodies under Article 43 of the General Data Protection Regulation*, 2019, 9, available at: https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-42018-accreditation-certification-bodies-under_en; F. Pezza, *Art. 43 – Organismi di certificazione*, cit., 489; R. Giannetti, *La certificazione ai sensi del GDPR: standard per l'affidabilità del mercato data-driven*, in L. Bolognini (eds.), *Privacy e libero mercato digitale: convergenza tra regolazioni e tutele individuali nell'economia data-driven*, Giuffré, Milano, 2021, 218-220.
[20] Art. 42, par. 7.

2.3 Certification schemes approved under the GDPR

Currently, there are several GDPR certification mechanisms in place, and other schemes are undergoing the criteria approval procedure by the respective SA.

The GDPR-Certified Assurance Report-Based Processing Activities Certification Criteria (CARPA) constitutes the first certification mechanism approved under art. 42 GDPR[21]. The scheme is unique, as it was developed by the Luxembourg SA to create an accredited compliance model for data controllers and processors[22]. The approval of the scheme has sparked criticism, as the Regulation does not explicitly provide for SAs to develop a certification mechanism[23]. However, the EDPB took a different view, recognising that SAs may develop their own schemes, if they guarantee to act impartially[24].

Approved following Opinion 25/2022 of the EDPB[25], the EuroPriSe© certification represents the direct evolution of an existing certification project in the German state of Schleswig-Holstein, already in place since Directive 95/46/EC[26]. This certification is primarily used by data processors to attest - in accordance with art. 28 GDPR - their compliance with the Regulation, with the aim of increasing trust among data controllers and data subjects[27]. Under this scheme, the certification criteria assess the processing activities from both a legal and technical perspective, verifying the satisfaction of formal obligations and the adequacy of the technical and organisational protection measures implemented to respond effectively to the accountability principle. Additionally, particular importance is given to relationships with data controllers and the management of data subjects' requests[28].

The EDPB has approved EuroPrivacy, the first European Data Protection Seal valid in all EU Member States with Opinion 28/2022. As previously stated, the European seal holds great value for the EU as it satisfies the varying needs of all Member States through

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[21] The certification was approved following EDPB Opinion 1/2022. See EDPB, *Opinion 1/2022 on the draft decision of the Luxembourg Supervisory Authority regarding the GDPR – CARPA certification criteria*, 2022, available at: https://edpb.europa.eu/our-work-tools/ourdocuments/opinion-board-art-64/opinion-12022-draft-decision-luxembourg_en.

[22] With a desire to meet this need, the certification is made to be flexible and scalable, not focusing on a specific field or treatment, but being applicable in various areas. See CNPD, *Le schéma de certification "GDPR CARPA"*, 2023, available at: https://cnpd.public.lu/fr/professionnels/outils-conformite/certification/gdpr-carpa.html.

[23] The Regulation does not explicitly allow SAs to create their own certification mechanism. According to art. 42, par. 5, SAs are solely responsible for approving the certification criteria and are not authorised to create their own. Acknowledging such a possibility could create a conflict of interest between the authority's role as a supervisory body and its role as an investigative authority responsible for preventing unlawful processing. See E. Lachaud, *What GDPR tells about certification*, in *Computer Law & Security Review*, 2020, vol. 38, 3-4, available at: https://doi.org/10.1016/j.clsr.2020.105457.

[24] See EDPB, *Guidelines 1/2018*, cit. 8.

[25] See EDPB, *Opinion 25/2022 regarding the European Privacy Seal (EuroPriSe) certification criteria for the certification of processing operations by processors*, 2022, available at: https://edpb.europa.eu/our-worktools/our-documents/opinion-board-art-64/opinion-252022-regarding-european-privacy-seal_en.

[26] See G. Hornung, S. Bauer, *Privacy Through Certification?: The New Certification Scheme of the General Data Protection Regulation*, in P. Rott (eds.), *Certification - Trust, Accountability, Liability*, 2019, 109-132, available at: https://link.springer.com/book/10.1007/978-3-030-02499-4.

[27] See LDI-NRW, *LDI NRW genehmigt erste deutsche Kriterien für Datenschutz-Zertifizierung*, 2022, available at: https://www.ldi.nrw.de/ldi-nrw-genehmigt-erste-deutsche-kriterien-fuer-datenschutz-zertifizierung.

[28] See EuroPriSe Gmbh, *EuroPriSe Criteria for the certification of processing operations by processors*, 2022, available at: https://www.euprivacyseal.com/wp-content/uploads/2022/12/Kriterien_Verarbeitungsvor gangevon-AV_EN_v3_0.pdf.

its objective criteria[29]. Identifying objective criteria for assessing compliance can ensure a consistent application of the GDPR[30]. Indeed, being primarily aimed at commercial actors, in addition to general requirements on data protection principles, the scheme also includes specific criteria that make the certification adaptable to certain processing or business sectors, for example through the use of emerging technologies such as Artificial Intelligence, Internet of Things, and blockchain; it is also designed to be scalable to the needs of small and medium-sized enterprises[31].

In conclusion, there are currently two additional certifications, although unofficial under art. 42 GDPR. The first is the ISDP©10003 certification, which, despite being judged by the Tilburg University study commissioned by the EU Commission as compliant with GDPR requirements, has not yet been approved by the relevant Data Protection Authority[32]. The scheme sets out generic criteria for assessing GDPR compliance related to every case of processing. However, it can be adapted to complex and specific contexts, potentially integrating additional requirements[33]. The second certification, developed by scheme owner Brand Compliance, is awaiting approval from the Dutch Supervisory Authority and is addressed in EDPB Opinion 15/2023. However, relevant doubts have been raised regarding the formulation of certification criteria and the subjective scope of this scheme. It is unclear if it can be applied to *sub*-processors, and its ability to serve as a useful control element for assessing the correctness of measures implemented by the data controller or processor has been questioned. This is due to unclearly phrased and excessively generic terms which may lead to confusion in the auditing process, and the absence of specific criteria regarding the identification of all data processing activities that would fall within the scope of the certification[34].

III. A COMPARATIVE PERSPECTIVE: OTHER EXPERIENCES OUTSIDE THE EUROPEAN ECONOMIC AREA

Because the global economy relies on the exchange of data across borders, it is important to consider perspectives on certification schemes different from the one proposed in the

[29] See EDPB, *Opinion 28/2022 on the Europrivacy criteria of certification regarding their approval by the Board as European Data Protection Seal pursuant to Article 42.5*, 2022, 4, available at: https://edpb.europa.eu/system/files/2023-03/edpb_opinion_202228_europrivacy_eu_data_protection_seal_it.pdf.

[30] See ECCP, *Europrivacy GDPR Core Criteria*, 2020, 1-3, available at: https://community.europrivacy.com/europrivacy-gdpr-core-criteria/.

[31] See EU Commission, *Europrivacy: the first certification mechanism to ensure compliance with GDPR*, 2022, available at: https://digital-strategy.ec.europa.eu/en/news/europrivacy-first-certificationmechanism-ensure-compliance-gdpr.

[32] See EU Commission, Directorate-general for justice and consumers, G. Bodea, K. Stuurman, M. Brewczyńska, *Data protection certification mechanisms – Study on Articles 42 and 43 of the Regulation (EU) 2016/679: final report*, 2019, available at: https://data.europa.eu/doi/10.2838/115106.

[33] See Inveo, *ISDP©10003, Schema internazionale per la valutazione della conformità al Regolamento Europeo 2016/679*, 2020, 6 (par. 1.2), available at: https://www.in-veo.com/privacy-tools-new/schema-dicertificazione-isdp-c-10003-dw/37-schema-di-certificazione-isdp-10003-2020-rev-01-ita-new-release.

[34] See EDPB, *Opinion 15/2023 on the draft decision of the Dutch Supervisory Authority regarding the Brand Compliance certification criteria*, available at: https://edpb.europa.eu/our-work-tools/our-documents/opinion-board-art-64/opinion-152023-draft-decision-dutch-supervisory_en, 2023.

GDPR. The comparative approach aims to identify the state of the art of data protection certification also outside EU countries, in order to understand the differences - both in law and in practice - compared to the GDPR, and possibly to borrow its advantages. Therefore, the present analysis considers tools also based on a notion of privacy[35] and self-regulation or co-regulation tools with broader scope, when compared to art. 42 and 43 GDPR. The legal systems chosen for this analysis are: the United Kingdom, for its peculiarities linked to the recent exit from the EU; Canada for the sensitivity that has always characterised this legislation regarding the protection of personal data; the United States, as an example of a different approach to privacy issues compared to the European one; the People's Republic of China, for similarities between its national data protection law and GDPR.

Lastly, it is worth mentioning that certifications based on international ISO standards, such as ISO/IEC 27701, are of considerable importance worldwide. Although not legally recognised by specific regulations, these certifications enable private and public organisations to build trust in their solutions, e.g. by developing an effective privacy information management system, i.e. a management model to mitigate key privacy risks[36]. The uniqueness of these tools lies in the fact that they are usually built according to principles and concepts that originate in the US and must then be applied, and therefore interpreted, in the European legal framework when adopted by EU controllers and processors. A clear example may be the recent ISO 31700:2023 on privacy by design for consumer goods and services[37].

3.1 United Kingdom: UK GDPR and the first certification schemes approved

The United Kingdom was still part of the European Union when the GDPR was enacted[38]. Furthermore, the domestic legislation related to the safeguarding of personal data had originally been developed under the influence of Directive 95/46/EC, producing

[35] Right to privacy and right to data protection are two different fundamental rights. While the right to privacy is a broader concept encompassing various aspects of private life and family life, as addressed by art. 8 of the European Convention on Human Rights, the right to data protection (or informational privacy) is a more specific right focusing on the control and protection of personal data against possible unlawful data processing that could affect rights and fundamental freedoms of data subjects. See R. Gellert, S. Gurwirth, *The legal construction of privacy and data protection*, in *Computer Law & Security Review*, 2013, vol. 29, 522-530; F. Pizzetti, *Privacy e il diritto europeo alla protezione dei dati personali*, Torino, 2016, 43-56; S. D. Warren, L. D. Brandeis, *The right to privacy*, in *Harvard Law Review*, vol. 5, n. 4, 1890, 193-220.

[36] See E. Lachaud, *ISO/IEC 27701 Standard: Threats and Opportunities for GDPR Certification*, in *European Data Protection Law Review*, vol. 2, 2020, available at: https://www.researchgate.net/profile/Eric-Lachaud/publication/339988867_ISOIEC_27701_Threats_and_Opportunities_for_GDPR_Certification/links/617ab3b93c987366c3f6c026/ISO-IEC-27701-Threats-and-Opportunities-for-GDPR-Certification.pdf.

[37] See M. B. Pisoni, F. Tugnoli, *The new ISO 31700:2023 and the standardisation of Privacy by Design*, in *Privacy and Data Protection by ICTLC Italy*, 2023, available at: https://www.ictlc.com/the-new-iso-317002023-and-the-standardization-of-privacy-by-design/?lang=en.

[38] Even though the United Kingdom is no longer a Member State of the EU, in 2019 it signed the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, which provides - according to the art. 71, par. 1, - that: "*Union law on the protection of personal data shall apply in the United Kingdom in respect of the processing of personal data of data subjects outside the United Kingdom, provided that the personal data: (a) were processed under Union law in the United Kingdom before the end of the transition period; or (b) are processed in the United Kingdom after the end of the transition period on the basis of this Agreement*".

significant similarities between European and British regulations concerning data protection. Today, after Brexit, formally enacted on 1 January 2021, despite amendments made by the UK GDPR to the Data Protection Act (DPA), the rules on the protection of personal data, including the main principles and obligations, remain substantially identical to those of the EU[39].

The revision process undertaken by the UK GDPR also involved the rules regarding certification mechanisms[40]. All references to European institutions, such as the EDPB, national SAs or the European Commission were removed, and the Information Commissioner Officer (ICO) and the United Kingdom Accreditation Service (UKAS) were given full authority to approve certification criteria, and to define procedures for establishing certification criteria and for evaluating methodology[41]. For example, in its guidance, the ICO specifies the material scope of certification under the UK GDPR: these must concern a specific processing operation or a set of treatments that constitute a product, process, or service offered by the organisation seeking certification[42]. The purpose, even under the UK GDPR, is to demonstrate compliance with accountability obligations and the conformity of a specific processing operation with the regulations protecting personal data. Encouraging and rewarding compliance of certified entities, these mechanisms are assigned significant evidential value, useful for demonstrating compliance with the DPA regulations to the ICO, as well as to third parties[43]. Due to their evidential value, certifications allow the certified entity to demonstrate the adoption of all appropriate and reasonable measures to ensure the protection and security of processed personal data, as well as the rights and freedoms of the data subjects. Therefore, in the event of breaches, it is reasonable to expect that certification would be considered a mitigating factor in potential sanctions. However, certification might not always carry such weight. In cases of serious violations resulting from non-compliance with the DPA

[39] The Data Protection Act 2018 (c.12) is the national implementation GDPR. Since Brexit, the UK has committed itself to maintaining a data protection regulation equivalent to the EU's. This happened with Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019, which revised the 2018 DPA to the new changes brought about by Brexit and for which it was named "UK GDPR". Indeed, the EU Commission, through Adequacy Decision No. 1772/2021, has determined that the UK legal framework provides the same guarantees as the European one to the individuals involved, allowing for cross-border transfer of data between the UK and the EU. See EU Commission, *Commission Implementing Regulation (EU) 2021/1772*, 2021, available at: https://eur-lex.europa.eu/legal-content/en/txt/?uri=celex%3a32021d1772; P. de Hert, V. Papakonstantinou, *The rich UK contribution to the field of EU data protection: Let's not go for "third country" status after Brexit*, in *Computer Law & Security Review*, 2017, vol. 33(3), 355-356, available at: https://doi.org/10.1016/j.clsr.2017.03.008.

[40] See Data Protection Act 2018, §17 e Schedule 5 — *Accreditation of certification providers: reviews and appeals.*

[41] UKAS (United Kingdom Accreditation Service) is the national accreditation body of the United Kingdom established by the government to assess the competence of organisations that provide certification, testing, inspection, and calibration services.

[42] Similar to the GDPR, certification can focus on one, part of, or multiple personal data processing activities that constitute a unified product, process, or service. See ICO, *What can a UK GDPR scheme be about?*, available at: https://ico.org.uk/for-organisations/advice-and-services/certification-schemes/certification-schemes-detailed-guidance/how-do-we-develop-a-certification-scheme/#2.

[43] See Impact News Service, *New certification schemes will "raise the bar" of data protection in children's privacy, age assurance and asset disposal*, in *LexisNexis*, 2021, available at: https://advance.lexis.com/api/document?collection=news&id=urn:contentitem:63f7-2yd1-jdg9-y46w-00000-00&context=1516831.

regulations and certification criteria, adherence to a scheme may be assessed by the ICO as an aggravating factor because of the seriousness of the violation[44].

The process for creating a certification scheme is very similar to setting up under the GDPR. The development of related criteria is accompanied by their approval by the ICO, and the accreditation of a certification body by UKAS[45]. The certification criteria must thoroughly focus on evaluating specific processing operations performed and how data is handled in light of the DPA. The scope of certification can then be either broad, covering all aspects of the UK GDPR, or specific to a particular sector or a specific type of processing[46]. Additionally, the interoperability of criteria with other technical standards is important, as is the scalability of certification concerning the varying sizes of organisations seeking certification. Unlike the EU GDPR, certifications in the United Kingdom must address an additional requirement: an identified need or requirement within the realm of personal data protection. According to the ICO, certifications, in general, should have a clear purpose and cover a wide range of diverse processing activities, in order to meet the data protection needs demanded by the market or consumers (data subjects)[47].

Currently, the ICO has approved four certification mechanisms[48]:

1. Age Check Certification Scheme (ACCS): the scheme owner Age Check Certification Scheme has developed two certification mechanisms. The first (ACCS) is aimed at verifying processes that estimate and verify a person's age (to impose age limits on access to certified products or services)[49]. The primary objective of the

[44] See ICO, *Will the ICO consider certification as a mitigating factor in an investigation?*, available at: https://ico.org.uk/for-organisations/advice-and-services/certification-schemes/certification-schemes-detailed-guidance/how-do-we-apply-for-gdpr-certification/#how5.

[45] The accreditation of CBs is based on compliance with the technical standards outlined in ISO/IEC 17065 and additional accreditation requirements established by the ICO, similar to practices in the EU. Naturally, for accreditation, the CB must ensure its impartiality, independence from third parties, and especially from organisations requesting certification. Additionally, the CB must demonstrate compliance with the UK GDPR and the specific competence of its personnel regarding personal data protection. Once accredited to issue a certification mechanism, the CB will be responsible for continuously monitoring the certified entities' compliance and taking action to suspend or revoke certification if these entities no longer meet the certification criteria.

[46] From this perspective, the ICO emphasises that, rather than solely focusing on governance provisions and data management, it is crucial to carefully analyse the technical specifications and measures adopted by data controllers and processors seeking certification.

[47] Specifically, in the application for approval of certification criteria, the scheme owner must: provide that the certification meets specific needs within the personal data protection sector; demonstrate the added value of their certification compared to existing schemes; identify relevant economic, social, technological, legal, or other sectors that may be influenced by the certification and its development and implementation; demonstrate that the certification criteria are based on legislative or governmental priorities identified by the ICO or arising from the market and stakeholders involved in data processing. See ICO, *How do we develop a certification scheme?*, available at: https://ico.org.uk/for-organisations/advice-and-services/certification-schemes/certification-schemes-detailed-guidance/how-do-we-develop-a-certification-scheme/#10.

[48] See ICO, *Certification schemes register*, available at: https://ico.org.uk/for-organisations/advice-and-services/certification-schemes/certification-schemes-register/(last access 15th January 2024). In addition to the certifications mentioned, the 1st February 2024 the ICO have approved a new certification: the Legal Services Operational Privacy Certification Scheme. See ICO, Certification scheme register: Legal Services Operational Privacy Certification Scheme (LOCS), 2024, available at: https://ico.org.uk/for-organisations/advice-and-services/certification-schemes/certification-scheme-register/legal-services-operational-privacy-certification-scheme-locs/.

[49] See ICO, *Certification schemes register: Age Check Certification Scheme (ACCS)*, 2021, available at: *https://ico.org.uk/for-organisations/advice-and-services/certification-schemes/certification-scheme-register/age-check-certification-scheme-accs/*.

scheme is to verify an organisation's compliance with obligations related to age verification and data processing of minors, thus addressing public needs concerning the protection of children's privacy[50]. The ACCS certification provides a set of technical criteria focused on evaluating the effectiveness and accuracy of age verification processes for customers, as well as the appropriate design of those systems[51]. Specifically, the certification mark will be awarded based on controls which include, for example: age verification tools based on video identification; identity document verification; social proofing systems, which confirm age through validation requests to verified third-party contacts (e.g. parents).

2. Age Appropriate Design Certification Scheme (AADCS): this second certification developed by ACCS aims to provide a set of criteria for the appropriate design of age verification services, in accordance with the principles of data protection by design and by default and the principles of the British Children's Code[52]. The AADCS scheme is more general compared to ACCS, because it can be applied to any processing activity related to services provided by 'information society services' accessible to minors in the United Kingdom[53]. The scheme includes a series of technical, organisational, and documentary requirements that organisations processing personal data of minors must meet to demonstrate

[50] The certification criteria of ACCS 2-2021 concern several services which are based on data processing performed by data controllers or data processors, such as: "*a) Proof-of-Age ID Providers that verify age attributes and issue a reusable physical ID card, token or app that an unknown third party (such as a retailer) can rely on with or without a pre-arranged contractual relationship with the Proof-of-Age ID Provider; b) Age Check Providers that verify age attributes on request by a third party on a transaction-by-transaction basis under a pre-arranged contractual relationship with the Age Check Provider; c) Age Check Exchange Providers or Brokers that provide an online gateway for Age Check Providers and Relying Parties to access user asserted, permissioned and verified attributes; d) Relying Parties (online or offline) that rely on results of an age check (either remotely or during a face-to-face encounter) to establish the age-related eligibility of an individual for the purposes of a transaction (such as sellers or providers of age restricted goods and services)*". See Age Check Certification Scheme Ltd, *ACCS 2:2021 Technical Requirements for Data Protection and Privacy*, 2021, 5-8, available at: https://ico.org.uk/media/for-organisations/documents/2620426/accs-2-2021-technical-requirements-aadc.pdf.

[51] In addition to ensuring the proper implementation of technical and organisational measures necessary to guarantee the lawfulness of processing, there is also a need to verify age verification procedures. See *ibid.*, 20-66; See E. Koulierakis, *Certification as guidance for data protection by design*, in *International Review of Law, Computers & Technology*, 2023 7-8, available at: https://doi.org/10.1080/13600869.2023.2269498.

[52] The Children's Code, in effect since 2 September 2021, is a specific regulation applicable to all digital services aimed at individuals under 18 years of age or that, even if targeted at the general user base, are likely to be used by minors. See ICO, *Introduction to the Children's code*, available at: https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/introduction-to-the-childrens-code/.

[53] With regard to this definition, it is to be considered that certification is applicable to both data controllers and joint data controllers, as well as data processors.

compliance with the Children's Code: for example, not resorting to geolocation systems[54] and data-profiling[55].

3. ICT Asset Recovery Standard 8.0: the scheme owner ADISA has developed a certification mechanism to ensure that personal data are processed correctly at the time of disposal of resources and computer equipment[56]. The certification regulates the disposal process by identifying procedures and operational methods based on risk from processing activities during sanitization of the storage media from personal data[57]. Because informed by a risk-based approach, the measures to be implemented and the controls for the assessment of conformity differ based on the category of the processed data[58].

4. UK GDPR Compliance Certification Scheme for the Provision of Training and Qualifications Services: developed by APM Group, it aims to build up the compliance with the UK GDPR of the organisations operating in the field of human resources training[59]. The scope is addressed to companies (private and public), acting as data controllers, in all activities related to their provision of training services and qualifications to candidates over 16 years of age. The scheme applies to the entire data lifecycle and all personal data processed, including those belonging to third parties, when providing these services. The only processing activities

[54] Those processes, however, are allowed if necessary and in the best interests of the child (such as safeguarding health, safety, and physical and moral integrity). See Age Check Certification Scheme Ltd, *ACCS 3:2021 Technical Requirements for Age Appropriate Design for Information Society Services*, 2021, 36, available at: https://ico.org.uk/media/for-organisations/documents/2620427/accs-3-2021-technical-requirements-aadc.pdf; ICO, *Certification scheme register: Age Appropriate Design Certification Scheme (AADCS)*, 2021, available at: https://ico.org.uk/for-organisations/advice-and-services/certification-schemes/certification-scheme-register/age-appropriate-design-certification-scheme-aadcs/.

[55] The criteria are clear in stipulating that, by default, profiling and automated processing of a child's data should not be carried out except in specific exceptions. However, in any situation where profiling is permitted, the data controller must take all necessary measures to protect the child from any harmful effects.

[56] The various processing activities included in the scope of application encompass customer involvement, logistics services, storage, resource management, and the recycling or resale of ICT equipment. See ADISA Certification Ltd, *ICT Asset Recovery Standard 8.0 Part 1: Introduction and Explanatory Notes*, 2022, 3, available at: https://ico.org.uk/media/for-organisations/documents/4021012/adisa-asset-recovery-standard-8_0-v3_1-part-1-introduction-and-explanation-notes.pdf; ICO, *Certification scheme register: ADISA ICT Asset Recovery Certification 8.0*, 2021, available at: https://ico.org.uk/for-organisations/advice-and-services/certification-schemes/certification-scheme-register/adisa-ict-asset-recovery-certification-80/.

[57] The treatment involving 'data sanitization' refers to the process of permanently and irreversibly destroying data on a storage device. This can occur at the end of the device's life cycle, at the conclusion of a device rental, or during the maintenance of non-functioning data storage devices for the purpose of recovering the device itself. However, the device is not intended to be returned to the data controller (e.g., refurbished products resold to the public). See ADISA Certification Ltd, *ICT Asset Recovery Standard 8.0 Part 1: Introduction and Explanatory Notes*, *cit.*, 4.

[58] See *ibid.,* 10 and *ff.* A unique aspect of the certification scheme is the provision for a new risk assessment document distinct from the Data Protection Impact Assessment (DPIA). To ensure that the data controller can manage their risk without being solely driven by cost, the Data Impact Assurance Levels (DIAL) is introduced. This evaluates the risk of the sanitization treatment based on five variables: 1. Threats; 2. Risk propensity; 3. Data category; 4. Data volume; 5. Impact of a data breach.

[59] See The APM Group Ltd, *UK GDPR Compliance Certification Scheme for the Provision of Training and Qualifications Services Criteria*, 2022, available at: https://ico.org.uk/media/for-organisations/documents/4023361/uk-gdpr-compliance-certification-scheme-for-the-provision-of-training-and-qualifications-services-v-6_2.pdf; ICO, *Certification scheme register: Provision of Training and Qualifications Services*, available at: https://ico.org.uk/for-organisations/advice-and-services/certification-schemes/certification-scheme-register/provision-of-training-and-qualifications-services/.

excluded from the scheme, since they are not considered relevant for the purposes of training and qualification, are those related to minors under 16 years of age, and personal data concerning criminal convictions and offences. The scope of evaluation of the criteria is particularly broad, as they are aimed at verifying compliance with the general requirements and principles of the UK GDPR[60], the provision of free consent from the data subject, the methods of managing the requests for exercising the rights of the data subjects, the formulation of a clear information notice to the latter and other operational requirements (including data breach notifications, the register of processing activities, procedures for cooperating with authorities, etc.)[61].

3.2 Canada: Privacy by Design Certification Shield

Following the full implementation of GDPR, the Brussels Effect has had significant influence on Canada's data protection regime[62]. In recent years, there have been several attempts to reform the Personal Information Protection and Electronic Documents Act (PIPEDA)[63], contributing to a more comprehensive and cohesive shift in perspective regarding data protection as a recognized right within the legal framework. Of particular note is Bill C-27: Digital Charter Implementation Act 2022, because it aims to introduce a new legislative text that would repeal much of PIPEDA, namely the Consumer Privacy Protection Act[64]. With the bill, new obligations for personal data processing will be introduced, granting new rights to data subjects - such as the right to data disposal and the private right to sue for damages in a Federal Court for loss or injury suffered as a result of a violation by an organisation. Also, a new body, the Personal Information and Data Protection Tribunal, will be established to adjudicate disputes regarding violations of the

[60] As, for example, the appointment of the DPO, company staff training, audit checks, compliance with DPbDD, conducting DPIAs and adherence to principles of lawfulness, fairness and transparency; purpose limitation; data retention limitation; data minimization; accuracy; integrity and confidentiality.

[61] See The APM Group Ltd, *UK GDPR Compliance Certification Scheme for the Provision of Training and Qualifications Services Criteria*, *cit.*, 12-36.

[62] See A. Bradford, *The Brussels Effect: How the European Union Rules the World*, New York, Oxford Academic, 2020, 25–66, available at: https://doi.org/10.1093/oso/9780190088583.001.0001.

[63] The PIPEDA represents the primary Canadian legislation concerning the protection of personal data in the private sector. This law focuses on safeguarding any personal information related to an identified individual. Unlike the European GDPR, the PIPEDA does not consider data pertaining to an indirectly identifiable subject as personal data. The PIPEDA establishes the requirements and principles that data processing must adhere to in order to be considered lawful. Furthermore, it grants rights to affected individuals similar to those outlined in the GDPR, ensuring control over their personal data and the ability to request access, rectification, erasure, and restriction of processing, when applicable. See M. Bhasin, *Challenge of Guarding Online Privacy: Role of Privacy Seals And Government Regulations*, in *South Asian Journal of Marketing & Management Research*, 3 (2), 2016, 69, available at: https://www.researchgate.net/publication/309407924_challenge_of_guarding_online_privacy_role_of_privacy_seals_and_government_regulations.

[64] Currently the bill has not yet been approved. See Government of Canada, *Consumer Privacy Protection Act*, 2023, available at: https://ised-isde.canada .ca/site/innovation-better-canada/en/consumer-privacy-protection-act; G. Bincoletto, *Il diritto alla protezione dei dati: una prospettiva comparata*, in P. Guarda, G. Bincoletto, *Diritto comparato della privacy e della protezione dei dati personali*, cit., 124.

legislation protecting personal data, as a second instance beyond the decisions of the Office of the Privacy Commissioner of Canada.

In the PIPEDA, as in the rest of current Canadian legislation, there is no reference to certifications or codes of conduct related to data protection. However, in an effort to establish Canada as a global player in digital policy, a project was initiated to create a Canadian mark for consumer data protection that would be recognized internationally[65]. This certification was intended to be developed by the private sector in cooperation with the government, consumer-interest groups and the Canadian Standards Association (CSA) International[66]. This mark would be managed by a neutral third party tasked with raising consumer awareness, promoting the adoption of the certification program, monitoring compliance and adherence, and providing a dispute resolution system[67]. In this context, Canada's thrust as a global player in the evolution of the data protection field is witnessed by Ann Cavoukian's elaboration of the privacy by design principle, which seeks to pre-empt data protection issues already at the design stage of information systems[68].

In 2015, the Privacy by Design Certification Shield program emerged from this vision, launched by the Privacy and Big Data Institute at Ryerson University in collaboration with Deloitte Canada.

The purpose of the certification scheme is to assist companies and organisations in proactively incorporating privacy into their processes by translating the seven principles of privacy by design into empirically measurable criteria. The scope of the certification involves privacy in the design, operation, and management of a specific information system, business process, or network project. From this perspective, compared to other legal systems, the Privacy by Design Certification Shield is very similar to data protection certifications provided under the EU GDPR and UK GDPR, as both encompass data processing related to products, processes, or services[69]. One relevant aspect of this certification scheme is its potential for international application: the privacy by design

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65 This initiative stems from the observations made by the Canadian E-Business Opportunities Roundtable in the report *Fast Forward: Accelerating Canada's Leadership in the Internet Economy*. In particular, the Roundtable pointed out the importance of developing privacy and consumer protection issues to establish e-business leadership. See R. Simpson, *Making Canada a Global Centre of Excellence for Electronic Commerce*, in *Horizons*, vol. 3(1), 2000, 17-18, available at: https://publications.gc.ca/collections/Collection/CP12-1-3-1E.pdf.

66 In fact, the Canadian standardisation body has developed the Model Code for the Protection of Personal Information, which forms one of the pillars of Canada's approach to data privacy legislation. It is available at: https://laws-lois.justice.gc.ca/eng/acts/p-8.6/page-7.html. See J. M. Spaeth, M. J. Plotkin, S. C. Sheets, *Privacy, Eh! The Impact of Canada's Personal Information Protection and Electronic Documents Act on Transnational Business*, in *Vanderbilt Journal of Entertainment and Technology Law*, vol. 4, 2002, 30, available at: https://scholarship.law.vanderbilt.edu/jetlaw/vol4/iss1/3.

67 See A. Cavoukian, M. Chibba, *Privacy Seals in the USA, Europe, Japan, Canada, India and Australia*, in R. Rodrigues, V. Papakonstantinou (eds.), *Privacy and Data Protection Seals*, 76.

68 Concept developed by Ann Cavoukian, former Privacy Commissioner of Ontario, and based on seven principles aimed at regulating data protection: proactive not reactive, preventive not remedial; privacy as the default setting; privacy embedded into design; full functionality - positive-sum, not zero-sum; end-to-end security - full lifecycle protection; visibility and transparency - keep it open; respect for user privacy - keep it user-centric. See A. Cavoukian, *Privacy by design, The 7 Foundational Principles*, Canada, 2011, available at: https://iab.org/wp-content/IAB-uploads/2011/03/fred_carter.pdf; G. Bincoletto, *La privacy by design: un'analisi comparata nell'era digitale*, Roma, 2019, 79-81.

69 See EU Commission, Directorate-general for justice and consumers, G. Bodea, K. Stuurman, M. Brewczyńska, *Data protection certification mechanisms – Study on Articles 42 and 43 of the Regulation (EU) 2016/679: annexes*, 2019, 65, available at: https://data.europa.eu/doi/10.2838/297807.

certification criteria identified by Deloitte aim to be aligned with the GDPR but also with other major international regulations and standards on the protection of personal data and information - including Convention no. 108 of the Council of Europe and ISO/IEC 27001 and ISO/IEC 27701 certification[70].

The certification process is directly managed by the Privacy and Big Data Institute and Deloitte[71], which will enter into an agreement with the requesting party seeking certification, which will regulate the terms of using the certification mark and outline the responsibilities for its usage. They will also conduct all necessary audit and assessment checks required for the certification[72]. In the event of a positive outcome, the organisation will be granted the Certification Shield mark. This certification is valid for a maximum of three years and is subject to annual renewal checks to ensure the certified subject's continuous compliance with the certification criteria. Additionally, these renewal checks oversee the updating of measures implemented for the protection of personal data concerning new technologies[73].

At the conclusion of the certification process, the certified subject will be capable of conducting personal data processing that is largely compliant with Canadian regulations. This capability enables the organisation to minimise the risks associated with potential non-compliance and, consequently, reduces the likelihood of facing administrative or

[70] It is reasonable to assume that if an organisation that is not part of the EU sought to obtain the Privacy by Design Certification Shield, it could achieve a significant level of compliance compared to other alternative privacy certifications in relation to the GDPR. However, it is important to emphasise that possessing such certification does not automatically guarantee full compliance with the GDPR, as these are two different regulatory contexts. The certification primarily focuses on the privacy by design principle and may not necessarily cover all specific aspects and requirements of the GDPR.

[71] Therefore, there are no third-party CBs involved with the mentioned organisations. See A. Cavoukian, Ryerson University, *Commit to Privacy, Publicly – Privacy by Design Certification Program*, 6, available at: https://www.torontomu.ca/content/dam/pbdce/certification/PbD-Brochure.pdf; Ryerson University, *Privacy by Design Assessment and Certification*, available at: https://www.torontomu.ca/content/dam/pbdce/certification/Privacy- by-Design-Overview_PbDCE.pdf.

[72] In particular, Deloitte will examine the products, services, and processes to be certified by conducting interviews, analysing documentation, and reviewing operational procedures. Subsequently, Deloitte will publish a report on which the Privacy by Design Centre of Excellence will conduct its verification assessments to determine whether or not to grant the certification. See A. A. Foujdar, *Implementing Privacy by Design through Privacy Impact Assessments*, Turku, 2019, 28-31, available at: https://urn.fi/urn:nbn:fi-fe2019061019771. For a delve into the content of the certification criteria see Deloitte, *Privacy by Design Certification Program: Assessment Control Framework - Privacy by Design: Privacy Assessment Methodology*, 2016, available at: https://www.torontomu.ca/content/dam/pbdce/certification/Privacy-by-Design-Certification-Program-Assessment-Methodology_PbDCE.pdf.

[73] The renewal, in fact, requires a statement from the organisation confirming that there have been no changes affecting their certification. See ENISA, Recommendations on European Data Protection Certification, 2017, 42-43, available at: https://www.enisa.europa.eu/publications/recommendations-on-european-data-protection-certification; A. Cavoukian, M. Chibba, *Privacy Seals in the USA, Europe, Japan, Canada, India and Australia*, cit., 77-78. In addition to this annual check, the Privacy by Design Centre of Excellence provides a reporting mechanism to the public through its website. Through this mechanism, individuals can report any violations or discrepancies observed in the certified entity in compliance with the certification policy. In cases where violations or discrepancies are found, the Centre reserves the right to suspend or revoke the certification. See EU Commission, Directorate-general for justice and consumers, G. Bodea, K. Stuurman, M. Brewczyńska, *Data protection certification mechanisms – Study on Articles 42 and 43 of the Regulation (EU) 2016/679: annexes*, cit., 68-69.

criminal sanctions, as well as compensation claims for data breaches[74]. Moreover, similar to certifications in the European framework, the Privacy by Design Certification Shield provides a distinctive mark compared to other competitors. This increases the trust of third parties and consumers in the certified products and processes, thereby providing a significant competitive advantage.

3.3 United States: an overview in the healthcare and online industry scenarios

The US system has been selected due to its position as a global leader in the development of new technologies, as well as its primary role as an economic and trade partner with the EU. Nonetheless, the implementation of self-regulatory tools has been made problematic and susceptible to interference due to the lack of a unified legislative text on data protection or a regulatory recognition of certification to ensure their enforcement. In that context, the development of certifying mechanisms aimed at protecting personal data has been achieved through the various implementing decisions concluded with the European Commission for the cross-border transfer of personal data. However, this was done solely with the aim of creating a legal framework that is suited to the EU.

Differently from the UK and to a lesser extent from Canada, the United States does not have a uniform level of personal data protection[75]. Since the enactment of the Privacy Act - which governs informational privacy[76] in processing carried out by federal agencies - no other federal law comprehensively addresses the protection of personal information. Instead, a series of federal laws and regulations govern the collection and disclosure of personal information, each of which is addressed differently by the US law based on

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[74] See B. Sookman, *Privacy by Design certification framework launched by Ryerson and Deloitte*, 2015, available at: *https://www.barrysookman.com/2015/05/25/privacy-by-design-certification-framework-launched-by-ryerson-and-deloitte/*.

[75] See A. C. Raul, T. D. Manoranjan, V. Mohan, *United States*, in A. C. RAUL (eds.), *The Privacy, Data Protection and Cybersecurity Law Review*, 2014, 268-270, available at: *https://www.sidley.com/-/media/files/publications/2014/11/the-privacy-data-protection-and-cybersecurity-la__/files/united-states/fileattachment/united-states.pdf*.

[76] The term "informational privacy" began to develop in US jurisprudence as a declination of the right to privacy and, specifically, as "*individual interest in avoiding disclosure of personal matters*" (Nasa v. Nelson, 131 S. Ct. 746 (2011)). A clearer definition is provided by scholars, who define "informational privacy" as freedom from epistemic interference that is archived where there is a restriction on personal information about someone that is unknown. Such information can include data that are directly related to a person, such as personal lifestyle, finances, medical history, and academic achievement. See H. T. Tavani, *Informational Privacy: Concepts, Theories, and Controversies*, in K. E. Himma, H. T. Tavani (eds.), *The Handbook of Information and Computer Ethics*, 2008, 139-141, available at: https://doi.org/10.1002/9780470281819.ch6; L. Floridi, *The Ontological Interpretation of Informational Privacy*, in *Ethics and Information Technology*, vol. 7(4), 185– 200, 2005, available at: https://link.springer.com/article/10.1007/s10676-006-0001-7. It is clear from this that the concept of personal information is narrower than that of personal data, which - according to art. 4, no. 1 GDPR - corresponds to "*any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly[...]*".

specific sectors[77]. Furthermore, the US regulatory landscape is complex, in light of various initiatives by specific States to adopt privacy laws at the domestic level[78].

In response to this critical situation, both public and private institutions have attempted to adopt a soft-law approach - based on self-regulatory or co-regulatory tools developed by trade associations - to modernise information privacy and align protection similarly to provisions in other legal contexts[79]. Nevertheless, within this framework, the standardisation did not focus on safeguarding personal data, because the initial goal was to establish regulations for consumer privacy on the internet and enhance cybersecurity for information.

Since the early 2000s, initiatives have emerged to regulate online business practices, including certifications aimed at verifying compliance with consumer privacy in the United States. Some of these certifications have an international scope, relying on global principles of personal data protection, such as the 1980 OECD Privacy Guidelines[80], surpassing sector-specific legislation on informational privacy[81].

The privacy certification mechanisms in the United States have, therefore, gained progressive significance due to their potential to standardise the management of informational privacy. Moreover, these certifications are intended to contribute to building consumer trust in web platforms through an attestation provided by a third-party institution that is impartial and possesses high professional expertise. Based on these characteristics, this entity is expected to transfer trust from third parties and consumers to

[77] Federal laws regulating the protection of personal information encompass, for example, consumer credit reports, electronic communications, federal agency records, educational records, banking information, healthcare information, protection of minors' personal information, and safeguarding financial information. See M. Bhasin, *Challenge Of Guarding Online Privacy: Role of Privacy Seals And Government Regulations*, cit., 66-67. For a more comprehensive list see P. Guarda, G. Bincoletto, *Diritto comparato della privacy e della protezione dei dati personali*, cit., 32-34.

[78] Currently, thirteen states have enacted national laws regarding consumer data privacy protection: California, Virginia, Colorado, Connecticut, Utah, Florida, Texas, Oregon - which are currently effective - and Iowa, Indiana, Tennessee, Montana, Delaware, New Hampshire, New Jersey, Kentucky, Nebraska, Rhode Island.. See generally S. P. Shatz, P. J. Lysobey, *Update on the California Consumer Privacy Act and Other States' Actions*, in *The Business Lawyer*, vol. 77(2), 2022, 539-547, available at: https://www.mcglinchey.com/wp-content/uploads/2022/04/011-ABA-TBL-77-2-Shatz_Lysobey.pdf; F.P. Pittman, *US Data Privacy Guide*, in *White&Case Newsletter*, available at: https://www.whitecase.com/insight-our-thinking/us-data-privacy-guide (last access 22nd October 2024).

[79] The Fair Information Practice Principles are of considerable importance. They were developed by the Department of Health, Education, and Welfare Advisory Committee and have been implemented in various measures by different US agencies and departments. See Privacy Council*, Fair Information Practice Principles (FIPPs),* available at: https://www.fpc.gov/resources/fipps/.

[80] See OECD, *Recommendation of the Council concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*, 1980.

[81] The advantage of privacy certifications, as a means of self-regulation through industry associations, would have been to adapt more rapidly and effectively to technological innovations compared to state or federal legislation. See FTC, *Protecting consumer privacy in an era of rapid change. Recommendations for businesses and policymakers*, 2012, 2-14, available at: https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

certified online operators[82]. By creating such a trust mechanism among consumers, the certifying entity and the certified bodies, organisations that do not respect user data privacy - and thus could not obtain certification - would be ousted from the market. This would benefit entities capable of demonstrating their privacy compliance through a distinctive mark[83].

The privacy certifications are intended to address three points - based on which they can also be classified - namely, whether they contribute to ensuring consumer privacy, whether they assure the security of their information, or whether they safeguard the integrity of online transactions. Each certification is supposed to pursue one or more of these 'functions', depending on the structure of the certification criteria, ultimately leading to the reinforcement of consumer trust in online services[84].

In this framework a significant role in certifying and managing privacy and security is played by HITRUST and TRUSTe, within their respective domains, namely healthcare (HITRUST) and consumer privacy (TRUSTe)[85].

The HITRUST (Health Information Trust Alliance) certification is a comprehensive approach designed specifically for the healthcare industry to manage and safeguard Protected Health Information (PHI) effectively. This is the dominant certification framework in the US health industry. HITRUST provides a framework and a common security standard that integrates various regulations and standards, such as the HIPAA Act[86], HITECH Act[87] and ISO/IEC 27001, to assess and manage risks related to health information[88]. Like European GDPR certification, the HITRUST approach is based on

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[82] See S. Listokin, *Does Industry Self-Regulation of Consumer Data Privacy Work?*, in *UIC John Marshall Journal of Information Technology & Privacy Law*, vol. 32(1), 2015, 17-19, available at: https://repository.law.uic.edu/jitpl/vol32/iss1/2/.

[83] Indeed, certification could offer a solution to the information asymmetry found in the market between businesses and consumers. It could allow consumers to distinguish, at first glance, products and services from companies that respect personal data from those that do not take it into account. See FTC, *Protecting consumer privacy in an era of rapid change. Recommendations for businesses and policymakers*, cit., 60-71.

[84] See K. Kyongseok, K. Jooyoung, *Third-party Privacy Certification as an Online Advertising Strategy: An Investigation of the Factors Affecting the Relationship between Third-party Certification and Initial Trust*, in *Journal of Interactive Marketing*, 2011, 25(3), 145–158, available at: https://doi.org/10.1016/j.intmar.2010.09.003.

[85] See M. Bhasin, *Challenge Of Guarding Online Privacy: Role Of Privacy Seals And Government Regulations*, cit., 63-65.

[86] The Health Insurance Portability and Accountability Act, enacted in 1996, aims to safeguard individuals' Protected Health Information (PHI), which is personal information related to medical history, health diagnoses and insurance data that can be used to identify patients. HIPAA establishes privacy and security standards for healthcare data, ensuring its confidentiality and integrity. The law also grants individuals control over their health information and regulates the use and disclosure of PHI by healthcare providers, health plans, and other entities. HIPAA compliance is essential in maintaining the privacy and security of patient information, with significant penalties for non-compliance.

[87] The Health Information Technology for Economic and Clinical Health Act, enacted in 2009, incentivises the widespread adoption of electronic health records (EHRs) among healthcare providers in the US. It aims to improve healthcare quality, efficiency, and patient outcomes. The legislation enforces HIPAA regulations, imposing penalties for non-compliance to enhance data privacy and security. For more details see L. Determann, *Healthy Data Protection*, in *Michigan Technology Law Review*, vol. 26, 2020, 241-244, available at: https://repository.law.umich.edu/mtlr/vol26/iss2/3.

[88] On the basis of these international standards and regulations, HITRUST incorporates almost 2,000 controls on protecting personal information that are continually updated. For example, its certification criteria are aligned with the California Consumer Privacy Act - as one of the most advanced regulations in the United States relative to the protection of personal data - and the GDPR also. For a list of all the authoritative sources which are covered by certification see HITRUST, *Introduction to the HITRUST CSF*, 9-

risk management, providing adequate transparency, scalability, consistency, accuracy, integrity, and efficiency on compliance assessment[89]. This seal aims at standardising and, consequently, facilitating the adoption of management systems for PHI and their integrity and security, as well as internal policies and regulations for the management and mitigation of risk concerning potential non-compliance or cyber threats[90]. Consequently, the depth of cybersecurity controls and data protection measures can be tailored to align with the risk profile of a specific organisation. This profile may vary based on the relationships that healthcare entities may have with different clients, stakeholders, and third-party end users[91]. However, this characteristic represents a significant difference from the GDPR. While the European regulation is rooted in a risk-based approach, it is more oriented towards a right-based methodology, varying the possible compliance requirements for data controllers but still maintaining a core set of obligations and rights that must always be respected[92].

As previously mentioned, the HITRUST Seal is based on federal and state regulations that oversee the management and safeguarding of PHI. This represents a key benefit of the certification, as it guarantees that healthcare companies applying the framework comply with the security and privacy laws of the United States.

One potential limitation of the HITRUST Seal is a concentrated emphasis on healthcare compliance. Its certification criteria take partial account of technical and organisational measures aimed at ensuring effective cybersecurity management and preventing breach risks[93]. However, this shortcoming can be remedied with other standards that focus primarily on information security management systems, thanks to the interoperability of HITRUST. Integrating the requirements of the latter with other certification schemes

10, available at: https://hitrustalliance.net/product-tool/hitrust-csf/; A. A. Garba, A. M. Bade, *An Investigation on Recent Cyber Security Frameworks as Guidelines for Organizations Adoption*, in *International Journal of Innovative Science and Research Technology*, vol. 6(2), 2021, 106, available at: https://ijisrt.com/assets/upload/files/IJISRT21FEB114.pdf.

[89] See HITRUST, *Why HITRUST Certifications are Broadly Accepted and Considered the Gold Standard*, 2, available at: https://hitrustalliance.net/content/uploads/Why-the-HITRUST-Certification-is-So-Broadly-Accepted.pdf. From an operational point of view, to evaluate organisations, HITRUST uses external auditors who test and validate security controls, possessing vast experience in IT compliance and auditing. The assessors must adhere to strict requirements to ensure the adequacy and efficiency of controls in order to award the HITRUST mark. See HITRUST, *Introduction to the HITRUST CSF*, cit., 8.

[90] See A. U. Patel, C. L. Williams, S. N. Hart, C. A. Garcia, T. J. S. Durant, T. C. Cornish, D. S. McClintock, *Cybersecurity and Information Assurance for the Clinical Laboratory*, in *The Journal of Applied Laboratory Medicine*, vol. 8(1), 2023, 145–161, available at: https://doi.org/10.1093/jalm/jfac119, where the authors highlight possible risks for healthcare facilities and identify procedures for their mitigation, in relation to US regulations as well as current standards.

[91] See M. F. Abo El Rob, *A narrative review of advantageous cybersecurity frameworks and regulations in the United States healthcare system*, in *Issues in Information System*, vol. 24(2), 2023, 9, available at: https://doi.org/10.48009/4_iis_2023_126.

[92] See WP29, *Opinion 1/1998 - Platform for Privacy Preferences (P3P) and the Open Profiling Standard (OPS)*, 1998, available at: https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/1998/wp11_en.pdf; cf. R. Gellert, *Understanding the notion of risk in the General Data Protection Regulation*, in *Computer Law & Security Review*, 2018, vol. 34(2), 279-288; ID., *Data protection: a risk regulation? Between the risk management of everything and the precautionary alternative*, in *International Data Privacy Law*, 2015, vol. 5(1), 3-19.

[93] See M. F. Abo El Rob, *A narrative review of advantageous cybersecurity frameworks and regulations in the United States healthcare system*, cit., 16.

could prove beneficial for adopting proactive measures in data protection compliance[94]. These could mitigate a wide array of risks in the processing of PHI, providing effective security of data and ensuring that data subjects and other stakeholders place greater trust in the certified subject. From this perspective, obtaining HITRUST certification could help as a competitive advantage by expanding current partnerships and earning new business for healthcare industries[95].

The TRUSTe certification scheme, developed by TrustArc Inc., is a personal data management model used for online platforms. The certification primarily concerns transparency and cybersecurity, mandating that companies implement commercially reasonable protections for data security. TRUSTe bases its criteria on both US and international standards[96] which take into account the protection of personal information[97] and privacy of consumers on the web[98].

Regarding the certification process for TRUSTe, the organisation that owns the online platform seeking certification must agree to the principles of the scheme and adhere to the supervision and monitoring procedures of the certification program. These principles are particularly significant. Organisations are required to include a privacy policy on their website that clearly outlines the personal information collected, also seeking user consent for the processing of this information. Additionally, the site must have adequate security measures in place to safeguard user information. TRUSTe conducts a verification of these principles and required security standards. Upon completion of the inspection procedures, TRUSTe may certify that the applicant is compliant with the program's requirements[99].

After assigning the mark, TRUSTe does not directly monitor compliance with certification requirements. Instead, it employs an indirect control mechanism that permits third parties to report potential certification violations. Upon receiving such reports, a sort of inspection process can be activated, during which the certification may be temporarily suspended or withdrawn[100]. However, it is unclear how TrustArc effectively manages non-

[94] *Ibidem*.

[95] See HITRUST, *Why HITRUST Certifications are Broadly Accepted and Considered the Gold Standard*, cit., 4.

[96] In particular, this relies in part on the FTC Fair Information Practice Principles, the NAI (Network Advertising Initiative) principles, and the DAA (Digital Advertising Alliance) principles. These frameworks help guide businesses towards responsible data practices in various aspects of consumer data protection and privacy in advertising and digital realms.

[97] Personal data is not considered, but rather personal information. The difference lies in the fact that for the protection of informational privacy, it is necessary that the information/data be directly linked to an identified individual, whereas data that allow potential identification of the subject to whom they belong are not protected.

[98] The criteria can be classified into various categories, including: limitation of processing; use of personal information; choice; collection and use of third-party personal information; user profile visibility; access; promotional communications and newsletters; material changes; data security; data quality and integrity; data retention; third-party data sources; service providers; training; user complaints and feedback; data breaches; accountability; and cooperation with TrustArc. See TrustArc, *TRUSTe APEC Privacy Certification Standards*, 2016, available at: https://download.trustarc.com/dload.php/?f=LH7RIJRS-627.

[99] See M. Bhasin, *Challenge of Guarding Online Privacy: Role of Privacy Seals and Government Regulations*, cit., 63-65; EU Commission, Directorate-general for justice and consumers, G. Bodea, K. Stuurman, M. Brewczyńska, *Data protection certification mechanisms – Study on Articles 42 and 43 of the Regulation (EU) 2016/679: annexes*, cit., 83-88.

[100] See EU Commission, Directorate-general for justice and consumers, G. Bodea, K. Stuurman, M. Brewczyńska, *Data protection certification mechanisms – Study on Articles 42 and 43 of the Regulation (EU) 2016/679: annexes*, cit., 85-86.

compliance. This lack of transparency in the functioning of the monitoring system represents a serious flaw in the certification scheme. There have been reported instances where several certified subjects, despite violating the required privacy principles for obtaining the mark, were still certified. Furthermore, it appears that the revocation of the seal is not frequently exercised, often keeping any identified violations confidential. Additionally, in 2014, TrustArc underwent an FTC investigation for allegedly failing to adhere to its own programs regarding annual recertification for maintaining certification marks in over 1,000 cases between 2006 and 2013, allowing previously certified platforms to retain the seal without any oversight[101].

The weak enforcement capability of TrustArc as a certifying body, along with the significant potential for abuse of certification by third parties, highlights the inherent weaknesses in privacy certifications like TRUSTe in the United States. This is due to the fact that certification bodies lack real power to address potential abuses of their own schemes. In such circumstances, certification could ultimately lead to a negative impact on the privacy and security of information, as data handling practices would be at a higher risk of data breaches[102].

One cause of the inefficiency of privacy certifications could indeed be the absence of general norms on personal data protection or legislative frameworks that enable federal authorities and agencies to oversee the proper implementation of certification schemes. Adopting a federal legislative text on personal data protection might, therefore, be a solution, making the right to informational privacy of users more enforceable. However, this possibility faces opposition from many[103], proving difficult to achieve[104]. Consequently, it might be more suitable to adopt an approach focused on co-regulation. Three possible co-regulatory models have been identified within legal theory[105]. Nevertheless, it is evident that cooperation between companies, private organisations, and

[101] See FTC, *TRUSTe Settles FTC Charges it Deceived Consumers Through Its Privacy Seal Program*, 2014, available at: https://www.ftc.gov/news-events/news/press-releases/2014/11/truste-settles-ftc-charges-it-deceived-consumers-through-its-privacy-seal-program; TrustArc Inc, *TrustArc's Agreement with the FTC*, 2014, available at: https://trustarc.com/trustarcs-agreement-with-the-ftc/.

[102] It has indeed been demonstrated that websites certified with the TRUSTe seal are more likely to be classified as untrustworthy compared to non-certified web platforms. See S. Listokin, *Does Industry Self-Regulation of Consumer Data Privacy Work?*, cit., 17-19.

[103] Some lobbyists and industrial groups, in fact, opposed this solution, believing that self-regulation was the only feasible option, even from a free-market perspective. However, such a stance cannot be reasonably supported until there is certainty that CBs, such as TrustArc, are capable of adequately monitoring the digital industry and wielding enforcement powers capable of penalising any non-compliance. See C. P. O'Kane, *Digital privacy and new media: An empirical study assessing the impact of Privacy Seals on personal information disclosure*, Bournemouth, 2019, 77-78, available at: https://eprints.bournemouth.ac.uk/34340/1/O%E2%80%99KANE%2C%20Conor%20Paul_Ph.D._2019.pdf.

[104] Indeed, in light of this, there was the failed attempt in 2022 to pass the American Data Privacy and Protection Act, which was intended to become the first federal law on online privacy. Although this federal bill represented an initial attempt to comprehensively regulate privacy, it didn't receive positive assessments and faced substantial criticism from industry associations as well as representatives from the State of California, which already has its own comprehensive data protection law in place.

[105] See R. Rodrigues, D. Wright, K. Wadhwa, *Developing a privacy seal scheme (that works)*, in *International Data Privacy Law*, vol. 3(2), 2013, 112, available at: https://doi.org/10.1093/idpl/ips037.

public authorities or the potential corrective intervention of the latter would ensure greater protection of informational privacy, reasonably ensuring the proper implementation of certification mechanisms, codes of conduct, or any other means of private self-regulation. In conclusion, concerning the certifications related to the protection of personal information within the US legal framework, it is worth referring to the new political agreement reached between the United States and the European Union aimed at making changes to US legislation to align it with the requirements outlined by the GDPR for cross-border transfer of personal data. The establishment of the EU-US Data Privacy Framework (hereinafter: DPF) served as the basis for the EU Commission's adoption of the adequacy decision on 10 July 2023, allowing the transfer of personal data to the United States without the additional safeguards required by art. 46 GDPR[106].

After the new requirement introduced by the Executive Order 14086 (hereinafter: EO-14086) to the data processing conducted by the US intelligence agencies[107], the new DPF aims to strengthen data privacy protection by correcting the critical issues previously raised by the CJEU. The Framework is precisely built upon certifications to attest to the ability of US businesses to adhere to the principles and guarantees outlined in the GDPR[108]. Data controllers and processors will be able to self-certify their compliance with the principles of the DPF in order to receive and process data originating from the EU. The mechanism will be administered by the US Department of Commerce, which will process certification applications and monitor whether participating companies continue to meet certification requirements[109]. Hence, European personal data can be transferred to any US organisations self-certified and included in the Data Privacy Framework List, as endorsed by the adequacy decision[110]. For entities not included in the List, the standard contractual

[106] See EU Commission, *Data Protection: European Commission adopts new adequacy decision for safe and trusted EU-US data flows*, 2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3721; EU Commission, *Commission Implementing Regulation (EU) 2023/4745 - adequacy decision*, 2023, available at: https://commission.europa.eu/document/fa09cbad-dd7d-4684-ae60-be03fcb0fddf_it.

[107] See The White House, Executive Order 14086 of October 7 2022, *Enhancing Safeguards for United States Signals Intelligence Activities*, available at: https://www.govinfo.gov/content/pkg/FR-2022-10-14/pdf/2022-22531.pdf. The EO-14086 incorporates into US law the principles that the processing of personal data by intelligence agencies should be governed by the criteria of necessity and proportionality in relation to their strategic objectives.

[108] The adequacy decision has been adopted after years of political discussion with the Commission and the US Government to assess if the US provides a level of data protection substantially equivalent to the EU. This evaluation follows the case law Schrems I and Schrems II of the CJUE, which invalidated the previously established US-EU treaty on data transfer due to the serious threats posed to the rights of EU citizens. These risks stem primarily from: the persisting primacy of US national security regulations over the principles of the Privacy Shield (and before the Safe Harbor); the lack of necessary limitations on the power of US intelligence agencies, particularly in light of proportionality requirements and bulk data collection (violating art. 52 of the Charter of Nice and causing excessive interference with fundamental rights under artt. 7-8 of the Charter); and the lack of judicial remedies for European data subjects, due to the absence of an independent and impartial judiciary (violating art. 47 of the Charter). For a comprehensive analysis of CJEU Case C-311/18 (Schrems II) and its consequences see R.A. Costello, *Schrems II: Everything Is Illuminated?*, in *European Papers*, vol. 5(2), 2020, 1045-1059, available at: https://www.europeanpapers.eu/it/europeanforum/schrems-II-everything-is-illuminated.

[109] See US Department of Commerce, *How to Join the Data Privacy Framework (DPF) Program*, available at: https://www.dataprivacyframework.gov/s/article/How-to-Join-the-Data-Privacy-Framework-DPF-Program-part-1-dpf.

[110] See US Department of Commerce, *Data Privacy Framework List*, available at: *https://www.dataprivacyframework.gov/s/participant-search*.

clauses or the binding corporate rules adopted under art. 46 GDPR will persist as appropriate safeguards for personal data transfers outside the EEA.

Despite slight improvements - for greater specification of privacy principles and enforcement assurances from public authorities - deep misgivings remain in the US approach to data protection: the DPF, substantially mirrors foregoing adequacy decisions, presenting various critical issues concerning both corporate data processing[111] and intelligence agency activities. With specific reference to the intelligence agency, EO-14086 emphasises the supremacy of national security, public interest, and the administration of justice, compelling US companies to disregard the DPF if it conflicts with these priorities. The EO-14086 sets out legitimate objectives that justify intelligence activities and specifies situations where such activities are prohibited. However, according to art. 52 of the Charter, restrictions on data subjects' rights must be defined, transparent, and foreseeable. Yet, within the EO-14086, legitimate objectives are vaguely formulated, allowing for broad interpretation and raising doubts about their compatibility with art. 52, as interpreted by the CJUE[112]. Furthermore, to uphold the essence of data subjects' rights, the EO-14086's preference for targeted data collection does not exclude the possibility of mass surveillance[113]. Despite prioritising necessity and proportionality, it lacks measures to prevent bulk collection, which raises concern for the EDPB because of the absence of prior authorization by an independent authority for bulk data processing and the lack of *ex post* judicial or independent authority oversight[114].

[111] Specifically, concerning the identified challenges related to the Data Protection Framework (DPF), the effectiveness of the right of access within the DPF is highlighted as an illustrative example. This right encompasses not only the right of access in its strict interpretation but also the rights of rectification and deletion of data. Additionally, numerous exemptions and limitations to this right exist, yet they lack clarity. The presence of exemptions of a broad nature, such as limitations imposed by judicial orders or to serve public interest, law enforcement, or national security objectives, poses difficulties in determining their precise scope. Consequently, the efficacy of data protection principles could be compromised. Moreover, it is pertinent to underscore the absence of any provisions pertaining to decisions solely reliant on automated processing, along with the requisite safeguards to prevent adverse impacts on data subjects. This deficiency in addressing automated decision-making mechanisms is a significant omission, as it neglects suitable measures essential for safeguarding individuals' rights and freedoms in algorithmic decision-making contexts. See EDPB, *Opinion 5/2023 on the European Commission Draft Implementing Decision on the adequate protection of personal data under the EU-US Data Privacy Framework,* 2023, 16-22, available at: https://www.edpb.europa.eu/system/files/2023-02/edpb_opinion52023_eu-us_dpf_en.pdf.

[112] Furthermore, these objectives can be altered by the President in response to perceived national security threats, lacking predictability, while Section 702 of the Foreign Intelligence Surveillance Act and Executive Order 12333, criticised by the CJEU for enabling excessive intrusions into privacy and not adhering to the proportionality principle, remain unchanged, thus violating Articles 7-8 of the Charter. See M. Giacalone, *Verso Schrems III? Analisi del nuovo EU-US Data Privacy Framework*, in *European Papers*, vol. 8(1), 2023, 152-154, available at: https://doi.org/10.15166/2499-8249/644.

[113] See AA.VV., *Third Time Is the Charm? The Draft Data Privacy Framework for International Personal Data Transfers From the European Union to the United States*, 16-19, 2023, available at: https://ssrn.com/abstract=4477120.

[114] See *ivi*, 19-20; EDPB, *Opinion 5/2023*, cit., 5, 45-52; Despite the establishment of the Data Protection Review Court, concerns persist about effective redress mechanisms for data subjects regarding intelligence agencies. From one hand, the mechanism outlined in the EX- lacks provisions for complainants to access, rectify, or erase their personal data processed by intelligence services, nor does it offer avenues for seeking compensation for damages, undermining the efficacy of redress. On the other hand, placing the Data Protection Review Court within the executive branch raises concerns about potential US Government influence on its judicial activities, potentially compromising the independence and impartiality of the Court, as recognized by the recent interpretation of the ECtHR (Di Giovanni v Italy App no 51160/06 (ECtHR,

3.4 People's Republic of China: the PIPL and standards ruling for cross-border personal information transfer

In recent times, the People's Republic of China (hereinafter: PRC) has implemented a robust legal framework, particularly targeting the technological and ICT sectors, resulting in the introduction of significant regulations concerning information security (such as the Cybersecurity Law of 2016) and data protection (including the Data Security Law of 2021)[115]. This culminated in the enactment of the Personal Information Protection Law, which represents the first comprehensive data privacy legislation dedicated to safeguarding the personal information of individuals (hereinafter: PI)[116].

The Chinese approach to data protection, often described as a middle ground between the privacy-centric European model and the more minimalist US approach[117], places emphasis on the principles that personal information handlers[118] have to comply with: lawfulness, fairness, necessity and good faith, purpose limitation, transparency, accuracy and integrity and accountability[119]. Although these principles seem aligned with European ones, they present significant differences: with regard to the principle of lawfulness, for example, the PIPL provides in art. 14 that consent must be freely given, expressed, and fully informed, but unlike art. 8 GDPR, it does not ensure that this is also specific, making it difficult to exercise withdrawal since the data subject cannot withdraw consent to one element of a general consent form[120].

However, the PIPL also mirrors the GDPR with regards to cross-border data transfers. These transfers are only permitted if the PI processor has obtained a PI protection

9 July 2013)) and the CJEU (Judgement of 8 July 2022, BN v Getin Noble Bank, C-132/20, ECLI:EU:C:2022:235). See M. Giacalone, Verso Schrems III?, cit., 154-156.

115 Of particular mention are the Cybersecurity Law, enacted in the 2016 and covering all the principal aspects linked to the protection of the critical information infrastructure and security review of the network products and services, and the Data Security Act, promulgated on june 2021 and focused primarily on the protection of overall national data security and sets out high-level data management and protection systems and rules for national agencies, industry association, and other organisation. Besides these laws a series of implementation legislation and national standards has been drafted by the Chinese Government. See S. Yang, *Privacy, Data Protection and Cybersecurity: China*, in A.C. Raul (edt.) *Privacy, Data Protection and Cybersecurity Law Review*, 2022, 147-148. For a delve into the Chinese legal-tech framework see V. R. Creemers, *China's emerging data protection framework*, in *Journal of Cybersecurity*, 2022, 4-7, Available at: https://doi.org/10.1093/cybsec/tyac011.

116 According to art. 4 PIPL, personal data are all kinds of information, recorded by electronic or other means, related to identified or identifiable natural persons, not including information after anonymisation treatment.The definition is quite similar to the notion of personal data under art. 4 GDPR, although the latter does not explicitly mention anonymised information.

117 See E. Pernot-Leplay, *China's Approach on Data Privacy Law: A Third Way Between the China's Approach on Data Privacy Law: A Third Way Between the U.S. and the E.U.?*, in *Penn State Journal of Law & International Affairs Penn State Journal of Law & International Affairs*, vol. 8.1, 2020, 51-55, available at: https://elibrary.law.psu.edu/jlia/vol8/iss1/6/.

118 Even though not expressed in the PIPL they are identified as any organisation or individual that independently determines the purpose and method of processing.

119 Artt. 5-9 PIPL. In particular, the latter provide that personal information handlers shall be responsible for the PI processing activities and take necessary measures to safeguard the security of the personal information they process.

120 Aside from this general consent requirement, the PIPL require a specific and individual consent in these cases: parental consent is required for processing personal information of minors below the age of 14; separate consent is required for the processing of sensitive personal information, providing personal information to third parties, publicising personal information and for PI cross-border data transfer.

certification from a certification body recognized by the Cyberspace Administration of China[121]. The certification structure established by the PIPL bears similarities to the European approach: certification, issued by a third-party entity, is viewed as an external standardisation mechanism separate from national regulations. However, it is legally linked to these regulations through recognition as a method to facilitate cross-border data transfers[122].

Drawing on this framework, the National Information Security Standardization Technical Committee has released the "Cybersecurity Standards Practical Guide – Security Certification Specifications for Cross-Border Processing of Personal Information V2.0". This publication delineates fundamental principles and protocols governing PI protection certification for entities handling data and overseas recipients engaged in cross-border data transfers, alongside measures for safeguarding the rights of data subjects[123]. It is crucial to note that this document does not function as a certification mechanism per se, but rather establishes the groundwork for certification agencies to oversee the cross-border processing activities of PI handlers. Moreover, it furnishes guidance to the latter concerning the regulation of their cross-border processing endeavours associated with PI. Specifically, it delineates the principles that processors and overseas recipients are obliged to adhere to within the framework of the PRC's PI protection regulations.

In the same way as in the European regulation, certifications are a voluntary adherence tool, albeit one capable of enhancing the safeguarding and efficiency of cross-border PI transfers. Indeed, PI handlers and their overseas counterparts are mandated to execute legally binding and enforceable agreements to ensure the protection of the rights and interests of PI subjects. Under this arrangement, the involved parties are obligated to: apprise data subjects of cross-border PI processing activities (including the purpose and extent of such processing); take technical and management measures to prevent possible security risks for PI; respect the rights of PI subjects provided for by the PIPL and introduce methods for them to protect their rights - such as the introduction of an arbitration or a mediation mechanism for dispute resolution; and ensure that the level of PI protection is not lower than China's relevant laws and regulations.[124]. This final provision exemplifies the resemblance between the PIPL and the GDPR. In the European

[121]Article 38 of the PIPL outlines additional conditions required to legitimise data exports. These include undergoing a security assessment organised by the Cyberspace Administration of China (CAC), obtaining certification from an accredited body, or entering into a contractual agreement with the foreign party to ensure compliance with the standards outlined in the PIPL.

[122] The proposed scheme, therefore, should fall within the realm of co-regulation tools.

[123] See National Information Security Standardization Technical Committee, *Security Certification Specifications*, December 2022, Available at: https://www.tc260.org.cn/upload/2022-12-16/1671179931039025340.pdf. For an english translation see Latham & Watkins Privacy & Cyber Practice, *China Clarifies the Personal Information Protection Certification Regime*, 2023, available at: https://www.lw.com/en/people/admin/upload/SiteAttachments/China-Clarifies-the-Personal-Information-Protection-Certification-Regime.pdf. Thus, on March 16, 2023, the NISSTC released the Information security technology-Certification requirements for cross border transmission of personal information, as an official set of standards of the Security Certification Specifications.

[124] See Dezan Shira & Associates, *PIPL 2023/24 Cross-Border Data Transfer in China Handbook*, 2024, 17-23, available at: https://www.asiabriefing.com/store/book/pipl-cross-border-data-transfer-china-handbook.html.

regulatory framework, the assessment of the adequacy of the level of protection is a crucial aspect. This evaluation serves as the basis for the Commission's potential adoption of an adequacy decision, or alternatively, requires data controllers to implement supplementary safeguards, as outlined in Art. 46 GDPR.

As of now, despite its established legal framework, neither China has received an adequacy decision nor has the Commission initiated proceedings to adopt such a decision for the transfer of personal data to China. Additionally, challenges have arisen regarding data transfers from the EU to China, exacerbated by concerns regarding Chinese access to user information on the TikTok platform[125]. These worries prompted the Irish Data Protection Commission (DPC) to commence an inquiry by the end of 2021 into TikTok's transfers of personal data to China and its compliance with the GDPR's stipulations for such transfers to third countries[126].

In conclusion, PRC's multifaceted legal framework appears to align with European principles in several aspects. Notably, the PIPL introduces a certification mechanism for cross-border data transfers, similar to the GDPR. However, China's cybersecurity and market standards authorities have not yet published a list of approved certification bodies or clear guidelines on certification procedures, so further action is needed to clarify how agencies will conduct certifications to ensure compliance by both agencies and target companies.

IV. FINAL REMARKS

Certifications represent a pivotal tool to allow the correct implementation of the principles which so profoundly characterise the new European approach to the protection of personal data. Moreover, they actually demonstrate the general effort to ensure that the entire lifecycle of personal data meets specific guarantees and is always aimed at protecting the individual.

Although a complete and exhaustive study goes beyond the goals of this paper, the relationship between certification schemes and liability of data controllers and processors is worth a brief mention to complete the present overview of certifications. In this context, there are four possible hypotheses: administrative liability, in the event of inspections and possible sanctions by the Data Protection Authority; civil liability, towards the data subject; contractual liability between data controller and data processor; contractual liability, between the certifying body and the certified subject. The GDPR states in a very clear

[125] See J. Czarnocki, F. Giglio, E. Kun, M. Petik, S. Royer, *Government access to data in third countries - Final Report*, 2021, 12-25, available at: https://www.edpb.europa.eu/system/files/2022-01/legalstudy_on_government_access_0.pdf, The authors arrive at the conclusion that the Chinese legal system lacks adequate safeguards for foreigners' data, which are comparable to those found in the EU. Specifically, their analysis of the PRC Constitution, along with secondary legislation, underscores the unrestricted government access to personal data facilitated by China's centralised power structure under the Communist Party of China. Moreover, the prioritisation of national security and public order over privacy protection grants the government broad discretion in accessing personal data.

[126] However, currently there is no information available regarding the ongoing investigations by the DPC on TikTok's compliance with GDPR in relation to the transfer of personal data to China. For a delve see M. Cantero Gamito, *Do Too Many Cooks Spoil the Broth? How EU Law Underenforcement Allows TikTok's Violations of Minors' Rights*, in *Journal of Consumer Policy*, vol. 46, 2023, 281–305, available at: https://doi.org/10.1007/s10603-023-09545-8.

manner that the adoption of certification schemes, although demonstrating compliance with the legislative framework, in no way reduces the liability of the data controller or data processor (see art. 42, par. 4). However, it is undeniable that these mechanisms may reduce exposure and mitigate risks of violations; therefore, they constitute useful elements in the judicial context, to demonstrate that the processing is effectively based on standards of diligence, and this should at least limit the amount of compensation[127] or administrative fines[128].

In addition, the informational value of the certification mark could grant a competitive edge and bolster the reputation of the certified subject[129]. The decision of third parties (such as data subjects, controllers or processors) could be influenced by the publicity of the positive conformity assessment, leading them to place greater trust in the certified subject and its data processing, due to the presence of the certification, and thus giving it a considerable advantage over other competitors[130].

The provision of certifications within the EU regulation on personal data is a novelty, even if a few certification schemes were already present on the European market before the GDPR. This is also true in the US, where the approach based on self-assessment and the adoption of technical models for integrating state legislation has long been adopted in various sectors[131]. To summarise, beyond the territorial context, the certifications can be categorised into: "generic", i.e. addressed to all data controllers regardless of the type of processing actually implemented (see, for example, EuroPriSe©; GDPR-CARPA; ISDP©10003; EuroPrivacy; TRUSTe); "sectoral", i.e. exclusively intended for specific treatments (for example ACCS and AADCS; HITRUST)[132]. A further distinction can be made with reference to the geographical scope of application: some certifications are valid only at a national or regional level, while others are valid in all Member States. Moreover: some certifications are approved by national Data Protection Authorities based on a pre-established regulatory framework; while others have an exclusively inter-private value, usually the result of self-regulation systems. Certification remains intrinsically voluntary: it is, therefore, a suggested but not mandatory tool.

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127 See G. M. Riccio, *Commento art. 42-43 GDPR*, cit., 609-611; R. Leenes, *Article 42. Certification and Art. 43. Certification bodies*, cit., 751-752.

128 See art. 82, par. 2, lett. j); EDPB, *Guidelines 1/2018*, cit., 6; E. Lachaud, *What GDPR tells about certification*, cit., 7-8.

129 According to some scholars, certification under the GDPR may be considered an instrument of 'trust and confidence'. See L. Bolognini, S. Ziegler, seminar The Mechanism of Certifications with the GDPR - The First European Data Protection Seal: Europrivacy Certification, 2022, available at: https://www.federprivacy.org/attivita/webinar-sul-meccanismo-delle-certificazionicon-il-gdpr-e-il-primo-sigillo-europeo-sulla-protezione-dei-dati. The CNIL, the French SA, already qualifies certifications and codes of conduct as 'confidence indicators'. See CNIL, *Privacy seals*, online: https://www.cnil.fr/en/privacy-seals.

130 See S. SILEONI, *I codici di condotta e le funzioni di certificazione*, cit., 933- 935.

131 See S. Vigliar, *Regole di responsabilità e self-assessment: analisi comparatistica del complesso equilibrio tra diritto e tecnica nei modelli di prevenzione del danno*, in *Cardozo Electronic Law Bulletin*, 2018, 1.

132 See G. M. Riccio, *Commento art. 42-43 GDPR*, cit., 607-609. EU Commission, Directorate-general for justice and consumers, G. Bodea, K. Stuurman, M. Brewczyńska, *Data protection certification mechanisms – Study on Articles 42 and 43 of the Regulation (EU) 2016/679: final report*, cit., 35-38.

The comparative analysis may have shown how some systems present mechanisms similar to the one only recently introduced in the EU. This is especially the case in which the regulatory framework presents similarities to the GDPR, for instance in terms of structure and approach to personal data protection regulation. We are therefore referring to the UK, which maintains a regulatory approach similar to the continental one despite Brexit, and to Canada, where the regulatory instruments tend to come closer to the European legal drafting and where the concept of data protection by design was originally established. The US scenario, instead, presents a framework in which the certification tool is certainly weaker, as it is of an intrinsically private nature. This can likely be explained by the lack of a general reference regulation to which the value of the certification scheme could possibly be linked. In the PRC, finally, there is strong control by public authority over data circulation and cross-border data transfer, leading to the adoption of a distinctive certification mechanism.

To sum up, if the GDPR is aimed at finding the proper balance between the protection of the individual's fundamental rights and the free movement of data, the codification of certifications amongst its provisions must be positively welcomed as powerful tools that perfectly advance this goal. As the paper tried to illustrate, at the present stage the tool could be perfected both in terms of more detailed and precise certification criteria and obligations, and with regards to the issuing procedure and audit methods. Some of these aspects are indeed currently left to the discretion of scheme owners and certification bodies. These scenarios require accurate interventions, in order for these tools to effectively work and enhance the transparency and security of processing on a large and general scale. They also play a fundamental role in generating reliance of users on digital services, and therefore guaranteeing that concept of "trust" which is pivotal to many dynamics of the digital world and in particular to the EU ecosystem.

ON LANDS AND DISPOSSESSION.
THE RELEVANCE AND POTENTIAL OF PROPERTY LAW FOR THE CONSTITUTIONAL RECOGNITION OF THE RIGHTS OF INDIGENOUS PEOPLES

Marina Federico

TABLE OF CONTENTS:

This paper intends to consider whether and how minorities, especially Indigenous groups, can and should be protected in Constitutions through property law rules, and it investigates the role that constitutional formants can play in the recognition of multiculturalism and pluralism, dealing with the Brazilian legal system as a case study.
To do so, this article seeks to establish whether the constitutional acknowledgment of ancestral land ownership of Indigenous communities can be a way to safeguard both their rights and, more broadly, other collective interests of society, such as multiculturalism and environmental protection. This essay adopts an interdisciplinary methodology, combining comparative private and constitutional law with an historical perspective. The aim is to valorize the right to property as a vehicle to promote the rights of Indigenous groups, and ensure social justice, taking into account the peculiarities of Latin American legal systems.

Keywords: property law – indigenous rights – legal pluralism – Latin America – land rights

I. INTRODUCTION

In critical studies and reflections on modern law and on the principles and development of classical liberalism in western legal culture, private property has often been linked to the colonial invasions and aggressions of the past century.[1] Nowadays, the right to property is also frequently addressed as one of the factors contributing to the rapid shift towards an extractive, individualistic economic and social system, which fosters inequality, oppression and power imbalances.[2] For instance, the contemporary market system has deprived disadvantaged groups from accessing essential resources, such as water, food, electricity or energy, which have been progressively privatized. This process has involved culture, art, drugs, medicine, research, and many other areas.[3] Furthermore, in the digital

[1] For a suggestive reconstruction of modern European state making, which emphasizes power concentration and the consequent "monopoly" of force, see the work of C. Tilly, *War Making and State Making as Organized Crime*, in P. B. Evans, D. Rueschemeyer & T. Skocpol (eds.), *Bringing the State Back In,* Cambridge University Press, 2010, 171-186. The Author proposes an analogy between state making, war making and "organized crime", arguing how forms of coercive exploitation have played a role in the making of Western States and capital accumulation.

[2] See the landmark work of C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, 1 ed., Clarendon press, 1962, and its various successive editions, including *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford University Press, Canada, 2010.

[3] U. Mattei – F. Capra, *Ecologia del diritto. Scienza, politica, beni comuni,* Aboca edizioni, 2017, *passim;* L. Nivarra, *Alcune riflessioni sul rapporto fra pubblico e comune,* in M. R. Marella (ed.), *Oltre il pubblico e privato. Per un diritto dei beni comuni*, Ombre Corte, 2012, 69 - 87. See also G. Resta, *The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspective,* in *Tulane European & Civil Law Forum,* 2011, 33-65; L.

economy, the increasing "commodification" of personality attributes has long assimilated personal data to goods, to be bought and traded, at the expenses of the protection of personhood and human dignity. In fact, in informational and knowledge capitalism, the most powerful economic actors found their business on the exploit and processing of personal and non-personal data.

Should property be radically condemned as evil, then? Or can property law be shaped in a way that promotes social justice, ensures a fairer distribution of resources, and protects and safeguards communities and minorities?

This article explores the possibilities of property in land as a vehicle for guaranteeing the rights of Indigenous communities, such as the right to cultural identity, as well as the general interests of society as a whole, such as environmental preservation, focusing on Central and Southern America, and specifically on the Country of Brazil and its Constitution. The paper upholds that, in multicultural legal systems, constitutional provisions on property can help building a more socially just and inclusive society. Latin American States, in this respect, can offer us a springboard to experiment with the right to property, thanks to their cultural diversity and the influence of Indigenous and Aboriginal traditions, which are traditionally open to collective forms of property.[4]

Particularly, this paper investigates on how the above-mentioned objectives can be achieved through the constitutional recognition of Native communities' titles to their ancestral lands. As Indigenous peoples have long been oppressed by colonization and by a libertarian use of the concept of property, this task is particularly delicate. The Constitution of Brazil is especially worth considering, due to its historic importance in promoting Indigenous rights, and to a recent, interesting ruling of the Supreme Court (*Supremo Tribunal Federal,* hereinafter: STF) which has brought to light the issue of the possession of Aboriginal lands.

This essay proceeds as follows. First, it describes the links between property, colonization and land grabbing in the Majority World, specifically in Latin America. The paper goes on to depict briefly the characteristics of property law in European legal systems, considering the existence of some models of property which are different from the individualistic and "neo-liberal" conception of this right, and which confirm and valorize its collective character. A brief overview of the features of collective property in western legal systems follows. The work takes also into account how property law has been framed in some nineteenth and the twentieth centuries' constitutional charters, as that period of time coincides with the historical process of the national independence of Countries in Central and South America (*Section 2*).

The paper follows by examining the significance of property law in relation to Aboriginal rights to land, specifically in the Constitution of Brazil, as a State marked by a unique

Lessig, *The Creative Commons*, in *Montana law review*, 2004, 1-13; J. Reichman & P. Uhlir, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment,* in *Law and contemporary problems*, 2003.

[4] P. Grossi, *"Un altro modo di possedere". L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Giuffré, 2017 (1977).

history.[5] It focuses on the significance of the terms *property, possession,* and *usufruct* (*dominio*, *posesión, usufruto*) with reference to native territories, and on the role of property law in the Constitution for fulfilling the needs of both Indigenous groups and the rest of the Brazilian citizens, as different populations composing a pluralistic Nation (*Section 3).*[6] Thus, this essay performs a general overview of the legal techniques employed in some Countries for enhancing Natives' cultural rights, after the colonial ruling (*Section 4)*. Afterwards, the paper circles back to the Brazilian legal system, and it investigates the effectiveness of the constitutional provisions on Aboriginal peoples and their lands, noting how the Constitution still fails to fully promote Indigenous rights in practice (*Section 5*).

The partial ineffectiveness of these Brazilian constitutional provisions has led to a recent ruling of the STF over a dispute involving the state of Santa Catarina and the Aboriginal Xokleng tribe about the territory of Ibirama-La Klãnõ, in the proceeding arisen from the extraordinary recourse (hereinafter: RE, *recurso extraordinário)* nr. 1.017.365 (*Santa Caterina Environment Institute v. the National Foundation for Indigenous People,* hereinafter: FUNAI). In the ruling, the Supreme Court has established the illegitimacy of the application of the so-called "time frame limit rule" (the *marco temporal,* which can be roughly translated into English as "temporal landmark") as interpreted in a way that prescribes the Indigenous to show their lands' possession since the time of the enactment of the Constitution for benefitting from the constitutional protection of their territories. This notwithstanding, the Brazilian Parliament has adopted a new statute which affirms the rule of *marco temporal*, precisely in the terms declared illegitimate by the STF, limiting Indigenous rights over their traditional territories. Thus, the article shifts to a normative analysis, formulating some suggestions for a general and more effective implementation of Indigenous rights, which is key to promote a more inclusive, pluralistic and diverse society (*Section 6*).[7] A conclusion follows (*Section 7*).

Overall, this paper formulates a quest for property in land as a vehicle for promoting the interests of communities, collectivities, and society as a whole, such as environmental preservation and diversity, pluralism and multiculturalism. This article adopts a relativist conception of property law, meaning that it tries to conceive property as a concept historically enclosing and carrying different meanings and solutions to the perennial problem of qualifying the relations between humans and nature.[8]

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[5] A. Gambaro & R. Sacco, *Sistemi giuridici comparati,* UTET, 2018, 285; A. dos Santos Cunha, *The Social Function of Property in Brazilian Law*, in *Fordham Law Review*, 2011, 1172.

[6] The most accepted definition of Indigenous people seems to be the one provided for by the UN Special Rapporteur, as peoples having common ancestors and a common history and culture, having suffered from occupation and land appropriation, with a tie with a certain territory, self-identified and accepted as such by the community of reference. This definition is elaborated on by J. B. Henriksen, *Key Principles in Implementing ILO Convention No. 169, Programme to Promote ILO Convention No. 169*, 2008, 5, available at: https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_118120.pdf.

[7] L. Salaymeh & R. Michaels, *Decolonial Comparative Law: A Conceptual Beginning*, in *MPI for Comparative and International Private Law - Research Paper Series*, 2022, 183; F. Englert & J. Schaub-Englert, *A Fruitless Attempt towards Plurinationality and Decolonization? – Perplexities in the Creation of Indigenous Territorial Autonomies in Bolivia*, in *Verfassung und Recht in Übersee*, 2019, 67–89; E. Tuck & K. Wayne Yang, *Decolonization is not a metaphor,* in *Decolonization: Indigeneity, Education and Society,* 2012, 1-40.

[8] P. Grossi, *La proprietà e le proprietà nell'officina dello storico,* Editoriale scientifica, 2006, 26.

In this sense, this research attempts to employ a decolonial approach to the study of foreign legal systems. The term "decolonial" is a conventional expression. By that, it is meant the construction of a reasoning free from hegemonic claims, when approaching non-European legal systems.[9] To this aim, this research acknowledges that, in multicultural and pluralist societies, different legal and cultural values have to coexist with each other. For instance, in the Latin American context, the interrelation of the constitutional text with norms qualified as "social" or "cultural" should always be born in mind, as well as the one between western-derived values and aboriginal ones.[10] The expression "decolonial" should not be confused with "post-colonial", which is conversely used in the paper to describe the result of a historical process of detachment and independence from the colonial domination – not necessarily abrupt and sudden, but even progressive, gradual or peaceful. The Countries which are going to be addressed as "post-colonial societies" are non-western legal systems that have experienced colonialism, and that are now formally independent, where western-derived rules and principles cohabit with aboriginal ones.[11]

This approach is embraced by scholars such as Ralf Michaels and Lena Salaymeh, when writing that: "decolonizing the discipline of comparative law in the Global North requires the involvement of Global North scholars"[12]. The authors seem to mean that it is important to avoid the mistake of linking legal concepts solely to our own cultural understanding when looking at foreign legal traditions.[13] After all, this is the way to build more inclusive societies, where diversity is welcomed as an added value.[14]

[9] Indeed, there is a risk of an even unconscious bias when western comparativists approach legal traditions that seem to be far away from ours. On this respect see, for instance, A. Somma, *Temi e problemi di diritto comparato. IV. Diritto comunitario vs. diritto comune europeo,* Giappichelli, 2003, 10-11.

[10] M. C. Locchi, *Pluralism as a key category in Latin American constitutionalism: some remarks from a comparative perspective*, in *Comparative Law Review*, 2017, 5.

[11] The line between "decolonial" and "post-colonial" is often blurred, as well as the validity of this distinction at all. However, the expressions "decolonial" and "post-colonial" are still widely used in the literature and, notwithstanding all their limits, if they are not interpreted too strictly, they can be helpful in describing certain approaches and historical moments. The terms are employed, for instance, in F. Renucci, *Legal pluralism at the heart of a unitary law. French colonial and post-colonial situations (19th-20th century),* in *Quaderni fiorentini*, L, 2021, 631-650, on legal pluralism and the colonial period in a French perspective; F. Coronil, *Elephants in the Americas? – Latin American Postcolonial Studies and Global Decolonization*, in M. Moraña, E. D. Dussel & C. A. Jáuregui (eds.), *Coloniality at Large: Latin America and the Postcolonial Debate*, 2008, 396-416; F. Englert & J. Schaub-Englert, *supra* note 7. Studies on "colonial law" were conducted also in Italy, at the beginning of 1900, by distinguished scholars such as Santi Romano, focusing on the relationship between property, sovereignty, and territory. On this matter, see L. Nuzzo, *Pluralismo giuridico e ordine coloniale in Santi Romano,* in *Quaderni fiorentini*, L, 2021, 215-249.

[12] L. Salaymeh & R. Michaels, *supra* note 7, 186. The terms "Global North" and "Global South" are not used in a prescriptive way, and they are employed to address the regions of Europe, the United States, and the regions of Asia, Latin America, Africa, Oceania, respectively. However, the use of this terminology is far from being uncontroversial. Indeed, the two areas are historically characterized by mutual contaminations and influences, and it is quite impossible to encase them in the encompassing formulas "Global North and Global South". And yet, even if categories have oftentimes the effect of restrict and embed concepts and entities, they can still be useful, at least for framing certain ideas in general terms.

[13] P. Grossi, *supra* note 8, 30; see also R. Míguez Núñez, *Per una decostruzione del concetto di "proprietà" nella realtà andina*, in *Rivista di Diritto Civile,* 2010, 425-427; I. Ortiz Gala & C. Madorrán Ayerra, *Inappropriate Nature. Natural Resources as Commons*, in *Journal of Interdisciplinary History of Ideas*, 2023, 2-18.

[14] In the words of Boaventura de Sousa Santos, this should be the aim of decolonial theory. Decolonial theory as a methodology, "does not mean discarding the rich Eurocentric critical tradition and throwing it

II. SETTING THE SCENE: PROPERTY IN LAND AND COLONIALISM

During the nineteenth century, Latin American Countries engaged in the process of achieving cultural, political and economic independence from colonial settlers. Although now almost all Latin American Countries are independent, colonialism is part of their story, and still influences the asset of their societies.[15] It has also been argued that, nowadays, we live in an age of neo-colonialism: namely, we still embrace colonialism as a mode of thought, unintentionally adopting a universalized Eurocentric standard in our laws and economies, and when approaching social and political issues.[16]

In Latin America, the European colonization exploded in all its ferocity after the fifteenth century, when the lands of the invaded territories were conquered for acquiring their mines and resources (the so-called *land grabbing*). The concept of sovereignty at the beginning, and the right to property later, served as an effective and "terrible"[17] sword in the hands of the settlers. In fact, the lands of Indigenous populations were regarded as *res nullius,* thus susceptible to be acquired, since the relationship between the Indigenous and their territories did not follow certain rules on properties embraced by the colonizers[18]. Aboriginal groups shared a communal bond to their lands, and Indigenous culture rejected a strong separation between humans and earth; this differed profoundly from the concept of property as an individual, exclusive and absolute right, promoted by the colonizers. The Indigenous deemed themselves and their lands as inseparable, the earth was shared with members of the community and preserved for future generations.[19] Land was intended as something that could be assimilated to a *common good*,[20] or even to a living subject, not as a source of wealth.[21]

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into the dustbin of history, thereby ignoring the historical possibilities of social emancipation in western modernity. It means, rather, including it in a much broader landscape of epistemological and political possibilities. It means exercising a hermeneutics of suspicion regarding its 'foundational truths' by uncovering what lies below their 'face value'." (B. De Sousa Santos, *Epistemologies of the South. Justice Against Epistemicide*, Routledge, 2014, 44).

[15] R. Michaels, *The legal legacy of the colonial era,* 1. Specifically on Latin America, see C. Marés de Souza Filho, *Os direitos invisiveis*, in F. Oliveira & M. C. Paoli (eds.), *Os sentidos de democracia. Políticas do dissenso e hegemonia global*, Vozes/Fapesp, 1999, 307-334.

[16] A. Lehavi, *The Construction of Property. Norms, Institutions, Challenges,* Cambridge Univ. Press, 2013, 243-246.

[17] The right to property has been defined as the "terrible right" by Cesare Beccaria. Later, this expression was used by the Italian legal scholar Stefano Rodotà (S. Rodotà, *Il terribile diritto. Studi sulla proprietà e i beni comuni,* Il Mulino, 2013).

[18] See G. Resta, *Systems of public ownership,* in M. Graziadei - L. Smith (eds.), *Comparative Property Law. Global Perspectives*, Cheltenham, UK - Northampton, MA, USA, 2017, 244; 246-249. Again, on the links between sovereignty and property, L. Nuzzo, *supra* note 11.

[19] Wub-e-ke-niew, *We Have the Right to Exist. A Translation of Aboriginal Indigenous Thought. The first book ever published from a Ahnishinahbaeójibway Perspective*, Black thistle press, 2013, 212; M. Risse, *A Radical Reckoning with Cultural Devastation and Its Aftermath: Reflections on Wub-e-ke-niew We Have the Right to Exist*, in *Carr Center Discussion Paper*, 2023, 19. On future generations and property law, S. Settis, *In whose name do we act?*, in S. Bailey, G. Farrell & U. Mattei (eds.), *Protecting future generations through commons*, Council of Europe Publishing, 2013.

[20] S. Lanni, *Diritti indigeni e tassonomie del sistema in America Latina*, in *Annuario di diritto comparato e di studi legislativi*, Edizioni Scientifiche Italiane, 2013, 170.

[21] In line with this conception, it has been argued that the most effective way to protect the relationship of the Indigenous with their lands could be to recognize legal subjectivity to the ancestral territories, rather than qualifying them as goods that can be owned and traded. According to the supporters of this approach, this could also help in framing a more eco-centric legal approach. On this topic, see, amongst other, C. Cullinan, *Wild Law: A Manifesto for Earth Justice*, Chelsea Green Pub. Co, II ed., 2011; T. Berry*, The Great Work: Our Way into the Future*, Crown, 2000; T. Berry, *The Origin, Differentiation and Role of Rights,* 01/11/2001,

Moral, religious and philosophical theories later furnished justifications for the Spanish and Portuguese colonial "enterprises" and land grabbing. A rediscovery of scholastic philosophy and the philosophies of natural law affirmed the right to property as a natural and moral entitlement of European citizens.[22] Ownership was intended as the exclusive and absolute right of a person over their goods; and, amongst these goods, land was the main one, as a naturally limited and scarce source of profit. It is not a coincidence that John Locke's theory of labor property developed during colonial times.[23] From Locke's perspective, the right to the appropriation of goods is inherent to natural law, and appropriation happens through labor, especially when it comes to land.[24] From these views a rigid separation between humans and objects follows. Land was conceived as something to be worked, exchanged and traded, a means for wealth.

Therefore, it comes as no surprise that Indigenous relationship towards land (both collective and non-exclusionary) appeared distant from the idea of property carried by the settlers. To justify the colonial enterprises, the Indigenous were presented as peoples without history, living in a perennial state of nature, non-conforming to western standards.[25] They were tragically dehumanized, which helped the process of colonization and justified the violent invasion of their lands.[26] As bitterly observed by Aboriginal writer Wub-e-ke-niew: "«Thou shall not steal» was not meant to apply outside the community of the faithful"[27].

This conception of property as the exclusive, individualistic power to fully dispose of a certain object can be traced back to the Roman law concept of *dominium*[28]. However, it

available at: https://www.ties-edu.org/wp-content/uploads/2018/09/Thomas-Berry-rights.pdf, accessed 13-02-2024; C. D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, in *Southern California Law Review*, 1972, 450-501.

[22] For a synthesis of the philosophical foundations of the right to property, U. Mattei & A. Quarta, *Punto di svolta. Ecologia, tecnologia e diritto privato. Dal capitale ai beni comuni,* Aboca, 2018, 43.

[23] See extensively J. Locke, *Two treatises of Government and a letter concerning toleration*, introduction of I. Shapiro, Yale University Press, 2003. For a complete account, see J. Tully, *A Discourse on Property: John Locke and His Adversaries,* Cambridge University Press, 1980 and L. Underkuffler, *On Property: An Essay*, in *Yale Law Journal*, 1990, 132-139.

[24] J. Locke, *The second treatise of government*, Sections 27, 40. See A. Ryan, *Locke and the Dictatorship of the Bourgeoisie*, in *Political Studies Association*, 1965, 225. Another crucial point of reference is the position of Hegel, who regards property as "the first embodiment of freedom and an independent end" (G. W. F. Hegel, *Philosophy of Right,* transl. S. W. Dyde, Batoche books, 2001, Section 1, § 45).

[25] E. R. Wolff, *Europe and the people without history*, Univ. of California Press, 1990.

[26] Even if with reference to the Sámi Indigenous people in Sweden, see R. Kuokkanen, *From Indigenous private property to full dispossession - the peculiar case of Sámi*, in *Comparative Legal History*, 2023, 24-44. The Spanish school of international law (Francisco Vitoria, Domingo de Soto, Luis de Molina, Bartolomé de Las Casas are the main exponents) recognized the natural rights of Indigenous people (C. Marés de Souza Filho, *The right to exist*, in *Tipití: Journal of the Society for the Anthropology of Lowland South America*, 2022, 158). However, they also justified conquest and subjugation under the idea of the "just war" (on the ambivalence of the Spanish school, see G. Giacomini, *Indigenous people and climate justice. A critical analysis of international human rights law and governance*, Springer, 2022, 151-225). On these matters, see also A. Garapon, *Peut-on réparer l'histoire? Colonisation, esclavage, Shoah,* Paris:Odile Jacob, 2008.

[27] Wub-e-ke-niew, *supra* note 19, XX. On March 20, 1570, the Portuguese government enacted the "*Ley sobre a liberdade dos gentios*", which granted some protection to the Indigenous, but only conditional to their conversion to the Christian religion.

[28] See the works collected in A. Gambaro, A. Candian & B. Pozzo, *Property, Propriété, Eigentum. Corso di diritto privato comparato,* CEDAM, 1992, specifically B. Pozzo, *La tradizione filosofica in Germania*, 289 and A. Di

only partially represents property in the western world, as ownership is a polysemic concept. Already during the transition from Roman law to *ius commune,* property underwent through radical changes. In the feudal system, the principle of the "closed number" of property rights was questioned; and "ownership" was referred to as the right to enjoy the land, regardless of the formal *dominium* over it.[29] Nonetheless, the individualistic face of the right to property resurfaced in England, with the enclosure movement. The enclosure movement meant the extinction of the previous common rights in land that the peasants had.[30] Property developed as the full power of an individual over a certain good, to be used, improved and labored, an instrument through which acquiring autonomy, self-determination and promoting the economic development of society.

During the enlightenment, property law was also key to affirm freedom and the civil rights of the new bourgeois society, thus allowing the greatest expansion of productive possibilities.[31] This idea of property was codified in the Code Napoléon, where Article 544 lays out the sovereignty of mankind over goods.[32] Such a concept is still present, to a certain extent, in European civil law systems.[33]

However, in European legal systems, property does not neglect public interest, and has never done so.[34] It is remarkable that even Thomas Aquinas, the primary exponent of the scholastic philosophy, upheld that property was to be used for the common good.[35] Alongside with the above-mentioned individualistic and exclusionary traits of the right to property, collective forms of ownership have always existed and survived in Europe. This was the case, for example, of the Italian "*partecipanza*" (which could be roughly translated with the word "participation"). *Partecipanza* is a collective form of property of rural territories, which still endures in Italy, built on the values of solidarity, respect, and

Robilant, *The making of modern property. Reinventing Roman law in Europe and its peripheries*, Cambridge University Press, 2023.

[29] See L. Capogrossi Colognesi, *Le vie del diritto romano*, Bologna, 2023.

[30] J. M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700-1820*, Cambridge University Press, 1993, 17-18.

[31] This is what has been pointed out by J. Boyle, *The Second Enclosure Movement*, in *Law & Contemporary Problems*, 2003, 35. For a criticism of the neo-liberal conception of the right to property, among many, see P. J. Proudhon, *What is Property? An Inquiry into the Principle of Right and Governance* (1840), ed. and transl. by D. R. Kelley & B. G. Smith, Cambridge University Press, 1994, where the Author famously affirmed that: "property is theft".

[32] Article 544 of the French civil code states that: "*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements*." ("The right to property is the right to enjoy and dispose of things in the most absolute way, as long as not they are not used against statutes or regulations").

[33] Conversely, in common law countries, property is often defined as a "bundle of rights" focusing more on the relationships between individuals, rather than between individuals and goods (W. N. Hohfeld, *Fundamental legal conceptions as applied in Judicial Reasoning*, in *The Yale Law Journal*, 1917, 710-770; A. di Robilant, *Property's Building Blocks: Hohfeld in Europe and Beyond,* in *Scholarly Commons at Boston University School of Law*, 2022, 1-29; S. Van Erp & B. Akkermans (eds.), *Cases, materials and texts on national, supranational and international property law*, Hart, 2012, 39).

[34] A. Gambaro, *Il diritto di proprietà,* in *Trattato Cicu-Messineo*, 1995, 185; P. Barcellona, voce *Proprietà (tutela costituzionale)*, in *Digesto delle discipline privatistiche, sezione civile*, Torino, 1997, 461 - 464; E. Resta, *Pubblico, privato, comune,* in *Tra individuo e collettività. La proprietà nel secolo XXI*, Giuffrè, 2012, 114.

[35] G. Portonera, *Diritto privato e interessi generali. Profili storico-sistematici*, in *Jus civile*, 2023, 1004; U. Mattei & A. Quarta, *supra* note 22, 35

equality, founded on the land concessions made by the Church to families and farmers' communities in the Middle Ages.[36]

Another model of collective property is represented by "*civic uses*", which can be roughly described as the right of the inhabitants of a municipality to enjoy a certain territory, privately or publicly owned. In this model, what truly matters is not the formal ownership of the land, but its concrete use, for the needs of a certain community. Nowadays, the importance of civic uses is recognized also for the preservation of the environment, and these territories cannot be sold or employed against public utility. For instance, the new Italian law nr. 168 of 2017, protects civic uses as "the primary legal order of aboriginal communities".[37] Collective ownership is still widely spread among European Countries, mostly in marginal and rural areas, even if it oftentimes lacks recognition in statutory law. Civic uses, *partecipanza,* are just a few examples, but these collective forms of property are impressively heterogeneous.[38] Their existence shows that there are, and there have always been, "other forms of owning".[39] In these models, it does not generally matter who formally owns the land, but how the land is used, by the present and future members of a community, in an "intergenerational" perspective. Currently, the vivid scholarly debate on *commons* focuses on these issues, and explores forms of collective property, focusing especially on the decision-making, the governance and the distribution of land and other resources.[40]

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[36] P. Grossi, *Il mondo delle terre collettive. Itinerari giuridici tra ieri e domani*, Macerata, 2019, *passim.*

[37] On law nr. 168 of 2017, in the Italian scholarship, see L. A. Vitolo, *Gli usi civici e il decreto di esproprio: un'occasione per ripensare ad un antico istituto guardando al futuro*, in *Giur. it.*, 2024, 808; G. Agrifoglio, *Usi civici e proprietà collettive: da* demanium *a* dominium, in *Giur. it.*, 2023, 2335; F. Marinelli - F. Politi (eds.), *Domini collettivi ed usi civici. Riflessioni sulla legge n. 168 del 2017*, Pisa, 2019.

[38] See also C. Camardi, voce *Zucconi Giovanni,* in M. L. Carlino, G. De Giudici, E. Fabbricatore, E. Mura & M. Sammarco (eds.), *Dizionario bibliografico dei giuristi italiani XII-XX secolo,* il Mulino, 2013, pp. 2095-2097, reporting the work of the Italian scholar Giovanni Zucconi, during the XIX century, on collective property and civic uses in the community of Fiuminata. In that chance, the Author highlighted how that particular form of collective property could be traced back to a communitarian idea of ownership which differs, but goes hand in hand, with its individualistic conception. See also P. Grossi, *La cultura giuridica di Giovanni Zucconi*, in *Quaderni Fiorentini*, 1988, pp. 171-196; and, on this matter, G. VENEZIAN, *Reliquie della proprietà collettiva in Italia*, Camerino, 1888, today in *Opere giuridiche di Giacomo Venezian*, II. *Studi sui diritti reali e sulle trascrizioni, le successioni, la famiglia*, Athenaeum, 1920, 3 ff.

[39] P. Grossi, *supra* note 4.

[40] Commons can be approximately defined as shared resources, used by and for the benefit of a community, and for the interest of future generations, too. They are "the opposite of private property" (S. Rodotà, *Il terribile diritto. Studi sulla proprietà private e i beni comuni*, il Mulino, 2013, *passim*). While, in the past, an economy based on commons had been viewed with skepticism (G. Hardin, *The tragedy of the Commons*, in *Science*, 1968, 1243-1248), the benefits and potentials of the theory of commons were later pointed out by many authoritative scholars. One cannot avoid mentioning the landmark works of Elinor Ostrom (E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge Univ. Press, 1990; E. Ostrom & S. Buck, *The Global Commons: An Introduction*, Island Press, 1998) and Daniel Bromley (D. Bromley, *Making the Commons Work: Theory, Practice and Policy,* ICS Press, 1992). See also M. Heller, *The tragedy of anticommons: a concise introduction and lexicon,* in *Modern Law Rev.*, 2013, 6-25. A vivid debate on commons flourished in the Italian legal scholarship at the beginning of the twenty-first century; see A. Gambaro, *La proprietà. Beni, proprietà, possesso*, Giuffrè, 2017; A. Quarta & M. Spanò (eds.), *Beni comuni 2.0. Contro-egemonie e nuove istituzioni*, Mimesis, 2015; U. Mattei, *Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance*, in *South Atlantic Quarterly,* 2013, 366-376; M. R. Marella (ed.), *supra* note 3; U. Mattei, *Beni comuni: un manifesto,* Laterza, 2011; U. Mattei, E. Reviglio & S. Rodotà (eds.), *Invertire la rotta. Idee per una riforma della proprietà pubblica*, Il Mulino, 2007.

In the light of the constant changes characterizing the evolution of the multi-faceted right to property, the affirmation of its social function in modern constitutional charters seems almost a natural and consequential outcome. The so-called *social function of property* is a concept that has evolved over history, which refers to the idea that exclusionary property should be contempered with the interests of society, according to the principle of solidarity.[41] The 1919 Constitution of the Republic of Weimar thus famously affirms that: "property obliges"[42]. The social function of property was also at the core of the debate preceding the enactment of the Italian civil code of 1942. Yet, back then, the apparent contradictions between *duty* (the social function) and *power* (individual property) emphasized by certain scholars, prevailed, and the social function of property did not find express recognition in the civil code. Nevertheless, the code still provided for an articulated regulation of both the internal and public limits to the right to property, where it may be argued that a certain idea of social function is condensed, even if, at that time, connected to the corporativist framework. Some years later, the social function was finally explicitly mentioned in Article 42 of the Italian Constitution, in a radically different context, and with another meaning, linked to the pluralistic society represented in the Italian constitutional charter[43]. The social function was later acknowledged in Article 33 of the Spanish Constitution, too.

As far as supranational Charters are concerned, the European Charter of Fundamental Rights (ECFR) considers property as a fundamental right,[44] in line with other national European Constitutions.[45] However, the Charter's provisions need to be interpreted in a

[41] See S. Foster & D. Bonilla, *The social function of property: a comparative law perspective,* in *Fordham Law Review*, 2011, 101-113. The social function of property has started to be theorized in the French legal system, with the work of Léon Duguit. It is the result of a long process of transformation of society and the role of the law in and for it. See T. Boccon-Gibod, *Duguit, et après? Droit, propriété et rapports sociaux*, in *Revue internationale de droit économique*, 2014, 285-300.

[42] Article 153, Constitution of the republic of Weimar: "Property shall be guaranteed by the constitution. Its nature and limits shall be prescribed by law. Expropriation shall take place only for the general good and only on the basis of law. It shall be accompanied by payment of just compensation unless otherwise provided by national law. In case of dispute over the amount of compensation recourse to the courts shall be permitted, unless otherwise provided by national law. Expropriation by the Reich against the states, municipalities, and associations serving the public welfare may take place only upon compensation. Property obliges. Its use by its owner shall serve the public good."

[43] On the social function of property in the Italian civil code, see U. Natoli, *La proprietà. Appunti delle lezioni, I*, 2 ed., Giuffrè, 1976, pp. 178-180. On Article 42 of the Italian Constitution, see P. Barcellona, *supra* note 34, 457; P. Barcellona, *Diritto privato e processo economico*, Jovene, 1973, pp. 196-208. This relevance placed on the public interest extends to Article 44 of the Italian Constitution, too, where productivity is said to be balanced with public utility. See also, on the matter, A. Candian – U. Mattei – A. Gambaro, *The law of property in Italy,* in A. Pizzorusso (ed.), *Italian Studies in Law*, Vol. 1, Dordrecht, 1992, pp. 119-159; and with specific reference to land law, A. Candian*, Land Law,* pp. 151-157.

[44] On Article 17 ECFR, see P. Grossi, *L'ultima carta dei diritti (lo storico del diritto e la carta di Nizza),* in G. Vettori (ed.), *Carta europea e diritti dei privati*, CEDAM, 2002 and A. Candian, *Riflessioni sull'articolo 17 della Carta di Nizza,* in *Scritti in memoria di Giovanni Cattaneo, vol. 1,* Giuffrè, 2002.

[45] Property is classified as a fundamental right by the Constitutions of Austria (Article 5, Fundamental Law of December 21, 1867, recalled by Article 149), Finland (Section 15), Sweden (Article 18), Denmark (Article 73), Czech Republic (Article 11), Estonia (Article 32), Latvia (Article 105), Slovenia (Articles 33-67-69), Slovakia (Article 20), Malta (Article 37), Cyprus (Article 23), Romania (Article 44), Bulgaria (Article 17), Lithuania (Article 23), Hungary (Article 13), Ireland (Article 43); the United Kingdom (Article 1, First Additional Protocol of the Human Rights Act). On the different constitutional conceptions of the right to property in Europe, see A. Viglianisi Ferraro, *Il diritto di proprietà e la sua "funzione sociale" nell'ordinamento giuridico italiano ed in quello europeo*, in *Rivista italiana di diritto pubblico comunitario*, 2016, 519-540.

coherent and systematic manner, as they do not affirm property as an absolute right. It is indeed generally acknowledged in the interpretation of the Charter that property ought to be limited for the public interest, as attested, for example, by the endorsed disciplines on urban constraints, expropriation, or the rise of new forms of property, such as fiduciary property.[46]

All in all, in European Constitutions and supranational Charters, property law provisions attempt to balance economic, social and personal instances. At the same time, in European legal systems, collective and individualistic forms of property coexist with each other, even though the relevance of the former is not always fully acknowledged by the law. This applies also to non-material forms of property. Nowadays, in the digital economy, we are witnessing the rise of a new "digital mutualism", which calls for establishing new forms of democratic "data governance", where personal and non-personal data are treated not as goods to be owned and traded, but as commons, to be used for the social good.[47] There is also a shared call for a conception of copyright law more attuned to the needs of society, able to ensure equal access to healthcare, food, and essential goods, such as energy, electricity, and even the internet. Today, in European legal systems there is a tension between the need to valorize solidarity through property, and the neoliberal economic model, which tends to privatize resources and prioritize market's needs.

III. Property, lands and multiculturalism in the Brazilian Constitution

As some of the above-mentioned considerations have summarized, colonization involved the dispossession of native communities from their traditional lands.[48] The Indigenous were confined in the hinterland, where most of them are still based today.[49] Even after Latin American States achieved their independence, the cohabitation between Indigenous peoples and those of colonial lineage has been far from easy.[50] Nevertheless, thanks also to the geographical isolation of the territories where part of these populations lives, they have managed to survive, and some of the areas where they live still maintain a certain degree of preservation and biodiversity.[51]

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[46] On fiduciary property, see M. Graziadei, *La proprietà fiduciaria, la proprietà nell'interesse altrui, e i trust. Un itinerario,* in *Trusts e attività fiduciarie,* 2022, 26-47; U. M. Morello, *Tipicità e* numerus clausus *dei diritti reali,* in A. Gambaro & U. M. Morello (eds.), *Trattato dei diritti reali,* Giuffrè, 2008, 67; A. Gambaro, voce *Trust,* in *Digesto discipline privatistiche – Sez. Civ.,* UTET giuridica, 1999, 449-469. Moreover, the Charter has to be interpreted in accordance with the case law of the European Court of Human Rights on Article 1 of the European additional protocol to the European Charter of Human Rights (ECHR) on the peaceful enjoyment of possessions.

[47] The concept of "data governance" is employed by the new legal act of the European Union, Regulation (EU) 2022/868, the so-called *Data Governance Act*, which is founded on the idea of sharing personal and non-personal data for the common good of society, with the appropriate safeguards to fundamental rights of the individuals.

[48] Dispossession is the territorial expropriation of Indigenous peoples from the lands that founded their livelihoods and societies (R. Nichols, *Theft is Property! Dispossession and Critical Theory*, Duke Univ. Press, 2020, 5-9).

[49] C. Marés de Souza Filho, *I popoli indigeni e il diritto brasiliano*, in S. Lanni (ed.), *I diritti dei popoli indigeni in America Latina,* Edizioni Scientifiche Italiane, 2017, 178-179.

[50] E. Allen, *Brazil: Indians and the new constitution*, in *Third World Quarterly,* 1989, 151.

[51] A. Mensi, *I popoli indigeni e le development-based evictions, il diritto alle terre come un diritto culturale*, in *Politica del diritto*, 2016, 191.

In the nineteenth century, when Latin American Countries became independent, there was a rapid escalation of various Indigenous organizations and groups, vindicating their collective rights towards the newly born South and Central American States. At the top of those rights was the right to possess and inhabit their "traditionally occupied lands"[52], essential to the survival of these communities. These fights are still not over, because of the generous mineral and natural resources contained in Indigenous soil, which makes it very attractive to other farmers and corporations. As anticipated above, ancestral lands are central on many levels for the Indigenous. They are essential for their own survival, through hunting and farming, and contribute in defining Aboriginal identities. The conservation of the land ensures the right to life; in the Aboriginal conception, the earth is not just a legal object, but it is an entity, representing the past, the present, and the future of the community. For Indigenous groups, the relationship with the land has cultural significance: it affects their collective identities and it shapes the organization of their groups and the structure of their society. The practices, beliefs, observations, that are transmitted in Indigenous communities from generation to generation, addressed as "traditional knowledge", go hand in hand with the relation between humans and their lands.[53]

As far as Brazil is concerned, an important step in the formal acknowledgment of Indigenous rights was the creation of the Indian Protection Service, in 1910. The Indian Protection Service was the first federal agency devoted to the protection of Indigenous peoples, replaced in 1967 by the FUNAI, the agency that, today, is still in charge of the implementation of Indigenous politics.[54]

After independence, various constitutional texts added specific provisions related to Indigenous peoples,[55] who were addressed as *Indios* in the Brazilian Constitution.[56] However, these documents were more prone to pursue the cultural assimilation of the *Indios* rather than acknowledging their existence as a distinct community, neglecting aspects of their self-determination and autonomy.[57] For a long time, the approach adopted

[52] This expression (in Portuguese, *terras tradicionalmente ocupadas*) is generally employed in International covenants, in the Brazilian Constitution and in the "Statute of *Indio*" (Law nr. 6001/1973). The "traditionally occupied" lands are essential for the customs and traditions of Indigenous populations (S. Barbosa, *Legal regime for a mosaic of differences: 25th anniversary of UNDRIP - experiences in Brazil,* in *Legal history insights*, 27.10.2022, available at: https://legalhistoryinsights.com/legal-regime-for-a-mosaic-of-differences-25th-anniversary-of-undrip-experiences-in-brazil/, accessed 22-12-2023).

[53] See R. C Ryser, *Indigenous People and Traditional Knowledge,* Berkshire Publishing Company, 2011. See also the definition provided for by the UN Permanent Forum of Indigenous Issues, available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/04/Traditional-Knowledge-backgrounder-FINAL.pdf, accessed 13-02-2024.

[54] E. Allen, *supra* note 50.

[55] Indigenous rights are generally included in Latin American Constitutions. A different and peculiar case of a Constitution of a State of Indigenous peoples is the Cherokee Constitution, established in 1827 (see B. Aryal, *Constitutional Rethoric: The Genre Performances of the Written Constitution in Transnational, Transcultural Contexts*, in *Graduate Theses, Dissertations, and Problem Reports*, 2018, especially 66, 2015).

[56] For the sake of this paper, the term *indios* is employed only when used in the Constitution and in black letter law. Indeed, the term "Indian" is a legacy of the colonial usurpation. On the use of language to define the Aboriginals and for a critique of the term "Indians" for this scope, see Wub-e-ke-niew, *supra* note 19, especially 34-35.

[57] M. Neves - J. T. Hottinger (eds.), *Federalism, rule of law and multiculturalism in Brazil,* Helbing & Lichtenhahn, 2001, 3; C. Marés de Souza Filho, *supra* note 49, 169-171.

by Latin American States towards Aboriginals was an integrationist one: the Indigenous needed to be "civilized" and integrated in the new State. They were forced to become a part of it, even when against their will, and when that would have meant losing their traditions and identity[58].

It was only with the 1988 Brazilian constitutional document that the Indigenous were no longer portrayed as a minority whose diversity needed to be cancelled, but as an autonomous, distinctive population.[59] In this sense, the Constitution was a turning point.[60] The Charter, still in force today, not only made Brazil a social democracy and federal state, but is considered revolutionary in the whole Latin America, as far as Indigenous rights are concerned.[61]

While the Constitution of 1946 already mentioned the opportunity of using the law of property "for the collective good" (Article 147), and the reform of 1967 introduced the "social function of property" (Article 160)[62], only in 1988 the social function of property was explicitly embraced as a political objective, and one Chapter was exclusively devoted to Indigenous peoples, focusing on their relationship with their "traditionally occupied lands" (Title VIII "The social order", Chapter VIII "Indigenous Peoples", Articles 231-232)[63].

In a nutshell, the Constitution now recognizes the existence of both collective and individual rights (Title II, Chapter I), qualifies property as a fundamental right, entrusted with a social function (Article 5)[64], and assigns a preeminent place to the possession of

58 On colonization as "assimilation" and "integration" of the Aboriginals, see, in general terms, G. Gozzi, *Eredità coloniale e costruzione dell'Europa. Una questione irrisolta: il 'rimosso' della coscienza europea,* il Mulino, 2021 and P. Costa, in *Quaderni fiorentini,* LI, 2022, 398.

59 S. Lanni, *supra* note 20, 159-161.

60 It paved the way to other constitutional documents recognizing Indigenous rights; for example, the Colombian and the Bolivian ones, adopted in 1992 and 2009 respectively (see C. Marés de Souza Filho, *supra* note 49, 173-175).

61 M. Neves & J. T. Hottinger (eds.), *supra* note 57, 6-8.

62 M. G. Losano, *Il controllo della terra, la riforma agraria e i movimenti sociali in Brasile*, in *Fra individuo e collettività. La proprietà nel secolo XXI*, Giuffrè, 2012, 139-141.

63 M. G. Losano, *supra* note 62, 147. For instance, the decision to devote one chapter to Indigenous *peoples* (not populations, groups, or minorities) is meaningful, as it acknowledges the difference between the Indigenous and the rest of the Brazilian society, minorities included (G. Ulfstein, *Indigenous Peoples' Right to Land*, in *Max Planck Yearbook of United Nations Law*, 2004, 12). Moreover, international documents, such as the International Convenant on civil and political rights, relate to *peoples* rights like self-determination and those over lands and resources.

64 G. Marini, *La costruzione delle tradizioni giuridiche ed il diritto latinoamericano*, in *Rivista critica del diritto privato,* 2011, p. 174; A. Somma, *Il diritto latino americano tra svolta a sinistra e persistenza dei modelli neoliberali*, in *Diritto pubblico comparato ed europeo*, 2018, 57-80. See art. 5, Brazilian Constitution: "[…] the right of property is guaranteed; property shall fulfill its social function; the law shall establish the procedure for expropriation for public necessity or use, or for social interest, with fair and previous pecuniary compensation, except for the cases provided in this Constitution; in case of imminent public danger, the competent authority may make use of private property, provided that, in case of damage, subsequent compensation is ensured to the owner; the small rural property, as defined by law, provided that it is exploited by the family, shall not be subject to attachment for the payment of debts incurred by reason of its productive activities, and the law shall establish the means to finance its development […]". Art. 186 of the Brazilian Constitution specifies when property law, specifically rural property, fulfils its social function: "The social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements: I. rational and adequate use; II. adequate use of available natural resources and

ancestral lands in the pursuit of Indigenous interests (Article 231). As it will be analyzed further in greater detail, the Constitution qualifies Indigenous ancestral territories as property of the Union, but attributes to the *Indios* the perennial possession of their lands, and powers corresponding to the usufruct of their resources.[65]

Thus, the Brazilian Constitution considers property as a fundamental right, which can be lawfully limited for the public interest (which includes the protection of minorities and communities). At the same time, it employs the property law scheme for valorizing the pluralistic and multi-ethnic nature of Brazilian society, entitling the Indigenous with property-related powers over their lands. The Indigenous community was actively involved in the process of shaping the eighth Chapter of the Constitution. Even if the Constituent assembly was formed within the National Congress, organizations and groups of representatives of Indigenous peoples represented and advocated for their rights.[66] Perhaps, the property law scheme was intended for favoring communication between the Indigenous and the rest of the members of the Brazilian State, as an institution potentially able to embrace both the European and the Indigenous cultural heritages.

Article 20 of the Constitution proclaims that the Federal Union of Brazil is entitled to the property of the rivers, the lakes and the lands "traditionally occupied by *Indios*". Chapter VIII states that the Union should respect and protect them; it follows by establishing that Aboriginal people shall have "the permanent possession and exclusive usufruct of the riches of the soil, the river and the lakes of their traditional lands"[67]. Article 231 further defines as "traditionally occupied" those lands "on which they (*the Indigenous*) live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their wellbeing and for their physical and cultural reproduction, according to their habits, customs and traditions".

The task of individuating which lands are "traditionally occupied" according to the Constitution is attributed to the FUNAI. The demarcation procedure involves an investigation on the nature of the land and its use, and must be carried on consulting Indigenous communities through all its stages.[68] Third parties, including state governments, municipalities and commercial actors, whose interests are impacted by the demarcation procedure, can present their opinions and challenge it, and this has often led to judicial trials.[69]

The regime of the collective model of property entailed in the Brazilian Constitution with respect to Indigenous ancestral territories is the following. Aboriginal lands are owned by the State, as Article 20 of the Constitution clearly affirms, but the rights of Indigenous peoples, in fact, fairly exceed and overcome the attributes and features of the usufruct,

preservation of the environment; III. compliance with the provisions that regulate labor relations; IV. exploitation that favors the well-being of the owners and laborers."

[65] In civil law systems, usufruct is a property right which grants the holder the right to use and enjoy a thing of the owner, and to benefit from its fruits (S. Van Erp & B. Akkermans (eds.), *supra* note 33, 253).

[66] C. Paixão, *Il potere delle rovine: pluralismo politico, dispute sul tempo e futuro della costituzione nel Brasile contemporaneo*, in P. Cappellini & G. Gazzetta (eds.), *Pluralismo giuridico. Itinerari contemporanei, atti dell'incontro di studi, Firenze, 20-21 ottobre 2022,* Giuffrè, 2023, 95.

[67] Article 231, Brazilian Constitution.

[68] As provided for by decree nr. 1775 of 8 January 1996, on the administrative procedure for individuating Indigenous lands (see *Sections 4* and *5* in greater detail).

[69] Article 2, para. 8; art. 9, decree nr. 1775 of 8 January 1996.

laid down in general civil law provisions.[70] The provisions of the Constitution concerning Indigenous ancestral lands derogate from the Civil Code rules on property rights. In fact, on a general level, the Brazilian civil code defines the usufruct (*usofruto*) as the right to the possession, use and administration of movable or immovable assets or estates, and their fruits (Article 1.390; Article 1.394).[71] It sets down that the usufruct can be extinguished by the death of the usufructuary and by change of the economic destination of the asset or the estate, and obliges the usufructuary to transmit to the owner the civil fruits of the administered goods (Articles 1.390-1.411). These limitations do not apply to Indigenous lands.[72] While the civil code does not deal with Indigenous law (*derecho indígena*),[73] the "Statute of *Indio*" (Law nr. 6001/1973) prescribes that "*Indios*" are entitled to all the resources generated by their lands;[74] that their rights cannot be restricted by any legal or governmental act; that they can engage in any agricultural or extractive activity, including activities such as fishing, hunting or harvesting fruits, in their territory.[75] Moreover, Indigenous lands are inalienable, their rights non-transferable, and not subject to the statute of limitations (art. 231, Brazilian Constitution).

Therefore, the Brazilian Constitution, when dealing with property law, seems to create a distinction between Indigenous peoples and the rest of the Brazilians. In fact, the Brazilian State is composed of non-Indigenous, minorities, different ethnical groups, and Indigenous communities. Hence, the general terms and rules about ownership provided for by the Brazilian civil code, such as usufruct or possession, that apply in private transactions, do not have the same meaning when referred to the Indigenous and their lands protected by the Constitution. Different rules apply to different peoples, for preserving their diversity. This happens also, for example, in the Bolivian Constitution, where Bolivia is defined as a Nation composed of all Bolivians, Indigenous peoples included (Article 3, Bolivian Constitution).

Indigenous lands, therefore, on paper, could be compared more to commons, rather to objects of possession or usufruct strictly speaking. As far as commons are concerned, the

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[70] V. M. Lauriola, *Terre indigene, beni comuni, pluralismo giuridico e sostenibilità in Brasile*, in *Rivista critica del diritto privato*, 2011, 425-458.

[71] The Brazilian civil code defines property (*propriedad*) in Article 1.228. The Article describes property as: "the subjective right over a thing, consisting in the possession, use, enjoyment and disposal of corporal or incorporal goods, and the right to claim it against those who unlawfully acquire that thing" ("*El derecho real subjetivo a poseer, usar, disfrutar y hacer uso de bienes corporals o incorpóreos, como reclamar a aquellos que poseen o poseen incorrectamente*") and possession in Article 1.196, as: "the behavior of someone who acts as the owner of a certain good, corresponding to the evident exercise, full or partial, of some of the powers of property" ("*Considera-se possuidor todo aquele que tem de fato o exercício, pleno ou não, de algum dos poderes inerentes à propriedade*"). The Brazilian civil code bears important resemblance with the German model of the BGB (T. Ascarelli, *Osservazioni di diritto comparato privato italo-brasiliano*, in *Foro italiano,* 1947, 98). Perhaps, the German ascendancy also contributes to keep the Brazilian system more open to the collective dimension of property (G. Marini, *supra* note 64, 178; M. R. Marella, *Introduzione*, in M. R. Marella, *supra* note 3, 13). On the specifics of the Latin American civil law system, see S. Lanni, voce *Sistema giuridico latinoamericano*, in *Digesto delle discipline privatistiche, Sezione Civile,* Aggiornamento, UTET, 2016, 711-755.

[72] G. Marini, *supra* note 64, 173; see A. Llunku & A. Yala, *Constituyencia indigena y código ladino por América*, Madrid, 2000.

[73] S. Lanni, *Sistema giuridico latinoamericano e diritti dei popoli indigeni*, in S. Lanni (ed.), *supra* note 49, 42.

[74] Article 2, L. nr. 6001/1973.

[75] Articles 17-18, L. nr. 6001/1973.

focus is not anymore on who owns a certain object, but rather on the common governance, access and preservation of a given good; hence why the commons have also been considered the opposite of private property. The fact that the Brazilian State formally owns the traditionally occupied land is not relevant *per se* for its use; these lands are, indeed, administered by the Indigenous, which have full access to their resources. At the same time, the Aboriginals preserve their territories, for the community and for its future generations. Thus, the situation of Indigenous traditionally occupied lands can perhaps be described as *collective possession,* a special relationship of the community with their land, ultimately aimed at preserving harmony between humans and nature: the *buen vivir*, which overcomes both the idea of accumulation by dispossession and the merely individualistic and exclusive relationship with the territory.[76]

The fact that the Constitution prescribes that the Federal Union preserves property over Indigenous lands involves that it can take advantage of their mineral and hydric resources, in certain, specific situations. This can be the case only when prescribed by law and when there is a relevant public interest, after having heard the involved communities. At the same time, "Indians" can be removed from their territory only by order of the National Congress, after a referendum, in cases representing a risk to their survival, or that put "the sovereignty of the Union" in danger.[77] More importantly, however, the fact that the State retains the ownership of the lands and that the Indigenous are entitled to their "usufruct and permanent possession" leads to the result that, when a land is demarcated and recognized as ancestral, it then becomes inalienable. This means that the rights of the Indigenous, which are natural and original, prevail over the economic interests of corporations and entrepreneurs, as well as of the non-Indigenous members of the civic society interested in these lands. The State acts a sort of "trustee", for the benefit of the general public and future generations[78].

Nonetheless, the choice to make the lands property of the State shows a protectionist approach toward Indigenous communities.[79] The fact that the Indigenous cannot freely dispose of their ancestral territories might be questionable and regarded paternalistic. Indeed, it could be argued that it should be up to Indigenous populations to change their traditions and their ties to the land freely. This would also include their right to sell those lands to other members of the civil society or corporations. This approach may as well favor Indigenous communities who are composed of hunters and gatherers, rather than those formed mostly by farmers and agrarian groups, who might benefit more from a

[76] See A. Acosta, *Le buen vivir. Pour imaginer d'autres mondes*, transl. by M. Barailles, Les Édition Utopia, 2014, 21-61.

[77] Article 231, para. 3 and 4, Brazilian Constitution. The other acts of disposal undertaken by the Federal Union are void.

[78] G. Resta, *supra* note 18, 250.

[79] In other Latin American States, Indigenous are directly entitled to the ownership of their lands: for example, Article 13 of the Chilean *Ley Indigena* states that communities are the owners of their traditional lands. Other Constitutions recognizing Indigenous' rights to their lands variably are the Constitution of Peru (Article 89), Guatemala (Articles 67-69), Argentina (Article75) and Ecuador (Article 57). In the latter, Chapter VII defines Nature as the holder of "the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes".

formal entitlement to their lands.[80] Moreover, attributing full property over their territories might have an empowering effect, even on a symbolic level.

However, if we regard the dignity of these populations as an utmost value, and conceive the Brazilian State as a grantor of pluralism, entitling the State to the property of Indigenous lands ensures that Aboriginals, as a potentially vulnerable group, are protected against the interests of corporations and commercial actors. In certain cases, there might also be a tension between the safeguard of Indigenous traditions and the preservation of nature; it is not always the case that Indigenous communities would actually protect their lands. Assigning to the State a crucial part in protecting Indigenous lands is a way to safeguard the Natives' identities and their cultural attributes. After all, this logic is also employed in other international charters and Constitutions that, for instance, forbid the selling of human body parts, in the name of dignity.[81] It is also remarkable that this result is pursued through a special use of property law.

This interpretation of the constitutional provision on Indigenous lands reflects the concept of "*indigenato*": a theory affirming that Aboriginals' rights over their lands are natural rights, which the Brazilian State has not established, but *recognized* in the Constitution, and safeguarded and guaranteed, since they are inherent to Indigenous populations, ancestral, and precede the creation of the state itself.[82]

Finally, it is interesting to witness a parallel process between the acknowledgment of Indigenous rights and the recognition of peasants' rights in Brazil, including former slaves. While the Indigenous were fighting for recognition of their rights over their lands, at the same time the Country was involved in important agrarian reforms. The *Movimento Sem Terra* (hereinafter: MST) a social and political movement embracing catholic values, was in charge of bringing to light the needs of the peasants and the poorest in society, as opposed to big landowners. This led to the adoption of the so-called *Land law,* L. nr. 601/1850, which today is still in force, though it failed to grasp the real social concerns that these social movements wanted to point out. Furthermore, the fights of peasants also embraced a sacred conception of the land, related to the relationship of Indigenous groups with their territories.[83] The struggles of the Indigenous, and those of the peasants and

[80] These groups have, indeed, a different relation with the lands and the forest. On this distinction, L. L. Wiersma, *Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims,* in *Duke Law Journal,* 2005, 1067.

[81] Specifically on human dignity see, among many, G. Resta, *Human Dignity*, in *McGill Law Journal*, 2020, 85-89; L. R. Barroso, *Here, There and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse,* in *Boston College International and Comparative Law Review,* 2012, 331-393; D. Beyleveld & R. Brownsword, *Human Dignity, Human Rights, and Human Genetics,* in *The Modern Law Review*, 1998, 661-680.

[82] The concept of *indigenato* goes back to the colonization period and it was used to address the sources of law that recognized the rights of Indians over their lands (D. Sartori Jr. & C. A. Vestena, *Land, Violence, and Identity in front of the Brazilian Supreme Court*, in *Verfassunblog*, 2023, available at: https://verfassungsblog.de/indigenous-rights-and-the-marco-temporal/, 2). Behind this theory there was originally an integrationist logic, as recalled also by philosophers such as Macaulay and Mill (see J. S. Mill, *Considerations on Representative Government*, Harper & Brothers, 1862, especially 249).

[83] M. G. Losano, *supra* note 62, 145. The agrarian reforms mostly concentrated land ownership to the State, expropriating peasants and farmers from their land without any due process. See also, on this matter, B. P. Reydon, V. B. Fernandes & T. S. Telles, *Land tenure in Brazil: the question of regulation and governance*, in *Land Use Policy*, 2015, 509-516.

other minorities, are not parallel lines that did not meet. In fact, the interests of the peasants and of the Indigenous sometimes converge, and other times are in conflict with each other.

IV. PLURALISM IN POST-COLONIAL SOCIETIES

In Brazil, the constitutional acknowledgment of Indigenous rights over their territories has been possible thanks to important social movements, happening not only at a local,[84] but also at an international level. Indeed, during the twentieth century, many organizations advocating for Indigenous rights gained progressive autonomy and importance,[85] battling for the adoption of significant international documents. Probably, the most important ones are Convention 169 of the International Labour Organization (ILO) on the protection and integration of Indigenous and other tribal and semi-tribal populations in independent countries, the UN Declaration on the Rights of Indigenous peoples (UNDRIP), the American Declaration of the right of Indigenous people, the Vienna Declaration for the elimination of racism and the Convention on biodiversity. Other historical gatherings and meetings happening during that period are worth mentioning. These include the United Nations Conference on Environment and Development (UNCED), in 1992, where the Indigenous were recognized as groups to be consulted for achieving a global sustainable growth.[86]

These movements differently pointed out the importance of the connection of native communities with their lands. Convention 169 mentions the "collective" relationship between the Indigenous and their lands (Articles 13 - 14).[87] As far as the UNDRIP is concerned, Article 10 lays down the right of Indigenous peoples not to be forcibly removed from their traditional lands and territories; Article 26 clarifies their right to use, develop and control these territories; and Article 25 acknowledges their spiritual connection to those lands.[88] Lastly, even though the American Convention of Human Rights does not explicitly acknowledge the rights of Native populations, the Inter-American Court of Human Rights, established within its framework, has embraced a notion of "communal property", as a collective interest that the Indigenous can claim over their traditional territories.[89]

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[84] S. Lanni, *supra* note 73, 42.

[85] R. C. Ryser, *Indigenous Nations and Modern States: The Political Emergence of Nations Challenging State Power,* Routledge, 2012, 193.

[86] G. Ulfstein, *supra* note 63, 11-32. Moreover, from 1982, the ECOSOC established the Working Group on Indigenous Populations.

[87] This applies not only to traditionally occupied lands, but also to lands "not exclusively occupied, but to which the Indigenous have traditionally had access for their subsistence and traditional activities" (G. Ulfstein, *supra* note 63, 22).

[88] R. C. Ryser, *supra* note 85.

[89] The Inter-American Court of Human Rights elaborated on the notion of common and collective property in the ruling *Mayagna, (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, C Nr. 79. in 2001 and in *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005 C. Nr. 125. The Court referred to Article 21 of the Convention, which establishes that: "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. Usury and any other form of exploitation of man by man shall be prohibited by law." Other pivotal rulings are *Saramaka People v. Suriname*, November 28, 2007, C Nr. 172, and *Kichwa Indigenous People of Sarayaku v. Ecuador,* June 27, 2012, C Nr. 245. Both deal with

Some scholars have maintained that these international charters have gradually formed the principles of Indigenous law;[90] thus, they should be taken into account as elements guiding the interpretation of the Constitutions and secondary legal provisions on Indigenous rights, when examining the Brazilian and the Ibero-American legal systems.

Indigenous rights to their ancestral lands are now formally acknowledged in almost all Latin American Constitutions.[91] Almost all of them dedicate some space to the Natives' rights to land, self-determination, autonomy, education, identity, language, which can be summarized in the term "Indigenous cultural rights". Aboriginal lands and territories are explicitly mentioned in the Constitutions of Brazil, Argentina, Bolivia, Colombia, Ecuador, Chile, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela.

In fact, every Latin American Country has experienced a history of colonization, land grabbing, independence, and the rising of Indigenous claims, thus they share some similarities. For instance, a general trend has been the use of private law (including the rules on property and land tenure) during early times of independence as a tool to strengthen the newly born State. Throughout the first phase of decolonization, this initially led to a rejection of the pluralism in Latin American Countries, adopting an integrationist logic towards Indigenous groups.[92] Later on, during the twentieth century, Ibero-American States started to abandon the integrationist logic, at least on paper, in favor of greater awareness of legal pluralism and plurinationality.[93]

The Constitutions which date back further in time, like the Guatemalan, the Nicaraguan, and even the Brazilian one, do not go as far as explicitly recognizing Indigenous law as an autonomous legal order. Conversely, others, such as the Mexican Constitution, take a clearer stand in stating the pluralistic composition of the Nation (Article 2). For instance, the Constitution of Paraguay highlights the existence of Aboriginal norms, besides national ones (Article 63), and the Bolivian Constitution stresses the autonomy of Indigenous customary law.

The Constitution of Bolivia was actually quite revolutionary in this respect. Revised in 2009, the Constitution takes an explicit stand in favor of plurinationality. To be more precise, it defines Bolivia as a "unitary social state of plurinational communitarian law" (Article 1) and a society built on decolonization (Article 9). It links land, and its collective ownership, with culture; it ensures that the Indigenous are duly represented in the judiciary, the executive and the legislative branches, and on a central and on a municipal level; it advocates for the creation of "Indigenous autonomies" in ancestral territories, to

the relationship between land preservation, Indigenous rights and the protection of the environment. The latter is particularly interesting as the Court dwelled on the definition of "communal property", when holding liable the State of Ecuador for violating the rights of the Sarayaku people. Specifically, they had failed to consult the Sarayaku when allowing an oil company to carry out exploration activities in their territories. On the case law of the Inter-American Court see, amongst many, V. E. Olivares Alanis, *Indigenous peoples' rights and the extractive industry: jurisprudence from the Inter-American System of human rights*, in *Goettingen Journal of international Law*, 2013.

90 S. Lanni, *supra* note 20, 169.

91 C. Mares de Souza Filho, *supra* note 49, 174-175.

92 R. Míguez Núñez, *Indigenous Costumary Law in a Civil Law Context*, in *Journal of the Max Planck Institute for European Legal History*, 2016, 306.

93 See T. Herzog, *Latin American Legal Pluralism: The Old and The New*, in *Quaderni fiorentini,* L, 2021, 705-736.

be administered and geared by the Natives (Article 290). Eventually, it protects the forest and biodiversity, devoting a whole Chapter solely to Amazonia and its relationship with Indigenous rights, while another Chapter is dedicated to legal issues related to land and the integrity of Indigenous territories.[94]

The Ecuadorian Constitution makes use of the principle of good living (*buen vivir*) for promoting coexistence between different peoples and populations. As far as ancestral lands are concerned, it recognizes the right of the Indigenous communities to maintain the "possession" of their lands. Additionally, after the constitutional reform of 2008, Ecuador has established Nature and the ecosystem as subjects of rights. Thus, Ecuador welcomes the Aboriginal concept of land as a living entity, also on a legal point of view.[95] This scheme has been quite effective to protect nature, especially through strategic litigation.[96] In fact, individuals, communities, and even nationalities can take legal action on behalf of *Pachamama,* before public institutions or courts.[97]

The Colombian Supreme Court has stated in favor of the rights of nature as well, specifically with reference to the Atrato river, described as a legal subject having the right to be preserved, conserved, maintained and restored when damaged.[98] At the same time, the Colombian Constitution adopts the property law scheme for guaranteeing Indigenous rights over their territories. It declares Indigenous lands as inalienable property of the communities, assigning directly to the Aboriginals the task to protect their territorial interests.[99]

Finally, the recent Chilean proposal for a constitutional reform, which unfortunately did not secure approval, was aimed at affirming Indigenous cultural rights, which currently lack recognition in the constitutional document of the Pacific Rim Country. Indigenous

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[94] See Chapter VIII, devoted to Amazonia; Chapter IX, entitled to "Land", especially Article 403, Bolivian Constitution. The latter describes the rules governing Indigenous ancestral lands, stating that the State establishes the procedure for the recognition of these territories. The Indigenous have the exclusive exploitation of the resources of the land and the right to enjoy it, to be consulted and informed when natural resources in their territories are administered by the State, according to the law, and to participate from the eventual profits, to apply their own norms, to set their structures of representation, and to live according to their own cultural criteria and principles of harmonious coexistence with nature.

[95] L. Cuocolo, *Dallo Stato liberale allo "Stato ambientale". La protezione dell'ambiente nel diritto costituzionale comparato*, in *DPCE online,* 2022, pp. 1074-1075. See Articles 71-72-73-74, Ecuadorian Constitution. Some important cases raised using the constitutional provisions of the right of nature are, amongst others, Ecuador Constitutional Court, Case no. 1149-19-JP/21, *Bosque Protector Los Cedros* and also Case no. 253/20-JH/22, *Mona Estrellita,* the latter attributing legal subjectivity to wildlife. Another Latin American Constitution mentioning the right to environmental protection as a general interest, but also as a subjective right, and linking it to the right of nature scheme, is the Cuban Constitution (L. Cuocolo, *La Costituzione cubana del 2019, in bilico tra tradizione e innovazione*, in *DPCE Online*, 2020, p. 464).

[96] However, it has been pointed out that attributing rights to the nature, using the human rights scheme, could potentially lead to the opposite outcome, as fundamental rights are naturally anthropocentric and framed for humans. On this matter see C. M. Kauffman, *How Ecuador's Courts Are Giving Form and Force to Rights of Nature Norms*, in *Transnational Environmental Law,* Cambridge University Press, 2023, 366-395.

[97] See U. Biemann & P. Tavares, *Forest Law - Foresta Giuridica*, Nottetempo, 2020, 82-83.

[98] Corte Constitucional de Colombia, sentencia T-622/2016 of November 10, 2016; in line with this ruling, and with reference to the Amazon forest, see also Corte Suprema de Colombia, sentencia STC 4360-2018 of April 5, 2018.

[99] Article 329, Colombian Constitution. The Indigenous have "collective property" over their lands, which are inalienable and perpetual. The "Institutional Act of Territorial Planning" lays down the rules for delimiting ancestral territories. The demarcation procedure is geared by the government, together with the representatives of the Indigenous communities, according to the law.

claims are historically noteworthy in Chile; the Country is the motherland of the Mapuche people, one of the biggest Indigenous populations which has resisted to Spanish colonizers. The Mapuche conflict with the Chilean State has exploded also on the issue of land grabbing.[100] The recent Chilean proposals for a constitutional reform of 2022 was meant to shape Chile as a plurinational state, in the footsteps of Ecuador and Bolivia, attributing self-determination and autonomy to peoples like the Mapuche. When the constitutional reform failed, a new, less ambitious proposal was filed in 2023; however, this latter proposal was later withdrawn, leaving Indigenous groups still without clear protection in the Chilean Constitution.[101]

All these Latin American Countries have something in common in the relationship between Indigenous and non-Indigenous peoples, and a key point is the connection with the land. The Indigenous conceive land as center of resources, invested of a spiritual value, to be used for the communal good, and for the benefit of future generations; ownership of the land is envisaged as the open sharing of supplies and the spiritual foundation of a community, of its history and its past, as well as its projection towards the future.[102] This conception is undoubtedly different from the exclusionary and individualistic idea of property law which is present also in the general civil law framework of most post-colonial societies. Dealing with the relationship between Indigenous customary law and the general civil law systems of Latin American States is challenging,[103] but these differences can also be used as a springboard for a change and development of the concept of property in land in collective terms, for the general interest of society as a whole, and for a more eco-centric approach to legal issues.

Of course, there are other ways to deal with the relationship between the Natives' titles to land and the neo-liberal conception of property in land, coexisting in pluralistic societies. For instance, it can also be useful to look at the solutions elaborated in North America, New Zealand and Australia.[104] The United States and Canada, as well as Australia and New Zealand, are Countries of the northern hemisphere where the Natives have been brutally dispossessed of their lands during times of colonization and which have been the site of important confrontations between Indigenous and non-Indigenous populations.[105]

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[100] For an account of the history of the Mapuche people, see R. Míguez Núñez, *supra* note 92, 308-310; extensively, on the implications of the agrarian reforms on the Mapuche people and their rights to their ancestral lands, M. Correa, R. Molina & N. Yáñez, *La reforma agraria y las terras mapuches. Chile 1962-1975*, LOM Historia, 2005; in general, J. Bengoa, *Historia del pueblo mapuche*, Ediciones SUR, 2000.

[101] On this matter, see the two proposals for a constitutional reform in Chile, *Consejo Constitucional de Chile, Propuesta Constitución Política de la República de Chile,* 2023; *Convención Constitucional de Chile, Propuesta Constitución Política de la República de Chile,* 2022.

[102] R. Míguez Núñez, *supra* note 92, 303.

[103] Extensively, see R. Míguez Núñez, *Terra di scontri. Alterazioni e rivendicazioni del diritto alla terra nelle Ande centrali,* in *Biblioteca - vol. 97, Quaderni fiorentini per la storia del pensiero giuridico moderno,* 2013, especially 242-250; 380-400.

[104] For interesting remarks in a comparative perspective about these legal systems, see G. Resta, *Il problema della rinunzia alla proprietà immobiliare nella prospettiva del diritto comparato,* in *Rivista di diritto civile*, 2024, 287-290.

[105] The relevant literature is extremely wide, and it is impossible to be recalled in its integrity it in this paper. See, amongst others, J. Cassidy, *The Stolen Generations – Canada And Australia: The Legacy of Assimilation,* in *Deakin Law Review,* 2006, 132-177; J. R. Saul, *The Roots of Canadian Law in Canada,* in *McGill Law Journal*, 2009, 671-694; S. Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, in *Law & History Review*,

In Canada, the Supreme Court has gone as far as to affirm the existence of an autonomous Indigenous legal system, with its own rules and specifics.[106] Aboriginal rights, recognized in Section 35 of the Constitutional Act, impose precise limitations to the power of the State, and Natives' lands are inalienable.[107]

In New Zealand and Australia, Indigenous rights to their ancestral territories are not mentioned explicitly in the Constitution. In New Zealand, the rights of the Aboriginal are recognized in the legal system primarily through the Treaty of Waitangi, which has been then implemented in secondary law. Furthermore, New Zealand's statutory law treats nature as a legal entity; for instance, the Te Urewera national park, or the Te Awa Tupua river, are both ancestral territories to the Indigenous communities and recognized as legal subjects by written law.[108] In Australia, conversely, the Supreme Court, in the famous *Mabo II case* has rejected the construction according to which Australian lands where *terrae nullius* before the colonization, recognizing the inalienability of Natives' lands and their rights to their own laws and customs, now implemented in statutory norms.[109]

Nowadays, the attention on Indigenous rights and fights happening all over the world has grown bigger with the increasing concern of the international community towards climate change. Indeed, the lifestyle of these populations is naturally respectful towards the environment, and helps to preserve it. Indigenous lifestyle is close to the idea of ecology, intended as the interconnection between diverse living systems.[110] Thus, valorizing the rights of the Indigenous has been a way of protecting the environment, too.[111] Oftentimes, the Indigenous are also the ones suffering the most from the consequences of deforestation and climate change, as these affect their traditional ways of living.

V. THE STATE OF THE ART: THE DEMARCATION OF INDIGENOUS ANCESTRAL TERRITORIES IN BRAZIL

According to the data collected by the *Instituto Brasileiro de Geografia e Estatistica* (IBGE), around 1.693.535 Indigenous peoples lived in Brazil in 2022, and half of them in the

2005, 95-131; E.A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*, Durham, NC, 2002;

[106] In Canada, Aboriginal rights are deemed to be acknowledged by Section 35 of the Canadian Constitution. In an important, yet extremely controversial ruling, *R. v. Van der Peet*, 1996, 2 SCR, the Court has affirmed the inalienability of Indigenous lands, but that the Indigenous had to show continuity in their lands' possession to enjoy this special safeguarding (similarly to the Brazilian rule of *marco temporal*). The Supreme Court, in *Delgamuukw v. British Columbia*, 1997, 3 scr 1010, with reference to natives' titles to land, has affirmed the coexistence of aboriginal titles to land with general civil law ones, and specified that customary rules of evidence can be used for proving the ancestral status and the continuity in the possession of Indigenous territories. Other important rulings in defining Aboriginal rights have been *Mitchell v. Minister of National Revenue,* 2001, 1 SCR 911, and *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 144.

[107] The landmark case where this has been made specific is *R. v. Sparrow*, 1990, 1 SCR 1075.

[108] R. Míguez Núñez, *Soggettivizzare la natura?,* in *The Cardozo Electronic Law Bulletin*, 2019, 4-5. On the same issue, in a different perspective, see M. W. Monterossi, *L'orizzonte intergenerazionale del diritto civile. Tutele, soggettività, azione*, Edizioni ETS, 263-268.

[109] See the case *Mabo v. Queensland, no. II*, 1992 HCA; the case *Wik people v. State of Queensland,* 1996 HCA; and the *Native Title Act* 1993, which officially recognizes Aboriginals' rights over their lands as pre-existing to the Australian State. On this matter, and on the Australian, Canadian, New Zealandese approach towards Natives' cultural rights, see N. McNeil, *Extinguishment of Aboriginal Title in Canada: Treaties, Legislation and Judicial Discretion*, in *Ottawa Law Review*, 2002, 301-346.

[110] J. Boyle, *supra* note 31, 72.

[111] S. Lanni, *supra* note 20, 183.

Amazonas.[112] The brutal exploitation of the Amazon forest and soil has put the right of the Aboriginal populations to exist, their cultural identity, biodiversity and environmental preservation at risk.[113] In this scenario, the territories which can be qualified as "traditionally occupied by the Indigenous" pursuant to the Constitution are those that are demarcated by the FUNAI, as anticipated above. In theory, demarcation should impair the alienability of ancestral lands and prevent corporations and third parties to acquire them. This practice of demarcation of Indigenous territories was meant to be concluded over seven years after 1988; nevertheless, the demarcation is still ongoing.[114]
Currently, over 1000 territories are claimed as traditional, but only 725 are going under a demarcation process, and many of them are occupied by non-Indigenous.[115] Some of these lands have been transformed into "natural reserves", which means that the Indigenous are guaranteed the sources of living and subsistence, but the Federal State still intervenes in their administration.[116] Furthermore, immediately after the enactment of the Constitution, the State continued to pass decrees and laws aimed at dispossessing the Indigenous of their existing rights over their lands. Another practice employed by the FUNAI, which has had the effect of isolating the Indigenous from one another and impaired their lifestyle, was delimiting Indigenous lands in a series of smaller, discontinuous areas, in order to make the areas in between exploitable by "non-Indians".[117] The "Statute of *Indio*" and the decree of the President of the Republic regulating the demarcation of Indigenous lands, decree nr. 1175/1996, were severely criticized as being insufficient to implement the provisions of the Constitution. In general, the years following the enactment of the Constitution have been characterized by agrarian reforms which have caused the further displacement of communities. The Indigenous still suffer from violent dispossession from their territories by land grabbers, agribusiness, and corporations engaging in mining activities; their relationship with the lands and the forest, where most of them live, is threatened by illegal aggressions and economic activities, including, in certain cases, disruptive tourism.[118]

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[112] The data is available at https://agenciadenoticias.ibge.gov.br/en/agencia-news/2184-news-agency/news/37575-brazil-has-1-7-million-indigenous-persons-and-more-than-half-of-them-live-in-the-legal-amazon, accessed 23-12-2023.
[113] S. Lanni, *supra* note 20, 183-184.
[114] E. Allen, *supra* note 50, 155-156. The procedure is established in decree nr. 1775 of 8 January 1996, and it involves the hearing of stakeholders and Indigenous communities, as well as anthropological investigations to enquire when and if a land can be defined traditional. Currently, the most populated Indigenous land already demarcated by the FUNAI is the Yanamans land. Since the demarcation procedure is complicated and long, many lands are only temporarily protected by the FUNAI; this is the case, for instance, of the Piripkura, an isolated tribe, whose land was put at risk recently because the temporary order of the FUNAI was about to expire.
[115] See D. Sartori & C. A. Vestena, *supra* note 82.
[116] See the policy report by S. Paixao, J.P. Hespanha, T. Ghawana, A. F. T. Carneiro & J. Zevenbergen, *Modelling Brazilian Indigenous Tribes Land Rights with ISO 19152 LADM,* 2013, 143, available at: https://fig.net/resources/proceedings/2013/2013_ladm/11.pdf accessed 15-01-2024. Of course, Indigenous can also acquire, as every Brazilian citizen, full property over a land which is not traditional, with a valid civil law title.
[117] E. Allen, *supra* note 50, 160.
[118] Even if not directly related to Brazil, this is for instance the case in the territory of Machu Picchu, the famous temple which is also UNESCO World Cultural Heritage. The temple corresponds to a territory

Even if the Constitution formally proclaims the inviolability of the rights of Indigenous peoples over their lands, these provisions are, in practice, quite ineffective.[119] At the same time, the contemporary political situation in Brazil does not seem promising for a constitutional reform (one involving, for example, the abandonment of the property construct in favor of an approached based on legal subjectivity of nature or on human rights); recent years have seen an increase of racial discrimination, the rise of populism, a disregard of the Brazilian environmental richness and, lastly, after the elections, even the attempt of a *coup d'état*. Currently, the National Congress' majority is mostly conservative and faithful to the former President Jair Bolsonaro, as opposed to the elected president Luìs Lula da Silva, which does not seem to be promising for a constitutional reform in favor of Indigenous rights.[120]

The Constitution attributes standing to sue whoever fails to respect the provisions on Indigenous rights to the FUNAI, the public prosecutor and each member of the Indigenous communities.[121] Thus, recent years have seen a rise in the use of strategic litigation for asserting Aboriginal rights over their lands.[122] The latest example is the most recent ruling of the Supreme Court on this matter. Nevertheless, the STF's efforts risk being thwarted if legal statutes do not follow accordingly, as it is shown by the new law on the demarcation of Indigenous traditional lands, approved in December.[123]

VI. RETHINKING PROPERTY AND ENHANCING COMMUNITIES: THE IBIRAMA- LA KLÃNÕ CASE AND THE "*MARCO TEMPORAL*" RULE

The FUNAI has recently brought the issue of Indigenous rights over their lands to the Supreme Court, in the case stemming from RE nr. 1.017.365. The agency has opposed the

historically inhabited by the Indigenous, and of great importance for their cultural and personal identities, whose ownership was also object of judicial controversies, touching upon the interrelations between cultural heritage and property (on which, see J. Velásquez Peláez, *Patrimonio cultural: de la propriedad a la metapropriedad. Tres ensayos a propósito del Santurario de Machupicchu,* Quisakuro editores, 2019, 52-58; and, in general, L. Anguita Villanueva, *El derecho de propiedad privada en los bienes de interés cultural,* Dykinson, 2005).

[119] C. Marés de Souza Filho, *supra* note 26, 158. S. Baldin - S. De Vido, S*trumenti di gestione della diversità culturale dei popoli indigeni in America Latina: note sull'interculturalità*, in *DPCE Online*, 2019, 1307. The consequences of the disregard of Indigenous rights, and the violence perpetrated against them even after the Constitution entered into force, are attested by the Nambiquara case, a tribe who was moved from their traditional territories to one of the poorest regions of the Country; or the Panarà case, a tribe who was dislocated into a national park and forced to coexist with another tribe of traditional enemies. The latter were compensated and then returned to their territories, by the Tribunal Regional Federal da Primera Regiao, AC 1988.01.00.028425-3/DR, *Rel. Juiz Saulo José Casali Bahia (conv) Terceira Turma*, 03/11/2000. Furthermore, a report by the Indigenist Missionary Council attested that violence against Indigenous peoples increased dramatically after 2019 (Conselho Indigenista Misionario - CIMI, Report: Violence against Indigenous Peoples in Brazil, 2020 data, available at: https://cimi.org.br/wp-content/uploads/2022/01/report-violence-against-the-indigenous-peoples-in-brazil_2020-cimi.pdf) and so the invasions of their lands (Conselho Indigenista Misionario - CIMI, Relatorío: Violencia Contra os Povos Indígenas no Brasil, 2021 data, available at: https://cimi.org.br/wp-content/uploads/2022/08/relatorio-violencia-povos-indigenas-2021-cimi.pdf).

[120] On the current Brazilian constitutional order, see C. Paixão, *supra* note 63, 108-111.

[121] Articles 129-232 (prescribing that the Prosecution Office shall also be notified when an action for the rights of Indigenous peoples is started).

[122] A. Pellegrini Grinover*, La difesa degli interessi transindividuali: Brasile e Iberoamerica*, in L. Lanfranchi (ed.), *La tutela giurisdizionale degli interessi collettivi e diffusi*, Giappichelli, 2003, 159-160; Article 234, Brazilian Constitution.

[123] L. nr. 14701/2023.

possessory action started by the Santa Caterina Environmental Agency (*Istituto do Meio Ambiente,* hereinafter: IMA) against the Xokleng population, an Indigenous tribe, for the release of the territory of Ibirama-La Klãnõ. The latter was deemed by the Indigenous group to be part of their traditionally occupied lands[124]. However, the IMA contested the qualification of those lands as traditionally occupied, because the Indigenous had not complied with the *marco temporal* rule.

The rule of the "temporal landmark" was introduced in the case *Raposa Serra do Sol*, decided in 2009 by the STF, through petition R.R. nr. 3388[125]. In the judgment, the STF recognized the legitimacy of the demarcation procedure led by the FUNAI which qualified as traditional the territory of Raposa Serra do Sol, in Roraima. The justices elaborated on nineteen criteria aimed at verifying whether the Indigenous occupation of that territory was ancestral or not. In conducting this enquiry, the Supreme Court highlighted that the presence of the Indigenous in a certain territory at the date when the Constitution entered into force, namely October 5, 1988, shows that the lands they claimed are ancestral (if the other criteria laid down by the constitutional charter are fulfilled, and if the FUNAI so establishes).

This case, however, was not meant to have general repercussions, meaning that it was not meant to become a binding precedent or a general rule. The "nineteen criteria" were valid only for the land in question. Furthermore, the *marco temporal* rule was formulated by the STF to defend the Indigenous' claims. Nevertheless, during the same years when the decision on the case *Raposa Serra do Sol* was pending, the Parliament promoted and presented a bill on the demarcation procedure, encapsulating and generalizing the *marco temporal* rule (bill 290/2007). The proposed law suggested that *only* the territories that on the day of the enactment of the constitution were under material or juridical possession of Indigenous groups could classify as traditional. Occupation or possession of the land needed to be shown by the presence of the Indigenous therein, the existence of a physical conflict, or the proposition of a judicial action in court.[126]

This interpretation of the *marco temporal* was then supported against Indigenous claims; as many Indigenous peoples were actually evicted from their territories in 1988, not all of them could show the possession of their lands on that date. Interestingly, the rule of *marco temporal* from a shield became a sword against the Indigenous, which started to be adopted

[124] The STF declared the proceeding as having "general repercussions": this means that the rules established in this case should be applied in future similar matters and embraced by the law (as provided for by Article 102 of the Brazilian Constitution).

[125] The thesis of *marco temporal* was elaborated in the plenary judgment of the STF in case nr. 3388/2009, *Raposa Serra do Sol*. On this matter, see E. Peluso Neder Meyer & L. de Souza Prates, *The Constitutional Interpretation of the Demarcation of Indigenous Lands in the Brazilian Federal Supreme Court: Time Framework vs. Indigeneity Theory*, in *Questione Giustizia*, 2024, 1-8; L. Massarenti Hosoya, C. Antonio Brighenti & O. de Oliveira, *Território indígena brasileiro e sua relação com as teses do indigenato,* in *TEKOA*, 2023, 1-21; S. Rodrigues Barbosa & M. Carneiro da Cunha, *Direitos dos povos indígenas em disputa*, Unesp, 2018; E. Ferreira de Carvalho, *La colisión entre el derecho colectivo de los pueblos indígenas a las tierras ocupadas tradicionalmente y el derecho a la propiedad privada en el ordenamiento jurídico brasileño: el caso Raposa Serra do Sol*, in *APEA*, 2013, 134-148.

[126] The Indigenous should therefore demonstrate that, if they were not in the possession of the territory, they had suffered from permanent dispossession from it and contrasting it actively; this is also known as "*renitente esbulho*" ("permanent dispossession").

in various demarcation procedures.[127] The 2007 bill was subsequently reshaped into bill 2903/2023, which has recently culminated into a statute, whose approval was accelerated precisely to obstacle the decision in the Ibirama - La Klãnõ case, as it will be analyzed shortly. Moreover, the former President of the Country, Michel Temer, in 2017, approved an opinion of the Attorney General of Brazil establishing guidelines on the demarcation procedure, imposing to the FUNAI to apply the *marco temporal* rule[128].

If understood this way, the *marco temporal* is an undue limit on Indigenous rights. First and foremost, in 1988, the Indigenous did not even have full legal capacity, as they were under the custodianship of the FUNAI. Consequently, legal actions for reclaiming their land rights were still very limited. Moreover, it is quite unrealistic to pretend that the Indigenous would legally demonstrate their entitlement and tenure on a certain territory through general civil law rules, since their forms of relation with the land do not follow those formal entitlements. Even more when uncontacted tribes are involved; in that case, it would be particularly hard, if not impossible, to prove their presence on a certain territory in 1988. Furthermore, many Aboriginal peoples who suffered from land grabbing were also prevented from reacting to it for a very long time. Moreover, in many cases, they never truly abandoned that territory, even though they did not actively engage in a conflict. In the case at stake, the Xokleng people were evicted by the small farmers that had acquired the Ibirama territory from the State of Santa Catarina. However, they had never truly left the land, but continued to wander around it. Even in the case *Raposa Serra do Sol,* recalled by the supporters of the *marco temporal,* there was not a permanent conflict, but Indigenous resistance against the occupiers of their lands. This did not diminish and, in the end, sovereignty was granted over their territory.

Furthermore, and most importantly, the temporal landmark rule, if generalized, contradicts the Constitution, degenerating in considering Indigenous rights valid only from the enactment of the Constitutional Charter onwards. This would go against the spirit of the Constitution itself, which declares that the rights of the Aboriginal peoples over their lands are natural, original and ancestral;[129] and it would also go against the values of a legal system that claims to recognize and protect the inalienable, fundamental rights of individuals.

The STF, in its ruling in the case Ibirama-La Klãnõ, clarified that demarcation has only declarative value, which is to acknowledge pre-existing rights over a certain land. It affirmed that the demarcation made by the FUNAI, following the procedures laid down in statutory law, ascertains if a territory is ancestral, "ancestrality" being a situation of a durable, spiritual and profound tie between the Indigenous and their lands. The STF also established that, if Indigenous peoples did not occupy a certain land in 1988, because they were expelled from that land unjustly, thus dispossessed, but had kept vindicating the area (for instance, wandering, making small incursions, trying to come back), the ancestral nature of the land should not be denied. The Court further clarified that when a certain

[127] For instance in the cases of the lands of Limão Verde, Buritim, Guirarokà (E. Peluso Neder Meyer & L. de Souza Prates, *supra* note 121, 4).

[128] Opinion 001/2017, AGU, available at: https://www.planalto.gov.br/ccivil_03/AGU/PRC-GMF-05-2017.htm accessed 12-02-2024.

[129] C. Marés de Souza Filho, *supra* note 26, 180-181; 184.

state legitimately transferred to third parties a land later claimed as Indigenous, when the third party was in good faith and possesses a valid civil law title, they have the right to receive compensation when expelled from the land, or at least to reach a compromise with the Aboriginal communities. Contrarily, Indigenous interests always and fully prevail over those of land grabbers.[130] Therefore, the outcome of the ruling valorizes both the social function of property, qualifying Aboriginal rights as public interest, and the peculiar nature of Indigenous possession, which is ancestral, inalienable and imprescriptible.

Nevertheless, on the day the ruling of the STF was released, the Parliament approved a new statute on the demarcation of Indigenous lands, l. nr. 14701/2023, precisely with the aim to oppose the decision undertaken by the judiciary.[131] Despite the veto expressed by the Brazilian Prime Minister over the statute, this statute not only codifies the rule of *marco temporal* in the most restrictive way, but it provides for greater limitations of the powers of the Indigenous over their lands. It also prohibits the extension of already demarcated lands, unduly limiting the FUNAI's action. Since it also applies to the ongoing demarcation procedures, the statute could even lead to a loss of the lands which are about to be recognized.[132]

The new statute is likely to be regarded as unconstitutional by the STF, if brought to its attention, as some Indigenous organizations have already anticipated that they intend to do.[133] Additionally, according to supranational charters, such as the above-mentioned American Convention on Human Rights, the Brazilian State has an obligation to refrain from adopting statutes that contradict the rights and principles laid down in the Convention, such as the ancestral and original nature of the rights of the Indigenous over their lands.[134]

Overall, this whole matter is emblematic of how property in land is an extremely sensitive and political issue; the *marco temporal* has become the occasion for the Congress, namely the legislative branch, to challenge the judiciary and the President, and the playground has

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130 Thus, confuting the argument of the justices who voted in favor of *marco temporal* for legal certainty. In fact, individuals who have a legitimate title are entitled to compensation. However, the rights of the Indigenous are still superior over the private property titles that other Brazilians might have, as also affirmed by the STF, in the case M.S. 21575, *Mato Grosso do Sul,* 3 February 1994. On the conflicts between the titles of third parties in good faith and Indigenous peoples, see M. Marciante, *Tutela dei diritti dei popoli indigeni nel sistema CADU: note a margine della sentenza Pueblo indígena Xucuru*, in *DPCE on line*, 2018, 3, with reference to the case *Xucuru Indigenous People and its members v. Brazil,* 5 February 2018, C. nr. 346, decided by the Inter-American Court, where the prevalence of Indigenous rights in ancestral lands over those of the general society in Brazil was remarked.

131 The law stems from bill nr. 490/2007, then bill nr. 2903/2023.

132 See Articles 4, 9, 13, 22-23, l. nr. 14701/2023. Moreover, the statute justifies the installation of military bases, units, and posts, as well as other military interventions, the expansion of the road network, the implementation of strategic energy centrals, and the protection of strategic assets in Indigenous territories without the need of consulting the involved Indigenous communities, nor the FUNAI; the superiority of national security and defense interests over Indigenous needs; and the possibility for the public authorities to interfere with the administration of Indigenous territories for the sake of building roads, transportation routes, and the constructions and the equipment necessary for implementing public services, related to the health and education sector.

133 The Articulation of Indigenous People in Brazil (APIB) has already announced that it will appeal the new statute. See https://apiboficial.org/marco-temporal/?lang=en, accessed 14-02-2024.

134 M. Marciante, *supra* note 130, 4-5.

been the recognition of Indigenous rights. The above-described facts show that, even if Indigenous rights over their lands are constitutionally acknowledged on paper, Indigenous claims still struggle to be effectively implemented in practice. The property law scheme can be a winning one, but constitutional provisions are not enough if they are not accompanied by proper rules regarding demarcation and land registration.

Probably, the most rewarding technique to ensure the respect of the constitutional norms could be to lay down a comprehensive legal framework for Indigenous law, with all its peculiarities and special features. An harmonization of Indigenous law, aimed at, amongst other things, protecting their traditional knowledge, openly establishing the superiority of Indigenous interests over those of third parties, including corporations and land grabbers, clarifying the relationship of the constitutional provisions regarding Indigenous rights on their lands with the general private law rules on property, possession, usufruct and transactions, would probably be a stronger safeguard of the rights of these communities, and could help interpreting the Constitution, which is, by nature, an open and general text. Constitutional principles, such as the originality of Indigenous rights, can and should be applied directly, but technical and procedural matters, such as the demarcation procedure, or land registration, need statutory implementation.

There is still an "implementation gap"[135] between constitutional norms and practice, which should be filled with secondary law and regulation. Cultural recognition of Indigenous groups is essential for stability and peace; and this necessarily implies a more stable protection of Aboriginal lands. While the role of the judiciary in strategic litigation has been fundamental, judicial activism should be followed by the other State powers, especially the legislative branch.

VII. CONCLUDING REMARKS

The case against *marco temporal* is only one of the many fights that Indigenous communities have led during the current and the past centuries.[136] In fact, the values proclaimed by the Brazilian Constitution (human dignity, social justice, equality and solidarity, the expression of "Indian and Afro-Brazilian cultures, as well as those of other groups", ethnic and regional diversity)[137], and the empowerment of Indigenous communities, still strive for effectiveness.

What is certain though, is that the Constitution identifies Brazil as a multiethnic and diverse State. Recognizing full usufruct and possession to the Indigenous over their lands, while leaving the property to the State, can work if Indigenous groups are favored as vulnerable subjects, whose dignity is ensured, without indulging in a paternalist approach. It is commendable, though, when interpreted as leaving Indigenous communities without full protection against State laws, such as l. nr. 14701/2023.

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[135] As pointed out by the UN General Rapporteur Stavenhagen in 2007, available at https://www.ohchr.org/en/statements/2009/10/special-rapporteur-human-rights-indigenous-people-presents-annual-report-human, accessed 14-02-2024.

[136] See the case *Marques, Mallmann and Cia. Ltda v. Irena Mello da Silva, José Claudemir Andrade, and others,* decided in 1988 by the Court of Appeal of Porto Alegre (cited by A. Ciervo, *Ya basta! Il concetto di comune nelle costituzioni latinoamericane*, in M. R. Marella (ed.), *supra* note 3, 134).

[137] Articles 1, 3, 215, 231, Brazilian Constitution.

Nowadays, South American Constitutions acknowledge the rights of Indigenous peoples and their connection to "Mother Earth" (*Pachamama*). However, constitutional texts alone are not sufficient. The principles laid down in the Constitution must be acted on, through legal acts; hence the argument for the necessity to lay down a comprehensive *derecho indígena*, suitable to the native Latin American communities.[138]

What emerged from the analysis of the relationship of Indigenous peoples with their lands is a conception of land ownership as a common bond between members of a certain community, and as a vehicle for the promotion and protection of human and fundamental rights. Indigenous peoples' struggles for their land are global challenges, as they impact on the preservation of territories, such as the Amazon forest, that are crucial for the survival of the environment. In a State, like Brazil, where very different cultural heritages coexist, legal norms should be framed to reflect this multicultural richness. The apparent contradictory stratification of European legal institutions and Indigenous traditions should not baffle lawyers. On the contrary, the ambivalences and internal frictions should be respected and valorized, and overarching interests, such as the one in preserving minorities and safeguarding the environment, be emphasized.[139]

In this framework, the right to property, if conceived in an inclusive and collective way, can act as a means of communication between the different social groups and populations composing the state and, most importantly, a driving force for empowering Indigenous communities and safeguarding their rights.[140]

To conclude, this paper has tried to unravel, with many simplifications, how the institution of property, if conceived as an inclusive, pluralistic, multi-ethnic right promoting the interests of future generations and the respect of all the living entities (in a word, shaped by dignity), can empower communities at a crossroads of different cultures. Bringing effectiveness to the relationship between the Indigenous and their lands is a matter of preserving a certain tradition and ensuring the survival of a population. Since Constitutions are pivotal in "constituting" a society, thus offering the foundations for social relations in a polity,[141] they should be framed to recognize this need. Implementing legal acts and policies should follow accordingly. Since under the proclaimed neutrality of the law there are conflicting interests, inequalities, and social contradictions,[142] it is up to lawyers to unveil them, and then act on them, with the instruments we have.

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[138] S. Lanni, *supra* note 73, 87.

[139] L. Salaymeh & R. Michaels, *supra* note 7, 172.

[140] As observed by Audra Simpson: "if Indigenous peoples ironically are to protect their lands and their people from further encroachment and expropriation (a protective measure) they might have recourse to the very instrument that has been used to take their lands and authorize their disenfranchisement and misery: law. Law is to protect them in the present; yet their sovereignty, granted by law, threatens the very exercise of that sovereignty." (A. Simpson, *Under the Sign of Sovereignty: Certainty, Ambivalence, and Law in Native North America and Indigenous Australia*, in *Wicazo Sa Review*, 2010, 108).

[141] G. J. Jacobsohn, *Constitutional Identity*, Harvard Univ. Press, 2010, 8, referring to Book III of Aristotle's *Politcs*.

[142] C. Camardi, *L'uso alternativo del diritto fra teoria e prassi,* in *Jus civile*, 2023, 975.

LATE PAYMENTS IN THE CONSTRUCTION INDUSTRY: COMPARATIVE LAW AND POLICY APPROACH IN THE UAE

*Andrea Stazi**

TABLE OF CONTENT:

In the construction industry, payment practices vary considerably across the globe, often influenced by legal frameworks, cultural norms, and industry maturity. However, in general, late payments represent a significant challenge, particularly affecting subcontractors and suppliers, especially SMEs. Pay-when-paid clauses can transfer payment risk down the supply chain. Dispute resolution can be costly and time-consuming. Thus, in comparative law, various regulatory approaches have been adopted to address the issue. The UAE has seen a rapid growth in its construction industry over the past few decades, with numerous high-rise buildings, infrastructure projects, and mega developments transforming the landscape of the country. Such growth has given rise to the need for effective rules and policy tools to ensure that all parties involved in construction projects are protected and paid in a timely manner.

Keywords: construction industry – payment practices – late payments – comparative law – regulatory approach

I. CONSTRUCTION INDUSTRY AND PAYMENT PRACTICES

In the construction industry, business expenses are incurred and often must be paid before payments are received for work conducted. Cash flows out of a contracting or subcontracting business for wages and materials quicker than the time it takes for cash to flow in. Wages must be paid weekly or biweekly, and materials are typically purchased on 30-day invoice terms[1].

Payment practices in construction vary considerably across the globe, often influenced by legal frameworks, cultural norms, and industry maturity.

Developed economies, such as the USA, EU and UK, generally have more formalized payment mechanisms, with legal protections for prompt payment, adjudication processes and standardized payment terms. Other strengths are the increasing adoption of digital payment systems and Building Information Modeling for transparent project management.

However, late payments still remain a significant challenge, particularly affecting subcontractors and suppliers, especially SMEs. Pay-when-paid clauses can transfer payment risk down the supply chain. Dispute resolution can be costly and time-consuming.

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[1] Rabbet, 2023 Construction Payments Report, available at https://info.rabbet.com/2023ConstructionPaymentsReport.html#:~:text=Rabbet's%20game%2Dchanging%202023%20Construction,number%20for%20all%20players%20involved, p. 7.

In the United States, in 2023 an estimated 72% of subcontractors reported they waited longer than 30 days to receive payment. This number has spiked significantly from previous 49% in 2022 and 50% in 2021[2].

General contractors are not immune from the impacts of slow payments and also see value in expediting payments for subcontractors. In the US, 67% of general contractors incurred financing costs while floating payments to subcontractors, a slight change from 62% in 2022, 63% in 2021, and 65% in 2020[3].

In the European Union, the economy and especially the construction sector have long been afflicted by late payment. Construction companies and especially SMEs have experienced impacts ranging from loss of income, bankruptcies, limited ability to invest in their growth and hire new employees[4].

In 2023, 57% of EU construction companies accepted longer payment terms than they are comfortable with, to preserve their client and customer relationships. 39% of SMEs said they would be more likely to request longer payment terms from suppliers or pay an invoice later than agreed, compared to 35% of large businesses. 53 per cent of businesses admitted they would accept longer payments from large companies, but just 38% said they would accept that from SMEs[5].

In developing economies, for example India and Southeast Asia, on one hand, the strengths are the growing infrastructure investment and construction activity, and emerging digital payment platforms and mobile banking solutions.

On the other hand, these regions often face greater challenges with payment delays, due to factors such as lack of standardized payment terms and contract enforcement, informal payment practices and reliance on cash transactions, limited access to financing and credit for smaller players and power imbalances between large contractors and SMEs, corruption and bribery risks.

In the Middle East, and in particular in the UAE, the strengths are the robust growth and dynamism of the construction industry, the strong government support for infrastructure development and mega-projects, the increasing adoption of new technologies like Building Information Modeling and digital payment systems, and recent legal reforms to protect SME contractors and ensure timely payments.

The weaknesses are traditional payment practices that often involve longer payment cycles and reliance on post-dated cheques, power imbalances between large contractors and smaller subcontractors, and dispute resolution processes that can be lengthy and complex. However, there is a growing recognition of the need for modernization.

One of the main challenges faced by contractors, subcontractors and suppliers in the UAE is late payments. Delays in payments can have a significant impact on such businesses' cash flow, making it difficult for them to meet their financial obligations and continue

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[2] Subcontractors are drawing down their reserve capital by using business savings and personal savings more in the last year. The use of business savings to float payments increased by 52% and the use of personal savings spiked by 105%. Reliance on retirement savings more than doubled from last year. See: Rabbet, 2023 Construction Payments Report, cit., p. 7-8.

[3] In 2023, 67% of general contractors relied on their personal savings. It is noteworthy that there was close to a 68% increase from 2022 to 2023 in the reliance on business savings. See again: Rabbet, 2023 Construction Payments Report, cit., p. 7-9.

[4] European Construction Section Observatory, Indicators on late payment in the construction sector, August 2021, available at https://single-market-economy.ec.europa.eu/sectors/construction/observatory/analytical-reports_en, p. 5.

[5] See: Intrum, "Don't do as I do" – a third of European businesses practice late payment hypocrisy, 6.7.2023, available at https://www.intrum.com/press/press-releases/press-release-article/?id=EA03B75D405D8BC6#Dont_do_as_I_do__a_third_of_European_businesses_practice_late_payment_hypocrisy.

operating efficiently. Late payments can also lead to disputes between parties involved in a construction project, which can further delay payments and disrupt the project timeline. Another challenge faced by contractors, subcontractors and suppliers is the lack of transparency in payment processes. Not having clear visibility into when they can expect to receive payments for their work, can make it difficult for them to plan their finances and allocate resources effectively.
Furthermore, contractors, subcontractors and suppliers may also face challenges in enforcing payment terms and recovering unpaid invoices. The legal process for recovering unpaid debts can be time-consuming and costly, which can further strain such businesses' finances. This can be particularly challenging for smaller operators who may not have the resources to pursue legal action against non-paying clients[6].

II. Late Payments: Reasons, Impact and Comparative Law

Looking at the reasons for late payments, 50% of EU businesses blame late payments on poor routines, admin and processes, claiming that processes are not strong enough to support financial sustainability despite economic uncertainty[7].
Businesses across Europe are spending more than a quarter of the working year, 74 working days, chasing late payments. The time spent chasing late payments by European businesses costs the European economy 275 billion euros[8]. 1/2 invoices are not paid on time, and 1/4 bankruptcies are due to invoices not being paid on time[9].
While the issue of late payment is more and more relevant, still limited comparable, consistent and regular data are available. To address this gap, the European Commission developed the EU Payment Observatory, to monitor the situation of late payment in the EU economy and provide data to support policy making[10].
The number of businesses making use of the rights to compensation for late payment provided by the EU Late Payment Directive[11] is growing. The regulation entitles businesses to charge interest when customers pay late, as well as to seek 40 euros in compensation for recovery costs for each invoice paid late. While businesses are concerned about confronting their clients and customers with demands, 47 per cent of respondents in 2023 say they sometimes or always enforce their LPD rights, up from 42 per cent in 2022[12].
However, to have more effective legislation, various stakeholders have deemed it appropriate to strengthen it[13]. Thus, the European institutions have proposed a stronger

[6] See: H. Zakaria, Understanding the UAE's Construction Industry Payment Security Legislation, 14.4.2024, available at https://hzlegal.ae/understanding-the-uaes-construction-industry-payment-security-legislation, p. 7-8.
[7] See again: Intrum, "Don't do as I do" – a third of European businesses practice late payment hypocrisy, cit.
[8] Intrum, European Payment Report 2023, available at intrum.com/epr2023, p. 19-20.
[9] Factsheet of the Late Payment Regulation, 12.9.2023, available at https://single-market-economy.ec.europa.eu/publications/late-payment-regulation-factsheet_en, p. 1.
[10] The Observatory monitors trends and developments on payment performance and behavior in commercial transactions in the EU. It collects, analyses and disseminates data and provides a repository of relevant initiatives and policy documents. Further information is available at: https://single-market-economy.ec.europa.eu/smes/sme-strategy/late-payment-directive/eu-payment-observatory_en.
[11] Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast). Text with EEA relevance, OJ L 48, 23.2.2011. Hereafter also "LPD".
[12] See: Intrum, European Payment Report 2023, cit., p. 22.
[13] For example, 55% of companies think there should be an increase to the 40 euros minimum compensation for recovery costs and/or to the interest rate charged on late payments, currently set as the European Central

legal instrument, a Regulation on combating late payment in commercial transactions[14], which is directly applicable in Member States after its entry into force[15] and provides:

- A mandatory maximum payment term of 30 days;
- Compulsory payment of interest that shall accrue until payment of the debt;
- Enforcement and redress measures to protect creditors against bad payers, with Member States to set up enforcement authorities to monitor and ensure the application of the rules;
- Increasing credit management and digital financial literacy of SMEs;
- A clear-cut list of unfair practices and contractual terms;
- Alternative Dispute Resolution[16].

In the United Kingdom, the Late Payment of Commercial Debts (Interest) Act 1998 created a statutory framework in the UK for tackling late payment, amended lastly in 2013, when the recast 2011 EU Late Payment Directive was transposed into UK law. Regulations made under sections 3 and 161 of the Small Business, Enterprise and Employment Act 2015, and for limited liability partnerships, made under section 15 and 17 of the Limited Liability Partnerships Act 2000, introduce a duty on the UK's large companies and limited liability partnerships to report on a half-yearly basis on their payment practices, policies and performance.

In April 2022, UK Government published a Statutory Review of the Regulations[17]. The review concluded that the Regulations have brought greater transparency to the payment practices and performance of large businesses, and the policy remains appropriate because there is an ongoing need to ensure greater compliance in terms of prompt payment and to increase awareness of the performance of large businesses in this area.

Following the conclusions of the Statutory Review, in 2023 Government consulted on extending and amending the Regulations. The review of consultation responses concluded that:

- The Regulations will be extended for up to 7 years[18], with a review to take place after 5;
- Qualifying businesses will be required to report the total value of payments due in the reporting period that have not been paid within agreed terms, alongside existing requirements to report on the total volume of payments due;
- The Regulations will include an effective method of reporting the proportion of disputed invoices whilst still including them as late payments in overall payment time data;
- A requirement is introduced that payment performance data must be included in the business's Annual (Director's) Reports[19];

Bank's lending rate, plus eight percentage points. 53% of businesses say they would exercise their rights under the LPD more frequently if the existing rules were reviewed, while 37% believe that increased enforcement from a public body with powers to consider complaints and issue sanctions would make them more likely to exercise their rights under the Directive. See again: Intrum, European Payment Report 2023, cit., p. 23.

[14] Proposal for a Regulation of the European Parliament and of the Council on combating late payment in commercial transactions, COM(2023) 533, 12.9.2023.

[15] Unlike the Directive that must be transposed into national laws before it is applicable in each Member State.

[16] See: Factsheet of the Late Payment Regulation, 12.9.2023, cit., p. 2.

[17] To assess the extent to which the Regulations have achieved their objectives, if those objectives remain relevant, whether the Regulations remain the appropriate vehicle to deliver the policy, and if there have been any unintended effects of the Regulations. See: https://www.legislation.gov.uk/uksi/2017/395/resources.

[18] Beyond their expiry date of 6 April 2024.

[19] This is subject to the outcome of the ongoing Financial Reporting Council review of non-financial reporting.

- Where relevant, reporting must include information on standard retention payment terms and retention payment performance statistics for qualifying construction contracts[20].

In the United States, in 2023 the estimated cost of slow payments has surged to $273 billion, approaching 14% of total construction costs, with a 17% increase in the cost of slow payments in 2023 compared to 2022[21].

The US Federal Prompt Payment Act[22] protects all tiers of contractors, subcontractors, and suppliers from late payments on federally-funded construction projects. It does this, in particular, by providing a timeline of when payments will be released to the prime contractor, subcontractors, and suppliers, respectively.

Prompt payment laws, then, vary across states, with each jurisdiction establishing its own framework to ensure timely compensation in the construction industry. However, in recent years, there has been a discernible shift as state legislatures actively revise these laws to provide stronger protections for claimants, and courts clarify and strengthen claimants' rights to prompt payment.

For example in 2018, Pennsylvania made changes to its Contractor and Subcontractor Payment Act focused on the protection of downstream claimants[23], and the California Supreme Court, deciding on the question whether a contractor may withhold retention payments when there is a good faith dispute of any kind between the contractor and a subcontractor, or only when the dispute relates to the retention itself, narrowly interpreted the good faith dispute provision and held that the "dispute" must relate to the specific payment due[24].

In the Middle East, more than one in four projects - 26.6% - were embroiled in cash flow and payment issues, which rank twice as high - 7th - as a causation factor of claims and disputes than in the rest of the world.

Faster mobilization increases the pressure on cash flow, but contractors are generally in a weak position when negotiating payment terms and seeking remedies for late payments[25].

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[20] UK Department for Business and Trade, Reporting on Payment Practices and Performance Regulations: Final Stage Impact Assessment, February 2024, available at https://www.legislation.gov.uk/uksi/2024/444/impacts, p. 4-5.

[21] 72% of contractors reporting payment delays longer than 30 days in 2023, versus only 49% reporting the same in 2022. Work delays due to payment delays have been reported by 67% of respondents, with 65% of subcontractors resorting to filing liens because of slow payments, that is a 141% increase from 2022. See: Rabbet, 2023 Construction Payments Report, cit., p. 19.

[22] 31 USC Ch. 39: Prompt Payment.

[23] Some of the key changes included: 1) clarifying that the protections of the statute could not be waived by the parties; 2) authorizing contractors and subcontractors to suspend performance in the event of non-payment, following the provision of statutorily required notice; 3) specifying that the failure to provide timely notice - within 14 days of receiving an invoice - containing a good faith basis for withholding waives the payor's right to withhold and requires payment in full; 4) requiring payment for undisputed items in an invoice, even if others are disputed; and 5) allowing a subcontractor or contractor to facilitate the early release of retention by posting a maintenance bond for 120 percent of the retainage held at substantial completion instead of waiting for payment after final acceptance of the work.

[24] United Riggers & Erectors, Inc. v. Coast Iron & Steel Co., 4 Cal. 5th 1082 (2018). See: J. R. Blease, B.J. Morris, Prompt Payment Laws Continue to Trend in Favor of Contractors, 6.12.2023, available at https://www.americanbar.org/groups/construction_industry/publications/under_construction/2023/winter2023/prompt-payment-laws-trend.

[25] CRUX Insight Sixth Annual Report, Forewarned Is Forearmed available at https://www.hka.com/crux-insight-sixth-annual-report-forewarned-is-forearmed, p. 50.

Predominantly, the construction industry emerges as one of the worst culprits. Large-scale projects, intricate supply chains, and multifaceted contractual obligations make it a breeding ground for payment delays[26].

On a positive note, the ongoing transition towards digital payments promises benefits including increased transparency, traceability of transactions, and reduced opportunity for payment delays[27].

To address these challenges, the United Arab Emirates has implemented legislation aimed at improving payment security in the construction industry. One of the key pieces of legislation is the UAE Construction Industry Payment Security Law, which was introduced in 2018. This law aims to regulate payment processes in the construction industry and ensure that contractors, subcontractors and suppliers are paid in a timely manner for their work.

Under the UAE Construction Industry Payment Security Law, parties involved in a construction project are required to adhere to specific payment terms and timelines. For example, contractors or subcontractors are entitled to receive interim payments at regular intervals throughout the project, based on the work completed. This helps to ensure that contractors have a steady cash flow and can meet their financial obligations.

The law also provides mechanisms for resolving payment disputes between parties involved in a construction project. In the event of a dispute, parties can refer the matter to a dispute resolution committee, which will work to resolve the issue in a timely manner[28].

III. CONSTRUCTION PAYMENTS PRACTICE AND REGULATORY APPROACH IN THE UAE

In the United Arab Emirates, the party selects a type of payment depending on the arrangements.

Negotiated price contracts typically involve fixed lump sum payments or measurements, where the work value is determined by a pre-set price schedule or bill of quantities. Prime cost payment is made for the costs of the labor and materials used, while cost plus payment is by prime cost plus an added percentage for profit. The usual payment method is based on the contract administrator's certification of completed work, occurring either periodically or at agreed-upon milestones.

Advance payments and interim payments are also widely used in the UAE construction contract law. For example, in government contracts, as per Circular No. 1 of 2019 from the Abu Dhabi Executive Council, payments should be settled within 30 days from the invoice date. The circular also mandates that undisputed amounts must be paid within 30 days in case of a dispute[29].

The UAE has seen a rapid growth in its construction industry over the past few decades, with numerous high-rise buildings, infrastructure projects, and mega developments transforming the landscape of the country. With this growth, however, comes the need

[26] Cedar Rose, Late Payments in the GCC Region: Present and Future, 19.7.2023, available at https://www.cedar-rose.com/article/15571-late-payments-in-the-gcc-region_-present-and-future.

[27] McKinsey, The future of payments in the Middle East, 23.8.2021, available at https://www.mckinsey.com/industries/financial-services/our-insights/the-future-of-payments-in-the-middle-east.

[28] See: H. Zakaria, Understanding the UAE's Construction Industry Payment Security Legislation, cit., p. 8.

[29] See: A. Dmitrova, A. Fischer, Key Regulations of the UAE Construction Law, 8.2.2024, available at https://firstbit.ae/blog/key-regulations-of-the-uae-construction-law/#:~:text=The%20usual%20payment%20method%20is,construction%20contract%20law%20in%20UAE.

for robust legislation to ensure that all parties involved in construction projects are protected and paid in a timely manner[30].

One of the key pieces of this legislation is payment security laws, which are designed to safeguard the rights of contractors, subcontractors, and suppliers by ensuring that they are paid for the work they have completed. In the UAE, payment security laws are governed by Federal Law No. 6 of 2018 on the Regulation of the Relationship between Landlords and Tenants in the Emirate of Dubai, as well as other relevant regulations and decrees issued by the respective emirates.

These laws outline the rights and obligations of all parties involved in a construction project, including developers, contractors, subcontractors, and suppliers. They establish guidelines for payment terms, dispute resolution mechanisms, and penalties for non-compliance.

One of the key provisions of the UAE's payment security laws is the requirement for parties to enter into written contracts that clearly outline the terms and conditions of the project, including payment schedules, milestones, and dispute resolution mechanisms.

Another important provision of the payment security laws is the requirement for parties to issue payment certificates. These certificates are issued by the engineer or consultant overseeing the project and certify that the work has been completed to the required standard. Once a payment certificate has been issued, the party responsible for making the payment must do so within a specified timeframe, typically within 30 days.

In cases where payment is not made on time, the payment security laws provide mechanisms for parties to enforce their rights. For example, a contractor or subcontractor who has not been paid may issue a notice of non-payment to the party responsible for making the payment. If the payment is still not forthcoming, the unpaid party may suspend work on the project or terminate the contract.

The UAE's payment security laws also require parties to provide security for payment in the form of performance bonds, advance payment guarantees, or retention amounts, to ensure that contractors, subcontractors, and suppliers will be paid for the work they have completed even in the event of a dispute or insolvency.

Furthermore, the UAE's payment security laws establish procedures for resolving payment disputes, including the submission of claims, negotiation, mediation, and arbitration, to ensure that all parties have access to a fair, impartial and expedited process for resolving payment disputes[31].

In recent years, the UAE government has taken further steps to address payment security issues in the construction industry. One of the key pieces of legislation introduced to improve payment security is the UAE Construction Trust Account Law. This law requires developers to deposit funds into a trust account for each construction project, which can only be accessed by contractors and subcontractors upon completion of specific milestones, ensuring that they are paid promptly and helping to prevent payment delays and disputes.

Another important development in the UAE payment security legislation is the introduction of the Construction Industry Payment and Adjudication Law. This law provides a mechanism for resolving payment disputes in the construction industry through adjudication. Adjudication is a quick and cost-effective way to resolve payment disputes, allowing parties to seek a resolution without resorting to lengthy and expensive court proceedings.

[30] H. Zakaria, Understanding the UAE's Construction Industry Payment Security Legislation, cit., p. 3-4.
[31] See: H. Zakaria, Understanding the UAE's Construction Industry Payment Security Legislation, cit, p. 6.

The UAE government has also introduced the Construction Industry Payment Security Initiative, which aims to improve payment security by promoting best practices and standardizing payment processes. This initiative includes guidelines for payment terms, invoicing procedures, and dispute resolution mechanisms, helping to create a more transparent and efficient payment system in the construction industry[32].

CONCLUSION: OPPORTUNITIES, CHALLENGES AND POLICY RECOMMENDATIONS

In conclusion, despite the benefits of the recent UAE payment security legislation, there are still relevant challenges that need to be addressed. Some companies may face delays in payments or disputes with clients, leading to financial strain and potential project delays.
Delayed payments are common, particularly for subcontractors and suppliers, leading to cash flow issues and financial strain. Long payment terms of 60-90 days or more are prevalent, exacerbating cash flow challenges. The reliance on post-dated cheques can also be risky, as they may bounce or be delayed.
One of the main issues is, in fact, the enforcement of payment terms, particularly for smaller contractors and subcontractors. Payment disputes can be lengthy and costly to resolve, further impacting SMEs.
On the other hand, there are also relevant opportunities that can lead to improving the practice of payments. First, as said, the UAE government has implemented measures to encourage timely payments and protect contractors, subcontractors and suppliers. Enforcing existing laws and imposing penalties for late payments will be key to their effectiveness.
The collaboration between stakeholders - government, contractors, clients, financial institutions - can also be key for driving positive change. In this perspective, for example, i) promoting standardized payment terms that are fair to all parties, particularly SMEs, ii) imposing a requirement for large companies to report annually on their payment practices and performance, iii) streamlining dispute resolution mechanisms to ensure fair and timely outcomes, and iv) providing training and support to SMEs on contract management, financial literacy, and dispute resolution, would help create a more transparent and efficient payment system[33].
Last but not least, the use of digital technologies and the adoption of digital payment platforms and e-invoicing can streamline payment processes and improve transparency. In particular, a) leveraging data analytics to track payment trends, identify bottlenecks, and develop targeted interventions, b) exploring innovative financing solutions like supply chain finance to improve cash flow for SMEs, and c) exploring the use of blockchain-based smart contracts can help automate payment processes and reduce disputes[34].
By implementing these recommendations, the UAE can create a more resilient, sustainable, and attractive construction industry that supports the broader vision of a thriving and sustainable economy for all stakeholders.
A reliable and transparent payment system will attract domestic and foreign investment. Digital transformation and innovative financing will drive innovation and competitiveness. Improved payment practices will boost the growth of SMEs, creating jobs and contributing to economic diversification. Finally, a fair and efficient payment ecosystem will enhance the UAE's reputation as a global business hub.

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[32] See again: H. Zakaria, Understanding the UAE's Construction Industry Payment Security Legislation, cit., p. 13.
[33] In this perspective, the recent introduction by the UAE government of the Construction Industry Payment Security Initiative seems to provide an interesting framework.
[34] See e.g., among others: A. Stazi, Smart Contracts and Comparative Law, Springer, 2021, and Id., Smart Contracts: Elements, Pathologies and Remedies, in 14 Comparative Law Review, 2023, 2, p. 101-113.