Comparative Law Review

VOLUME 14/2 – 2023

ISSN:2038 - 8993

COMPARATIVE LAW REVIEW
The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.

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Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010

COMPARATIVE LAW REVIEW VOL. 14/2

TORT LAW AS A LEGAL-REALIST SYSTEM*

Vincenzo Zeno Zencovic

P.G. Monateri has written extensively on the law of torts from an Italian and a comparative perspective[1]. Our views not always have coincided, but this is due to the fact that die-hard legal realists like myself tend to be more blunt than nuanced and therefore inevitably create a mismatch with elegant and intellectually elaborated writings such as those of P.G. Monateri.

These few pages in no way wish to deepen differences, but simply offer – in a rich and diverse collection of essays – one of the many views of the law of torts.

A further caveat is necessary.

These pages are inspired by a minimalistic approach and try to lay down, very succinctly, the conclusions the author believes he has reached in four decades of studying, writing, and practicing tort law.

The approach – I apologise from the beginning – is legal-realist, but when as a young researcher has been struck by the intellectual wand of Jerome Frank, Karl Llewellyn, Alf Ross and, in Italy, of Gino Gorla, Giovanni Tarello and Guido Alpa, that imprinting is impossible to dispel.

But I wish to underline a further aspect, which probably will raise many eyebrows. Tort law is a creature of the courts, and if one has not lived – from the side of the plaintiff or of the defendant – the heat of the case, the clash with one's opponent and the dialectic confrontation with the judge, the enthusiasm or the frustration of the verdict, it is rather difficult to understand what tort law really is about. And this is the reason why some very elegant and profound treatises appear to be cookbooks written by someone who has never set foot in a kitchen and whose recipes seem to be written in fairy tales.

When the first law faculty was founded in 1088, in Bologna – and since then – one of the distinctive features of Italian academic scholarship has been that in order to really know the law you must (also) practice it.

This approach is particularly appropriate in a comparative perspective where one tries to look not at the law in the books but at the law in action. Which in no means aims at

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* This article was meant to be published in the *Liber Amicorum* for P.G. Monateri, *The Grand Strategy of Comparative Law*, forthcoming with Routledge. Owing to my misunderstanding of the deadlines I missed the train. I hope this publication *extra ordinem* will make good for my carelessness.

1 Among his monographs *ex multis* see (1984) *Il quantum del danno a persona,* Giuffrè; (1988) *Il danno alla persona,* Cedam; (1988) *La responsabilità civile,* UTET; (2002) *Illecito e responsabilità civile*, UTET; (2004) *The Law of Torts in Italy,* Kluwer. To which one should add dozens of articles on the most various aspects and cases.

diminishing the role of legal scholarship in this realm and the comparison between different intellectual trends[2], but simply stating what these few pages are **not** about.
With these necessary caveats I will try to lay out a few points, which I am well aware may not be widely shared.

I. TORT LAW IN ITS ECO-SYSTEM: PRIVATE LAW (I)

Tort law cannot be understood and described if one does not take into account the legal eco-system in which it has developed and lives. Metaphorically, if tort law is a wood made of large and small trees, and countless bushes and thickets, it is mostly surrounded by cultivated land, the land of contract. And on one of its sides, it borders with a wasteland full of brushwood but also, sometimes, wild medicinal herbs (unjust enrichment).
The extent of these three terrains is in direct relation one with another. The larger the expansion of the field of contract, the less the space left to the wood of torts. And if the damaged party cannot find solace in either, it will venture into its last resort, unjust enrichment. Historically one could compare the relationship between tort and contract law in England, Germany and France[3]. Or look at the explosion, in the first fifteen years of the BGB, of case law on § 812 in order to escape the rigidity of § 823.
The effectivity of tort law and the shape it takes has to be constantly compared with its neighbouring fields: the most egregious examples are those of pure economic loss; of contracts with protective effects towards third parties; of direct actions against the ultimate producer different from the vendor.
A comparative approach therefore leads to examine not the theoretical tenets, but the path followed by the damaged party. In the case of medical malpractice should it be non-performance of contract or violation of bodily integrity?
At the end of the day, one must consider that the plaintiff – or rather his or her lawyer – has no academic qualms but is seeking the safest way to reach the result: award of damages. This determines a path-dependency: a certain action lies in tort, in contract or in unjust enrichment because that is the easiest way to the objective and the one which has a multitude of precedents and will find a favourably biased court.

II. TORT-LAW AND ITS ECO-SYSTEM: PRIVATE LAW (II)

But the relationship between tort law and contract law is not only about shifting boundaries. There is a much more stable aspect and that is the role of insurance contracts. From a business point of view insurance transforms the uncertainty of litigation (both as cost and as outcome) into a certainty (the premium) which is transferred as part of the production cost to the final buyer or user[4]. The interest of the defendant in the trial is

[2] The author is still intellectually indebted towards the works – which he feels are essential in understanding what the law of torts is about – of Patrick Atiyah (1970) *Accidents, Compensation and the Law*, Cambridge U.P.; and of John G. Fleming (1968) *An Introduction to the Law of Torts*, Clarendon Press.
[3] The unsurpassed text for comparing these various relationships in the main European legal systems, and with reference also to the US in Basil S. Marklesinins et al (2019) *The German Law of Torts,* V ed., Bloomsbury.
[4] Not for some sort of chauvinist attitude it should be pointed out that a decade before Richard Posner's celebrated book on Economic Analysis of Law (1973, Aspen Pub.), Pietro Trimarchi, at that time a professor in his twenties at the University of Urbino, before moving to Genoa and Milan, presented this theory in (1961) *Rischio e responsabilità oggettiva*, Giuffrè.

reduced because it will not bear the brunt of a negative decision (except for, maybe, an increase in the premium which will be again transferred downstream). Insurance companies – who often manage the claim and the litigation – have a mostly actuarial approach to the case. Provided the overall liquidated damages do not go beyond a certain threshold they see a negative outcome as an ordinary business risk and having a deep pocket they will view favourably out-of-court settlements.

This scenario is even more enhanced in the many areas where third party insurance is compulsory – circulation of practically all vehicles (road, rail, air, water), medical institutions, professionals, owners of buildings etc. – and often allows the damaged party to bring a direct claim against the insurer.

This circumstance – the nature of the effective defendant (if ever one gets to court) – has a significant effect on the psychological attitude of the judge who generally takes into account the nature and economic power of the parties.

III. TORT LAW AND ITS ECO-SYSTEM: PUBLIC LAW

The context in which tort law must operate is further influenced by both traditional and more recent procedures to face damages.

a) *Criminal law*. As is well known, tortious actions are the development, both in Roman law and in English law, of criminal actions (*furtum, rapina, iniuria* and trespass).

This genealogy is not only historical. In those jurisdictions (France and its followers) where the damaged party can decide to be *partie civile* in the criminal case, damages are awarded in a significantly different context.

On the one side it may be more favourable for the defendant, owing to the much higher burden of the proof which is put on the prosecution (beyond a reasonable doubt vs. preponderance of the evidence). But at the same time, once a crime has been ascertained there will be little leniency in the liquidation of damages which become an element of both general and specific deterrence.

b) *Compensation schemes*. A much broader and pervasive public law intervention in the realm of torts is represented by the growing tendency to introduce compensation schemes for damages that hypothetically could fall within a tort action but, in reality, do not because of the extreme difficulty (if not impossibility) to recover any damages.

The obvious example is compensation for victims of violent crimes or of terrorism[5] where the author is or dead or impecunious. But one finds a multitude of other instances: compensation of victims of medical malpractice in public institutions (which is the rule introduced over fifty years ago in Scandinavian countries); compensation for victims of natural disasters due also to some negligence of the public authorities in controlling, directing or warning; compensation for wrongful arrest or detention.

[5] see e.g. the EC Directive 2004/80 on the compensation to crime victims

The rationale behind these schemes can be referred to classical Hobbesian theory. The King (nowadays Government), having received the allegiance of his subjects, has the duty to protect them. If he fails, he must make good for the damage they have suffered[6].
In Europe the expansion of compensation schemes is also the result of two converging principles, that of solidarity (the heir of the French idea of "*fraternité*") and of general welfare, which find their first application at the end of the 19th century with compensation funds for injuries to workers.

IV. THE HABITAT: THE COURTS

Having indicated the context in which tort law is immersed and which deeply influences its actual reach, one can pass to examine the "wood" in which it operates. The first point that must be made is that in every Western jurisdiction the Lord and Master of tort law are the courts. Contracts are mostly left to the parties, compensation schemes to the Legislature. But tort law is the undisputable domain of the Courts. The best evidence of such a situation is given by the fate of the countless attempts by all Parliaments to limit judicial activism and creativity. As, at the end of the day, as the ultimate interpreter of the law are the Courts, the latter will easily argue that the piece of legislation that is meant to direct or even to impose certain solutions must be construed in a restrictive way (the golden rule), or in the light of constitutional and fundamental rights principles, or in conjunction with other pieces of legislation that have not been taken into account by Parliament[7].
The bottom line is that the legislature, which surely has bigger fish to fry, realizes that its attempts are if not hopeless, useless and surrenders to the will of the courts.
This suggests two converging analyses. The first is that tort law is the thermometer of the balance between the first Power (Parliament) and the third Power (the judiciary). One can compare policies, tendencies towards innovation or in favour of conserving the *status quo*, convergencies and divergencies, agenda settings. The situation of dialogue or of conflict is most obvious when Parliament subtracts areas from the competence of the Courts and hands them to non-judiciary bodies and compensation schemes, or sets new procedural rules (e.g. class actions).
The second aspect is that tort law is the living portrait of how the judiciary is and sees itself. The first clear distinction is the UK tort law system which is under the century old principle of judicial self-restraint *versus* the rest of the Western world, where tort law is the gym of judicial activism. But here too, a certain degree of distinguishing is required because the level of activism depends on the procedures through which judges are recruited, their mentality, the structure of the judicial organization, the more or lesser strength of *stare decisis*. Tort law – or rather the jurisprudence in tort cases – is the best example of judicial

[6] And going even further back in time to the "Hundreds Act" (Statute of Winchester, 1285) which stated that individual members of a community could be held liable if a member of that community had committed a serious crime and had not been apprehended (see William Blackstone (1807) *Commentaries on the Laws of England,* Portland vol. III, p. 160)
[7] The egregious example is the French law 2002/303 on medical malpractice (the so-called Loi Kouchner) and the reaction by the courts: see App. Paris 4.5.2005 in *D.* 2005, 2131; or App. Paris 7.10.2004, in Gaz. Pal. 2005, Somm. 1382

reasoning. Given exactly the same facts, how do judges A and B, in different jurisdictions, come to the same conclusions? What are their arguments? To what extent do they rely on the *ius positum*, on precedent, on evidence, on external data (e.g. statistics, scientific reports)? Tort law renders at its best the style of a legal system: the unsurpassable elegance of English Law Lords, the legal realism of American justices, the analytical approach of German judges, the self-explanatory phrases which compose the "*attendus*" of the French Cassation.

For these reasons tort law is the Eldorado of private law comparison where one can see at its best the law in action.

V. NO COURTS, NO TORT LAW

If tort law is the creation of the courts and their purest expression, the inescapable consequence is that outside the courts there is no tort law. There is a damaged party, there is somebody that decides, there may be some kind of award, but the context is completely different. Metaphorically, one eats both in a restaurant and in a fast-food, but the two meals are not comparable.

The first fundamental difference is that outside the Courts the decision-maker is not a judge, with his or her background, deference, organizational and career constraints. The second point is that the rules of procedure are different, and whoever is familiar with the judicial process knows very well how they influence the outcome. In third place the typical adversarial contest between plaintiff and defendant, the skills and tactics put into place by their lawyers are of hardly any relevance in an administrative procedure which must decide if and how much compensation must be granted. Finally, decisions by the courts are public in the sense that they are reported, debated, used, cited, appealed, repealed or confirmed. Nothing such happens with decisions taken by non-judicial bodies.

VI. THE HABITAT: REMEDIES PRECEDE RIGHTS

A further reason that justifies the passion of comparative lawyers for tort law is that it represents in every jurisdiction – and not only in the duly revered English common law – the expression of the principle that remedies precede rights. A tort exists only if the Court establishes that there has been one. The claim that a right has been violated and requires to be made good is valid only if it is recognized by a Court.

Therefore, in the generality of cases, a party who has suffered damages claims that the acts of the defendant are wrongful because they have violated his right disregarding some rule of conduct (*in iure, non iure*).

Clearly there are some age-old situations which are always protected – one could use the enumeration in § 823 of the BGB: property, life, limb, health, liberty. But when a new "right" tries to make its way through the crowd of generic interests it will search recognition by the legislature and/or by the Courts. Tort law therefore becomes the entrance door to the protection of certain situations and at the same time to the creation of new duties upon the community. In fact, one should not forget that tort law plays a fundamental regulatory role which can be seen comparing the European approach (*ex ante* regulation, with pointilliste definition of the obligations, generally imposed on businesses)

and the US approach which prefers *ex post* judicial intervention which determines what can or cannot be done.
Tort law therefore manifestly embodies policies and plays a governance role. One of the most common areas in which conflicts arise and find in tort law the solution is that of allegedly discriminatory behaviour (e.g. the "gay cake" controversy[8]).

VII. THE HABITAT: THE BURDEN OF THE PROOF

A hard-to-die legal realist such as the author of these pages has a strong temptation to affirm that tort law, in the end, boils down to a question of burden of the proof. If it must be borne by the plaintiff, the chances he or she will succeed are limited. If it is put upon the defendant, the positions are reversed, and the latter has few chances to avoid a negative decision. The situation, however, is more nuanced and requires a certain number of indispensable clarifications.
The first is the differences between the different burdens. Proof of what? Of the wrongful acts? Of the causal link? Of the amount of damages? Is the burden set by the legislature or by case-law? In the first case what kind of tortious acts does it cover? Or is it one of those catch-all Latin expressions (*res ipsa loquitur*)?
One must also take into account the fact that when the legislature introduces no-fault systems (the mere facts justify the claim) it generally attaches a compulsory insurance or a compensation scheme which clearly alters the tort law process (*i.e.* litigation).
The allocation of the burden of the proof is much more than a technical solution. It is policy-laden, it imposes precautionary obligations upon certain individuals (since the Roman quasi-delicts of *de positis et suspensis, de effusis et deiectis*, *actiones contra caupones, nautas et stabularios*), it is aimed also at deflating litigation.
One should also consider – and this is a further area of comparative research – that often a full and direct evidentiary proof is substituted by indirect and circumstantial evidence based on syllogisms or presumptions, generally in favour of the plaintiff (*id quod plerumque accidit*).
At any rate the predominant role of the burden of the proof is evident in the legislative process of regulation of new technologies (whether digital or bio-chemical), putting on the producer the burden of demonstrating some entirely external and unforeseen reason for the damage.

VIII. THE HABITAT: THE (WASTED) LABOUR ON CAUSATION

Over the last two centuries tens of thousands of pages have been written on the issues of causation in tort law. Hundreds of theories, classifications (e.g. causation in fact, causation at law), distinctions.
A legal realist clearly registers this never-ending debate as a matter of fact. At the same time, however, he underlines that this is one of the points were most of academic work is on a different planet in respect of the down-to-earth daily operation of tort law.

[8] Lee v. Ashers Baking Company Ltd [2018] UKSC 49

To pick – because doctrinal work is essential to clarify and classify – from the unsurpassed theoretical analysis by Honoré and Hart[9], causation is a rhetorical argument to justify a decision that has already been taken[10]. This means that a certain decision (favourable or negative) is taken not because it passes or does not pass the causation test. But that the verdict on the existence or non-existence of the causal link depends on the paramount decision on the outcome of the case.

The Court will choose the approach which is more convenient in order to explain, plausibly, why the claim has been accepted or rejected. The more "scientific" the causal theory, because it is based on the findings of experts (physicians, engineers, toxicologists, etc.), the more credible, and resistible, the decision will appear. And lawyers and lawmakers, whether in Parliament, in Government or in the Courts regularly resort to "science" to justify their decisions, because it is way to externalize their responsibilities putting them on a supposedly "neutral" body. On the other hand, a sceptical analysis of case law tells us that causation is affirmed or denied on the basis of at least three variable elements:

i. Is the tort the result of an intentional act, of gross negligence, of simple or of slight negligence? In the first two cases the causal claim ends up by including even the most distant and unforeseen consequences. A criminal intent cannot hide behind the niceties and subtilties of causal philosophy.

ii. What is the hierarchy of the rights that have been violated? At the pinnacle we shall place human life. Rights in expectation are placed at a much lower level. In the first case the causation rules will be much more relaxed. In the latter case the exam will be stringent, and a direct effect will be required.

iii. What is the nature and the amount of the damage that has been inflicted? Profound grief and suffering? One's only child? The house one lives in? All one's savings or a petty sum? In some cases, the plaintiff will attract the natural sympathy of the Court. In others the age-old maxim of *de minimis non curat praetor* will apply, and the rules of causation will follow suit. Therefore, the is very little "science" in causation rules and much more *ars aequi et boni* adapted to the facts of the case[11].

The importance of the plight of the damaged party is very clear when, in order to partially accept his or her claim, the causal link is diverted on some different situation. The best example is that of the French "*perte d'une chance*"[12]. One does not have to be a disciple of Parmenides or of Zeno of Elea to understand that when one says that the acts of the defendant have destroyed a chance of profit or of well-being of the plaintiff one has scuttled any rational notion of causal link, substituting it with a merely hypothetical consequence. And a similar approach can be found in the "market share" cases where the producer of the defective good is unknown.[13]

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[9] H.L.A. Hart and Tony Honoré (1985) *Causation in the law,* II ed., Clarendon Press.

[10] Especially in Ch. II

[11] These variables are widely analysed in Marta Infantino and Eleni Zervogianni (eds.) (2017) C*ausation in European Tort Law,* Cambridge U.P.

[12] The landmark decision is App. Grenoble 24.10.1962, in *Rev. trim. dr. civ.* 1963, 334.

[13] See Sindell v. Abbott Laboratories (1980) 607 P.2d 924.

IX. DAMAGES: THE BOTTOM LINE

Tort law is the most ancient institutional form of allocation of losses. It establishes the criteria through which a loss is passed on to a third party or it must lay where it fell. In its general-preventive function it warns of risks – *hic sunt leones* –, it encourages caution and pre-cautions, it promotes third-party and self-insurance.

The structure of the claim is practically always the same: the damaged party is the plaintiff, the damaging one, the defendant, differently from contractual claims is which any of the two parties can find itself as plaintiff or defendant, and the latter generally responds through counterclaims.

Claims in tort are brought to obtain a judicial remedy in the form or of *restitutio in integrum* or of monetary compensation. Sometimes there is also the aim of vindication (when reputation has been smeared, when a near relative has been killed). But the cases in which the plaintiff asks for *nummo uno* (the typical "*un franc*" in French cases) are a negligeable minority. The award of damages being the direct and main objective of claim in tort, a comparative lawyer immediately notices that while for the *an debeatur* issue practically all Western jurisdictions reach similar results (which the noticeable British exception), when it comes to the *quantum debeatur* the results widely differ. Which, in substance, means that the allocative function of tort law is extremely variable and inevitably influences the eco-system.

The first, obvious, distinction is between the US system and the rest of world. The former is still entrenched in the multimillion-dollar punitive damages system, and whatever the limitations set by the Supreme Court or the power of *remittur* bestowed upon the trial judge, the perspective of big, huge, gains is the driver of tort law.

The latter, instead, follows explicitly or implicitly, the century-old German *differenztheorie*. The damages awarded must make good the loss that has been suffered, but the plaintiff cannot expect to be enrichened by the Courts. As a witty South-African judge put it: "*The figure of Justice holds a pair of scales, not a cornucopea*[14]".

However, the application of the *differenztheorie* brings about widely different results because the criteria of evaluation are far apart in one jurisdiction from another.

The most obvious case is represented by the death of a person through a negligent act. Let us take an unfortunately recurrent case: a middle-aged breadwinner is killed in a road accident and leaves a housewife and two teenage children. There may be some convergence on the calculation of loss of income, but what is the price-tag put on sorrow and grief, on the loss of consortium, on the loss of parental guidance and of all the way of life a family had established? The range is, varying from country to country, from 1 to 10[15]. In one sentence: non-pecuniary damages are liquidated without any real substantial criterion. And this is replicated in a multitude of other cases: Wrongful birth (typically quadriplegia due to anoxia of the foetus during labour), disfiguring accidents, defamation. The consequence is, in most jurisdictions, that of under-deterrence, with forum shopping effects, typically in transnational road accidents and playing on Article 4 of the Rome II

[14] *Innes v. Visser* 1936 WLD 44 (per Greenberg J.)
[15] The mind goes obviously to Terence G. Ison (1967) *The forensic lottery,* Stapler Press.

Regulation (864/07) which constantly engages the CJEU in lengthy interpretative decisions[16].

When one moves across the Atlantic the situation only apparently is better. On the one side the multimillion punitive damage awards have an overdeterrence effect, which strongly reduces the general-preventive effect of tort law.

A decision which arrives many years *post factum* and generally against business defendants does not really encourage them to improve their production process (which belongs to the past) and therefore misses its indirect regulatory import.

On the other side punitive damages create a "vulture" secondary market in the hands of large law firms which, through champerty and contingent fees, are the main beneficiaries of tortious claims. It is sufficient to look at some common class actions where the class representative receives a modest amount while his or her lawyers have their million dollars legal fees covered.

To sum up the conclusions of this paragraph, an effective comparison between tort law models would require a vast amount of reliable statistics on the numbers of cases brought, the claims decided in favour or against the plaintiff, the incidence of out-of-court settlements (very common when there is insurance coverage), the amounts liquidated, for what kinds of damages (economic assessment or rule-of-thumb?). A good example is that of the so-called "cable cases". A statistical survey could have easily demonstrated that the "floodgates argument" even if espoused by a giant like Lord Denning was entirely fallacious and the courts in other jurisdictions that had, to a certain extent, accepted the claim of the plaintiff, did not suffer the extreme consequences that had been feared in *Spartan Steel*[17].

It would appear, however, that academic lawyers rarely wish to soil their elegant intellectual robes with dreary statistics. The ivory tower of academia loses therefore touch with the prosaic reality of tort law, which is not much different from how chancellor von Bismarck compared law making and sausage making.

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The author, at the end, wishes to stress that these few pages – many too few – in no way wish to represent the truthful nature and state of extracontractual liability. They are simply – and knowingly – one of the many "views of the Cathedral", or to put it on a more personal keynote, a memoir of many decades spent travelling in the province of the law of tort.

Other travellers will have seen and will have depicted more thoroughly and thoughtfully different landscapes and monuments[18]. The educated and unbiased reader will be able put these various views together and make himself or herself a more holistic idea.

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[16] *ex multis* see case C-577/21 (non-pecuniary damage for road accident and comparison between German and Bulgarian law)

[17] *Spartan Steel and Alloys v. Martin & Co.* (C.A. [1972] 3 All. E.R.557)

[18] See, e.g. the collected essays in Mauro Bussani (ed.) (2007) *European Tort Law. Eastern and Western Perspectives*, Stämpfli Pub.

DIGITAL ASSETS AND PROPERTY: COMPARATIVE REMARKS FROM A CIVIL LAW PERSPECTIVE*

Ermanno Calzolaio

SUMMARY:

This paper reflects on one of the most relevant aspects of the so-called digital revolution that has invested contemporary societies and is transforming them in a profound way, consisting in the emergence of a de-materialized dimension of mobility of 'objects' that exist only electronically and in a process state, as entities susceptible to continuous mutation and transformation. It investigates the legal qualification of these new entities, adopting a comparative perspective, with particular regard to the civil law and the common law traditions. The 'proprietary' logic continues to appear as a key that is not easy to replace for configuring a relationship of belonging of the new digital entities. However, the difference between the continental and the common law models of property is at the origin of diverging outcomes in the case law of the various jurisdictions. The model of property accepted in the Anglo-American tradition seems more inclined to welcome digital entities within the realm of property.

I. INTRODUCTION: THE DE-MATERIALIZED DIMENSION OF OUR CONTEMPORARY WORLD

This work intends to reflect on one of the most relevant aspects of the so-called digital revolution that has invested contemporary societies and is transforming them in a profound way, consisting in the emergence of a de-materialized dimension of mobility-globality of 'objects' that exist only electronically and in a process state, as entities susceptible to continuous mutation and transformation.

The digital revolution has clear implications from a legal point of view, as it reaches the heart of the languages and techniques used by jurists. Data, cryptocurrencies, NFTs are all terms unknown until the recent past, but today familiar. Wanting to open the windows on this world in which everything has become mobile and digitalized, we soon come across a significant discovery. The initial euphoria that accompanied the development of the blockchain foreshadowed the birth of a world without law. At the basis of the famous expression 'code is law'[1] and then of the launch of the blockchain[2], there is precisely the idea of finally being able to free oneself from constraints and rigidities, because the technical infrastructures and software of the Internet would allow online negotiations to

* This work has been funded by the European Union - NextGenerationEU under the Italian Ministry of University and Research (MUR) National Innovation Ecosystem grant ECS00000041 - VITALITY - CUP E13C22001060006 contribution. It is intended for the essays in honour of prof. Rodolfo Sacco.

[1] The expression "code is law" was shaped by L. Lessig, *Code and Other Laws of Cyberspace*, New York, 1999. For a punchy critic see K. Yeung, *Regulation by Blockchain: the Emerging Battle for Supremacy between the Code of Law and Code as Law*, in *Modern Law Review*, 2019, p. 207.

[2] See the contribution *Bitcoin: A Peer-to-Peer Electronic Cash System*, probably drafted by a group of engineers under the pseudonym Satoshi Nakamoto, available at *https://bitcoin.org/bitcoin.pdf*.

be regulated autonomously and beyond any regulatory intervention, especially by the states.

Soon, however, reality called this claim into question, hand in hand with the appearance of several problems, which brought out the need to identify forms of protection for the owners of the new entities entered and circulating on the network, when, for example, they end up being dispersed in it, due to malfunctioning or fraudulent interventions. There are already many cases in which, almost in every legal system, judges have to deal with data, cryptocurrencies, NFTs, in a context characterized by the scarcity (if not the total absence) of legislative provisions[3].

The aim of this article is to investigate the legal qualification of these new entities, adopting a comparative perspective, with particular regard to the civil law and the common law traditions. The comparative approach is really unavoidable in order to have insights and suggestions in respect to a phenomenon having clear supranational outcomes. In fact, the new technologies open a truly unprecedented perspective of a 'space' - in which contracts are made, data are acquired, new 'goods' and services circulate, and torts are committed - that lies outside of a territory identified by boundaries, and therefore beyond specific legal orders, as is also the case for other emerging fields of legal studies, such as environmental law[4].

In both legal traditions the 'proprietary' logic continues to appear as a key that is not easy to replace for configuring a relationship of belonging of the new digital entities. However, the difference between the continental and the common law models of property is at the origin of diverging outcomes in the case law of the various jurisdictions. We will first move from a short outline of the different conceptions of property in the civil law and the common law legal traditions (§ 2), in order to catch the problems encountered in Italy, France and Germany in the qualification of the new digital entities (§ 3). We will then consider the situation in English law, where, despite the lively debate about the *tertium genus* within the articulation of personal property, the new digital entities are considered to be property, as it also happens in other common law countries (§ 4). The inclusion of digital assets within property opens the way to recur to the law of trust and its intriguing doctrines, such as constructive trust, totally ignored by the civil law systems (§ 5). At the end we will draw some comparative remarks, pointing out the relevance of the different models of property in the civil law and the common law legal traditions also in this field, being also at the origin of the difficulties encountered when undertaking regulatory initiatives in the national, European and supranational spheres (§ 6).

II. PROPERTY BETWEEN CIVIL LAW AND COMMON LAW.

As for the civil law, it is well known that, both in the definitions contained in the continental codes and in the systematic-conceptual system, property continues to be based

[3] For this remark, see K.F.K. Low, *Cryptoassets and the Renaissance of the Tertium Quid?*, in C. Bevan (cur.), *Edward Elgar Handbook on Property Law and Theory*, 2023, available at https://ssrn.com/abstract=4382599 or http://dx.doi.org/10.2139/ssrn.4382599.

[4] For this analogy see J.-S. Bergé, *The "datasphere" as a new paradigm of relationship between territories in law*, in *Rev. Bras. Polit. Publicas*, 2018, pp. II ss. About the role of comparison see L. Moccia, *Law Comparison 'Inner Worthiness'. The Example of Environmental Protection* in *Annuario di diritto comparato e di studi legislativi*, 2021, available at https://ssrn.com/abstract=4107438.

on the materiality of its object and characterized by absoluteness, fullness and exclusivity. The origins of this conception are commonly linked to the influence of Roman law and, in particular, to the distinction between corporeal things ("res corporales, quae tangi possunt") and incorporeal things ("quae tangi non possunt"), dating back to the *Institutiones* of Gaius (II century. A.D.). The first category includes land, slave, garments, gold, etc., while the second one includes rights such as the right of inheritance, the right to possess land (usufruct), the debts resulting from a right of obligation. However, the right of property is not included, because its relevance is linked to the relationship of confusion-identification with the material thing that constitutes its object in an exclusive way. In essence, property acts as a filter to distinguish things that exist only on the level of law, being its creations, from things in the material sense, which derive their legal qualification and relevance insofar as they are appropriable[5].

Thus, despite the basic ambivalence of the term "res" (as a physical entity susceptible to appropriation and as an intangible object owned by someone, having the nature of an asset as part of its patrimony), the corporality of the thing is placed in a one-to-one relationship with the commonly accepted notion of property right: on the one hand, the right is, so to speak, incorporated into the thing, in the sense that it is this that satisfies the subject's interest (and with this the property right is distinguished from other juridical situations) and, on the other hand, the right to property can only have corporeal entities as its object. The 19th-century model of property was built on these foundations, which in turn constitute the pivot on which the whole system of patrimonial rights is based, articulated in real rights and personal (or credit) rights. In particular, property is conceived as a subjective right of a patrimonial nature, an archetype of real right, which confers on its owner the classic prerogatives to use and exploit a corporeal thing. On the other hand, a personal right is nothing more than a relationship established between two subjects, on the basis of which the debtor is required to perform something against the creditor[6]. The difference between the two categories is clear: a personal right obliges the person through his patrimony, while a real right obliges its holder in his capacity and not a specific subject. Keeping this basic scenario in mind, the phenomenon of the dilatation of the objective sphere of property has indeed contributed to making clear that the nineteenth-century codes ran after the mirage (which soon revealed itself as such) to consider property monolithically, but it did not come to undermining its systematic-conceptual value, as a paradigm of individual rights and pivot of the articulation of property rights into absolute rights and relative rights, which still constitutes the deep plot on which the very architecture of private law is organised.

Therefore, when (private) law is confronted with the new technologies, the disorientation with respect to entities that elude any attempt to be classified within the traditional

[5] For a general introduction to the different models of property, see L. Moccia, *Forme della proprietà nella tradizione giuridica europea*, in L. Moccia, *Comparazione giuridica e prospettive di studio del diritto*, Padova, 2016, p. 19.

[6] In the words of R. Libchaber, *Biens*, in *Rep. Dr. Civil*, Paris, 2016 : « La propriété est ordinairement appréhendée comme un droit subjectif, de nature patrimoniale, et qui, en véritable archétype du droit réel, confère à son titulaire les trois prérogatives canoniques classiques que sont l'usus, le fructus et l'abusus d'une chose, considérée comme nécessairement corporelle ».

schemes and categories emerges: virtual entities, whose existence is linked to the fact that they are able to produce an income and claiming tools that ensure their belonging to their owner, or at least allow their value to be preserved.

On the other hand, in the common law model the term property does not have a single and precise meaning, which instead varies according to the context in which it is used[7]. It can designate a physically considered thing, the rights concerning the use and enjoyment of this thing, but also rights that are independent of a direct relationship with a physical thing, such as for example a debt. From the point of view of the systematic structure of the law of property, the absence of a correspondence with respect to property in the codified law systems emerges, since property designates the belonging of rights, so that both for immovable property and for movable property it is correct to say that the subject has a property right over them[8].

This difference may appear harmless, while instead it marks a distinction which brings out the different conceptual texture of the English model. It is inspired by a distinctly patrimonial conception of the relationships of belonging, referring not to things understood in a material sense, but to the rights that can be exercised over them and which, as they have patrimonial value, constitute an object of belonging. One of the most relevant consequences of this conception is that there can be more than one property right over the same thing. In this sense, the main distinction between real and personal property has little or nothing to do with the civil law distinction between real and personal rights. In the common law model, real property and personal property constitute distinct objects of property, while in the civil law tradition personal rights are outside the field of property. The brief remarks outlined in this paragraph now allow us to address more directly the attempts at the legal qualification of the new immaterial entities in the two legal traditions.

III. THE LEGAL QUALIFICATION OF THE NEW IMMATERIAL ENTITIES IN THE CIVIL LAW TRADITION.

Starting from Italian law, the issue has been addressed with reference to cryptocurrencies, but it is also proposed in similar terms for NFTs and, in general, for all the new immaterial entities in the web[9].

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[7] See the *leading opinion* by Lord Mance in *Akers v Samba Financial Group* [2017] UKSC 6: "As to what constitutes "property", this is always heavily dependent on context … - something can be 'proprietary' in one sense while also being nonproprietary in another sense" (n. 15). In *Kennon v Spry* [2008] HCA 56 the Court of Appeal affirmed: "the term 'property' is not a term of art with one specific and precise meaning. It is always necessary to pay close attention to any statutory context in which the term is used" (n. 89, *per* Gummow and Hayne JJ).

[8] "The common law of property is essentially about rights in things and the volume of rights that accompanies a particular type of proprietary interest" (M. Bridge-L. Gullifer-G. McMeel-K. F.K Low, *The Law of Personal Property*, 2nd ed., London, 2019, n. 4-002). In the same sense, W. Swadling, *Property: General Principles*, in P. Birks (eds.), *English Private Law*, vol. I, Oxford, 2000, n. 4.02.

[9] S. Capaccioli, *Criptovalute e bitcoin: un'analisi giuridica*, Milano 2015; N. Vardi, *"Criptovalute" e dintorni: alcune considerazioni sulla natura giuridica dei bitcoin*, in *Dir. inf. e informatica*, 2015, p. 443. See also E. Calzolaio, *La qualificazione del* bitcoin: *appunti di comparazione giuridica*, in *Danno e responsabilità*, 2021, p. 188. About the absence of a common notion of cryptocurrencies see B. Cappiello, *Cepet Leges in Legibus. Cryptoasset and Cryptocurrencies Private International Law and Regulatory Issues from the Perspective of EU and its Member States*, in *Dir. Commercio Internazionale*, 2019, p. 561.

A first perspective brings cryptocurrencies within the scope of the rules on pecuniary obligations and in particular to article 1228 of the civil code according to which if the sum due is fixed in a currency lacking legal tender, the debtor can pay in the legal currency at the exchange rate on the due date. The code does not offer a definition of currency and some argue that "currency not having legal tender in the State" includes both foreign currencies properly speaking, and currencies chosen by the parties. In this perspective, a cryptocurrency (which is obviously a "non-state" currency) falls within the scope of article 1228 of the Civil Code, so that the debtor discharges himself by paying with the same cryptocurrency deducted as an obligation, even if he "has the right" to pay in his legal currency[10].

This approach was confirmed by a judicial decision, in relation to a case in which the issue was to decide if the registered capital of limited liability company could be increased through the payment of cryptocurrencies. The Court of Appeal of Brescia recognized that cryptocurrencies have the nature of money, but it excluded the possibility to accept them as a part of the registered capital, given that their extreme volatility prevents the attribution of a precise value[11].

This shows that equating cryptocurrencies to money is far from easy, because unlike traditional or electronic money, they do not represent a right, but an asset which does not correspond to a passive voice in another's asset. For this reason, some argue that they should be considered as "goods", more precisely as "digital goods". This would be in line with the approach adopted by Directive 2018/843/EU, which marks an explicit recognition of virtual currencies as means of exchange, as such capable of being sold, purchased and exchanged. In this perspective, in short, cryptocurrencies would be "assets" in the legal sense falling within the broad notion referred to in article 810 of the civil code ("Goods are things that can be objects of rights").

Some decisions seem to confirm this view, such the one issued by the Court of Florence, stating that "cryptocurrencies (...) can be considered "assets" pursuant to article 810 of the Civil Code, as an object of rights, as now recognized by the national legislator, who also considers them, but not only, as a means of exchange (...)"[12].

However, even this theory is problematic, because cryptocurrencies are so immaterial as to be even evanescent, remaining widespread within a distributed architecture electronic communication network[13]. Furthermore, as in the generality of legal systems, also in Italy the attribution of exclusive rights on intangible assets responds to the principle of strict

[10] In this sense, M.F. Campagna, *Criptomonete e obbligazioni pecuniarie*, in *Riv. Dir. Civ.*, 2019, p. 183. According to others, cryptocurrencies are means of payment: G. Arcella-M. Manente, *Le criptovalute e le loro contraddizioni: tra rischi di opacità e di eccessiva trasparenza*, in *Notariato*, 2020, p. 23 and V. De Stasio, *Verso un concetto europeo di moneta legale: valute virtuali, monete complementari e regole di adempimento*, in *Banca, Borsa, Tit. Cred.*, 2018, p. 747.

[11] Corte app. Brescia, sez. I, decr. 24 ottobre 2018, in Società, 2019, p. 26, with comments by F. Murino, *Il conferimento di token e di criptovalute nelle s.r.l.* and F. Felis, *L'uso di criptovaluta in ambito societario. Può creare apparenza?*, ivi.

[12] Trib. Firenze, sez. fall., 18 gennaio 2019, n. 18 available at https://www.coinlex.it/wp-content/uploads/2019/01/Sentenza_Fallimento_Bitgrail.pdf.

[13] In this sense, R. Bocchini, *Lo sviluppo della moneta virtuale: primi tentativi di inquadramento e disciplina tra prospettive economiche e giuridiche*, in *Dir. inform. e informatica*, 2017, p. 27

typicity, so that the qualification in terms of intangible assets is at least questionable, in the absence of a specific legislation[14].

The picture that emerges in the light of the cases examined so far is somewhat uncertain. The Court of Florence brings cryptocurrencies under the category of intangible assets and states that, as such, the holder is the owner, since the deposit on the platform is configured as an irregular deposit (article 1782 of the civil code), which determines the transfer of ownership and the obligation of the depositary to retransfer the same amount of deposited assets. Given the default and the bankruptcy of the company, the protection of the cryptocurrency holders is very weak. It is of little use to qualify the relationship that binds the holder to cryptocurrencies in terms of 'ownership' if no consequence in terms of protection derives from this qualification. In fact, their 'owner' has nothing more than a personal right against the creditor, but which does not allow the 'things' that belong to him to be recovered from third parties.

It is significant that a similar outcome characterizes also the French experience. Called to establish their taxation regime, the *Conseil d'Etat* includes cryptocurrencies in the field of incorporeal movable property[15]. However, new difficulties arise when judges come to drawing concrete consequences from this qualification. For example in a case decided by the Court of Nanterre in 2020, a dispute arose between the parties to a bitcoin loan agreement, due to the non-payment of interest. The French judge held that the bitcoin is to be considered as a fungible and consumable thing, so that the loan agreement must be seen in the context of the rules on consumer loans. As a result, against the transfer of ownership of the lent bitcoins, the other party has the (contractual) right to obtain the return in kind of things of the same quality pursuant to article 1902 Civil Code[16].

The situation in German law is even clearer. The BGB recognizes the nature of goods only to corporeal objects (§ 90, "Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände") and ownership can only be configured with respect to them. It follows that the transfer of digital entities cannot in any way be framed within the context of a transfer of property. Nor is it possible to recur to the analogical application mechanism of the rules on the transfer of ownership in the event of the assignment of rights under §§ 398 and 413 BGB, as the blockchain cannot be considered as a 'debtor'. Finally, recourse to the general rules on non-contractual torts and unjustified enrichment prove to be of little use, so that, in the absence of an intervention by the legislator, German law does not seem to offer concrete solutions[17].

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[14] V. Zeno-Zencovich, *Ten legal perspectives on the "big data revolution"*, in *Concorrenza e mercato*, 2016, p. 29: "From a civil law perspective, it is clear that exclusive rights on non-material entities tend to be a numerus clausus. Copyright, trademarks, patents and all that follows are protected (in the whole world) on the basis of legislative definitions and regulated procedures".

[15] *Conseil d'Etat*, 26 april 2018, n° 417809 ; see M. Collet, *Le bitcoin devant le Conseil d'État*, in JCP, éd. G, 2018, p. 743.

[16] Trib. Nanterre, 6e ch., 26 february 2020, n. 2018F00466 ; see E.A. Caprioli, *La nature juridique du Bitcoin enfin précisée*, in *Communication-Commerce Electronique*, 2020, n. 6, p. 1 and J. Moreau, *Lorsque les juges du fond se penchent sur la nature juridique du* bitcoin *et des prêts y relatifs*, in *AJ Contrat*, 2020, p. 296.

[17] For more details, see S. Omlor, *Digital ownership of blockchain tokens: a comparative law guideline*, in E. Nordtveit (cur.), *The Changing Role of Property Law. Rights, Values and Concepts*, London, 2023, p. 130, esp. p. 137. See also E. Rizos, *The Nature of Rights upon Cryptocurrencies*, in T.E. Synodinou-P. Jougleux- C. Markou-T. Prastitou-Merdi (eds.), *Internet Law in the Digital Single Market*, Cham, 2021, p. 605.

IV. THE DIGITAL ASSETS AS PROPERTY IN THE COMMON LAW.

In the common law tradition, the characteristics of the property model that we evoked previously makes it easier to bring the new digital entities back into the sphere of personal property. Historically this category was formed in a rather erratic way and it is articulated on the distinction between choses or things in possession (corporeal things) and choses or things in action (incorporeal things). Among the choses in possession are included all objects capable of being possessed and therefore "tangible, moveable and visible"[18], while choses in action are not only intangible assets (patents, intellectual creations, goodwill, etc.), but also debts and, in general, any right having patrimonial value (and, in this sense, 'proprietary'), provided that it can be sanctioned in judicial proceedings to obtain an order to pay a sum of money. In essence, any right that can be "turned into money"[19] tends to be considered a chose in action.

Digital assets can hardly be included among the things in possession, since they are completely intangible. Neither their classification as things in action is entirely satisfactory, as it is not always possible to determine a subject against which to assert the right claimed by their owner[20]. Nonetheless, the English judges have always shown a high degree of flexibility, including among the things in action every new right having patrimonial value. This happened, for example, for milk quotas[21], carbon emission quotas[22], export quotas[23], waste management licenses[24].

In 2019, the UK Jurisdiction Taskforce issued an important document, entitled "Legal statement on cryptoassets and smart contracts"[25]. It came to the conclusion that cryptocurrencies should be included in the catch-all category of personal property. In particular, the study believes that cryptocurrencies have all the characteristics of property, laid down in the leading case *Ainsworth* of 1965, according to which: "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties and have some degree of permanence or stability"[26]. The blockchain makes it possible to associate the cryptocurrencies to a specific subject; moreover, the cryptographic-based authentication procedure ensures that the holder of the private key is the only one authorized to dispose of the cryptocurrency, to the exclusion of anyone else. As for the faculty of disposal, the holder can certainly transfer the cryptocurrency to third parties and, finally, the requirement of stability is ensured by the fact that its permanence in the holder's hands lasts until the cryptocurrency is cancelled or transferred.

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[18] M. Bridge-L.Gullifer-K. Low-G. McMeel, *The Law of Personal Property*, 3a ed., London, 2021, par. 1-018.
[19] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, at p. 915.
[20] For a comprehensive analysis, see L. Sagar-J. Burroughs, *The Digital Estate*, 2nd ed., London, 2022, esp. ch. 4 and 8.
[21] *Swift v. Daisywise (No 1)* [2000] 1 WLR 1177.
[22] *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch.).
[23] *A-G of Hong-Kong v Chan Nai-Keung* [1987] 1 WLR 1339.
[24] *Re Celtic Extraction Ltd* [2001] Ch 475.
[25] Available at *https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf.*
[26] *National Provincial Bank v Ainsworth* [1965] 1 AC 1175.

The conclusions reached in the Legal Statement were confirmed by the High Court in the *AA v Persons Unknown* case[27]. The dispute originated from the request formulated by an English insurance company to obtain the return of bitcoins transferred by a Canadian company, its client, to some subjects, whose identity the judge conceded not to disclose. It had in fact happened that, following an attack by computer hackers, the insured Canadian company had suffered the blockage of its operating systems, which had been encrypted and rendered unusable. The hackers had offered to send a program to restore full functionality, upon payment of a ransom. In order to limit the damage, the insurance company had instructed its client to agree to the request and then to pay the equivalent of 950,000 dollars in bitcoins, according to the methods indicated by the hackers, in order to receive the recovery program in return (thus also avoiding greater damages to be indemnified). Substituting its client's rights, the company then commissioned an expert to attempt to identify the beneficiaries of the payment. The investigations carried out revealed that the bitcoin wallet was connected to a platform operated by two foreign companies. The insurance company asked the reimbursement of the bitcoins, on the basis of various alternative claims, i.e. by way of restitution, unlawfulness of the contract or by virtue of the principles of constructive trust, on the basis of which the owners of the platforms through which the bitcoins transfer had taken place were involved, as presumed trustees (constructive trustees).

In order to prevent the bitcoins to be lost during the time necessary for the proceedings, the insurer also requested immediate interim remedies, *inaudita altera pars*, explaining precisely that he had reimbursed his client company the sum of 950,000 dollars, with which the bitcoins were purchased to pay the ransom. The judge allowed the claim for proprietary injunction, aiming at the seizure of the debtor's assets to prevent their dissolution. Since the proprietary injunction postulates the existence of a dispute over property, the High Court had to establish the legal nature of bitcoin, concluding that it possesses all the characteristics to be included in personal property, in adherence to the arguments developed in the Legal Statement examined above. This judgment opened the way to other subsequent decisions, confirming the inclusion of cryptocurrencies in the category of personal property.

However, it is interesting to observe that it is deeply debated how to precisely qualify digital assets within this category. According to traditional teaching, "all personal things are either in possession or in action. The law knows no *tertium quid* between the two" [28] and some scholars wonder whether it could be more appropriate to identify a *tertium genus* in order to provide a more precise legal framework with respect to the new digital entities.

[27] *AA v Persons Unknown* [2020] 4 W.L.R. 35. About the qualification in terms of property, P.G.Watts-F.K. Low, *The Case for Cryptoassets as Property*, 2022, available at https://ssrn.com/abstract=4354364 or *http://dx.doi.org/10.2139/ssrn.4354364*, *T. Chan, The nature of property in cryptoassets, in Legal Studies, 2023, available at https://www.cambridge.org/core/journals/legal-studies/article/nature-of-property-in-cryptoassets/6B882C05BD3D9A7A924FBE41C359E92E*; J. Jacques, *E-money and trusts: a property analysis*, in *Law Quarterly Review*, 2022, p. 605.

[28] *OBG Ltd v Allan [2007]* UKHL 21, per Lord Fry.

This issue was extensively addressed by the Law Commission in the Consultation Paper on Digital Assets issued in 2022[29], where it was observed that the category of things in action includes those rights that can be "asserted by taking legal action or proceedings", while digital assets exist independently of other subjects, so that it is not consistent to consider them as things in action. The recognition of a third category of personal property would make it possible to adequately consider the fact that digital assets have peculiar characteristics both with respect to things in possession and things in action.

The topic is quite controversial and there are strongly conflicting opinions regarding it[30]. In particular, some argue that today's debate seems in line to the one started over a century ago regarding the legal nature of copyright and, in general, of intellectual property rights, which has proved to be rather sterile, since the flexibility of the English model of property has allowed the courts to easily place those new situations in the realm of personal property[31].

In the Final Report on Digital Assets issued on June 2023[32] the Law Commission insists on the third category approach and considers that case law shows that "the common law has clearly moved towards the explicit recognition of a third category of things to which personal property rights can relate"[33]. Consequently, the Law Commission concludes that a statutory confirmation is not necessary, even if it could be helpful in order to allow the courts to focus on the substantive issues before them and reduce the time spent on questions of categorisation of objects of personal property rights[34].

Without going into the details, it is worth pointing out that the precise classification of 'digital assets' is controversial, but their inclusion in the field of personal property seems now unquestioned by courts. The 'proprietary' nature of the rights claimed by their owner has also a widespread academic support.

Against the background of such a general consensus, a dissenting view claims that cryptoassets are independent of a single operator or a particular legal system backed up by state power and it is impossible to identify a right, power, privilege or immunity they could give rise to in legal proceedings[35]. However, also in other common law jurisdictions, courts reached the conclusion that cryptocurrencies are capable of being objects of personal property rights. The various consequences that follow from this include recognition that

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[29] Available at https://www.lawcom.gov.uk/project/digital-assets/. The *tertium genus* thesis was shaped by D. Fox, *Cryptocurrencies in the Common Law of Property*, in D. Fox-S. Green (cur.), *Cryptocurrencies in Public and Private Law*, Oxford, 2019, pp. 139 ss., seguito da J-Sarra-L. Gullifer, *Crypto-claimants and bitcoin bankruptcy: Challenges for recognition and realization*, in *International Insolvency Review*, 2019, p. 233; see also J.D. Michels-C. Millard, *The New Things: Property Rights in Digital Files?*, in *Cambridge Law Journal*, 2022, p. 323.

[30] For a punchy critic against the *tertium genus*, see K.F.K. Low, *Cryptoassets and the Renaissance of the Tertium Quid?*, *cit.*

[31] H. W. Elphinstone, *What is a Chose in Action?*, in *Law Quarterly Review*, 1893, p. 311, F. Pollock, *What is a Thing?, ivi*, 1894, p. 318; W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, in *Harv. L. Rev.*, 1920, p. 997.

[32] *Digital Assets: Final Report*, available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2023/06/Final-digital-assets-report-FOR-WEBSITE-2.pdf.

[33] See the over 24 cases quoted in the Report, 3.9, p. 53, ref. 207.

[34] Recommendation 1, 3.76, p. 55.

[35] R. Stevens, *Crypto is not Property*, in *Law Quarterly Review*, 2023, forthcoming, available at https://ssrn.com/abstract=4416200.

crypto-tokens can be subject to an interlocutory proprietary injunction, are capable of being held on trust and fall within broad statutory definitions of "property"[36].

V. THE RECOURSE TO TRUST AND, IN PARTICULAR, TO CONSTRUCTIVE TRUST.

From a comparative perspective, significant outcomes arise from the qualification in terms of property in the common law world, in particular thanks to the possibilities offered by trust. According to its general theoretical scheme, trust is a mechanism – essentially unknown in the civil law countries - on the basis of which a settlor transfers to a trustee the property right on one or more assets in order to administer them in favour of one or more beneficiary(-ies).

The trustee's duty affects the assets themselves, with the consequences that, on the one hand, a separate patrimony is created and, on the other hand, the beneficiary acquires a right affecting the assets in order to maintain their destination to his profit. Through the remedy of tracing, it is possible to 'follow the traces' of the assets transferred to the trustee, to ensure that they belong to the beneficiary if they have been transferred in violation of the trust duty or if they have been confused with the trustee's personal patrimony. The beneficiary can recover the original assets or, at least, what they have been converted into (money, shares, other assets purchased with the proceeds, etc.). The right of the beneficiary, therefore, is able to bind anyone who purchases the original assets or those that can be traced back to them, with the sole exception of the purchaser for value and without notice of the trust (the so-called equity's darling).

Although the issue of the nature of the beneficiary's right is constantly debated, the common law judges tend to qualify it as 'real' right, because it binds anyone who acquires the assets as long as it is possible to identify them in some form, even if different from the original one, up to the money that is obtained from their sale to third parties. Moreover, the protection of the right of the beneficiary is strengthened by equity through the so-called constructive trust, on which it is useful to dwell briefly as it assumes a specific interest for our purposes.

It is based on the idea that a third party can be held liable as a constructive trustee when he has collaborated in the violation of the trust duties or has become the transferee of the trust assets despite being aware of their violation. According to the approach followed by the English judges, the beneficiary acquires an equitable interest at the very moment in which the violation of the fiduciary obligations occurs and, conversely, no right is acquired by whoever collaborated in the violation.

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[36] See for instance in Australia *Chen v Blockchain Global Ltd* [2022] VSC 92 and *Commissioner of the Australian Federal Police v Bigatton* [2020] NSWSC 245; in Canada *Shair.Com Global Digital Services Ltd v Arnold* [2018] BCJ 311; in Hong Kong *Re GateCoin Ltd (In Liquidation)* [2023] HKCFI 914; in New Zealand *Ruscoe v Cryptopia Ltd (In liquidation)* [2020] NZHC 728. In the US, the proprietary nature of cryptoassets was expressly held in *In re Celsius Network LLC, et al.*, 647 [2023] B.R. 631 decided by the U.S. Bankruptcy Court for the Southern District of New York. It concerns the bankruptcy of a platform where large quantities of cryptocurrencies were deposited. Individual customers claimed their return, arguing that ownership had not been transferred to the platform. The judge, does not doubt about the nature of the right claimed on cryptocurrencies, even if he concluded that individual customers are simple unsecured creditors because, on the basis of the general terms of the contract, property has been transferred to the platform. This judgment opened a lively debate and, although it does not constitute a binding precedent, it indicates the importance of carefully analysing the content of the general terms accepted by users. Cfr. J. Bernbrock-J. Nassiri-P. Almasi, *Ownership Issues in Crypto Cases*, in *American Bankruptcy Institute Journal*, 2023, available at www.abi.org.

Although some English authors consider that the beneficiary's right is a "personal right", this terminology should not be confused with the meaning that "personal right" assumes in the civil law world. In fact, thanks to tracing and constructive trust, the position of the beneficiary is protected not only in a personal key, i.e. as a right that can be exercised against the original trustee, but also against the third parties involved, even without their knowledge, in the violation of the trust duties. It is a 'real' protection, both from the side of the right that is asserted, and from the side of the possible recovery of the assets[37].
Keeping these references in mind, it is then useful to review the already significant cases concerning the protection of cryptocurrency buyers.
One of the first occasions in which the issue was addressed was *B2C2 Ltd v Quoine Pte Ltd* decided by the Singapore International Commercial Court (SICC). [38] The Quoine company operated in the cryptocurrency exchange with the collaboration of other companies also operating in the sector, in particular through the purchase and resale of bitcoin against ether. Due to an error in Quoine's software, there had been an abnormal overestimation of the market value of ether compared to bitcoin, resulting in a huge loss suffered by one of the customers, who took legal action claiming, among other things, that Quoine held cryptocurrencies on trust in favour of the customers as beneficiaries. This request was allowed by the Court on the ground that cryptocurrencies constitute (personal) property and, as such, the trust mechanism is applicable to them.
The High Court of New Zealand also went in the same direction in the case *Ruscoe v. Cryptopia*[39]. Cryptopia Ltd was a company operating a digital cryptocurrency trading platform that went into liquidation following a cyberattack that resulted in the theft of a number of cryptocurrencies worth NZD 30 million. The judges were called to address the problem of the legal nature of cryptocurrencies as the users of the platform argued that the platform should be considered as a trustee, so that customers hold an equitable interest as beneficiaries and, as such, are to be preferred to other creditors. In adherence to this thesis, the Court held that cryptocurrencies should be considered as property as they can be identified on the basis of the public key, to which the private key of their holder is associated and, in the event of transfer, on the basis of the generation of a new private key[40]. The Court therefore held that the cryptocurrencies are held in trust in the wallet managed by the platform.

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[37] In this sense, see the leading case *Foskett v McKeown* [2000] 2 WLR 1299. Recently, H. Dagan-I. Samet, *The Beneficiary's Ownership Rights in the Trust Res in a Liberal Property Regime*, in *Modern Law Review*, 2023, p. 701.
[38] [2019] SGHC(I) 3. The decision was then reversed by the Singapore Court of Appeal (SGCA), (*Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 2), but for reasons pertaining the facts and so without affecting the thesis about the nature of cryptocurrencies. See K. Low, *Trusts of Cryptoassets*, in *Trust Law International and Trusts and Private Wealth Management: Developments and Directions*, Cambridge, 2021, City University of Hong Kong School of Law Legal Studies Research Paper No. 2020-020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3749040.
[39] *Ruscoe and Moore v. Cryptopia Limited (in Liquidation)* [2020] NZHC 728. See the extensive comment by M. Solinas, *Investors' Rights in (Crypto) Custodial Holdings: Ruscoe v Cryptopia Ltd (in Liquidation)*, in *Modern Law Review*, 2021, p. 155.
[40] "They are a type of intangible property as a result of the combination of three interdependent features. They obtain their definition as a result of the public key recording the unit of currency. The control and stability necessary to ownership and for creating a market in the coins are provided by the other two features

Many English cases rely on these precedents, going even further. In *D'Aloia v. Persons Unknown and Others*[41] decided by the English High Court in 2022, a company that operated a cryptocurrency exchange platform had induced an investor to make several deposits, then blocked his account, resulting in the impossibility of recovering the cryptocurrencies deposited there. Realizing the fraudulent nature of the company's conduct, the interested party requested the pronouncement of a precautionary measure against persons whose identity was unknown, but on whose platforms the cryptocurrencies appeared to have been deposited, as ascertained by specific IT investigations. In granting the requested remedy, the High Court started from the premise that cryptocurrencies constitute property and, therefore, whoever holds them can be considered constructive trustee, if in some way he has cooperated in their dispersion, so that the holder can recover their value from anyone it is traceable.

The same trend can be seen in the first decisions about NFTs (Non Fungible Tokens). The *Rajkumar* case decided by the High Court of Singapore concerned a decentralized finance operation[42]. The defendant (Chefpierre) undertook to lend a certain number of cryptocurrencies, receiving as a pledge an NFT belonging to the plaintiff. According to the contract stipulated by the parties, in the event of non-repayment of the loan, the NFT would be automatically transferred to the company, as indeed happened following the default. However, the NFT itself had meanwhile been put up for sale by the company on a different platform. The plaintiff sought a remedy to inhibit the transfer to third parties as an interim measure. Without qualifying the nature of the right on a NFT, the Court allowed the request, which was based on the existence of a proprietary right on the NFT. Other English cases follow the same path. In particular, the High Court issued two judgments relating to the same case: *Osbourne v. Persons Unknown* and *Ozone*[43] *and Osbourne v. Persons Unknown and Others*[44]. Complaining of having suffered the unlawful removal of two NFTs from her digital wallet, the plaintiff asked the Court for an injunction against the alleged wrongdoers in order to prevent the transfer to third parties. Of particular interest is the second judgment, in which the Court decided on the request for an injunction against the use and transfer of NFTs to third parties involving some companies located in other countries, managing portfolios to which the NFTs had been transferred. According to the High Court, under English law NFTs are property, so that the companies with which they are deposited can be considered as constructive trustees, in the interest of their beneficiary, since their removal from the original portfolio took place fraudulently. In reaching this conclusion, the High Court also considered that the remedy for compensation for damages is not satisfactory, both because the identity of the wrongdoers is unknown, and because the NFTs in question had a value for the owner going beyond their economic value.

– the private key attached to the corresponding public key and the generation of a fresh private key upon a transfer of the relevant coin" (n. 120).

41 *D'Aloia v. Persons Unknown and Others* [2022] EWHC 1723, p. 4.

42 *Janesh s/o Rajkumar v. Unknown Person ("CHEFPIERRE")* [2022] SGHC 264. T. Chan-K. F. K. Low, DeFi Common Sense: The Risk of Crypto-backed Lending in Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE"), 2023.

43 *Lavinia Deborah Osbourne v. Persons Unknown and Ozone* [2022] EWHC 1021.

44 *Lavinia Deborah Osbourne v. Persons Unknown and Others* [2023] EWHC 39.

The Court also addresses the delicate issues relating to service outside the jurisdiction and to the law applicable to a case which evidently has an international nature, given that the companies to whom the NFTs were transferred are incorporated abroad[45]. The request was allowed on the grounds that the relevant English civil procedure rules make it possible to serve abroad if the application concerns assets located in England or Wales or if it is addressed to a person as a constructive trustee according to English law. To this last respect, the Court considers that "[…] the constructive trust alleged to have been created when the Alleged Hackers transferred the Two NFTs from the MetaMask Wallet was governed by English law and, consequently, that the question whether the Third and Fourth Defendants in turn became constructive trustees when they received the trust property was also governed by English law"[46].
In essence, this decision clearly shows the very flexible approach adopted by the English judges, who do not hesitate to root disputes involving foreign companies within the jurisdiction, on the basis of the constructive trust mechanism.

VI. Conclusions

The time has now come to draw some concluding remarks. The new technologies open up unprecedented perspectives, marked by the dematerialization of 'things' within virtual spaces, in the web, a fascinating and mysterious place, where new entities continually appear, as easy to grasp as they are quick to vanish in a network where they are born, live, aggregate, but can also hide.
In both the civil law and the common law traditions there is an attempt to qualify these entities from a legal point of view, in a context characterized by a fragmented and uncertain regulatory framework, due also to the fact that it is a phenomenon deeply linked to electronic communication networks and which therefore lies outside the legal systems. The complexity of today's world projects us into a dimension where law becomes less and less identifiable in an exclusively territorial key.
This is precisely the reason why a comparative approach is unavoidable. In this perspective, we observed that both traditions are moving in the direction of bringing the new digital entities into the orbit of a "proprietary" reading, to protect those who, venturing into the world of the web, risk seeing vanish what they (believe to) own. The very fact that the traditional property discourses schemes are used in this field shows to what extent the name and of the concept of property is capable of being expanded, in a process that appears to be endless, which sees that name adapt to new and different contexts[47]. In particular, as regards the experience of civil law, the qualification of the new digital entities as 'immaterial assets' can only be read as an attempt to consider the new entities as susceptible to appropriation. However, we noted that this qualification collides

[45] Cfr. *Practice Direction 6B – Service out of the Jurisdiction*, emanata in attuazione della Section IV della Part 6 dei *Civil Procedure Rules*, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part06/pd_part06b.
[46] *Lavinia Deborah Osbourne v. Persons Unknown and Others* n. 43. See J. Lam, *Establishing proprietary claims over cryptocurrencies*, in *Trust Law International*, p. 94.
[47] About the idea of property resilience see L. Moccia, *Riflessioni sull'idea di proprietà*, in Id., *Comparazione giuridica e prospettive di studio del diritto, cit.,* p. 191.

with the difficulty of recognizing to the owner of digital assets the typical remedies associated with property, as a paradigm of the immediacy of the powers guaranteed by the law and of the effectiveness of the related remedies. In other words, when it is stated that we are in the presence of 'new assets', as such capable of becoming property objects, it remains to specify the content of the right of whoever owns them and, in essence, if the owner has the right to recover them from everybody who possess them.

It is precisely at this point that the weight of the nineteenth century's civil law model of property re-emerges, based on an idea of property as an absolute and exclusive right calibrated on the materiality of its object. This model is substantially incompatible with goods that exist in an exclusively immaterial dimension. For example, with reference to NFTs, the French authors, while starting from the qualification in terms of assets capable of becoming the object of property, are forced to ask themselves whether the right over them is comparable to the 'classical' property. They wonder, in particular, if the property remedies are available or not to the owner of NFTs, stating that "many of the new entities respond only in part to the classical regime of property. Their holder often enjoys limited, sometimes very limited, prerogatives"[48]. These digital goods therefore border on 'half' goods or 'mini' goods, unless they are simply 'false' goods".[49]

It is interesting to consider the recent initiative of Unidroit, which established a specific working group with the aim of drafting "Principles on Digital Assets and Private Law", approved by the Institute's Council on May 10, 2023[50]. Its purpose is to offer guidance to national legislators wishing to enact rules in accordance with international standards regarding the custody, transfer and use of digital assets, defined as electronic records that are capable of being subject to control ("Digital asset means an electronic record which is capable of being subject to control," Art. 2.2). The Principles address only private law issues in order to unravel some critical profiles related to the transfer and use of digital assets. Due to the difficulty of reconciling the opposing civil law and common law models of property, the choice of the drafters goes in the direction of overcoming the stumbling block related to the nature of the right enjoyed by the person owning the digital assets. Indeed, the official commentary text makes it clear that the Principles, while considering digital assets as susceptible to be the subject of proprietary rights, do not address the question of whether they should be considered as property, which is to be ascertained according to state regulations. Instead, the Principles focus on the a-technical notion of 'control,' defined by Article 6 as the situation that gives the subject exclusive power to derive utility from the digital asset, to transfer control over it, and to prevent a third party from enjoying it.

The choice of the drafters goes in the direction of overcoming the obstacle related to the nature of the right enjoyed by the subject who owns the digital assets. Even if

[48] See N. Martial-Braz, *Les NFT aux prises avec le droit des biens: essai d'une qualification*, in *Rev. Dr. Bancaire et Financier*, 2022, n. 4, p. 1.

[49] « […] nombre de nouveaux biens n'obéissent qu'assez partiellement au régime classique des biens et, notamment, aux articles 544 et suivants. Leur titulaire bénéficie souvent de prérogatives réduites, voire très réduites. Les vrais biens voisinent donc avec des demi-biens et des mini-biens à moins qu'il ne s'agisse, tout simplement, de faux biens » : H. Périnet-Marquet, *Regard sur les nouveaux biens*, in JCP, éd. gén., 2010, p. 2071.

[50] The text (with comments) is available at https://www.unidroit.org/wp-content/uploads/2023/04/C.D.-102-6-Principles-on-Digital-Assets-and-Private-Law.pdf.

understandable, however, this is not perhaps a real solution. Significantly, some French commentators outline the discrepancy between French law and the Unidroit Principles' notion of control, especially with regard to the mechanisms concerning the transfer of property rights on digital assets and the position of a *bona fidae* third party[51]. The same remark could be addressed as far as Italian law is concerned. This shows that it is not easy to overcome the different models and conceptions of property and the solution to bypass them through a-technical notions (such as 'control') could create misunderstandings and hamper harmonization in this field.

In the preceding pages we outlined that also in the common law world the emergence of digital entities, having peculiar characteristics, generates problems and sometimes confusions, as shown by the debate on the opportunity to add a new category of digital assets within the traditional articulation of personal property. However, the model of property accepted in the Anglo-American tradition is certainly more inclined to welcome digital entities within the realm of property. In continuity with the flexible and articulated medieval (feudal) experience, the common law model of property has a marked patrimonial connotation. It is characterized by a sort of abdication of the idea of ownership of things in a material sense, in favour of a conception of ownership of rights, which can be qualified as a set of powers relating to things, including incorporeal assets. Property is not linked to the thing itself, but to the utilities that can be drawn from it[52].

Whether it concerns rights to the possession and enjoyment of identified things or simple rights to receive an income, what really matters is their patrimonial value (and, in this sense, 'proprietary'), as well as the possibility of their judicial protection in a specific form, which allows the holder of the right to recover the 'thing' or in any case its value[53]. One of the outstanding outcomes of this conception is that it allows to recur to the trust mechanism, which reveals its usefulness and flexibility in providing for adequate remedies for the recovery of digital assets in the event that, due to malfunctions or for computer piracy attacks, they reach the legal sphere of third parties, who can be considered constructive trustees if they have somehow cooperated in their dispersion. Although with a certain emphasis and with an attitude of self-satisfaction, it is then at least understandable the remark according to which: "The great advantage of the English common law system is its inherent flexibility. Rather than depending on the often cumbersome, time-consuming and inflexible process of legislative intervention, judges are able to apply and adapt by analogy existing principles to new situations as they arise"[54].

[51] C. Leveneur-T. Cremers, *Les transferts et la protection de l'acquéreur de bonne foi selon les Principes Unidroit régissant les actifs numériques*, in *Revue de droit banquier et financier*, 2023, 4, p. 1.
[52] See R. Goode, *What is property?*, in *Law Quarterly Review*, 2023, p. 1.
[53] L. Moccia, *Il modello inglese di proprietà, cit.,* p. 144
[54] *Legal Statement on Cryptoassets and Smart Contracts, cit.*, p. 4.

THE WAVE OF TRANSFERS: AN EAST-EUROPEAN CHAPTER IN THE CIVIL LAW TRADITION*

Tomasz Giaro

TABLE OF CONTENTS:

To the civil law tradition belong the countries in which Roman law was received or a romanistic civil codification was imitated. The latter is true for Eastern Europe, inundated at the beginning of the 19th century by a wave of legal transfers from the West. In the countries of East-Central Europe, Poland, Bohemia, Slovakia, Slovenia and Croatia, both codes of natural law, code civil and ABGB, were introduced, whereas Romania and Serbia adopted their faithful translations.
In the second half of the 19th century, this transfer was followed by the doctrinal reception of the German pandect science, sometimes called „pandectification", experienced for the first time by the Austrian and Prussian civil law scholarship. In Eastern Europe, it was Greece, Hungary and Russian Empire which preserved their traditional law collections, limiting themselves to their modernization with the help of conceptual categories borrowed from the German pandect science.
This legislative and doctrinal-judicial transfer was additionally flanked with western continental models of legal education and administration of justice. Even Poland and Hungary, countries which represented in East-Central Europe traditional bulwarks of lay justice, quickly formed a professional court staff. The reception of these models of legal education and administration of justice proved essential for the legal „civilization" of Eastern Europe during the long 19th century.

I. THE AGE OF TRANSFERS

It has long been a fashion among comparative lawyers to question the solidity of the divide between the English common law and the continental civil law. The old dissonance is periodically sidelined as obsolete (*überholt*) or overemphasized (*überbetont*).[1] This continues to be the case even after Brexit, an event surely auguring England's return, at least partially, to island status. However, this state of affairs should not inhibit scholars from having reference to the time-honored divide when probing significant episodes from the past of the civil law tradition.

Let us begin with the simple observation that comparative law can be practiced either in the manner of micro- or macro comparison.[2] The former focuses on particular norms and institutions, whereas the latter's concern is whole normative orders, legal systems or

* Paper financed by the Narodowe Centrum Nauki (Poland) research project no. 2021/41/B/HS5/03842.

[1] James Gordley, *Common law and civil law: eine überholte Unterscheidung*, Zeitschrift für Europäisches Privatrecht 1 (1993) 498-518; Reinhard Zimmermann, *England und Deutschland: unterschiedliche Rechtskulturen?*, Göttingen 2019, 47.

[2] Konrad Zweigert, Hein Kötz, *Introduction to Comparative Law*, 3 rd ed. 1995, 4-5; Tomasz Giaro, *Diritto romano attuale. Mappe mentali e strumenti concettuali*, in P.G. Monateri, T. Giaro, A. Somma, Le radici comuni del diritto europeo, Roma 2005, 97.

traditions.[3] Serving as a basis for comparison, legal traditions are in general conceived as fixed and stable entities. However, appearances are deceptive since legal traditions change through history. This is true not only of the scattered legal transplants which are smaller legal units travelling in time and space, made popular by Alan Watson (1933–2018).[4]

Even the geographical borders of traditions can be moved hundreds of miles. I classify transplants as objects of micro comparison, whereas transfers, our present concern, are objects of macro comparison. The former consist in moving specific elements of legal systems across their borders, whereas the latter may even correspond to moving the border itself. Some legal historians, dating to the work of Paul Koschaker (1879-1951), formerly characterized this problem as one that raised the question of the territorial extent of Europe, apparently strictly connected with its metaphysical essence.[5]

However, when using the language of comparative law it seems more appropriate to speak about the enlargement of the civil law family rather than the extent of Europe. According to Ernst Rabel (1874-1955), the term civil law refers to "all the countries in which Roman law was, at one time, received or one of the romanistic codes has been imitated".[6] However, if in Rabel's lifetime either a special Nordic group within the civil law family had already been widely acknowledged[7] or Rodolfo Sacco's (1923-2022) legal formants theory[8] had been known, Rabel would probably have also included the independent effectiveness of the combined doctrinal-judicial transfer of legal knowledge.

As a matter of fact, the period stretching from the French Revolution to World War I, adopting the "long 19th century" conception of Eric Hobsbawm (1917-2012), had profound consequences for the legal landscape of Eastern Europe, comprising all its components: East-Central Europe, South-Eastern Europe and Russia.[9] The regionally differentiated mosaic of customary legal traditions was suppressed during that era by western codified law. However, the inclusion of some of these countries into the civil law family happened without any reception or imitation of a civil code.

Eastern Europe consisted during the 19th century of countries which were, as a rule, well defined historical regions, but did not exist as sovereign states. As in the case of Hungary and Poland, already during the 12th and 13th centuries they came into contact with western legal institutions, transmitted in part by Roman canon law,[10] and in part by the German town laws.[11] But only with the Enlightenment did there arrive the first movement of legal

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[3] Christiane Wendehorst, *Rechtssystemvergleichung*, in Zimmermann (ed.), Zukunftsperspektiven der Rechtsvergleichung (2016) 31 - 33, available at SSRN: https://ssrn.com/abstract=4087258.

[4] Tomasz Giaro, *Alt- und Neueuropa, Rezeptionen und Transfers*, in id. (ed.) Modernisierung durch Transfer zwischen den Weltkriegen, Frankfurt a.M. 2007, 276-279.

[5] Tomasz Giaro, *Legal Historians and the Eastern Border of Europe*, in Tommaso Beggio, Aleksander Grebieniow (eds.), Methodenfragen der Romanistik im Wandel, Tübingen 2020, 145-164.

[6] Ernst Rabel, *Private Laws of Western Civilization*, Louisiana Law Review 10.1 (1949) 1.

[7] Zweigert, Kötz, *Introduction*, 276-285.

[8] Rodolfo Sacco, *Legal Formants*, The American Journal of Comparative Law 39 (1991) 1-34, 343-399.

[9] Tomasz Giaro, *Modernisierung durch Transfer – Schwund osteuropäischer Rechtstraditionen*, in id. (ed.), Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert, Frankfurt a.M. 2006, 283-284.

[10] Wacław Uruszczak, *Rola prawa kanonicznego w rozwoju prawa polskiego w XII-XV wieku*, in id., Opera historico-iuridica selecta, Kraków 2017, 343-357.

[11] Heiner Lück, *Aspects of the transfer of the Saxon-Magdeburg Law to Central and Eastern Europe*, Rechtsgeschichte 22 (2014) 79–89; Maciej Mikuła, *Municipal Magdeburg Law* (Ius municipale Magdeburgense) *in Late Medieval Poland*, Leiden-Boston 2021, 1-39.

culture common to the whole of Europe. From the end of the 18th century, enlightened codification projects, including but not limited to the Polish 'May Constitution' of 1791, were known particularly in Poland, Hungary and Romania.[12]

At the same time, further to the East, Russia under Catherine the Great became increasingly conscious of the need to reform its law. But prior to the long 19th century, which brought an extensive transfer of civilian tradition to the East, neither learned law, nor juristic literature, nor a juristic profession were known to Russia and South-Eastern Europe. Only the veritable inundation of western law, which started at the beginning of the 19th century, occasioned the comprehensive inclusion of Eastern Europe into the continental branch of the western legal tradition.

II. Private Law in East and West

At the end of the 18th century there reigned in Eastern Europe a mass of customary law, administered by lay judges and differentiated according to the social strata and geographical regions. And if the medieval reception of Roman law in the West consisted in an intellectualization of the handling of local law, in the East the same happened with a considerable delay. Up to that point, the role of Roman law in East-Central Europe had indeed been to some extent greater than in the Balkans and Russia. However, despite the medieval origins of the universities at Prague and Cracow, it was only during the 19th century that modern law schools emerged in East-Central Europe, along with law journals and associations, not to mention professional judges.

The countries of East-Central Europe were governed during the 19th century by empires: the Danubian, the Russian, and since 1871, the German. The momentous changes in legal systems were brought about voluntarily only in Russia and, with even more decisiveness and rapidity, in South-Eastern Europe.[13] In the latter region, the gradually retreating Ottomans left behind a very archaic law: in Greece it was the byzantine *Hexabiblos*, compiled by Harmenopoulos in 1345, whilst in the Slavic countries there had persisted even older customs forming a culturally specific law of family and successions.

During Ottoman rule over the Balkans, such native domestic institutions as joint family ownership, called *kuća* or *kućna zadruga*, remained "mummified" throughout the centuries.[14] Moreover, from the viewpoint of capitalist trade, in the age called by Karl Polanyi (1886-1964) the Great Transformation, this was tantamount to a legal vacuum. Hence, the new, and in some cases reborn, Balkan states decided to exchange almost

[12] Katarzyna Sójka-Zielińska, *Le mouvement de la codification du droit en Pologne au XVIIIe siècle,* in Stanislas Salmonowicz (ed.) La codification européenne du Moyen Age au siècle des Lumières, Warszawa 1997, 207-215.

[13] Tomasz Giaro, *Transfers von Traditionen. Zum Rechtswechsel auf dem Balkan*, Studia Iuridica 58 (2014) 100-101; *Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert*, vol. I. *Rumänien, Bulgarien, Griechenland* (ed. Michael Stolleis) Frankfurt a.M. 2015; vol. II. *Serbien, Bosnien-Herzegowina, Albanien* (ed. Thomas Simon), Frankfurt a.M. 2017.

[14] Giannantonio Benacchio, *La circolazione dei modelli giuridici tra gli slavi del Sud (sloveni, croati, serbi),* Padova 1995, 70-71.

overnight their outdated Byzantine and Slavic models for a modernized western one,[15] a process which is sometimes even directly qualified as a reception of Roman law.[16]

The codifications of the 19th century, regarded generally as the signature of continental law, were exported throughout the world during the process of colonization. But they were also transferred to Eastern Europe within a short time of their promulgation in the West. Especially the anti-feudal Napoleonic legislation had immediately produced a great propagandistic impact and a broad levelling effect across the whole of Europe.[17] In private law its consequences were first felt in the Grand Duchy of Warsaw, where the French *code civil* of 1804 was introduced not later than in 1808, and in the Illyrian Provinces where it was introduced in 1809.[18]

However, if the first wave of western civil codes reached Eastern Europe almost contemporaneously with the same phenomenon in the West, what would be the point of insisting upon the big transfer wave of the 19th century as a distinct landmark of the continental legal tradition? The value of singling out this experience is that the situation in the East certainly did differ greatly from that in the West, inasmuch as western legal development was far more continuous than legal historians frequently think. The civil codifications of natural law were merely a kind of organic efflorescence capping processes that had already long been in motion.

The essence of this legislative reality is brilliantly captured by Jean-Etienne-Marie Portalis (1746-1807), the main drafter of the *code civil*, who described it as a compromise (*transaction*) between the written (Roman) law and (French) customs.[19] Conversely, in the East the borrowed or imposed codification came as a deep shock. Therefore, the contemporary legal culture of East-Central Europe contains barely any national elements pre-dating the 19th century. At the same time, the situation was still distinct in the Nordic countries which imported or, to use Rabel's terminology, 'imitated' no western civil code;[20] but this problem lies beyond the scope of our paper.

III. EXAMPLES OF LEGISLATIVE TRANSFERS

Let us start with some notable instances in which civil codes have been transferred or 'imitated', where imitation is in any case viewed by some scholars, along with reception, as a kind of legal transfer (*transferts par imitation*).[21] This strategy constituted the dominant approach to making up the lack of any original, medieval reception of Roman law. For

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15 Holm Sundhaussen, *Europa balcanica. Der Balkan als historischer Raum Europas*, Geschichte und Gesellschaft 25 (1999) 641-642.

16 Holm Sundhaussen, *Bevölkerungsentwicklung und Sozialstruktur*, in Magarditsch Hatschikjan, Stefan Troebst (eds.) Südosteuropa. Ein Handbuch, München 1999, 140.

17 Michel Grimaldi*, L'exportation du Code civil*, Pouvoirs 107 (2003) 80-96; Tigran Yepremyan, *Napoleonic Paradigm of European Integration. Theory and History*, Napoleonica. La Revue 39.1 (2021) 35-53.

18 Marko Petrak, *Code Civil and Croatian Legal Culture*, Odsev dejstev v pravu. Liber amicorum Janez Krajnc, Ljubljana 2019, 345-347.

19 Jean-Louis Halpérin, *L'impossible code civil*, Paris 1992, 276; Tomasz Giaro, *Some Prejudices about the Legal Tradition of Eastern Europe*, in Bronisław Sitek et al. (eds.) Comparative Law in Eastern and Central Europe, Cambridge 2013, 39.

20 Heikki Pihlajamäki, *Private Law Codification, Modernization and Nationalism. A View from Critical Legal History*, Critical Analysis of Law. An International and Interdisciplinary Law Review 2.1 (2015) 142-146.

21 Vladimir Hanga, *Les transferts de droit. Une esquisse*, in Tomasz Giaro (ed.) Modernisierung durch Transfer zwischen den Weltkriegen, Frankfurt a.M. 2007, 2-3.

those who, as for Koschaker, Europe is forever one and the same, the reception territory marks Europe's borders which are coincident with those of the German First Reich referred to from the 13th century onwards as the Holy Roman Empire.[22]

The peripheral countries, located outside these borders, were destined to wait some centuries for their second chance. In this respect for instance, Romania emerged as an independent state only in 1859 through a personal union between the Danubian Principalities of Moldavia and Wallachia. Romania represents a characteristic example of a country with a byzantine-orthodox cultural substrate practically unaffected by the Ottoman domination. The country managed to modernize its entire legal system, in a western vein, within the space of a few years.[23]

Romania achieved this effect by adopting all its normative models from France, with the exception of the Belgian style constitution, promulgated in 1866, which proclaimed a constitutional monarchy based on the separation of powers. Already in 1864, the *codul civil*, a faithful copy of the French *code civil*, had been adopted in Romania. It imposed modern western rules and institutions, first and foremost the civil marriage, upon a traditional rural society governed by orally transmitted customs of family and succession.[24]

This reform, born out of the Napoleonic spirit, provoked in Romania the decline of the patriarchal family and the disempowerment of the Orthodox Church, regardless of its merits in preserving national identity under Ottoman rule. Equilibrium was nevertheless soon restored by the Romanian constitution of 1866, which in its art. 22 "amended" the *codul civil* by requiring a religious blessing to accompany civil marriage. The latter became in the result a mixed civil-religious act.[25] However, the Romanian courts acknowledged marriage as valid even without religious benediction.

As is generally known, Eugen Ehrlich (1862-1922), the founding father of legal sociology, discovered underneath the Austrian civil code (ABGB) of 1811 in the multinational district of Bukovina, which was the northwestern part of Moldavia, annexed by the Habsburg Empire in 1775, the living law of local peasants.[26] A similar phenomenon was the initial resistance of Romanian peasants against the *codul civil*[27] whose reliance upon the French *code civil* was so total that prior to the 20th century Romania lacked an original indigenous doctrine of the local civil code.[28]

In contrast, Croatia was a Catholic land endowed with the Latin cultural substrate, which had remained traditionally in the orbit of the continental European common law (*ius commune*), and now enjoyed partial autonomy within the Hungarian half of the Habsburg

22 Giaro, *Legal Historians*, 151-153.
23 Viorel S. Roman, *Romania / Rumänien between the European Union and Orthodox Values*, Dr. Falk Verlag Offenbach a.M. 2005.
24 Radu Ghidău, *The Regulation and Legal Practice of the Institution of the Family before and after the Publication of the Romanian Civil Code*, in Zoran Pokrovac (ed.) *Rechtsprechung in Osteuropa. Studien zum 19. und frühen 20. Jahrhundert,* Frankfurt a.M. 2012, 113-172.
25 Marius Rotar, *On Civil and Free Marriages in Romania before 1914*, Journal of Family History 44.2 (2019) 200-218.
26 Eugen Ehrlich, *Soziologie und Jurisprudenz,* Czernowitz 1906 (from "Österreichische Richter-Zeitung") 3-7.
27 Leontin Constantinesco, *Roumanie*, in Travaux de la Semaine Internationale de Droit. L'influence du code civil dans le monde, Paris 1954, 677-78.
28 Constantin G. Dissesco, *L'influence du code civil français en Roumanie*, in Le code civil. Livre du centenaire, vol. II, Paris 1904, 861-62; Constantinesco, *Roumanie*, 680-684.

Empire. In Croatia, during Bach's absolutism the Vienna government imposed in 1852, in defiance of the authority of Croatian parliament (*Sabor*), the 1811 Austrian ABGB: in the local translation *Opći građanski zakonik* (OGZ). With this the archaic Croatian-Hungarian private law codified in Istvan Werböczi's *Opus tripartitum* of 1526 was in both countries abrogated.

Although during the limited constitutionalism of the 1860s Hungary immediately abolished the ABGB, Croatia voluntarily retained it up until WW II, as did equally Bohemia and Southern Poland. And, what is more singular, under the rule of the OGZ the old peasant joint family, despite being completely disregarded by the civil code, continued to thrive in the countryside. At the same time, reinforced by judicial rulings and administrative decisions, several local norms of rural law were enacted in Croatia which in one respect served to support this institution, traditionally regarded as typically Slavic, but in the other curtailed the practical influence of this anachronistic legal fossil.[29]

So, even if the legislative transfer of the long 19th century was here and there delayed in its effects, it ultimately led, as a rule, to the progressive disappearance of several customary institutions, witnessed at the Balkans in the gradual dissolution of the South-Slavic joint family property. The dissolution of this property type was especially rapid and irreversible in Serbia[30] and Montenegro,[31] even though it was precisely in those jurisdictions that the institution obtained legal regulation in the codes adopted. The same happened elsewhere in the Balkan region, particularly in Bulgaria, where the *zadruga* remained, however, a purely customary institution.[32]

IV. DOCTRINAL-JUDICIAL TRANSFERS

During the long 19th century, liberal codifications of private law, referred to as natural law codes, did not appear everywhere on the European continent. In Russia, Greece, and Hungary, a classical legislative transfer was impeded by the autocracy in the first case, the authority of the *Hexabiblos* in the second, and in the third by the strong national-conservative movement. Thus, in these countries there took place a mere doctrinal-judicial modernization of their time-honored legal collections: *Svod Zakonov* in Russia, *Hexabiblos* in Greece, and the *Opus Tripartitum* in Hungary.

We speak of doctrinal-judicial transfer, because on the continent the straightforward judge made law, typical of English legal culture, was excluded. Continental courts and scholarship always worked together, for which reason the judge needed backing from the professor when their personal union, usual only in the higher court instances, was lacking. In consequence, despite the European impact of the Napoleonic legislation the doctrinal-

[29] Damir Prislin-Krbavski, *Administrative and judicial practice of the peasant communal joint-family (kućna zadruga) in Croatia o f the 19th century,* in Pokrovac (ed.) *Rechtsprechung in Osteuropa*, 377-454.

[30] Jivoïn M. Péritch, *L'évolution du droit civil en Serbie*, in Les transformations du droit dans le principaux pays depuis cinquante ans 1869-1919, vol. II, Paris 1923, 307-308; Holm Sundhaussen, *Institutionen und institutioneller Wandel*, in Johannes Chr. Papalekas (ed.) Institutionen und institutioneller Wandel in Südosteuropa, München 1994, 43-44.

[31] Giaro, *Modernisierung durch Transfer*, 308-309; Gábor Hamza, *Bemerkungen zur Privatrechtsentwicklung in Montenegro*, in Spomenica Valtazara Bogišića, Beograd 2011, 318.

[32] Stefan Simeonoff, *Die zadruga und Ehegüterrechtsverhältnisse Bulgariens*, Hamburg 1931, passim.

judicial transfer route, enabled first and foremost by German Pandect scholarship, was indispensable.[33]

As a matter of fact, at that time in Europe, eastern Europe included, the German Pandect science was considered as the very essence of legal scholarship. So, starting from the middle of the 19th century, we register a historical process christened as the "Pandectification" of private law first in Prussia and Austria,[34] but soon also in western and – which is our object of interest – eastern Europe. Moreover, the countries which refused the legislative transfer of a western civil code, adopted nonetheless several pieces of foreign legislation.

This was the case particularly in Greece, which adopted the Napoleonic commercial code of 1807, while the Greek criminal code as well as the codifications of criminal and civil procedure followed other western models;[35] even in Hungary, a stronghold of judge-made law in eastern Europe, several Austrian, French and German legislative transplants were effected;[36] the Russian judicial reform, promulgated in 1864 under Tsar Alexander II, included a civil and a criminal procedure of the French type, but followed also some English and German patterns.[37]

During the 18th and early-19th centuries prior to the reform period in the 1820s, Hungary rested – in like manner to the territories of partitioned Poland – upon a system of noble privilege which stifled the development of commerce and a modern bourgeoisie, while perpetuating the oppression of peasants.[38] It seems that in Hungary judge-made law, which during the 19th century followed the Pandect science, was even more respected than in pre-revolutionary Russia. Also, the ABGB, although it was in force only during the short period of Neo-absolutism from 1853 to 1861, is assumed to have influenced the subsequent development of Hungarian private law.[39]

As far as Russia is concerned, its early modern law, including the *Sobornoe Ulozhenie* (Council Code) of 1649, the first Russian attempt at more systematic legislation, shows few traces of Roman-Byzantine influence. The legal occidentalization of Russia started only at the beginning of the 19th century and was initially limited to the doctrinal level alone.[40] Compared to western universities, the Russian institutions of higher learning were

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33 Tomasz Giaro, *Europa und das Pandektenrecht*, Rechtshistorisches Journal 12 (1993) 326-345.

34 Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today*, Oxford 2001, 4-5; Stefan Vogenauer, *An Empire of Light? Learning and Lawmaking in the History of German Law*, The Cambridge Law Journal 64.2 (2005) 496.

35 Evdoxios Doxiadis, *Resurrecting the Law. State Formation and Legal Debates in Nineteenth-Century Greece*, European History Quarterly 48.4 (2018) 629–657.

36 István Kajtár, *Rechts- und Gerichtspraxis in Ungarn 1840-1944. Tradition und Transfer,* in *Pokrovac* (ed.) *Rechtsprechung in Osteuropa,* 226-27.

37 Jörg Baberowski, *Autokratie und Justiz. Zum. Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgehenden Zarenreich 1864-1914*, Frankfurt a.M. 1996, 39-60, 57.

38 Martyn Rady, *Judicial Organization and Decision Making in Old Hungary*, The Slavonic and East European Review 90.3 (2012) 450-481.

39 Judith Balogh, *Österreichisches Recht in Ungarn und in Siebenbürgen*, in Martin F. Polaschek, Anita Ziegerhofer (eds.), Recht ohne Grenzen? Grenzen des Rechts, Frankfurt a.M. 1998, 126-132; Mária Homoki-Nagy, *Der Durchbruch des ABGB in Ungarn,* in Martin Löhnig, Stephan Wagner (eds.) **,**Nichtgeborene Kinder des Liberalismus'? Zivilgesetzgebung im Mitteleuropa der Zwischenkriegszeit, Tübingen 2018, 71-90.

40 Martin Avenarius, *Fremde Traditionen des römischen Rechts. Einfluss, Wahrnehmung und Argument des ‚rimskoe pravo' im russischen Zarenreich des 19. Jahrhunderts*, Gottingen 2014.

considerably belated. Universities were first founded in 1755 in Moscow, and then at Kazan in 1804, Kharkov in 1805, Saint Petersburg in 1819, and Kiev in 1834, to mention only the earliest.

The first step in promoting Russian legal education was taken by the Tsar's Empire in 1829, when a group of young Russians was sent to Berlin to study first under the great German jurist and founder of the Historical Law School, Friedrich Carl von Savigny (1779-1861), and then somewhat later under such renown professors as Carl Adolf von Vangerow (1808-1870) in Heidelberg and Rudolf von Jhering (1818-1892) in Göttingen. With the same object in view, the Russian government ran a seminar in Roman Law at the Law Faculty in Berlin during the years 1887-1896.[41]

Russian translations of the German handbooks of Pandect law served in the Russian Empire as introductions to the local private law interpreted from a systematic point of view, exactly as did their original editions in Germany. In the plans for the Russian civil code, drafted at the turn of the 20th century, the impact of German legal scholarship was particularly strong. As early as 1898, a Russian translation of the German civil code BGB, despite not yet being in effect in its mother-country, appeared in print in the Tsar's Empire.[42]

V. THE CIVIL CASSATION COURT OF THE GOVERNING SENATE

This doctrinal reception of the German Pandect law, taught at all Russian universities, supported the modernization of the *Svod Zakonov* (Collection of Laws) which in 1832 replaced the *Sobornoe Ulozhenie*. A significant impetus for these developments was the emancipation of the Russian serfs, which took place only in 1861, and burdened them with redemption payments. Following the judicial reform of 1864, the body of jurisprudence emerging from the civil cassation court of the Governing Senate in Saint Petersburg, the Empire's supreme court, gained momentum, generating space for the judicial reception of the Pandect law.

The Civil Cassation Department of the Governing Senate was composed of several qualified professors of Roman and private law, such as Konstantin P. Pobedonostsev (1827-1907), Kronid I. Malyshev (1841-1907), Semjon V. Pachman (1825-1910), Petr P. Tsitovich (Cytowicz 1843-1913), among others.[43] Even if they voiced misgivings about the conception of doctrine as an independent legal source and declined to adopt the entirety of the teachings of the German Pandectists, they followed them in the practice of citing directly ancient sources of Roman law to motivate their decisions.[44]

The Civil Cassation Department of the Governing Senate promoted the free sale of peasant land based on the absolute law of private property as derived from the supposedly Roman idea of autonomous and apolitical private law. The cassation court facilitated free

[41] Alexei S. Kartsov, *Das Russische Seminar für römisches Recht an der juristischen Fakultät der Friedrich-Wilhelms-Universität zu Berlin*, in Pokrovac (ed.) Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg, Frankfurt a.M. 2007, 317-356.

[42] Tomasz Giaro, *Russia and Roman Law*, Rechtsgeschichte 23 (2015) 312.

[43] Anton Rudokvas, Alexei Kartsov, *The Development of Civil Law Doctrine in Imperial Russia under the Aspect of Legal Transplants*, in Zoran Pokrovac (ed.) Rechtswissenschaft in Osteuropa. Studien zum 19. und frühen 20. Jahrhundert, Frankfurt a.M. 2010, 322.

[44] Avenarius, *Fremde Traditionen,* 461-463, 482-519.

commerce in landholdings within the framework of the freedom of contract and extended the freedom of testation.[45] In this framework there flourished also such neighboring institutions of property, all of Roman origin, as possession, easements (servitudes), prescriptive acquisition of ownership, right of pre-emption, limitation of actions, pledge and mortgage.[46]

The judicial reform of 1864 inaugurated the golden age of Russian law, enriching the legal order of the Empire with several features of judge-made law.[47] The success of the Civil Cassation Department also demonstrates how feudal and collectivist oriented customary traditions could be eliminated without a legislative intervention, through the employment of western legal concepts alone. That result could be achieved by mere doctrinal reception reinforced by court decision-making oriented by the same precepts.

A similar modernizing role was played by the Russian courts in Bessarabia, a province roughly equivalent to the two thirds of today's Moldova, acquired by Tsar Alexander I in 1812.[48] In Bessarabia was in force the late byzantine *Hexabiblos*, a medieval Nutshell in "Six books".[49] As it urgently required modernization, it was interpreted according to German Pandect science to the effect that the Russian translation of Baron's "Pandekten" was considered there directly applicable law.[50] The parallel developments promoted by the pandectist German-influenced judiciary in respect of the same *Hexabiblos* in modern Greece, where it remained effective from 1828 until 1946, is already well known.

By 1884-1885 the reform of legal education had bestowed upon Roman law an exceptional level of importance; consequently, the Russian curriculum dedicated more hours per week to the study of Justinian's Pandects than several law faculties in Germany where Roman law was still in force.[51] The aim of its intense study was to elevate the professional ethics of the Russian jurist and to improve his knowledge of two important pieces of foreign legislation in force within the Empire: the French *code civil* in central Poland and von Bunge's code of private law in the Baltics.[52]

VI. Foreign laws within the Russian Empire

In the capitulations of the Swedish provinces of Estonia and Livonia, stipulated in 1710 during the Great Northern War, Emperor Peter the Great promised to respect the local rights and freedoms existing in these territories. He limited this privilege, however, to the

[45] William Butler, The Role of Case-Law in the Russian Legal System, in John H. Baker (ed.) Judicial Records, Law Reports and the Growth of Case Law, Berlin 1989, 337–352; Gareth Popkins, Russian Peasant Wills in the Decisions of the Ruling Senate 1861–1906, The Journal of Legal History 20.2 (1999) 1–23.

[46] Alexei S. Kartsov, *Transplants in the Cassation Senate's practice. The problem of the Privies' Rights of Participation*, in Pokrovac (ed.) *Rechtsprechung in Osteuropa*, 233-266; Anton Rudokvas, *‚Labour-ownership' contra abstraktes Eigentum: Acquisitive Prescription*, ibid., 455-473.

[47] Adriano Silvestri, *The Contrast between Modernization and Tradition. Landownership during the Last Decades of the Tsarist Empire*, Review of Central and East European Law 19 (1993) 8-9, 29.

[48] Analysis in Avenarius, *Fremde Traditionen,* 467-482.

[49] Kirill Maksimovič, *Byzantinische Rechtsbücher und ihre Bedeutung für die Rechtsgeschichte Osteuropas*, in Giaro (ed.) Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert, 25-29.

[50] Anton D. Rudokvas, *Petrażyckis russische Übersetzung der „Pandekten" von Julius Baron*, in Tomasz Giaro (ed.) Leo von Petrażycki und die Rechtswissenschaft der Gegenwart, Warszawa 2020, 324.

[51] Anton D. Rudokvas, Alexei S. Kartsov, *Der Rechtsunterricht und die juristische Ausbildung im kaiserlichen Russland*, in Pokrovac (ed.) Juristenausbildung, 273-316.

[52] T. Giaro, *Russia and Roman Law*, 311.

Baltic German burghers and nobles, excluding the Estonian and Latvian speaking population. The same model preserving old rights and freedoms had already been applied by Russia in the capitulations of Curland in 1795. In the Baltics, the autonomous character of the local legal order that emerged from the capitulations lasted a very long time.[53]

In this way, the German-influenced private law of Livland, Estland and Curland, compiled in 1864 by a local learned jurist, Friedrich Georg von Bunge (1802–1897), could be promulgated as the Empire's provincial law. This extensive code relied to a certain extent upon German Pandect scholarship. Von Bunge, professor at the University of Dorpat, was primarily a local legal historian rather than a lawyer. However, his code was, from a technical-systematic standpoint, much more advanced than the Russian *Svod Zakonov*, even if its content embodied in greater measure local than western tradition.[54]

The Baltic jurisprudence was from 1889 subject to cassation by the Governing Senate in Saint Petersburg which in principle defended the new code, promulgated by Tsar Alexander II. In such manner, the Pandect scholarship may have radiated throughout Russia via an additional pathway: the medium of Baltic law.[55] On the other hand, the direction of transmission might have been the reverse and the Baltic jurisprudence could have been influenced by the lines of decision adopted by the Russian cassation. The latter was obviously, together with the whole legal doctrine in Russia, occidentalized in the Pandectist sense.

A similar reciprocal influence must have taken place between the courts of Russia and the central part of the old Polish territory. On this territory Napoleon Bonaparte established in 1807 a satellite state called the Grand Duchy of Warsaw (*Grand-Duché de Varsovie*). It was here that in 1808 his *code civil* was introduced and a modern law school aiming at its implementation founded.[56] The Warsaw Law School and its first Dean, Jan Wincenty Bandtkie (1783-1846), strongly supported the *code* which, on the other hand, was opposed by the gentry and the Catholic clergy of the Duchy.[57]

Moreover, after the Napoleonic debacle, the Vienna Congress of 1815 assigned the former territory of the Grand Duchy of Warsaw to Tsar Alexander I who decided to leave in force there the French *code civil*. The territory, which became conjoined with the Russian Empire by a personal union, was now called the Polish Kingdom or, recalling the Vienna Congress, the Congress Kingdom. During this period several legal fields were transformed from French to Polish models, beginning in 1818 with the French law of mortgage and followed in 1825 by family law and the law of persons. Rounding out the changes, 1836 saw the introduction of Russian marriage law.[58]

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[53] Tomasz Giaro, *Transnational Law and its Historical Precedents*, Studia Iuridica 68 (2016) 78-79.

[54] Marju Luts, *Modernisierung und deren Hemmnisse in den Ostseeprovinzen Est-, Liv- und Kurland im 19. Jahrhundert* , in Giaro (ed.) Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert, Frankfurt a.M. 2006, 175-190.

[55] Tomasz Giaro, *Westen im Osten. Modernisierung osteuropäischer Rechte bis zum Zweiten Weltkrieg,* Rechtsgeschichte 2 (2003) 131.

[56] T. Giaro, *Legal Historians*, 160-161.

[57] Adam Lityński, *Die Geschichte des Code Napoléon in Polen*, in Reiner Schulze (ed.) Französisches Zivilrecht in Europa während des 19. Jahrhunderts, Berlin 1994, 258-259; Michał Gałędek, Anna Klimaszewska, *A Controversial Transplant? Debate over the Adaptation of the Napoleonic Code on the Polish Territories in the Early 19th Century*, Journal of Civil Law Studies 11.2 (2018) 269-298.

[58] T. Giaro, *Modernisierung durch Transfer*, 311.

This interaction by osmosis between the Polish Kingdom and Russia proper notably increased from 1876 when the Warsaw judicature administering the *code civil* was put under the control of the Saint Petersburg cassation. What resulted was a partial Pandectification of the Warsaw jurisdiction.[59] At the end of the 19th century, the *code civil* remained one of the few distinctive institutions of the Polish Kingdom with respect to the Empire. Despite the strong Russification measures following the defeat of the January uprising of 1863-64, several Polish judges and public prosecutors remained in office until World War I, whilst advocates and notaries were almost exclusively Poles.

With this, attention must turn to a final dilemma of the Russian Empire's legal pluralism: that of the lands beyond the river Bug, which during the partitions of Poland were incorporated into Russia. The third Lithuanian Statute of 1588, an impressive Renaissance codification, was there in force up until the 1840s.[60] Only at that point did these territories become subject to the Russian *Svod zakonov*.[61] However, with the arrival of the age of nationalism in the late 19th century, Empire's legal pluralism, and particularly the law of the Baltic Germans, was increasingly questioned by the Russian central government which advocated imperialistic and pan-Slavic tendencies.[62]

In particular, the *Szkoła Główna* (Main School) in Warsaw, which in the years 1862-1869 had served as a short-lived successor institution to the University of Warsaw, closed after the 1830 November insurrection. The *Szkoła Główna* was Russified and replaced in 1870 by the Russian Imperial University which was scarcely anything more than a provincial university of the Tsar's Empire.[63] With some delay, a similar process took place in the Baltic Provinces, where the city of Dorpat (Tartu), known in Russian as *Derpt*, together with its prestigious university founded in 1632 by Gustav Adolf of Sweden, were renamed to *Jurjev*.[64]

VII. National emancipation in the Habsburg Monarchy

The Polish territory acquired by Austria during the partitions of Poland-Lithuania, where the Austrian civil code ABGB was in effect, became Habsburg crown land under the title of the Kingdom of Galicia and Lodomeria. After this land was granted a *de facto* autonomy within the Habsburg Empire in the 1860s, both old Polish Universities of Cracow and Lwów (*Lemberg*) became training centers for Polish lawyers serving Austria-Hungary.[65]

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[59] Katarzyna Sójka-Zielińska, *La réception du Code Napoléon en Pologne*, in Rapports polonais présentés au VIIIe Congrès International de Droit Comparé, Varsovie 1970, 219-220; Lityński, *Die Geschichte des Code Napoléon*, 265-266.

[60] Juliusz Bardach, *Les Statuts Lituaniens – codifications de l'époque de la Renaissance*, in Salmonowicz (ed.) La codification européenne, 103-126.

[61] Sławomir Godek, *III Statut Litewski w dobie porozbiorowej*, Warszawa 2012 (793-810 an extensive summary: *The Third Lithuanian Statute in the Post-Partition Era*).

[62] Thomas Anepaio, *Die Justizreform von 1889 in den Ostseeprovinzen*, in Jörn Eckert, Kjell A. Modéer (eds.), Geschichte und Perspektiven des Rechts im Ostseeraum, Frankfurt a.M. 2002, 78.

[63] Piotr S. Wandycz, *The Lands of the Partitioned Poland 1795-1918*, 4th ed. Seattle-London 1996, 196.

[64] T. Anepaio, *Die russische Universität in Jur'jev 1889–1918*, in Pokrovac (ed.) Juristenausbildung, 391-425.

[65] Andrzej Mączyński, *Das ABGB in Polen*, in 200 Jahre ABGB - Ausstrahlungen, vol. I, Wien 2011, 180-188; Filippo Ranieri, *Zur Bedeutung nationaler Privatrechte im heutigen europäischen Zivilrecht*, Zeitschrift für Neuere Rechtsgeschichte 33 (2011) 142-148.

These universities were also frequented by Poles from the Russian and Prussian partitions, a fact which fostered the unification of Polish law after World War I.[66]

Previously, the judges of peripheral courts had been dispatched directly from Vienna and subordinated to the *Oberste Justizstelle* which from 1850 was substituted by the *Oberstes Gerichts- und Kassationshof*. However, during the autonomy the jurisdiction of Galicia became infused with local elements. In particular, the Lemberg civilian, Ernest Till (1846-1926), followed by Fryderyk Zoll jr. (1865-1948) of Cracow, [67] both fought for acknowledgment that real property could be acquired without an accompanying entry in the land register (*intabulatio*), as was required by the ABGB.[68] Moreover, the customary law of succession of the Polish peasants remained unaffected by any of the new civil codes.[69]

Within the Danubian Monarchy, outside of Southern Poland, the national linguistic emancipation of legal education was strictly intertwined with the modernizing function of legal scholarship particularly in Bohemia and Croatia. In 1882, at the culmination of the Czech National Revival, a Czech Law Faculty was founded at the Charles-Ferdinand University of Prague by a splinter group of Czech professors under the leadership of the well-known Pandect scholar Antonín Randa (1834-1914).[70] Both the German and the Czech university went by the name Charles-Ferdinand, but after World War II the German one was not reopened.

On the other hand, in Zagreb (*Agram*) a university and a law faculty following the Austrian model were established in 1874; the curriculum of the law faculty conceded a large place to education in historical subjects, but Croatian legal history was not included.[71] The Zagreb law faculty's establishment followed that of its Romanian brethren, founded at Iasi (*Jassy*, *Jászvásár*) in 1860, at Bucharest in 1864, and at Cluj (*Clausenburg*, *Kolozsvár*) in 1872, which had since 1867 been part of Hungary. But the University of Zagreb predated, in its turn, those founded at Sofia in 1892 and at Belgrade in 1905.

In this way, it may be generally stated that the medieval reception of Roman law, which assured the relative unity of western European countries, occurred in eastern Europe during the 19th century. It is true that this region received Roman law in its modern guise of western codifications and legal doctrines. But however this may be, it is from this time that the threefold European legal geography, with its tripartite division between the British Isles, the west and the east of the continent, collapsed to a dual system which confronted the English common law with the relatively homogeneous continental landscape of civil law.[72]

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[66] Andrzej Wrzyszcz, *Die Juristenausbildung an polnischen akademischen Einrichtungen im 19. und zu Beginn des 20. Jahrhunderts*, in Pokrovac (ed.) Juristenausbildung, 238-246.

[67] Ernest Till, *Prawo prywatne austryackie*, vol. II. *Prawo rzeczowe*, Lwów 1892, 209 nt. 1; Fryderyk Zoll jr., *Petytoryjna ochrona posiadania prawnego*, Przegląd Notarialny 7-8 (1947) 22.

[68] Rafal Wojciechowski, *Das ABGB und die polnische Zivilistik*, in 200 Jahre ABGB, vol. I, 186-187.

[69] Adam Bobkowski et al. (eds.) *Zwyczaje spadkowe włościan w Polsce*, parts I-IV, Warszawa 1928-29.

[70] Petra Skřejpková, *Die juristische Ausbildung in den böhmischen Ländern bis zum Ersten Weltkrieg*, in Pokrovac (ed.) Juristenausbildung, 172-175.

[71] Dalibor Čepulo, *Legal Education in Croatia from Medieval Times to 1918: Institutions, Courses of Study and Transfers*, in Pokrovac (ed.) Juristenausbildung, 123-141.

[72] Tomasz Giaro, *Legal Tradition of Eastern Europe. Its Rise and Demise*, Comparative Law Review 2.1 (2011) 22.

VIII. PUBLIC LAW: RECEPTION TAKEN AT A GALLOP

We have mentioned the legal vacuum in private law left behind by the Ottomans in the Balkans. The characterization "power vacuum", can in turn aptly be applied to the situation then prevailing in public law.[73] Likewise, the legal occidentalization of the Tsar's Empire during the 19th century was not restricted to private law. The Russian Empire served to export western constitutional models that were not even given a moment's consideration for usage in Russia proper. By means of such "constitutional diplomacy", the Tsar's Empire supplied numerous countries subject to Russian tutelage in East-Central and South-Eastern Europe with western legal models.[74]

The constitutions of the Ionian Islands, both the so-called Usakov-constitution of 1799 and its successor promulgated in 1803, were inspired by the French revolutionary models. In contrast, the two 1815 constitutions, for the Free City of Cracow and for the Congress Poland, both mainly devised by Prince Adam Jerzy Czartoryski (1770-1861),[75] followed the Bourbonic *charte octroyée* of 1814. The latter also affected the *Règlement organiques* of the Romanian Principalities of Moldavia and Wallachia, enacted by the Russians in 1831-1832, as well as the Serbian constitution of 1838, called also the "Turkish" constitution (*Turski ustav*).

Russian translations of early German authorities on the concept of "legal state" (the German *Rechtsstaat*)[76], sometimes less happily rendered into English as the "law-state",[77] started to appear in the Tsar's Empire as early as the 1860s, such as in the case of the classic Robert von Mohl (1799-1875).[78] However, the term *pravovoe gosudarstvo*, which seems to be the most exact translation from the German, was known to Russian constitutionalism only from the 1880s onwards. Thereafter, it was energetically, but inefficiently, popularized among others by the Polish jurist, professor of the Imperial Moscow University and member of the First Duma on behalf of the Constitutional Democrats, Gabriel Shershenevitch (Szerszeniewicz 1863-1912).[79]

The Bulgarian Tarnovo Constitution, in whose preparation Russian assistance proved indispensable, already in 1879 followed the liberal model of the Belgian parliamentary monarchy of 1831. But within the Tsar's Empire itself the first ever Russian constitution, inspired by the anachronistic Prussian *Verfassung* of 1850, famous for its plutocratic three-class franchise, was promulgated by the last Russian Tsar Nicholas II Romanov only in 1906. Nevertheless, in the succeeding period this constitution remained a dead letter. Only

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73 Thomas Simon, *‚Nationale Wiedergeburt' und ‚koloniale Modernisierung'. Zwei Muster des Rechtstransfers auf dem Balkan im 19. Jahrhundert*, in id. (ed.) Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert, vol. II, 1-42, 31.

74 Vladislav J. Grossul, *Der russische Konstitutionalismus außerhalb der Grenzen Russlands*, in Dietrich Beyrau et al. (eds.) Reformen im Russland des 19. und 20. Jahrhunderts. Westliche Modelle und russische Erfahrungen, Frankfurt a. M. 1996, 60-84.

75 Martian Kukiel, *Czartoryski and European Unity, 1771-1861*, Princeton NY 1955.

76 James R. Silkenat et al. (eds.) *The Legal Doctrines of the Rule of Law and the Legal State*, Springer 2014.

77 Neil MacCormick, *Institutions of Law: an Essay in Legal Theory*, Oxford 2007, 3, 35, 49.

78 Hiroshi Oda, *The Emergence of Pravovoe Gosudarstvo (Rechtsstaat) in Russia*, Review of Central and East European Law 25 (1999) 381-382.

79 Anita Schlüchter, *Gabriel Feliksovic Sersenevic – eine rechtspositivistische Verteidigung des Rechts und des Rechtsstaates in Russland*, Rechtstheorie 35.3 (2004) 563-575; Adam Bosiacki, *Koncepcje prawa Gabriela Szerszenewicza a ich znajomość w Polsce*, Studia Iuridica 57 (2013) 22-24.

during the February Revolution of 1917 did there arise a short interruption of autocracy that finally allowed some space to parliamentary government.[80]

Of course, South-Eastern Europe resorted to the reception not only of private law from the West, but also received western public law, particularly of the constitutional variety.[81] The diffusion underwent by the Belgian constitution of 1831, itself inspired by the 1815 Dutch constitution, and by the 1830 French *charte constitutionnelle*, based in its turn on the 1814 *charte octroyée*, is particularly noteworthy.[82] The Belgian constitution was characterized by the principle of popular sovereignty, fundamental rights and separation of powers, as well as the joint legislative competence of the king and both chambers of parliament.[83]

The Belgian 1831 model of liberal parliamentary monarchy had an astonishing career during the 19th century throughout western Europe, but first and foremost in the Balkans.[84] It was adopted twice, in 1844 and 1864, by the Kingdom of Greece, in 1866 by Romania which produced the most faithful copy of the Belgian constitution, again twice by the Principality of Serbia, first in 1869 and then again in 1888, by Bulgaria in the above-mentioned Tarnovo Constitution of 1879, and by the Principality of Montenegro in 1905. The choice of the transfer source in South-Eastern Europe was predominantly dictated by political reasons and circumstances. For instance, Serbia followed France in the Napoleonic era of the First French Empire until 1815, but modeled its civil code of 1844 (*Građanski zakonik za Kneževinu Srbiju*) chiefly upon the Austrian ABGB.[85] When between 1850 and 1870 the Second French Empire of Napoleon III, aspired again to the role of the leading continental power, Serbia turned again to French patterns, particularly in its commercial code of 1860 (*Trgovački zakonik*).[86]

We are unable to trace in detail the rapid reception of western law in the Balkans, which was vividly described by a Romanian expert as reception "taken at a gallop".[87] But in any case, the Principality of Serbia ultimately overcame its dependency on French models to the benefit of the German Empire, as did Greece, albeit only at the end of the 19th century. The German orientation also prevailed by the turn of the century in the Principality of Bulgaria, even if the country had previously wavered between Russian and French models.[88]

IX. DISTANT OUTCOMES OF THE BIG TRANSFER WAVE

While the Tsar's Empire had been moving ever closer to the legal world of the West, in the immediate aftermath of the October Revolution the newly emerged Soviet Russia

[80] Michał Sadłowski, *Między Mikołajem II a Leninem. Państwowość rosyjska i jej koncepcje*, Kraków 2021.
[81] Dimitrije Djordjevic, *Foreign Influences on Nineteenth-Century Balkan Constitutions*, in Papers for the 5th Congress of Southeast European Studies, Columbus 1984, 72–102.
[82] Günter Frankenberg, *Constitutional transfers and experiments in the 19th century*, in id. (ed.) Order from Transfer. Comparative Constitutional Design and Legal Culture, Elgar 2013, 296.
[83] Günter Frankenberg, *Comparative Constitutional Studies. Between Magic and Deceit*, Elgar 2018, 173-176.
[84] Diana Mishkova, *Balkan Liberalisms*, in Roumen Daskalov, Mishkova (eds.) Entangled Histories of the Balkans, vol. II. Transfers of Political Ideologies and Institutions, Leiden-Boston 2014, 171-192.
[85] Sima Avramović, *Mixture of legal identities: case of the Dutch (1838) and the Serbian (1844) civil code,* Belgrade Law Review 66.4 (2018) 27-34.
[86] Dušan Nikolić, *Codification of Civil Law in Serbia*, in Liber amicorum Ján Lazar, Tranava 2014, 443-471.
[87] Valentin Al. Georgesco, *Modèles juridiques de la réception romano-byzantine*, in *Da Roma alla Terza Roma*, vol. I. Studi. Roma, Costantinopoli, Mosca, Napoli 1983, 351: „une réception galopante du droit occidental*"*.
[88] Giaro, *Modernisierung durch Transfer*, 302-303.

sought a retreat. After having said, in striking contrast with liberal slogans, that they did not recognize any distinction between private and public law,[89] and after having tried for a couple of years to administer justice without statutes and codes, the Soviets quickly set to work on the codification of civil law, which has been since then their main concern and the constant feature of the Soviet legal tradition.[90]

However, in East-Central and South-Eastern Europe, during the integral interwar period of 1918-1939 the intense circulation of western legal models continued unabated. Only following World War II was Soviet communism able to extend throughout the whole Eastern Europe its campaign to reverse the effects of legal westernization. But all in all, the entire 20th century became for this region a century of codification. In other words, even after the fading away of the big transfer wave of the long 19th century Eastern Europe remained on the same path.

A redirection of effort occurred only so far as necessary to bring about the substitution of relatively simple receptions, typical of the previous period, with more syncretic models. It was the case of the Polish code of obligations (*kodeks zobowiązań*) promulgated in 1933. While being a distant reverberation of the transfer era, this was by no means a mere transplant. Rather, it was the product of comparative research conducted by Polish jurists in the interwar time.[91] Hence, the Polish code of obligations was described by Filippo Ranieri (1944-2020) with good reason as the first truly European private law codification.[92]

After World War II the codification trend persisted. Only at the dawn of the 21th century have some countries in the region attained first codifications, while others had no more to do than undertake recodification,[93] for instance, Lithuania in 2000, Estonia in 2002, Ukraine in 2003, the Czech Republic in 2012, and Hungary in 2013.[94] Latvia alone opted in 1992 to simply return to its own old civil code of 1937 which, in its turn, was essentially hardly something more than a reworking of Friedrich Georg von Bunge's private law codification for the Baltic provinces of the Russian Empire, promulgated in 1864.[95]

With respect to the period of communist rule, even the old civil codes could survive in Eastern Germany where the BGB of 1896 was in force until 1976. The case was the same in Romania, where the *codul civil* of 1864 was never abrogated until the fall of communism. To these legislative survivals several examples of doctrinal survivals may be added. Some of the supposedly new real-socialist civil codes, particularly those enacted by Hungary in

89 Rafał Mańko, '*We do not Recognize Anything Private*', in Bronisław Sitek et al. (eds.) Private Interest and Public Interest in European Legal Tradition, Olsztyn 2015, 31-65.

90 Dmitry Poldnikov, *The Formalistic Pattern of Soviet Civil Codification as a Chapter in European Legal History*, Working Papers of National Research University Higher School of Economics 94 (2020).

91 Wojciech Dajczak, *Kodeks zobowiązań jako lekcja metody prawno-porównawczej*, Kwartalnik Prawa Prywatnego 23.4 (2014) 829-854; Anna Moszyńska, *Codification of the Civil Law in Interwar Poland*, in Löhnig, Wagner (eds.) Nichtgeborene Kinder? 167-172.

92 Filippo Ranieri, *Europäisches Obligationenrecht*, 3rd ed., Springer 2009, 106.

93 Kamil Zaradkiewicz, *Rekodyfikacja prawa cywilnego*, Przegląd Legislacyjny 36 (2003) 60-96; id., *Kodyfikacja prawa cywilnego na Litwie, Łotwie i w Estonii*, Przegląd Legislacyjny 38 (2003) 25-74.

94 Anna Stawarska-Rippel, *Problem kodyfikacji prawa prywatnego w państwach Europy Środkowo-Wschodniej z perspektywy stulecia*, Miscellanea Historico-Iuridica 18.1 (2019) 50-51.

95 Thomas Anepaio, *Die rechtliche Entwicklung der Baltischen Staaten 1918-1940*, in Giaro (ed.) Modernisierung durch Transfer zwischen den Weltkriegen, 19-20; Philipp Schwartz, *Das Lettländische Zivilgesetzbuch vom 28. Januar 1937*, in Löhnig, Wagner (eds.) Nichtgeborene Kinder?, 317-358.

1959 and Poland in 1964, substantially drew upon the good old tradition of the German Pandect science. The former could have been equally promulgated, according to a Hungarian expert, some 150 years earlier.[96]

In legal history, such phenomena of hidden continuity from previous periods frequently accompany episodes of more or less extensive and conspicuous change. In reference to phenomena like these, Rafał Mańko has formulated a theory of legal survivals, first and foremost, though not only, with the real-socialist survivals in legal systems of post-communist societies in view.[97] However, even Soviet legal concepts and institutions, although lauded by many as particularly innovative, were not heaven-sent.

As a matter of fact, even though they were exported to East-Central and South-Eastern Europe from the Russian center as instruments of Sovietization, they had been previously westernized by the pre-revolutionary legal scholarship. Soviet legislation on civil law (the very term "private law" was now forbidden), in particular the first modern civil code of Russia promulgated in 1922, was drafted by pre-revolutionary jurists, such as Aleksandr Grigoryevich Goikhbarg (1883-1962), who bestowed upon it a relatively high technical-doctrinal endowment and a decidedly traditional shape.

Probably for this reason, during the Stalinism of the 1930s, Goikhbarg was condemned in official circles as "not Marxist" (which was *per se* a heavy censure) and bourgeois; in 1948–1955 he was even imprisoned. In 1962 he died in oblivion.[98] But coming back to the Russian code of 1922, in its "general part", as well as the clauses on the social function of law and the abuse of right, it demonstrates the clear influence not only of German Pandectism, but also of such representatives of "juristic socialism" as the French legal philosopher Léon Duguit (1859-1928) and the Austrian critic of the German BGB, Anton Menger (1841-1906).[99]

X. LAW OF REAL SOCIALISM AND THE CIVIL LAW TRADITION

Many features of the Soviet legal system are cited in comparative law scholarship to corroborate the theory of the radical separation between socialist law and the civil law tradition: first and foremost the ideological factors, but also some structural features, such as the dominant role of the monoparty, the absorption of private law by public law, the so-called prerogativism which means in the final analysis nothing less than legalized lawlessness.[100] However, if we search for legal innovations or discoveries in the field of legal dogmatics, the results are rather scarce.

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[96] László Sólyom, *Zivilrecht und Bürgerrecht oder was man darf, was nicht*, Acta Juridica Academiae Scientiarum Hungaricae 28.3-4 (1986) 267.

[97] Rafał Mańko, *Is the Socialist Legal Tradition 'Dead and Buried'?*, in Thomas Wilhelmsson et al. (eds.), Private Law and the Many Cultures of Europe, Wolters Kluwer 2007, 86–89; id., *Legal Survivals. A Conceptual Tool for Analysing Post-transformation Continuity of Legal Culture*, in Tiesību efektivitāte postmodernā sabiedrībā, Riga 2015, 20-24.

[98] Adam Bosiacki, *Utopia, Władza, Prawo. Doktryna i koncepcje prawne bolszewickiej Rosji 1917-1921*, 2nd ed., Warszawa 2012, 379-395.

[99] Norbert Reich, *Sozialismus und Zivilrecht. Eine rechtstheoretisch-rechtshistorische Studie zur Zivilrechtstheorie und Kodifikationspraxis im sowjetischen Gesellschafts- und Rechtssystem*, Frankfurt a.M. 1972, 540-68; Giaro, *Westen im Osten*, 136.

[100] John Quigley, *Socialist Law and the Civil Law Tradition*, The American Journal of Comparative Law 37.4 (1989) 786-796.

For instance, the differentiation of property according to its object and the model of the externally controlled state enterprise were not invented by Soviet jurists. It was the continental branch of liberal capitalism that distinguished for the first time between property as an absolute unitary right of possession, on the one hand, and the mere usage or disposal thereof, on the other. So, property in the technical sense remained with the enterprise, whereas the development strategy and the choice of managers were decided externally by the majority stockholders.[101]

The question whether Soviet law constituted a system distinct from continental civil law that eventually became the "mother" of the "socialist legal family" remains unsettled among comparatists. In his seminal handbook of comparative law, René David (1906-1990) defined the emergence of the socialist law as "secession" from the civil law system or, as he used to say, from the Romano-Germanic family.[102] John Henry Merryman (1920-2015) spoke about "the Soviet deviation" as a temporary phenomenon.[103] In such a case socialist law would be simply an short-lived offshoot of the civil law system.

However, the eminent American sovietologist and expert in Russian law, Harold J. Berman (1918-2007), went still further, extending the concept of western legal tradition not only to East-Central Europe, but also directly to Russia, even the communist one.[104] Although Berman strangely forgot to mention in this context South-Eastern Europe,[105] since then the belief in the European character of Soviet civil law, and in consequence of the whole system of socialist law, has been gaining still more adherents amidst the community of comparatists.

Evident elements of continuity between the pre-revolutionary and the Soviet era in the field of Soviet public law[106] prompt the conclusion that Soviet law retained many enduring 'survivals' carried over from earlier Russian law.[107] We should mention at the theoretical level the concept of *pravovoe gosudarstvo*, equivalent to the continental-German *Rechtsstaat*. However, we also must not overlook administrative law, which took over from tsarist times the organizational structure of the government and particular ministries, nor for that matter criminal law, which restored the traditional penalty of banishment already in 1922.[108]

The conservatism of Soviet lawyers is also easily observable in those sectors of legal regulation which in the West fall under the heading of private law, above all in matters of the law of economy and state ownership. The Soviet "Principles of Civil Legislation of the USSR and the Union Republics", promulgated in 1961, as well as the Russian (RSFSR)

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101 Tomasz Giaro, *Aufstieg und Niedergang des sozialistischen Zivilrechts. Von der Ideologie zur Rechtsdogmatik der Pauschalenteignung*, in Gerd Bender, Ulrich Falk (eds.), Recht im Sozialismus, vol. I. Enteignung, Frankfurt a.M. 1999, 251-252.

102 René David, Les *grands systèmes de droit contemporains*, 4th ed., Dalloz 1971, 71.

103 John H. Merryman, *The French Deviation*, The American Journal of Comparative Law 44.1 (1996) 109, 119.

104 Harold J. Berman, *Law and Revolution*, vol. I. *The Formation of the Western Legal Tradition*, Cambridge MA, London 1983, 539.

105 Tomasz Giaro, *The East of the West. Harold J. Berman and Eastern Europe*, Rechtsgeschichte 21 (2013) 195.

106 Citations in Tomasz Giaro, *Legal Tradition of Eastern Europe*, 20-21.

107 Frits Gorlé, *Le poids de la tradition juridique nationale russe dans le droit sovietique*, Tijdschrift voor Rechtsgeschiedenis 48.2 (1980) 99–123.

108 William Partlett, *Reclassifying Russian Law: Mechanisms, Outcomes, and Solutions for an Overly Politicized Field*, Columbia Journal of Eastern European Law 2.1 (2008) 1-55.

civil code of 1964, embraced the principle of the unity of civil law, contradicted within the socialist camp only by Czechoslovakia and East Germany (DDR).[109] In consequence, only those two countries promulgated a kind of commercial code for the units of socialized economy.[110]

In accordance with its conservative function, the principle of the unity of civil law required a sharp dogmatic distinction between the public administrative and private civilian components of economic regulation.[111] In this way, the Napoleonic fiction of the younger civil law tradition equal for all the subjects could be maintained. However, the reality of socialist commercial life was that the economic plans adopted by the state administration were considered as paramount "super-sources" of economic law.[112]

Or take finally the famous *crux interpretum* concerning the subjective rights granted to state-owned enterprises over the portions of national property administered by them. The question of the bearer of these rights, interpreted in accordance with the German Pandect science as exclusive ownership, was formulated according to the abstract way of thinking dominant in this scholarly discipline. Little wonder that such a highly conceptual problem never came to be resolved satisfactorily and instead persisted as a paradox until the collapse of real socialism.[113]

Rafał Mańko would like to resolve the dilemma of the supposed autonomy of socialist law from the traditional civil law system with the help of the form/substance dichotomy. He sees the followers of formalism as focusing on the textual and conceptual similarities between the Pandect scholarship and the socialist civil codes, whereas the opposite party, the substantialists, highlight the dissimilar legal culture: collectivist ideology, omnipresent monoparty, planned economy, soviet mentality, etc.[114]

However, when directed toward legal matters, the distinction between form and substance results in a very imperfect dichotomy. Is it not the case that socialist conceptualism, which is paramount in the above-cited discussions on the proper construction of state ownership, belongs to the field of legal culture? I somewhere happened upon the view that Russia was a civil law country until 1917 and then again after 1991. And what was in between? Was real socialism something like a total blackout of the civil law tradition marked by precipitous discontinuities?[115]

Democracy, the market economy, separation of powers and human rights are not invariably present in every civil law country. If we are not entitled to enrich the definition of civil law with moral and ideological elements based upon value-laden criteria, we must

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[109] Klaus Westen, *Das ‚sozialistische Zivilrecht' und die Kontinuität europäischer Zivilrechtsentwicklung*, Juristen-Zeitung 48 (1993) 13-14.

[110] Gábor Hamza, *Continuity and Discontinuity of Private/Civil Law in Eastern Europe* after World War II Fundamina 12 (2006) 69.

[111] Giaro, *Aufstieg und Niedergang,* 273-276.

[112] Wenceslas J. Wagner, *General Features of Polish Contract Law*, in id. (ed.), Polish Law Throughout the Ages, Stanford 1970, 409-410.

[113] Frederic H. Lawson, *Pour une étude comparative de la propriété*, Revue Internationale de Droit Comparé 19 (1967) 420; Katlijn Malfliet*, The Hungarian Quest for a Valid Theory of 'Socialist' Property. Still a Long Way to Go*, Review of Socialist Law 13 (1987) 261-262; Giaro, *Aufstieg und Niedergang*, 279-280.

[114] Rafał Mańko, *Legal Taxonomy and the Political. A Central_European Perspective*, in Paulina Bieś-Srokosz et al. (eds.) Law, Space and the Political. An East-West Perspective, Częstochowa 2018, 17-19.

[115] Giaro, *Some Prejudices*, 45.

resign ourselves to the impossibility of having a clear-cut answer.[116] The real socialist state resembled in some measure – if I may say so without offence – the "dual state", devised by Ernst Fraenkel (1898-1975) for the system of early Nazism.[117] To speak with René David, the real socialist law was a system in train of "secession" from the civil law family or, the other way round, a civil law system modified by "socialist" elements.

XI. The effectiveness of the XIX century transfers

The concept of transfer is the victim of several misunderstandings. Generally, it seems reasonable to distinguish between the question of effectiveness broadly understood and a narrower inquiry into whether a transfer has exactly replicated its object; something akin to a mere mechanical displacement, like the transfer of passengers from the airport to the city. The transfer of western legal knowledge during the 19th century was frequently belated and even distorted. However, its general effectiveness consisted in an adoption of the whole set of continental systematic "formants" typical for the codified civil law.[118]

So, the big transfer wave of the 19th century signified, in the end, the victory of the continental juristic mindset or, to express it more traditionally, of the 'codification idea' which has always been central for the civil law tradition.[119] This can be said equally of the countries hostile to codification, which during the long 19th century rejected the legislative transfer of a western civil code, limiting themselves instead to a transfer of purely doctrinal-judicial nature. Yet in the 20th century, new civil codes were promulgated by all these countries: in 1922 by Soviet Russia, in 1946 by Greece, and in 1959 by Hungary.

On the other hand, legislative transfer has never signified the total inclusion of a transferee country into the legal system of the transferor, since the East-European derivates of the French *code civil*, adopted in Central Poland and Romania, were of course situated in jurisdictions formally independent from the French. Although we know that until the beginning of the 20th century Romania lacked, according to our scanty relations, an indigenous doctrine of the local civil code. The main concern of Romanian civil law scholarship at that time was "to explain the institutions" of Romanian civil code.[120]

In Central Poland, the dogmatics of private law was seemingly more creative,[121] but case law relating to the Polish implementation of the *code civil* was published to some extent systematically only since the 1840s.[122] However, because of the destruction of the Warsaw

116 Cf. the discussion in Adam Bosiacki, *Andrei Yanuarevich Vyshinsky: Paragon of the Totalitarian Conception of the Law and Political Organisation*, in Jerzy Borejsza et al. (eds.) Totalitarian and Authoritarian Regimes in Europe, Oxford 2006, 177–187; Giaro, *Russia and Roman Law*, 316-317.

117 Ernst Fraenkel, *Dual State. A Contribution to the Theory of Dictatorship*, New York–London–Toronto 1941; Richard Sakwa, *The Dual State in Russia*, Post-Soviet Affairs 26.3 (2010) 185-206.

118 Rodolfo Sacco, *Einführung in die Rechtsvergleichung*, Baden-Baden 2001, 59-77; id., *Legal Formants*, The American Journal of Comparative Law 39 (1991) 1-34, 343-399.

119 Peter A.J. van den Berg, *The Politics of European Codification. A History of the Unification of Law in France, Prussia, the Austrian Monarchy and the Netherlands*, Europa Law Publishing 2007.

120 Dan Constantin Mâţă, *The Development of Romanian Legal Science 1814-1940*, in Pokrovac (ed.) Rechtswissenschaft, 230-234.

121 Adam Słomiński, *Myśl prawnicza z dziedziny prawa cywilnego w Królestwie Kongresowym*, Warszawa 1923.

122 Piotr Pomianowski, *Divorce proceedings pursuant to the code civil and the code of the procedure civile of 1806 in the practice of Polish Courts*, Vergentis 6 (2018) 239; Adam Moniuszko, Piotr Pomianowski, *Zerwana więź. Tradycje dawnego prawa polskiego w XIX i XX w.,* in Łukasz Pisarczyk (ed.) Między tradycją a nowoczesnością. Prawo polskie w 100-lecie odzyskania niepodległości, Warszawa 2019, 383-398.

court archives by the German troops, which happened directly after the 1944 Warsaw Uprising, we possess only very fragmentary documentation of this judge-made law. What is known today stems rather from other courts of the Grand Duchy of Warsaw, such as Kalisz and Cracow, with only limited insights obtainable from the sparse remains of documentation in Warsaw and Bydgoszcz (Bromberg).

Generally speaking, the Polish customary law[123] was not directly eliminated by the partitions of Poland at the end of the 18th century.[124] Of the partitioned territories, it was in the Russian that Polish law and jurisdiction remained in force for the longest time.[125] But until the mid-19th century also the transfer of immovables in Galicia followed Polish law, and even later, despite the Austrian law on land registers (*Allgemeines Grundbuchgesetz*) of 1871, the practice of transacting in immovables without the obligatory land register entries (*Eintragungsgrundsatz*, *intabulatio*) prevailed among the Polish peasants.

Delayed effectiveness was frequently the case not only with the doctrinal-judicial transfers, but also with the legislative. In South-Eastern Europe during the first decades after the transfer of western law had been formally accomplished, the rural population invoked the jurisdiction of the courts either very rarely or not at all;[126] in reference to the higher social groups the public's lack of recourse to the courts could at least partially be explained by the then dominant opinion that judicial activity is purely reproductive.

Probably the greatest success of the big transfer wave, which inundated Eastern Europe during the 19th century, was the professionalization of the justice system's personnel. As a matter of fact, the organization of legal education with an emphasis on the preparation of students for the exercise of practical legal service was transformative in its significance for the professionalization of the administration of justice and legal occupations. By the end of the 19th century, Greece and Romania, countries with the highest rates of illiteracy, became countries of jurists no longer educated in Berlin and Paris, but at domestic universities.[127]

This process of professionalization of the jurisdiction personnel during the 19th century resembled functionally the reception of Roman law in Germany, where already at the end of the 15th century the lay judge had been substituted by the learned one.[128] In all the countries of eastern Europe, without excepting the Balkan region and the Russian Empire, modern law faculties emerged at newly founded universities; moreover, legal associations were created, while scholarly books and journals dedicated to juristic questions appeared on the market.[129]

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123 Wacław Uruszczak, *La coutume et la loi dans la pensée* juridique polonaise des XVIe et XVIIe siècles, in Recueils Jean Bodin 53 (1992) 145-146, 156-157.

124 Irena Malinowska-Kwiatkowska, *Customary Law in the Partitioned Poland*, in Recueils Jean Bodin 54 (1989) 171-178; Anna Karabowicz, *Custom and Statute*, Krakowskie Studia z Historii Państwa i Prawa 7.1 (2014) 128-9.

125 Władysław Sobociński, *Sąd i prawo w Polsce pod zaborami*, Państwo i Prawo 2 (1967) 220-234.

126 Giaro, *Modernisierung durch Transfer*, 309.

127 Giaro, *Modernisierung durch Transfer*, 317.

128 Gerald Strauss, *Law, Resistance and the State. The Opposition to Roman Law in Reformation Germany*, Princeton 1986, 80-83; Tomasz Giaro, *Vorwort*, in Pokrovac (ed.) Juristenausbildung, VII.

129 Giaro, *Modernisierung durch Transfer*, 316-317.

On this ground, building upon the concept of the second reception or after-reception (*Nachrezeption*), whose merits are usually ascribed to German Pandecticism,[130] we are entitled in this context to fall back on this concept to describe the above depicted spread of Pandect scholarship in Europe. As a matter of fact, the same feature was equally a part of the historical transfer process in the countries where a legislative transfer was initially rejected and subsequently substituted in functional terms by a doctrinal-judicial one.[131]

XII. Is "transfer" a useful concept?

The conceptual dyad of traditions and transfers was popularized to a certain extent by my own modest contribution as editor of two collective volumes, published in 2006 and 2007 at the Max Planck Institute of European Legal History in Frankfurt am Main. These publications appeared as the two first volumes of a new series dedicated to "Legal cultures of modern eastern Europe. Traditions and transfers" (*Rechtskulturen des modernen Osteuropa. Traditionen und Transfers*).[132] However, the idea was not always and not by all favorably received.

The most critical voice was raised by Prof. Wilhelm Brauneder of the University of Vienna. According to this legal historian of outstanding merit, "transfer" is neither a meaningful nor useful concept,[133] at least in reference to those countries which were constitutive parts of bigger state organisms, as for instance the Habsburg Empire. This conclusion arises from the simple reason that such subordinate countries could be at most only the passive subjects of modernizing operations decreed and guided from the imperial center.

Prof. Brauneder, who assumes in this respect a position of extreme legal positivism, which is a somewhat strange approach in a legal historian, admits the transfer of law only between sovereign states. According to this "imperial" mindset, it would be incorrect to characterize the state of affairs existing after the promulgation of the German civil code BGB as one in which Hesse, one of the German lands and insofar an old component of the German *Reich*, "was influenced by German legal thinking".[134]

With all due respect to Hesse, this land seems to be hardly comparable to Poland or Hungary, countries which were already at the relevant time centuries-old state organisms and full subjects of international law. They had developed an autonomous legal culture composed of legal institutions harking from a genesis which was decidedly different from the German or Austrian one.[135] In other words, these countries acquired their legal-

130 Franz Wieacker, *A History of Private Law in Europe with Particular Reference to Germany*, Oxford 1995, translated by Tony Weir, 155, 349 renders *Nachrezeption* with 'post-reception'.

131 Malgorzata Materniak-Pawlowska, review of Pokrovac (ed.) *Rechtsprechung in Osteuropa,* in Czasopismo Prawno-historyczne 65 (2018) 530.

132 Giaro (ed.), *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert*, Frankfurt a.M. 2006; id. (ed.) *Modernisierung durch Transfer zwischen den Weltkriegen*, Frankfurt a.M. 2007.

133 Wilhelm Brauneder, *review of Giaro* (ed.) Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert; id. (ed.) *Modernisierung durch Transfer zwischen den Weltkriegen*, Zeitschrift für Neuere Rechtsgeschichte 31 (2009) 157-162, 159.

134 Brauneder, review of Giaro (ed.) Modernisierung, 159.

135 Rudolf B. Schlesinger, *Polish Law Throughout the Ages*, Cornell Law Review 57 (1972) 850-854; Barna Mezey, *Traditions of Hungarian Legal Development*, Annales Universitatis Scientiarum Budapestinensis. Sectio Iuridica 41-42 (2000-2001) 7-37.

historical identity long before they were favored by the Almighty with the imposition of the Austrian civil code ABGB.

And what about semi-sovereign states, such as the Duchy of Warsaw and, to some extent, Congress Poland before the 1830 November insurrection? Croatia after its 1868 settlement with Hungary could be considered in like manner. Is it forbidden to compare the half forced reception of the *code civil* in Poland to its completely autonomous reception in the wholly sovereign Romania? Thus, in reference to European empires it seems advisable to apply a center-periphery model where eastern Europe is to be considered as a peripheral part of the whole.[136]

Moreover, Prof. Brauneder has contested not only the concept of transfer, but also that of the western legal tradition which seems to him likely to be too comprehensive (*umfassend*).[137] He rejects my own modest methodological orientation as unilaterally dictated by Roman law (*einseitig-romanistisch*), and as being premised on the disjunction 'either Roman law or common law'; he summarizes this orientation as constricted and narrowing (*verengt und verengend*), if not blocking insights into complex processes.[138]

Alright, history is usually complex! But sometimes it is also ironic. Only a decade after Prof. Brauneder attacked the dyad 'traditions and transfers' as pretentious (*pompöser Titel*),[139] a view perhaps in part triggered by the use of both concepts in the discourse on 'modernization', the very same scholar became the celebrated subject of an international *Festschrift*. The volume, which boomeranged on the honored professor with unnerving precision, was entitled simply "The Legal Transfer in History".[140] Live by the sword, die by the sword.

XIII. NEITHER TRANSFERS NOR TRADITIONS?

In like manner to Prof. Brauneder, Marju Luts-Sootak, Professor for Legal History at the University of Tartu, admits almost no space for the conceptual dyad of tradition and transfer in the process by which Baltic Private Law was codified by Friedrich Georg von Bunge, nor for that matter in its further judicial application. In 2012, when her conclusion ran "neither transfers, nor traditions", she emphasized that the code was pre-modern (*vormodern*), since its regulations were bound to the social estates (*ständisch gebunden*).[141]

As far as the application of von Bunge's private law code in the Russian Empire was concerned, the Saint Petersburg judges of the second half of the 19th century were inspired not by such general concepts as tradition and transfer, but simply by the intention to reach practicable solutions. According to Luts-Sootak courts are always busy with decisions in individual cases, and so the approach of the Saint Petersburg Governing Senate showed,

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136 Giaro, *Legal Tradition*, 5-6, 12-13, 21-23; Rafal Mańko et al., *Carving out Central Europe as a Space of Legal Culture: a Way out of Peripherality?*, Wroclaw Review of Law, Administration & Economics 6.2 (2016) 4-28.

137 Brauneder, review of Giaro (ed.) Modernisierung, 160.

138 Brauneder, review of Giaro (ed.) Modernisierung, 161.

139 Brauneder, review of Giaro (ed.) Modernisierung, 158.

140 Gábor Hamza et al. (eds.) *Rechtstransfer in der Geschichte. Internationale Festschrift für Wilhelm Brauneder zum 75. Geburtstag*, Berlin 2019.

141 Marju Luts-Sootak, *Die baltischen Privatrechte in den Händen der russischen Reichsjustiz*, in Pokrovac (ed.) Rechtsprechung in Osteuropa, 290-291, 311-313; cf. also id., *Das Baltische Privatrecht von 1864/1865 – Triumphbogen oder Grabmal für das römische Recht im Baltikum?*, Zeitschrift für Ostmitteleuropa-Forschung 58.3 (2009) 378-379.

in this framework, simply a healthy conservative respect for the wording of Baltic Private Law.[142]

Such a conclusion is surprising, since the subjective intentions of legal personnel, situated as actors within the transfer process, surely must not be permitted to determine the appreciation of its social consequences by legal historians. In this case, Baltic Private Law, even if considered less progressive and modernizing than the Austrian ABGB,[143] was evidently to some extent an autonomous outcome of the Central-European reception of Roman law,[144] which functioned in Russia as a byword for liberal and modern legislation.

In her subsequent paper of 2019, which appeared in the above-mentioned Festschrift *Rechtstransfer in der Geschichte* dedicated to Prof. Wilhelm Brauneder, a well-known enemy of both opposing concepts "traditions and transfers", Luts-Sootak re-examines von Bunge's Code of Baltic Private Law. On this occasion, she locates it again with those instruments brought forth completely under the spell of tradition stemming from the pre-modern social and legal order (*Tradition der vormodernen Gesellschafts- und Rechtsordnung*) dominant at that time throughout the Russian Empire.[145]

As a result, we must necessarily accept that the Baltic Provinces of the Romanov Empire knew no (modernizing) transfer at all, because von Bunge's private law code was quite to the contrary – according to Luts-Sootak – not a modern codification, but a pre-modern backward legislative consolidation.[146] However, at the same time, we do recognize nevertheless the presence of two competing legal traditions; of which one, the long-lived tradition of Russian autocracy, victoriously prevailed over the other, namely the German-Baltic.

In this way, on grounds of the careful reflection of Prof. Luts-Sootak, we can dispense with the concept of transfer, although its opposite, namely tradition, does reveal some utility for the comparative legal history of the Baltics. On the other side, in this context even Prof. Brauneder has overcome his repugnance towards the transfer concept, admitting that the Russification of the Baltics in the last decades of the 19th century represented a comprehensive (*umfassend*) cultural transfer but, evidently, no modernization at all.[147] The choice is yours.

XIV. Final reflections

Other legal historians too have made contributions worth examining, particularly Prof. Rafał Mańko who is not only an expert in the law of East-Central Europe but also himself resident there, and consequently, like Marju Luts-Sootak, a natural representative for the

142 Luts-Sootak, *Die baltischen Privatrechte*, 366-369.
143 Luts-Sootak, *Die baltischen Privatrechte*, 306-308.
144 Hesi Siimets-Gross, *Das Liv-, Est- und Curlaendische Privatrecht (1864/65) und das römische Recht im Baltikum*, Tartu 2011, 48-55, 65-82; Avenarius, *Fremde Traditionen,* 464-467.
145 Marju Luts-Sootak, *Zur Verortung des Baltischen Privatrechts (1864/65) unter den europäischen Privatrechtskodifikationen*, in Hamza et al. (eds.) Internationale Festschrift für Wilhelm Brauneder *zum 75. Geburtstag*, 243.
146 Marju Luts-Sootak et al., *Estlands Zivilrechtskodifikation – ein fast geborenes Kind des Konservatismus*, in Löhnig, Wagner (eds.) Nichtgeborene Kinder des Liberalismus?, 278-279.
147 Brauneder, review of Giaro (ed.) Modernisierung, 159.

region.[148] For Mańko the concept of transfer in substance correctly reflects the facts and vicissitudes of the civil law tradition, in particular its eastward enlargement during the long 19th century. He finds this concept useful especially in the cases not marked by voluntariness of legal change, but which can rather be more accurately characterized as forced transfers.[149]

Mańko stresses also that transfers, which as a rule are undertaken with the intention to modernize, or which objectively result in the modernization of backward legal systems, imply a positive value judgment.[150] However, Mańko has not joined, thank goodness, the community of the well-intentioned and politically correct who never stops questioning the concept of modernization as such. Indeed, the scholarly usage of modernization is frequently criticized, in particular by Dr. Jani Kirov, as symptomatic of the cardinal sin of euro centrism.[151]

This sin consists in lauding the West as the incarnation of modernity, progress, and civilization, which in reality turns out to be merely a form of self-thematization and self-celebration performed by successful exemplary societies. So, Western Europe presents itself, and is celebrated, as the center, depicting in turn the East of the continent as the periphery, and accordingly: the West must be the pattern and the East mere imitation, the West the original and the East nothing more than a copy, the West the rule and the East mere deviation.

However, the related conviction that there is no 'center' at all, from which evaluations could be projected,[152] must be consigned to the realm of wishful thinking. In the first volume of South-European papers „Konflikt und Koexistenz"[153] there is frequently talk of modernization of all the countries discussed: Greece, Romania, and Bulgaria,[154] but not always of private law codification. The latter is not inseparable indeed – as the Nordic experience teaches – from the civil law tradition.[155] There are other modernization forces, particularly legal scholarship and adjudication, which drove eastern law to this end.

In summary, the concern with modernization seems somewhat anachronistic at a time when the concept is relied on even in the legislation of highly developed countries, as in the "Act on modernizing the German law of obligations" (*Schuldrechtsmodernisierungsgesetz*) of 2001. If such countries can admit to the improvability of law over time, let us not then confound the lead and bit parts at the stage of History. The Duchy of Warsaw marked "the beginning of modernity in Poland",[156] yet the *code civil* was carried not from Warsaw

148 Mańko at al., *Carving out Central Europe,* 4-28.

149 Hanga, *Les transferts de droit,* 3-4: „transfert forcé".

150 Rafał Mańko, *Legal Transfers in Europe Today: Still "Modernisation Through Transfer"?*, in Paulina Bieś-Srokosz et al. (eds.) Mutual interaction between contemporary systems and branches of law in European countries, Częstochowa 2017, 140-141.

151 Jani Kirov, *Prolegomena zu einer Rechtsgeschichte Südosteuropas*, Rechtsgeschichte 18 (2011) 140-141.

152 Kirov, *Prolegomena,* 142-144.

153 Michael Stolleis (ed.) *Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert*", vol. I, Frankfurt a.M. 2015.

154 Styliani-Eirini Vetsika, *Die Modernisierung Griechenlands im 20. Jahrhundert*; Bogdan Iancu, *Constitutionalism between Transplant and Irritation: The Case of 19th-Century Romanian Modernization*; Ivo Hristov, *Das Recht im Regime der Modernisierung. Der Fall Bulgarien 1878–1944*.

155 Pihlajamäki, *Private Law Codification*, 150-151.

156 Jarosław Czubaty, *The Duchy of Warsaw 1807-1815. A Napoleonic Outpost in Central Europe*, Bloomsbury 2016, 215.

or Bucharest to Paris, but in the opposite direction. The real scholarship does not vainly expend itself in striving to abolish simple truths.

ABORTO, ARMI DA FUOCO E CAMBIAMENTO CLIMATICO

OVVERO SULLA PRIVATIZZAZIONE DEL CONFLITTO POLITICO NEGLI STATI UNITI A PARTIRE DAL TRITTICO DI SENTENZE DEL GIUGNO 2022 DELLA CORTE SUPREMA

Lorenzo Serafinelli

SOMMARIO:

In June 2022, the Supreme Court of the United States rendered three fundamental and troubling decisions on three critical issues: abortion, firearms regulation and climate change. There has been a great deal of writing about the consequences of these changes in terms of constitutional law and administrative law. On the contrary, less, if anything, has been said about the private law implications. This research aims at filling the gap and argues that the stance taken by the Supreme Court in the three decisions is likely to increase the use of tort law, and of civil litigation, as a tool to wage political struggle, both in conservative and progressive terms. From a comparative point of view, such a phenomenon is of particular interest, since in the European context, and particularly in the Italian one, an increasing number of climate change disputes are currently being brought before the courts, using civil liability rules as an instrument of regulation through litigation. The comparison with the U.S. legal system will therefore be instructive in addressing the perils and promise of employing tort law and civil litigation in the optics of the privatization of political conflict.

CONSIDERAZIONI INTRODUTTIVE

L'impiego dei tribunali civili e del diritto privato come veicoli di composizione (o in alcuni casi di alimentazione) dei conflitti politici e sociali è oggi un argomento attuale non solo negli Stati di giurisdizione, ma anche in quelli di legislazione.

La questione è particolarmente avvertita nello spazio europeo dal momento che l'istituto dell'illecito civile viene impiegato in numerose controversie volte a fronteggiare il cambiamento climatico dinanzi ai tribunali di diversi Stati europei. Esemplificativa, in tal senso, è l'esperienza italiana, dove due recenti iniziative, una contro lo Stato e la seconda contro ENI, assunte rispettivamente dall'Associazione "A Sud" e da Recommon/Greenpeace, testimoniano l'emergere pure nel nostro ordinamento di sensibilità nuove rispetto all'utilizzo del diritto privato (*sub specie*, della responsabilità aquiliana) quale catalizzatore di istanze inedite. E funzionali al riconoscimento di parimenti inediti diritti, primo tra gli altri quello delle future generazioni a un clima stabile. Strumento cardine della nuova tendenza, lo si diceva, è la responsabilità civile, che, segnatamente in

quadri normativi informati al principio della (tendenziale) atipicità dell'illecito, si presta ad abbracciare eterogenee forme di interessi.

Tutto questo sollecita a rivolgere lo sguardo comparatistico all'esperienza campione dell'utilizzo della responsabilità extracontrattuale per propositi latamente di regolazione: gli Stati Uniti d'America. L'interesse nutrito nei loro confronti è accresciuto dalle conseguenze pratiche e dai punti di caduta che il trittico di sentenze del giugno 2022 della Corte Suprema su armi, clima e aborto sta producendo e produrrà sulla dorsale della *tort litigation*.

Il presente lavoro sarà strutturato in modo tale che per ogni tematica trattata si riporteranno le ricadute ricreate dalle pronunce sul fronte del diritto privato. Per ciò che concerne la materia climatica, la decisione di sostenere l'inesistenza di un *regulatory power* in capo all'EPA con riferimento alla regolazione delle emissioni di gas climalteranti delle società produttrici di energia elettrica potrebbe condurre, per i motivi che diremo, a una peculiare configurazione della *climate change tort-related litigation*. Per quanto interessa le armi da fuoco, all'oltremodo espansiva interpretazione del diritto di portare armi resa dalla Corte Suprema, si assiste già e si assisterà sempre più all'emersione di iniziative giurisdizionali tese a citare in giudizio i produttori di armi al fine di ridurne quanto più possibile il commercio e la vendita. Quando non proprio a tentativi (ad esempio in California) di imitare l'approccio *sue your neighbor* sotteso alla legge texana in materia di aborto così da incaricare i privati di monitorare la circolazione illegale di armi. Appunto, nel caso sull'aborto (l'ultimo deciso in ordine cronologico ma il primo in ordine di trattazione) la dichiarata insussistenza di un diritto federale all'interruzione della gravidanza coniugata alla declaratoria di inammissibilità nei confronti della richiesta di sospensione dell'operatività della legge texana è idonea a produrre due effetti. Da un lato, una frammentazione dell'accesso ai diritti civili nei differenti Stati, dall'altro, a emulazioni da parte degli Stati conservatori di leggi simili a quella texana con il suo meccanismo di *private enforcement* che trasforma i cittadini in *vigilantes* di pratiche abortive illegali.

Volendo sin da subito anticipare le conclusioni, va detto che dalla disamina del contesto statunitense fuoriesce un quadro complesso e chiaroscurale. Se è vero che la *tort law* è impiegata come tentativo di colmare il vuoto politico e giudiziario federale ricreato ad arte dai *justice* nel campo delle armi e del clima, al contempo la discutibile disciplina texana in materia di aborto segnala i rischi dello scivolamento del conflitto sociale nel terreno del diritto privato. Il che costituisce un chiaro monito: lo strumento della responsabilità civile va maneggiato con cura e gli spazi ad esso lasciato per occuparsi dei conflitti sociali devono essere ragionati, ponderati e ben misurati. Altrimenti, un'eccessiva disinvoltura negli approcci rischia di far dimenticare come esso, proprio in quanto strumento "neutrale" e pertanto idoneo a soddisfare le più eterogenee esigenze, possa tramutarsi in possente dispositivo per l'affermazione e la garanzia di interessi "conservatori". Lo testimonia il caso texano in materia di aborto, a cui conviene ora volgere la nostra attenzione.

I. ABORTO

1. Dobbs v. Jackson *e le sue implicazioni per il diritto privato*

Il 24 giugno 2022, la Corte Suprema ha pubblicato la sentenza nel caso *Dobbs v. Jackson*[1], determinando – a maggioranza di 6-3 – l'*overruling* dei consolidati precedenti *Roe v. Wade*[2] e *Planned Parenthood of Southeastern Pa v. Casey*[3]. Com'è noto, negli Stati Uniti la materia dell'aborto, in assenza del varo di una legge federale *ad hoc*, era disciplinata dai due precedenti da ultimo citati, i quali avevano ricavato il diritto ad abortire dalla protezione della riservatezza in favore della donna. L'interruzione volontaria di gravidanza, come configurata prima in *Roe* e poi in *Casey*, era uno schema a diverse finestre temporali, scandite in trimestri, all'interno delle quali si operava un bilanciamento differenziato tra i due interessi antagonisti della donna ad abortire e del feto a nascere in base a quanto fosse progredito lo stato della gestazione. Di talché, tanto più si era vicini alla fase finale della gravidanza, tanto più era prevalente il secondo sul primo, e viceversa. Il perno attorno al quale ruotava l'intero sistema confezionato dai *justice* era la *viability*, ovverosia il termine di ventiquattro settimane a partire dal concepimento e creduto essere il momento in cui il feto è sufficientemente sviluppato da poter sopravvivere al di fuori dell'utero materno. Oltre tale termine, l'interruzione volontaria di gravidanza veniva generalmente esclusa, pur ammettendosi casi di natura eccezionale là dove, ad esempio, il proseguire della gestazione avesse potuto attentare alla salute della madre. Prima del termine indicato, gli Stati rimanevano liberi di regolare la materia, con l'unico limite di non poter escludere completamente il diritto ad abortire[4].

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[1] 597 U.S. ___ (2022). La sentenza ha ricreato una discussione pressoché sterminata in letteratura scientifica, non solo statunitense. Tra i molti, cfr. B. Andrews, *No Choice. The Fall of Roe v. Wade and the Fight to Protect the Right to Abortion*, London, 2022, p. 208 ss.; V. Barsotti, *Not only Dobbs v. Jackson. Abortion laws and private enforcement*, in *DPCE Online*, 2023, n. Sp. 1, p. 249 ss.; A. Buratti, *Egregiously Wrong. Errori e mistificazioni della Corte Suprema nella decisione di disincorporation del diritto delle donne all'interruzione volontaria della gravidanza*, in *Diritticomparati.it*, 14 luglio 2022; A. Di Martino, *Donne, aborto e Costituzione negli Stati Uniti*, in *Nomos*, 2022, II, spec. p. 17 ss.; L. Fabiano, *Tanto tuonò che piovve: l'aborto, la polarizzazione politica e la crisi democratica nell'esperienza federale statunitense*, in *BioLaw J.*, 2022, p. 5 ss.; E. Grande, *Dobbs e le allarmanti implicazioni di un overruling politico in tema di aborto*, in *Stato, Chiese e pluralismo confessionale*, 2022, p. 73 ss.; R. Johnson, *Dobbs v. Jackson and the Revival of the States' Rights Constitution*, in 93 *Polit. Q.*, 2022, p. 612 ss.; M.R. Marella, *Dobbs v. Jackson Women's Health Organization, l'Europa e noi*, in *Giustizia insieme*, 26 settembre 2022; S. Penasa, *People have the power! E i corpi e le biografie delle donne? I diversi livelli di rilievo della sentenza Dobbs della Corte Suprema USA*, in *DPCE Online*, 2022, p. 1609 ss.; L. Poli, *La sentenza della Corte Suprema statunitense in Dobbs v. Jackson: un judicial restraint che viola i diritti fondamentali delle donne*, in *Diritti umani e diritto internazionale*, 2022, p. 659 ss.; L. Ronchetti, *La decostituzionalizzazione in chiave populista sul corpo delle donne: è la decisione Dobbs a essere «egregiously wrong from the start»*, in *Costituzionalismo.it*, 2022, II, Parte I, p. 32 ss.; C. Sunstein, *Dobbs and the Travails of Due Process Traditionalism*, in *ssrn.com*, 29 giugno 2022; M. Dani, *Le aporie del caso Dobbs ed il ruolo della giustizia costituzionale in questioni moralmente controverse*, in *BioLaw J.*, 2023, n. Sp., p. 73 ss.; P. Insolera, *Sentenza Dobbs e dintorni. Appunti pessimisti sulla problematica "direzione" dell'attuale maggioranza della Corte Suprema americana*, ivi, p. 115 ss.; A. Ridolfi, *«Roe and Casey are overruled». Riflessioni sulla sentenza Dobbs e sul ruolo della Corte Suprema nel sistema costituzionale statunitense*, in *Costituzionalismo.it*, 2023, I, Parte III, p. 1 ss., nonché, da ultimo, R.B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism – and Some Pathways for Resistance*, in 101 *Tex. L. Rev.*, 2023, p. 1127 ss.

[2] 410 U.S. 113 (1973).

[3] 505 U.S. 833 (1992).

[4] In argomento di arboro negli Stati Uniti, cfr. R.L. Welborn, *Abortion Laws: A Constitutional Right to Abortion*, in 49 *N.C.L. Rev.*, 1971, p. 487 ss.; A.N. Cabot, *History of Abortion Law*, in 12 *Ariz. St. L. J.*, 1980, p. 73 ss.; L.H. Tribe, *Abortion. The Clash of Absolutes*, II ed., New York-London, 1992; R. Dworkin, *Life's dominion: an*

La pronuncia in *Dobbs* ha di fatto esautorato la precedente impostazione, rinfocolando il dibattito sul tema, reso ancor più aspro da una fuga di notizie prima della pubblicazione della decisione[5]. In estrema sintesi, la Corte Suprema ha sancito l'incostituzionalità del criterio della *viability*, reputando pienamente legittima la legislazione del Mississippi che lo ha sostituito con quello dello "sviluppo fetale". Detto ultimo criterio impone il divieto di abortire quando «the probable gestational stage of the unborn human being has been determined to be greater than (15) fifteen weeks»[6]. Sicché la pronuncia in esame attribuisce patente di legittimità ad una legge che punisce sul fondamento di una possibile maturazione del feto calcolato dal primo giorno dell'ultimo ciclo mestruale della donna incinta.

Dobbs ha attratto l'attenzione della dottrina, non solo statunitense, alla luce delle molteplici ed eterogenee implicazioni che reca con sé. La prima caratteristica che spicca è che l'opinione di maggioranza è informata a un'interpretazione di segno tradizionalista della *due process clause*. Il *due process traditionalism* postula la tutela dei diritti non espressamente previsti dalla Costituzione solo allorquando essi siano: profondamente radicati nella storia e nella tradizione del Paese; impliciti nel concetto stesso di libertà ordinata (*ordered liberty*)[7]. Ha poi suscitato interesse poiché: ha criticato i due precedenti *Roe* e *Casey* definendoli "egregiously wrong"[8]; produce l'effetto di inasprire le diseguaglianze tra Stati sull'accesso ai diritti civili[9]; mette a rischio la sopravvivenza dei diritti ricavati in via giurisprudenziale dagli emendamenti alla Costituzione (cosiddetti *penumbra rights*)[10]; modifica il criterio di scrutinio costituzionale, affermandosi che i giudici valuteranno le discipline statali sull'aborto adottando il più blando criterio della *rational basis* rispetto a quello imposto in *Casey* dell'*undue burden*[11]; rimodula significativamente il ruolo della Corte in un *self-restraint*

argument about abortion, euthanasia, and individual freedom, New York, 1993; C. Sanger, *About Abortion. Terminating Pregnancy in Twenty-First-Century America*, Cambridge-Mass., 2017; M. Ziegler, *Abortion and the Law in America: Roe v. Wade to the Present*, Cambridge-Mass.-London, 2020; B. Andrews, *No Choice*, cit.; A. Di Martino, *Donne, aborto e Costituzione negli Stati Uniti*, cit.; L. Fabiano, *Tanto tuonò che piovve*, cit., p. 42 ss.; D.S. Cohen, G. Donley, R. Rebouché, *The New Abortion Battleground*, in 123 *Colum. L. Rev.*, 2023, p. 1 ss. In ottica comparatistica, cfr. R. Siegel, *The Constitutionalization of Abortion*, in M. Rosenfeld e A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, p. 1057 ss. e A. Baraggia, *Stati Uniti e Irlanda. La regolamentazione dell'aborto in due esperienze paradigmatiche*, Torino, 2022. Per una prospettiva generale sulle linee di tendenza del diritto di aborto nel quadro contemporaneo, si rinvia altresì al n. Sp. della *BioLaw J.* del 2023, a cura di L. Busatta, M.P. Iadicicco, B. Liberali, S. Penasa, M. Tomasi, dedicato a *Gli Abortion Rights e il costituzionalismo contemporaneo*.

5 https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504.

6 Gestational Age Act, Miss. Code Ann. §41-41-191 (2018).

7 Cfr. C. Sunstein, *Dobbs and the Travails of Due Process Traditionalism*, cit. Si veda pure Id., *Due Process Traditionalism*, in 106 *Mich. L. Rev.*, 2008, p. 447 ss. Opportunamente rilevano A. Sperti, *Il diritto all'aborto e il ruolo della tradizione nel controverso* overruling *di* Roe v. Wade, in *Gruppo di Pisa*, 2022, III, p. 23 ss. e V. Barsotti, *Not only Dobbs v. Jackson*, cit., p. 253 che la pronuncia in esame fa proprio l'approccio interpretativo del *Due Process Traditionalism* e non già una forma di interpretazione originalista, come accaduto invece – per come vedremo – nel caso della sentenza sulle armi. Per ulteriori approfondimenti, cfr. R.E. Barnett e L.B. Solum, *Originalism after* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, in 118 *Nw. U. L. Rev.*, 2023, p. 433 ss.

8 *Dobbs v. Jackson*, cit., *opinion of the Court*, p. 6.

9 V. Barsotti, *Not only Dobbs v. Jackson*, cit., p. 252.

10 *Dobbs v. Jackson*, cit., *concurring opinion*, *justice* Thomas, p. 3.

11 Per queste e altre riflessioni, cfr. V. Barsotti, *Not only Dobbs v. Jackson*, cit., p. 254.

che delega agli Stati la regolamentazione della materia e che le fa perdere il carattere di potere contromaggioritario[12].
Oltre quanto fin qui riportato, vi è un ulteriore, e per certi versi maggiormente inquietante, aspetto da tenere a mente nella lettura delle recenti vicende relative all'aborto negli Stati Uniti. Difatti, la sentenza *Dobbs* deve essere letta assieme a una pronuncia di poco precedente con cui gli stessi *justice* hanno rigettato la richiesta di sospensione dell'operatività della legge texana in materia[13]. Il tutto, lo diremo, getta una luce sinistra sul futuro del diritto di abortire, e più in generale sul godimento dei diritti civili negli Stati Uniti.

2. *Il* Texas Heartbeat Act *e l'introduzione di un sistema di taglie*

La sostanziale traslazione del conflitto politico nell'alveo delle arene del diritto privato trova una sua recente emblematica espressione nell'approvazione della disciplina texana in materia di aborto. Il 1° settembre 2021 è entrato in vigore in Texas l'*Heartbeat Act* (SB 8)[14], che ha introdotto nello Stato il divieto di abortire dopo il rilevamento dell'attività cardiaca o fetale (normalmente, dopo circa sei settimane dal concepimento).
Al fine di assicurare effettività al dettato legislativo, è stata predisposta una inedita variante di *private enforcement*, istituto originariamente ideato per attribuire ai privati il potere di far valere in giudizio violazioni di leggi statali o federali così da assicurarne l'osservanza pur nell'inerzia o nell'impossibilità di intervenire dei pubblici poteri. Più precisamente, la legge texana ha previsto una sorta di sistema di taglie (un *bounty system*), sicché sono i cittadini, e non anche le autorità pubbliche, incaricati di vigilare sull'osservanza delle prescrizioni limitative delle pratiche abortive attraverso il ricorso alla *civil litigation* (divenendo così degli autentici *bounty hunter*). Per l'effetto, ai privati (sia residenti del Texas che non) i quali instaurino vittoriosamente un giudizio civile contro chi è ritenuto responsabile di una pratica abortiva vietata è riconosciuto il diritto di pretendere la somma di 10.000 dollari. Al contrario, in caso di soccombenza la legge esonera gli attori-*vigilantes* dal rifondere ai convenuti le spese processuali.
Nel novero dei possibili convenuti rientra un ampio spettro di soggetti: i medici, il personale sanitario, i dirigenti delle strutture cliniche e finanche coloro che abbiano eventualmente accompagnato la donna ad abortire. Più in generale tutti coloro che effettuino aborti in spregio alla legge. Il novero, pur notevole, non include la donna. Circostanza che ben esemplifica il paradigma ispiratore della disciplina: i diritti riproduttivi, prim'ancora che afferenti alla sua sfera individuale, sono piuttosto un fatto collettivo pienamente riconducibile alla sfera di controllo dello Stato, da funzionalizzare in virtù degli interessi che esso – più o meno esplicitamente – persegue[15].

[12] *Ibidem*.
[13] *Whole Women's Health et al. v. Jackson et al.*, 594 U.S. ___ 2021.
[14] Acts 2021, 87th Leg., R.S., Ch. 62 (S.B. 8), che ha emendato e integrato il Tex. Health and Safety Code Ann. ai §§ 171.204(a), 171.207(a), 171.208(a)(2), (3).
[15] Per una disamina storica della funzionalizzazione dei diritti negli Stati Uniti, cfr. A. Somma, *Stato del benessere o benessere dello Stato? Giustizia sociale, politiche demografiche e ordine economico nell'esperienza statunitense*, in *Quad. fior.*, 2017, p. 417 ss.

La configurazione di un meccanismo di attivazione da parte dei privati per il perseguimento di interessi pubblici (o che presentino interferenze pubblicistiche) gode oramai di una diffusa tradizione. Il settore della concorrenza è a tal fine particolarmente istruttivo: sia negli Stati Uniti che nell'Unione europea il *private enforcement* volto a intercettare e sanzionare pratiche distorsive del confronto competitivo è elemento che potremmo definire strutturale dell'assetto di economia di mercato[16]. L'assunto di fondo, condiviso da regolazioni in vari settori[17], è fondato sulla convinzione per cui i più interessati al rispetto dei regolamenti sulla concorrenza sono gli attori e gli operatori economici, in guisa che risulta quantomeno efficiente attribuire loro compiti e funzioni di polizia (*sub specie* economica)[18]. L'argomento cardine della citata tendenza devolutiva è stato nel senso che l'attivazione di forze estranee alla pubblica amministrazione permette di controbilanciare la concreta situazione di asimmetria informativa e di scarsità di risorse (anche in termini di organico) che i pubblici poteri si trovano a scontare. Si è osservato che una cooperazione di segno virtuoso tra i diretti interessati al rispetto di talune prerogative, da un lato, e gli organi pubblici deputati alla loro tutela, dall'altro, mostra dei vantaggi indubbi e significativi per l'interesse generale coinvolto. Con il che si giunge a volte a giustificare persino l'immunità ai soggetti denuncianti ancorché abbiano preso parte all'illecito e ne abbiano tratto vantaggio[19].

Nonostante gli effetti benefici rilevati nel *private enforcement*, non può sottacersi che la devoluzione ai privati di compiti di polizia incrina gli assetti dello Stato contemporaneo, dove il presidio dei diritti è tendenzialmente appannaggio proprio dell'apparato pubblico. Sebbene le diverse forme di devoluzione privatistica di sorveglianza di interessi pubblici presentino dei tratti assolutamente particolari, e perciò il loro accostamento merita cautela[20], è difficile negare la presenza di una oltremodo trasversale crescita di forme devolutive da parte degli Stati, implicite o esplicite, più o meno consapevoli[21].

Si diceva di come discipline attributive ai privati del potere di rendere effettivi i loro dettami sono diffuse in ambiti eterogenei, e campioni di questa esperienza sono certamente gli Stati Uniti, sia a livello federale che statale. Si è già riportato che tale attribuzione ha solitamente ad oggetto un interesse che, se non propriamente pubblico (per esempio, l'anticorruzione), quantomeno tracima nel pubblico (o nel pubblicamente rilevante). Siffatta caratteristica è completamente assente nella disciplina texana: lì a legittimare l'attivazione del privato, al di là della forte carica morale che le è sottesa, è solo l'interesse materiale ed egoistico di ottenere il premio in denaro. Vieppiù in considerazione del fatto che non è richiesta in alcun modo una qualche forma di collegamento, neppure indiretto, tra il vigilante e la pratica abortiva oggetto della querela. Ciò vale a rendere il

[16] *Ex plurimis*, cfr. G.A. Benacchio, *Il private enforcement del diritto europeo antitrust: evoluzione e risultati*, in L.F. Pace (a cura di), *Dizionario sistematico della concorrenza*, Padova, 2020.

[17] Quale quello dell'anticorruzione, ad esempio: cfr. W.T. Loris, *Private Civil Actions. A Tool for a Citizen-Led Battle against Corruption*, in 5 *World Bank Legal Rev.*, 2014, p. 437 ss.

[18] Cfr. S. Ferreri, *La rivincita del delatore. Il privato promotore di giustizia: dal private enforcement delle politiche antitrust alla legislazione del Texas sull'aborto. L'interesse individuale come strumento di pressione o cacciatori di taglie?*, in *RGDPC*, 2022, p. 295 ss.

[19] Come accade nel caso dei *whistle blower*: ivi, p. 296.

[20] Ivi, p. 295.

[21] È la stessa autrice che, se da un lato richiama alla prudenza, dall'altro parla di "piano inclinato" e di "deriva" verso l'attivazione delle forze private: *ibidem*.

congegno del *private enforcement* texano pruriginoso e ancor più carico di un'aura sinistra. Rievoca, all'evidenza, momenti travagliati della storia statunitense: la caccia alle streghe, vecchia e nuova (dai roghi di Salem alle persecuzioni durante il maccartismo); il sistema delle patenti rilasciate ai cacciatori di taglie; infine, i meccanismi di denuncia degli schiavi in fuga.

Al riguardo, benché la legge texana sia stata definita "senza precedenti"[22] e "inventiva"[23], non è mancato chi ha fatto convincentemente notare che negli Stati Uniti vi siano stati dei precedenti parimenti discutibili relativi all'attribuzione di "licenze" a privati affinché si attivassero per sopprimere il godimento di diritti attraverso l'instaurazione di controversie in tribunale[24]. Un analogo storico è rappresentato dalle due famigerate leggi sugli schiavi fuggitivi approvate dal Congresso nel 1793[25] e nel 1850[26]. I due *Act* citati hanno compromesso il diritto dei cittadini neri al giusto processo previsto dal Quinto Emendamento e il diritto all'*habeas corpus* per contestare le privazioni della libertà da parte del governo. Le leggi consentivano ai negrieri di assumere agenti per rintracciare persone fuggite dalla schiavitù negli Stati liberi. All'epoca della loro approvazione, nessuno contestava seriamente che gli afro-americani liberi dovessero godere dei diritti costituzionali alla libertà. E però le procedure delle leggi sugli schiavi fuggitivi erano state appositamente confezionate per aggirare altresì le libertà dei cittadini neri liberi. Secondo la disciplina del 1850, ad esempio, i procedimenti erano a dir poco sommari; una presunta persona schiavizzata non aveva diritto di parola in corte e le era precluso di poter testimoniare a proprio favore; un commissario riceveva 10 dollari se giudicava a favore del proprietario, mentre solo 5 se a favore della presunta persona schiavizzata; e non vi era alcuna supervisione giudiziaria. Si trattava di un congegno progettato per ottenere decisioni rapide a favore degli schiavisti, aggirando così le protezioni costituzionali.

Volendo passare a esaminare in dettaglio l'*Heartbeat Act*, occorre iniziare con l'enucleare i principali aspetti problematici della disciplina, che possono così sintetizzarsi: l'attivazione dei privati; il sistema delle taglie; l'assenza di un qualsivoglia collegamento tra il denunciante e la pratica abortiva; l'estensione a un ventaglio potenzialmente illimitato di soggetti responsabili.

3. (Segue). *L'attivazione dei privati*

La legge incarica in maniera esclusiva i privati cittadini di rendere effettive le sue prescrizioni, mentre le autorità pubbliche sono dispensate da ogni coinvolgimento. Se, a primo acchito, il modo di incedere può apparire controintuitivo, a una più ravvicinata analisi se ne scorge la logica diabolica: esso è proteso ad aggirare lo scrutinio delle corti federali sulla conformità a Costituzione dello *statute* texano. Nelle parole dell'opinione dissenziente resa nel caso *Whole Women's Health v. Jackson*, «a flagrantly unconstitutional law

[22] *United States v. Texas*, 566 F. Supp. 3d 605 (W.D. Tex. 2021).
[23] J. Filipovic, *Is the Texas Abortion Law Backfiring on the People Who Pushed It Through?*, in *The Atlantic*, 1° ottobre 2021.
[24] A. Huq, *What Texas's abortion law has in common with the Fugitive Slave Act*, in *Wash. Post*, 1° novembre 2021.
[25] Fugitive Slave Act of 1793.
[26] Fugitive Slave Act of 1850.

engineered to prohibit women from exercising their constitutional rights and evade scrutiny … by outsourcing enforcement of unconstitutional laws to its citizenry»[27].
Atteso che non è il potere pubblico chiamato a sorvegliare sul rispetto dei dettami legislativi, nessun individuo o associazione potrebbero citare in giudizio il Procuratore generale del Texas per sentir dichiarare l'illegittimità del suo operato, e a monte della legge. L'unico viatico possibile, viceversa, rimane quello di assumersi il rischio di violarla e contestarla in sede di contenzioso contro il *bounty hunter*[28]. Rischio che, tuttavia, in pochi hanno intenzione di correre: «In a study published in the New England Journal of Medicine[29], researchers conclude that the Texas abortion ban has had a chilling effect on a broad range of health care professionals, adversely affecting patient care and endangering people's lives» [30]. Si tratta di uno stratagemma che, coinvolgendo i privati nel perseguimento dell'illecito, mira a sottrarre il governo dello Stato alle critiche derivanti dall'applicazione della legge, così da operare un distanziamento tra le relative conseguenze e l'apparato pubblico[31]. Il tutto coadiuvato dagli ostacoli frapposti all'accesso alla giustizia federale. Difatti, in virtù del consolidato orientamento delle corti federali statunitensi, una pretesa di risarcimento avanzata da un qualsiasi individuo contro una clinica abortista sarebbe respinta a livello di giustizia federale per mancanza di legittimazione ad agire ai sensi dell'articolo III della Costituzione. L'articolo citato limita l'intervento del potere giudiziario alla risoluzione di "casi" e "controversie" nelle quali la parte attrice abbia subito (*rectius*, affermi di aver subito) un danno concreto[32].
In *Lujan v. Defenders of Wildlife*[33], la Corte Suprema ha stabilito che i danni indiretti o speculativi non conferiscono la legittimazione ad agire: nel caso dal quale è originata la pronuncia, i ricorrenti hanno tentato di utilizzare una disposizione dell'*Endangered Species Act* che autorizzava qualsiasi persona ad avviare un'azione civile per proprio conto al fine di ingiungere a qualsiasi soggetto, compresi gli Stati Uniti e qualsiasi altro ente o agenzia governativa, che si presuma violi una qualsiasi disposizione della normativa[34]. Gli attori avevano contestato un regolamento emanato dall'Interior Department poiché, a loro dire, non prevedeva adeguate cautele nei confronti delle specie in via di estinzione. Nonostante ciò, la Corte Suprema ha concluso che il danno lamentato era speculativo e pertanto inidoneo a legittimare l'azione[35]. In sostanza, sulla scorta della pronuncia in *Lujan*, i tribunali federali avrebbero buon gioco a ritenere che un *bounty hunter* anti-abortista non ha sofferto di un danno concreto, con il conseguente difetto di legittimazione ad agire. Come si è accennato, l'articolo III si riferisce in modo esclusivo alla giurisdizione federale, non trovando applicazione nelle cause instaurate dinanzi ai tribunali statali. Di

[27] *Whole Women's Health et al. v. Jackson et al.*, cit., *dissenting opinion*, pp. 1 e 4.
[28] Cfr. M. Johnson, *The Texas Heartbeat Act: How Private Citizens Are Given the Power to Violate a Woman's Right to Privacy through an Unusual Enforcement Mechanism*, in 23 *Geo. J. Gender & L.*, 2021, p. 1 ss., spec. p. 3.
[29] W. Arey *et al.*, *A Preview of the Dangerous Future of Abortion Bans – Texas Senate Bill* 8, in 387 *N. Eng. J. Med.*, 2022, p. 388 ss., spec. p. 389.
[30] Così M. Goodwin, *Complicit Bias and the Supreme Court*, in 136 *Harv. L. Rev.*, 2022, p. 119 ss., spec. p. 158.
[31] Cfr. S. Ferreri, *La rivincita del delatore*, cit., p. 298, nota 10.
[32] Sul tema, V. Barsotti, *Not only Dobbs v. Jackson*, cit., p. 258 s.
[33] 404 U.S. 555 (1992) con commento di V. Barsotti, *La sentenza Lujan della Corte Suprema degli Stati Uniti sulla legittimazione ad agire delle associazioni ambientaliste*, in *Riv. trim. dir. proc. civ.*, 1996, p. 1175 ss.
[34] 16 U.S.C. nn. 1531-1544 (1988).
[35] *Lujan*, cit.

conseguenza, le norme sulla legittimazione ad agire del Texas potrebbero in teoria essere sufficientemente ampie da riconoscere la legittimazione ad agire per le richieste proposte in base al *Texas Heartbeat Act*. Al contrario delle leggi anti-aborto a cui l'esperienza ci ha abituato, dove è il governo a essere il guardiano della loro applicazione, qui il presidio è affidato ai privati. Così si giunge al paradossale risultato che anche chi è contrario alla disciplina si ritrova costretto a trasformarsi in vigilante al fine di metterne in discussione la costituzionalità. È quanto accaduto, ad esempio, all'avvocato Oscar Stilley e a Felipe Gomez, i quali hanno convenuto in giudizio un medico, il dott. Braid, al fine di poter stimolare in sede giudiziale lo scrutinio di costituzionalità sulla legge texana. Benché i due si professino contrari alla legge, hanno comunque dovuto attivare il meccanismo di *private enforcement* onde tentare di inficiarne la validità in sede giurisdizionale[36].
Eloquentemente, nella *dissenting opinion* in *Dobbs v. Jackson* si legge che «(a)s Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another doing so»[37].
Insomma, il meccanismo di applicazione promuove il vigilantismo con la creazione di un sistema di taglie e il riconoscimento di un premio di 10.000 dollari a chiunque inizi un giudizio contro un soggetto ritenuto di aver effettuato una pratica abortiva illegale. Questo ha dato la stura all'emersione di iniziative fantasiose da parte delle associazioni anti-abortiste. Ad esempio, l'organizzazione *Texas Right to Life* aveva annunciato di voler lanciare un sito web per consentire in forma anonima alle persone di riportare di essere venute a conoscenza di un aborto praticato in spregio alla legge. Il sito non è mai entrato in funzione, asseritamente per problemi tecnici che l'associazione non ha saputo risolvere[38].

4. (Segue). *L'assenza di un danno diretto subito dal denunciante e l'ampio novero dei legittimati passivi*
Si è già avuto modo di accennare che la disciplina non impone al querelante di provare l'esistenza di un rapporto o di un legame diretti con chi ha abortito o ha reso possibile l'aborto. Si tratta di una peculiarità unica che accresce il grado di vigilantismo insito nell'*Heartbeat Act*. L'impiego della formula "qualsiasi persona" per riferirsi ai legittimati attivi senza che ne sia data una definizione chiarificatrice apre le porte a un novero potenzialmente illimitato di soggetti, sia cittadini che non dello Stato texano. Il meccanismo è stato ben illustrato da Melissa Murray, docente di diritto alla New York University: stando a quanto da lei ricostruito, se un barista in un caffè dovesse sentire una donna parlare del suo aborto, sarebbe legittimato a far causa alla clinica dove l'aborto è stato praticato. Più significativo poi è che un partner in disaccordo con l'intenzione di abortire con la donna può citare in giudizio, a mo' di vendetta, la clinica e ciascun soggetto coinvolto[39].

[36] Cfr. M. JOHNSON, *The Texas Heartbeat Act*, cit., p. 8.
[37] *Dobbs v. Jackson*, cit., *dissenting opinion*, p. 3.
[38] Il dominio del sito era emblematicamente *ProLifeWhistleBlower.com*: cfr. M. Kornfield, *A website for 'whistleblowers' to expose Texas abortion providers was taken down – again*, in *Wash. Post*, 6 settembre 2021, reperibile al seguente indirizzo *https://www.washingtonpost.com/nation/2021/09/06/texas-abortion-ban-website/*.
[39] S. Tavernise, *Citizens, Not the State, Will Enforce New Abortion Law in Texas*, in *NYT*, 9 luglio 2021, reperibile al seguente indirizzo *https://www.nytimes.com/2021/07/09/us/abortion-law-regulations- texas.html*.

Neppure il parallelismo con il il *Clean Air Act* e con il *Clean Water Act*, checché se ne dica[40], conduce a far rinvenire i germi di vigilantismo in altre leggi statunitensi contemporanee. È vero che ai sensi delle fonti menzionate, i privati cittadini sono legittimati a convenire in giudizio il Governo federale per la mancata applicazione delle disposizioni in esse contenute. Tuttavia, e in disparte il fatto che si tratta di un congegno volto a far causa alle autorità pubbliche per condotte omissive e che è necessario dimostrare l'esistenza di un danno diretto in capo ai ricorrenti, non sfugge come l'interesse sotteso riguardi pretese volte a tutelare la salubrità dell'ambiente, e non già un interesse egoistico, quale è al contrario quello scolpito nell'*Heartbeat Act* texano.

Il terzo e ultimo elemento problematico della disciplina è rappresentato dallo spettro assai ampio di soggetti legittimati passivi: potenzialmente, tutti coloro i quali sono entrati in contatto con la donna durante il processo di aborto. Mai la donna stessa, essendo ridotta a mero dispositivo riproduttivo per gli interessi generali della collettività. Così, ad esempio, l'autista che l'ha accompagnata in clinica è passabile di condanna. Il tema ha generato una gran discussione, anche complice il fatto che due società di servizi di trasporto, Uber e Lyft, non hanno mancato di utilizzare l'occasione a proprio vantaggio per farsi pubblicità. Il 3 settembre 2021, Lyft ha rilasciato una dichiarazione dove ha definito inaccettabile che un conducente possa essere dichiarato responsabile di aver trasportato, non importa se consapevolmente o meno, una donna in clinica ad abortire. Al contempo, la medesima dichiarazione reputa parimenti inaccettabile che una donna incinta possa vedersi cancellata la corsa perché gli autisti potrebbero temere di violare la legge[41]. Lyft ha quindi assunto due iniziative conseguenti: ha effettuato una donazione da 1 milione di dollari a Planned Parenthood; ha affermato che sosterrà le spese e i costi legali che i propri conducenti dovessero essere chiamati ad affrontare in modo da tenerli al riparo da esborsi di somme di denaro. Da parte sua, Uber ha invece creato un fondo per i propri autisti destinato a coprire i costi e le spese processuali da affrontare[42].

Oltre alle criticità fin qui rilevate (vigilantismo, assenza del requisito della sussistenza di un danno diretto tra attore e pratica abortiva, l'ampio spettro dei legittimati passivi), vi è un'aggiuntiva implicazione, altrettanto sinistra e di sistema, che è racchiusa in un siffatto tipo di congegno di *private enforcement* contemplato nel *Texas Heartbeat Act*. Ci si riferisce alla sua potenziale estensione ad ulteriori settori, così venendosi a ricreare un'innumerevole sequenza di terreni di scontro nei tribunali. In effetti, all'indomani della sentenza che ha rigettato la richiesta di sospensione della legge texana[43], da più parti, e in maniera assolutamente bipartisan, sono arrivate proposte di leggi contenenti un meccanismo simile. Sicché, per quanto il raffronto tra i sistemi di *private enforcement* chiami alla cautela, vieppiù in ragione della diversità profonda degli interessi di volta in volta coinvolti, è indubitabile che si sia di fronte a un effetto di "deriva" e di "piano inclinato", con un inarrestabile scivolamento nella direzione della devoluzione ai privati di funzioni

[40] Così M. Johnson, *The Texas Heartbeat Act*, cit., p. 8 s.
[41] Cfr. *https://www.lyft.com/blog/posts/defending-drivers-and-womens-access-to-healthcare*.
[42] Cfr. K. Frazier, *Lyft, Uber to pay legal fees for drivers sued under Texas abortion ban*, in *Axios*, 3 settembre 2021, reperibile al seguente indirizzo *https://www.axios.com/2021/09/03/lyft-uber-pay-legal-fees-for-drivers-sued-under-texas-abortion-ban*.
[43] *Whole Women's Health et al. v. Jackson et al.*, cit.

di polizia. Emblematica sul punto è la dichiarazione resa dall'allora Governatore della California, Gavin Newsom, un democratico si badi bene, che aveva paventato la possibilità di utilizzare l'approccio *sue your neighbor* della legge texana nel contesto delle armi. Il progetto di legge che intendeva proporre avrebbe mirato «to let private individuals sue anyone who makes or sells assault weapons of the 'ghost guns' made from parts bought online. (I)f states could protect their laws from review by federal courts then California will use that authority to protect people's lives, where Texas used it to put women in harm's way»[44]. Proprio alle armi conviene ora volgere la nostra attenzione avendo a mente quanto fin qui sostenuto: siamo probabilmente solo all'inizio della diffusione di sistemi, più o meno espliciti, di vigilantismo.

II. ARMI DA FUOCO

1. New York State Rifle & Pistols Assn. v. Bruen *e le sue implicazioni per il diritto privato*

Con la pronuncia resa il 23 giugno 2022 in *NYSRPA v. Bruen*[45], la Corte Suprema degli Stati Uniti è tornata sull'ampiezza del diritto riconosciuto dal Secondo Emendamento di possedere e portare armi. La decisione, adottata 6-3, trae origine da un'azione proposta da due cittadini dello Stato di New York, tali Brandon Koch e Robert Nash, avverso il rigetto opposto loro alla richiesta, fondata sul diritto all'autodifesa, di una licenza incondizionata per portare in pubblico armi da fuoco. L'ufficio competente dello Stato ha motivato il diniego concentrandosi sul mancato assolvimento, sia da parte di Koch che di Nash, dell'onere di provare la sussistenza di una giusta causa (*proper cause*). Secondo la disciplina vigente nello Stato, un individuo può portare con sé fuori dalla propria abitazione un'arma nascosta a condizione che possegga un'apposita licenza (*to have and carry*), il cui rilascio è condizionato alla prova dell'esistenza di una *proper cause*[46]. Quest'ultima, secondo quanto hanno chiarito le corti newyorchesi, sussiste ove l'istante provi una speciale esigenza di protezione individuale che sia differenziata rispetto a quelle della comunità nel suo complesso[47]. Koch e Nash, assistiti dalla New York State Rifle & Pistol Assn., Inc., un'organizzazione che persegue interessi dei proprietari di armi e della quale sono membri i due, hanno agito dolendosi del diniego opposto loro dall'organo competente al rilascio delle licenze, la sovrintendenza della New York State Police. Sia la Corte distrettuale che la Corte di appello hanno confermato l'operato dell'autorità convenuta, entrambe fondandosi sullo standard fissato da un precedente della seconda che ha imposto la presenza del perseguimento di taluni interessi pubblici per il ricorrere di una *proper cause*[48]. Di conseguenza, la questione è stata portata dinanzi alla Corte Suprema, che ha rilasciato il *certiorari* per stabilire se la disciplina newyorchese che abbiamo ricostruito brevemente sia o meno conforme a Costituzione.

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[44] Cfr. le dichiarazioni riportate in https://www.nbcnews.com/politics/politics-news/newsom-says-he-will-use-texas-abortion-law-tactics-restrict-n1285794.
[45] 597 U.S. _____ (2022).
[46] N.Y. Penal Law Ann. §400.00(2)(f).
[47] *In re Klenosky*, 75 App. Div. 2d 793, 428 N.Y. S. 2d 256, spec. p. 257.
[48] *Kachalsky*, 701 F. 3f 81, spec. p. 96.

Venendo al merito della decisione, occorre iniziare con il dire che i giudici hanno optato per il superamento dell'analisi bifasica che le corti inferiori avevano sviluppato per esaminare le doglianze in materia di controllo delle armi successivamente alle altre sue due pronunce sul tema, *Heller*[49] e *McDonald*[50]. Un approccio a due passaggi che era funzionale a limitare, sostanzialmente, la loro portata applicativa. Tale approccio risultava essere così articolato: in primo luogo, si verificava se una restrizione fosse conforme all'interpretazione storicamente orientata del testo del Secondo Emendamento; in secondo luogo, e in caso affermativo, si passava a stabilire se la restrizione fosse proporzionale alla promozione di un interesse pubblico meritevole di tutela (cosiddetto *means-end scrutiny*)[51]. Appunto, secondo l'*opinion* di maggioranza, il doppio passaggio va censurato atteso che né *Heller* né *McDonald* supportano lo scrutinio circa gli obiettivi perseguiti dalle autorità pubbliche nella regolazione. Detto diversamente, per stabilire la costituzionalità di una determinata norma limitativa dell'uso delle armi, l'autorità da cui essa promana deve dimostrare che la norma faccia parte della tradizione storica che delimita i confini esterni del diritto di detenere e portare armi[52].

Circostanza ancor più degna di nota è che la Corte ha rifiutato radicalmente l'operatività del sistema dei tre livelli di scrutinio (*three tiers of scrutiny*) nel sindacato di costituzionalità delle misure che riguardino il Secondo Emendamento[53]. Com'è noto, nell'ambito dei diritti fondamentali della persona e sulla clausola dell'*equal protection*, vi sono tre test elaborati dalla prassi giurisprudenziale[54]. Il *rationality basis test*, che si atteggia a sindacato di legittimità sulla ragionevolezza dell'operato dei poteri pubblici, *rectius* a controllo di non manifesta irragionevolezza (si tratta di uno scrutinio generalmente impiegato per giudicare su legislazioni economico-sociali). L'*intermediate scrutiny*, in virtù del quale la costituzionalità di una legge è stabilita guardando al perseguimento di un importante obiettivo da parte del governo (e viene impiegato generalmente in alcune forme di discriminazione, di disciplina del cosiddetto *commercial speech* e della *freedom of speech* nei luoghi pubblici). Infine, lo *strict scrutiny*, la forma più penetrante di controllo giurisdizionale che impone alle autorità pubbliche di dimostrare che la misura adottata sia necessaria per ottenere un impellente obiettivo di interesse generale (*compelling government purpose*) e che costituisca l'alternativa meno restrittiva e discriminatoria (il tipo di scrutinio appena descritto viene impiegato nei casi di discriminazione razziale, sulla base della nazionalità, nei confronti degli stranieri, e in materia di *fundamental rights*)[55].

Si diceva che i giudici statunitensi avessero impiegato nell'epoca post-*Heller* uno scrutinio di tipo intermedio per valutare la costituzionalità delle misure in materia di controllo delle

[49] 554 U.S. 570 (2008), sulla quale v. V. Fanchiotti, *District of Columbia v. Heller: Todos Pistoleros?*, in *Dir. pen. proc.*, 2008, p. 1459 ss.
[50] *McDonald v. City of Chicago*, 561 U.S. 742 (2010).
[51] Ad es. *United States v. Greeno*, 679 F. 3d 510. 518 (CA6 2012),
[52] *NYSRPA v. Bruen*, cit., *opinion of the Court*, pp. 9-15.
[53] Da ultimo, sul tema, cfr. A. GORDMAN, *The Enumeration Conflagration: Originalist Interest-Balancing Tests After* Bruen, in 60 *Hous. L. Rev.*, 2023, p. 1143 ss.
[54] Cfr. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), spec. p. 152, n. 4.
[55] Cfr., tra i molti, T.L GROVE, *Tiers of Scrutiny in a Hierarchical Judiciary*, in 14 *Geo. J. L. & Pub. Pol'y*, 2016, p. 475 ss.

armi[56]. In *Bruen* è netta la cesura rispetto al *modus operandi* appena illustrato: nella sentenza in commento, si legge che mentre la deferenza da parte del potere giudiziario al bilanciamento degli interessi legislativi è comprensibile e, altrove appropriato, non è quanto richiesto dalla Costituzione con riferimento al Secondo Emendamento. Il quale, nell'opzione interpretativa assunta dalla Corte, è già «il prodotto stesso di un bilanciamento degli interessi da parte del popolo (*People*)», sicché «eleva sicuramente al di sopra degli altri interessi il diritto dei cittadini responsabili e rispettosi della legge a usare le armi» per l'autodifesa[57]. Da ciò deriva che l'unico test da doversi impiegare, in conformità con *Heller*, sia l'analisi storica (*historical analysis test*), che si traduce nell'imporre ai tribunali di valutare se le moderne normative sulle armi da fuoco siano coerenti con il testo del Secondo Emendamento e con la sua interpretazione, appunto, storicamente orientata. *Justice* Thomas concede che le sfide normative poste oggi dalle armi da fuoco non coincidono con quelle che hanno interessato i Fondatori nel 1791 o la generazione della Ricostruzione nel 1868. Ciononostante, egli reputa che il significato della Costituzione, benché essa debba applicarsi a circostanze non limitate solo a quelle previste dai Fondatori, non può che essere quello che i Fondatori stessi le hanno attribuito.

2. Firearms regulation through civil litigation: *il ruolo del tort law*

La sentenza *Bruen*, oltre ad aver chiarito la natura costituzionale del diritto di portare in luoghi pubblici armi e ad aver riacceso il dibattito intorno all'originalismo quale strumento di manipolazione dei dati storici, simboleggia verosimilmente l'inizio di una stagione dove la regolazione delle armi assumerà nuove forme, e in cui i singoli, le associazioni e le stesse autorità pubbliche tenteranno di contrastare la crescente diffusione delle armi da fuoco attraverso la proposizione di *tort claim* nei confronti della *gun industry*, nel più ampio contesto della cosiddetta *Firearms Litigation*[58]. Questo stato di cose è confermato da due iniziative processuali avviate dallo Stato di New York sei giorni dopo la pronuncia della Corte Suprema[59]. In particolare, i funzionari hanno intentato due azioni legali volte a fermare la proliferazione di armi da fuoco non rintracciabili (le cosiddette *ghost gun*) sulla scorta di una nuova legge statale diretta ad aggirare l'ampia immunità riconosciuta dal *Protection of Lawful Commerce in Arms Act*[60], che esenta l'industria delle armi da responsabilità per crimini commessi con le armi che produce[61].

La disciplina newyorchese prescrive in capo ai produttori una forma di responsabilità nel caso di *public nuisance* creato dalle loro attività commerciali[62]. La normativa impone alle società produttrici di realizzare dei controlli ragionevoli finalizzati a impedire che le armi

[56] S.H. HERMAN, *Post*-Heller *Second Amendment Jurisprudence*, Congressional Research Service, 25 marzo 2019, p. 15 s., reperibile al seguente indirizzo https://crsreports.congress.gov/product/pdf/R/R44618/14.
[57] *NYSRPA v. Bruen*, cit., *opinion of the Court*, pp. 15-17.
[58] In tema, T.D. Lytton (ed.), *Suing the Gun Industry – A Battle at the Cross of Gun Control and Mass Torts*, Ann Arbor, 2005, *passim*.
[59] Si veda il comunicato stampa reperibile al seguente indirizzo https://ag.ny.gov/press-release/2022/attorney-general-james-sues-national-gun-distributors-fueling-gun-violence-crisis.
[60] 15 U.S.C. §§ 7901-39.
[61] N.Y. Gen. Bus. Law §§ 898-a–e.
[62] Per una ricognizione di questo tipo di *tort*, tra tutti, si veda la recente ricostruzione offerta da L. KENDRICK, *The Perils and Promise of Public Nuisance*, in 132 *Yale L. Rev.*, 2023, p. 701 ss.

vengano utilizzate, commercializzate ovvero illegalmente vendute nello Stato di New York. In assenza di tali controlli, il procuratore generale e le autorità locali sono legittimati ad agire in giudizio, parimenti consentendosi anche alle persone lese da crimini commessi a valle dei mancati controlli di ottenere un risarcimento. Oltre ai risarcimenti per equivalente, le azioni giudiziarie, modellate sull'esperienza maturata nel contenzioso contro l'industria farmaceutica nell'ambito della crisi degli oppioidi, mirano a realizzare una specie di redistribuzione imponendo alle aziende di alimentare il fondo per la prevenzione della violenza armata a New York attraverso il versamento dei profitti derivanti dalle vendite delle *ghost gun*. Con le iniziative proposte dalle autorità di New York, sono state convenute in giudizio dieci società ritenute responsabili di aver venduto illegalmente nel territorio dello Stato decine di migliaia di componenti di armi negli ultimi cinque anni ad acquirenti che poi le hanno usate per assemblare pistole e armi d'assalto, così alimentando la diffusione della violenza armata.

Nella prassi giurisprudenziale statunitense, si rinviene un caso in cui una corte ha condannato un'azienda produttrice di armi in un contenzioso civile per responsabilità. In *Kelley v. R.G. Industries, Inc.*[63], i giudici del Maryland sono stati chiamati a stabilire se il produttore dell'arma utilizzata in una rapina fosse responsabile civilmente per i danni causati dalla commissione del reato. L'attore aveva richiesto la condanna al risarcimento sia per la qualificazione come pericolosa dell'attività di produzione e commercializzazione delle armi, sia perché esse sono un prodotto intrinsecamente pericoloso. I giudici aditi hanno messo anzitutto in rilievo l'inapplicabilità al produttore di armi delle disposizioni sulla responsabilità oggettiva. In guisa che per potersi configurare una sua responsabilità si rendeva necessario dimostrare la difettosità e l'irragionevole pericolosità del prodotto. La Corte ha quindi condannato l'azienda produttrice perché *strictly liable* in ragione delle caratteristiche dell'arma venduta (particolarmente attrattiva per usi criminali e virtualmente senza alcuna utilità per usi legittimi) e ha per l'effetto condannato al risarcimento dei danni patiti dalle vittime innocenti a causa dell'uso criminale del dispositivo, denominato *Saturday Night Special*[64]. Invero, il caso citato del *Maryland* rappresenta un *unicum* nel panorama degli Stati Uniti, dal momento che le corti hanno tendenzialmente, quantomeno in passato, prediletto un atteggiamento di *self-restraint* sostenendosi l'opportunità che fossero le assemblee legislative ad adottare iniziative in materia[65]. Più frammentata è la posizione della letteratura in materia: accanto ai sostenitori dell'idea della *regulation through litigation*[66] e ai suoi detrattori[67], si ritrovano posizioni più caute che adottano un approccio che potremmo definire olistico, di sinergia – più correttamente – tra la sfera dell'attività legislativa e quella del contenzioso[68].

[63] 479 A.2d. 1143 (Md. 1985).

[64] Per approfondimenti, E. Togni, *Il II emendamento della Costituzione americana e la responsabilità dei produttori di armi da fuoco*, in *Riv. dir. civ.*, 2007, p. 407 ss., spec. p. 428 s.

[65] Per una rassegna, cfr. ivi, p. 431.

[66] J.G. Pearson, *Make It, Market It, and You May Have to Pay for It: An Evaluation of Gun Manufacturers Liability for the Criminal Use of Uniquely Dangerous Firearms in Light of In re 101 California Street*, 1997 *BYU L. Rev.*, 1997, p. 131 ss.

[67] V. ad es. M. Pontillo, *Suing Gun Manufacturers: A Shot in the Dark*, in 74 *St. John's L. Rev.*, 2000, p. 1167 ss.

[68] T. Lytton, *The Complementary Role of Tort Litigation in Regulating the Gun Industry*, in Id (ed.), *Suing Gun Industry*, cit., p. 250 ss.

Al momento, e a séguito della pronuncia in *Bruen*, è evidente che l'attività legislativa volta all'imposizione di limiti alla detenzione e al porto di armi sarà recessiva, stante l'ampiezza dell'interpretazione data al diritto riconosciuto dal Secondo Emendamento agli individui. Ebbene è ragionevole credere che sarà il contenzioso civile ad occupare tali spazi nell'ottica di una tendenza che sta tornando in auge negli Stati Uniti, e si sta diffondendo altrove, che potrebbe esprimersi con la formula di "privatizzazione del conflitto", ovvero di "compensazione privatistica di scopi pubblicistici". Non sfugge come lo schema sia divenuto ormai ridondante. Abbiamo già trattato diffusamente dell'aborto, e ci apprestiamo nei paragrafi che seguono a tracciare le linee essenziali della materia climatica. Ad accomunare le tre tematiche non è dunque il solo fatto di avere formato l'oggetto di scrutinio da parte della Corte Suprema sostanzialmente nello stesso arco di tempo, ma principalmente la circostanza che sempre più il conflitto sociale derivante da tali settori (nonché la sua gestione) viene traslato nel campo del diritto privato, statale, e delle sue arene. Certamente, nell'aborto l'utilizzo della *civil litigation* si pone in un'ottica conservatrice quale meccanismo di sorveglianza privata per il rispetto dei dettami legislativi in ordine al divieto di effettuare pratiche abortive in taluni casi e a certe condizioni. Di segno senza dubbio più progressista paiono invece le iniziative statali di introduzione di specifiche forme di responsabilità in capo ai produttori di armi. E nel medesimo solco emancipatorio si innestano le controversie climatiche che elevano il sistema dell'illecito civile a viatico per l'affermazione di regole maggiormente attente alle questioni dei *climate change*[69].

III. CAMBIAMENTO CLIMATICO

1. West Virginia v. EPA *e le sue implicazioni per il diritto privato*

Giungiamo dunque con il cambiamento climatico al terzo atto della saga della Corte Suprema, deciso sempre con la stessa maggioranza di 6-3 il 22 giugno 2022[70]. La vicenda da cui è scaturita la pronuncia in *West Virginia v. EPA* può essere così brevemente riassunta: i *justice* hanno ritenuto non rientrante tra i poteri dell'EPA l'emanazione del *Clean Power Plan* e, in particolare, l'imposizione alle centrali elettriche esistenti di una transizione energetica dal carbone verso fonti rinnovabili. Per la prima volta, si è adottata una decisione invocando in maniera esplicita la *major questions doctrine*[71].

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[69] Cfr., *ex multis*, D.A. Kysar, *What Climate Change Can Do about Tort Law*, in 41 *Environmental Law*, 2011, p. 1 ss.; Id. e R.H. Weaver, *Courting Disaster: Climate Change and The Adjudication of Catastrophe*, in 93 *Notre Dame L. Rev.*, 2016, p. 296 ss.; R. Blomquist, *Comparative Climate Change Torts*, in 46 *Val. U. L. Rev.*, 2012, p. 1053 ss.; B. Pozzo, *Climate Change Litigation in a Comparative Law Perspective*, in F. Sindico e M.M. Mbengue (eds.), *Comparative Climate Change Litigation: Beyond the Usual Suspects, Ius Comparatum – Global Studies in Comparative Law 47*, 2021, p. 593 ss.

[70] *West Virginia v. Environmental Protection Agency*, 597 U.S. ___ (2022). Per alcuni commenti alla sentenza, cfr. J. Novkov, West Virginia v. EPA*: Whither the New Deal Order?*, in 55 *Polity*, 2022, p. 410 ss.; L. Parona, *La Corte Suprema si pronuncial sul Clean Power Plan: prime note a West Virginia et al. v. Environmental Protection Agency*, in *DPCE Online*, 2022, p. 1597ss.; A.M. Sabino, West Virginia v. EPA*: Behind the Supreme Court Principled Decision*, in 39 *Climate & Energy*, 2022, p. 1 ss.; E.M Dishman, West Virginia v. EPA*: Major Questions for the Future of the Administrative State and American Federalism*, in 53 *Publius*, 2023, p. 435 ss.; G. Vivoli, *Gli effetti della sentenza West Virginia v. Epa sul futuro dell'administrative state statunitense*, in *Federalismi*, 2023, p. 88 ss.

[71] Sulla *major questions doctrine*, D.T. Deacon e L.M. Litman, *The New Major Questions Doctrine*, in 109 *Va. L. Rev.*, 2023, p. 1009 ss.

Volendo succintamente passare in rassegna i punti salienti, è possibile enucleare alcuni passaggi significativi. In primo luogo, l'opinione di maggioranza ha stabilito che il Congresso non ha delegato all'agenzia, a mente della *section* 111(d) del *Clean Air Act*, di definire le soglie delle emissioni fondate sull'approccio del *Clean Power Plan*. Secondo la Corte, sulla scorta appunto della *doctrine* della *major questions*, ci sono settori straordinari dove il significato economico e politico della materia oggetto di regolazione fa sì che sussistano quantomeno una o più ragioni per dubitare dell'intenzione del Congresso di delegare il potere normativo. Detto altrimenti, i fatti alla base della decisione costituiscono uno di quei casi in cui l'EPA avrebbe dovuto indicare una chiara e inequivoca autorizzazione del Congresso. Cosa che – nella prospettiva dei *justice* – non è riuscita a dimostrare. Piuttosto, l'agenzia si sarebbe solo limitata ad asserire il preteso affidamento delle competenze, al contempo essa stessa ammettendo che la trasmissione, la distribuzione e lo stoccaggio dell'elettricità non ricadono tra tali competenze.

La decisione del 2022 si pone solo in apparente contrasto con il precedente *Massachusetts v. EPA*[72] deciso nel 2007. In quella sede la Corte Suprema aveva a chiare lettere stabilito che l'agenzia federale era detentrice del *regulatory power* in materia di emissioni di gas climalteranti. A una più attenta disamina, i risultati raggiunti in *West Virginia* si pongono in perfetta linea di continuità con il precedente del 2007 dal momento che espressamente riconoscono il potere regolatorio in materia di gas climalteranti in capo al Congresso, che può delegarlo – rispettando i criteri enucleati dalla *major questions doctrine* – alle agenzie federali. *A fortiori*, si esclude radicalmente la possibilità di corti federali che si facciano promotrici di decisioni manifesto volte a regolamentare la materia delle emissioni dei gas altamente inquinanti. Si tratta a ben vedere di portare alle sue logiche conseguenze una ricostruzione ben precisa offerta dai *justice*. Se, difatti, il giudiziario federale qualifica la questione climatica come *major*, allora la qualifica come intrinsecamente politica. Con la conseguenza che non solo è impossibile affidare implicitamente le regolazione ad un'*agency*, ma nei suoi confronti opererà in aggiunta la *political question doctrine* che sbarra la strada alla regolazione attraverso le pronunce delle corti. Con parole diverse, se il clima è considerato per sua stessa natura politico, allora nei confronti delle agenzie federali opererà la *doctrine* della *major questions*; viceversa, nei confronti del giudiziario quella della *political question*. La quale ultima comporterà fatalmente la dichiarazione di insussistenza di giurisdizione ogni qualvolta le istanze climatiche dovessero presentare, quantunque solo lontanamente, una qualche forma di afflato regolatorio.

La tesi di fondo che qui si sostiene, e che è corroborata da una linea di tendenza giurisprudenziale che si porrà in evidenza nel prosieguo, è *in primis* nel senso che la sentenza in *West Virginia v. EPA* si pone nel solco di un consolidato orientamento già tracciato dalla Corte Suprema e dalle corti federali quando v'è da trattare il contenzioso climatico che presenti propositi di *regulation through litigation*. Da un punto di vista comparativo, tale circostanza suscita non poco interesse giacché è idonea ad allargare di molto le distanze tra il contenzioso civile climatico che si sta delineando in Europa rispetto a quello dell'esperienza, che del fenomeno è la matrice, statunitense[73]. Il primo è sempre

[72] 549 U.S. 497 (2007).

[73] Cfr. B. Pozzo, *La climate change litigation in prospettiva comparatistica*, in *Riv. giur. amb.*, 2021, p. 271 ss.

più votato a perseguire obiettivi di regolazione delle attività future dei governi (tre esempi su tutti: il caso olandese *Urgenda*[74], la decisione del Tribunale federale tedesco nel caso *Neubauer*[75] e il ricorso presentato dinanzi al Tribunale civile di Roma da parte dell'Associazione A Sud[76]) ovvero all'impiego della responsabilità civile in ottica di strumento di conformazione delle politiche industriali future delle imprese (emblematica in tal senso la controversia *Milieudefensie et al. v. Royal Dutch Shell*[77] e il caso citato in apertura proposto da Recommon e Greenpeace contro ENI[78]). Mentre ben altra è la rotta intrapresa oltreoceano, dove più che domande di provvedimenti di natura ingiuntiva funzionali ad utilizzare il contenzioso a mo' di strumento autentico di confezionamento di regole valide per il futuro (sia pure nel contesto europeo ciò valendo al limite come *persuasive authority*), le associazioni ambientaliste e gli enti pubblici statunitensi hanno da tempo virato verso strategie meno ambiziose, apparentemente, ma non meno concrete. Così, anziché avanzare richieste di provvedimenti ingiuntivi, domandano risarcimenti per equivalente imperniati essenzialmente sulla figura di *tort* che abbiamo già incontrato nelle pagine che precedono, il *public nuisance*.

Il tutto almeno per due ordini di ragioni. In primo luogo, l'utilizzo della *tort law*, in quanto materia di competenza statale, scongiura i rischi sottesi ai ricorsi in sede di giustizia federale, dal momento che essa risulta essere quanto mai riluttante nel settore interessato. In secondo luogo, l'utilizzo delle regole in materia di responsabilità civile in senso classico (ovverosia il focus sulle condotte illecite pregresse delle imprese da cui sorge l'obbligo di risarcimento in denaro) consente di porsi al riparo da eventuali declaratorie di difetto di giurisdizione anche da parte dei giudici degli Stati. Stando così le cose, è palese che la scelta statunitense di ripiegare verso approcci tradizionali alla *tort law* contraddice almeno in parte gli iniziali e roboanti tentativi di utilizzare la *litigation* per la *regulation*. Tentativi invece ben presenti in alcuni dei più significativi casi di quella che possiamo definire la prima ondata di contenzioso civile climatico, che ci occuperò nel paragrafo seguente.

2. *La prima ondata di contenzioso climatico tort-based negli Stati Uniti*

Il caso *Comer* è un esempio particolarmente calzante del *self-restraint* adottato dalle corti statunitensi per ignorare il tema della responsabilità civile climatica[79]. Esso è altresì rilevante dal momento che costituisce la prima volta in cui i *tort* sono stati impiegati in una controversia climatica, dal momento che le doglianze erano state predicate sulla disciplina

[74] *Urgenda Foundation v. the State of Netherlands* [2015] HAZA C/09/00456689.
[75] BVerfG, 1 BvR 2656/18 *et al.*, del 24 marzo 2021 (*Klima-Beschluss*), reperibile su www.bundesverfassungsgericht.de, anche in versione inglese, francese e spagnola. Per una dettagliata disamina del caso e delle sue implicazioni, nonché sul dibattito dottrinale che ne è scaturito in Germania, cfr. A. Di Martino, *Intertemporalità dei diritti e dintorni: le scelte argomentative del Bundesverfassungsgericht nella sentenza sul clima e le interazioni con i processi democratici*, in *Dir. comp.*, 2023, II, p. 56 ss.
[76] *A Sud et al. c. Italia*. Documenti di causa reperibili al seguente indirizzo https://giudiziouniversale.eu/la-causa-legale/. In argomento, cfr. D. Castagno, *Le procès pour l'environnement et le climat en droit italien: potentialités, limites et alternatives dans un cadre de contentieux «stratégiques»*, in *RIDC*, 2023, p. 583 ss.
[77] *Milieudefensie et al. v. Royal Dutch Shell plc.*, file no. 90046903.
[78] *Greenpeace Italia et al. c. ENI S.p.A. et al.* Documenti di causa accessibili al seguente indirizzo https://climatecasechart.com/non-us-case/greenpeace-italy-et-al-v-eni-spa-the-italian-ministry-of-economy-and-finance-and-cassa-depositi-e-prestiti-spa/.
[79] D.A. Kysar e R.H. Weaver, *Courting Disaster*, cit., p. 323.

in materia di responsabilità civile dello Stato del Mississippi. Alcuni proprietari terrieri avevano invocato la responsabilità di alcune società petrolifere, affermando che le loro condotte inquinanti avessero esasperato la violenza dell'uragano Katrina, derivandone la maggiore severità dei danni patiti dagli attori con riguardo ai beni interessati. La corte ha respinto la richiesta sia in primo grado che in appello. Gli attori nel caso *Comer* hanno dovuto percorrere una strada impervia, atteso che il preteso risarcimento riposava principalmente sull'affermazione dell'esistenza di un nesso causale tra le attività dei convenuti, il riscaldamento globale e la distruzione delle loro proprietà a causa dell'innalzamento del livello del mare e della maggiore ferocia dell'uragano Katrina[80]. Gli studi scientifici prevedevano già un aumento sostanziale della gravità e dei danni degli uragani atlantici a causa dell'innalzamento della temperatura e del livello del mare, ma rimaneva comunque complesso stabilire un nesso causale con un'analisi *ex post facto* delle attività umane[81]. Prevedibilmente, le domande attoree sono state respinte poiché ponevano una *non-justiciable political question*[82].

Il secondo caso della prima ondata è *Connecticut v. AEP*, reputato il più influente caso di illecito civile sul cambiamento climatico sinora portato dinanzi a una giudice negli Stati Uniti[83]. Diversi Stati, la città di New York e un gruppo di enti no-profit hanno citato in giudizio cinque grandi aziende erogatrici di servizi pubblici e la Tennessee Valley Authority, denunciando violazioni della *common law* sia statale che federale. Gli attori chiedevano la cessazione delle condotte di *public nuisance* dei convenuti, invocando il loro ruolo di contributori al riscaldamento globale. Le centrali elettriche da loro gestite sono state considerate negli atti processuali le cinque maggiori emittenti di CO2 negli Stati Uniti responsabili di circa un quarto delle emissioni di anidride carbonica del settore elettrico statunitense[84]. In *Connecticut v. AEP*, la questione del nesso di causalità era meno problematica rispetto a *Comer*, dato che le attività dei convenuti rappresentavano il 2,5% delle emissioni annuali globali di CO2. Restava in ogni caso da doversi assolvere l'onere di provare l'illiceità dei comportamenti. La circostanza che le domande fossero fondate sulla fattispecie di *public nuisance* mirava strumentalmente al superamento di tale ostacolo. Riguardando i danni all'interesse pubblico, il *public nuisance* è in grado di ovviare ad alcune criticità delle domande di danni climatici, come ad esempio quelle della possibile assenza di prossimità tra la condotta e il danno e dell'attenuazione tra quest'ultimo e la prima per via di fattori concausali idonei a incidere sul nesso diretto. Più di altro, il caso *Connecticut v. AEP* assume rilevanza sotto il profilo delle tutele rimediali, avendo gli attori presentato una richiesta di provvedimento ingiuntivo che, ove accolta, avrebbe imposto ai convenuti l'obbligo di ridurre le emissioni di gas serra. La strategia ha suscitato critiche perché, data la sua innovatività e carica sovversiva, sembrava quasi volesse indurre i giudici a rigettare il caso schermandosi dietro la presenza di questioni politiche. E, in effetti, i giudici hanno respinto le domande poiché persupponvevano una *non-justiciable political question*[85].

[80] *Comer*, 585 F.3d, §§859 s. e 863.
[81] T.R. Knutson *et al.*, *Tropical Cyclones and Climate Change*, in 3 *Nat. Geosci.*, 2010, p. 157 ss.
[82] Comer, 585 F.3d, §872.
[83] *Connecticut v. AEP*, 406, F. Supp. 2d, §268.
[84] D.A. Kysar, *What Climate Change Can Do about Tort Law*, cit., p. 23.
[85] *Connecticut*, 406, F. Supp. 2d, §272.

Gli esiti fallimentari di *Connecticut v. AEP* non hanno impedito ad altri soggetti di richiedere rimedi di natura ingiuntiva di tenore analogo. In *California v. General Motors Corp.*[86], il procuratore generale dello Stato ha intentato una causa contro la General Motors e altre cinque grandi case automobilistiche per *public nuisance*, poiché, in base alle prove allegate, le emissioni di CO2 dei convenuti ammontavano al 9% delle emissioni totali a livello mondiale. Come in *Connecticut v. AEP*, il giudice ha respinto l'istanza di risarcimento qualificandola una *non-justiciable political question*, e ritenendo che il giudizio, ove reso, avrebbe imposto di condurre una valutazione politica *tout court*[87].
L'ultima controversia da ascriversi alla prima ondata di contenzioso in materia di clima *tort-related* è il caso che ha visto coinvolto gli abitanti del villaggio di Kivalina. Il 26 febbraio 2008, circa quattrocento residenti hanno citato in giudizio ventiquattro grandi società energetiche, domandando di sostenere i costi associati al trasferimento del proprio villaggio, minacciato dall'innalzamento dei mari, dalla riduzione dei ghiacci e dallo scioglimento del permafrost[88]. Le istanze erano ancora una volta incentrate sul *public nuisance*, e un aspetto interessante della controversia in questione è che le domande erano radicate su una *cause of action* tradizionale, ovverosia la rivendicazione dell'uso e del godimento esclusivo della proprietà, così rivitalizzando una concezione classica della responsabilità per *nuisance*, e della *tort law* più in generale, a scapito di quanto era accaduto nei precedenti casi[89]. Nonostante gli sforzi di arretramento, in un certo modo imposti dagli esiti infausti delle pregresse controversie, i quali hanno fatto ripiegare gli attori su approcci "tradizionali", il 30 settembre 2009, la Corte per il distretto settentrionale della California ha respinto l'azione di risarcimento qualificandola *non-justiciable political question*[90].
Proprio nel solco dell'approccio assunto in *Kivalina* si pongono le attuali controversie instaurate in materia negli Stati Uniti. Queste ambiscono a utilizzare i canoni tradizionali della *tort law* non tanto per fini regolatori, quanto redistributivi.

3. *La seconda ondata di contenzioso climatico tort-based negli Stati Uniti*

Le principali controversie attualmente pendenti negli Stati Uniti mirano eminentemente a rintracciare, analogamente a quanto accade in differenti parti del globo[91], la responsabilità delle compagnie produttrici di combustibili fossili[92]. Il quadro che si profila è assai frastagliato e complesso, e ricomprende tanto casi proposti da enti pubblici (Stati, contee e municipalità) quanto da privati (sia individui sia gruppi associativi). Eloquente a tale ultimo riguardo è la controversia intentata da un gruppo di pescatori che ha portato in

[86] No. C06-05755, 2007 WL 2726871.
[87] Ivi, §8.
[88] *Kivalina*, 663 F. Supp. 2d, *Complaint*, §§1-4.
[89] Cfr. J.H. Adler, *Taking Property Rights Seriously: The Case of Climate Change*, in 26 *Soc. Phil. & Pol'y*, 2009, pp. 296 e 306.
[90] *Kivalina*, 663 F. Supp. 2d, §880 s.
[91] Si v. il documento *Global Climate Litigation Report – 2023 Status Review* accessibile al seguente indirizzo https://reliefweb.int/report/world/global-climate-litigation-report-2023-status-review.
[92] C. McGreal e A. Chang, *How cities and states could finally hold fossil fuel companies accountable*, in *The Guardian*, 30 giugno 2021, accessibile al seguente indirizzo https://www.theguardian.com/environment/ng-interactive/2021/jun/30/climate-crimes-fossil-fuels-cities-states-interactive.

giudizio cinque grandi compagnie petrolifere facendo valere come le loro attività inquinanti stiano compromettendo la pesca[93].

Anche nella seconda ondata, le controversie si poggiano prevalentemente sul *tort* di *public nuisance*[94], e dunque sul diritto statale. Detto altrimenti, esse cercano di qualificare le attività delle convenute come una lesione dell'interesse generale della collettività a un clima stabile. L'argomento cardine è quello della consapevolezza da parte degli attori economici della pericolosità per l'ambiente del loro operato[95]. Traslato nella grammatica della responsabilità civile, tale tesi ambisce a dimostrare che i danni cagionati fossero prevedibili dalle convenute, a cui è per l'effetto addebitabile una responsabilità per colpa. Più nello specifico, gli argomenti si dirigono a denunciare il fatto che le imprese sono perfettamente consce del contributo climalterante delle attività economiche svolte. Inoltre, le convenute vengono altresì accusate di aver posto in essere strategie distorsive della percezione del fenomeno climatico da parte dell'opinione e dei decisori pubblici. Tradotto nel linguaggio dei *tort*: di aver realizzato condotte di *misrepresentation*, *deceit* e *lobbying* aggressivo.

Lo si intuisce, esiti di controversie così impostate riposano sulla premessa del riconoscimento dell'accertata interferenza tra la condotta realizzata e l'evento dannoso prodotto, e che ha leso un diritto riconducibile alla collettività nel suo complesso. Da qui l'intimo legame esistente tra le controversie climatiche *tort-related* con quelle sul versante eminentemente costituzional-pubblicistico, dove si mira ad ottenere per l'appunto il riconoscimento di un diritto fondamentale a un clima stabile. Segnali della sua praticabilità provengono, sempre con riferimento al contesto statunitense, da un lato, dalla decisione dei giudici del Montana che – di recente – hanno accordato tutela costituzionale a un gruppo di giovani e attribuito loro un diritto di tale consistenza[96].

Sicché, volendola raffrontare con quelli che abbiamo ascritto alla cosiddetta prima ondata, l'attuale sequenza di casi pendenti negli Stati Uniti si inscrive pienamente nel solco tracciato dalla controversia in *Kivalina*, in cui la *tort liability* è stata invocata – in ottica "tradizionale" – per l'ottenimento di un risarcimento per equivalente e non già per perseguire obiettivi regolatori attraverso l'emanazione di provvedimenti di natura ingiuntiva. Ma vi è di più: le controversie statunitensi si orientano nel senso di guardare alle condotte pregresse delle imprese convenute al fine di ottenere un risarcimento in forma monetaria, mentre in Europa si guarda alle responsabilità future. Vi si scorge una notevole differenza, sebbene *in nuce*, tra il contenzioso civile climatico *à la* europea e quello *à la* statunitense. Nel contesto europeo, lo dimostrano i casi *Urgenda* e *Milieudefensie* per tutti, la tendenza delle corti (e, a monte, delle parti attrici) è stata di tendere all'emanazione di misure conformative delle politiche pubbliche degli Stati e di quelle industriali dei privati

[93] A. Bland, *Fishermen Sue Big Oil for Its Role in Climate Change*, in *NPR*, 4 dicembre 2018, testo accessibile al seguente indirizzo https://www.npr.org/sections/thesalt/2018/12/04/671996313/fishermen-sue-big-oil-for-its-role-in-climate-change#:~:text=The%20Pacific%20Coast%20Federation%20of,fleshed%20crustacean%20most%20years%2C%20and.

[94] Per tutti, B. Pontin, *The role of tort in environmental protection*, in *Ann. dir. comp.*, 2021, p. 37 ss. e L. Kendrick, *The Perils and Promise*, cit.

[95] Diffusamente in argomento M. Russo, *Productive Public Nuisance: How Private Individuals Can Use Public Nuisance to Achieve Environmental Objectives*, in 2018 *U. Ill. L. Rev.*, 2018, p. 1969 ss.

[96] *Rikki Held et al. v. State of Montana et al.*, No. CDV-2020-307, 1st Dist. Ct. Mont., 14 agosto 2023. Si v. anche il caso, attualmente pendente dinanzi alla *District Court* dell'Oregon: *Juliana, et al. v. United States, et al.*, No. 6:15-CV-01517-AA, D. Or.

con riferimento alla prevenzione dei danni futuri. Rifacendosi pedissequamente all'ultimo rapporto disponibile pubblicato dal *panel* intergovernativo per i cambiamenti climatici (IPCC), i giudici hanno rispettivamente imposto ai Paesi Bassi di modificare in senso più ambizioso la loro disciplina in materia di clima per renderla maggiormente allineata agli obiettivi degli Accordi di Parigi e alla Shell di conformare la propria politica industriale futura ai medesimi obiettivi.

Se, a primo acchito, la contrapposizione può apparire una vera e propria idiosincrasia (essendo i secondi, e non i primi, formalmente uno Stato giurisdizionale), la spiegazione risiede nel particolare assetto di poteri presente negli Stati Uniti, accentuato da ultimo dalla recente decisione in *West Virginia v. EPA*.

Come si ritrae dalla disamina della prima ondata di contenzioso civile climatico, il problema principale incontrato dagli attori è stato di superare il vaglio di ammissibilità, quando non proprio quello di sussistenza della giurisdizione. Si rammenterà la rilevanza a tal riguardo della *political question doctrine*. Ebbene, questo aiuta a spiegare la scelta strumentale di radicare le controversie climatiche nelle corti statali e di fondare le pretese su un approccio classico, tentandosi così di ovviare al rischio che le istanze climatiche vengano considerate regolatorie per loro natura, e pertanto debordanti rispetto ai poteri attribuiti ai giudici. Del resto, nella recente controversia proposta dalla Città di New York contro la Chevron, una corte federale, chiamata ad applicare in *diversity jurisdiction* la materia dei *tort*, ha rigettato le domande di risarcimento sulla scorta delle due seguenti argomentazioni: anzitutto, il cambiamento climatico presenta una singolare problematica in sé internazionale che è opportuno affrontare a livello di legislazione federale; la quale legislazione federale, per l'interpretazione che le corti dànno del *Clean Air Statute*, preclude richieste di risarcimento avanzate da privati[97].

Per converso, segnali maggiormente favorevoli provengono dalla giurisprudenza delle corti statali. In particolare, in un recente arresto che ha visto contrapposte la città e la contea di Honolulu ad alcune società produttrici di petrolio, i giudici statali hanno ritenuto la responsabilità civile una disciplina adeguatamente equipaggiata per fronteggiare il cambiamento climatico[98]. La decisione sembra sottintendere la convinzione di fondo per cui la *tort law* è una macchina sufficientemente sofisticata che ingloba in sé una vasta gamma di strumenti pienamente capaci di gestire questioni politicamente sensibili, incluso il cambiamento climatico. Ciò fa ancor più chiarezza sulla propensione crescente delle associazioni ambientaliste e degli avvocati statunitensi di rivolgersi alle corti statali e non ai distretti giudiziari federali.

Quanto ricostruito non deve indurre a credere, si badi bene, che si ritrovi già un precedente che abbia stabilito una responsabilità per *tort* di *public nuisance* in capo agli attori inquinanti. È senza dubbio vero che le più recenti iniziative stanno tentando di capitalizzare quanto più possibile sul progresso della scienza in materia di *source attribution*, con tale formula intendendosi la branca delle scienze dure che si occupa di individuare con crescente grado di certezza e precisione la porzione esatta di responsabilità ascrivibile a determinati soggetti

[97] *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d. Cir. 2021), spec. p. 19.
[98] *City & County of Honolulu and BWS v. Sunoco, LP, et al*, Civ. No. 1CCV-20-0000380 (1 Cir. Hawai'i), *motion to dismiss*, 22 febbraio 2022, p. 7.

per determinate emissioni nell'ambiente di gas climalteranti[99]. Nonostante ciò, sarà niente affatto agevole persuadere i giudici che debbano essere le imprese a farsi carico delle conseguenze dannose delle emissioni di gas nell'aria poiché implicherebbe dover stabilire una responsabilità esclusiva lungo l'intera catena del valore di produzione. Il che non è facile in un contesto di sistemi produttivi di capitalismo fossile nei quali ciascun individuo contribuisce alle emissioni, fosse anche solamente nella sua veste di consumatore.

4. *I possibili futuri sviluppi del contenzioso climatico tort-based negli Stati Uniti*

Da qui il pronostico che si formula rispetto al fatto che il filone di contenzioso che progredirà all'avanzare della scienza sulla *source attribution* verrà affiancato da altre sequenze di casi in cui si tenterà di neutralizzare la responsabilità degli Stati e dei consumatori finali dei prodotti fossili.

Una possibile prima linea di sviluppo potrebbe concentrarsi sul far emergere la presenza di condotte fraudolente da parte delle compagnie inquinanti. Pratiche che, alterando il patrimonio informativo a disposizione degli individui/consumatori e dei pubblici poteri, hanno distorto la maturazione della consapevolezza circa la pericolosità dei prodotti fossili. Si intravvede vistosamente il parallelismo che c'è con la *tobacco litigation*: in quella sede uno dei punti nodali fu dimostrare proprio che i produttori avevano manipolato i dati sulla dannosità dell'uso di tabacco, con la conseguente sterilizzazione della responsabilità dei singoli fumatori e delle autorità pubbliche che avevano fondato le loro decisioni su quei dati[100]. Del resto, gli Stati Uniti, al pari di altri Paesi[101], impongono in virtù del *Greenhouse Gas Reporting Program*[102] degli obblighi di pubblicità alle imprese con riferimento alle emissioni di gas nell'atmosfera. Di talché la responsabilità civile, in un'ottica di *private enforcement*, potrebbe farsi strumento per assicurare maggiore effettività a tali regole. Obblighi informativi i quali, prospetticamente, potrebbero spingersi ben oltre il tema del solo report delle emissioni: in argomento, è istruttiva una causa intentata in Australia da un membro di un fondo pensionistico, i cui membri sono prevalentemente *millennial*, contro il fondo medesimo, macchiatosi, secondo le prospettazioni di parte attrice, di aver omesso di fornire un adeguato prospetto informativo relativamente all'impatto negativo del cambiamento climatico sui guadagni attesi e derivanti dalla partecipazione al fondo[103]. Oltremodo interessante la controversia lo è pure per il suo esito: il fondo ha transatto, obbligandosi ad assicurare un più rigoroso piano di *disclosure* sul fronte del cambiamento climatico.

L'ampliamento del perimetro della responsabilità con riferimento ai disastri ambientali è del resto già ben noto negli Stati Uniti. Una linea questa che ove accolta condurrebbe all'allargamento dei contorni dei doveri ascrivibili agli operatori economici. Nel senso che

[99] Cfr. J. Wentz, M. Burger, R. Horton, *The Law and Science of Climate Change Attribution*, in 51 *ELR*, 2021, p. 1 ss.

[100] Cfr. M. Olszynski, S. Mascher, M. Doelle, *From Smoke to Smokestacks: Lessons from Tobacco for the Future of Climate Change*, in 30 *Geo. Envtl. L. Rev.*, 2017, p. 1 ss.

[101] V. N. Singh e L. Longendyke, *A Global Look at Mandatory Greenhouse Gas Reporting Programs*, in *World Resources Institute*, 27 maggio 2015, accessibile al seguente indirizzo https://www.wri.org/insights/global-look-mandatory-greenhouse-gas-reporting-programs.

[102] *Greenhouse Gas Reporting Program* (GHGRP), 40 CFR Part 98.

[103] *McVeigh v. Retail Employees Superannuation Trust*, NSD1333/2018 (FCA 2018).

la questione si sposterebbe a monte, ovverosia a stabilire se e in che misura appunto gli attori hanno fatto tutto quanto era nella loro sfera di controllo (donde l'esigibilità) per prevenire i danni da *climate change*. Paradigmatica, sul punto, è la controversia intentata dalla Conservation Law Foundation contro la Exxon[104]. Lì gli attori non hanno denunciato i danni direttamente causati dalla società, quanto quelli indirettamente cagionati e derivanti dalla mancata presa in considerazione del cambiamento climatico nella fase di costruzione degli impianti di stoccaggio del combustibile fossile. L'associazione ambientalista si è lamentata della circostanza che la Exxon non aveva adeguatamente inserito il cambiamento climatico tra i fattori di rischio nella predisposizione del piano di prevenzione dei siti dove il materiale era conservato. In altri termini, la società sarebbe stata responsabile dei danni causati al vicinato, in aggiunta per lo più composto da poveri, dall'innalzamento dei mari e dall'intensificarsi dei fenomeni atmosferici estremi. L'impostazione argomentativa così formulata è atta a ricomprendere nel campo dei responsabili per il cambiamento climatico non solamente la produttrice, ma anche i soggetti a vario titolo coinvolti nel processo produttivo. Nella specie, la colpa viene imputata ai progettisti e agli ingegneri degli impianti, ancorché indirettamente, ma non sfuggirà come l'approccio possa essere esteso, ad esempio, ai consulenti legali o finanziari di una determinata società.

Un risvolto simile si è palesato, nel 2014, in una controversia instaurata da una compagnia assicurativa dell'Illinois, la quale ha agito nei confronti di alcune città statunitensi lamentandosi del fatto che queste avevano omesso di includere nella valutazione le accresciute precipitazioni dovute al cambiamento climatico nei loro piani delle acque meteorologiche. Così producendo un numero superiore di inondazioni riverberatesi in un aumento degli indennizzi dovuti dalla assicuratrice ai propri assicurati[105].

Alla luce di quanto detto, non è affatto da escludersi che nei prossimi anni assisteremo a un continuo ampliamento dei soggetti ritenuti responsabili del *climate change*[106]. Del resto, gli Stati Uniti conoscono già una disciplina che include un vasto novero di individui onerati di porre rimedio alle condotte inquinanti perpetrate nelle attività produttive. Ci si riferisce alla regolazione nota comunemente con il nome di *Superfund*[107]. Tra gli obbligati alla rimessione in pristino e alla bonifica dei siti inquinati essa include gli ingegneri, le persone sul ponte di comando dell'azienda danneggiante al momento dell'evento dannoso, e quelle in posizioni apicali al momento della proposizione della controversia, etc. Benché si tratti di disciplina statutaria, alcuni studi condotti in letteratura ne hanno rintracciato l'origine nella *common law*[108]. Tale rilievo non è privo di conseguenze pratiche, dal momento che gli

[104] *Conservation Law Foundation v. ExxonMobil Corp.*, No. 20-1456 (1st Cir. 2021).
[105] *Illinois Farmers Insurance Co. v. Metropolitan Water Reclamation District of Greater Chicago*. Documenti accessibili al seguente indirizzo https://climatecasechart.com/case/illinois-farmers-insurance-co-v-metropolitan-water-reclamation-district-of-greater-chicago/.
[106] I germi di questo processo evolutivo si ritrovano già in *County of Multnomah v. Exxon Mobil Corp.,* 3:23-cv-01213 (D. Or.), dove tra i convenuti figura anche la società di consulenza McKinsey & Co. Documenti di causa accessibili al seguente indirizzo https://climatecasechart.com/case/county-of-multnomah-v-exxon-mobil-corp/.
[107] *Comprehensive Environmental Response, Compensation, and Liability Act*, PL-96-510, Dec. 11, 1980, 94 Stat. 2767.
[108] Si v. J.M. Greenberg, *Superfund and Tort Common Law: Why Courts Should Adopt a Contemporary Analytical Framework for Divisibility of Harm*, in 103 *Minn. L. Rev.*, 2018, p. 999 ss., spec. p. 1010, testo corrispondente alla nota 76.

attori nei ricorsi in materia di clima potrebbero invocare il parallelismo con il *Superfund* proprio facendo leva sulla scaturigine storica della regolamentazione nella casistica giurisprudenziale statunitense.

È ragionevole credere che in una lotta interstiziale si attesteranno le traiettorie del conflitto sociale, *sub specie* climatico, nel campo del diritto privato dei *tort*. Che un ulteriore passaggio così congegnato sia privo di rischi non è possibile da sostenere. Aleggia, infatti, costantemente lo spettro di un approccio da *sue your neighbor* che abbiamo avuto già modo di criticare nelle pagine precedenti e che abbiamo visto incastonato nella legge texana in materia di aborto, nonché ingaggiato sotto diverse forme nel contesto della regolamentazione delle armi da fuoco. Ed ecco allora che si tratterà di accostarsi al fenomeno in modo misurato, con realismo e senza eccessivi entusiasmi. Al contempo, nell'osservazione, sarà bene in ogni caso però tenere a mente di come si tratti di tentativi, certo a volte claudicanti, sovente imperfetti, di compensazione con forme privatistiche di interessi pubblicistici. Il tutto, nell'inerzia del circuito legislativo e nella chiusura del circuito giudiziario federale all'affrontare tali tematiche.

VICARIOUS/EMPLOYER'S LIABILITY IN COMMON LAW AND IN CIVIL LAW IN CANADA

Marel Katsivela

TABLE OF CONTENTS:

I. INTRODUCTION

Vicarious liability in common law (responsabilité du fait d'autrui in french) is defined as the liability that imputes responsibility of one person for the acts of another; it occurs when the law holds one person responsible for the misconduct of another, although he is himself free from personal blameworthiness or fault[1]. Vicarious liability is well-recognized in tort law (common law) where it is used as a means to transfer liability to an employer for the fault of employee[2]. In extracontractual civil liability[3] in Québec (civil law), the expression 'responsabilité du fait des autres' refers to different liability regimes (parents' liability, educators' liability)[4]. This includes the employers' liability (responsabilité des commettants ou employeurs in French)[5].

Vicarious liability is defined by precedent in torts whereas in Québec the employer's liability is defined by article 1463 Q.c.C (Québec Civil Code) and case law accompanying it[6]. They both are strict liability regimes[7]. Strict liability means that the employer's liability can be engaged even in the absence of fault on the part of the employer[8] and that the absence of fault is not a defense for the employer[9].

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[1] Government of Canada, *Termius Plus* (2022) <https://www.btb.termiumplus.gc.ca/tpv2alpha/alpha-eng.html?lang=eng&i=&index=alt&srchtxt=RESPONSABILITE%20FAIT%20AUTRUI>. In Canada, torts are governed by common law in all provinces except Québec that follows civil law principles in this area.

[2] Lee Stuesser, "Convicting the Innocent Owner: Vicarious Liability under Highway Traffic Legislation Criminal Reports" (1989) 67 C.R. (3d) 316.

[3] This is the Québec equivalent of the common law liability in tort. Government of Canada, *Bijural Terminology Records* (2022) <https://www.justice.gc.ca/eng/csj-sjc/harmonization/bijurilex/terminolog/not176.html>.

[4] Réseau du Québec, *La Responsabilité Civile : Vos droit et vos obligations* (2022) <https://www.avocat.qc.ca/public/iirespextrac.htm>.

[5] Baudouin, Jean-Louis & Deslauriers, Patrice & Moore, Benoît, *La responsabilité civile* Vol 1 (Yvon Blais, 8th ed. 2014) 809.

[6] Article 1463 Q.c.C. provides: *The principal is bound to make reparation for injury caused by the fault of his subordinates in the performance of their duties; nevertheless, he retains his remedies against them*. This corresponds to article 1054 of the Civil Code of Lower Canada (the predecessor of the Q.c.C.).

[7] Common law: Government of Canada, *supra* note 1. Common law and civil law: Nikolas De Stefano, "A Comparative Look at Vicarious Liability for Intentional Wrongs and Abuses of Power in Canadian Law" (2020) 2020 CanLIIDocs 1869, 3. For different theories (risk, guarantee) underpinning this liability regime in civil law see Baudouin, Deslauriers, Moore, *supra* note 5, 816s.

[8] Common law: Government of Canada, *supra* note 1. Civil law: Baudouin, Deslauriers, Moore, *supra* note 5, 812.

[9] Common law: J.W. Neyers, "The Theory of Vicarious Liability" (2005) 43 (2) Alberta Law Review 287, 294. In civil law, the employer can be exonerated in proving absence of the conditions to establish liability under this regime, force majeure or the victim's or third party's fault. Vincent Karim, *Les Obligations* 4th ed. Vol. 1 (Wilson & Lafleur, 2015) pp.1308-1309 citing case law and H.J. Alicia Soldevila, *La responsabilité pour le fait ou la*

In order to establish vicarious or employer's liability in both legal traditions the plaintiff needs to prove10: 1) a fault (civil law) or the tort of the employee (common law); 2) an employer-employee relationship and; 3) that the tort or fault was committed in the employee's scope of employment. As we are going to see, a lot of similarities but also differences denote the details of these three conditions.

The policies underlying the liability regimes in both legal traditions are the need to provide compensation to victims for their harm and the deterrence of future harm[11]. At the same time, when vicarious/employer's liability is not closely and materially related to a risk introduced or enhanced by the employer but is only coincidentally linked to it, it serves no deterrent purpose and relegates the employer to the status of an involuntary insurer or guarantor[12]. Fairness, therefore, to both the victim and the employer has to be taken into account regarding policy considerations underlying vicarious/employer's liability in both legal systems. In both legal cultures, tort and extracontractual liability lead to *restitutio in integrum*: the victim must be placed in the situation in which he/she would have been had it not been for the tort/fault[13].

The present study will examine the conditions of application of the vicarious (common law) and the employer's (civil law) liability regimes in Canada. It will identify the similarities and differences of the basic rules present in the two Canadian legal systems (Part II). The study will also critically analyze the recent adoption by some Québec cases of common law principles regarding the condition that the employee's tort should be committed within the scope of his/her employment (Part III).

II. CONDITIONS OF APPLICATION

(a) 1st condition: a fault (civil law) or a tort of the employee (usually negligence or an intentional tort, common law)[14].

In civil law, the employee's fault[15] is an express condition in article 1463 Q.c.C.[16] and, therefore, not based on precedent as is the case in common law. Further, the employer cannot avoid liability simply because the damage caused is the consequence of a crime or a

faute d'autrui et pour le fait des biens, Collection de droit 2020-2021, École du Barreau du Québec, vol. 5, *Responsabilité*, Montréal, Éditions Yvon Blais, 2020, EYB2020CDD89 (La Référence). For a comparative analysis of the civil law force majeure and the common law equivalent concept see M.Katsivela, "Canadian Contract and Tort Law: The Concept of Force Majeure in Quebec and Its Common Law Equivalent" (2011) 70 Rev. du Barreau Canadien, 69.

10 Common law: The Late Allen M. Linden, Lewis N. Klar, Bruce Feldthusen, *Canadian Tort Law* (Lexis Nexis, 16th ed. 2022) p. 551-552. Civil law: 1463 Q.c.C. *supra* note 6.

11 Common law: *Bazley infra* note 42 paras 29s. Civil law: *Borduas infra* note 92 para 146, 160 noting that this was the intent of the legislator, *Axa infra* note 86, para 59 for both legal traditions.

12 Civil law: *Havre infra* note 63. Common law: *Bazley*, *ibid* para 36.

13 *Laferrière c. Lawson*, [1991] 1 RCS 541, 1991 CanLII 87 (CSC) a case cited both in civil law and in common law.

14 Hereinafter we will refer to the employee's fault (civil law) or negligence-intentional tort (common law) as wrong or wrongdoing.

15 The notion of fault in civil law comprises intentional, non-intentional faults and other types of faults (regulatory, gross negligence etc). An intentional fault in civil law denotes an intent to cause damage. Baudouin & Deslauriers & Moore, *supra* note 5, 180. *La Royale du Canada* c. *Curateur public,* C.A., 2000 CanLII 10597 (QC CA) para 17 citing Baudouin.

16 The employee's mental disability may not allow the presence of a fault and cannot, therefore, justify the employer's liability. Baudouin, Deslauriers, Moore, *supra* note 5, 820.

criminal act of the employee[17]. On this point and regarding state employees, Q.c.C. article 1464 specifically states: "A subordinate of the State or of a legal person established in the public interest does not cease to act in the performance of his duties by the mere fact that he performs an act that is illegal, beyond his authority or unauthorized, or by the fact that he is acting as a peace officer."[18].

On the contrary, in common law, there are no equivalent legislative provisions to C.c.Q. article 1464. Apart from the fact that the Crown or other public authorities will not be vicariously liable under common law for torts committed by employees exercising independent discretion or independent authority conferred by statutory law or common law (for example, unlawful acts by police officers, torts of naval ship commanders, customs collectors), common law courts have traditionally been reluctant to hold the employer liable for the employees intentional rather than negligent wrongs[19]. However, these trends may be more nuanced today considering that provincial legislation may hold government entities liable for the torts committed by representatives and that recent case law has imposed vicarious liability on employers in general in the case of an employee's intentional wrongdoings including sexual assaults and theft[20]. For example, in *Evans v The Bank of Nova Scotia*21 the court held a bank may be liable for the unauthorized disclosure of customers' information by an employee. Also, in *Thiessen v. Clarica Life Insurance Co.*[22] the court of appeal confirmed the trial judge conclusion, holding the life insurance company liable and therefore bearing the risk of a defalcating life insurance representative who misappropriated clients' funds.

(b) 2nd condition: an employer-employee relationship. As stated, in both legal systems this condition denotes that there must be a close link between the person who commits the tort or fault and the person whom we seek to hold liable.

In both legal systems the presence of a salary is not determinative of the presence of this close link. A volunteer can hold the employer liable23. In civil law, a key criterion that has

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17 Baudouin, Deslauriers, Moore, *supra* note 5, 848.

18 See also *Guité c Québec, infra* note 71. De Stefano, *supra* note 7 p. 23, 24 for the *raison d'être* of this article.

19 For the vicarious liability of public authorities see Andrew Botterell, et al, *Fridman's The Law of Tort in Canada* 4th ed. (Carswell 2020) p. 318-319. *For the common law stance see Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 (S.C.C.), at para. 44. See also *Plains Engineering Ltd. v. Barnes Security Services Ltd.* 1987 CarswellAlta 270 para 9.

20 On the presence of legislation in common law provinces see Andrew Botterell, et al, *Fridman's The Law of Tort in Canada* 4th ed. (Carswell 2020) p. 319-320. On recent case law: *Infra* notes 21-22, 42 and accompanying text for cases on theft and sexual assault.

21 2014 ONSC 2135. According to the court, even if the employee did not serve the employer's aim of generating profits on good loans, the other factors of *Bazley* (*infra* note 42s and accompanying text) were present (para 22). It has also been noted that the employee who steals a fur in a shop that cleans and repairs furs may hold the employer liable. As mentioned by *Alberta U Drive Ltd. v. Jack Carter Ltd. et al.*, 1972 CanLII 1092, 120-121.

22 2002 BCCA 501 that followed *Bazley*, holding the employer liable even if its representative was an independent contractor. Also, in *The Queen v. Levy Brothers Co. Ltd. and The Western Assurance Co.*, [1961] SCR 189 the Crown was found liable for the diamonds' theft by its employees (customs officers) who had access to them. Compare these cases with equivalent civil law cases, *infra* notes 66, 67 and accompanying text where the employer was not found liable. On the contrary, in *Royal Bank of Canada v. Intercon Security Ltd.,* 2005 CanLII 40376 (ON SC) the theft of bank funds committed by an employee of the bank's security company was not found sufficiently related to his employment based on *Bazley*, partly because the security company did not authorize the employee to be on the bank's premises when he was not responding to an alarm or was off duty and it did not authorize him to be in possession of any key to the bank's premises or any radio equipment when he was off duty.

23 Common law: Lauren Chalaturnyk and Jenna Chamberlain, "*Can I Be Liable for the Actions of My Volunteer?: Vicarious liability and volunteers*" in Thomas Kannanayakal et al, LawNow Magazine, 2020 44-5, 2020 CanLIIDocs 2545, 19. Civil law: Baudouin, Deslauriers, Moore, *supra* note 5, 838-838.

been used to determine an employer-employee relationship is the level of control that the employer may have over the employee[24]. This is evaluated based on the whole context of the relationship with an emphasis put on: the control of the employer over the performance of the employee's work (performance of the employee's work), the ownership of the work tools, the risk of loss or chance of profit, the obligation of personal performance and the integration into the company[25].

Under common law, although the control test (essentially the right to give orders and instructions to the employee regarding the manner in which to carry out his work) was the test traditionally applied to determine an employer-employee relationship, today, other tests (for example, the organization test, the enterprise test) may also apply; as a result, there is no universal test applied in this area26. In the leading case *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*(*Sagaz*)[27] the court stated that a central question in this area is whether the person who has been engaged to perform the services is performing them as a person in business on his own account (as is the case of an independent contractor) or an employee. In making this determination, although the level of control the employer has over the worker's activities is a factor to consider, other factors include – although not limited to - whether the worker provides his or her own equipment; whether the worker hires his or her own helpers; the degree of financial risk taken by the worker; the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks[28].

These criteria are similar to the above-mentioned ones followed by civil law[29]. The similar criteria justify similar judicial conclusions. It has, therefore, been held in both legal traditions that a person who organizes and performs its work freely (for example, by determining specific tasks, working hours, hiring personnel) is not an employee but an independent contractor and cannot engage the liability of the employer[30]. On the contrary, an employer-employee relationship has been found to exist between a priest and a congregation or diocese employing the priest despite the less typical employee-employer relationship in this case[31].

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[24] Civil law: Baudouin, Deslauriers, Moore, *supra* note 5**.** 823.

[25] *Essor Assurances Placements-conseils inc. c Taillon*, citing other cases. *Gaulin c. Roy*, 2003 CarswellQue 2587 (CSQ) para 16s, Baudouin, Deslauriers, Moore, *supra* note 5, 830-831 for some of these criteria.

[26] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* 2001 SCC 59 paras 36-48. Andrew Botterell, et al, *Fridman's The Law of Tort in Canada* 4th ed. (Carswell 2020) 306-308.

[27] 2001 SCC 59 para 47 for what follows. This decision has been often cited by civil law courts in general and specifically on the criteria it related in this context (i.e. *Papaeconomou c. 177930 Canada inc.*, 2009 QCCQ 13039 para 50s).

[28] *Ibid* (Sagaz) para 47. See also *Fridman's The Law of Tort in Canada ibid* p. 308-309 detailing other factors that subsequent case law has taken into account such as who pays professional fees, liability insurance, continuing education, the method of remuneration (payment of a salary rather than a percentage of the billings), the presence of non-compete clauses.

[29] *Supra* note 25 and accompanying text.

[30] Common law: Sagaz *supra* note 26-27 para 49s. Civil law: Article 2099 Q.c.C. which provides: "The contractor or the provider of services is free to choose the means of performing the contract and, with respect to such performance, no relationship of subordination exists between the contractor or the provider of services and the client." See also *Lambert v. Blanchette*, 1925 CarswellQue 126 (Q.C.K.B.), *Quebec Asbestos Corporation v. Couture*, [1929] S.C.R. 166 (SCC); the latter has been cited in common law on other grounds.

[31] Common law: *Untel infra* note 54 (cited by common law and civil law case law and doctrine). Civil law: *Tremblay*, *infra* note 90.

Further, following both legal traditions two employers may both be held liable for their employee's negligence. In *Blackwater v Plint*[32], a common law case cited by Québec case law, both the Church and the Canadian Government have been held liable for the sexual assaults committed by an employee against aboriginal children at a residential school.

(c) 3rd condition: scope of employment: Both in common law and in civil law, the employee's wrongdoing must be committed in the scope of employment[33]. This third condition of the vicarious or employer's liability has been a focal point of debate in both legal traditions.

(c)(i): The scope of employment at common law

In the field of the employee's intentional wrongdoing and vicarious liability, the leading case is *Bazley v. Curry* (*Bazley*)[34]. In this case, a boy had been sexually abused by an employee of a non-profit organization that operated residential care facilities where children were treated for emotional disorders. The abuse took place in the organisation during the employee's work. The duties of the employee included attending to the intimate needs of the children.

In deciding this case, the supreme court of Canada did cite with approval the Salmond test according to which[35]: a master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorized by the master, or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. Following Canadian case law, negligent performance of authorized acts fits under the first head of the Salmond test36. Tests that formerly applied (whether the employee was acting for his own benefit or for the benefit of the employer or whether the employer forbade the employee from doing something) do not have today the weight or materiality they once did[37]. It has, therefore, been held that the damage caused by employees who burn garbage while cleaning and cause a fire out of control damaging the building of the plaintiff render the defendant employer liable for the employees' negligence[38]. Likewise, a railway company was found vicariously liable for the negligence of its employee who did not keep proper look out leading to two persons' serious injuries when the train collided with a car at a railway crossing[39]. The court found that the employee was in the course of his employment[40]. Finally, the employer of a waitress who accidentally caused scalding injuries to the head and left hand of the infant plaintiff when a pot of boiling water or tea fell from a table in the restaurant into the bassinette occupied by the infant plaintiff, then aged 17 days, was held liable[41]. The court held that the waitress was in the course of her employment for the corporate defendant.

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[32] *Blackwater Plint*, [2005] 2 R.C.S. 3 for what follows. Civil law: *Tremblay infra* note 90 citing this case on this point. Baudouin, Deslauriers Moore *supra* note 5 p. 839-840 for civil law.

[33] *Supra* note 10 and accompanying text.

[34] *Bazley v. Curry*, [1999] 2 SCR 534 cited by civil law and common law cases.

[35] R F V Heuston; R S Chambers; John W Salmond, Sir, *Salmond and Heuston on the Law of Torts* 18th Ed. (Sweet & Maxwell 1981) 437, 438 for what follows.

[36] *Sickel v. Gordy*, 2008 SKCA 100 para 28 citée en common law mais pas au Québec.

[37] G.H.L. Fridman *The Law of Torts in Canada* 2nd Ed. (Carswell, 2002) 293. It has also been noted that the course of employment cannot be limited to the time or place of the specified work which the person is employed to do. *Alberta U Drive Ltd. v. Jack Carter Ltd. et al.*, 1972 CanLII 1092, 121.

[38] *Edmonton (City) v. W. W. Sales Ltd.* [1942] SCR 467 citing the Salmond test. See also *Fenn v. City of Peterborough* (1979), 1979 CanLII 77 (ON CA), aff'd [1981] 2 S.C.R. 613.

[39] *Chand v. Martin* (2017), 2017 BCSC 660 (B.C. S.C.) citing the Salmond test; affirmed 2018 BCCA 41 (B.C. C.A.)

[40] *Ibid* para 79 mentioning the Salmond test and *Bazley* (*infra* note 42).

[41] *Aubertin v. Sandy's Pancake House Ltd.* (1980), 22 B.C.L.R. 315 (B.C. S.C.) for what follows.

However, in *Bazley* the focus was on the employee's intentional wrongdoing and not on his negligence. The court decided in this case that rather than obscuring the decision beneath semantic discussions on the "scope of employment" and the "mode of conduct", the fundamental question is whether the employee's wrongful act was sufficiently related to conduct authorized by the employer[42]. In other words, vicarious liability will be present where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom - incidental connections to the employment like time and place (without more), will not suffice[43]. According to the court, factors materially increasing the risk of harm include but are not limited to the following[44]:

(a) the opportunity that the enterprise afforded the employee to abuse his or her power;
(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee) [45];
(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise; [46]
(d) the extent of power conferred on the employee in relation to the victim;
(e) the vulnerability of potential victims to wrongful exercise of the employee's power.

Bazley's risk enhancing factors underlie precedent and policy considerations (deterrence, compensation, fairness), – two elements that should also be examined in establishing vicarious liability[47]. In effect, according to *Bazley,* a court should determine if there is precedent that unambiguously establishes whether the facts in the specific case give rise to vicarious liability. If no precedent exists, the court must then determine whether vicarious liability should be imposed in light of the broader policy rationales of this regime. The risk of wrongdoing that the employer creates or exacerbates underlie both policy considerations and precedent[48]. According to the court it is difficult to imagine a job with a greater risk for child sexual abuse[49]. Further, fairness and the need for deterrence in this critical area of human conduct suggest that as between the non-profit organization that created and managed the risk and the innocent victim, the non-profit organization should bear the loss. According to Bazley the policy considerations that justify imposition of vicarious liability for an employee's sexual misconduct are unlikely to be satisfied by incidental considerations of time and place[50]. For example, an incidental or random attack by an employee that merely happens to take place on the employer's premises during working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related to the business the

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42 *Bazley, supra* note 34 para 41. See also *B.(P.A.) v. Children's Foundation*, *supra* note 36 referring to the Salmond test. See also *Sickel Estate v. Gordy*, 2008 SKCA 100 para 28.

43 *Bazley*, *ibid* para 41.

44 *Bazley, ibid.*

45 The fact that the employee's wrongful conduct does not benefit the employer is not, any longer, dispositive of the issue *British Columbia Ferry Corp. v. Invicta Security Service Corp.*, 1998 CanLII 15029 (BCCA) para 48-49.

46 Following precedent, a bank employee stealing a client's money cannot be put in a situation of friction (unless one believes that any money-handling operation generates an inexorable temptation to steal) and cannot be said to further the bank's aims. Nevertheless, courts considering this type of case have increasingly held employers vicariously liable even when the employee's conduct is antithetical to the employer's business. *Bazley*, *ibid* para 20 reasoning on cases prior to *Bazley*.

47 *Bazley, ibid* para 37, 15.

48 *Bazley, ibid* para 37.

49 *Bazley, ibid* para 58 for what follows.

50 *Bazley, ibid* para 42 for what follows.

employer is conducting or what the employee was asked to do and vicarious liability in this case would not have a significant deterrent effect - short of closing the premises or discharging all employees, little can be done to avoid the random wrong.

Such an incident occurred in *Jacobi v. Griffiths*[51] which was decided in the same year as Bazley. In this case, a boys and girls club employee, Griffiths was employed to supervise volunteer staff and organize recreational activities and outings. Griffiths sexually abused the Jacobi brother and, in another incident, he did the same with the Jacobi sister after work hours at Griffiths' home following several lesser incidents, including one incident of sexual touching in the Club's van. Jacobi's sued the club on the basis of vicarious liability.

The SCC did not hold the club vicariously liable. According to the court the club's enterprise was to offer group recreational activities for children. The opportunity that the Club afforded Griffiths to abuse whatever power he may have had was slight. The sexual abuse only became possible when Griffiths managed to subvert the public nature of the activities. It is not enough to postulate a series of steps each of which might not have happened "but for" the previous steps". Citing *Bazley*, the court stated that mere opportunity to commit a tort did not suffice to impose no-fault liability[52]. Regarding Bazley's policy considerations of compensation and deterrence the court noted that in the presence of non-profit organizations such as the defendant, it was unlikely for them to be able to offset litigation losses. If held liable, such organizations would simply stop recreational activities that benefit children.

Likewise, in *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*[53] the plaintiff was sexually abused for many years as a child by a residential school's maintenance man. The residential school was run by the Order of the Oblates of Mary Immaculate that was not found vicariously liable by the court of appeal and the supreme court of Canada. Following *Bazley*, the supreme court held that the employee was assigned no supervisory duties or power over the students. Intimacy with students was prohibited. As a result, there was no 'sufficient connection' between his duties and his wrongful conduct to

[51] [1999] 2 SCR 570 for what follows. This case is cited by common law and Québec cases (such as *Axa*, *Borduas infra* notes 86, 92).

[52] *Jacobi,* para 45 citing other Supreme court cases. It has also been held that the taxi company which has a system to dispatch taxis (not owned by it) to clients is not vicariously liable to a victim of a sexual assault committed by a taxi driver. *Ivic v. Lakovic,* 2016 ONSC 5750 para 32-36 affirmed on appeal, leave for appeal refused (SCC). Likewise, in *E.D.G. v. Hammer*, [1998] B.C.J. No. 992 (QL) (S.C.), Vickers J. found there was no vicarious liability of a school board for the sexual assault committed by a janitor. Regarding policy considerations the court stated that if school boards are to become insurers for all of the actions of their employees, then that is a policy choice that must be made by Members of the Legislative Assembly. Also attempts to hold school boards vicarious liability for sexual abuse of students by teachers have not always worked. In *A.B. v. C.D.,* 2011 BCSC 775 the Commission was not held liable following *Bazley*'s risk enhancing factors: among them appears the modest opportunity offered by the school board for a teacher to engage in sexual intercourse with a student. Also, in *H. (S.G.) v. Gorsline* 2001 ABQB 163, 2001 CarswellAlta 277 the school board was not held vicariously liable for the sexual assault of the physical education teacher towards the student. However, a contrary conclusion was reached in *Langstaff v. Marson*, 2013 ONSC 1448: the school board was held vicariously liable for the sexual assault of a teacher towards a student because it allowed the presence of a mini-zoo in the teacher's classroom which allowed the teacher the opportunity to be alone with at least the plaintiff in the classroom during recess, after hours and on weekends -.

[53] 2005 SCC 60 a leading case in common law cited with approval by civil law cases including *Axa, infra* note 86.

impose vicarious liability. This case required, therefore, that the increased risk must derive from the specific task assigned by the employer[54].

(c)(ii): The scope of employment at civil law – comparative aspects.

At civil law, and contrary to the two previous conditions underlying the employer's liability and the similarities they present with their common law equivalents, the third condition of article 1463 CcQ (the employee's fault must be committed within the scope of employment) is based on criteria that are at times similar and at times different from common law. The following two considerations underline this condition of the employer's liability[55]: a) the employee must remain within the general framework of his/her duties and; (b) the fault must benefit, at least partially the employer.

a) the general framework of the employee's duties: if the employee does not perform well his/her duties (for example, a trucker drives intoxicate[56] or an educator makes discriminatory comments towards a student in the cafeteria[57]) the liability of the employer may be engaged. Even when an employee does not perform his/her duties well before or after hours (for example, if a police officer causes an accident while off duty but while performing police related activities[58]) or disobeys the employer's instructions (for example, the driver of an oil truck is intoxicated and causes an accident after a call for an emergency delivery)[59], the employer's liability may be engaged. In other words, disobeying orders or not performing well duties outside work hours are not determinative factors excluding the employer's liability. This approach resembles the one present at common law. As stated earlier, the place or time of the employee's wrongdoing, his-her disobedience of orders or the negligent performance of a task are not determinative factors excluding vicarious liability at common law[60].

However, the second consideration taken into account in civil law in order to establish that the fault was committed within the scope of the employment, the benefit test, is only in part similar in both legal cultures as we are going to see from the analysis that follows.

b) The benefit test: this test seeks to determine if the employee's wrongdoing (intentional or negligent) sought to benefit his/her employer at least in part. The question to ask in applying this test is if one of the primary objectives that the employee targeted by his/her fault was the satisfaction of a dominant interest or direct benefit to the employer[61]. After *Havre* that we are going to examine as follows, this question usually relies on the subjective motives of the wrongdoer rather than any objective risk factors linked to the employer's enterprise.[62]

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[54] Linden, Klar, Feldthusen, *supra* note 10 p. 565. On the contrary, in *John Doe v Bennett*, [2004] 1 SCR 436 (in French *Untel v Bennett* (2004) 1 RCS 436), Father Kevin Bennett, a Roman Catholic priest in the Diocese of St. George's, sexually assaulted boys in his parishes. Following *Bazley*, the SCC of Canada held the diocese liable due to the opportunity the work afforded to commit these acts. As we are going to see later, this case has been cited by common law and civil law cases.

[55] *Havre des Femmes inc. c. Dubé*, (1998) CanLII 13167 (QC CA).

[56] *Lambert v. Canadian Import Co.*,1961 CarswellQue 111 (CS).

[57] *Gallardo c. Bergeron*, 2012 QCCA 908.

[58] *Guité c Québec*, 2006 QCCA 354.

[59] *Lambert v Canadian Import Co.*,:1961 CarswellQue 111, *supra* note 56. See also Baudouin, Deslauriers, Moore, *supra* note 5 p. 852 s.

[60] *Supra* note 37, 43 and accompanying text.

[61] Baudouin, Deslauriers, Moore, *supra* note 5, 859.

[62] De Stefano *supra* note 7 p. 18.

The important case in this area is *Havre des Femmes c Dubé* (*Havre*)[63] which involved an employee's intentional wrongdoing. In this case, Denis, an employee at a shelter for vulnerable women, convinced Laurette, a patient of *Havre* suffering from alcoholism to come to her house and live with her. At the shelter Denis had a telephone conversation with the daughter of Laurette following which she started inquiring Laurette about the value of her house, car and financials. Denis learnt about an amount of money Laurette had received as a result of a divorce settlement. During the stay of Laurette at Denis house, she was served alcohol and was convinced to make her substantial transfers of money. When Laurette regained control of her acts and tried to be reimbursed her money, she sued Denis and Havre for the money she had lost. The Court found that in taking advantage of the victim at her home Denis was acting in her own interest and not in the interest or benefit of the employer. Denis also disobeyed the orders of Havre that did not allow employees to house patients. The court also noted that holding the employer liable for the employee's personality disorders[64] could transform institutions such as Havre to guarantors of their employees[65]. The employer was therefore, not held liable in this case based on the benefit test.

Following *Havre*, it has also been held that the employer is not liable for the employee who facilitated the entry of thieves into the employer's premises leading to vehicle theft[66]. According to the court, the employee was pursuing, by his acts, a personal benefit and not a benefit to the employer. In another case, UPS was also not held liable for a package that an employee stole on the basis that this act did not benefit the employer[67].

Havre has not been mentioned by common law cases. However, it has been argued that if *Bazley* was applied to *Havre*, the center would have been found liable for increasing the risk of harm, in part because 'but for' the employee's work at the center the employee would not have met the victim (opportunity afforded by the employer)[68]. We respectfully disagree with this opinion. Following *Bazley* and as previously mentioned "mere opportunity" to commit a tort, in the common "but-for" understanding of this phrase, does not suffice to establish vicarious liability following *Bazley*'s risk enhancing factors[69]. The employment must not only provide the locale or the bare opportunity for the employee to commit his or her wrong, it must materially enhance the risk, in the sense of significantly contributing to it, before it is fair to hold the employer vicariously liable[70]. In this regard, it is questionable if Havre had

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[63] (1998) CanLII 13167 (QC CA) not cited by common law cases. In *Curley v Latreille* (1919) 28 BR 388, to which the current state of the law in Québec can be traced back following *Havre*, the employee used the employer's vehicle without authorization and for his personal benefit and caused an accident. The court did not hold the employer liable: the act occurred outside the scope of employment.

[64] According to a judicial trend, a damage caused due to the personality traits of the employee (*vices de personnalité*) may engage the employer's liability. This judicial trend favors victims mostly in cases of sexual harassment, discrimination or racist comments. Karim, *supra* note 9, 1315, Baudouin, Deslauriers, Moore, *supra* note 5, 849.

[65] This statement shows that Québec courts do take into account policy considerations (this particular one favoring the employer) while commenting on legislative provisions.

[66] *Zurich Canada inc c Services Transport André Marcoux ltée*, 2016 QCCS 2566 paras 122-131. The case also distinguished *Axa*, *infra* note 86 and accompanying text because in this case there was a benefit to the employer. See also *Patenaude c Caisse Populaire Desjardins de Ville-Émard*, 2011 QCCS 6086 along the same lines.

[67] *Murphy v United Parcel Service China*, 2016 QCCQ 5550 para 64. See similar theft cases at common law that have held the employer liable, *supra* notes 21, 22 and accompanying text.

[68] Louise Langevin, *Acte criminel de l'employé et responsabilité objective de l'employeur : pour une redéfi- nition du critère de rattachement* (2013) 47 RJTUM 31, 61-62 < https://ssl.editionsthemis.com/uploaded/revue/article/10419_Langevin.pdf> 61s.

[69] *Supra* note 52 and accompanying text and Andrew Botterell, et al, *Fridman's The Law of Tort in Canada* 4th ed. (Carswell 2020) p. 344 citing relevant case law.

[70] *Bazley supra* note 42 para 40.

created a significant link between the employment and the fault in question. The organization employed Denis and her tasks included being in contact with vulnerable victims. However, when Denis committed the fraud, she was not performing her work duties. She was at her home and she committed the fraud for her personal benefit and against the employer's instruction not to house patients. Due to these facts, the significant link present between the wrongdoing and the employer's liability based on the risk enhancing factors is diluted and probably insufficient to hold the shelter liable following *Bazley*.

On the contrary, in the Québec case *Guité c Québec* (Procureur général)[71] where a police officer attacked and injured a person outside work hours but while performing police duties the court held the employer liable[72]. In reiterating that illegal acts can engage the employer's liability, the court found that the police officer was within the scope of his employment based on the benefit test. Along the same lines, in *Gauthier v Beaumont* (*Gauthier*)[73] the employer's liability was engaged in the case of police officers beating, torturing and threatening victims during the exercise of their duties (conducting an interrogation in the course of a criminal investigation). As the court stated: …

If, as the respondent municipality suggests, the employer's liability was only engaged where it is shown that a delict was committed by its employees in the public interest, in the fight against crime or for the protection of the municipality's citizens, but was not engaged where the alleged acts are excessive, para. 7 of art. 1054 C.C.L.[74]. would be totally meaningless. The employer would have no incentive to exercise control over the conduct of its police officer employees.

The situation is more nuanced in common law. As previously noted[75], public authorities are not vicariously liable under common law for torts committed by employees exercising independent discretion or independent authority conferred by statutory law or common law. Further, common law courts have traditionally been reluctant to hold the employer liable for the employees intentional rather than negligent wrongs. Recently however, statutory enactments and case law have allowed actions against employers in some of these cases. This renders the traditional common law stance less rigid and seems to reduce the distance present between civil law and common law in this area.

The benefit test under Québec civil law has also been applied to cases involving employee's negligence. For example, a company's executive who, in trying to boost the company's sales, takes a client golfing and injures him during the return trip may engage the employer's liability: the accident is deemed to take place within a context favoring the employer's business[76]. Likewise, an employee of an automobile sales company who could use a vehicle for work purposes but also for personal use and by doing so causes an accident may engage the employer's liability[77]. The benefit to the employer in using this vehicle is obvious. Overall,

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71 2006 QCCA 354. This case has not been cited at common law.

72 *Ibid.*

73 [1998] 2 SCR 3. See also paragraph 93 for the excerpt that follows This case is cited with approval by common law cases on other grounds and was distinguished by *Blackwater Plint* (*supra* note 32 and accompanying text). Courts in Québec have also held that a doorman who proceeds to unjustifiable acts of violence against clients may hold the employer liable. *Ménard c. Disco-spec Dagobert inc.*, 2009 QCCS 185, *Chantal c. 9022-1672 Québec inc.* 2009 QCCA 70.

74 This article is the equivalent of Q.c.C. art. 1463 under the CcLC.

75 *Supra* notes 19-20 and accompanying text for what follows in this paragraph.

76 *Clement* vs *Edgington,* (1953) CS 325.

77 *Garage Touchette v Casavant* 1944 BR 117 Baudouin, Deslaurier, Moore, *supra* note 5 p. 862. For common law and the employee's negligence see *supra* note 36-41 and accompanying text.

the benefit test applies in Québec to the employee's wrongs (intentional or negligent) in order to hold the employer liable. This will occur if the employee's wrongs are not for the exclusive or clearly principal benefit of the employee[78].

III. SCOPE OF EMPLOYMENT: THE SHIFT OF RECENT CIVIL LAW CASES TOWARDS *BAZLEY* (COMMON LAW): A CRITICAL ANALYSIS.

It has been argued that the benefit test in Québec creates a significant blind spot since in cases of an employee's self-serving theft or sexual assault it is hard to argue even in part an employer's benefit[79]. In effect, civil law cases have suggested that following the benefit test, the facts in *Bazley* would not have led to the employer's liability[80]. The reason for this is that the shelter employee's acts were performed purely for a personal benefit as it was argued in *Havre*[81] and as the court concluded in this case excluding the employer's liability[82]. For similar reasons, employee theft cases committed for purely personal benefit may not hold the employer liable in Québec but may do so in common law following *Bazley*[83].

It has, therefore, been proposed that the narrow benefit test could be replaced by the *Bazley* risk-based approach regarding an employee's intentional or criminal wrongdoing[84]. This approach shows how the employer benefitted from a situation which allowed for the wrongdoing to occur[85]. Such a position is based on a more nuanced criterion regarding the risk created by the employer compared to the civil law benefit test.

It is probably following this reasoning that recently, Québec cases in the field of the employer's liability regarding an employee's intentional wrongdoing have followed common law principles. For example, in *Axa Assurances inc. c. Groupe de sécurité Garda inc.*[86] the court followed the *Bazley* risk enhancing factors in a case of an employee of a security company (Garda) who intentionally set fire to the building he was supposed to watch in order to impress his employer about his team's capabilities in dealing with the fire which finally caused damages. The insurer succeeded in holding Garda liable for the employee's intentional fault. In citing the common law cases *Bazley* and *Untel* the court opined that the guard had full access to the building and could ensure that no one, even other guards, would interrupt him because of the nature of his duties since he was supervising the other security guards on the evening of the fire. The buildings he was guarding were, therefore, in a vulnerable position[87]. Even if the guard's wrongful act did not contribute to the achievement of Garda's objectives, the fact that the guard set fire in order to shine and impress in the performance of his duties was work related. The court did not follow *Havre* and stated that Q.c.C. article 1463 scope of employment may be subject to different interpretations[88]. It also added that *Bazley*'s risk

78 Beaudouin, Deslauriers, Moore, *supra* note 5, 862-863.
79 De Stefano, *supra* note 7, 20, 19. Louise Langevin, *supra* note 68, 61.
80 *Axa*, *infra* note 86 para 92.
81 *Supra* notes 63s and accompanying text, *Axa, ibid.*
82 *Havre, ibid.*
83 Civil law: *Zurich* and *Murphy, supra* note 66, 67 and accompanying text. Common law: *Supra* note 21, 22 and accompanying test for cases where the employer was held liable despite the employee's personal benefit in the theft.
84 De Stefano, *supra* note 7, 30. Louise Langevin, *supra* note 68.
85 De Stefano, *supra* note 7, 30.
86 2008 QCCS 6087.
87 *Ibid* para 104-112 for what follows.
88 *Ibid* para 103.

enhancing factors as well as the policies of fair compensation and deterrence are the applicable law underlying the employer's liability in civil law and in common law[89].

Likewise, in *Tremblay c. Lavoie*[90] a priest sexually abused students in a school setting. In holding the congregation liable, the court followed the list of *Bazley* risk enhancing factors. It specifically mentioned that the Redemptorist Fathers assigned to the College had great power over their students in a religious context where the father already enjoys a status representing moral authority in the face of students who come from religious backgrounds and who aspire to religious vocations[91]. Also, the students were young and were living at the school at night and often on weekends, a factor that increased their vulnerability. Finally, the constant presence of the priests with the students (in sports, dormitory, education or in hard times when the students would confide to the priest) increased the risk of reprehensible behavior[92].

In the 2021 *Lachance c. Institut Séculier Pie X*[93] case, the plaintiff was sexually abused for many years as a child by his uncle at his uncle's residence during visits that the family made. The uncle's house was located on the defendant's premises, a religious institution for which the uncle was working – doing landscaping, maintenance, snow removal, housework, shopping, working in the printing service. The question in this case was whether the defendant institution was liable for the uncle's sexual abuse. In excluding the employer's liability, the court reasoned on both *Havre* (civil law) and *Bazley* (common law)[94]. Based on the Québec's benefit test the court held that the family's visits to the plaintiff's uncle and the sexual abuse that followed were based on the family link present between the plaintiff and his uncle rather than the defendant's work activities[95]. As a result, these acts did not benefit the employer. Further, following *Bazley*'s risk enhancing factors the defendant institute did not give the plaintiff the opportunity to abuse his power by letting him and his family live in the defendant's rooms located close to one another. The sexual abuse arose because of the family link between the employee and the victim[96]. For the rest, in committing the sexual abuse the employee did not serve the employer's benefit and the employer had not created any relation of conflict or intimacy or power between the employee and the victim. Although the victim was a vulnerable person this factor alone could not engage the employer's liability[97]. The court also distinguished this case from the above-mentioned *Tremblay* holding where the priests had tasks allowing them to get really close to children during the exercise of their duties[98]. This was not so in the case at bar.

These trial court cases demonstrate that in the presence of an employee's intentional wrongdoing there is a judicial trend in Québec that follows *Bazley*'s risk enhancing factors at

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[89] *Ibid* paras 100 - 102.

[90] 2014 QCCS 3185 cited in general by one common law case. This case did not mention *Havre* but noted its similarity to the common law *Untel* case *supra* note 54 which followed *Bazley*.

[91] *Ibid* (Tremblay) paras 159s for what follows.

[92] Similar cases that cite with approval *Bazley* and/or *Untel*: *J.J. c. Oratoire Saint-Joseph du Mont-Royal*, 2017 QCCA 1460; *A c. Frères du Sacré-Coeur*, 2017 QCCS 5394. *A.B. c. Religieux de St-Vincent-de-Paul Canada*, 2021 QCCS 2045. *Borduas c Catudal*, 2004 CanLII 18292 (QC CS).

[93] 2021 QCCS 1064.

[94] *Ibid* at para 200-204. The court cites the judge Alicia Soldevila, *supra* note 9. In her commentary, the judge talks about a dynamic interpretation of the Q.c.C. article 1463 following *Bazley*.

[95] *Ibid* (*Lachance*) at para 300, 301.

[96] *Ibid* para 309.

[97] *Ibid* paras 301-316.

[98] *Ibid* at para 325.

common law. It is not, however, the dominant judicial trend[99]. One needs to wait and see whether the Québec higher courts sanction or not this case law trend.

It is true that following the recent Québec case law trend the common law risk-enhancing factors propose a well-rounded and more nuanced approach to the employer's liability than the civil law benefit test. They evaluate the risk created by the employer regarding the employee's wrongdoing rather than simply insist on whether the primary objective that the employee targeted by his/her fault was the satisfaction of a dominant interest or direct benefit to the employer. As stated, case law has noted that the facts of *Bazley* would probably not justify holding the employer liable under the benefit test because of the employee's personal benefit in engaging in wrongful acts[100] whereas *Bazley*'s risk enhancing factors have retained vicarious liability in this case. Likewise, in employee's theft cases where theft is committed for a personal benefit, Québec case law is reluctant to retain the employer's liability compared to corresponding common law cases[101]. As a result, following *Bazley,* vicarious liability may be engaged in cases where the personal benefit test would exclude its application in Québec.

As appealing as adopting *Bazley* and *Bazley*'s risk enhancing factors appear in Québec following case law and doctrine (De Stefano, Langevin as noted) its consequences need to be reflected further. Adopting *Bazley's* risk enhancing factors in Québec to establish the employer's liability in the case of an employee's intentional wrongdoing would mean that the benefit test would still apply in Québec in cases involving an employee's negligent acts. The application of different tests to establish the employer's liability under Q.c.C. article 1463 for an employee's intentional and non-intentional faults would not necessarily conform with this article that does not distinguish between the nature of the employee's faults to retain the employer's liability. Nor would it conform with case law implementing this article that has applied the benefit test to both employee's intentional and negligent acts[102]. Further, applying different tests to the employee's intentional and negligent wrongs in Québec does not conform with the general approach of the Québec civil code. In effect, the code applies, in principle, a single liability regime to both negligent and intentional wrongdoing[103]. On the contrary, common law adopts different rules depending on the nature of the tort (for example intentional torts or the tort of negligence)[104].

To avoid the fragmentation of applicable tests under Q.c.C. article 1463 CcQ we could apply *Bazley*'s risk enhancing factors to both the employee's negligent and intentional wrongdoing. This would result in avoiding the application of different tests under this article depending on whether the wrongdoing of the employee is intentional or negligent. Following this reasoning, in the case of an employee's negligence and following *Bazley*'s risk enhancing factors, the risk that the employer's activities would promote the employee's wrongdoing would be easier to establish since the employee is generally performing – albeit negligently - the employer's duties. More specifically, the opportunity afforded to the employee to proceed to the wrongdoing and the furtherance of the employer's objectives (*Bazley's* risk enhancing factors) would be more easily established based on the employee's negligent acts. The power

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99 De Stefano, *supra* note 7 p.20.

100 Axa,*supra* note 86 (para 92) and accompanying text.

101 *Supra* note 83 and accompanying text.

102 *Supra* notes 63-78 and accompanying text regarding the benefit test.

103 Baudouin, Deslauriers, Moore, *supra* note 5, 175s, 180. Marel Katsivela, *Responsabilité délictuelle et responsabilité extracontractuelle au Canada* (Éditions Thémis, 2021) Chapitre VI (civil law and comparative study sections).

104 Katsivela *ibid.*

conferred on the employee by the employer, the vulnerability of the victim and whether the employee's wrongdoing related to a relationship of conflict, friction or intimacy created by the employer's enterprise could also be relevant factors that may be considered in the case of an employee's negligence based on the facts of each case. Whatever the solution adopted by civil law courts, it is important to reflect on the effect the adoption of *Bazley* will have on the application of Q.c.C. article 1463 with respect to the nature of the employee's wrongdoing. It is equally important to clarify and justify the position the courts will adopt in this area paving the way forward.

Another question raised by the adoption of *Bazley* is whether Québec courts should also adopt *Bazley*'s reference to precedent and policy considerations in establishing the employer's liability.

It is often said that the Québec civil law rejects the doctrine of precedent[105]. Civil law considers that written laws (in our case Q.c.C. article 1463) are the primary source of law that judges merely apply[106]. On the contrary, common law judges not only apply laws but also create the rule of law. These considerations do not favor the application of *Bazley* in Québec due to the different perception of the value of precedent in both legal cultures. The question arises: in adopting *Bazley*, should civil law courts adopt its reference to precedent as it is understood by common law courts?

The answer to this question is that civil law courts should not necessarily adopt *Bazley's* reference to precedent as it is understood by common law courts. Even though civil law rejects the doctrine of precedent, in practice, precedent (for example *Havre* regarding the employer's liability) is often cited by courts. Authors have talked about 'une autorité de fait incontestable' regarding the value of precedent in Québec civil law[107]. This appears to diminish in practice the distance between the common law adherence to precedent and the civil law formal rejection of it. One could, therefore, suggest that *Bazley*'s reference to precedent could be followed by Québec courts based on the way precedent is currently treated in practice in this province. This would clarify how *Bazley*'s reference to precedent would apply in Québec and would explain the difference in perception of the doctrine of precedent in the two legal traditions. If this is the case, in adopting *Bazley,* it would be preferable for courts to clarify this point.

Regarding the express reference of *Bazley* to policy as a condition of application of the vicarious liability regime and its adoption in Québec, one should first note that, in common law, it is not uncommon to use policy considerations as an explicit condition underlying liability[108]. In civil law, however, policy is taken into account by legislators in establishing legal rules. Consequently, in applying the law, civil law judges do not need to reference policy. As judge Baudouin has stated, civil law courts do not need to have recourse to policy considerations to restrict or establish liability since these are implicitly present in the legal

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[105] Silvio Normand, "An Introduction to Québec Civil Law" in Aline Grenon, Louise Bélamger-Hardy, *Elements of Québec Civil Law: A Comparison with the Common Law of Canada,* Toronto, Thompson Carswell, 2008 p. 78.

[106] Like Montesquieu noted: "…les juges de la nation ne sont […] que la bouche qui prononce les paroles de la loi ». Charles de Secondat Montesquieu, *L'Esprit des Lois*, vol. 1 livre XI, c. VI, 1768, p. 327.

[107] Jean Louis Baudouin, « L'interprétation du Code Civil Québécois par la Cour Suprême du Canada » (1975) LIII Can. Bar Rev. 716 p.724.

[108] This is the case of the vicarious liability regime as previously mentioned (*supra* note 47s and accompanying text) but also of the duty of care element of the tort of negligence. *Cooper v Hobart,* 2001 SCC 79.

analysis judges make of the elements of liability[109]. It is probably for this reason that even in the area of vicarious or employer's liability where, as mentioned, the same policies of compensation, deterrence and fairness underlie both legal cultures, the explicit and analytical reference to policy considerations are more apparent in common law than in civil law[110].

In adopting *Bazley*, civil law courts need to reflect on whether policy considerations underlying the employer's liability should become an explicit element conditioning its engagement as is the case in common law. It could be that in adopting *Bazley* civil law judges will also adopt its explicit reference to policy as a condition of application of the employer's liability regime since these policies are also present in civil law and, as stated by civil law courts, Q.c.C. article 1463 'scope of employment' may be subject to many interpretations[111]. Or, it could be that the difference in approach in the two legal cultures regarding policy considerations would continue to exist even after the adoption of *Bazley* in Québec if, for example, civil law courts merely adopt *Bazley's* risk enhancing factors and not its reference to precedent and/or policy. In citing *Bazley* civil law courts need to clarify the extent to which policy considerations will be taken into account in order to establish the employer's liability and in order to avoid confusion as to the applicable law in this area.

One last but not least consideration in determining the extent to which Québec should adopt *Bazley* in order to engage the employer's liability, is determining how other jurisdictions have treated *Bazley*. In the United Kingdom, three years after *Bazley* was decided in Canada, the House of Lords reasoned on a similar case, *Lister v Hesley Hall*[112], where the warden of a children's home committed a number of sexual assaults on children who were in his care without the employer knowing about them. In holding the employer vicariously liable, the House of Lords opted for a test of 'sufficient connection' concentrating on the relative closeness of the connection between the nature of the employment and the particular tort. The test adopted the essence of the Canadian *Bazley* approach but phrased the governing rules in more general terms[113]. Lord Hobhouse, however, rejected *Bazley* averring that '[l]egal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it'[114].

In this regard, in Australia, another country governed by common law principles, the High Court of Australia *New South Wales v. Lepore*[115] case is instrumental. The case focused on the vicarious liability of a school authority due to a teacher's sexual assault towards a student in a school setting. In refusing to hold the school authority vicariously liable, the court majority

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[109] Jean Louis Baudouin, "La responsabilité civil comparée : droit civil et common law » (2014) 48-2 R.J.T. 683, 692.

[110] Compare the short reference to policy in *The Havre* (if liability is imposed, the employer would the guarantor of the employee's wrongs, *supra* note 65 and accompanying test) to *Bazley*'s detailed reference to policy considerations (*supra* notes 47-49 and accompanying text).

[111] *Supra* note 88 and accompanying text.

[112] [2001] 2 AC 215.

[113] Robert M. Salomon et al. *Cases and Materials on the Law of Torts* 8th ed. (Carswell, Canada, 2011) 938. Some authors find some differences in the approaches adopted in Canada and the United Kingdom stating that the tests conditioning vicarious liability in *Lister* and *Bazley* are not the same. According to one author, the Canadian Supreme Court talked about the role of policy in vicarious liability and adopted an approach that spoke in terms of the enhancement of risk while the English approach is more closely aligned with the Salmond test, focusing on the close connection between the wrong and the employee's scope of employment. Jane Wangmann, "Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?" (2004) 28 MELULR 169, 186-187.

[114] *Supra* note 112 para 60.

[115] [2003] HCA 4 (2003)

rejected the Canadian *Bazley* risk approach on the basis that it does not provide certainty in allocating liability and that such can extent too widely with respect to risks not in furtherance of the employer's venture but directly antithetical to those aims[116]. In a later Australian case, *Prince Alfred College Inc v ADC*[117] the High Court of Australia also stated with respect to *Bazley* that policy considerations based on risk allocation "have found no real support in Australia…".

Considering the different approaches regarding *Bazley* at the international level as well as other considerations herein examined, in importing *Bazley* in Québec civil law courts need to examine this case as a whole. The different elements of this case, such as its reference to policy, precedent and the possible application of *Bazley* to the employee's intentional and non-intentional wrongs need to be reflected upon by civil law courts. The international standing of *Bazley,* including its criticism in some common law jurisdictions, should also be examined in considering adopting this case in Québec. Avoiding examination of these elements risks to create further confusion regarding the governing principles of the employer's liability in this province.

IV. Conclusion

Based on the foregoing, it is evident that the conditions that underlie the vicarious and employer's liability in common law and in civil law in Canada present great similarities but also differences. Although the general conditions that underlie both doctrines are phrased similarly, the specific elements of the employee's scope of employment are not viewed in the same way in both legal cultures. Recently, some Québec cases have adopted *Bazley* in the area of the employee's intentional wrongs. This shift may be justified from the point of view that *Bazley*'s risk enhancing factors provide a well-rounded approach in establishing the employer's liability. However, this move is not without consequences in civil law. *Bazley*'s various elements, its international standing and the civil law approach are all factors that need to be considered when importing *Bazley* in Québec. Avoiding this discussion would leave doubt as to the extent of the application of *Bazley* in civil law. This will lead, in turn, to further confusion as to the applicable law in this area

[116] *Ibid* paras 217, 222.
[117] (2016) 258 CLR 134, para 59. See also Pauline Bomball, « Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law » (2021) 43 SYDLR 83, 98.

SMART CONTRACTS: ELEMENTS, PATHOLOGIES AND REMEDIES

*Andrea Stazi**

TABLE OF CONTENTS:

In reviewing the characteristics of "smart contracts", above all their peculiarities of automatic execution and resistance to tampering, the paper aims to define the characteristics and peculiarities of their binding force, legal effectiveness and regulation.
Thus, the paper examines the elements, pathologies and contractual remedies for smart contracts, and the related main issues that emerge in comparative contract law.

I. "SMART CONTRACTS": CHARACTERISTICS, PECULIARITIES AND CHALLENGES

"Smart contracts"[1], built on distributed ledger technologies, first of all the Blockchain,[2] are characterised by the self-execution of the contractual clauses without the need for human intervention.
They generally exclude the possibility of interrupting such execution or modifying the content, although with some exceptions such as the options of multi-signature or self-destruct[3].

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1 Regarding the definition of smart contracts, see e.g.: A. Stazi *Smart Contracts and Comparative Law - A Western Perspective*, Berlin: Springer, 2021, p. 71 ff.; R. De Caria, *The Legal Meaning of Smart Contracts*, in *European Review of Private Law*, 2019, vol. 26, p. 731 ff.; R. Herian, *Legal Recognition of Blockchain Registries and Smart Contracts*, EU Blockchain Observatory and Forum, 2018, https://www.eublockchainforum.eu/knowledge, p. 16 f.; L.W. Cong, Z. He, *Blockchain Disruption and Smart Contracts*, NBER Working Papers 24399, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985764, p. 11.

2 Which provides the ecosystem within which the idea of smart contracts proposed by Nick Szabo in the nineties of the last century can be realised, which at the time still seemed substantially utopian; see: N. Szabo, *Formalizing and Securing Relationships on Public Networks*, in *First Monday*, 1997, http://firstmonday.org/ojs/index.php/fm/article/view/548/469; N. Szabo, *Smart Contracts: Building Blocks for Digital Markets*, 1996, www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html; N. Szabo, *Smart Contracts*, 1994, http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html, who argued that the objectives of such contracts would be to fulfil contractual obligations such as payment terms, privileges, confidentiality and even enforcement, and to minimise both harmful and accidental exceptions and the need for trusted intermediaries.

3 Multi-signature, or "multisig", verification technology allows you to stop running a smart contract until several parties have signed the transaction with their private keys. These can include not only the parts of the smart contract, but also an external third party, a so-called referee. See: K.D. Werbach, N. Cornell, *Contracts Ex Machina*, in *Duke Law Journal*, 2017, vol. 67, p. 313 ff. (345). Furthermore, the code of most smart contracts contains a so-called kill switch. Solidity, the language used to write smart contracts on the Ethereum Blockchain, allows an operation called self-destruction, which removes the smart contract code from the Blockchain; see: H. Eenmaa-Dimitrieva, M.J. Schmidt-Kessen, *Creating markets in no-trust environments: The law and economics of smart contracts*, in *Computer Law & Security Review*, 2019, vol. 35, p. 69 ff. (84-5).

In a technical sense, smart contracts are computer protocols that execute themselves by applying the lines of the computer source code[4] for which they were programmed, stored on a distributed ledger[5].

A smart contract program is executed by a network of so-called miners, who, once consensus has been reached on the outcome of the execution, update the status of the contract on the Blockchain accordingly. In this way, users can send or receive money, data, *etc.*[6].

The fields of application of smart contracts, in fact, are numerous. They can be used, at least in theory, in all cases in which economic activities are correlated to the Internet and some events can be digitally verified[7].

In addition to the financial and insurance sectors where digital bargaining already plays a central role, the use of smart contracts is developing in sectors such as art and entertainment, agri-food, energy, *etc.*[8].

Devices and other material properties can be registered on a Blockchain and, using smart contracts, transformed into "smart properties", thus allowing the control of material properties on the network[9].

Although most of the data comes from the Blockchain or other databases connected to it, some smart contracts, for their execution, may have to acquire data from outside the Blockchain. This creates the need to make use of reliable external sources, so-called "oracles", which represent interfaces between contracts and the outside world[10].

If through smart contracts an economic function recognized by the legal system in which they are intended to carry out their effects is pursued, they allow the drafting and possible automation of the agreement between the parties - as a real contract in the legal sense - according to an "if / then" logic[11].

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[4] The source code, in computer science, is the text of an algorithm of a program written in a programming language by a programmer during programming. It therefore defines the flow of execution of the program itself. See: Wikipedia, "*Source code*". https://it.wikipedia.org/wiki/Codice_sorgente.

[5] P. De Filippi, A. Wright, *Blockchain and the Law: The Rule of Code*, Cambridge (Mass.): Harvard University Press, 2018, p. 33 ff.; V. Buterin, *Ethereum White Paper: A Next-Generation Smart Contract and Decentralized Application Platform*, 2013, https://github.com/ethereum/wiki/wiki/White-Paper, p. 1 ff.

[6] See: G.O.B. Jaccard, *Smart Contracts and the Role of Law*, in *Jusletter IT*, November 2017, available on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3099885, p. 5 ff.; A. Juels, A. Kosba, E. Shi, *The Ring of Gyges: Investigating the Future of Criminal Smart Contract*, in E. Weippl (eds), *Proceedings of the 2016 ACM SIGSAC Conference on Computer and Communications Security*, New York: ACM, 2016, p. 283 ff.

[7] In this regard, see: D. Linardatos, *Smart Contracts – einige klarstellende Bemerkungen*, in *Kommunikation & Recht*, 2018, p. 9 ff.; G. Governatori et al., *On legal contracts, imperative and declarative smart contracts, and blockchain systems*, in *Artificial Intelligence and Law*, 2018, vol. 26, p. 377 ff.

[8] In this regard, see e.g.: A. Stazi, R. Jovine, *Food Traceability in Europe, the US and China: Comparative Law and Technological Regulation*, forthcoming in *BioLaw Journal*, 2022; A. Stazi, *Genetically modified organisms and sustainable development*, in *BioLaw Journal*, 2020, p. 127 ff. (149); Chamber of Digital Commerce – Smart Contracts Alliance, 2016, available on: http://digitalchamber.org/assets/smart-contracts-alliance-press-release-7_27_2016-final.pdf; R. Unsworth, *Smart Contract This! An Assessment of the Contractual Landscape and the Herculean Challenges it Currently Presents for "Self-executing" Contracts*, in M. Corrales, M. Fenwick, H. Haapio, 2019, p. 17 ff.

[9] Relationships and credentials can also be encoded in the Blockchain regarding certain cryptographically activated resources, such as key blocks or smartphones, to ensure that only certain subjects or nodes have access to the functionality of the property. In this regard, see again: De Filippi, Wright, 2015, cit., p. 14 ff.

[10] A case of smart contracts activated by external inputs is, for example, that of the insurance policies proposed by AXA and Etherisc, insurance companies that offer policies that compensate travellers who experience flight delays or cancellations. Flight information is acquired automatically and in real time by an oracle company indicated in the contract and the compensation is paid automatically.

[11] See eg: A.M. Gambino, A. Stazi, *Contract Automation from Telematic Agreements to Smart Contracts*, in *Italian Law Journal*, 2021, vol. 7, p. 97 ff.; F. Idelberger et al., *Evaluation of Logic-Based Smart Contracts for Blockchain Systems*, in JJ. Alferes et al (eds) *Rule Technologies. Research, Tools, and Applications*, 10th International Symposium RuleML, Stony Brook, NY, USA, July 2016, Cham: Springer, p. 167 ff.

Smart contracts can implement a previous contractual agreement in the legal sense, the clauses of which are formalised in the source code[12].
Otherwise smart contracts can establish new coded relationships that are both defined and automatically applied by the computer code, but are not linked to any underlying contractual right or obligation[13].
From the legal point of view, regardless of the technical necessity, there may be a need to draw up a smart contract in writing in order to make its clauses legally binding and applicable at the judicial level, that is to give rise to a so-called smart legal contract[14].
Smart contracts operate autonomously, in a transparent, anti-tampering and tendentially immutable way[15]. Actually, as mentioned, a smart contract is not always immutable. The Blockchain could be "forked" by the majority of users. Moreover, the computer code of smart contracts can contain several functions that allow for a certain range of flexibility[16].
These characteristics grant the contracting parties several significant advantages over traditional contracts. The parties can rely on contractual promises that are stored in the smart contract, that is the transaction protocol automatically executed without recourse to judicial intervention, and do not have to trust the counterparty.
This allows them to take calculated risks, even in areas where the parties are not directly opposed to each other, but which are often characterised by anonymity and application risks, as is usually the case in electronic commerce and international contracts.[17].
Consumers/users, in particular, could benefit from these advantages in a relevant way, since they usually face difficulties and costs for which they neglect to assert their rights in court[18].
Furthermore, smart contracts involve the possibility of reducing transaction costs, performing some functions currently performed by intermediaries such as Amazon, eBay, PayPal, *etc.*[19]. Smart contracts, in fact, allow the parties to incorporate the commercial practice in their agreement, bypassing the need for explicit but redundant negotiation[20].

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12 The creation of smart contract models, in practice, could lead to a reduction in the role of lawyers in the moment of contract formation, especially with respect to those that can be easily modelled; on this point; see: M. Corrales, M. Fenwick, H. Haapio (eds), *Legal Tech, Smart Contracts and Blockchain. Perspectives in Law, Business and Innovation*, Berlin: Springer, 2019.

13 In this regard, see among others: Chamber of Digital Commerce - Smart Contracts Alliance, *Smart Contracts: Is the Law Ready?*, September 2018, available on: https://digitalchamber.org/smart-contracts-whitepaper, p. 10 ff.

14 See: P. De Filippi, A. Wright, *Decentralized Blockchain Technology and the Rise of Lex Cryptographia*, 2015, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2580664, p. 11, who found that, while at the beginning smart contracts were mainly developed to automatically execute derivatives, options, futures and swaps, later they began to be used to enable the sale of goods on the network between unrelated persons without the need for a centralised organisation. The authors cite in this sense the example of OpenBazaar, an open source service aimed at creating a decentralised global market in which people can buy and sell products directly, without intermediation costs or centralised control (see: https://openbazaar.org).

15 In this regard, see: De Filippi, Wright, 2018, cit., p. 72; Linardatos, 2018, cit., p. 2.

16 Like the multi-signature or self-destruct assumptions mentioned above, but also functions like "call" (which accepts an arbitrary number of arguments of any type), "enums" (a way to create a user-defined type), "self-destruct", and also variable functions that allow the smart contract to process inputs external; in this regard, see: Juels, Marino, 2016, cit., p. 151 ff.

17 See: P. Ryan, *Smart Contract Relations in e-Commerce: Legal Implications of Exchanges Conducted on the Blockchain*, in *Technology Innovation Management Review*, 2017, vol. 7, p. 14 ff..

18 In this regard, see: O. Borgogno, *Usefulness and Dangers of Smart Contracts in Consumer and Commercial Transactions*, in L.A. DiMatteo, M. Cannarsa, C. Poncibò, *The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms*, Cambridge: Cambridge University Press, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350128, p. 8 ff.

19 Borgogno, 2019, cit, p. 13 ff.; M. Sokolov, *Smart Legal Contract as a Future of Contracts Enforcement*, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3208292, p. 11; E. Mik, *Smart contracts: terminology, technical limitations and real world complexity*, in *Law, Innovation and Technology*, 2017, vol. 9, p. 272 ff. (277).

20 On this point, see: J.M. Sklaroff, *Smart Contracts and the Cost of Inflexibility*, in *University of Pennsylvania Law Review*, 2017, vol. 166, p. 263 ff. (282 ff.).

Automatic application or compensation has the potential to reduce the amount of disputes, increasing certainty and reducing performance monitoring costs[21]. In general, therefore, smart contracts give rise to a further reduction of human intervention in the negotiation and formalisation of the contract[22].
Compared to traditional contracts, again, smart contracts increase the speed with which it is possible to execute contractual relationships. Given that they are not dependent on paper and related procedural steps and can be performed in real time, they simultaneously enable cost savings and faster execution than paper contracts[23].
Finally, smart contracts offer an alternative to a key aspect of contractual drafting: the intrinsic ambiguity of natural language[24], with the relative flexibility in terms of contractual performance[25].
The ambiguity and editorial shortcomings can also be used by the parties who intend to free themselves from contractual conditions that they no longer want to honour[26]. Compared to this phenomenon, smart contracts provide a different binding option by incorporating legal provisions into the computer code[27].
On the other hand, smart contracts also present a number of new issues and challenges for trade law and practice.
A first question that can arise is that of the identification of the other contracting party, when the Blockchain allows anonymous, or rather pseudonymous transactions[28], such as when transactions are registered by referring to an IP address or a cryptocurrency wallet[29].
The codification of the clauses in computer language may give rise to a limitation of the possible contents of the smart contracts, linked to the possibilities of automation of the contractual prose according to the if/then logic[30].
Connected to this is the risk that the parties or the legal operators misunderstand the code, drawn up by IT technicians[31], or the code incorrectly reports the provisions of the contractual agreement between the parties, or again it operates differently from what was planned, with the related issue of attributing liability.
In practice, the connection between the text in computer code and a contractual text drawn up in natural language is increasingly common. The texts may have the same content, so-

[21] See: Werbach, Cornell, 2017, cit., p. 318 and 352 ff.
[22] A. Savelyev, *Contract law 2.0: 'Smart' contracts as the beginning of the end of classic contract law*, in *Information & Communications Technology Law*, 2017, vol. 26, p. 116 ff. (120 ff.).
[23] In this regard, see: De Filippi, Wright, 2015, cit., p. 25.
[24] See, among others: M. Raskin, *The Law and Legality of Smart Contracts*, in *Georgetown Law Technology Review*, 2017, vol. 1, p. 305 ff. (324); E.A. Farnsworth, *"Dmeaning" in the Law of Contracts*, in *Yale Law Journal*, 1967, vol. 76, p. 939 ff.
[25] In this regard, see: M.P. Gergen, *The Use of Open Terms in Contract*, in *Columbia Law Review*, 1992, vol. 92, p. 997 ff. (1006); G.K. Hadfield, *Judicial Competence and the Interpretation of Incomplete Contracts*, in *Journal of Legal Studies*, 1984, vol. 23, p. 159 ff.
[26] See: S.J. Burnham et al., *Transactional Skills Training: Contract Drafting-Beyond the Basics*, in *Transactions: The Tennessee Journal of Business Law*, 2009, p. 253 ff.
[27] Thus: De Filippi, Wright, 2015, cit., p. 25.
[28] By pseudonymity we mean the possibility that, although a person is not identifiable with his real name, such identification can still take place through the acquisition of further information about him, such as a pseudonym, an IP address, a current account, *etc.*; on the subject, see: Article 29 Data Protection Working Party, *Opinion 05/2014 on Anonymisation Techniques*, WP 216, April 2014, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/index_en.htm, p. 20 ff.
[29] On this point, see: European Bank for Reconstruction and Development, Clifford Chance, *Smart Contracts: Legal Framework and Proposed Guidelines for Lawmakers*, October 2018, https://www.ebrd.com, p. 22 ff.
[30] Cardozo Blockchain Project, *Research Report #2: "Smart Contracts" & Legal Enforceability*, October 2018, https://cardozo.yu.edu/sites/default/files/Smart%20Contracts%20Report%20%232_0.pdf, p. 365 ff.
[31] Regarding these profiles, see: M. Giancaspro, *Is a 'Smart Contract' Really a Smart Idea?*, in *Computer Law & Security Review*, 2017,vol. 33, p. 830 ff.; MIK, 2017, cit., p. 281 ff.

called split contracting, or they can be respectively the specification and/or execution of the other, so-called hybrid agreement[32].
In a system governed by self-imposed smart contracts and other technical agreements, there would be less need for judicial intervention, since the computer code through which the rules were defined is the same tool through which they are applied[33].
Although the implementation of basic contractual guarantees and consumer protection regulations in smart contracts is theoretically possible, in fact it can prove to be complex, given the formalised and deterministic nature of the computer code[34].
The possible acquisition of external data requires the guarantee that the oracle is reliable and actually a third party, and that there is no interference or security threats during the acquisition of data from the same[35].
Another problematic issue concerns the need to intervene on a smart contract in the event that an injunction issued by the judicial authority must be executed.
In general, given the impossibility of interrupting the execution of a smart contract - excluding the exceptions mentioned above - the realisation of this result may take place in the hypothesis of using a private Blockchain which provides mechanisms for blocking the execution under the responsibility of certain nodes.

II. Formation of contract

In smart contracts, offer, acceptance and consent are manifested by signing the transaction in a cryptographic way. In this regard, the main question lies in the fact that the computer code represents an obscure language for most human beings[36].
Different considerations must be made depending on whether the smart contract on the Blockchain is the only existing contract, as the parties have never reached an oral agreement or entered into a written document, or there is an oral or written agreement next to or that includes the smart contract.
In the first hypothesis, the computer code represents the only proof of a legal relationship between the parties, and it is not clear whether the contract and/or its clauses have been well understood by them. However, based on the principle of freedom of form, the contract can still be considered valid[37].
In this case, the entire process of offering, accepting and existence of consent takes place only on the Blockchain. In case of uncertainty on the content, the rules that require to interpret the will of the parties must be applied, and in the event of non-compliance, declare the nullity of the contract or clauses without consent[38].
When there is an oral or paper version alongside or that includes the smart contract, the first can be considered hierarchically higher than that expressed in the computer code,

32 On this point, see: European Bank for Reconstruction and Development, Clifford Chance, 2018, cit., p. 17 ff.; De Filippi, Wright, 2018, cit., p. 76 ff.; J.G. Allen, *Wrapped and Stacked: 'Smart Contracts' and the Interaction of Natural and Formal Languages*, in *European Review of Contract Law*, 2018, vol. 14, p. 307 ff.
33 From the merger of law and code it follows, therefore, that the only way to violate the law is to effectively break the code.
34 T. Cutts, *Smart Contracts and Consumers*, LSE Legal Studies Working Paper No. 1/2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3354272; De Filippi, Wright, 2015, cit., p. 26.
35 See again: Sokolov, 2018, cit., p. 10; Mik, 2017, cit., p. 292 ff.
36 On this point, see: Giancaspro, 2017, cit., p. 830 ff.
37 See, for example: Swiss Federal Council, Rapport du Conseil fédéral sur les monnaies virtuelles en réponse aux postulats Schwaab (13.3687) et Weibel (13.4070) du 25 juin 2014, p. 11; Singapore High Court, Chwee Kin Keong and Others v Digilandmail.com Pte Ltd [2005] 2 LRC 28I.
38 See: G.O.B. Jaccard, 2017, cit., P. 22 s .; M. Eggen, *Chain of Contracts*, in *Aktuelle juristische Praxis - Pratique juridique Actuelle*, 2017, p. 3 ff. (8).

similarly to what is considered for the interpretation of the *click-wrap* agreements in relation to the main contract[39].

Some authors believe that coexistence with an off-chain contract should become a good practice whenever the contract is of some relevance[40]. In this way, then, the parties can actually verify that consent has been given on the specific content of the contract[41]. On the other hand, this practice - especially for simpler transactions - could risk reducing the advantages of using smart contracts in terms of speed and saving of transaction costs.

The initial phase of a contractual agreement relating to a smart contract can be similar to that of traditional contracts, with the contracting parties that agree on a series of contractual terms, or closer to standard contracts in the case of a smart contract unilaterally prepared by one of the parties[42].

The publication of the contract on the chosen Blockchain platform appears configurable as an offer, and the acceptance of the other party by means of its own cryptographic key will configure an acceptance[43].

Similarly to what happens in the context of electronic bargaining *tout court*, depending on the circumstances, the publication of the message by the proposing party on the Blockchain can be considered similar to an advertisement and therefore a mere invitation to offer[44], or instead the terms of the transaction may configure a real contractual offer[45].

Furthermore, the publication may, depending on the preferences of the offeror and the permissioned or permissionless characteristics of the Blockchain, constitute an offer to a specific recipient or an offer to the public[46].

Acceptance can take place either through the execution of a specific service, or through authorization to transfer a consideration or digital asset by entering a cryptographic key[47].

The offer and the contractual acceptance, therefore, can be considered expressed, in the light of the regulations in force at transnational level, by «data messages» stored in a Blockchain. These are defined in the UNCITRAL Model Electronic Commerce Act as

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[39] In this sense, see: Giancaspro, 2017, cit., p. 834; B. Winiger, in L. Thévenoz, F. Werro (edited by), *Commentaire Romand, Code des obligations I*, Munich: Helbing Lichtenhahn, 2021, *Art. 18 n. 1 ff.*

[40] In fact, the automatic compilation of a smart contract in human-readable language is quite easy.

[41] See J. Hazard, H. Haapio, *Wise Contracts: Smart Contracts that Work for People and Machines*, in E. Schweighofer et al. (edited by), *Trends und Communities der Rechtsinformatik / Trends and Communities of Legal Informatics*, *Tagungsband des 20. Internationalen Rechtsinformatik Symposions IRIS 2017*, Österreichische Computer, Vienna, 2017, p. 2 ff.

[42] See: Raskin, 2017, cit.,, p. 305 ff. (322).

[43] In this sense, see: M. Durovic, A. Janssen, *The Formation of Blockchain-based Smart Contracts in the Light of Contract Law*, European Review of Private Law, 2019, p. 762.

[44] See: United Nations Convention on the Use of Electronic Communications in International Contracts. New York, November 23, 2005, art. 11. In doctrine, see among others: M. Kaulartz, J. Heckmann, *Smart Contracts - Anwendung der Blockchain-Technologie*, in *Computer und Recht*, 2016, p 621.

[45] See: Durovic, Janssen, 2019, cit., p. 762. For a broader overview on formation of contracts in electronic bargaining, see among others: Y. Goh, *Contractual Consent in the Age of Machine Learning*, in G. Chan Kok Yew, M. Yip (eds.), *AI, Data and Private Law. Translating Theory into Practice*, London: Bloomsbury, 2021, p. 199 ff.; Stazi, 2021, cit., p. 29 ff.

[46] In the Italian legal system, pursuant to art. 1336 of the Italian Civil Code. For a comparative framework, with particular regard to the *common law* English, US and Australian, see: J. Madir, *Smart Contract: (How) Do They Fit Under Existing Legal Frameworks?*, 2018, available on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3301463, p. 7 ff.; Chamber of Digital Commerce - Smart Contracts Alliance, 2018, cit., p. 15 ff.; R3, Norton Rose Fullbright, *Can smart contracts be legally binding contracts?*, November 2016, available on: https://www.nortonrosefulbright.com/en-it/knowledge/publications/a90a5588/can-smart-contracts-be-legally-binding-contracts, p. 27 ff. For an analysis of the issues posed by smart contracts in the Chinese system, see: J. Wang, C. Lei, *legalWill Innovative Technology Result in Innovative Legal Frameworks? Smart Contracts in China*, in *European Review of Private Law*, 2019, p. 921 ff.

[47] See: G.O.B. Jaccard, 2017, cit., p. 22; JJ Szczerbowski, *Place of Smart Contracts in Civil Law. A Few Comments on Form and Interpretation*, Proceedings of the 12th Annual International Scientific Conference "New Trends 2017", Private College of Economic Studies Znojmo, in 2018, p. 336, available on: https://ssrn.com/abstract=3095933; see also: Carlill v. Carbolic Smoke Ball Co Ltd (1892) 1 QB 256, 262.

information generated, sent, received or stored by electronic, optical or "similar" means. This definition appears applicable to both traditional communication techniques and digital communications, including smart contracts[48].
The Convention on the use of electronic communications in international contracts, then, with regard to the formation of a contract, provides the principle of functional equivalence, under which the execution of a contract by an automated system cannot be denied for the only reason that no natural person intervened in each of the actions carried out[49].
The subscription requirement can be difficult to fulfil for smart contracts since the signature could only be a code entered into the software by one of the contracting parties. Moreover, the purpose of a signature is to ensure that the signatory party actually intended to contract[50], therefore a fully electronic environment without any human intervention can make it difficult to establish an intent[51].
On the other hand, smart contracts meet the originality and integrity requirements of the data messages provided for in the Model Law on electronic commerce[52], given the characteristics of tamper resistance and unchangeable tendency of the Blockchain[53].
The Model Law on Electronic Transferable Records, which allows the use of these registers[54] for transferable instruments, provided that the electronic register meets the purposes and functions of the transferable instrument[55], requires the guarantee of the singularity of the document and the use of a reliable method for identifying and checking the record[56].
Distributed ledger technologies such as Blockchain appear capable of replacing the registry administrator with an algorithm that guarantees that the tokens registered in it are subject to the exclusive control of the holders of the relative private keys[57].
The Electronic Records Model Law also requires a reliable method to be used to identify the person in order to meet the signature requirement[58].
A signer can use a pseudonym, but the distributed registry system must have the ability to link it to a real name to meet the signer identification requirement, since some reports or actions require mandatory links to real names[59].

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48 UNCITRAL Model Law of Electronic Commerce with Guide to Enactment, 1996, arts. 2 (a) and 11 and par. 31.
49 United Nations Convention on the Use of Electronic Communications in International Contracts. New York, cit., Arts. 8 and 12. On the topic, see: V. Ooi, *Contracts Formed by Software: An Approach from the Law of Mistake*, SMU Center for AI & Data Governance Research Paper No. 2019/02, available on: https: //papers.ssrn. com / G3 / papers.cfm? abstract_id = 3322308.
50 See UNCITRAL Model Law of Electronic Commerce with Guide to Enactment, cit., Par. 56.
51 Thus: A. Mukherjee, *Smart Contracts - Another Feather in UNCITRAL's Cap*, in *Cornell International Law Journal Online*, February 2018, available on: http://cornellilj.org/smart-contracts-another-feather-in-uncitrals- Postal Code.
52 See again: UNCITRAL Model Law of Electronic Commerce with Guide to Enactment, cit., Arts. 8-10.
53 In this sense, see: Mukherjee, 2018, cit.
54 A transferable register is a document that authorises the holder to claim fulfilment of the obligation indicated in the document and to transfer the right to execute. See: UNCITRAL, Model Law on Electronic Transferable Records, 2017, art. 2.
55 Thus: UNCITRAL, Model Law on Electronic Transferable Records, cit., Art. 1 (1).
56 UNCITRAL, Model Law on Electronic Transferable Records, cit., Arts. 10-11 and parr. 189-190 of the Explanatory Note. Since it embodies the right to claim the execution of one obligation by another, it is essential to prevent multiple complaints about the same obligation.
57 See: K. Takahashi, *Blockchain Technology and Electronic Bills of Lading*, in *Journal of International Maritime Law*, 2016, vol. 22, p. 202 ff. (209).
58 See: UNCITRAL, Model Law on Electronic Transferable Records, cit., Art. 9.
59 UNCITRAL Model Law on Electronic Signatures with Guide to Enactment, 2001, par. 29. For example, you need to be able to link pseudonyms to real names when you appeal against a promissory note. The explanatory notes also suggest that to link pseudonyms to a real name, it is possible to rely on factual elements outside the distributed registry system.

III. MISTAKE

According to the law of mistake under English, Australian and Singapore law, while where when only one party to the contract is under a mistake the contract is not void, the contract can be void where at the time of signing the agreement one of the parties is mistaken as to a term of the contract, the party would not have entered the contract but for this mistake, and the mistake is known or reasonably ought to be known to the other party[60].

In the United States, as well, a contract can generally be voided at the discretion of the misled party if the other party was aware of it - as in the case of identity theft - and the execution of the contract would be unreasonable[61].

In civil law, in the Italian and French legal systems, for example, a mistake can void an agreement in which it influences the very essence of the same[62].

A particularly interesting case of application of the doctrine of mistake to smart contracts was the Singapore Court of Appeal's decision in Quoine v B2C2[63].

B2C2 had entered into a membership contract with Quoine under which B2C2 could make trades of cryptocurrencies with other counterparties on Quoine's automated cryptocurrency trading platform. However, the platform executed the B2C2 trades of Ethereum in exchange for Bitcoin at an exchange rate approximately 250 times the then current market rate, in favour of B2C2, whose account was automatically credited with the proceeds of the trades.

When Quoine later reviewed the trades, it considered that they were the result of an error and reversed them, notwithstanding that the membership contract provided that trades were "irreversible". B2C2 brought an action against Quoine, claiming that in reversing the trades Quoine's actions were a breach of the contract and Quoine was in breach of trust[64].

Both the Singapore International Commercial Court and the Singapore Court of Appeal decided in B2C2's favour. In reversing the trades, Quoine had breached its contract with B2C2, and Quoine had failed to establish a mistake that would make the contracts for trades void[65]. Thus, Quoine was also held in breach of trust and liable for damages[66].

As for the subject and the time regarding which to assess whether the non-mistaken party had the requisite actual knowledge of the mistake[67], the Court of Appeal held that - given that it is the programmer who sets the parameters which the algorithm is bound by - her

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[60] See: Cundy v Lindsay (1878) 3 App Cas 459; Hartog v Colin & Shields (1939) 3 All ER 566; Shogun Finance Ltd v Hudson (2003) UKHL 62; Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] 1 SLR(R) 502. This is the case known as "unilateral mistake". Regarding its application to automated contracts, in a critical perspective, see eg: K.F.K. Low, E. Mik, *Lost in Transmission: Unilateral Mistakes in Automated Contracts*, in *Law Quarterly Review*, 2020, vol. 136, p. 563 ff.

[61] In this sense, see: Restatement (Second) of Contracts (1981) art 153; Gethsemane Lutheran Church v Zacho 258 Minn 438 (1960); Maryland Casualty Co v Krasnek 174 So 2d 541 (1965).

[62] See: art. 1130 ff. of the French *Code Civil*; art. 1429 ff. of the Italian Civil Code.

[63] Quoine Pte Ltd v B2C2 Ltd [2020] 2 SLR 20, on appeal from the Singapore International Commercial Court (SICC) ([2019] 4 SLR 17.

[64] See: Low, Mik, 2020, cit., p. 563 ff.; R. Kulms, *Blockchain: Private Law Matters*, in *Singapore Journal of Legal Studies*, 2020, p. 63 ff. (74 ff.); Norton Rose Fulbright, Singapore court's cryptocurrency decision: Implications for cryptocurrency trading, smart contracts and AI, available at: https://www.nortonrosefulbright.com/nl-nl/knowledge/publications/6a118f69/singapore-courts-cryptocurrency-decision-implications-for-trading-smart-contracts-and-ai.

[65] The mistake was in the way in which Quoine's platform had operated. This "might conceivably be seen as a mistake as to the premise on which the buy orders were placed, but it can in no way be said to be a mistake as to the terms on which the contracts could or would be formed"; see Quoine [2020], 114.

[66] Furthermore, the Court confirmed the requirement of actual knowledge to invoke unilateral mistake. In line with the analysis above, then, the means by which the subjective knowledge of the non-mistaken party is ascertained may include considerations of the matter from an objective perspective. In this regard, see: Goh, 2021, cit. p. 221.

[67] Time which is in general that of contract formation.

or his state of knowledge is the one to assess, from the time of programming to when the relevant contract is formed[68].

IV. Form and interpretation

Contractual freedom allows contracting parties to draw up the contract in any form and language they wish, including the computer code[69]. Similarly to what happened in the past with the progressive adaptation of contract law to the new communication methods and technologies, a similar adaptation to smart contracts seems underway, in some systems through *ad hoc* regulatory interventions[70].

As in the case of the vending machine in which a contract is formed when the coins are inserted into the machine, the fact that the subsequent execution process occurs without human intervention does not preclude the formation and existence of a legally binding contract[71].

Regarding the question of the intelligibility of the contractual content[72], except for the hypothesis in which both parties participate in the drafting and/or understand the terms written in the computer code, problems arise if at least one of the contracting parties does not understand the computer code but concludes the smart contract[73].

In this case, the party itself could try to affirm later the existence of an error and request the cancellation of the contract. In doctrine, on the one hand, there are those who believe that in contracts drawn up by one of the parties it is reasonable to attribute to the same the burden of proof of understanding of the computer code by the other[74].

On the other hand, this option has so far been rejected, for example in Italian law by art. 1429 of the Civil Code or in German law as Inhaltsirrtum pursuant to § 119 (1) BGB, believing that the risk of the conclusion of a contract without knowing the underlying code lies with the parties, based on the principle of self-responsibility and of entrustment[75].

The rules governing contract law on both sides of the Atlantic refer to the form of the contract, sometimes providing for legal requirements relating to the need for a specific form *ad substantiam* or to ensure particular guarantees.

The smart contracts recorded on the digital support of the Blockchain platform, as such, do not allow policyholders to make declarations in writing, but possibly in documentary form where there are two elements: i) the drafting of the declaration as a document; ii) the identifiability of the author of the declaration.

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[68] See again: Quoine [2020], 89-99; Y. Goh, 2021, cit., p. 222.

[69] See, *ex multis*: M. Giuliano, *The Blockchain and smart contracts in the innovation of third millennium*, in *The law of information and information technology*, 2018, p. 989 ff. (1030 ff.); Szczerbowski, 2018, cit., P. 335; M. Jünemann, A. Kast, *Rechtsfragen beim Einsatz der Blockchain*, in *Kreditwesen*, 2017, p. 533; Kaulartz, Heckmann, 2016, cit., p. 622; M. Kaulartz, *Herausforderungen bei der Gestaltung von Smart Contracts,* in *Zeitschrift zum Innovations- und Technikrecht*, 2016, p. 201 ff. (204).

[70] For a reconstruction of the various interventions adopted so far in the different legal systems, see: Stazi, 2021, cit.., p. 91 ff.; R3, 2016, cit., p. 22 ff.

[71] In this sense, see: Durovic, Janssen, 2019, cit., p. 764 f., Which recall what has been established in this regard in Thornton v. Shoe Lane Parking (1978) 2 QB 163 (Lord Denning MR), and R (Software Solutions Partners Ltd) v. HM Customs & Excise (2007) EWHC 971, par. 67.

[72] From which, moreover, as is known, contracts drawn up in natural language are not exempt; cf .: Madir, 2018, cit., p. 10-11, which also notes that, for example, in the German legal system the validity and binding nature of a contract is not affected by the lack of understanding of the German language (see: Bundesarbeitsgericht, 5 AZR 252/12 (B), 19 March 2014); International Swaps and Derivatives Association, Linklaters, *Whitepaper on Smart Contracts and Distributed Ledger - A Legal Perspective*, August 2017, available on: https://www.isda.org/2017/08/03/smart-contracts-and-distributed-ledger-a-legal-perspective, p. 17.

[73] See: Durovic, Janssen, 2019, cit., p. 764-5.

[74] Thus: Szczerbowski, 2018, cit., p. 336 f.

[75] In this regard, see: Jünemann, Kast, 2017, cit., p. 533; Kaulartz, Heckmann, 2016, cit., p. 622; A.M. Gambino, *L'accordo telematico*, Milan: Giuffré, 1997, p. 83 ff. In common law, for an approach aimed at reconciling the doctrine of mistake and responsibility, see: Ooi, 2019, cit.

The first requirement appears satisfied by the smart contracts since the declarations are recorded in a distributed register, which constitutes an informative support that allows the reading of the content.
Regarding the identification requirement, the declarations registered on Blockchain are labelled by the addresses of the accounts, a series of numbers and letters that does not indicate a specific person, but allows their identification[76].
In practice, there is a tendency to adopt the so-called split contracting or hybrid agreement approach, with the contextual drafting of a natural language contract together with a copy in computer code, or with the inclusion in the contractual text of some codified and self-executable parts[77].
The drafting of the contract generally takes place through a web interface, that is a module which contains, on the one hand, the text in natural language, on the other, the parameters that can be computed in computer code, relating to any information to be collected from sources external, any conditions to which execution or modification is subject, and to the automatic execution mechanism[78].
As regards the interpretation of the smart contract, where reference is made to it having regard exclusively to its codified part, it can be considered inflexible and interpretable in one way only: on the basis of the computer code, precisely[79]. In this sense, smart contracts could be considered inflexible and unable to adapt to changing circumstances or the preferences of the parties[80].
Specific problems of certainty of terms and interpretation may derive from the algorithmic application of clauses that refer to regulatory standards such as "good faith", "correctness", "reasonableness", *etc.*, or that contain a variation mechanism, a common feature in many commercial agreements.
These notions do not perfectly fit the "binary" approach of the computer code. It is not clear, at least so far, how it is possible to code a smart contract to apply these terms in the specific case[81].
Except for the hypothesis of recourse to an external oracle, the need to insert similar clauses would therefore seem at the moment to make inappropriate the use of smart contracts, which as mentioned are more suitable for the regulation of simple relationships[82].
In a smart contract, the terms are translated into a computer code that is usually incomprehensible to the lawyer or the average judge. The reference to the terms in a

[76] In this sense, see: Szczerbowski, 2018, cit., p. 336.
[77] In this regard, see in particular: V. Pasquino, *Smart contracts: characteristics, advantages and problems*, in *Dir. e proc.*, 2017, p. 245; D. Di Maio, G. Rinaldi, *Blockchain and the legal revolution of smart contracts*, in *Banking Law*, July 2016, available on: http://www.dirittobancario.it/news/contratti/blockchain-e-la-rivolution- legal-of-smart-contracts; De Filippi, Wright, 2018, cit., p. 76-78; MADIR, 2018, cit., p. 12; Dutch Blockchain Coalition, *Smart contracts as a specific application of blockchain technology*, December 2017, available on: https://www.dutchdigitaldelta.nl/uploads/pdf/Smart-Contracts-ENG-report.pdf, p. 23.
[78] Often referred to in technical jargon as a *smart contract*, but which from a legal point of view in reality properly constitutes only the part relating to the automatic execution.
[79] In this regard, see: De Filippi, Wright, 2018, cit., p. 82.
[80] These characteristics, which can also be considered an advantage as instruments of guarantee of execution, could also be altered through provisions that allow modification of some parts of the contract, for example through information from the oracles or interventions of the parties; cf .: De Filippi, Wright, 2018, cit., p. 75 ff.
[81] In this regard, see: M. Cannarsa, *Interpretation of Contracts and Smart Contracts: Smart Interpretation or Interpretation of Smart Contracts?*, in *European Review of Private Law*
2018, vol. 26, p. 780; Giancaspro, 2017, cit., p. 830-1; S. Farrell et al., *How to Use Humans to Make "Smart Contracts" Truly Smart*, July 2016, available on: http://www.kwm.com/en/au/knowledge/insights/smart-contracts-open-source-model-dna- digital-analoguehuman-20160630, which detect how trying to program similar clauses so that they can be performed computationally is currently science fiction (without the use of a huge amount of code or computing power).
[82] In this regard, see: V. Zeno-Zencovich, *Legal Epistemology in the Age of Big Data*, in G. Peruginelli, S. Faro (edited by), *Knowledge of the Law in the Big Data Age*, Amsterdam: IOS Press, 2019, p. 3 ff. (7 f.).

readable linguistic form in external materials[83], even where as in common law would be prohibited by the so-called parol evidence rule, according to which extrinsic evidence is inadmissible to change a written contract[84], is allowed if the terms of the smart contract are completely ambiguous and incomprehensible without reference to these extrinsic materials[85].
It is also possible that the parties or the judge make use of external experts such as qualified programmers to interpret the code of the smart contract. In any case, whenever a text in natural language is available, the interpretation process should reconcile the terms encoded in the smart contract with those of the natural language text[86].

V. VARIATIONS AND FULFILMENT

Smart contracts are self-executable, resistant to tampering and tend to be unchangeable. By virtue of these characteristics, smart contracts present the risk of programming errors and/or incorrect representation of the will of the parties which may not be reversible, or which require significant efforts to this end, as well as, given the possibility of spontaneous alteration of the computer code, the risk of complex disputes over liability for technical error[87].
The ancillary elements of the contract such as conditions or terms, vice versa, can be included originally in the smart contract. Some questions arise regarding specific profiles, such as the retroactive effectiveness of the fulfilment of the condition[88], which could contrast with the aforementioned characteristics of smart contracts.
In practice, in the case of a suspensive condition, the contract can only be entered in the Blockchain when the condition is fulfilled, while for the resolutive condition a subsequent restitutive bargain must be accompanied by an *ex nunc* dissolution of the previous contract[89].
The term relating to a future and certain event, then, can also be provided in smart contracts through a specific provision in the code that links the relative legal effect upon its expiry[90].

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83 As original terms of reference, negotiation notes, email, *etc.*
84 See, in US law: Restatement (Second) of Contracts (1981) art 213; Uniform Commercial Code (UCC) art 2-202; in English and Australian jurisprudence: Goss v Nugent (1833) 110 ER 713; Mercantile Bank of Sydney v Taylor (1891) 12 LR (NSW) 252. In *civil law*, cf. also for example art. 1359 of the Civil Code, although other provisions affect the way in which the evidence can be used towards the parties involved in the relationship.
85 See in this regard: Reardon Smith Line Ltd v Yngvar Hansen-Tangen and Sanko SS & Co Ltd (1976) 1 WLR 989; Codelfa Construction Pty Ltd v State Railway Authority of New South Wales (1982) 149 CLR 337.
86 See: Giancaspro, 2017, cit., p. 833. In this case the contractual agreement should be found in this original text.
87 In this sense, see: Giancaspro, 2017, cit., p. 830 f., which reports examples of the significant economic repercussions that occurred on the Ethereum platform; L. Luu et al., *Making Smart Contracts Smarter*, in Association for Computing Machinery, *CCS '16. Proceedings of the 2016 ACM SIGSAC Conference on Computer and Communications Security*, ACM, New York, 2016, p 254 ff.
88 Fruit of the will of the parties or imposed by law (so-called *condicio iuris*). In the Italian legal system, for example, the retroactivity mechanism on the one hand may not exist due to the will of the parties or due to the nature of the relationship, on the other hand it is without prejudice to the acts of ordinary administration carried out *medium-time* by the entitled person and the executed in contracts with continuous or periodic execution (see articles 1360-1361 of the Italian Civil Code). In the French legal system, cf. the articles 1304-6 and 1304-7 of the Civil Code, which following the 2016 reform eliminated the retroactivity for the suspension condition and not for the resolutive one, except for leaving both parties the right to predict or eliminate it respectively, and in any case maintaining the risk for the debtor and the effectiveness of the conservative and administrative documents.
89 Normally, pending the condition, the purchases made by third parties are not affected *medium tempore*, but a smart contract that is executed pending the suspensive condition of a previous contract determines a discontinuity in the transcriptions, blocking the possibility of executing the other contract.
90 For the purpose of verifying the fulfilment of both the condition and the deadline, it may be useful to acquire objective data from the outside through the oracles. Regarding the relevance of oracles in order to mitigate the rigidity of smart contracts, introduce conditions or terms, *etc.*, but also on any risks in terms of

The rigidity of smart contracts can constitute a significant limit for any interventions by public authorities, to guarantee compliance with legislation or regulation, or judicial interventions *ex post* in application, for example, of withdrawal or nullity[91].
However, as mentioned, some technical solutions can help prevent similar situations. The first is the destruction of the smart contract through the so-called self-destruction function, even if this remedy could be excessive compared to the problems encountered.
Other functions have been developed, such as cd. *callcode*, *enum* or other, which can modify the content of the computer code. The use of these functions by the courts could help address the legal issues that arise during or as a consequence of the execution of the contract[92].
If the smart contracts appear particularly useful because they are able to guarantee that the contract will actually be executed, then the creditor's right to the performance is not absolute, and each legal system recognizes that the execution of the contract can be prevented by several external factors[93].
In smart contracts, some contingencies can be easily foreseeable and programmable in the computer code, where they are part of the smart contract environment, such as in the case of insufficient balance of the cryptocurrency.
Other causes may be more difficult to assess, and possibly require the use of an oracle, such as in the case of ascertainment of the failure of a parcel to be delivered by the courier, which thus acts as an oracle.
Still other causes may be more complex to predict, code and verify, such as strikes, technical failures, *etc.* While it is theoretically possible to include long lists of possible contingencies, the determination is further complicated as there may be different relevant causes depending on the type of contract and different ways in which they can be verified[94].
A solution may be that of the presumption that the failure is attributable and the possibility of coding a limited set of foreseeable causes of significant contingency. Any remaining and unforeseen causes would therefore remain the responsibility of the debtor, in accordance with the provisions of most legal systems[95].
Regarding the most complex or relevant contracts, in-depth analysis may be necessary regarding the possible existence of facts that make the imputation of the cause of impediment or justification of the failure to fulfil the obligation configurable or not[96].

VI. WITHDRAWAL AND TERMINATION

Regarding the withdrawal attributed by law or contractual clause to one of the contracting parties, which in contracts with continuous or periodic execution can be exercised even after the start of execution[97], and of the cancellation, which differs from the first as refusal

trust and security, see: Mik, 2017, cit., p. 292-3; Wang, Lei, 2019, cit., p. 937-8; P. Ortolani, *Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin*, in *Oxford Journal of Legal Studies*, 2016, vol. 36, p. 595 ff.

91 See: Pasquino, 2017, cit., p. 247; Giancaspro, 2017, cit., p. 831, which shows the example of the injunction with the relative complexity of interrupting the execution of the smart contract.

92 See: A. Juels, B. Marino, *Setting Standards for Altering and Undoing Smart Contracts*, in JJ Alferes et al. (edited by), *Rule Technologies. Research, Tools, and Applications - Proceedings of the 10th International Symposium RuleML 2016*, Springer, Cham, 2016, p. 151 ff. (158).

93 Thus: E. Tjong Tjin Tai, *Force Majeure and Excuses in Smart Contracts*, in *European Review of Private Law*, 2018, p. 787 ff., Tilburg Private Law Working Paper Series No. 10/2018, available on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183637, p. 5.

94 In this regard, see: Tjong Tjin Tai, 2018, cit., p. 12; Z. Xiaojing, *Development of Smart Contracts based on Blockchain and their Restrictions through the lens of Law*, in *Legality Vision*, 2018, p. 3-4.

95 See again: Tjong Tjin Tai, 2018, cit., p. 13, which highlights that the debtor will generally be in the best position to identify the possible risks and causes of default in advance and take precautionary measures or take out insurance against them.

96 See: G. Castellani, *Smart Contracts and civil law profiles*, in Comparazione e Diritto Civile, 2019, p. 8; Tjong Tjin Tai, 2018, cit., p. 14.

97 With regard to services that have not yet been performed or are in progress (see Article 1373 of the Italian Civil Code).

to renewal an automatic duration contract[98], in both cases an *ex ante* programming of these hypotheses and the related conditions at the time of the conclusion of the smart contract may be considered configurable, possibly against a deposit or promise of a consideration in cryptocurrency[99].
The withdrawal could be codified subordinating the execution of the smart contract to the moment in which its failure to exercise will be verified[100], while the cancellation could be similarly programmed so that, if it has not occurred within the deadline for the renewal, the latter will take place automatically[101].
In the event of non-fulfillment, the program may provide that if the obligee has not performed his service within a certain date, the contract will automatically be terminated[102]. However, as a result of the default, the party may not have an interest in activating the resolution and, if it has not yet fulfilled, want to activate an exception of default[103] or accept a late fulfilment[104]. In smart contract, this could take place where it is envisaged in the contract form that the creditor of the service will be able to choose which remedy to use[105].

98 See, among others: R. Sacco, G. De Nova, *The contract*, Turin: Giuffrè, 2010, p. 1715 ff.; E. Tuccari, *Contingencies and remedies in duration contracts*, Padua: Cedam, 2018, p. 217 ff.; M. Ambrosoli, *Withdrawal*, in *Digest of private disciplines*, Update IX, 2014, p. 527 ff.; P. Fava, *The contract*, Milan: Giuffré, 2012, p. 153 ff.; M. Granieri, *Time and the contract. Historical-comparative itinerary on duration contracts*, Milan: Giuffré, 2007, p. 291 ff.; G. De Nova, (edited by), *Withdrawal and termination in contracts*, Milan: Giuffré, 1994; G. Gabrielli, *Contractual bond and unilateral withdrawal*, Milan: Giuffré, 1985.

99 Who will then be automatically transferred to the counterparty at the time of the conclusion of the smart contract or the exercise of the agreed faculty. On the configurability of these hypotheses in *smart contracts*, see: L. Piatti, *From the Civil Code to the binary code: blockchain and smart contracts*, in *Cyberspace and law*, 2016, p. 325 ff. (339-40); Sokolov, 2018, cit., p. 31-2, Which highlights the relevance of the contextual programming of automatic compensation mechanisms.

100 Traditionally it is believed that the right of withdrawal is exercised by means of a declaration and not of a behaviour that indicates the will not to fulfil; v .: Sacco, De Nova, 2010, cit., p. 1721 ff .; Gabrielli, 1985, cit. p. 121 ff. On the other hand, in the context of automatic execution, the inclusion of a specific automatic mechanism, possibly following the occurrence of a certain condition, for the expression of the withdrawal declaration could also be considered configurable.

101 Conversely, if the condition occurs, the program will result in the termination of the contract with the related legal consequences.

102 With relative retroactive elimination of the effects of the contract, total or partial in the cases of contracts with continuous or periodic or plurilateral execution, and without prejudice to the rights purchased by third parties (see articles 1458-1459 of the Italian Civil Code). This elimination, however, in *smart contracts will* present the difficulty already noted *above* for termination. The plaintiff may also be entitled to propose further actions for the repetition of the undue and / or for compensation for the damage. Both the French legal system, pursuant to articles 1224-1230 Code civil, both the German one, in §§ 325-327 and 346-256, like the English one, release the case from the necessary judicial ruling. In doctrine, see among others: Sacco, De Nova, 2010, cit., p. 1583 ff. and 1637 ff., which among other things believe, contrary to the majority of interpreters, that in the Italian legal system the out-of-court declaration of resolution binds the declarant in application of the principle of custody.

103 In the Italian legal system *pursuant to* art. 1460 of the Civil Code, in French law see Articles. 1219-1220 Civil Code and Court of Appeal of Paris, 28 January 2015, RG n. 10/15692.

104 In this regard, see: G. Sicchiero, *The resolution for failure to fulfill obligations. Articles 1453-1459*, in the *Civil Code. Commentary*, founded by P. Schlesinger, directed by FD Busnelli, Milan: Giuffré, 2007; A. Luminoso, M. Costanza, U. Carnevali, *Resolution for failure to fulfill obligations*, vol. 1.1 (articles 1453-1454), in *Commentary of the Civil Code* Scialoja-Branca, Zanichelli, Bologna-Rome, 1990; L. Nanni, M. Costanza, U. Carnevali, *Resolution for failure to fulfill obligations*, vol. 1.2 (articles 1455-1459), ibid., 2007.

105 According to some scholars, a possible solution to various issues mentioned above could lie in the use of the Blockchain permissioned platforms, which restrict access to identified users and pre-select nodes that authorise the operations. So public/judicial interventions would have concrete targets (see: P. Cuccuru, *Blockchain and contractual automation. Reflections on smart contracts*, in La Nuova Giurisprudenza Civile Commentata, 2017, p. 116-7). Others point out that in such platforms the key advantages of decentralisation and autonomous execution would be missing (see: Pasquino, 2017, cit., p. 247).