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EDITORIAL

RULE OF LAW, INDEPENDENCE OF THE JUDICIARY AND PRIMACY OF EU LAW

*Filippo Donati**

1.- In its landmark decision *Associação Sindical dos Juízes Portugueses*[1], the Court of Justice of the European Union (CJEU) held that Article 19(1), second paragraph TEU, entails an obligation for Member States to ensure that national courts adjudicating in the fields covered by EU law meet the requirement of effective judicial protection, including, in particular, that of independence. Following this decision, many cases have been brought before the CJEU, on certain reforms of national judicial systems and their compliance with the principle of judicial independence enshrined in Article 19(1) TEU and in Article 47 of the Charter of Fundamental Rights of the European Union (the Charter).

In *A.K. and others*[2], the CJEU indicated the criteria for establishing the independence of a court. In *A.B. and others*[3], the CJEU acknowledged that art. 47 of the Charter and art. 19(1), second paragraph TUE, meet the requirements of clarity, precision and unconditionality for a EU norm to have direct effects, and further specified that the principle of primacy of EU law obliges national court to disapply any provision, whether of a legislative or constitutional origin, infringing the principle of judicial independence.

The view taken by the Court in Luxembourg has triggered strong reactions in certain Member States, where the internal organisation of national justice continues to be considered as a domain outside the competences conferred on the EU and,

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[1] Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, case C-64/16, ECLI:EU:C:2018:117.

[22] Judgement of 19 November 2019, *A. K. v Krajowa Rada Sądownictwa*, joined cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.

[3] Judgement of 2 March 2021, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, case C-824/18, ECLI:EU:C:2021:153.

therefore, reserved to internal political choices. Similar reactions took place with respect to certain decisions, where the European Court of Human Rights (ECtHR) found a violation of the right to a fair trial by an impartial and independent tribunals established by the law, granted by article 6 of the European Convention on Human Rights (ECHR).

2.- The Constitutional Tribunal of Poland blatantly declared that the Polish Constitution has primacy over both the European Convention on Human Rights (ECHR) and the Treaties on European Union. By its decision of June 15, 2021[4], the Constitutional Tribunal in Warsaw held that the *Xero Flor* judgment of the European Court of Human Rights (ECtHR), which found a violation of art. 6(1) ECHR for the illegal appointment of a constitutional judge, "was issued without legal grounds, overstepping the ECtHR's jurisdiction, and constitutes unlawful interference in the domestic legal order, in particular in issues which are outside the ECtHR's jurisdiction; for these reasons it must be considered as a non-existent judgment"[5].

A similar conflict broke out in the field of EU law.

In application of the principles set forth in the judgement *A.B. and others*, on 14 July 2021 the Vice-President of the CJEU ordered the immediate suspension of any activity of the new Disciplinary Chamber of the Polish Supreme Court, for not meeting the requirements of independence[6]. The next day, the CJUE declared that the Republic of Poland, by failing to guarantee the independence and impartiality of the Disciplinary Chamber and by allowing the content of judicial decisions to be classified as a disciplinary offence, has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU[7]. The Polish Constitutional Tribunal responded on 7 October 2021, declaring Articles 1, 4(3) and 19(1) TEU incompatible with the Polish,

[4] Decision of 15 June 2021 Case P 7/20, case P 7/20, in *https://ruleoflaw.pl/wp-content/uploads/2021/06/20819_P-7_20_eng.pdf*.
[5] Judgment1 of of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland* (application no. 4907/18)
[6] Order of the Vice-President of the Court of 14 July 2021, Commission v Poland, case C-204/21 R, EU:C:2021:593.
[7] Judgement of 15 July 2021 (Grand Chamber), *European Commission v. Republic of Poland*, case C-791/1, ECLI:EU:C:2021:596.

constitution insofar as they require national courts to give precedence to EU law over the Polish Constitution and to disregard national provisions, including the constitutional ones, in case of a contrast with EU law. Moreover, the Constitutional Tribunal held Articles 2 and 19(1) TEU inconsistent with the Polish Constitution, insofar as they allow Polish judges to assess the independence of domestic Courts. The judgement of the Constitutional Tribunal in Warsaw was issued the day after the CJEU dismissed the appeal of the Republic of Poland against the order of 14 July 2021[8]. A few days after the new judgment of the Polish Constitutional Tribunal, the Vice-President of the CJEU, considering that Poland had not fulfilled its obligations under the order of 14 July 2021, has imposed on such Member State a daily penalty of one million euros, until compliance.

A strong confrontation between the Constitutional Tribunal and the CJEU is taking place also in Romania. The object of the dispute is a reform in the field of justice and the fight against corruption in Romania, which has been monitored at EU level since 2007 under the cooperation and verification mechanism established by Decision 2006/928 on the occasion of Romania's accession to the European Union[9]. The Curtea Constituţională (Constitutional Court of Romania), in its judgment of 6 March 2018 n. 104, held that EU law would not take precedence over the Romanian constitutional order, and that Decision 2006/928 could not constitute a reference provision in the context of a review of constitutionality under Article 148 of the Constitution, according to which Romania is required to comply with the obligations under the Treaties to which it is a party. The CJEU, in the *Asociația 'Forumul Judecătorilor din România'* judgement, took the opposite view, by ruling that Decision 2006/928 and the reports drawn up by the Commission on the basis of that decision constitute acts of

[8] Order of the Vice-President of the Court, 6 October 2021, case C-204/21 R-RAP, ECLI:EU:C:2021:834.

[9] The reform contains certain provisions threatening the independence of the judiciary, regarding: (i) the establishment of a specialized section of the public prosecutor for the investigation of crimes committed within the judicial system (SIRG), (ii) the governmental power to appoint the head of body in charge for disciplinary proceedings and proceedings concerning the personal responsibility of judges, and (iii) the personal liability of judges for damage caused by judicial error. The Commission, in exercising the power of verification provided for by Decision 2006/928, concluded that the above provisions give rise to serious doubts of consistency with EU law.

an EU institution, which are binding on Romania. In addition, the CJEU reaffirmed that the principle of the primacy of EU law must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with the national constitution[10]. The response of the Curtea Constituțională was not long in coming. With a judgement of 8 June 2021, n. 390[11], the Court in Bucharest harshly replied to that in Luxembourg, by reaffirming the primacy of the national Constitution over EU law, by rejecting as unfounded the doubts unconstitutionality raised in respect to the disputed provisions of the Romanian judicial reform and, finally, by reaffirming that ordinary judges have no jurisdiction to examine the conformity with EU law of a national provision which has been found to comply with Article 148 of the Romanian Constitution. With the latest decision of this saga, issued on 22 February 2022, the CJEU, while reaffirming the primacy of EU law, concluded that EU law precludes national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with the national Constitution. Also, the CJEU declared that EU law precludes any domestic legislation allowing disciplinary penalties to be imposed on a judge for assessing the conformity of a national provision with EU law[12].

3.- Those who defend the rule of law as the fundamental principle, which binds the Member States of the European Union together and constitutes the essence of the European identity, hope that, in the current tug-of-war, the reasons of the CJEU will prevail. For this to happen, however, the CJEU cannot be left alone. A

[10] Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393.

[11] Curtea Constituțională, sentenza 8 giugno 2021, n. 390, in *ccr.ro/wp-content/uploads/2021/10/Decizie_380_2021.pdf*.

[12] CJEU, Grand Chamber, judgement of 22 February 2022, *RS*, case C-430/21, ECLI:EU:C:2022:99.

prompt and resolute intervention by the other European institutions is needed.

Political dialogue has so far proved to be ineffective. The Article 7(2) procedure requires unanimity in the Council to determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU and to suspend certain of the rights conferred by the Treaties to that Member State. Such an unanimity requirement, however, is quite difficult to be reached, given the possibility that Member States having problems with the respect of the Rule of Law would use their veto power to help each other. This is currently the case of Poland, Hungary and Romania. The Commission should, therefore, resolutely launch new infringement procedures against those Member States which have so seriously questioned the fundamental principles of the EU legal order. In addition, financial leverage should be used in order to convince reluctant Member States to respect the Rule of Law and restore the independence of the judiciary. It is worth noting that the CJEU, with its recent "twin decisions"[13], has dismissed the complaints of Hungary and Poland against the "Conditionality Regulation"[14], which aims at protecting the Union budget against breaches of the principles of the rule of law. The CJEU emphasized that the rule of law and solidarity constitute the foundations of mutual trust between EU member states and that the Union should be able, within the limits of its powers, to defend these values. Compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State[15]. The CJEU also indicated that the

[13] See judgements of 16 February 2022, *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98 and *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2022:97.

[14] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 *on a general regime of conditionality for the protection of the Union budget*, OJ L 433I, 22.12.2020, p. 1

[15] See judgements of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 63; of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 162; of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 162 and of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, paragraph 126 and *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98, paragraph 144.

principles of sound financial management and the protection of financial interests of the Union "cannot be fully guaranteed in the absence of effective judicial review designed to ensure compliance with EU law", and that "the existence of such review, both in the Member States and at EU level, by independent courts and tribunals, is of the essence of the rule of law"[16].

Since the guidelines for the enforcement of the Conditionality Regulation have been finally approved[17], there is no further obstacle for the European Commission to include the financial leverage in the toolbox available to protect and restore the Rule of Law in the European Union.

[16] See judgements of 16 February 2022, *Hungary v Parliament and Council*, C-156/21 ECLI:EU:C:2022:97, paragraph 132 and of 16 February 2022, *Poland v Parliament and Council*, C-157/21 ECLI:EU:C:2022:98, paragraph 150.

[17] See the Communication from the Commission, *Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget*, Brussels, 2.3.2022 C (2022) 1382 final.

KELSEN VERSUS KELSEN: DEMOCRACY OR CONSTITUTIONAL DEMOCRACY? *

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Abstract

This paper seeks to offer food for thought on the current state of democracy in modern states starting from Kelsen's thought as a liberal thinker.

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1. Two introductory remarks and a clarification

I would start with two introductory remarks and a clarification.

The first remark addresses the complexity of Hans Kelsen's theory. The thought of a prolific author such as Kelsen cannot be simplified and reduced to the theses argued at a certain time of his life. For example, although the first edition of the *Reine Rechtslehre* is perhaps Kelsen's most popular work, alone it does not encompass his entire philosophy.

* Text based on a paper that will also appear in *Scritti in onore di G.F. Ferrari*.

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It is well-known that there exist as "many Kelsens" as the several different "phases" of his refined theoretical thought. This is due to Kelsen's theory evolving over time whether imperceptibly or blatantly, rather than him being static over time[1].

The second remark addresses the nature of Kelsen's thought anomalies. It may be deemed pretentious or reckless to detect a contradiction, or in any case an incongruity, in a thinker of Kelsen's stature[2]. In reality, the (apparent?) anomalies in Kelsen's works about democracy, which will be immediately discussed, are plausibly due to the natural evolution of a complex thought and the necessary "political-practical" application of a merely "logical-theoretical" elaboration.

On the basis of these introductory points, I would argue that it is always necessary to be aware of the historical context during which an author writes. It explains or even justifies the choices made about the socio-political applications of abstract legal principles.

To summarise, the general thesis supported here is that Kelsen, while speaking simply of democracy, in reality wanted to reflect on a particular type of democracy, the *constitutional* one, which is only one of the many possible forms of application of the abstract principle of popular sovereignty. In truth, Kelsen emphasises especially the *relativity* of democratic decisions, but it is precisely the formal and relativistic nature of majority decisions that ultimately forces Kelsen himself, albeit between the lines, to admit the need for the existence of substantial and *meta-democratic* limits – therefore *constitutional*! – to mere democratic procedures.

The clarification concerns the term '*meta-democratic*', to which this paper often refers (especially in para. 5). By using this compound word, I here intend to recall all those values whose legitimacy is not purely democratic, insofar they *precede* (and *pre-exist* to) the expression of popular will and, hence, are not subject to the majority principle. According mostly to the *European* legal tradition, these values correspond in a greater part to 'natural law' claims and, in Anglo-American tradition, to the 'universal human rights' topic. Obviously, the two approaches differ in several

[1] See, for example, J. Kammerhofer, *Kelsen - Which Kelsen? A Reapplication of the Pure Theory to International Law,* in 22 *Leiden Journal of International Law* 225 ff. (2009).

[2] But see, for example, recent and authoritative: L. Ferrajoli, *La logica del diritto. Dieci aporie nell'opera di Hans Kelsen* (2016).

aspects: the former relies on *human dignity* and takes in due account mutual duties and balancing of rights, while the latter «does not explicitly refer to limitations [of rights], nor correlates them to responsibilities or other rights»[3]; in this respect it could be defined as a libertarian or individualistic approach (especially for some supposed 'new rights'), basically informed to self-determination[4].

I am fully aware that these rights «originate from the peculiar mix of the Enlightenment and the Jewish-Christian tradition»[5], and I also do not intend to directly address the controversial question of the 'foundation' of human rights[6]. Nonetheless, I believe that the assessment of universal and/or natural rights largely reduces the differences between the abovementioned approaches, as very neatly confirmed by the proposition used by Chung-Shu Lo (the philosopher representing the Communist China at the UNESCO symposium in 1948) to translate the words 'human rights' in Chinese cultural context: «Heaven loves the people; and the Sovereign must obey Heaven»[7]. Briefly, the concepts argued during the drafting of the 1948 UN Charter were quite shared to be

[3] M.A. Glendon, *La visione dignitaria dei diritti sotto assalto*, in L. Antonini (ed.), *Il traffico dei diritti insaziabili* (2007) at 63, according to which «a Country in which everyone is free to act as he or she pleases in not a free Country […] Human rights Declarations run the risk of becoming bulletin boards where one or another interest group manages to post its new favorite right» (at 73 and 79). However, the distinction proposed in the paper is approximate: for a natural law-based approach in American scholarship, see J. Finnis, *Natural Law*, 2 vols, New York University Press 1991

[4] I have elsewhere argued the need for 'self-limitation', beside 'self-determination': see A. Spadaro, *Dall'indisponibilità (tirannia) alla ragionevolezza (bilanciamento) dei diritti fondamentali. Lo sbocco obbligato: l'individuazione di* doveri *altrettanto fondamentali*, in 1 *Politica del diritto* 167 (2006) (also published in Aa.Vv., *Il traffico dei diritti insaziabili*, cit., 129 ff.) and Id., *I "due" volti del costituzionalismo di fronte al principio di* auto-determinazione, in 3 *Politica del diritto* 403 (2014), spanish transl. *Las «dos» caras del constitucionalismo frente al principio de auto-determinación,* in 92 *Revista de Derecho Político* 27 (2015).

[5] M.A. Glendon, *La visione dignitaria*, above cited, at 78.

[6] On this issue, see A. Spadaro, *Il problema del "fondamento" dei diritti "fondamentali"*, in 3 *Diritto e società* 453 (1991), also published in *I diritti fondamentali, oggi* (1995).

[7] Chun-Shu Lo, *Human Rights in the Chinese Tradition*, in *Human Rights: Comments and Interpretation*, A Symposium edited by UNESCO, (1949). The fact is also witnessed by J. Piper, *Ueber die Gerechtigkeit*, It. transl. (1975). On the drafting of the UN Charter, see amongst all M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

considered «inherent in the *very nature* of man»[8] as a member of a society.

The strict connection between 'human rights' and 'natural law' should appear clearer now. By using the term *meta-democratic*, I mean to refer (at least empirically and in a nonreligious sense) to a Law that precedes positive Law (*ius positum*). Given that contemporary Constitutions incorporate and sanction natural law aspirations of this kind – not depending on democratic negotiations – in this paper I assume that Constitutions themselves are partly *meta-democratic* too.

2. Notes on Hans Kelsen's democratic theory

Kelsen's conception of democracy is widely well-known and it is not necessary to herein discuss it *funditus* and in detail. Summarising to a great extent his thought, but – I hope – without altering it, it is possible to argue that Kelsen's general, "systematic" approach is, by author's admission, not *liberal* (subsequently not inspired by the *ideology* of "Constitutionalism"). Indeed, Kelsen affirmed to have *unintentionally* «contributed to the misunderstanding of the pure theory of law as liberalism (…) as an appendix of the liberal-individualistic Rule of law theory, or political democratism and pacifism»[9]. On the contrary, he rejects any sort of political theology and assumes that also *illiberal* regimes may be considered 'legal' systems[10]. His method and theory, then, aims to be scientific, neutral, descriptive, and non-evaluative[11].

In this framework, from a clearly *relativistic* axiological point of view, «the values supported by the majority are not less valuable

[8] R.P. McKeon, *The Philosophic Bases and Material Circumstances of the Rights of Man*, in *Human Rights*, above cited, at 45 (emphasis added).

[9] See H. Kelsen, *Formalismo giuridico e dottrina pura del diritto*, in *Lineamenti di una teoria generale dello Stato ed altri scritti* (1933). A more recent paperback edition of this work is edited by S.L. Paulson (1992).

[10] See now C. Luzzati, *Il nodo di Kelsen. Ancora liberali nonostante tutto*, in 15 *Lo Stato* 102 (2020). Kelsen's reject of political theology, however, does not deny his interest in the topic, stated by one of his less known work: H. Kelsen, *Die Staatslehre des Dante Alighieri* (1905), It. trans. *Lo Stato in Dante. Una teologia politica per l'impero*, Mimesis (2017). On this point see O. Lepsius, *Hans Kelsen on Dante Alighieri's Political Philosophy*, in 27 *EJIL. European Journal of International Law*, 1153 (2016).

[11] This is well explained by G. Gavazzi, *Introduzione*, in H. Kelsen, *La democrazia* (1981), especially 8.

than those supported by the minority»[12]. Hence, the minority can always become majority, confirming the absolute unknowability and total mutability of values.

Anyway, at the moment of turning to practical applications of his doctrine, Kelsen seems to mitigate the initial 'pureness' of his legal theory, as attested by his well-known contribute to the drafting of the Austrian and Czech Constitutions in the 1920s[13].

However, in theoretical terms, the alternatives to relativistic democracy are not attractive. According to Kelsen's perspective, democracy (where the values of the majority prevail, whether they are right or wrong) is the more preferable, or convenient, form of State compared to the opposing regimes of anarchy (*libertarianism*, which denies the existence of common values) and tyranny (*authoritarianism*, which imposes values with violence). This is due simply because in a democracy the majority of the associates is free (autonomy) and only the minority[14] remains in a state of subjection (heteronomy). Inexorably, in a democracy «the fewest people suffer»[15].

In short, my critic to Kelsen's theory does not focus on the *acknowledgment* of minority rights – a core topic, in *procedural/formalistic* terms, of his thought – but on the fact that his axiological relativism appears inadequate to legitimize the existence of *substantial* values 'shared' by both majority and minority, that is 'common' constitutional values.

Given that Kelsen realistically excludes the hypothesis of decisions taken unanimously, according to him the ideal regime would be that of *direct democracy*, where at least governed and rulers coincide. Nevertheless, in the practical impossibility of

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[12] G. Gavazzi, *Introduzione*, above cited, at 18.

[13] See, among others: P. Carrozza, *Kelsen and Contemporary Constitutionalism: The Continued Presence of Kelsenian Themes*, in 67/1 *Estudios de Deusto* 55 (2019); M.G. Losano, *Presentazione* to H. Kelsen, *Scritti autobiografici*, in *Acc. Sc. Torino, Atti Sc. Mor.* (2009), 95 ff. and Id., *La nascita della garanzia costituzionale in Europa (la Costituzione austriaca del 1920)*, in 1 *Consulta Online* (2021).

[14] See H. Kelsen, *Vom Wesen und Wert der Demokratie* (1920-1929), It. transl. *La democrazia*, cit., 94 ff. Note: Of the work, not the 1920 version is used here, but the 1929 version.

[15] In such a way, I elsewhere summarised Kelsen's point of view. See A. Spadaro, *Su alcuni rischi, forse mortali, della democrazia costituzionale contemporanea. Prime considerazioni*, in 1 *Rivista AIC (Associazione italiana dei Costituzionalisti)* 16 (2017), but see also Id., *Contributo per una teoria della Costituzione*, I, *Fra democrazia relativista e assolutismo etico* (1994), especially 245 ff.

implementing it, one must fall back on the "fiction" of representative democracy (parliamentarism)[16], which should be improved by tying the electoral body more to the elected representatives through a mechanism that closely resembles a binding mandate from the party, despite in the perspective of a proportional electoral system and effective internal party democracy[17]. In the end, and in opposition to Rousseau's thought, Kelsen joins the idea of deliberative democracy promoted in North America, for example, by Jefferson and Madison.

3. Historical limits of Kelsen's theory…

Although rigorously logical and acute, Kelsen's approach is strongly influenced by context and time. For example, Kelsen could not imagine the incredible evolution that telematics and the internet would soon have, up to the unpredictable developments of artificial intelligence today. Naturally, *ratione temporis*, he is still tied to the traditional role of parties and does not take into account the influence that *social media* and *algorithmic models* exert on democratic decisions. In short, he could not witness the rise of *digital democracy* and what is now known as *algocracy*[18].

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[16] «The fate of parliamentarism will also decide the fate of democracy»: H. Kelsen, in *Vom Wesen und Wert der Demokratie*, cit., at 67. See also Id., *Das Problem des Partamentarismus*, Wien - Leipzig 1924.

[17] H. Kelsen, *Vom Wesen und Wert der Demokratie*, cit., at 82 and 84: «We can certainly no longer think of a return of the imperative mandate in its ancient form; but [...] today we cannot categorically reject the idea of permanent control of deputies by groups of voters constituted in political parties. The possibility of legally carrying out this control exists [...] The irresponsibility of the deputy vis-à-vis his constituents, which is undoubtedly one of the essential causes of the discredit into which the parliamentary institution has fallen today, is not at all, as transpired by the 19th century doctrine, a necessary element [... it should not be surprising if ...] deputies, even if they are not tied to the mandate of their constituents, lose it as soon as they leave the party for or from which they were elected or as soon as they are excluded from it».

[18] Among a long list, see for example: C. O'Connor, J. Owen Weatherall, *L'era della disinformazione. Come si diffondono le false credenze* (2019); A. Soro, *Libertà, algoritmi, umanesimo digitale. Democrazia e potere dei dati*, Baldini e Castoldi (2019); L. McIntyre, *Post-verità* (2019); F. Donati, *Internet e campagne elettorali*, 16 Federalismi (2019); A. D'Atena, *Sul cortocircuito tra democrazia illiberale e* Internet, 13 Lo Stato (2019), 261 ff.; P. Gerbaudo, *The Digital Party* (2019), 105 ff.; M. Barberis, *Come Internet sta distruggendo la democrazia* (2020); F. Zambonelli, *Algocrazia. Il governo degli algoritmi e dell'intelligenza artificiale* (2020).

My concern is not about the *electronic* vote as a tool with pros and cons (having regard to the risk of electoral frauds) but relates rather to the strong (perhaps excessive) influence of statistic/algorithmic data on democratic processes as well on social networks' manipulation, especially if directed by foreign Countries. It is the case of *political bots* in US 2016 presidential election[19] and, in a more positive (though not completely satisfying) sense, of the 2013 web-participated constituent process in Iceland.

I also refer to the possibility of letting the Members of the Parliament to use the electronic vote staying at home. The issue has come at stake after the Covid-19 pandemic, due to the risk of virus circulation when the MPs gather during each session.

Kelsen stands firm on the idea, reasonable for his time, that *direct democracy* in mass society was impossible. For theoretical reasons that cannot be explored here, in my opinion the principle is still valid, but now it is possible to realise some type of *direct democracy*, despite in a primitive form. This stems from the possibility of easily voting "from home", or from wherever one is, simply by clicking on one's computer. There remains the insurmountable problem of the vote's freedom, which certainly no password can guarantee, since it cannot ensure with certainty the essential *secrecy* of the vote. However, it is possible to imagine at least a purely *consultative* telematic democracy rather than a truly *deliberative/decisional* one, but obviously in Kelsen's thinking there does not seem to be room for direct democracy in the form of *e-democracy*.

Additionally, today it appears inadequate Kelsen's 'recipe' of a closer link between elected representatives and voters through an imperative party mandate. Although this recipe is still popular, for example some political forces in Italy support it, it does not seem to be a valuable solution for various reasons, especially due to the current high levels of distrust towards parties, which are often de-ideologised and characterised by excessive personalism from their leaders. This idea of an imperative party mandate is proposed by the latest Kelsen, the "American" one, who is perhaps influenced by the clearly different US recall model. Nonetheless, this idea certainly does not appear to be suitable for solving the long-standing problems that representative democracies currently face all over the world.

[19] A. Chadwick, *The hybrid media system: Politics and Power* (2017).

Representative democracy would probably fall in a deeper crisis with the introduction of an imperative party mandate. This would make the elected members simple "puppets", emptying the freedom of thought that should always guide every parliamentarian. In Europe, the debate on this issue is very heated but it is largely prevalent the idea that the essence of political representation still stems from the idea of a free mandate (free even from party ties), while recognising the need to avoid the so-called *political transformism* of the elected representatives.

4. …and the inadequacy of democracy as mere procedure

The most radical and direct criticism to Kelsen's theory stems from his *neutral*, non-evalutative and merely *procedural* idea of democracy. This idea has never been appropriate for the existence and the survival of contemporary state, since it may introduce the risk for a state to be "democratic" … but not "liberal" anymore, refusing the indispensable values of constitutionalism, as it will be further discussed in the last paragraph, where I will mention the risks of contemporary national populism, as the dangerous Capitol Hill riot at the end of Donald Trump's presidency confirms[20].

As it is well known, Kelsen refers to the Gospel of John, chs. 18 and 19, as the main example to "explain" the relativistic, non-evaluative and merely procedural nature of democracy. This chapters allude to Pilate's famous appeal to the crowd, which ends with the condemnation of Jesus and the release of Barabbas. Kelsen almost *obsessively* employs the trial of Jesus as an illuminating historical precedent to explain the "democratic procedure", mentioning it at least six times in six different works (1920-29, 1933, 1948, 1955-6,1960 and 1979), written in German and English[21].

[20] For a further analysis on populism, see A. Spadaro, *Les évolutions contemporaines de l'État de droit*, in *Civitas Europa*, 37 Revue semestrielle de l'Université de Lorraine (2016), 95 ff. [published also in 8 Lo Stato (2017), 139 ff.], but especially Id., *Dalla "democrazia costituzionale", alla "democrazia a maggioranza populista/sovranista" alla "democrazia illiberale", fino alla.... "democratura"*, 3 Rivista di Diritto Pubblico Comparato ed Europeo (*DPCE online*) (2020).

[21] This passage of the Gospel is commented in these essays by Kelsen: *Vom Wesen und Wert der Demokratie* (1920), rev. in 1929; *Staatsform und Weltanschauung* (1933); *Absolutism and Relativism in Philosophy and Politics*, XVII The American Political Science Review 5 (1948); *Foundations of Democracy*, in *Ethics*, LXVI, 1, part II, 1955-56. He mentions it also in *Das Problem der Gerechtigkeit* (1960) and in *Allgemeine*

Several years ago, I dedicated an entire volume to critically comment on Kelson's interpretation of this event described in the Gospel of John and I refer to that work for a more detailed analysis[22].

Herein, I only highlight that this is an evident case of demagogy/ochlocracy/populism where irrational and inherently manipulative components of the democratic process emerge, but Kelsen seems to fail to acknowledge this. We know relatively little of how things actually went, but the very question that Pilate posed to the crowd, whether to free Jesus or Barabbas, is inherently equivocal and manipulative. In addition, the name of Barabbas, removed from the Gospels, was "Jesus" and also the Aramaic word "Bar Abba" (Son of the Father) constituted a messianic name of the Nazarene. Therefore, it cannot be excluded that Pilate ambiguously asked: do you want me to free "Jesus Bar Abba" or "Jesus Barabbas"? The ambiguity is also in the answer: Jesus! (which one?), Bar Abba! Barabba (which?). The episode, whether true or false, is a sufficient indication of how every "direct appeal to the people" with subsequent decision (*Volksabstimmung*) presents irrational and emblematic aspects of irresolvable complexity. In any case, this is a dangerous historical simplification, which is an example of "ochlocracy" (government of, and over, the crowd), not of democracy (government of the people) and certainly not of "constitutional democracy" (government of the people "limited" also by meta-democratic principles).

As it should be clear by now, the democratic procedure alone does not necessarily lead to *fair* decisions. Even without mentioning the endless issue related to the mechanism of political representation (*Repräsentation*, *Vertretung*, identity, identification, etc.), nowhere is it stated that what the greatest number decides is fair. *Vox populi* is not necessarily *vox dei*. On the contrary, historical experience tells us that the opposite is often true. In particular, *truth* (scientific, empirical, philosophical, moral, political, etc.) has nothing, or very little, to do with the *democratic principle*, that is, the principle by which majority wins/prevails and minority

Theorie der Normen (1979). For a further analysis in this respect, see my *Contributo per una teoria della Costituzione*, cit. at 15, 333, pp. 190, especially fn. 3.

[22] See A. Spadaro, *Contributo per una teoria della Costituzione*, cit. at 15, 333, especially 189 ff.

loses/succumbs[23]. Unfortunately, at least in this respect, from a political viewpoint democracy by itself (*i.e.*: without a *constitutional* trait, that means *liberalism* and some kind of 'limited government'), is not a particularly preferable regime to another, since we all know very well that the *maior pars*, which decides in a democracy, is not necessarily the *melior pars*[24].

In short, if democracy is meant as a synonym of mere *procedure*, it cannot grant the well-functioning of complex societies and citizens' freedoms. All these goods need a *Constitution*, whose concept does not flatly coincide with *democracy*. Indeed, the Constitution is not an 'empty box' that temporary political majorities can fill as they please: this would lead to a minimal, substantially *wertfrei* (value-free), basically procedural idea of Constitution, in opposition to the American notion of Higher Law in natural law terms. US *Bill of Rights* or article 16 of the 1789 *Déclaration des Droits de l'Homme et du Citoyen* are excellent paradigms of *substantial* limit to pure democratic will. As well known, article 16 runs as follow: « Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de Constitution ».

5. Logical need for meta-democratic (largely "constitutional") limits to democracy

I believe that democracy is historically the best form of government, mainly for two reasons:

a) Democracy is historically the best form of government not specifically because in a democracy "the least number of people" suffer (as Kelsen implies), but rather since it is the only regime which "tries" to reach "shared" social decisions, albeit rarely unanimously, as a government by discussion (*government par la discussion*). Unlike all the others, being preceded

[23] See especially A. Spadaro, *Contributo per una teoria della Costituzione*, cit. at 15, 333, 121 ff., and *passim*; P. Häberle, *Wahrheitsprobleme im Verfassungsstaat* (1995), It. transl., (2000); and now, J. Nida-Rumelin, *Demokratie und Wahrheit* (2006), It. transl., (2015). The latter (at 13) reminds that «Democracy without pretentions of truths is void of content. Democracy is not reduced to a mere game of interest».

[24] See, above all, G. Sartori, *Democrazia e definizioni* (1979), 80 ff., and *passim*.

by a public discussion[25], democratic social decisions could be wrong, and not infrequently they are, but they also are, or at least seem to be, more *persuasive*[26] and, consequently, they "try" to be *non-violent*[27].

b) The democratic form of state is the best one only whether inspired and "limited" by a framework of values-principles (meta-democratic) contained in the constitutional charts (and, a fortiori, in the many "universal declarations" of human rights), without resulting in an aberrant heterogony of ends (*Heterogonie der Zwecke*), that is, an "ethical" state. Unfortunately, unlike some philosophers, as jurists we are not able to establish what is the "foundation" (*Grund*) of these principles, whether natural law or not, but we can reasonably contend that, *without them*, a democracy cannot work.

What is certain is that the constitutional principles mentioned herein – recognised in terms of *human rights* in the American tradition, and of *natural law* in the European context (*supra*, para. 1) – are capable of constituting a real "limit" to popular sovereignty, and subsequently to democratic power, precisely since they refer to "over epochal" social values. As stated above, these values must be "not" simply of procedural derivation, that is, democratically decided, but *substantial* and self-legitimating (*selbst-legitimation*). To this end, in order to avoid an insuperable logic aporia, namely "a dog biting its own tail", it seems unthinkable that a procedure (democracy) is limited simply and exclusively by another procedure (the Constitution, at least understood according to Kelsen's pure/formalistic approach).

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[25] As it is well-known, J. Habermas's contribution in this respect is decisive, for example in *Faktizität und Geiltung. Beiträge zur Diskurstheorie des Recths und des demokratischen Rechtsstaats*, (1992), It. transl., (1996), especially 341 ff.

[26] As J. Nida-Rumelin rightly observes: (*Demokratie*, cit. at 37 e 40): «In a democracy, the discussion of arguments and the use of good reasons play a greater role than in any other form of government [...] It is the public use of reason that legitimises political action in a democracy, not the continuous approval of every single political decision in parliament and government».

[27] That this is a mere hope or attempt, and unfortunately not a certainty, is confirmed by the fact that constitutional states often provide for, or better phrased, they must provide for, the right to *conscientious objection*, which is the last extreme guarantee of the single individual to protect the principle of dignity of the human person from majority decisions. On this point, see my *Libertà di coscienza e laicità nello Stato e laicità nello Stato costituzionale* (sulle radici "religiose" dello Stato "laico") (2008).

In sum, drawing on incontrovertible logical-legal reasons partly attributable to mathematician K. Gödel's incompleteness theorems [*i.e.*: the 'inner' aporia of a (democratic) system can be solved only by means of an 'outer' factor (constitutional values)][28], the rules of the democratic game must be inspired and limited by substantial and *meta-democratic* values, as from a legal viewpoint O. Weinberger[29] well puts. In particular, I am herein referring to the supreme values constituting the so-called "intangible hard core of constitutions": those that, in Italy, the Constitutional Court calls «fundamental principles and inviolable rights» (starting from sentence no. 1146/1988), which *are* not and cannot be subject to the mutability of democratic public opinion.

Nonetheless, the aforementioned fundamental principles and inviolable rights cannot be 'selected' and 'determined' *exclusively* and *arbitrarily* by Constitutional Courts, not by chance depicted in Kelsen's theory as 'super-legislators' (*Uberparlament*), albeit only with repealing functions (*negative Gesetzgebung*)[30]. By contrast, it is a non-viable option to 'freeze' constitutional texts at a certain historical moment, excluding appropriate hermeneutical updates besides the path of formal revision procedures. To this end, affirming the need for 'constitutional' (and not mere or simple) democracy' does not mean, in the context of the theories on constitutional interpretation (just briefly mentioned herein), flatly adhering to the *originalist* theses, in the most extreme *textualist*

[28] *Human dignity* represents the ultimate goal of a liberal-democratic Constitution; even if it were formally unexpressed, it will remain a super- and meta-constitutional value. On this point, and for further references, see my *L'idea di Costituzione fra letteratura, botanica e geometria. Ovvero: sei diverse concezioni "geometriche" dell'"albero" della Costituzione e un'unica, identica "clausola d'Ulisse"*, in F. Fernández Segado (ed.), *The Spanish Constitution in the European Constitutionalism Context*, (2003), 169 ff., published also 6 Revista Brasileira de Direito Constitucional (2005), 119 ff.

[29] See the bold and sharp commentary by O. Weinberger, *Abstimmungslogik und Demokratie*, in *Reform des Rechts. Festschrift zur 200 Jahr-Feier der Rechtswissenschaftlichen Facultät der Universität Graz* (1979), 605 ff.; but also Id., *Rechtspolitische Istitutionanalyse*, in *Geseztgebunstheorie und Rechtspolitik* (1988), It. transl. in N. Mac Cormick - O.Weinberger, *Il diritto come istituzione* (2009) especially 313 ff. Despite from a different perspective, it relates to what L. Ferrajoli (*Iura Paria. I fondamenti della democrazia costituzionale*, (2017), 48, calls «sphere of the non-decidable».

[30] See H. Kelsen, *La garantie jurisdictionnelle de la Constitution (La justice constitutionnelle)*, XXXV Rev. dr. publ. et sc. pol. (1928), 197 ff., It. trans., (1981), 143 ff.

version, which tend to "mummify" a constitutional Charter. Instead, a *balanced* but evolutive interpretation of the Constitution is indeed needed, without this leading to the so-called "free judge-made law" (*freie Recht*)[31].

As I already argued in many of my works, democracy, left alone, could be compared to a "child" abandoned to itself: it can rarely survive. If a child does not become "adult", he/she can very easily get into trouble. Out of metaphor, if a democracy does not grow into a *constitutional* democracy, its wellbeing can be at serious risk. The failure of most of the so-called "Arab springs" (in countries with very modest, if non-existent, constitutional traditions) or the recent elections of "unreliable leaders" (in countries with great constitutional traditions) essentially constitutes the failure of the *democratic* political procedure rather than of the legal model of *constitutionalism*, which is imperfect but still valid. The outcome of a democratic procedure can be not only naturally unpredictable but also ominous or even counterproductive, due to the phenomenon of widespread and sophisticated manipulation of public opinion.

This issue is ancient and could be summarised as follows: *how to defend democracy from itself*. Therefore, the mere democratic regime risks being a form of dictatorship in some respects perhaps even worse than the other regimes. Although, in a parliamentary system, limited in time (until the transformation of the minority into a "new" majority), the *tyranny of majority* presents strong totalitarian aspects, due to the intrinsic violence and psychological oppression that the force of number can determine on individual free conscience[32]. In conclusion, it is thereby necessary that in order not to degenerate democracy becomes "constitutional". Nonetheless, this process requires an adequate historical context and a unique *civil and political maturation*.

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[31] On this aspect, see A. Ruggeri, A. Spadaro, *Lineamenti di giustizia costituzionale*, 6th ed., (2019), especially at 19 (with further references).

[32] See, above all, L. Talmon, *The origins of totalitarian democracy* (1952), It. transl. Il (1967). Nonetheless, the risk of a tyranny by the majority is an issue widely discussed by the literature. See for example A. de Toqueville, *La démocratie en Amérique* (1835-1840), It. transl., (1971), for example 107 ff. (it is the well-known chapter on the "Omnipotence of the majority in the United States and its effects"). On democracy and non-violence, see G. Sharp, *Come abbattere un regime. Manuale di liberazione non violenta* (2011), especially 109 ff.

6. Kelsen as a thinker (involuntarily) liberal and thus (implicitly) in favour of constitutional democracy

As I indicated in another work, «the links between Kelsen's *Reine Rechtslehre* and *Politischer Wertrelativismus* […] are more than evident: they represent two sides of the same coin»[33]. Paradoxically, it is the fragility of Kelsen's political relativism that makes the purity of his legal doctrine less credible.

As previously mentioned, he always denies that his theories have an ideological content, that is, distinctly "liberal", and excludes any axiological contamination external to his thought. However, he is not only surely a convinced liberal democratic, but he is forced to contradictorily contaminate his theory of democracy, which is a merely *procedural* construction, with *substantialist* arguments (liberal ideology).

On the one hand, Kelsen is aware that political *liberalism*, the other side of legal *constitutionalism*[34], essentially means «limitation of power […] also limitation of democratic power», to the point of admitting that a social order that did not provide for «guarantees for certain intellectual freedoms, especially for freedom of conscience […] would not be considered democratic». On the other hand, he continues to stubbornly say that «even liberal democracy is first and foremost a procedure»[35]. At this point, it seems that the issue is almost "terminological": Kelsen regards as and calls *political* freedoms "procedures" as well. Nevertheless, even considering them mere "logical" presuppositions of the majority or democratic procedure, there is no doubt that the principles that enunciate political rights and freedoms are not mere procedural techniques, but on the contrary have a remarkable substantial "axiological" nature.

This is a result of Kelsen's decision to remain within the "logical citadel" of rigid formal purity of the law, where the formal-hierarchical distinction between the normative sources, for example between the Constitution and primary law, is not also axiological-

[33] See my *Contributo per una teoria della Costituzione*, cit. at 15, 333, at 319.

[34] Indeed, 'constitutionalism' is nothing else that the translation in *legal* terms of the *political* ideology of 'liberal democracy'. See, amongst all, cfr. A. Spadaro, *Costituzionalismo,* in *Enciclopedia filosofica*, vol. III, (2006), 2369 s. (with further references).

[35] H. Kelsen, *Foundations of democracy*, in *La democrazia*, cit, at 188.

substantial but only procedural. He goes so far as to imagine that the Constitution prevails only because the procedure for its drafting or modification is more complex than that approving primary law. According to Kelsen, all defects of the law are mere formal/procedural defects, and it would thus be sufficient to adopt the correct procedure (for example of constitutional revision) to remedy the defect of a law that "substantially" violates a rigid Constitution[36]. It is surprising that Kelsen does not seem to realise that this leads to overcome only *psychologically* but not *logically* the substantial defects of the law, since "before" adopting the right revision process (instead of the ordinary one) it is always necessary to ascertain the existence of a substantial defect.

Above all, in such a closed and apparently perfect construction, Kelsen clearly lacks the idea of the existence of a "hard constitutional core" – by and large shared by European contemporary constitutions, as for Italy under the formula 'constitutional counter-limits'[37] – that *definitively* fixes the principles of liberal democracy, subtracting them from any majoritarian-democratic logic[38]. In reality, as already argued, he does not ignore the need for constitutional "guarantees" but he does not make explicit, or he forgets, their nature as an axiological supra-majoritarian framework. Indeed, it is worthless acknowledging, with Kelsen, the importance of liberties (and of 'constitutional adjudication' mechanisms devoted to their protection) and at the same time admitting, as in Kelsen's theory, that *any* prevision of the Constitution may be modified simply following the appropriate formalistic procedures provided therein[39]. Fortunately, Kelsen

[36] See again H. Kelsen, *La garantie jurisdictionnelle de la Constitution*, cit. at 23, 334, at 154.

[37] On this topic, see S. Polimeni, *Controlimiti e identità costituzionale nazionale. Contributo per una ricostruzione del «dialogo» tra le Corti* (2018) (with further references).

[38] On this point, amogst all, A. Ruggeri, A. Spadaro, *Lineamenti di giustizia costituzionale*, cited above, especially 130 ff.

[39] Albeit widely known, it is worth recalling Kelsen's own thought: «a statute may result unconstitutional both for a lack regarding the procedures for its adoption and for a substantial contrast with some principle or directive set forth by the constituent power, when the statute exceeds predetermined limitations (…) This distinction, however, is acceptable only under the condition that even the so-called substantial lack is turned into a procedural lack, for the contrast of statute and constitution's contents would be overcome if the former were adopted following the procedures for constitutional revision». See H. Kelsen, *La garantie jurisdictionnelle de la Constitution*, cited above, at 154. But it should be

himself refrains from a 'literal' application of his theory, for examples in the drafting of the Austrian Constitution, where the distance between the severe formalistic *legal* doctrine and concrete *political* thought and conduct followed by the Author clearly emerges.

The transfer of such a great extent of abstract formal logic from legal to political theory is immediate. As a political philosopher, Kelsen argues that the *majority principle*, which represents the foundation of a democracy, neutrally expresses a "quantitative" method that always cancels any "qualitative" judgment[40]. He does not admit the principle "*princeps legibus solutus est*" and he contends that the "compromise" is born from the parliamentary confrontation between majority and minority and this is made possible only by *political relativism*. Nonetheless, it is the same person that, arguably contradictorily, then appeals (or acknowledges) what he calls, a little euphemistically, the "principle of tolerance", which on closer inspection is not very relative: «democracy cannot be an absolute domination [...] of the majority [...] not only because of the fact that by definition it presupposes an opposition, that is, the minority, but also because it recognises its political existence and it protects its rights» to the point of finally admitting that «modern democracy cannot be separated from political liberalism. Its principle is that the government must not interfere in certain spheres of individual interests, which must be protected by law as fundamental human rights or rights to liberty; respecting which minorities are safeguarded from the arbitrary domination of majorities»[41].

Naturally, the narrative that Kelsen employs to admit this recalls and suggests a procedural dimension, perhaps owning to an intimate need for consistency. It is as if he said: "guarantees are needed for the minority to survive and become a majority, respecting the procedures".

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added (and Kelsen did not add) that no statute, *even of constitutional rank*, could really question what is *definitively out of question*, that is fundamental freedoms and democratic procedures themselves. On this point, see also below in the next footnote. On the risks of interpreting constitutional adjudication as an implicit consequence of finalizing democratic theory to the protection of minority rights, as in Kelsen's though, see now O. Pfersmann, *Natura e valore della democrazia cento anni dopo. Dalla procedura del compromesso alla trasformazione giurisdizionale*, 3 Dir. pubbl. 2020, 887 ff.

[40] See H. Kelsen, *Foundations of democracy*, cit. at 21, 336, at 231, especially fn. 1.

[41] *Ivi*, 237 et seq.

However, the fact remains that "guarantees", whether they are called *liberal* or *constitutional*, are *not* procedures but (substantial) limits to the democratic procedure! And the democratic "compromise" that led to the *stable* drafting of those (constitutional) guarantees is absolutely not comparable to the everyday parliamentary "compromise" that leads to the more widespread and *variable* production of (legislative) legislation[42].

In addition, it does not seem sufficient to recall the *generic principle* of tolerance, as Kelsen does, on the basis of the (questionable) thesis that «tolerance presupposes the relativity of the sustained truth or of the postulated value, and this relativity implies that the truth or the opposite value are not entirely excluded»[43]. For an easy critique of this hasty conceptual simplification, it would be enough to remember, for example, that "tolerating" the deniers/flat-earthers does not at all presuppose the relativity of the opposite truth supported by science[44]. In short, it does not seem enough to recall the principle of tolerance as a limit (by the way implicit) to the democratic procedure. In fact, «modern pluralist democracy is not the regime of full tolerance, which is the regime where the majority, from time to time, decides the content and limits of *values*, thus identifying, in an ever-changing way, *what truth is*. A democracy without "fixed points" [...] is a regime of tolerance paradoxically willing to tolerate also the intolerants, therefore even willing to commit suicide [instead] a true democracy is intrinsically the regime of "relative" tolerance or, in other words, of "partial" relativism: but it is now evident, at this point, that herein the concept of democracy ends and that of Constitution begins»[45].

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[42] According to H. Kelsen (*La garantie jurisdictionnelle de la Constitution*, cit. above, at 202), «If the essence of democracy lies not just in majority omnipotence rather than in the continuous compromise between majority and minority parliamentary groups, and thus in the social peace, constitutional adjudication appears the most adequate means to put this idea in practice».

[43] See H. Kelsen, *Foundations of democracy*, cit. at 21, 336, at 313.

[44] For a further analysis, see my *Contributo per una teoria della Costituzione*, cit. at 15, 333, above, 261 ff.

[45] Quoted from my *Contributo per una teoria della Costituzione*, cit. at 15, 333, at 277 e 287, but see *passim*. Instead, on the issue of a democracy that can always "democratically" question itself, see in Italy, more explicitly, F. Rimoli (*Pluralismo e valori costituzionali. I paradossi dell'integrazione democratica* (1998), 378 ff.) and, with some uncertainty, G. Zagrebelsky (*Il «crucifige!» e la democrazia* (1995) 101 ff.), alluding to a *critical democracy*, that is, perpetually under discussion. However, this type of democracy evidently is NOT a "constitutional democracy":

Certainly, the contradiction or aporia just discussed is not the only one within a thought as rich and articulated as Kelsen's[46], but surely the sought-after scientific "purity" of the *Reine Rechtslehre* method in the legal elaboration does not help a "coherent" construction of the *Politischer Wertrelativismus* as the basis of a functioning democracy[47].

In fact, «relativism is in kelsenian thought the matching point between the defence of science and the defence of liberal democracy (…) the Achille's heel of kelsenian democratic theory is exactly the same of his general law theory: the impossibility – and, I would say, the uselessness too – of an *indifferent*, neutral viewpoint when the protection of democratic values is at stake».

In conclusion, Kelsen is a convinced liberal-democratic and certainly seems to adhere to the historical model of *constitutional democracy*, where the popular will is not absolute, but "limited" by superior values, also (not especially) scientific[48]. However, Kelsen clearly avoids recognising the imperative *logical* necessity of fixed points, that is, of a stable substantial *axiological* framework, since it is removed from the variable majorities. Why? Perhaps for the fear that this recognition could lead to an involuntary *return of natural law*, which, to the father of the "pure doctrine" of law, would appear as an even more intolerable inconsistency.

7. Conclusions: the current risks to *constitutional democracy*: towards a *démocrature*?

The limits but also the merits of Kelsen's contribution to democratic theory can perhaps be better noticed today than yesterday.

At the time of writing, the "constitutional" state is in crisis in many countries around the world, which accept (or pretend to

for a critical analysis on this point, see my *Libertà di coscienza e laicità nello Stato costituzionale*, cit. at 16, 331, 209 ff. but see *passim*.

[46] This is not the right place to list Kelsen's aporias. On this point, see my *Contributo per una teoria della Costituzione*, cit. at 15, 333, 235 and 277 ff.

[47] In critical perspective, among others, see also: S. L. Paulson, B. L. Paulson, *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (1988); A. Somek, *Stateless Law: Kelsen's Conception and its Limits*, 26 Oxford Journal of Legal Studies 4 (2006), 753 ff.

[48] In particular, H. Kelsen (*Foundations of democracy*, cit. at. 21, 336, 238 ff.) mentions a «rational science» in contrast with «any metaphysical or religious intrusions».

accept) the *democratic* procedures but do not accept, or evade, the *liberal* guarantees of the rule of law. In my view, the expression popular/political/populist/illiberal[49] constitutionalism constitutes an intolerable *oxymoron* or at least delineates a constitutionalism seriously ill. Unlike the past, when the *law* was an instrument of *political* power, today *constitutionalism* in its essence is the exact opposite: an instrument of *legal limitation of political power*[50].

Although it is highly desirable for a *democracy* (a purely procedural concept) to be *constitutional* (a predominantly axiological-substantial concept), nevertheless it cannot be excluded that in practice there are also imperfect forms of democracy. However, a "simple" democracy, without adjectives, inevitably tends to also become totalitarian (majoritarian autocracy): this is the case of "uncertain" or "illiberal" democracies[51]. Some examples are H. Rouhani's Islamic Republic of Iran or N. Maduro's Bolivarian Republic of Venezuela. In both cases, on closer inspection, we are faced with "democracies": in fact, with all imaginable reservations, people ... "vote".

It follows that democracy or primacy of the popular will, alone without the adjectives necessary to qualify it (*liberal, constitutional* ...), is a bad regime, not too dissimilar from authoritarian and totalitarian ones. In recent times, "intermediate" entities are being formed between the *democratic-constitutional* and the *non-democratic states*, which can be briefly examined diachronically with the following scheme:

I stage:

• **DEMOCRACIES WITH «POPULIST/SOVEREIGN» MAJORITIES** [H.-C. Strache's Austria, the yellow-green Di

[49] Among a long list, see M. Tushnet, *Authoritarian Constitutionalism*, 100 Cornell Law Review 2 (2015, Jan.); G. Frankenberg, *Authoritarian Constitutionalism - Coming to Terms with modernity's nightmares*, in H.A. García,G. Frankenberg (eds.), *Authoritarian Constitutionalism. Comparative Analysis and Critique* (2019). See also A. Di Gregorio, *Le transizioni alla democrazia nei Paesi dell'Europa centro-orientale, baltica e balcanica*, in A. Di Gregorio (ed.), *I sistemi costituzionali dei paesi dell'Europa centro-orientale, baltica e balcanica* (2019), 1 ff.

[50] On this point, see again A. Spadaro, *Costituzionalismo* cit. at 34, 342, 2369 f.

[51] This issue has been widely discussed in the literature (see for example G. Sartori, *Democrazia e definizioni*, cit. at 24, 338, especially 226 ff.) but reached global recognition with Fareed Zakaria, *The rise of Illiberal Democracy*, 76 Foreign Aff. 6 (1997, nov./dec.), 22 ff. ,T.G. Daly has even listed many ways to indicate the decay of democracies: see www.democratic-decay.org/index.

Maio/M. Salvini's Italian government, D. Trump's USA, etc.: anti-Europeanism, economic protectionism, masked xenophobia, intolerance to the checks and balances of constitutional guarantees]

II stage:

• **«ILLIBERAL DEMOCRACIES»** [V. Orban's Hungary, twins Kaczyński's Poland, etc.: the tendency towards the tyranny of majority, *very strong nationalist/sovereign identity*, limitations of judicial powers and civil rights]

III stage:

• **«*DÉMOCRATURES*» [**V. Putin's Russia, R.T. Erdogan's Turkey, Lukašėnka's Belarus, etc.: limitations of freedom of the press, control of the judiciary, repressions of the oppositions**]**

Illiberal democracies and *démocratures* could be defined as "post-constitutional" states, that is, intermediate entities between "constitutional" states (classical liberal regimes) and traditional "anti-constitutional" states (authoritarian/totalitarians regimes)[52].

If what hitherto briefly explained is true, the real problem that, today as yesterday, must be faced without unnecessary evasion remains that of "sovereign" or absolute power, regardless of who holds it: the individual, as Schmitt wanted (the *Führerprinzip* of the authoritarian regime), the ideological party (the *communist-Stalinist* party in a totalitarian regime) or even the people (the *political representation* of the democratic regime). In the rule of law, and thus in the *constitutional* order, a "sovereign" power is always inadmissible, because this system is historically characterised as the social organisation that has the "limitation of power" as its primary objective, whatever it may be.

Surely, everyone would benefit from a better selection of the political class and the existence of parties with true internal democracy. Nonetheless, if the basic problem remains that of the "limitation of power", it is not needed "more" democracy (*quantity*) but rather "better" democracy (*quality*). In short, more Constitution is needed, that is, greater attention to constitutional guarantees that constitute a 'limit' to the democratic process.

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[52] For a further analysis, and references, of this issue, that here can be inevitably just touched, see my *Dalla "democrazia costituzionale", alla "democrazia a maggioranza populista/sovranista" alla "democrazia illiberale", fino alla.... "democratura"*, cit. at 20, 336.

It must be said that to a certain extent this was clear to Kelsen, at least in the case of his defence of the Constitutional Court against Carl Schmitt. However, in the current difficult international and comparative context mentioned earlier, which calls into question the very idea of *limitation of power*, the "limit" of Kelsen's approach is given precisely by the insufficient explanation of the value of "constitutional" democracy and, in particular, by the failure to recognise *substantial* axiological limits to democratic *procedures*.

Paradoxically, perhaps the "value" is also hidden in the "limit". After all, Kelsen reminds us, with a certain ruthlessness but not wrongly, that democracy alone *without adjectives* is simply the regime of the majority, a mere "procedure", the results of which are not necessarily "right", but only welcome to most or, perhaps better phrased, unwelcome to least. Nothing more and nothing less.

This is precisely the necessary knowledge base, minimum I would say, from which to start to recognise that the legitimation of power "from below", of democratic origin, alone is insufficient for a good functioning of the state. It is also required a legitimation "from above", given, on the one hand, by the micro-truths continually discovered by science, and, on the other, by a necessary supra-majority legal-political axiological framework: the "Constitution".

TOWARDS A THEORY OF TRANSNATIONAL JUDICIAL REVIEW IN EUROPEAN ADMINISTRATIVE LAW*

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Abstract

In the cases of *Berlioz* (2017) and *Donnellan* (2018), the European Court of Justice has required national judges, under certain conditions, to carry out the transnational judicial review of preparatory acts adopted, in mutual assistance procedures in the tax field, by authorities of EU Member States different from those in which the judiciary concerned is located. The present Article takes an Italian ruling on a case presenting a factual setting similar with *Donnellan* as a case study, and explores the limits and prospects of such doctrine of transnational judicial review under EU fundamental rights law (with a view, in particular but not exclusively, to the right to an effective judicial remedy). It thus strives to develop a general theory of transnational judicial review for EU administrative law.

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1. Introduction and Methodological Remarks

Despite the unquestionable specificity of its substantive aspects (identifying, for instance, taxable facts and the relevant tax rates), tax law raises, in respect of its organisational and functional dimensions, a number of questions shared with general administrative law.[1] This is true, in particular, as regards the issues revolving around the judicial review of acts of tax authorities, where a confrontation of private (here: that of the taxpayer in preserving their property) and public (here: that of the government in maximising revenues) interests requires an appropriate balance to be struck – arguably, the main feature of administrative law as a discipline since its very emergence.[2] Viewed through this lens, the system of mutual assistance established by the EU for tax recovery

[1] The point has been strongly debated in recent years in the US jurisdiction, in particular following the Supreme Court's ruling in *Mayo Foundation for Medical Education & Research v United States* (2011) 562 US 44. Here, the Supreme Court maintained that the famous deference standard for judicial review of agencies' acts executing a federal statute, laid down in *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837, was, contrary to what had been deemed that far, also applicable to acts of the Treasury Department. For an introduction to the debate, see R. Murphy, *Pragmatic Administrative Law and Tax Exceptionalism*, 64 Duke L.J. Online 21 (2014-2015); for a defense of the peculiarity of the role occupied by tax law in the US legal system, see L. Zelenak, *Maybe Just a Little Bit Special, after All?*, 63 Duke L.J. 1897 (2014).

[2] This is not, however, an undisputed understanding of administrative law in turn: see the juxtaposition of "control" and "instrumentalist" theories of administrative law, and the application thereof to European administrative law, drawn by C. Harlow, *European Administrative Law and the Global Challenge*, European University Institute Working Paper RSC 98/23 (1998).

and assessment purposes[3] does, indeed, share a number of features and challenges with EU administrative law. Just like therein, cooperation in fiscal matters brings together authorities coming from a number of different national jurisdictions, contributing through discrete, yet coordinated acts to the adoption of an administrative act (be it of assessment, or of enforcement of a claim) which impinges upon the legal entitlements of taxpayers. The cross-boundary pattern of cooperation thus carried out hence provides a striking example of what EU administrative law scholarship labels a "horizontal composite procedure": administrative acts adopted by the authorities of an EU Member State (MS) are based on a preparatory act adopted by the authorities of a different MS.[4] Such procedure(s) raise(s) serious questions on the judicial review side.

[3] For a concise, yet comprehensive overview of the system, see S. Hemels, *Administrative Cooperation in the Assessment and Recovery of Direct Tax Claims*, in P.J. Wattel, O. Marres & H. Vermeulen (eds.), *European Tax Law: Volume I – General Topics and Direct Taxation* (7th ed., 2018).

[4] Horizontal composite procedures are to be contrasted with "vertical composite procedures", which do similarly involve a cooperation between administrative authorities belonging to different jurisdictions; in such case, however, coordination occurs between the authorities of a MS, on the one hand, and those of the EU (e.g. the European Commission, or a European Agency), on the other hand. Both vertical and horizontal procedures are increasingly common techniques of implementation of EU (administrative) law, and amount to one of the most distinctive features thereof. Scholarly and judicial elaboration, however, seems to be significantly more developed on vertical composite procedures than it is on their horizontal counterparts. On these and other aspects, with a focus on the notion and the functional aspects of composite procedures, see G. Della Cananea, *The European Union's Mixed Administrative Proceedings*, 68 Law & Contemp. Probs. 197 (2004); H.C.H. Hofmann, *Decision-Making in EU Administrative Law – The Problem of Composite Procedures*, 61 Adm. L. Rev. 199 (2009); H.C.H. Hofmann, G.C. Rowe & A.H. Türk, *Administrative Law and Policy of the European Union* (2011), 405-410; M. Eliantonio, *Judicial Review in an Integrated Administration: The Case of 'Composite Procedures'*, 7 Rev. Eur. Adm. L. 65; B.G. Mattarella, *Procedimenti e atti amministrativi*, in M.P. Chiti (ed.), *Diritto amministrativo europeo* (2nd edn., 2018), 343-345; H.C.H. Hofmann, *Multi-Jurisdictional Composite Procedures: The Backbone to the EU's Single Regulatory Space*, University of Luxembourg Law Working Paper No 003-2019 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399042> accessed 3rd February 2022.. Focussing more on the institutional and organisational implications of Europe's "composite administration", see C. Franchini, *Les notions d'administration indirecte et de coadministration*, in J.B. Auby, J. Dutheil de la Rochère & E. Chevalier (eds.), *Traité de droit administratif européen* (2nd edn., 2014); L. De Lucia, *Strumenti di cooperazione per l'esecuzione del diritto europeo*, in L. De Lucia, B. Marchetti (eds.), *L'amministrazione europea e le sue regole* (2015).

It is, indeed, frequently difficult to effectively safeguard the taxpayer's rights and interests, because of the entanglements between authorities and functionally tied administrative acts, spanning in a transnational dimension, through which fiscal cooperation unfolds. In recent years, tax law scholars have, in fact, started applying categories developed in the EU administrative law field to the EU system of administrative cooperation in fiscal matters,[5] and it is likely that this fertile trend will (and should) continue. EU administrative law scholarship can provide EU tax law with powerful analytical grids to tackle what scholars in the latter field themselves forcefully point to as the most compelling question faced by their discipline as it stands now – the protection of taxpayers' (fundamental) rights and the filling of the gaps in judicial protection left by the transnational dimension of mutual assistance procedures.[6]

The European Court of Justice (ECJ) itself is gaining increasing awareness of the problem. In an earlier contribution,[7] we analysed the landmark rulings of *Berlioz* (2017)[8] and *Donnellan* (2018),[9] in which the ECJ upheld what we labelled "transnational judicial review". In those cases, the ECJ empowered (and actually required), under certain circumstances, national judges to review, in the context of proceedings initiated against acts adopted at the outcome of a horizontal composite procedure in the fiscal field, the legality of preparatory acts adopted by authorities belonging to the legal system of another MS. In both cases, transnational judicial review was deemed necessary to safeguard the right to an effective judicial remedy under Art. 47 of the Charter of Fundamental Rights

[5] See, for instance, S. Dorigo, *Mutual Recognition versus Transnational Administration in Tax Law: Is Fiscal Sovereignty Still Alive?*, 13 Rev. Eur. Adm. L. 209 (2020). More comprehensively, but not always as lucidly, F. Saponaro, *L'attuazione amministrativa del tributo nel diritto dell'integrazione europea* (2017), in particular 186-208 and 331-371.

[6] See I. De Troyer, *Administrative Cooperation and Recovery of Taxes*, in C.H.J.I. Panayi, W. Haslehner & E. Traversa (eds.), *Research Handbook on European Union Taxation Law* (2020), in particular 478-480 and 484-487; K. Perrou, *Fundamental Rights in EU Tax Law*, Ibid., in particular 529-539; G. Kofler, *Europäischer Grundrechtsschutz im Steuerrecht*, in M. Lang (ed.), *Europäisches Steuerrecht* (2018), in particular 179-185.

[7] P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures:* Berlioz*,* Donnellan*, and the Constitutional Law of the Union*, 5 Eur. Papers 41 (2020).

[8] ECJ, Case C-682/15 – *Berlioz Investment Fund* (ECLI:EU:C:2017:373).

[9] ECJ, Case C-34/17 – *Donnellan* (ECLI:EU:C:2018:282).

of the European Union (CFREU). In both cases, the benchmark against which to carry out such review were EU law norms regulating the transnational administrative cooperation process, from both a substantive (in *Berlioz*) and a procedural (in *Donnellan*) point of view. This legitimised a judicial review which could have otherwise been regarded as an intrusion into another MS' sovereign legal order: the judges of all MS are *juges de droit commun*, equally entitled to review the correct application of EU norms, irrespective of the fact that, *in casu*, they would be executed by the authorities of another MS (which would hence be acting *qua* part of the EU's integrated administration, and not of that State's sovereign executive power).[10] We maintained that this strand of case law marks a much welcome development in EU law, filling the gaps in judicial protection which have this far been left much too often in the context of administrative cooperation in fiscal matters; and, most importantly, that the fact that transnational judicial review was based on Art. 47 CFREU, a general provision, gives this case law the potential of being applied throughout the whole range of horizontal composite procedures deployed by EU administrative law.[11]

The acceptance of transnational judicial review at the supranational level, however, does not, as such, have any impact on the actual practice of horizontal composite procedures. By definition, such procedures are carried out at the national level: they entail the adoption of administrative acts on the part of authorities of the MS, which must be challenged before the judiciary of the respective legal system. This means that, once the ECJ clarifies that EU law enables and requires national judges to review the legality of foreign preparatory acts, those judges must be actually ready to do so in the concrete cases before them, for taxpayers' right to an effective judicial remedy to be actually safeguarded. It goes without saying that this might not be the case, due to a number of reasons – ranging from the possible unawareness by national judges of the ECJ's jurisprudence, to a

[10] On the notion of "integrated administration" see, in particular, H.C.H. Hofmann, A.H. Türk, *Conclusions: Europe's Integrated Administration*, in H.C.H. Hofmann, A.H. Türk (eds.), *EU Administrative Governance* (2006). For a detailed analysis of the institutional role of national authorities in such administration, see L. Saltari, *Amministrazioni nazionali in funzione comunitaria* (2007).

[11] See P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 49-55.

misapplication thereof. This, a crucial feature of EU law in most of its manifestations,[12] prompted us to ask ourselves whether competent national courts (correctly) apply the *Berlioz-Donnellan* jurisprudence, by carrying out the transnational judicial review of foreign preparatory acts in the context of mutual assistance procedures in the fiscal field. In this paper, we took the Italian courts as a case study to address that research question. We only examined tax rulings, despite our faith in the wider potential of the case law concerned, acknowledging that it might take time for such an innovative judicial stance to trickle into other policy areas.[13] We thus researched into the main Italian case law databases (*DeJure*, *Leggi d'Italia*), including one specialised in tax law (*Sistema "il fisco"*), looking for express quotations of *Berlioz*, *Donnellan*, and *Kyrian* (another, earlier and seminal precedent, on which see below, Section 3.1, which we chose to include for the sake of completeness). We queried the databases by separately searching for both the rulings' names and the ECJ numbering of the cases.[14] We hence found three rulings, handed down by the Court of Cassation between 2019 and 2020,[15] one of which (Court Order No 2395/2019)

[12] As has been powerfully said in B. de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, in P. Craig, G. De Búrca (eds.), *The Evolution of EU Law* (3rd edn, 2021), 211: "[T]he European Court indicated, quite rightly, that the crucial element for the effective application of the principles of primacy and direct effect is the attitude of *national* courts and authorities. It is not enough for the Court of Justice to proclaim that EU law rules should have direct effect and should prevail over national law: 'To put it bluntly, the ECJ can say whatever it wants, the real question is why anyone should heed it'. There is therefore a second dimension to the matter, which is decisive for determining whether the Court's doctrines have an impact on legal reality: the attitude of national courts and other institutions". Both the emphasis and the quotation are in the original, the latter coming from K.J. Alter, *The European Court's Political Power*, 19 West Eur. Pol. 459 (1996).

[13] In Italy, tax claims are indeed heard by a specialised judiciary in first instance (*Commissione Tributaria Provinciale*, District Tax Commission) and appeal (*Commissione Tributaria Regionale*, Regional Tax Commission) proceedings, whereas appeal rulings can be further challenged before the generalist Court of Cassation (*Corte di Cassazione*, the highest judicial instance). For an overview of the system, see G. Tinelli, *Istituzioni di diritto tributario* (5th edn, 2016), 507-664.

[14] C-682/15, C-34/17, and C-233/08, respectively.

[15] Court Order No 2395/2019, delivered on 29th January 2019; Court Order No 22652/2019, rendered on 11th September 2019; and Judgement No 13826/2020, handed down on 6th July 2020. Note that, as regards Court Order No. 22652/2019 and Judgement No. 13826/2020, the difference between "Court Order" (*ordinanza*) and "Judgement" (*sentenza*) is one of procedure, not substance, given

immediately appeared, however, to be of a somehow lesser importance to our research, and will not be further analysed in this contribution.[16]

The two retained rulings are, first, Court Order No 22652/2019 (in the following: *Intini*, after the name of the taxpayer involved). Here, the facts of the case were in line with a *Donnellan*-like scenario (see below, Sections 2 and 3). However, they also differed in a number of important respects, raising a number of novel, intriguing questions to which, in our submission, the Court of Cassation did not answer in an appropriate way. The second ruling is Judgement no 13826/2020, which on its part, mostly raised questions similar to those at stake in *Intini*. The Judgement, however, did not clearly explain the factual setting of the case. Rather, it adopted a somehow contradictory narrative, seriously hampering the possibility to carry out a rigorous analysis from the point of view of compliance with *Donnellan* and *Berlioz*.[17]

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that both acts decide the case. Court Orders are adopted in a more expedited way, without a public hearing, when the claim appears *prima facie* to be inadmissible or ill-founded, whereas Judgements are adopted, pursuant to a proceeding with longer delays and comprising a public hearing, when there is no such immediate filter: see Arts. 375-376 of the Italian Code of Civil Procedure (also applying to tax proceedings pursuant to Art. 62.2 of Legislative Decree No. 546/1992). On the other hand, Court Orders are also adopted for incidental acts not deciding the claim: see Arts. 121 and 295 of the Italian Code of Civil Procedure. This includes the issuance of preliminary references to the ECJ, such as was, indeed, the case of Court Order No. 2396/2019 (see the following note).

[16] Here, a preliminary reference to the ECJ was involved. The question was whether Italy should assist Greece in recovering an excise duty, claimed on the basis of Directive 92/12 (See Art. 20 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, OJ L 76, 23.3.1992, pp. 1-13). Whereas the issue could be technically framed as potentially involving an instance of transnational judicial review based on EU substantive norms (since the Italian judiciary was asking whether it enjoyed jurisdiction to review the application, by the Greek authorities, of Directive 92/12's criteria for the determination of the State competent to levy the tax), it seemed to us that the facts of the case revolved more around issues of substantive tax law (the prevention of double taxation), than around questions of effective judicial protection – a point which also appears to have been acknowledged by the ECJ in the preliminary ruling recently delivered on the matter (ECJ, Case C-95/19 – *Silcompa*, ECLI:EU:C:2021:128): see, in particular, para. 75 of the judgement.

[17] In fact, reading the judgement, it is not entirely clear what were the reasons for the claim brought by the taxpayer (an Italian resident in respect of whom Italian authorities adopted acts of enforcement, based on a request by Austria, which alleged the claimant to have smuggled clocks, hence evading the VAT and

Given the limited size of our sample, it is impossible to infer any meaningful conclusion on the application of the European case law in Italy. At the same time, the ruling in *Intini* provides stimulating food for thought to reflect on how transnational judicial review based on Art. 47 CFREU could further evolve. In this paper, while conscious of a number of methodological limitations of our study,[18] we thus momentarily set aside our original empirical perspective (leaving it to future research). Rather, we take *Intini* as a case study to develop a conceptual, qualitative perspective on the

customs duties). On the one hand, the taxpayer seems to have challenged the Italian acts of enforcement because of the failure, on the part of the authorities involved, to notify to him the acts of assessment of the claim (paras. 1, 3) – a most serious defect, which would attract the case to the *Donnellan* constellation (see below, Section 2). On the other hand, reference is also confusingly made to the fact that the act of assessment was served on him only in German, which he could not understand (para. 2) – the same kind of problem which was at stake in *Intini*, so that our remarks made in Section 3 below would also be valid for the instant case. That such latter defect was the main reason underlying the claim seems more likely to be the case, considering that, further on, reference is also made to the fact that the *Donnellan* principles cannot apply to the case, since the taxpayer is reported, at any rate, to have challenged the Austrian act in the Austrian legal system; and this seems hardly compatible with a failure on the part of Austria to notify the act to the taxpayer (para. 4.4). Even after changing our perspective, as explained shortly below, we decided to focus on *Intini* only, since there the Court of Cassation engaged more clearly with the facts of the case, making it possible to appraise more extensively the problems dealt with. Further, one of the most interesting aspects of *Intini* is the fact that, unlike *Donnellan* (and *Berlioz*), the claim for which the requesting applicant State (also Austria) sought cross-border assistance did not involve any penalty element, which raises important questions concerning the scope of the *Donnellan* solution (see Section 3.2 below). In Judgement No 13826/2020, on the other hand, albeit that the point is not expressly clarified in the ruling, the fact that the taxpayer was charged with smuggling seems to point to the fact that a sanctioning element was also at stake in the Austrian claim. From the conceptual perspective developed throughout this paper, the Judgement thus appeared not to pose novel questions and hence to be less relevant, and will accordingly not be further examined in the following.

[18] The collection of data we carried out may be problematic, since some judgements might have applied the ECJ's jurisprudence while failing to mention the cases (e.g. only referencing the relevant provisions, and generically quoting EU jurisprudence), hence being incapable of being detected pursuant to our methodology. Equally untraceable therewith are possible instances where the judge completely failed to apply the ECJ's jurisprudence in a case in which this would have been apposite. At more fundamental a level, empirical research in the field of Italian tax law is radically flawed by the fragmentary state of legal databases in the field, with first and second instance rulings being particularly hard to find.

topic. We thus counterfactually speculate how the general principles to be elicited from (in particular) *Donnellan* should have been applied by the Court of Cassation, and strive to provide a further contribution towards a *theory* of transnational judicial review in EU horizontal composite procedures.

With all this in mind, the present paper proceeds as follows. Section 2 outlines the system of cooperation between administrative authorities in the EU MS in the recovery of tax claims, and conceptualises it along the lines of the EU administrative law category of horizontal composite procedure. It highlights the gaps in the judicial protection of taxpayers thereby left, and outlines the solution developed by the ECJ, based on Art. 47 CFREU, in *Berlioz* and *Donnellan*. Section 3 builds upon those findings to analyse *Intini*, finding out that EU law, as it emerges from, in particular, *Donnellan*, was not properly applied by the Court of Cassation. This is done through a four-step analysis. Section 3.1 addresses the use of the ECJ's jurisprudence by the Court of Cassation as a reason to decline jurisdiction in *Intini*, and dismisses the analysis thus carried out as ill-founded. The following Sub-Sections speculate how more appropriate a use of *Donnellan* should have been done, deepening the conceptual analysis of Art. 47 CFREU. Section 3.2 thus investigates the *scope of application* of Art. 47 CFREU, to preliminarily assess whether *Donnellan* is actually capable of regulating a case such as *Intini*. Deeming the case at hand to be covered by Art. 47 CFREU, Section 3.3 delves into the *substance* of the provision. It thus finds out that the ECJ jurisprudence shows that Art. 47 CFREU has a linguistic dimension, bestowing upon the recipient of a transnationally notified fiscal document a right to have that document served in a language which they can understand (that which was indeed problematic in *Intini*). Section 3.4 thus turns to the conditions under which a violation of EU law in a horizontal composite procedure can be deemed to be so "exceptional" as to require transnational judicial review to be carried out. Section 4 concludes.

2. Administrative Cooperation between Fiscal Authorities in the EU: *Berlioz*, *Donnellan*, and the Right to an Effective Judicial Remedy in Horizontal Composite Procedures

Taxation forms an integral part of the common market project ever since its very inception. Arts. 95-99 of the Treaty of

Rome (the fundamental tenets of which are now reflected in Arts. 110-113 TFEU) envisaged a complex system of constraints placed upon the MS' fiscal sovereignty. This was meant to prevent the exercise thereof from being of prejudice to the establishment of the European common market, going so far as to enable the harmonisation of indirect taxation by a unanimous vote in the Council "in the interest of the common market" (Art. 99 of the Treaty of Rome). Whereas, in particular, such latter legal basis was successfully employed in the edification of the VAT system, European institutions soon realised that the common market could be hampered not only by differences in fiscal burdens resulting from non-harmonised *substantive* tax provisions, but also by procedural and organisational arrangements concerning the *administration* of taxation in the EU. The proliferation of cross-border transactions would result increasingly often in, *inter alia*, the very same indirect taxes which had been harmonised to have to be levied upon individuals and businesses established in a MS other than that in which the taxable fact had taken place. This would entail the risk of fraudulent deployments of the mobility enabled by the common market, with traders establishing themselves in a MS other than their own, while keeping on entertaining business with the State of provenance. Taxes claimed by the latter, based on the principle of territoriality, would then have been unenforceable in the State of establishment, and traders could curtail the costs stemming from taxation – hence gaining an unfair competitive advantage, while further causing revenue losses to the MS of origin. With a view to this, the Council adopted Directive 76/308/EEC,[19] enabling for mutual assistance to be provided in the cross-border recovery of a number of tax claims forming part of fiscal schemes harmonised at the European level. The Directive underwent a number of successive modifications over time, which progressively expanded the range of duties which could benefit from mutual assistance. Administrative cooperation in the recovery of taxes is now governed by Directive 2010/24/EU,[20] which broadened the

[19] Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties (OJ L 73, 19.3.1976, pp. 18-23).

[20] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ L 84, 31.3.2010, pp. 1-12). Prior to this, Directive 76/308 was modified by a number of

arrangements' scope to "all taxes and duties of any kind", including their accessories (e.g. interest) and, crucially, "administrative penalties, fines, fees and surcharges relating to the claims for which mutual assistance may be requested".[21] Directive 2010/24 reiterates however, in their fundamentals, the schemes of mutual assistance dating back to Directive 76/308, which can be conceptualised resorting to the EU administrative law category of horizontal composite procedure.

Mutual assistance could (and can) be provided, essentially, in three respects. First, fiscal authorities can request their counterparts assistance in the *notification* of "all instruments and decisions (…) which relate to a claim and/or to its recovery".[22] Art. 9 of Directive 2010/24, expressly stating what was implicit in Directive 76/308, also clarifies, on the one hand, that "[t]he requested authority shall ensure that notification in the requested Member State is effected in accordance with the national laws, regulations and administrative practices in force in the requested Member State",[23] and, on the other hand, that this "shall be without

instruments essentially meant, as recalled, to broaden the scope of the tax claims which could benefit from mutual assistance. The most significant broadening was carried out by Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties (OJ L 175, 28.6.2001, pp. 17-20). The changes carried out over time were eventually consolidated in Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ L 150, 10.6.2008, pp. 28-38), governing mutual assistance in the short 2008-2010 interval, before being replaced by Directive 2010/24. For an account of the historical development of Directive 76/308, see F. Saponaro, *L'attuazione amministrativa del tributo nel diritto dell'integrazione europea*, cit. at 5, 170-173, as well as I. De Troyer, *Administrative Cooperation and Recovery of Taxes*, cit. at 6, 477. For an analysis of Directive 2010/24, highlighting the changes brought to the system established by Directive 76/308, see Ead., *Tax Recovery Assistance in the EU: Analysis of Directive 2010/24/EU*, 23 EC Tax Rev. 135 (2014), as well as F. Saponaro, *L'attuazione amministrativa del tributo nel diritto dell'integrazione europea*, cit. at 5, 318-330.

[21] Directive 2010/24, Art. 2.

[22] Directive 76/308, Art. 5.1. Art. 8.1 of Directive 2010/24 now more generally refers to "all *documents*, (…) which emanate from the applicant Member State and which relate to a claim as referred to in Article 2 or to its recovery" (emphasis added).

[23] Directive 2010/24, Art. 9.1.

prejudice to any other form of notification made by a competent authority of the applicant Member State in accordance with the rules in force in that Member State".[24] Such latter form of cross-border notification turned out to be problematic both in *Donnellan* and in *Intini*, and will accordingly be returned to below. Second, and key to the Directives' system, assistance may be requested in respect of the *recovery* of the taxes due themselves. This form of cooperation, which intrudes more significantly on the traditional tax law principle of non-cooperation with foreign authorities in the enforcement of claims,[25] is subject to a two-fold condition. First, the claim and/or the instrument permitting its enforcement must not be contested in the legal system of origin.[26] Second, the applicant MS must have unsuccessfully attempted to recover the claim domestically, although Directive 2010/24 now allows for some margins of exception in this regard.[27] When such conditions are fulfilled, the applicant MS is to send the requested one a copy of the instrument permitting enforcement of the claim (which, after Directive 2010/24, is "uniform", i.e. drafted according to a common template whose minimum formal requirements are harmonised at the EU level).[28] Directive 2010/24 now expressly stipulates that such instrument shall "constitute the sole basis for the recovery measures taken in the requested Member State", that it "shall not be subject to any act of recognition, supplementing or replacement in that Member State",[29] and that the claim "shall be treated as if it was a claim of the requested Member State".[30] Finally, completing

[24] Directive 2010/24, Art. 9.2. See, as to the significance of the amendment in this respect, F. Saponaro, *L'attuazione amministrativa del tributo nel diritto dell'integrazione europea*, cit. at 5, 324.

[25] Also known in common law systems, especially as regards judicial enforcement, as the "revenue rule". For a detailed analysis of the history of the doctrine, see B. Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty-First Century*, 16 Duke J. Comp. & Int'l L. 79 (2006), in particular 83-94.

[26] See Art. 7.2(a) of Directive 76/308 and Art. 11.1 of Directive 2010/24. The latter provision, however, now explicitly allows for the cross-border recovery of claims which are only partially contested, in respect of the part which is not, as well as for the recovery of a claim which is contested *in toto*, insofar as the law of the requested MS allows for such a possibility. This latter possibility is subject, however, to an obligation to refund the tax illegitimately levied in the event the challenge brought by the taxpayer were eventually upheld (see Art. 14.4).

[27] See Art. 7.2(b) of Directive 76/308 and Art. 11.2 of Directive 2010/24.

[28] See Directive 2010/24, Art. 12.

[29] Ibid.

[30] Directive 2010/24, Art. 13.1.

the system, requests for assistance can also be made concerning the adoption of *precautionary measures*, to which most of the requirements governing recovery cooperation also apply.[31]

All three arrangements can be conceptualised as horizontal composite procedures. The act adopted by the requested authority (be it one of notification, or of enforcement, or a precautionary measure) is based on one or more acts adopted by the applicant authority which can hence be qualified as "preparatory". In instances of notification this boils down to the request for assistance in notifying the documents. In cases of recovery and precautionary measures, however, this also more obviously involves attributing relevance in the legal system of the requested authority, pursuant to an EU norm to this effect, to acts of tax assessment and/or instruments permitting the enforcement of the claim emanating from the applicant MS' legal system. This raises the problem of derivative illegality: Are violations of the norms governing the preparatory stages of the procedure liable to affect the legality of the final act? From the point of view of (transnational) judicial review, the question is: Can the judiciary of the requested MS review the legality of the final act, in the light of violations which took place in the applicant MS' legal system, during the adoption of the preparatory acts by the authorities belonging to such latter system?

This heated issue was expressly dealt with by the EU legislature. The Directives adopted a conservative solution, which seriously diminished the possibility for an effective judicial remedy to be granted to taxpayers. Ever since Directive 76/308, the judges of the *applicant* MS are to hear challenges brought against "the claim and/or the instrument permitting its enforcement",[32] to which Directive 2010/24 appropriately added disputes concerning the newly-introduced uniform instrument permitting enforcement, and (crucially for our purposes) those "concerning the validity of a notification made by a competent authority of the applicant Member State".[33] Judges in the *requested* MS, on the other hand, are competent to hear disputes concerning "the enforcement measures" taken in that MS,[34] which Directive 2010/24, codifying the ECJ's *Kyrian* jurisprudence, also clarified to encompass disputes

[31] See Directive 76/308, Art. 13, and Directive 2010/24, Arts. 16 and 17.
[32] Directive 76/308, Art. 12.1.
[33] Directive 2010/24, Art. 14.1.
[34] Directive 76/308, Art. 12.3.

"concerning the validity of a notification made by a competent authority of the requested Member State".[35]

As a consequence, judges in the applicant MS are given with exclusive jurisdiction to hear challenges brought against acts of the authorities forming part of the legal system of the applicant MS itself. The same then goes for the requested MS, whose judges are given with exclusive jurisdiction on the acts of the authorities located therein. Transnational judicial review thus appears to be explicitly barred. This can, however, be problematic, as the facts in *Donnellan* show.[36] There, an Irish taxpayer was subject in Ireland, on request from Greece, to measures of enforcement of an administrative penalty imposed on him by the Greek customs administration. Mr Donnellan was, however, only made aware of the existence of the penalty many years after its adoption, when the Irish acts of enforcement were put in place, since Greece had failed to notify to him the relevant decision. As a consequence of such failure, when Mr Donnellan became aware of the penalty, the limitation period laid down in Greek law for challenges to be brought against the act imposing the penalty had already elapsed. The apportionment of jurisdiction enshrined in Directive 2010/24 did, however, also prevent Mr Donnellan from challenging in Ireland both the decision (which was, technically speaking, the "claim" concerned, upon which only judges in the applicant MS enjoy jurisdiction) and, crucially, its enforcement, based on the defective notification process (which, having been carried out by the applicant authority, pertained to the jurisdiction of the judiciary belonging to the same legal system as the latter). The Irish judge did thus apparently have no other choice than enforcing the sanction, despite the most obvious breach of the right to an effective judicial remedy which this would have entailed. In a landmark preliminary ruling, however, the ECJ acknowledged that the Directive's apportionment of jurisdiction could not, when read in the light of Art. 47 CFREU, "reasonably be invoked against [Mr Donnellan]",[37] since it would have deprived the applicant of any possibility to challenge the penalty and its enforcement in both fora. The Irish

[35] Directive 2010/24, Art. 14.2. On the germination of the provision from *Kyrian* (addressed in Section 3.1 below), see P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 59-61.

[36] The following only sums up the main facts and findings of the case. For more detailed analysis, see Ibid., 55-68.

[37] *Donnellan*, cit. at 9, para 59.

judge would thus be empowered to review the legality of the notification process (not) carried out by Greece also in the context of the challenge brought against the Irish acts of enforcement. Such (non-)notification was, however, also bound to be deemed incompatible with Art. 47 CFREU itself, which was construed to require "that the addressee of a document actually receives the document in question but also that he is able to know and understand effectively and completely the meaning and scope of the action brought against him abroad, so as to be able effectively to assert his rights in the Member State of transmission"[38] – a standard most obviously not complied with, in a case where the addressee of the document was not even made aware of the existence of foreign measures against him. The Irish judge could thus legitimately refuse to enforce the Greek penalty against Mr Donnellan.

It is important to notice that, in *Donnellan*, Art. 47 CFREU thus played a dual role: on the one hand, it provided a legal basis for transnational judicial review, grounding the ECJ's stance that the notification process carried out by Greece was, despite the Directive's unambiguous wording to the contrary,[39] censorable also before the Irish judge (we might call this the *cause of action* aspect of Art. 47 CFREU). On the other hand, it provided the legal standard against which to carry out such judicial review itself, instructing that judge to assess whether the conditions under which notification was (not) effected could be held to enable Mr Donnellan to effectively safeguard his rights and interests (we will refer to this as the *benchmark* aspect of Art. 47 CFREU).[40] This radical outcome complements the earlier finding in *Berlioz*, where a preparatory act adopted under the twin Directive 2011/16[41] was also accepted to be prone to transnational judicial review in the context of a challenge brought against the final act of the tax assessment cooperation

[38] Ibid., para. 58.

[39] This appears to be conceptually problematic, since in such a case the most appropriate remedy would rather be expected to be a declaration that the Directive's norms are null and void, pursuant to a preliminary ruling (not on the *interpretation*, but) on the *validity* of the act. See P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 63-64.

[40] Although the ECJ unpersuasively attempted to conceptualise this point in a different way. See Ibid, 64-68.

[41] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11.3.2011).

procedure: whereas Directive 2011/16 does *not* contain an explicit apportionment of jurisdiction barring transnational judicial review, so that the solution reached was perhaps less problematic, *Berlioz* amounted to the first time where transnational judicial review was accepted by the ECJ, also drawing on Art. 47 CFREU *qua* cause of action. Further, it shows that such judicial review can also be relied upon to censor a misapplication of *substantive* EU norms governing the procedure laid down in secondary law acts (hence providing the benchmark which, in *Donnellan*, is provided by Art. 47 CFREU itself).[42] Taken together, *Berlioz* and *Donnellan* show that Art. 47 CFREU, in its cause of action aspect, can be used to carry out transnational judicial review whenever, without such review, individuals would be deprived of any judicial remedy against alleged violations of EU norms in the preparatory stages of horizontal composite procedures, be those norms substantive or procedural (and, in such latter case, be they a secondary law provision, or Art. 47 CFREU in its benchmark aspect). This innovative solution, arguably stemming from judicial dialogue between the ECJ and the European Court of Human Rights (ECtHR) (see below, Section 3.2), opens most interesting horizons for the future of EU administrative law. As recalled in Section 1 above, its actual working in practice depends, however, on the capability of national judges to comply with the ECJ's *dicta*. This does not appear to have been the case in *Intini*, as the following Section will try to detail.

3. The Case of *Intini*: Transnational Judicial Review in Action

Intini involved the provision, on the part of the Italian tax authority, of assistance to the Austrian revenue service in the recovery of VAT (plus interest) due by Mr Intini, an Italian taxpayer, on importation into Austria of some jewelry from third countries. The Austrian authority had directly notified to Mr Intini acts of assessment of the duty, and had subsequently adopted an

[42] In this case, the requirement, stipulated in Art. 1 of Directive 2011/16, that the information sought under the Directive's cooperation scheme be "foreseeably relevant to the administration and enforcement" of the domestic tax law of the applicant MS. The following does not address *Berlioz* in detail: to this end, reference can be made, again, to P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 44-55.

instrument permitting enforcement of the claim. Pursuant to an Austrian request for recovery assistance, the Italian authority initiated the recovery procedure. It thus notified to Mr Intini a document, called *cartella di pagamento*, inviting him to pay the sum due within 60 days, after the expiry of which term the claim would be enforced. Mr Intini unsuccessfully brought a complex challenge against the *cartella di pagamento* before the Milan District Tax Commission, by which, in essence, he aimed at having the Austrian tax claim declared as substantively non-existing; at reprehending the process of notification of the *cartella di pagamento* undergone by the Italian authority pursuant to Italian law; and, what is most relevant for our purposes, at remedying the fact that he had been served with the Austrian act of assessment, upon which the Austrian instrument permitting enforcement (and, therefore, the *cartella di pagamento*) was premissed, only in German.[43] Upon lodging a successful appeal with the Lombardy Regional Tax Commission,[44] Mr Intini was relieved from paying the contested

[43] *Intini*, preliminary remarks. In this respect, the ruling is complex because under Italian tax law, pursuant to Art. 19 of Legislative Decree No. 546/1992, claims in the fiscal field can only be brought against certain enumerated acts, and the unlawfulness of acts other than those mentioned in the prevision can only be redressed by means of derivative illegality of the former: see, also for the broader conceptual implications of the system, F. Batistoni Ferrara, *Gli atti impugnabili nel processo tributario*, 67 Diritto e pratica tributaria 1109 (1996). The Court of Cassation, however, tends to interpret broadly the enumerated acts: see G. Fransoni, *Spunti ricostruttivi in tema di atti impugnabili nel processo tributario*, 22 Rivista di diritto tributario 979 (2012). Mr Intini brought his claim against the *cartella di pagamento*, a document which, as stated above, is to be notified, pursuant to Art. 25 of Decree of the President of the Republic No. 602/1973, to the taxpayer in order to make them aware of the existence of an instrument permitting the enforcement of a tax claim. However, from the perspective of the taxpayer, the *cartella di pagamento* tends to subsume the instrument permitting enforcement, taking into account that enforcement itself cannot take place before the *cartella di pagamento* has been notified (Art. 50, Decree No. 602/1973) and that the limitation period for the taxpayer to challenge the instrument permitting enforcement starts elapsing, in turn, only when the *cartella di pagamento* is served on them (Art. 19, Legislative Decree No. 546/1992): see M. Basilavecchia, *Il ruolo e la cartella di pagamento: profili evolutivi della riscossione dei tributi*, 78 Diritto e pratica tributaria 127 (2007). Strictly speaking, however, the grounds for Mr Intini's claims concerned only in part the *cartella di pagamento* (to the extent that they pivoted on the process of notification thereof). Rather, they were largely devoted to seeking redress for alleged violations of his rights brought about by the Austrian acts of the procedure (that is, the act of assessment and its notification), that which caused the problems which are of interest here to arise.

[44] *Intini*, preliminary remarks. On Regional Tax Commissions, see note 13 above.

VAT, and the Italian authority challenged the Commission's ruling before the Court of Cassation. Mr Intini was eventually unsuccessful: the Court of Cassation upheld the lawfulness of the notification process put in place by the Italian authority under the national law,[45] and declared not to have jurisdiction to hear the claims concerning the non-existence of the Austrian claim and the notification in German of the relevant documents on the part of the Austrian authority.[46] The latter aspect is most relevant from the angle chosen in the present paper. Given that, in the Court of Cassation's view, any irregularity in the notification of the acts of assessment underlying the Austrian instrument permitting enforcement was to be conceptualised as affecting the existence of such latter instrument, Mr Intini's third claim was deemed to be one regarding that instrument. The Court of Cassation thus held that "Italian jurisdiction must be declined [in respect of those amongst Mr Intini's claims] which involve questions revolving around the existence of the foreign tax claim and the foreign instrument permitting enforcement, and not the Italian enforcement procedure, as it is the competent authority of the State asserting the tax claim which has jurisdiction to hear those claims".[47] The Court reached this conclusion by allegedly applying Directive 76/308 (applicable *ratione temporis* over Directive 2010/24): it was of the view that the rule demanding jurisdiction to be declined could be inferred from the principle of correspondence between the law regulating the acts to be challenged and the judiciary given with competence to hear those challenges implicit in the Directive (see Section 2 above), and allegedly stated by the ECJ in *Kyrian*.[48] Indeed, the Court of Cassation excerpted from such latter judgment the *obiter* that an allocation of jurisdiction which was such as to exclude the Italian jurisdiction in the instant case "results from the fact that the claim and the instrument permitting enforcement are established on the basis of the law in force in the Member State in which the applicant authority is situated, whilst, for enforcement measures in the Member State in which the requested authority is situated, the latter applies, pursuant to Articles 5 and 6 of Directive 76/308, the provisions which its national law lays down for corresponding

[45] *Intini*, paras. 4-7.
[46] *Intini*, para. 2.
[47] Ibid.; Authors' translation.
[48] ECJ, Case C-233/08 – *Kyrian* (ECLI:EU:C:2010:11).

measures, that authority being the best placed to judge the legality of the measure according to its national law".[49]

Setting aside the claim on the existence of the tax claim in the narrow sense, which was indeed purely a matter of Austrian tax law, Mr Intini was, however, essentially striving to engage in the kind of transnational judicial review of alleged procedural defects sketched out in *Donnellan*. In EU administrative law terms, the Austrian instrument permitting enforcement of the claim was a preparatory act for the Italian acts of enforcement of the said claim (the final act of the horizontal composite procedure, which the Italian judge no doubt had jurisdiction to review, also pursuant to Directive 76/308's allocation criteria). Mr Intini was arguing that, since the Austrian act of assessment upon which the instrument permitting enforcement was premissed in turn had been notified to him in German, a language he could not understand, the whole transnational recovery procedure was to be deemed invalid, as he had not been placed in such a position as to be able to assert his rights *vis-à-vis* the Austrian authority. Otherwise put, implying that the Italian judge was given jurisdiction to do so (based on Art. 47 CFREU's cause of action aspect), Mr Intini was searching for redress to what he deemed to amount to a violation of Art. 47 CFREU's benchmark aspect, *not*, as the Court of Cassation implied referencing *Kyrian*, of the Austrian tax law governing notification. There are most certainly aspects of the transnational notification process at stake in *Intini* which are exclusively governed by the law of the applicant MS,[50] and it is inapposite for the judiciary of the requested MS to review the application of those provisions by the notifying authority. This does not, however, exhaust what notification is all about. A *Donnellan*-like assessment of whether that process as a whole complies with the minimum standard laid down by Art. 47 CFREU, which is an EU law provision, can be carried out by a *juge de droit commun* situated in the requested State, without engendering any practical or conceptual problem in a system of shared sovereignty such as the EU's. A closer scrutiny of *Intini* is therefore apposite, in order to more carefully assess the merits of the Court of Cassation's interpretive strategy from the

[49] Ibid., para. 40.

[50] This might be the case, for instance, of the identification of the competent authority within that State's legal system, or the detailed content of the instrument permitting the enforcement of the claim besides the minimum standard of the Directive's uniform template.

perspective of the correct application of the ECJ's case law on effective judicial review in EU horizontal composite procedures.

3.1 The Apportionment of Jurisdiction on Claims Concerning the Transnational Notification of Fiscal Documents, between Kyrian and Donnellan

The Court of Cassation's simplistic reliance upon *Kyrian* hides, in fact, the complexity of the issues dealt with in these cases. At first glance, *Kyrian* regarded a factual setting similar to that of *Intini*. The German customs authority had availed itself of the assistance of the Czech authority to notify to Mr Kyrian, a Czech taxpayer, an assessment act imposing the payment of excise duties. Assistance was also requested to carry out the subsequent steps in the recovery procedure, including the notification of the instrument permitting the enforcement of the claim.[51] Similarly with the case of *Intini*, the assessment notice was served on Mr Kyrian in German. This led Mr Kyrian to claim that "he was unable to take the appropriate legal steps to defend his rights", to the effect that the German claim, so Mr Kyrian submitted, was unenforceable in the Czech Republic.[52] Upon challenging the Czech enforcement acts, Mr Kyrian had to confront the Czech authority's defence that "neither it nor the Czech administrative courts ha[d] jurisdiction to review the tax assessment notice",[53] and a preliminary ruling was requested to the ECJ to provide clarification on the allocation of jurisdiction under Directive 76/308. The ECJ concluded in the sense of the excerpt quoted above, on the principled correspondence between applicable law and competent judiciary.[54] However, in a key facet of the ruling completely overlooked by the Court of Cassation in *Intini*, it also held that, in exceptional cases, the enforcement of the recovery request could be denied, if needed to safeguard the requested State's public policy.[55] It further maintained that, in any event, the notification carried out by the Czech authorities was to be considered an "enforcement measure" of the requested authority for the purposes of the jurisdiction's

[51] See Opinion of Advocate General Mazák in Case C-233/08 – *Kyrian* (ECLI:EU:C:2009:552), paras. 5-7.
[52] Ibid., para. 9.
[53] Ibid., para. 10.
[54] See note 49 above and surrounding text.
[55] *Kyrian*, cit. at 48, para. 42.

apportionment.[56] As a consequence, the Czech judge was competent to hear Mr Kyrian's claims on, *inter alia*, the language of the documents which, though emanating from Germany, had been notified to him by the Czech authority.

As recalled above,[57] the approach deployed in *Kyrian* was consolidated in Directive 2010/24, which explicitly bestowed jurisdiction to hear claims concerning notification processes in cross-border cases upon the judge belonging to the same legal system as the notifying authority. That approach was, however, radically questioned in *Donnellan*. In fact, in such latter case, and like in *Intini* (but unlike *Kyrian*), it was the applicant authority (in *Donnellan*: Greece; in *Intini*: Austria), not the requested one (in *Donnellan*: Ireland; in *Intini*: Italy) which (should have) carried out the notification in the territory of the requested State; as a consequence, applying the *Kyrian* jurisprudence and/or Directive 2010/24, the judge belonging to the same legal system as the applicant authority (respectively, Greek or Austrian) should have enjoyed jurisdiction to hear the claims concerning the notification process. However, as recalled in Section 2 above, in *Donnellan* the ECJ accepted that the judge of the requested MS could be given with jurisdiction, based on Art. 47 CFREU *qua* cause of action, to review whether such notification complied with Art. 47 CFREU *qua* benchmark. In other words, *Kyrian* seems hardly relevant to *Intini*: it concerned a factual setting where it was the requested authority which notified all the relevant documents (which was not the case in *Intini*), and the principles it laid down to govern the allocation of jurisdiction have been, despite Directive 2010/24's codification, essentially overruled by *Donnellan*. It is therefore at least dubious to invoke it to ground a regressive ruling, which basically upholds the cross-border enforcement of a tax claim which the taxpayer was not able to challenge owing to language barriers.

At a closer scrutiny, the main force behind the Court of Cassation's use of *Kyrian* actually seems to be that Court's willingness not to depart from its well-established jurisprudence. In fact, the Court of Cassation mainly quotes *Kyrian* to provide further authority in support of the leading precedent in the Italian legal system to decide jurisdictional issues in fiscal mutual

[56] Ibid., para. 47.
[57] See note 35 above.

assistance procedures, Judgement No 760/2006.[58] This ruling was delivered on the interpretation of the 1938 Convention on mutual assistance in the fiscal field between Italy and Germany, which, similarly with the EU Directives, envisaged the possibility for the tax authorities of one State to request assistance in the recovery of taxes in the territory of the counterpart.[59] The Italian authority had enforced a German claim pursuant to the said Convention, and the taxpayer concerned had alleged, on the one hand, that the Italian provisions on the notification of the enforcement acts had not been complied with, and, on the other hand, that the relevant limitation period set forth by German tax law had elapsed.[60] The Court of Cassation accepted that the Italian judge enjoyed jurisdiction on the former aspect, but denied it in respect of the latter, based on a principle of correspondence between acts (and the law regulating them) and competent judiciary. What is more for present purposes, although it reached such conclusion through an interpretation of the 1938 Convention, the Court of Cassation expressly stated that the resulting apportionment of jurisdiction could also apply to the system established pursuant to the EU Directives, holding them to embody, as a matter of positive law, the criterion which it was interpretatively eliciting from the 1938 Convention. In a sense, therefore, the quotation of Judgement No 760/2006 in *Intini* is an interpretive twist. Judgement No 760/2006 used Directive 76/308, interpreted superficially and in isolation from the broader system of EU law, to read into the 1938 Convention a rigid allocation of jurisdiction, excluding any form of transnational judicial review from the purview of the tools available to the Italian judge. In a perverse form of path dependence, however, it soon became a leading precedent which the Court of Cassation could resort to, also when applying EU law, to claim that a *jurisprudence constante* existed, under which transnational judicial review in fiscal assistance procedures was barred *a priori*. This tautological reference to the national case law, however, turns ultimately out to

[58] Court of Cassation, Judgement No 760/2006 of 17 January 2006. For early comment on the ruling, see M. Poggioli, *Le controversie giudiziali generate dalla riscossione in Italia di crediti tributari formati all'estero ed il riparto di giurisdizione affermato dalle SS.UU. della Corte di Cassazione*, 17 Rivista di diritto tributario 119 (2007). The ruling is quoted, just before referencing *Kyrian*, in *Intini*, para 2.

[59] *Convenzione sull'assistenza amministrativa e giudiziaria in materia tributaria, stipulata in Roma, fra l'Italia e la Germania, il 9 giugno 1938*, executed in the Italian legal system by Royal Decree No 1676/1938 of 9 September 1938.

[60] Judgement No 760/2006, cit. at 58, preliminary remarks.

be a way to immunise the Italian legal system from the developments occurred in the meanwhile in this area of the law at the EU level. Judgement No 760/2006 was, in fact, handed down in 2006 – before *Kyrian* (2010), way before *Donnellan* (2018), and, in general, when the realisation, by scholars and practitioners, of the perilous implications for taxpayers' rights of cross-border cooperation between tax authorities was far ahead. Even if this approach were to be legitimately applied under a non-EU scheme of assistance, such as that of the 1938 Convention (and there are serious indices that, without being properly qualified, it would be in breach of Italian constitutional law as well),[61] it can no longer prevail when the authorities involved act under the EU Directives, which *Berlioz* and *Donnellan* have caused to rebalance in a manner which is more sensitive to taxpayers' rights under Art. 47 CFREU.

3.2 The Applicability of the *Donnellan* Jurisprudence: On the Scope of Application of Art. 47 CFREU

Setting aside *Kyrian*'s outdated solution, the Court of Cassation should have thus acknowledged that *Donnellan* arguably required the establishment of Italian jurisdiction, based on Art. 47 CFREU's cause of action aspect. We use "arguably" because a conservative reading of the ruling could raise some doubts as to whether *Donnellan*'s liberal solution can be extended to a case such as *Intini*. This is not only on account of the merits of the cases, with the ECJ's insistence that *Donnellan*'s circumstances were "exceptional".[62] We will return to this point in Section 3.4 below. For now, it must be noted that more radical questions, surrounding the very same *scope* of transnational judicial review based on Art. 47 CFREU *qua* cause of action, are also raised by *Intini*'s factual setting. In this respect, we have submitted in our earlier contribution that a key factor determining the ECJ's unusual outcome in *Donnellan* (as well as, earlier, in *Berlioz*) was its willingness to bring forward the dialogue with the ECtHR, and, in particular, to prevent the *Bosphorus* presumption, viewed in the light of *Avotiņš v. Latvia*, from being rebutted.[63] Had the ECJ not

[61] See M. Poggioli, *Le controversie giudiziali*, cit. at 58, 129-142.

[62] *Donnellan*, cit. at 9, para. 61.

[63] See P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 49-51 and 63-64. The *Bosphorus* presumption is the well-known doctrine, developed in ECtHR, *Bosphorus Hava Tollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, Judgement of 30 Jun 2005, application No

allowed the Irish judge in *Donnellan* to review the legality of the notification procedure carried out by the Greek authority, Mr Donnellan would have had a rather easy case to claim, before the ECtHR, that his right to a fair trial under Art. 6 of the European Convention on Human Rights (ECHR) had been breached by the Irish judge. Given that, however, this would have amounted to "a serious and substantiated complaint" (since it was undisputed that Mr Donnellan could not bring claims in either Ireland and Greece, and that he had not been served in due time with the relevant documents) that "the protection of [Art. 6 ECHR] ha[d] been manifestly deficient" (since a key aspect of Art. 6 ECHR, the right of access to court, had been completely denied by the radical unavailability of any judicial remedy, and that, on the Greek side, this was due to the failure to notify to him the decision to be challenged),[64] Ireland could not have shielded itself behind the sole fact that it was applying EU law. Had Art. 6 ECHR been found to have been breached, however, a disrupting acknowledgment by the ECtHR that the application of EU law was the root cause of the violation would have ensued. In our view, such need to accommodate the system set up by the EU Directives' allocation of jurisdiction, on the one hand, and the precepts of ECHR law, on the other hand, was to a large extent responsible for *Donnellan*'s apparently erratic conclusion.

With this in mind, one could draw a crucial distinction between *Donnellan* and *Intini*. As recalled in Section 2 above, in

45036/98, under which the ECtHR would refrain, as a rule, from hearing claims brought against State Parties to the ECHR for conduct amounting to a mere implementation, lacking any degree of discretion, of obligations stemming from membership in an international organisation. This is conditional, however, on the fact that such organisation offers a system of protection of human rights comparable, from both the substantive and the procedural point of view, with that under the ECHR. Under such conditions, the ECtHR would presume that the State conduct complained of would comply with ECHR law. It would not waive, however, the possibility to carry out an assessment of the merits of the individual case, with a view to ascertaining whether the protection of fundamental rights was "manifestly deficient", so that the presumption should be rebutted. In ECtHR, *Avotiņš v. Latvia*, Judgment of 23 May 2016, Application No 17502/07, the ECtHR came close for the first time to a rebuttal of such presumption, while also introducing an obligation, under certain conditions, for national judges themselves to assess whether the conditions for rebuttal applied (see text surrounding the following note).

[64] "Serious and substantiated complaint of manifest deficiency" is, indeed, the formula deployed Ibid., para. 116.

Donnellan, the claim for the recovery of which Greece had requested Ireland's assistance was an *administrative penalty* imposed on Mr Donnellan for smuggling:[65] Art. 6 ECHR was therefore applicable, since, pursuant to the so-called "*Engel* criteria",[66] the challenge brought against the enforcement of the claim qualified as one aiming at "the determination of a criminal charge".[67] In *Intini*, on the other hand, Austria had requested Italy's assistance to recover a VAT sum *as such* (plus interest), without a penalty element being involved at all. Given that Art. 6 ECHR can apply to proceedings aiming at "the determination" of either "a criminal charge" or of "*civil rights and obligations*", the applicability of the provision to the instant case, if at all, would have to hinge upon such second limb. This is problematic. In the case of *Ferrazzini v. Italy* (2001),[68] the

[65] *Donnellan*, cit. at 9, paras. 16-24.

[66] Reference is made here to the famous criteria laid down in ECtHR, *Engel and others v. The Netherlands*, Judgment of 8 June 1976, Application No 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, para. 82, under which, with a view to determining whether a given penalty imposed by a State party to the ECHR possesses a "criminal" nature for the purposes of triggering the Convention's procedural (Art. 6) and substantive (Art. 7) guarantees, the ECtHR would take into account, besides the national law's qualification thereof, "the nature of the offence" and "the degree of severity of the penalty". For an overview of the case law which further clarified the meaning and scope of the *Engel* jurisprudence (e.g., and importantly, specifying that the "nature of the offence" and the "severity of the penalty" criteria, recalled above, are alternative, and not cumulative), see B. Rainey, E. Wicks & C. Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn., 2017), 275-277. The first case where tax penalties (coming as surcharges) were deemed to qualify as "criminal" was ECtHR, *Bendenoun v. France*, Judgment of 24 February 1994, Application No 12547/86. Some uncertainty arose, however, as to whether that judgement amounted to an application of the *Engel* criteria, or rather laid down a different test applying in fiscal matters only, because of the failure by the ECtHR to reference *Engel* and of the partially different analysis carried out in this case (see Ibid., para. 47). The ECtHR, however, reviewed its case law in what is now regarded as the leading precedent in the field (ECtHR, *Jussila v. Finland*, Judgment of 23 November 2006, Application No 73053/01), clarifying that *Bendenoun v. France* was not intended to depart from *Engel v. The Netherlands*, and that also the field of tax penalties is governed by such general jurisprudence (*Jussila v. Finland*, paras. 29-36). From then on, the ECtHR has accepted that a strikingly wide array of tax penalties qualify as "criminal" for the purposes of Art. 6 ECHR: see R. Attard, *The Classification of Tax Disputes, Human Rights Implications*, in G. Kofler, M. Poiares Maduro & P. Pistone (eds.), *Human Rights and Taxation in Europe and the World* (2011).

[67] See, mutatis mutandis, P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 51.

[68] ECtHR, *Ferrazzini v. Italy*, Judgment of 12 July 2001, Application No 44759/98.

ECtHR famously posited that "tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant".[69] As a consequence, "rights and obligations" arising in the fiscal field could not, in and of themselves, be considered as having a "civil" character. Art. 6 ECHR would hence be inapplicable in tax cases other than those falling under the criminal prong of the provision. To be sure, the roots of the principle can actually be traced back to the very early years of application of the ECHR.[70] The significance of *Ferrazzini v. Italy* lies primarily in the fact that here, when asked to review its jurisprudence pursuant to the "Convention as living instrument" doctrine,[71] the ECtHR confirmed its earlier approach, and kept on excluding tax trials from the scope of the procedural guarantees under Art. 6 ECHR in its "civil" component. *Ferrazzini v. Italy* was harshly criticised by tax law scholars,[72] but still holds as good law. The significant curtailing of taxpayers' procedural rights arising from this broad exclusion might, to a certain extent, be practically downscaled: the ECtHR has, indeed, acknowledged that, if penalties qualifying as "criminal" are imposed, when challenges are brought in a single trial against both the penalty and the properly fiscal aspects of the dispute, Art. 6 ECHR applies.[73] In *Intini*, however, there not being any penalty whatsoever in place, not even this path was available. Henceforth, had the case been considered under ECHR law, Art. 6 ECHR would most likely have been found to be inapplicable. If, therefore, we accept that the need to preserve a good relationship with the ECtHR laid the foundations for *Donnellan*'s (and, earlier, *Berlioz*') acceptance of transnational judicial review, we might be

[69] Ibid., para. 29.

[70] For a detailed overview of the early case law, see P. Baker, *Taxation and the European Convention on Human Rights*, 40 Eur. Tax'n 298 (2000), 306-312.

[71] On which see B. Rainey, E. Wicks & C. Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights*, cit. at 66, 76-80.

[72] See, for instance, P. Baker, *Should Article 6 ECHR (Civil) Apply to Tax Proceedings?*, 29 Intertax 205 (2001), in particular 207-211, and Id., *The Decision in* Ferrazzini*: Time to Reconsider the Application of the European Convention on Human Rights to Tax Matters*, 29 Intertax 360 (2001). Less based on ECHR law proper, but pivoting on general jurisprudence arguments, see A. Perrone, *Art. 6 della CEDU, diritti fondamentali e processo tributario: una riflessione teorica*, 23 Rivista di diritto tributario 919 (2013), in particular 945-978.

[73] See ECtHR, *Georgiou v. The United Kingdom*, Judgment of 16 May 2000 (admissibility decision), Application No 40042/98, para 1.

led to conclude that *Intini*'s circumstances lack a crucial condition for that judicial review to apply.

The point made here, however, is that this is not decisive. In fact, the conceptual *a priori* for the reception of *Avotiņš v. Latvia* in the EU legal order effected with *Donnellan* and *Berlioz* is Opinion 2/13, rendered by the ECJ on the EU's accession to the ECHR.[74] The Opinion introduced a constitutional discourse on the principle of mutual trust meant to exclude, as a rule, transnational judicial review on the implementation of EU law.[75] It was, possibly, as a reaction to this that the ECtHR prevented, in *Avotiņš v. Latvia*, EU MS from successfully invoking the need to implement EU law as a justification for shortcomings in the protection of ECHR rights.[76] At the same time, however, the Opinion itself already introduced a principled room for exception to mutual trust on fundamental rights grounds, which was actually applied in *Donnellan* (and, earlier, in *Berlioz*).[77] More precisely, and crucially, in the Opinion we read that MS may, "in exceptional cases", derogate from the principle of mutual trust, double-checking "whether [another MS] has actually, in a specific case, observed the fundamental rights

[74] ECJ, Opinion 2/13 – *Adhésion de l'Union à la CEDH* (ECLI:EU:C:2014:2454). See the reference to the Opinion made in *Donnellan*, cit. at 9, para. 40.

[75] That which was, ultimately, allegedly instrumental in preserving the principle of autonomy of EU law, the overarching preoccupation of the ECJ throughout the Opinion: see B.H. Pirker and S. Reitemeyer, *Between Discursive and Exclusive Autonomy: Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law*, 17 Cambridge Y.B. Eur. Legal Stud. 168 (2015). The principle of mutual trust, in turn, is a principle requiring MS, "save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law" (Opinion 2/13, cit. at 74, para. 191). Despite lacking a clear treaty foundation, such principle, which was mainstreamed in the 1990s in connection with the deepening of integration in judicial matters, was constitutionalised in Opinion 2/13, grounding it on the commitment by all MS to the set of shared values of Art. 2 TEU: see Ibid., para. 168, and, in the literature, K. Lenaerts, La Vie après l'Avis*: Exploring the Principle of Mutual (Yet Not Blind) Trust*, 54 Common Mkt. L. Rev. 805 (2017). Comprehensively on the principle, its roots, and its normative content, see C. Rizcallah, *Le principe de confiance mutuelle en droit de l'Union européenne : Un principe essentiel à l'épreuve d'une crise de valeurs* (2020).

[76] See P. Gragl, *An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of* Bosphorus *and Reaction to* Opinion 2/13 *in the* Avotiņš *Case*, 13 Eur. Const. L. Rev. 551 (2017), in particular 560-566.

[77] See P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 48-53 and 68-70.

guaranteed by the EU".[78] This is a major turning point in our inquiry. *Berlioz* and *Donnellan* might have well availed themselves of the room for exceptions to mutual trust left by Opinion 2/13 in order to accommodate *Avotiņš v. Latvia*'s precepts. This acted, however, as the "political" determinant for the ECJ's willingness to accept transnational judicial review. As a matter of law, neither Opinion 2/13, nor *Donnellan*, nor *Berlioz* quote ECHR law as such: what transnational judicial review may exceptionally aim at checking is compliance with *EU* fundamental rights law. Since, as is well known, the ECHR provides the CFREU with "a floor, not a ceiling",[79] provided ECHR rights are safeguarded in any event, EU fundamental rights might provide a higher degree of protection, both in scope and content. Coming to *Berlioz* and *Donnellan*, this means that, when the ECJ said that transnational judicial review was to be carried out "in the light of Article 47 of the Charter",[80] it was laying down a basis for a doctrine of such review which, while motivated by the dialogue with the ECtHR, ends up having a way broader scope than would suffice to have *Avotiņš v. Latvia* complied with. In fact, one of the major features of Art. 47 CFREU, which corresponds with Art. 6 ECHR as regards its substantive content, is its exceptionally broader scope of application.[81] Indeed, provided

[78] Opinion 2/13, cit. at 74, para. 192. Emphasis added.

[79] This is the image most frequently deployed to account for the model of protection emerging, in particular, from Arts. 52(3) and 53 CFREU. Under the former provision, "[i]n so far as [the] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection"; pursuant to the latter, "[n]othing in [the] Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States' constitutions".

[80] *Donnellan*, cit. at 9, para. 62.

[81] As authoritatively stated in the relevant Explanation, to be found in the Explanations relating to the Charter of Fundamental Rights (OJ C 303, 14.12.2007): "[i]n Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. (…) Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union". Although this excerpt regards one aspect of Art. 47 CFREU in particular (i.e. the right to a fair hearing), the same goes for all of the components of the provision – including, for our purposes, the right of access to court. For commentary in this respect, see P. Aalto and others, *Article 47 – Right to an*

that the MS concerned can be regarded as acting "within the scope of EU law", so that, under Art. 51 CFREU, the Charter is applicable in the first place, Art. 47 CFREU extends its guarantees not only to controversies aiming at "the determination of civil rights and obligations, or of any criminal charge". Under Art. 47 CFREU, the relevant test is, rather, whether the proceeding aims at safeguarding a "right [or] freedom guaranteed by the law of the Union" whatsoever.

To start with, there is no doubt that, in fiscal cooperation cases, the Charter is applicable pursuant to Art. 51 CFREU's requirements: MS resorting to mutual assistance arrangements are "acting within the scope of EU law", to the extent that the authorities involved act pursuant to a procedure laid down in EU secondary law.[82] Everything thus boils down to ascertaining

Effective Remedy and to a Fair Trial, in S. Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (2014) paras. 47.44-47.46.

[82] Indeed, in the early years of the CFREU, some uncertainty famously arose as to the exact scope of application of the rights guaranteed by the CFREU to action undertaken by the MS. Art. 51 CFREU, titled "Field of application", states that "[t]he provisions of [the] Charter are addressed […] to the Member States only when they are *implementing* Union law" (emphasis added). The pertinent Explanation, however, states that "it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States *when they act in the scope of Union law*" (emphasis added), and engenders some confusion: pre-Charter, the ECJ reportedly stated that the fundamental rights guaranteed as general principles of Union law were binding upon the MS in situations of "implementation" of EU law, such as those of the instant case (see ECJ, Case C-5/88 – *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, ECLI:EU:C:1989:321), but also in the event MS adopted measures derogating from the four freedoms, since also in this case action at the State level would be taken "within the scope of EU law" (ECJ, Case C-260/89 – *ERT*, ECLI:EU:C:1991:254). In the aftermath of the entry into force of the Charter, commentators speculated whether Art. 51 CFREU's wording meant that only *Wachauf*-like situations would be governed by the Charter, or whether a reading thereof in the light of the Explanations justified the conclusion that the ECJ's case law was to be confirmed *in toto*, so that *ERT*-like instances would be covered as well (see, for instance, A.P. Van der Mei, *The Scope of Application of the EU Charter of Fundamental Rights: ERT Implementation*, 22 Maastricht J. Eur. & Comp. L. 432 (2015), 433-436). The issue was eventually solved in ECJ, Case C-390/12 – *Pfleger and Others* (ECLI:EU:C:2014:281), confirming that *ERT*-like situations were also covered by Art. 51 CFREU, and that the relevant test was therefore the traditional "acting within the scope of EU law" one. Such test was then famously given an extremely broad reading in ECJ, Case C-617/10 – *Åkerberg Fransson* (ECLI:EU:C:2013:280), which went so far as to state that "[t]he applicability of

whether in such cases a "right [or] freedom guaranteed by the law of the Union" for the purposes of Art. 47 CFREU is at stake. Although the precise meaning of the expression is unclear, the tendency of the ECJ seems to be that of actually conflating the analysis thereof with the question whether MS are acting within the scope of EU law for the general purposes of Art. 51 CFREU.[83] From this perspective, the requirement that the protection of a right or freedom guaranteed by EU law be at stake would thus amount to nothing more than a requirement that an EU law provision be applied in the dispute, one way or another. Again, this would patently be the case in the event of a horizontal composite procedure, such as that pursuant to which a tax claim is enforced in the territory of a MS other than that to which the duty is owed by the authorities of the former State. This only happens because EU norms so provide, regulating a case which would otherwise have to be decided by reference to the national law concerned only – most likely, in the sense that, pursuant to the revenue rule, the foreign claim would be unenforceable.[84]

Therefore, assuming that here a violation of Mr Intini's right to an effective judicial remedy under Art. 47 CFREU might well take place, it would be of no bearing, for the purpose of triggering *Donnellan*'s transnational judicial review, that the same would not go for Art. 6 ECHR, despite the fact that *Donnellan* was arguably intended to safeguard Art. 6 ECHR itself. The transformative and autonomous character of the discourse generated into EU law by ECHR law's input makes it possible to accept an exception to the principle of mutual trust, to safeguard the broader right under Art. 47 CFREU, even when the ECHR counterpart would not be applicable. In *Donnellan*, therefore, the ECJ paved the way for

European Union law entails applicability of the fundamental rights guaranteed by the Charter" (para 21). For an analysis of the point in the specific field of tax law, see G. Kofler, *Europäischer Grundrechtsschutz im Steuerrecht*, cit. at 6, 146-177. Note, incidentally, that Kofler concludes that, in the case of the Directives on mutual assistance, the applicability of the Charter does not derive from the "implementation" of EU law *stricto sensu* (but the difference is merely descriptive): contrast 146-154 and 159-172. For systemic reflections on the scope of application of the Charter, also pointing out the limits of any rigid categorisation along the lines of the *Wachauf/ERT* dichotomy, see M. Dougan, *Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"*, 52 Common Mkt. L. Rev. 1201 (2015).

[83] See P. Aalto and others, *Article 47*, cit. at 81, para 47.01.

[84] See note 25 above and surrounding text.

transnational judicial review to be carried out, whenever this would be necessary to redress a breach of EU law in its broadest sense – including, in a scenario such as *Donnellan* and *Intini*, of Art. 47 CFREU in its benchmark aspect.

3.3 The Language of Fiscal Documents in Transnational Notification Processes: On the Substance of Art. 47 CFREU

A question is thus begged: Is the right to an effective judicial remedy under Art. 47 CFREU actually breached, if a taxpayer is notified with an act of assessment drafted in a language which the taxpayer does not understand? The point is debated ever since *Kyrian*. Here, the ECJ indeed concluded that the taxpayer had the right to receive the relevant documents in one of the official languages of the MS of residence, with a view to ensuring the understandability of their content. It did so, however, pivoting not on Art. 47 CFREU, but rather on a self-standing interpretation of Directive 76/308. It found the understandability of the documents by the recipient to be an implicit requirement of any act of notification, viewed in the light of its purpose of "mak[ing] it possible for the addressee to understand the subject-matter and the cause of the notified measure and to assert his rights".[85] Scholarly comments on *Kyrian* were quick to notice that there was no such need to ground that requirement on a self-enclosed interpretation of the Directive, and that more satisfactory a result could have been reached by focusing, to the same effect, on what is now Art. 47 CFREU.[86] Interestingly, however, the ruling referenced by the ECJ in *Kyrian* to support its interpretation on the function of notification does actually reason in terms of the right to an effective judicial remedy.

Weiss und Partner (2008)[87] concerned the interpretation of Art. 8(1) of Regulation (EC) No 1348/2000, which enables the

[85] See *Kyrian*, cit. at 48, para. 58.

[86] See E. Lege, 'Zustellung des Vollstreckungstitels in einer Sprache, die der Empfänger nicht versteht – Anmerkung zum Urteil des EuGH vom 14.1.2010 – Rs. C-233/08 (*Kyrian*)', 7 Zeitschrift für das Privatrecht der Europäischen Union 193 (2010), 195-196. Also see, *mutatis mutandis*, F. Péraldi-Leneuf, *Confiance mutuelle en matière de recouvrement de créance* (2018) 6 Europe – Actualité du droit de l'Union Européenne.

[87] ECJ, Case C-14/07 – *Weiss und Partner* (ECLI:EU:C:2008:264). For a detailed, yet concise account of the ruling from the civil procedural point of view, see the case note (written by P. Orejudo Prieto de los Mozos) in S. Alvarez Gonzalez, *Jurisprudencia Española y Comunitaria de Derecho Internacional Privado – Sección III:*

recipient of a judicial document in civil or commercial matters to refuse the transnational service thereof, if the document is not drafted in the official language of the MS addressed or a language of the MS of transmission which the recipient otherwise understands.[88] The question was how far the right of refusal could go, as far as documents to be notified in the initial phase of a proceeding were concerned: in the main proceeding, the documents relating to an action for damages for defective design on the basis of an architect's contract had been served on the defendant, an English company, to file an application with the German courts. However, only the contract had been translated into English, whereas the annexes thereto (including, for instance, technical reports on the project) had been notified in their original German version.[89] The ECJ concluded that the right of refusal only extends to "the document or documents which must be served on the defendant in due time in order *to enable him to assert his rights*", and highlighting that it does not cover "documents which have a purely evidential function and are not necessary for the purpose of *understanding the subject-matter of the claim and the cause of action*".[90] What is more, however, the ECJ opened its analysis by recalling that the objectives of the Regulation concerned (namely, "to improve and expedite the transmission of documents")[91] "cannot be attained by undermining in any way the rights of the defence", which "derive from the right to a fair hearing guaranteed by Article 6 [ECHR and] constitute a fundamental right forming part of the general principles of law whose observance the Court ensures".[92] It

Jurisprudencia, Parte B (Derecho Judicial Internacional y Derecho Civil Internacional), 60 Revista Española de Derecho Internacional 215, (2008) 229-232.

[88] See Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ L 160, 30.6.2000, pp. 37-52), Art. 8(1).

[89] *Weiss und Partner*, cit. at 87, paras. 19-31.

[90] Ibid., para. 73. Emphasis added.

[91] Ibid., para. 46.

[92] Ibid., para. 47. Note that the judgment predates the entry into force of the Lisbon Treaty and, hence, the acquisition of fully binding legal force on the part of the Charter. The ECJ thus makes reference not to Art. 47 CFREU, but to the corresponding general principle of EU law guaranteed by Art. 6.3 TEU, consolidating into positive treaty law the ECJ's case law dating back to Case C-29/69 – *Stauder v. Stadt Ulm* (ECLI:EU:C:1969:57) and Case C-11/70 – *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECLI:EU:C:1970:114). On these aspects, see G. De Búrca, *The*

accordingly drew the distinction recalled above, between refusable documents and those which are not, precisely based on the need to reach a compromise between those conflicting needs.[93] In other words, contrary to what the ECJ maintained in *Kyrian*, *Weiss und Partner* did not ground its protective interpretation of language requirements in Regulation 1348/2000 on the purpose of notification, objectively viewed. It rather referred to a dichotomy between such objective purpose, on the one hand, and the subjective (fundamental) right granted by what is now Art. 47 CFREU, on the other hand. The latter acted antagonistically to the former, and implied the tearing down of language barriers to effectively safeguard the concerned person's rights before court. The effectiveness and expeditiousness of the cross-border notification of judicial documents (and so, by analogy, of fiscal acts) would benefit if the notifier were enabled to avoid the costly and time-consuming process of translation; the right to an effective judicial remedy, however, does not allow such a solution, at least insofar as the documents which are "necessary for the purpose of understanding the subject-matter of the claim and the cause of action" are concerned. *Weiss und Partner* hence confirms that the full and prompt linguistic understandability of documents which are crucial for a suit at law is a key component of Art. 47 CFREU, even in cases not qualifying as "criminal" (such as, in fact, Mr Intini's), in respect of which the point is made explicit by Art. 6(3)(a) ECHR.[94]

This allows one to imbue with meaning the statement in a leading precedent on Art. 47 CFREU, *ZZ* (2013),[95] that, pursuant to that right, "the person concerned must be able to *ascertain the reasons upon which the decision taken in relation to him is based*, (…) so as to make it possible for him to *defend his rights in the best possible conditions and to decide*, with full knowledge of the relevant facts, *whether there is any point in his applying to the court* with

Evolution of EU Human Rights Law, in P. Craig, G. De Búrca (eds.), *The Evolution of EU Law*, cit. at 12, in particular 486-492.

[93] *Weiss und Partner*, cit. at 87, paras. 50-72.

[94] Art. 6(3)(a) ECHR, in fact, reads: "Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him (…)".

[95] ECJ, Case C-300/11 – *ZZ* (ECLI:EU:C:2013:363). For commentary, see N. de Boer, *Secret Evidence and Due Process Rights under EU Law: ZZ*, 51 Common Mkt. L. Rev. 1235 (2014).

jurisdiction".[96] An individual is not only prevented from effectively appraising whether there is any point in applying to a court when the document is not notified to them at all, as happened in *Donnellan* (which quotes *ZZ* to this effect).[97] This is also the case where the information, whilst formally notified, cannot be given any real meaning by the recipient, because they cannot understand the language in which that decision is drafted. If, therefore, Art. 47 CFREU as interpreted in *ZZ* and *Weiss und Partner* is considered in its benchmark aspect, the relevant provisions in the EU Directives should be understood in the sense that fiscal documents in mutual assistance procedures should be notified in a language which is understandable to the recipient. The ECJ, indeed, reached such conclusion, already in *Kyrian*, drawing on arguments which, as *Weiss und Partner* shows, would actually tend to limit such aspect of Art. 47 CFREU.[98] It thus seems hard not to see an *a fortiori* argument to this end in the right to an effective judicial remedy. However, once it is acknowledged that notification in a language which is not understandable to the recipient is of prejudice to a crucial aspect of Art. 47 CFREU, it should be assessed whether this would qualify as an "exceptional circumstance" under (Opinion 2/13 and) *Donnellan* – that is, for present purposes, as an instance where transnational judicial review would be allowed, despite the allocation of jurisdiction to the contrary laid down in the EU mutual assistance Directives. We submit that the answer should be in the affirmative.

3.4 The (Exceptional) Conditions of Transnational Judicial Review and the Case of Fundamental Rights

As hinted at in Section 3.2 above, transnational judicial review under *Berlioz* and *Donnellan* was placed by the ECJ in a broader constitutional context. In fact, transnational judicial review was construed as an exception to the principle of mutual trust between the EU MS, needed to safeguard the right to an effective judicial remedy under Art. 47 CFREU. In those cases, mutual trust would have implied a complete denial of that right, since the taxpayers concerned would have been deprived of any opportunity to have an alleged breach of EU law redressed: in *Berlioz*, the

[96] *ZZ*, cit. at 95, para. 53; emphasis added. For a similar statement in *Donnellan*, see the excerpt quoted in the text surrounding note 38 above.
[97] See *Donnellan*, cit. at 9, para. 55.
[98] See note 85 above and surrounding text.

request for information-sharing was an act confined to the relationship between the MS involved, of which the addressee of the order was not aware, and which it could therefore not separately challenge.; in *Donnellan*, the Greek limitation period had elapsed without Mr Donnellan having been put in the position of asserting his rights. The judges of a MS could thus exceptionally double-check compliance with EU law by the authorities of another MS. The criterion to operationalise Opinion 2/13's "exceptional cases" clause which seems to emerge from *Berlioz* and *Donnellan* is thereby a test of whether, without transnational judicial review, the taxpayer would not have any opportunity to bring a suit at law against a decision adversely affecting their interests. In our view, this would not, however, be a completely accurate account of the stakes in the cases involved. This is *also* true, but, we submit, there is more than this to transnational judicial review. The question to be asked is: *Why* should transnational judicial review be allowed when there would be no other opportunity to have one's case heard by a judge? If one bears in mind that, pursuant to Opinion 2/13, exceptions to mutual trust (such as transnational judicial review is) are to be allowed in order to ensure that "the fundamental rights guaranteed by the EU [be] observed",[99] the answer becomes more apparent: because access to court is a substantive aspect of the right to an effective judicial remedy under Art. 47 CFREU. From this perspective, the dichotomy between Art. 47 CFREU *qua* cause of action and Art. 47 CFREU *qua* benchmark, which we have deployed this far for explanatory purposes, tends to dissolve: establishing a judge's transnational jurisdiction (hence giving effect to the cause of action) is a way not to have the particular aspect of the benchmark provided by the right of access to court breached. Consider *Donnellan*: the case can be framed as follows.[100] Since Greece acted under Directive 2010/24 to notify the penalty notice across the border, Art. 51 CFREU rendered Art. 47 CFREU applicable. Mr Donnellan thus had the right under Art. 47 CFREU

[99] Opinion 2/13, cit. at 74, para. 192.

[100] This appears to be the most apposite conceptualisation of the construction implied by the ECJ in its ruling, which however is influenced by the particular setting of the case (with Mr Donnellan demanding the enforcement of the claim to be refused based precisely on the defective notification process, and with the Directive's provisions barring the Irish judge's jurisdiction to do so). In our submission, the case could however be more accurately framed in a different way: see below, text surrounding note 110.

(via ZZ) to have the documents duly served, in order to assess whether there was any point in bringing a claim against the penalty order before a court of law. Such right does also, however, amount to a "right or freedom guaranteed by the Union" in respect of which Mr Donnellan enjoyed (also under Art. 47 CFREU) a right of access to court, to seek to have alleged breaches thereof redressed. The apportionment of jurisdiction under the mutual assistance Directives stood in the way of that access to court, since it reserved jurisdiction upon the issue to the Greek judge. Mr Donnellan was, however, prevented from challenging the claim before that judge, because the very same procedural defect complained of had caused the relevant limitation period to elapse, without Mr Donnellan even being aware of the penalty. The Directive's allocation of jurisdiction accordingly had to be discarded: otherwise, the very essence of the right of access to court would have been rendered nugatory. The implications of this construction are, however, even broader. Under the current interpretation by the ECJ, EU administrative law provisions placing substantive or procedural conditions upon preparatory acts in horizontal composite procedures also qualify as attributing "a right or freedom guaranteed by the law of the Union" for the purposes of Art. 47 CFREU.[101] The right of access to court must be granted in respect of that right/freedom, whether the latter can in turn be subsumed into a fundamental right or not. If, therefore, in a given case there were no other way to have a violation of those provisions redressed, than to enable the judge reviewing the final act to check in their light the legality of the preparatory acts of the procedure (most remarkably, because preparatory acts were not separately challengeable in the legal system of provenance), transnational judicial review would also have to be carried out.[102] Art. 47 CFREU would then provide again

[101] See note 83 above and surrounding text.

[102] It might be objected that this solution is somehow artificial, since it might also be the legal systems in whose context the preparatory acts are adopted to be placed under an obligation to enable the separate challengeability of those acts, despite any provision to the contrary in the national law. In principle, preparatory acts are not, indeed, separately challengeable in many a national system of EU MS: see M. Eliantonio, *Europeanisation of Administrative Justice? The Influence of the CJEU's Case Law in Italy, Germany and England* (2008), 35-37 (for the Italian legal system) and 42-48 (for the German legal system); R. Chapus, *Droit du contentieux administratif* (12th edn., 2006), 587-595 (for the French legal system). That such rules should not be applied and the legal system of the preparatory act should make the latter applicable might be opined, in particular, following the

a cause of action, with the relevant "right and freedom guaranteed by EU law" serving as the benchmark for transnational judicial review.

When compliance with EU fundamental rights is concerned, this point can, however, also be brought one step forward. The very same logic underlying such solution would also dictate that, when the foreign preparatory act impinges upon a fundamental right guaranteed by EU law other than the right to an effective judicial remedy,[103] the national judge reviewing the final act of the procedure should be entitled to review it, *irrespective of whether that act could have been separately challenged in the system of provenance*. If the need to safeguard fundamental rights is, pursuant to Opinion 2/13, the ultimate reason to derogate from mutual trust, also rights other than Art. 47 CFREU deserve access to the enhanced and exceptional protection provided by transnational judicial review, when necessary. Residuality to challenges in the foreign system is a requirement which makes sense from the perspective of Art. 47 CFREU (which can be effectively safeguarded even without transnational judicial review, if a suit at law can be initiated abroad), but is of no bearing on the question whether a given

rationale behind the ECJ's decision (which however, strictly speaking, only regards vertical composite procedures, on which see note 4) in Case C-97/91 – *Oleificio Borrelli v. Commission* (ECLI:EU:C:1992:491). Whereas one argument in favour of this might be found in the fact that "stopping" the composite procedure at the preparatory stage is more in line with the principle of legal certainty, it cannot, however, be ignored that such a solution goes to the detriment of the effectiveness of the individual's judicial remedy. It potentially entails a costly and time-consuming multiplication of judicial claims against the acts of one and the same procedure, spanning throughout a number of different national legal systems. Further, it requires both the individual and the national judge to be ready to, respectively, initiate and decide a suit at law contrary to what the national law to be applied envisages (for reflections on the sharp drawbacks for rightholders of such a kind of litigation in even more "publicised" a policy area such as the common market, see J. Pelkmans, *Mutual Recognition in Goods. On Promises and Disillusions*, 14 J. of Eur. Pub. Pol'y 699 (2007).

[103] This might be the case, for instance, in cases of fiscal information exchange such as *Berlioz*, where the unlawful gathering of information which is not foreseeably relevant to tax assessment procedures (see note 42 above) might clash with the rights to respect for private and family life and to the protection of personal data under, respectively, Arts. 7 and 8 CFREU. The rights forming part of the right to a good administration granted under Art. 41 CFREU might also have a particular and cross-cutting significance from this perspective (think, for instance, of a preparatory act not stating any reasons whatsoever for its adoption).

decision violates a fundamental right *as such* (i.e., irrespective of the effective judicial protection thereof under Art. 47 CFREU). At the same time, Opinion 2/13 makes clear that such derogation should only be applied "in exceptional cases", since mutual trust is a fundamental principle of EU law, just as much as the protection of fundamental rights.[104] A criterion to draw a distinction between transnationally reviewable acts and those which are not should thus be developed. In our submission, *Avotiņš v. Latvia*'s concept of a "serious and substantiated claim that protection has been manifestly deficient" might provide a useful starting point. This embodies a persuasive rationale that a claimant would be expected to meet a high evidentiary burden, i.e. to make a "serious" and "substantiated" case, before a fundamental principle of EU law such as mutual trust can be derogated from. At the same time, the "manifest deficiency" limb of the formula can be given, in EU law, a more precise meaning, helping in further circumscribing the scope of transnational judicial review. In *Donnellan*, a core aspect of Art. 47 CFREU had been violated – *ZZ*'s need for the addressee of a decision to be placed in the position of deciding whether to bring a judicial claim against it or not.[105] We suggest that this was also the case in *Intini*, interpreting *ZZ*, in the light of *Weiss und Partner*, to embody also a criterion of linguistic understandability.[106] Just as in cases of access to court in the narrow sense, what is at stake here is one of the aspects which form the hard core of Art. 47 CFREU. Relevance to this circumstance can be attributed, as a matter of positive law, drawing on Art. 52(1) CFREU's requirement that any limitation on EU fundamental rights "respect the essence of those rights and freedoms".[107] Where this is not the case, the limiting

[104] See Opinion 2/13, cit. at 74, para. 191.

[105] See note 96 above and surrounding text.

[106] See text surrounding note 98 above.

[107] This is, however, an under-theorised provision, to which scholars and the ECJ seem to have started paying systematic attention just recently: for an excellent (and critical) overview, see T. Tridimas and G. Gentile, *The Essence of Rights: An Unreliable Boundary?*, 20 Germ. L. J. 794, in particular 802-812. Interestingly, the conceptualisation of the "essence" of a Charter right which seems to be most advanced is the one regarding Art. 47 CFREU itself (whose essence is commonly held to comprise, for instance, the right of access to a court given with jurisdiction to review all the relevant issues of law and fact). In the literature, see S.K. Gutman, *The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?*, 20 Germ. L. J. 884 (2019). In the case law, see ECJ, Case C-245/19 – *État*

measure is unacceptable under EU law. In horizontal composite procedures, an easy and effective way to redress the violation thus carried out would be to refuse to enforce, or to declare null and void as the case may be, the final act adopted on the basis of a preparatory act violating the essence of a fundamental right. In our submission, the jurisdiction to do so could be established, as recalled above, by providing serious and substantiated evidence that such a violation has taken place – conceiving, as in *Donnellan*, the fundamental right at stake as both the cause of action and the benchmark for judicial analysis of the case. Further, given that the right of access to court would not be involved in the doctrinal construction of the case's cause of action, it would not be necessary to show, as the current *Berlioz-Donnellan* approach based on the right to an effective judicial remedy requires, that challenges against the preparatory act in the legal system of provenance would be barred.

We concede that this latter interpretation of the Opinion 2/13-backed *Berlioz/Donnellan* jurisprudence might be held to go too far. Allowing national judges to review foreign preparatory acts in the light of EU fundamental rights even where those acts might have been challenged in the "original" legal system might lead to a proliferation of instances of transnational judicial review. While sensible from a constitutional point of view in the EU's system of shared sovereignty, this might cause legitimacy concerns in many a circle.[108] The first solution, allowing for a transnational fundamental rights scrutiny based on Art. 47 CFREU whenever preparatory acts would not be amenable to separate challenge, would however amount to no more than a generalisation of *Donnellan*'s logic to EU fundamental rights law as a whole. Just like secondary norms explicitly devoted to regulating the horizontal composite procedure (which *Berlioz* already makes censorable), fundamental rights are norms which are binding upon the MS involved, since national authorities are acting "within the scope of EU law".[109] The correct application of such norms might then be reviewed by the judges belonging to the legal system of the final

Luxembourgeois (Droit de recours contre une demand d'information en matière fiscal) (ECLI:EU:C:2020:795), para. 66.

[108] See e.g. Filipe Brito Bastos, Luxembourg v. B*: How Far Should Jurisdictional Limits Be Eroded in the Name of Effective Judicial Protection?*, 41 EU Law Live – Weekend Edition 10 (2020).

[109] See note 82 above and surrounding text.

act, *qua juges de droit commun*, and in respect of which a judicial remedy must be granted, *qua* "rights granted by the law of the Union" under Art. 47 CFREU. If, therefore, the most liberal solution were to be deemed excessively innovative, we should however acknowledge that a fundamental rights-based transnational judicial review, when no other judicial remedy would otherwise be available, would still be compelled in any event by the current logic of EU law.

Closing the circle, we submit that in *Intini* the Court of Cassation should indeed have accepted Italian jurisdiction, and declared the Austrian instrument to be unenforceable. Based on our second solution, this would be most obvious. Enforcing a claim in breach of the linguistic aspect of Art. 47 CFREU would violate the essence of the provision, viewed under *ZZ* and *Weiss und Partner*'s understandability angle. If, however, the first, access-to-court-centric interpretation we advance is adhered to, transnational judicial review appears also apposite. From the case's narrative, it appears that Mr Intini did not challenge before the Austrian judge the act of assessment upon receiving it, but it seems fair to assume that he would have had the opportunity to do so. One might thus be tempted to conclude that transnational judicial review should not be allowed, since another opportunity to redress the violation of Art. 47 CFREU's language rights existed, and Mr Intini decided not to avail himself thereof. Mr Intini can however hardly be blamed for not challenging abroad an act which he was not in the position to understand – or in respect of which, in *ZZ*'s parlance, he was unable "to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court".[110] Viewed from the perspective of Art. 47 CFREU, Mr Intini was in the same position as Mr Donnellan: his right to apply to an Austrian court was rendered merely illusory on account of defects in the process of notification attributable to the Austrian authority. The point is that, in this context, it is artificial to conceive procedural rights such as those governing notification as independent "rights and freedoms guaranteed by the law of the Union", in respect of which access to court must be granted (with the residuality to challenges in the legal system of provenance which this entails from the perspective of transnational judicial review, "exceptionally" conceived). Those rights are a corollary of, and a precondition for,

[110] See text surrounding note 96 above.

the right of access to court, which is *already* breached when the former are violated. Stakeholders cannot be required to bring in the legal system of origin a judicial claim against preparatory acts, aiming at censoring procedural defects which prevent them from bringing a judicial claim whatsoever. In such instances, the only way for those rights to be effectively safeguarded is to accept jurisdiction to review in their light the eventual act of the composite procedure, irrespective of any further consideration (as the ECJ in fact did in *Donnellan*).

4. Concluding Remarks

All in all, one cannot but be disappointed at the superficiality with which, as shown in Section 3.1, the Court of Cassation approached such a complex case as *Intini*. That case and similar cases involve many an aspect which is far from crystal-clear, and would require more careful judicial analysis to be correctly solved. One might agree or disagree with the interpretation of the current state of EU law advanced above; but, for sure, one would also be legitimately entitled to a deeper consideration of the profiles highlighted here at the highest judicial level of a MS' legal system. *Intini* also enabled us, however, to engage at length with the conceptual framework of transnational judicial review in EU horizontal composite procedures. We thus found that, based on *Berlioz* and *Donnellan*, both substantive and procedural defects affecting preparatory acts in those procedures are, in principle, liable to be transnationally reviewed (see Section 2 above). The fact that this solution was based on Art. 47 CFREU enables it to be broadened to all horizontal composite procedures, irrespective of the constraints which Art. 6 ECHR places upon it when viewed from Strasbourg (Section 3.2 above). As far as violations of Art. 47 CFREU are concerned, extant ECJ jurisprudence shows that cross-border recipients of administrative decisions have a right to receive them in a language which they are in a position to understand, with a view to ensuring that the decision's content can be understood, and appropriate steps against it can be taken to safeguard one's rights and interests (Section 3.3 above). Art. 47 CFREU is, however, just one amongst many fundamental rights guaranteed by EU law. *Berlioz* and *Donnellan*'s logic compels national judges to safeguard all those rights in horizontal composite procedures. Foreign preparatory acts impinging upon them must thus be amenable to

transnational judicial review, possibly even in instances where such acts could have been separately challenged in the legal system of origin. The baseline is, however, that violations of fundamental rights, as well as of provisions of secondary law applicable to the procedure, must be redressed in the context of challenges brought against the final act of the procedure, when the preparatory act could not be separately challenged in the legal system of origin; and this includes cases in which a challenge which would have been possible in the abstract, was prevented in the concrete because of procedural flaws amounting, in themselves, to a violation of Art. 47 CFREU (Section 3.4 above).

Transnational judicial review can thus be carried out against three benchmarks: *substantive* norms of secondary law specifically regulating the procedure; *procedural* norms of secondary law also specifically devoted thereto; and *fundamental rights*, both substantive and procedural, irrespective of whether norms of secondary law specifically meant to give effect thereto are also explicitly laid down. We believe the time to be ripe for Europe's integrated administration to be subject to a unitary jurisdiction of *juges de droit commun*, capable of ensuring that the horizontal composite procedures through which that administration operates do not result in the rule of law being systematically circumvented. Only by so doing, the ambitious commitment in Art. 2 TEU to a "Union founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights" will be able to be fully respected in practice.

THE RECOVERY PLAN UNDER THE SCRUTINY OF THE GERMAN CONSTITUTIONAL COURT: INSTITUTIONAL IMPLICATIONS AND A LESSON FROM THE PAST

*Angela Ferrari Zumbini**

Abstract

The article offers a critical analysis of the German Constitutional Court's decision of 15 April 2021 on the law ratifying the Own Resources of the European Union Decision. Two central problems are highlighted. The first has institutional implications: the case at issue not only highlights a potential conflict between the European institutions and a national court but also an ongoing conflict between two constitutional bodies of the German State, in which one — the BVG — appears to challenge (or at least check the actions of) the other, namely the Bundestag, for exercising its authority in breach of the fundamental Constitutional norms protecting citizens' rights and national identity. The second regards the two opposing visions of Europe that have always been in dialectical contrast on this point, specifically, an ever-closer union between the peoples of Europe on the one hand and an expanding but less cohesive one on the other. Lastly, the article suggests some lessons from the past, recalling how the League of Nations rescued Austria in the aftermath of World War I.

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1. Introduction

Less than a year after the resolution of the dispute on Quantitative Easing – the monetary policy programme adopted by the European Central Bank (ECB) in 2015 in response to the financial crisis of 2010 — the *Bundesverfassungsgericht* (the Federal Constitutional Court, from now on BVG) also examined (in the interim) the new European programme to overcome the current economic crisis resulting from the COVID-19 pandemic: the Next Generation EU (NGEU), which allows implementation of the National Recovery and Resilience Plans (NRRPs).

The judgment examined here[1] is somewhat problematic in terms of the intrinsic coherence of the decision and — above all — from the institutional point of view. In its dialogue with the Court of Justice of the European Union, the Court appears to envisage a referral for a preliminary ruling in the course of the main proceedings while suggesting that, if necessary, it will carry out an *ultra-vires* review of the European decision at issue.

Here — and unlike in previous cases — the BVG also comes

[1] BVerfG, Beschluss des Zweiten Senats vom 15. April 2021-2 BvR 547/21.

up against a federal constitutional body, the Bundestag. The German Parliament had ratified the European decision with a significant majority. Thus, the Court's review, allegedly aiming to protect the prerogatives of the Parliament as a whole, actually appears to be a form of *ex-post* control over the exercise of that prerogative, also in defence of the parliamentary minority, as opposed to *ex-ante* protection of decision-making authority.

Moreover, as this case concerns financial matters, for which a discretionary assessment is par for the course, the Court does not appear to intend to limit itself to censuring hypothetical cases of manifest unreasonableness and illogicality, which suggests robust control over the merits of the decision.

From the European Union's point of view, the BVG's Judgment of April 2021 highlights — once again — some problematic aspects affecting European integration[2], especially in terms of the two opposing visions of Europe that have always been in dialectical contrast on this point, namely an ever-closer union between the peoples of Europe on the one hand, and an expanding but less cohesive one on the other[3].

Lastly, taking its cue from an analysis of the possible developments following the decision examined here, the article concludes with a past example of international lending to revive a national economy; one that worked well and from which lessons may be drawn, i.e. how The League of Nations rescued Austria in the aftermath of World War I.

2. The decision of 5 May 2020 on Quantitative Easing and its developments

With a judgment of May 2020[4], the BVG stated that the ECB's decisions on the Public Sector Purchase Programme were unlawful, observing that they were contrary to the *Verhältnismaβigkeitsprinzip*. However, it considered that this unlawfulness could be remedied

[2] L. Rapone, *Storia dell'integrazione europea*, (9o ed. 2015).

[3] G. della Cananea, *Differentiated Integration in Europe after Brexit: A Legal Analysis*, in European Papers, 2/2019, 447.

[4] The judgment of the *Bundesverfassungsgericht* of 5 May 2020 gave rise to a wide-ranging debate and several commentaries. See, among many, issue 2/2020 of DPCEonline, which contains a whole section (Cases and Questions) on this decision and includes several contributions, and P. Dermine, *The Ruling of the Bundesverfassungsgericht in PSPP– An Inquiry into its Repercussions on the Economic and Monetary Union*, 16 Eur. Const. L. Rev., 525 (2020).

through an *ex-post* supplementary statement of reasons, which was to be rendered within 90 days. Less than two months later, the ECB submitted a series of documents to the German Government in which it examined in greater depth the proportionality of previous measures, thus concluding in a positive and conciliatory manner the potential crisis triggered by the BVG judgment of May 5, 2020.

Indeed, on 26 June 2020, the German Finance Minister sent the President of the *Bundestag* a note (to which the documents received from the ECB were annexed), stating that 'We have come to the conclusion that the proportionality assessment undertaken by the ECB Governing Council, as evidenced by the documents provided, demonstrates the required balancing of interests in a comprehensible manner'[5].

Concluding the brief summary of the May 2020 judgment — which can be regarded as the last of a long series of precedents relating to the decision analysed here — it should be pointed out that the BVG recently rejected an application for an enforcement order by way of 'compliance'.

Article 35 of the Law on the Constitutional Court (*Bundesverfassungsgerichtsgesetz* – BVerfGG) provides that in its decision, 'the Federal Constitutional Court may specify who is to execute it; in individual cases it may also regulate the manner of execution'[6]. However, according to the applicants, the ECB had not yet complied with the Judgment of May 2020, considering the documents produced to be insufficient. They therefore referred the matter to the Court once again, requesting enforcement. On 29 April 2021, the Second Senate declared this request inadmissible[7] as it sought adjudication on measures adopted after the May 2020 ruling.

Measures implementing judgments may concern only the factual and legal situations examined in the decision to be enforced since they may not supersede those limits and must comply with the principle of the separation of powers. Although the BVG resolved the dispute in purely procedural terms and declared the application inadmissible, the grounds for the rejection decision

[5] The letter of the Federal Ministry of Finance is cited in the BVerfG, Order of the Second Senate of 29 April 2021 - 2 BvR 1651/15, § 6.

[6] Article 35 of *the* Bundesverfassungsgerichtsgesetz — BVerfGG "*Das Bundesverfassungsgericht kann in seiner Entscheidung bestimmen, wer sie vollstreckt; es kann auch im Einzelfall die Art und Weise der Vollstreckung regeln*".

[7] BVerfG, Beschluss des Zweiten Senats vom 29 April 2021-2 BvR 1651/15.

contained an *obiter dictum* clarifying that, in relation to the substance, the decisions of the Council of the ECB would, in any event, be sufficient to comply with the judgment[8].

As indirectly confirmed by the large number of judgments brought before the BVG and elsewhere, the tensions and potential conflicts between European bodies and national courts are not likely to disappear, at least as long as a number of inconsistencies remain in the overall European design, as we claim here.

3. Context: The Council's Decision on the Own Resources of the European Union and the Recovery Plan

At the July 2020 European Council, the EU's Heads of State and Government agreed to adopt an extraordinary plan to respond to the economic and social consequences of the COVID-19 pandemic. In particular, the European Council approved the "European Recovery Plan" presented by the Commission with some amendments[9]. The Plan is based on the EU's multiannual budget, namely the Multiannual Financial Framework for the years 2021-2027 and the key Next Generation EU recovery programme, a temporary and exceptional instrument to help the economies of the Member States. A reform of the Union's own resources has been envisaged to finance the Next Generation EU[10] in accordance with the Treaty of Lisbon.

On 14 December 2020, the Council of the EU therefore adopted the Own Resources Decision, which sets out the arrangements for financing the EU budget[11].

Reorganisation of the EU's own resources must follow three guidelines introducing or amending the same number of instruments.

Firstly, an additional category of own resources is

[8] Ibid., esp. § 86.

[9] https://ec.europa.eu/info/strategy/recovery-plan-europe_it.

[10] On the EU budget in the light of the Lisbon reforms see A. Brancasi, *Il bilancio dell'Unione dopo Lisbona: l'apporto delle categorie del nostro ordinamento nazionale alla ricostruzione del sistema*, in *Diritto Pubblico*, 3/2010, 675. For an outline of the EU budgetary system with a view to reforming the Own Resources system, see A. Somma, *Il bilancio dell'Unione europea tra riforma del sistema delle risorse proprie e regime delle condizionalità*, in DPCEonline, 4/2018, 873.

[11] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of Own Resources of the European Union and repealing Decision 2014/335/EU, Euratom.

introduced from scratch, contributing to supporting the circular economy and tackling climate change: these are national contributions calculated according to the weight of non-recycled plastic packaging waste (at a uniform rate of EUR 0.80 per kilogram of non-recycled plastic)[12].

Secondly, Article 5 of the Decision authorises the Commission to borrow on the financial markets on behalf of the European Union up to a maximum of EUR 750 billion. These funds will be used to implement the 'Recovery Plan', thus financing the National Recovery and Resilience Plans. Loans taken out by European Union may be allocated for grants (up to a maximum of EUR 390 billion) and lending (up to a maximum of EUR 360 billion).

Thirdly, to provide an adequate guarantee that the debts incurred can be regularly repaid, the Decision raises the own resources ceilings that the EU may request from the Member States. To maintain budgetary discipline, paragraph four of Article 310 TFEU stipulates that it must be possible to finance the expenditure provided for in the budget within the limits of the own resources. With the Decision of December 2020, the maximum amount of funds that EU may obtain from the Member States was raised to 1.40 %[13] of the gross national income (GNI) compared with the previous limit of 1.23 %.

As laid down in Article 311 TFEU, the Council Decision on the European Union's own resources must follow a special legislative process. First, it is necessary to act unanimously after consulting the European Parliament. In addition, in order to enter into force, the Decision must be approved in advance by all the Member States "*in accordance with their respective constitutional requirements*."

This means that the NRRPs, which are decisive for the recovery of the real economy, can only be financed once the fundamental Own Resources Decision is ratified by the Member States themselves.

Under their various circumstances, all the Member States approved the decision according to their respective constitutional systems. The decision therefore entered into force on 1 June 2021 (i.e. the first day of the first month following receipt of the last notification relating to the procedures for adopting the decision, as

[12] Article 2(1)(*c)* Council Decision 2020/2053 of 14 December 2020.
[13] Article 3(1) of the Decision.

provided for in Article 12 of the decision). Interestingly, the last notifications came in from Austria, the Netherlands, Poland, and Hungary on 31 May 2021[14].

Germany finalised its adoption procedure on 29 April, following a complex process that once again saw the involvement of the BVG, with two successive rulings, and on which the last word is yet to be written.

4. The ratification procedure in Germany and the grounds for appeal

The Federal Act ratifying the Own Resources Decision (*Eigenmittelbeschluss-Ratifizierungsgesetz* - ERatG) was presented on 19 February 2021 and was predictably debated at length in Parliament.

The Bundestag passed the law on 25 March 2021 with 478 votes in favour, 95 against, and 72 abstentions[15]. The following day, the Bundesrat (Federal Council) also unanimously approved the ratification[16].

On 26 March 2021, over two thousand German citizens (2,281 to be precise), members of the *Bündnis Bürgerwille* organisation led by Bernd Lucke, filed an appeal for a constitutional judgment (*Verfassungsbeschwerde*) on the law ratifying the European Own Resources Decision.

There are two main grounds of appeal: one regarding national law and the other concerning EU law.

With regard to the *Grundgesetz* (Basic Law), the citizens complained that their constitutionally guaranteed rights had been infringed, namely those deriving from the democratic principle of self-determination and the budgetary sovereignty of the Bundestag[17]. According to the applicants, the 2020 Own Resources

[14] The dates and summary of the procedures for adopting the Own Resources Decision can be found online at https://www.consilium.europa.eu/it/documents-publications/treaties-agreements/agreement/?id=2020025&DocLanguage=en

[15] See the results of the vote on https://www.cducsu.de/abstimmungen/eigenmittelbeschluss-ratifizierungsgesetz-eratg, also providing information on the distribution of votes by parliamentary group.

[16] https://www.bundesrat.de/SharedDocs/beratungsvorgaenge/2021/0201-0300/0235-21.html

[17] In particular, the applicants alleged infringement of the constitutional rights provided for under Article 38(1) (Members of the Bundestag are elected by

Decision undermines German constitutional identity as it affects the Bundestag's overall responsibility for the budget (§ 13).

As for EU law, German citizens argue that the ratification law — and thus also the Council's Own Resources Decision as a ratified act — infringes Article 311 TFEU and the bail-out prohibition set out in Article 125 TFEU.

The point is crucial: once again, an act of a European institution is censured as *ultra-vires* since it does not merely introduce a new category of own resources but authorises an EU indebtedness programme not provided for under Article 311.

On the same day, 26 March, in a separate application, the applicants asked the BVG for urgent interim protective measures to prevent completion of the legislative ratification procedure, thus making it impossible to notify the European Union that the decision had been ratified (and preventing the decision from entering into force).

5. The provisional interim decision of 26 March 2021 preventing the President of the Republic from enacting the law

Paragraph 32 of the Federal Law on the Federal Constitutional Court *(Bundesverfassungsgerichtsgesetzt – BVerfGG*) provides for interim measures in proceedings on constitutionality. The conditions for issuing a protective measure are linked to the urgency of protecting the common good (*Gemein Wohl*).

Specifically, the three cases where precautionary claims may be upheld are: to prevent serious negative consequences for the common good, to prevent threats of violence to the common good, or for some other significant and urgent reason relating, once again, to the common good. An interim measure expires after six months and may be reconfirmed only by a two-thirds majority of the adjudicating panel.

The adoption of interim protective measures is also

universal, direct, free, equal, and secret suffrage. As representatives of the whole population, they are not bound by mandates or Directives, and are subject only to their conscience) in conjunction with Article 20(1) (The Federal Republic of Germany is a democratic and social federal State) and 2 (All State power emanates from the people. It is exercised by the people by means of elections and votes, and by special bodies vested with legislative, executive, and judicial powers), and Article 79(3) (No amendment to this Basic Law concerning the organisation of the Federation in the *Länder*, the principle of participation of the *Länder* in the legislation or the principles set out in Articles 1 and 20, is permitted).

envisaged pending the plenary hearing of the petition, an institution very similar to Article 56 of the Italian Code of Administrative Process[18], with the fundamental difference that it must always be a collegial (rather than a monocratic) decision, albeit in 'reduced ranks'. Under Article 15(2) BVerfGG, the constituent quorum for the Second Senate of the BVG is six judges (out of eight). If the quorum is not reached when the application for interim relief is filed with the Senate, in cases of particular urgency, a provisional precautionary measure may still be adopted, if at least three judges are present and adjudicate unanimously. In this case, the interim protective measure lapses after one month and may be reconfirmed by the panel in its ordinary composition for a further six months (§ 32(7) BVerfGG).

This is precisely what happened on 26 March 2021, thanks to a decision adopted by five judges ordering the President of the Republic not to complete the legislative process relating to the challenged provision until the BVG had expressed its views on the interim application presented by the applicants[19].

Despite its great media impact and significance in terms of claiming the power to prevent a European legislative act from coming into force, the decision to provisionally suspend implementation of the German law ratifying the Own Resources Decision is, on closer examination, less extreme in terms of its effects.

On 26 March 2021, when the BVG granted the application for interim protective measures, only 10 of the 27 Member States had completed the ratification process. A further 16 Member States besides Germany would have to ratify the Council Act before it could come into force.

As mentioned above, interim suspension lapses after one month, and, in any event, the BVG would have ruled on the application for interim measures after 20 days.

The Karlsruhe Court suspended entry into force of the law as a provisional precautionary measure so as not to frustrate the outcome of the ruling on the application for interim measures, also sending a strong signal to the Government and Parliament (which had approved the law by a large majority), as well as the European institutions.

[18] The Italian Code of Administrative Process has been adopted with Legislative Decree 2 July 2010, n. 104.

[19] BVerfG, Beschluss des Zweiten Senats vom 26. März 2021-2 BvR 547/21.

However, the actual practical impact of the decision was not disruptive, considering that when the Court later denied final interim protection – thus allowing the law to enter into force – 10 Member States had not yet completed the process of ratifying the decision.

6. The decision of 15 April 2021 rejecting the application for interim measures

In its decision of 15 April 2021[20] rejecting the definitive application for interim measures to suspend the entry into force of the ERatG, the BVG first sets out the conditions for issuing an interim order, clarifying that it has always applied strict criteria in its case law, especially on suspending the entry into force of a law, because this represents a significant infringement of the legislature's original jurisdiction (§ 67).

6.1. The assumptions and criteria for issuing precautionary measures

Firstly, the BVG clarified that there is generally no examination of the merits of the pleas put forward for the unconstitutionality of the contested measure unless the main proceedings relating to the action are inadmissible or manifestly unfounded from the outset (§ 68). To use the Italian categories, we might say that there is no examination of the *fumus boni iuris*, limiting the analysis to a weighing of the negative consequences of the decision and their possible irreversibility (considering both scenarios, in granting the precautionary measure with a subsequent ruling on constitutionality and the rejection of the application for a protective measure with a subsequent ruling on unconstitutionality).

However, if the application for interim relief concerns an act of consent to an international treaty, and if a breach of the interests protected by Paragraph 79(3) of the *Grundgesetz* is alleged, then a summary examination of the legal situation is required. Indeed, in this case, according to the Court, it is appropriate not to confine itself to a mere assessment of the consequences but to carry out a summary examination (*summarische Prüfung*) of the degree of probability that the main proceedings might lead to a finding of

[20] BVerfG, Beschluss des Zweiten Senats vom 15. April 2021-2 BvR 547/21.

unconstitutionality at the precautionary stage.

If there is a high degree of probability (*mit einem hohen Grad*) that the law ratifying an international treaty may be declared unconstitutional for breaching fundamental principles and German constitutional identity, the precautionary application may be accepted so as to ensure that the Federal Republic of Germany does not conclude any binding international legal agreement incompatible with the Basic Law (§ 69).

Lastly, if the summary examination of the question remains open, and in the absence of a high degree of probability, the BVG need only assess the consequences. In particular, the Court must make a comparative assessment of the disadvantages that would arise from failure to adopt the protective measure if the constitutional appeal were deemed well founded, compared with the disadvantages that would result from adopting the protective measure if the constitutional appeal were subsequently deemed unfounded.

6.2. Assessments of the specific case

After clarifying the fundamental coordinates and requirements, the BVG applied the assessment standards to the specific case on which it was asked to issue a ruling.

a) Not declared manifestly inadmissible or unfounded

Firstly, the Court assessed whether the main referral appeared to be inadmissible from the outset or manifestly unfounded, answering in the negative.

In substantiating this assessment, the Court expressed serious concerns about the Council's decision — and consequently the German ratification law. In particular, the courts of Karlsruhe deemed that the law of ratification may affect the constitutional identity of the GG under Paragraph 79(3) since the right to democratic self-determination not only grants citizens protection from substantial erosion of the Bundestag's power to draw up general policies but also that EU bodies may exercise only the powers conferred on them under Paragraph 23 GG[21].

[21] According to article 23(1) of the GG provides that "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that

During its *Identitätskontroll*, the BVG claimed the power to verify that no sovereign powers are transferred (and that European bodies introduce no measures) that will undermine the fundamental rights under Paragraph 79(3) GG (§ 83). Based on this argument, the Court clarified that the European institutions might well cross the threshold set in Article 79 if they substantially restrict the budgetary power of the Bundestag, since this power, together with its general financial and budgetary responsibility, is 'protected as a non-negotiable element in the fundamental democratic principle' (*Sind als unverfügbarer Teil des grundgesetzlichen Demokratieprinzips geschützt*, § 84).

The crux of Paragraph 20 GG is that the *Bundestag* 'shall be accountable to the people and decide on all essential revenue and expenditure' (§ 84).

In summary, the Court considers it plausible that (*a)* the Own Resources Decision goes beyond the limits of the powers conferred by Article 311(3) TFEU; (*b*) the European Union's authorisation to raise EUR 750 billion on the capital market, for which Germany may be responsible under particular circumstances, affects the Bundestag's overall responsibility for the budget, safeguarded under Art. 79 GG in conjunction with Art. 20(1) and (2). In such a case, the *Bundestag* would no longer be the master of its own decisions (*Herr seiner Entschlüsse*, § 90).

However, moving towards an assessment of the degree of probability of such breaches, the Court considered that it could not be said that the high degree of probability required for the precautionary measure to be adopted was reached.

b) Assessment of the degree of probability that a situation of unconstitutionality had occurred

Several factors contribute to uncertainty as to the outcome of the main proceedings.

First of all, the BVG states that it has not yet consolidated its case law on 'whether and to what extent the democratic principle gives rise to directly and immediately protectable limits to the assumption of obligations concerning payment or liability'. Thus,

afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79."

the Second Senate probably intends to calmly and thoughtfully address this critical issue carefully in its own time, which will have consequences, and on which it has not yet had the opportunity to clearly and definitively express its opinion.

Secondly, on examining the Council Decision in detail, the BVG considers that the amount, duration, and purpose of the Commission's loans are limited, as is Germany's possible liability. The possibility of further liability is considered unlikely.

Given the still uncertain outcome of the main proceedings, as the necessary high probability of unconstitutionality has not been reached — the Court must decide on the application for interim measures, weighing up only the consequences of its decision.

c) Weighing up the consequences

The Court considers the consequences of adopting the anticipatory measure to be particularly serious if, upon the conclusion of the main proceedings, the law is found to be constitutional. Furthermore, suspending the entry into force of the German ratification law would prevent entry into force of the Council Decision. This would make it impossible to finance Next Generation EU and all the NRRPs for the time required to decide on constitutionality, which would be two or three years.

A suspension would ultimately frustrate the Recovery Plan, with potentially irreversible economic and financial consequences. The Court clarifies that this is especially true with regard to the major beneficiaries of the Recovery Plan, with an aside that appears to be addressed to Italy albeit without naming it explicitly (§ 106). Fulfilment of the economic objectives pursued through NGEU requires measures to be adopted quickly, which is irreconcilable with the requested suspension.

The Court also considered the consequences in terms of Germany's foreign policy and credibility on the international level. The BVG pointed out that the Decision of December 2020 stems from an agreement between Germany and France. In its submission, the Federal Government had expressed concerns over substantial tension in its relations with France, a decrease in the credibility of Germany's foreign and European policy, and a further threat to cohesion between the Member States of the European Union. The Second Senate endorses the Government's considerations, observing that the GG gives the Government ample

margin to assess the consequences of international policies, including those of a prognostic nature.

On the other hand, the Karlsruhe Court considered that the negative consequences of bringing the law into force immediately would be significantly lower if the main proceedings subsequently found the law unconstitutional.

In fact, any additional burden on Germany would materialise over a relatively long period and only after a series of eventualities which the Federal Government considered *unrealistisch* (§ 109).

Finally, with a very brief but equally significant aside, the Court concluded by declaring that if the European decision were found to have been adopted *ultra-vires* due to an infringement relating to the European integration project, it could be annulled *erga omnes* by the Court of Justice of the European Union in its preliminary referral, which is already envisaged as a sure means of adoption in the future.

What is more, in its final discussion, the Court reiterates that if, in the main proceedings, the BVG (regardless of the CJEU judgment) considers the Own Resources Decision to be an *ultra-vires* act, or if it deems that constitutional identity has been affected by the Own Resources Decision, 'the Federal Government, the Bundestag, and the Bundesrat should adopt the measures at their disposal to restore constitutional order' (§ 111).

Thus, in listing the measures available to neutralise or limit the adverse effects (in terms of liability for obligations) arising from the Council decision if found unconstitutional *ex-post*, the BVG hinted that it would use the referral for a preliminary ruling but that it would then assess the possible *ultra-vires* nature of the European decision.

7. Some incongruities

In the judgment of May 2020, some contradictions in the BVG's decision had already been noted[22]. Among the various points highlighted, it is worth mentioning that the BVG had claimed that it had exercised *ultra-vires* control also in the interest of all other Member States. Indeed, if no State were to do so, EU

[22] A. Ferrari Zumbini, *Some contradictions in the Bundesverfassungsgericht judgment on Quantitative Easing of the ECB,* 12 Italian Journal of Public Law 259 (2020).

bodies would have exclusive control over the Treaties, thus excluding the Member States.

However, the other Member States had never given Germany any such mandate; indeed, some had joined proceedings before the CJEU to defend the ECB's actions in this case.

In the judgment in question, the BVG considers admissible the appeal to assess compliance with democratic principles and the budgetary responsibility of the German Parliament in general. However, the Act ratifying the Council Decision on Own Resources was approved by the *Bundestag* with a vote of more than 74 % and was approved unanimously by the *Bundesrat*. Thus, the Court stated that it wished to protect the prerogatives of the German Parliament, which had already expressed its view with a significant majority.

Moreover, the *Bundestag* entered an appearance in proceedings on constitutionality, submitting that the application for interim measures was inadmissible, as was the underlying constitutional appeal, which in any event is manifestly unfounded[23].

This is tantamount to saying that the Court seems to ignore Parliament's position, which it reiterated by becoming a party to the proceedings on unconstitutionality.

The Court, it would seem, considers itself entitled not only to protect the prerogatives of Parliament but also to carry out an external review of their proper and appropriate exercise (i.e. respecting the constitutional rights of German citizens), even entering into a disagreement with it.

Therefore, we are not only witnessing a potential conflict between the European institutions and a national court but also an ongoing conflict between two constitutional bodies of the German State, in which one — the BVG — appears to contest (or at least check the actions of) the other, namely the *Bundestag*, for exercising its authority in breach of fundamental Constitutional norms protecting citizens' rights and the national identity.

There is also a risk of another incongruity, already highlighted in the May 2020 decision. The BVG had requested a preliminary ruling from the CJEU, asking the European Court of Justice whether the ECB's decisions had infringed the Treaties. The

[23] The judgment of 15 April 2021 summarises the position of the referring German Constitutional Bodies, including the *Bundestag*, in §§ 43-62.

CJEU ruled that the decisions were lawful in a judgment that the German Court subsequently disregarded.

In this case too, the pleas in law include the infringement of Treaty rules, whose interpretation is the exclusive jurisdiction of the CJEU.

The applicants claim that the Own Resources Decision infringes Article 311(3) TFEU. It is therefore not unlikely — indeed it is *very* likely — that, in order to decide on the merits, the BVG will refer the case to the CJEU for an opinion on the interpretation of Article 311 TFEU, thus reserving the final judgment on the unconstitutionality arising from the breach of German constitutional norms to itself.

The contradiction inherent in the German Court requesting a preliminary ruling from the CJEU, but then disregarding its conclusions if they are not in line with its own interpretation, could repeat itself.

As mentioned above, in a somewhat brief but very significant passage in the decision on the interim measure, the German Court states that if, in the main proceedings on constitutionality, the Council's decision were considered *ultra-vires*, instruments are available to counteract the consequences, as the European Court can quash the decision, 'or the Constitutional Court could declare it inapplicable in Germany'[24].

The BVG thus confirmed its case law from last year, in which it stated its competence, under certain circumstances, to declare *ultra-vires* acts of the European institutions inapplicable in Germany.

8. Two visions of Europe

The BVG ruling of April 2021 once again highlights developments in European integration[25] and the two opposing visions of Europe that have always been dialectically opposed on this issue.

The context is one in which only a year ago the BVG pronounced both the ECB's decisions and a preliminary ruling of

[24] "*Sollte sich eine solche Maßnahme im Hauptsacheverfahren als Ultra-vires-Akt herausstellen, kann sie durch den Gerichtshof der Europäischen Union für nichtig oder durch das Bundesverfassungsgericht für in Deutschland unanwendbar erklärt werden*" § 72.

[25] L. Rapone, *Storia dell'integrazione europea*, cit. at 2.

the CJEU to be *ultra-vires*, refusing to comply with them.

As a result, the Commission opened infringement proceedings against Germany for breach of the fundamental principles of EU law, in particular the principles of autonomy, primacy, effectiveness, and uniform application of EU law, as well as failure to respect for the jurisdiction of the European Court of Justice under Article 267 TFEU. The Commission sent a letter of formal notice on 9 June 2021 requesting explanations regarding the BVG's Judgment of 5 May 2020[26]. The Commission referred to the order rejecting the enforcement measures adopted by the BVG on 29 April 2021 but deemed that the order did not alter the substance of the 2020 decision.

Thus, the BVG now essentially subjected the entire Recovery Plan to its review on constitutionality, stating that the violation of the democratic principle "appears at least possible", although not highly probable.

A new clash is to be expected[27] not only between courts (the CJEU and BVG) but also with EU bodies in the relationship between supranational and national interests, or rather, between the interests of the individual Member States and those of the community of Member States.

The decision must not only be read in the wake of the precedents of the German Constitutional Court, however.

It is also necessary to consider a very recent article published jointly by the President of the Austrian Constitutional Court, a member of the Second Senate of the BVG, the President of the Constitutional Court of Slovenia, and the former President of the Constitutional Court of Latvia (now a member of the CJEU)[28].

The article clearly states that domestic constitutional courts must address and solve three main questions. The first regards transfer review, verifying that the transfer of sovereign powers under the European Treaties complies with the conditions and limits laid down in the constitutional systems of the Member States. The second is the *ultra-vires* review, ascertaining that the acts of the

[26] https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743

[27] For an Italian perspective on the constitutional clash in Europe see, G. Martinico and G. Repetto, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath*, in Eur. Const. Law Rev., 4/2019, 731.

[28] C. Grabenwarter, P.M. Huber, R. Knez, I. Ziemele, *The Role of Constitutional Courts in the European Judicial Network*, in Eur. Publ. Law, 1/2021, 43.

European institutions do not exceed the limits imposed by the Treaties. The third is identity control, which protects the fundamental core of national constitutional identity.

In order to overcome possible criticism of the CJEU's exclusive competence over the interpretation of the Treaties, the four authors argue that when the European Court does not exercise its powers seriously and in full, it is then up to the national courts to exercise those powers.

As for protecting constitutional identity, the authors propose introducing a reverse referral for a preliminary ruling, i.e. from the CJEU to the national courts when the European Court has to rule on acts that may interfere with national identities.

It should be noted that the national identity clause[29] is not a matter solely or mainly for the founding States; apart from Germany, it is also relevant to other countries that have recently joined the EU[30]. On the other hand, the French *Conseil d'Etat* (Council of State) has recently rejected the idea that national courts (supreme or constitutional) can carry out an *ultra-vires* review of acts of the European institutions[31].

The fundamental underlying question of the growth of European integration cannot — and should not — be resolved by courts.

If one agrees with these premises, it must be concluded that underlying the conflicts between European bodies and the national courts is a purely political Gordian knot.

Returning to the challenged decision, the applicants before the BVG claim that the EU's Own Resources Decision set up a fiscal union between the Member States that had not been envisaged in the Treaties, drawing national budgets into a kind of joint and

[29] There is an extensive bibliography on the national identity clause. We merely refer to E. Cloots, *National Identity in EU Law* (2015) and, for an Italian perspective, to G. Di Federico, *L'identità nazionale degli stati membri nel diritto dell'Unione europea. Natura e portata dell'art. 4, par. 2, TUE*, (2017).

[30] Regarding the Hungarian case, see G. Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law*, in Rev. of Centrl. East Europ. Law, 1/2018, 23, critically set out the 2016 Hungarian Constitutional Court ruling that evoked constitutional identity to justify the non-implementation of the European refugee relocation scheme.

[31] J. Ziller, *Il Conseil d'Etat si rifiuta di seguire il pifferaio magico di Karlsruhe*, in *Ceridap*, 2/2021 available online https://ceridap.eu/il-conseil-detat-si-rifiuta-di-seguire-il-pifferaio-magico-di-karlsruhe/.

several liability for the next 38 years, considerably reducing the scope for autonomous budgetary choices.

Leaving aside the desirability (or otherwise) of this development, and stripping these statements of the exaggerations and hyperbolic reconstructions used in the application, some specific aspects call for consideration.

The financial crisis that hit Europe from 2010 onwards[32] has been counteracted (though not with entirely positive results) through the European Stability Fund, later transformed into the European Stability Mechanism[33]. This mechanism was, and still is, in place outside the European Union, having been produced by an international treaty and sets strict conditions for granting loans.

Almost 10 years later, the instrument adopted to respond to the economic and financial consequences of the COVID-19 pandemic is very different. This time it relies on a decision of the European Council and an EU Council Decision to decide on new own resources, increasing the previous ones and authorising the Commission to borrow on the capital markets on behalf of the EU.

We can welcome the new European response to crises, which is now timelier and more decisive. However, it is precisely the evident intrinsic and institutional differences between these instruments that show an evolutionary path of integration to be shared by all.

Of course, the temporary and exceptional nature of the current Recovery Plan plays a fundamental role in maintaining a difficult balance. However, the dialectic between an ever-closer union among the peoples of Europe and an ever-wider but less cohesive[34]one will sooner or later have to find common ground, and this will certainly not be through the activities of one or more national courts.

Moreover, if the May 2020 emergency mainly concerned Italy, as Germany had not yet been hit so drastically, which meant that the 2020 ruling could be interpreted as the expression of a strict policy towards southern European countries with suboptimal debt

[32] M. Ruffert, *The European debt crisis and European Union law*, in Comm. Mkt Law Rev., 6/2011, 1777.

[33] C. Holer, *The European Stability Mechanism: The Long Road to Financial Stability in the Euro Area*, in Germ. Yearb. Int'l Law, 2011, 47.

[34] On the difficult relationship between unity and difference, with an analysis of the two opposing visions referred to in the text, see G. della Cananea, *Differentiated Integration in Europe After Brexit: A Legal Analysis*, cit. at 3.

management. Unfortunately, Germany too would be dramatically affected by the pandemic in 2021.

Thus, the heart of the problem lies precisely in the vision of the future of European integration and how it is implemented, which must be clear, explicit and grounded in legislation.

9. Possible developments

It will take some time before the Court decides on the merits. During this period, the BVG will probably follow the developments and processes of implementing the various NRRPs closely, especially that of Italy, which has benefited most from European funds. Italy also recorded a significant increase in the public-debt-to-GDP ratio during the pandemic, rising from 135 % in 2019 to an estimated 160 % by the close of 2021 compared with an average growth in Europe of about 15 percentage points[35].

These are not purely political or economic considerations. The practical arrangements for implementing the NRRPs — together with the control methods adopted by the States and European bodies — may influence the legal configuration of the Recovery Plan, especially in terms of verifying compliance with democratic principles and that of the general budgetary responsibility of the Bundestag as stated by the BVG in its case law.

European Union debts will have to be repaid. In order to make repayments sustainable, these debts will have to be used to foster growth: indebtedness must consist of 'good debt', not 'bad debt'[36]. Therefore, how the resources received are used is crucial not only on the economic and social levels but also makes the debt plan legally sustainable. The individual Member States will only have to respect the planned repayments (approved by each parliament in accordance with its own constitutional requirements).

If a country misuses the funding it receives from Europe and does not ensure sufficient growth to support repayment, the problems will not be purely economic as the other Member States cannot be required to contribute more than was budgeted for. The case law of the BVG is adamant on this point, seeing such an

[35] The data given are the Commission's estimates, quoted by Mario Draghi, the Italian President of the Council of Ministers during his speech at the Accademia dei Lincei on 30 June 2021.

[36] President Draghi underlined the distinction between good and bad debt in his speech to the Accademia dei Lincei, cit. at 35.

eventuality as a breach of the democratic principle and that of the German Parliament's responsibility for the budget.

Moreover, in its judgment of May 2020, which obviously could not have borne any relation to the funds allocated to address the outbreak at the time, the Court outlined the coordinates for possible future verifications of constitutionality regarding new purchase programmes. The Court expressly stated that "an assumption of responsibility for decisions taken by third parties with potentially unforeseeable consequences" would be unconstitutional[37].

In its judgment of April 2021, despite rejecting the application for interim measures, the BVG stated that "No permanent mechanisms may be created under international treaties which would essentially entail an assumption of liability for decisions taken by other states, especially if they have potentially unforeseeable consequences" (§ 85)[38]. The BVG's assessment in the main proceedings revolved around the characteristic of 'permanence'. It is no coincidence that in the Council Decision on Own Resources of December 2020, the term "exceptional" occurs eight times, and the term "temporary" is repeated 16 times in a summary text of only 12 articles.

10. International loans and their conditions, an example from the past

The Recovery Plan was preceded by an intense debate in all Member States, covering the fundamental economic component of the instrument and any related conditions.

The Recovery Plans adopted by supranational bodies to help individual States in severe economic and financial difficulties are certainly not an innovation of the European Union. Suffice it to recall the work of the League of Nations[39]. Regarding the League of Nations, it may be helpful to mention a successful example of a

[37] Judgment of 5 May 2020, § 227.

[38] '*Es dürfen keine dauerhaften Mechanismen begründet werden, die auf eine Haftungsübernahme für Willensentscheidungen anderer Staaten hinauslaufen, vor allem wenn sie mit schwer kalkulierbaren Folgewirkungen verbunden sind*'.

[39] Still valid on this matter is C. Schmitt, *Die Kernfrage des Völkerbundes* (1926), republished in Italian *La Società delle Nazioni. Analisi di una costruzione politica* (2018). More recently, S. Mannoni, *Da Vienna a Monaco (1814-1938). Ordine europeo e diritto internazionale* (2019).

Recovery Plan, not only at the economic level (allowing the economic recovery of the country that received the loans) but also and above all at the institutional level, boosting the modernisation and efficiency of the entire bureaucratic apparatus and thus helping reduce the costs of the administration while increasing its efficiency. Ultimately, an efficient public administration is a fundamental and indispensable prerequisite for a thriving economy.

The example in question is Austria's rescue by the League of Nations after World War I, which allowed the newly formed republic to recover economically and set up a particularly efficient administrative system (also thanks to the conditions for the loan).

Indeed, after the war and the dissolution of the Austro-Hungarian Empire, Austria entered a deep economic crisis with an exceptionally high inflation rate. In May 1922, slightly under 350 billion kroner in banknotes (*Papierkrone*) were in circulation, while there were nearly 600 billion in July, and in August there were over 800 billion kroner in circulation. Wages were paid every 3-4 days because the purchasing power of the Krone had already halved by then[40].

An enormous loan from an international body was the only way to deal with this challenging situation, but, to access this funding, it was necessary to ensure that a series of economic, financial, and budgetary reforms would be put in place. In addition, the State's administrative apparatus had to be reformed as these factors were inseparable if there were to be a thoroughgoing and lasting reduction in public expenditure allowing repayment of the loan.

These considerations — and others of a more political nature — led to the international treaty known as the *Genfer Reformbeschlüsse* on 4 October 1922. England, Italy, France, and Czechoslovakia would act as guarantors so that Austria could obtain a total loan of approximately 690 million gold kroner *(Goldkrone*) from the League of Nations over 20 years[41]. With these

[40] These economic data are provided by L. Kerekes in *Österreichs Weg zur Sanierung (1922)*, *Acta Historica Academiae Scientiarum Hungaricae,* 1-2/1977, 75 et seq., esp. p. 78.

[41] It is not certain exactly how much was disbursed by the League of Nations, but there is no doubt that Austria received at least 650 million gold kroner. See G. Strejcek, Vor *90 Jahren flossen Österreich aus einer Völkerbund-Anleihe rund 650*

guarantees, Austria assumed a number of obligations.

The Austrian State was required to undertake a comprehensive economic-financial and budgetary reform, drastically reducing costs. Furthermore, to reduce expenditure, it had two years to present Parliament with a comprehensive plan to reform the administration, simplifying and making administration and administrative procedures more efficient[42].

To fulfil this duty, in 1924, Austria submitted a package of laws to streamline its administration. These were passed in 1925, including the famous *Allgemeine Verwaltungsverfahrensgesetz* (AVG), the first general law on administrative procedure. The origins of the AVG are actually somewhat older[43], as it is based on the rich case-law of the Austro-Hungarian Empire's Administrative Court and the reworking carried out by Tezner[44]. However, the final and decisive push to adopt the Law on Administrative Procedure stems precisely from post-conflict requirements. The AVG proved to be a straightforward law leading to greater administrative efficiency[45]. It proved so effective that it was taken as a model and transposed into several legal systems.

In this example, the conditions attached to the international loan helped the beneficiary State recover across the board in terms of both the economy and its administrative system. Of course, success of this kind always depends on the type of conditions envisaged, the clarity and method of laying down such conditions,

Millionen Goldkronen zu. Die folgende Sanierung des Staatshaushaltes brachte aber keine nachhaltige politische Stabilität, *Wiener Zeitung*, 13-14 October 2012.

[42] The text of the International Treaty signed in Geneva on 4 October 1922 is very difficult to find online. A copy of the text is contained in A. Feiler, *Das neue Österreich*, (2015) (unaltered reprint of the original of 1924), pp. 101-118.

[43] For a more complete reconstruction of the origins of the 1925 Austrian Law on Administrative Procedure, please refer to A. Ferrari Zumbini, *Alle origini delle leggi sul procedimento amministrativo. Il modello austriaco* (2020).

[44] F. Tezner, *Das österreichische Administrativverfahren, dargestellt auf Grund der verwaltungsrechtlichen Praxis, Mit einer Einleitung über seine Beziehung zum Rechtsproblem, (*1922).

[45] Obviously, merit was not only due to the adoption of the law on proceedings. For example, one of the reforms adopted by Austria to fulfil its international obligations was the reform of the railways, which started as early as November 1922, separating ownership of the railway network and the railway service operator (the latter transformed into a company, an economic entity with legal personality, independent from the State apparatus, since 1923). See S. Solvis, *Der Weg zur Neuordnung der Österreichischen Bundesbahnen*, (1933), esp. pp. 18 et seq. However, the AVG made up an important part of the overall reform system.

the monitoring system, and the beneficiary State's ability to fulfil its obligations in substance and not merely on paper.

SMART PUBLIC LAW. AUTOMATION AND DECENTRALISATION OF PUBLIC POWER: SMART CONTRACTS AND THE BLOCKCHAIN AS STEPPING STONES FOR A DIGITAL AND POLYCENTRIC GOOD ADMINISTRATION?

Christian Iaione & Sofia Ranchordas***

Abstract

This article sheds light on two blind spots of the debate on the automation of administrative decision-making: the impact of automation on the principles of good administration and the ongoing decentralization of administrative adjudication in public procurement and public services through smart contracts and blockchain. In both fields, public authorities have significant margins of power and discretion to deliver decisions and establish who is awarded a contract. We draw two main conclusions from the analysis. On the one hand, automation does not fit well with the existing principles of good administration, originally designed to ensure transparent, proportionate and fair decisions, limit human discretion, and guarantee that all relevant circumstances were taken into account. On the other, automation is inherent to the future of administrative law in any country. The use of blockchain in particular contains the promise of disrupting the monopoly of public power and addressing common concerns regarding its abuse. This article contributes to existing legal scholarship by offering solutions for a future-proof redesign of public law that is able to address the challenges of automation and decentralization.

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1. Introduction

Administrative decision-making and public services have faced the daunting challenge of automation for multiple years[1]. In the 1980s and 1990s, public authorities employed simple forms of automation to accelerate the process of making simple bulk decisions (*e.g.* calculation of tax returns)[2]. Nowadays, a growing number of fields of administrative action, requiring a greater deal of discretion, have become either partially or fully automated (*e.g.* eligibility for social welfare benefits, allocation of students or professors to schools and universities, evaluation of teachers, public

This article is the result of a long and mutually enrinching intellectual journey between two colleagues and friends. We are grateful for comments received at the Max Planck Institute Luxembourg Seminar on Blockchain and Procedural Law held in January 2020 and at the ICON-S Italian Chapter Florence conference held in November 2019. While a collaborative effort has led to the joint production of the research results presented in this article, paragraphs 1, 2 and 6 should be attributed to Sofia Ranchordas, while paragraphs 3, 4 and 5 should be attributed to Christian Iaione.

[1] J. Sutcliffe, *Welfare Benefits Adviser: A Local Government Expert System Application*, 4 Computer Law & Security Rev. 22 (1989); D. Hogan-Doran, *Computer Says "No": Automation, Algorithms and Artificial Intelligence in Government Decision-Making*, 13 J. Jud. Commission of New South Wales 1 (2017).

[2] For a thorough analysis of the wide array of uses of automation, and the benefits and limits thereof, see M. Zalnieriute, L.B. Moses & G. Williams, *The Rule of Law and Automation of Government Decision-Making*, 82 Mod. L. Rev. 425 (2019).

procurement)[3]. In the United States, a recent report revealed that 45% of the largest federal agencies in the country use or have experimented with artificial intelligence (AI) and machine-learning related tools[4]. While many public services are still not fully automated, automated tools are increasingly being used to support decision-making.[5] Government services, ranging from regulation to public procurement adjudication, are becoming 'smarter' in the way they operate. However, administrative law has not changed significantly over the last decades. This field of law remains ruled by the same laws, principles, and case law that were designed to address human flaws that could endanger the pursuit of the public interest (*e.g.*, corruption, nepotism, abuse of power). It remains thus unclear what a 'smart public law' interpreted as a body of public law dealing with the phenomena of digitalization and automation of public decision making should look like in order to accommodate these new smart services and their underlying automation[6].

The risks posed by automation have captured more the attention of scholars than its benefits[7]. The switch from a paper-based administration with human decision-makers to automated systems has been described in the literature as 'the algorithmic

[3] A.E. Waldman, *Power, Process, and Automated Decision-Making,* 88 Fordham L. Rev. 613 (2019); R. Binns, *Algorithmic Decision-making: A Guide for Lawyers*, 25 Jud. Rev. 2 (2020). For the Italian context and debates on the use of automation, see A. Simoncini, *L'algoritmo incostituzionale: intelligenza artificiale e il futuro delle libertà.* Biolaw J. 63 (2019); A. Simoncini (2019). *I soggetti e l'oggetto del patto costituzionale: l'esperienza italiana*, 29 R. General De Derecho Constitucional 1 (2019).

[4] D.F. Engstrom, D.E. Ho, C.M. Sharkey & M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies, Report Submitted to the Administrative Conference of the United States* (2020), https://www.law.ox.ac.uk/sites/files/oxlaw/government_by_algorithm_acus_report.pdf (last visited Sep. 9, 2020).

[5] A. Simoncini & E. Longo, *Fundamental Rights and the Rule of Law in the Algorithmic Society* in A. Simoncini, G. Sartor, G. De Gregorio, O. Pollicino, A. Reichman & H. Micklitz. Constitutional Challenges in the Algorithmic Society (2021).

[6] *See* D.A. Zetzsche, R.P. Buckley, D.W. Arner & J.N. Barberis, *Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation*, 23 Fordham J. Corp. and Fin. L. 31 (2017) (describing 'smart regulation' as a sequenced set of 'proportionate' regulatory responses to identified fintech-driven risks, which explicit aim to promote financial innovation); C. Coglianese, *Optimizing Regulation for an Optimizing Economy*, 4 U. Pa. J. L. Pub. Pol'y 1, 13 (2018) (describing smart regulation as 'regulating just enough and in the right ways').

[7] C. Coglianese, *Administrative Law in the Automated State*, 150 Daedalus 104 (2021).

state': A system in which citizens are powerless before technological advancements, algorithmic biases, state surveillance, and opaque decision-making procedures[8]. These accounts of government decision-making in the algorithmic state rarely focus on the efficiency gains and the overall balancing of benefits of automation in the public sector. Nevertheless, in low-trust contexts, the automation of public contracts can reduce the risk of bad faith, abuse of powers, and corruption.[9] In addition, critical accounts of automation often focus on single values of the rule of law (transparency, due process, accountability) instead of taking into account the complete but complex framework of good administration that guides public authorities in several civil and common law jurisdictions throughout the world[10]. Moreover, the term 'algorithm' encompasses a wide array of more or less complex forms of automation with and without human agency that are reshaping administrative law in different ways[11]. This article offers a balanced perspective of automation in the public sector.

We argue that administrative law needs to be rethought to embrace and promote technical innovation while safeguarding longstanding values of good administration (efficiency, transparency, accountability, timely decisions). Automation has a paradoxical relationship with good administration, and particularly with transparency: Automation may just as well be

[8] E. Kosta, *Algorithmic state surveillance: Challenging the notion of agency in human rights*, Reg. & Gov. (2020), E. Loza de Siles, *AI, on the Algorithmic State of the Nation: Artificial Intelligence Unleashed and Civil Rights*, Duq. U. Sch. L. Res. Paper No. 2020-1 (2020), https://ssrn.com/abstract=3658630; M. Veale, I. Brass, *Administration by Algorithm? Public Management Meets Public Sector Machine Learning*, in K. Yeung, M. Lodge (eds.), *Algorithmic Regulation* (2019), https://ssrn.com/abstract=3375391; H.-W. Liu, C.-F. Lin & Y.-J. Chen, *Beyond State v Loomis: Artificial Intelligence, Government Algorithmization and Accountability,* 27 Int'l J.L. & Info. Tech. 122 (2019). There is an international and comparative public law research group dedicated to the study of the 'Algorithmic State': *see* IACL-AIDC, https://blog-iacl-aidc.org/iacl-news/2018/11/4/new-research-group-algorithmic-state-society-and-market-constitutional-dimensions (last visited Sep. 6, 2021).

[9] *See* M. Zalnieriute, L. Bennett Moses & G. Williams, *The Rule of Law 'By Design'?* 95 Tulane Law Review 1063.

[10] For an analysis of this issue in the Spanish context, see J.V. Torrijos, *Las Garantías Jurídicas De La Inteligencia Artificial En La Actividad Administrativa Desde La Perspectiva De La Buena Administración,* 58 Revista Catalana de Dret Públic 82 (2019).

[11] P. Sales, *Algorithms, Artificial Intelligence and the Law*, 25 J. Rev. 46 (2020).

transparency's best friend or worst enemy. Administrations and administrative law judges have already started building a body of case law that could help solve the paradoxical relationship between transparency and automation. The jury is out, and interpreters are already dividing themselves between supporters of transparency first and supporters of efficiency first theories. The digital transformation of government appears to conflict with the traditional perception of good administration. Also, transparency is only a means to an end. Indeed, too much transparency does not always equal to an adequate protection of procedural rights. This article shows that the relationship between the potential of automation, particularly in the context of automation of public contracts, and the protection of principles of good administration, such as transparency, is more nuanced than it seems.

This article explores different types of automation employed for administrative decision-making, including smart contracts for public procurement and energy services. This Article focuses not only on AI and automation as such but the broader use of different technologies that are comprised by the term 'GovTech' or digital technology specifically developed for government services. *GovTech,* the industry behind the development of AI, the Internet of Things (IoT), big data and predictive analytics, has revolutionized administrative law and promised greater efficiencies, fewer mistakes, and more accountability and transparency in the distribution of public services[12]. The automation of government encompasses a wide array of tools such as Chatbots, intelligent assistants for public engagement, Robo-advisors for civil servants, smart contracts, and real-time management of traffic information in smart cities[13]. Automation in public tenders, for example, allows public authorities to rank and classify individuals competing in a tender in order to issue a decision. With natural language-processing techniques, public authorities can also easily detect

[12] For a broader analysis of the implications of the use of digital technology in administrative decision-making, see M. Bovens, S. Zouridis, *From Street-Level Bureaucrat to System-Level Bureaucracies: How Information and Communication Technology Is Transforming Administrative Discretion and Constitutional Control*, 62 Pub. Admin. Rev. 174 (2002).

[13] Z. Engin, P. Treleaven, *Algorithmic Government: Automating Public Services and Supporting Civil Servants in Using Data Science Technologies,* 62 Comput. J. 448 (2019).

irregularities in public tenders[14]. Smart contracts enable self-regulation by algorithms, reduce contracting costs in public procurement and public services as well as the risk of conflict of interests[15]. Distributed ledger technologies like blockchain reduce transaction costs, reinforce trust between parties, and create secure contractual rights.

This article aims to provide a comprehensive overview of the different ways in which automation is being used by public authorities. We argue that public law could benefit greatly from automation as this could ensure that personal interests, friendships, and animosities are less often taken into account when discretion has to be exercised. Smart public services could thus in principle be conducive to more objective and smarter public law. Public procurement and public services, in particular, are a good example of fields which can profit from enhanced transparency and accountability when automated. As smart public contracts are characterized by a high level of discretion, their use, together with other digital technologies and electronic platforms, could reduce the corruption concerns that often plague this field throughout the world.

The contribution of this article is threefold: First, it offers an innovative discussion about the potential and shortcomings of automation in public decision-making, with a specific focus on automation as a form of decentralization of decision-making. This occurs mainly when administrative decisions an contracts are automated using blockchain-based technologies and smart public contracts. Second, it advances the emerging field of public law and technology, which seeks to understand the challenges of digitizing government, employing digital government techniques, and the relationship between digital technology and the principles of good administration. More broadly, this article contributes to the advancement of the position that law should be future-proof and

[14] A.C. i Martinez, *How Can We Open the Blackbox of Public Administration? Transparency and Accountability in the Use of Algorithms*, 58 Revista Catalana de Dret Públic 13 (2019).

[15] P. Sales, *Algorithms, Artificial Intelligence and the Law,* cit. at 9, 47.

innovation-friendly[16], within the limits of the protection of fundamental rights[17].

This article, though not comparative in its methodology, draws on the experience of several European countries (Italy, Spain, the Netherlands, the United Kingdom) with automated decision-making and smart public contracts. Considering that most Western countries share similar administrative values as regards good administration and that digital government is expanding exponentially, this article's relevance is not limited to the jurisdictions analyzed throughout it.

This article is organized as follows. Part II provides an overview of the different ways in which automation is employed in automated government decision-making. Part III focuses on decentralization as the next frontier of automation. Part IV examines two case studies in which the introduction of blockchain can exemplify the different dimensions of decentralization. Part V discusses the interaction between decentralized automation and the principles of good administration. To conclude the final part delves into the need to rethink administrative law and the skills or capabilities necessary to the administrative State so as to embrace digital and polycentric innovation in the public sector.

2. Automation and Public Decision-Making

This part provides a brief account of how automation is reshaping administrative decision-making[18]. It discusses different types of automation, providing an overview of the areas within the public sector in which automation is being embraced, and the advantages of automating public services and administrative decision-making. In this part, we consider both fully automated decisions and semi-automated decisions.

[16] S. Ranchordas, M. van 't Schip, *Future-Proofing Legislation for the Digital Age* in S. Ranchordas, Y. Roznai (eds.), *Time, Law and Change* 347 (2020); S. Ranchordas, *Innovation Experimentalism in the Age of the Sharing Economy*, 19 Lewis & Clark L. Rev. 871 (2015).

[17] C. Iaione, E. De Nictolis & A.B. Suman, *The Internet of Humans (Ioh): Human Rights and Co-Governance to Achieve Tech Justice in The City*, 13 L. Ethics Hum. Rts. 263 (2019).

[18] In the Italian public law scholarship this topic has gained considerable attention in the last few years. See for instance M. Luciani, *La decisione giudiziaria robotica*, 3 Rivista AIC (2018) and T. Groppi, *Alle frontiere dello stato costituzionale: innovazione tecnologica e intelligenza artificiale*, Giurcost.Org (2020).

Automation is currently used both in the public and the private sector: from retirement funds, the banking sector to welfare benefits, automated systems have become ubiquitous in decision-making[19]. The automation of different fields of administrative decision-making started decades ago. Different forms of automation (from simple algorithms to AI and machine learning) have been used to grant licenses and permits in agriculture and fisheries, assign students to high schools and universities, and for traffic regulation[20]. The need to decide "in bulk" and within a short period of time are the common denominators of these fields where written rules and policies can easily be translated into code to determine whether an applicant fulfils all the requirements for an administrative request[21]. The automation of government decision-making is cost-effective, timely, and can promote consistency[22]. Indeed, the right to receive an administrative decision within a reasonable period of time is an important part of the right to good administration both in national and EU law contexts, (see, for example, Article 41 of the Charter for Fundamental Rights) which justifies adopting new tools[23].

Automated systems refer to different information technologies that are designed either to produce measurements or assessments regarding a particular case, or to make an administrative decision in lieu of a civil servant[24]. While some areas of decision-making (for example, tax systems throughout the Western world) are indeed being automated thanks to AI, a large

[19] See F. Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (2015).
[20] M.K. Kołacz, A. Quintavalla & O. Yalnazov, *Who Should Regulate Disruptive Technology?,* 10 Eur. J. Risk Reg. 4 (2019).
[21] M. Suksi, *Administrative Due Process When Using Automated Decision-Making in Public Administration: Some Notes from a Finnish Perspective*, 29 Artificial Intelligence & L. 87 (2021).
[22] D. Hogan-Doran, *Computer Says "No": Automation, Algorithms and Artificial Intelligence in Government Decision-Making*, cit. at 1, 5.
[23] "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union": *Consolidated Version of the Charter of Fundamental Rights of the European Union* (2016), O.J. (C202) 393, art. 41.
[24] M. Hong Chang, H. Choon Kuen, *Towards a Digital Government: Reflections on Automated Decision-Making and the Principles of Administrative Justice*, 31 Singapore Acad. L. J. 875, 878 (2019).

number of public services rely on more simple legal tech systems[25]. The majority of public authorities rely on support expert systems that provide data, rankings, indexes, and other types of preliminary analyses so as to inform a human decision-maker. 'Human-in-the-loop-systems' are thus made by a government employee with the support of AI. An important and common distinction refers to the difference between rules-based systems which apply sets of pre-existing rules and employ decision-trees, and systems that employ machine learning[26]. The latter is applied to more complex procedures, as it enables algorithms to learn from historical datasets, detect patterns, and make predictions. Contrary to expert-based systems that are written as "if-then" rules, systems powered by machine learning can result in inscrutable and non-intuitive outputs[27]. In the public sector, most automated systems that draw on machine learning are supervised, that is, the learning algorithm is shown what a public authority aims to predict or classify and learns thus by demonstration[28]. A machine-learning system can be re-trained using new data so that models can be adapted and corrected to changes. While the possibility to continue learning from data can potentially improve objective decision-making, it may be detrimental to its procedural guarantees. As Reuben Binns explains: "a constant flow of new data into a machine learning system might make it impossible to recreate the conditions necessary to interrogate an earlier decision (…) as the model [does not] stay fixed long enough to be assessed"[29]. Nonetheless, public sector rules require that information regarding updates of any system or logbook are archived, so that they can be made public and scrutinized.

The relationship between AI and administrative law becomes particularly complex when legal questions rely on interpreting open textured concepts ('speech'), do not have one

[25] B. Verheij, *Artificial Intelligence as Law: Presidential Address to the Seventeenth International Conference on Artificial Intelligence and Law*, 28 Artifical Intellifence & L. 181, 186 (2020).
[26] C. Hall, *Challenging Automated Decision-making by Public Bodies: Selected Case Studies from Other Jurisdictions*, 25 Jud. Rev. 8 (2020).
[27] D.F. Engstrom, D.E. Ho, C.M. Sharkey & M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies, Report Submitted to the Administrative Conference of the United States*, cit. at 4, 11.
[28] R. Binns, *Algorithmic Decision-making: A Guide for Lawyers*, 25 Jud. Rev. 2, 3 (2020).
[29] *ibid*, at 5.

single answer and should thus be answered in a 'reasonable' or 'proportionate' way, and are susceptible to frequent changes over time[30]. As laws are not static and go through complex transitions due to scholarly and judicial interpretation, it is important to understand the limits of automation when it comes to the interpretation of undetermined concepts, as these require a broader consideration of circumstances and of ongoing changes[31]. In the context of automated systems or risk assessments that support decision-making, we will often see or fear different interpretations of the law. The interpretation of vague and indeterminate terms will be primarily focused on data analytics, and thus bound by past events in an attempt to predict the future (*e.g.*, if someone has committed fraud once or belongs to an ethnic group that has abused the system in the past, the system may flag this individual as a potential abuser).

3. How Decentralization as a Further Dimension of Automation can reshape Public Power

Automation in public administration through the use of AI is not just reshaping the way in which public administrations are adopting their decisions, but also the very nature of the way they are performing their functions. In particular, we are interested in analyzing whether the use of blockchain-based technologies applied to public contracts and public services can advance a further, less explored dimension of administrative automation: decentralization.

Blockchain or distributed ledger technologies (DLTs) are able to implement decentralization of power in public administration, allowing empowerment of users and therefore citizens, not just in terms of their greater involvement in the decision-making or monitoring/scrutiny function, but also from the implementation standpoint. The concept of decentralization has different applications in public law as well as in political economy studies. Decentralization takes different forms and has the potential

[30] B. Verheij, *Artificial Intelligence as Law: Presidential Address to the Seventeenth International Conference on Artificial Intelligence and Law*, cit. at 22, 188.
[31] D. Hogan-Doran, *Computer Says "No": Automation, Algorithms and Artificial Intelligence in Government Decision-Making*, cit. at 1, 10.

to modernize administrative law within a framework of open and collaborative governance[32].

From a theory of the state perspective, the concept of decentralization refers to the allocation of legislative or administrative functions at the agency, local or regional level. In countries that are explicitly organized as federal states like, for example, Germany, local jurisdictions typically enjoy administrative autonomy. The French constitution mentions the fundamental principles of the free administration, the competences, and the revenues of local jurisdictions. The Italian Constitution establishes the competences of the State and the Regions as well as formally recognizing municipalities as part of the Republic[33]. Decentralization could also refer to organizational solutions or devolution of discretional powers and choices, as well as implementation of administrative duties to social organizations and citizens[34].

From a political economy perspective, the concept of decentralization is not merely treated as a matter of administrative

[32] J. Freeman, *Collaborative Governance in the Administrative State,* 45 UCLA L. Rev. 1 (1997).

[33] R. Schwager, *The theory of administrative federalism: an alternative to fiscal centralization and decentralization*, 27 Pub. Fin. Rev. 282, 284 (1999). On how cities use their local self-government rights to compete with each other both in a US and EU context see also C. Iaione, *Local Public Entrepreneurship and Judicial Intervention in a Euro-American and Global Perspective*, 7 Wash. U. Global Stud. L. Rev. 215 (2008).

[34] This is known within the EU legal framework as the so-called principle of horizontal subsidiarity: see Christian Iaione, *The Tragedy of Urban Roads: Saving Cities from Choking, Calling on Citizens to Combat Climate Change*, 37 Fordham Urb. L.J. 889 (2010); A. Estella, *The EU Principle of Subsidiarity and Its Critique* (2002); E. Arban, *Re-centralizing subsidiarity: Interpretations by the Italian Constitutional Court,* 25 Reg. & Fed. Stud. 129 (2015). In the U.S. literature, this approach towards decentralization was particularly relevant in local services, on which see G. Frug, *The City as a Legal Concept,* 93 Harv. L. Rev. 6 (1980), and the implementation of the federal urban renewal programs of the 1960s, on which see H. Hallman, *Neighbourhood Control of Public Programs* 185-86, 202-04 (1979). For a critique of the effectiveness of the participation elements in those programs, see J. Bellush, M. Hausknecht, *Urban Renewal: People, Politics and Planning* 274-311 (1967); J.H. Strange, *Citizen Participation in Community Action and Model Cities Programs*, 32 Pub. Admin. Rev. 655 (1972). For a discussion on the success of the New York City public school decentralization, see M. Gittell, *School Governance*, in C. Brecher, R.D. Horton (eds.), *Setting Municipal Priorities* (1981). On the relationship between decentralization and subsidiarity, see A. Breton, A. Cassone & A. Fraschini, *Decentralization and Subsidiarity: Toward A Theoretical Reconciliation*, 19 U. Pa. J. Int'l Econ. L. 21 (1998).

choice, but it is indeed conceived as a tool to achieve efficiency, encouraging development and innovation (especially when used to empower local authorities)[35]. In institutionalist-centered approaches to public economy, decentralization was conceived as the result of a polycentric organization of administration. The government is hereby envisioned as an arena in which a multiplicity of public authorities engages in a polycentric process of self-governance[36]. Scholars supporting this approach claim that it would resolve some of the inefficiencies that the administrative state often encounters, especially in the provision of local services, when guided by concerns of exploitation of economies of scale and internalization of externalities, that are often not taken into consideration by the allocation of functions based on administrative delineation of jurisdictional boundaries[37].

The technology literature has more recently showed that there is indeed a strong connection between automation and decentralization, explaining that emerging technologies such as DLTs and blockchain can indeed lead to a new industrial standard defined as industry 4.0[38].

In this part, the article will show how this further dimension of automation can take place through the use of blockchain in the public sector, and in particular through its implementation in public procurement and the provision of public services such as energy services.

3.1 Blockchain and Public Law: Relevance

To understand the legal implications of the use of decentralizing administrative functions through blockchain and DLTs, we first have to briefly introduce what they are and what their application to the public sector implies.

The blockchain utilizes DLTs to store information verified by cryptography among a group of users, which is agreed through a

[35] R.C. Schragger, *Decentralization and Development,* 96 Va. L. Rev. 1837 (2010).
[36] R.E. Wagner, *Self-governance, polycentrism, and federalism: recurring themes in Vincent Ostrom's scholarly oeuvre,* 57 J. Econ. Behav. Organ. 173 (2005).
[37] V. Ostrom, *The Meaning of Democracy and the Vulnerability of Societies: A Response to Tocqueville's Challenge* (1997); see also V. Ostrom, C.M. Tiebout & R. Warren, *The organization of government in metropolitan areas: a theoretical inquiry*, 55 Am. Pol. Sci. Rev. 831 (1961).
[38] A. Sulkowski, *Industry 4.0 Era Technology (AI, Big Data, Blockchain, DAO): Why the Law Needs New Memes*, 29 Kan. J. L. & Pub. Pol'y Online 1 (2019-2020).

pre-defined network protocol[39]. The validation of the information provided and of the transactions is operated by different and independent nodes, without the control of a central authority, thus diminishing the role of intermediaries.

The blockchain can be described as a public or private database that can store and exchange tangible and intangible goods in a decentralized way, where nodes operating from different computers can send, receive, store information and value. What makes it decentralized and safe at the same time is the fact that the dataset is run and updated by a network of participants, operating from different computers, but interconnected. First of all, every transaction that is initiated on the blockchain is recorded (and then made immutable, the immutability being secured through cryptography), and can proceed only when the rest of the network ratifies the validity of the transaction, on the basis of the pact transactions taking place on the blocks[40]. The blockchain technology could be used as the baseline for smart contracts in the public sector, especially in public procurement and public services[41].

The concept of smart contract was first introduced in 1996, before the diffusion of blockchain terminology in legal studies[42]. We can define a smart contract as a computer transaction protocol based on a DLT technology such as the blockchain, that executes, automatically, the terms of a contract written in a programming language (code) and embedded into the software itself. The parties define traditional contractual clauses, but the execution can happen without the need for intermediaries such as procurement officials, civil servants, strategic consultants or legal experts, and it protects

[39] For a thorough introduction to blockchain and its legal implications, see A. Wright, P. De Filippi, *Blockchain and the Law: the Rule of Code* (2018); for an examination of how the blockchain can replace certain legal transactions through decentralized and disintermediated services, such as, for example, registration of marriage, see M. Swan, *Blockchain: Blueprint for a New Economy* (2015). Others have suggested that blockchain is in fact a legal institution that can function better than existing rules in certain legal domains, for instance in the case of protection of property rights in the digital realm: see G. Ishmaev, *Blockchain technology as an institution of property*, 48 Metaphilosophy 5 (2017).

[40] M. Corrales, M. Fenwick & H. Haapio, *Digital Technologies, Legal Design and the Future of the Legal Profession*, in M. Corrales, M. Fenwickhand & H. Haapio (eds.), *Legal Tech, Smart Contracts and Blockchain* 10 (2019).

[41] N. Fabrizi-Racine, *La blockchain: (R)évolution d'Etat*?, 49 La Semaine Juridique: Administrations et Collectivités Territoriales (2017).

[42] N. Szabo, *Smart Contracts: Building Blocks for Digital Markets,* 16 Extropy **(**1996).

both parties from the risk of malicious exceptions or other kind of abuses, which included, in the case of public smart contracts, the risk of delays, corruption, and other crimes against public administration[43].

So far, blockchain has been employed mostly for its digital financial asset applications, mainly criptocurrencies[44], but public institutions all over the world are also investigating the possibility to use blockchain for the public sector[45]. The blockchain can be used for several legal transactions in which the government or the administration is involved, for instance to carry out voting[46]; to implement the provision of public services in fields such as healthcare[47]; to keep registry, inventory and to exchange any type of physical and intangible/digital assets.

An example is the case of Norway. The Norwegian Tax Administration Agency experimented with blockchain to secure documents and make them immutable. The Norwegian Labour and Welfare Administration also conducted a trial, applying the technology to allow social security recipients to register a new address. In both cases, the technology's limitations came to the fore: in the first instance, the immutability of the blockchain raised concerns in terms of citizens' privacy and right to be forgotten, that must be enforced by the administration. In the latter case, the administration concluded that the technology was not necessary. Blockchain responds to the need of a plurality of involved parties with limited trust between each other, but in the case where one of the parties involved (the administration) has control over the access, simpler technologies are available[48]. The use of blockchain

[43] S.N. Sanchez, *The Implementation of Decentralised Ledger Technologies for Public Procurement: Blockchain Based Smart Public Contracts,* 14 Eur. Procurement & Pub. Priv. Partnership L. 180, 186 (2019).
[44] M. Finck, *Blockchains: regulating the unknown*, 19(4) German Law Journal, 665-692 (2018).
[45] J.B. Auby, *Le droit administratif face aux défis du numérique*, 15 Actualité Juridique Droit Administratif 835 (2018).
[46] F. Casino, T.K. Dasaklis & C. Patsakis, *A systematic literature review of blockchain -based applications: current status, classification and open issues,* 36 Telemat. Inform. 55, 81 (2019).
[47] The OECD blockchain primer, http://www.oecd.org/finance/OECD-Blockchain-Primer.pdf (last visited Sep. 9, 2020).
[48] S. Olnes, A. Janses, *Blockchain Technology as infrastructure in the public sector: an analytical framework*, Proceedings of the 19th Annual International Conference on Digital Government Research: governance in the data age, art. 77, 1-10 (May 2018).

for the public sector represents, for some, the ultimate and more advanced stage of decentralization of the State, resulting in public policies and services managed directly by citizens. However, some have highlighted the risk that the use of blockchain technology to neutralize the State brings, for example, the risk of exposing administrative functions to capture by corrupt individuals or discriminatory market rules[49].

Among the public authorities that are experimenting with blockchain, the EU Commission is also taking initiative. As we will see in the following paragraph, the EU is on the one hand promoting pilot projects or research and innovation projects that generate use cases of blockchain applications to the public sector, while on the other hand directly contributing to the development of an infrastructure that can support blockchain applications that are interoperable across countries. The EU is also promoting guidance to avoid a fragmented and uncontrolled regulation of blockchain-based public services. The article will now explore the emerging academic discussion and policy practice of blockchain applications to core functions of administrative law such as public procurement and energy provision.

3.2 The EU initiative to regulate and promote the blockchain

The EU has taken the initiative to support the development of cross-border blockchain infrastructures applied to public services, and the interconnections between the blockchain and the EU legal framework[50].

The EU supports the creation of a body of knowledge on blockchain and the law by funding theoretical and applied research that generates pilot projects on the legal implications of the use of blockchain for public services. Use cases of the application of the Blockchain to public services were developed through EU-funded research and pilot projects, for example in Amsterdam and Barcelona. These use cases, focused on citizen sovereignty of data enabled by Blockchain technologies, highlight the opportunities and legal challenges presented by the use of blockchain at the urban level[51].

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[49] M. Atzori, *Blockchain technology and decentralized governance: is the State still necessary?*, 6 J. Gov. & Reg. 45, 62 (2017).

[50] *See* M. Finck, *Blockchain Regulation and Governance in Europe* (2018).

[51] The pilots were developed through the Horizon 2020 DECODE project.

The City of Amsterdam experimented with "*Gebiedonline*", an open source platform to connect neighborhood residents while protecting their privacy[52]. The platform adopted a system of attributes-based verification that ensures a high level of data ownership[53]. The city of Barcelona experimented with two pilots[54]. The first was the "Digital Democracy and Data Commons" pilot, a participatory process designed to test a blockchain technology for improving the City's digital participation platform, *Decidim*, by improving the user's control over their data, as well as the transparency in citizen petitions. The pilot also had a broader policy uptake of stimulating a deliberative democracy process, wherein city residents could discuss alternative visions, networks and practices on citizens' data.

The second pilot was focused on implementing an Internet of Things application of Citizen Science Data Governance. It would enable communities to support IoT data gathering and allow them to control the sharing of information that they produce and contribute to managing. The two pilots were connected by a platform, *BarcelonaNow*, that was built to combine crowdsourced data from city residents with City-owned open data and dataset produced by external service providers. Users have the chance to mine the data, compose and share it through user-friendly custom visualization tools, in a privacy-aware digital environment.

The EU is also directly involved in the development of a public blockchain infrastructure; within the European Blockchain Partnership (EBP) is a cooperation between the European Commission, all EU Member States and some countries of the European Economic Area[55], working to deliver a European Blockchain Services Infrastructure (hereinafter: EBSI)[56].

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[52] Gebied online, https://gebiedonline.nl/ (last visited Sep. 8, 2020).

[53] DECODE, *Final Report on Pilots Amsterdam and sustainability plans* (2019), https://decodeproject.eu/publications/final-report-pilots-amsterdam-and-sustainability-plans (last visited Sep. 8, 2020).

[54] DECODE, *Final report on the Barcelona pilots, evaluations of BarcelonaNow and sustainability plans* (2019), https://decodeproject.eu/publications/final-report-barcelona-pilots-evaluations-barcelonanow-and-sustainability-plans (last visited Sep. 8, 2020).

[55] *Declaration on Cooperation on a European Blockchain Partnership* (2018), https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50954 (last visited Sep. 8, 2020).

[56] CEF Digital Connecting Europe, *Introducing the European Blockchain Services Infrastructures*,

The EBSI aims to become a standard infrastructure that all EU public administrations, and potentially any business or organization, can use to launch public services or applications. The EBSI will be a completely decentralized system; every Member State will run its own set of nodes. The EBSI provides the baseline infrastructure of blockchain nodes at EBP / Member State level and the central services. The same infrastructure can be reused for different applications, namely "use cases". The initiative started in 2019 with four use cases of blockchain-based public services: 1) notarization; 2) diplomas - user-based management and control of education credentials, reducing the verification costs for both citizens and institutions, application to generate trusted digital audit trails, automate compliance checks and data integrity proof; 3) European self-sovereign identity creating a standardized identity format that citizens can use to have their identity controlled across borders with a high level of security and privacy protection; 4) trusted data sharing using blockchain technology to store and share data among customs and tax authorities.

The use cases of blockchain-based public services tested in the first phase of implementation of the EBSI can easily be implemented in different contexts using basic blockchain technology already existing on the market. To enable the delivery of more demanding services, the development of a complex service infrastructure that is compliant with the EU legal framework is necessary. Therefore, in 2019, the EC, leveraging on the work of the EBP, has initiated a pre-commercial public procurement (PCP) process to develop a service infrastructure based on a distributed ledger or blockchain solution, that could be adopted by all countries in the EU to enable them to offer advanced and cross-border blockchain services to citizens, businesses and public administrations. The aim of the PCP is to trigger the co-creation of a novel, use-case based infrastructure compliant with the EU legal framework (the GDPR Regulation, the eIDAS Regulation, the NIS Directive)[57].

Beyond the EU-level activities, EU countries are already implementing legislation to promote and regulate the use of

https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/ebsi (last visited Sep. 8, 2020).

[57] *European Blockchain Pre-Commercial Procurement, Prior information notice*, 2019/S 241-590329, https://ted.europa.eu/TED/notice/udl?uri=TED:NOTICE:590329-2019:TEXT:EN:HTML (last visited Sep. 8, 2020).

technologies that enable decentralization such as Blockchain and their legal applications, in particular smart contracts. A prominent example is the Italian legislation on smart contracts, contained in a law for simplification approved in 2019 that recognizes DLTs, blockchain technology and smart contracts as valid legal tools able to produce and store valid legal documents[58]. The EU is willing to provide standard rules and guidance, since the proliferation of national legislations without coordination at the EU level could, of course, lead to a fragmented legal framework and potentially hamper the diffusion of blockchain-based public services, and this could, in turn, harm the implementation of good administration at the EU-level, resulting in a situation in which different countries offer different levels of good administration in terms of blockchain use[59].

3.3 Automation and Decentralization: Using Blockchain to Rethink the Monopoly of Power of Public Administrations

DLTs, blockchain and public smart contracts can be potentially disruptive for administrative law because they allow the principle of decentralization to be implemented at an advanced level. We argue that the use of technologies for automation are capable of pushing decentralization to the point of restructuring the power dynamics of public, private and civic actors, not just in administrative decision-making but also at the level of performing the administrative functions.

One example of the advanced application of disruptive, advanced technologies is the application of blockchain to data governance. Within this field, public policy and legal scholars have argued that decentralization technologies can and should be used to implement different ownership and governance models of data and digital infrastructures that are able to empower citizens. The creation of decentralized forms of collective ownership of digital platforms, as well as establishing a role for citizens in the definition of and data property regimes, would be critical to improve the

[58] Law no 12 of Feb. 12 209, Art. 8 [Italy].

[59] L. Courcelas, T. Lyons & K. Timsit, *EU Blockchain Observatory and Forum 2018-2020: Conclusions and Reflections* (2020), https://www.eublockchainforum.eu/sites/default/files/reports/report_conclusion_book_v1.0.pdf (last visited Aug. 5 2021).

democratic responsiveness of data policies[60]. Within this framework, blockchain technologies would be used to empower forms of commons-based peer production based on digital sovereignty[61].

An attempt to implement a similar form of digital sovereignty was the Sidewalk Labs' proposal to establish an independent civic data trust which would control and govern all urban data as part of its Quayside Waterfront smart city project in Toronto. The project ultimately failed, due to privacy concerns raised about the tool and the strong resistance from the city residents[62]. Nevertheless, the project raised the possibility that, guided by urban authorities, urban citizens could produce, access and control their data, and exchange contextualized information in real-time through institutional co-governance platforms that could ensure confidentiality and accountability. Especially when facilitated by blockchain-based tools, a data trust has the potential to empower local communities by giving them control, not just over the privacy settings related to the access and use of the data that they provide to the platforms and that they produce by using them, but also over the use of the economic revenues and the value produced by the use of their data. Since the underlying technological infrastructure on which tech companies rely is often publicly funded, and the data that makes these businesses profitable is collectively produced, economist Mariana Mazzucato has argued for the creation of a public repository that could sell data to companies rather than the other way around[63].

The risks related to lack of transparency, privacy concerns, and other potential distortions related to the technological innovations in the process resulting from the use of automation technologies to involve citizens, should be addressed by specific policies designed for this purpose. As an example, one relevant policy uptake of the pilots on blockchain for data sovereignty

[60] F. Bria, *Public policies for digital sovereignty*, in T. Scholz, N. Schneider (eds.), *Ours to Hack and to Own: the Rise of Platform Cooperativism, A New Vision for the Future of Work and a Fairer Internet* 218 (2016).
[61] Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006).
[62] M. Mazzucato, *Let's make private data into a public good*, MIT Technol. Rev. (2018), https://www.technologyreview.com/2018/06/27/141776/lets-make-private-data-into-a-public-good/.
[63] E.P. Goodman, J. Powles, *Urbanism Under Google: Lessons from Sidewalk Toronto,* 88 Fordham L. Rev. 457 (2019).

carried out by the City of Barcelona, was their impact on the ethical digital standards set up by Barcelona Chief Technology Office (CTO)[64]. These standards include new "data sovereignty" procurement clauses integrated in public procurement contracts. The clauses mandate the city providers to give back the data they gather to deliver the service to the city hall. This is an example of the building of a data commons as a social infrastructure. This data will enable the City to build future smart public services. The terms and conditions for data access and sharing are set by citizens themselves and they will keep control over data once shared. The data will remain open to local companies, cooperatives and NGOs that can build data-driven services[65].

4. Blockchain – based Public Contracts and Services

The previous paragraph outlined data governance as a benchmark example of how blockchain technology is currently being experimented with, and used, as a tool to implement disintermediation and decentralization of data governance and privacy protection at the city level. Data governance is a broad, cross-cutting issue that involves the protection of citizens' privacy.

The application of blockchain in sectors of public law in which decentralization and disintermediation could raise similar concerns in terms of accountability and rule of law, and would require innovations in the legal framework, is stimulating an academic discussion, although the legal and policy practice is less developed.

In the following paragraphs, we will analyze two, less advanced, applications of blockchain technologies that, by introducing the possibility for citizens/local communities to have a role in the design, implementation, provision, monitoring and revenue-sharing of public services, are potentially capable to produce a disruptive effect on administrative functions that are at the core of administrative law and of good administration: public procurement and energy provision.

At the EU level, as well as in some national governments, as the cases will show, there is a growing interest in the possibility of adopting blockchain for public procurement. We aim to highlight

[64] City of Barcelona, *Ethical Digital Standard: A Policy Toolkit*, https://www.barcelona.cat/digitalstandards/en/ (last visited Sep. 8, 2020).
[65] DECODE, *Final Report on Pilots Amsterdam and sustainability plans*, cit. at 49, 8.

the potentialities (especially in terms of structuring opportunities for a proactive role of citizens in the process) and limitations of the use of blockchain for public procurement, an area where significant legal restrictions and obstacles towards decentralization of power exist.

We also aim to show advanced decentralization and disintermediation features of blockchain technologies through the case of energy provision, where existing cases of renewable energy communities are able to clearly demonstrate some of these features.

4.1 Blockchain – based public contracts

In public procurement, the use of automation is crucial, as it reduces the risk that contracting decisions will be invalidated due to conflict of interests, bad faith, or overlooking exclusion criteria[66]. Procurement for innovation has been thus far one of the few exceptions to an explicit legal effort in public law to facilitate innovation. The literature on urban innovation, in particular, points to innovative procurement practices overcoming the traditional public-private partnership model of long-term innovation for public infrastructures and provision of services[67]. A move towards partnerships that involve civic society actors, city residents, and local communities starting from the pre-procurement phase would allow the risk of investing in innovative services and infrastructures to be shared amongst multiple actors. Besides, introducing end-users in the procurement process allows the development of collaborative and innovative solutions targeting local challenges and needs. The Urban Agenda Partnership on Innovative and Responsible Procurement has tapped into the potential of these new forms of partnerships, that have been defined as public-private-people[68], or public-community partnerships, by analyzing new

[66] D. Hogan-Doran, *Computer Says "No": Automation, Algorithms and Artificial Intelligence in Government Decision-Making*, cit. at 1, 5-6.

[67] P. Marana, L. Labaka & J.M. Sarriegi, *A Framework for Public-private-people Partnerships in the City Resilience-building Process*, 110 Safety Sci. 39 (2017); see also C.O. Cruz, J.M. Sarmento, *Public-Private Partnerships and Smart Cities*, 19 Network Industries Q. (2017).

[68] S.A. Ahmed, S.M. Ali, *People as partners: Facilitating people's participation in public–private partnerships for solid waste management*, 30 Habitat International 781 (2006); see also R. Mäntysalo, *From Public-Private-People Partnerships to Trading Zones in Urban Planning,* in G. Concilio, F. Rizzo (eds.), *Human Smart Cities* (2016); S.T. Ng, J.M.W. Wong & K.K.W. Wong, *A public private people partnerships (P4) process framework for infrastructure development in Hong Kong*, 31 Cities 370 (2013).

institutional, legal, and policy frameworks that could foster innovation through procurement. Innovation Partnerships constituted through these processes can extend their scope to also encompass digital social innovation initiatives[69].

Within its legislative action on green and social procurement, the EU Commission is working to address the issue of how public procurement can best "integrate the demand-side function for social innovation and social entrepreneurship"[70]. So far, the EU has encouraged public buyers to develop opportunities for social economy enterprises. This goal was transposed in national legislations in different ways. This includes the introduction of social considerations linked to the employment of disabled people, or to the promotion of gender equality and the promotion of employment in the public procurement process[71].

Although this approach stimulates innovation and the production of social impacts, it does not promote decentralization as an approach that includes citizens or city residents in general in the procurement process itself, through public smart contracts based on blockchain or DLTs. Some legal scholars argued that the use of blockchain and DLTs in procurement processes as an advancement in the process of digitalization of procurement, or e-procurement or procurement 4.0. They highlight the benefits of the use of blockchain in terms of greater transparency and accountability of procurement processes, as well as a potential protection from corruption, by reducing human intermediation in the validation of data provided by bidders[72]. By relying upon these technologies, in fact, NGOs and the media could implement greater monitoring on the procurement process that would leave less room

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[69] B. Baccarne, S. Logghe, D. Schuurman & L. De Marez, *Governing Quintuple Helix Innovation: Urban Living Labs and Socio-Ecological Entrepreneurship*, 6 Tech. Innovation Mgmt. Rev. 22 (2006).

[70] Communication from The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, *Making Public Procurement work in and for Europe* (2017), COM(2017) 0572 final, 8.

[71] Executive Agency for Small and Medium-sized Enterprises (European Commission), *Buying for social impact* (2020), https://op.europa.eu/en/publication-detail/-/publication/b09af6a5-513a-11ea-aece-01aa75ed71a1 (last visited Sep. 8, 2020).

[72] S.N. Sanchez, *The Implementation of Decentralised Ledger Technologies for Public Procurement: Blockchain Based Smart Public Contracts,* cit. at 40; see also M. Raskin, *The Law and Legality of Smart Contracts,* 1 Geo. L. Tech. Rev. 305, 309 (2017).

for civil servants to take discretionary decisions[73]. This control, operated by citizens, individually or organized in NGOs, is often envisaged as an ex-post intervention to verify the fairness of the tender procedure[74]. Such an implementation of the principle of decentralization should be accompanied by an awareness of the risks associated. Legal scholars highlighted the critical issues related to the involvement of city residents and civil society in general in public procurement procedures. They can be related to expertise, knowledge and representation. If the civil society groups involved are not representative or do not possess the necessary knowledge and experience to actively cooperate with both public and private actors, there is an inherent risk that their role within a public procurement process will be meaningless, or even produce distortive or negative effects[75].

There are also examples of state level experimentations on the application of blockchain technologies to public procurement. Mexico, for instance, is experimenting with the use of a blockchain-based platform for public procurement processes as a tool to involve citizens in the monitoring and validation of documents submitted by the bidders, the evaluation of the proposals and the voting process, that will happen in an anonymous way, thus preventing inappropriate influence from interest groups[76].

4.2 Blockchain – based energy services

The academic and policy discussion on the use of blockchain to support the self-production and peer-to-peer (P2P) provision of energy is rich, and the example of the renewable energy communities, spreading in rural as well as urban areas, does show

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[73] C. Yang, *Is There a Role for Blockchain For Enhancing Public Procurement Integrity*? OECD Global Anti-Corruption & Integrity Forum (2019), https://www.oecd.org/corruption/integrity-forum/academic-papers/Chan-Yang-blockchain-public-procurement-integrity.pdf (last visited Sep. 8, 2020).

[74] S.N. Sanchez, *The Implementation of Decentralised Ledger Technologies for Public Procurement: Blockchain Based Smart Public Contracts,* cit. at 40.

[75] C. Cravero, *Rethinking the Role of Civil Society in Public Procurement*, 14 Eur. Procurement & Pub. Priv. Partnership L. 30 (2019).

[76] D. Floyd, *Mexico is testing blockchain to track public contract bids*, October 2017 https://www.coindesk.com/mexico-tests-blockchain-track-public-contract-bids/ (last visited Aug. 5 2021); see also Y. Martinez Mancilla, *Blockchain HACKMX*, presentation, https://www.unece.org/fileadmin/DAM/cefact/cf_forums/2017_Rome/PPTs/BlockChain/PM_05_Yolanda_Martinez_Mancilla_Mexico_Blockchain_HACKMX.pdf (last visited Sep. 8, 2020).

how this model can embody the principle of decentralization by empowering communities, organized in NGOs, or social economy businesses/cooperatives, to participate in the energy market.

The energy community tool was recently incorporated into the legal framework of the European Union in the so-called "RED II" directive on promoting the use of energy from renewable sources. The Directive defines the renewable energy community as a legal entity

> 'which, in accordance with the applicable national law, is based on open and voluntary participation, is autonomous, and is effectively controlled by shareholders or members that are located in the proximity of the renewable energy projects that are owned and developed by that legal entity the shareholders or members of which are natural persons, SMEs or local authorities, including municipalities, the primary purpose of which is to provide environmental, economic or social community benefits for its shareholders or members or for the local areas where they operates, rather than financial profits'[77].

Even before, energy communities were recognized informally, for instance by Interreg Europe, the European Regional Development Fund (ERDF) program for cooperation between regions of the European Union. Interreg recognizes and promotes energy communities as new business models and ownership structures, emerging as a result of the increasing decentralization of the energy generation, which allows the participation of a greater number of businesses, individuals and groups to the energy system. Renewable energy communities are defined as a variety of economic and legal models that involve many actors such as citizens, local businesses, local authorities, charities, broadly defined as local communities. Organized civil society directly participates in the energy transition by investing in, producing, selling and distributing renewable energy[78]. The European

[77] European Parliament and Council, *Directive 18/2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC - Commission Declaration* (2018), O.J. (L 328), art. 2 para. 16.

[78] Interreg Europe, *A Policy Brief from the Policy Learning Platform on Low-carbon economy* (2018), https://www.interregeurope.eu/fileadmin/user_upload/plp_uploads/policy_briefs/2018-08-30_Policy_brief_Renewable_Energy_Communities_PB_TO4_final.pdf (last visited Sep. 8, 2020).

Committee of the Regions (CoR, 132nd plenary session of 5 and 6 December 2018) also indicates this model as strongly positive and emphasizes that the main challenges for local energy communities are often related to their organizational and financial capacity, and to the fact that the regulatory framework does not address those issues. Participating in a bidding process, for example, is complicated for communities that often lack financial capacity, also because they are structured as NGOs as well as human resources[79]. Energy Communities might not, in fact, be able to face the procedural, legal, and economic requirements related to accessing the grid and then selling the energy. To overcome these challenges, the Committee believes that local and regional authorities can partner with energy communities or establish new ones in collaboration with city residents[80]. Indeed, Interreg recognized that among the benefits associated with the creation and promotion of energy communities, is that the profits and costs related to energy production do not go beyond regional borders, and can contribute to lowering the cost of energy in the long term while inducing the emergence of new local value chains. One of the major benefits is increasing acceptance and awareness of renewable energy, which also helps to overcome resistance to infrastructural development. Furthermore, if public administrations decide to play an active role in an energy community, or if they mandate the community to produce energy, they can benefit from cheaper energy for the public utilities themselves (such as street lighting or the recharging of electric means of transport)[81].

The RED II Directive affirms that the planning of infrastructure necessary for energy production purposes such as electricity from renewable sources, should take into account policies relating to the participation of the people affected by the projects, in particular the local population[82], and that renewable energy communities can participate in available support schemes

[79] M. Gancheva, S. O'Brien, N. Crook & C. Monteiro, *Models of Local Energy Ownership and the Role of Local Energy Communities in Energy Transition in Europe* (2018), https://cor.europa.eu/en/engage/studies/Documents/local-energy-ownership.pdf (last visited Sep. 8, 2020).

[80] *ibid,* 61.

[81] Interreg Europe, *A Policy Brief from the Policy Learning Platform on Low-carbon economy*, cit. at 74, 4.

[82] European Parliament and Council, *Directive 18/2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC - Commission Declaration*, cit. at 73, art. 22, para. 7.

on an equal footing with other players, especially large scale players[83]. The Directive also identifies peer to peer trading as the sale of renewable energy between market participants by means of a contract with pre-determined conditions governing the automated execution and settlement of the transaction, either directly between market participants or indirectly through a certified third-party market participant, such as an aggregator: "the right to conduct peer-to-peer trading shall be without prejudice to the rights and obligations of the parties involved as final customers, producers, suppliers or aggregators"[84].

In Italy we can still find few experiments in the field of energy communities based on a form of peer-to-peer trading. The first one is the case of the Melpignano energy community, where a Community Cooperative was initiated in 2011 in a rural area, the inhabitants of which offer the roofs of their homes to install photovoltaic panels and produce and sell renewable energy.

In the urban context, the implementation of an energy community cooperative has considerably complex features, however, there are cases of experimentation at the neighborhood or district level. An experiment in this sense was launched in Rome by ENEA and Luiss, which focused on creating an intelligent and collaborative energy district in the complex urban area of the South East Rome quadrant, comprising three neighborhoods, Alessandrino, Centocelle and Torre Spaccata. This experimentation led, also thanks to the support of EU funding through the Horizon 2020 program, to the creation of a neighborhood cooperative that will co-produce and co-manage collaborative neighborhood services in the energy sector as well. A digital environment was also tested through which citizens had the opportunity to share information related to energy saving, including through the installation of "smart energy boxes" in the homes of the inhabitants of a district. The goal is to facilitate energy saving and therefore improve the efficiency of the use of energy sources, through greater attention to final energy consumption.

The legal framework, as well as the first experiences of energy communities, provides for strong autonomy of energy communities, but the availability of legal tools and economic/financial tools provided through cooperation with the

[83] *ibid,* point 27.
[84] *ibid,* art. 2, para. 18.

local authority seems vital to ensure the sustainability of these experiments. Blockchain-based infrastructures could be particularly useful when used by energy communities to implement a decentralized production and distribution of energy, especially at the urban level.

In the UK, the community energy NGO "Repowering London" is an example of an energy community that is evolving towards the experimentation of blockchain technology to facilitate self-production and P2P trading of electricity[85]. In 2018, in cooperation with the UK-based company Verve, Repowering London realized one of the first blockchain-based tradings of community-produced power. The power was generated through solar panels placed on private buildings roofs in the Hackney borough (London). Residents are allowed to purchase the surplus of energy produced by the solar panel that is not used to fuel the common parts of the underlying buildings, and the transaction is based on blockchain technology[86].

The decentralization of key functions of administrative law and the disintermediation of legal transactions between public actors, private actors and citizens through legal tools such as renewable energy communities at the local or even sub-local level, or in public procurement procedures, is a clear example of how decentralization can empower local communities that produce value for the general interest and even provide a public service, facilitated by the use of blockchain technologies.

The cases outlined in the previous paragraph were used to introduce blockchain technologies as a way to empower single citizens or local communities within administrative procedures and/or functions. By doing so, blockchain technology would allow an extensive interpretation of good administration as a principle aimed at ensuring efficiency of public administration and broad participation of citizens[87].

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[85] M. Gancheva, S. O'Brien, N. Crook & C. Monteiro, *Models of Local Energy Ownership and the Role of Local Energy Communities in Energy Transition in Europe*, cit. at 75, 42.

[86] Dentons, *Blockchain in the energy sector: evolving business models and law,* 7 Int'l Energy L. Rev. 233 (2018).

[87] Good administration is in fact a notion capable of protecting subjective rights of individuals and allowing them to defend themselves against abuse of their rights. See H.C.H. Hofmann, B.C. Mihaescu, *The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case* , 9 Eur. Const. L. Rev. 73 (2013).

5. The interaction between decentralized automation and the principle of good administration

Can the blockchain and therefore decentralized automation advance in some way or hinder the principle of good administration? This is the fundamental question that every public law scholar dealing nowadays with the issue of the use of blockchain for the realization of some public or general interest is trying to address and solve[88].

If we go back to the very inner core of the principle of good administration we may recollect that its most loyal enforcement implies efficiency, transparency, accountability, timely decisions[89].

Would the blockchain advance all these dimensions of the principle? On paper it seems that it can do so. We have showed here that blockchain can indeed be one of the avaneues whereby the public administration can tackle the digital transition in a very effective, transparent, participatory way.

The use of blockchain technology for smart public contracts in procurement procedures could facilitate the decentralization process and help overcome the issues related to civic participation explored in this article, under certain conditions[90]. The case of energy shows the most advanced features of blockchain as a technology capable of triggering decentralization and self-governance in a regulated local public service. The model of energy communities, in particular, seems to be a cutting-edge tool for co-creation and co-management of energy and local and widespread energy supply chains, and blockchain could contribute to implementing them at the urban and/or neighborhood level.

[88] Y Hermstrüwer, *Blockchain and public administration*, Edward Elgar Publishing (2020).

[89] T.P. Fortsakis, *Principles Governing Good Administration*, 11(2) European Public Law, 207-217(2005)

[90] C. Cravero, *Rethinking the Role of Civil Society in Public Procurement*, cit. at 71; see also World Bank, *Civic engagement in procurement: a review of eight international cases studies* (2009), https://documents.worldbank.org/en/publication/documents-reports/documentdetail/900321468041934999/civic-engagement-in-procurement-a-review-of-eight-international-case-studies (last visited Sep. 9, 2020).

However, we should ber very careful in fantasizing about the blockchain or depicting rosy scenarios[91].

The blockchain does bear more some risks for public law and the principle of good administration[92].

On one hand, scholars in the field of public procurement highlighted the risks related to the application of blockchain to public contracts. One of the main features of blockchain, immutability, seems to be particularly problematic. Once the smart public contract is uploaded on the infrastructure, in fact, it cannot be modified, re-negotiated, or rescinded. It ultimately does not prevent nor give the chance to amend mistakes. This feature could be problematic, especially when considering the possibility of judicial scrutiny and the potential overturn of administrative decisions[93]. Eventually, the use of blockchain could be inefficient and even counter-productive if the institutional design of public procurement does not change, and the control and coordination of activities remains concentrated on the public administration[94].

On the other hand, blockchain-enabled energy communities could create disruption in the markets and regulatory frameworks of the energy sector. The REDII directive does set forth a very forward-looking legislative set of principles, rules and guidelines. Still the design and implementation of energy communities is in its infancy and requires a careful action of regulatory experimentation and crafting[95]. Both the technical and legal standards necessary to implement the rules and principles established by the new EU regulatory framework have not been tested and this creates an economic and legal uncertainty which is further increased by the use of the blockchain in this case. As everyone knows uncertainty is an enemy of both the scaling up of effective public policies, as well as the protection of fundamental rights.

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[91] The need to carefully analyze any economic and technical innovation from a political economy standpoint is highlighted by C. Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW AND CONTEMPORARY PROBLEMS 71-103 (2015)

[92] Y. Hermstruwer, *The Limits of Blockchain Democracy*, 14 N.Y.U. J.L. & LIBERTY 402 (2020).

[93] A. Sanchez-Graells, *Data-Driven and Digital Procurement Governance: Revisiting Two Well-Known Elephant Tales,* 24 Com. L. – J. of Computer, Media & Telecomm. L. 107 (2019).

[94] *ibid.*

[95] S. Vanhove, *Locality in EU Energy Law*', 29(6) European Energy and Environmental Law Review, 220-23 (2020).

6. Conclusion: redesigning public power for automation

Despite the risks highlighted above, automating government and decentralizing decision-making might emerge in the future as key pathways for the evolution of public administrations and hence administrative law. If administrative law intends to keep governing effectively some of the most salient issues public administrations normally tackle (*e.g.*, heavy bureaucracy, delayed decisions, incoherence, conflict of interests, corruption), it should dedicate sufficient energies to the study of the impacts that digital technologies and, in particular, automation will produce on the relationship between citizens and public administrations. If well construed also through the prism of traditional categories, automation can promote the modernization of administrative law and ensure that state action is equitable, efficient, and accurate[96].

New institutional frameworks that promote technological innovation while safeguarding the principles of good administration and public values, are needed. Innovation in public administration is required to change the way in which public authorities operate and relate to citizens. However, automation should be used to customize decisions in a proportionate and fair way rather than to further depersonalize the system and disregard individual needs[97]. The creation of independent commissions that supervise the development of algorithms and audit their implementation could be a viable solution to ensure that the principles of good administration are safeguarded without stifling innovation.

Automation can also be used to decentralize. Decentralization can have different degrees of intensity. The fact that organizations as well as individuals can cooperate without an external central regulation contributed to the conception that "code is the law" and nurtured expectations in terms of the use of blockchain for public administration[98]. But the conception that the code is the law is more of a moral claim than an approximation of reality, since the best use for blockchain technology has to be defined through specific rules and guidelines once it enters the

[96] D.F. Engstrom, D.E. Ho, C.M. Sharkey & M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies, Report Submitted to the Administrative Conference of the United States,* cit. at 4, 8.

[97] A.C. i Martinez, *How Can We Open the Blackbox of Public Administration? Transparency and Accountability in the Use of Algorithms*, cit. at 12, 20-21.

[98] M. Swan, *Blockchain: Blueprint for a New Economy*, cit. at 36, 16.

public and administrative law realm. Its compliance with human rights is still to be tested, and the negative externalities on third parties, as well as the environment, are still to be carefully evaluated[99].

Further intellectual investigation and regulatory experimentation might represent a good investment though. As a matter of fact synergy between automation and true decentralization can lead to autonomisation. Literature in the technical fields is already paramount from this point of view.

The public and administrative law scholarship has devoted little attention to autonomisation as a combination of automation with decentralization[100]. However autonomisation could challenge the very inner core of administrative law: the monopolistic exercise by a public administration (an organization composed by public officials and civil servants who are appointed or selected) of an authoritative power over citizens. Through autonomisation, power could become more distributed, and administration would become somehow collective rather than just public.

A more participatory and decentralized administration with all the due transparency and effectiveness safeguards would enhance the principle of good administration as the administration would benefit from broader legitimacy. This of course implies interpreting the blockchain as a public infrastructure and therefore government intervention in its provision and oversight through regulatory scrutiny and public investment[101]. The need to govern the exchange among these distributed powers will remain, but governing these processes might require slightly different approaches and probably will partially repurpose administrative law as the law of an automated and polycentric good administration[102].

It goes without saying that investment on capacity building for both civil servants and communities or single citizens contributing to an automated and polycentric good administration will become of paramount importance to enable their mastering of the tools of automation, decentralization and polycentrism. However, the recent turn and push towards third mission and

[99] A.J. Kolber, *Not-So-Smart Blockchain Contracts and Artificial Responsibility,* 21 Stan. Tech. L. Rev. 198 (2018).
[100] C. Iaione, E. De Nictolis & A.B. Suman, *supra* note 17.
[101] G. Dimitropoulos, *The Law of Blockchain*, 95 Wash. L. REV. 1117 (2020).
[102] *Ibid*.

engagement by universities as much as other scientific and educational actors might accelerate the pace of this capacity building process in the public domain[103].

[103] See for instance the Erasmus+ project ENGAGE.EU (https://engageuniversity.eu/) which aims to enable learners to act as socially engaged European citizens and to have an impact on society at large.

MAX WEBER'S IDEAL TYPE AS A BEHAVIORAL HYPOTHESIS IN PUBLIC LAW THE LEXICON OF CONSTITUTIONS ON PUBLIC ADMINISTRATION

*Paolo D'Anselmi**

Abstract

Public administration is a topical global industry that employs half a billion people and covid-19 reminded us that relief from emergency hinges upon political decisions as much as it does on the capability of public administration to implement those decisions. Public administration is shaped by public law. It is topical then that public law be effective in performing the task of shaping public administration. Legal scholars have acknowledged the debt of public administration's organizations to Max Weber's ideal type of legal-rational authority. But how exactly has Weber's ideal type permeated public law? The literature does not seem to have asked this question. On the other hand, public law seems to have remained on the margin of the debate about the Weberian state. Legal scholars have said public administration is Weberian more from their general view than by citing specific elements of law. This paper identifies one of the ways such permeation has happened. In fact, the purpose of this article is to show that the influence of Max Weber's ideal type of legal-rational authority on public law – constitutions, specifically – is revealed by public law's use of the lexicon and the characteristics of the same ideal type to shape the organizational model of public administration. This purpose will be pursued by showing that the language of Max Weber's ideal type has been transposed into legislation without further elaboration. The demonstration is pursued through comparative text analysis and inductive approach based on qualitative empirics of a sample of constitutions and legislation. The importance of conducting such operation is to make explicit that public law adopts Max Weber's ideal type of legal-rational authority as a behavioral hypothesis about public administration. This is a contribution to the interdisciplinary field of law and sociology of organizations. Policy implications open the way for a fresh look at

public administration reform, questioning the basic conceptual model that is underlying legislation.

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1. Introduction

The pandemic of 2019-2021 has brought public administration center-stage in the global governance domain because it has shown that relief from medical emergency hinges upon the political decisions of leaders as much as it does on the capability of public administrations to implement those decisions, in health care, economic welfare and other areas of government. Public administrations then constitute a large and topical global industry. They employ half a billion people[1] from the global employed population of 3.5 billion making about 15% of the total. Public administrations collect and spend sizeable shares of GDP (from 13% to 55%, depending on the specific country[2]) through levying taxes, providing merit and non-merit goods and services, and managing market economies or acting instead of the market economy in large parts of the globe. Public administrations are a crucial and

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[1] P. D'Anselmi, *The Privileged Working Conditions of Public Employees Sanctioned by Public Law: Adding One Dimension to Inequality* 1 Inequality Inquiry 46 (2020) https://scholarship.law.umn.edu/jii/1

[2] https://tradingeconomics.com/country-list/government-spending-to-gdp accessed 31 January 2021

instrumental sector for the management of all salient public policy issues from climate change and the green transition to the alleviation of poverty and inequality, from the Fourth Industrial Revolution to debt and unemployment, and last but not least, the mentioned covid-19 pandemic. Nonetheless most public administrations seem to be underperforming globally and public administration reform is part of international organizations' agenda for problem countries, so much so that public administration reform appears to be the common denominator to several of the Washington Consensus' ten points[3]. Of course there are nuances in the performance of different public administrations and in the therapies that are put forth in each country to cope with the issue: some public administrations are much better than others.

Public administrations are governed by public law and other disciplines that have acknowledged each other's influence on this subject[4]. However, public law is the hegemonic discipline governing public administrations around the world[5]. Public law includes administrative law and constitutional law. Administrative law descends from constitutional law and 'civil service law and bureaucratic organization' are a subset of administrative law[6]. Bradley and Ewing define the relationship between the two branches of public law:

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[3] J. Williamson *What Washington Means by Policy Reform* in: J. Williamson (ed.), *Latin American Readjustment: How Much has Happened* (1989)

[4] M. Albrow, *Bureaucracy* 13 (1970), "Political scientists, sociologists, management scientists have all devoted major pieces of theory and research to bureaucracy." W. Wilson, *The Study of Administration* 2.2 Political Science Quarterly (1887) https://doi.org/10.2307/2139277

[5] L.E. Lynn Jr., *Public Management: Old And New* i (2006), Lynn recognizes the prevalence of public law and law in general: 'constitutions and constitutional institutions, legislatures, and courts regulate the evolution of managerialism'. See generally S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, (2010); V.C. Jackson and M. Tushnet, *Comparative Constitutional Law*, (2014); R. Masterman and R. Shutze, *The Cambridge Companion to Comparative Constitutional Law*, (2019); M. Rosenfeld and A. Sajo, *The Oxford Handbook of Comparative Constitutional Law*, (2013). Handbooks of comparative constitutional law provide a global landscape for the relevance of public law in public administration.

[6] S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, cit. at 5, 1

> "Administrative law is a branch of public law concerned with the composition, procedures, powers, duties, rights and liabilities of the various organs of government that are engaged in administering public policies. Administrative law includes at one extreme the principles and institutions of constitutional law and at the other the detailed rules in statutes and ministerial regulations."[7] "There is no precise demarcation between constitutional and administrative law."[8] "Constitutional law is that part of national law which governs the system of public administration and the relationships between the individual and the state."[9]

Hegemony of public law especially reflects the reality in the least developed systems, where managerial sciences are not so much developed and implemented.

Legal scholars have acknowledged the debt of public administration's organizations to Max Weber's ideal type of legal-rational authority. But how exactly has Weber's ideal type permeated public law? The literature does not seem to have asked this question. Public law seems to have remained a little on the margin of the debate about the Weberian state[10]. Legal scholars have said public administration is Weberian more from perception and their general view[11] than by citing specific elements of law. This paper identifies one of the ways such permeation has happened. In fact, the purpose of this article is to show that the adoption of Max Weber's ideal type as a behavioral hypothesis about public administration is revealed by public law's use of the lexicon and the characteristics of the ideal type to shape the organizational model of public administration. The demonstration is pursued through comparative text analysis. This is

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[7] A.W. Bradley and K.D. Ewing, *Constitutional & Administrative Law,* 605 (2011).
[8] A.W. Bradley and K.D. Ewing, *Constitutional & Administrative Law,* cit. at 7, 451.
[9] A.W. Bradley and K.D. Ewing, *Constitutional & Administrative Law,* cit. at 7, 451.
[10] C. Pollitt and G. Bouckaert, *Public Management Reform: A Comparative Analysis-New Public Management, Governance, and the Neo-Weberian State* 71-72 (2011). L.E. Lynn Jr., *What Is a Neo-Weberian State? Reflections on a Concept and its Implications*, NISPAcee Journal of Public Administration and Policy 17 (2008).
[11] C. Harlow and R. Rawlings, *Law and Administration* (2009); A.W. Bradley and K.D. Ewing, *Constitutional & Administrative Law,* cit. at 7.

important because public administration reform should take into account the basic conceptual model[12] that is underlying legislation about the organization of public administration.

Public law's effective shaping of public administration requires first of all an awareness on the part of public law that it is doing so and that this happens in specifically identifiable instances. Such operation would be a contribution to the legal interdisciplinary field of law and sociology of organizations. Public law would be drawn into the debate about Max Weber's ideal type and hypotheses on the organizational behavior of public administration, opening perhaps the way for a fresh look at public administration reform.

Constitutions are a key element of public law and constitutions appear to be a good starting point for the study of the influence of Max Weber's ideal type on public law. Constitutions are key as objects to be observed and studied for the purpose of this paper. Not only constitutions are laws that are present and characterise every country, but by their very – abstract or higher level - nature constitutions set models and principles which is exactly what we are looking for. The language of constitutions is homogenous to Max Weber's level of language in the ideal type of legal-rational authority. Constitutions make explicit what ordinary legislation often times takes for granted or implicitly assumes. Constitutions explicate the general views that legislative bodies hold about the public administration and other bodies that make up a country's government. Constitutions of countries around the world have a common denominator when it comes to their shaping of public administration and the civil service. The thesis of this article is that common denominator is the use of Max Weber's language of the ideal type of legal-rational authority[13].

This article investigates a small and interdisciplinary niche, revealing the literal transposition of Max Weber's ideal type which is

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[12] G.T. Allison and P. Zelikow, *Essence of Decision: Explaining the Cuban Missile Crisis* (1999).

[13] W.J. Mommsen, *The Age of Bureaucracy: Perspectives on the Political Sociology of Max Weber* 73, 81 (1974) A more precise way to say 'legal-rational authority' is 'legal domination by means of bureaucratic administrative techniques'. The very difference between legal-rational authority and legal domination should be the subject of relevant study.

embodied in public law. It will do so through a comparative analysis of world public administration organizational arrangements as written in the constitutions and other major pieces of domestic legislation. Originality of this study is in defining and contributing to the interdisciplinary niche where public law and sociology of organizations overlap revealing the underlying behavioral model of public law and innovating in the methodology of analysis by lexicographic search. Relevance of such study is noteworthy because – as already mentioned - on the effectiveness of such organizational arrangements embodied in public law depends the work of about half a billion public employees globally – affecting all of humanity, people and GDP[14].

Methodology of this paper implies a comparative[15] inductive approach to theory development: an analysis of individual pieces of legislation is performed to argue by logical grouping that public law's view of public administration is based on Max Weber's ideal type. The thesis – once again - is that public law, globally, uses the ideal type of legal-rational authority as a behavioral hypothesis[16]. The technique will be to perform text analysis or qualitative empirics of constitutions and other public law provisions.[17] The time frame is in the present time, analyzing present legislation in a global cross-section, leading to an exercise in comparative constitutional law.

The plan of this article is as follows: section 2 is a statement of Max Weber's ideal type that will act as a template for the qualitative empirics analyzing legislation in section 4. In section 3, we provide a literature review of Weber in public law doctrine, acknowledging Max Weber's influence but also revealing a possible gap. Section 4 -

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[14] P. D'Anselmi *The Privileged Working Conditions*, cit. at 1, 449.

[15] B. Ackerman, *The New Separation of Powers*, 113.3 Harvard Law Review 706 (2000) 'Comparative public administration is not a well worked field'. However, comparative public administration is the only way to assess the status of each country's public administration, given each public administration's monopolistic status in their own country

[16] S. Whimster, *Understanding Weber*, 111, 112 (2007); see generally P. D'Anselmi *Ideal Types and Behavioural Hypotheses: Public Law, Max Weber and the New Public Administration*, Max Weber Studies 20.2 (2020)
doi: 10.15543/maxweberstudies.20.2.168

[17] Constituteproject.org, World constitutions were translated into English language, homogenized in their texts and made available through constituteproject.org.

Analysis of legislation – is dedicated at showing that legislation (constitutions) have borrowed Max Weber's language, which is outlined in section 2. The article shows how this has been done by citing specific articles of constitutions and comparing these articles' language to the language of Max Weber's ideal type, as illustrated in Section 2 – The language of the ideal type. Finally the policy implications are discussed and conclusions are drawn.

2. Max Weber's language of the ideal type

For sake of analysis this section defines what is meant by language of the Weberian ideal type of legal-rational authority. Let us now listen to Max Weber's[18] voice, in the classical summary of the characteristics of the ideal type of legal-rational authority:

1: characteristics of the legal-rational authority
i [there is] continuous rule bound conduct
ii specific sphere of competence (jurisdiction)
iii there is a hierarchy (right of appeal)
iv specialized training is necessary [for] administrative staff
v_ staff should be completely separated from ownership of the means of production or administration.

2: characteristics of bureaucracy and bureaucrats
[members of staff are:]
1_ personally free
2_ are organized in hierarchy of office
3_ office is filled by free [contract] … on the basis of technical qualifications [and office holders receive] fixed salaries

[18] I. Szelényi, *Lecture 20: Weber on Legal-Rational Authority*, at 9:11–14:30, Yale Open Course (Fall 2009), https://oyc.yale.edu/sociology/socy-151/lecture-20 [https://perma.cc/M6DW-JN5Q]
M. Weber, *Economy and Society* 1418 (Guenther Roth & Claus Wittich eds., 1978, 1956). Full text and pdf available at https://archive.org/details/MaxweberEconomyAndSociety full text pp. 1720 "3. Legal Authority: The Pure Type" starts at page 338/1720 of the full text

> 4_ office is sole occupation of the incumbents [and it] constitutes a career [this implies a pension]

As a corollary to the characteristics of the ideal type of legal domination, the queen of the Weberian lexicon is 'ethics'. Ethics in public administration derive from Weber's *Politik als Beruf*, extended – beyond politicians - to civil servants by metonymy[19]. Metonymy of course has also delivered public ethics from The Protestant Ethic.[20] Ethics is not explicitly mentioned in the constitutions however it is the basis for much legislation on public administration, leading to an expectation of special 'public ethics' on the part of public employees. The precursor of ethics is 'vocation':

> "I. Office Holding as a Vocation -
> That the office is a "vocation" (Beruf) finds expression, first, in the requirement of a prescribed course of training, which demands the entire working capacity for a long period of time, and in generally prescribed special examinations as prerequisites of employment. Furthermore, it finds expression in that the position of the official is in the nature of a "duty" (Pflicht).'[21]
> 'However, when a civil servant appears in his office daily at a fixed time, he does not act only on the basis of custom or self-interest which he could disregard if he wanted to; as a rule, his action is also determined by the validity of an order (viz., the civil service rules), which he fulfills partly because disobedience would be disadvantageous to him but also because its violation would be abhorrent to his sense of duty (of course, in varying degrees).'[22]

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[19] Weber's notion of civil service as vocation, obtained from Politics as Vocation, was conveyed – for instance - to a "public-spirited" audience in the sermon delivered at the interfaith religious service of the five year reunion at the Harvard Kennedy School, a school for public employees and managers, May 15, 2016.
[20] See generally M. Weber, *The Protestant Ethic and the Spirit of Capitalism* (1976)
[21] M. Weber, *Economy and Society*, cit. at 18, 1063 of 1720
[22] M. Weber, *Economy and Society* , cit. at 18, 151 of 1720

In this section we have outlined Max Weber's basic language of the ideal type. These terms will be useful in section 4, where they are searched in the constitutions.

3. Literature review: Weber in public law doctrine

How exactly has Max Weber's ideal type of legal-rational authority permeated public law? It is not easy to test empirically the reception of Weber's ideal type in public law. The influence of Weberian bureaucracy (and institutions in general) on economic growth has been studied from an economics and political science point of view[23], however this link has stayed mostly in the background of law studies. Nonetheless, the following literature review is intended to show the basic accord of legal scholars on Max Weber's influence on public administration.

An early encounter of public law with the theory of the organization of public administration is to be found about one hundred years before Max Weber's age, in Hegel's Philosophy of Right. We will notice that several of Max Weber's characteristics and words are found already in Hegel. We can profitably work on Hegel through Karl Marx's Critique, where both authors speak[24]. The distinction between public management and public policy is intimated in the following passage:

> 'There is a distinction between the monarch's decisions and their execution and application, or in general between his decisions and the continued execution of maintenance of past decisions, existing laws, regulations, organizations for the securing of common ends, and so forth.'[25]

Hegel continues with a description of the bureaucracy and an intimation of the professional status of civil servants:

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[23] A. Cornell et al., *Bureaucracy and Growth*, 53.14 Comparative Political Studies (2020) https://doi.org/10.1177/0010414020912262; more broadly: D. Acemoglu and J. Robinson, *Why Nations Fail: The Origins Of Power, Prosperity, And Poverty* (2012).
[24] K. Marx, *Critique of Hegel's 'Philosophy of Right'* (2009).
[25] K. Marx, *Critique of Hegel*, cit. at 24, 41 par. 287 these are Hegel's words.

> 'The nature of the executive functions is that they are objective and that in their substance they have been explicitly fixed by previous decisions (see Paragraph 287); these functions have to be fulfilled and carried out by individuals. Between and individual and his office there is no immediate natural link. Hence individuals are not appointed to office on account of their birth or native personal gifts. The objective factor isn their appointment is knowledge and proof of ability. Such proof guarantees that the state will get what it requires; and since it is the sole condition of appointment, it also guarantees to every citizen the chance of joining the class of civil servants.'[26]

Still Hegel on civil servants says what Max Weber will echo: 'A dispassionate, upright, and polite demeanor becomes customary [in civil servants]'.[27] Marx comments:

> 'A division of labor occurs in the business of the executive. Individuals must prove their capability for executive functions, i.e., they must sit for *examinations*. The choice of the determinate individual for civil service appointment is the prerogative of the royal authority. The distribution of these functions is given in the nature of the thing. The official function is *the duty and the life's work* of the civil servants.'[28] (emphasis added)

Marx uses here the word examinations which is going to be found in the constitutions, it is articulated in Weber and echoes to the present day; also at 'the duty and the life's work' read 'vocation', another intimation of Weber.

In their turn, contemporary comparative studies in constitutional and administrative law have taken the basic elements of the state or public administration as a given. 'Civil service law and bureaucratic organization charts and rules provide an essential

[26] K. Marx, *Critique of Hegel*, cit. at 24, 43 par 291 these are Hegel's words.
[27] K. Marx, *Critique of Hegel*, cit. at 24, 44 par 296 Hegel's words.
[28] K. Marx, *Critique of Hegel*, cit. at 24, 45 Marx comments on Hegel's parr. 290-297.

background, but our emphasis is on the law's fundamental role in framing the way individuals and organizations test and challenge the legitimacy of the modern state outside of the electoral process'.[29] One could observe comparative scholars are interestingly concerned with the 'dynamics' of the administrative state while this article is concerned with its basic 'statics'. We deal with this statics subject because we think statics too affects the effectiveness of the 'external checks that enhance the democratic accountability and competence of the administration.'[30]

Individual scholars have acknowledged the influence of Weber on public administration. Harlow and Rawlings take a 'law in context' approach and acknowledge that: 'The British civil service set in place by Northcote-Trevelyan was Weberian to a limited extent'[31]. Harlow and Rawlings describe as Weberian something that came before Weber, albeit 'to a limited extent'. Weber however, is the touchstone for describing public administration. An overt acknowledgement of Weber's influence is to be found in Ackerman who acknowledges the need for a 'Weberian culture' in public administration[32]. Merloni [33] explicitly expresses a wish to better internalize Weber:

> 'We entertain the hope that in the future the model of organizational behaviour for public administrations—which is implicit in the law—will take into account those organizational behaviour theories that have been formulated over the past century which describe and modify the Weberian ideal of rational bureaucracy.'

Concluding this literature review, we notice how legal scholars have appreciated the influence of Max Weber's ideal type on public administration. However, there appears to be a gap in the

[29] S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, cit. at 5, 1
[30] S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, cit. at 5, 1
[31] C. Harlow and R. Rawlings, *Law and Administration*, cit. at 11, 53
[32] B. Ackerman, *The New Separation of Powers*, cit. at 15, 687; B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* 1 (2019), where Ackerman acknowledges Weberian 'bureaucratic rationality'.
[33] F. Merloni, *Corruption and Public Administration: The Italian Case in a Comparative Perspective* 138 (2019).

literature about the exact mode of internalization of Max Weber into public law and awareness of the behavioral hypothesis that is implied in it. We now turn to show how legislation has tended to take in Max Weber's ideal type.

4. Analysis of legislation

The purpose of this section is to show how specific constitutions were permeated by Max Weber's language of the ideal type. Constitutions are going to be analysed for a sample of countries. Such sample has been identified in order to include first of all the US and UK tradition vis-à-vis the European tradition, which are distinct, as Parrillo clarifies in the following passage: the 'emerging corps of public servants often did not conform to the Weberian ideal type of bureaucracy; what united the more bureaucratic forms of administrative power on the European continent with their relatively less bureaucratized counterparts in Britain and the United States (at least in the nineteenth century) was the increasing importance of positive law – legislation – in framing the limits of public authority.'[34] On the continental Europe side, France, Germany, Greece, Italy and Romania were analysed. The sample has been extended to include more countries of the Anglo-Saxon tradition, including India, South Africa, South Sudan, as constitutions of more recent framing. Finally China was included as a pivotal country in the globe, between developing and developed countries. More than half the world's population is thus represented in the sample.

The present analysis starts from the United States constitution which is rather laconic about public administration. The only reference (to what will become public administration) is found in article II.

Article II
Section 2

[34] N. Parrillo, *Testing Weber: Compensation for public services, bureaucratization, and the development of positive law in the United States*, in S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, cit. at 5, 3.

> [The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices.
> Section 3
> [The President] shall take Care that the Laws be faithfully executed.
> Section 4
> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.[35]

Article II, Section 4 – which of course was written before Weber – is an intimation of later higher standards for civil servants. In fact, US legislation expects civil servants to abide special ethics, through the Ethics in Government Act of 1978 and the Inspector General Act of 1978. We have seen – in section 2, above - that ethics is a major Weberian keyword. The Ethics in Government Act of 1978 establishes the Office of Government Ethics, whose director's prerogatives are the following:

> 'TITLE IV—OFFICE OF GOVERNMENT ETHICS
> § 402. Authority and functions
> (a) The Director shall provide, in consultation with the Office of Personnel Management, overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency'[36]

The nature of the expected ethics is expressed in terms of avoidance of 'conflict of interest'[37], a keyword to be added to the Weberian

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[35] constituteproject.org *United States of America's Constitution of 1789 with Amendments through 1992*

[36] US Ethics in Government Act of 1978, public law 95-521, statutes 92 Stat. 1824. US Inspector General Act of 1978, United States federal law, public law 95-452, statutes 92 Stat. 1101, established Offices of Inspector General in departments and other bureaus of the federal government with capability to initiate investigations. Also Inspector General Reform Act of 2008 Public Law 110-409.

[37] See generally F. Merloni, *Corruption and Public Administration: The Italian Case in a Comparative Perspective*, cit. at 33. Anti-corruption legislation and action is very much based on the administrative prevention of conflict of interest.

lexicon. Ethics remains otherwise unspecified as in the following clause:

> (b) The responsibilities of the Director shall include—
> (1) developing, in consultation with the Attorney General and the Office of Personnel
> Management, rules and regulations to be promulgated by the President or the Director pertaining to conflicts of interest and ethics in the executive branch[38].

One additional element is 'financial disclosure', potentially revealing conflict of interest. Ethics remains otherwise unspecified.

> (6) interpreting rules and regulations issued by the President or the Director governing
> conflict of interest and ethical problems and the filing of financial statements;
> (14) providing information on and promoting understanding of ethical standards in executive
> Agencies.[39]

Notwithstanding the Madisonian legacy of not relying on the virtues of individuals[40], US legislation expects special ethics from their public employees, operationalizing such ethics through one of its possible

[38] F. Merloni, *Corruption and Public Administration: The Italian Case in a Comparative Perspective*, cit. at 33.
[39] US Ethics in Government Act, cit. at 36.
[40] J. Madison, *Federalist Paper 51* (1788) 'Ambition must be made to counteract ambition' https://founders.archives.gov/documents/Hamilton/01-04-02-0199; *Federalist Paper 10* also says: 'It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm'.
https://founders.archives.gov/documents/Madison/01-10-02-0178 Let us also notice that the very notion of "civil servant" is a Weberian notion (A. Lapiccirella, *On Bureaucratic Behavior* in M. Di Bitetto, A. Chymis and P. D'Anselmi (eds.), *Public Management as Corporate Social Responsibility: The Economic Bottom Line of Government* 107 (2015). 'Public employee' would be the public equivalent of a private employee. Constitutions however do not seem to concern themselves with private sector workers as much as they do with civil servants.

precursors, conflict of interest, and through one of its possible consequences: inappropriate financial gain. Enforcement of special ethics is entrusted in specific organizational structures and functions: the Office of Government Ethics and the Inspector Generals.[41]

The United Kingdom famously does not have a one document constitution[42], however its Civil Service Code 'declares that civil servants are expected to carry out their role "with dedication and commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality'"[43]. Reform had been brought about by the Constitutional Reform and Governance Act 2010[44]. Such legislation enriched the lexicon and it introduced several keywords ancillary to 'ethics': integrity, objectivity, impartiality. Bradley and Ewing show an appreciation for nuances deviating from Weber's ideal type: 'There is now great emphasis not only on the public service values of impartiality, objectivity and integrity, but also on the need for "greater creativity, radical thinking, and collaborative working", as well as efficiency in the delivery of public services.'[45], which can be interpreted as a sign of the unsatisfactory nature of the core values of impartiality, objectivity and integrity.

On the other hand, constitutions of more recent establishment, in countries of Anglo-Saxon influence, deal with civil service more at length. India, South Africa and South Sudan incorporate in their constitutions provisions that the US and the British wrote in their laws. One such element is the British Public Service Commission:

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[41] US Ethics in Government Act, cit. at 36; also see generally US Office of Government Ethics, www.oge.gov *Agency Profile: Preventing Conflicts of Interest., Standards of Ethical Conduct for Employees of the Executive Branch.* Retrieved 1 January 2017, *Conflict of Interest Prosecution Survey*. Retrieved 27 July 2016. Analogous analysis can be carried out for the states. For instance the State of Massachusetts, Const. Article LXXXVII, about reorganization plans of the executive branch, at *Section 2.(c)* is concerned about preserving 'the civil service status, seniority, retirement and other rights of any employee to be affected by such plan'.

[42] P. Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* 1 (2016). Constituteproject.org does however have a text for the UK as well, it is of about 700 pages: *United Kingdom's Constitution of 1215 with Amendments through 2013*.

[43] A.W. Bradley and K.D. Ewing, *Constitutional & Administrative Law,* cit. at 7, 279.

[44] Constitutional Reform and Governance Act 2010 (c. 25)

[45] A.W. Bradley and K.D. Ewing, *Constitutional & Administrative Law,* cit. at 7, 283, citing Cabinet Office, Civil Service Reform – Delivery and Values (2004)

'The Constitutional Reform and Governance Act (CRGA) places the management of the civil service on a statutory footing, but it also establishes a Civil Service Commission which is responsible for appointing civil servants."[46] Here is what section 3 of the CRGA says[47]:

> *Civil Service Commission*
> 2 Establishment of the Civil Service Commission
> (1) There is to be a body corporate called the Civil Service Commission ("the
> Commission").
> (2) Schedule 1 (which is about the Commission) has effect.
> (3) The Commission has the role in relation to selections for appointments to the
> civil service set out in sections 11 to 14.

Here is what the South Africa[48] constitution says about the public service commission:

> 196. Public Service Commission
> 1. There is a single Public Service Commission for the Republic.
> 2. The Commission is independent and must be impartial, and must exercise its
> powers and perform its functions without fear, favour or prejudice in the
> interest of the maintenance of effective and efficient public administration and a
> high standard of professional ethics in the public service. The Commission must
> be regulated by national legislation.

The South Africa constitution is also more explicit about civil service and ethics[49].

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[46] P. Leyland, *The Constitution of the United Kingdom*, cit. at 42, 182.
[47] Constitutional Reform and Governance Act 2010, PART 1 THE CIVIL SERVICE CHAPTER 1 STATUTORY BASIS FOR MANAGEMENT OF THE CIVIL SERVICE, *Application Civil Service Commission* 2 Establishment of the Civil Service Commission *Power to manage the civil service,* 3 Management of the civil service.
[48] Constituteproject.org, *South Africa's Constitution of 1996 with Amendments through 2012*.

> CHAPTER 10: PUBLIC ADMINISTRATION
> 195. Basic values and principles governing public Administration
>
> 1. Public administration must be governed by the democratic values and principles
> enshrined in the Constitution, including the following principles:
> a. A high standard of professional ethics must be promoted and maintained.
> b. Efficient, economic and effective use of resources must be promoted.
> c. Public administration must be development-oriented.
> d. Services must be provided impartially, fairly, equitably and without bias.
> e. People's needs must be responded to, and the public must be encouraged
> to participate in policy-making.
> f. Public administration must be accountable.
> g. Transparency must be fostered by providing the public with timely,
> accessible and accurate information.

South Sudan[50] about the public service commission and ethics:

> 140. The Civil Service Commission
> 1. There shall be established a Civil Service Commission composed of persons
> of proven competence, experience, integrity and impartiality.
> 3. The Civil Service Commission shall advise the National Government on the

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[49] These constitutions were established before the UK *Constitutional Reform and Governance Act (CRGA) of 2010*, however reciprocal influence must be acknowledged.

[50] Constituteproject.org, *South Sudan's Constitution of 2011 with Amendments through 2013*.

> formulation and execution of policies related to public service, employment
> and employees.
> 4. The Commission shall be independent and impartial, and shall exercise its
> powers and perform its functions without fear, favour or prejudice in the
> interest of the maintenance of an effective and efficient Civil Service and a
> high standard of professional ethics therein.
>
> 139. Basic Values and Guidelines for Civil Service
> 1. The Civil Service shall be governed by, inter alia, the following values and
> principles:
> a. a high standard of professional ethics shall be promoted and maintained through focusing on merit and training;

For sake of brevity let us recall only a few lines from India's constitution[51] about the public service commission:

> 320. Functions of Public Service Commissions
> 1. It shall be the duty of the Union and the State Public Service Commissions to
> conduct examinations for appointment to the services of the Union and the
> services of the State respectively.

Wording of constitutions about the Service Commissions confirms the lexicon we found in the UK legislation: integrity, objectivity, and impartiality are assumed to be possible on the part of civil servants. The Indian constitution adds a word we already found in Hegel and Marx[52]: examinations. We will come back to this point. Following

[51] Constituteproject.org, *India's Constitution of 1949 with Amendments through 2016*; also Dipankar Gupta, *An inconstant Constitution*, Times of India, Mar 1, 2014.

[52] Examinations were in Karl Marx's language supra note 24, p. 45: 'A division of labor occurs in the business of the executive. Individuals must prove their capability for executive functions, i.e., they must sit for examinations.' Marx is explicating what Hegel implies in parr. 290 and 291, pages 42 and 43

Parrillo and coming to continental Europe, we find closer Weberian influence and more words are added by the Greek constitution[53]: allegiance and devotion.

> Article 103.1. Civil servants shall be the executors of the will of the State and shall serve the people, owing allegiance to the Constitution and devotion to the Fatherland.

The Italian constitution[54] speaks of exclusive service:

> Art. 98.1: "Civil servants are exclusively at the service of the Nation."

Allegiance, devotion and exclusive service implement Weber's characteristics: 'office is sole occupation of the incumbents [and it] constitutes a career'[55]. Ethics – on the other hand - is widely mentioned in the codes of ethics of civil service that most countries have adopted. The Italian constitution reveals the adoption of a Weberian lexicon. Let us take our lead from art. 97 and 98 of the Italian constitution[56].

> Section II: Public Administration
>
> Art 97
>
> Public offices are organized according to the provisions of law, so as to ensure the efficiency and impartiality of administration.
>
> The regulations of the offices lay down the areas of competence, the duties and the responsibilities of the officials.
>
> Employment in public administration is accessed through competitive examinations, except in the cases established by law.
>
> Art 98
>
> Civil servants are exclusively at the service of the Nation."[57]

Notions of personnel system and notions of structure are very much intertwined in the Italian constitution. Let us examine this wording in detail by juxtaposing excerpts from it to excerpts from Weber, as cited

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[53] Constituteproject.org, Greece's Constitution of 1975 with Amendments through 2008

[54] constituteproject.org, *Italy's Constitution of 1947 with Amendments through 2012*.

[55] M. Weber, *Economy and Society*, cit. at 18

[56] constituteproject.org. *Italy's Constitution* cit. at 54.

[57] constituteproject.org, *Italy's Constitution*, cit. at 54.

above. Where the Italian constitution says: "Public offices are organised according to the provisions of law" it implements Weber's characteristic "1.i [there is] continuous rule bound conduct". This constitutional provision then generates administrative law defining bureau organization and judicial review, thus implementing Weber's characteristic: "1.iii there is a hierarchy (right of appeal)". The same generation of administrative law has to be found in the Romanian constitution:

> CHAPTER V: Public Administration
> Section 1: Central Public Administration
> Article 116: Structure
> 1_ The ministries are organized under the direction of the Government.
> 2_ Other specialized bodies can be organized under the direction of the Government or of the ministries or as autonomous administrative authorities.
> Article 117: Establishment
> 1_ The ministries are established and organized and operate in accordance with the law.[58]

The basic tenets of public administration's organizational structure are warranted under art. 117 of the Romanian constitution which generates administrative law defining bureau organization and judicial review: "1.iii there is a hierarchy (right of appeal)". We must acknowledge that for the purpose of this article, the Romanian constitution yields less satisfactory results. The rule bound and the hierarchical nature of public administration generated in turn the subordination of technical and managerial skills to legal skills, leading to the predominance of law graduates hires in public administration.

The above language defines organizational structure and systems of public administration. The following is concerned about performance of the public administration. Going back to the Italian constitution, let us recall the second part of art. 97.1: 'so as to ensure

[58] constituteproject.org, *Romania's Constitution of 1991 with Amendments through 2003*.

the efficiency and impartiality of administration'; this passage implements Weber's statement 'the purely bureaucratic type of administration is, from the technical point of view, capable of attaining the highest degree of efficiency'[59]. It makes possible a particularly high degree of calculability"[60] A keyword is added to the lexicon here: efficiency. Besides we find once again the word impartiality. Impartiality was most dear to Weber's ideal type: the public official performs his task 'sine ira et studio'[61]. Let us hear from Weber his notion of impartiality:

> 1_ Decentralized and Typified Administration As a Consequence of Appropriation and Monopolization
> In a patrimonial state every prebendal decentralization of the administration, every jurisdictional delimitation caused by the distribution of sources of fee incomes among competitors, and even more so every appropriation of benefices signifies not rationalization but typification. In particular the appropriation of the benefice, which made the officials — as we have seen — often practically irremovable, can have the same effect as the modern legal guarantee of judicial 'independence', although its meaning is completely different; its aim is the protection of the official's right to his office, while modern civil service law endeavors to insure the official's impartiality in the interest of the ruled through 'independence', that means, through his irremovability unless he has been properly tried and convicted.[62]

Two more words are added: irremovability and independence. One aspect that is synergistic with irremovability comes up when we notice that the Weberian status of '[members of staff as] 2.i_ personally free', implies they benefit the rights of all citizens, including the right of strike, sanctioned by art. 40 of the Italian constitution: "Art 40 - The right to strike shall be exercised in

[59] M. Weber, *Economy and Society*, cit. at 18, 344 of 1720, 'highest degree of "efficiency" high degree of calculability'.
[60] M. Weber, *Economy and Society*, cit. at 18, 344 of 1720.
[61] M. Weber, *Economy and Society*, cit. at 18, 975.
[62] M. Weber, *Economy and Society*, cit. at 18, 1137 of 1720.

compliance with the law." Also the Greek constitution[63] is concerned about the right to strike in the civil service:

> Art. 23.2 - Strike constitutes a right to be exercised by lawfully established trade unions in order to protect and promote the financial and the general labour interests of working people. Strikes of any nature whatsoever are prohibited in the case of judicial functionaries and those serving in the security corps. The right to strike shall be subject to the specific limitations of the law regulating this right in the case of public servants.

This is interesting because it sanctions a privilege of public employees: the right to strike against an agent, whereas private employees strike against a principal.[64] Constitutions also worry about the right of civil servants to stand for election, prescribing some kind of limitation. For sake of brevity this theme will not be pursued in this article. Coming back to irremovability, the German constitution[65] is also concerned about job protection:

> Article 132: [Retirement of civil servants]
> 1_ Civil servants and judges who enjoy life tenure when this Basic Law takes effect may, within six months after the Bundestag first convenes, be retired, suspended, or transferred to lower-salaried positions if they lack the personal or professional aptitude for their present positions. This provision shall apply mutatis mutandis to salaried public employees, other than civil servants or judges, whose employment cannot be terminated at will.

This provision appears to be concerned about the transition from the previous regime to the new constitutional regime. Note however the vision of a possible two tier system of Germany that is implicit in this provision: some civil servants may enjoy job tenure (albeit not 'life tenure') while others do not. This is relevant to a key global issue as it appears that most of the half a billion public employees globally enjoy job tenure status. In principle, public employees in several

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[63] *Greece's Constitution*, cit. at 53.
[64] P. D'Anselmi, *Privileged Working Conditions*, cit. at 1, 39.
[65] Constituteproject.org, *Germany's Constitution of 1949 with Amendments through 2014*.

countries – like for instance the USA and the UK - can be fired or made redundant for reasons non relevant to their misconduct, such as budgeting reasons. However it is rather rare – at least at the federal or central government level - that such circumstance has historically taken place.[66] The German constitution is also concerned about job protection in specific areas of the civil service:

> Article 143a: [Exclusive legislative power concerning federal railways]
> **1. ….** Civil servants employed by federal railways may be assigned by a law to render services to federal railways established under private law without prejudice to their legal status or the responsibility of their employer.
> Article 143b: [Privatisation of the Deutsche Bundespost]
> **3.** Federal civil servants employed by the Deutsche Bundespost shall be given positions in the private enterprises that succeed to it,

This is relevant again to the issue about the number of public employees who enjoy constitution protected status. This is not only about the public administration, it is also about publicly owned services and State Owned Enterprise. Irremovability is also a concern of the Greek constitution:

> Art. 103.4. Civil servants holding posts provided by law shall be permanent so long as these posts exist … civil servants may not be transferred without an opinion or lowered in rank or dismissed without a decision of a service council consisting of at least two-thirds of permanent civil servants.

Irremovability and independence of civil servants leads us to the constitutional concern about the personnel hiring system of public administration. Where the Italian constitution says: 'Employment in public administration is accessed through competitive examinations" it implements Weber's characteristics "1.iv specialized training is necessary [for] administrative staff" and "2.iii_ office is filled by free [contract] … on the basis of technical qualifications". We already

[66] P. D'Anselmi, *Privileged Working Conditions*, cit. at 1, 42.

found the prescription of competitive examinations in the Indian constitution and we find it again in the Greek constitution[67]:

> Art. 103. 7. Engagement of servants in the Public Administration … shall take place by competitive entry examination"

Weber is dealing here with the role of knowledge:

> 'Legal Authority With a Bureaucratic Staff – 'Bureaucratic administration means fundamentally domination through knowledge. This is the feature of it which makes it specifically rational.'[68]

Germane to the hiring system of personnel is the issue of salaries and pensions. Art. 98 of Italian constitution says: 'Civil servants are exclusively at the service of the Nation' implements characteristic '2.iv_ office is sole occupation of the incumbents [and it] constitutes a career'. The notion of a lifetime career leads to consider salaries and pensions which in the civil service are not a marginal issue. Conventional wisdom wants salaries in the public sector to be lower than in the private sectors.[69]

About structure of public administration, where the Italian constitution says: "The regulations of the offices lay down the areas of competence, the duties and the responsibilities of the officials." it implements Weber's characteristic "1.ii specific sphere of competence (jurisdiction)".[70] Such provisions lead to division and an implicit organizational principle of administrative law: 'one function, one bureau': when a new function is identified for the public administration, most likely this is dealt with the constitution of a new specific bureau. The 'one function, one bureau' organizational structure principle inappropriately derived from Max Weber's ideal type of bureaucracy, has been applied to the very observance of the

[67] *Greece's Constitution*, cit. at 53.
[68] M. Weber, *Economy and Society*, cit. at 18, 345 of 1720.
[69] However International Monetary Fund statistics tell a different story, showing the monopolistic aspect of the privileged status of public employees, see P. D'Anselmi *Privileged Working Conditions*, cit. at 1, 41.
[70] M. Weber, *Economy and Society*, cit. at 18, 138 of 1720.

bureaucratic principles through the institution of special courts or better through the survival of special tribunals meant to check on the appropriate conduct of public employees. Such provision was constitutionalized in France:

> 'ARTICLE 47-2
> The Cour des Comptes shall assist Parliament in monitoring Government action. It shall assist Parliament and the Government in monitoring the implementation of Finance Acts and Social Security Financing Acts, as well in assessing public policies. By means of its public reports, it shall contribute to informing citizens. The accounts of public administrations shall be lawful and faithful. They shall provide a true and fair view of the result of the management, assets and financial situation of the said public administrations.'[71]

Italy's founding father, count Camillo Cavour, also argued the need of a special court of audit, back in 1852: "It is an absolute necessity to concentrate ex ante and ex post audit in an irremovable magistrate".[72]

China's constitution of 1982 does not seem to mention the public administration[73]. 'East Asia has a long tradition of centralized, hierarchical, and bureaucratic rule – a sort of "administrative law" avant la lettre. And yet, in forging its own modern variants, East Asia has also drawn on Western (and particularly German and US) models.'[74] 'John Ohnesorge notes, in East Asia, for example, the term 'administrative law' was unknown; nevertheless, the prevailing traditional system of government was something of a pioneer.'[75]

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[71] Constituteproject.org, *France's Constitution of 1958 with Amendments through 2008*.

[72] Cited in the speech of the president of the Court of Audit, in Matera, 2019 (author's translation)
https://www.corteconti.it/Home/Organizzazione/Presidente/DiscorsiPresidente/11Mar2019Matera accessed 08 12 2019

[73] Constituteproject.org, *China (People's Republic of)'s Constitution of 1982 with Amendments through 2018*

[74] S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, cit. at 5, 1.

[75] S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, cit. at 5, 2; ibidem J. Ohnesorge, *Administrative law in East Asia*.
Professional bureaucracy existed in China well before its appearance in Europe where bureaucratic rationality legitimized the modern state. In Chinese culture the

However in our times China as well relies on special ethics[76]. Reports about China say president Xi Jinping:

> "appears to be betting that transforming the moral character of officials will enable him to leave intact the institutional structure of the one-party state." [77]

This may seem very difficult in the eyes of Westerners. However, change the word "one-party" and write democratic, and that is exactly governments in the West and all other parts of the world are trying to do: 'transforming the moral character of officials'. The issue is not in the one-party system, the issue is in the institutional structure. China and the rest of the world are relying on the "moral character" of officials, from directors general of internal revenue services to groundskeepers of graveyards and to full-fledged public employees that are school janitors. Reliance on Confucius ethics, with due respect, seems quite traditional: "Govern with virtue and keep order through punishments."[78]

Xunzi, a second-century BC Confucian thinker, did not reject "the importance of institutions, only that he saw them as secondary to the people running them." The logic was "Should each official cultivate righteousness in himself and let morality guide his actions and decisions, a well-ordered state and society will naturally result."[79] We

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notion of the 'state' was absent. To make sense of this seeming contradiction, we need to separate the ideal type from the behavioral hypothesis. The legal-rational ideal type is of the modern state, whereas the charismatic and the traditional ideal types do not need the state. Real bureaucracies participate of all three ideal types. Therefore, bureaucracy in (ancient) China was founded on the charismatic and the traditional ideal types. Bureaucracy does not need rationality to exist. Modern states have turned the legal-rational ideal type in a template for the design of an ideal bureaucracy, but Max Weber never said that. On this subject see generally P. D'Anselmi, *Ideal Types and Behavioural Hypotheses: Public Law, Max Weber and the New Public Administration*, Max Weber Studies 20.2 (2020).

[76] M. Keliher and H. Wu *How to discipline 90 million people: Can China's president reform the world's largest one-party state by reforming its officials?* The Atlantic April 7, 2015.

[77] M. Keliher and H. Wu, *How to discipline 90 million people*, cit. at 76.

[78] M. Keliher and H. Wu, *How to discipline 90 million people*, cit. at 76.

[79] M. Keliher and H. Wu, *How to discipline 90 million people*, cit. at 76. The Atlantic then wax populist: 'Modern-day state-building efforts in the Middle East and Africa have confirmed much of Xunzi's thought. It is not enough to set up

see the fallacy of composition at work here: if we are all good, the aggregate good will result.[80]

Taking stock at this point from the lexicon of constitutions, it could be argued that also private sector organizations tend to implement and speak in the language of Max Weber about ethics and other Weberian keywords. It is however in the case of public organizations only that faith in special public ethics allows reliance on monopolistic organizational structures. Albeit it is not explicitly written in the constitutions, we need to introduce a last keyword into this Weberian lexicon: monopoly.

> 3. Group Structures and Economic Interests: Monopolist versus Expansionist Tendencies
>
> This monopolistic tendency takes on specific forms when groups are formed by persons with shared qualities acquired through upbringing, apprenticeship and training. … But normally this concern for efficient performance recedes behind the interest in limiting the supply of candidates for the benefices and honors of a given occupation. The novitiates, waiting periods, masterpieces and other demands, particularly the expensive entertainment of group members, are more often economic than professional tests of qualification. Such monopolistic tendencies and similar economic considerations have often played a significant role in impeding the expansion of a group[81].

This excursus on the constitutions may well end by noticing that a common and unwritten implication of constitutions is the monopolistic organizational arrangement of public administration.

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independent courts or to hold elections. For democracy to flourish and the rule of law to reign, citizens and those who govern them must share a set of values to inform behavior and promote collective goals.' Anyway, public law is about institutions by definition. If we do not believe in the importance of institutions. We do not need public law.

[80] T. Schelling, *Micromotives and Macrobehavior* (1978).

[81] M. Weber, *Economy and Society*, cit. at 18, 462-463 of 1720 "3 4 4 ECONOMIC RELATIONSHIPS OF ORGANIZED GROUPS - CH. 11".

5. Lexicon, implications and conclusions

Summarizing, this article has included the more obvious and literal citations of Max Weber in constitutional language as well as the more general and cultural influences, from literal to conceptual. Use of the ideal type lexicon has generated a cascade of concepts and keywords, leading from irremovability, independence and impartiality to monopoly. Weber's original keywords are: rule bound conduct, specific sphere of competence, personally free, specialized training, hierarchy of office, technical qualifications, fixed salaries, sole occupation, right of appeal. From Weber writings and beyond, more keywords have found their way into public administration regulation: efficiency, vocation, ethics, public spiritedness, examinations, permanence in office, life employment (career), pension, right to strike.

This article constitutes an empirical verification of the language of constitutions and of its organizational implications. By induction it has been shown how pervasive the legacy of Max Weber's ideal type of legal-rational authority has been in the highest expression of public law: the constitutions. Through the language of the Weberian ideal type, constitutions seems to adopt a Rational Behavior Hypothesis vis-à-vis the public administration[82]. Therefore, public law needs to join the debate about Max Weber's ideal type and the organization of public administration. Policy implications open the way for a fresh look at public administration reform, starting from questioning the basic model that is underlying legislation.

From a methodology point of view, this article has provided a proof of concept of simple method for testing the Rational Behavior Hypothesis vis-à-vis the more complex case study method[83]. The Weberian lexicon is susceptible of further investigation through data mining and computational means towards a comprehensive survey of world constitutions and legislation. For sake of comparative study, it is desirable that such legislation be homogeneous in its subject and endeavor; for instance legislation and governmental action on anti-

[82] G.T. Allison and P. Zelikow, *Essence of Decision*, cit. at 12, speak of 'rational actor model'.

[83] G.T. Allison and P. Zelikow, *Essence of Decision*, cit. at 12, adopted the case study method.

corruption in public administration is a key candidate as a subject for the kind of analysis that has been carried out here.

FIGHTING WITH HANDS TIED? THE EUROPEAN SOCIAL FUND AND THE PROMOTION OF SOCIAL INCLUSION

Cristina Fasone, Marta Simoncini***

Abstract

Before the COVID-19 outbreak as well as in its aftermath, the capacity of the EU budget to contribute to the protection of social rights has remained largely unexplored. This article critically highlights that the Union suffers from the misalignment between the solidarity goals set in EU primary law and the structure of the EU budget and its expenditure channels. By focusing on the European Social Fund (ESF) and the right to social assistance and inclusion, this article demonstrates that this gap has both policy and legal reasons. The many constraints on budgetary decisions and the management of the ESF generate a dysfunctional framework for the promotion of social inclusion and for the implementation of the right to social assistance, showing that the protection of social rights can be only marginally pursued through the EU budget and at high administrative and judicial costs.

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1. Introduction

The adoption of the EU measures to foster the recovery from the pandemic has sparked a lively debate on the functions and the goals of the EU budget. This article aims to contribute to this debate by investigating to what extent the EU budget, and the European Solidarity Fund in particular, is well-equipped to protect the social rights that EU law "promises" to deliver. The financing of the EU (regular) budget, as per the new 2021-2027 Multiannual Financial Framework (MFF) alongside Next Generation EU (NGEU)[1] will be capable to mobilise almost twice[2] the usual amount of resources that has typically featured the EU budget pre-crisis[3]. While this has been recurrently criticised for being too small to fulfil the myriad of

[1] A legislative package injecting 806.9 billion euro (in 2021 prices) for the recovery, with the recovery and resilience facility being by far the largest fund (723.8 billion euro) separated from the regular EU budget (On the "EU budgetary galaxy", which the response to the pandemic further increases, see R. Crowe, The European Budgetary Galaxy, in European Constitutional Law Review, 13, 2017, pp. 428-452). See Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, p. 17–75. For an overall view on NGEU, see https://ec.europa.eu/info/strategy/recovery-plan-europe_en#documents The size of the MFF 2021-2027 alone amounts to 1.211 trillion euro (in 2021 prices) and, thus, it is slightly higher than the MFF 2014-2020.

[2] According to the previous Council's Own Resources Decision (Decision 2014/335/EU) the size of the EU budget could not exceed 1.29% of all the Member States' Gross National Income (GNI) for commitment appropriations and 1.23% of the EU GNI for payment appropriations (Art. 3). With the new Own Resources Decision (Decision 2020/2053), in force since 1 June 2021, the ceilings will reach almost 2% of the EU-27 GNI.

[3] For example, the EU budget for 2020 comprised about 153 billion euro (in payments) and was, therefore, smaller than the national budget of medium sized Member States such as Belgium or Austria.

EU objectives (especially under Art. 3 TEU)[4], the question arises as to whether, thanks to the inflow of resources triggered by the recent post-pandemic measures, the EU budget will become more fit for purpose.

An aspect of the EU budget that so far has remained largely unexplored is its capacity to contribute to the protection of social rights in the EU. While scholarly work has been carried out on the asymmetries in the EU budget[5] and on budget spending for what concerns the structural and cohesion funds in particular[6], little attention has been paid to the enforcement of the social rights protected under the Charter of fundamental rights of the EU (hereinafter, the Charter) through EU budgetary resources[7]. The issue is all the more important now that the size of the EU budget has been expanded, though temporarily, and a renewed effort has been made to implement the European Pillar of Social Rights[8] under the Portuguese Presidency of the Union[9].

The goal of this contribution is precisely to investigate if and how the EU budget contributes to the protection against social

[4] On this critique, which is decades old, see B. Laffan, *The Finances of the European Union* (1997), 15.

[5] Especially on its structural deficiencies on the side of the EU own resources, see G. Della Cananea, *No representation without taxation in the European Union*, in L. Papadopoulou, I. Pernice, J.H.H. Weiler (eds.), *Legitimacy issues of the European Union in the face of crisis: Dimitris Tsatsos in memoriam* (2017), 95-122 and F. Fabbrini, *A Fiscal Capacity for the Eurozone: Constitutional Perspectives*, In-depth Analysis commissioned by the Directorate General for Internal Policies of the Union, European Parliament, PE 608.862 (2019), 10-14.

[6] V. Viță, *Conditionalities in Cohesion Policy, Research for REGI Committee*, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels (2018), 21 ff. and M. Casula, *Economic Growth and Cohesion Policy Implementation in Italy and Spain: Institutions, Strategic Choices, Administrative Change* (2020), esp. 1-110.

[7] An interesting proposal, with this regard, has been formulated by A. Sangiovanni, *Solidarity in the European Union*, 33(2) Oxford Journal of Legal Studies 240 (2013) to introduce "an EU-funded compensation scheme for member states that are net importers of social assistance recipients", thereby linking the EU budget to a clear social assistance function.

[8] S. Giubboni, *Appunti e disappunti sul pilastro europeo dei diritti sociali*, 4 *Quaderni costituzionali* 953 (2017) and S. Sciarra, *Solidarity and Conflict. European Social Law in Crisis* (2018), esp. 142-143.

[9] See the outcomes of the Porto Social Summit of 7-8 May 2021, in particular, the Porto Social Commitment of 7 May 2021 and the European Pillar of Social Rights Action Plan, available at: https://www.2021portugal.eu/en/porto-social-summit/action-plan/

exclusion. The EU in fact has embraced the policy goal of fighting poverty by recognising the fundamental right to social assistance under Art. 34 (3) of the Charter, "so as to ensure a decent existence for all those who lack sufficient resources". This right is different from the social protection of workers on which scholarly investigation has primarily focused[10]. In fact it points to the core of the existence of a social Europe beyond the internal market: the specific focus on the "most deprived persons and children"[11] and on the need to address material deprivation through food and/or basic material assistance allows to redistribute EU resources on the EU inactive population and people temporarily out of the job market.

We will analyse the European Social Fund (ESF) as a case study to understand if and how the right to social assistance and inclusion has been effectively enforced through the EU budget and whether it is justiciable. Indeed, although there are several EU funds that can potentially contribute to fostering this right directly or indirectly - from the European Regional Development Fund to the European Globalisation Adjustment Fund - the ESF is the oldest and the largest instrument, and it has been further strengthened in the aftermath of the pandemic (ESF+) to protect the most vulnerable groups and deprived persons. According to the official figures, every year the ESF has "helped some 10 million people to find work or to improve their skills to enable them to find work in future"[12] and during the pandemic 1.4 billion euro in direct support were

[10] See, amongst many, M. Dougan, E. Spaventa (eds.) *Social Welfare and EU law* (2005); D. Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (2017), and A. Nato, *La cittadinanza sociale europea ai tempi della crisi economica* (2020), 51-107.

[11] Art. 2, para 6, Regulation (EU) 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013 offers a definition of "most deprived persons" as "natural persons, whether individuals, families, households or groups of persons, including children in vulnerable situations and homeless people, whose need for assistance has been established according to the objective criteria which are set by the national competent authorities in consultation with relevant stakeholders while avoiding conflicts of interest, and which may include elements that allow for the targeting of the most deprived persons in certain geographical areas".

[12] See H. Hoffman, *Fact Sheets on the European Union – European Social Fund Plus*, European Parliament, last update March (2021), https://www.europarl.europa.eu/factsheets/en/sheet/53/european-social-fund

immediately mobilised from the ESF to ensure social services and guarantee vulnerable groups.

Given the complex arrangement for the financing (and national co-financing) of the ESF projects, between the domestic and the supranational levels, the effective support of social inclusion in the EU context is constrained by supranational principles and rules besides being conditioned by national law (which, however, remains out of the scope of the analysis).

Without any aim to put forward policy proposals (which is beyond the scope of the analysis), the contribution critically reviews the problematic enforcement of the right to social inclusion along several dimensions, which are closely intertwined, all of them revolving around the spending of the EU budget especially through the ESF. The first dimension considers the limits of the Treaty framework and of the case law on social rights in relation to the budgetary constraints that feature the EU spending. The institutional dimension of analysis follows, by looking at the disposition of the Council and the European Parliament towards social spending in the decision-making.

The second dimension concerns the multilevel governance of the ESF. We claim that the complexity of the cooperative mechanisms in place affects the enforcement of the rights and their justiciability. The coexistence of all these problematic dimensions, each for its own part, in the EU daily practice contributes to making the EU budget quite weak in the fight against social exclusion.

The article will proceed as follows. Firstly, we will consider the architecture of the EU budget and its many constraints (Section 2). We will then move on to review the principles, the social objectives set out in the TEU and the social rights listed in the Charter, in particular Art. 34 (3), with the aim of understanding whether and to what extent they are aligned with the competence and the powers conferred to the EU (Section 3). Subsequently, we will focus on the (to date) very limited case law of the Court of Justice on the right to social assistance in relation to budgetary constraints (Section 4). We will also examine the relevance of the right to social assistance and inclusion in the decision-making on the budget by EU representative institutions (Section 5). Against this backdrop, we will deal with the case study of the ESF and its reform in the ESF+. We will firstly trace the growth in terms of size and scope of the Fund and consequently assess how the spending of the ESF during the MFF 2014-2020 has translated into the

protection of the right to social assistance and inclusion (Section 6). In doing this, we will highlight problems and pitfalls, and focus on the key issues of the administrative governance of the Fund, showing how the cooperation between domestic authorities and the Commission and conditionality clauses affect enforcement (Section 7). On these grounds, we will also analyse the justiciability of the alleged breach of social rights due to the exclusion from the ESF (and ESF+) resources (Section 8). Section 9 concludes and emphasises how these multidimensional issues make the redistributive performance of the EU budget dysfunctional.

2. The architecture of the EU budget and its many constraints

The constitutional debate on the social function of the budget, on the protection of the welfare state and of social rights as inevitably linked to the public spending[13], is almost lacking at supranational level while, instead, it is several decades old within the Member States and has recently resurfaced as a consequence of the sovereign debt crisis[14]. In particular, at the EU level, there is no elaboration on the idea of the conditional nature of social rights, and namely on the dependence of their enforcement on the availability of public resources.

Such a lack seems to derive from the (to date) incomplete nature of the EU budget as ancillary and complementary to the national ones. While it is hard to object to this conclusion when

[13] In some countries, like Italy and Germany, there is a consolidated line of case law on the point. While in Italy the Constitutional Court has been called to fulfil a different balancing between sound public budget and guarantee of social rights, depending on the economic cycle (see jurisprudence of the 1960s and 1970s compared to judgment no. 70/2015, 118/2015, 275/2016), in Germany the social state principle has been the linchpin to develop a case law very protective of social rights. See J. King, *Social Rights*, *Constitutionalism and the Social State Principle*, I(3) *e- Pública* 19 (2014).

[14] See Commissioner for Human Rights, Council of Europe, Safeguarding human rights in times of economic crisis, Issue Paper, November 2013, https://rm.coe.int/safeguarding-human-rights-in-times-of-economic-crisis-issue-paper-publ/1680908dfa; the special issue 1 *European Journal of Social Law* on *A comparative framing of fundamental rights challenges to social crisis measures in the Eurozone* (2014); A, Nolan, *Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis*, 4 *European Human Rights Law Review* 358 (2015). For a classic on the topic, see S. Holmes, C. R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (2000).

looking at the system of financing of the EU budget - so far predominantly built up around national contributions[15] (and the same massive operations to issue a common debt to finance the RRF will be ultimately backed by national budgets as a last resort) - the EU maintains a higher degree of autonomy on its spending decisions, however influenced they are by the Member States[16].

The lack of EU fiscal autonomy makes it impossible for the EU budget to effectively fulfil the three classic functions that are normally attributed to state budgets: stabilisation, redistribution and allocation of resources[17]. According to Musgrave, the first two functions shall be exercised by the federal government, for example through transfer mechanisms or federal spending[18]. As the EU expenditure is inevitably constrained by the amount that national governments commit to transfer, these functions are only marginally performed by the EU, respectively through the coordination of economic policies and the cohesion policy[19]. The third function, the allocation of resources, which Musgrave considered to be better fulfilled by state and local authorities, is instead managed by the EU through the internal-federal market[20]. Without dealing with the details of each of these budget functions, it suffices to say that during the sovereign debt crisis the stabilisation function, especially with regard to the Euro area, has been the main focus of attention and of several proposals of reform. Much more controversial and underexplored has been the

[15] Today the quota of national contributions amount to more than 70% of the EU budget: A. De Feo, *The Multiannual Financial Framework 2021-2027: Ambition or Continuity?*, in B. Laffan, A. De Feo (eds.), *EU Financing for the Next Decade. Beyond the MFF and the Next Generation EU* (2020), 3.

[16] C. Fasone, *Towards a strengthened coordination between the EU and national budgets. A complementary role and a joint control for parliaments?*, 40(3) *Journal of European Integration* 265 (2018).

[17] R.A. Musgrave, *The Theory of Public Finance: A Study in Public Economy* (1959).

[18] A. Hinarejos, *Fiscal Federalism in the European Union: Evolution and Future Choices for the EMU*, 50 Common Market Law Review 1625 (2013).

[19] Writing in 2003, Oates contended that neither the EU's nor the Member States' budgets were capable of fulfilling a macroeconomic stabilisation function in the Union: see W. Oates, *Fiscal federalism and the European Union: Some Reflections,* in D. Franco, A. Zanardi (eds.), *I sistemi di welfare tra decentramento regionale e integrazione europea* (2003), 43-44.

[20] R. Schütze, *From International to Federal Market. The Changing Structure of EU Law* (2017), 275 ff.

redistributive function of the EU budget, traditionally considered weak and almost non-existent[21].

Within the boundaries of the (limited) resources conferred – through truly own resources and national contributions[22] – the EU budget needs to abide to a tight fiscal discipline, in theory. Art. 310 TFEU and Art. 6 of the EU Financial Regulation set the principles of the balanced budget and sound financial management[23]. This in turn implies that a policy of deficit spending, for instance to finance the enjoyment of social rights, could not be pursued via the EU budget. Furthermore, based on Art. 311 TFEU, "the Union shall provide itself with the means necessary to attain its objectives and carry through its policies" and that "without prejudice to other revenue, the budget shall be financed wholly from own resources". The long-standing interpretation of Art. 310 combined with Art. 311 TFEU and Art. 17 of the Financial Regulation postulates that the EU is prevented from financing its budget through borrowing as the latter spells out clearly that "The Union (…) shall not raise loans within the framework of the budget". It is precisely the very narrow leeway left to the Union to expand its budget in support of Member States social policies and of citizens' social rights that has let EU institutions resort to the emergency clause of Art. 122 TFEU – lacking another suitable legal basis and in derogation to the

[21] P. Pasimeni, S. Riso, *The redistributive function of the EU budget*, 174 IMK Working Paper, IMK at the Hans Boeckler Foundation, Macroeconomic Policy Institute (2016). R. Doménech, A. Maudes, J. Varela, *Fiscal Flows in Europe: The Redistributive Effects of the EU Budget*, 136(4) Weltwirtschaftliches Archiv 631 (2000), consider that the redistributive effect is marginal, but has increased over time and M. Citi, M. K. Justesen, *Redistribution in a political union: The case of the EU*, 60(2) European Journal of Political Research 317 (2021), highlight that the redistributive effort of the EU budget primarily targets inequalities within Member States rather than inter-States imbalances.

[22] On the composition of the own resources, see A. Sandulli, A. Nato, M. Bellacosa, M. De Bellis, E. Tatì, *The Past and Future of EU Financial Interests*, BETKOSOL Project, Work Package 1 - Deliverable 2 (2021), https://betkosol.luiss.it/wp-content/uploads/2021/07/D2-BETKOSOL-final-26-June-2021-def.pdf, 10-11 and A. D'Alfonso A., *Own resources of the European Union: Reforming the EU's financing system*, European Parliamentary Service Research, European Parliament, Brussels (2021).

[23] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

borrowing prohibition – to finance with loans, first, a European instrument for temporary support to mitigate unemployment risks in an emergency following the COVID-19 outbreak (SURE)[24] and, now, also the Recovery and Resilience Facility[25]. The reception of these developments by legal scholarship has been mixed. For example, some have argued that while the adoption of the Next Generation EU package amounts to "a politically bold move but also a case of creative legal engineering", the overstretching of the legal basis and the questionable interpretation of the principle of conferral and of the constraints imposed by the EU financing system can be deemed acceptable with a view to the extraordinary situation faced[26]. Others, instead, have come close to consider that the EU institutions have acted ultra vires and that the bypassing of Art. 310 TFEU sets a highly problematic precedent[27].

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[24] Council Regulation EU 2020/672 of 19 May 2020 on which see P. Dermine, *The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture*, 47(4) Legal Issues of Economic Integration 342 (2020); A. Nato, *Il Meccanismo europeo di sostegno temporaneo per attenuare i rischi di disoccupazione nello stato di emergenza (SURE): solidarietà in prestito nella crisi COVID-19?*, 2 La comunità internazionale 265 (2020); S. Giubboni, *Crisi pandemica e solidarietà europea*, 1 Quaderni costituzionali 218 (2021).

[25] While the legal basis of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility is Art. 175(3) TFEU, the same as that of the structural funds, the legal basis to proceed with the issuance of common debt by the European Commission, through the European Union Recovery Instrument, is precisely Art. 122 TFEU (see Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis).

[26] B. De Witte, *The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift*, 58(3) Common Market Law Review 635 (2021) and E. Cannizzaro, *Neither Representation nor Taxation? Or, the "Europe's Moment" – Part I*, 2 European Papers 705 (2020), who stresses how the choice of Art. 175(3) TFEU is meant to equip the Union with broad power insofar as this legal basis enables it to take specific actions "outside the funds", which is exactly the case with the Recovery and Resilience Facility.

[27] See P. Leino, *Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU*, Verfassungsblog,18 June (2020), https://verfassungsblog.de/who-is-ultra-vires-now-the-eus-legal-u-turn-in-interpreting-article-310-tfeu/,
subsequently pointing to the debate in Finland on the "constitutionality" of the EU own resources decision. The concerns were somewhat shared by the complainants in front of the German Constitutional Tribunal, BVerfG, Beschluss des Zweiten Senats vom 26. März 2021,- 2 BvR 547/21 -, Rn. 1-1, which rejected the preliminary injunction.

Whether the developments linked to the pandemic, though temporary in nature, are able to pave the way to a paradigm shift in the understanding of the EU budget and of its financing system is probably too early to say, but the debate triggered by the creative interpretation of those Treaty clauses can be coupled with that on the rigidity and the inadequacy of the EU budget as such to deliver on the many social objectives enshrined in the EU primary law. Some financial tools, such as the European Social Fund (Art. 162 TFEU), are directly acknowledged in EU primary law "to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living", amongst other things. How the financial constraints highlighted and the capacity of this and of other EU funds impact the protection of social rights, in particular of the right to social inclusion, remains to be seen as no direct connection is drawn in the TFEU or in the Charter.

3. The EU commitment to social rights and the competence issue

When it comes to the objectives the EU sets to pursue in relation to social rights enforcement, the stake posed by the drafters of the Treaties is very high. Art. 3(1) TEU includes amongst the EU's aims the promotion of people's well-being. The Union aims to support "a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment" (Art. 3(3) TEU). It is committed to combating social exclusion (since the Amsterdam Treaty, in particular), to ensure solidarity amongst generations, the protection of the rights of the child and to advance "economic, social and territorial cohesion, and solidarity among Member States" (again, Art. 3(3) TEU), an implicit effort to redistribute resources across the Union.

TFEU's Title X on social policy begins, in Art. 151(1), by recalling the European Social Charter of 1961 and the 1989 Community Charter of the Fundamental Social Rights of Workers – neither of them binding upon Member States – and highlights amongst the objectives, besides the promotion of the employment and the improvement of the working conditions[28], proper social

[28] On which, see also Arts. 152 and 154 to 158 TFEU.

protection and the dialogue between management and labour, also the combating of social exclusion. The fulfilment of these objectives, according to Art. 151(3) TFEU, will not only depend on the functioning of the internal market, favouring the harmonisation of national welfare systems, but also from the approximation of domestic legislation, regulation and administrative procedures. Moreover, the combating of social exclusion is expressly listed amongst the fields in which the Union "shall support and complement the activities of the Member States" (Art. 153(1), lit. j TFEU). Although the harmonisation of national law is excluded in this area, the European Parliament and the Council can adopt, via ordinary legislative procedure, directives setting minimum requirements for the gradual implementation of the objective to promote social inclusion (Art. 153(2), lit. b).

Thus, it appears that, compared to what the EU promises to deliver in principle on solidarity and social inclusion, the tools at the disposal of and the legal margins of manoeuvre for the Union's institutions are rather limited[29]. This is further confirmed by the circumstance that the provisions adopted pursuant to Art. 151 TFEU cannot "affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof" and cannot prevent them from introducing more protective social measures, in compliance with the Treaties (Art. 151(4) TFEU). In particular, the explicit reference to the fiscal implications of the EU social measures, for example those linked to combating social exclusion, left the EU to acknowledge that the protection of social rights entails considerable costs, the burden of which is predominantly borne by the Member States. The support offered by the EU, through its budget, thus comes as an addition to national budgets.

By the same token, the Charter of fundamental rights contains a long Title (IV) on solidarity with provisions ranging from fair and just working conditions and the protection of young people at work (Arts. 31 and 32) to workers' guarantee in case of unjustified dismissal and the right to paid maternity and parental leave (Arts. 30 and 33), from the right to health care to the right to social security

[29] A. Sangiovanni, *Solidarity in the European Union*, cit., at 7, 229; F. De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (2015), 124 ff. and F. Croci, *Solidarietà tra gli Stati membri dell'Unione europea e governance economica europea* (2020), 117 ff.

and social assistance (Arts. 34 and 35). The fulfilment of these rights does seem dependent on the politics of financing them, while in fact their effectiveness is subject to a two-tier constraint dependent on the national and EU budgets.

Due to the nature of the EU competences in matters of social policy, mainly limited to the coordination and the support of national policies except for the social protection of the workers[30], the action of the Union is necessarily combined with that of the Member States to secure the enjoyment of social rights, also taking into account that, in principle, the field of application of the Charter is limited to the implementation of EU law[31].

4. The very limited European case law dealing with the fight against social exclusion

It is difficult to detect cases dealing with social benefits[32] to be granted under EU law that are solved on the ground of the Title on solidarity of the Charter rather than as citizenship case law[33] or according to EU secondary law within the framework of the

[30] A shared competence according to Art. 4(2), lit. b TFEU, read in conjunction with Title X TFEU – Social Policy.

[31] See, e.g., N. Lazzerini, *La Carta dei diritti fondamentali dell'Unione europea: i limiti di applicazione* (2018) and A. Ward, *Article 51 – Field of application*, in S. Peers et al. (eds.), *The EU Charter of fundamental rights. A Commentary*, 2nd edition (2021).

[32] Different is the case of the right to take collective action, which does not entail a direct disbursement of public money, and that has triggered important developments in terms of case law since Case C-438/05 *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v Viking Line ('Viking')* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet ('Laval')* [2007] ECR I-11767.

[33] As has been claimed by S. O'leary, *Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union*, in G. de Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity* (2005), 51 ff. This element can also be seen as a consequence of the relatively recent entry into force of the Charter of fundamental rights compared to the codification of the citizenship provisions in the EU Treaties. For the relevant case law here, see, e.g. *Ruiz Zambrano*, C-34/09, 8 March 2011, and *Dano*, Case C-333/13, 11 November 2014 (in particular, the latter for quite a restrictive approach on the social treatment of economically inactive EU citizens). For a recent case where the CJEU turned to the Charter (Arts. 1, 7 and 24) to ascertain whether the right to social assistance has to be granted to Union citizens in the host country, see *CG v The Department for Communities in Northern Ireland*, Case C-709/20.

functioning of the internal market[34]. Moreover, when dealing with social security and social assistance, it appears that Art. 34(2) of the Charter on the entitlement of social security benefits and services in cases of "maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment" substantially mirrors what had already been prescribed by Regulation EC no. 883/2004 and EU no. 492/2011[35]. Aiming at combating social exclusion and poverty (Art. 34(3), at first the Charter appears to embed just a programmatic provision when it refers to the Union's acknowledgment and respect of "the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices". Indeed, the Explanation of this clause of the Charter hints at the mere nature of "principle" rather than a fully-fledged right under Art. 34(3). However, in one of the very few cases to date in which the CJEU had the opportunity to interpret Art. 34 of the Charter, the European Court made it clear that when the Charter's provisions provide for social security and social assistance measures to be ensured through national law the Member States must abide by the rights and the principles set by the Charter, including those established under Art. 34[36]. Hence the duty to guarantee the protection of a social right stems from this obligation, in that case of social housing for third country nationals with a legal residence permit under the same conditions as national and EU citizens.

The exact meaning and scope of Art. 34 and of the right to social assistance between the Member States and the Union is subject to interesting developments from the perspective of the obligation of national law to ensure the protection of this right in relation to national budgetary constraints. A preliminary reference by the Italian Constitutional Court to the CJEU concerning the granting of childbirth and maternity allowances to non-EU citizens would have offered the opportunity to use Art. 34 of the Charter as

[34] See, notably, CJEU, Case C-449/16, *Martinez Silva*, 21 June 2017 on family benefits to be corresponded according to Directive 2011/98/EU.

[35] D. Gallo, A. Nato, *L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza n. 182/2020 della Corte Costituzionale*, 4 Eurojus (2020), 328.

[36] CJEU, C-571/10, *Kamberaj*, 24 April 2012, § 80. See O. Golynker, *Article 34 – Social Security and Social Assistance*, in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary*, 2nd edition (2021), 998.

the crucial yardstick to expand the protection of the right to social assistance in the Union[37]. Despite the central place occupied by Art. 34 of the Charter in the order of referral, the CJEU decided to follow a "minimalist approach"[38] on this point: the Grand Chamber has acknowledged the right of third-country nationals holding a single work permit to receive the social benefits of birth and maternity provided for by the Italian legislation (Law 190/2014 and legislative decree 151/2001) only for long-term residents, but the Court did so on the ground of EU Directive 2011/98[39]. Although in this case the potential of the Charter has not been expounded, the tension between the right to social assistance protected under EU law and its financing stands out as a key issue and like in some previous judgments has been solved in favour of the social right's protection[40]. The approach of the CJEU has not always been

[37] Order no. 182/2020 of 8 July 2020 issued by the Italian Constitutional Court – on which see D. Gallo, A. Nato, *L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza n. 182/2020 della Corte Costituzionale*, cit., at 48, 308-338; N. Lazzerini, *Dual Preliminarity Within the Scope of the EU Charter of Fundamental Rights in the Light of Order 182/2020 of the Italian Constitutional Court*, 3 European Papers 1463 (2020); G. Pistorio, *L'operatività multilivello della leale collaborazione. Nota all'ordinanza n. 182 del 2020 della Corte costituzionale*, 1 Nomos 1 (2021).

[38] See D. Gallo, A. Nato, *Cittadini di Paesi terzi titolari di permesso unico di lavoro e accesso ai benefici sociali di natalità e maternità alla luce della sentenza* O. D. et altri c. INPS, forthcoming in Lavoro Diritti Europa (2022).

[39] Court of Justice, Grand Chamber, *O.D. and Others v Istituto nazionale della previdenza sociale (INPS)*, C-350/20, 2 September 2021, para 46, the Court stresses that by "reference to Regulation No 883/2004, it must be held that Article 12(1)(e) of Directive 2011/98 gives specific expression to the entitlement to social security benefits provided for in Article 34(1) and (2) of the Charter." Waiting for the final judgment to be published, following the decision of the Luxembourg Court, in its press release of 12 January 2022, https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20220112103101.pdf, the Italian Constitutional Court reported to have declared unconstitutional the domestic norms excluding from the contested benefits third-country nationals admitted for work purposes and those admitted for other purposes who are allowed to work and that are in possession of a residence permit lasting more than six months.

[40] See, e.g. *Grzelczyk*, Case C-184/99 [2001] ECR I-6193; *Martinez Sala*, Case C–85/96 [1998] ECR I–2691; *Collins*, Case C–138/02, [2004] ECR I–2703; *Vatsouras and Koupatantze*, Joined Cases C-22/08 and C-23/08 [2009] ECR I-4585; *Ibrahim*, Case C-310/08, [2010] ECR I-01065; *Texeira*, Case C-480/08, [2010] ECR I-01107; *Martinez Silva*, C-449/16, 21 June 2017; C*aisse pour l'avenir des enfants (Child of the spouse of a frontier worker)*, C-802/18, 2 April 2020.

consistent in striking this balance[41]. Moreover, in the *Brey* judgment the Court clarified that the right to access social assistance benefits "should be balanced against the need to protect the general stability and availability of welfare resources"[42] at domestic level.

5. The role of the representative institutions: Is there an advocate of social inclusion in the budgetary decision-making?

We now turn to the actual role and attitude of the EU representative institutions (according to Art. 10 TEU), in particular of the Parliament and the Council, in promoting social inclusion and assistance in the budgetary policy-making. Indeed, the amount of the ESF resources directly derives from the EU budget and is governed by the financial rules applicable to the general budget[43], within the ceilings set by the MFF. Thus, it follows that the size and the concrete objectives of the ESF are now defined by the Parliament and the Council together upon the proposal of the Commission.

The role of the European Parliament on the ESF has grown substantially over the years. Under the Maastricht Treaty (Art. 159 TEC), the Parliament could only give its assent to the general provisions regulating the funds. By contrast, since the Treaty of Lisbon the adoption of both the EU Financial Regulation (Art. 322 TFEU) and the Regulation on the ESF (Arts. 46, point (d), 149, 153(2), point (a), 164, 175, third paragraph, and 349 TFEU) is subject to ordinary legislative procedure. This adds up to the circumstance that post-Lisbon the Parliament and the Council have been placed on an equal footing also for what concerns the adoption of the annual budget (Art. 314 TFEU)[44]. It follows that with the European Parliament and the Council's symmetric positioning over the yearly

[41] See the already cited case *Dano,* C-333/13.

[42] F. De Witte, *Justice in the EU*, cit., at 36, 156. See *Brey*, Case C-140/12, 19 September 2013.

[43] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

[44] However, for some the loss of the monopoly on non-compulsory expenditures has triggered the weakening of the European Parliament's budgetary powers: see G. Benedetto, *The EU budget after Lisbon: rigidity and reduced spending?*, 33(3) Journal of Public Policy 345 (2013).

budgetary cycle and the ESF (and ESF+) Regulation, the intensity of the struggle on the matter between the two institutions has increased[45]. While the European Parliament has always been keen on increasing the level of commitments and payments, the Member States through the Council, instead, have been willing to reduce them compared to the Commission's proposal[46]. Such conflicting interests of the two institutions also reflect on the negotiations over the ESF.

In particular, the European Parliament has been a long-standing advocate of the design of simpler and more streamlined procedures for the ESF implementation, to improve the effectiveness of the ESF assistance to end beneficiaries and has traditionally viewed the ESF as the most important EU tool to combating unemployment. The European Parliament has also been the crucial actor behind the enlargement of the scope of the fund's objectives as to include the fights against gender inequalities, social exclusion and marginalisation of the most vulnerable groups. In its resolution of 7 October 2010[47], it considered the ESF as the main tool to react to the social drawbacks of the sovereign debt crisis and to fulfil the targets of the Europe 2020 Strategy.

During the negotiations of the MFF 2014-2020, the Parliament has successfully fought to increase the size of the ESF resources to become slightly more than 23% of the total amount of the cohesion funds and to set, amongst the ESF spending targets for each Member State, that 20% had to be allocated on social inclusion. Furthermore, following the refugee crisis 2014-2015, and with an approach that has remained consistent over time, the Parliament has claimed that the ESF should have been used to support the professional training of refugees to favour their social inclusion and prospective integration into the EU labour market[48]. This proposal has been followed by the Commission, which has inserted a specific

[45] On the budgetary struggle post-Lisbon, see S. Becker, M. W. Bauer, A. De Feo, *The New Politics of the European Union Budget: Background, Key Findings, and Outlook*, in S. Becker, M. W. Bauer, A. De Feo (eds.), *The New Politics of the European Union Budget* (2017), 15-32; C. Fasone, N. Lupo, *The Union Budget and the Budgetary Procedure*, in R. Schütze, T. Tridimas (eds.), *Oxford Principles of European Union Law* (2018), 810-847.

[46] C. Fasone, N. Lupo, *The Union Budget and the Budgetary Procedure*, cit., at 58, 831.

[47] European Parliament resolution of 7 October 2010 on the future of the European Social Fund, Brussels, P7_TA(2010)0357.

[48] See European Parliament resolution of 5 July 2016 on refugees: social inclusion and integration into the labour market, Strasbourg, P8_TA(2016)0297.

reference to the social inclusion of migrants into its ESF+ draft Regulation for the period 2021-2027. The Parliament's amendments to this legislative proposal have gone in the direction to increase the stock of ESF resources available for food and material aids to the most deprived persons and to children living below the poverty line, to make social inclusion and assistance a priority in the spending of the ESF+, and to include a clear reference to the respect of the Charter of fundamental rights (see Recital 31 and Art. 8).

On this occasion, the Council concurred with most of the European Parliament's amendments and, also for this reason, the final text of the ESF+ Regulation looks much more protective of the right to social assistance and inclusion than the previous ESF Regulation(s). With this regard the targets are more ambitious than in the past. For example, Art. 7 prescribes that Member States must spend "at least 25 % of their resources of the ESF+ strand under shared management to the specific objectives for the social inclusion" (para 4) and "at least 3 % of their resources of the ESF+ strand under shared management to support the most deprived persons under the specific objective set out in Article 4(1), point (m)"[49] (para 5). A specific objective in the Regulation is defined to combat child poverty by using the ESF+ to implement the Child Guarantee and Member States with an average rate of minors at risk of poverty or social exclusion between 2017 and 2019 below the average level in the EU as a whole are requested to spend no less than 5% of their resources of the ESF+ strand under shared management to actions and reforms targeted to counter this trend (Art. 7, para 3).

Traditionally the Council has been much more reluctant to support the consolidation of a strong social dimension in the EU action and to consider it a priority in the budgetary decision-making, although since 2000 the Social Protection Committee has been in operation as an advisory policy committee to the Ministers in the Employment and Social Affairs Council "to promote cooperation on social protection policies between Member States and with the Commission" (Art. 160 TFEU; former Art. 144 TEC).

[49] i.e. "addressing material deprivation through food and/or basic material assistance to the most deprived persons, including children, and providing accompanying measures supporting their social inclusion".

The textual analysis of the programs of the six-month Council presidencies 2014-2021[50] reveals that social assistance and inclusion very rarely appear amongst the priorities set out. Such a result probably also depends on the national, political and legal culture on social policies and the practice and the modus operandi of the welfare systems at domestic level,[51] besides the already mentioned cautious approach of the Council – hence, of Member States' governments – to increase the size of the EU budget and funds in general (especially of those, like the ESF, for which national co-financing is foreseen).

The only exceptions to this trend were the Luxembourgish (July-December 2015), the German (July-December 2020) and the Portuguese (January-June 2021) Presidencies[52]. The agenda and priorities of the Luxembourgish presidency were in line with the change of pace favoured by the Juncker Commission post-austerity and with the Commission Work Programme for 2015, through setting the objective of a "Triple-A social rating" for Europe. Amongst the seven pillars selected there was the deepening of the Union's social dimension, in particular promoting social investment and female employment and strengthening public health, education and high-quality child-care[53].

The programme of the Germany Presidency put a strong emphasis on the social recovery from the pandemic, on the implementation of the European Pillar of Social Rights, and in supporting the range of initiatives put forward by the European

[50] There is no single website of the EU Council Presidency collecting information on the various rotating presidencies. Each Presidency has created its own website where the relevant documents, including the programmes, are published.

[51] S. Giubboni, *Diritti e solidarietà in Europa. I modelli sociali nazionali nello spazio giuridico europeo* (2012), 32-35.

[52] Also the Estonian Presidency (July-December 2017), in the framework of which the Gothenburg Social Summit for Fair Jobs and Growth took place (17 November 2017) and the European Pillar on Social Rights was proclaimed, highlighted social inclusion as a priority, but with a specific focus – almost exclusively – on job conditions and social security for workers rather than on combating poverty and hunger: Programme of the Estonian Presidency of the Council of the European Union, https://web.archive.org/web/20181229200455/https://www.eu2017.ee/sites/default/files/2017-06/EU2017EE%20Programme_0.pdf, p. 24 ff.

[53] See Grand Duchy of Luxembourg, A Union for citizens. Priorities of the Luxembourg Presidency, 1 July-31 December 2015, http://www.eu2015lu.eu/en/la-presidence/a-propos-presidence/programme-et-priorites/PROGR_POLITIQUE_EN.pdf

Commission, including the proposals for a European Unemployment Reinsurance Scheme, to promote youth employment, and to provide a European framework for national minimum income protection[54]. The German Presidency also promoted the further allocation of funds to the ESF for 2021 and 2022 through NGEU and, in particular, the Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU).

During the same Presidency Trio, the Portuguese Presidency has further strengthened social inclusion and assistance as a top priority through a renewed effort to implement the European Pillar of Social Rights and culminated in the Porto Social Commitment and Declaration. Under this Presidency the Council took further concrete steps in the direction of a "Social Europe", through the Council conclusions on equity and inclusion in education and training for all[55], the Council Recommendation (EU) 2021/1004 establishing a European Child Guarantee, and the launch of the European Platform on Combating Homelessness[56]. The initiatives of the Council (Presidency) during the second semester of 2020 and the first semester of 2021 were promoted in a joint effort with the von der Leyen Commission, which has proved to be more sensitive towards the issue of social assistance and inclusion compared to previous Commissions[57].

6. Between EU social goals and budgetary tools to fight social exclusions. The case of the European social fund

European funds are aimed at repairing the imbalance in the functioning of the internal market and enhancing solidarity with underdeveloped regions and sectors in economic distress. Since 1961 the European Social Fund (ESF) has supported employment

[54] Together for Europe's recovery - Programme for Germany's Presidency of the Council of the European Union, 1 July to 31 December 2020, https://www.eu2020.de/blob/2360248/e0312c50f910931819ab67f630d15b2f/06-30-pdf-programm-en-data.pdf, p. 13.

[55] Council conclusions on equity and inclusion in education and training in order to promote educational success for all 2021/C 221/02, ST/8693/2021/INIT, OJ C 221, 10.6.2021, p. 3–13.

[56] See Lisbon Declaration on the European Platform on Combatting Homelessness, 21 June 2021, https://www.2021portugal.eu/en/news/lisbon-declaration-on-the-european-platform-on-combatting-homelessness/

[57] A. Hemerijck et al., *Social Europe Now! Advancing Social Europe Through the EU Budget* (2020), 36 ff.

and promoted the development of an inclusive society. Being the oldest structural fund, its functioning has often been revisited and its scope and size progressively increased. For example, for the programming period 2000-2006, under the aegis of Agenda 2000[58], the ESF was endowed with a stock of 60 billion euro and was meant to contribute both to the cohesion policy and to the European Employment Strategy. The Lisbon Strategy[59] established the open method of coordination (OMC), a new governance mechanism for the voluntary cooperation amongst Member States on a set of indicators and benchmarks also instrumental to poverty measurement. The OMC has been rearticulated and revised on several occasions, the first being in 2006, with an OMC specifically devoted to social inclusion.

Under the MFF 2007-2013[60] and the MFF 2014-2020[61] the equipment of the ESF was first increased and then remained stable, at 75 and 74 billion euro, respectively, compared to 920.7 and 908.5 billion euro (in payments) of the long-term budgets' sizes. Under the MFF 2007-2013, the Europe 2020 Strategy was adopted setting as a new common target for the fight against poverty, the reduction by 25% of the number of Europeans living below the national poverty line and launching the European platform against poverty and social exclusion[62]. The ambitious objective and the difficulty in reaching it[63] led the Commission to establish in the MFF 2014-2020, next to the ESF, a new ad hoc Fund, the Fund for European Aid to the Most Deprived (FEAD), initially endowed with nearly 4 billion euro. During the last seven-year programming budget, the EU has also revamped its social ambitions through the much-discussed

[58] See European Commission, *Agenda 2000: For a stronger and wider Union*, COM(97) 2000, 15 July 1997.

[59] See Presidency Conclusions, Lisbon European Council, 23-24 March 2000, https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm

[60] See the Interinstitutional Agreement on budgetary discipline and sound financial management, concluded between the European Parliament, the Council and the Commission on 17 May 2006.

[61] See Council Regulation 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020 and the related inter-institutional agreement.

[62] See European Commission's Communication, EUROPE 2020 A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, Brussels, 3 March 2010.

[63] Indeed, as is well known, the objectives were not met by 2020.

European Pillar of Social Rights[64], criticised by some for its soft-law nature[65], and praised by others for its ambitious list of principles and the related initiatives taken[66]. The interinstitutional proclamation of 2017 devotes considerable attention to the problem of social inclusion, for example referring to the right to unemployment benefits to a minimum income, to old age income and pensions, to the inclusion of people with disabilities, to housing and assistance for the homeless, and to access to essential services of good quality. The European Pillar of Social Rights has been described as a "dynamic and fluid, wide-ranging, and permeating" initiative[67], combining its programmatic nature with a set of several important proposals of implementation already put forward[68].

Unable to lift more than 20 million people out of poverty by 2020, as per its target set in 2010, the EU has revamped its social ambitions to support the recovery from the pandemic. At the Porto Social Summit of 7 May 2021, the President of the Commission, of the Parliament, of the rotating Presidency of the Council as well as the European social partners and civil society organisations have endorsed in a Joint Porto Social Commitment the 2030 headline targets set in the Commission's European Pillar of Social Rights Action Plan to foster employment (1), to have at least 60% of the adults participating in training activities every year (2) and, notably, to reduce the number of people at risk of poverty or social exclusion by at least 15 million, including at least 5 million children (3). The Action Plan seems to show for the first time a new EU approach to combating social exclusion by paying considerable attention to the financing of these targets. Indeed, the Plan

[64] Proclaimed on 17 November 2017 and undersigned by the Presidents of the Council, of the Parliament and of the Commission: https://data.consilium.europa.eu/doc/document/ST-13129-2017-INIT/en/pdf

[65] Z. Rasnacă, *Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What It Can Bring to EU-level Policymaking*, 5 ETUI Working Paper 14 (2017) and S. Giubboni, *L'insostenibile leggerezza del Pilastro europeo dei diritti sociali*, 4 Politica del diritto 577-578 (2018).

[66] S. Sciarra, *How Social Will Social Europe Be in the 2020s?*, 21 German Law Journal 85 (2020) and S. Garben, *The European Pillar of Social Rights: An Assessment of its Meaning and Significance*, 22 Cambridge Yearbook of European Legal Studies 101 (2020).

[67] S. Garben, *The European Pillar of Social Rights*, cit., at 79, 102.

[68] See, e.g., Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM/2020/682 final, 28 October 2020.

highlights how the new allocation of Funds, following the negotiation for the MFF 2021-2027[69], can become instrumental to concretely support such objectives.

The move towards an ESF+ has followed the same rationale reinforcing the fight for social inclusion with its roughly 99 billion euro stock[70]. The visible increase in the size of the Fund is due to the preference for having one single crucial instrument at EU level to curb poverty and social marginalisation. Under the MFF 2021-2027 the FEAD has been integrated into the ESF+, with important consequences for its scope of action[71]. While EU Regulation no 1304/2013, on the ESF, had a clear focus on equal opportunities, active participation, employability, and training as well as on local development strategies[72], the new Regulation 2021/1057, on the ESF+, has also the declared objectives to promote social integration of people at risk of poverty or social exclusion and to address material deprivation through food and/or basic material assistance to the most deprived persons[73]. Thus, whereas the former ESF had the job market and its failures as its main targets – to redress problems such as unemployment and unequal opportunities, the new ESF+ encompasses a wider perspective dealing with the most vulnerable fringes of the population regardless of whether they are active or inactive EU citizens.

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[69] See Council Regulation 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027. In relation to the Recovery and Resilience Facility, both Regulation 2021/241 establishing the Recovery and Resilience Facility (Arts. 29(4) and 30(2)) and the European Pillar of Social Rights' Action Plan (p. 35) foresee the adoption by the Commission, by the end of 2021, of a delegated act to define a methodology for reporting on social expenditure under the Recovery and Resilience Facility. Delegated Regulation (EU) 2021/2105 of 28 September 2021 supplementing Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility by defining a methodology for reporting social expenditure is now in force and is expected to strengthen visibility of the Facility's social impact.

[70] 88 billion in 2018 prices.

[71] Within the ESF+ the Youth Employment Initiative and the EU Programme for Employment and Social Innovation have also been merged. By contrast, in the aftermath of the pandemic, the Commission has decided to keep the EU Health Programme, under the EU4Health Programme separate as an autonomous fund.

[72] Art. 3 (1) lett. b), (i) and (vi), Regulation 1304/2013.

[73] Art. 4 (1), lett. l) and m), Regulation 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013.

That said, however, it cannot be neglected that, when looking at the fight against social exclusion, including supporting social assistance to inactive EU citizens, the amount of EU resources to be spent on this "priority" is minimal, nearly 5% of the size of the EU long-term budget for 2021-2027 and NGEU combined. Even more problematic, however, is the effectiveness of the ESF so far recorded to reach the objective of promoting social inclusion and combating poverty (Thematic Objective 09, according to the MFF 2014-2020). Significant delays have been registered in the ESF spending and the average rate of project selection for this objective was only 71% with lowest peaks detected in Italy (only 48%), Greece (50%) and Bulgaria (54%)[74]. While the capacity to spending the ESF resources in all Member States remains considerably lower than the stock of funds allocated under the EU budget[75], it is especially lower for the Thematic Objective dealing with social inclusion, which can sound as an alarming signal for the ESF's capacity to deliver on social assistance. Amongst the factors that impair the ESF effectiveness are the "complexity in the requirements of the ESF framework", with multiple actors involved and significant coordination costs, the audit procedures and the data collections systems, the growing number of administrative procedures activated to finance a project[76].

This connects to the circumstance that the disbursement of this Fund has to abide to further significant constraints: ESF projects shall demonstrate their adherence to the European Semester's targets. Member States are in fact required to prioritise projects that address the challenges identified in the European Semester through country-specific recommendations as well as in their national

[74] European Commission, Directorate-General for Employment Social Affairs and Inclusion, Directorate G, Study supporting the 2020 evaluation of promoting social inclusion, combating poverty and any discrimination by the European Social Fund (Thematic Objective 09) – Final Report, written by ICF, Cambridge Econometrics and Eurocentre, October 2020, pp. 54-55.

[75] See European Commission's website, European Structural and Investment Funds – Data, ESIF 2014-2020: Implementation by country for European Social Fund - total cost of selection and spending as % of planned (bullet chart, excluding multi-thematic allocations), https://cohesiondata.ec.europa.eu/funds/esf#

[76] European Commission, Directorate-General for Employment Social Affairs and Inclusion, Directorate G, Study supporting the 2020 evaluation of promoting social inclusion, cit., p. 55.

reform programmes[77]. The link between the ESF and national reforms introduces a sort of conditionality clause in the pursuit of social rights, which rewards and protects EU stability through the indirect support of the balance of national budgets.

7. The administrative governance of the European social fund

Member States and the Commission share the management of the European social fund through a "mixed administrative" and "multi-face" administration[78], where both the administrative levels contribute to designing, implementing and controlling the payment of the money sizeable on the Fund. This means that the disbursement of the resources occurs in composite administrative proceedings, where both levels of government need to exchange information and tightly cooperate to implement the policy[79]. To reduce the sophistication of the cooperative mechanisms, the 2021 reform of the Fund[80] has in part aimed at simplifying procedures.

Each Member State, in partnership with the European Commission, agrees on one or more Operational Programmes (OPs) for the ESF funding, which provide the goals and priorities for ESF activities during the seven-year programming period. The ESF+ Regulation requires that the design of the ESF strategy and the monitoring of its implementation also ensure the meaningful participation of the social partners and civil society organisations[81], so to understand better the needs of the relevant communities and to control the efficient and effective spending. The 2013 Regulation expressly required the participation of institutional actors, civil society and economic and social partners in the design of the partnership agreement and the OPs that the Commission should

[77] Arts. 7 (1) and 12, Regulation 2021/1057; Art. 4 (1), Regulation 1304/2013.
[78] See G. Della Cananea, *The European Union's Mixed Administrative Proceedings*, 78 Law and Contemporary Problems 198 (2004).
[79] See H.C.H. Hofmann, *Decision making in EU Administrative Law - The Problem of Composite Procedures*, 61 Administrative Law Review 199 (2009). On the legal concerns surrounding the composite administrative procedures in the European Union, see S. Alonso de León, *Composite Administrative Procedures in the European Union* (2017), esp. 2015 ff.
[80] Regulation 2021/1057/EU of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013.
[81] Art. 9 (1), Regulation 2021/1057/EU.

approve following assessment and dialogue with the concerned Member State[82]. Partnership agreements essentially aimed at transposing the EU strategy and principles in the national context[83]. The beneficiaries of the funds can be a variety of organisations, including public administrations, workers' and employers' organisations, NGOs, charities and companies.

For every OP, the Member States designate both a managing authority and an audit authority. To improve the quality of the design and implementation of programmes, Member States and their managing authorities carry out evaluations of the programmes on the grounds of their effectiveness, efficiency, relevance, coherence and Union added value[84]. The Commission also performs a mid-term evaluation and a retrospective assessment on the grounds of the effectiveness, efficiency, relevance, coherence and Union added value of the Fund[85].

Payments are made in the form of pre-financing, interim payments and payments of the balance of the accounts for the accounting year[86]. Until 2021, management and audit authorities were required to submit to the Commission their documents and information so to make the Commission able to examine and accept

[82] Art. 5, Regulation 1303/2013/EU of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

[83] See K. Pantazatou, *European Union Funds*, in H.C.H. Hofman, G. C. Rowe, A. H. Türk (eds.), *Specialized Administrative Law of the European Union* (2018), 537.

[84] Art. 44 (1), Regulation 2021/1060/EU of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy. See also Art. 54 (1) Regulation 1303/2013/EU.

[85] Art. 45, Regulation 2021/1060/EU. Art. 56 Regulation 1303/2013/EU was less specific about the role of the Commission in the mid-term evaluation, while emphasised the role of Member States in the evaluation during the programming period.

[86] Art. 89, Regulation 2021/1060/EU. See also Art. 77 (3) Regulation 1303/2013/EU.

the accounts if they were complete, accurate and true[87]. The Commission could accordingly recalculate the amount chargeable to the Fund for the accounting year and the consequent adjustments in relation to the payments to the Member State[88]. The case law also contributed to clarifying the responsibilities of the Member States and of the Commission in such a procedure. In particular, in *DAFSE v Frota Azul-Transportes e Turismo Ld[a]*, the CJEU held that the Member State certifying the accuracy of the facts and accounts shall ascertain "first, that the expenditure incurred by the recipient of the aid is 'reasonable' and, second, that that person has displayed 'sound financial management'"[89]. Yet, the final decision is exclusively on the Commission[90].

The 2021 Common Framework Regulation simplified the procedure for the examination of the accounts, conferring the general responsibility on national audit authorities and triggering the Commission's control when (a) the audit authority has provided a qualified or adverse audit opinion due to reasons linked to the completeness, accuracy and veracity of the accounts; (b) the Commission has evidence putting into question the reliability of an unqualified audit opinion[91].

In addition, financial corrections to the amounts chargeable to the Fund can be made by the Member States to protect the Union budget against irregularities and by the Commission in the case of serious deficiencies of the programme, irregularities not detected by the Member States, or if the Member States have not complied with their obligations in case of suspension of payments[92].

The protection of the right to social assistance under the ESF is thus the result of such a complex system of governance. In the framework of the financial rules of the EU budget, the multilevel structure of cooperation challenges the enforcement of the right on different grounds.

Firstly, it creates significant procedural challenges. The design of cooperation through composite administrative

[87] Art. 137-139, Regulation 1303/2013/EU.
[88] Art. 139 (6), Regulation 1303/2013/EU.
[89] *Directora-Geral do Departamento para os Assuntos do Fundo Social Europeu (DAFSE) v Frota Azul-Transportes e Turismo Ld[a]*, C-413/98, para 27.
[90] Ibid., para 30.
[91] Art. 101, Regulation 2021/1060/EU.
[92] Arts. 103-104, Regulation 1060/2021/EU; Arts. 143-144, Regulation 1303/2013/EU.

proceedings that take place between national and supranational institutions exposes the system to a range of risks, including financial irregularities and litigation in courts, while the administrative burdens may also discourage potential applicants for assistance[93].

In addition, successful implementation pragmatically depends on the efficient functioning of the institutional and administrative system in each Member State[94]. National variations in the administrative capacity are factual circumstances that independently affect the protection of social rights. By requiring prompt administrative performance, the governance of the ESF, however, exacerbates variations and indirectly contributes to the uneven implementation of social rights.

Thirdly, national variations also affect the disbursement of the ESF from a substantive perspective. Spending is in fact connected to the Member States' budgetary performance. Under the 2013 Common Framework Regulation, OPs shall comply with the European Semester: "the Commission may request a Member State to review and propose amendments to its Partnership Agreement and relevant programmes"[95] where – among others – the Member State has not aligned them to the pursuit of coordination in economic policies, excessive deficit requirements and macro-economic imbalance procedure. If the Member State does not comply, the Commission "shall make a proposal to the Council to suspend part or all of the commitments or payments"[96]. This creates a direct link between the stability of the economic and fiscal governance and the protection of social rights.

A further challenge comes from the fact that the use of EU funds is additional to national cohesion policies and requires national co-financing. If the ESF is meant to support national efforts and not to be an alternative tool to enforce social rights, in practice this creates an additional burden on the capability of Member States

[93] See also K. Pantazatou, *European Union Funds*, cit., at 555.
[94] Ibid., 539. See also C. Mendez, J. Bachtler, *Prospects for Cohesion Policy in 2014-20 and Beyond: Progress with Programming and Reflections on the Future*, 88 European Policy Research Paper (2015), available at https://eprc-strath.org/wp-content/uploads/2021/09/Prospects-for-CP-in-14-20-and-beyond-EoRPA-144.pdf, 23.
[95] Art. 23 (1), Regulation 1303/2013/EU. See also Art. 19 (1), Regulation 2021/1060.
[96] Art. 23 (9), Regulation 1303/2013/EU. See also Art. 19 (8), Regulation 2021/1060.

to use the Fund, especially in times of crisis. However, it is worth noting that to face the adverse effects of the economic crisis, the Commission has reduced and waived the fixed co-financing rates[97]. In addition, the 2021 Common Framework Regulation also set more flexible rates for co-financing[98].

As Pantazatou put it, "the more the public finances of the Member States decline – or are to be used for very specific purposes – the less likely it is that they will wish to meet these demands to complement the Union's own investment in economic, social and territorial cohesion"[99]. In other words, in comparison to the national dependency on the availability of public resources, the legal framework for the use of the ESF and the ESF+ generates a sort of double conditionality: with the EU rules aimed at the coordination of economic policies and with the national availability for co-financing.

8. The European social fund and the justiciability of the right to social assistance

The composite administrative proceedings designed for the allocation of the Fund do not allow the (potential) recipients of the funding as well as third parties to participate in all the levels of the decision-making. Shared administration is built upon the creation of binary administrative relationships, so that the interested parties effectively participate only in the national procedures, and not at the level of the Commission[100]. This has triggered litigation regarding the competence of the Commission vis-à-vis the Member States in relation to the right of the recipients of the amounts chargeable on the Fund. The binary structure of the proceedings also reflects on the capability of the recipients of the assistance to challenge the decisions taken in the multilevel procedure[101].

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[97] Art. 24, Regulation 1303/2013/EU.

[98] Art. 112, Regulation 2021/1060/EU.

[99] K. Pantazatou, *European Union Funds*, cit., at 109, 539.

[100] On the legal issues generated by binary administrative relationships in the banking sector see also M. Simoncini, *Challenges of Justice in the European Banking Union. Administrative Integration and Mismatches in Jurisdiction* 40 Yearbook of European Law 310 (2021).

[101] On this aspect, which has been characterised as a "serious judicial review gap", see F. Brito Bastos, *An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law*, 16 European Constitutional Law Review 64 (2020).

Justiciability issues emerged on different grounds. With specific reference to the ESF, the EU case law particularly reflected on procedural rights with the aim of ensuring the substantive protection of individual rights in the cooperation between national and EU authorities and set key guarantees for the exercise of procedural rights. The framework of composite administrative proceedings in fact makes the protection of the substantive right critically dependent on the certain and effective implementation of procedural rights[102]. Yet, this occurs in a legislative framework that focuses on multilevel administrative cooperation without protecting expressly the rights of the persons affected by such composite proceedings[103]. The binary structure of the administrative proceedings has generated specific challenges with regard to the effective protection of the right to the defence and, as a consequence of that, of the right to social assistance. In the seminal case *Commission v Lisrestal*, the CJEU recognised that "even though the Member State is the sole interlocutor of the Fund a direct link is established between the Commission and the recipient of the assistance"[104] and pointed out that "although a decision to suspend, reduce or withdraw Community assistance may sometimes reflect an assessment and evaluation by the competent national authorities, (…) it is the Commission which adopts the final decision and takes sole legal liability for such a decision as against the beneficiaries"[105]. As a consequence, the CJEU recognised the right of the affected party to be heard before the Commission and highlighted that substantive, triangular relationships operate between cooperating authorities and private parties beyond the formal rules[106].

The Court has also protected the effective capability of the parties to defend their rights in the procedure. In *Mediocurso v Commission*, it ensured the provision of a reasonable time period between the cognition of the relevant documents and the

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[102] See S. Cassese, *European Administrative Proceedings*, 68 Law and Contemporary Problems 31-34 (2004); M. Eliantonio, *Judicial Review in an Integrated Administration: the Case of 'Composite Procedures'*, 7(2) Review of European Administrative Law 65 (2015).

[103] See C. Eckes, J. Mendes, *The Right to Be Heard in Composite Administrative Procedures: Lost in between Protection?*, 36 (5) European Law Review 665 (2011).

[104] *P Commission v Lisrestal*, C-32/95 [1996] ECR I-05373, para 28.

[105] Ibid., para 29.

[106] See M. Simoncini, *Challenges of Justice in the European Banking Union. Administrative Integration and Mismatches in Jurisdiction*, cit., at 103, 310-334.

expression of comments on them, so that the party could be able to analyse the documents and organise its own defence[107]. Yet, in *CPEM v Commission*, the General Court made clear that procedural irregularities should be relevant only insofar as they have "a concrete effect on the ability of the undertakings concerned to defend themselves" [108].

In addition, the case law pointed out that decisions on the reduction of assistance need to be "sufficiently reasoned" and in the framework of the cooperation between national authorities and the Commission, this meant that the grounds for such decisions should be clearly stated and duly justified, "either when the decision itself clearly demonstrates the reasons justifying the reduction of the assistance or, if that is not the case, when it refers in a sufficiently clear manner to a measure of the competent national authorities in the Member States concerned in which the latter clearly set out the reasons for such a reduction"[109].

In a nutshell, EU case law has contributed to defining the guarantees and the requirements of due process in the use of the ESF. Even though it concerned previous ESF regulations, the principles held therein are still valid and applicable to the management of the new Fund.

Nevertheless, the kind of litigation triggered by the shared management of the ESF shows that the complex legal framework has not favoured legal certainty in the implementation of social rights. The lack of certainty enhances the risk of litigation. Experience from other sectors shows that more general questions cannot be eluded. For instance, the allocation of competence between national and supranational authorities, the distribution of responsibilities and the recognition of binding legal acts may trigger concrete risks of litigation. These legal issues may also affect the very justiciability of the right, as the identification of the competent court may be problematic given the structural separation of competence between national and EU courts[110]. The

[107] *Mediocurso v Commission*, C-462/98 P, para 38.
[108] *Centre de promotion de l'emploi par la micro-entreprise (CPEM) v Commission*, T-444/07, para 53.
[109] *Partex*, T-182/96, para 76.
[110] On these aspects, see in particular F. Brito Bastos, *Derivative illegality in European composite procedures*, 55 Common Market Law Review 101 (2018); F. Brito Bastos, *An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law*, cit., at 104, 68 ff.; M. Simoncini, *Challenges*

multilevel system in the spending of the ESF thus structurally challenges (and weakens) the protection of the right to social assistance.

9. Conclusion

The protection of social rights and, notably, of the right to social assistance and inclusion in the EU suffers from the misalignment between the solidarity goals set in the Treaties and the Charter, on the one hand, and the structure of the EU budget and its expenditure channels on the other. As this article demonstrated, this gap has both policy roots and legal reasons.

From a policy-making perspective, social inclusion is not consistently pursued and prioritised by EU institutions. The analysis of the budgetary decision-making has shown that the European Parliament is the most relevant advocate of redistributive policies, including the protection of social rights and the promotion of social inclusion. Although the Council has also engaged with such policy effort, its position is less consistent. In addition, the Presidencies of the EU have interpreted this responsibility in different ways. In a nutshell, despite the renewed effort to promote social inclusion[111], the EU budgetary policy is still fragmented and lacks a coherent political plan.

From a legal standpoint, the protection of social rights under EU law and funds is subject to several constraints. Firstly, there is a competence limit. The Treaties and the Charter clearly confer on the EU supporting competence, so that the Member States have the major responsibility on the protection of social rights and in particular social inclusion. As the welfare remains national competence and the role of the EU is ancillary, enforcement is necessarily shared and eventually dependent on national policies.

Secondly, the existence of administrative burdens exacerbates the claims of protection. As the article explained, the management of the ESF clearly shows that the enforcement of rights strictly depends on the effectiveness of the cooperation between the

of Justice in the European Banking Union. Administrative Integration and Mismatches in Jurisdiction, cit., at 103, 313 ff.

[111] See, again, the European Pillar of Social Rights Action Plan, which gives the ESF a centrale stage, and the assessment of the social expenditures financed through the national recovery and resilience plans, as envisaged in Regulation 2021/241.

EU and national levels in composite administrative procedures. This requires the Member States to develop adequate administrative capability. The deficiencies of national administrative systems thus clutter the enforcement of rights. In addition, the binary structure of the cooperation has reduced the chances to participate in the administrative proceedings and could also affect their capability to challenge the decisions taken in the multilevel procedure, as other sectors' experience demonstrates. In short, the ambiguous allocation of responsibilities and tasks affects the certainty of the administrative guarantees and relationships. This may trigger litigation, while making the protection of substantive rights critically dependent on the certain and effective enforcement of procedural rights. As a result, protection is linked to the judicial and administrative capacity of the Member States to respond to the claims for justice.

Finally, conditionalities apply to the disbursement of the ESF resources. In fact, their use is subject to the EU law infringement conditionality: since the 2013 Common Framework Regulation, a direct link between the stability of the EMU and the protection of social rights and social inclusion has been introduced. As a result, the Commission can suspend funding if a State is suspected of the breach of EU law. The legal framework so far makes the protection of social rights conditional upon the coordination of economic policies. It indirectly creates a sort of double conditionality, which builds upon the national budgetary performance. Social rights are protected insofar as there is national compliance with EU budgetary rules and co-financing requirements. Yet the current suspension of the Growth and Stability Pact[112] and the current path toward the EU Economic Governance Review[113] could operate on the alignment of social policies with the fiscal rules, relaxing the conditions applicable to the enforcement of social rights.

All these different constraints generate a dysfunctional framework for the promotion of social inclusion and for the right to social assistance, showing that the protection of social rights can only be marginally pursued through the EU budget and at high

[112] See European Commission, Communication on the activation of the general escape clause of the Stability and Growth Pact, Brussels, COM (2020) 123 final, 20 March 2020.

[113] European Commission, Communication on The EU economy after COVID-19: implications for economic governance, COM(2021) 662 final, Strasbourg, 19 October 2021.

administrative and judicial costs. To take social inclusion seriously, we should address these misalignments among policy goals, law enforcement and budget resources. Only by addressing their dysfunctional combinations would solidarity either become a much more feasible goal or push for a comprehensive reform to achieve the higher standard of protection set in the Treaties and in the Charter.

WHERE DOES SOCIAL EUROPE LAY? LOOKING FOR SOCIAL EUROPE AMONG THE WORKER, RESIDENT AND HUMAN BEING STATUSES WITH THE HELP OF THE RIGHT TO ACCOMMODATION IN THE MULTILEVEL SYSTEM

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Abstract

Together with the economic crisis (2008) and the sovereign debt crisis (2011), the Covid-19 crisis has highlighted how the dependence of social rights on a formal citizenship status or resident status should be considered as a restriction on the access and effective enjoyment of social rights and comprehensive social protection, especially by vulnerable people (i.e. cross-border EU citizens, migrant citizens of third countries, precarious low-skill and low-income workers). The paper will look specifically to agricultural workers with an irregular work status and/or an illegal immigration status. Focusing on one of the most disadvantaged conditions – illegal immigrants with seasonal jobs in the agricultural sector – the expectation is that a higher number of variables will enter the picture. If a solution can be imagined for the least advantaged, it would presumably work for less disadvantaged people as well, both at the national and supranational levels. The paper will proceed in two steps. In the first, it will analyze the problem of the right to accommodation for seasonal workers in agriculture from the perspective of the supranational level of the European Union, studying in detail the criticalities of the EU legal system. In the second, it will examine the same topic from the perspective of the national level, using Italy as a case-study. In the conclusions, the paper will propose some recommendations to improve the effective enjoyment of social rights more in general and the right to accommodation of transnational seasonal workers in agriculture more specifically.

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1. Introduction. Human being-status, worker-status, (legal) resident-status: overcoming clashes versus a European social citizenship

Together with the economic crisis (2008) and the sovereign debt crisis (2011), the Covid-19 crisis has highlighted how the dependence of social rights on a formal citizenship status or resident status should be considered as a restriction on the access and effective enjoyment of social rights and comprehensive social protection, especially by vulnerable people (i.e. cross-border EU citizens, migrant citizens of third countries, precarious low-skill and low-income workers).

This is the case, for instance, of the right to accommodation for seasonal workers and for those cross-border seasonal workers in agriculture, both EU and extra-EU citizens. In fact, the current pandemic affects most those who need to move from their home country for work. The lack of accommodation for seasonal workers, especially in the agricultural sector, has existed for a long time, but the Covid-19 crisis has worsened these already poor conditions for workers. Many do not receive adequate

accommodation from employers and live in substandard housing. The latter does not comply with the minimum health and safety standards in force in the Member States (i.e. social distancing and the health and safety measures applicable in the context of the fight against the Corona virus). These inadequate accommodation conditions have allowed the development of outbreaks of infection among cross-border seasonal workers in agriculture. Infection can cause long periods of inactivity and a drastic drop in income. For these reasons, the European Commission[1] and the Council of the European Union[2] recommended to the Member States that they ensure all necessary measures.

The paper will look specifically to agricultural workers with an irregular work status and/or an illegal immigration status[3]. Focusing on one of the most disadvantaged conditions – illegal immigrants with seasonal jobs in the agricultural sector – the expectation is that a higher number of variables will enter the picture. If a solution can be imagined for the least advantaged, it would presumably work for less disadvantaged people as well, both at the national and supranational levels[4]. As seen, during the Covid-19 crisis, guaranteeing effective social protection to regular and irregular seasonal workers in agriculture, such as the right to accommodation, has become even more urgent. However, it is not only an ethical imperative but has also been necessary for health reasons – to circumscribe the pandemic – and for economic reasons – to support the recovery phase[5]. In fact, how the agri-

[1] Communication COM(2020)4813.

[2] Conclusion 9 October 2020, 11726/2/20.

[3] V. Papa, *Dentro o fuori il mercato? La nuova disciplina del lavoro stagionale degli stranieri tra repressione e integrazione*, 27 Diritto delle Relazioni industriali 368 ff. (2017), according to which the seasonal worker is the ideal type reflecting the major factors of vulnerability and that directive 2014/36/Eu has a double function: securitization/immigration policy and Labor Law. See for other comment J. Fudge, P. Herzfeld Olsson, *The European workers directive: when immigration controls meet labour rights*, 4 Eur. J. Migr Law (2014). Cfr. C. Rijken, *Legal approaches to combating the exploitation of third-country national seasonal workers*, in 4 IJCLLIR 422 ff. (2015).

[4] This is the "max-min" approach, to maximize the conditions of the least advantaged people, following the Rawlsian "Theory of justice".

[5] For example, East European seasonal workers preferred to go to Germany and other Northern countries than to come in Italy, since those countries could guarantee better social and health conditions; or, the functioning of soft mechanisms based on consumer behavior that pull people gently towards production networks needs farms and enterprises that can guarantee – and

food sector and its entire productive chain are suffering from an unsustainable market-oriented system will emerge from the case-study. For example, even the Common Agricultural Policy needs to be reviewed in order to achieve its 2030 goals. This can be done if social and environmental priorities start to be addressed as a prerequisite to a healthy Economy[6].

Hence, the case-study will have the following as an underlined second-level question: does the effective enjoyment of social rights depend on attaining worker-status in the European legal system? And, if so, to what degree does the latter depend on citizenship or legal residency status? Furthermore, in the light of the pandemic experience, are these the best theoretical paths for the future of social rights in Europe? Or should a different perspective be adopted and, above all, is such a change in perspective possible[7]? Perhaps the theoretical solution to the

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prove – adequate social conditions to their workers. L. Palumbo, A. Corrado (eds.), *Covid-19, Agri-food Systems, and Migrant Labour the Situation in Germany, Italy, The Netherlands, Spain, and Sweden* 3 (2020).

[6] For a theoretical argument in favor of "integrated" sustainable development see M. Bombardelli, *Public Informatics, E-government and sustainable development* and S. Battini, *Policies for sustainable development*, in G. Arena, M. P. Chiti (eds.), *Public Administration, Competitiveness and Sustainable Development* (2003). Cfr., for a recent attempt of balancing economic and social dimensions in the European legal order, G. Marín Durán, *Sustainable development chapters in Eu free trade agreement: emerging compliance issues*, 57 Common Mkt. L. Rev. 1048-1052 (2020). See also D. Damjanovic, *The Eu market rules as social market rules: why the eu can be a social market economy*, 50 CMLR 1658 ff. (2013). Cfr. A. De Witte, *A competence to protect: the pursuit of non-market aims through internal market legislation*, in P. Sypris (ed.), *The judiciary, the legislation and the Eu internal market*, (2012). For the hypothesis of "integrated" sustainable development as a European objective and "sustainability" as a European principle see E. Tatì, *L'Europa delle città. Per una politica europea del diritto urbano* (2020), 241-250.

[7] It is possible to describe the social and legal rhetoric prevalent in the European Union until today as follows: you should have a job; if you have it, you can be considered a worker with a set of social rights that guarantee a minimum living standard. However, the latter depends on the kind of sector you work in and on your starting skills. This also means that pathological situations can arise at any level of this chain. For example: you have a job in the EU and you are a worker; however, you work in the agricultural sector and there is a legislative vacuum both at the EU and National level that cannot guarantee your social rights, indispensable, for example, for having decent living conditions; the "worker status" in a Union based on mobility of people does not work sufficiently well. Or: you are an irregular immigrant (non-legal "resident status") and you are also a worker. However, the second status does not overcome your irregular residency in Europe and you have no social

above-mentioned limitations could be to adopt a "human being" approach[8]. In other words, a European citizenship that is based on a "concrete" social citizenship or on the "reality" of being in the European territory, as part of a community[9].

The previous can be considered a utopian reconstruction, if one chooses to consider utopian the Court of Justice of the European Union (ECJ) case-law as well. In 2014, in the *Tümer* case, the ECJ affirmed that safeguards established by EU law apply to all workers, including third-country nationals in an irregular situation[10]. The worker's residence *status* does not affect them, and immigration considerations should never interfere with the equal treatment of all workers. For the purpose of implementing labor

guarantees even though you work. In the first case, the shortcoming is to put before the social dimension before the economic one, in this way losing the possibility to guarantee fundamental rights (a defective EU legal order) (A. Supiot, *L'esprit de Philadelphie: La justice sociale face au marché total* (2010)); in the second case, the problem derived from putting the legal "resident status" before the "reality" of being in the EU and being a worker. In this second case, a "worker status" could be sufficient (if built on the first case prerequisites) but it is not the case, due to the incoherence of immigration policy. See, on the historical prevalence in Europe of a concept of citizenship based on the idea of "nationality", even though with different national approaches, E. Böckenförde, *Welchen Weg geht Europa?*(1997). See, on the limitation of European citizenship, J. H. Weiler, *To be a European citizen: eros and civilization*, in *id.*, *The Constitution of Europe: "Do the New Clothes Have An Emperor? "And Other Essays on European Integration* (1999), 79 ff. Cfr. S. O-Leary, *The evolving concept of community citizenship. From the free movement of person to Union citizenship* (1996), especially 3-31; S. Kadelbach, *Union Citizenship*, 9 Jean Monnet Working Paper (2003).

[8] The reasoning should follow this order: first of all, you can enter the EU just because you are a human being; secondly, you have the most extensive set of rights (also "positive" rights, mainly social ones, in order to make negative freedoms effective negative); thirdly, you are a worker; lastly, your minimum living conditions do not depend on the kind of sector you are in. See K. Nash, *Between Citizenship and Human Rights*, in 43 Sociology 1067 ff. (2009). Cfr. G. Shafir, A. Brysk, *The Globalization of Rights: From Citizenship to Human Right*s, 10 Citizenship Studies 275-287 (2006). For the position in favor of social rights as (human) rights see C. Barnard, *Are social 'Rights' rights?*, 11 Eur. Labour Law J. 352-363 (2020). Cfr. E. Triggiani, *La complessa vicenda dei diritti sociali fondamentali nell'Unione europea*, 1 St. integr. Eu. 9 ff. (2014).

[9] See for argumentation in favor of a European social citizenship, and its difficulties, A. Nato, *La cittadinanza sociale europea ai tempi della crisi economica* (2020). Cfr., for a European citizenship based on "being" in the European territory and on the importance of "where" you are, E. Tatì, *L'Europa delle città. Per una politica europea del diritto urbano*, cit. at 6, 439 ff.

[10] CJEU, C-311/13, *O. Tümer v. Raad van bestuur van het Uitvoeringinstituut werknemersverzekeringen*, 5 November 2014.

and health and safety standards, migrant workers have to be considered workers, whatever residence status they may have or lack. The ECJ ruled that the power of Member States to limit the application of the directive, object of the case, is subject to satisfying the social objectives of the EU act. Those social objectives do not go as far as to permit exclusion of third-country nationals[11]. The rights of workers are an expression of solidarity among societies[12]. Moreover, in the case-law, the Public Law level – immigration policy – remains separate from the Private Law level – labor policy under the Civil Code. Indeed, this separation guarantees the application of those national provisions in favor of employees[13]. Only in this way, abused migrant workers can be empowered to use complaint mechanisms and other complaint channels against abusive employers or recruiters, without fear of such action triggering consequences for their residence status[14]. In addition to this aspect, it is also true that if ordinary employment law applies to irregular migrants, then they will not challenge the legally resident workforce as employers will lack economic

[11] *Tümer* case, par. 42: «Furthermore, according to the case-law of the Court, the first subparagraph of Article 2(2) of Directive 80/987 must be interpreted in the light of the social objective of that directive, which is to guarantee employees a minimum of protection at EU level in the event of the employer's insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period. Member States therefore cannot define at will the term 'employee' in such a way as to undermine the social objective of that directive (see, by analogy, judgment in van Ardennen, C-435/10, EU:C:2011:751, paragraphs 27 and 34)».

[12] European Union Agency for Fundamental Rights, *Protecting migrant workers from exploitation in the EU: workers'perspectives* (2019), 15.

[13] *Tümer* case, par. 49: «In the light of all the above considerations, the answer to the question referred is that Directive 80/987 must be interpreted as precluding national legislation on the protection of employees in the event of the insolvency of their employer, such as that at issue in the main proceedings, under which a third-country national who is not legally resident in the Member State concerned is not to be regarded as an employee with the right to an insolvency benefit — on the basis, in particular, of claims relating to unpaid wages — in the event of his employer's insolvency, even though that third-country national is recognized under the civil law of the Member State as having the status of an 'employee' with an entitlement to pay which could be the subject of an action against his employer before the national courts».

[14] See European Union Agency for Fundamental Rights, *Protecting migrant workers from exploitation in the EU: workers' perspectives*, cit. at 6, 15.

incentive to employ irregular migrants instead of the former[15]. In the case-law, all the above-mentioned layers for the second level question are present: worker status, resident status and the social ("human being") status. In the ECJ decision, the worker status prevails over that of resident. However, and positively enough, the worker status considered is the most ancestral since it takes into consideration its social nature and not only the reasons of the market. This happens because the case involves an EU Directive that has, as its primary scope, a social objective and the appellant's need concerns an infringement of a "linked" right to his worker status.

As it will be affirmed thereof, the European Charter on social rights can be considered a step further along this path. The right to accommodation analyzed in the case-study is only one of the several social rights addressed in EU law and national law. To all these, the abovementioned ECJ approach can be extended in order to render them more effective. This process has many obstacles to overcome, if one considers the number of European directives that still have a limited approach. This is the case of Directive 36/2014/EU on seasonal workers, in which, even though there is an attention to social rights such as that for a decent accommodation, the very objective at the base of the European act remains, mainly, market-oriented (worker status) and suffers, in its effectiveness, of the political *impasse* on immigration policies, both at the EU and national levels.

To sum up, the paper aims to study how cross-border seasonal workers in agriculture could enjoy the social right to accommodation. To achieve this goal, the paper will proceed in two steps. In the first, it will analyze the problem of the right to accommodation for seasonal workers in agriculture from the perspective of the supranational level of the European Union, studying in detail the criticalities of the EU legal system. In the second, it will examine the same topic from the perspective of the national level, using Italy as a case-study. In the conclusions, the paper will propose some recommendations to improve the effective enjoyment of the right to accommodation of transnational seasonal workers in agriculture in the European multilevel

[15] S. Peers, *Irregular migrants and EU employment law*, available at http://eulawanalysis.blogspot.com/2014/11/irregular-migrants-and-eu-employment-law.html (5 February 2020).

system. Finally, it will address the issue also under the second level question.

2. Cross-border seasonal workers in EU: the toolbox

In general terms, seasonal work is a form of temporary employment linked to specific periods of the year and sectors, such as fruit pickers in the agricultural sector or cleaners in holiday resorts in the tourist industry. Cross-border seasonal worker in agriculture can be defined as the person who is required to move temporarily from his or her permanent residence in a country to another one in a different State, in order to do the job for which he has been employed[16]. Hence, they are often employed under temporary work contracts, through temporary work and recruitment agencies or subcontracting chains. Especially when not employed directly by the employer, they are often not provided with enough clarity and protection regarding information, liability, and rights[17]. Furthermore, it is important to underline the fact that cross-border seasonal work in agriculture can be carried out in the European Union by both EU citizens and non-EU citizens. Indeed, the EU attracts many mobile seasonal workers in agriculture from non-EU countries[18].

In theory, Cross-border seasonal workers enjoy a wide range of rights, which may vary depending on whether they are citizens of the Union or third countries. In concrete terms, although the situation differs from Member State to Member State, seasonal workers are often treated less favorably than permanent workers in terms of legal entitlements - for example, dismissal protection; benefits offered by employers, as with pension

[16] See K. Culp, M. Umbarger, *Seasonal and migrant agricultural workers: A neglected work force*, 52 AAOHN J. 383 (2004).

[17]See C. C. Williams, *Tackling undeclared work in the agricultural sector: a learning resource* (2019); C. Faleri, *Il lavoro povero in agricoltura, ovvero sullo sfruttamento del (bisogno di) lavoro*, 33 Lav. e Dir. 149 (2019).; J. Gertel, S. R. Sippel (eds.), *Seasonal workers in Mediterranean agriculture: The social costs of eating fresh* (2014); B. Mesini, *The stakes in the circular mobility of labour: the example of seasonal foreign workers in Mediterranean agriculture*, 11 J. Med. Geo. 105 (2009).

[18] See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive: when immigration controls meet labour rights*, 16 Eur. J. Migr. Law 439 (2014).

entitlements; other employment conditions, such as health and safety training[19].

Looking at the legal framework, seasonal EU workers enjoy the protection of Art. 45 TFEU, that is one of the cardinal principles of the European integration process. According to this principle, citizens' rights to work in another Member State are based on the legal framework of the Member State in which the work is carried out. This first type of rights-based labor mobility is increasingly integrated with the temporary labor mobility of posted workers based on the freedom to provide cross-border services and the freedom of establishment.[20]. Secondary EU law, then, protects also posted seasonal workers[21], even though these

[19] See A. F. Constant, O. Nottmeyer & K. F. Zimmermann, *The Economics of Circular Migration*, in A. F. Constant, K. Zimmermann (eds.), *International Handbook on the Economics of Migration* 55 (2013); B. S. Unsal-Akbiyin, K. Cakmak-Otlouglu, K. Ovgu, H. De Witte, *Job insecurity and affective commitment in seasonal versus permanent workers*, 24 Int'l J. Hum. Soc. Scie. 14 (2012).

[20] Workers making use of the freedom of movement under Art. 45 TFEU are subjected to the relevant laws and collective agreements of the host Member State and must be treated in the same way as nationals concerning the conditions of pay, dismissal, occupational health, and safety protection. Furthermore, workers who are EU citizens are entitled to the same social and tax advantages as those granted to nationals of the host Member State. Directive 2014/54/EU also entitles this category of workers to benefit from the assistance of the national bodies of the host Member State responsible for promoting equal treatment and support for workers and their families, to take fair action in the event of discrimination based on nationality, receive the support of trade unions and other subjects in any judicial and/or administrative procedure and be protected against exploitation (Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers Text with EEA relevance). In addition, Directive 2014/67/EU provides that the Member States must ensure that posted seasonal workers can use effective mechanisms to directly report their employers in the Member State to which they are or were posted and that trade unions or other third parties can initiate any judicial or administrative on behalf or in support of posted workers. In line with this directive, Member States should take measures to ensure the effective protection of workers' rights in the subcontracting chain. See in literature K. Davies, *Understanding European Union Law* (2019); P. Koutrakos P. (eds.), *Research Handbook on the Law of the EU's Internal Market*, (2017); N. Reich, A. Nordhausen Scholes & J. Scholes, *Understanding EU Internal Market Law* (2015); F. Weiss, C. Kaupa, *EU Internal Market Law* (2014).

[21] According to Art. 1, para. 2, of Directive 96/71/EC, EU seasonal workers employed in a Member State and sent by their employer to work in another Member State are considered posted workers. In addition, third-country nationals who work and legally reside in one Member State can be posted to

provisions do not apply to third-country nationals who reside and work outside the EU and whose employer is established in a third country.

The directive 2014/36/EU was the culmination of the Commission's efforts to harmonize seasonal worker's rights in the EU. The directive seeks to respond to the needs of Member States for a source of labour to fill the low skill, seasonal, and typically, precarious, jobs, that are not attractive to EU residents and citizens, while simultaneously minimizing the possibility of economic and social exploitation of third country migrant workers by providing them with the set of rights, including the employment rights to which resident seasonal workers are entitled. At the same time, the directive 2014/36/EU is designed to promote circular migration and to ensure that these low skilled workers do not become permanent resident of the EU, while also stemming what is perceived to be a flood of irregular migrant workers into the EU. However, it also allows workers to come back for several years in a row to perform seasonal work.[22]. Indeed, this directive applies only to third-country workers normally resident in non-EU Member States[23]. In contrast, the Directive does not apply to usually resident in the EU[24].

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another Member State by their employer and, in this case, are considered posted workers. See T. Novitz, R. Andrijasevic, *Reform of the posting of workers regime–An assessment of the practical impact on unfree labour relations*, 58 J. Common Mark. Stud. 132 (2020).; P. Van Nuffel, S. Afanasjeva, *The Revised Posting of Workers Directive: Curbing or Ensuring Free Movement?*, in N. Cambien, D. Kochenov & E. Muir, *European Citizenship under Stress*, 271 (2020); P. Van Nuffel, S. Afanasjeva, *The Posting of Workers Directive revised: enhancing the protection of workers in the cross-border provision of services*, 3 Eur. Papers 1401 (2018).

[22] See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive,* cit. at 3, 440.

[23] See Art. 2, para. 1, directive 2014/36/EU.

[24] In the EU legal framework, many workers who are nationals of third countries is covered by specific directives. Especially, the directive 2011/98/EU establish employment and social security rights of migrant workers. The Art. 12 Directive 2011/98/EU includes an elaborate provision on the right to equal treatment. Indeed, this article establish that extra-EU national workers – covered by directive 2011/98/EU - shall enjoy equal treatment with national of the Member State where they reside about employment conditions as well as for branches of social security, as defined in Regulation (EC) 883/2004. However, this directive does not create a right for third-country national workers to enter a Member State for the purpose of employment. It introduces a single application procedure and a single permit for both residence and access to employment on the territory of the host State. In addition, the directive

The directive sets out the conditions of both the admission and stay of non-EU citizens entering the EU in order to be employed as seasonal workers[25]. However, the directive itself is limited to new potential labour immigrants as its Art. 2, para. 3 of the directive 2014/36/EU requires residence abroad and, therefore, does not cover those living in a Member State already. Hence, the directive established a common set of rules for the admission, residence, and rights of non-EU seasonal workers. As seen, for example, it ensures decent working and living. Nevertheless, the obligations for the Member States regarding the latter point are rather weakly formulated in the directive so that there could be some doubts as to the attainability of this objective. In fact, it also introduces a controlled admission system that requires workers to have means to support themselves before admission. Indeed, for seasonal workers staying no longer than 90 days, Member States shall require that the seasonal workers will have no recourse to their social assistance system[26]; for those staying more than 90 days, Member States shall require that the seasonal workers will have enough resources during his or her stay to maintain her/himself without having recourse to their social assistance system[27]. These provisions imply that seasonal

2011/98/EU guarantees a set of rights for extra EU nationals' workers legally admitted to the Member States. Indeed, Art. 3 of this directive define a broad personal scope of this normative act. On one hand, the directive includes extra EU national workers who apply to reside in a Member State for the purpose of work and those who have been admitted for reason of work. On the other hand, the directive includes extra-EU nationals who have been admitted for other reasons but are permitted to work in a Member State in accordance with EU and national law. Nevertheless, many categories are excluded from the scope of the directive 2011/98/EU, for examples extra-EU national's family members of EU citizens, posted workers, intra-corporate transferees, seasonal workers, au pairs, asylum-seekers, third-country nationals enjoying temporary or international protection, persons who are long-term residents in accordance with directive 2003/109/EC and self-employed workers. See. H. Verschueren, *Employment and social security rights of third-country nationals under the EU labour migration directives*, 20 Eur. J. Soc. Sec. 106 (2018); S. I. Sanchez, *Single Permit Directive 2011/98/EU*, in K. Hailbronner, D. Thym (eds.), *EU Immigration and Asylum Law* 881 (2016).

[25] See Art. 1 Directive 2014/36/EU and L. Medland, *Misconceiving 'seasons' in global food systems: The case of the EU Seasonal Workers Directive*, 23 Eur. Law J. 157 (2017).

[26] See Art. 5, para. 3, Directive 2014/36/EU.

[27] See Art. 6, para. 3, Directive 2014/36/EU.

workers do not have access to the social assistance systems of the host Member State.

The directive establishes while cross-border seasonal workers enjoy of the equal treatment with national in the host Member State[28]. Art. 23 Directive 2014/36/EU expressly embodies the equal treatment principle, providing that seasonal workers are to be treated equally to nationals at least with regards to nine enumerated categories of rights. For example, seasonal workers are entitled to have the same access to goods, services - apart from housing services - and the supply of goods made available to the public. Moreover, migrant seasonal workers are entitled to equal treatment regarding education and vocational training, recognition of diplomas, certified and other professional qualifications, and tax benefits. Besides, Art. 23, para. 2, Directive 2014/36/EU provides for equal treatment about the right to strike and freedom of association[29]. The Directive 2014/36/EU also pays special attention to control measures and, paradoxically enough, to the implementation of rights[30].

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[28] See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive,* cit. at 3, 457.

[29] Art. 23, para. 1, Directive 2014/36/EU established the equal treatment for non-EU seasonal workers in terms of employment, including the minimum working age, and working conditions, including pay and dismissal, working hours, leave and holidays, as well as health and safety requirements in the workplace. Art. 23, para. 1, of the directive in question provides for various forms of social rights. Indeed, this article provides that migrant seasonal workers are entitled to social security defined in Art. 3 Regulation (EC) 883/2004. Art. 3 of Regulation EC no. 883/2004. Nevertheless, as far as social security is concerned, Art. 23, paragraph 2, letter i), directive 2014/36/EU allows the Member States to restrict equal treatment for social security by excluding family benefits and unemployment benefits. This means that the Member States may deny seasonal workers entitlement to these benefits even if they meet the conditions imposed on nationals of the Member States about these benefits and even if themselves or the employer paid contributions for the financing of the benefits. This provision clearly highlights the circular migration aspect of this Directive: seasonal workers are not supposed to remain in the host Member State after finishing their seasonal work, or to be joined by family members. It is unclear whether this would further deprive seasonal workers of entitlement to social benefits, including health care. See Y. Jorens, F. van Overmeiren, *General Principles of Coordination in Regulation 883/2004*, 14 Eur. J. Soc. Sec. 47 (2009); G. Straban, *Family Benefits in the EU: Is it Still Possible to Coordinate Them?*, 18 Maastricht JECL 775 (2016).

[30] See H. Verschueren, *Employment and social security rights of third-country nationals*, cit. at 9, 110. Indeed, Art. 24 Directive 2014/36/EU obliges Member States to provide for measures to prevent possible abuses and to punish infringements by including a system of monitor, assessment and inspection. In

Despite the normative framework just examined, cross-border seasonal workers remain, *de facto*, a very vulnerable category of workers. Exploitation of cross-border seasonal workers is regularly documented[31], and it includes underpayment and substandard work and living condition[32]. While these abuses are not unique to the seasonal workers, their temporary status and often limited ties to the host society mean they tend to be even more vulnerable to exploitation than other workers. Indeed, seasonal workers experienced different types of exploitation: very little or no pay for very long working hours; working conditions that violate labour standards and compromise – especially irregular – migrant workers' health and safety with access to medical care often denied by authorities; lack or a contract provided in a language that the worker did not understand; accommodation provided by the employer in unsanitary or degradation conditions[33]. For these reasons, the European institutions have often recommended EU Member States to implement measures to improve the working and living conditions of seasonal workers in the EU[34].

addition, Art. 25 Directive 2014/36/EU obliges Member States to ensure that there are effective mechanisms through which seasonal workers may lodge complaints against their employers, either directly or through third parties that have a legitimate interest in ensuring compliance with this directive - such as trade unions and NGOs.

[31] See A. Zawojska, *Exploitation of migrant labour force in the EU agriculture*, Ekon. Org. Gosp. Żyw. 37 (2016). According to the literature, exploitation is defined as an act of taking unfair advantage of another person in order to benefit oneself. Economic theories generally perceive labour exploitation as an act of capturing the fruits of hired labour through wage rate lower than worker's – marginal - contribution to the value of – marginal- output. In legal and practical terms, labour exploitation goes beyond unfair remuneration for work, taking also the forms of deception, debt bondage, abusive working and living conditions, and others.

[32] See L. Palumbo, A. Sciurba, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU: The Need for a Human Rights and Gender Based Approach* (2018).

[33] See European Union Agency for Fundamental Rights, *Protecting migrant workers from exploitation in the EU: workers' perspectives* 19 (2019).

[34] See Communication C/2020/4813 of 16 July 2020, from the Commission Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak.

2.1. Cross-border seasonal workers in agriculture: a vulnerable category

Among the various categories of seasonal workers, those who suffer the most exploitation are seasonal workers in agriculture[35]. In the EU agricultural sector, the exploitation of seasonal workers moving within the EU has become a very profitable but unethical activity[36]. The exploitation of seasonal workers is related to a mode of production that involves several actors along the entire supply chain. This chain is involved multinationals, corporations, large-scale distribution companies, temporary agencies, transport companies, and wholesalers, which aim to reduce production costs to increase profit margins, leading to a squeeze of workers' rights up to cases of severe exploitation and trafficking[37]. Several kinds of research point out worrying cases of exploitation in this sector not only of illegal foreign immigrants but also of persons with their legal status and European citizens[38]. In many Member States, the scarce supply of domestic labor threatens the survival of their agriculture. To compensate for the shortage of domestic workers, farmers legally or illegally procure workers from abroad with the possibility of severe hidden exploitation as workers may be entirely confined to remote rural areas or because there is a lack of workplace controls

[35] See G. G. Lodder, *Protection of Migrants Against Labor Exploitation in the Regulation of Migration in the EU*, in J. Winterdyk, J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking* 1361 (2020); C. De Martino, M. Lozito & D. Schiuma, *Immigrazione, caporalato e lavoro in agricoltura*, Lav. e dir. 313 (2016)

[36] See Z. Rasnaca, *Essential but Unprotected: Highly Mobile Workers in the EU during the COVID-19 Pandemic*, ETUI Res. Paper 9 (2020); L. Şmuleac, *Impact of COVID in Agriculture*, in M. K. Goyal, A. K. Gupta (eds.), *Integrated Risk of Pandemic: Covid-19 Impacts, Resilience and Recommendations* 197 (2020); K. Hooper, C. Le Coz, *Seasonal Worker Programs in Europe Promising practices and ongoing challenges*, Migration Policy Institute-Policy Brief (2020); A. Sommarribas, Z. Rozenberga & B. Nienaber, *Attracting and Protecting Seasonal Workers from third countries in the EU* (2020).

[37] See L. Palumbo, A. Sciurba, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU*, cit. at 2, 18; D. Perrotta, *Ben oltre lo sfruttamento. Lavorare da migranti in agricoltura'*, Riv. Mulino 29 (2014).

[38] See C. Costello, M. Freedland, *Seasonal workers and intra-corporate transferees in Eu-Law. Capital's hand maidens?*, in J. Howe, R. Owens (eds.), *Temporary Labour migration in the Global Era. The regulatory challenge* 103 (2016).

by national authorities[39]. Furthermore, in recent years there has been an increase in the number of migrant workers from different parts of the world and from Central and Eastern Europe who have been trafficked into the EU agricultural sectors for exploitation, ending up being exploited as forced labor[40]. In this context, foreign workers with irregular status, usually non-EU citizens, are the most susceptible to extreme exploitation. Indeed, all the significant risk factors for labour exploitation seem to be over-represented in the agricultural sector in EU Member States, especially with respect to migrant workers[41]. The precarious conditions create specific form of vulnerability for seasonal workers which are used and exploited, each one in a way, within the agricultural production system[42].

This happens notwithstanding several EU law instruments are used to contrast labour exploitation. According to Art. 153 TFEU, EU supports and complements the activities of EU Member States in different fields relating to work, including working conditions, social security and social protection of workers, conditions of employments for third-country nationals legally residing in EU, and equality between men and women regarding labour market opportunities and treatment at work. Furthermore,

[39] See K. Strauss, *Unfree Labor and the Regulation of Temporary Agency Work in the UK*, in J. Fudge, K. Strauss (eds.) *Temporary Work, Agencies, and Unfree Labor: Insecurity in the New World of Work* 164 (2013).

[40] See A. Zawojska, *Exploitation of migrant labour force in the EU agriculture*, cit. at 16, 52. Even though different sources tend to underline the vulnerability to labour exploitation of migrants in an irregular situation, empirical evidence and data from separate EU Member States also increasingly demonstrate how migrants possessing a regular permit to stay, and EU migrants, are not exempted at all from being exposed to sub-standard and exploitative working conditions. For example, is significant that, among the reported victims in the period 2013–2014, 70% of these were EU citizens6. Internal EU trafficking is widely represented, and EU citizenship does not appear to protect migrants from being involved in forms of severe exploitation. See Europol, *Situation Report, trafficking in Human Being in the EU, February, Europol Public Information, Document Ref. No 765175* (2016); ILO, *Fair Migration. Setting an ILO Agenda* 19 (2014); L. Palumbo, A. Sciurba, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU*, cit. at 22, 12.

[41] In particular, the risk factor for labour exploitation regards the worker's personal situations; workplaces; the legal and institutional framework; employers' attitudes. See European Union Agency for Fundamental Rights, *Protecting migrant workers*, cit. at 19, 25.

[42] See. L. Palumbo, A. Sciurba, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU*, cit. at 22, 16.

Art. 79 TFEU establishes that the EU adopt measures to combat trafficking in human beings, a crime that Art. 83 TFEU contemplates among those criminal offences for which the EU may establish minimum rules[43]. Moreover, the Art. 5 EU Charter of fundamental rights prohibits slavery, forced labour and trafficking in human beings and the Art. 31 EU Charter entitles every worker to fair and just working conditions. Several secondary legislations contain provisions that protect workers from exploitation, including seasonal ones. For example, Directive 2003/88/EC[44] gives workers the right to enjoy an annual rest period and a maximum weekly working time. In addition, Directive 2018/957/EU introduces the principle of equal pay for equal work between posted and local workers. Also applicable to all workers, whether they are EU nationals or not, are those legal instruments which relate to criminal justice. In particular, the directive 2011/36/EU[45] contains several provisions for the protection of victims of trafficking in human beings.

In this context, Directive 2009/52/EC[46] is the one that contributes most to the fight against the exploitation of illegal work. It establishes sanctions and measures against the employers of workers of illegally staying third-country nationals[47]. Firstly, Directive 2009/52/EC prohibits the recruitment of illegally staying third-country nationals and establishes minimum common rules and measures, including criminal and

[43] See S. Carrera, E. Guild, *Addressing Irregular Migration, Facilitation and Human Trafficking: The EU's approach*, in E. Guild, S. Carrera, *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU*, *Centre for European Policy Studies* 24 (2016).

[44] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time.

[45] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA. See for a comment E. Symeonidou-Kastanidou, *Directive 2011/36/EU on Combating Trafficking in Human Beings: Fundamental Choices and Problems of Implementation*, 7 New J. Eur. Crim. L., 465 (2016).

[46] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

[47] See Art. 2, let. b), Directive 2009/52/EC: "illegally staying third-country national' means a third-country national present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State":

administrative sanctions, which the Member States must apply against employers, that violate this prohibition[48]. This legislative act aims to make the employment of irregular workers less attractive, an occupation already characterized by low wages, poor working conditions, and even exploitation and non-payment of social security contributions[49]. However, that Directive 2009/52/EC does not contain an equal treatment clause that guarantees the nondiscrimination to this kind of worker in matters of employment and social security rights with nationals of the host Member State. Therefore, the social security rights for these workers is completely dependent on the national law of each of the Member States. Also, national authority shall repatriation of citizens of irregular third-country nationals, in this way, the expulsion measure jeopardizes their rights in employment and social security[50].

It should be emphasized that the link established by Directive 2009/52/EC between illegal work and irregular immigration can be considered both clear and wrong. The fight against irregular immigration is dealt with at the level of employment relationships on the basis that a key factor in the appeal of illegal immigration in the European Union is the possibility of finding work despite not having the required legal status[51]. Considering this, the directive prohibits the employment of illegally staying third-country nationals to combat illegal immigration. To this end, it lays down common minimum rules on penalties and measures applicable in the Member States to employers who violate this prohibition.[52] However, the directive incorrectly chooses the conditions on which to base the fight against the phenomenon of exploitation of illegal workers. Erroneously, it considers illegal work as the cause of the spread of illegal immigration. Instead, illegal employment is caused by restrictions on access to the regular labor market, and this pushes illegal immigration, promoting the exploitation of non-EU

[48] Art. 6 Directive 2009/52/EC concerns back payments to be made by employers.
[49] See H. Verschueren, *Employment and social security rights of third-country nationals*, cit. at 9, 106.
[50] See H. Verschueren, *Employment and social security rights of third-country nationals*, cit. at 9, 107.
[51] See Preamble 2 of the Directive 2009/52/EC.
[52] See Art. 1 of Directive 2009/52/EC.

workers. On these false premises is built, of course, an equally wrong regulatory apparatus.

The crisis caused by Covid-19 has shown the living and working conditions in in which seasonal workers work in the agricultural sector[53]. The Covid-19 pandemic gave more visibility to these conditions, and in some cases exacerbated them. Also, it showed that in some cases such problems can lead to the further spreading of infectious diseases and increase the risk of Covid-19 clusters. They made a crucial contribution to the internal market and continued to do so during the Covid-19 crisis, demonstrating once again the essential role that played in the production of food[54]. Indeed, since the outbreak of the Covid-19 pandemic, a rise in the demand for essential goods has meant that workers in core sectors, such as agri-food, have been recognized as fundamental in the economic and societal functioning of EU Member states. However, since workers face unprecedented mobility barriers, this poses a substantial risk to the agricultural sectors, and as a consequence, to the food supply in Europe. In some sending and hosting countries, steps have been taken to enable mobility for seasonal foreign workers or introduced exceptions to mobility restrictions to allow them in or proposed to regularize those already in the country but in an irregular situation to enable them to take up employment. At the same time, by immobilizing thousands of foreign seasonal workers from EU and non-EU Member states, border and mobility restrictions have caused labour shortages and food production losses in many EU countries. All this has highlighted how agri-food supply chain system rely significantly on migrant labour[55]. Agriculture in EU Member States heavily relies on seasonal workers, and that most of these workers are foreign workers, either coming from within or outside the EU. To respond to the labour shortage, national governments have adopted several to facilitate the mobility and recruitment of seasonal migrant workers. While some actions have consisted in the organization of charter flights to bring migrant workers to the EU, other measures have included short-term

[53] See A. Reid, E. Ronda-Perez & M. B. Schenker, *Migrant workers, essential work, and COVID-19*, 64 Am. J. Ind. Med. 73 (2021).
[54] See S. Olivier, *Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis: From Restrictive Selection to Selective Mobility*, 5 Eur. Papers 613 (2020).
[55] See L. Palumbo, A. Corrado, *Covid-19, Agri-food Systems*, cit. at 5, 5.

solutions[56]. In this framework, governments have envisaged three different strategies, but not mutually exclusive[57]. First, the Member States attract unemployed, inactive students, and other available citizens into the agricultural sector. In addition, the national authority must prolong the stay of regular migrants who are already in the country, regularize those who are not legally present to enlist them in the workforce[58], or enabling asylum seekers with pending applications to take up employment sooner than the normal procedure would entail. Moreover, Member States have activated schemes to bring in seasonal foreign workers, thus enacting exceptions to overall mobility restrictions.

Nevertheless, during the outbreak there have been several complaints by migrant farmworkers concerning wage deductions, housing conditions and violations of their rights. For example, in Spain, the decrease in seasonal workers has resulted in harder and more abusive working conditions[59]. While, in Italy, a lack of inspections due to the covid-19 outbreak prevention measures has contributed to increased recourse to irregular migrant workers working in exploitative conditions, who have offset the labour shortage of Eastern EU citizens[60]. In all EU Member States, very few companies have provided farmworkers with masks or other kinds of safety equipment and information[61].

The European Commission adopted a guidance at the end of July 2020 recommending that Member States improve the work and living conditions of seasonal workers from other Member States, principally in the agricultural sector[62]. In particular, the

[56] See L. Palumbo, A. Corrado, *Covid-19, Agri-food Systems,* cit. at 5, 6.

[57] See K. Hooper, C. Le Coz, *Seasonal Worker Programs in Europe*, cit. at 21, 11.

[58] For example, Italian authorities proposed the regulation scheme for undocumented migrants. See M. G. Giammarinaro, L. Palumbo, *Covid-19 and inequalities protecting the human rights of migrants in a time of pandemic*, 10 Migr. Pol. Prac. 22 (2020).

[59] See B. Mesini, *Seasonal workers in Mediterranean agriculture: flexibility and insecurity in a sector under pressure*, in B. Appay, *Globalization and precarious forms of production and employment: challenges for workers and unions*, 98 (2010).

[60] See A. Polomarkakis, K. Alexandris, *Health and Safety at Work in the Time of COVID-19: A Social Europe Reckoning?*, 11 Eur. J. .Risk Regul. 864 (2020); E. Heikkila, *Foreign seasonal migrants in agriculture and COVID-19*, 17 Migr. Lett. 563 (2020). See S. Kalantaryan, J. Mazza & M. Scipioni, *Meeting labour demand in agriculture in times of COVID 19 pandemic*, in *Publications Office of the European Union* 7 (2020).

[61] See L. Palumbo, A. Corrado, *Covid-19, Agri-food Systems,* cit. at 5, 5.

[62] See Communication C/2020/4813 cit. 4.

Commission invites the Member States to carry out information on obligations in occupational safety materials for seasonal workers. Furthermore, the European institution recommends that national authorities provide practical information to employers on how to implement the relevant legal provisions relating to seasonal workers in all sectors. Employers should carry out an adequate assessment of all possible occupational hazards and consequently establish preventive and protective measures, including the provision of the necessary protective devices, as well as to adapt these measures to changing circumstances. The European Commission invites the Member States to provide practical guidance to smaller companies, including through controls, on the most effective measures to be taken to contain health and safety risks, especially those related to Covid-19, together with information on the incentives that have been introduced. They could also provide specific support to smaller companies in sectors where the risk of spreading Covid-19 is highest. However, the Commission guidelines have an indicative nature and they are not binding for the Member States.

Despite the urgency of the situation and the need to prevent a shortage of seasonal workers, it is also important that their rights and social protection are not overlooked. More than ever, Member States must ensure the strict application of national provisions transposing EU rules on the occupational safety and health of workers, which require that occupational risks are assessed, and adequate preventive and protective measures are in place[63].

Furthermore, the EU Fundamental Rights Agency states that some of the most severe forms of labour exploitation were experienced by workers living at the workplace or at the employer's home, with the worker depending in the employer not only for accommodation, but also for food and for transport. These situations were identified especially among domestic, construction and agriculture workers[64]. These issues esteem not only extra EU national workers, but it regards also posted workers and seasonal workers which are national of EU Member States. According to the EU agency, some of the agricultural workers living in accommodation provided by the employer in France, the

[63] See Communication C/2020/4813 cit. p. 4 and see Z. Rasnaca, *Essential but Unprotected*, cit. at 21, 6.

[64] See European Union Agency for Fundamental Rights, *Protecting migrant workers*, cit. at 19, 54.

Netherland and Portugal, reported staying in places without electricity, with no or very limited access to running water and to sanitary facilities and/or with no bedding, being overcrowded or being accommodated in containers with very high temperatures and poor nutrition. Indeed, data collected by the EU Fundamental Rights Agency shows that malnutrition is one of the main reasons for workers in agriculture to flee from employers. The Agency reports that other issues relating to housing include worker being homeless, living on the street, in train station or in centers for homeless peoples. Moreover, in several cases, seasonal workers housed in illegal properties not connected to gas, water, and electricity. Also, seasonal agricultural workers live segregated within farms, often in derelict shelter without any facilities, despite the fact that farmers deduct the cost of this housing from wages[65]. The EU Fundamental Right Agency collected empirical data showing that seasonal workers, especially those dependent on the employer for food and accommodation, referred to their overall work conditions and treatment by employer as amounting to violence. Complementary data shows that suspected cases of sexual exploitation of migrant women in the rural zones of both Italy and Spain can be linked to the problem of "ghettoization" and inadequate accommodation conditions for migrant workers in rural areas. This kind of isolation often leads women to specific physical and psychological gendered abuses[66]. Data also shows that migrant women's family responsibility, especially for those with dependent children, can lead them not to report these in absence of viable working alternatives. This happens in the case of children left behind in the country of origin and, above all, when migrant women bring their children onto farms with them[67].

Compared to this serious situation, the existing supranational instruments could be able to put an end to these violations.

[65] See P. L. Martin, *Migrant Workers in Commercial Agriculture, in ILO, Sectoral Policies Department, Conditions of Work and Equality Department* (2016).
[66] See. L. Palumbo, A. Sciurba, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU*, cit. at 19, 16.
[67] See. L. Palumbo, A. Sciurba, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU*, cit. at 19, 17.

2.2. How to guarantee the effective enjoyment of the right to accommodation for seasonal workers in agriculture?

The right to benefit from adequate accommodation for cross-border seasonal migrant workers in agriculture is recognized in various international, European, and national acts[68]. In general, the primary law of the Union provides that the Member States and EU shall have as their objectives the promotion of employment, improved living and working conditions, to make possible their harmonization while the improvement is being maintained[69]. Furthermore, the provisions of the EU Charter of Fundamental Rights provide that, to combat social exclusion and poverty, the European Union recognizes and respects the right to social and housing assistance to ensure a decent existence for all those who lack enough resources, following the rules laid down by Union law and national laws and practices[70]. This principle could also concern the accommodation conditions of cross-border seasonal workers in agriculture, both European citizens and citizens of third countries.

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[68] See P. Gunderson, J. Dosman, *Safety and health in agriculture*, ILO Res. Report (2011); Z. Turhangullari, O. Özcatalbas, *The importance of extension for occupational health and safety in agricultural sector*, 12 J. Food Agr. & Env. 312 (2014). In particular, the Art. 19 ILO Convention n. 184/2001 "Concerning safety and health in agriculture", affirms that "national laws and regulations or the competent authority shall prescribe, after consultation with the representative organizations of employers and workers concerned: a) the provision of adequate welfare facilities at no cost to the worker; and b) the minimum accommodation standards for workers who are required by the nature of the work to live temporarily or permanently in the undertaking". Unfortunately, still in the EU, not all Member States have ratified the ILO Convention n. 184 on safety and health in agriculture. For example, only Belgium, Luxemburg, Portugal, Slovakia and Sweden have ratified this convention. Furthermore, Art. 19, para. 4, let. c), of the European Social Charter affirms that "to secure for migrant workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favorable than that of their nationals in respect of the following matters: c) accommodation". This Charter has been ratified by all EU member states.

[69] See Art. 151 TFEU. See H. Verschueren, *Employment and social security rights of third-country labour migrants under EU law: an incomplete patchwork of legal protection*, 18 Eur. J. Migr. Law 373 (2016).

[70] See Art. 34, para. 3, EU Charter of Fundamental Rights. See for a comment R. White, *Article 34–Social Security and Social Assistance*, in S. Peers, T. Hervey, J. Kenner & A. Ward (eds.), *The EU Charter of Fundamental Rights* 936 (2014).

Art. 34 EU Charter contains two different types of social rights: the right to access social security benefits and social services; the right to social and housing assistance. These prerogatives are recognized and must be valued in the manner established by Union law and following national regulations and practices. The article does not provide information on the organizational methods and forms through which to protect these rights, referring to national legislation and EU secondary legislation. According to the classification provided for in Art. 52 EU Charter and Art. 6, para. 2, TEU it should be recalled that in the Explanations to the Charter it is mentioned that Art. 34, para, 2, EU Charter constitutes a right in the proper sense, while para. 1 and 3 of Art. 34 of the Charter recognize principles[71]. Art. 34, para. 3, EU Charter, is dedicated to social assistance benefits and housing assistance, and it aims to ensure a dignified existence for all those who do not have enough resources. Furthermore, the Explanations to the Charter of Fundamental Rights indicate that the article draws inspiration from Art. 13, 30, and 31 European Charter of Social Rights. The first rule concerns the right to social and medical assistance and confirms that this notion includes benefits intended for those who do not benefit from benefits deriving from a social security scheme. Art. 30 and 31 of the European Social Charter concern the right to protection against poverty and social exclusion and the right to housing respectively.

The right to housing establishes that the Member States should guarantee access to the housing, adjust the cost of the same to the applicant's resources, and gradually overcome the homeless status. This should also include the fundamental right to housing assistance expressly recognized by Art. 34, para. 3, EU Charter[72].

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[71] R. White, *Article 34–Social Security and Social Assistance*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights*, 936 (2014). Si vedano, a tale proposito, S. Peers, S. Prechal, *Article 52 – Scope and interpretation of rights and principles*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), cit. at 55, 1506; A. O. Cozzi, *Diritti e principi sociali nella Carta dei diritti fondamentali dell'Unione Europea – Profili costituzionali* (2017).

[72] See G. Orlandini, W. Chiaromonte, *Commento all'art. 34*, in R. Mastroianni, O. Pollicino, S. Allegrezza, F. Pappalardo, O. Razzolini (a cura di), *Carta dei diritti fondamentali dell'Unione europea* 651 (2017). Si veda in questo senso W. Chiaromonte, S. Sciarra, *Migration Status in Labour and Social Security Law. Between Inclusion and Exclusion in Italy*, in C. Costello, M. Freedland (eds.), *Migrants at Work. Immigration and Vulnerability in Labour Law* 128 (2014); R. Nielsen, *The Charter of Fundamental Rights and Migrant Workers' Welfare Rights'*,

In the *Kamberaji*[73] case-law, Art. 34, para. 3, EU Charter was directly used by the Court of Justice to assess the correct application of EU law concerning the issue of equal treatment of long-term resident non-EU nationals. In particular, the Court of Justice clarified that the Member States is required to respect rights and principles enshrined in the EU Charter of Fundamental Rights and by Art 34, para. 3, EU Charter, cannot prejudice the useful effect of the directive in applying the principle of equal treatment[74].

However, EU secondary legislation contains some provisions which partially cover the right to adequate accommodation for cross-border seasonal workers, including those in agriculture. While, as discussed in the literature, the seasonal worker's directive includes rules on accommodation which third-country mobile seasonal workers must comply with to be issued a visa, work permit, or residence permit[75], and the revisited Posting workers directive makes host country rules on the conditions of accommodation, where they exit applicable to posted seasonal workers[76], there is no EU legislation in place to

in U. Neergaard, R. Nielsen, and L. Roseberry (eds.), *Integrating Welfare Functions into EU Law. From Rome to Lisbon* 97 (2009).

[73] Court of Justice, judgement of 24 April 2012, case C-571/10, *Kamberaj*, para. 86 and 87. See for a comment K. De Vries, *Towards Integration and Equality for Third-Country Nationals? Reflections on Kamberaj*, 13 Eur. Law Rev. 248 (2013); E. Bertolini, *Status giuridico dei soggiornanti di lungo periodo e diritto al sussidio per l'alloggio: precisazioni in materia di disparità di trattamento*, 12 Dir. pubbl. comp. Eur. 923 (2012); F. Costamagna, *Diritti fondamentali e prestazioni sociali essenziali tra diritto dell'Unione europea e ordinamenti interni: il caso Kamberaj*, 5 Dir. um. dir. int. 672 (2012).

[74] See G. Orlandini, W. Chiaromonte, *Commento all'art. 34*, cit. at 57, 664. Other important EU acts recognize the right to cross-border seasonal migrant workers in agriculture to enjoy adequate accommodation conditions. For example, the European Pillar of social rights contains a reference in point 8 of the Preamble. While the Community Charter of Fundamental Social Rights of Workers recognizes art. 7 the need to improve the living and working conditions of workers, including seasonal ones.

[75] See Art. 20 directives 2014/36/EU. See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive*, cit. 16, 458; F. Breggiannis, *An analysis of the EU Seasonal Workers Directive in the light of two similar regimes: Three dimensions of regulated inequality*, in 15 Eur. Lab. Law J. 9 (2020).

[76] See Art. 1, para. 2, let. h), Directive 2018/957/EU. See P. Van Nuffel, S. Afanasjeva, *The Revised Posting of Workers Directive*, cit. at 6, 275.

guarantee accommodation conditions for other seasonal workers[77].

Nevertheless, Art. 20 Directive 2014/36/EU establishes that accommodation for seasonal workers must be in accordance with an adequate standard of living. According to this rule, EU Member States must require proof that the seasonal workers will benefit from accommodation that guarantees them an adequate standard of living according to national legislation, for the duration of their stay. Also, the competent authority must be informed of any change of accommodation for the seasonal worker. If the accommodation is provided by the employer or through him, on the one hand, the seasonal worker may be required to pay a rent whose cost must not be excessive compared to his salary and compared to the quality of the accommodation. Besides, the rent cannot be automatically deducted from the salary of the seasonal worker and the employer must provide him with a rental contract or equivalent document, which indicates the rental conditions of the accommodation. Also, the employer is required to ensure that the accommodation meets the general health and safety criteria in force in each host Member State. Art. 20 Directive 2014/36/EU is linked to the Art. 6, para. 1, let c). This last Article states that the applications for admission to a Member State under the terms of this Directive for a stay exceeding 90 days shall be accompanied by evidence that the seasonal worker will have adequate accommodation or that adequate accommodation will be provided, under Art. 20. Article 20 of the directive in exam is designed to ensure that employers do not exploit migrant workers through excessive housing charges or providing unacceptable accommodation. It is within the discretion of the EU Member State to determine whether workers are free to arrange their own accommodation or whether it is the employer's responsibility[78]. Moreover, Art. 20 Directive 2014/36/EU reflects a human rights approach because an adequate standard of living is one of the fundamental social rights adopted in international and European conventions[79]. The improvement of living condition and the social

[77] See Communication C/2020/4813, cit., p. 8.

[78] See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive*, cit. at 16, 452.

[79] See C. Rijken, *Legal approaches to combating the exploitation of third-country national seasonal workers,* 31 Int'l J. Comp. Lab. Law Ind. Rel. 447 (2015). See, for instance, Art. 11 International Convention on Economic, Social and Cultural Rights, and Art. 31 European Social Charter.

inclusion of seasonal workers in the host EU Member States contributes to the long-term effectiveness of strategies against labour exploitation as part of a human rights approach[80]. However, at EU Member States level, there is great variation in how national authority and national legislation have further defined the concept of adequate living standards, including criteria which focus on living space, sanitation, safety, access to utilities, and the inclusion of basic facilities such as a hob and a toilet. The most often used criteria are sanitation, living space, and safety[81].

To ensure that seasonal workers effectively benefit from the provisions enclosed in Art. 20 of Directive 2014/36/EU, the competent national authorities must carry out intensive monitoring of the accommodation where they reside. The fact that accommodation is not sufficiently monitored is time and time again proven by cases of labour exploitation that come before the Courts, in which the abominable living conditions are an element of the exploitative conditions. National authorities responsible for ensuring labour standards oversee inspecting the accommodation provided to check that it meets the minimum standards. Other authorities, such as police or fire departments, border guards, immigration authorities, trade unions and tax authorities may also conduct inspections[82]. In other words, the effects of Art. 20 Directive 2014/36/EU depend on monitoring and effective enforcement by national authorities.[83] According to Art. 24 Directive 2014/36/EU, the EU Member States should have in place appropriate mechanisms for monitoring and ensure adequate inspections are carried out based on a risk assessment[84]. In addition, EU Member States should set up effective mechanisms by which seasonal workers may seek legal redress and lodge complaints directly or through relevant third parties. Workers should have access to judicial protection against victimization as a result of a complaint being made. However, a

[80] See C. Rijken, *Legal approaches to combating the exploitation*, cit. at 64, p. 447.
[81] See European Migration Network (2020). Attracting and protecting the rights of seasonal workers in the EU and the United Kingdom – Synthesis Report. Brussels: European Migration Network, p. 23.
[82] See European Migration Network (2020). Attracting and protecting the rights of seasonal workers in the EU and the United Kingdom – Synthesis Report. Brussels: European Migration Network, p. 26
[83] See C. Rijken, *Legal approaches to combating the exploitation*, cit. at 64, 448.
[84] See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive*, cit. at 16, 461.

strong position for labour inspectors has not been implemented in the seasonal worker's directives[85]. Indeed, Art. 24 Directive 2014/36/EU does not add any substantial obligations for inspectors and other monitoring bodies as it relies on national legislation for its implementation. Hence, this directive does not create new obligations for EU Member States on the monitoring of risk areas, such as housing or wage and working hours. Furthermore, the Directive 2014/36/EU fails to provide that if the employer does provide accommodation the seasonal workers should never be obliged to stay in such accommodation[86].

The directive establishes mechanisms for monitoring, evaluating, and verifying the compliance of employers with national instruments[87]. According to Art. 24, para. 1, Directive 2014/36/EU, Member States must establish measures to prevent possible abuses and to sanction infringements of this Directive, including monitoring, evaluation, and, where appropriate, inspection under national law or administrative practice. In particular, the Directive 2014/36/EU recommends using risk assessments, based on sectors and history of infringements, when selecting employers to inspect[88]. Furthermore, Art. 24, para. 2, Directive 2014/36/EU requires the Member States to ensure that the departments in charge of the labour inspection or the competent authorities and, where provided for by national law for national workers, organizations which represent the interests of workers have access to the workplace and, with the agreement of the worker, to housing.

In this context, the European Labour Authority[89] (ELA) could step up its efforts, effectively enforcing employers' obligations and ensuring suitable accommodation for its workers.

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[85] See C. Rijken, *Legal approaches to combating the exploitation*, cit. at 64, 448.
[86] See C. Rijken, *Legal approaches to combating the exploitation*, cit. at 64, 448.
[87] See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive*, cit. at 16, 462.
[88] See Preamble 49 of Directive 2014/36/EU.
[89] Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 (Text with relevance for the EEA and for Switzerland). See for a comment S. Giubboni, *The new European Labour Authority and social security coordination. Some preliminary remarks*, 19 Riv. dir. sic. soc., 521 (2018); S. Fernandes, *What is our ambition for the European labour authority?*, Jacques Delors Institute Policy Papers (2018).

Art. 2 Regulation (EU) 2019/1149 states that the objective of ELA is to contribute to ensuring the fair mobility of workers across the Union and to assist the Member States and the Commission in coordinating social security systems in the Union. To this end, and within the scope of application of Art. 1 Regulation (EU) 2019/1149, the European Authority facilitates and strengthens cooperation between the Member States in the application of the relevant Union legislation throughout the territory of the Union, including through concerted and joint inspections[90]. The European Labour Authority can allow the competent Member State authorities the right to organize and participate in joint cross-border inspection actions. Art. 8 and Art. 9 Regulation (EU) 2019/1149 define the coordination and support responsibilities regarding concerted and joint inspections and the modalities in which these are carried out. To improve the capacities of Member States to ensure the protection of persons exercising their right to free movement and to tackle cross-border irregularities relating to Union law within the scope of this Regulation, ELA may assist national authorities in carrying out concerted and joint inspections, including by facilitating the conduct of inspections following Art. 10 Directive 2014/67/EU. These inspections must take place at the request of the Member States or subject to their consent to the Authority's proposal. The European Authority provides strategic, logistical, and technical support to the Member States participating in concerted or joint inspections in the areas of its competence and with the utmost respect for confidentiality obligations. Inspections should take place with the agreement of the Member States concerned and take place in full compliance with the legislative framework or national practice of the Member States in which they take place. Member States should follow up on the results of concerted or joint inspections under national law or practice. Concerted and joint inspections should not replace or undermine national competencies. National authorities can also be fully involved in such inspections and have full authority.

However, there is no EU-wide mandate comparable to the competence in joint activities of other EU authorities such as the powers of inspection and coordinated action in the areas of antitrust law or consumer protection. Within the entire EU

[90] See Art. 2, let. b), Regulation (EU) 2019/1149.

territory, national compliance authorities carrying out their tasks jointly should be empowered to conduct all necessary company inspections and related investigations[91].

The establishment of ELA does not contribute to improving the sanctioning policy towards violators. Art. 7, para. 1 let. d), Regulation (EU) 2019/1149 states of the task of facilitating and supporting cross-border procedures for the execution of sanctions and fines. However, the internal market rules governing economic freedoms so far have few fine or redress mechanisms in the field of cross-border activities. Indeed, in the context of cross-border labour mobility, the lack of effective and dissuasive sanctions was noted. For example, different types of sanctions are not guaranteed in a transnational context. Furthermore, the detection of fraud or infringements in one Member State does not prejudice the initiation of comparable fraudulent activities in another Member State. The fine policy must fulfill two objectives: to punish and discourage. In this regard, the literature reports that violations damage the economy and long-term violations undermine the principles of free movement. The contribution of ELA could be useful in developing the main rules for a fine policy at EU level and for procedures in case of violation of the law[92].

Now, only the intervention of the national authorities can allow the full enjoyment of the rights of seasonal workers.

3. Accommodation rights in Italy: the extreme example of cross-border seasonal workers in agriculture

The case study here analyzed highlights that unacceptable living conditions exist also in contemporary Europe, for instance in Italy, with a variety of consequences of both legality and fairness. For example, extreme and unfair living conditions of immigrant workers - state of need –, including outside the agricultural sector, can lead to illegal occupations of spaces - criminal aspects -. The severity of these further consequences on human beings and on the system as a whole, of interacting legal and social domains, often depends on some legal prerequisites or on their absence, such as a legal resident or citizen status. This

[91] See J. Cremers, *The European Labour Authority and rights-based labour mobility*, ERA forum 31 (2020).
[92] See J. Cremers, *The European Labour Authority*, cit. at 76, 32.

makes for a sort of "vicious cycle" among systems, which has been already mentioned with respect to the *Tuïmer* case.

Hence, the purpose of this section is to explain how Italian authorities fulfill their obligations concerning the right of accommodation through law and public policies.

In the next subsections, three areas will be presented, since they each affect the condition of less advantaged groups: Immigration policy, Labor Law conditions in the agricultural sector, and the protection of the right to accommodation in Italy. However, their overlap will soon become evident as the argument is developed.

Before proceeding further, two preliminary aspects deserve to be mentioned.

The first is based on the connection between the European and the national contexts. Directive 2014/36/EU has been implemented in the Italian system through Legislative Decree n. 203/2016[93] and the latter has modified what can be called the Immigration Code (*Testo unico sull'immigrazione*, TUI)[94]. These recent normative interventions will be explored further below, but for the moment it is interesting to underline the fact that the only national legal source that received changes from the directive, so implementing EU Law, is that concerning immigration. Above all, this scenario appears notwithstanding that the European directive addresses conditions not only for entering the country but also for periods, more or less long, of permanence in the country[95]. This is

[93] Legislative Decree 29 October 2016, n. 203, *Attuazione della direttiva 2014/36/UE sulle condizioni di ingresso e di soggiorno dei cittadini di Paesi terzi per motivi di impiego in qualità di lavoratori stagionali*.

[94] Legislative Decree 25 July 1998, n. 286 (and following modifications), *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero* (since now on, *Testo unico sull'immigrazione*, TUI).

[95] Recital 41, directive 2014/36/EU: «Seasonal workers should all benefit from accommodation that ensures an adequate standard of living. The competent authority should be informed of any change of accommodation. Where the accommodation is arranged by or through the employer the rent should not be excessive compared with the net remuneration of the seasonal worker and compared with the quality of that accommodation, the seasonal worker's rent should not be automatically deducted from his or her wage, the employer should provide the seasonal worker with a rental contract or equivalent document stating the rental conditions for the accommodation, and the employer should ensure that the accommodation meets the general health and safety standards in force in the Member State concerned». Or 43: «Considering the specially vulnerable situation of third-country national seasonal workers

an element in support of the position according to which the protection of social rights still passes through other sectorial policies, mainly immigration and labor ones, with the consequence that this kind of general safeguard appears to be of a second level importance.

The second aspect concerns instead the social context and its practical needs, as an available and affordable workforce in the agricultural sector. The starting point for the following intellectual exercise consists in ignoring, for the moment, the social or legal composition of the workforce, for example the distinction by the categories of National/European/third-countries or that of the legal-illegal dichotomy. Simple as a marketing slogan, employers keep what is available at the lowest cost. If this "efficiency" point of view is taken as true, it can be also affirmed the condition that minimum social rights should be the same for all (an "equity" externality or starting point), but it is certainly possible that this same condition does not apply to the real world. In fact, and first of all, it can be more economically convenient to employ illegal immigrants, considering the scale of and number of immigration flows in the last years and migrants' vulnerability in terms of weak protections against breaches of the Law. Secondly, farmers can also hire a worker with a legal status - European or third-country national - but they are incentivized to exploit weaknesses of the social and legal orders, such as a lack of administrative controls and sanctions, to avoid contracting legal workers[96]. In

and the temporary nature of their assignment, there is a need to provide effective protection of the rights of third-country national seasonal workers, also in the social security field, to check regularly for compliance and to fully guarantee respect for the principle of equal treatment with workers who are nationals of the host Member State, abiding by the concept of the same pay for the same work in the same workplace, by applying collective agreements and other arrangements on working conditions which have been concluded at any level or for which there is statutory provision, in accordance with national law and practice, under the same terms as to nationals of the host Member State».

[96] A. Corrado, F.S. Caruso, M. Lo Cascio, M. Nori, L. Palumbo and A. Triandafyllidou, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?* (2018), 3. In 2015, nearly half of all agricultural workers in Italy were foreigners (both European and third-country workers). In 2015, 50 percent of all workers in the sector (Italian and non) were without a formal contract, but the vast majority (80 percent) were foreigners. Cfr. A. Corrado, *Migrant crop pickers in Italy and Spain*, Heinrich Böll Foundation e-paper 14 (2017): «A restrictive migration policy, together with a complicated, inefficient and bureaucratic system for admitting seasonal workers from abroad, as well as low quotas for

Italy, this reality resulted in paradoxical situations, such as that between 2006-2015, in the Foggia area, migrant farm workers preferred to stay in their existing ghettos, which are dispersed throughout the countryside, despite alternative solutions offered by public authorities[97]. During the Pandemic, the situation has deteriorated and, particularly in the South, thousands of migrant workers have been stuck in makeshift encampments, living without basic protections against Covid-19 (Bari-case, April 2020; Mondragone-case, June 2020)[98]. Now, differently from the pre-Pandemic context, hidden degraded social situations are becoming more easily evident than in the past, of isolated individuals in the countryside during harvest seasons. The sanitary-risk heightens public awareness and concern, hence weakening the urban/rural or center/periphery divide - and the

entering the country and difficulties with renewing work permits, are all factors that encourage irregular immigration or asylum applications by people, who want to enter the country to work. Irregular migrants and asylum seekers are at great risk of being severely exploited when working in agriculture. However, seasonal agricultural workers often also experience difficult working and living conditions because of a lack of housing and transport services». Concerning statistical data, see M. McBritton, *Lavoro extracomunitario, mercato del lavoro, contratti*, in 4 RGL 582-583 (2017). Yearly reports are also available on the official website of *Ministero del lavoro e delle politiche sociali*, https://www.lavoro.gov.it/priorita/Pagine/Pubblicato-il-X-Rapporto-annuale-Gli-stranieri-nel-mercato-del-lavoro-in-Italia.aspx (11 February 2021).

[97] A. Corrado, *Migrant crap pickers in Italy and spain*, cit. at 96, 14: «In 2006, in the province of Foggia (Italy), the Regional Government tried to establish a housing system for seasonal workers through local co-operatives, called "alberghi diffusi per i lavoratori stagionali". Yet cost cutting and delays meant that many such accommodations were converted for other uses (such as housing asylum seekers), and the isolated locations in the countryside, with no transportation available, meant that migrant farm workers had little incentive to stay there. This model was replaced by «emergency measures», and in 2015, three million euros were spent for setting up a camp of tents for 250 people (the number of seasonal farm workers for the tomato harvest is estimated to be around 7500). This camp remained unoccupied during the entire summer season […]».

[98] L. Palumbo, A. Corrado (eds.), *Covid-19, Agri-Food Systems*, cit. at 5, especially the *Italy Chapter*, 10: «In April, a group of workers in an industrial meat processing plant in the province of Bari were infected by the Covid-19 virus. In June, an outbreak hit Bulgarian Roma farmworkers living in degraded buildings in Mondragone (Campania). This situation and the ensuing lockdown of the entire residential area caused protests and clashes with the Italian inhabitants».

favoritism towards the first element of this juxtaposition[99]. Once mobility started to decrease, space as "territory" or *locus* of living has acquired more relevance. The real territory - as a portion of land with its social problems and as a different concept from that of space - has become a more central issue to public opinion since people spend more time where they live. Hence, when in June 2020 an epidemic outbreak hit Bulgarian Roma farmworkers living in degraded buildings in Mondragone (Campania), the lockdown of the entire residential area caused protests and clashes between the Bulgarian Roma and the Italian inhabitants, with a nationalist resonance.

3.1. Prerequisites for a legal resident-status: job and accommodation

The key issue for this section consists in explicating the prerequisites low-skilled workers need to fulfill to enter the country. This includes those in the agricultural sector - especially extra-EU - and mainly regarding affordable living conditions. Consequently, the above-mentioned Immigration Code (TUI) will be analyzed.

First, the discipline of Visas comes into relevance[100]. In order to clarify access conditions to the country, the picture can be simplified by considering the following two elements: job and accommodation. In terms of accommodation, to have *ex ante* access to social housing services is impossible since for this purpose, according to the Italian legal order, a minimum period of legal residency in the country is necessary and the amount of time depends on regional and municipal regulations[101]. Hence, the *ex ante* availability of accommodation depends entirely on the market and on public policies that create it or on personal connections.

Then, to be considered legally resident, apart for obtaining a Visa, third-country nationals (TCNs) must apply for a residency permit (*permesso di soggiorno*) within eight days of their entrance to the country[102]. For foreign workers, the residency permit depends

[99] E. Olivito, *Le diseguaglianze fra centro e periferie: lo sguardo miope sulle città*, 2 Costituzionalismo.it 73-74 (2020).
[100] Art. 4, TUI.
[101] See paragraph n. 3.3. for more information on the point. However, the social housing system is explicitly mentioned among temporary and long-term reception facilities by paragraph 4 and 6, art. 40, TUI.
[102] Art. 5, TUI.

on the work contract (*contratto di soggiorno per lavoro subordinato*)[103]. The latter must guarantee minimum standard accommodation and the payment of a return flight to the employee's country, in order to be considered adequate for requesting a residence permit[104]. "Minimum standard" means that the accommodation respects social housing requisites, according to national legislation[105]. For seasonal workers the residence permit can last no more than nine months. If the worker can demonstrate having had at least one seasonal contract in the last five years, he or she can obtain a multi-annual permit of up to three years for the same kind of job activity. In this case, the migrant must return periodically to his or her country during the off-season as indicated by his or her contract[106].

Regions are obliged to provide short-term reception facilities for immigrants with a legal "residence status" but in temporary economic difficulty, hence unable to aspire to decent living conditions[107]. However, to be equalized to Italian citizens in access to standard social housing services, the immigrant must have a "special" legal "resident-status". This means he or she should have had a residence permit of at least two years validity,

[103] Art. 5-*bis*, TUI.

[104] See specifically for seasonal workers, art. 24, TUI, as modified by Legislative Decree n. 203/2016 that implements directive 36/2014/EU. It establishes the administrative procedure to follow by the employer, in addition to general consequences and specific sanctions in case of irregularities (par. 12 and 15).

[105] See paragraph n. 3.3. for more information on the point.

[106] Art. 5-*bis*, TUI.

[107] Par. 4, art. 40, TUI. Regions should provide these services in collaboration with provinces and municipalities (in addition to voluntary associations). The services to offer can be the same provided to Italian and European citizens and they are subjected to minimum payment conditions. Discrimination in the provision of social assistance, also for short-term immigrant with a legal "resident-status" (less than a year), is forbidden by art. 41, TUI. What is the meaning of "discrimination" is specified by art. 43, TUI, such as under paragraph 2, letter: «c) chiunque illegittimamente imponga condizioni più svantaggiose o si rifiuti di fornire l'accesso all'occupazione, all'alloggio, all'istruzione, alla formazione e ai servizi sociali e socio-assistenziali allo straniero regolarmente soggiornante in Italia soltanto in ragione della sua condizione di straniero o di appartenente ad una determinata razza, religione, etnia o nazionalità;», among which discrimination for the provision of an accommodation by whoever. Art. 40, TUI also provides instruments for guaranteeing legal protection against discrimination.

based on a stable work contract, or a permit card (*carta di soggiorno*)[108].

To sum up, there is not any *ex ante* effective enjoyment of the social right to accommodation, as considered from the perspective of the provision of a public service. Indeed, having access to accommodation is a prerequisite to obtain a Visa, and is the foreign worker's responsibility. Once the TCN worker has accessed the country legally, he can receive temporary support in case of economic difficulties - such as reception in private or public facilities under a sustainable payment regime. This is extremely relevant in the context of low-skilled workers and an employment sector with a high risk of exploitation. In this sense, it is established that a special kind of residence permit can be provided for reasons of social protection, for example when situations of violence and cases of severe exploitation by criminal organizations towards foreign people emerge during administrative and criminal controls. However, this provision has been limited in its application[109]. It is important to point out that a large portion of the immigrant population in the country, for various reasons, does not enjoy a legal resident status[110]. According to TUI, for example, the category of asylum seekers is entitled to temporary accommodation in emergency hotspots[111]. Formally, their situations in terms of access to social

[108] Par.6, art. 40, TUI.

[109] Art. 18, TUI.

[110] Asylum seekers and migrants' vulnerability have been significantly exacerbated by the provisions of the new Law Decree n. 113/2018 on immigration and security (the first so called "Decreto Salvini"), declared partially unconstitutional in 2020 and now partially reversed by Law Decree n. 130/2020. The 2018 Decree abolished residence permits for humanitarian reasons, which were rolled out twenty years ago by Legislative Decree No. 286/98 to protect people in situations of humanitarian need, including vulnerable migrant women and minors as well as victims of torture. A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 6: «In Italy, the lack of an effective entry system for foreign workers capable of meeting labor demand in sectors such as agriculture has mainly been offset by the arrival of growing numbers of migrants from Eastern EU countries as well as by non-EU asylum seekers and refugees. In the case of asylum seekers, the interplay between lengthy asylum procedures — which to date take an average of 13-14 months — and a lack of adequate hosting and protection mechanisms in the country increases their vulnerability, thereby heightening the risks of exploitation».

[111] Art. 10-*ter*, TUI.

accommodation will differ once their requests for international protection are accepted or denied[112]. Nevertheless, a percentage of the immigrant population stays and works on the territory irregularly, without any legal status with which to enjoy social services and with a less than effective fundamental rights protection regime. For instance, to have access to standard social housing public services, immigrants need a minimum period of legal residency. It is curious enough to observe that an "accommodation", as a pre-condition, is also necessary in case of a request for a long-term residence permit[113].

3.2. The "default" disadvantaged worker-status in the Italian agricultural sector

At this point, the current section will try to consider "worker-status" independently from that of "resident". An abstract approach to the reasoning could be a fruitful path especially for analyzing seasonal workers in the European agricultural sector. Then, a more legal approach will be adopted.

At least in theory, a labor contract in agriculture should guarantee a set of minimum rights to the worker, for instance a fair salary. In other terms, he should receive a kind of remuneration - also in the form of "in kind" benefits - that can help him to achieve a dignified standard of life, such as decent accommodation. Hence, in applying Labor Law conditions no incongruences should emerge from the very moment that the supply of labor – determined also by free movement in the EU and

[112] Artt. 10-17, TUI. See also Law Decree n. 451/1995 on the control system at the borders; legislative decree n. 251/2007 on the asylum seeker status and on people more in general in need of international protection; legislative decree n. 25/2008 on minimum standards in procedures by Member States for granting and withdrawing refugee status (implementing the that time Council Directive 2005/85/EC and now replaced by directive 2013/32/EU of the European Parliament and of the Council); legislative Decree n. 142/2015 that implements European provisions on laying down standards for the reception of applicants for international protection (directive 2013/33/EU). Art. 22, Legislative Decree n. 142/2015 provides that also asylum seekers can work under certain conditions. However, a residence permit for asylum seekers can not be transformed in a work residence permit. On the Italian system of reception facilities for immigrants (especially with the pending recognition of the "asylum seeker" status) see M. Savino (ed.), *La crisi migratoria tra Italia e Unione Europea* (2017), especially chapters I and II and, specifically on the right to accommodation, chapter VI, 195 ff.

[113] Art. 9, TUI but also for family reunification, *ex* art 29, TUI.

conditions of the immigration policy - fit the labor demand perfectly - need of workers - and that the multilevel legal framework is based on premises of justice and fairness. This being the theory, why do many injustices emerge anyway in practice in contemporary Europe?

To answer the question, at least two "states of the world" must be recalled. On the one side, the market-approach at the supranational level should be taken into consideration, as already presented in section 2 for the European level. One of the main features of the European agri-food sector, which has led to problems related to Labor Law and social and immigration policies, has been the industrialization/digitization of the primary sector, even though this process has created less labor intensiveness. Then, this first element is combined with a second characteristic: a weaker union structure, that also means the contractual position of the worker is less protected than in the industrial sector. The third feature consists instead in the prevalent criteria of efficiency along the entire productive chain - with policies of driving prices down that can affect also the cost of labor. Finally, favoritism for large retailers must be taken into consideration as an element that also causes the depopulation of territories where once there were numerous small and medium-sized enterprises. This last process can evolve into less social control in the absence of local communities, with consequences, for example, on integration processes of immigrants[114].

On the other side, there are specific weaknesses of the Italian agricultural sector. First of all, a large portion of the workforce is foreign and irregular[115]. Secondly, there is a high

[114] For this group of arguments, see C. Faleri, *Il lavoro povero in agricoltura*, cit. at 17, 149-152. Cfr., adding the Italian literature to the European one mentioned in par. 2.2.: I. Canfora, *La filiera agroalimentare tra politiche europee e disciplina dei rapporti contrattuali: i riflessi sul lavoro in agricoltura*, in DLRI 259 ff. (2018); A. Frascarelli, *L'evoluzione della Pac e le imprese agricole: sessant'anni di adattamento*, 50 Agriregionieuropa (2017); M. Giaconi, *Le politiche europee di contrasto al lavoro sommerso. Tra (molto) soft law e (poco) hard law*, LD 439 (2016); A. Riccaboni, S. Cresti, *L'agricoltura nel Mediterraneo di fronte alle questioni globali*, Economia e società 335 (2016); D. Schiuma, *Il caporalato in agricoltura tra modelli nazionali e nuovo approccio europeo per la protezione dei lavoratori immigrati*, 1 RDA 87 (2015).

[115] Since the incidence of irregular working positions on the total working population in agriculture is already strong, considering also Italian citizens. A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 3, referring to 2015 CREA report. Cfr. C. Faleri, *Il lavoro povero in agricoltura*, cit. at 17, 151.

incidence of organized criminal activities, especially in the South, that make up the so-called "agromafia" system: control of the flow and type of products as well as to determine their prices and marketing methods, counterfeiting Protected Designation of Origin (PDO) and Geographical Protected Indication (GPI) products, fraud in the management of EU Common Agricultural Policy and, finally, the incidence of illegal recruitment practices and the role of *caporali* or gang leaders[116]. The last point is an issue that overlaps labor with international trafficking in human beings but also with the *de facto* presence of irregular foreign workers. Apart from irregular immigrants that enter the country for humanitarian reasons, to arrive and stay irregularly in the country for a certain period of time can be the only means for economic immigrants to directly establish a fruitful network for future job opportunities with local employers. Once a network has been created, the migrant will leave to then return to the country and stay legally on invite from an employer, considering the conditions required by the national immigration policy.

Furthermore, there are specific failings of the corresponding national legal framework. Some solutions offered to face structural peculiarities of agricultural activities contribute to exacerbating the sector weaknesses, to the detriment of EU-citizens as well (such as seasonal workers from Eastern Europe). In this case, the national legal system is unable to guarantee effective equal rights under European Law.

First, there is the *ab origine* discontinuity of the job activity, since it follows the harvest seasons. Hence, a discontinuity in salary follows a natural discontinuity in time (seasonality), with great disadvantages for workers. A public policy in response to this "in time" peculiarity can be the flexibility of the job-market, through special contracts, for example the *voucher* system. The latter has been implemented in Italy but reduced, also recently (2015), to a limited number of sectors and beneficiaries (with specific restrictions in agriculture, where there are already exceptions to the standard discipline of temporary contracts due to the intrinsic seasonality of the working activity)[117]. The reason

[116] A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 4.

[117] See C. Faleri, *Il lavoro povero in agricoltura*, cit. at 17, 157-159. The *voucher*, like a *sui generis* form of labor contract, has been established with art. 70, Legislative Decree n. 276/2003. In the first years following the adoption of the norm, the

lies in its not being able to guarantee long-term stability to working conditions, since employers prefer these contracts to more stable, but also more expensive, contract solutions. In addition to this problem, an even worse falling wages process can be added in time of economic crisis, with the concurring event of the increase in cheaper undeclared work in agriculture, where systems of controls, inspections and sanctions are less enforced[118].

Secondly, employers also suffer the consequence of crises, as the pandemic has proved. In the absence of sufficient workflow from abroad, the sector was not able to produce enough for the correspondent external and internal demand[119]. The Italian government adopted measures in March and April 2020 to provide financial support packages during the crisis, also covering

legislator modified the source of law (with Law Decree n. 2003/2005), providing the admissibility of the voucher system in the agricultural sector but with the limitation to carry out only short-term and occasional harvests, by students and pensioners. Later, Law Decree n. 112/2008 expanded the application of the 2003 and 2005 provision to all kinds of working activities with a seasonal feature, always executed by students, retired persons and housewives. Also with the more recent modifications to art. 70, introduced by Law n. 92/2012 and 99/2013 with the intention to intensify the use of the instrument, hence abandoning the enumerative list of activities allowed (the only limit is now the maximum amount of salary paid in a year), the limitations for the agricultural sector has remained in force, with regard to retired persons and young people with less than 25 years old (and enrolled in school or university courses). To sum-up, the intention has always been to reduce the use of the legal tool in the agricultural sector, in order to avoid its substitution with alternative (more guaranteed) forms of subordinate labor contracts. This limitation has been partially confirmed in 2015, with art. 48, Legislative Decree n. 81/2015. Beneficiaries of vouchers are all the operators in productive sectors, hence also the agri-food one, with the limit of 3.000 euro per year by people that are leaving unemployment situations and receiving public economic support. However, the legislator has forbidden the use of vouchers in the execution of works or services procurement contracts, except for specific hypotheses, to be identified by a decree of the Ministry of Labor and Social Policies, after consulting the social partners, thus introducing a limitation which, as far as it affects all productive sectors, it is certainly destined to have a significant impact in the agricultural sector, given the widespread use of these contract instruments.

[118] C. Faleri, *Il lavoro povero in agricoltura*, cit. at 17, 151-152.

[119] L. Palumbo, A. Corrado, *Italy Chapter*, in L. Palumbo, A. Corrado (eds.), *Covid-19, Agri-Food Systems*, cit. at 5, 4: «National farmers' organisations sounded the alarm on labor shortages due to border restrictions, especially of Eastern European workers (mainly Romanians, Poles and Bulgarians). This has highlighted the dependence of the agri-food sector on cheap and exible migrant labor, one of the results of power imbalances in long supply chains».

the agri-food sector[120]. In order to address the labor shortage in the sector, it also adopted a specific Law decree in May, as a post-pandemic economic stimulus. It is a temporary scheme to formalize all kinds of "irregular employment relationships"[121]. However, the provisions were not sufficiently economical for employers and the governmental solution received few applications[122].

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[120] L. Palumbo, A. Corrado, *Italy Chapter*, in L. Palumbo, A. Corrado (eds.), *Covid-19, Agri-Food* Systems, cit. at 5, 10: «establishing for instance an increase from 50 to 70 percent in advance payments from the Common Agricultural Policy (CAP) as well as incentives for exports. The measures also provided for a two-month €600 transfer to agricultural workers on short-term contracts, subsidised lay-offs for all employees in the sector and rolled out social protection for seasonal workers. However, many migrant farmworkers who were employed informally could not benefit from this aid».

[121] *Ivi*, 10: «The scheme establishes two channels. The first allows employers to apply for a fixed-term employment contract for foreign nationals who were in the country before 8 March 2020 or to declare the existence of an irregular employment relationship with Italian citizens or foreign nationals. Undocumented migrants receive a residence permit for work reasons. The second channel allows foreign citizens with a residence permit that expired after 31 October 2019 and who can prove they worked in the above-mentioned sectors before this date to apply for a six-month temporary residence permit to look for a job in these sectors. The temporary permit can be converted into a longer residence permit for work reasons. In both channels, if the employment relationship ends, foreign nationals have the possibility of applying for a one-year residence permit to seek employment». The so called *sanatorie* must be considered as emergency-measures, similarly to the other instrument known as *Decreto flussi*, even if it is now adopted yearly. The issuance of one or more "flow decrees" by the President of the Council of Ministers is functional to annually plan the maximum quotas of non-EU foreign citizens to be admitted into the Italian territory, divided by subordinate and seasonal work - on the basis of a recruitment proposal name made by an Italian or foreign employer regularly residing.

[122] *Ibidem.* Among the shortcomings, the plan suspended some ongoing criminal and administrative proceedings against employers, but the regularization had a monetary cost and there may not be sufficient advantages to convince employers to regularise employment relationships. In addition to it, the conditions required to apply, especially for the second channel, significantly limit its scope, leaving numerous migrants in situations of irregularity and precariousness. It should be noted that, although the success of the measures adopted in 2020 is questionable, the implementation of the decree nevertheless required some efforts on the part of the public administration, in order to follow up on the requests. 2021, therefore, saw the paradoxical result for which the public administration was apparently not able to fulfill all the requests relating to fixed-term employment contracts before their expiry. Consequently, the Ministry of the Interior, given the difficulties presented by the Ministry of Labor

Thirdly, the incidence of criminality and irregularity in the sector should require a reasonable number of administrative inspections and criminal controls. As has observed in a previous study, in recent years the number of labor inspections in the agricultural sector has dropped from 14,397 in 2006 to 7,265 in 2017 and, hence, the belief in better-targeted controls is statistically unfounded since the percentage ratio between the number of inspections and employment irregularities has essentially remained the same, at around 70 per cent[123]. The labor inspections system is one of the key points addressed by European documents following the adoption of directive 36/2014/EU, for example in addressing another element of weakness in the sector: subcontracting[124]. The 2020 pandemic measures initially undermined the actions of illegal gang leaders (*caporali*) over the recruitment, transport and accommodation of farmworkers. However, police controls have progressively relaxed, mirrored by the corresponding rise in situations of criminality and exploitation[125]. In addition, the insufficiency of labor inspectorate controls in the sector increased during the pandemic[126] and this has contributed to an increase in recourse to irregular workers[127]. Given the original humanitarian residence permit has been withdrawn by TUI with the so-called *Decreto Salvini* of 2018, and

and Social Affairs and many immigration desks (*Sportelli unici per l'immigrazione*), has adopted an internal note stating that, in the event of a deadline of the contract and in case of pending procedure to regularize the position of the immigrant, the government cannot proceed with the issue of the residence permit (Circular no. 3020 of 21 April 2021). At a later stage, the Ministry then adopted a new circular, mitigating the effects of the previous provisions but always with heavy administrative burdens for the immigrant (*Circular no. 3625 of 11 May 2021*).

123 A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 6

124 See art. 24, directive 36/2014/EU and, for example, Council Conclusions (9 October 2020), 11726/2/20 REV 2, *Improving the working and living conditions of seasonal and other mobile workers*.

125 However, a National plan for the fight against the so called *caporalato* has been approved in 2020, for the period 2020-2022. See *Piano nazionale di contrasto al caporalato*, available here https://www.lavoro.gov.it/temi-e-priorita/immigrazione/focus-on/Tavolo-caporalato/Documents/Piano-Triennale-post-CU.pdf (Jan 2022).

126 A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 7.

127 L. Palumbo, A. Corrado, *Italy Chapter*, in L. Palumbo, A. Corrado (eds.), *Covid-19, Agri-Food Systems*, cit. at 5, 9-10.

that permits were issued mainly where international protection was rejected, the result is that the new legislation will entail an increase in the number of rejected asylum requests as well as of migrants losing their current legal status, which, in turn, will boost the number of irregular migrants that inevitably will remain on the territory, who will be even more vulnerable to exploitation[128].

Finally, the Italian approach to the sector seems quite advanced in terms of repression, even though an efficient prevention strategy seems more suitable to address the previous recalled structural problems[129]. In fact, art. 603-*bis* of the Criminal Code has been modified by the important Act addressing undeclared work and labor-exploitation in agriculture[130]. The article targets both abusive gang leaders and employers who take advantage of workers' precarity and insecurity. The amendment also provided for mandatory arrest *in flagrante delicto* and mandatory confiscation of proceeds and property as well as introducing corporate criminal liability. Moreover, in 2012 new paragraphs were also added to art. 22, TUI. According to this article, employers, who have the intention of calling workers from

[128] A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 6.

[129] For example, "regularization" schemes, preferably permanent and not temporary; more efficient systems of inspections and controls; an easier access to the country by foreign people for working reasons, in terms of *ex ante* conditions - since the 2016 modifications to TUI have already started to simplify the system of residence permit for "circular" workers, according to European provisions -.

[130] Law n. 199/2016. See A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 7: « […] Law established that victims of labor exploitation may have access to Article 18 of the Consolidated Act on immigration (Legislative-Decree No. 286/98), which provides victims of violence or severe exploitation with a long-term assistance and social integration programme, as well as - in the case of non-EU migrants - a residence permit for social protection, regardless of their cooperation with law enforcement (the so-called 'social route' to protection). […] In addition, Law 199/2016 amended the regulation concerning the Network of Quality Agricultural Work ('Rete del Lavoro agricolo di Qualità), which includes companies that respect fair labor and employment conditions in the agricultural sector. Although the law provides for structuring the Network into 'territorial sections' (local branches) to develop active labor market policies and promote actions to address labor intermediation, cooperation among the state bodies involved and from companies has been very low, with only a handful of them registering to join».

abroad, must present an *ex ante* permission to the territorial immigration office, proving the suitability of the accommodation offered and providing the draft of the contract. The recent modifications regard consequences of crimes committed in the past or irregular behaviors put in practice in view of this procedure by employers. Specifically, if during the preceding the office verifies that the employer was previously involved in illegal trafficking of human beings, was condemned under art. 603-*bis* of the Criminal Code or for employing immigrants without a valid residence permit, the officer must refuse the employer's request of authorization. The procedure must have the same outcome if the office ascertains that the documentation presented by the employer is false or if the foreign worker does not appear at the same office to sign the labor-contract, a precondition for the residence permit[131]. In 2016, with the implementation of directive 36/2014/EU and the new art. 24, TUI, the immigration discipline further specifies consequences for irregular behavior by employers of seasonal workers, referring mainly to the norms established in the above-mentioned art. 22. However, the updated provision enumerated an additional list of conditions that impede the employer from asking for a labor contract in favor of a foreign worker if the employer has been subjected to sanctions for provision of irregular work; if the employer's firm was insolvent or a shell company; if the employer did not respect his legal obligations towards workers in terms of social security, taxes or labor rights as provided by collective labor agreements; if, in the last twelve months, the employer fired workers to hire new ones. Moreover, the new discipline on seasonal work now provides the payment of damages by fraudulent employers in favor of workers[132].

The effectiveness of all these repression provisions depends on the system of inspections and criminal controls[133]. Inspections and control procedures can start *ex officio* or *ex parte*, through complaints, petitions or lawsuits. However, the regulatory

131 Par. 5-*bis* and 5-*ter*, art. 22, TUI, as added by Legislative Decree n. 109/2012, that implement directive 2009/52/EC, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

132 Par. 14, art. 24, TUI (art. 17, directive 36/2014/EU).

133 L. Calafà, *Undocumentes work (by foreigners) and sanctions. The situation in Italy*, 321 Working paper "Massimo d'Antona".it (2017).

vacuum is precisely at both these levels in the national legal system, considering that the European directive has been quite vague on these points (art. 24, on monitoring and inspections, and 25, on petitioning) and that seasonal/foreign workers are normally quite reluctant to denounce. Sanctions and judicial reviews, at a second stage in the process to obtain effective protection of individual and collective rights, cannot work properly without an efficient detection system[134].

In conclusion, workers in the Italian agricultural sector comprise a vulnerable category, regardless of their territorial origin. The main reasons are the diffusion of atypical contracts and the "demand-driven" nature of employment relations. Foreigners are especially vulnerable to extortion if the definition of directive 36/2014/EU counts: "[…] the position of vulnerability […] as a "situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved". In this sense, Italy has made an evaluation subject to criticism by deciding to condition the Visa and the residence permit to strict job prerequisites (see par. 3.1) and by not providing an efficient mechanism for permanent regularization. Especially if the immigrant is irregular, he will enter the world of undeclared work - often in the hands of organized crime -, where there are no effective means of legal protection and no easy ways to get out.

The result is that the "worker-status" for one of the most disadvantaged human beings in society is not a sufficient theoretical starting point to guarantee legality and human and broader social rights – such as that to accommodation -, especially if the context in which the status of worker is defined, suffers structural abnormalities, mainly the myth of efficiency despite economic and social unsustainability.

3.3. The Right to accommodation in Italy and foreign people: human being-status versus (legal) resident-status and worker-status.

In this section the Italian legal order concerning the social right to accommodation will be analyzed, with the final goal to isolate the group of the most disadvantaged people - irregular seasonal foreign workers - for this paper. The right to accommodation will be looked at in depth mainly in terms of a

[134] V. Papa, *Dentro o fuori il mercato? La nuova disciplina del lavoro stagionale degli stranieri tra repressione e integrazione*, cit. at 3, 386-389.

public service that provides, in the most extensive meaning, social housing facilities (Public Law), even though the relevance of two other aspects must not be forgotten. On one side, the explicit attention paid by the Constitution to promoting homeownership through private savings - i.e. through public policies supporting easier access to credit by families - (art. 47, Cost.) [135]. On the other side, it is useful to underline its nature as an effective right that can guarantee other fundamental rights[136]. This includes a more basic idea of the right to accommodation that is able to balance subjective legal positions in Private Law - i.e. in cases of abusive residency or, on the contrary, of limits to evictions - or to guarantee effective enjoyment of basic freedoms - i.e. the right to private property, to the protection of family and privacy, etc. - [137].

The Italian Constitution does not explicitly mention a right to accommodation, differently to other countries such as Spain or Sweden[138]. However, the Constitutional Court has had many occasions to affirm its nature as a fundamental and a social right, even though it appears conditioned by the availability of public resources when considered in its "social" nature[139]. Hence, at least in a theoretical sense, the right to accommodation applies

[135] F. Bilancia, *Brevi riflessioni sul diritto all'abitazione*, 3-4 Istituzioni del Federalismo) 232-233 (2010).

[136] P. Chiarella, *Il diritto alla casa: un bene per altri beni*, 2 Tigor: rivista di scienze della comunicazione 140 ff. (2010).

[137] T. Martines, *Il «diritto alla casa»,* in N. Lipari (ed.), *Tecniche giuridiche e sviluppo della persona umana* (1974), 391-405. Cfr. G. Alpa, *Equo canone e diritto all'abitazione*, Politica del diritto 159 ff. (1979); D. Sorace, *A proposito di "proprietà dell'abitazione", "diritto d'abitazione" e "proprietà (civilistica) della casa"*, Rivista Trimestrale di Diritto Processuale Civile 1177-1778 (1977). A. Pace, *Il convivente* more uxorio*, il «separato in casa» e il c.d. diritto «fondamentale» all'abitazione*, in 1 Giurisprudenza costituzionale 1801 ff. (1988).

[138] G. Marchetti, *La tutela del diritto all'abitazione tra Europa, Stato e Regioni e nella prospettiva del Pilastro europeo dei diritti sociali*, 4 Federalismi.it 7 (2018). Cfr. R. Rolli, *Il diritto all'abitazione nell'Ue*, in A. Bucelli, *L'esigenza abitativa. Forme di fruizioni e tutele giuridiche. Atti del Convegno in onore di Gianni Galli* (2013), 51-61. C. Hunter, *The right to housing in the Uk* and G. G. Alvarez, *El derecho a la vivienda en España*, in 3-4 Federalismi.it 310 and 325 ff. (2010).

[139] Constitutional judgements n. 47/1987, n. 404/1988 but especially n. 252/1989. To remember this approach in the Italian legal order F. Bilancia, *Brevi riflessioni sul diritto all'abitazione*, in *Istituzioni del Federalismo*, cit. at 24, 234 ff. Cfr. G. Marchetti, *La tutela del diritto all'abitazione tra Europa, Stato e Regioni e nella prospettiva del Pilastro europeo dei diritti sociali*, cit. at 137, 9. Traditionally, for the definition of the right to accommodation as a "right of great uncertainties" see F. Modugno, I «*nuovi diritti» nella giurisprudenza costituzionale* (1995).

indistinctly to Italians and foreign people, due to the existence of the principle of equality[140]: what should really matter, in terms of fundamental rights, is the status of human being (and not citizenship or the resident status), as well as, in terms of social rights, the "worker-status", even though a labor perspective does not exhaust the entire range of enjoyable social rights[141].

The following analysis will briefly rebuild the overlap among national, regional and local regulations on the topic. Aspects of immigration policy will also be considered for foreign people. A last brief overview will be dedicated to a judicial review in favor of the latter.

In 2008, a national law decree was adopted, known as the "Housing Plan"[142]. In fact, there is a National legislative competence to establish minimum standards for access to social housing by disadvantaged people. In the past, the regions appealed the Constitutional Court for possible conflicts between national and regional competences[143]. The Court affirmed that social public housing is a "transversal subject" that involves different material segments for which the government and regions share legislative competences[144]. Regions have a complementary role in urban planning, in the management of the public and private real estate at the disposal of social services and in the provision of the latter, taking into consideration also local autonomy[145].

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[140] F. Modugno, I «*nuovi diritti» nella giurisprudenza costituzionale*, cit. at 134, 61 ff.
[141] See, for a controversial constitutional judgement, the decision n. 32/2008, against which C. Corsi, *Il diritto all'abitazione è ancora un diritto costituzionalmente garantito anche agli stranieri?*, in 3-4 Dir. imm. e citt. 141 ff. (2008). Cfr. P. Bonetti, L. Melica, *L'accesso all'alloggio*, in B. Nascimbene (ed.), *Diritto degli stranieri* (2004), 1017 ss. F. Scuto, *Il diritto sociale alla salute, all'istruzione e all'abitazione degli stranieri «irregolari»: livelli di tutela,* 2 Rassegna parlamentare 381 ff. (2008). M. Meo, *Il diritto all'abitazione degli stranieri quale presupposto per un'effettiva integrazione*, in F. Rimoli (ed.), *Immigrazione e interazione. Dalla prospettiva globale alle realtà locali* (2014), 415-417; F. Pallante, *Gli stranieri e il diritto all'abitazione*, 3 costituzionalismo.it 135 ff. (2016).
[142] Art. 22, Law Decree n. 112/2008.
[143] Constitutional judgment n. 94/2004. See also Constitutional judgment n. 121/2010.
[144] S. Civitarese Matteucci, *L'evoluzione della politica della casa in Italia,* 1 Riv. Trim. dir. pubbl. 163 ff. (2010).
[145] E. Balboni (ed.), *La tutela multilivello dei diritti sociali* (2008), especially chapter V. Valenti, *Il diritto alla casa nelle politiche regionali*.

Differently to the Constitution, many regional statutes and laws explicitly recognize a right to accommodation, hence filling the national legal gap on the point and providing *in melius* conditions[146]. Hence, many plans for social housing have been established territorially, mixing different approaches. However, not all of them have concretely addressed the entire population spectrum, since more detailed regional and local regulations have often conditioned the access to social housing services to a legal permanency in the region or in the municipality for a minimum period, normally in terms of years (within a range of 2-10 years). In some cases, they have established a calculation system for priority lists, giving significant weight to residency variables, instead of considering as prevalent the real difficulties for families. As a result, foreign people suffer institutionalized discrimination since it is precisely the lack of legal regularization or the difficulties to obtain long terms residence permits that can cause the most disadvantaged situations and, at the same time, these factors are the exact impediments for the access to social services[147]. Two events indicate attempts to change this *status quo*. Firstly, in 2014, a national law modified the "Housing Plan", providing a more extensive definition of social housing[148]. Secondly, in the same year, the Constitutional Court declared illegal the term of eight years residency required by *Regione Valle d'Aosta* to have access to social housing[149].

In terms of judicial review, regarding the right to accommodation, the preference will be here for the subjective position of foreign people, since this case-study has shown how their position is one of the most disadvantaged in the country, both as workers, immigrants and human beings, especially in the seasonal agricultural sector. Policy-sectors taken into consideration are often overlapped in terms of jurisdiction. For example, the Italian immigration discipline, that also involves the right to accommodation, divides the jurisdiction between Civil

[146] See for example the statues of Regione Abruzzo, Regione Lazio and Regione Piemonte.
[147] R. Lungarella, *Guerra tra poveri per la casa. Tra italiani e stranieri*, *www.lavoce.info* (2015).
[148] Art. 10, co. 3, Law n. 47/2014.
[149] Constitutional judgment n. 168/2014.

and Administrative tribunals[150]; the doctrine agrees on the fact that clarity lacks in this system of concurring jurisdictions and that traditional parameters able to justify certain administrative judicial powers do not often apply in the sector - with further complications[151]. Moreover, the right to accommodation can be

[150] To rebuild the division between the two jurisdictions is for example M. Noccelli, *Il diritto dell'immigrazione davanti al giudice amministrativo*, 5 *Federalismi.it* 5 ff. (2018). Concerning the civil jurisdiction, new tribunal sections were established in 2017, specialized in immigration, international protection and free movement of European citizens (artt. 1-5, Law Decree n. 13/2017). To sum-up, in terms of extra-Eu voluntary migration (i.e. for economic and working reasons), Civil tribunals have jurisdiction on measures of refoulement, expulsion, execution and on measures concerning family reunifications. Civil tribunals have also competences concerning involuntary migration *ex* art. 35, Legislative Decree n. 25/1988: recognition of the asylum seeker status or of that of subsidiary protection in case of non-recognition of the asylum seeker status but there is a serious risk for personal security in case of refoulement. There was also a status for humanitarian reasons, before the 2018 so-called *Decreto Salvini* (see above in footnotes). In its place, there are temporary residency permits for special reasons (such as medical care, social protection, working exploitation, etc.). Administrative tribunals, on the opposite, have jurisdiction in special case of public power exercise for voluntary migration, with and without discretion, as provided by TUI: all controversies on Visa and residency permit procedures (with the today exception of family reunification); against procedures for the emersion of irregular work conditions, refoulement-expulsion-execution measures for public order and security (art. 13, co. 1, TUI) or for terrorism prevention (Law n. 155/2005). In the subject of involuntary migration, administrative tribunals have jurisdiction, again, on special cases. For example, there is that of temporary residency permit procedures for the following special reasons: wars, natural disasters and other events of particular seriousness in extra-Eu countries (as provided by Legislative Decree n. 88/2003, that implement directive 2001/55/EC); or against decisions of prefects that revoke reception measures in favor of immigrants as a sanction for their not compliance with settled conditions of permanency. Civil tribunals have jurisdiction also on citizenship, except for the one "for concession" (art. 9, Law n. 91/1992).

[151] For example, the distinction between the exercise of discretionary and not discretionary administrative powers; neither the classical distinction between subjective rights and legitimate interests. Hence, both jurisdictions obtain the same results in terms of foreign people protection even though under different legal reasoning and justifications. See M. Noccelli, *Il diritto dell'immigrazione davanti al giudice amministrativo*, cit. at 149, 12. In case of administrative jurisdiction, judicial powers increase, normally, when public administration discretion decreases. However, since the foreign people positions and the guarantee of fundamental rights, administrative judges are called to a different balance in terms of administrative discretion and their power to judge. For example, the author recalls case-law concerning foreign people's "income

observed, as already seen, under other perspectives. These include from within different jurisdictions, for example through Criminal judicial review in the case of substandard residency or through Labor judicial review in the case of irregular contracts without guarantees of a decent accommodation by employers in seasonal agriculture.

However, the choice of this last section has been to prefer the perspective of a right to accommodation as a fundamental social right or a positive freedom that needs a public policy - or a public service - in order to be enforced. As seen, the right to accommodation as a public service is not the only or the prevalent reading key, but probably the most fruitful one if one wants to explore the effectiveness of this social right[152]. Hence, public

capacity" as a proof for the confirmation procedure of residency permits, where the administrative judge has adopted a wide meaning of "income capacity", judging the effective and concrete contribution of immigrants to the national community; or in case of foreign people considered "dangerous" for the community by administrative decisions, hence intended for expulsions; etc. As observed in the essay abovementioned, the administrative judges do not jeopardize the scope of TUI concerning the access to the country. However, once the person is in the country, regularly or irregularly, the tendency is to recognize the fullest set of rights is possible.

[152] Social housing is expressly defined as a service of general economic interest by art. 1, par. 5, Ministerial Decree 22 April 2008, that has been the first to introduce the notion of social housing (*edilizia residenziale sociale*, different from *edilizia residenziale pubblica in* the sense that the first one is a more general category where the second one is included). Also, the Council of State had the occasion to clarify the definition of social housing, even though in a more restricted way to the previous one (Cons. St. Ad. Plen., 30 January 2014 n. 7). In par. 6.1.1., the tribunal has affirmed that social housing, as a (also local) public service of general economic interest, addresses disadvantaged citizens that are unable to afford a market-price rent but that, at the same time, can not have access the *edilizia residenziale pubblica* since they lack of standard conditions requested for traditional public facilities of social housing (in concrete terms, the service provide rents at affordable prices). In the judgment, the application of the Public Procurement Code has been excluded since the service under scrutiny falls in the category of granting a "public service" (*concessione di pubblico servizio*). In the legal science, see P. Saggiani, *La tutela del diritto all'abitazione per le fasce più deboli della popolazione: tra politiche abitative esistenti e alcune proposta per il social housing*, 17 Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente 440 (2019), where the author affirms that in the Republic, in its different territorial declinations, the right to accommodation has a "pretensive charge" towards public powers by people, especially disadvantaged ones (since the nature of social housing). Hence, public powers should have a "duty" of doing or providing "something" (a public service) in favor of citizens, or of those assimilated to them, and under reasonable

administrations exercise their powers according to a set of rules and rights in the provision of the public service, at times under a judge's scrutiny. In terms of social housing, jurisdiction is divided, again, between ordinary and administrative courts on the basis of the phase of the procedure: before and after the allocation decision. Before it, the procedure is considered of administrative relevance[153].

In terms of denied access to this public service to foreign people, the jurisdiction is even more unstable. If the issue is amplified in terms of discrimination, it is possible to find judgments by ordinary tribunals even though administrative decisions are involved. For example, the quite recent decision in favor of Mr. Majdi Karbai against *Regione Lombardia*, for the adoption of a discriminatory regulation which impeded access to public real estate to foreign people with an international/humanitarian protection status, with a long-term residency permit but unable to demonstrate their lack of property of a home in their original country, or in absence of a legal residency or of five years working activity[154]. At the same time, it is possible to find judgments by administrative courts on similar

conditions. Cfr. E. Bargelli, *Abitazione (diritto alla)*, in *Enciclopedia del diritto* (2013), 7. See also S. Civitarese Matteucci, *L'evoluzione della politica della casa in Italia*, cit. at 143, 167.

[153] Judgments of the Court of Appeal (ordinary jurisdiction) 14267/2019; n. 9918/2018; n. 3623/2012. Judgments of Regional Administrative Courts: TAR Lazio Roma n.6272/2016; Tar Lazio n. 12307/2016; Tar Puglia n. 315/2017; Tar Puglia n. 401/2017.

[154] Order 27/07/2020, Ordinary court of Milan (Civil section), case n. r.g. 23608/2018. Apart for the object of the controversy, it is interesting that the case arrived in front of the Constitutional Court, which declared unconstitutional the regional regulation (judgment n. 44/2020), and that Regione Lombardia asked for a changing jurisdiction in favor of administrative tribunals, obtaining a rejection. With similar conclusions of the Ordinary Court of Milan, the even more recent Constitutional judgment n. 9/2021, regarding a law adopted by Regione Abruzzo in 2019. The latter provided a further documentary burden to citizens of third countries with the fiscal residency in Italy that wanted to apply for social housing accommodation, hence causing discrimination (specifically, a proof of the lack of property of an adequate home in the original country by all the components of the family). In addition to it, the Regional Law also conditioned unreasonably the score obtained by each applicant to the period of residency in a municipality of the Region. The provision has been considered illegal by the Constitutional Court (as already in the judgments n. 281 and n. 44/2020, n. 166 and n. 107/2018, n. 168/2014, n. 172 and n. 133/2013 and n. 40/2011).

situations and outcomes[155]. Comparable results to those of judicial decisions can be observed in municipal practices as well[156].

In conclusion, concerning the case of foreign seasonal workers discussed in this paper, the analysis in the previous paragraphs has pointed out that the employer must guarantee the provision of adequate accommodation to the worker. This provision applies to European citizens and immigrants with a regular residence permit. In case of irregularities perpetrated by the employer, the worker lacks the effective enjoyment of a social right to accommodation - notwithstanding the new provision of monetary compensation by the employer if the crime/irregularity is detected by the authorities - and in case of workers with a single or double irregularity: in the "resident-status" and in the "worker-status".

What are missing are both the fulfillment of duties by the employer, as prescribed by Law, and public policies in favor of a social right to accommodation open to all, as human-being with existential difficulties[157].

In the first case, the detrimental effect on the enjoyment of an effective social right, with probable consequences on the enjoyment of fundamental freedoms, derives from particularly vulnerable working conditions. Even though a solution has been found in the field of Labor Law, so following the Constitution according to which important social rights depend on the broader worker-status and not on being citizens, the specificity of seasonal workers, especially foreign people, seriously threatens the right to

[155] On the calculation system for priority lists for accessing procedures to *edilizia residenziale pubblica*, the administrative court of Regione Liguria has recognized a discriminatory behavior perpetrated by the Municipality of Genova, considering the additional points for having the Italian citizenship (TAR Liguria, n. 1354/2011).

[156] For example, in 2009, the Municipality of Calenzano (Florence, Regione Toscana) provided subsidies for rents to foreign people notwithstanding they did not respect the prerequisites provided by the national law n. 133/208 (10 years of permanence in Italy and 5 in the Region). The municipal executive decided to allocate part of the resources in favor of foreign people, differently excluded by the procedure. See CONSPE, in collaboration with the *Presidenza del Consiglio dei ministri* (*Dipartimento per le pari opportunità*), *La discriminazione nell'accesso all'alloggio. Analisi dei settori pubblico e privato*, 2010, 28-29.

[157] B. Pezzini, *Una questione che interroga l'uguaglianza: i diritti sociali del non-cittadino*, Associazione italiana dei costituzionalisti. Annuario 2009 (2010), 178 ff. Cfr. G. Bacherini, *Immigrazione e diritti fondamentali. L'esperienza italiana tra storia costituzionale e prospettive europee* (2007), 266 ff.

decent accommodation. In fact, even though the worker-status is not built on a citizenship prerequisite, the idea at the very base is influenced by market-oriented logic, limiting the importance of the social dimension. In addition, the fact that a specific regulation on seasonal work is provided by TUI, makes evident the tendency of the Italian legislator to think in terms of securitization, instead of integration.

In the second case, what prevails in Italian public policies in favor of a social right to accommodation is a lack of attention to real equality and a tendency to excessive legality. Notwithstanding the theoretical debate, the effective enjoyment of adequate accommodation for the least advantaged people depends in practice on the traditional idea of citizenship, as derived by the idea of the Nation.

4. Conclusions

The Covid-19 crisis has sharply exacerbated the structural inequalities that characterize the socio-economic systems of EU Member States, including Italy, disproportionately impacting people most affected by discrimination and social exclusion[158]. This happens, above all, regarding cross-border seasonal workers in the agricultural sector. As the literature has underlined, the recourse to flexible, cheap and low-cost labor in the agriculture sector is driven by an interplay of factors[159]. This system takes advantage of the inadequacies of European and national policies on migration and labor mobility[160]. On the one side, seasonal workers in agriculture, and cross-border workers, have been recognized as essential workers needed to feed EU Member States, during the Pandemic. On the other side, the recent social crisis shows that not even the status of worker allows the enjoyment of access to social rights in the EU multilevel legal system. Cross-border, seasonal workers in agriculture - both EU and non-EU citizens - have difficulty accessing the right to suitable

[158] See M. G. Giammarinaro, L. Palumbo, *Covid-19 and inequalities protecting the human rights of migrants in a time of pandemic*, Migr. Pol. Pract. 21 (2020); D. Mangan, E. Gramano, M. Kullmann, *An unprecedented social solidarity stress test*, 10 Eur. Lab. Law J. 247 (2020).

[159] See A. Corrado,*Is Italian Agriculture a "Pull Factor" for Irregular Migration – And, If So, Why*?, cit. at 96.

[160] See M. G. Giammarinaro, L. Palumbo, *Covid-19 and inequalities protecting the human rights of migrants in a time of pandemic*, cit. at 157, 22.

accommodation in EU Member States. Thus, agricultural seasonal workers in live in unsafe and unhealthy housing such as in shacks near farms. In this way, they are highly exposed to exploitation. Directive 2014/36/EU has established some standards to promote better protections for these workers, but most governments do not invest enough resources in monitoring mechanisms to detect instances where employers break the rules and exploit workers[161]. National and European institutions must take additional steps to support cross-border seasonal workers in agriculture directly, such as investing in pre-departure orientation to ensure they are aware of their rights and the services available to them in the destination Member States. Furthermore, host national authorities could map and design initiatives to address issues facing specific kinds of workers, such as women. Thus, dedicated monitoring, outreach, and support mechanisms for such workers could be provided. Lastly, in concrete terms, the improvement in the access to social rights for seasonal workers in agriculture – both EU citizens and non-EU citizens – depends on a broader access to the labor market, efficient inspection systems, exchange of information on the rights possessed by each category and on the national effort for social public policies and social integration.

Hence, difficulties remain for the enjoyment of social rights by the most vulnerable individuals. No predominant legal status can effectively guarantee access to them. For example, difficult access to the labor market by non-EU citizens fosters irregular immigration and leads to greater exploitation for these vulnerable individuals. At the level of the Member States, social citizenship is understood as an institution that gives citizens the right to enjoy a minimum of economic well-being and inclusion through the sharing of social solidarity created within the community.

EU citizenship, on the contrary, does not offer a similar right to enjoy a level of social security across Member States. Rather, in the European legal framework, the EU social citizenship configures a set of prerogatives that allows European citizens – who make use of the freedom of movement (Art. 21 TFEU) – to access, under certain conditions and without discrimination based on nationality (Art. 18 TFEU), the welfare system of the host Member State. Indeed, these rights are subject to the conditions

[161] See Hooper K., Le Coz C., *Seasonal worker programmes in Europe: promising practices and ongoing challenges* 12 (2020).

established by Directive 2004/38/EC. The European worker is the central element of the single market. For this reason, he or she enjoys full rights of free movement and residence. These rights entail equal treatment between EU migrant workers and workers of the host Member State, as regards employment, remuneration and other working conditions. The right to receive equal treatment means the worker must also have his social rights guaranteed in the host Member State. This is meant to better integrate the EU resident into the host society and allow him or her to fully benefit from the freedom of movement. By contrast, EU economically inactive citizens enjoy freedom of movement and the unconditional right of residence only for a period of three months. It should be noted that social solidarity is shared based on the individual's participation in the market and of her contribution to the financing of the welfare of the host Member State. Therefore, greater sharing brings with it greater enjoyment of social rights in the European legal area. However, European citizens who do not produce wealth enjoy a lesser share of solidarity. On one hand, the Court of Justice's case law – in the aftermath of the economic crisis – confirms this approach. Indeed, the Court of Justice's restrictive interpretation of access by economically inactive EU citizens to the welfare state has strengthened the logic that sharing social solidarity is subordinated to the contribution that the subject provides to the production of economic wealth in the host Member State. On the other hand, the restrictive approach on the sharing of solidarity is confirmed by the situation of low skilled workers, often non-EU citizens. They do not enjoy easily social protection and social security to protect them from the risk of living in poverty. In fact, non-EU citizens access social rights in a different way than EU citizens[162]. Moreover, some categories remain excluded from Directive 2014/36/EU, for example, third-country family members of EU citizens, posted workers, intra-

[162] Directive 2011/98/EU is relevant to the employment and social security rights of migrant workers. It introduces a single application procedure and a single permit for both residence and access to work in the territory of the host State. Furthermore, the directive guarantees some rights for workers who are nationals of third countries legally admitted to the Member States. The art. 3 of Directive 2011/98/EU has a broad scope. Indeed, it includes both workers who are nationals of third countries who apply to reside in a Member State for work reasons and those who have been admitted for work reasons, as well as third-country nationals who have been admitted for other reasons but are authorized to work in a Member State, under Union or national law.

corporate transferees, seasonal workers, au pairs, asylum seekers, third-country nationals enjoying temporary or international protection, persons who are long-term residents under Directive 2003/109/EC and self-employed workers[163]. The employment and social security of third-country nationals are guaranteed by a series of EU directives. They aim to promote and regulate labor migration from third countries to the EU, and they make the EU more attractive for labor migration from outside the EU and to partially harmonize rights and procedures to create a level playing field between the Member States. In particular, the EU directives on labor migration take a sector-by-sector approach. EU institutions have failed to adopt a comprehensive and common EU policy on labor migration and the corresponding legal instruments. For this reason, EU leaves room for the Member States to provide exceptions regarding the right to equal treatment in terms of employment and social security rights.

However, also at the Member States level, social citizenship is living through a period of crisis. In the case-study for Italy, the perspective of the right to accommodation as a fundamental (social) right is probably the most suitable. In the structure of Immigration Law in Italy, what emerges is that the "right to security" is inversely proportional to the "security of rights"; however, when immigration policies (but also policies addressing market failures) are not supported by adequate social interventions, what is obtained is social deconstruction and the "depression" of the Welfare State[164]. On the contrary, the solidarity principle should be always conditioned by a territorial criterion. Hence, foreign people should have access to social

[163] Art. 12, para. 1, let. e), of the directive no. 2011/98/EU, read in conjunction with its art. 3, par. 1, let. c), establishes an equality clause in access to social security, providing that a third-country national admitted for work purposes and third-country nationals admitted for purposes other than worker but who can work benefit from the same treatment reserved for citizens of the Member State in which they reside by social security sectors, as defined in Regulation 883/2004.

[164] See for these argumentations M. Noccelli, *Il diritto dell'immigrazione davanti al giudice amministrativo*, cit. at 149, 36 and M. Ruotolo, *Sicurezza, dignità e lotta alla povertà. Dal "diritto alla sicurezza" alla "sicurezza dei diritti"* 241 (2012). Cfr. G. Tropea, *Homo sacer? Considerazioni perplesse sulla tutela del migrante*, Riv. dir. amm. 861 (2008). On the evolution of the Italian Welfare State, see V. Satta, *Profili evolutivi dello Stato sociale e processo autonomistico nell'ordinamento italiano* (2012), especially chapter III.

services and to minimum standards of care, in equal terms to citizens, just because they are on a shared *locus*, in the same community, and especially if they need assistance as human beings in precarious conditions[165]. Apart for the role of Constitutional and supranational courts in favor of an abstract equality of rights and non-discrimination[166], especially the legislator, public administrations[167] and (ordinary and administrative) tribunals can play an important role in guaranteeing an "effective" enjoyment of fundamental rights to foreign people. In fact, effectiveness is the real core of social rights, in terms of the realization of a social citizenship[168].

Notwithstanding the difficulties observed in the theorization and implementation of a social citizenship at EU and national level[169], some case-law mentioned during the paper, even though limited, can be considered a further step towards an effective social right in both the EU legal order and in the country

[165] Constitutional judgement n. 306/2008, in the comment of A. M. Battista, *Rilevanza del reddito e adeguatezza della prestazione assistenziale per i cittadini e gli stranieri extracomunitari*, Giur. Cost 3338 (2008).

[166] Rebuilding the constitutional jurisprudence on foreign people between citizenship and territoriality, M. Savino, *Lo straniero nella giurisprudenza costituzionale: tra cittadinanza e territorialità*, Quad. cost. 41 (2017).

[167] Interesting policy proposals for the effectiveness of the right to accommodation, but without the reference to foreign people, can be found in P. Saggiani, *La tutela del diritto all'abitazione per le fasce più deboli della popolazione: tra politiche abitative esistenti e alcune proposta per il social housing*, cit. at. 151, 446: private involvement in facilities provision (as in the case of urban regeneration processes, also through the *Community Land Trust,* already experimented with in Belgium or UK), the creation of "social agencies" (already active in different municipalities) to manage supply and demand, or the involvement of social cooperatives or enterprises. See F. Gasparri, *Il social housing nel nuovo diritto delle città*, in *Feder.it,* 21 (2018).

[168] M. Noccelli, *Il diritto dell'immigrazione davanti al giudice amministrativo,* cit. at 149, 39. See G. Repetto, *La dignità umana e la sua dimensione sociale nel diritto costituzionale europeo*, Dir. pubbl. 247 (2016), where the author affirms human dignity has become a pure global formula that establishes and justifies the protection of fundamental rights.

[169] See S. Sciarra, *Solidarity and Conflict: European Social Law in Crisis* (2018); F. Costamagna, *Social Rights in Crisis: Any Role for the Court of Justice of the EU?*, in M. Meccarelli (eds.), *Reading the Crisis: Legal, Philosophical and Literary Perspectives* (2017); M. Ferrara, *The European Social Union: A Missing but Necessary "Political Good"*, in F. Vandenbroucke, C. Bernard & F. De Baere (eds.), *A European Social Union after the Crisis* (2017).

here under scrutiny: Italy[170]. Through jurisprudence, the European social charter and EU Charter of fundamental rights become alive. At the European level there are the already recalled *Tuïner, Kamberaji* and *Martinez Silva* cases. Concerning the right to accommodation, the 2010 decision of the European Committee of Social Rights, in response to complaint n. 58/2009 by the Centre on Housing Rights and Evictions can be recalled, especially since it addresses Italy[171]. At the national level, the above-mentioned case-law concerning specifically the right to accommodation for foreign people comes into relevance (i.e. the *Mr. Majdi Karbai* case). Recent case-law at the national level has further stressed the enforcement of social rights, beyond worker status, legal resident status and citizenship and beyond the example of the right to accommodation (i.e. the *INPS v. WS*[172] and *INPS v. VR*[173], ruled by

[170] On the effectiveness of the right to accomodation in Europe, see G. Guiglia, *Il diritto all'abitazione nella Carta sociale europea: a proposito di una recente condanna dell'Italia da parte del Comitato europeo dei diritto sociali*, *Aic* 1 (2011): «Malgrado il massiccio riconoscimento giuridico apprestato formalmente, sul piano del diritto internazionale e sovranazionale, spesso rafforzato dalle Costituzioni e dalle legislazioni nazionali, nonché dalla giurisprudenza delle Corti europee, costituzionali e dei giudici comuni, il diritto all'abitazione è in realtà scarsamente tutelato. In Europa la crisi abitativa colpisce ormai 70 milioni di persone mal alloggiate, di cui circa 18 milioni sotto sfratto e 3 milioni senza tetto. Tale numero sta ulteriormente aumentando a causa degli effetti della crisi finanziaria globale, che sta facendo perdere casa, a livello europeo, a circa 2 milioni di famiglie, in specie per morosità dei mutui. La crisi è poi aggravata dalla libera circolazione degli investimenti speculativi in seno all'UE, dalle privatizzazioni del settore abitativo pubblico e sociale, dalla mercantilizzazione del mercato abitativo, anche nella maggior parte dei nuovi Stati membri, dalle migrazioni e dagli insediamenti urbani non equilibrati, e ha come risultato, tra l'altro, un enorme approfondimento delle disuguaglianze e della segregazione sociale intra-urbana, che colpiscono i giovani, gli anziani, i disoccupati, i poveri, i migranti, ma anche le famiglie a reddito medio. Questa situazione, esattamente all'opposto dell'inclusione sociale che si vorrebbe ottenere all'interno dell'UE, porta ad emarginazione, precarizzazione e segregazione sociale; sviluppa disuguaglianza, speculazione e corruzione». See L. Ghekiere, *Le développement du logement social dans l'Union européenne. Quand l'intérêt général rencontre l'intérêt communautaire* 239 (2008).

[171] See G. Guiglia, *Il diritto all'abitazione nella Carta sociale europea: a proposito di una recente condanna dell'Italia da parte del Comitato europeo dei diritti sociali*, cit. at 90.

[172] Judgement CJEU, 25 November 2020, case C-302/20, *INPS v. WS*, EU:C:2020:957.

[173] Judgement CJEU, 25 November 2020, case C-303/20, *INPS v. VR*, EU:C:2020:958.

the CJEU, that concern the recognition of public economic benefits – maternity and birth – by the National Welfare Agency in favor of foreign families where one of the main members has a residency permit for work or a long-term residency permit in Italy)[174]. Also worth mention is the national jurisprudential and doctrinal discussion on the cogent role of the European Social Charter in the Italian legal system, under the "*norma interposta*" argument (the same adopted for the Nizza Charter or the European Charter of Fundamental Rights), and on limitations due to the *sui generis* nature of the European Committee of Social Rights' decisions[175].

In the end, it is perhaps possible to affirm that with the new European budget and the parallel Next Generation EU programmes, the implementation of the European pillar of social rights will receive a new impulse in terms of substantial Law. It is relevant, for example, that in the preamble and in the core text of the recent regulation on the establishment of the Recovery and Resilience Facility, the pillar and its implementation – but not the European Social Charter – are mentioned several times in key passages[176].

[174] For a complete presentation of these cases, also in the National legal order, see D. Gallo, A. Nato, *L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza n. 182/2020 della Corte Costituzionale*, *Eurojus* 308 (2020).

[175] The occasion has come with the Council of State, IV sez., decision to refer to the Constitutional Court, 4 May 2017, n. 2043, in www.giustizia-amministrativa.it (R. O. n. 111 del 2017). Then, Constitutional judgement n. 120/2018. See B. Liberali, *Un nuovo parametro interposto nei giudizi di legittimità costituzionale: la Carta Sociale Europea a una svolta?*, in Feder.it (2017). Cfr. S. Forlati, *Corte costituzionale e controllo internazionale: quale ruolo per la «giurisprudenza» del Comitato europeo per i diritti sociali nel giudizio di costituzionalità delle leggi*?, in *La normativa italiana sui licenziamenti: quale compatibilità con la Costituzione e la Carta sociale europea*, Atti del Seminario di Ferrara del 28 giugno 2018 (2019); S. Sturniolo, *Una porta prima facie aperta ma in realtà ancora «socchiusa» per la Carta sociale europea*, Forum Quad. cost. (2018); G. Monaco, *La Corte costituzionale ridisegna il proprio ruolo nella tutela dei diritti fondamentali tra Carta di Nizza, CEDU e Carta sociale europea,* Aic 146 (2020).

[176] Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility: recital 4, 39 and 42 and art. 4, 18, 19.

TAXPAYERS' RIGHT IN CHALLENGING THE MISMANAGEMENT OF PUBLIC FUNDS IN NIGERIA: TOWARDS A LIBERAL APPROACH

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Abstract

Corruption has been recognised as a bane to development in Nigeria. The extant rules of standing in the Nigerian legal system empower the Attorney General and the Economic and Financial Crimes Commission (EFCC) as the competent authorities for instituting an action against public officials for misappropriation of public funds. However, available data on conviction rates for cases instituted against corrupt officials has revealed that the current system is ineffective. This begs the question; is a private citizen/ taxpayer competent to institute an anti-corruption action bearing in mind that corruption cases are criminally prosecuted? Should the fact that the funds constitute taxpayers' funds vest standing in the taxpayer? This paper analyses the Nigerian law on the subject. It also examines whether the *actio popularis* principle entrenched in the Fundamental Rights Enforcement Procedure Rules, 2009 ("FREP Rules, 2009") provides an opportunity for the private citizen/ taxpayer to institute an action where the misappropriation of public funds violates the human rights obligation of the state. This paper also examines the standing of private citizens to prosecute anti-corruption cases under international law and in the European Union. This paper argues that in order to make the fight against corruption effective, the Court would have to adopt a liberal approach to the interpretation of the standing rules in Nigeria and give life to the *actio popularis* principle captured in the FREP Rules, 2009.

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1. Introduction

Nigeria, as we know today, is a country where corruption has become a way of life and has penetrated deep into every fabric of the government and the society at large. The pervasiveness of corruption in the country has become a menace which undermines democratic governance and impedes economic growth and development. The overwhelming influence of corruption at all levels of government and in the various sectors of the country led to the enactment of the Corrupt Practices and Other Related Offences Act 2000 and the Economic and Financial Crimes Commission (Establishment) Act 2002 which created the Independent Corrupt Practices and Other Related Offences Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC), respectively. Despite the creation of these specialised anti-corruption agencies, they have not been effective in combatting corruption in Nigeria[1].

The current trends of corrupt practices in Nigeria have created a system of kleptocracy where billions of dollars are being siphoned illegally from public coffers into private hands every year[2]. This was confirmed by the acting chairman of EFCC who

[1] A. Albert & F.C. Okoli, *EFCC and the Politics of Combatting Corruption in Nigeria (2003 – 2012)*, 23 J. Fin. Crime 725 (2016).
[2] M Page, *Nigeria's kleptocracy has been stealing public funds forever. Here's how to stop it*, Washington Post, 22 July 2016.

noted that over $3.6 billion (1.3 trillion naira)[3] was stolen from public purse between 2011 and 2015[4].

Although the 1999 Constitution[5] and the EFCC Act[6] vest the power to prosecute corruption-related offences in the Attorney-General and the EFCC respectively, these agencies have failed to nip the issue in the bud or make any significant progress in the anti-corruption fight. A number of factors appear to be militating against the effectiveness of the specialised agencies of Government[7] in their fight against corruption and they include; political interferences[8] in the anti-corruption fight, lack of technical capacity of the staff engaged in the specialised agencies, inadequate funding which results in operational incapacity, etc[9]. Consequently, corruption continues to remain a bane to national development in the country and pose a threat to the actualisation of economic and social rights[10]. It is therefore clear that building strong institutions in the fight against corruption is imperative if Nigeria is to ever have a real shot at development[11].

However, while the specialised anti-corruption agencies continue to perform sub-optimally in the fight against mismanagement of public funds, there is need to examine the question of whether the average Nigerian citizen ought to have the

[3] In addition to the fiscal cost associated with the failure of the government to effectively combat corruption, there are other ways in which corruption affects the fabric of the Nigerian society, such as; increased social evils (tribalism, fraud, nepotism), erosion of moral values, disregard for the rule of law, absence of transparency in government, etc. See P. Nmah, *Corruption in Nigeria: A Culture or Retrogressive Factor*, 13 OANJAS 116 (2017).

[4] L. Papachristou, *Nigeria: US 3.6 Billion Dollars in Public Funds Stolen, Says Anti-Graft Body*, 2 OCCRP 12 (2019). In addition, PwC Nigeria estimates that by 2030, corruption will cost Nigeria approximately 37 percent of GDP if left unabated.

[5] Section 174.

[6] Section 6 (m).

[7] The Office of the Attorney General (Ministry of Justice), EFCC, and ICPC.

[8] There have also been claims by observers that the EFCC has been utlised by the ruling party in Nigeria to selectively prosecute anti-corruption cases against members of the opposition party. See O. Adeshokan, *Nigeria's EFCC Boss Suspended from Office following Secret Tribunal*, The Africa Report, 17 July 2020.

[9] E. Onyeama et al., *The Economic and Financial Crimes Commission and the Politics of (in) effective Implementation of Nigeria's Anti-Corruption Policy*, 1 ACE Working Paper 7 (2021).

[10] T. Osipitan & A. Odusote, *Nigeria: Challenges of Defence Counsel in Corruption Prosecution*, 10 AUDJ 71 (2014).

[11] See N. Okonjo *Nigeria lacks institutions, systems, to prevent corruption*, Premium Times, 17 February 2015.

right to institute an action against such persons stealing from public funds. This is particularly in light of the fact that the money which has been looted and forms the subject matter of the offence is the collective wealth of Nigerians, that is, Nigerian taxpayers. The justification for considering the right of private citizens to challenge the mismanagement of public funds is that the private citizen is not affected by the political and institutional issues which prevent the specialised agencies from being effective. It is against this background that this paper seeks to examine the traditional rules of *locus standi* of taxpayers in anti-corruption cases in Nigeria. The second part of this paper shall address the *locus standi* of the taxpayer to institute anti-corruption cases in Nigeria. The third part addresses the potential or otherwise in utilising the principle of *actio popularis* in human rights jurisprudence to circumvent the limitations placed on the right of the taxpayer by the *locus standi* rule. The fourth part of this paper examines the rules which have evolved in other jurisdictions for protecting the right of the taxpayer to challenge the mismanagement of public funds. The fifth and final part of this paper concludes the paper and makes recommendations for protecting the right of the taxpayer to challenge the mismanagement of public funds in Nigeria.

2. The *locus standi* of the taxpayer in anti-corruption cases in Nigeria

The term '*locus standi*' implies the legal capacity of a person to initiate a proceeding in a court of law. It is the right of a party to appear and be heard on a question before the court or tribunal[12]. *Locus standi* is a threshold issue and its determination one way or another has an impact on the access to justice of a litigant and power of the court to exercise jurisdiction[13]. Accordingly, this rule has posed serious problems to both the litigants and the Courts in the past[14]. Against the backdrop of the need to explore the option of having private citizens challenge the mismanagement of public funds, there is need to question whether apart from the Attorney General and the EFCC, citizens ought to have the requisite standing

[12] Senator Adesanya v. President of Nigeria & Anor, 2 NCLR 358 (1981).
[13] O. Oyewo, *Locus Standi Administrative Law in Nigeria: Need for Clarity of Approach by the Courts*, 13 IJSRIT 79 (2016).
[14] E. Taiwo, *Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision*, 9 AHRLJ 549 (2009).

to bring an action against government officials for acts of fraud perpetrated in relation to taxpayers' money. In other words, can a taxpayer have *locus standi* to institute an action against the government for the misappropriation of tax funds? There is no clear answer to this question under Nigerian legal jurisprudence. The only constitutional provision that seemingly confers this right to a taxpayer in public interest litigation is Section 6(6) (b) of the 1999 Constitution of the Federal Republic of Nigeria. Based on this provision, a claimant must show that his civil rights and obligations have been affected and that he has sufficient interest in the subject matter of the action in order have the standing to sue[15]. Nigerian courts have overtime interpreted this provision strictly in determining the standing of a claimant. This is exemplified in the Supreme Court case of Senator Adesanya v President of Nigeria[16], where the court held that a plaintiff will have *locus standi* only in matters where he has a sufficient or special interest or injury. Undeniably, this approach to the interpretation of *locus standi* in public interest litigation makes it difficult to challenge unconstitutional conduct and recklessness in the management of public funds in Nigeria[17].

In Hon Wunmi Bewaji v. Chief Olusegun Obasanjo[18], the appellant initiated a suit at the Federal High Court claiming that being a citizen of Nigeria and a taxpayer, his civil rights and obligations under the provisions of Section (6)(6)(b) of the 1999 Constitution had been adversely affected by the imposition of petroleum taxation by the respondents. The suit was struck out on ground of lack of *locus standi*. On appeal, Omoleye JCA held thus: «Under public law, an ordinary individual or a citizen or a taxpayer without more will generally not have *locus standi* as a plaintiff. This is because such litigations concern public rights and duties which belong to and are owed all members of the public including the plaintiff. It is only where the individual has suffered special damage over and above the one suffered by the other members of the public generally that he can sue personally […] In the instant case, I am of the view that there is not in issue any legal right

[15] Senator Adesanya case cit. at 12 above, 385-386.
[16] *Ibidem*.
[17] R. Salman & O. Ayankogbe, *Denial of Access to Justice in Public Interest Litigation in Nigeria: Need to learn From Indian Judiciary*, 53 JILI 594 (2011)
[18] 9 NWLR 1093 (2008).

peculiar to the Appellant. There is therefore nothing relating to his legal position which the court can declare.

Similarly, in Fawehinmi v Mrs Maryam Babangida[19], the defendant, the First Lady of Nigeria between 1985 and 1993, initiated a project known as the Better Life Programme on which a large portion of public funds was expended. Chief Fawehinmi initiated this action to challenge the unauthorized and extra-budgetary expenditure of public funds on the programme. The court adopted the strict and narrow interpretation of *locus standi* and held that a citizen and a taxpayer in Nigeria lacked the standing to challenge the expenditure of public funds by the office of the First Lady on the programme.

From the abovementioned cases, it is clear that an average citizen and a taxpayer will usually have no standing to sue in anti-corruption cases for the mismanagement of public funds unless the taxpayer is able to show that he has suffered a direct injury or damage over and above that suffered by the public generally[20]. This restrictive application of *locus standi* has however been heavily criticized as giving government officials the latitude to misappropriate taxpayers' money without taking into consideration the interests of the citizens. It has therefore led to the burning question of whether a taxpayer should stand aloof without challenging the government on what it is using the taxpayers' money to do.

The case of Fawehinmi v President FRN and Ors[21] provides a positive interpretation in this regard. In this case, the appellant who was a former political chairman and a taxpayer, initiated an action against the government about the payment of the salaries and allowances of two ministers in foreign currency which is contrary to the provisions of Certain Political, Public and Judicial Office Holders (Salaries and Allowances, et cetera) Act. While the Government argued that Appellant has no standing since he could not show a sufficient interest or threat of injury he would suffer in the matter over and above those of the general public, the appellant on his own part contended that he is a taxpayer and that he has *locus standi* to challenge the government on what it is using the taxpayers' money to do. The trial court struck out the suit on the ground that the appellant had no locus to the suit. On appeal to the

[19] Unreported Suit No. LO/532/90.
[20] Bewaji's case cit. at 18.
[21] 14 NWLR 275 (2007).

Court of Appeal, it was commendably held that if a taxpayer lacks the standing to challenge the action of the government, who then would. Aboki JCA, in delivering the lead judgment held that: «It will definitely be a source of concern to any taxpayer, who watches the funds he contributed or is contributing towards the running of the affairs of the state being wasted when such funds could have been channelled into providing jobs, creating wealth and providing security to the citizens. If such an individual has no sufficient interest of coming to court to enforce the law and to ensure that his tax money is utilized prudently, who else would have sufficient interest in such matter other than him […] In our present reality, the Attorney General of the Federation is also the Minister of Justice and a member the Executive Cabinet. He may not be disposed to instituting an action against the Government in which he is part of, it may tantamount to the Federal Government suing itself. Definitely, he will not perform such a duty».

The *ratio* of the Court in this case aptly captures the challenge in having the Attorney General (a member of the executive) instituting action against members of the executive for misappropriation of funds. Also, there is no doubt that the above decision completely deviates from the restrictive rule in *Adesanya's case* and provides a taxpayer with the requisite *locus standi* to sue. This is significant as it provides evidence of Nigerian courts clothing the taxpayer with the standing to sue for the mismanagement of public funds[22]. This liberal approach of *locus standi* has been applied in several cases including the case of Williams v. Dawodu[23], Shell Petroleum Development Co. Ltd. & 5 Ors. v. E.N. Nwaka & Anor[24], and Ladejobi v Oguntayo[25].

Notwithstanding the court's reasoning in *Fawehinmi v President FRN,* the Federal High Court in *Falana v National Assembly*[26] struck out a suit initiated by a prominent human rights activist to challenge the powers of members of the National Assembly to award enormous salaries and allowances to themselves. Although the applicant had claimed that as a taxpayer,

[22] See I. Olateru-Olagbegi, *An Examination of Taxation as a Means of Establishing Locus Standi for the Taxpayer in Anti-Corruption Cases in Nigeria*, 6 Unilag L. Rev. 12 (2017).
[23] 4 NWLR 189 (1988).
[24] 10 NWLR 64 (2001).
[25] 18 NWLR 153 (2004).
[26] Unreported FHC/L/CS/13.

the amount of money being spent on the legislators was bogus and an unnecessary public expenditure, the court held that he lacked the standing to sue as he was unable to prove that he had suffered a greater injury than other Nigerian citizens as a result of the actions of the legislators.

In the fight against corruption, citizens and tax payers should be able to institute an action against looters of public funds which include taxpayers' money and which could have otherwise been used for the general development and growth of the country. Furthermore, there is doubt as to whether the Attorney General can diligently prosecute in this instance considering the fact that he is a member of the government and it may amount to the government suing itself. Evidence has also shown that prosecuting agencies such as the EFCC do not diligently prosecute many high profile anti-corruption cases and this has ultimately led to the acquittal of perpetrators of massive fraud and looting on grounds of legal technicalities[27]. It is therefore necessary for a citizen and taxpayer who wishes to challenge the misappropriation of public funds by government officials to be granted the *locus standi* to institute an action. Such a taxpayer should not be chased out of court on the ground that he is a meddlesome interloper or busy body who has no interest in the matter and is merely looking for trouble. *Locus standi* should not be the reason a public-spirited taxpayer would not be allowed to challenge unconstitutional actions of the government.

One of the reasons that have been canvassed for the refusal to allow taxpayers institute actions challenging the actions of government is that it will lead to a floodgate of litigation. However, as was noted by one legal writer, what should be considered is not the number of litigants but the dispensation of justice[28]. This is simply because the funds are paid by the taxpayers in a social contract with expectation of developments, and where they are mismanaged or stolen, they should have a right to challenge this. To insist on the contrary is to make the archaic *locus standi* rule a shield for corrupt officials who know that the specialised anti-corruption agencies are ineffective.

Additionally, the dictum of Pats-Acholonu JCA in Shell Petroleum Development Co. Ltd & 5 Ors v EN. Nwawka and

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[27] I. Bolu, *The Anti-Corruption Legal Framework And Its Effect On Nigeria's Development*, Mondaq, 13 May 2016.
[28] B. Amadi, *Socio-Legal Approaches to the Enforcement of Tax Compliance in Nigeria*, 11 NAUJILJ 161 (2020).

Anor[29], is instructive on the issue of the fear of floodgates of litigation being a bar to the right of the public-spirited taxpayer to challenge the actions of government officials. The learned Justice of the Court of Appeal noted as follows: «The development of the law of *locus standi* has been retarded extensively due to fear of floodgate of persons meddling into matters not even remotely connected with them. In my opinion, let them sue and let the court remove the wheat from the chaff... I believe that it is the right of any citizen to see that law is enforced where there is an infraction of its being violated in matters affecting the public law and in some cases of private law such as where widows, orphans are deprived, and a section of the society will be adversely affected by doing nothing. The justice of a taxpayer's suit lies in granting him the purpose for which the tax is paid and not on the number of suits that could be instituted thereto. The only way the issue of floodgate could be reasonable curtailed is ensuring judicious and judicial use of taxpayer's money. No taxpayer would go to court when he is seeing the dividend of his tax fund».

The dictum of the learned Justice above puts the floodgate argument in context. There is no doubt that the floodgate argument does nothing but stunts the development of the law in this regard and consequently the development of the nation. The learned justice however failed to provide for tests or conditions a taxpayer will be required to satisfy in order to exercise this right. Surely, allowing all taxpayers is inimical to achieving justice in the circumstance and will simply fail to achieve the objective behind allowing taxpayers challenge the actions of government in relation to the mismanagement of public funds.

Interestingly, the current position of the law is difficult to reconcile against the backdrop of the Freedom of Information Act which provides that every citizen, whether interested or not, has the right to request for information which is in the custody of any public official[30]. The interesting question therefore becomes, when the taxpayer requests for this information and finds discrepancies in the information provided or discovers the mismanagement of public funds, can the taxpayer then institute an action against the public official or public authority? The answer, based on the position adopted by the courts and analysed above; is no. it would

[29] 10 NWLR (2001).
[30] Section 1.

therefore mean that the law appears to be providing for a right without a remedy[31].

3. Can the *actio popularis* principle contained in the FREP Rules affect the justiciability of a taxpayers' right?

The *actio popularis*, otherwise known as public interest litigation, encompasses an action brought by a person or group in the interest of the public. It was developed under the Roman law for the purpose of granting better access to court to any member of the public who wishes to challenge the breach of a public right or duty. Public interest litigation serves as a medium for protecting, transforming and liberating the interest of marginalized groups[32].

According to one writer, the scope of public interest litigation: «cuts across every facet of human endeavour, ranging from but not limited to the following: infringement of human rights or violation of rights of marginalised groups, environmental degradation, failure and or neglect to provide and or maintain public infrastructures, employment and housing discrimination, environmental regulation, reform of prisons amongst a host of other areas where the interest of members of the public are adversely affected».

Nigeria's return to democratic governance in 1979 created a new space for civic activism and judicial review of governmental actions which civil rights and rule of law activists took advantage of, leading to a significant amount of public interest litigations coming to court[33]. In Adesanya's case, the question was raised as to whether a Senator who had participated in proceedings in the Senate for the confirmation of the Chairman of the Federal Electoral Commission (but had objected to the confirmation), had the requisite *locus standi* to institute an action on the ground that the appointment was unconstitutional. The Supreme Court held that he

[31] Although the law provides for a restrictive remedy in Section 1(3) of the Act when it states that a person can institute an action against the public authority where the public authority refuses to provide the information requested for. It does not however provide for a remedy where the person is dissatisfied with the information provided (in terms of mismanagement and not where the person is dissatisfied because information was not provided or incomplete information was provided).

[32] G. Akinrinmade *Public Interest Litigation as a Catalyst for Sustainable Development in Nigeria*, 6 OIDAIJSD 86 (2013).

[33] J. Otteh, *Litigating For justice: A Primer on Public Interest Litigation* (2021).

lacked the requisite locus to institute the action because he had participated in the debate that led to the confirmation of the appointment[34].

The case of Ukaegbu v. Nigerian Broadcasting Corporation[35] complicated public interest groups' search for representative legitimacy because the Court of Appeal formulated a distinction between the right of access to court and the right to establish a right of action that is personal to the litigant. Several decisions of the court have employed this distinction to throw out public interest group litigations on the grounds that the lead representatives of such actions did not have sufficient interests in the matter and that they did not show a direct damage or injury suffered over and above any other citizen in Nigeria[36]. In Shell Petroleum Development Co. Ltd. v. Otoko[37], the plaintiffs instituted an action in a representative capacity at the Bori High Court in Rivers state claiming compensation for deprivation of the use of the Andoni Rivers and creeks as a result of the spillage of crude oil. The Court rejected the action and held that "it is essential that the persons who are to be represented and the person(s) representing them should have the same interest in the cause or matter." The Supreme Court however adopted a liberal approach in Fawehinmi v Akilu[38] on the capacity of a private individual to initiate proceedings against suspected criminals. The Supreme Court held that the applicant as a person, a Nigerian, a friend and legal adviser to Dele Giwa, a journalist, had a right under the law to see that a crime is not committed and if committed, to lay a criminal charge against anyone known or reasonably suspected to have committed the offence. This decision clearly moves away from the restrictive views of *locus standi* adopted by the court in *Adesanya's case.*

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[34] It has however been noted that the floodgates of litigation did not open since Adesanya's case as conservative jurists had feared, as courts vacillated in many other subsequent cases over the true meaning of the Adesanya decision. See Otteh as above.

[35] 14 NWLR 551 (2007).

[36] See the decision of Archibong. J in Rita Dibia v NBC (FHC/L/CS/492/2004) where he relied totally on Ukaegbu v. NBC.

[37] 6 NWLR 693 (1990). See also Adediran v Interland Transport Ltd, where the plaintiffs instituted an action for nuisance due to noise, dust and obstruction of roads in the estate. The court held that the public or group cannot sue in a representative capacity and claim special damages when they do not suffer equally.

[38] 4 NWLR 797 (1987).

Section 46(3) of the 1999 Constitution empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure for the enforcement of human rights in Nigeria. Pursuant to this provision, Hon. Justice Idris Legbo Kutigi CJN (as he then was), promulgated the Fundamental Rights (Enforcement Procedure) Rules, 2009 (hereinafter 'FREP Rules') which replaced the previous FREP Rules of 1979. The Rules outline the procedure for the commencement of an action for the enforcement of fundamental human rights in Nigerian courts[39]. While the *actio popularis* principle is not expressly contained in the provisions of the 1999 Constitution, it is reflected in preamble 3(e) of the FREP Rules which provides that the court shall encourage "public interest litigations in the human rights field" and that "no human rights case may be dismissed or struck out for want of *locus standi*". This provision has subsequently been used to expand the applicability of *locus standi* in relation to fundamental human rights cases[40]. With the operation of the *actio popularis* contained in the FREP Rules, an applicant in a human right litigation may therefore include anyone acting in his own interest; anyone acting on behalf of another person; anyone acting as a member of, or in the interest of a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members or other individuals or groups[41].

There are arguments that the provisions of preamble 3(a) of the FREP Rules are inconsistent with the provisions of Section 6(6)(b) of the Constitution as the former discards the "sufficient interest test" interpreted by the Supreme Court in Adesanya's case and subsequently followed in a plethora of cases[42]. According to one writer, the FREP Rules have set a high standard for the court by seeking to override the express provisions of the 1999 Constitution on the extent of the judicial powers of the Courts[43]. Relying on the provisions of Section 1(1) and (3) of the

[39] A. Ekeke, *Access to justice and locus standi before Nigerian Courts* (2019).
[40] Olumide Babalola v A.G Federation & Anor (2018) CA/L/42/2016.
[41] FREP Rules 2009 preamble 3(e).
[42] Owodunni v. Registered Trustees of Celestial Church of Christ, 10 NWLR 315 (2000); Olawonyi v A.G Northern Region, 1 All NLR 1 (1961); Shell Petroleum Development Co. Ltd. v. Otoko, 6 NWLR (1990) 693; Busari v. Oseni 4 NWLR 557 (1992).
[43] A. Sanni, *Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform*, 11 AHRLJ 526 (2011).

Constitution[44], he submits that all the provisions of the FREP Rules which are inconsistent with the Constitution stand the risk of being declared null and void to the extent of their inconsistency[45]. This view can be seen in SERAP and others v Nigeria[46], which was initiated under the FREP Rules 2009. The Federal Government contended that the enactment by the former Chief Justice of Nigeria Idris Legbo Kutigi of the FREP Rules 2009: «exceeded his Constitutional powers by liberalising the rules on *locus standi*, permitting public impact litigation, and allowing the inclusion of the African Charter on Human and Peoples' Rights in the Rules».

However, some writers are of the opinion that the Rules, having been made by the Chief Justice of Nigeria, are akin to subsidiary legislation[47]. It has been argued that since the Chief Justice derives his power to make the Rules under section 46(3) of the 1999 Constitution, the Rules have been elevated from the status of mere subsidiary legislation to the same status as the Constitution[48]. This view has also been upheld by the Court of Appeal in Abia State University, Uturu v. Chima Anyaibe[49], where it was noted that the FREP Rules form part of the Constitution and therefore enjoy the same force of law as the Constitution.

It seems that there is no settled law on the standing of litigants as public litigation and representative action has been

[44] Section 1 (1) of the 1999 Constitution provides thus: «This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria». Subsection (3) provides that «If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void».

[45] Sanni cit. at 43, 528.

[46] FHC/ABJ/CS/640/10.

[47] E. Nwauche, *The Nigerian Fundamental Rights (Enforcement Procedure) rules 2009: a fitting response to problems in enforcement of human rights in Nigeria?*, 10 AHRLJ 513 (2010).

[48] Since the 2009 FREP Rules were made pursuant to Section 46 (3) of the 1999 Constitution, they are deemed to be at par with the constitutional provisions. They possess the same force and potency of the Constitution. They are thus of a higher status than other laws in the hierarchy of laws in this country. In the event of any inconsistency between the FREP Rules and any other law, the former will prevail to the extent of such inconsistency.' See O. Duru, *An Overview of the Fundamental Rights Enforcement Procedure Rules* (2009).

[49] (1996) 1 NWLR (Pt 439) at 660-661.

allowed in a host of other cases[50] for the purpose of providing access to justice for the enforcement of human rights. Can the *actio popularis* principle which has undoubtedly fostered human rights litigation in Nigeria therefore affect the justiciability of a taxpayer's right to prosecute anti-corruption cases? The answer to this would be in the affirmative. There is no doubt that a relationship exists between challenging corruption and enforcing human rights[51]. The waste and mismanagement of public funds leaves governments with fewer resources to fulfil their human rights obligations, to deliver services and to improve the standard of living of their citizens[52]. The impact of corruption is often considered to be especially pronounced in relation to economic, social and cultural rights[53], which are contained in Chapter II of the 1999 Constitution and are known as the Fundamental Objectives and Directive Principles of State Policy. Chapter II places obligations on the government to ensure the security and welfare of the people; control the national economy in such a manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity; that the material resources of the nation are harnessed and distributed as best as possible, and that there are adequate medical and health facilities for all persons, among others[54]. However, these provisions are non-justiciable pursuant to Section 6(6) (c) of the Constitution[55]. It is therefore difficult for a taxpayer to initiate an action for the enforcement of the provisions of Chapter II or challenge the government on that basis or even call on the government to account for revenue collected under the Constitution or any local legislation[56]. An aggrieved taxpayer can however institute an action

[50] Dilly v Inspector General of Police & Ors CA/L/12/2013; Nosiru Bello v A.G Oyo State, 5 NWLR 828 (1986); Shobayo v. C.O.P, Lagos State suit No. ID/760M/2008; Ahmad v. S.S.H.A 15 NWLR 539 (2002).

[51] K. Davis, *Corruption as a Violation of International Human Rights: A Reply to Anne Peters*, 29 EJIL 4 (2019).

[52] UNODC, Impact of corruption on specific human rights, 27 March 2021.

[53] *Ibidem*.

[54] K. Lerkwagh et al., *The protection of the rights of the taxpayer: a legal conundrum in Nigeria*, 6 IJL 47 (2020).

[55] See Bishop Olubunmi Okogie v. Attorney General, 2 NCLR 337 (1981), where the court held that the Fundamental Objectives of the nation and the Directive Principles of State Policy laid down in Chapter II of the Constitution are non-justiciable.

[56] However, in Registered Trustees of the Constitutional Rights Project v. President FRN & Ors, 14 UNLAG 669 (1987), the court held that the African

through the FREP Rules on behalf of other taxpayers as it has now been recognised that actions arising from income tax can give rise to an action under the FREP Rules[57] and the enforcement of community or group rights can be brought in a representative capacity where the plaintiff shows sufficient interest as seen in *Fawehinmi v. President FRN.*

4. The right of the taxpayer to challenge mismanagement of public funds in other jurisdictions

It is imperative to examine the extant position on how the *locus standi* of taxpayers to sue in anti-corruption cases is viewed, especially for countries whose courts have moved away from the strict and narrow interpretation of *locus standi* to a more liberal approach. The progressive trends in these jurisdictions will no doubt prove invaluable in persuading the Nigerian courts to relax the rigid rules of *locus standi* and pave way for a more liberal interpretation, particularly with respect to the standing of a taxpayer to challenge the misappropriation of taxpayers' public funds by government officials.

4.1. Specific Country Examples

4.1.1. United Kingdom

In the United Kingdom, the courts have adopted a liberal interpretation to the "sufficient interest" criterion of *locus standi*. In Inland Revenue Commissioners v. National Federation of Self-employed and Small Business Ltd[58], a group of taxpayers challenged the legality of a tax amnesty scheme created between Inland Revenue Commissioners (IRC) and a group of printing

Charter on Human and Peoples' Rights being an international treaty is superior to local legislation including Decrees of the Military Government of Nigeria. Consequently, it has been argued that since Nigeria is a member of the African Union and a signatory to the African Charter on Human and Peoples' Rights which has been domesticated, a Nigerian taxpayer may rely on the provisions of the Charter in order to ventilate his grievances despite the fact that Chapter II of the Constitution is non-justiceable. See Lerkwagh et al cit. at 55; O. Umozurike, *The Application of International Human Rights Instruments and Norms of Nigeria*, Paper presented at Human Rights Training Seminar for Law Students organised by Constitutional Rights Project, Nike Lake Hotel, Enugu 8-11 October, 1997.

[57] Panapina World Transport Nig. Ltd. v. Lagos State Board of Internal Revenue & 2 Ors, 10 TLRN 174 (1999); Egbounu v. B.R.T.C. 12 NWLR 29 (1997).

[58] AC 617 (1982).

industry workers who evaded taxes due on earnings for casual labour for several years. The scheme was made on the condition that no investigations would be made concerning payment of all taxes owed in previous years provided the printing workers registered for tax purposes. Although the House of Lords held by majority that the National Federation lacked *locus standi* due to its failure to show any illegality in the amnesty granted by the IRC, Lord Diplock noted in dissent thus: «It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped».

4.1.2. India

In India, the restrictive doctrine of *locus standi* in public interest litigations and judicial review has been relaxed through judicial activism[59] notwithstanding the fact that the country's constitution makes no provision for the liberalization of the doctrine. Public interest litigation has now become an effective tool used for the purpose of addressing issues relating to the poor and marginalized in the country[60]. The case of Hussainara Khatoon v State of Bihar[61] is one of the earliest cases where the Indian courts adopted a liberal approach to the principle of *locus standi*. The case involved the rights of prisoners under trial and the harsh and disturbing conditions of prisons in the State of Bihar. Standing was granted to an advocate who filed a petition on behalf of the prisoners for the purpose of ensuring the safeguard of their personal liberties. The right of a taxpayer to challenge misuse of funds by a local authority has also been recognized by the courts in India. In R. Varadarajan v Salem Municipal Council[62], the court noted that the petitioner, as a taxpayer, is entitled to make a complaint that the Municipal Council should not spend municipal funds for the maintenance of a statue that has been erected in

[59] S. Sen, *Public Interest Litigation in India: Implication for Law and Development*, 16 MCRGKI 7 (2012).
[60] T. Ngcukaitobi, *The evolution of standing rules in South Africa and their significance in promoting social justice*, 18 SAJHR 601 (2002); See also A. Verma, *Impact of public interest litigation on public administration*, Ipleaders, 20 October 2020.
[61] AIR 1979 SC 1377.
[62] AIR 1973 Mad 33.

violation of an Act. The Indian authorities on this issue are uniform and have clearly shown that a claimant can sue in his individual capacity if he is sufficiently interested in the municipal fund[63].

4.1.3. United States

In the United States, the standing of a taxpayer was initially examined in Frothingham v Mellon[64] and Massachusetts v Mellon[65] where the Supreme Court considered the question of whether a plaintiff can rely on his status as a taxpayer to challenge the constitutionality of a federal statute. The Court unanimously rejected the concept of taxpayer standing and noted that a plaintiff lacked the requisite standing to challenge a federal statute as unconstitutional solely on the basis that he was a taxpayer since his interest in the treasury moneys is shared with millions of others and is too small to determine[66]. However, in Flast v Cohen[67], the Supreme Court narrowed the rule in Frothingham for the purpose of determining the standing of a taxpayer to challenge the unconstitutional use of tax funds. The case involved a group of taxpayers challenging the government for the unconstitutional use of federal funds on religious schools which contravenes the First Amendment ban on the establishment of religion. While allowing the appeal, the Court adopted two tests in order to determine the standing of a taxpayer to challenge the federal government on public expenditure.

First, the plaintiff must show a logical connection between his status as a taxpayer and the type of legislative enactment attacked. Second, he must show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power, rather than simply proving that the enactment is generally beyond the powers delegated to the Congress. Some jurisdictions within the United States have accorded standing to a taxpayer to challenge an unconstitutional action of the government with respect to public funds. In Florida,

[63] Yasan v Municipality of Bholapur, 22 LL.R.Bom. 646 (1898); Municipal Corporation, Bombay Municipality v Govind Laxman, 34 AIR Bom. 229 (1949); Narendra Nath v Corporation of Calcutta, 45 AIR Cal 102 (1960); Chittibabu v Commissioner, Corporation of Madras and o.rs W.P. Nos. 1567 and 1568 of 1969.
[64] 262 U.S. 447 (1923).
[65] 89 262 U.S. 447 (1923).
[66] Frothingham, cit. at 64.
[67] 392 U.S. 83 (1968).

the taxpayer has the standing to institute an action against the government on two grounds; where the actions of the government in relation to public funds is unconstitutional and when the action of the government caused the taxpayer to suffer harm that has not been suffered by other taxpayers[68]. In Missouri, an aggrieved taxpayer may institute an action against a governmental unit for an alleged illegal or improper act[69]. Based on the decision of the Court in Collins v Vernon[70], the reasoning behind this rule lies in the fact that: «a taxpayer has equitable ownership in public funds and the illegal expenditure of these funds subjects that taxpayer to further liability in the replenishment of money which was misappropriated»[71].

The Supreme Court of Alabama also reiterated this position in Alabama State Florists Association, Inc. v Lee County Hospital Board[72], where it held that the plaintiffs as taxpayers have the standing to maintain a suit for the purpose of preventing the misappropriation of county funds[73]. In the state of Virginia, a taxpayer who has suffered no special damages will have no standing to sue to recover money alleged to be illegally paid out until he first requests the appropriate authorities to sue or shows that such a request would be unavailing[74].

4.2. European Union

This section of the paper shall analyse the framework for combatting corruption in the European Union against the right of the taxpayer to institute actions in anti-corruption cases. Despite the image posed by members of the European Union as being transparent and accountable, the Global Corruption Barometer (GCB) in a survey of 40,000 individuals, 62% believed that acts of

[68] O. Ifeoluwagbeminiyi, *The Locus Standi of a Taxpayer to Challenge Public Expenditures*, www.academia.edu
[69] Champ v Poelker 755 S.W.2d 383 at 387; Newmeyer v Mo. & Miss. R.R. Co. 52 Mo. 81 (1873).
[70] 512 S.W.2d 470 (Mo. App. 1974) at 473.
[71] See also Everett v County of Clinton 282 S.W.2d 30, 34 (Mo. 1955).
[72] 479 So. 2d 720, 722 (Ala 1985).
[73] See also, Thompson v Chilton County 236 Ala. 142, 181 So.701 (1938); Court of County Revenues for Lawrence County v Richardson 252 Ala. 403, 41 So. 2d 749 (1949); Zeiler v Baker 344 So. 2d 761 (Ala. 1977); Henson v HealthSouth Med. Centre 891 So. 2d 863, 866 (Ala. 2004).
[74] 171 Va. 421 (Va. 1938) at 424.

corruption involving the government was a major problem[75]. These numbers are reflective of the fact that most South Eastern and Eastern European countries have been embroiled in corruption allegations[76].

An anti-corruption report was established by the European Commission in 2011, with the aim of assessing the effects of EU members with regards to their fight against corruption[77]. This was an initiative created alongside the Council of European Group of States against Corruption (GRECO), a partnership with saw the creation of a detailed anti-corruption policy[78]. The EU and the Council of Europe have been able to put in place, a number of Conventions allowing the criminalisation of corruption, as well as ensuring that specialised agencies in the nations, private individuals, and now an EU sanctioned body, sue for acts of corruption. The Conventions include:

4.2.1. Criminal Law Convention on Corruption

The Treaty was introduced to protect the society from the adverse effects of corruption and ensure that proper legislative measures are put in place. It also highlights the fact that corruption not only affects the rule of law, but also ridicules democracy and human rights[79]. The Convention provides that countries should criminalise acts of active corruption, as well as acts of passive corruption involving a public official. The Convention ensures that countries have a central body whose duty it is to prosecute corruption actions[80]. Article 20 states that: «Each party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The party shall ensure that the staff of such entities has adequate training and financial resources for their tasks«.

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[75] See Transparency International European Union Report (2021), available at www.transparency.org/en/gcb/eu/european-union-2021

[76] A. Popescu, *Corruption in Europe: Recent Developments*, 13 CES 150 (2014).

[77] *Ibidem*, 152.

[78] Supra n. 2.

[79] Criminal Law Convention on Corruption CETS 173/1 (1999).

[80] Criminal Law Convention on Corruption CETS 173/6 (1999).

Essentially, the Convention highlights the fact that private individuals cannot seek criminal actions against public officials with matters that have to deal with corruption.

4.2.2. Civil Law Convention on Corruption, 1999

The Treaty, which was established with the aim of fighting corruption, as well as ensuring that individuals who have been affected by the acts of corruption can receive fair compensation for the damage suffered[81]. The Treaty provides that state parties ensure that effective remedies are inputted in its law, ensuring that persons who have suffered certain damages due to acts of corruption are able to defend their right – including getting compensation for the damages[82].

According to the Treaty, corruption can be described as: «Requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospected thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof»[83].

Thus, the Treaty ensures that private individuals who have interests in various acts of corruption can sue when they are directly affected. Further, countries signed to the Treaty are to input into their internal law, provisions that enable persons who have suffered certain damages to have the right to initiate legal action in a bid to access full compensation for the damage[84]. It also provides that the compensation also includes material damage, profits that have been lost, as well as non-pecuniary losses[85].

Article 4 of the Treaty additionally provides for the conditions which parties have to prove to ensure that the occurred damage can be compensated. They include:
1. Where the defendant has committed a corrupt act, or failed to prevent the occurrence of a corrupt act;
2. Where the plaintiff has suffered damage;

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[81] Civil Law Convention on Corruption CETS 174/1 (1999).
[82] See Civil Law Convention on Corruption CETS 174/2 (1999). Article 1 of the Convention states that "Each party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage".
[83] Civil Law Convention on Corruption CETS 174/2 (1999).
[84] *Ibidem*.
[85] *Ibidem*.

3. Where there is the existence of a causal link between the corrupt act and the damage which occurred.

Having established the fact that private individuals can sue for acts of corruption, the Treaty further provides that the State can be held responsible for acts committed by a public official. Article 5 of the Treaty states that countries must provide in its laws, proper procedures which individuals who have been affected by the act of corruption by a public official in the exercise of their duties, can claim compensation for from the State[86]. It is however provided that where the plaintiff is partly or wholly at fault, the compensation be reduced or not granted[87].

4.2.3. Convention against Corruption involving Public Officials, 2005

The Convention was introduced to ensure that necessary measures are implemented by the European Union States to ensure that acts of corruption involving public officials is duly criminalised[88]. Additionally, the Convention was established to combat corruption by European or national officials of EU countries, as well as ensuring that judicial cooperation amongst EU countries is well fostered[89].

The Convention provides that countries put in place effective means to ensure that active and passive corruption within their territories are criminalised[90]. Also, effective and proportionate sanctions must be in place to dissuade corrupt act[91]. Article 8 (2) of the Convention states that Member states who opt not to extradite the individual to a member State based on his nationality, must submit the case to its competent authorities with the aim of prosecution where it is appropriate[92].

It is however important to note that despite these laws, EU nations have not fully implemented them, with countries like Hungary being accused of mismanagement of EU funds, as well as

[86] Civil Law Convention on Corruption CETS 174/2 (1999), Article 5.
[87] Civil Law Convention on Corruption CETS 174/2 (1999), Article 6.
[88] Convention against Corruption involving Public Officials] OJ C195/1 (2005), Preamble.
[89] *Ibidem*.
[90] Convention against Corruption involving Public Officials] OJ C195/2 (2005), Article 2 and 3.
[91] Convention against Corruption involving Public Officials] OJ C195/3 (2005), Article 5.
[92] Convention against Corruption involving Public Officials] OJ C195/4 (2005).

an inability to effectively prosecute acts of corruption within the country, and a compromise of the Hungarian judiciary[93].

These controversies were also compounded with the fact that the EU could not prosecute individuals who stole from them[94]. Rather, individual States were empowered to carry out the prosecution of such persons, and should the country opt not to prosecute, the EU could do nothing about it[95]. However, in June 2021, the EU decided to remedy this by establishing the European Public Prosecutions' Office (EPPO), empowering it to prosecute criminal cases involving the misuse of EU funds[96], as well as offences including VAT and customs[97].

4.3. Whistle-blowers in the EU

The implementation of whistle-blower policies is one strategy through which private individuals have been able to contribute to the fight against corruption. Although, this approach does not necessarily avail the private citizen the opportunity to prosecute an anti-corruption case unless the legal regime specifically provides for an avenue to do so. Whistle-blowers have proven important in recent time, and their effect has seen them being open to threats from large organisations and States as it combats the wrongs in the society[98]. Traditionally, whistle-blowers have been mandated to report to independent bodies, and this has been implemented by the European Union in the enactment of the EU Whistleblowing Directive. It ensures that acts of retaliation are not meted out to those who disclose such information and Member States implement laws protecting whistle-blowers[99].

It is important to note that prior to the implementation of the Directive, the protection of whistle-blowers was not fully considered by Member States - with some protecting only public

[93] J. Rankin, *EU Urged to Suspend Funds to Hungary over 'grave breaches of the rule of law*, The Guardian, 7 July 2021.
[94] M. Steinglass *The EU's New Anti-Corruption Cop will Start Prosecuting Scammers*, The Economist, 8 November 2021.
[95] The Economist, The EU gets a Prosecutor's Office of its own, 19 August 2021.
[96] In November 2021, the EPPO led a raid in Czechia, after allegations of corruption and manipulation of public contracts, seizing over sixteen thousand euros and searching several houses.
[97] In November 2021, the EPPO led a raid in Palermo, Italy, against a criminal syndicate alleged to have smuggled tobacco products into Italy.
[98] https://whistleblowerprotection.eu.
[99] Directive of The European Parliament and of The Council L 305/17 (2019]).

employees; others mostly focusing on employees in the private sector; and other States providing for whistleblowing of certain acts[100].

The EU Directive further notes that:

1.Widens the scope of individuals eligible to be protected under the Directive[101];

2. Ensures confidentiality and protect the identities of whistle-blowers;

3. Ensures that proper compensation is in place to ensure victims of whistle-blowing are duly protected;

4. Widens the scope of organisations that are affected; amongst others.

Despite the protection provided for under the law, the law does not extend to matters affecting national security, as it is a national matter[102]. Thus, the EU can only mandate countries to implement the Directive, but cannot fully act on such issues[103]. This therefore means that whistle-blowers are still not fully protected, and are open to being targeted or harassed by erstwhile aggrieved parties seeking to protect their interests.

5. Conclusion and Way Forward

The inability of the prosecutorial authorities to effectively prosecute the anti-corruption cases has made an examination of the right of taxpayers to ensure effective prosecution of anti-corruption cases necessary. This is important as the fight against corruption requires ingenuity and a departure from the traditional rules that have made the fight ineffective over the years[104]. This will also be helpful in developing our legal jurisprudence on the standing to sue in public interest litigation. The liberal approach of *locus standi*, as expressed in Fawehinmi v President FRN and adopted in other jurisdictions, is no doubt the more preferable view to the interpretation of the taxpayer's standing. The nature of taxpayers'

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[100] N. Nielsen, *EU-Wide Whistleblower Protection Law Rejected*, EU Observer, 23 October 2013.

[101] J. Stappers, *European Union: What Is Happening with The EU Whistleblower Protection Directive in The Different Countries?*, Mondaq, 26 February 2020.

[102] Directive of The European Parliament and of The Council L 305/17 (2019). Article 3(2) and (3).

[103] Treaty on European Union. Article 4.

[104] Human Rights Watch, *Corruption on Trial? The Record of Nigeria's Economic and Financial Crimes Commission*, 25 August 2011.

money is such that is sacrosanct to the growth and development of a country and its citizens. Consequently, in the event of the misappropriation of taxpayers' money by government officials, the average Nigerian citizen and taxpayer ought to have the standing to institute an action to challenge such fraudulent act and corrupt practice where the prosecutorial authorities are not willing to do so. However, this further begs the question – should the fear of floodgates of persons meddling into matters not even remotely connected to them be completely ignored all in a bid to encourage public-spirited taxpayers to challenge extravagant public expenditures? The answer to this question would be in the negative.

While it is admitted that the doors of the court ought to be opened to taxpayers to challenge government actions where the governmental authorities are unwilling to prosecute, it is recommended that a test be adopted as laid down in the US case of *Flast v Cohen* for the purpose of preventing mere busybodies from bringing frivolous cases before the courts. Thus, a claimant who intends to challenge a public expenditure should be able to show a nexus between his status as taxpayer and the type of public expenditure challenged. Furthermore, where an action is instituted to challenge a legislation used as an instrument to perpetrate fraud against public funds, the taxpayer should be able to show that such legislation was enacted outside of the government's constitutional powers.

Additionally, the courts are to adopt the practice of judicial activism in pushing the frontiers of our laws towards a path for development. This can be done by relaxing the *locus standi* rules in line with the approach adopted by other jurisdictions. The *actio popularis* principle can also be adopted where the mismanagement has resulted in the failure of the government to respect the human rights of the citizens and the government is refusing to make the officials responsible for such violation accountable. This will establish the action as a human rights suit[105]. It is time for the Nigerian courts to wholly accept public interest litigation into the country's legal jurisprudence and use it as tool to tackle corruption which has become a clog in the wheel of progress.

[105] Interestingly, there is evidence to suggest that an action rooted in taxation can give rise to an action under the Fundamental Rights Enforcement Procedure Rules, 2009 as was the case in Panapina World Transport case cit. at 57.

While developing our jurisprudence on providing access to court for taxpayers where unscrupulous government officials siphon public funds, the protective mechanisms in the whistle-blower policies should also be improved to enhance the participation of the taxpayers in the preservation of the fiscus from the pilfering hands of corrupt government officials.

ACCESS TO INTENSIVE CARE AND ARTIFICIAL INTELLIGENCE. A CONSTITUTIONAL PERSPECTIVE

*Caterina Di Costanzo**

Abstract

In this paper, after analyzing documents on access to intensive care in the pandemic period, we will focus on the use of new technologies for the priority assessment of access to intensive care in the event of a health emergency. The issue of automatic (based on "automatic" criteria) or automated (based on algorithms) decisions is a central constitutional issue as its analysis is further capable of suggesting values and principles that may even refine the approaches to the use of AI in the care relationships.

We argued in the paper that a risk-based approach, aimed at allowing European circulation of artificial intelligence devices and services, must be accompanied by a fundamental rights-oriented approach which therefore does not prevent the uniformity of the European space, but allows, where provided for by the European constitutional system, guarantees and measures to protect the fundamental rights at stake.

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1. Introduction

From the moment the coronavirus first spread in China at the end of 2019 and then to the rest of the world, it became clear that the respiratory problems caused by this virus would place enormous pressure on hospitals and particularly on intensive care.

The spread of the virus has highlighted a series of allocative suffering which in all Western countries has characterized the evolutionary trends in the financing of health systems. Healthcare resources, as is well known, are scarce in the face of ever increasing and greater need.

In particular, the scarcity of personal resources emerged, of ventilator support (more or less invasive) and of beds. Moreover, in Western countries, for decades, de-hospitalization policies have been in place which has led to rapidly reallocated resources from hospital care to territorial care.

In this context, documents relating to the priority criteria for access to intensive care have been published in many countries in order to cope with the first waves and peak moments of the pandemic[1].

[1] We have to mention, among others, the following fundamental documents: in Spain, the document produced by the Sociedad Espanola de Medicina Intensiva Critica y Unidades Coronarias (SEMICYUC) y Sociedad Espanola de Enfermeria Intensiva y Unidades Coronarias (SEEIUC) and entitled "Plan de Contingencia para los Servicios de Medicina Intensiva frente a la pandemia COVID-19"; the document of the Belgian Society of Intensive Care, "Medicine Ethical principles concerning proportionality of critical care during the 2020 COVID-19 pandemic in Belgium: advice" of 2020; the Hastings Center document of 17 March 2020 entitled "Health Care Institutions & Guidelines for Institutional Ethics Services Responding to the Coronavirus Pandemic. Managing Uncertainty, Safeguarding Communities, Guiding Practice"; the document of 13 March 2020 of the Comite Consultative National d'Etique entitled "Enjeux éthiques face à une pandémie"; the Nuffield Council on Bioethics document entitled "Ethical considerations in responding to the COVID-19 pandemic" of 2020. In Italy, the issue was addressed in an opinion of the National Committee for Bioethics (NCB), entitled "COVID-19: the clinical decision in conditions of lack of resources and the criterion of triage in pandemic emergency", published on 15 April 2020.
All these documents, with the exception of the Spanish one, refer to the need to use criteria of justice that are not likely to determine discrimination in access to intensive care, asking in some cases to report the possible allocative conflict, determined by the situation of a disproportion between people requesting access to available care and health resources, to a clinical bioethics committee (this is the position expressed in the French document and in the Hastings Center document) and in other cases to refer to criteria that guarantee a greater impartiality and objectivity, such as the criterion of medical urgency (this is the

The debate on the subject has developed in a broad and participatory manner and the scientific contributions have been numerous[2].

The subject undoubtedly raises some unavoidable questions to contemporary constitutionalism and tests the "resilience" of the European common fundamental principles and standards.

In particular, it highlights the need to investigate the linkages between ethics, law, health and technology[3] and how these connections are reflected and respond to the protection of people's fundamental rights.

In this paper, after analyzing documents on access to intensive care in the first pandemic period – i.e. before the vaccination processes began from the end of December 2020 in the

position expressed in the Belgian document) and the clinical criterion (this is the main position that can be deduced also from the aforementioned opinion of the NCB).

[2] With reference to the European scientific debate, see J. Bauer, D. Brüggmann, D. Klingelhöfer, W. Maier, L. Schwettmann, D. J. Weiss & D. A. Groneberg, *Access to Intensive Care in 14 European Countries: a Spatial Analysis of Intensive Care Need and Capacity in the Light of COVID-19*, 46 Intensive Care Medicine 2026 (2020); F.G. Zampieri, M.B. Skrifvars & J. Anstey, *Intensive Care Accessibility and Outcomes in Pandemics*, 46 Intensive Care Medicine 2064 (2020). See also A. Lebret, T. Minssen, *Digital Health, Artificial Intelligence and Accessibility to Health Care in Denmark*, 1 Eur. Hum. Rts. L. Rev. 39 (2021).

With reference to the Italian scientific debate, see M. Piccinni, A. Aprile, P. Benciolini, L. Busatta, E. Cadamuro, P. Malacarne, F. Marin, L. Orsi, E. Palermo Fabris, A. Pisu, D Provolo, A. Scalera, M. Tomasi, NO. Zamperetti & D. Rodriguez, *Considerazioni Etiche, Deontologiche e Giuridiche sul Documento SIAARTI "Raccomandazioni di etica clinica per l'ammissione a trattamenti intensivi e per la loro sospensione, in condizioni eccezionali di squilibrio tra necessità e risorse disponibili"*, 111 Recenti Progressi Medici 212 (2020); G. Razzano, *Riflessioni a Margine delle Raccomandazioni SIAARTI per l'Emergenza Covid-19, fra Triage, Possibili Discriminazioni e Vecchie DAT: Verso una Rinnovata Sensibilità per il Diritto alla Vita?*, 3 Rivista AIC 107 (2020); S. Rossi, *Società del Rischio e Scelte Tragiche al Tempo del Coronavirus*, 3 Rivista AIC 246 (2020); L. Conte, *Covid-19. Le Raccomandazioni di Etica della SIAARTI. Profili di Interesse Costituzionale*, Federalismi (1 April 2020).

[3] On this issue see S.M. Carter, W. Rogers, K.T. Win, H. Frazer, B. Richards & NO. Houssami, *The Ethical, Legal and Social Implications of Using Artificial Intelligence Systems in Breast Cancer Care*, 49 The Breast 25 (2020); M. Robles Carrillo, *Artificial Intelligence: from Ethics to Law*, 44 Telecommunications Policy (2020); A. Azevedo, P.A. Azevedo, *Digital Education, Work and Artificial Intelligence: Health and Law*, European Distance and E-Learning Network (EDEN) Proceedings 2020 Annual Conference, Timisoara (22-24 June 2020); I. Habli, T. Lawton & Z. Porter, *Artificial Intelligence in Health Care: Accountability and Safety*, Bullettin of the World Health Organization (1 April 2020).

Western countries -, we will focus on the use of new technologies for the priority assessment of access to intensive care in the event of a health emergency. The documents analyzed will be some international and national documents (in particular, for the Italian context those elaborated by SIAARTI - Italian Society of Anesthesia, Analgesia, and Intensive Care) and documents drawn up in the field of artificial intelligence by the Institutions of the European Union.

The main "lens" of analysis of the documents in this sector will be constituted by the Italian constitutional principles and by the relevant and copious case law of the Italian Constitutional Court in the matter of care relationships, determination of the levels of care, appropriateness and allocation of health resources.

This methodological perspective has been chosen since the renowned richness of the Italian Constitution and Italian constitutional case law in this scope can provide a fundamental rights-based approach and relevant parameters in respect to the analysis and evaluation of the developing European regulatory framework regarding the use of new technologies in the health sector.

2. SIAARTI documents on access to intensive care during the covid-19 pandemic

In Italy, during the first wave of the covid-19, the Northern Regions were heavily impacted by the spread of the virus.

It should be specified that the transfer of services from the hospital sector to the territorial sector has not been completed in Italy because on the one hand, there has been a rapid reallocation of resources from the hospital setting, and on the other, territorial care has not been symmetrically developed, meaning that in many regions organizational and allocative deficits and deficiencies have arisen.

In some northern regions, for example in Veneto, local care has been strengthened, while in others, such as Lombardy, economic resources have been invested mostly in the hospital sector.

In addition, the specific situation of intensive care in the regions of Northern Italy also presented itself in an ambivalent way. Some intensive therapies, especially those in Lombardy, had been better equipped with respect to health crises by virtue of previous

exercises attributable to the H1N1 epidemics, MERS and Ebola[4]. In other Regions, however, such preparation was not possible. The situation in the face of the health crisis has therefore been shown to be very diverse in the various territories both in terms of response methods and preparation for such an event.

In this context of inhomogeneity both in regard to the spread and impact of the virus and in regard to the response capacity of the territories, SIAARTI published on 6 March 2020 - therefore in the initial moment of the first wave of the pandemic - its "Recommendations of clinical ethics for admission to intensive treatments and for their suspension, in exceptional conditions of imbalance between needs and available resources" and on 13 January 2021 - in full pandemic and in anticipation of the second wave - it published with the SIMLA (Italian Society of Forensic Medicine and Insurance) the Guidelines "Decisions for intensive care in the event of disproportion between care needs and available resources in the course of a covid-19 pandemic"[5].

The common goal of these documents was to provide a support tool for professionals involved in the health crisis.

What are the continuities and discontinuities between the two documents?

The first aspect of continuity between the two documents concerns the identification of appropriateness in intensive care[6].

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[4] Influenza from the H1N1 virus developed from April 2009, originating in Mexico, and has spread to over 80 countries. MERS, or Middle Eastern coronavirus respiratory syndrome, developed from September 2012, while the initial infection of Ebola is documented in West Africa in December 2013.

[5] From a formal point of view, the Recommendations constitute a non-binding policy act produced by a Scientific Society. The Guidelines were produced according to the procedure provided by the national system of guidelines provided for by article 5, paragraph 3, of the law no. 24 of 2017. In this framework, the Higher Institute of Health, through the National Center for Clinical Excellence, Quality and Safety of Care, plays the role of methodological guarantor and national governance of the production process of Good quality Guidelines, informed by the best available evidence. Article 6, paragraph 1, of law no. 24 provides for a case for exemption from criminal liability for professionals who have complied with the Guidelines.

[6] See SIAARTI, *Clinical Ethics Recommendations for Admission to Intensive Treatments and Their Suspension, in Exceptional Conditions of Imbalance Between Needs and Available Resources*, 6 March 2020, pp. 3 and followings; SIAARTI-SIMLA, *Decisions for Intensive Care in the Event of Disproportion Between Care Needs and Available Resources During the Covid-19 Pandemic*, 13 January 2021, at 4.

This notion intercepts the clinical aspects concerning the effectiveness of the treatments and then declines them in relation to the effects of the treatment in the medium and long term and the correct allocation of very expensive and therefore very scarce intensive care resources.

A first important aspect of difference between the recommendations of March 2020 and the Guidelines of January 2021 concerns the theoretical context of reference of the two documents that we consider to be radically changed. In the first case, reference is made to a utilitarian perspective inserted in the context of Disaster Medicine in which the collective interest in health is considered absolutely preponderant over the individual's right of access to care[7].

In our opinion, the Recommendations, as formulated, constitute indications provided strictly for the health emergency situation but present some major criticalities and some friction with the ordinary constitutional framework of our country.

The Recommendations, formulated in a context of stringent health emergency, establish criteria that are not compatible with the needs of solidarity and personalization that are the basis of the relationship of care between professional and patient.

The age criterion, provided there as an autonomous criterion[8], constitutes an "automatic" criterion not compatible with the constitutional principles underlying the care relationship also by law n. 219 of 2017 on informed consent and advance provisions of therapeutic treatment[9]. This is a criterion that allows a quick assessment but does not take into account a personalized assessment that the Constitutional Court, following the

[7] SIAARTI, *Clinical Ethics Recommendations for Admission to Intensive Treatments and Their Suspension, in Exceptional Conditions of Imbalance Between Needs and Available Resources*, 6 March 2020, at 3 ff.

[8] SIAARTI, *Clinical Ethics Recommendations for Admission to Intensive Treatments and Their Suspension, in Exceptional Conditions of Imbalance Between Needs and Available Resources*, 6 March 2020, at 5.

[9] Law no. 219 of 2017 establishes that the constitutional basis of the care relationship are the principles referred to in articles 2, 13 and 32 of the Constitution and articles 1, 2 and 3 of the Charter of Fundamental Rights of the European Union, protecting the right to life, health, dignity and self-determination of the person.

constitutional principles in this field, placed as the basis of the care relationship[10].

The Guidelines of January 2021 recontextualize the problem of access to intensive care in conditions of disproportion between care needs and available resources through reference to the fundamental principles on the subject, such as the principles of equality and equal social dignity; universality and equity; self-determination[11]. In the 2021 Guidelines, the issue of the health emergency and access to intensive care is, in our opinion, correctly placed within the Italian constitutional framework through reference to the principle of the dignity of the person and the guarantee of his/her inviolable rights.

There are two changes in particular that the Guidelines introduce on the subject, unlike the Recommendations: the reference to the principle of self-determination, and informed consent as a fundamental dimension of the relationship of care between doctor and patient necessary for the purpose of deciding the type of treatment to be given; and eliminating the age criterion as an independent criterion of evaluation.

In this second document, following the dramatic first wave of infections, the balance between the individual's right to access to treatments and the collective interest in saving the greatest number of people is recalibrated in a more weighted way.

As part of the definition of triage for intensive care, the Guidelines refer to a global assessment of the person that takes into account a series of parameters that do not have a hierarchical relationship between them and, finally, the age criterion must be considered in the context of the global assessment of the person and not on the basis of defined cut-offs.

In order to anticipate some considerations and reflections that will be carried out in the discussion, it is necessary to specify that the Guidelines immediately raise the question of whether

[10] See what emerges in the matter of personalized evaluation of treatments in the judgments of the Constitutional Court no. 282 of 2002, no. 338 of 2003, no. 151 of 2009, no. 169 of 2017.

[11] SIAARTI-SIMLA, *Decisions for Intensive Care in the Event of Disproportion Between Care Needs and Available Resources During the Covid-19 Pandemic*, 13 January 2021, at 5.

technology can "help in managing the disproportion between the demand for assistance and available resources"[12].

The question arises because artificial intelligence tools and algorithms have been used in other countries.

In the context outlined, the Guidelines establish that in our country, in the triage of the person, it is not possible to use algorithms as an appropriate evaluation tool[13].

2.1 Criticalities regarding the allocation of resources and the definition of health priorities

The SIAARTI documents had the important advantage of dealing transparently with such a delicate issue as that of the allocation of health resources and the definition of priorities, and they did so at a particularly pressing moment from many points of view.

The issue of the allocation of health resources and the definition of priorities raises a number of critical issues in relation to the identification of the relevant actors, the criteria identified, and the decision-making processes implemented to achieve the set objectives.

First of all, the matter of resource allocation and the definition of priorities is a matter that has a high political gradient and which intercepts numerous problems that arise in contiguous sectors.

In particular, the Italian Constitutional Court has affirmed on several occasions that the determination of the essential core of the right to health constitutes a determination that is the responsibility of the state legislator[14] and that the determination of the essential levels of care constitutes an area in which the protection of health intersects with the need to prepare the resources to cope with it[15].

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[12] SIAARTI-SIMLA, *Decisions for Intensive Care in the Event of Disproportion Between Care Needs and Available Resources During the Covid-19 Pandemic*, 13 January 2021, at 6.

[13] SIAARTI-SIMLA, *Decisions for Intensive Care in the Event of Disproportion Between Care Needs and Available Resources During the Covid-19 Pandemic*, 13 January 2021, at 11.

[14] Decision no. 455 of 1990 of the Constitutional Court. In the same sense, the Constitutional Court, 16 March 1990, no. 127; Constitutional Court, 31 January 1991, no. 40; Constitutional Court, 15 April 1992, no. 180; Constitutional Court, 3 June 1992, no. 247; Constitutional Court, 23 June 1992, no. 356.

[15] See the decisions of the Constitutional Court no. 169 of 2017 and no. 62 of 2020.

The "essential core", outlined in constitutional case law[16], can be defined as a threshold of constitutional protection of the right to health and, in particular, functions as a "counter-limit" to the discretion of the legislator in matters of social rights[17].

On this, the Constitutional Court affirmed that there is a "constitutionally necessary expense" concerning the financing of essential levels of care[18]. This expenditure is inevitably connected to what the legislator decides to fall within the essential levels of care and which corresponds to the constitutional priorities in the matter of the right to health.

On the other hand, the Constitutional Court affirmed the transversal nature of the matter of the "determination of the essential levels of assistance" and the "transcendent" nature of the same with respect to the purposes of protecting human dignity[19].

There is no doubt that the matter of the allocation of health resources is a competence in which the legislator should play a fundamental role while respecting the constitutionally established constraints on the protection of the equality and dignity of the person. It is not only a question of establishing the quantity of the necessary resources but also establishing the distribution between care sectors and between possible patients in the same care sector. This represents a fundamental area in which the preeminent political nature of the relative choices is expressed.

Especially in a situation of health emergency, such as the one that occurred following the spread of covid-19, it should be asked whether the ordinary rules established by the legislator on the allocation of resources and access to care can somehow "hold up" in the face of a wave of pressures that lead to a reversal of the usual arguments regarding the balance between individual rights and collective interests. The emergency situation has inevitably led to a shift in focus to the collective interest in saving the greatest number of people, causing a decline in the individual's right to access intensive care, even and especially in the case of frail and elderly people.

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[16] See decisions no. 267 of 1998 and no. 304 of 1994.

[17] See ruling no. 304 del 1995 and no. 275 del 2016. On this see S. Rossi, *Società del Rischio e Scelte Tragiche al Tempo del Coronavirus*, 3 Rivista AIC 265 (2020).

[18] See paragraph no. 9.3.2 of the decision of the Constitutional Court no. 169 of 2017.

[19] See paragraph no. 4.5 of the decision of the Constitutional Court no.no. 62 of 2020.

On this aspect, the law doctrine has already confirmed for some time that the collective interest can prevail over the individual's right to health in a strict emergency context, while in an ordinary situation there can be no prevalence of the collective interest over an individual's right to health[20].

In this sense, an intervention by the legislator that declined the constitutional principles on the subject could have been considered appropriate when the period of exceptional peak of the health emergency was exceeded in order to rebalance a situation that was going to affect especially fragile and elderly people who could be excluded from access to ventilation support, not necessarily invasive, since the required interventions could be considered long, very expensive and, in cases where the clinical situation was very compromised, even of lesser clinical utility.

In addition to the constitutional principles of equality, dignity, and personalistic dimension that should guide the implementation of the rights and actions of public powers, contained in articles 2 and 3 of the Italian Constitution, a fundamental role in the health emergency was played by the judgment on the appropriateness of care. In fact, appropriateness represents a synthesis criterion between the clinical dimension of the evaluation and the economic dimension of the evaluation. That is, it includes a judgment on the correct distribution of resources aimed not at economizing but at guaranteeing a reasoned distribution that allows the greatest number of people to be treated in the best possible way.

The canon of appropriateness constitutes a very important distribution criterion at the micro level that cascades down other criteria and principles set at a general level, both constitutional and legislative.

Having said that, we believe that the judgment of appropriateness is unlikely to be able to reconcile in a proportionate manner with respect to the needs that have arisen in the health emergency, which have very different dimensions, such as clinical and economic, and in any case cannot represent the only criterion, resource allocation regulations, at a time of such a serious global health emergency.

[20] B. Pezzini, *Il Diritto alla Salute: Profili Costituzionali*, 23 Diritto e Società (1983); D. Morana, *La Salute come Diritto Costituzionale. Lezioni* (2018).

2.2 Criticalities regarding appropriateness of care

As anticipated, the criterion of clinical appropriateness in intensive care represents, more than in other sectors, a multidimensional evaluation instrument that summarizes different dimensions relating to the clinical efficacy of a treatment, the judgment on prognosis and the outcome of a treatment, on the correct and fair allocation of resources.

Intensive therapies in fact represent very high technological intensity wards and each patient admission (so-called direct triage) and discharge (so-called reverse triage) represents an allocation and reallocation of important resources that could imply a series of choices on inclusion and exclusion from the care.

Given the high technological intensity that characterizes intensive care, the problem of choices in a situation of scarcity of resources in intensive care can be considered an indicator of a more general problem that highlights a general misallocation of resources and concerns in our healthcare system that has been directly affected by numerous seasons of disinvestments in healthcare.

Furthermore, it must be considered that in intensive care there is likely to be more and less invasive action in ventilatory support and life support. In each case, characterized by different degrees of invasiveness of the treatment, the risk/benefit balance requires that the need for ventilatory and life support, the probability of survival, and the quality of life of a patient be evaluated in proportion to the degree of invasiveness of the treatment.

On the evaluation of these factors, the Constitutional Court has repeatedly stated that the personalized evaluation of these aspects is part of the context of the relationship of care and trust that is constituted by the encounter between the autonomy of the person and the professional responsibility of the doctor[21]. In this context, legislative discretion is limited and the legislator must be guided in their choices by scientific evidence that is documented by the technical-scientific bodies appointed to do so[22].

The assessment of appropriateness, on the other hand, is correctly attributed by constitutional decisions to the doctor, who, in the context of autonomy and professional responsibility, is called

[21] See the decisions of Constitutional Court no.no. 282 of 2008, no. 338 of 2003, no. 151 of 2009, no. 169 of 2017.

[22] See the decisions of Constitutional Court no. 151 of 2009 and no. 162 of 2014. See the decision of the Constitutional Court no. 185 of 1998.

upon to choose treatments, together with the patient, on the basis of the most up-to-date scientific knowledge[23].

The personalistic dimension of the right to health and healthcare, which must therefore disregard automatisms (which could be considered as the one connected to the definition of age as a criterion for inclusion or exclusion from intensive care), requires that the autonomy of the doctor, with the informed consent of the patient, is paramount in making the necessary therapeutic choices.

Any tension that may exist between the orientation of the legislator on the allocation of resources and on the definition of appropriateness, on the basis of the data provided by the technical-scientific bodies, and the choices of the doctor is particularly taken into consideration in the ruling n. 169 of 2017 of the Italian Constitutional Court.

This ruling declares the groundlessness of the question of constitutional legitimacy promoted by the Veneto Region with reference to articles 3, 32, 97, 117, second and third paragraphs, article 120 of the Constitution, of article 9-quarter, paragraphs 1, 2, 4, 5 and 6 of the legislative decree n. 78 of 2015, converted with amendments into law n. 125 of 2015, which provide that by decree of the Minister of Health, subject to agreement in the State-Regions Conference, the conditions of derogation and indications of prescriptive appropriateness of the outpatient specialist assistance services are identified, as well as the application of sanctions and liability towards the prescriber. The contested provisions are not, in fact, deemed to prejudice the prerogatives of the prescriber to operate according to knowledge and conscience, having to be understood as an invitation to make the permitted faculty to depart from the ministerial indications transparent, reasonable and informed.

In this case, the prescriber, also in order to keep under control any serious deviations from the physiology of medical practice, is called to justify any deviations from the ministerial indications, but the prescriber's autonomy is not considered to be affected by the validity of these indications.

On the other hand, indications on the appropriateness of the services, mostly in its declination of organizational appropriateness, are contained in the Prime Ministerial Decree on

[23] See the decisions of Constitutional Court no. 282 of 2002 and no. 338 of 2003.

the essential levels of care of 2001[24] and in the decree updating the essential levels[25]. These indications have the purpose of guiding health practice and guaranteeing uniformity throughout the territory and the good performance of the system.

In fact, the legislator's interventions on the subject are manifold[26] precisely because, since the appropriateness clause is a multidimensional clause, it is inevitable that its evaluation will be affected by actors placed at different levels with clearly different tasks.

3. Artificial intelligence and the healthcare sector

3.1 Documents on artificial intelligence at international and European level

In this context, many international institutions and scientific societies have published guidelines and recommendations in order to support healthcare professionals on the issue of the use of new

[24] See attachment 2C "Services included in Essential Levels of care that have a potentially inappropriate organizational profile, or for which it is necessary to identify more appropriate methods of disbursement" to the Prime Ministerial Decree of 2001. See also the Prime Ministerial Decree of 16 April 2002 "Guidelines on priority criteria for access to diagnostic and therapeutic services and on maximum waiting times" concerning temporal appropriateness.

[25] See the Prime Ministerial Decree of 12 January 2017 on the essential levels of care that has replaced the Prime Minsterial Decree of 2001. For organizational appropriateness, see article 39 on the appropriateness of ordinary hospitalization; article 41 on the appropriateness criteria of day surgery; article 43 on the appropriateness of admission to day hospital; article 45 on the appropriateness of admission to rehabilitation; see the indications on prescriptive appropriateness contained in Annex 4D.

[26] See law no. 311 (2005 Finance Law): paragraph 169 entrusts the Minister of Health with the task of setting "the qualitative, structural, technological, process and possibly outcome, and quantitative standards, referred to in the essential levels of assistance", also to ensure that the procedures for providing the services included in the essential levels of care are uniform throughout the national territory; the State-Regions Agreement of 23 March 2005 provides for the establishment, at the Ministry of Health, of the Standing Committee for the verification of the provision of the Essential Levels of Assistance which is entrusted with the task of verifying the provision of the essential levels of care in conditions of appropriateness and efficiency in the use of resources, as well as the congruity between the services to be provided and the resources made available by the National Health Service; the Ministerial Decree of 21 November 2005 establishes the permanent essential levels of care verification Committee.

technologies in triage decision-making processes for covid-19 patients starting from March 2020.

Artificial intelligence (AI) technologies can be used to make therapies smarter and more targeted and help prevent life-threatening diseases. Doctors and healthcare professionals can potentially perform a more accurate and detailed analysis of a patient's complex health data, even before they become ill, and prescribe *ad hoc* preventive therapy.

AI can also make contributions on a larger scale. For example, it can examine and identify general trends in healthcare and treatment, help to diagnose diseases earlier, develop medicines more efficiently, decide on more targeted therapies, and ultimately save more lives.

In three international documents we find different references that allow us to develop even antithetical reflections on the subject. Consider Unesco's "Ethical considerations from a global perspective" and, in particular, the ninth statement which reads: "Digital technologies like mobile phones, social media, and artificial intelligence can play a substantial role in dealing with pandemics, by making it possible to monitor, anticipate and influence the spreading of the disease and the behaviour of human beings. It is of crucial importance to make sure that the ethical, social and political issues related to the use of these technologies are adequately addressed. Human rights should always be respected, and values of privacy and autonomy should be carefully balanced with values of safety and security"[27]; as indicated in the following: "Ethical implications of the use of AI to manage the covid-19 outbreak" in which we read "AI-based algorithmic models can help hospitals and doctors make decisions in light of limited time and resources. [……] However, AI needs ethical guidelines to work effectively and with regard to intrinsic human rights"[28]; the Italian guidelines for decisions in intensive care in the event of a disproportion between care needs and resources available in the covid-19 pandemic, which states: "The outcome of the triage for intensive care cannot depend on the score resulting from the use of

[27] Statement of the UNESCO International Bioethics Committee (IBC) and the UNESCO World Commission on the Ethics of Scientific Knowledge and Technology (COMEST), *Statement on Covid-19: Ethical Considerations From a Global Perspective* (26 March 2020), at 4.

[28] TUM Institute for Ethics in Artificial Intelligence, *Ethical Implications of the Use of AI to Manage the COVID-19 Outbreak* (April 2020), at 2 ff.

any tool or algorithm, even if proposed or used in other countries, as inappropriate. In case of previous comorbidities, the assessment of the severity and stage of the disease must be based on objective criteria and parameters"[29].

At European level, in the Communications of 25 April 2018 and 7 December 2018 of the European Commission, a sort of AI manifesto is drawn up, in support of "an ethical, safe and avant-garde 'made in Europe' AI"[30].

The possibility of having an impact in the case of the use of artificial intelligence from an ethical and regulatory point of view is highlighted in the White Paper on artificial intelligence of 19 February 2020[31] and in the Ethical guidelines for reliable AI of the Group of Experts set up by the European Union Commission on artificial intelligence[32].

Artificial intelligence has the potential to contribute to the improvement of services but can involve a series of potential risks, such as opaque decision-making mechanisms, discrimination based on gender or otherwise, violations of privacy, and issues of responsibility for actions and conduct.

In the White Paper on artificial intelligence, the compatibility of artificial intelligence with the framework of democracy and the rule of law is brought back to the framing of artificial intelligence within an approach that is anthropocentric, ethical and respectful of fundamental rights.

In particular, the principle of human surveillance is aimed at guaranteeing human autonomy in decision-making processes in which artificial intelligence is involved[33]. Basically, human intervention is required to be guaranteed in the various stages of the decision-making process, in the design phase, validation of the

[29] SIAARTI-SIMLA, *Decisions for Intensive Care in the Event of Disproportion Between Care Needs and Available Resources During the Covid-19 Pandemic*, 13 January 2021, at 11.

[30] Communication from the Commission of 25 April 2018, *Artificial Intelligence for Europe*, COM (2018) 237 final; Communication from the Commission of 7 December 2018, *Coordinated Plan on Artificial Intelligence*, COM (2018) 795 final.

[31] See White Paper on Artificial Intelligence - *A European Approach to Excellence and Trust*, 19 February 2020, COM (2020) 65 final.

[32] Artificial Intelligence High Level Expert Group, *Ethical Guidelines for Trusted AI*, 8 April 2019.

[33] See White Paper on Artificial Intelligence, *A European Approach to Excellence and Trust*, 19 February 2020, COM (2020) 65 final, at 23-24.

decision, review of the decision, and in monitoring of the functioning of the system.

The White Paper incorporates some of the main indications that the High Level Expert Group set up by the European Commission and published in 2019.

The document on a trusted AI states that it must have three dimensions: legality, i.e. the AI must comply with all applicable laws and regulations; ethics, i.e. the AI must ensure adherence to ethical principles and values; robustness, from a technical and social point of view, since, even with the best of intentions, AI systems can cause unintended damage.

In the document of the Group of Experts, the distinction between human intervention and surveillance is functional to establish a different degree of human participation in automated decisions.

In particular, on the basis of article 22 of the privacy regulation - regulation n. 679 of 2016, General Data Protection Regulation (GDPR) -, the right not to be subjected to a decision based solely on automated processing when this produces legal effects on users or if it significantly affects them in a similar way[34].

In the proposed regulation of 21 April 2021, characterized by a very detailed framework aimed at regulating the use of artificial intelligence[35], the approach used by the Commission, as it has been already analyzed in some scientific works[36], is to divide the activities on the basis of the degree of risk they involve[37]. Already

[34] High Level Expert Group on artificial intelligence, *Ethical Guidelines for Reliable AI*, 8 April 2019, at 18.

[35] Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts, COM (2021) 206 final.

[36] NO.A. Smuha, *From a 'Race to AI' to a 'Race to AI Regulation': Regulatory Competition for Artificial Intelligence*, 13 Law, Innovation and Technology 57 (2021); S. Wray, *Europe Proposes Risk-Based Regulation for AI*, Cities Today (26 April 2021).

[37] The risk is classified as unacceptable risk (anything that is considered a clear threat to EU citizens), high risk, limited risk, minimum risk. Article 6 of the proposed regulation defines three categories of high-risk systems. The list is not exhaustive, and may be supplemented by the European Commission: systems explicitly mentioned in Annex 3 to the proposed regulation (for example artificial intelligence systems intended to be used to evaluate the access to and enjoyment of public services and benefits, and, specifically, artificial intelligence systems intended to be used for sending or for establishing priority in sending services' first response to emergencies, including firefighters and medical help); AI

in the European regulation on privacy n. 679 of 2016 (GDPR), the approach used is based on the degree of risk and the use of new technologies is considered to be a risk factor for the fundamental rights and freedoms of users[38], so much so that before using new technologies, article 35 of the regulation requires an impact assessment on user rights.

Healthcare is a public service in which the use of artificial intelligence can represent a high risk of impact on user rights, since it could impact on the access to and enjoyment of public services and benefits and, specifically, AI systems could be used to establish priority in the dispatching of emergency first response services, including by firefighters and medical aid[39].

High-risk systems need to satisfy a series of requirements: establishment of a risk management system; data governance (training, validation and testing of datasets); technical documentation; recording of events (traceability); transparency in relations with users; human supervision; robustness, precision and safety[40].

At first reading, for example, article 29, which expressly regulates the obligations of the professional users (e.g. the healthcare workers), the latter are expressly called upon not only to follow the provider's instructions for use but also to control the system of AI, reporting problems or even interrupting the service if they consider the existence of a risk.

But the most interesting parts are perhaps those relating to the bridge created with the GDPR.

It is necessary to remember the provisions contained in articles 13.2, lett. f), and 14.2, lett. g), of the GDPR which establish the obligation to provide the data subject with information on the

systems intended to be used as a product or as a component of products covered by a series of pre-existing EU regulations indicated in Annex 2 (for example, the 2017/745 regulation on medical devices); AI systems in the event that the product whose security component is the artificial intelligence system, or the artificial intelligence system itself as a product, is subjected to a third party compliance assessment with a view to placing on the market or the commissioning of this product in accordance with EU regulations pre-existing in Annex 2.

[38] M.E. Gonçalves, *The Risk-Based Approach under the New EU Data Protection Regulation: a Critical Perspective*, 23 Journal of Risk Research 139 (2020).

[39] See Annex 3 of the proposal of regulation on artificial intelligence, paragraph no. 5.

[40] See the second chapter (articles 8 and following) of Title III of the proposed regulation on artificial intelligence.

existence of an automated decision-making process and, in cases where there is a profiling activity that may affect a person's rights, information on the logic used and on the possible consequences deriving from this activity. Article 22 of the GDPR, already mentioned, establishes in this sense that there is a "right" to human intervention in automated processes that affect the rights of the person. Only the hypothesis of a totally automated process is excluded; however, the intensity or level of this "human intervention" is not established by law.

A further field of interaction between the privacy sector and that of artificial intelligence is that of data governance taking into account that AI "works" on the data: indeed, to be more precise, the AI finds its "autonomy" (qualifying requirement the same for the EU) precisely in that activity of "data correlation" that humans are not able to do, or not at that speed. In particular, article 10 of the mentioned proposal on AI which governs in detail the governance to be followed to process data in order to train the AI models, establishing that the same must be relevant, representative, error-free, complete, and in possession of all the statistical properties appropriate for the context and with reference to the specific groups of people to whom the AI system will apply.

There are two main guarantee instruments in place: on the one hand, the risk management system that was previously used, in different ways, also in the privacy sector (e.g. data governance) and on the other hand the reference to human supervision provided for by the European strategy on artificial intelligence which also incorporates some indications of the Group of Experts set up on the subject in 2018 by the Commission.

The provision that there is always a human intervention aimed at guaranteeing control of the functioning of the system and of the decision-making process undoubtedly contributes to making the process more humanized but does not constitute an inescapable guarantee that human decision-making autonomy is protected. In distinguished studies it has been highlighted that the risk of a strong conditioning and flattening of the human decision-making process on that of the machine exists and it is not such a strange hypothesis considering the saving of energy and time that the decision of the machine allows[41].

[41] See A. Simoncini, *L'Algoritmo Incostituzionale: Intelligenza Artificiale e Futuro delle Libertà*, 1 BioLaw Journal 53 (2019); A. Galiano, A. Leogrande, S. F. Massari, A. Massaro, *I Processi Automatici di Decisione: Profili Critici sui Modelli di Analisi e*

It would undoubtedly be necessary to establish some more stringent characteristics of this human intervention. In some cases, simple surveillance may be required; in other cases, where there is a greater risk to people's rights, human decision-making may be required to be equally developed and then compared, in order to exploit the advantages that technology allows, with that of artificial intelligence.

3.2 Artificial intelligence and triage of covid-19 patients to access intensive care

The uses of artificial intelligence and algorithms to support clinicians' decisions are old and multifaceted[42].

It should be specified that there is not yet a shared international definition of AI and conventionally at scientific level it could be defined as a digital technology that provides a robot with computing qualities that allow it to perform complex and accurate operations and "reasoning" in a short time through algorithms[43]. Artificial intelligence is, therefore, based on algorithms that make a series of predictions through the use of large data sets.

These algorithms represent instructions that are based on large datasets that allow "reasoning" and predictions which are much more accurate than those made with other methodologies.

Think of the use of robotics, the support of intelligent technology in research, in particular through the use of deep

Impatti nella Relazione con i Diritti Individuali, 2 Rivista Italiana di Informatica e Diritto 55 (2019).

[42] A. Becker, *Artificial Intelligence in Medicine: What is it Doing for Us Today?*, 2 Health Policy Technol. 198 (2019); S. Reddy, S. Allan, S. Coghlan, P. Cooper, *A Governance Model for the Application of AI in Healthcare*, 27 Journal of American Medical Informatics Association 491 (2020); D.A. Bluemke, *Are you Working with Artificial Intelligence or Being Replaced by Artificial Intelligence?,* 2 Radiology 365 (2018).

[43] L. Floridi, J. Cowls, M. Beltrametti, R. Chatila, P. Chazerand, V. Dignum, et al., *AI4People – an Ethical Framework for a Good Artificial Intelligence Society: Opportunities, Risks, Principles, and Recommendations*, 28 Minds and Machine 689 (2018); S. Samoili, C. Montserrat Lopez, E. Gomez, G. De Prato, F. Martinez-Plumed, B. Delipetrev, Blagoj, *AI Watch. Defining Artificial Intelligence. Towards an Operational Definition and Taxonomy of Artificial Intelligence,* Technical Report. Joint Research Centre (Seville site) (2020); D. Zandi, A. Reis, E. Vayena, K. Goodman, *New Ethical Challenges of Digital Technologies, Machine Learning and Artificial Intelligence in Public Health*, 97 Bull World Health Organization 2 (2019).

learning aimed at identifying breast or lung cancer, in diagnosis and treatments, and the implications for the workforce[44].

Furthermore, studies have been demonstrating the importance of technology in monitoring patients in home care for some time.

During the pandemic in Italy and in many parts of the Western world, intensive care has represented a specific test of the resilience of these systems because they are characterized by a very high technological intensity and have been at the centre of the pandemic discourse because the respiratory infection to which the coronavirus gives rise requires action to support respiratory and vital functions.

There is no doubt that the use of technology at such a delicate juncture of the pandemic has been justified by the need to support the professionals involved in the "tragic choices"[45] that have emerged in the triage processes of covid-19 patients.

If the reasons that require the support of artificial intelligence are understandable, it is also necessary to highlight that a whole series of questions exists on the classification of the uses of artificial intelligence in healthcare, especially when the use of new technologies affects the decisions of admission or exclusion from treatment and suspension of treatment for individuals who may have reduced chances of recovery.

Artificial intelligence was used in the pandemic period for different and multiple purposes[46].

Its use has been characterized differently according to the phases of the health crisis. In particular, it has been used in order to identify covid-19 cases and diagnose them (e.g. computed tomography scans - CT scans), to predict a person's likelihood of contagion, to respond through chatbots, and to speed up the search for therapies and vaccines against covid-19.

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[44] T. Davenport, R. Kalakota, *The Potential for Artificial Intelligence in Healthcare*, 6 Future Healthcare Journal 94 (2019); E. Gomez-Gonzales, E. Gomez, *Artificial Intelligence in Medicine and Healthcare: Applications, Availability and Societal Impact*, Publications Office of the European Union (2020); F. Jiang, Y. Jiang, H. Zhi, et al., *Artificial Intelligence in Healthcare: Past, Present and Future*, 2 Stroke and Vascular Neurology 230 (2017).

[45] The reference is to the book by P. C. Bobbit, G. Calabresi, *Tragic Choices* (1978).

[46] See OECD, *Using Artificial Intelligence to Help Combat Covid-19*, 23 April 2020.

With regard to triage in intensive care, artificial intelligence, i.e. the deep learning machine, has been used in some countries in order to predict the need for intensive care[47].

Another use of artificial intelligence has resorted to algorithms to interpret the results of tests and examinations in order to speed up identification of covid-19 cases[48].

We will proceed to analyze the artificial intelligence tools that have been used for the triage of covid-19 patients.

The artificial intelligence tools for triage of covid-19 patients are many and of different types: some are able to detect cases of covid-19 through technologies applied to image x-ray; others are able to predict clinical deterioration in the ICU (Intensive Care Unit); others are also able to predict the needs of ICUs in a given area[49].

AI approaches also have the potential to predict high-risk patients, enabling doctors and hospitals to better manage patient care and predict and allocate the resources needed to reduce deaths.

Artificial intelligence tools have shown immense potential for medical imaging analysis (lung CT scans).

The artificial intelligence tools used in the triage of covid-19 patients refer to algorithms used to read diagnostic images more quickly and accurately.

In the very first use of AI in the triage of a covid-19 patient, i.e. medical imaging for diagnosis, artificial intelligence with a deep learning algorithm has been used to help recognize lesions in CT images and even quantitatively characterize results and compare changes between examinations, which works at a considerably greater speed and accuracy. Some algorithms can even help differentiate covid-19 from normal viral pneumonia. When a suspected covid-19 CT image is detected, the AI alerts the doctor and brings the case to the top of the doctor's work list, suggests a

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[47] D.Y. Kang, K.J. Cho, O. Kwon et al., *Artificial Intelligence Algorithm to Predict the Need for Critical Care in Prehospital Emergency Medical Services*, 28 Scandinavian Journal of Trauma Resuscitation and Emergency Medicine 17 (2020); E. Klang, B.R. Kummer, NO.S. Dangayach, et al., *Predicting Adult Neuroscience Intensive Care Unit Admission from Emergency Department Triage Using a Retrospective, TabularFree Text Machine Learning Approach*, 11 Scientific Reports 1381 (2021).

[48] S.B. Jang, S.H. Lee, D.E. Lee, S.-Y. Park, J.K. Kim, J.W. Cho, et al., *Deep-Learning Algorithms for the Interpretation of Chest Radiographs to Aid in the Triage of COVID-19 Patients: a Multicenter Retrospective Study*, 15 PLoS ONE 11 (2020).

[49] See J. Bullock et al., *Mapping the Landscape of Articial Intelligence Applications against COVID-19*, 69 Journal of Articial Intelligence Research 807 (2020).

possible infection, and recommends pre-set interventions based on the results. This significantly improves the detection rate and consistency of treatment of covid-19 cases.

In the second fundamental use of AI in the triage of covid-19 patients, i.e. the field of patient prognosis prediction, using approaches such as the XGBoost algorithm[50] and Support Vector Machines[51] aims to identify key measurable characteristics for predicting mortality risk, which can later be tested in hospitals upon patient admission and during the hospital stay.

The advantages of using AI in the triage of covid-19 patients have already been highlighted and focus on the possibility afforded by AI to carry out very precise and accurate assessments, where the data entered is of good quality.

The disadvantages undoubtedly reside in the possibility of undermining the autonomy of the decision-making process that leads to the choice of one specific treatment rather than another, and in the possibility of errors due to incompleteness or inconsistency of the data, or errors due to machine problems; in such cases it becomes important to establish precise and punctual responsibilities.

This stipping away of autonomy concerns both the medical decision-making process and the decision-making process of choosing by the patient expressed in the informed consent process.

Therefore, AI could affect, in terms of medical responsibility, the assessment of the appropriateness of treatment and, in terms of the patient's fundamental rights, the right of self-determination and the right to access intensive treatments.

We believe that the risk of conditioning the relative decision-making processes must be taken into serious consideration and that therefore in the health sector the principle of human surveillance must be understood in a "strong sense". That is, the decision-making processes must be developed independently of the AI which should simply represent, in the health sector where a fundamental right could be affected, a factor of comparison of the human decision-making process and should not be the main actor

[50] T. Chen, C. Guestrin, *Xgboost: a Scalable TreeBoostingSystem*, Proceedings of the 22nd ACM SIGKDD International Conference on Knowledge Discovery and Data Mining 785 (2016).

[51] C. Cortes, V. Vapnik, *Support-Vector Networks*, 3 Machine Learning 273 (1995).

of the decision-making processes that affect responsibilities and rights.

4. Concluding remarks

The analysis conducted in the paper allows us to carry out some concluding remarks.

We have seen how extensive the debate has been on priority criteria for access to intensive care during the pandemic. International organizations and national scientific societies have intervened and offered their contribution on this point.

We concluded that in this field the use of "automatic" criteria, e.g. the age criterion, cannot allow a personalised evaluation of the situation of the patient that is at the core of the relationship of care and trust, as the Constitutional Court underlined in the mentioned decisions.

In this context, an analysis of the relevant issue of the use of new technologies in the field of evaluating the priority of access to intensive care is considered to be an extremely topical matter.

The issue of automatic (based on "automatic" criteria) or automated (based on algorithms) decisions is a constitutonal central issue as its analysis is further capable of suggesting values and principles that may even refine the approaches to the use of AI in the care relationships.

On these aspects, the European documents on the subject up to the proposal for a regulation of 21 April 2021 introduced the first rules on the matter which were subjected to analysis and reflection during the course of the discussion. The application of artificial intelligence systems in the field of access to intensive care certainly represents a very relevant sector for evaluating the compatibility of artificial intelligence with the protection of the right of access to treatment, the protection of the autonomy of the doctor and of self-determination of patient in the relationship of care.

We have concluded that, also in the context of the mentioned rules issued at European level, in our system the principle of personalization of care does not allow for a complete substitution of human evaluation with a machine. While having to maintain an openness to the use of technologies in the care sector, we must be aware of the risks that exist, in particular with respect to the critical issues that may arise in the decision-making processes in reference to the connection between AI and professionals and AI and

patients. Where these processes are not transparent, it is not possible to distinguish between human reasoning and that of the computer program.

Above all, we think that there is still a space and a reason for a constitutionally and ethically oriented framework that should be developed for AI uses in healthcare and that this should complement the European rules in this field.

As we have seen, the proposed regulation on artificial intelligence contains very precise and timely rules and in the course of its approval it is possible that some provisions will be modified.

We believe that a risk-based approach, aimed at allowing European circulation of artificial intelligence devices and services, must be accompanied by a fundamental rights-oriented approach which therefore does not prevent the uniformity of the European space in terms of artificial intelligence systems, but allows, where provided for by the European constitutional system, further guarantees and measures to protect the fundamental rights at stake.

In Italy, as we have seen, constitutional case law has repeatedly highlighted the personalistic principle that underlies the care relationship[52].

The relationship between doctor and patient is a relationship of care and trust that is constituted by the encounter between personal autonomy and professional responsibility[53].

In the Italian constitutional decisions, it is stated that the doctor's reasoning must be transparent and reasonable and the doctor may be called upon to explain the reasoning followed in identifying the appropriateness of a treatment[54].

From this constitutional case law a series of assumptions, that should inspire the regulation on the use of AI in the healthcare sector at European level as well, can be listed as follows:

a) the personalistic principle of care emerges in a way that, therefore, the personal dimension should prevail in the healthcare service. In such a system, the principle of personalization of care

[52] See decisions of the Constitutional Court no. 282 of 2002, no. 338 of 2003, no. 151 of 2009, no. 169 of 2017.

[53] See Constitutional Court decision no. 438 of 2008 on informed consent as a "right of synthesis" between the right to be treated effectively according to the best scientific evidence and the right to self-determinationo.

[54] See paragraph no. 8 of the decision of the Constitutional Court no. 169 of 2017.

does not allow a complete replacement of decision-making professionals with the tools of AI;

b) the care relationship is a meeting of two autonomies (personal and professional). Autonomy refers to a space of freedom that is based on a dual notion of freedom: freedom *of* and freedom *from*. In this field there should be a freedom *of* choice, and a freedom *from* guidelines and *from* automatic and automated decisions, etc.;

c) the principle of explicability becomes especially important when artificial intelligence is brought into medical decision making. Beside this principle, the possibility of distinguishing between the AI decision-making process and the professional decision-making process is the basis of the legal and social acceptance of the processes.

Thus, professionals need to be able to understand AI systems in order to use them fairly. This requires inclusive and transparent processes and well understood governance.

Establishing ethical guidelines and constitutional boundaries requires an even more deeply developed supranational and multidisciplinary exchange between constitutional lawyers, professionals, ethicists, informatics and algorithm developers.

The European rules that we have seen in this analysis, of which the proposal of a regulation for artificial intelligence is only the latest act of the European Union in this field, represent a good basis but we think that they should be complemented with a fundamental rights-oriented approach which should also be interpreted as a normative tool that could increases the value of artificial intelligence with a view to achieving a standard of excellence by guarantees and measures aimed at protecting fundamental rights.

In conclusion, therefore, we believe that there is space and reason to develop further, starting from the analyzed European rules in this field, a constitutionally and ethically oriented framework for AI in healthcare based on the principle of personalization of care and the protection of the care relationship as, principally, a human relationship between a doctor and a patient.

ON THE CRITERIA USED FOR THE INTERPRETATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: SOME SHORT REMARKS AFTER TWENTY YEARS FROM ITS PROCLAMATION

*Giulia D'Agnone**

Abstract

This article examines the case-law of the CJEU to assess the criteria used in the interpretation of the Charter of fundamental rights of the European Union. In particular, it highlights that the traditional criteria applied by the judge of Luxembourg in the interpretation of the other sources of EU law are scarcely used in relation to the Charter. In the author's view, this is because of the *sui generis* character of the Charter and the need for dynamic interpretation of the individual rights provided by it.

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1. Introduction

More than twenty years have passed since the proclamation of the Charter of fundamental rights of the EU (the Charter)[1], and more than twelve since the entry into force of the Lisbon Treaty, which resolved the issue of the Charter's legal status by attributing to it the same legal value as the Treaties. Although the Charter has progressively gained a central role in the interpretive activity of the Court of Justice of the European Union (hereinafter simply the Court or the CJEU), the hermeneutic criteria guiding the Court

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[1] The Charter was proclaimed at the Nice European Council on 7 December 2000.

when called to interpret the legal source of EU law remain largely unclear.

Article 52, dedicated to the "scope and interpretation of rights and principles", gives some indications on the interpretation of the Charter. Paragraph 3, for example, requires that in the case of correspondence of the rights of the Charter with those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), their meaning and scope shall be the same as those laid down by the Convention. Paragraph 4 states that the rights under the Charter resulting from the constitutional traditions common to the Member States shall be interpreted in harmony with those traditions. Paragraph 2 provides that the rights recognised by the Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties. However, the Article does not clarify the criteria to be used in the interpretation of the Charter's provisions.

This is an element that the Charter shares with the other sources of EU law[2]. Both the Rome Treaties and the subsequent modification treaties do not specify the criteria that should direct their interpretation and EU secondary law provides no guidance either.

The Court of Justice generally refrains from explicitly defining the hermeneutic criteria used to interpret both primary and secondary law[3] and when it has, it has done so sporadically, demonstrating a desire to avoid being bound by the interpretative scheme used[4], "on the basis of the characteristic features of Community law and the particular difficulties to which its

[2] The reasons behind the choice not to indicate the methods to interpret EU law are unknown, since the *travaux préparatoires* of the founding Treaties have not been published.

[3] International agreements of the EU are subject to the rules of interpretation codified in the Vienna Convention on the Law of Treaties Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *U.N.T.S.* 331; 8 *I.L.M.* 679 (1969).

[4] See G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (2012): "In its case law the Court rarely expressly mentions that it has followed a particular so-called method of interpretation, such as the literal, historical or teleological (purposive) method, although it readily refers to the 'wording', 'context', 'general scheme' or indeed the precise words and provision in question, and the 'purposes, objectives and spirit' of the EU Treaties and legislation adopted under it".

interpretation gives rise"[5]. As far as we know, the CJEU has not made explicit the interpretative criteria that it uses with regard of the Charter. The choice is probably due to the peculiar nature of the Charter among the sources of EU law, since it is a *sui generis* source that has the same legal value as the Treaties, but it is, nonetheless, an external legal instrument to the Treaties which is incorporated by the reference contained in Article 6(1) TEU. At the same time, the Charter, like EU secondary law, was "adopted" by the European institutions.

The lack of clear interpretative rules of the Charter can be explained by the fact that the latter is hardly ever the object of an autonomous process of interpretation of the Court, as interpretation of its provisions typically arises only in combination with other EU norms[6].

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[5] Case 283/81 *Cilfit* ECLI:EU:C:1982:335, para. 17. In this judgment the Court stated that (para. 20) "every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".

[6] It has been observed that the fundamental rights enshrined in the Charter are themselves a sort of interpretative criteria in the interpretation process of all EU law: see H.C.K. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (2011). On the scope of application of the Charter see, in particular, G. Biagioni, *The EU Charter of Fundamental Rights: In Bad Need of Instructions for Use?*, in A.M. Mancaleoni & E. Poillot (eds.), *National Judges and the Case Law of the Court of Justice of the European Union* (2021); M.E. Bartoloni, *Ambito d'applicazione del diritto dell'Unione europea e ordinamenti nazionali. Una questione aperta* (2018); N. Lazzerini, *La Carta dei diritti fondamentali dell'Unione europea. I limiti di applicazione* (2018); J. Ziller, *Articolo 51*, in R. Mastroianni, O. Pollicino, S. Allegrezza, F. Pappalardo & O. Razzolini (eds.), *Carta dei Diritti Fondamentali dell'Unione Europea* (2017); B. Nascimbene, *Il principio di attribuzione e l'applicabilità della Carta dei diritti fondamentali: l'orientamento della giurisprudenza*, 98 *RDI* 49 (2015); A. Tizzano, *L'application de la Charte de droits fondamentaux dans les États membres à la lumière de son article 51, paragraphe* 1, 19 *DUE* 429 (2014); H. Kaila, *The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States*, in Vv. Aa. *Constitutionalising the EU Judicial System – Essays in Honour of Pernilla Lindh* (2012); S. Iglesias Sánchez, *The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights*, 49 *Comm. Mkt. L. Rev.* 1565 (2012); X. Groussot, L. Pech & G.T. Petursson, *The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication*, *Eric Stein Working Paper* 1/2011 www.eracomm.eu/charter_of_fundamental_rights/kiosk/pdf/EU_Adjudication.pdf; A. Rosas & H. Kaila, *L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice – un premier bilan*, 16 *DUE* 1 (2011); J.

The subsequent analysis will examine whether the Court resorts to the traditional interpretative canons when the Charter of fundamental rights is at stake and, if it does, how they are applied in relation to this source of EU law.

2. Textual interpretation

It has been correctly summarised that "three broad techniques of interpretative argumentation […] – based on i. semantic or linguistic, ii. systematic and iii. purposive (i.e. teleological, functional or consequentialist) criteria – […] provide the general doctrinal framework and accepted judicial canon followed by the Court of Justice of the EU"[7]. According to the International Law Commission, which codified the rules of interpretation in the 1969 Vienna Convention on the law of treaties, these principles and maxims of interpretation "are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document"[8]. These rules are, in most cases, common to many juridical systems and are frequently applied by national judges.

As regards the textual canon of interpretation, the Court of Justice has in some cases emphasized linguistic elements of the Charter's provisions.

In *AMS* the Court was asked to rule whether Article 27 of the Charter produces horizontal effects in a dispute between private parties concerning a French law considered to be in breach of Directive 2002/14/EC[9] for excluding certain categories of

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Kokott & C. Sobotta, *The Charter of Fundamental Rights of the European Union after Lisbon*, *EUI Working Papers*, Academy of European Law, n. 6, 2010 available at http://cadmus.eui.eu/bitstream/handle/ 1814/15208/AEL_WP_2010_06.pdf; A. Egger, *EU-Fundamental Rights in the National Legal Order: The Obligations of Member States Revisited*, 25 *Yearbook of European Law* 515 (2006); R. Alonso García, *The General Provisions of the Charter of Fundamental Rights of the European Union*, 8 *ELJ* 492 (2002); P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 *Comm. Mkt. L. Rev.* 945 (2002)

[7] G. Beck, cit. at 4, 187, referring to J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (1993).

[8] *Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session*, *Yearbook of the International Law Commission* vol. II, 218 *(*1966), para. 4.

[9] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting

employees from the calculation of staff numbers. The Court concluded that Article 27 of the Charter is not a source of obligations for private parties, and textual interpretation played a central role since the Court stressed that "[i]t must also be observed that Article 27 of the Charter […] provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by European Union law and national laws and practices" and that "[i]t is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law"[10].

The cases of *Bauer et al*.[11] focused once again on the direct effects of the Charter. It concerned a German law that restricted an employees' ability to claim compensation for days of leave not taken prior to the termination of the contract. The German law clearly contravened the Directive concerning certain aspects of the organisation of working time[12]. However, the act of secondary law could not be invoked directly as the main proceedings concerned a dispute between a worker and his employer, i.e. in a horizontal situation. The Court, distancing itself from *AMS*, made use of the text of the provision at stake and concluded that "it follows, first, from the wording of Article 31(2) of the Charter that that provision enshrines the 'right' of all workers to an 'annual period of paid

employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80/29.

[10] Case C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2, paras 44 and 45. For some early comments on the conclusions of the Court, see F. Dorssemont, *The Right to Information and Consultation in Article 27 of the Charter of Fundamental Rights of the European Union,* 21 *Maastricht J. Eur. Comp. Law* 704 (2014); E. Dubout, *Principes, droits et devoirs dans la Charte des droits fondamentaux de l'Union européenne*, 23 *RTDeur* 409 (2014); E. Frantziou, *Case C-176/12 Association de Mediation Sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union*, 10 *Eur. Const. Law Rev.* 332 (2014); N. Lazzerini, *(Some of) the Fundamental Rights Granted by the Charter may be a Source of Obligations for Private Parties*, 51 *Comm. Mkt. L. Rev.* 907 (2014).

[11] Joined cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871. For early comments on the judgment see, in particular, E. Frantziou, *(Most of) the Charter of Fundamental Rights is Horizontally Applicable*, 15 *Eur. Const. Law Rev.* 306 (2019); M.A. Panascì, *The Right to Paid Annual Leave as an EU Fundamental Social Right. Comment on Bauer et al.*, 26 *Maastricht J. Eur. and Comp. Law* 441 (2019).

[12] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

leave'"[13]. The Court thus found Article 31(2) of the Charter to be directly effective.

Similarly, in *Garlsson Real Estate e a*. the Court examined whether a national legislation which permitted administrative proceedings against a person in respect of unlawful conduct (market manipulation) for which they had already been finally convicted was contrary to the *ne bis in idem* principle enshrined in Article 50 of the Charter[14]. In its evaluation, the Court determined that "[i]t follows from the very wording of Article 50 of the Charter that it prohibits the prosecution or the imposition of criminal penalties on the same person more than once for the same offence"[15].

In *Di Puma* e *Zecca*[16] the Court applied a textual interpretation of the Charter to produce a different result. The issue at stake was whether Article 14(1) of Directive 2003/6[17], read in the light of Article 50 of the Charter, precluded national legislation denying proceedings for administrative fines of a criminal nature to be brought following a final criminal judgment of acquittal concerning acts capable of amounting to insider dealing. The Court observed that "[t]he interpretation [under which Article 14(1) of Directive 2003/6 does not preclude national legislation such as that at issue in the main proceedings], is confirmed by Article 50 of the Charter"[18] and that "[i]t must be added that, according to the wording itself of Article 50 of the Charter, the protection conferred by the ne bis in idem principle is not limited to situations in which the person concerned has been subject to a criminal conviction, but extends also to those in which that person is finally acquitted"[19].

These cases demonstrate that the Court of Justice is rarely persuaded by the mere textual element in its interpretative process. This is understandable since the interpretative activity cannot be exhausted in the mere textual interpretation[20]. This is even more

[13] *Bauer*, para. 54.
[14] Case C-537/16 *Garlsson Real Estate e a*. ECLI:EU:C:2018:193.
[15] *Ivi*, para. 36.
[16] Joined cases C-596/16 e C-597/16, *Di Puma* e *Zecca* ECLI:EU:C:2018:192.
[17] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L 96/16.
[18] *Garlsson Real Estate e a*., para. 37.
[19] *Di Puma* e *Zecca*, para. 39.
[20] Case C-133/00 *Bowden* ECLI:EU:C:2001:254, Opinion of AG Tizzano, para. 30 "It is often the case, however, that a literal interpretation of the text is not by itself

true for a judge when called to interpret a text which has "a very general formulation, sometimes even generic like the Charter"[21]. After all, one should recall that "[i]n the context of fundamental rights protection the role of textual interpretation in the case-law of the CJEU was virtually non-existent until very recently […] since no binding legal text containing a catalogue of fundamental rights existed in the EU context"[22].

3. Systemic and comparative interpretation

The contextual or systemic criterion is frequently used by the Court in the interpretation of both primary and secondary law. According to this interpretative canon a provision is considered in the light of the different Treaties or European acts, and of EU law as a whole, with the aim of strengthening the unity of the EU system through the coherence of the legal texts from which it derives[23]. Therefore, and depending on the case, the context of a provision of the Charter of fundamental rights consists of: the recitals in the preamble; other provisions of the text; primary law provisions; other relevant secondary legislation; and, general principles of EU law.

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always sufficient to resolve a problem of interpretation; help is then provided by the further interpretative criteria normally used by the Court. In particular, in accordance with settled case-law of the Court of Justice, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".

[21] Author's free translation of A. Tizzano, *Sui rapporti tra giurisdizioni in Europa*, 13 *DUE* 21 (2019). On the linguistic vagueness of the Charter, see also G. Beck, cit. at 4, 167, stressing that: "Even the less abstract, seemingly more specific fundamental rights such as some of the solidarity rights listed in Title IV of the EU Charter […] are open-ended, imprecise and/or context-dependent; the relevant definitions in the Charter are often so vague as to raise doubts as to their core meaning, substance and justiciability in the absence of further legislation designed to provide specific protection".

[22] It has been observed that (H.C.K. Senden, cit. at 6, 54) "The EU Charter on Fundamental Rights became binding only in December 2009. As a result of this, textual interpretation might take on a more prominent role in the interpretation of fundamental rights".

[23] V. H. Kutscher, *Alcune tesi sui metodi d'interpretazione del diritto comunitario dal punto di vista d'un giudice*, in Vv. Aa., *Convegno di studio per magistrati e professori universitari, 27-28 settembre 1976* (1976).

However, when the Charter is at stake, reference to provisions of EU law *other* than those directly at stake in the case is not as common as one would expect. With regard to contextual interpretation of human rights provisions, it has been noted that "systemic interpretation makes little sense in legal systems that do not rely on codification, ... [because] judge made law cannot aim to be systematic, since there is no theoretical reference point to which interpretation could turn"[24]. In effect, until recently, fundamental rights protection within the EU legal order was mainly based upon judge-made law. However, it seems that the incorporation of the Charter into the EU system has rapidly changed the interpreter's approach such that systemic interpretation is progressively increasing.

Though sometimes conflated[25], contextual interpretation should be distinguished from comparative interpretation – i.e. the recourse to provisions of *other legal systems* in case of incompleteness of the normative framework to decide the case. While the Court of Justice, when it interprets EU law, has been reluctant to draw comparisons with concepts and provisions of other legal systems, mainly those of the Member States[26], when it

[24] N. Reich, *Understanding EU Law: Objectives, Principles and Methods of Community Law* (2005).

[25] On the use of the comparative method in EU law, see, *ex multis*, P. Pescatore, *Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des Etats membres*, 32 *Rev. Intern. Droit Comparé* 337 (1980); M. Hilf, *The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities*, in A.E.C. De Mestral (ed.), *The Limitation of Human Rights in Comparative Constitutional Law* (1986); J. Mertens De Wilmars, *Le droit comparé dans la jurisprudence de la Cour de justice des Communautés européennes*, 7 *Ch. Droit Eur.* 37 (1991); C.N. Kakouris, *L'utilisation de la méthode comparative par la Cour de Justice des Communautés européennes*, in U. Drobnig & S. Van Erp (eds.), *The Use of Comparative Law by Courts* (1999); K. Lenaerts, *Le droit comparé dans le travail du juge communautaire*, 37 *Rev. Trim. Droit Eur.* 487 (2001); Id., *Interlocking Legal Orders in the European Union and Comparative Law*, 52 *Int'l & Comp. L.Q.* 873 (2003).

[26] Reference is mainly to earlier cases, when the Community was composed of six Member States: see joined cases 7/56 and 3/57 to 7/57 *Algera and Others v Assemblée commune* ECLI:EU:C:1957:7. It should be recalled, moreover, that usually the comparative activity with national law is exercised by Advocate generals. For example, in the *Leitner* case, dealing with compensation for damage arising out of a ruined holiday, AG Tizzano made a long reference to the legislation and the case-law of the Member States recalling that, in certain Member States the developments of this type of compensation were formally sanctioned by legal provision, whilst in others they were elucidated essentially

deals with human rights, it is not unusual for it to resort to provisions of international law, mainly those of human rights conventions.

Comparative interpretation of the EU Charter is required by the Charter itself when provisions refer to legal documents which constitute their sources of inspiration[27] or represent their normative framework[28].

The *Max-Planck* judgment[29], for example, concerned allowances in lieu of paid annual leave not being taken before the termination of employment. In this case, the Court interpreted Article 31(2) of the Charter and recalled that "the right to paid annual leave constitutes an essential principle of EU social law" and that this derives "both from instruments drawn up by the Member

by case-law (see case C-168/00, *Leitner*, Opinion of AG Tizzano, ECLI:EU:C:2001:476, paras 40-42). This analysis induced the AG to observe the existence of "the existence of a widespread trend, which has made varied progress in the different legal systems, towards a wider concept of liability for this type of damage and, more specifically, for damage arising out of a ruined holiday" (para. 43).

[27] On the relations between the Charter and international conventions on human rights protection see G. Gaja, *The Charter of Fundamental Rights in the Context of International Instruments for the Protection of Human Rights*, 1 *European Papers* 796 (2016): "When the explanations state that a certain provision in the Charter 'is based' or 'draws' on a certain international instrument, they implicitly consider that the right conferred by the Charter corresponds to that guaranteed by the instrument. This points to an interpretation which reflects that of the provision of the relevant international instrument. Such a conclusion is not prevented by the absence in the Charter of a provision parallel to Art. 52, para. 3, which requires to align the meaning and scope of rights protected by the Charter with the corresponding rights under the ECHR". See also A. Adinolfi, *Qualche riflessione sulla rilevanza nell'ordinamento dell'Unione europea dei trattati sui diritti umani diversi dalla CEDU*, in Vv. Aa., *Temi e questioni di diritto dell'Unione europea. Scritti offerti a Claudia Morviducci* 133 (2019).

[28] G. Gaja, cit. at 28, 796: "With regard to international instruments for the protection of human rights other than the European Convention, the Charter does not include any provision indicating that these instruments may also be relevant in the interpretation of the Charter. However, the instruments in question, when they bind all the Member States or a substantial number of them, are part of the normative context surrounding the Charter and therefore are relevant for the interpretation of the latter. The provisions of the Charter cannot be interpreted in total isolation from the meaning given to rights guaranteed by these international instruments. This is also in view of the fact that these instruments had an influence on the drafting of the Charter which is only partly reflected in the explanations".

[29] Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* ECLI:EU:C:2018:874.

States at EU level, such as the Community Charter of the Fundamental Social Rights of Workers, which is moreover mentioned in Article 151 TFEU, and from international instruments on which the Member States have cooperated or to which they are party. Among them is the European Social Charter […]. Mention should also be made of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (revised) which […] sets out principles of that organisation which recital 6 of Directive 2003/88 states must be taken account of"[30].

Comparative interpretation is also required by the reference in the Charter to the level of protection guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Article 52(3) provides that, in case of correspondence, the meaning and scope of the rights contained in the Charter shall be the same as those laid down by the ECHR[31]. In addition, Article 53 of the Charter imposes a level of protection that

[30] Paras 69 and 70 of the judgment. See also the judgment in *Bauer* (joined cases C-569/16 and C-570/16 ECLI:EU:C:2018:871) delivered on the same day, paras 80 and 81. The Court therefore concluded that the right to paid annual leave is "both mandatory and unconditional in nature", and "not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter" (para. 85). On the case-law on paid annual leave and on the direct efficacy of the Charter see, within the Italian doctrine, M. Condinanzi, *Le direttive in materia sociale e la Carta dei diritti fondamentali dell'Unione europea: un dialogo tra fonti per dilatare e razionalizzare (?) gli orizzonti dell'effetto diretto. Il caso della giurisprudenza "sulle ferie"*, 10 *Federalismi.it* (2019); F. Ferraro, *Vecchi e nuovi problemi in tema di efficacia diretta orizzontale della Carta*, 10 *Federalismi.it* (2019); L.S. Rossi, *La relazione fra Carta dei Diritti Fondamentali dell'Unione Europea e direttive nelle controversie orizzontali*, 10 *Federalismi.it* (2019) and S. Sciarra, *Diritti sociali fondamentali nazionali e europei. A proposito di diritto alle ferie retribuite*, 10 *Federalismi.it* (2019). On the direct efficacy of the Charter, among the most recent works, see D. Gallo, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa* (2018); E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (2019).

[31] The list of the rights which may be regarded as corresponding to rights in the ECHR is contained in the Explanation on Article 52 of the Charter. It shall be recalled that the Explanations relating to the Charter of Fundamental Rights shall be given "due regard" by the courts of the Union and of the Member States under Art. 6(1) TEU and Art. 52(7) of the Charter.

cannot restrict or affect that recognised by Union law, international law – including international agreements to which the Union or all the Member States are party – and by the Member States' constitutions.

4. Teleological interpretation

The teleological criterion, with its corollary the *effet utile* principle[32], is the typical interpretative canon applied by the Court of Justice to accelerate the European Union integration process[33]. It is usually enumerated as one of the three criteria used by the Court of Justice of the EU in its interpretative activity.

Many authors have expressed the need for a teleological interpretation of the Charter[34]. But the Court of Justice makes sporadic use of this criterion when fundamental rights are at stake.

The Court alluded to teleological arguments, for example, in the *Internationale Handelsgesellschaft* judgment, which preceded the entry into force of the Charter. In this case, the Court affirmed that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice" and that "[t]he protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community"[35]. It has been highlighted that "[t]he objectives of the Community can

[32] Though there are authors averse to the linking of the *effet utile* principle to the teleological criterion, the major legal literature supports this assumption. See H. Kutscher, *cit.* at 24, I-40; R. Ormand, *L'utilisation particulière de la méthode d'interprétation des traités selon leur «effet utile» par la Cour de Justice des Communautés Européennes,* 1 *Rev. Trim. Droit Eur.* 625 (1976); T. Tridimas, *The Court of Justice and Judicial Activism*, 21 *Eur. Law Rev.* 208 (1996); J. Joussen, *L'interpretazione (teleologica) del diritto comunitario*, 12 *Riv. Critica Diritto Priv.* 519 (2001).

[33] But see I. Ingravallo, *L'effetto utile nell'interpretazione del diritto dell'Unione europea* (2017) demonstrating a minor use of the *effet utile* principle in the more recent phase of the integration process.

[34] V. J. Kühling, *Fundamental Rights*, in A. Von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law* (2006); H.-J. Blanke, *Protection of Fundamental Rights Afforded by the European Court of Justice in Luxembourg*, in H.-J. Blanke & S. Mangiameli (eds.), *Governing Europe under a Constitution* (2006).

[35] Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermitte*l ECLI:EU:C:1970:114, para. 4. Emphasis added.

therefore be regarded as one of the elements that play a role in determining the scope of fundamental rights"[36].

However, the adoption of the Charter has not substantially altered the Court's attitude towards the teleological criterion for the interpretation of fundamental rights, to which the Luxembourg judge still scarcely resorts.

One of the cases in which the objectives of the Charter have been clearly mentioned is the *Parliament v. Council* case, decided on 27 June 2006. Though not at the time a binding instrument, the Court considered that "the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court … and of the European Court of Human Rights'"[37].

In the *CCOO* case the need to guarantee the *effet utile* of a Charter's provision was similarly stressed[38]. This case concerned the obligation of an employer to set up a system for recording the time worked each day by its members of staff, in order to make it possible to verify compliance with the working times stipulated and the obligation to provide union representatives with information on overtime worked each month. The obligation found its basis in a number of sources including, in particular, the Workers' Statute – as interpreted in the light of Article 31(2) of the Charter – and several articles of Directive 2003/88[39]. Here the Court of Justice observed that "a national law which does not provide for an obligation to have recourse to an instrument that enables the objective and reliable determination of the number of hours worked

[36] K.C.K. Senden, cit. at 6, 368.

[37] Case C-540/03 *Parliament v. Council* ECLI:EU:C:2006:429, para. 38. The cited statement was later recalled by the Court of Justice in Opinion 2/2013 ECLI:EU:C:2014:2454, para. 39 and often mentioned also by the Civil Service Tribunal (see for example case F-1/05, *Landgren v. ETF* ECLI:EU:F:2006:112, para. 71; case F-51/07, *Bui Van v. Commission* ECLI:EU:F:2008:112, para. 75). However, the objective of the Charter, though sometimes evoked by the Court, has not been concretely applied to resolve the case at issue.

[38] Case C-55/18 *CCOO* ECLI:EU:C:2019:402.

[39] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

each day and each week is not capable of guaranteeing […] the *effectiveness of the rights* conferred by Article 31(2) of the Charter and by this directive, since it deprives both employers and workers of the possibility of verifying whether those rights are complied with and is therefore liable to compromise the objective of that directive, which is to ensure better protection of the safety and health of workers". Hence it was considered that "to *ensure the effectiveness of those rights* provided for in Directive 2003/88 and of the fundamental right enshrined in Article 31(2) of the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured"[40].

When analysing the Court's case-law, it is evident that there are some areas in which teleological arguments are more frequently used. Among them are cases concerning the non-discrimination principle, incorporated in Article 20 of the Charter, and those relating to the application of the *ne bis in idem* principle[41].

The *Vernaza Ayovi* case represents a clear illustration of the recourse to teleological arguments in the application of the non-discrimination principle[42]. Here the Court was asked to determine whether the principle is violated by a national legislation which provides that when the wrongful disciplinary dismissal of a permanent worker in the service of a public authority, the worker must be reinstated. In contrast, a worker employed under a temporary contract (or a temporary contract of indefinite duration) performing the same duties as a permanent worker cannot be reinstated but may receive compensation.

The Court of Justice recalled that the right under Article 20 of the Charter has been applied for workers employed under a temporary contract by Clause 4(1) of the Framework Agreement on fixed-term work concluded on 18 March 1999[43]. It noted that "one of the objectives of that agreement is to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination", "to improve the quality of fixed-term work by setting out minimum requirements in order to ensure the

[40] Paras 50 and 60, respectively. Emphasis added.
[41] See H.C.K. Senden, cit. at 6, 369 ff.
[42] Case C-96/17 *Vernaza Ayovi* ECLI:EU:C:2018:603.
[43] It is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/43.

application of the principle of non-discrimination" and "to apply the principle of non-discrimination to fixed-term workers in order to prevent an employer using such an employment relationship to deny those workers' rights which are recognised for permanent workers"[44]. Hence it was concluded that "[h]aving regard to the objectives which the Framework Agreement pursues, Clause 4 thereof must be understood as expressing a principle of EU social law which cannot be interpreted restrictively"[45].

Regarding the *ne bis in idem* principle, the *Kossowski* case is a significant example of the resort to teleological arguments[46]. This case concerned the interpretation of Articles 54 and 55 of the Convention Implementing the Schengen Agreement of 14 June 1985 (CISA)[47] and of Articles 50 and 52(1) of the Charter of Fundamental Rights.

Here the Court of Justice recalled the need to "take into account both the objective of the rules of which Article 54 of the CISA forms part and the context in which it occurs"[48]. It stated that "whilst Article 54 of the CISA aims to ensure that a person, once he has been found guilty and served his sentence, or, as the case may be, been acquitted by a final judgment in a Contracting State, may travel within the Schengen area without fear of being prosecuted in another Contracting State for the same acts, it is not intended to protect a suspect from having to submit to investigations that may be undertaken successively, in respect of the same acts, in several Contracting States"[49]. Finally, interpreting the provision in the light of Article 3(2) TEU, it concluded that "the interpretation of the final nature, for the purposes of Article 54 of the CISA, of a decision in criminal proceedings in a Member State must be undertaken in the light not only of the need to ensure the free movement of persons but also of the need to promote the prevention and combating of crime within the area of freedom, security and justice"[50].

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[44] Paras 21 and 22.

[45] Para. 23.

[46] Case C-486/14 *Kossowski* ECLI:EU:C:2016:483.

[47] The Schengen *acquis* - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/19.

[48] Para. 43 of the judgment.

[49] *Ivi*, para. 45.

[50] *Ivi*, para. 47. In the light of those considerations the Court has thus concluded that the *ne bis in idem* principle under Art. 54 of the CISA, read in the light of Art.

Arguments of a teleological nature, though rarely used directly with reference to the Charter, are far from being irrelevant when EU acts are interpreted in light of the rights enshrined in the Charter.

5. Subjective interpretation

Interpretative arguments, being of a subjective character, are almost absent in the interpretation of the Charter, even if their use is not infrequent in Advocates General's Opinions[51].

This is unsurprising considering the Court's reluctance to make use of interpretative techniques and emphasis on the original intentions of the drafters of the EU legal sources. While in more recent times the Court of Justice has progressively enhanced subjective interpretation[52], the peculiarity of the Charter within the EU legal system undoubtedly increases the interpreter's difficulties towards considerations of a subjective character.

The Charter is a source of EU primary law, but it is not the result of the will of the parties to the Treaties. As is well known, the Charter has been drafted within a Convention similar to the one that brought to the Constitutional Treaty (and then, indirectly, to the Lisbon Treaty)[53], but it was proclaimed by the three political institutions – the Parliament, the Council and the Commission – on

50 of the Charter, implies that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person, albeit with the possibility of its being reopened or annulled, without any penalties having been imposed, cannot be characterised as a final decision for the purposes of those articles when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out.

[51] See, for example, in the context of the already cited *AMS* case, the paragraphs of the Opinion of AG Cruz Villalón where attention was paid to the distinction between "rights" and "principles", through a detailed analysis of the will of the authors of the Charter (Case 176/12 *Association de médiation sociale* ECLI:EU:C:2013:491, esp. paras 47 ff.).

[52] See G. D'Agnone, *L'interpretazione soggettiva nella giurisprudenza della Corte di giustizia dell'Unione europea* (2020).

[53] D. Castiglione, J. Schönlau, C. Longman, E. Lombardo, N. Pérez-Solórzano & M. Aziz, *Constitutional Politics in the European Union: The Convention Moment and its Aftermath* (2007).

the sidelines of the Nice European Council. It is the outcome of an inter-institutional process[54].

The final scheme which led to its inclusion in the Treaty on European Union is not unlike the one adopted in occasion of the Constitutional Treaty and of the Lisbon Treaty. However, contrary to these models, no negotiations regarding the Charter's content took place during the Lisbon intergovernmental Conference since the latter simply shared content from the product of the Charter's original Convention[55]. The consequence is that the Charter is not formally imputable to the contracting parties to the Treaties. Therefore it is extremely difficult to trace the original intentions and thus to apply a subjective interpretation of the Charter's provisions.

Nonetheless, reference to the intentions of the institutions which proclaimed the Charter is not completely absent in the case-law of the Court of Justice. This has been functional in stressing the importance of the Charter before the formal recognition of its binding legal value by Article 6(3) TEU.

For example, in some judgments of the former European Union Civil Service Tribunal concerning the Staff Regulations of officials of the European Communities, it has been recognized that "by solemnly proclaiming the Charter of Fundamental Rights of the European Union, the Parliament, the Council and the Commission necessarily intended to give it particular significance, account of which must be taken in this case in interpreting the provisions of the Staff Regulations and the Conditions of Employment"[56].

While prior to the entry into force of the Lisbon Treaty subjective arguments were occasionally used to emphasize the legal value of the Charter, recently they have been substantially set aside.

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[54] See R. Adam, *Da Colonia a Nizza: la Carta dei diritti fondamentali dell'Unione europea*, 19 *DUE* 881 (2000); D. Anderson & C.C. Murphy, *The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe*, 8 *EUI Working Papers* 15 (2011); N. Coghlan & M. Steiert, *The Charter of Fundamental Rights of the European Union: The Travaux Préparatoires and Selected Documents* (2020).

[55] Indeed, the debate on the content of the Charter was far from absent, both during the Herzog Convention and during the D'Estaing Convention, which amended the final provisions of the Charter devoted to its interpretation. For some insights see, for example, G. Braibant, *La Charte des droits fondamentaux de l'Union européenne* (2001); E. Pagano, *Dalla Carta di Nizza alla Carta di Strasburgo dei diritti fondamentali*, 14 *Dir. Pub. Comp. Eur.* 94 (2008) and, more recently, G. Amato, *La Convenzione sul futuro dell'Europa e la Carta di Nizza*, 42 *Quad. cost.* 631 (2020).

[56] See case F-51/07, cit., para. 76 and case F-1/05, cit., para. 72.

6. Conclusions

The previous analysis demonstrates the difficulties of identifying the criteria used by the Court of Justice to interpret the Charter of fundamental rights of the European Union and the interpretative differences from the other sources of European Union law.

Mainly, this appears to be because of the peculiar nature of the Charter and of the fact that its provisions are rarely the primary object of the legal issues presented before the Court.

Moreover, the notion that for a long time the protection of fundamental rights has been guaranteed not by a written text but by principles and by the constitutional traditions common to the Member States, has meant that still today the Court is not totally at ease with the application of the traditional interpretative criteria to the Charter of fundamental rights. At the same time, that the case-law discussed in this paper, while being far from exhaustive, is relatively recent demonstrates that the Court is becoming progressively accustomed to a written text and, as a consequence, to the application of the criteria which usually guide the interpreter in its activity.

Consequently, far from affirming the autonomy of the Charter within the EU legal sources, this article has highlighted how the peculiar nature of the Charter of fundamental rights of the European Union, and the diversity of the objectives that animate it, affect its interpretation. Meanwhile, the Court of Justice has become increasingly acquainted with the application of the traditional interpretative criteria to the Charter.

The absence of a rigid and predetermined application of the canons of interpretation generally used by the Court, is conducive to a dynamic interpretation of the Charter which, being a living instrument, needs flexibility in its interpretation[57]. This serves as a contrast to the Treaties, which are the expression of attributed competences[58], and secondary law, which cannot be interpreted in

[57] In this respect it was noted that "he ECJ must refrain from rewriting secondary EU law, even if the latter is outdated or no longer fulfills the objectives it pursues. The role of the ECJ is indeed neither to anticipate nor to pre-empt policy choices that fall within the purview of the EU legislator". See K. Lenaerts, *How the ECJ Thinks: A Study on Judicial Legitimacy*, 36 *Fordham Intern. Law Journ.* 1323 (2013).

[58] Of course, as long as the Member States are part to this legal order, they are no more the "masters of the treaties".

violation of the principle of separation of powers under which political choices should be left to the European legislator.

The interpretation of the Charter requires the use of interpretative criteria which are best able to guarantee protection of the rights which the Charter enshrines.

LEGAL REGULATION OF INITIAL COIN OFFERINGS IN RUSSIA

*Marina Kasatkina**

Abstract

Depending on the country, the approach to Initial coin offerings (ICOs) may be different. While some jurisdictions are hesitating from regulating this industry, Russia has taken the lead and presented a specific regulatory framework for ICO's and blockchain technology. This article seeks to give an outline of the laws related to ICOs in Russia. In particular, there are discussed two main questions: whether Russian framework concerning 'blockchain' is a meaningful concept and whether there are regulatory rules which can be taken into account while elaborating global ICO regulation and which disadvantages should be avoided.

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1. Introduction

The development of the society is accompanied by constant changes. An actual phenomenon in the context of global digitalization is the development of the latest financial technologies (hereinafter-FinTech, fintech). Nowadays FinTech represents a new chapter in financial regulation that marks a break from past cycles of innovation. revolution assumes to provide a number of advantages for the economy, e.g. free access to capital, better investment assistance and more secure operations[1]. One of the main

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goal of fintech is to lower transaction costs in order to better allocate capital on the markets. They have proven the availability of receiving alternative sources of financing.

FinTech today comprises five major areas[2]:

1) Customer interface. Fintech technology allows customers to quickly access financial services and thereby simplify and automate their interaction. For instance, it offers customers greater mobility and ease of working with personal finance management systems, loans and transfers compared to banks.

2) Internal operations and risk management. The main task of risk management is to provide formalized information about the possibility of risk events and choose ways to deal with them. For example, SAS Risk Management (SAS), which is a widely recognized as worldwide solution in the field of risk management at the bank-wide level. Besides, EGAR Focus (EGAR Technology) is a comprehensive solution for banks and investment companies that allows to monitor positions, manage risks, evaluate the value of derivative financial instruments, and calculate profits and losses in real time.

3) Payments and infrastructure. Payment services occupy a major place due to their simplicity as financial products. The payment services for consumers include mobile wallets, direct payments between cards of different banks, currency exchange services (i.e., a cross-border transfer could be made by using the British services Kantox and TransferWise).

4) Data security. Due to digitalized nature, financial industry is vulnerable for cybercrime and espionage. In this regard much attention is paid to the information security of banking systems and protection of personal data in the Internet. For instance, information security methods such as multi-factor authentication and dynamic transaction confirmation have become mandatory.

5) Finance and investment concentrate on alternative financing mechanisms, specifically crowd funding and P2P lending. Crowdfunding means attraction of funds from a large number of users through a specialized Internet platform. P2P

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[1] *The Fintech Revolution*, The Economist (May 9, 2015), *https://www.economist.comlnews/leaders/21650546-wave-startups-changing-financefor-better-flntech-revolution* [*https://perma.cc/3FQW-UUZC*] (discussing benefits).

[2] D.W. Arner, J. Barberis, R.P. Buckley, *The Evolution of FinTech: A New Post-Crisis Paradigm*, 47 Geo. J. Int'l L. 1291 (2016).

lending as an alternative to bank lending provides direct interaction between borrowers and lenders/investors (including retail) without the mediation of a bank or other financial institution. Another alternative financing mechanism which attracts the attention of the public, investor, and regulatory is called initial coin offering (ICO).

ICO is one of the new ways of attracting investment through the sale of coins (tokens) to investors in the form of cryptocurrencies and crypto assets based on blockchain-financing mechanism. The «basics» of ICO are blockchain, smart contract and digital assets.

The main advantage of ICO is the use of blockchain technology – a decentralized digital transaction register. A blockchain represents a database that can be used simultaneously by many participants, each of them instantly synchronizes changes in it. The database is formed as a chain blocks containing a fixation of all transactions that are being performed, with each new record referring to the previous one. Due to the connection of all records with each other, it becomes impossible to forge one of them without changing the rest[3]. Typically, the key constituents of ICO process are fully automated by computer protocols on a blockchain, called smart contracts[4].

To sum up, ICO is based on blockchain infrastructure where tokens are placed, distributed and exchanged with the help of a smart contract without any intermediaries[5].

Initial coin offerings are a global phenomenon disrupting capital markets across several countries. As more offerings are held and more investors are enticed by promises of significant profits, a new regulatory framework becomes critical to promoting

[3] A.B., Brizitskaya, Y.S. Serebryakova, *Approaches to ICO regulation in the World economy*, Materials of the X I International student scientific and practical conference "Economic Sciences. Current state and prospects of development", 17-28 (2018), available at *https://www.elibrary.ru/item.asp?id=32644824.*

[4] M. Chanson, M. Risius, F. Wortmann, *Initial Coin Offerings (ICOs): An Introduction to the Novel Funding Mechanism Based on Blockchain Technology*, 24th Americas Conference on Information Systems 2018: Digital Disruption, AMCIS 2018, New Orleans, LA, 16-18 August 2018, available at https://espace.library.uq.edu.au/view/UQ:054eb24.

[5] S.L. Furnari, *Trough Equity Crowdfunding Evolution and Involution: Initial Coin Offering and Initial Exchange Offering*, 74 Lex Russica, 101 (2021), available at *https://cyberleninka.ru/article/n/trough-equity-crowdfunding-evolution-and-involution-initial-coin-offering-and-initial-exchange-offering*.

innovation without exploiting unsophisticated investors[6]. Given the amount of money involved, it is not surprising that most governments have looked at how they should approach crypto assets in general, and ICOs in particular. As should be expected, however, different jurisdictions have taken a wide variety of regulatory approaches to public distribution of these new phenomena[7].

The analysis of legal regulation of ICO and digital assets in different countries allows to classify States in three main groups: the State which on the legislative level stipulate a ban to conduct ICO and turnover of digital assets (Bolivia, Bangladesh, Brazil, Afghanistan, etc.); States, not officially prohibiting ICO, but not regulating this phenomena (Greece, Denmark, etc.); the State in which the legal framework governing ICO are already reflected in national legislation or positions of regulators (Malta, France, Germany, Liechtenstein, Switzerland, Japan, etc.).

At the same time, regarding the EU member states, it is necessary to take into account not only national regulation, but also supranational legislation of the European Union. Currently, the EU is working on common principles for crypto regulation for all member states. On 24 September 2020 the European Commission adopted a digital finance package. It includes a digital finance strategy and legislative proposals on crypto-assets for the EU financial sector providing consumers with the access to financial services and ensuring consumer protection[8]. This package is aimed at the EU's commitment to an economic recovery after coronavirus pandemic based on digital transition. It is expected that digital financial services can contribute to the modernization of the economy and transforming Europe into a global digital actor. By making the rules more digitally safer for consumers, the Commission seeks to exploit the synergy between newly established financial companies, eliminating the possible risks. Besides, the financial markets are regulated on the EU level by numerous regulations and directives. In particular, the European Securities Market Supervision Authority (ESMA) in 2017 defined

[6] N. Essaghoolian, *Initial Coin Offerings: Emerging Technology's Fundraising Innovation*, 66 UCLA L. Rev 294 (2019).
[7] C.R Goforth, *It's Raining Crypto: The Need for Regulatory Clarification When It Comes to Airdrops*, 15 Indian J. L. & Tech. 321 (2019).
[8] See *https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en*.

the requirements for ICOs in the EU member state[9]. ESMA does not prohibit ICO in EU countries, but emphasizes that ICO projects should not contradict EU legislation. For instance, according to the EU Prospectus Directive, if the ICO project meets the criteria of an IPO (public offering of securities), it is necessary to publish a pre-approved by the regulator prospectus. Moreover, EU securities regulation is applicable to ICOs with the security tokens. In this respect the former Prospectus Directive[10] and the new Prospectus Regulation[11], the Market Abuse Regulation[12], and the MIFID II[13] form the core of financial legislation across the EU.

Broadly speaking, nowadays it is difficult to make blanket statements about clear ICO legal regulation because of the different regulatory schemes and approaches. But while some regulators struggle to keep up with the ICOs currently-existing regulatory regimes, Russia has already taken major stages of developing a clear regulatory paradigm for crypto assets. Moreover, Russia currently has one of the most up-to-date legislation regarding the regulation of the issuance and circulation of digital assets. For that reason, it is worthwhile worldwide to study Russian legal framework regarding ICO.

I will therefore try to draw conclusions on strengths and weaknesses of the Russian ICO framework and extract the positive elements which could be incorporated into a harmonised crypto-asset framework for adoption worldwide.

The research question addressed in this article can thus be formulated as follows:

What are the difficulties that may be encountered and solutions to them on the way of elaborating global approach towards ICO regulation on the example of Russian legislation?

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[9] See *https://www.esma.europa.eu/search/site/ICO*.

[10] Council Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading, amended by Council Directive 2010/73/EU on the prospectus to be published when securities are offered to the public or admitted to trading, OJ L 345, 31.12.2003, p. 64.

[11] Council Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, OJ L 168, 30.6.2017, p. 12.

[12] Council Regulation (EU) No 596/2014 on market abuse OJ L 173, 12.6.2014, p. 1.

[13] Council Directive 2014/65/EU on markets in financial instruments OJ L 173, 12.6.2014, p. 349.

The article begins in Part Two by examining the understanding of the fundamentals of legal regulation of ICO in Russia. Besides, to address the research question, it is important that the reader has a broad understanding of digital assets and its taxonomy. Meanwhile it is important to mention, that in Russia the legislator took a different path with respect to the global approach by introducing such concepts as "digital rights", "digital financial assets", "utility digital rights". Therefore, the Part Three briefly describes the classical approach to tokens as well as introduces the notion of digital rights, and its main types - digital financial assets and utility digital rights. Besides, the author highlights features of digital rights, the differences from the global approach to the digital assets. The Part Fourth deals with the determination of the law applicable to the issue of digital rights. Finally, the article briefly concludes about recommendations concerning possible future ICO regulatory developments on the international level.

2. The Russian model of ICO legal regulation

One of the essential questions in defining the most appropriate regulatory ICO approach is deciding whether crypto assets require completely new regulation or if they should be regulated in line with existing regulations. Russian model of ICO legislative regulation can be described as synthetic, since it combines new special rules regulating crypto assets as well as amendments to existing legislation.

The new legislative rules regarding crypto assets have been entered into force in the Russian Federation with the adoption of two federal laws, namely Federal Law "On Attracting Investments using Investment Platforms and on Amendments to Certain Legislative Acts of the Russian Federation"[14] (hereinafter - the Law on Investment Platforms) dated 02.08.2019 N 259-FZ and Federal Law "On Digital Financial Assets, Digital Currency and on Amendments to Certain Legislative Acts of the Russian Federation"[15] (hereinafter - the Law on DFA) dated 31.07.2020 N 259-FZ. Besides, amendments were made to the current legislation, in particular in the Civil code of the Russian Federation, Federal Law "On Countering the Legalization (Laundering) of proceeds

[14] РГ. 2019. N 172.
[15] RG. 2020. N 173.

from crime and the Financing of Terrorism" dated 07.08.2001 No. 115-FZ, Federal Law "On the Securities Market" dated 22.04.1996 N 39-FZ and some others.

It seems interesting to note the reasons for establishing a crypto assets regulatory framework in Russia. To a greater extent the adoption of the Federal Laws is a response to the requests of the economic community. Information technologies provide new opportunities for investing, raising funds necessary for business development. At the same time, there are new risks associated with the use of such technologies in the field of investment. It should be noted that the lack of a legal mechanism for investing in the digital economy significantly hinders its development and contributes to the expansion of the shadow sector. This, in particular, leads to the spontaneous spread of alternative financial instruments. But the reliability of such financial instruments raises serious doubts. By investing money in them, investors are deprived of guarantees of their return due to the lack of a legal mechanism that protects the rights of investors, as well as regulatory influence from government agencies. Their functioning outside the legal field prevents the implementation of the powers of the financial authorities of the state in this area (the Ministry of Finance of Russia, the Bank of Russia, etc.), provides an opportunity for illegal activities (concealment of income, financing of terrorism, etc.).

Furthermore, the President of the Russian Federation in his Message to the Federal Assembly in 2019[16] noted that it is necessary "... to promptly adopt laws that are priority for creating a legal environment for a new, digital economy, which will allow concluding civil transactions and attracting financing using digital technologies, developing e-commerce and services".

Besides, according to sub-item "p" of item 4 of Part I of the Strategy for the Development of the Information Society in the Russian Federation for 2017-2030[17] digital economy is an economic activity in which the key factor of production is digital data, processing large volumes and using the results of analysis of which, compared with traditional forms of management, can significantly improve the efficiency of various types of production, technologies, equipment, storage, sale, delivery of goods and services. Of great

[16] See *http://kremlin.ru/events/president/news/59863* (last access: Feb. 02, 2022).
[17] Decree of the President of the Russian Federation No. 203 of May 9, 2017 "On the Strategy for the development of the Information Society in the Russian Federation for 2017-2030", SZ RF. 2017. N 20. St. 2901.

importance for the economic development of the country is the formation of an ecosystem of the digital economy - a partnership of organizations that ensures the constant interaction of their technological platforms, applied Internet services, analytical systems, information systems of public authorities of the Russian Federation, organizations and citizens.

Overall, the development of legislation concern digital assets in the Russian Federation is stipulated primarily by promotion of market economy, because innovative activities can diverse business and income. Meanwhile, it is worth pointing out that consumers in Russia are left vulnerable as there exist no special legal rules to protect them. But the risks of clients conducting money are potentially high. Crypto asset trading platforms may not have special mechanisms to guard against fraud and hacking incidents. In addition, consumers are not sufficiently informed of the risk of crypto assets and the losses that can be incurred as a result of investing and trading in crypto assets.

Thus, the legal regulation of digital assets underlies the development of the Russian economy. And high hopes for the stability and viability of the Russian legal framework in relation to ICO have grown due to the adoption of the two abovementioned federal laws.

But it is the view of the author that new regulation at the federal level of the Russian Federation is clearly not enough for a ubiquitous application of blockchain technologies. It is stipulated by the size of the territory of Russia predetermines the large distances between the centers of economic activity, the presence of remote territories in the subjects of the federation, which generates significant inequality Therefore, in addition to federal legislation, legislation at the level of the states is also needed. It should contain norms that reflect the specifics of each subject. At the federal level, the basic principles of ICO regulation should be established, and the subjects of the Russian Federation, should have the right to independently exercise legal regulation in this area.

3. Digital rights as an object of civil rights

The technical basis of the ICO is a token, that could not be ignored when studying this technological phenomenon. Tokens along cryptocurrencies are the two most common blockchain-based digital assets. But it is necessary to distinguish between them.

Firstly, cryptocurrencies have their own blockchains, whereas tokens are built on an existing blockchain (Ethereum, Waves, etc.). A token is a mean of payment in a specific blockchain, which is based on the underlying cryptocurrency. A token without a cryptocurrency cannot exist, and a cryptocurrency without a token can. Secondly, unlike cryptocurrencies, the issue of tokens is carried out by a person (individual or legal entity) — the initiator of their issue. As a rule, the issue of tokens occurs during ICO and their issue is limited. Thirdly, the ICO token has a wider range of applications. In addition to being used as a payment unit, they can certify various rights. In practice, they can simultaneously: (a) have purchasing power and perform the function of a means of payment in the ecosystem of a particular project or even outside it (cryptocurrency); (b) perform the role of a financial asset (as a rule, an analogue of a stock, bond, deposit or warrant) and be the object of free purchase/sale on the relevant trading platforms and exchange services; (c) certify the ownership or loan of the investor in a project / enterprise (i.e., perform the role of loans and bonds); (d) certify the rights to purchase a certain amount of services, goods/property (so-called app coins or app tokens); (e) be a form of reward for certain actions, etc.

According to some researchers, "a token personalized by its owner for future use may represent an investment, a share in the capital, a copyright, or a restaurant voucher... any amount and any asset in digital form. A token can represent anything. It can be a value, such as bitcoin, or a title of ownership"[18]. Broadly speaking, tokens can symbolize any property right - absolute or relative; they can act as a representation of any object of law. As it is pointed out in the doctrine[19], they resemble undocumented securities.

The token in its essence represents a legal symbol that certifies the rights to civil rights objects by recording them in a decentralized information system. Blockchain provides the storage and accounting of tokens.

To date, there exist no universal approaches to the consideration and interpretations of the term "token". It is often used in legal and economic literature in different meanings.

[18] W. O'Rorke, *Le status juridique des criptoactifs* (2018), available at *https://blockchainpartner.fr/wp-content/uploads/2018/03/Blockchain-cryptoactifs-et-ICO.pdf*.

[19] See L.A. Novoselova, "*Tokenization" of objects of civil law*, Business and Law, 37-38 (2017), available at *https://www.elibrary.ru/item.asp?id=30755294.*

Various notions of the term "token" is stipulated by diverse types of tokens. It should be noted that at the present time, there is no unified system for classifying tokens. In the legal literature, several classifications of tokens are also proposed depending on the types of functions that they perform.

According to the global classical approach, tokens are divided into investment (Security) Token, Utility Token and Payment tokens (Cryptocurrencies). However, in Russia, the legislator took a fundamentally different path by introducing such concepts as "digital rights", "digital financial assets", "utility digital rights".

It should be noted that the term "digital rights" is borrowed from the American term "digital rights", but this term is used in a completely different meaning. In the USA digital rights are understood as a set of human rights to use a computer, access to the Internet, publication of content in a digital environment, its processing, transmission and other rights of Internet users[20]. Whereas in Russia digital rights represent the legal analogue of the term "token".

According to the Russian approach the concept of "digital rights" means the property rights recorded in electronic (digital), which meet two criteria: (i) they must be explicitly named as digital in the law; (ii) they must be acquired, carried out and alienated on an information platform that "meets the criteria established by law". In other words, the rights secured in electronic form can become "digital" only if they comply with these two main criteria.

Digital rights as objects of civil legal relations appeared on October 1, 2019, due to amendments to Articles 128, 141.1 of the Civil Code of the Russian Federation. Article 128 of the Civil Code of the Russian Federation provides that such an object of civil rights as property rights, in addition to non-cash funds and non-documentary securities, include digital rights. Article 141.1 of the Civil Code of the Russian Federation is devoted to them.

According to clause 1 of Article 141.1. of the Civil Code of the Russian Federation, digital rights are recognized as obligation and other rights named in this capacity in the law, the content and conditions of which are determined in accordance with the rules of the information system that meets the criteria established by law.

[20] See G. Goggin et al., *Digital rights in Australia*, Sydney Law School Research, 18-23 (2017), available at *https://www.researchgate.net/publication/330195909_Digital_Rights_in_Australia*.

The exercise, disposal, including transfer, pledge, encumbrance of digital rights by other means or restriction of the disposal of digital rights is possible only in the information system without contacting a third party.

Thus, digital rights represent objects of civil law and belong to the category of "other property". Despite the legislative consolidation of digital rights among the objects of civil rights, there is a discussion around digital rights as objects of civil rights. Various points of view are expressed.

R.B. Golovkin and O.S. Amosova believe that digital rights are "not a possible behavior of subjects of legal relations, but rather a form of expression of subjective rights reflected in civil legislation and relevant information systems. Therefore... digital rights are a kind of subjective rights expressed in digital form and implemented within the framework of information systems"[21].

V.P. Kamyshansky adheres to the point of view that "digital rights are not a special kind of subjective civil rights, different from real or binding rights. They represent binding and other rights, the content and conditions of which are contained in a special information system"[22].

S.I. Suslova and U.B. Filatova believe that "digitalization of rights does not lead to the emergence of a new type of property rights that exist along with mandatory, corporate, exclusive rights, but to a digital way of fixing them"[23]. A similar conclusion is contained in the articles of L.Y. Vasilevskaya[24]. Thus, according to a number of scholars, digital rights in the form in which they are enshrined in the law do not form a new object of civil rights, but represent a digital form /way of fixing traditional civil rights.

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[21] R.B. Golovkin, O.S. Amosova, *"Digital rights" and "digital law" in the mechanisms of digitalization of the economy and public administration*, 51 Bulletin of the Vladimir Law Institute 165 (2019), available at *https://elibrary.ru/item.asp?id=38246588*.

[22] V.P. Kamyshansky, *Digital Rights in Russian Civil Law,* 1 Power of the Law 15 (2019), available at *https://www.elibrary.ru/item.asp?id=42490448*.

[23] S.I. Suslova, U.B. Filatova, *Objects of civil rights in the conditions of formation of the information space of Russia*, Prologue: Law Journal 11 (2019), available at *https://cyberleninka.ru/article/n/obekty-grazhdanskih-prav-v-usloviyah-formirovaniya-informatsionnogo-prostranstva-rossii*.

[24] L.Y. Vasilevskaya, *Token as a new object of civil rights: problems of legal qualification of digital law*, Actual problems of Russian law, 111–119 (2019), available at *https://cyberleninka.ru/article/n/token-kak-novyy-obekt-grazhdanskih-prav-problemy-yuridicheskoy-kvalifikatsii-tsifrovogo-prava*.

3.1. Features of digital rights

The legislator refers digital rights to property rights. Therefore, digital rights have all features of property rights, such as: digital law does not exist by itself, it has the ability to belong to a certain person; with the help of digital law, the property interest of its owner is realized; digital right can be alienated; digital right must have a monetary value.

However, in addition to the features inherent in digital rights as a kind of property rights, digital rights have the following specific features.

1) The main distinguishing feature is the virtuality of a digital asset, which is due to its digital form. The exclusively digital form of the object is associated with the use of a computer. Computers process information in encoded form. The code consists of a finite number of characters (binary code, standard six-bit code of the International Organization for Standardization (ISO), etc.)[25]. Information is usually entered automatically, including by directly reading the original documents, etc. The input information is converted by the input devices into signals and stored in storage devices.

The virtuality of digital assets also determines their immateriality, i.e. their lack of material and corporeal substance. The division of goods that are objects of civil rights into tangible and immaterial, depending on their physical nature, is used in legal science to characterize property goods of an immaterial nature[26].

Such a distinction seems important, because historically, things, i.e. objects of the material world, have prevailed in property turnover. The emergence of an electronic form for a number of traditional objects of civil rights, such as money, securities, and the results of intellectual activity, did not lead to a revolution in law, although it created a number of problems. The legal regulation of such objects was lined up by analogy with the regulation of objects having a similar legal nature and the characteristics of a thing.

However, objects in digital form change the nature of interaction between the participants for the following reasons: 1) digital content cannot be read without using a communication device; 2) computers read and transmit digital content by copying

[25] [2017] UKSC 36, [2017] AC 624. Explanations to the Unified Commodity Nomenclature of Foreign Economic Activity of the Eurasian Economic Union (TN VED EAEU) (Volume IV. Sections XIV - XVI. Groups 71 - 84).

[26] L.V. Sannikova, *Services in Russian civil law*, 97 (2006).

it. In this case, any use of the file entails copying it. Even when such copies are temporary or secondary[27].

In my opinion, the specificity of digital assets and their difference from traditional objects, which can exist both in analog form and in digital (electronic), is that they are not only immaterial in nature, but also do not need to be materialized in the real world for their functioning. This property of digital assets is emphasized when certain types of them are characterized as virtual: virtual currency, virtual property, etc.

2) economic value

The use of digital assets such in the financial sector indicates that these objects have a certain value. The fact that the newly generated token or cryptocurrency may not meet the expectations of investors and turn out to be "soap bubbles" has no legal significance. These objects have at least a potential value.

Thus, digital assets with economic value can be recognized as objects of civil rights. It is the economic value of the object that determines its demand among the participants of the property turnover, and, accordingly, participation in the property turnover. At the same time, it should be emphasized that the value is not the code entry itself, but the right certified by it to the object encrypted in it, including the right to access the code (login, password, crypto wallet, etc.), as well as the right to dispose of a digital asset.

3) fixation of digital rights with the help of individual digital technologies (blockchain / distributed registry / decentralized information system) embodied in cryptoassets.

4) the interaction between the participants in civil legal relations regarding digital rights occurs exclusively within the framework of the information system. For utility digital rights, according to the Law On Investment Platforms, it is an investment platform; for digital financial assets - information system, following the Law on DFA.

To sum up, the following definition of digital rights as objects of civil legal relations can be formulated: they are the property rights to objects existing exclusively in cyberspace that are recorded digitally, by creating a record about them in the information system, provided that the holder of such rights has the technical ability to dispose of them.

[27] V.L. Entin, *Copyright in virtual reality (new opportunities and challenges of the digital age)*, 216 (2017).

3.2. Types of digital rights

According to the Law on DFA and the Law on Investment Platforms, digital rights are divided into the following categories: digital financial assets (DFA) and utility digital rights. However, digital rights do not include digital currency (cryptocurrency)

Currently, the legislator names as digital rights the following utility digital rights: 1) the right to demand the transfer of the thing (things); 2) the right to demand the transfer of exclusive rights to the results of intellectual activity and (or) the rights to use the results of intellectual activity; 3) the right to demand the performance of work and (or) the provision of services. (Art. 8 of the Law on Investment Platforms).

In accordance with paragraph 2 of Art. 1 of the Law on DFA, digital financial assets (DFA) are digital rights, including monetary claims, the ability to exercise rights to equity securities, the right to participate in the capital of a non-public joint stock company (JSC), the right to demand the transfer of equity securities, which are provided for by the decision on the issue of digital financial assets in the manner prescribed by law, the release, accounting and circulation of which is possible only by making (changing) entries in the information system based on the distributed register, as well as in other information systems (IS).

I believe that digital rights cannot be limited solely to utility digital rights or digital financial assets. For example, utility digital rights are inherently obligation rights. The fact that they are recorded in the information system does not make them digital.

A) Utility digital rights.

The Law on Investment Platforms regulates a specific type of investment relationship - a relationship in which investment is carried out exclusively through the investment platforms.

According to sub-paragraph 1 of Part 1 of Article 2 of the Law on Investment Platforms, an investment platform is an information system in the Internet information and telecommunications network used to conclude investment contracts with the help of information technologies and technical means of this information system, access to which is provided by the operator of the investment platform.

Based on the above definition, the main task of the investment platform is to ensure the conclusion of investment contracts. The following functions of investment platforms can be distinguished:

- ensuring the conclusion of investment contracts (main functions);

- providing additional service to participants of investment relations (auxiliary functions).

The main functions of the investment platform ensure the implementation of the rights of participants in investment legal relations, as well as legal requirements (in terms of ensuring economic security, etc.).

Acquisition, emergence and alienation of issued utility digital rights under Russian law is possible only on investment platforms. Therefore, in order to use the services of the investment platform, the investor enters into an agreement with the operator of the investment platform on the provision of investment assistance services. Both of these agreements are accession agreements.

It should be noted that the definition of an investment contract appeared in Russian legislation for the first time. The implementation of investment is recognized as the main criterion for classifying a contract as an investment one[28]. However, it applies only to investment contracts concluded through investment platforms. In fact, the legislator has identified a special kind of investment contracts. Such contracts, in addition to the feature of investment activity, include specific methods of concluding and executing the contract. Moreover, the method of investment used by the participants determines the terms of the relevant investment agreement.

Thus, the main features of investment agreements are: (i) making investments through the investment platform; (ii) making investments in specific ways that are provided for by Federal Law.

The parties to investment agreements, as well as their place in the system of investment relations, are shown in the following table.

[28] V.N. Lisitsa, *The legal regulation of investment relations: Theory, legislation and practice of enforcement*: Monograph; Russian Academy of Sciences, Institute of Philosophy and Law SB RAS; Ministry of Education and Science of the Russian Federation, Novosibirsk State University. Novosibirsk, 467 (2011), available at *https://www.elibrary.ru/item.asp?id=26096166*.

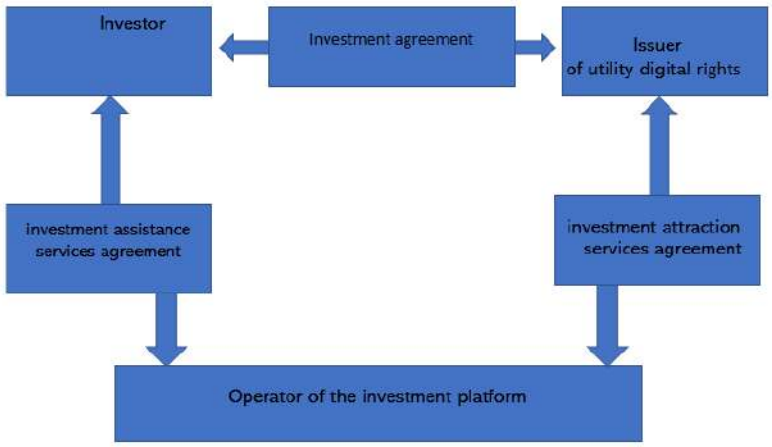

Table 1. System of the investment relations.

A mandatory feature of the parties to the investment agreement is that they must be registered on the investment platform itself as a user (the necessary functions must be available to them in accordance with the rules of such an information system).

1) The operators of the investment platform are an obligatory party to contracts concluded in the process of organizing investment attraction. Only the operators of the investment platform have the right to organize investment attraction. The operator of the investment platform can only be a business company established in accordance with the legislation of the Russian Federation. The activity of the operator of the investment platform can only be carried out by an organization included in the specialized register of the Bank of Russia - the register of operators of investment platforms.

Moreover, investment attraction services can only be provided to persons who meet the established requirements.

Therefore, the operator of the investment platform has the right to conclude the above-mentioned contracts only with persons who meet such requirements, which imposes on him the obligation to establish compliance with the requirements of the legislation of a potential investor or a person attracting investments.

2) An investor can be a natural person or a legal entity. At the same time, the legislation establishes a number of restrictions for attracting investments and investing by individuals.

Thus, the amount of investments that one person can attract during one calendar year should not exceed 1 billion rubles (the restriction does not apply to public joint-stock companies that attract investments by acquiring utility digital rights by investors). Monitoring of compliance with this restriction is carried out by the operator of the investment platform each time a person attracts investments using the investment platform of this operator.

Investing by natural person requires the compliance with special rules and restrictions. A natural person can invest using investment platforms in total no more than 600 thousand rubles during one calendar year. Moreover, this restriction applies to investing in all investment platforms, and not just one. If the total investment volume of an individual exceeds the specified limit, the operators of investment platforms are not entitled to provide an opportunity for a natural person to invest.

This restriction does not apply:

1) to natural person who are individual entrepreneurs and (or) individuals recognized by the operator of the investment platform as qualified investors in accordance with Article 51.2 of Federal Law No. 39-FZ of April 22, 1996 "On the Securities Market";

2) to natural person when they acquire utility digital rights under investment agreements concluded with a public joint stock company.

For each investment by a natural person, the operator of the investment platform is obliged to monitor compliance with this restriction. Such control is carried out by the operator of the investment platform on the basis of the assurances of a natural person on compliance with the specified restriction, submitted in accordance with the procedure provided for by the rules of the investment platform. In case of exceeding the specified limit of the investment amounts of a natural person, the operator of this investment platform may be obliged, at the request of such a natural person, to acquire from him property rights, securities and

(or) utility digital rights acquired in this investment platform for the amount of such excess (the consequence of investing in violation of the established restrictions). A claim for the application of this effect may be filed by the investor within one year from the date of the transaction with exceeding the limit. However, if a natural person has given the operator of the investment platform false assurances about compliance with the restriction, he is deprived of the right to demand that the operator of the investment platform purchase the specified rights, securities from him.

3) An issuer of utility digital rights can be a natural person or a legal entity. The Law on Investment Platforms imposes several requirements on them.

Thus, the issuer of utility digital rights cannot be a natural person who, and (or) whose controlling persons, and (or) the head (sole executive body) of which:

a) included in the list of organizations and individuals in respect of which there is information about their involvement in extremist activities or terrorism, and (or) in the list of organizations and individuals in respect of which there is information about their involvement in the proliferation of weapons of mass destruction;

b) do not meet the requirements established by the rules of the investment platform.

A legal entity cannot be an issuer of utility digital rights if:

a) the controlling persons of such a legal entity and (or) its head (sole executive body) have an outstanding or outstanding criminal record for a crime in the field of economics or a crime against state power, the interests of public service and service in local self-government bodies;

b) in respect of the head (sole executive body) of such a legal entity, the period during which he is considered to have been subjected to administrative punishment in the form of disqualification has not expired;

c) proceedings on bankruptcy of a legal entity have been initiated against such a legal entity.

An individual entrepreneur cannot be a person attracting investments if:

a) has an outstanding or outstanding criminal record for a crime in the field of economics or a crime against state power, the interests of public service and service in local self-government bodies;

b) the arbitration court has introduced the procedure applied in the case of insolvency (bankruptcy) in respect of such an individual entrepreneur;

c) in respect of such an individual entrepreneur, from the date of completion of the procedure for the sale of property or termination of bankruptcy proceedings during such a procedure, the period provided for by Federal Law No. 127-FZ of October 26, 2002 "ON Insolvency (Bankruptcy)" has not expired, during which he is not entitled to carry out entrepreneurial activities, as well as hold positions in the management bodies of a legal entity and otherwise participate in the management of a legal entity.

As part of the investment attraction activity, a person places an investment offer in which, in addition to all the essential terms of the investment agreement, the following must be specified:

- the validity period of such an investment offer;
- the minimum amount of investors' funds, the achievement of which is a prerequisite for the conclusion of an investment agreement;
- the maximum amount of investors' funds, upon reaching which the validity of such an investment offer is terminated (the maximum amount of investors' funds is considered reached if investors accept an investment offer for an amount of funds equal to the specified maximum amount of funds).

As a general rule, the conclusion of an investment contract is confirmed by an extract from the register of contracts issued by the operator of the investment platform. The conclusion of contracts under which utility digital rights are acquired is allowed by confirming information in the register of contracts (if such information is entered into the register of contracts according to the rules for entering information about the emergence of utility digital rights in the investment platform).

B) Digital financial assets

The Law on DFA establishes that the release, accounting and circulation of DFA is possible only by adding entries to an information system based on a distributed registry, as well as to other systems.

According to the legislation, the release, accounting and circulation of DFA are possible only by making (changing) entries in the information system based on the distributed register, as well as in other information systems. This approach seems to be

justified, because, on the one hand, it brings certainty to the understanding of the essence of digital financial assets as a type of cryptoassets, on the other hand, it makes it possible to extend this regulation to similar objects that can be created in the future using other digital technologies. Digital financial assets are accounted for in the information system in which they are issued, in the form of records in the ways established by the rules of the specified information system.

Parties in the system of DFA relations, are shown in the following table.

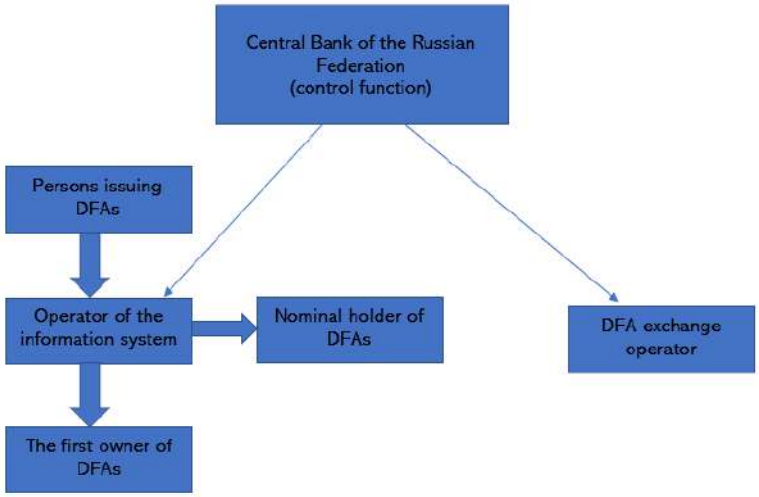

Table 2. System of DFA relations.

The information system may be a legal entity, whose personal law is Russian law (including a credit institution, a person entitled to carry out depository activities, a person entitled to carry out the activities of a trade organizer).

The operator of the information system is obliged to ensure:

1) the ability to restore access of the owner of digital financial assets to the records of the information system at the request of the owner of digital financial assets;

2) uninterrupted and uninterrupted functioning of the information system, including the presence and proper functioning of duplicate (backup) technological and operational means, ensuring the uninterrupted and continuous operation of the information system;

3) the integrity and reliability of information about digital financial assets contained in the records of the information system;

4) the correctness of the implementation in the information system of the algorithm (algorithms) established by the operator of the information system for creating, storing and updating information contained in the distributed register, and the algorithm (algorithms) that ensure the identity of the specified information in all databases that make up the distributed register, as well as the impossibility of entering changes in the algorithm (algorithms) established by the operator of the information system by other persons - for information systems based on a distributed register.

Sale and purchase transactions and other transactions related to DFA are made through the digital financial asset exchange operator, which ensures the conclusion of transactions with the digital asset by collecting and comparing multidirectional applications for such transactions or by participating at its own expense in the transaction with DFA as a party to such a transaction in the interests of third parties.

The status of this entity can be compared to a broker or dealer in the securities market.

The operator of the exchange of digital financial assets can be credit organizations, trade organizers, as well as other legal entities that meet the requirements of this Federal Law and the Bank of Russia regulations adopted in accordance with it, which are included by the Bank of Russia on the basis of their petition in the order established by it in the register of operators exchange of digital financial assets. The operator of the exchange of digital financial assets has the right to carry out its activities from the moment it is included in the register of operators of the exchange of digital financial assets, which is maintained by the Bank of Russia in accordance with the procedure established by it. The register of operators for the exchange of digital financial assets is posted on

the official website of the Bank of Russia in the information and telecommunications network "Internet".

Actions for entering into the information system in which the issue of digital financial assets is carried out, records of the transfer of digital financial assets to their first owner are entitled to carry out Persons issuing DFAs. The law establishes the following requirements to them:

1) individuals registered in accordance with Federal Law No. 129-FZ of August 8, 2001 "On State Registration of Legal Entities and Individual Entrepreneurs" as individual entrepreneurs;

2) legal entities (commercial and non-commercial organizations).

The rights certified by the DFA arise from their first owner from the moment the records of the transfer of digital financial assets to the specified person are entered into the information system in which the DFA is issued.

The owner of digital financial assets is a person who simultaneously meets the following criteria:

1) a person is included in the register of users of an information system in which digital financial assets are taken into account;

2) a person has access to an information system in which digital financial assets are accounted for by possessing a unique code necessary for such access, which allows him to receive information about digital financial assets that he possesses, as well as to dispose of these digital financial assets through the use of an information system.

Digital financial assets can be also credited to a nominal holder of digital financial assets. He keeps account the rights to digital financial assets owned by other persons. Only a person who has a license to carry out depository activities can act as a nominee holder of digital financial assets. The operator of the information system in which the digital financial assets are issued cannot act as a nominal holder of digital financial assets.

The law on the DFA provides that the Bank of Russia is the regulator and controller of the circulation of digital financial assets. However, nowadays there are no standards and rules for protecting the rights and interests of recipients of digital financial services in the new digital market.

To sum up, the Russian legislation establishes the basics of the mechanism of interaction of participants in legal relations on

investing using an investment platform and circulation of financial digital assets through information system, defines legal status of participants and the procedure for concluding transactions with the help of such platform.

It should to be noted that the new concepts introduced by Russian legislators do not correspond to the notions formed in international practice. The use of such terms as "digital rights", "digital financial assets", "utility digital rights" has the following disadvantages.

a) Unlike the global approach, cryptocurrencies and tokens are united by the common concept of "digital financial assets".

b) The term "digital financial assets" is not used in world practice when regulating the crypto market. Accordingly, such terminology will not be clear to foreign investors.

c) The concept of utility rights is revealed in the law by listing digital rights that can be acquired, alienated and implemented in the investment platform. These include: 1) the right to demand the transfer of a thing(s); 2) the right to demand the transfer of exclusive rights to the results of intellectual activity and (or) the rights to use the results of intellectual activity; 3) the right to demand the performance of works and (or) the provision of services. Based on the content of utility digital law, it can be assumed that we are talking about security tokens rather than utility tokens.

Besides, the requirement of only limited range of participants reflects the national character of the Russian legislation on crypto assets. In other words, only Russian legal entities can be operators of the information system and the exchange operators of digital financial assets. In the case of utility digital rights and DFA, the legislator "binds" cross-border relations on the turnover of digital rights to the Russian jurisdiction. This leads to limitation of the number of foreign participants to take part in these relations, as well as intermediary institutions through which all transactions with digital rights must pass. On the one hand, such a system makes it possible to strengthen control over the digital rights market, provide clear rules of participation for ordinary investors and increase general confidence in the new market (in particular, this is facilitated by the introduction of the responsibility of the operator of the information system). On the other hand, it creates an additional obstacle for foreign ICO companies that will have to

comply with new legislative requirements of the Russian Federation (for example, the requirement that persons attracting investments through investment platforms have to be Russian legal entities).

4. Applicable law

One of the major problems when it comes to regulating crypto assets is that it goes beyond jurisdiction. Therefore, the fundamental issue in the conflict of laws is whether the territorial, citizenship or domicile theory is the correct basic principle for determining jurisdiction. One of the inherent difficulties of applicability of these principles is stipulated by the anonymous and decentralised nature of blockchain. It is likely that legislation will be required to resolve these issues, potentially requiring international cooperation across jurisdictions. In this regard it is interesting to analyze Russian approach to the law applicable to crypto assets which could help in elaborating the uniform international view.

According to paragraph 5 of Article 1 of the Law on DFA, Russian law applies to legal relations arising during the issuance, accounting and circulation of digital financial assets, including relations with the participation of foreign persons. Thus, Russian law will apply to the legal relations of a foreign investor and a Russian company offering to sell DFA on the territory of the Russian Federation, since the issue of DFA on the territory of the Russian Federation is regulated by the Law.

It has to be noted that although the Law does not directly indicate the law applicable to the purchase of tokens from foreign ICO projects, most likely, the legislator implied that all legal relations arising from transactions with the DFA, in which a person from the territory of the Russian Federation participates, will be regulated by Russian law. This is evidenced by the fact that, according to the Law, it is possible to make a transaction related to the DFA only through the DFA exchange operator. Accordingly, all types of such transactions are covered by Law and Russian law applies to them.

It can be concluded that a citizen of the Russian Federation who is abroad can purchase a DFA in a foreign jurisdiction according to the rules of the country of his location. However, in

Russia, the acquired DFA can be sold only through the DFA exchange operator, whose activities are regulated by Russian law.

In this regard, the DFA exchange operator will act as a kind of intermediary between the resident of the Russian Federation and the person issuing the DFA abroad. In particular, Article 10 of the Law on DFA indicates that the exchange operator can ensure the execution of such transactions in two ways: "by collecting and comparing multidirectional orders for such transactions or by participating at its own expense in a transaction with digital financial assets as a party to such a transaction in the interests of third parties". In other words, if in a foreign jurisdiction an asset token was issued, for example, on the Waves blockchain platform[29], then in Russia the DFA exchange operator can provide a service to residents of the Russian Federation for its acquisition. In this case, on the Waves blockchain platform, the acquirer of such an asset will be the exchange operator of the DFA, and in the information system operated by our intermediary, the owner of such an asset will be a resident of the Russian Federation.

Thus, there are three parties in the legal relationship for the acquisition of a digital asset by a resident of the Russian Federation: an investor, an operator who provides the service "to participate in a transaction with digital financial assets as a party to such a transaction in the interests of third parties", and a foreign entity issuing DFA[30].

The described system of choosing the applicable law is very close to the concept of the Proper Law, namely the law of the state with which this legal relationship is most closely connected. In my opinion, the emergence of operators of information systems, DFA exchange operators, which are Russian legal entities, brings legal relations of DFA closer to Russian law, makes them more closely connected.

As opposed to the Law on DFA, the Law on Investment Platforms does not provide for any provisions on the applicable law. Due to the fact that three parties are involved in the process of circulation of utility digital rights and 3 different contracts are used, it seems appropriate to consider each contract separately.

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[29] Waves Enterprise blockchain platform, available at *https://wavesenterprise.com/ru/platform*.

[30] M.Yu. Kuzmenkov, *Conflict Regulation in Digital Rights Circulation*, 16 Actual Problems of Russian Law, 152 (2021) (In Russ.), available at *https://doi.org/10.17803/10.17803/1994-1471.2021.124.3.152-159*.

The question of applicable law arises only when the legal relationship involves a foreign element. In the doctrine of private international law, the foreign element is usually expressed in the subject of legal relations, the object of legal relations and a legal fact[31]. A legal fact (the acquisition of utility digital rights) takes place on the territory of the Russian Federation, since according to the Law, "digital rights arise from the first acquirer, passes from one person to another person and (or) terminates from the moment information about this is entered in the investment platform". The object of legal relations is digital law, which actually exists in the form of a computer code. Undoubtedly, it can technically be located on foreign servers. However, given the absence of a significant legal connection between the location of such digital rights and the actual legal relationship of the parties, as well as the difficulty of locating in the case of using a distributed data registry, the object of legal relationship should not be regarded as a foreign element that influences the choice of applicable law. As for the subjects of legal relations, there are three of them: the operator of the investment platform, the investor and the issuer of utility digital rights.

According to the Law on Investment Platforms, an investment platform operator is always a Russian legal entity. Accordingly, it cannot be a foreign element. The law also indicates that the issuer of utility digital rights) is "a legal entity created in accordance with the legislation of the Russian Federation, or an individual entrepreneur to whom the investment platform operator provides investment attraction services". Consequently, the issuer of such digital rights is also a person whose personal law is Russian law. But the Law refers to an individual or legal entity as an investor without reference to Russian law. Such a person may be a foreign citizen, who will be the only possible foreign element in these legal relations. As already noted, the investor enters into an investment agreement with the issuer of utility digital rights using the technical means of the investment platform. It was also noted that the register of investment agreements is maintained by the operator of the investment platform, the conclusion of agreements takes place on the investment platform, the issue and circulation of utility digital rights also occur within the investment platform. Both the operator

[31] I.B. Ilovaisky, *On the definition of "foreign element" in private international law and ease of understanding of law*, Legal Concept, 99–106 (2019), available at *https://cyberleninka.ru/article/n/o-definitsii-inostrannyy-element-v-mezhdunarodnom-chastnom-prave-i-prostote-ponimaniya-prava*.

of the investment platform and the issuer of utilitarian digital rights are residents of the Russian Federation. Based on this, it can be concluded that these legal relations are most closely related to Russian law, which is to be applied.

However, the application of Russian law to such relations is fair only from the Russian legislation perspective. In other countries, there may be other conflict-of-laws rules to legal relations arising from the issuance and turnover of DFA. Besides, in most countries, there are no special laws that regulate the turnover of utility digital rights, known abroad as utility tokens. Such tokens by their nature are usually compared with the product[32]. In this regard, Regulation (EC) N 593/2008 on the law to be applied to contractual obligations (Regulation "Rome I")[33]. This Regulation applies in situations containing a conflict of laws to contractual obligations in the civil and commercial area. Thus, the Regulation establishes that the contract of sale of goods is governed by the law of the country where the seller has his usual place of residence, and the service contract is governed by the law of the country where the service provider has his usual place of residence. Therefore, if in law enforcement practice there is a situation of recognizing a utility token as a product or service, there is the possibility of using conflict-of-laws bindings established in the Rome I Regulations. The key point is to determine the legal nature of the token in a particular jurisdiction in order to understand whether we can apply certain conflict-of-laws rules.

5. Conclusion

Due to the global nature of ICOs, the elaboration of its global regulation could become quite an extensive exercise, in which an assessment of the experience of other jurisdictions could be very useful. Thus, the choice to analyze Russian ICO framework was natural due to its recently passed federal laws in this area.

Assessing in general the Russian legislation in the field of crypto assets, it should be recognized that Russia has not managed

[32] Legal Classification of Tokens: Utility Token, available at *https://www.lexology.com/library/detail.aspx?g=c1d69ffb-c010-4ffe-8923-841a804907db*.

[33] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177, 4.7.2008, p. 6, SPS "Garant".

to avoid conceptual miscalculations and inconsistencies in creating its own model of legal regulation, which lead to difficulties in its practical implementation.

Firstly, the exclusively national character of the adopted Russian legislation needs to be stressed. In particular, this is manifested in the rejection of terminology that has accepted worldwide and introducing such concepts as "digital rights", "digital financial assets", "utility digital rights". Meanwhile, the name of various types of crypto assets is of great importance for the formation of supranational legislation. Such requirements and the general difference from the legal practices of regulating the turnover of digital rights in the vast majority of jurisdictions can significantly reduce the desire of foreign ICO projects to enter the Russian market. It is unlikely that this will contribute to the formation of the image of the Russian jurisdiction as friendly and open for the introduction of new digital technologies and for investments in this area. Therefore, it seems appropriate to harmonize national legislation with the world practice of turnover of crypto assets. Reverse approach can negatively affect the investment attractiveness of the Russian digital asset market.

Secondly, in Russia exist no special rules to protect consumers and provide them with special rights as compared with professional investors (e.g. for disputes).

Thirdly, there is no special state supervisory authority for this area of relations. The Bank of Russia collects information from citizens about unscrupulous financial companies, including those that hide behind crypto-legends. For this purpose, a special department for countering unfair practices in the financial market has been established. But the Bank of Russia does not have any opportunities to influence the alleged fraudsters if they do not have permits (licenses) issued by the regulator itself. His task in this case is to collect, summarize information and transfer it to law enforcement agencies for investigation.

Fourthly, the size of the territory of Russia predetermines the large distances between the centers of economic activity, the presence of remote territories in the constituent entities of the federation, which generates significant inequality. In other words, at the federal level, the legislator adopts general framework laws that establish the principles and main directions of regulation and regional legislation establishes the specification of federal normative legal acts, taking into account the local specifics and

features of the formation of local self-government in the subjects of Russia.

All in all, the example of the Russian ICO laws illustrates some of the obstacles that may be encountered when trying to elaborate global and uniform approach towards ICO regulation. Identifying these difficulties at an early stage will help to avoid possible future mistakes.

Therefore, on the global level the legislators should take into account the following recommendations while elaborating the uniform ICO regime. In particular, regulators should not introduce fundamentally new concepts and categories, but tend to harmonize the conceptual framework as much as possible. Moreover, it seems necessary to set rules in order to protect consumers and provide them with special rights as compared with professional investors (e.g. for disputes). In addition, it is recommended to form the new global organization that would present a comity with the representatives of States national authorities. Members of such organisation would cooperate closely and having this kind of interaction as everyday practice makes easier to prove facts that cannot be changed without a trace. The ultimate goal of this organization should be the development of best practice standards and common global ICO framework.

TWO CENTURIES OF GREEK CONSTITUTIONALISM: THE FIRST REVOLUTIONARY CONSTITUTIONS

*Georgios Th. Zois**

Abstract

The paper examines the foundations of the Greek constitutionalism and the formation of the democratic ideal in the modern Greek constitutional and national identity.

The term "Constitutionalism" could be attributed to more than one sense, as it is associated with the historical evolution of the state phenomenon from antiquity[1] until today, and inherently linked to the request for entering into legal restrictions to the power of State (broad meaning of the term). However, Constitutionalism, as one understands it on the basis of the present information that give a narrower interpretation of the term, is the historical movement that claimed the establishment of a formal, i.e. written Constitution, from the end of the 18th century onwards under the influence of the great Revolutions of that time, namely the American (1776) and the French (1789)[2]. His appearance is located during the period of the European Enlightenment with the main demands being the limitation of the absolute and arbitrary power of the monarch and the clear demarcation of state powers. Under its liberal version, the constitution demanded the separation of secular from ecclesiastical power, the delimitation of political power through its distribution among the various state bodies, and its limitation through guarantees of the exercise of certain rights. Under its dem-

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[1] The foundations of the state organization were laid already with the establishment of the ancient Greek city (city-state). For Aristotle (Politics III, 1278b, 10) «Πολίτευμα δ'ἐστὶν ἡ πολιτεία». See G. Glotz, *La cité grecque* (1953). The codification of the legislation, i.e. the recording of the current rules and their exposure to public view (e.g. in a public building, in "agora"), was another step towards closer organization. In this respect, the Romans were pioneers.

[2] See indicatively K. Chrysogonos, *Theory of the State. The State as a form of organization of human societies* (2020).

ocratic version, which complemented the liberal one, the main demands of the Constitution were the recognition of the universal suffrage[3] and the securing of the universal representation of the people in the legislature[4]. Since the first Revolutionary Constitutions in the early nineteenth century, all Greek Constitutions that have been written, are generally recognized as the supreme law. Their amendment is difficult, as the constitutional texts themselves demand certain and higher procedural and substantial requirements, in order to be protected from political volatility and the caprices of occasional majorities.

However, apart from the above versions, the request for the adoption of a written Constitution is also connected with a claim to political status for a Nation, in other words it is an element of an existential character. The first formal Constitution of a state coincides with the declaration of its independence. Thus, if for the French Revolution the Declaration of the Rights of Man and of the Citizen[5] and a little later the enactment of the Constitution of 1791 symbolized the transition from the Old Regime[6] to a new state, for the American Revolution the enactment of the Constitution of 1787 was the "Registry" of the birth of the mosaic that made up the American Nation. The French Revolution and the Napoleonic Wars were the events that triggered the Greek Revolution.

Before the Revolution, the liberal and democratic ideology was present in large sections of Greek society and not only among the bourgeoisie and the scholars who pioneered its spread. The modern Greek Enlightenment, which succeeded in combining progressive European ideas with the historical memories and future perspectives of Hellenism, helped the Nation to get rid of the fatalism that cultivated passivity and submission[7]. Rigas Feraios (1757-1798), an intellectual and early revolutionary, tried to secure Napoleon's support for an insurgency in the Balkans but he was betrayed and arrested by the Austrians who delivered him to the Ottomans who tortured and executed him. He became one of the first national

[3] By replacing the old system of "honorary" voting of the bourgeoisie.
[4] From the end of the 19th century onwards. The demand for the recognition of rights to collective action, such as the right to associate, trade union rights and the right to establish and participate in political parties, was also added.
[5] Déclaration des droits de l'homme et du citoyen de 1789.
[6] Ancien Régime.
[7] See A. Manesis, *The liberal and democratic ideology of the national revolution of 1821* (2021).

heroes of modern Greece and he inspired similar revolutionary activities, especially in the Greek diaspora, between merchants, students, and some Phanariotes[8]. In an effort to stimulate a Pan-Balkan uprising against the Ottomans, Rigas Feraios published in 1797 his book, entitled "New Political Constitution of the Inhabitants of Roumeli, Asia Minor, the Islands of the Aegean and the Principalities of Moldavia and Wallachia"[9]. This work includes 4 sub-works: a) a Revolutionary Proclamation, b) Rights of Man (34 articles), c) the Constitution of the Hellenic Republic (124 articles) and d) the Thourios or Patriotic hymn (poem). At the core of Rigas Feraios's constitutional ideology is the democratic principle and, in particular, the principle of popular sovereignty. The democratic character of the regime is confirmed by the principle of political equality. The liberal character of the regime is reflected in the provisions for the exercise and protection of fundamental rights and freedoms. The fundamental rights in the Constitution of Rigas Feraios appear under the title "Rights of Man" (and not "Rights of the Citizen"), a term that eloquently refers to the theory of natural law[10].

Taking into account the above assumptions, the Greek Revolution of 1821 is not only connected with the birth of the Modern Greek State-Nation but is also the birth act of the Greek Constitution. With the beginning of the Greek war of independence in 1821, the first regional governments were established: the "Organization of the Temporary Administration of Western Continental Greece", the "Legal Order of Eastern Continental Greece" and the "Peloponnesian Senate". Those governments were founded by regional assemblies during the first year of the revolution (1821) and facilitated provisional government and military set-ups, until the eventual establishment of the "National Assembly". The latter would control regional administrations and possess all legislative powers[11]. The first Greek Constitution, signed on 1st January 1822 at the First Na-

[8] See A. Hatzis, *A Political History of Modern Greece 1821*, Encyclopedia of Law and Economics 1-12 (2018), available at: https://www.researchgate.net/publication/327405175.

[9] «Ῥήγα τοῦ Φιλοπάτριδος. Νέα Πολιτικὴ Διοίκησις τῶν κατοίκων τῆς Ῥούμελης, τῆς Μικρᾶς Ἀσίας, τῶν Μεσογείων Νήσων καὶ Βλαχομπογδανίας. Ὑπὲρ τῶν νόμων - ελευθερία, ἰσότης, ἀδελφότης - καὶ τῆς Πατρίδος».

[10] See P. Pavlopoulos, *The constitutional foundations of the modern Greek state* (2021).

[11] See indicatively the "Constitutional History" in this link. https://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagmatiki-Istoria/ (last update 23/2/2022).

tional Assembly at Epidaurus, was entitled: The Provisional Regime of Greece ("Προσωρινὸν Πολίτευμα τῆς Ἑλλάδος"), sometimes translated as Temporary Constitution of Greece. The will for the creation of a Constitution was firmly expressed with the Declaration of Independence of the 15th of January 1822, where it was clearly stated that «(…)we decided or, more precisely, we were forced to decide to organize Greece under Constitution». That was a moment of fundamental importance in the modern political history of Greece, as it highlighted the necessity of the pioneering connection between constitutional formation and political stability. It is worth noting that the main inspirer and author of the constitutional draft, that was formed by a twelve-member committee of the first National Assembly, was the Italian revolutionary and philhellene Vincenzo Gallina (1795-1842)[12]. According to other sources, the main inspirer of the constitutional draft was Alexandros Mavrokordatos (1791-1865), a prominent Greek politician of Phanariote descent, while Gallina was the person providing assistance to the National Assembly due to its knowledge as concerns legislation[13]. It was an event of paramount importance, as the elected representatives of an insurgent people expressed their intention to announce their political self-existence, thus sending a message both to the Interior by replacing the various local regimes (such as the "Organization of the Senate of the West Coast of Greece", "The Legal Order of the East Coast of Greece" and "The Organization of the Peloponnesian Senate"[14], as well as the Abroad, and especially, the three most important powers of the time (England, France and Russia)[15]. This message is also expressed explicitly and solemnly in the moving Preamble of the Constitution, which, invoking the Holy and Indivisible Trinity, which reads as follows: The Greek nation, under the horrible Ottoman dynasty, unable to hold the heavy and unparalleled yoke tyranny, and having shaked it off after great sacrifices, declares presently via its legal Representatives, who were met as national Assembly, before God and men, "Its political presence and

[12] «The Constitution of Epidaurus consisted of one hundred and ten short paragraphs, divided according to the French standard into 'titles' and 'sections' (…)», See N. Alivizatos, *Introduction of the Greek Constitutional History,* Vol. I (1981).
[13] See indicatively A. Pantelis, *Handbook of Constitutional Law* (2020).
[14] Ὀργανισμὸς τῆς Γερουσίας τῆς Δυτικῆς Χέρσου Ἑλλάδος, Νομικὴ Διάταξις τῆς Ἀνατολικῆς Χέρσου Ἑλλάδος και Ὀργανισμὸς τῆς Πελοποννησιακῆς Γερουσίας.
[15] See indicatively N. Alivizatos, *Introduction to Hellenic Constitutional History* cit. at 13 and G. Anastasiadis, *Political and Constitutional History of Greece 1821-1941* (2001).

independence"[16]. The theoretical background for the preparation of the Provisional Government of Greece, but also of the subsequent constitutional texts that replaced it is found not only in the works of the European Enlightenment, but also in the political ideas of the representatives of the Modern Greek Enlightenment (such as Rigas Feraios, Adamantios Korais, the "Anonymous" author of the "Hellenic Nomarchy", i.e. The Greek rule of law, e.t.c.), as well as in the revolutionary Constitutions of the French Revolution[17]. Finally, one should not forget the efforts of constitutional government in the Ionian Islands during the pre-revolutionary period and until the integration of these islands in the Greek state (1864). The Constitutions of the Ionian Islands were characterized for the maintenance of the oligarchic system. On the contrary, as it is mentioned below, the Greek revolutionary Constitutions were pioneering.

The three Greek revolutionary Constitutions were pioneering, formed on the basis of the social, geographical and demographic characteristics of the Greek Revolutionaries. Despite the strong influence of the French Constitutions and the previous American Constitution of 1787, the Constitutions of the Greek Revolution seem on the whole to reflect the Revolutionaries' new will for a constitutional conscience, with the ultimate goal of organizing the political sovereignty of the Nation through the representatives.

The role of the Constitutions was twofold: on the one hand assertive (insofar as it regulated the functioning of the pregnant state), and on the other as a guarantor in relation to fundamental, human rights. Thus, the paradoxical phenomenon appears that there are three mutatis mutandis perfectly legal statutory maps, but without the other elements that make up the classic concept of the

[16] «Τὸ Ἑλληνικὸν Ἔθνος, τὸ ὑπὸ τὴν φρικώδη Ὀθωμανικὴν δυναστείαν, μὴ δυνάμενον νὰ φέρῃ τὸν βαρύτατον καὶ ἀπαραδειγμάτιστον ζυγὸν τῆς τυραννίας, καὶ ἀποσεῖσαν αὐτὸν μὲ μεγάλας θυσίας, κηρύττει σήμερον διὰ τῶν νομίμων Παραστατῶν του, εἰς συνηγμένων Ἐθνικὴν Συνέλευσιν, ἐνώπιον Θεοῦ καὶ ἀνθρώπων, "τὴν Πολιτικὴν αὐτοῦ ὕπάρξιν καὶ ἀνεξαρτησίαν"». As N. N. Sariplos characteristically wrote, «Πᾶς Ἕλλην δὶς καὶ τρὶς καὶ τετράκις καὶ πάλιν ὀφείλει νὰ ἀναγνώσῃ καὶ ἀπὸ στήθους μάθῃ αὐτὴν (τη Διακήρυξη)», N. N. Saripolou, *System of Constitutional Law and General Public Law* (1903).

[17] See X. Contiades, *The adventurous history of the revolutionary constitutions of 1821* (2021) and P. M. Kitromilides, *The Origins of the Greek Constitution (1797–1827)*, in: *30 Years since the Constitution of 1975* (2004).

State, as expressed by Georg Jellinek ("People and a certain Territory")[18]. The first Constitution of Epidaurus, or the Constitution of 1822, did not provide full protection of individual liberties, but guaranteed the right to property, honor, security and freedom of religious conscience, while its most important provision in this chapter was the complete prohibition of torture[19]. Most of the provisions of the Constitution were inspired by the principle of equality, as a consequence of the popularity of Rousseau's theory[20]. On the contrary, most of the constitutional text was devoted to the regulation of state institutions. The administration consisted of two bodies, the Parliamentary and the Executive. Members of Parliament were appointed as representatives who were elected for a 1-year term (however, the Constitution did not mention their number nor any electoral system). Although the Parliament exercised legislative power, the laws passed were valid only after their ratification by the Executive. The five members of the Executive were also elected for a 1-year term, appointing the first Secretary of State and the seven Ministers. Finally, the Judiciary, which consisted of eleven members, was appointed by a common decision of the Parliament and the Executive. According to a Law, justice was administrated by independent courts. The equivalence of the Parliament and the Executive, which had as the result the paralysis of the legislative function, constituted the main weakness of the Constitution of 1822. Nevertheless, the prominent English philosopher and jurist Jeremy Bentham (1748-1832) wrote in 1823 the following words with regard to the first Greek Constitution of 1822 "To find the provisional Greek Constitution in so high a degree comfortable to the principle of the greatest happiness of the greatest number has been matter of considerable and no less agreeable surprize to me"[21].

In April 1823, one year after the adoption of the first Greek Constitution, the Second National Assembly, convened in Astros (Kynouria), to revise the Provisional Constitution of Epidaurus. The new Constitution of Astros was more concise and an example

[18] See G. Jellinek, *Allgemeine Staatslehre, Verlag von O. Haring* (1914), according to whom: «Als Rechtsbegriff ist der Staat demnach die mit ursprünglicher Herrschermacht ausgerüstete Körperschaft eines seßhaften Volkes oder die mit ursprünglicher Herrschermacht ausgestattete Gebietskörperschaft».

[19] See N. Alivizatos, *Introduction of the Greek Constitutional History*, cit. at 13.

[20] See N. Alivizatos, *The Constitution and its Enemies, 1800-2010* (2011).

[21] See F. Rosen, B*entham's constitutional theory and the Greek Constitution of 182*2 (1984).

of good lawmaking. It also gave a slight advantage to the Legislative branch over the Executive given that the latter's veto power was reduced from absolute to suspensory, it improved the provisions on the protection of individual rights and democratized the electoral law. Also the new Constitution was characterized as temporary, although it was more complete than the previous one. A key feature of it was the strengthening of the Parliament against the Executive by the abolition of the absolute right of veto of the Executive. The new Constitution also strengthened individual rights with provisions that abolished slavery in Greece, established freedom of the press, the right to report to the Authorities and the right to a fair trial. An important innovation was the extension of property protection, honor and security to foreigners in Greece. Nevertheless, the civil war that broke out in Greece in 1824 prevented the implementation of the above pioneering constitutional requirements.

The Third National Assembly, also known as the Troezen Assembly, convened between March 19 and May 5 1827. On April 14 1827, the Assembly elected Ioannis Kapodistrias as the "Governor of Greece" for a seven-year term and endorsed the "Political Constitution of Greece". The Assembly established a democratic regime based on liberal principles and declared the sovereignty of the people (popular sovereignty): «Sovereignty lies with the people: every power derives from the people and exists for the people». This declaration has been included in all subsequent revisions since 1864. The Governor was only granted suspending veto powers on the bills and no prerogative to dissolve the parliament. Even though the Governor enjoyed immunity for his actions, the Secretaries of State, i.e. the Ministers, were accountable for his public actions (signaling the start of the parliamentary principle). On May 1st, 1827, the 3rd National Assembly passed a new Constitution called the "Political Constitution of Greece". One issue that concerned the members of the National Assembly was the collective or single-person nature of the executive branch. Eventually, under the influence of the US Constitution, the one-person body was chosen. In general, the Constitution of 1827 was more complete than the previous ones and, perhaps, the most democratic Constitution in time. For the first time, the principle of popular sovereignty was proclaimed, as was the explicit separation of powers (Article 36). In particular, the executive power belonged to the governor, who was elected for a 7-year term, appointed the six ministers and had the right of deferral

veto vis-a-vis Parliament. Legislative power belonged to the Parliament, which was elected for a 3-year term and its members were renewed by one third (1/3) each year (Article 57). Finally, the Constitution of 1827 established the principle of equality (also with respect to tax burdens) and provided for the possibility of imposing expropriation for the purpose of public benefit overcompensation.

The Constitution of 1827 is important because of its rather progressive character in the treatment and protection of human rights, constituting one of the most comprehensive constitutions of its time, in particular for the protection of civil rights. The Assembly aspired to provide the country with a stable government, modeled on democratic and liberal ideas. The Troezen Constitution sought to combine the need for strong centralized power with the existence of democratic institutions and practices. However, the constitution remained in force only until 1828, shortly after the arrival of Ioannis Kapodistrias, who proposed in January 1828 the suspension of the operation of Parliament with well-designed political manipulations.

For the first time in Greek history, an explicit reference to the Nation as a source of sovereignty is made in Article 5 of the Constitution of 1827 ("Political Constitution of Greece") adopted by the Third National Assembly of Troezen on May 1, 1827, which stipulated that "Sovereignty lies with the people: every power derives from the people and exists for the people" («Ἡ κυριαρχία ἐνυπάρχει εἰς τὸ Ἔθνος · πᾶσα ἐξουσία πηγάζει ἐξ αὐτοῦ, καὶ ὑπάρχει ὑπὲρ αὐτοῦ»)[22]. It is noteworthy that the reference to the "Nation" as a source of sovereignty, with the sole exception of the period of Absolute Monarchy (1832-1844) and the Constitutional Monarchy (1844-1862/64), is repeated in the Constitution of 1864/1911, in the Constitution of Second Hellenic Republic of 1927 and the Constitution of 1952.

The continuation of military operations against the Ottomans, the constant efforts to find a diplomatic solution to the Greek issue and the enormous difficulties encountered by the Governor (i.e. Ioannis Kapodistrias, who had been elected by the 3rd National Assembly on April 3rd, 1827) prevented the normal implementation of the Constitution. Subsequently, with a resolution of the National Assembly, the implementation of the Constitution was officially

[22] See A. Manitakis, *The Greek Constitutionalism 200 years after Independence. Democratic, modern, prosperous* (2020).

suspended (January 1828). After the London Protocol (February 1830)[23], the assassination of I. Kapodistrias in 1831 and the election of Otto of Bavaria[24] as the first king of independent Greece (chosen by the 3 "Protecting Powers", England, France, Russia during the London Conference of 1832), the country was ruled without a constitution until 1844. However, monarchy in Greece has always remained a foreign institution, which was accepted by the Greek people out of necessity.

Regardless of their fate, the three revolutionary Constitutions, which established the "First Hellenic Republic"[25], were not only pioneering for their time, but also laid the foundations of the Greek constitutionalism and the formation of the democratic ideal and the modern Greek constitutional and national[26] identity.

[23] The London Protocol (February 3rd, 1830) was an agreement between the three Great "protecting" Powers (The United Kingdom of Great Britain and Ireland, The Kingdom of France and the Russian Empire) established Greece as an independent, sovereign state.

[24] Otto Friedrich Ludwig von Wittelsbach (1815-1867).

[25] See J.S. Koliopoulos and T.M. Veremis, *Modern Greece: A History since 1821* (2010).

[26] See A. Liakos, *La storia della Grecia come costruzione di un tempo nazionale*, 4-1 Contemporanea 155-169 (2001). It is worth to add that, according to article 2 of the Constitution of 1822, «All indigenous inhabitants of the Land of Greece (Hellas) believing in Christ are Hellenes and are entitled to an equal enjoyment of every right» («Ὅσοι αὐτόχθονες κάτοικοι τῆς ἐπικρατείας τῆς Ἑλλάδος πιστεύουσιν εἰς Χριστόν, εἰσὶν Ἕλληνες, καὶ ἀπολαμβάνουσιν ἄνευ τινὸς διαφορᾶς ὅλων τῶν πολιτικῶν δικαιωμάτων»).

BOOK REVIEW

J. O. FROSINI
DALLA SOVRANITÀ DEL PARLAMENTO
ALLA SOVRANITÀ DEL POPOLO.
LA RIVOLUZIONE COSTITUZIONALE DELLA BREXIT (2020)

*Elettra Stradella**

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1. Introduction

"*Dalla sovranità del Parlamento alla sovranità del popolo. La rivoluzione costituzionale della Brexit*" by Justin O. Frosini, is a book that can be read with growing curiosity, page after page, and this seldom happens when it comes to a scientific monograph.

The Author guides us through a historical, political, and institutional path revealing their inner causes, investigating the implicit features, complexity and cryptotypes of the English constitutional system.

Considering and moving from the impressive preface by De Vergottini, I shall only underline one aspect, which the author himself mentions on page 3: the timeline of the events significantly affecting the current constitutional situation is constructed through a "diachronic weighting of the spirit of English constitutionalism". The author refers to Bognetti, who underlines how, in order to fully acknowledge a specific legal framework, one should need "the detection of the core values shaping its structures and contents...that is to say, of the soul that creates its fundamental traits

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in being as it is". And this soul seems to emerge from the engaging pages of the book.
Another important pattern lies in its background thesis, guiding the whole discussion. The Author highlights that most of British citizens voted 'leave' to defend the principle of sovereignty of the Parliament; nonetheless the outcome was the emersion of a general principle of popular sovereignty.
This thesis comes back into the picture throughout the book.
One point seems particularly striking: when the speaker of the House of Commons does not allow a new vote on the agreement reached by Johnson with the European Union because the Commons had already voted on a motion on the same issue. As stated by the government: "Once again the Speaker of the House denied us the possibility to fulfil the British people will".
Coming back to the concept of 'soul' mentioned by Bognetti and recalling Powell, Frosini explains, how in English history Parliament has literally represented the soul of the nation. In no other continental legal system, the legislative assembly has ever gained the same identity: "Remove parliament from the history of England and history itself becomes meaningless".
Wondering whether joining the European Communities in 1972 had effectively undermined this parliamentary supremacy, Frosini denies this is the case, relying on a huge literature on the topic. Additionally, the 1972 law contains an interpretative rule according to which "the future legislative acts of Parliament must not be interpreted in ways that might conflict with the supremacy of European laws owning direct effect". This statement would establish an implicit supremacy clause since the prevalence of the EU law finds its source in a legislative act of Parliament.
In my opinion, the book can thus be discussed around two main points: the referendum (as a political tool and as a source of law), and the interactions between Brexit and devolution. However, the latter can foster the analysis of additional issues, in particular: the role and possible evolutions of the debated Sewel convention, cooperation and connecting institutions within the devolution framework, the role of Northern Ireland. A brief overview on these topics will thus follow.

2. The referendum

In relation to Frosini's thesis, it is worth noting that the spread of anti-Europeanism after joining the European communities was born in a populist, not parliamentarian, key. It someway introduced from the beginning the conflict between the European integration process and the English people's (alleged) economic and social interests, intertwining them with a (recessive) constitutional interest in the preservation of the traditional institutional framework.

How does the referendum fit into this scenario? The reference – made by Frosini – to the mail exchanges between Jenkins and Wilson is highly significant, since the former wrote that "Referendum is the most powerful tool against a progressive legislator this country has ever known since the days of the House of Lords absolute powers".

From this point of view, the referendum can certainly embody a 'conservative' instrument, as well as a link between popular sovereignty and the sovereignty of Parliament, in which the latter is guaranteed through the exercise of the former. But this will not reasonably happen at all. Moreover, the issue is relevant since the particular role the referendum plays within the English constitutional system. The latter also emerges indirectly, considering the relationships with Northern Ireland. In fact, the Good Friday Agreement represents quite an innovation in the way the referendum itself is conceived.

The republican "style" followed in the 1998 Agreement is also envisaged, on the one hand, through the integration between direct democracy tools and the principle of parliamentary sovereignty the act pursues. On the other hand, it places the former on a substantially higher and certainly different level from the limited role it usually plays in English constitutional law. In the British system, a referendum "can only be consultative in character" (see B. Putschli, *The Referendum in British Politics. Experiences and Controversies since the 1970s*, 2007, 94). Hence, notwithstanding its political relevance and ability to deeply influence present and future institutional choices, it is not legally binding, nor it can influence legislative agenda.

In this regard Justin Frosini recalls Bogdanor, who reminds us how "the referendum must not replace the instruments of representative democracy, but only support them": it would therefore be a mere completion of the representative principle.

It is also worth mentioning the report carried out by the *Select Committee on the Constitution of the House of Lords* in 2010, '*Referendums in the United Kingdom*', in which the main *rationales* of referendums in the United Kingdom are briefly and effectively discussed. Specific focus is devoted to the use of the referendum on issues falling among "constitutional matters". One of the conclusions the Select Committee reached is quite significant: "*The balance of the evidence that we have heard leads us to the conclusion that there are significant drawbacks to the use of referendums. In particular, we regret the ad hoc manner in which referendums have been used, often as a tactical device, by the government of the day. Referendums may become a part of the UK's political and constitutional practice. Where possible, cross-party agreement should be sought as to the circumstances in which it is appropriate for referendums to be used*."

From a different perspective, referendums seem crucial for the system in all those cases affecting parliamentary sovereignty, some way envisaging a defence against it and a form of popular control over its potential limits. This happened in the first occasion of a positive result as well (i.e.: confirming membership in the European Community and the Single Market, see Frosini, 29).

Currently, we are witnessing the replication in the judicial context of the value referendum owns in the system as a whole. Paradigmatically, on the Brexit referendum, when (page 90) the High Court, in the *Miller v. Secretary of State* 2016 took the opportunity to reconfirm the mere consultative nature of referendum, though not obliged to do so given that the question concerned, as is well known, the limits to the exercise of the royal prerogative. The court shows that with the Referendum Act 2015 the Parliament did not delegate to the British people the decision whether the United Kingdom should have stayed or not in the EU.

Therefore, with reference to the book thesis, one can ask whether, rather than a mere opposition between parliamentary sovereignty and popular sovereignty, we are witnessing a general crisis of the British model of separation of powers. The triangulation of the conflict involving executive-parliament-judges well represented by the attack promoted by the media against the judiciary in the aftermath of the Miller sentence (and with respect to which the government did not take a strong position, indeed), also emerged in 2019. The Supreme Court, on the question relating to the *prorogation* requested by Johnson, emphasized that if the matter is justiciable, a judgment on it does not conflict with the

principle of separation of powers. On the contrary, the Court will grant its balance, ensuring that, through the *prorogation*, the Government would not prevent the Parliament from carrying out its functions.

Undoubtedly, this conflict shows an instrumental use of popular consensus carried out by the government, in addition to evident distortions driven by the media. These schemes seem less known in British parliamentarism but quite recurrent in other systems, especially in times of crisis of political representation. From this point of view, the considerations on the role of fake news are crucial (pages 40 and 80).

Hence, one might wonder if the United Kingdom's constitutional system and the constitutional culture, have been transformed by Brexit (and its consequences) or mostly by the decades of belonging to Europe.

The distinction between endogenous and exogenous innovations is not that stark, since one should also investigate interplaying multiform leverages. The advent of judicial review, the different role of judges, determined also (although not only) by external influences and the belonging to a European constitutional framework have played an important role in Brexit in the preservation of the parliamentary sovereignty.

3. The interactions between Brexit and Devolution

The transformation of a system from centralized to decentralized, especially when legislative functions are involved, may require a set of institutional changes of the state as a whole: an effective system of intergovernmental relations, adequate tools for participation, a system of constitutional litigation in case of conflicts arising from shared competences and to protect the prerogatives of local entities. Indeed, in the United Kingdom the accommodations of the central institutions (Westminster and Whitehall) to devolution have been minimal. The Westminster Parliament sovereignty has not been questioned, and no joined decision-making processes have been established between Westminster and *devolved legislatures* (G. Saputelli, 2020, *DPCE online*). Overall, the system of connections and participation is weak and shows a hierarchical setting of relations between central and devolved

institutions. British centralism has not been dissolved, and judicial review of legislation, a fundamental constitutional innovation for the United Kingdom led by the progressive transformation due to the membership of the EU and the Council of Europe, is limited to devolved legislatures. In fact, Lady Hale in 2018 declared: "I think that the only conclusion I can draw is that devolution of legislative – as opposed to executive – power turns the United Kingdom Supreme Court into a genuinely constitutional court" (*Devolution and The Supreme Court – 20 Years On Scottish Public Law Group 2018*, Edinburgh, Lady Hale, President of The Supreme Court 14 June 2018). Nevertheless no one, even in light of the events that Frosini describes in his work, could ever consider the Supreme Court as a "Court of Nations". This would mean, quoting Wechsler (H. Wechsler, *The Political safeguards of federalism: the role of the states in the composition and selection of the national government*, 1954), a *judicial safeguard of federalism*' (an expression meant to identify in the political safeguards of federalism the real guarantees of the US federal system/model?).

Therefore, Frosini's thesis challenges the role parliamentary sovereignty and popular sovereignty have played vis-à-vis local autonomies. Indeed, the Parliament and the central government both seem to have regained centrality in detriment of the latter, whose promotion stems, so to speak, from the European pattern. In fact, in the 1970s the first devolution *rationale* was rooted in the success of nationalist parties and, therefore, in political and strongly ideological dynamics that in 1997-1998 might not have had strong motivations considering the low electoral endorsement of the independence parties (first and foremost the Scottish National Party). In turn, the Blairian devolution in the 1990s was based on economic and development reasons closely linked to the European Union agenda, to the gathering and use of EU funds, to the increasing importance of regional government in the EU context. Analysing the Brexit effects from the devolution perspective, the United Kingdom's exit from the EU has both strengthened the centrality of the Whitehall government, confirming its pivotal role

in relations with nations, as well as the inherent shortcomings of the devolution process, as developed since 1998 onwards.
The particular British system and its *unwritten constitution* (or rather, *uncodified*, as Frosini points out on several occasions) have certainly guaranteed flexibility, but have not proved sufficient in providing tools able to manage conflicts.
The above has shown the limits of a perspective that grounds the guarantee of autonomy on the central government's self-restraint. Tools and offices capable of constitutionally solving the tensions between all institutional levels, thus safeguarding the prerogatives of sub-national bodies, and encompassing their collaboration and participation in central government decisions are still needed. As far as the author's investigation is concerned, the abovementioned interaction between Brexit and devolution can be articulated in three main points.

3.1. The Sewel convention

As is well-known, although devolution has profoundly affected the UK constitution, the process has been essentially carried out through continuously redefined asymmetrical negotiations. Moreover, the relations between the State and the regional autonomies have never been addressed as a whole, as well as the issue concerning constitutional legitimacy.
First and foremost, Brexit intersects this scenario with the Miller sentence of 24 January 2017, which declares that the consent from the Nations is not required for the adoption of this legislative act, due to the lack of a "legal veto". In support of this assertion, judges reiterated the scope of the Sewel convention: "*we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law*".

Hence, the Sewel Convention is and still remains a *political convention* never converted "into a legal rule justiciable by the courts" (these are the words expressed by the Supreme Court).
Therefore, despite the situation of institutional conflict with Scotland in 2018, the EU Withdrawal Act (UK EUWA) was also approved by Westminster: in this regard, the central government argued that the "exceptional" circumstances allowed Westminster to approve the legislation without the consent from Scotland. In the history of intergovernmental relations, it was the first time for an act of Westminster to be adopted despite the denial of the *devolved legislatures*.
The entry into force of the UK Withdrawal Act – which amended the devolution settlements (such as Annex No. 4 to the Scotland Act 1998) in order to include it (EUWA) among the Acts that cannot be amended by national assemblies – resulted in the subsequent 'unconstitutionality' of the parts of the Scottish Bill in conflict with the UK EUWA. Precisely, these sections were under the responsibility of the Scottish Parliament at the time they were issued (in March 2018) but turned 'unconstitutional' following the approval of EUWA (June 2018) and its entry into force.
Tensions between the central government and the devolved administrations arose again on the occasion of the approval of the European Union (Withdrawal Agreement) Act 2020 (EUWAA) providing for the ratification of the Brexit Withdrawal Agreement and for its implementation in the national law. Although more focused on the role of devolved legislatures than the previous EUWA, in January 2020 again all nations denied consent, showing the strong flaws in intergovernmental relations. Once more, the problematic aspects concerned the regulatory power of the central government and the risk of massive interference with devolved legislatures (Saputelli, 2020). Nonetheless, the act was quickly approved, since the approaching European deadline, and without any further negotiations with the territorial levels.
From this perspective, the Nations do not seem to have overlapped or prevailed over the sovereignty of Parliament. Indeed, government centralization is emerging.

The old question of the viable, desirable reform of the Sewel Convention comes back into the picture, also "affected" by Brexit, taking into account that: "*The Sewel Convention has been a fundamental underpinning of the relationship between the four legislatures of the UK since 1999, but it has been broken by Brexit. As well as managing the immediate political backlash that will follow the passing of the WAB, the UK government must now seriously engage with the case for reforming the convention if it wants to ensure the sustainability of the union in the long term*". (J. Sargeant, *The Sewel Convention has been broken by Brexit - reform is now urgent*, *Institute for Government (think tank*), January 21, 2020).

3.2. Cooperation and connecting institutions

As already mentioned, one of the main issues surrounding devolution has always concerned the insufficiency of the existing forms of cooperation and instruments of connection between State and Nations. This is inevitably exacerbated by the exit from the EU, which emphasizes the need to establish a new "common framework" for the United Kingdom to replace what was previously ensured by an 'EU common framework'. The difficult dialogue and collaboration are strengthened and the weakness of intergovernmental relations as well as the substantial absence of fora of connection between central institutions and Nations have become a problem requiring urgent solutions.

From the purely procedural side (see Saputelli, 2020), Brexit seems to have increased the opportunities for participation and intervention for the Nations. On the one hand, the creation of the JMC EU *Negotiations* in 2016, a new inter-ministerial committee on Brexit issues, on the other hand, in 2018, the *Ministerial Forum* on EU negotiations, another intergovernmental body devoted to the discussion of negotiations with the European Union. In comparison with the previous lack of formal, institutional meetings between the different tiers of government, the Brexit process seems to have at least urged to do so.

However, in terms of effectiveness and results, many questions remain unanswered, considering the persisting institutional conflicts and the decision-making processes have been delayed or hindered by the management difficulties due to the dialogue complexity.

3.3 Northern Ireland

Frosini does not specifically address the question of Northern Ireland, but it appears more or less explicitly; in fact, the relationship between the sovereignty of Parliament and the sovereignty of the people clearly impacts the Northern Irish question, amplified by the long-term effects that Brexit could have on the Good Friday Agreement. It is known that Northern Irish devolution, unlike the other cases – especially the Scottish one, which can more easily be compared in terms of the breadth and intensity of the devolved powers – is based on an international law agreement, and therefore establishes a treaty regime between two sovereign states, providing Northern Ireland with a special status. Additionally, the Republic of Ireland recognizes the political and constitutional status of Northern Ireland by legitimizing its existence. This international law agreement, on the other hand, derives from a particular regime of international protection regarding one of the territories parts of the agreement, in particular Northern Ireland. In this case, international protection is represented by the role that European Union has played in building the peace process and in envisaging a consensual way of managing powers.

According to the Agreement the Westminster Parliament (and, more generally, the British institutions) is not authorized to exercise powers in Northern Ireland if not compliant with the Agreement itself. Northern Ireland, in fact, unlike Wales and Scotland, can, through the Northern Ireland Act 1998, strengthen the confederal nature of the link with the United Kingdom to the point of unilaterally leaving the Kingdom, thus exercising a right to secession (or to self-determination). This appears quite different from the perspective of procedural and democratically negotiated secession that has affected, and still impact on, the Scottish case. In fact, it is well-known that Schedule 1, in point 2, provides the Secretary of State for Northern Ireland with the option of a direct referendum concerning the secession from the United Kingdom, at any time the majority of the holders of the right to vote, in such a consultation, would presumably be in favour of ending Northern Ireland's participation in the United Kingdom and therefore of entering a United Republic of Ireland. Moreover, although the European matter is reserved by all *devolutions* to London, European issues have become an important part of the regional Assemblies and their policies agenda as well. As it has been underlined, it is

possible to detect a broad convergence between the competences devolved to the Northern Ireland Assembly since 1998 and the matters of European relevance, between 60% and 80% according to estimates on the legislation produced by the Stormont Parliament as stemming from European institutions (E. Stradella, 2017, *Federalismi*). A significant European dimension of *devolution* in Northern Ireland should therefore be recognized from an objective point of view, due to the intersection between community competences and devolved competences in substantive relevant areas. To this complex situation, the major shortcomings already deriving from Brexit should be added: on the one hand the economic effect of a significant increase in trade with Ireland and a decrease of up to a third of those with the United Kingdom, on the other, the beginning in March 2021 of the infringement procedure against the United Kingdom (followed by a suspension). Moreover, the subsequent repeated tensions between the British Government and the European Union on the Northern Ireland protocol, which cast shadows on the sustainability of the protocol as the only tool able to keep in force the Good Friday Agreement.

4. Frosini's thesis and the aims of the withdrawal

Whether Brexit has fostered a "constitutional revolution", rather than a "constitutional restoration" that its supporters seemed to promote, can be verified in the argumentations proposed by the Author. He develops a focused and never redundant analysis of the institutional political events, assisted by a robust knowledge of the context, always essential in a comparative investigation, but particularly important when it comes to the United Kingdom.

Brexit certainly restores, at least symbolically, the traditional control on which the *leave* referendum campaign was largely based: *taking back control* was one of the slogans used by its supporters.

This also emerges from the EU-UK Trade and Cooperation Agreement (December 2020), which embodies the United Kingdom's wish to prevent any form of subordination to supranational structures, and the bilateral nature of mutual obligations between equally ordered entities, only based on international law.

Indeed, the real question concerns who, within the form of government, shall really enforce control. Further, after reading the documented analysis conducted by Frosini, one may ask if rather

than towards the sovereignty of the people – which today in the United Kingdom may resemble the sovereignty "of the peoples", since the *quasi-federal* nature that characterizes relations with at least some of the *nations*, despite the cautious approach of the Supreme Court – the transition is leading towards an "executive sovereignty". This tendency, across systems of government, seems a shared feature of contemporary constitutional orders, progressively strengthened by the pandemic emergency as well.

THREE BOOKS ON "THE LEGAL ORDER" IN THE AFTERMATH OF THE CENTENNIAL CELEBRATIONS OF ITS PUBLICATION: IS SANTI ROMANO'S DOCTRINE STILL USEFUL? [1]

*Marco Lunardelli**

Book Review

- Marco Mazzamuto (ed.), *Santi Romano. L'ordinamento giuridico (1917-2017). La fortuna della teoria romaniana dell'ordinamento dalla sua pubblicazione ai tempi nostri nelle varie aree disciplinari*, Conference Proceedings, Palermo, November 24-25, 2017, Naples, Editoriale Scientifica, 2020, 353 pp.;
- Roberto Cavallo Perin, Giovanna Colombini, Fabio Merusi, Aristide Police, Alberto Romano (eds.), *Attualità e necessità del pensiero di Santi Romano*, Conference Proceedings, Pisa, June 14-15, 2018, Naples, Editoriale Scientifica, 2019, 300 pp.;
- Renato Federici, *Rivolte e rivoluzioni. Gli ordinamenti giuridici dello Stato e dell'anti-Stato*, Naples, Editoriale Scientifica, 2019, xii-315 pp.

Abstract

This review scrutinizes the three books just mentioned and proceeds as follows. The second paragraph is devoted to Santi Romano's doctrine, as recently read by distinguished scholar Martin Loughlin. The review then provides a description of the two books directly concerned with Romano's legal order doctrine. Since they are both a collection of essays, which investigate the possible applications of the doctrine in different domains and subject matters, the analysis will be limited to some of the essays, essentially to those adopting an administrative law or at least a public law perspective. The fourth paragraph details some of the contents of Federici's book, in which Santi Romano's influence can be inferred not only from the public law arguments but also from those apparently used to pursue other objectives, such as to provide an account of some historical events. Finally, the review seeks to

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[1] All translations from the Italian language are mine, so I am the only one responsible for them.

answer the question of whether Romano's doctrine may have some vitality today.

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1. Introduction

How old should a book review be? Should it come out shortly after the publication of the book it reviews? The problem does not exist for an article – thus, not a book review – aimed at redeeming the main theory or approach of a book, regardless of when the latter was published. This is exactly the case with a recent essay in the Yale Law Journal, wherein professor Pojanowski sets forth a series of observations based on a 2001 book by Julie Dickson[2]. The example is no coincidence, since this essay is concerned with legal theory, a subject matter to which the three books here under review are related. They have in common, indeed, a connection with "The Legal Order" by Santi Romano, which is definitely a public law work but adopts a very broad perspective[3].

However, only two of the three books derive from study conferences specifically aimed at celebrating the 100th anniversary of the publication, in 1917-1918, of the essay just mentioned by Santi

[2] J. Pojanowski, *Reevaluating Legal Theory*, 130 Yale L. J. 1458 (2021). The essay has a sort of subtitle referring to the book, whose contents it intends to reconsider – "*Evaluation and Legal Theory*, by Julie Dickson, Hart Publishing, 2001".

[3] See S. Cassese, *Ipotesi sulla formazione de "l'ordinamento giuridico" di Santi Romano*, in Id., *La formazione dello Stato amministrativo* 24 (1974), arguing that Romano's essay is mainly regarded as a "construction" of general theory of law and, thus, not directly related to the time when it was published.

Romano[4], then professor at the University of Pisa and later President of the Council of State[5]. Those two books are aimed not only at reassessing Romano's legal order doctrine but also and, in actual fact, mainly at ascertaining whether it may have nowadays a scope of application in the different domains of law, including domains that imply a multidisciplinary approach, such as sociology of law[6]. The third book analyzes several issues from different perspectives, non only a legal one. It is included in this book review, because Santi Romano's doctrine may be seen as the leitmotif keeping those issues together. Meant this way, Federici's essay stands as an example of how Romano's book, published more than 100 years ago, keeps a good – or at least sufficient – level of vitality in the scholarly milieu. Therefore, "The Legal Order" and the

[4] As underlined in the presentation of one of the books reviewed and in the opening remarks at the related conference, the essay was first published in 1917 and then re-published in 1918 in its final version, with the subtitle "Studi sul concetto, le fonti e i caratteri del diritto". Either version of the book was published by publishing houses headquartered in Pisa. See *Presentazione del volume* and *Allocuzioni*, in *Attualità e necessità del pensiero di Santi Romano*, respectively 7 and 13.

[5] In this regard, see A. Pajno, *Santi Romano ed il Consiglio di Stato*, in *Santi Romano. L'ordinamento giuridico (1917-2017)*, 23-29.

[6] See A. La Spina, *Santi Romano e la sociologia del diritto*, in *Santi Romano. L'ordinamento giuridico (1917-2017)*, 247-286. The author argues – and concludes – that, despite having considered himself as a pure jurist, Romano defined the legal order by following a pluralistic approach, which is still valuable to those who study the connections between sociology and law. According to a 1937 brief article, "[h]uman behavior in society, in so far as it is related to law, is the object of the new science, called 'sociology of law.' Causal investigation is its chief method". N. S. Timasheff, *What Is "Sociology of Law"?*, 43 Am. J. Sociol. 227 (1937). On this subject matter, in general terms, see R. Tomasic, *The sociology of law* (1985); R. Cotterrell, *The sociology of law: An introduction* 2nd edition (1992); M. Deflem, *Sociology of law: Visions of a scholarly tradition* (2008). As for the Italian scholarship, see R. Treves, *Sociologia del diritto* (2002). The aforementioned definition of the scope of this subject matter, namely the term "behavior", must not be confused with a perspective, from which another subject matter may be studied – administrative science. Here, the reference is to administrative behavior as a concept, which was developed by economist Herbert Simon and devised to apply to public administrations, mainly to their organization. See H.A. Simon, *Il comportamento amministrativo*, 2nd edition [1957], Italian translation (2001). For the identification of administrative behavior as one of three different approaches to administrative science, see J. Chevallier, D. Loschak, *Introduzione alla scienza dell'amministrazione*, [1974] Italian translation, 11 (1981). See also V. Mortara, entry *Comportamento Amministrativo*, in 2 *Enc. sc. soc.* 148 (1992), underlining that Simon was probably the scholar who coined the expression "administrative behavior", in the first edition of his book, which was published in 1947.

doctrine it sets forth may still be deemed to contain significant insight for the analysis of current legal systems.

2. An Account of Santi Romano's Legal Order Doctrine: Professor Loughlin's Perspective

Professor Loughlin dealt with Santi Romano's legal order doctrine in a preface to the first English translation of Romano's essay, which was published in 2017[7], and this preface also appears in Italian, with no substantial revision, in one of the books here reviewed[8]. He begins by underlining that, although it contains "the most rigorous account of the institutional theory of law", the essay is almost entirely unknown in the countries of the Anglo-Saxon tradition[9]. Its English translation is deemed very useful especially for the time being, given the emerging renewed interest of the scholarship in institutional theories[10]. Professor Loughlin recalls that, at international level, the institutional theory is usually ascribed to French scholar Maurice Hauriou, who adopted a phenomenological perspective in crafting his idea of the institution while rejecting both legal positivism and the social foundation of law[11]. At the heart of his theory of state and society lie the

[7] S. Romano, *The Legal Order*, [1917–1918] edited by M. Croce (2017). Actually, the book also contains a note preceding the foreword, which underscores not only that Romano's book came out first in 1917 e then in 1918, with a second edition of the final version published in 1946 (later reprinted multiple times), but also that this work has gained over time high recognition in Continental Europe and South America.

[8] M. Loughlin, *Santi Romano e la teoria istituzionalista del diritto*, in *Santi Romano. L'ordinamento giuridico (1917-2017)*, 289-307. However, the citations that follow are taken from the preface to the English version of Romano's essay.

[9] See M. Loughlin, *Santi Romano and the institutional theory of law*, in S. Romano, *The Legal Order*, supra at 7, xi. This fact is also pointed out in a book review of the English translation at issue, wherein one single scholar is credited for truly sponsoring Romano's institutional theory in an article on cultural heritage in the emerging field of global law. See, F. Fontanelli, *Book Review, Santi Romano. The Legal Order. Ed. Mariano Croce. New York: Routledge*, 31 EJIL 1539 nt. 15 (2020), referring to F. Francioni, *Public and Private in the International Protection of Global Cultural Goods*, 23 EJIL 719 (2012). That book review defines Santi Romano's influence on international and transnational law "minuscule" and finds one of the reasons thereof in the very lack – until 2017 – of an English translation of the book (1540).

[10] See M. Loughlin, *Santi Romano and the institutional theory of law*, supra at 9, xii.

[11] In the preface to the second edition of his essay "Political Theology: Four Chapters on the Concept of Sovereignty", Carl Schmitt regards the institutional theory, as devised by Hauriou, as one of the types of general legal (or juristic)

institutions, meant as the primary source of law, while rules are a secondary product of law. More precisely, Hauriou defines an institution as "an idea of a work or enterprise that is realized and endures juridically in a social milieu". In order for such an institution to exist, it requires a power to endow it with organs. The State, too, is an institution, wherein the authority is ensured by a balance of the governmental powers. However, the concept of the institution applies not only to corporate bodies but to all types of associations that are "manifestations of communion" among the members of a certain group. Institutions have a life cycle entirely governed by law, from birth to death. Bodies such as States and trade unions imply the existence of an "organized power", which is the expression of the "directing idea" of them. The former and the latter – the organized power and the directing idea – "constitute the core of Hauriou's theory". The directing idea is a theoretical representation of the tasks of the State, meant as a body, but it is something transcending its functions. The organized power of government, which must also comply with the principle of the separation of powers, is aimed at realizing the directing idea. The latter always prevails on the former from a logical point of view[12].

Professor Loughlin argues that Hauriou's institutional theory is an essential starting point to understanding the meaning and nature of the legal order as devised by Santi Romano. In particular, he detects two similarities between the two scholars and their theories: Firstly, they both take into account the evolutions

thought. Therefore, it must be considered in addition to those based – respectively – on a system of norms and on individual decision-making according to specific circumstances. This further type of legal (juristic) thought conceives of the existence of institutions and super-personal structures. It has at least one rather clear advantage over the other two types of thought. The first type, championed by pure normativists, may lead to a degeneration, in which law ends up being merely functional to a State bureaucracy. The other type always implies that the decider may fail and make wrong decisions. The institutional thought, instead, entails pluralism, and pluralism in turn opposes to the idea of sovereignty. See C. Schmitt, *Teologia politica: Quattro capitoli sulla dottrina della sovranità*, *Premessa alla seconda edizione*, [1934] Italian translation, 30 (2020). For a brief comparison between the thought of Santi Romano and that of Schmitt, see G. Corso, *Conclusioni della Tavola rotonda*, in *Santi Romano. L'ordinamento giuridico (1917-2017)*, 330, 336.

[12] See M. Loughlin, *Santi Romano and the institutional theory of law*, supra at 9, xvi. For Hauriou's doctrine, expressly called "theory of the institution and the foundation", see M. Hauriou, *La teoria dell'istituzione e della fondazione (Saggio di vitalismo sociale)*, [1925] Italian translation, 29-32 (2019).

gradually occurred in the different areas of public law; secondly, their theories are not based upon a hierarchical normative framework[13].

Romano's doctrine is based on two main arguments. The first one is that a legal order is not just a set of norms, i.e. of rules, because it is a unitary entity, which must be kept apart from its normative components. Rules are secondary products. Professor Loughlin observes that the doctrine has a clear advantage over the normative theories, which usually find it difficult to explain how some administrative measures, such as sanctions, fit in the framework they create. Santi Romano refuses to consider sanctions as norms, just because theoretically they come first. According to Romano, the sanction – Loughlin explains – "exists as a more fundamental element than the norm, again suggesting that, rather than being a normative order law is a type of concrete order".

The second argument is the definition of what the legal order actually is. Law is expressly defined as "an *order* rather than a *system*", as the latter is a more abstract and thus more inaccurate concept. The legal order, instead, is connected with the social context. Other than being a concrete unitary entity, the legal order is primarily an "*organization*"[14]. Romano recognizes some similarities with Haurou's construction of the institution but also some major differences. In particular, unlike the French scholar, Romano does not regard the institution as a source of law and, accordingly, law as a product of the institution. In his view, instead, "the concept of institution and the concept of a legal order, considered as a unity and as a whole, are absolutely identical". Furthermore, while Hauriou attempts to identify the institution as an object, that is a "*res*" (in Latin), the institution Romano devises does not have an object in a strict sense, as it is "an objective legal order"[15].

With each institution equating to a legal order, Romano argues that non only the State but also all social bodies are to be considered legal orders, and the unity characterizing them as institutions remains regardless of changes – respectively – in norms or membership. This notion applies also to the international community and to other institutions not deriving from the State,

[13] See M. Loughlin, *Santi Romano and the institutional theory of law*, supra at 9, xviii.
[14] Id., xix-xx (italics in original).
[15] S. Romano, *The Legal Order*, supra at 7, 15-16.

such as the Catholic Church[16]. Romano, indeed, considers the State as "nothing other than a species of the genus 'law'"[17]. Furthermore, Laughlin underlines[18] that the issue of whether criminal or immoral organizations could qualify as legal orders is given "short shrift", as Romano believes that the jurist should refrain from facing the underlying issue, i.e. whether positive law is or may be based on ethical considerations[19]. That clarified, Romano provides a classifications of legal orders, from which two main distinctions emerge – a distinction between original and derivative institutions, with other ones lying at an intermediate level; a distinction between institutions with limited purposes and those with unlimited purposes, potentially at least. Finally, Romano focuses on the role of the State, emphasizing that the State as an institution is different from its internal institutions, such as the components of the legislative body, which should be considered legal orders as well, despite having a more limited sphere of action. Romano deems his construction to be able to lead to the application of some existing theories of general character, among which he mentions "the theory of legal relations regulated by public law and the theory of the division of powers"[20].

Professor Laughlin concludes his analysis of Santi Romano's legal order doctrine by seeking to figure out the issue of whether this doctrine may have some application today or whether, at least, there are "contemporary resonances" of it. He finds it a hard task, because even if one might detect some of those resonances, they do not fall within "institutionalism", which does not exist anymore[21].

However, he menages to find at least an example in a 1983

[16] See M. Loughlin, *Santi Romano and the institutional theory of law*, supra at 9, xx-xxi.

[17] He observes that the pivotal position the State has acquired since the Modern Era results mainly from a philosophical conception of it. However, the current – of that time, of course – positive law contradicts that position, as it may not be interpreted as to identify the State as "the only entity that decides on the legal character of the other social orders". S. Romano, *The Legal Order*, supra at 7, 53.

[18] See M. Loughlin, *Santi Romano and the institutional theory of law*, supra at 9, xxi-xxii.

[19] Such considerations, however, are not ignored by Romano with regard to legal orders, whose purposes are to meet the citizenry's fundamental needs and to pursue justice. This aspect is underlined by G. Corso, *Conclusioni della Tavola rotonda*, supra at 11, 337.

[20] S. Romano, *The Legal Order*, supra at 7, 109.

[21] See M. Loughlin, *Santi Romano and the institutional theory of law*, supra at 9, xx-xxv.

essay by Robert Cover, where the author argues that law is not merely a system of rules to abide by, but it includes the world, in which we are living. Rules are only secondary products of a broader concept, that of "*nomos*". This concept implies the existence of a "normative world", where individuals' comprehension of and reaction to rules are also taken into account. This normative world embraces the relations between rules and the material universe, on the one hand, and between rules and ethical considerations, on the other hand. In general terms, Professor Laughlin deems what Cover calls "*nomos*" to be a sort of adjustment of the concept of institution as meant by Hauriou and Romano. Yet he pinpoints at least a major difference between Cover's theory of the "*nomos*" and Romano's doctrine. Even though the idea that each community interpreting rules has its own "*nomos*" appears to Laughlin as a restatement of "Romano's claim about the plurality of legal orders", Cover and Romano follow very different methods to elaborate their theories. Romano "deploys a rigorous empirical method to specify the character of the modern phenomenon of law". By defining the law of the State as simply a species of the genus "law", Santi Romano adopts a sort of neutral approach to the relationship of the law of the State with other legal orders. Cover, by contrast, follows an ideological approach, which leads him to opposing to the State because of its formalistic and bureaucratic character. Laughlin observes that Cover's hostility towards the State and the way its functions are exercised does not clarify how conflicts among institutions may be solved. The risk – he maintains – is that the usage of force may be the only way to solve them. For these reasons, he considers the constructions by Hauriou and Romano much more reasonable[22].

Professor Laughlin, however, argues that the two scholars failed to analyze the specific features of the political power that leads to compliance with rules by most individuals, and – above all – that rules are still mainly law of the State. Indeed, even if one intends to put stress on the myriad of institutions existing at international and transnational levels, "the legal orders of nation-

[22] Id., xxv-xxvii, referring to R.M. Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4-68 (1983). In this regard, see also, recently, G. Hertz, *Narratives of justice: Robert Cover's moral creativity*, 14 Law Humanit. 3-25 (2020).

states still constitute the primary form of institutional world-building in contemporary life"[23].

3. The Two Books Celebrating the 100th Anniversary of Santi Romano's "The Legal Order"

The first of the three books under review mentioned above is relevant for two contributions, concerning – respectively – Santi Romano's legal order doctrine from the perspectives of constitutional law and administrative law. As for the former, a contribution by Mario Dogliani, it is noteworthy especially for the observations expressed beginning from paragraph No. 4. The author recalls that another scholar has pointed out that Romano followed two different approaches[24], a first one in 1909, when he praised the modern State as a wonderful creation of the law, despite noting its crisis[25], and the approach of "The Legal Order", where he saw the State as just one among many legal orders. An explanation may be that Romano constructed the relation between the law of the State and the law of different legal orders, such as those of the Italian municipalities, from two different perspectives over time: In 1909, he focused on the need to ensure the unity of the State; in 1917-1918, by contrast, he was looking at the plurality of institutions and legal orders[26].

As for the latter perspective, it has already been put stress on the broad scope of his concept of the legal order, which is capable of including any association of people gathered for the achievement of a given objective or having in common the compliance with rules or the observance of practices in a given sector. The critical issue is the relation among different legal orders. Romano himself solved the issue, but, as Dogliani points out, only in 1946, by adding a footnote to the second edition of "The Legal Order"[27], a footnote that, therefore, was not present in the original version.

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[23] See M. Loughlin, *Santi Romano and the institutional theory of law*, supra at 9, xxviii-xxix.

[24] See M. Dogliani, *La fortuna della teoria romaniana dell'ordinamento nel Diritto costituzionale*, in *Santi Romano. L'ordinamento giuridico (1917-2017)*, 40, referring to A. Romano, *Nota bio-bibliografia*, in *L'ultimo Santi Romano* 843 (2013).

[25] S. Romano, *Lo Stato moderno e la sua crisi*, [1909] in Id., 1 *Scritti minori*, reprint, 379 (1990).

[26] See M. Dogliani, *La fortuna della teoria romaniana dell'ordinamento*, supra at 24, 41-42.

[27] See S. Romano, *L'ordinamento giuridico*, 2nd edition, [1946] reprint, 146 n. 95-bis (1967).

Here, Romano explains that, even though, as a matter of principle, a certain legal order is not affected by the rules of another legal order, nothing prohibits the former from assigning legal value to those rules and from recognizing the other legal order, albeit usually just to a certain extent. He refers to the adoption of rules of recognition, which by granting relevance to another legal order imply evaluations of convenience and constitute an expression of sovereignty. More precisely, such rules turn out to be an application of a principle of necessity[28]. In Romano's view, necessity is, at the same time, both the reason for the birth of all legal orders and the source of production of rules not included in the law of the State and perceived indeed as necessary by the members of a social group. According to the explanation inserted in the second edition of "The Legal Order", the State has to adopt a rule of recognition that be valid within the legal order of the State itself, in order for another legal order to bring about effects relevant to the State. The only way to deem the two versions of Romano's book to be consistent on this issue is to define necessity and thus a principle of effectiveness as a limit to the sources of law in the State's legal order. Therefore, necessity and the principle of effectiveness end up binding the exercise of the legislative function, in the sense of requiring the recognition of the rules of another legal system[29]. Overall, Dogliani concludes that Santi Romano's intention to strengthen the autonomies within or outside the State should not be overestimated, as the scholar's primary concern was always to ensure the unity and stability of the State. In other words, Romano's legal order doctrine should be seen in light of the objective to devise instruments preventing the dissolution of the State[30].

Sabino Cassese provides the administrative law perspective on "The Legal Order" in the same collective volume. He begins by recalling both that Santi Romano had trouble having his book

[28] On necessity as a source of law, related to Romano's legal order doctrine, see R. Cavallo Perin, *Ordinamenti giuridici paralleli e necessità come fonte del diritto*, in *Attualità e necessità del pensiero di Santi Romano*, 41-55.

[29] See M. Dogliani, *La fortuna della teoria romaniana dell'ordinamento*, supra at 24, 50-53. The author also underlines (55) that the same holds true in a negative sense, i.e. if the State later intends to deny validity to the rules of another legal order. The line of continuity linking necessity, effectiveness, and the expulsion of those rules from the State's legal order implies a value judgment and thus an a legislative act or anyway the resort to a formal source of law.

[30] Id., 61.

published[31] and that the doctrine went through a lot of criticism[32]. He also underlines that Romano's work represented a sort of breakthrough for its anti-State approach. When Romano wrote "The Legal Order", during the First World War, indeed, the Italian legal scholarship was still much influenced by the German one, and German scholars traditionally defended the pivotal role of the State. In this sense, the book was innovative. Furthermore, most of the contemporary – and even the subsequent – scholars did not grasp the implications of the legal order doctrine for the study of administrative organization[33].

Actually, between the '50s and the '60s, several Italian scholars used Romano's construction to pursue different purposes[34], all of them somehow related to the organization of public administrations. Firstly, this construction was employed to maintain that the internal rules and acts of the public administration, as well as the entities within it, were not rules, acts, and entities of the general legal system – or general legal order, to use Romano's terminology – but of a derivative legal order, which existed within public administrations. In other words, a clear distinction between administrations' internal and external activities was deemed to be grounded in Romano's construction[35].

Secondly, by applying the legal order doctrine, two scholars reached opposite outcomes. Cassese underlines that in one case, the

[31] The very first version of the book, indeed, gained only a local publication, in two parts, in the "Annali delle università toscane" ("Annals of Tuscan Universities"), between 1917 and 1918. Cassese also points out that the book remained unfinished, as the introductory note in the first edition spoke of other parts that would follow but never saw the light. See S. Cassese, *Le alterne fortune de "l'Ordinamento giuridico" di Santi Romano*, in *Santi Romano. L'ordinamento giuridico (1917-2017)*, 65.

[32] Ibid., referring to Massimo Severo Giannini, who reported that the book was stigmatized because of its vagueness, and for containing merely assumptions and tautologies. Giannini, however, argued that those critiques were perfectly understandable for two reasons: Firstly, the book was not complete in all of its parts; secondly, Romano did not manage to go beyond an equation between institutions and social bodies. Giannini added that the French scholars championing an institutional theory, namely Hauriou and Waline, failed as much as Romano to set forth a legally acceptable definition of the institution. See M.S. Giannini, *Prime osservazioni sugli ordinamenti giuridici sportivi*, [1949] in 3 Scritti 85-86 (2003).

[33] See S. Cassese, *Le alterne fortune de "l'Ordinamento giuridico" di Santi Romano*, supra at 31, 69-70.

[34] Id., 71-72.

[35] See E. Silvestri, *L'attività interna della pubblica amministrazione* (1950).

outcome was substantially the same as the one just mentioned – a separation between the general legal system and an internal order of administrations, which was concerned with activities other than traditionally administrative ones, such as those carried out to issue disciplinary measures and sanctions in general, as well as administrative regulations[36]. In the other case, an analysis of the military order was systematically conducted to show, by contrast, that this order was actually a part of the general legal system[37].

Another scholar, who analyzed administrations' internal rules, noted a growing trend towards the inclusion of special administrative orders in the general legal system[38], and thus this study somehow put an end to the attempts to devise such derivative orders. Cassese observes that those attempts would be even more untenable today given the existence in Italy – but the argument may be extended to many other countries – of a general law on the administrative procedure and the lack of any deference by the administrative judges towards internal administrative activities[39]. The distinguished scholar concludes that "The Legal Order" should be read only from a historical perspective to emphasize the importance the essay had at the time of the publication of its first edition, when it significantly contributed to the separation of Italian scholarship from its former (mainly German) influences[40].

As far as the second book under review is concerned, the first paper it contains starts by mentioning the position just analyzed, as it was presented at the Palermo conference on Santi Romano[41]. The author of the paper, Sordi, compares this position to one expressed by another distinguished scholar, who, by contrast, has regarded

[36] See V. Ottaviano, *Sulla nozione di ordinamento amministrativo e di alcune sue applicazioni*, 8 Riv. trim. dir. pubbl. 825-906 (1958).
[37] See V. Bachelet, *Disciplina militare e ordinamento giuridico statale* (1962).
[38] See F. Bassi, *La norma interna* (1963). That consideration led the author to envision a gradual loss of importance of the class of internal rules of administrations (561-562). The topic, however, seems to be still capable of attracting scholarly interest. See, recently, F. Fracchia, M. Occhiena, *Le norme interne: potere, organizzazione e ordinamenti* (2020).
[39] See S. Cassese, *Le alterne fortune de "l'Ordinamento giuridico" di Santi Romano*, supra at 31, 73.
[40] Id., 75-76.
[41] When the second conference was held in Pisa, the proceedings of the previous one had not been published yet, and they eventually were published later than those of the Pisa conference.

Santi Romano's thought as being potentially significant and worthy of a reevaluation today, especially in light of the current crisis of the system of the sources of law[42]. Sordi admits that he has deliberately exacerbated the divergence between those two opinions not to take one side but rather to underscore that the perspective he follows is broader. He believes, indeed, that the debate between the merely historical or current significance of Romano's construction underlies a more general issue – the distinction between a state-centered approach ("statualismo") and one founded on pluralism[43].

Sordi expressly defines "The Legal Order" and a book published in the year of Romano's death (1947)[44] as two general theory of law works, wherein Romano attenuated the state-centered approach he had followed in the previous years of his scientific engagement. Sordi, indeed, points out that such an approach was mainstream among scholars who, between the 19th and the 20th century, dealt with an Italian State that was still consolidating its legal system. The importance of the evolution of Santi Romano's thought, however, should not be underestimated, since neither his master, Vittorio Emanuele Orlando, nor a scholar more or less contemporary with Romano, Oreste Ranelletti, took a similar path of departure from the approach mentioned above[45].

The dichotomy between this approach and the one emerging from "The Legal Order" may be explained, according to Sordi, with the broad range of Romano's interests and perspectives in the comprehensive domain of public law. In this sense, Santi Romano conducted leading studies on a variety of issues – autarchy, i.e. the concept of indirect administration whereby the Italian legal culture implemented the foreign – mainly British – experience of Self-government; subjective public rights; the interpretation of public law statutes; the identification of the general principles of administrative law. When he studied the topics just listed, Romano had the purpose to arrange them systematically in the field of (positive) public law, and, in pursuing this purpose, he followed the state-centered approach.

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[42] See P. Grossi, *Santi Romano: un messaggio da ripensare nell'odierna crisi delle fonti*, [2005] in Id., *Nobiltà del diritto*, 669-688 (2008).

[43] See B. Sordi, *Statualità e pluralità nella teoria dell'ordinamento giuridico*, in *Attualità e necessità del pensiero di Santi Romano*, 15-16.

[44] S. Romano, *Frammenti di un dizionario giuridico*.

[45] See B. Sordi, *Statualità e pluralità*, supra at 43, 17.

By contrast, when he dealt with issues going beyond the State, such as the existence of international organizations, and – above all – when he adopted a general theory of law perspective, Romano regarded the State as just one among numerous institutions and legal orders, thereby championing pluralism. In other words, these two spirits coexisted in Santi Romano, and they revealed themselves depending on the subject matter or issue of his studies[46]. Sordi argues that "The Legal Order", too, shows this coexistence. In this regard, the author relies primarily on the interpretation of Romano's essay provided by important philosopher of law Norberto Bobbio. As a normativist, Bobbio considered "The Legal Order" as the expression of a moderate version of pluralism, which, at the same time, does not deny radically the state-centered approach[47]. From such a perspective, Sordi includes Romano among the scholars – such as Jellinek, Kelsen, and Schmitt – who studied and contributed to outlining a "*Staatslehre*", i.e. a general doctrine of the State. This consideration, together with the mention of a 2009 article by Professor Laughlin as a supporting argument, leads Sordi to conclude that Romano's construction turns out to be useful today[48].

This second book contains a lot of insightful observations, which derive from the attempt to investigate possible applications of Santi Romano's legal order doctrine not only to different subject matters falling within the general domain of public law but also to several issues and topics concerning only administrative law. As for the latter contents, the contributions may further be divided into two categories. The first one encompasses two studies conducted from a broad perspective, which are aimed at assessing whether and to what extent the doctrine may affect today certain types of

[46] Id., 18-21.

[47] Id., 21. In particular, Sordi refers to a passage of Bobbio's article, in which the scholar maintains that Santi Romano "does not accept the extreme or subversive pluralism of those who hope for not the transformation of the state and its adjustment to new social needs but its destruction. He is a moderate pluralist, that is he believes in the beneficial effects that the emergence of such quarrelsome social groups as trade unions may result in a better articulation of the relationships between individuals and the state, but he still considers the state as a final and necessary moment of society. Even better, he is theoretically a pluralist, but ideologically a monist". N. Bobbio, *Teoria e ideologia nella dottrina di Santi Romano*, [1975] in Id., *Dalla struttura alla funzione*, 156 (2007).

[48] See B. Sordi, *Statualità e pluralità*, supra at 43, 23-24, referring to M. Laughlin, *In Defense of* Staatslehre, 48 Der Staat 1-28 (2009).

Italian administrations, namely the autonomies, such as territorial public bodies, and the independent administrative authorities[49]. Other two studies compose the second class of contributions, devoted to specific sectors of administrative law[50]. The remaining part of this paragraph, however, analyzes two contributions, which address the general issue of the applicability of Romano's doctrine to current administrative law.

The contribution by Travi enunciates a strong thesis: Santi Romano's legal order doctrine turns out to be today a necessary reference even for those who espouse normativism and thus theoretically reject that doctrine[51]. After underlining that any manifestation of pluralism and, accordingly, any special legislation or administrative regulation have to be justified in light of the principles of equality – *rectius*, equal treatment – and reasonableness, the author argues that the institutional theory is even more useful today than it was one century ago. Indeed, the two principles just mentioned, which are general principles of the administrative action, apply primarily to the relations among different legal systems (or orders, under Romano's terms), and the relations between the national and the European Union (EU) legal systems constitute a clear example. Despite mentioning in a footnote the 1946 edition and not the original version of "The Legal Order", the author puts stress on the fact that the second part – formally, the second chapter – of Romano's essay, which is also more extended than the first one, is entirely devoted to the issue of

[49] See, respectively, A. Police, *Le autonomie pubbliche come ordinamenti giuridici* and A. Massera, *Le autorità amministrative indipendenti e l'Ordinamento giuridico*, in *Attualità e necessità del pensiero di Santi Romano*, 101-118 and 143-166.

[50] One of these contributions, actually, might have been inserted into the previous class, because it adopt a somewhat broad perspective in its first part. See L. Ferrara, *Ancora sugli ordinamenti di settore e su quello sportivo in particolare*, in *Attualità e necessità del pensiero di Santi Romano*, 215-221. It is included in this class, however, because the second part of the article (221-228) is focused on a potentially autonomous administrative order pertaining to a single sector, the sports order. Whether or not this order is deemed to be compatible with Santi Romano's doctrine, it is governed by a public body, the Italian National Olympic Committee (CONI), which is also a member of the corresponding entity operating at international level (International Olympic Committee). The other contribution is concerned with public procurement, and thus it definitely belongs to this category. See A. Fioritto, *Il mercato dei lavori pubblici come ordinamento giuridico*, id., 229-242.

[51] See A. Travi, *Il diritto amministrativo e l'ordinamento giuridico di Santi Romano*, in *Attualità e necessità del pensiero di Santi Romano*, 199-200.

the relations between legal orders[52]. It is pointless to search in this part the possible solution to specific problems that may present themselves when a legal order gets in touch with another one, since the analysis conducted by Romano is mainly aimed at showing, from a mainly theoretical point of view, the variety of legal orders that exists or may exists. However, Romano's construction implies the variety of relations among different legal orders and this is considered by Travi "a decisive contribution"[53].

Another example he provides is the principle of legality of the administrative action: Since laws quite rarely provide specific instructions on how this principle should be applied, to adopt a purely normativistic approach may not suffice for the solution of concrete problems in the carrying out of administrative activities[54].

The author then shifts the analysis to some specific applications of Romano's doctrine in the field of administrative law. One of them is the carrying out of internal activities by administrations. In this regard, the two main issues are whether there exists a special supremacy relationship between a given administration and its public employees and whether the elements of illegitimacy of an internal administrative act may affect the validity of the final act, i.e. the act producing effects outside the administration. As for the first issue, Santi Romano addresses it towards the end of "The Legal Order", by rejecting – in part, at least – the special supremacy relationship theory and proposing an explanation consistent with his doctrine. He devises two types of situations:

A minor institution may be encompassed by an institution with a broader scope, as is the case with the disciplinary power, and thus the disciplinary order, or a minor institution may lay down rules on its own, as is the case with the chambers of Parliament. The key aspect is that those orders are legal orders, even though they

[52] See S. Romano, *L'ordinamento giuridico*, supra at 27, 104-223.

[53] A. Travi, *Il diritto amministrativo*, supra at 51, 201. The author specifies (201 n. 10) that Romano's construction is also useful for an assumption on which it is founded, i.e. the idea that no legal order is to be considered predominant over the others.

[54] Id., 202. It is not clear whether the situations, to which the author is referring here, are only those that are explained in the subsequent part of the paper. However, since it is underlined that the legal basis for the exercise of administrative powers is not specified in many cases, I speculate that a possible situation consists in a conflict of rules or principles pertaining to different legal systems on how those powers should be exercised.

are internal to administrations. Furthermore, one of the scholars Cassese has already mentioned, Ottaviano, relied on Romano's doctrine to claim the existence of ad administrative order separated from the general one. This theory was subject to criticism. The theory, indeed, is not in conformity with articles 97 and 24 of the Italian Constitution, which – respectively – establish some general principles on administrative organization and ensure to anyone the right to judicial review.

Travi argues that Romano offers a solution by constructing the relationship between the administrative order and the general order in terms not of a separation, which would violate the Constitution, but in terms of a distinction. To speak of a distinction of the internal administrative orders means to recognize their peculiar characters, which, in Travi's view, are undeniable[55]. Regardless of the 20th century's debate upon the so-called sectional orders, such as that of finance, the author deems Romano's doctrine also useful to explain the functions of the independent administrative authorities. The model of administration they embody – Travi observes – shows several analogies with Romano's legal order doctrine: Each authority governs a sector, which may be seen as a social group, and has regulatory powers, other than an oversight function.

The regulatory powers sometimes do not find specific foundations in legislative provisions and may be regarded as implicit powers. Furthermore, there is widespread deference by the administrative judge towards many technical evaluations adopted by those authorities. Travi argues that not only may these issues be explained by resorting to Santi Romano's doctrine, but the peculiar characters of the (possible) legal orders pertaining to the independent administrative authorities seem to be increasing. He points out that such a conclusion is incompatible with the Italian constitution, but it shows at least the current value of Romano's construction. Furthermore, he disagrees with the identification of a contradiction in the different perspectives, from which Romano conducted his studies. There is always a twofold approach to legal issues – a general one, which involves speculations, and a specific one, which consists of a practical investigation[56]. Travi concludes that Santi Romano's doctrine is currently significant and it is so,

[55] Id., 203-207.
[56] Id., 209-211.

above all, because the analysis is conducted from a purely legal perspective. Therefore, he rejects the critique based on the lack of a multidisciplinary approach in "The Legal Order"[57].

The final contribution of the book corresponds to the concluding remarks in the Pisa conference, and therefore its purpose is to summarize and keep together all the previous papers. In consideration of the positions expressed in the conference, the answer to the question whether Santi Romano's legal order doctrine is currently useful is obviously in the affirmative. The author of the contribution, Merusi, identifies the current meaning of the doctrine in the fact that it falls within the subject matter of general theory of law while it is not directly concerned with positive law. As such, it is "an instrument of interpretation of legal phenomena that may manifest themselves anytime and with the most diverse features". In other words, "The Legal Order" should be considered as "an operative instrument to study reality" from a general theory (or legal thought) perspective[58]. Ergo, meant this way, Romano's doctrine ends up being not a current doctrine but more precisely a timeless one. The core of the doctrine is "the institution-legal order symbiosis". The relations of relevance among different institutions-legal orders vary and may assume different degrees of intensity, ranging from irrelevance to overlapping or even to coincidence. This is the meaning of Romano's construction, by which the author suggests reading the contributions contained in the book[59]. Two are the main applications the doctrine may have today according to Merusi[60]. The first one is grounded in the fact that a State today, at least in the Western world, is "open". It means that non only legislative provisions and rules in general pertaining to another legal system may enter a State's legal system, but foreign legal institutions – in this case, not in Romano's sense – and dogmatic constructions, too, sometimes affect that legal system or may at least be taken into account in it. An example thereof is what the Italian legal system calls the excess of power, an expression embracing a series of cases of illegitimacy concerning the exercise of administrative powers. The influence of the EU legal system gradually led to the passage from the identification of the cases of

[57] Id., 214.
[58] See F. Merusi, *Osservazioni conclusive*, in *Attualità e necessità del pensiero di Santi Romano*, 296.
[59] Id., 296-297.
[60] Id., 297-299.

excess of power by the Italian Council of State as symptoms of an incorrect exercise of power, on diverse aspects, by an administration to the judicial review on compliance with general principles of law established by the EU legal system itself. The latter, however, formulates those principles on the basis of the member States' legal traditions[61]. Another example the author provides is the circulation of the principle of fairness or fair procedure, which originated in the common law countries[62] and is now widespread in the administrative law of many national legal systems[63]. The second issue consists in the fragmentation that characterizes contemporary legal systems, and not only those of the national States. This element may be the key to understanding some of the uncertain applications of Santi Romano's doctrine. Sectional orders, for instance, should probably be regarded not as legal orders formally separated from the general legal system but rather just as fragments of the latter. Finally, Merusi argues that Santi Romano's doctrine is also suited for usage in connection with a method of study based on a multidisciplinary approach, such as the so-called economic analysis of law, which constitutes thus a further possible application of the doctrine[64].

4. Federici's Book: A Possible Application of Romano's Construction From a Historical Perspective

Federici's essay is not statedly aimed at applying Santi Romano's legal order doctrine to some legal experiences of the past, but this is the interpretation of the essay adopted here. In other

[61] In this sense, see E. Chiti, *La costruzione del sistema amministrativo europeo*, in M. P. Chiti (ed.), *Diritto amministrativo europeo*, 2nd edition, 74-75 (2018). For an analysis of those general principles, see G. della Cananea, C. Franchini, *I principi dell'amministrazione europea*, III edition, 57-85 (2017).

[62] See D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996).

[63] It has been observed that, when a "clear rule" to apply is missing, the judicial review on compliance with this principle by a given administration may imply recognizing to the court a certain margin of "discretion to determine not what is procedurally fair, but what is unfair". G. della Cananea, *Due process of Law Beyond the State* 186 (2016). It is interesting to point out that this consideration is founded on the view of a distinguished philosopher of law and legal thought scholar, Herbert Hart.

[64] See F. Merusi, *Osservazioni conclusive*, supra at 58, 300. For such an approach to public law, see G. Napolitano, M. Abbrescia, *Analisi economica del diritto pubblico* (2009).

words, the doctrine is seen as the underlying element capable of keeping together the topics analyzed, primarily from a historical perspective, in the various chapters of the book. In this sense, Federici's essay appears to be an application of the doctrine, especially if the latter is meant, as Merusi suggests, as a timeless general theory of law instrument to assess a legal system (or order) and its relations with other legal systems[65]. Federici offers some evidence that the historical perspective formally followed in the book works as a sort of pretext to conduct a general theory analysis, based on Romano's construction. First of all, an element of proof may be found in the subtitle. The title is "Rivolte e rivoluzioni", and it seems to suggest that the book is about history and not law: That of "revolution" is not a legal concept, at least in a strict sense[66].

However, the subtitle is "*Gli ordinamenti giuridici dello Stato e dell'anti-Stato*", and the express mention of the term "legal systems" may not be overlooked. The indirect reference to Romano's doctrine is twofold. Firstly, the concept of revolution, which actually constitutes just one of several forms of antagonism towards a legitimate power (attempts of secession, rebellions, civil wars, the preparation of a coup d'etat), implies the existence of both an official legal system and another legal system, which intends to replace the former. According to the author, these are – respectively – the legal systems of the State and of the Anti-State[67]. Secondly, Federici argues that the plurality of legal systems (or orders) is often a pathologic event, and he analyzes as an example thereof the situation in France right before the Revolution broke out, with the Third Estate aspiring to gaining power[68]. The *Ancien Régime* was so fragmented at the time that it could be seen as a sum of different

[65] See supra, para. 3.

[66] Obviously, if a revolution occurs, it brings about first-level legal effects. As Bobbio underlines, indeed, a revolution, regarded as a normative fact, consists in the break of the preexisting legal system and in the establishment of a new one. The scholar specifies that, since a revolution results not just in the adoption of one or more rules but in the substitution of a legal system for another, it is a "complex" normative fact. See N. Bobbio, *Consuetudine e fatto normativo*, [1962-1967] in Id., *Contributi ad un dizionario giuridico*, 54-55 (1994). However, it has also been maintained that the concept of "normative facts" ("fatti normativi") does not equate to "legal facts" ("fatti giuridici"). See G. Fiaschi, entry *Rivoluzione*, in 41 *Enc. dir.* 84 (1989).

[67] See R. Federici, *Rivolte e rivoluzioni* 10-11 (2019).

[68] Id., 11 and, more broadly, 99-111.

legal systems[69]. Even though Romano's construction is purely legal, it is possible to identify a connection with such a fragmentation of social groups as the one existing then in France, where each of those groups could be regarded as a legal order[70]. It is in this very chapter, indeed, that the author mentions Santi Romano for his leading role in introducing the theory of the plurality of legal systems, even though Romano is not given credit for its invention[71]. Federici does not refer to the corresponding efforts by Hauriou in devising an institutional theory but to two traditional maxims, which Romano quotes in "The Legal Order", even though it is unclear whether they may be ascribed to him. Those maxims are both concerned with the relationship between society and law but in an opposite sense. The first one emphasizes that there is a "purely individual sphere", which, as such, is irrelevant to law (*ubi ius ibi societas*). The second one, by contrast, maintains that law is requisite for the existence of society: "there is no society, in the proper sense of the word, unless the legal phenomenon manifests itself within it (*ubi societas ibi ius*)"[72]. The connection of those maxims to the doctrine at issue is

[69] Alexis de Tocqueville recalls that, when the King summoned the Estates-General, which where held in May 1789 for the first time after 1614, he asked for opinions about participation in the election and limits to the right to vote. By embracing the King's invitation, all local powers, private bodies and social classes in general advanced their own claims. In doing so, they "thought of their particular interests and sought to find in the ruins of the old Estates-General the form that appeared more suited to guarantee them". A. de Tocqueville, *Frammenti e note inedite sulla Rivoluzione*, in 1 *Scritti politici*. *La rivoluzione democratica in Francia*, [1850-1859] 949-950 (2018).

[70] For a critique of Romano's approach, see G. Fiaschi, *Rivoluzione*, supra at 66, 89, arguing that the institutional theory applied from a strictly legal approach turns out to be a mere "inductive abstraction", incapable of grasping the true essence of the social facts it takes into account. According to this opinion, the category of the institution as devised by Santi Romano is just "a bad generalization".

[71] See R. Federici, *Rivolte e rivoluzioni*, supra at 67, 109-110. In general terms, on the plurality of legal systems, see W. Cesarini Sforza, entry *Ordinamenti giuridici (Pluralità degli)*, 12 Noviss. Dig. it. 1-3 (1965). For a position expressly giving Santi Romano credit for "the logical and definitive exposition" of the institutional theory, see G. Balladore Pallieri, *Diritto costituzionale*, 11th edition, 6 (1976).

[72] S. Romano, *The Legal Order*, supra at 7, 12. See also A. Levi, *Teoria generale del diritto*, 2nd edition, reprint, 36-40 (1967), who points out that the relationship between law and society is one of the hardest (general theory of law) issues to solve and expressly refers to Santi Romano in speculating about the two maxims quoted above. In particular, he defines the identification of a legal order in any organized social entity as a "postulate", i.e. an unproved assumption, formulated by Santi Romano. This postulate – he adds – may be better explained if

shown by Romano himself. With a clarification aimed at putting stress on the legal nature of his construction, thus on the prevalence of law over relationships of merely social relevance, he continues by maintaining that "[a]ny legal order is an institution, and vice versa, any institution is a legal order: The equation between the two concepts is necessary and absolute"[73].

There is further evidence that Federici's book may be regarded as an application of Santi Romano's legal order doctrine. In the first chapter, the author begins by making two preliminary points. Firstly, law is a structural element of any society. This consideration may appear somewhat obvious and thus scarcely significant, but it must be read together with the author's conception of law as antithetical to war: They are two instruments of conflict resolution that may not coexist. It means not only that a war may occur only to the extent that law has failed – or has not been employed – to settle a given social or political conflict, but also that war is not governed by law[74]. Secondly and above all, the author clarifies that he intends law in a objective way, that is as a set of laws and rules and, therefore, as a legal system[75]. This simple assumption would lead to him being included among normativists, but the historical cases he investigates throughout the book appear to have been singled out to apply Romano's construction. Two examples in particular show such an underlying purpose. The first one is the experience of the free local governments (or municipalities) in Central and Northern Italy during the Late Middle Ages. He regards them as legal systems, whose features derived from their relations with what should have been the upper or at least more comprehensive legal system, i.e. that of the Empire.

Actually, those legal systems gradually arose as a result of bottom-up processes, which implied the acquisition of several forms of freedom from obligations towards the Empire itself. Consequently, the author deems those legal systems to be both sovereign and democratic[76]. The second example is concerned with two forms of the Communist Party, as devised in the 1848

considered from a philosophical perspective rather than from the merely legal one followed by Romano (37-38).

[73] S. Romano, *The Legal Order*, supra at 7, 13.

[74] See R. Federici, *Rivolte e rivoluzioni*, supra at 67, 1, 5-10. The author explains this theory broadly in Id., *Guerra o diritto?*, 3rd edition (2013).

[75] See R. Federici, *Rivolte e rivoluzioni*, supra at 67, 3-4.

[76] Id., 52-55.

Manifesto and as treated in the Soviet Union: They were legal systems (or, once again, legal orders). It means that, especially in the latter case, the party was not just a prominent political institution of the Soviet State, but it was the true legal system, in the sense that the party's legal system was requisite for the existence of that of the State[77]. The author claims that, in the Soviet experience, the legal system of the party coincided with that of the general legal system on the basis of some elements: Laws and administrative acts were to be ascribed, directly or indirectly, to the party; the State was organized according to a strict hierarchical criterion, which was related to the party; the legal system provided for severe sanctions in case of any violation of rules, but those sanctions were usually inflicted to meet the needs of the party[78]. These elements recall some of the characters an institution, therefore a legal order, should have according to Santi Romano, and, more generally, at least the pivotal role of sanctions is common to many legal theory constructions[79]. In the conclusions, Federici expressly admits that the historical perspective followed for the most part of the essay is instrumental to his legal arguments[80].

5. Conclusion: The Scope That Santi Romano's Doctrine May Have Today

The description of the scholarly positions provided above have shown that Santi Romano's legal order doctrine is still worthy of consideration not only for the study of current legal issues, mainly in the broad domain of public law[81], but also when past legal

[77] Id., 114, 118, 212-213.
[78] Id., 45-46, 212.
[79] See *Hart, Austin, and the Concept of a Legal System: The Primacy of Sanctions*, 84 Yale L. J. 584 (1975). See also supra, para. 2.
[80] See R. Federici, *Rivolte e rivoluzioni*, supra at 67, 227.
[81] From a purely terminological point of view, the usage of the phrase "legal order" is somewhat rare, but it sometimes occurs in international or global law studies. See L.M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 Stan. J. Int'l L. 347 (2001); Y. Blank, *Localism in the New Global Legal Order*, 47 Harv. Int'l L. J. 263 (2006). For a reference of the phrase at issue to a national legal system, namely that of the U.S., see R.P. Burns, *Is Our Legal Order Just Another Bureaucracy?*, 48 Loy. U. Chi. L. J. 413 n. 2 (2016), where the author specifies that he intends to employ that phrase, instead of "legal system", as the latter "already shows hints of bureaucracy". Recently, the phrase "constitutional order" was employed to argue that "norms", meant mostly as a set of practices governing the practical exercise of powers by federal government officials, play a pivotal

experiences are analyzed to discuss about the plurality of legal systems, as is the case with the third book reviewed. However, opinions vary, and, from at least some of them, it may be inferred a veiled or explicit invitation to be cautious in identifying possible applications of the doctrine to current legal systems. One might regard the position expressed in the final contribution of the second book reviewed, which defines the doctrine as a general theory of law instrument for the interpretation of diverse legal issues and institutions, as a sound intermediate solution. It would mean to formally put the doctrine outside administrative law. At the same time, the two most extreme views – the doctrine belongs to the past or, by contrast, it has potentially a broader scope today than it had when it was formulated – have come from the perspective of this very subject matter. They both use solid arguments and refer to positive law, as well as to judicial review of the administrative action. As for the former view, exposed by Cassese, its fundamental position has been explained – by Sordi – as based on the awareness that it has been "[t]oo long, too full with transformations and changes, the century that separates us from [Santi Romano's] works"[82]. As for the latter, advanced by Travi, the reference to internal administrative activities as a possible application of Romano's doctrine is very doubtful in today's legal framework while the argument focusing on the peculiar role of independent administrative authorities has more chances of success. This argument appears to be somewhat persuasive especially if one combines it – as the author indeed does – to the judicial deference usually accorded to the decisions, mostly technical assessments, made by those authorities. Travi also underlines that, traditionally, the main scope of application of the doctrine encompasses "administrative pluralism and the system of autonomies"[83].

As has been pointed out, the coexistence of a general legal system, that of the State, and of particular legal systems (or orders) leads to "a problem of boundaries"[84]. An analysis aimed at defining the boundaries among different legal systems may be conducted from a domestic perspective, that is by focusing on a single legal system, namely a national one, to see how it is affected by other

role in the U.S. legal system. See K. Whittington, *The Role of Norms in Our Constitutional Order*, 44 Harv. J. L. & Pub. Pol'y 17 (2021).

[82] B. Sordi, *Statualità e pluralità*, supra at 43, 16.

[83] A. Travi, *Il diritto amministrativo*, supra at 51, 202.

[84] G. Corso, *Conclusioni della Tavola rotonda*, supra at 11, 338.

legal systems, in addition to ascertaining whether there are some derivative legal systems or fragments of a legal systems within it.

However, the interactions of several systems on a given issue may also be a specific subject matter, as is the case with the dialogue among courts belonging to different legal systems on the judicial enforcement of individual rights provided for at constitutional level[85]. Furthermore, these two perspectives may be kept together, by arguing, for instance, that the EU is neither a State nor an international organization in a strict sense but rather a "composite" legal system[86]. Overall, Santi Romano's legal order doctrine still turns out to provide useful insight on a series of issues concerning a single legal system or the mutual influence among legal systems.

One might object that, according to the positions expressed in the three books reviewed, the only scope the doctrine may have today is restricted to legal theory, i.e. to general theory of law. Actually, this is just one possible application of the doctrine, and yet the outcomes of such an application may be employed in studies conducted from an administrative law perspective. A recent reevaluation of U.S. administrative law by professors Sunstein and Vermeule, for instance, is mostly founded on the thought of distinguished legal theory scholar Lon Fuller[87].

[85] See A. Sandulli, *Dialogo tra le Corti e tutela dei diritti nella crisi del pluralismo costituzionale: la teoria ordinamentale alla prova europea*, in *Attualità e necessità del pensiero di Santi Romano*, 57-88.

[86] See G. della Cananea, *L'Unione europea: un ordinamento composito* (2003).

[87] I am referring to C.R. Sunstein, A. Vermeule, *Law & Leviathan* (2020), a good deal of the theoretical framework of which embraces the construction advanced in L.A. Fuller, *The Morality of Law*, 2nd edition (1969). I take the liberty to mention my review of the essay by Professors Sunstein and Vermeule in 71 Riv. trim. dir. pubbl. 1322-1325 (2021).

LATIN AMERICA LAW REVIEWS ON ADMINISTRATIVE LAW

*Silia Gardini**

Latin America Law Reviews on Administrative Law begins from encouraging the encounter between italian doctrine and foreign legal systems, both with their similarities and differences. The aim is to examine in depth the theoretical and practical problems of the Italian Administrative Law, according to a comparative perspective. This paper includes some essays published in Chile, Argentina, Cuba, Perù and Colombia during 2021 about heterogeneous topics in order to offer a multifaceted view to users on the latest latin american doctrine linked to administrative law.

M. Castillo Arjona, *El fenómeno de la COVID-19 y sus efectos sociales en el derecho administrativo del siglo XXI*, 8-1 *Revista eurolatinoamericana de derecho administrativo* 174 (2021).

The phenomenon of COVID-19 and its social effects on XXI century's administrative law.

The paper seeks to analyze the phenomenon of the pandemic generated by COVID-19 from a sociological perspective of law and how it has significantly influenced the deterioration of relationships between citizens and rulers. It tried to address the following central question: how could the relationship between rulers and citizens be improved? The conclusion is that the ideal way to reach a better understanding between Administration and the administered ones is through the revision and reform of the norms of public law.

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The aim of this process is double: on one hand, to evolve towards national standards, on the other hand, to consciously involve the citizen in daily decision-making. Innovation plays an important role too in the process of transforming administrative law. The standards that have been achieved through European law and in Latin America, through Free Trade and Investment Agreements, as well as the remarkable influence of international human rights law on state dynamics, remind a public administration that ensures efficiency, effectiveness, continuity and permanence of the natural elements of the fundamental right to good administration.

Keywords: *administrative law; covid-19; pandemic; 21st century; public management.*

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L. Ferney Moreno Castillo, *Potestad normativa en estado de excepción por situaciones de calamidad pública, como el COVID-19 en Colombia*, 27 *Revista Iberoamericana de Derecho Administrativo y Regulación Económica* 374 (2021).

Normative power in state of emergency for situations of public calamity, such as COVID-19 in Colombia

The purpose of the article is to explain the reasons why the normative power of the State proliferates in the state of emergency. A lot of norms have been issued, aimed at avoiding the extinction coming from the effects of the supervening and extraordinary situation, such as COVID-19. Bearing in mind that it has not been possible to deal only with regulatory powers in use of ordinary powers, but it is also been necessary exercising regulatory powers in use of extraordinary powers, with the declaration of a state of exception.

Keywords: *regulation; production of standards; COVID-19; competences; procedure; decisions; state of exception.*

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F. Huepe Artigas, *Técnicas y propuesta metodológica para el control de legalidad de los actos administrativos reglados y discrecionales*, 33 *Revista de Derecho Administrativo Económico* 101 (2021).

Techniques and methodological proposal for the control of legality of regulated and discretionary administrative acts.

The paper analyzes the controlling method on administrative acts legality. It happens through several steps, starting with the identification and analysis of the elements of the administrative act, its normative coverage and the detection of the legitimacy flaw of the act in relation to the violated legal rule. The Author believes that technique of administrative discretionary acts' control can be adapted to all kinds of acts.

Keywords: *legality control; administrative acts; discretionary powers.*

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J.C. Peláez Gutiérrez, *La responsabilidad patrimonial del Estado y la protección del patrimonio público en Colombia. La cultura de la anticipación como elemento central y articulador de una conciliación urgente, necesaria y posible*, 8-1 *Revista eurolatinoamericana de derecho administrativo* 191 (2021).

The patrimonial lability of the State and the protection of the public patrimony in Colombia. The culture of anticipation as a central and articulating element of urgent, necessary and possible conciliation.

In the paper the author deals with the issue of the contrast between patrimonial liability of the State and the protection to the public patrimony as conflicting extremes that should be addressed legally, in the framework of the Public Legal Defense in Colombia. He believes that the legal way to address the problem comes from the perspective of the culture of anticipation as a central and articulating element of an urgent, necessary and possible conciliation.

Therefore, it is necessary to conceive, develop and lay the foundations for the conception, implementation and consolidation of the anticipative law as an instrument of creation, development and consolidation of a Culture of Anticipation.

Keywords: *Patrimonial liability of the State; protection to the public patrimony; culture of anticipation; anticipatory law; constitutional weighting; public legal defense.*

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A. Ramìrez Sànchez, La responsabilidad patrimonial del Estado. Panorama de su régimen juridìco en Cuba, 19 Revista Derechos en Accìon 548 (2021).

Public liability of the State. Review on its regulation in Cuba.

The author assumes that public liability confirms the quality of the law rule. Based on the new Constitution, the impact of regulation of public liability requires reflection on the essential aspects of its historical feature, constitutional development and configuration of its legal regime. Therefore, it represents the first patrimonial guarantee for citizens against damages suffered by the exercise of public power.

Keywords: *State; liability; rights; guarantees; reparation.*

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P. Gamio Aita, *Retos de la regulación de las energías renovables alternativas en el Perù*, 19 *Revista de Derecho Administrativo* 23 (2021).

Regulation challenges for alternative renewable energies in Perù.

This work analyses the excessive use of polluting energy (mostly based on hydrocarbons) in Perù, as well as, the challenge of gradually innovation to cleaner and renewable energies that

allow us to cope with climate change. Public policies are needed to promote the sustainable and healthy development of the country. Governance issues and the lacking of a proper institutional structure make the situation difficult to change. It also analyzes the great potential of renewable energies, such as solar, wind and geothermal energies, among others. The regulation will be reviewed to promote the renewable Energy.

Keywords: *hydrocarbons; renewable energies; environmental pollution; climate change; sustainable development; public policies; environment.*

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A. Montaña, P. Zapata García, *La necesaria claridad conceptual y teórica sobre los contratos estatales que se rigen por el derecho privado como presupuesto para su control judicial efectivo*, 27 *Revista digital de Derecho Administrativo* 45 (2022).

The need for conceptual and theoretical clarity regarding public contracts ruled by private law, as a tool for effective judicial control.

The paper investigates the matter of public contracts ruled by private law. The fact that public contracts are labelled "especial" in nature when they are ruled by private law is unfair, since this type of public contracts are highly common, in fact. The plethora of issues related to their analysis leads the author to clarify some controversial ideas, fundamental to their judicial review. Given that they do not have a general instrument supervising every contract that the Administration executes, the paper is aimed to identify the main issues related to this topic and to introduce both conceptual order and prerequisites that are necessary in facilitating a thorough and coherent judicial review of these contracts.

Keywords: *public procurement; public contracts; private law; judicial control.*

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C. E. Delpiazzo, *Nulidades contractuales en el derecho público uruguayo*, 25 *Revista digital de Derecho Administrativo* 109 (2021).

Contractual nullities in Uruguayan public law.

According to the author, contractual nullities are the result of non-compliance with a rule of law. This observation, common to different disciplines, is relevant to public contracts that lack a specific positive regulation on the subject. This allows to assess contractual pathologies from a classic classification. The latter distinguishes the subjective nullities (related to both the administration and the contractor), the objective nullities (referring to the illegal object and cause of the contract), and the additional nullities (derived from formal vices). Behind the referral to the Civil Code to distinguish the nullity from the annulment, as well as, to appreciate different grounds for nullity, the pecularities of the public contract impose special assessments. Such evaluation derived from the nature of the affected interests, the contractual good faith principle, the importance of publicity and competition, the reasonableness inherent to administrative actions, and the special interpretation of contracts.

Keywords: *public procurement; administrative contract, nullities, void-ability, contractual good-faith.*

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T. Reis, R. Alves, R. Dantas, *Imprecisiones en materia de indemnizaciones en los contratos de concesiones y asociaciones público privadas en Brasil*, 25 *Revista digital de Derecho Administrativo* 213 (2021).

Imprecisions in the matter of compensations in concessions and public-private partnerships in Brazil.

Until recently, the subject of contractual terms has not enough stressed in the discussion about the structuring of

concessions and public private partnerships (PPP) in Brazil. However, the practical challenges experienced by the Public Administration on this matter revealed the need for its review. As a matter of fact, early contractual terminations and the duty to provide a previous response to the effects of each event became more compelling in a credit crisis scenario, in order to allow an early termination. Despite the development of decision-making techniques in Brazilian law, some inaccuracies and scepticism can still be found regarding the amount of compensation due and its quantification in concessions agreements and PPP.

Keywords: *infrastructure; concessions; public private partnerships (PPP); project structuring; contractual terms.*

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E. Cordero Quinzacara, *El permiso de construcción desde la perspectiva del Derecho administrativo general. Análisis de sus principales problemas a nivel jurisprudencial*, 33 *Revista de Derecho Administrativo Económico* 33 (2021).

Urban planning licenses in general Administrative Law. Analysis of its main problems in Jurisprudence.

This research aims to analyze the urban planning license in Chile and the way it has been incorporated into the institutions and the concepts of administrative law, considering positive legislation and jurisprudence from a vision of urban law. In addition, it is shown how this license constitutes one of the main categories of analysis to strengthen general administrative law and provide conclusions that are projected in various areas of this discipline, such as the existence of rights that have their source in legal- administrative titles, the effects of the invalidation, the extinction for the term and the judicial and administrative actions.

Keywords: *urban planning; licenses; construction; urbanism.*

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R. Pacheco Reyes, *Los conceptos de función administrativa y servicio público en la jurisprudencia y en la doctrina iuspublici stacolombiana*, 26 *Revista digital de derecho administrativo*, 11 (2021).

The Concepts of Administrative Function and Public Service in Colombian Judicial Rulings and Scholarly Works in Public Law.

The research highlights the main thesis that either equate or differentiate the concepts of administrative function and public service in Colombia. The main argument distinguishes public service from administrative function by resembling the later with public prerogatives; an organic position simplifies public services by making them dependent on the nature of the service provider; and a finalist perspective requires explicit rules to resolve procedural aspects arisen when the administrative function may not be authoritative and governed under private law. The theoretical highlighted inconsistencies explain why the concepts of public service and administrative function request caution against common generalizations and are still a relevant topic in the field of public services.

Keywords: *Administrative Function; public service, economic activity, public function, state prerogatives.*

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J.J. Rastrollo Suàrez, *Contratacion publica y programas de cumplimiento empresarial en América Latina: los casos de Brasil y Colombia*, 26 *Revista digital de derecho administrativo*, 197 (2021).

Public procurement and regulatory compliance in Latin America: the cases of Brazil and Colombia

The article analyzes regulatory compliance as a tool to prevent corruption in the area of public procurement. Firstly, it examines the introduction and integration of regulatory compliance in the field of Public Law from its incorporation to U.S. American and European law. Secondly, it analyzes the introduction and development of regulatory compliance in Latin American legal systems,

with special attention to the national cases where regulatory compliance has been most advanced, such as Brazilian and Colombian law.

Keywords: *business compliance; public procurement; self-regulation; inspection; control; Latin America.*

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M.A. González Maldonado, R. Rivero Ortega, *La codificación del procedimiento administrativo en América Latina. Un hito más*, 27 *Revista Iberoamericana de Derecho Administrativo y Regulación Económica* 684 (2021).

The codification of administrative procedure in Latin America. One more milestone.

A new administrative procedure Act is always an event for public Law. The processing of the bill in the Paraguayan Congress gives to the doctrine the opportunity to participate in the improvement of this text and to mention other recent legislative initiatives in El Salvador. Therefore, the paper analyzes the project of a procedure law, the first Paraguayan legal text which incorporates the express recognition of administrative law general principles, such as legality and rationality. Latin American norms show inspiration from Spanish Law, also reflected in the Ibero American Chart of Citizen´s Rights and Obligations, approved by CLAD in the XXIII Ibero American Summit of Heads of State.

Keywords: *administrative procedure; state reform in Latin America; citizen´s rights; innovation in public administration; comparative law.*

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L. E. Ferreyra, *Contratos de participación público privada*, 19 *Revista Derechos en Accìon* 510 (2021).

The work depicts the legal regime of public-private participation contracts (PPP) in Argentina. Likewise, the main

characteristics of PPP contracts are here presented. Moreover, it addresses the problems that the initiatives suffered due to the economic and financial turbulence of the country, which, in turn, were used to justify a new and irregular loan with the International Monetary Fund (IMF). IMF conditions led to cuts in the works program, particularly those to be carried out with PPP contracts. However, the fragility of the PPP plan exhibited other transparency and sustainability deficiencies. Finally, the few PPP contracts that were entered into for highway corridors are examined and the reasons for their termination are developed.

Keywords: *Public administration; contracts; Public Private Participation; PPP contracts; monetary fund.*