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Remembering Stefano Rodotà

±Of Machines and Men. The Road to Identity
Scenes for a Discussion*

Stefano Rodotà

1.In the reflections on the "homme-machine" by La Mettrie and D'Holbach[1], the physical and psychical identity is ordered, in a regulatory sense, by nature. But it is the relationship with the world of machines that shows that identity is a complex social entity, irreducible solely to naturalistic data, resulting from a never accomplished historical event. Montaigne reminds us that life, in which identity is reflected, "est un mouvement inégal, irrégulier, multiforme"[2], thus a continuous construction, entrusted to variable contexts, departing from any automatism. Furthermore, if the order that governs identity were only naturalistic, then the autonomy of a person itself would be denied at its origin.

Rather, throughout history we have always tried to force the limits of nature, especially when we have tried to mimic it, reproduce it, transport it to a different dimension. It is not a paradoxical conclusion, but just when reproduction of nature appears at its zenith, the highest degree of artificiality has been reached. The automatons, the Ingenious Devices have fascinated us since ancient times; they have paved the way to other mechanical creatures, like robots and the different thinking machines; and then came the cyborgs, announcing the trans- and post-human, the researches on brain-machine interfaces (BMIs) or brain-computer interfaces (BCIs). But relations between man and the world of machines are not linear[3]. The fact that we start from man as a reference or model may lead to very different results: to try to replicate man in a machine or to replicate machine in a man, an object among other objects, in fact an "homme-machine".

± The editorial team of the Comparative Law Review has decided to publish this contribution of Professor Stefano Rodotà to celebrate him on the Fifth anniversary of his passing. Both papers engage with new technology, identity, data and legal rules. It seems the best way to remind how important his work is within the academia.

* The title of this paper mimics that one of a well known John Steinbeck's novel, "Of Mice and Men" (1937), a story of an unconscious destructive power that can be stopped only through the destruction of that power itself. Violence, public or hidden, against violence? We must avoid any aggressive attitude. To mimic William Shakespeare (King Lear, act V, scene II, "Ripeness is all") we could say "Consciousness is all".

[1] J. 0. de La Mettrie, L'homme machine (1748), in Oevres philosophiques, 2 vol., Fayard, Paris, 1987; P. H. T. D'Holbach, Svg}jeipe de la nature (1770), 2 vol., Fayard, Paris, 1990.

[2] M. de Montaigne, Essais (1588), Livre III, chap. III, De mois commerces.

[3] M. G. Losano, Storie di automi. Dall'antica Grecia alla belle époque. Einaudi, Torino 1990; C. Sini, L'uomo. la ma«china l'automa, Bollati Boringhieri, Torino 2009.

Social concern has always accompanied these matters; it has brought about many reactions against, and radical criticism of, mechanicism; the most well known and extreme reaction was the one that went under the name of Luddism, which manifested itself still in the '60s when Harvey Matusow and his International Society for the Abolition of Data Processing Machines demonstrated in front of the IBM offices, raising banners saying: "Computers Are Obscene". Criticism of technological progress has expressed itself in various forms, to protect man from a fate that makes him become "a happy slave of machines" and to prevent the whole of society from changing into a relentless control machine.

In reality, great dystopias and utopias constitute an essential cultural background at the basis of any discussion on the man-machine relationships. Turnarounds are continuous. It is the progressive integration with the world of science and machines, in fact, that has been considered also as an extraordinary chance given to the world of humans to reach a fullness that it had lacked till then.

The *Magnalia naturae* listed by Francis Bacon at the end of New Atlantis[4] comes back to the mind: "the prolongation of life; the retardation of age; the curing of diseases counted incurable; the mitigation of pain; the altering of temperament, the statures, the physical characteristics; the increasing and exalting of the intellectual parts; versions of bodies into other bodies; making of new species; drawing of new foods out of substances not now in use".

All this, today, can also be considered in the dimension of rights, a construction of identity that ends up coinciding with the construction itself of humans. After the Oskar Pistorius issue, the South African runner running with two carbon fibre artificial limbs replacing his lower legs (authorised to participate into the Olympic Games), another paraolympic athlete, Aimée Mullins, said that "to change one's body through technology is not an advantage, but a right. Both for those doing sports professionally and common people". Thus the barrier between "normal people" and those with artificial prosthesis falls, and in fact a wider notion of "normal" is developed, which becomes a condition to freely construct one's identity using all the socially available opportunities. The new dimension of humans calls for a different legal measure, that can dilate the scope of the fundamental human rights.

Through the body people can take possession of technology, bringing it back to the dimension of humans. But what happens when these phenomena do not manifest

[4] F. Bacon, New Atlantis (published in 1627).

themselves as appropriation, but as expropriation, when people find themselves living in an environment where machines can take over their identity, change their body to enable its external control, when we live in an *augmented reality, ambient intelligence, ubiquitous* or *pervasive computing, smart environments,* when, all said and done, we live in an environment where machines can take on a position of supremacy, for whatever use is made of them or for their own autonomic nature?

2. To try and answer these questions, and grasp the new way in which identity is constructed, we have to start from the realisation that a social and legal order of machines is developing that claims its own autonomy, that not only may clash with people's traditional autonomy but also give rise to a new anthropology. Two judgements of the Bundesverfassungsgericht (the German Constitutional Court) may help clarify some aspects of the problem.

The first (15 February 2006) concerns par. 14.III of Luftsicherheitgesetz, that authorised military aviation to shoot down a civilian plane as, after having been hijacked by terrorists, it was feared that it could be used as a weapon against civilian or military targets (the case of the 9/11 attack to the Twin Towers and the Pentagon), without there being any other way of preventing such an outcome. The said rule was considered in contravention with Articles 1 and 2 of the Grundgesetz, on the dignity and defence of life, two particularly significant grounds. The german constitutional judges, in fact, thought that the passengers of the aeroplane were being "depersonalised and, at the same time, deprived of their rights" ("verdinglich und zugleich entrechtlicht"). A unilateral decision by the State on the life of the passengers deprived them of the right of every human being to autonomously decide of its own existence They were reduced to inanimate objects, to mere components of the plane, to be absorbed by the machine and undergoing a radical change in their prerogatives, in their 'human' status.

Just as important is the subsequent judgement of 27 February 2008, by which the Bundesverfassungsgericht declared in contravention with the Grundgesetz an amendment to the law about the domestic intelligence service of the Land North-Rhine Westphalia. The amendment had introduced a right for the intelligence service to "covertly observe and otherwise reconnoiter the Internet, especially the covert participation in its communication devices and the search for these, as well as the clandestine access to information-technological systems among others by technical means". The decision of the Bundesverfassunsgericht is widely considered a landmark ruling, because it constitutes a new "basic right to the confidentiality and integrity of information- technological systems"

as part of the general personality rights in the German constitution. The reasoning goes: "From the relevance of the use of information-technological systems for the expression of personality (Persönlichkeitsentfaltung) and from the dangers for personality that are connected to this use follows a need for protection that is significant for basic rights. The individual is depending upon the state respecting the justifiable expectations for the integrity and confidentiality of such systems with a view to the unrestricted expression of personality." (margin number 181). The decision complements earlier landmark privacy rulings by the Constitutional Court that had introduced the "right to informational self-determination" (1983) and the right to the "absolute protection of the core area of the private conduct of life" (2004).

Information-technical systems that are protected under the new basic right are all systems that "alone or in their technical interconnectedness can contain personal data of the affected person in a scope and multiplicity such that access to the system makes it possible to get insight into relevant parts of the conduct of life of a person or even gather a meaningful picture of the personality" (margin number 203). This includes laptops, PDAs and mobile phones.

The decision also gives very strict exceptions for breaking this basic right. Only if there are "factual indications for a concrète danger" in a specific case for the life, body and freedom of persons or for the foundations of the state or the existence of humans, govemment agencies may use thèse measures after approval by a judge. They do not, however, need a sufficient probability that the danger will materialize in the near future. Online searches can therefore not be used for normal criminal investigations or general intelligence work.

Let us compare this approach with the one that emerges from the front cover of the first issue of the 2007 Time's magazine, dedicated as is tradition to "the person of the year", which spelled out in big letters the word "You". Thus it was the endless numbers of individuals to be indicated as the protagonist. Each one, though, in their unrepeatable individuality, because the front page was made of reflecting material that allowed anyone looking at it to recognise himself as in a mirror. You are the world.

But, at a closer look, that mirror was a computer screen drawn over the word "You". The message thus takes on a particular meaning. I recognise you as the person of the year because you have become part of the most significant technological apparatus. The man-machine order is upside down. You are a protagonist, and maybe the lord of the

environment around you, only if you become a machine yourself, basically if you become a part of the apparatus.

In the German judgement of 2008 this approach is completely overturned. It is the human that embodies the machine, not the opposite. It is recognised that between man and machines not only is there an interaction, but a compenetration. This is a structurally evident data, and its constitutional relevance is recognised. The law thus reiterates the priority of humans, but manifests its power telling us that the world is going through a new entity, made up of the person and the technical apparatus to which data is entrusted. A continuum is established between the person and the machine: by recognising this, the law hands us a new anthropology, affecting legal classifications and changing their quality. Confidentiality, a quality of humans, is handed over to the machine.

It is not possible, then, to consider this judgement as just a further development of the orientation adopted by the Constitutional Court itself in 1983. By that historic judgement, the Constitutional Court recognised "informative self-determination" as a fundamental right, and radically changed the traditional picture of privacy protection, retrieving the more important indications of the cultural development started in the early '70s. In the 2008 judgement reference to confidentiality still appears, even if its transfer from the person to the machine already confirms a new approach. But two fundamental questions differentiate it from the previous ruling. The first concerns the fact that the notion of confidentiality is extended to comprise an ensemble that prevents reducing the person, and thus the human, to a mere material entity. From here, and this is the second important point, there is a new form of protection, that overcomes the dychotomy between *habeas corpus,* linked to the physical body, and *habeas data,* conceived as an extension of that historical protection of the electronic body. We no longer have separate entities to be protected but only one: the person in its different configurations, progressively determined by his relation with technologies, which are not only electronic.

We are facing the reconstruction of the integrality of the person, similar to the one realised through the recognition of a unitary protection of the person's integrity, no longer limited only to a physical integrity, but extended to comprise also psychical and social integrity, as explicitly set forth in the definition of health developed by the World Health Organisation ("a state of complete physical, mental and social well-being and not merely absence of disease or infirmity") and then transposed in a multitude of legal documents (e.g. Article 3 of the Charter of Fundamental Rights of the European Union). We could say, with some rhetoric emphasis, that the law, after having acknowledged the non-severability of the

body and the soul, provides its version of "man machine" through the 2008 German judgement. Primary importance is given to human element, the only way to reconcile man with the technical apparatuses that progressively accompany, restructure and invade him.
Personal identity is expanding. But who, concretely, is behind this? The answer emerging from the 2008 German judgement seems to tell us that it should always and only be the person concerned to set the conditions for defining his identity, by re-establishing his rule on a portion of the external world, and the technical apparatuses he directly uses.
That has never been the case, the construction of identity cannot be confused with the right to self—representation. But the technological changes in the methods for processing personal information have progressively changed the relationship between the identity freely constructed by the individual and the intervention of third parties, giving growing weight to the activities of the last mentioned.
Inaccuracies and partial representations, or even real falsifications, are a constant feature of many biographies freely developed by entities other than the person concerned, which then become part of the socially accredited information structures (like Wikipedia). Nowadays we also have "dispersed" identity, in the sense that information concerning the same person is entered in different data banks, each one of which only returns a part or a fragment of the overall identity. We risk entering a time of identity "unknown" to the person concerned himself, in the sense that not only is it found in different places, but also in places that are difficult or impossible to know of, or to have access to.
Our identity, thus, is more and more the result of an operation prevailingly conducted, processed and controlled by others. And we are not speaking here only of a construction based on the way the others see us and define us: "le Juif dépend de l'opinion pour sa profession, ses droits et sa vie"[5]Collective representation can determine the way in which we are considered, without necessarily providing the identity constitutive materials, as it happens when personal data is used directly. Furthermore, it is also true that in the one or the other case we have an "unstable" identity, at the mercy, from time to time, of moods, prejudices or the concrete interest of the entities collecting, storing and disseminating personal data. A circumstance of dependence is thus created that causes the construction of an "external" identity, and the classification of identity in forms that reduce the identity managing power of the person concerned.

[5] J.-P. Sartre, Réflexions sur la question juive, Gallimard, Paris, 1954, p. 106.

3. A small American story can help us understand a change that has already become a part of our daily lives. In a primary school of California, for security reasons, it was decided that each child would carry a necklace including a smart tag - a remotely readable RFID chip - to enable charting all his/her movements and localise him or her at any time. Back home, a little girl commented the novelty like this with her parents: "I do not want to become a packet of cereals". The reference made here is clear. It reflects the experience of a girl who, in a supermarket, sees that the things she buys are "read" by an electronic instrument through the bar codes, and refuses to be assimilated to a mere remotely readable object.

The little girl has understood everything, she has described a ehange that affects not only society, but the very anthropological nature of individuals. The body is giowing in its importance, and is changing its functions. lt is becoming a source of new information and is exploited by unrelenting data mining activities - it is a veritable open-air mine from which data can be extracted uninterruptedly. The body as such is becoming a password—physicality in replacing abstract passwords. Fingerprints, hand/finger/ear geometry, iris, retina, face scans, body odours, voice, signature, keystroke dynamics, gait recognition, DNA are increasingly used as biometric information not only to identify individuals or allow access to several servlces. but also to set up permanent categories and perf'orm additional controls following identification or authentication/verification, i.e. confirmation of someone's identity.

The body is getting into focus. A manipulated body is being created, which is primed towards surveillance and can be located. Technology is working directly on the body, Surveillance is no longef implemented from the outside, for instance by means of video surveillance. It is not enough to exploit physical features, as is the case with the use of biometric data. Indeed. the body is coupled Cth electronic devices - first and foremost, these based on the RFID technology. The body is supplemented and modified by means of the insertion of electronic implants and of the use of nanotechnologies. The body is being transformed as a whole, not only because it is becoming post- human or trans-human, but because the very autonomy of individuals is being affected - since individuals can be monitored and directed remotely. The body is therefore becoming a new object, wh‹ch also requires considering anew what is a personal data nowadays in order to ensure that the protection of such data as currently envisaged remains workable. and personal identity can remain nder control by the subject itself..

We have concrete examples before us. and they are growing in number by the day. We all are aware of the cases of employees required to carry a small "wearable computer", which allows the employer to guide their activities via satellite, direct them to the goods to collect, specify the routes to be followed or the work to be done, monitor all their movements and thereby locate them at all times. In a report published in 2005 by Professor Michael Blackmore from Durham University, commissioned by the English GMB trade union, it was pointed out that this system already concCmed thousand people and had transformed workplaces into battery farms" by setting the stage for *prison surveillance". We are facing a small-scale Panopticon, the harbinger of the possibility for these types of social surveillance to become increasingly widespread, Similar results, although concerning only location at the workplace, are already possible by means of the insertion of a RFID chip *in* employees' badges.

Some companies, like City Watcher in Ohio, took another step forward in the direction of manipulating its employees' bodies by requiring some of them to have a microchip implanted in their shoiitdefs in order to be idenlified at the entralice of restricted access areas. Thus, the body is modified in its very physicality and primed in order to be monitored directly. And the body implants pf remotely readable microchips are being increasingly used in the most diverse sectors. from disco clubs to hospitals, to open the door of one's house or start up one's computer - With a resulting cost reduction and growing ease of deployment exclusively in order to safeguard the data subjects' health. Any other utilisation should be regarded as in conflict with human dignity, which was declared inviolable in Article 1 of the Charter of fundamental rights of the EU, as well as with data protection principles.

What would be of a society in which a growing number of individuals were tagged and tracked? Social surveillance is committed to a sort of electronic leash. The human body is equated to any moving object, which can be monitored remotely via satellite technologies or else radiofrequency devices. If the body can become a password, location technologies are bringing about the creation of a networked person.

We are confronted with changes that have to do with the anthropological features of individuals. We are confronted with a stepwise progression: from being "scrutinised" by means of video surveillance and biometric technologies, individuals can be "modified" via the insertion of chips or "smart" tags in a context that is increasingly turning us precisely into "networked persons" - persons who are permanently on the net, configured little by

little in order to transmit and receive signals that allow tracking and profiling movements, habits, contacts, and thereby modify the meaning and contents of individuals' autonomy. Technological drifts are therefore taking on especially disquieting features. The purposes of identification, verification, surveillance, security in transactions may they really justify any use of the human body that is made possible by technological evolution?

These considerations obviously also apply to the cases in which RFID technologies do not result into modifying a person's physicality. To address these issues, one should draw a distinction between the cases in which RFID tags are used as devices directly connected with a given individual (e.g. when they are embedded in an ID card), and the cases in which this link is brought about by the relationships with objects that are, in turn, tagged. In the former case, one has unquestionably to do with situations that are quite similar to those described in respect of body implants, although here the individual has always the option available to get separated from the medium containing the tag and thus escape surveillance - which is unfeasible, or actually much more difficult to do with regard to body implants, including reversible implants. In the latter case, it is necessary to adjust the current legislation on personal data protection by taking account of the pervasive nature of the control and classification this kind of data collection makes possible - as aptly pointed out in a Working Document adopted by the European Working Party on Data Protection. This implies, on the one hand, the need for re-considering the definition of personal data in order to counter the dangerous trend towards the adoption of formalistic and reductionistic interpretations, which may be prejudicial to the concrete protection of individuals exactly with regard to the applications of RFID technology - and not only this technology. On the other hand, one should seriously take into consideration the risk that standardisation, by allowing access to the data contained in the chip by a plurality of entities and enabling active interventions on such data, might result into controlling and manipulating identity.

This trend was explicitly confirmed by a declaration of the Prime Minister of the United Kingdom on 19 July 2004 to tag and track the five-thousand more dangerous English offenders via satellite. The technical difficulties involved in this project have been stressed by many, but it is the symbolic strength of the message that has to be seriously taken into consideration.

Basically it implies a deep change in the legal and social status of a person. The fact of having entirely served the sentence will no longer be enough to be free again. If it is considered as highly probable that a person will commit offences, then that person will

loose his freedom of movement and all the relevant forms of individual autonomy, because he will be forced to have an electronic instrument attached to him that will make his location possible at an time. And this tagging of dangerous people can be achieved by putting a microchip under the skin. This would change the nature itself of the body, as by being technologically manipulated it becomes post-human. But canthis prospect be considered as compatible with the principle of dignity, which is set forth at the beginning of the Charter of Fundamental Rights of the European Union? Can we accept the Blairian semantic daring move that re-baptized this further version of the "society of surveillance" as "the society of respect"? In conclusion: we cannot accept that, networking people, our societies are turned into surveillance, selection, sorting societies; and that via networking and mass control free countries are turned into nation of suspects.

4. Thus, identity is built up in a scenario where one is increasingly dependent on the outer world — on the manner in which the surrounding environment is built up. One is dependent on other individuals as well as on the things surrounding them or else used to directly change their own bodies. In fact, we are living a true identity revolution, "the identity (...) is in the middle of a period of extraordinary tumult[6] in the age of the Web 2.0, of the coming Web 3.0, of the massive profiling, of the new dimensions of the cloud computing and of the autonomic computing. Two changes should be highlighted especially, both being related precisely to the Web 2.0 and 3.0.

Internet 2.0 has become an essential tool for a mass process of socialization and for the free development of the individual personality. In this perspective, the rights of expression are an essential part of the construction of the person and of its place in the society. The construction of one's identity is becoming increasingly a means to communicate with the rest of the world — to present one's self on the world's stage. This is changing the relationship between public and private sphere, indeed the very concept of privacy.[7]

Privacy has been conceived as an "exclusion" device — as a tool to fend off the "unwanted gaze". However, by analyzing the definitions of privacy one can appreciate how privacy has changed over time by giving shape ultimately to a right that is increasingly geared towards enabling the free construction of one's personality — the autonomous building up of one's identity, and the projection of fundamental democratic principles into the private sphere. The initial definition of privacy as the "right to be let alone" has not been

[6] J. D. Lasica, Identity in the Age of Cloud Computinq – The next generation of Internet's impact on business, governace and social interaction, The Aspen Institute, Washington D. C. 2009, p. 1.
[7] S. Warren-L. D. Brandeis, "The Right to Privacy", Harvard Law Review, l890,p. 4 ss.

done away with; rather, it is now part of a context that has grown out of different contributions. The first real innovation was brought about by Alan Westin, who defined privacy as the right to control how others use the information concerning myself.[8] Later on, privacy was also regarded as "the protection of life choices against any form of public control and social stigma"[9] as vindication of the boundaries protecting each person's right not to be simplified, objectified, and evaluated out of context"[10] and more directly as "the freedom from unreasonable constraints on the construction of one's own identity[11]. Since the information flows do not simply contain "outbound" data - to be kept off others' hands - but also "inbound" information - on which one might wish to exercise a "right not to know" - privacy is also to be considered as "the right to keep control over one's own information and determine the manner of building up one's own private sphere"[12] and as "the right to freely choose one's life[13].

In 2000, the Charter of Fundamental Rights of the EU recognized data protection as an autonomous right. This can be considered the final point of a long evolution, separating privacy and data protection. The evolution is clearly visible by comparing the EU Charter with the provisions made in the 1950 Convention of the Council of Europe. Under Article 8 of the Convention, "everyone has the right to respect for his private and family life, his home and his correspondence". Conversely, the Charter draws a distinction between the conventional "right to respect for his or her private and family life" (art. 7), which is modelled after the Convention, and "the right to the protection of personal data" (art. 8), which becomes thereby a new, autonomous fundamental right. Moreover, article 8 lays down data processing criteria, expressly envisages access rights, and provides that "compliance with these rules shall be subject to control by an independent authority".

The distinction between right to respect for one's private and family life and right to the protection of personal data is more than an empty box. The right to respect for one's private and family life mirrors, first and foremost, an individualistic component: this power basically consists in preventing others from interfering with one's private and family life.

[8] A. Westin, Privacy and Freedom. Atheneum, New York, 1970.
[9] L. M. Friedman, The Republic of Choice. Law. Authority and Culture, Harvard U. P., Cambridge (Mass.), 1990, p. 184.
[10] J. Rosen, The Unwanted Gaze. The Destruction of Privacy in America.. Random House, New York,2000, p. 20.
[11] P. E. Agree-M. Rotenberg, Technology and Privacy. The New Landscape, Mit Press, Cambridge (Mass.), 2001, p. 7.
[12] S. Rodotà, Tecnoloeie e diritti, Il Mulino, Bologna 1995, p. 122.
[13] F. Rigaux, La protection de la vie nrivée et des autres biens de la tiersonnalité, Bruylant, Bruxelles-Paris, 1990, p.167.

In other words, it is a static, negative kind of protection. Conversely, data protection sets out rules on the mechanisms to process data and empowers one to take steps — i.e., it is a dynamic kind of protection, which follows a data in all its movements. Additionally, oversight and other powers are not only conferred on the persons concerned (the data subjects), as they are also committed to an independent authority (Article 8.3). Protection is no longer left to data subjects, given that there is a public body that is permanently responsible for it. Thus, it is a redistribution of social and legal powers that is taking shape. It is actually the endpoint of a long evolutionary process experienced by the privacy concept — from its original definition as right to be left alone, up to the right to keep control over one's information and determine how one's private sphere is to be built up.

Furthermore, article 8 should be put in the broader context of the Charter, which refers to the new rights arising out of scientific and technological innovation. Article 3 deals with the "right to the integrity of the person", i.e. the protection of the physical body; Article 8 deals with data protection, i.e. the electronic body. These provisions are directly related to human dignity, which article 1 of the Charter declares to be inviolable, as well as to the statement made in the Preamble to the Charter— whereby the Union "places the person at the heart of its activities". Thus, data protection contributes to the "constitutionalisation of the person" — which can be regarded as one of the most significant achievements not only of the Charter. We are faced with the true re-invention of data protection — not only because it is expressly considered an autonomous, fundamental right, but also because it has turned into an essential tool to freely develop one's personality. Data protection can be considered to sum up a bundle of rights that make up citizenship in the new millennium.

If one probes deeper into the layered safeguards applying to the various categories of personal data, one can appreciate a highly meaningful paradox: indeed, many of the so-called "sensitive data", especially those concerning opinions, are afforded strong safeguards not so much to better ensure that they are kept confidential, but to enable *public* disclosure of those data without running the risk of discrimination or social stigma. My political opinions or my religious beliefs go hand in hand with and make up my identity only to the extent I can place them outside my private sphere — to the extent I can make them public. The true focus of protection is equality rather than confidentiality.

If identity becomes a relational concept, data protection takes on a different meaning. Social networking, which is the flagship of Web 2.0, mirrors this change in perspective most clearly. You join Facebook because you want to be seen and get a permanent public

identity that goes beyond the fifteen minutes of fame Andy Warhol considered to be everyone's right. You feed the "public" sphere to so that your "private" can make sense. You exhibit a set of personal data, your electronic body, exactly like one's physical body is exhibited via tattoos, piercing, and other identity sign[14]. Identity becomes communication. But what happens with this identity that is totally geared to the outer world? It becomes more readily available to data mining activities[15] - whereupon one might wonder whether social networking also entails an implied consent to the collection of networked data. Or should the principle of purpose specification apply further, whether directly or indirectly, in order to make such data collection legitimate? These questions re-surface if one considers Internet 3.0 — the Internet of Things — and autonomic computing in terms of their being new methods to create and collect personal data.

We are about to experience what an EU research group termed a "digital tsunami", which might ultimately overthrow the legal tools that safeguard not only the identity, but the very freedom of individuals[16]. We are faced with an in-depth change in societal organisation, whereby the public security criterion is liable to become the sole benchmark.

This objective is stated openly. A document by the EU Council Presidency reads as follows: "Every object the individual uses, every transaction they make and almost everywhere they go will create a detailed digital record. This will generate a wealth of information for public security organisations, and create huge opportunities for more effective and productive public security efforts". Furthermore, "in the near future most objects will generate streams of digital data (...) revealing patterns and social behaviours which public security professional can use to present or investigate incidents". A Statewatch report, The Shape of Thines to Come (the same title of a 1933 novel by H. G. Wells)[17] shows how the EU has substituted the concept that data relating to EU citizens should in principle be kept private from State agencies, in favour of the principle that the State should have access to every detail about our private lives. In this scenario, data protection and judicial scrutiny of police surveillance are perceived by the EU as "obstacles" to efficient law enforcement cooperation. This implies that European

[14] D. Le Breton, Signes d'identité. TJtotiRces. piercines et autres marques corporelles. Métailé Paris, 2002.

[15] M. Hildebtandt-S. Gutwirth (eds.), Profiling the European Citizen – Cross disciplinary perspectives, Berlin- Heidelberg, 2008;F. Giannotti-D. Pedreschi (eds.), Mobility. Data Mining and Privacy, Geographic knowledge Discovery, Berling-Heidelberg, 2008.

[16] EU Future Group, Freedom. Security, Privacx — European Home Affaire in an open world, 2008 https://www.statewatch.org/news/2008/september/eu-future-group-report-freedom-security-privacy-european-home-affairs-in-an-open-world/

[17] T. Bunyan, The Shape of Things to Come. Statewtach, September 2008.

governments and EU policy-makers are pursuing unfettered powers to access and gather masses of personal data on the everyday life of everyone, on the ground that we can all be safe and secured from perceived "threats".

The criticisms by Statewatch are levelled against a specific feature of the digital tsunami — the growing use of the public security argument to downsize freedoms and rights and turn our societal organisation fiom a society of free individuals into a "nation of suspects". This is unquestionably a key issue because it has to do with the change in the relationship between citizens and State; more specifically, it is a violation of the undertaking made by the State vis-a-vis every individual that their data will be used selectively in compliance with such principles as data minimization, purpose specification, proportionality, and relevance. ia this manner, some of these principles underlying the system of personal data protection are being slowly eroded. This applies, first and foremost, to the purpose specification principle and the principle concerning separation between the data processed by public bodies and those processed by private entities. The only principle to be referred to becomes the principle of availability, with a view to improving the exchange and use by law enforcement agencies. The multi-functionality criterion is increasingly applied, at times under the pressure exerted by institutional agencies. Data collected for a given purpose are made available for different purposes, which are considered to be as important as those for which the collection had been undertaken. Data processed by a given agency are made available to different agencies. It means that individuals are more and more transparent and that public bodies are more and more out of any political and legal control. It implies a re distribution of political and social powers.

This means that the so-called digital tsunami should also be evaluated from different standpoints — starting exactly from the identity perspective. The full availability of all personal data to public agencies brings about a veritable transfer of identity into the hands of such agencies, which can actually rely on information that is unknown to the given data subject. This phenomenon is bound to take on increasing importance in view of the increasing amount of object-generated information. One comes face to face, in this manner, with one of the key features of data protection — the right of access, meaning everyone's unconditional power to know who holds what data concerning them and how such data is used. This can be the stepping stone to start re-constructing one's identity, by having any data that is untrue, obtained unlawfully and/or kept beyond the allotted time cancelled or erased; by having any data that is inaccurate rectified; and by supplementing any incomplete data. However, this has turned by now into a never-ending story — a

bottomless chasm, because never does the recording of every trace we leave come to an end. "Know thyself' is no longer a precept that requires us to only probe into ourselves. Indeed, it relies on the assumption that one should manage to get back to different sources in order to establish not so much what the others know about us, but who we are in the electronic dimension — where a major portion of our lives are nowadays to be found.

We have to do with issues that relate to autonomy and the right to freely develop one's own personality. Everyone's freedom to know and build up their own selves is being increasingly constrained, whilst it is increasingly easier for others to become the lords and masters of our lives.

5. Thus, it is not enough to remark that we are living by now in a "networked public sphere", to quote Yochai Benkler[18]. It is necessary to consider how this public sphere is being created, by whom it is created, and how the public sphere in question is being shaped on account of these changes. The stepwise descent into a smart environment populated by intelligent things is giving rise to yet another shift, which goes beyond what has brought about the stepwise separation/opposition between one's self and the others as related to building up one's own identity. Indeed, there is a widening gap between individuals and machines due to the growing autonomy of the latter as mirrored by the so-called autonomic computing. The power to set the boundaries of human beings and their identity is increasingly shifted from the realm of man's appreciation to that of automated decisions.

An analysis of the above issues raises several questions. One can start from Article 15 of EU Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. This article, at point (1), provides that "member States shall grant the right to every person not to be subject to a decision which produces legal effects regarding him or significantly affects hlm and which is based solely on automated process of data intended to evaluate certain personal aspects relating to him, such as performance at work, creditworthiness, reliability, etc.". For the sake of simplification, one might argue that this is a general provision on the allocation of decision-making powers in the digital world.

However, the symbolic as well as practical import of this provision is markedly reduced by the restrictive interpretation espoused by several domestic laws and, in particular, by the increasingly widespread, sophisticated application of profiling techniques — which

[18] Y. Benkler, The Wealth of Networks. How Social Production Trasforms Markets and Freedom. Yale University Press, New Haven, 2006.

have changed the very meaning of "decision". The studies on data mining and profiling have highlighted the basically regulatory importance attached to categorization, which is often socially more binding than legally binding decisions. This point is actually made in the EU directive, which refers to decisions "significantly affecting" persons. Profiling results into social sorting and accordingly brings about the risks of social stigma and exclusion. It is no chance that the definition of privacy had already emphasized the risk of social stigma well in advance of the coming of the age of profiling.

The creation of this new environment results into changes in individuals' behaviour; these changes have often been described and consist in self-restraint, "spontaneous" normalization, and the a priori adoption of mainstream behaviour. Profiling mirrors the modelling of society, which gives rise to mainstream behaviour rather than normalcy — which is actually no news to the scholars of cultural models, because the influence of such models is not a function of their formally binding value, but of their being regarded as a necessary step in view of social acceptance at the most diverse levels. This effect is enhanced further by data mining and profiling, because models are customised and linked to single individuals — ultimately, they are used in a targeted, selective manner. Social acceptance is shaped thereby as a kind of "compulsory" identity.

The possibility to escape from this mandatory scenario by relying on the system introduced by directive 95/46 is jeopardised further by the considerations put forward to criticise the view that exclusively automated decisions are unacceptable. It is argued that the human presence — considered to be a fundamental component of any legitimate decision-making — features from the start in this context: "humans will write the software, shape the database parameters and decide on the kinds of matches that count[19]. This argument is supported further by the consideration that automated decision-making processes are increasingly similar to human decision-making. It is no chance that the autonomic computing paradigm has been inspired by the human autonomic nervous system. "Its overarching goal is to realize computer and software system and applications that can manage themselves in accordance with high-level guidance from humans"[20] If what is artificial is increasingly modelled after nature, there is no longer any reason for the ban set

[19] P. M. Schwartz-R. D. Lee-I. Rubinstein, Data Mining and lnternet Profiling: Emerging Regulatoryand Technological Approaches, Berkeley Center for Law and Technology, Paper 50. 2008, p. 282.
[20] M. Parashar-S. Hariri, "Autonomic Computing: An Overview", in J.-P. Banatre et al. (eds.), UPP 2004, LNCS 3566, Springer, Berlin-Heidelberg, 2005, p. 247.

forth in article 15 of directive 95/46. The severance from the human factor is seemingly complete.

In the light of this blunt elimination of any boundaries between human and artificial processes, it should be pointed out that the staunchest supporters of the above stance are those who claim that markets and security should have the upper hand. Monitoring individuals and turning them into mere consumers are regarded as priority objectives that allow for the use of any tools. This impacts directly on identity, which is increasingly built up via external entities — and the interests vested in such entities may be completely different from those vested in the given individuals, who are deprived accordingly of any opportunity both for exercising their self-governance powers and for controlling who has got hold of their identities.

Can one re-appropriate at least some measure of control by relying, first and foremost, on the guidance set forth in directive 95/46? There are three points to be made in this connection. Firstly, it is necessary to uphold the principle whereby a wholly automated decision should never replace a decision that involves some sort of human involvement. Secondly, one should consider the access rights vested in every data subject under Article 12(a) of the directive, in particular with a view to knowing "the logic involved in any automatic processing of data concerning him, at least in the case of the automated decisions referred to in Article 15(1)." The emphasis put on logic is especially important because it is linked to another key feature, i.e. the contribution given by technology designers[21] and the circumstance that digital technologies are built around their own "code"[22] which means that the control issue is also to be taken into account. Furthermore, since the limitations and constraints applying to subject access are widely known[23] - and this is the third point to be made — one should envisage access by collective entities acting on a data subject's instructions, which is already the case with some domestic laws. This solution — which is reminiscent of the approach that has emerged from the history of trade unions — would help reduce

the power unbalance of the individual stakeholders, bring about enhanced transparency, and above all initiate wide-ranging control processes based on societal self-organisation schemes.

[21] A. Rouvroy, "Privacy, Data Protection, and the Unprecedented Challenges of the Ambient Intelligence", Studies in Ethics, Law, and Technology, vol. 2, issue 1, 2008, p. 44.
[22] L. Lessig, Code and Other Laws of the Cyberspace, Basic Booke, New York, 1999.
[23] M. Hildebrandt, "Profiling and the Identity of the EuropeanCitizen", *supra* note 16, pp. 303-337.

In this perspective, four more issues must be taken into account. The first one looks at the "anonymity" (alias, pseudonym) and to the encryption as tools that make possible not to be identified and, consequently, not to be profiled, with a dichotomy between online persona and real- world identity.. The second looks to "the right to make silent the chip", immediately referred to the Rfid technologies, but that can be extended to the many devices making possible the multifarious forms of distance control (localisation and so on). The third underlies the necessity of "sunset rules" on data retention. The fourth is connected directly with cloud computing.

Cloud computing is a shorthand for defining a vast, always-on, accessible, broadband-enabled next-generation Internet. This new dimension must be looked at in connection with the changes of the online identity produced by the social Web. "Blogging became a mainstream activity, and with it came a different mind set. With a few exceptions, bloggers found the need to stand behind their words. They needed to tie their online musing to their real lives. Authenticity and transparency not imagination and anonymity — became the cardinal rules of the blogsphere[24]. This conclusion could be criticised, but it is true that with the rise of You Tube, of the video sharing sites, of the social networking sites such as MySpace and Facebook the situation has changed, and Facebook became the first Web service requiring validated identities, even if it not difficult to create false identities, becoming the largest platform of the cloud computing era. It implies that the personal data posted in Facebook need a fresh approach, because the traditional protection provided by the principle of the consent could not work, due to the fact that the posting is voluntary. Taking into account this novelty, it has been suggested to make reference to the purpose specification principle, so that the personal data made public for a merely social interaction with other people cannot be accessed and treated for different finalities (marketing, control).

The identity in the cloud has suggested a new approach to the identity itself in the social context, going toward a "user-centric open identity network". The idea is "an identity system that is scalable (so it works everywhere), user-centric (serving your interest, instead of something done to you by outside interests) and, importantly, customizable. This new system would recognize that each of us has multiple identities. We will be able to spoon out bits and pieces of our identity, depending on the social or business context we find ourselves in (...) You could separate your identity into discrete units and assign different

[24] J. D. Lasica, Identity, supra note 7, p. 16.

access permission depending on your role in a given situation. You could create a business profile, a health care profile, a friend profile, a mom or singles profile, a virtual profile and so on (...) Few identity softwar developers expect that most people want to manage their own identities[25]. Can we look at this suggestion as a road to the reconquest of individual power on identity?

6. Autonomic computing should be regarded in the perspective of this force field. It is a fact of life that should be understood in cultural terms and requires mechanisms of societal control, which need not rely on laws only. It is unquestionable that we are faced with the re-definition of the whole context applying to the relationship between identity and autonomy, which is bound to impact on the meaning and import of these two concepts. In fact, autonomic computing might mark the ultimate separation between autonomy and identity. Identity is becoming objective via mechanisms that do not rely on awareness of one's own self; it is turning into a functional replacement for autonomy — at least to the extent an adaptive scheme is built out of an identity that was "captured" at a given time, with all the respective features and needs, whereupon that identity is committed to self-management systems that can provide responses and meet the requirements arising out of the given circumstances. The construction of this "adaptive" identity might be regarded as a process that originates exactly from the freezing of that identity and keeps on adapting it to the relevant environment without any decisions being made and/or any awareness being developed by the individual. This is made possible by the unrelenting collection of information yielding statistical estimates that can accordingly anticipate/implement what the individual data subjects would have decided in the given circumstances. The possibility of a conscious interventions by the individuals could be totally excluded, making impossible their participation by default too. The construction of identity depends on algorithms, and we must be aware of the role played by mathematic models and algorithms as key elements of an economic organisation that has produced the financial crisis.

In fact, the environment can act upon the user's behalf without conscious mediation. It can extrapolate behavioural characteristics and generate pro-active responses[26]. One might argue that we are faced with the separation between identity and intentionality, which may give rise to unaccountability, discourage the propensity to change, and jeopardise a vigilant approach to the governance of one's self. Indeed, one should wonder whether the

[25] J. D. Lasica, Identity, supra note 7, pp. 17-18.

[26] E. Aarts-B. de Ruyter, "New research perspectives on Ambient Intelligence", in "Journal of Ambient Intelligence and Smart Environments", 2009, p. 8.

activities performed via autonomic computing are a projection from the past rather than the anticipation of future events[27].

7. Autonomic computing, which is not expressed solely by the specific functions described above, is setting the cultural, political and institutional agenda. It is bringing about an information collection mechanism that — as well as being wide-ranging and pervasive — 1s not static, but rather intrinsically dynamic. This means that it produces effects without any mediation being required, without having to make the information available to other entities or else use it for subsequent processing operations. Obviously, given the manner in which personal data are collected, opportunities also arise for such data to be used further, which increases not only the chances to automatically meet the given requirements, but also the overall transparency of individuals. And it means that, at same time, not only a new "inner" space of the person, but as "outer" space is currently being shaped.

Given this context, one is bound to turn once again to personal data protection seen not only as "a necessary utopia"[28], but also as a way to ensure the freedom of individuals and conditions for the democratic exercise of powers. Indeed, the technological changes impacting on social organisation do not only give rise to unbalances in the distribution and practice of power- They also bring about a societal gap between increasingly transparent individuals and increasingly opaque, unbridled powers.

Especially after 9/11, the boundless collection of personal data has been used as an indispensable tool to counter terrorism, based on the argument that who has nothing to hide has nothing to fear from whatever collection of information concerning them. Still, we should not forget that the "glass man" is a Nazi, totalitarian metaphor. Who wishes to retain a private, confidential sphere is automatically labelled as a "bad citizen" and can be the target of oppression.

Thus, the starting point for looking at data protection in a new perspective can be said to consist in highlighting the mechanisms required to counter the coming of the digital tsunami. However, in the age of networked persons, the Internet of Things, and autonomic computing, this means to be also afforded a general "freedom to disconnect", to have the right "to make silent the chip", as already remarked in connection with the

[27] M.Hildebrabdt-S. Gutwirth, „General Introduction and Overview", in M. Hildebrandt-S. Gutwirth, *supra* note 17, p. 4.
[28] S. Simitis, "Datenschtz — eine notwendige Utopie", in Summa. Dieter Simon zum 70. Gebtir stae. Klostermann, Frankfurt a. M. 2005, 511-527.

purchase of goods containing a chip that can allow information on the purchaser to be subsequently acquired.

The conditions applying to the electronic body and digital identity are similar, at least in part, to those applying to the physical body, given that the insertion of electronic devices into the human body or its dependence by the way some things are working can hamper one's autonomy to a greater or lesser extent and make one dependent on the outer world. A precondition for the insertion of a chip to be lawful consists first and foremost in the reversibility of the implant — which ensures that the individual can retain governance over their own body.

It is exactly in looking at the physical dimension of the individual that one cannot help raising questions concerning identity. "Is a hybrid bionic system a person, an entity one can attribute rights and duties on that account? (...) 1s the human user/component of a hybrid bionic system the same person before and after being so interfaced with artificial devices?"[29]

Identity is therefore shifting from a synchronic to a diachronic dimension, which also holds true if the individual is digitized and becomes part of an electronic network. It is the time-honoured topos of Theseus' ship, which can be conjured up nowadays as a token that can help us better realize how necessary it is to replace a static concept of identity by a dynamic one — whereby identity becomes as varying as the individual it applies to whilst its epistemological nature is unrelentingly reshaped. Subject is no longer compact, unified, neatly defined entity. It is enigma[30] rather than problem. It is becoming nomadic[31] - which mirrors the fragmented, mobile reality. It is no harbour — rather, it is process. And identity may be equated to the many "windows" that open on a screen. "These windows have become a powerful metaphor to conceive of the self as a multiple, distributed system"[32]. However, this multiplication of identities does not only result from the activities of several entities looking at the same individual from multifarious viewpoints. In cyberspace, the data subject can continuously take on different identities in order to better communicate and get rid of constraints that would hamper the free development of their personality. A

[29] F. Lucivero-G. Tamburrini, "Ethical monitoring of brain-machine interfaces. A note on personal identity and autonomy", in "Artificial Intelligence & Society", 2008, p. 451.
[30] C. Castoriadis, "L'état du sujet aujourd'hui", in Le monde morcelé. Les Carrefours du Labirinthe. III, Seuil, Paris, 1990, pp. 189-225.
[31] R. Braidotti, Nomadic Subject : Embodiment and Sexual Difference in Contemootarv Feminist Theorv, Columbia University Press, New York, 1994.
[32] S. Turkle, Life on the Screen. Identiy in the Age of the Internet, Simon & Schuster, New York 1995, p. 14.

necessary assumption in this scenario is the right to anonymity: even if it has been harshly questioned in the age of the endless war on terror, however it still remains a key component of citizenship in the new millennium. Indeed, there is no conflict between the permanent vindication of this right, which entails opaqueness, and the rampant social networking that is the utmost manifestation of transparency. There are increased options available to build up identity, and people must be in a position to make use of all those options.

We are faced ultimately with the concept of identity as a process, and this is clearly shown by digital identity management systems: these systems should arguably meet three core privacy requirements. The system must: (1) make data flows explicit and subject to data owners' control; (2) support data minimization by disclosing no more data is needed in a given context; and (3) impose limits on linkability"[33]. Still, these requirements, which are compounded of legal norms and privacy by design, should not be regarded as the ultimate solution — rather, they are markers to be used in order to enhance societal awareness of identity-related issues.

[33] P. M. Schwartz and a1., *supra* note 17, p. 278.

[±]NEW TECHNOLOGIES AND HUMAN RIGHTS FACTS, INTERPRETATIONS, PERSPECTIVES

A REPORT FOR A FUNDAMENTAL RIGHTS AGENCY'S DISCUSSION

Stefano Rodotà

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I. INTRODUCTION

One of the FRA's long term objectives is to: "identify and analyse major trends in the field of fundamental rights". One major trend at the present time is the relationship between scientific and technological innovations and fundamental rights. An analysis of this relationship has become even more important after the entry into force of the Treaty of Lisbon, which, by giving the Charter of Fundamental Rights the same legal force as the treaties, provides a more solid and inescapable legal basis.

In these cases, we usually speak of "new rights", but this expression can be dangerously ambiguous. It creates the impression that rights are capable of constant renovation, to satisfy at any moment a reality that is constantly changing. At the same time, however, it also gives us a glimpse of a contrast between rights that are new and those that are old, as though the most distant are consumed by time, leaving the field open to a better, more up-to-date and glossier product. Rights are spoken about in terms of "generations", and this terminology, identical to that used in the computer world, might suggest that each new generation of tools takes the place of the one that came before, which, having become obsolete may be definitively abandoned. The Charter, however, takes a different standpoint, underlining the indivisibility of rights, and therefore a process of accumulation and integration, not replacement. Consequently, when we look at rights that relate more

[±] The editorial team of the Comparative Law Review has decided to publish this contribution of Professor Stefano Rodotà to celebrate him on the Fifth anniversary of his passing. Both papers engage with new technology, identity, data and legal rules. It seems the best way to remind how important his work is within the academia.

directly to science and technology, we need to reconstruct and interpret all recognized rights as a whole.

More generally, it should be noted that today, in a global dimension in which sovereignty often disappears and uncontrollable powers are manifested, it is precisely fundamental rights that represent the only visible counterbalance and the only instrument that is in the hands of citizens. From this point of view, the European Union, which represents the largest supranational area in the world, can build its own model of balance and distribution of power. We should not forget that the process of drafting the Charter started in a decision taken in the Cologne European Council of June 1999, which opened with these particularly demanding words: "The protection of fundamental rights is a founding principle of the European Union and the essential condition of its legitimacy". This means that the construction of Europe cannot be left solely to market logic but its legitimacy comes from the fact that it is built on rights. This also implies that the European Union has a responsibility and a great opportunity to take the lead in the protection of fundamental rights.

Starting from this premise, we might conclude that, with the (supposed) coming to an end of ideologies and the demise of traditional common references, fundamental rights can be seen as the only common reference for the world to follow.

II. THE PERSPECTIVE OF FUNDAMENTAL CHARTER OF RIGHTS

In the Preamble of the Charter it is stated that "it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and *scientific and technological developments".* And, in general, it is stated that the Union "places the individual at the heart of its activities". The relationship between the individual, fundamental rights, science and technology is particularly clear in Articles 3 and 8, which may also be seen as a specific development of the statement that opens the Charter as a whole: "Human dignity is inviolable. It must be respected and protected". Thus, the process of "constitutionalization of the person", already clearly stated in many national constitutions, is expressly brought to completion.

In Article 3, regarding the "right to the integrity of the person", the Charter identifies four principles of reference, which reflect broadly held viewpoints: consent of the person concerned, prohibition on making the body an object of profit, prohibition of mass eugenics, ban on reproductive cloning. According to these indications, therefore, the

respect and dignity of the person is incompatible with seriality or market logic and, above all, it gives all concerned full independence of decision. The basic principles in the field of bioethics are thus established.

Moreover, the undeniable fact that our life is now becoming a continuous exchange of information, that we live in a continuous stream of data, means that data protection is extremely important, bringing it to the centre of the political and institutional **system.** This evolution is clearly visible by comparing the EU Charter with the provisions made in the 1950 Convention on Human Rights of the Council of Europe. Under Article 8 of the Convention, "everyone has the right to respect for his private and family life, his home and his correspondence". Conversely, the Charter draws a distinction between the conventional "right to respect for his or her private and family life" (art. 7), which is modelled after the Convention, and "the right to the protection of personal data" (art. 8), which becomes thereby a new, autonomous fundamental right. Moreover, article 8 lays down data processing criteria, expressly envisages access rights, and provides that "compliance with these rules shall be subject to control by an independent authority".

The distinction between right to respect for one's private and family life and right to the protection of personal data is more than an empty box. The right to respect for one's private and family life mirrors, first and foremost, an individualistic component: this power basically consists in preventing others from interfering with one's private and family life. In other words, it is a static, negative kind of protection. Conversely, data protection sets out rules on the mechanisms to process data and empowers one to take steps — i.e., it is a dynamic kind of protection, which follows an item of data in all its movements. Additionally, oversight and other powers are not only conferred on the persons concerned (the data subjects), as they are also committed to an independent authority (Article 8.3). Protection is no longer left to data subjects, given that there is a public body that is permanently responsible for it. Thus, it is a redistribution of social and legal powers that is taking shape. It is actually the endpoint of a long evolutionary process experienced by the privacy concept — from its original definition as right to be left alone, up to the right to keep control over one's information and determine how one's private sphere is to be built up.

The approach outlined in Articles 3 and 8, in conclusion, identifies common principles, which concern the various ways in which science and technology affect people's lives. So not only is the above-mentioned process of "constitutionalization of the person" specified and concretized, but it also involves a "reconstruction" of that person, going beyond the

distinction between physical or real person and virtual or digital person, which was thought to have been an inevitable consequence of new technologies. This integral reconstruction of the person is also important because it provides clear indications on how to react to "reductionism" and the technological decomposition of the person, present in statements like "we are our data", "we are our genes", yielding to the "mystique of the DNA" with the dangerous effects of reducing our guarantees of rights. It is no coincidence that the UNESCO Universal Declaration on the Human Genome and Human Rights states in Article 2b that "dignity makes it imperative not to reduce individuals to their genetic characteristics and to respect their uniqueness and diversity.

III. QUALITY OF CHANGE? A NEW ANTHROPOLOGY

The changes produced by science and technology are driving profound changes that affect anthropology at its deepest levels and the very notion of humanity. The root of this change is in the transition from situations governed by the laws of nature (chance or fate) to situations in which a person is given the freedom to make a choice. Scientific and technological innovations affect the way we are born and die, the construction of the body in an age in which it can be technically reproduced, and a person designed. The techniques of assisted procreation not only involve the treatment of sterility but they offer forms of programming which, for example, allow our own mothers or sisters to become surrogate mothers or may even include human cloning. All this produces social anxieties, because it disrupts kinship systems, generational order, and the very uniqueness of individuals. Human kind is in the throes of another kind of anthropology, one that is hard to metabolize. It is almost as if humanity, which until recently lived protected from the laws of nature, has discovered areas where the sudden burst of freedom turns out to be unmanageable. This determines a change in the meaning of 'appealing to the law'. If the laws of nature fall, the void left by them should be filled by the laws of men who, mainly through prohibitions, artificially reconstitute (by making laws) the natural constraints removed by science. From law, society seeks reassurance first and foremost, and then protection. But such a radical rejection cannot obviously be proposed, and only careful reflection on the meaning of the undeniable "procreative rights" can help us find a point of balance.

Equally significant is the change made apparent by the judgment 27 February 2008, by which the Bundesverfassungsgericht declared in contravention with the Grundgesetz an

amendment to the law about the domestic intelligence service of the Land North-Rhine Westphalia. The amendment had introduced a right for the intelligence service to "covertly observe and otherwise reconnoitre the Internet, especially the covert participation in its communication devices and the search for these, as well as the clandestine access to information-technological systems among others by technical means". The decision of the Bundesverfassunsgericht is widely considered a landmark ruling, because it constitutes a new "basic right to the confidentiality and integrity of information- technological systems" as part of the general personality rights in the German constitution. Confidentiality, a quality of humans, is handed over to the machine. It is recognised that between man and machines not only is there an interaction, but a compenetration. This is structurally evident data, and its constitutional relevance is recognised. The law thus reiterates the priority of humans, but manifests its power telling us that the world is going through a new entity, made up of the person and the technical apparatus to which data is entrusted. A continuum is established between the person and the machine: by recognising this, the law hands us a new anthropology, affecting legal classifications and changing their quality.

This appropriation of technology to build a new human dimension is even more evident in the case of Oskar Pistorius, the South African runner running with two carbon fibre artificial limbs replacing his lower legs, authorised to participate in the games with the other "normal" athletes. After this case, another paralympic athlete, Aimée Mullins, said that "to change one's body through technology is not an advantage, but a right, both for those doing sports professionally and common people". Thus, the barrier between "normal people" and those with artificial prosthesis falls, and in fact a wider notion of "normal" is developed, which becomes a condition to freely construct one's body using all socially available opportunities.

This raises a number of new questions, primarily the right to use technology not only to restore lost functions or ones that were never there but also to enhance physical or intellectual performance. The new dimension of humanity requires legal measures that expand the scope of fundamental human rights. The construction of the person thus becomes central to how we see rights, making the necessary distinctions between the design of the self and the design of others, the continuous exploration of frontiers, such as the use of synthetic biology for the programming of people.

Experiments with brain-machine interfaces (BMIs) or brain-computer interfaces (BCIs) highlight the new relationship between man and machine even more clearly and, together with other mechanical creatures, like robots, different thinking machines and cyborgs,

herald the advent of the trans-and post-human and pose a fundamental question: since a series of rights have been historically identified as the rights "of man" or "human" rights, will the transition to a post-human or trans-human state gradually lessen the significance of these rights? To avoid such stark and misleading alternatives, we should reflect on the fact that the social acceptability of the post-human, in a democratic environment, depends on ensuring that technologies are safe, equally accessible to everyone, and that everyone's right to freely govern their own bodies is respected. This prospect is totally opposed by those who see the transformations of the body, when involving cloning or transmittable genetic modifications, as a crime against humanity. Such an emphatic standpoint runs the risk of producing distortions, since it shifts the question to the extremely problematic area of crimes against humanity, thus making it more difficult conduct a legitimate debate around the necessary limitations to interventions on the body. Moreover, by equating reproductive cloning with transmittable modifications of the genome, an extremely delicate question involving the fundamental right to health is transformed into an ideological issue.

Through the body people can take possession of technology and bring it back to a human dimension. But what happens when these phenomena do not manifest themselves as appropriation but as expropriation, when people find themselves living in an environment where machines can take over their identity, change their body to enable its external control, when we live in an *augmented reality, ambient intelligence, ubiquitous* or *pervasive computing, smart environments,* when, all said and done, we live in an environment where machines can take on a position of supremacy, for whatever use is made of them or for their own autonomic nature?

IV. SELF-DETERMINATION AND IDENTITY

In recent years, the principle of self-determination has been consolidated and specified. The most significant stages of this process include the importance of informed consent and the recognition of self-determination as a separate fundamental right of the person, within the overall constitutional framework of the free construction of the personality (par.2 the Grundgesetz, Art. 2 of the Italian Constitution).

In 1946, the Nuremberg Code stated that "the voluntary consent of the human subject is absolutely essential." This statement, which was a reaction to the horrors of human experimentation which emerged during the trials of Nazi doctors, not only reversed the

relationship between doctor and patient, subtracting the latter from the power of the therapist but created a new "moral subject" in possession of a specific legal power. It identified a principle which was to be widely applied in many different fields. Informed consent is fundamental to Directive 95/46 on personal data and Article 8 of the European Charter of Fundamental Rights. This confirms, on the basis of a common reference principle, the unification of the abovementioned physical and electronic body.

Case law in some European constitutional courts confirms this position. In 1983, the Bundesverfassungsgericht held that there was a new fundamental right, "informational self- determination", which led to further regulatory elaborations and inspired requests for additional recognitions, even the right to "biological self-determination." Similarly, in 2008 the Italian Constitutional Court concluded that "informed consent represents a synthesis of two fundamental rights: the right to health and the right to self-determination". We may say that self-determination is the foundation of free governance of the self, sovereignty over our own bodies.

Naturally, self-determination has its limits, since it can interfere in the freedom of others and can be contradictory. The subject of imposing limitations is a particularly sensitive point because it immediately produces hostility towards "paternalistic" legislator, who have no right to invade the sphere of personal freedom. This criticism also extends to references to the principle of dignity, seen by some scholars, especially Americans, as an authoritarian tool to impose one's own point of view. These objections can be countered by observing, on the one hand, that the principle of dignity, as is stated in the opening of the Grundgesetz and the Charter of Fundamental Rights, is closely linked to that of freedom, and therefore cannot be used to limit the latter. On the other hand, self-determination must by definition be free from external influence, especially market logic. It is no coincidence that Art. 3 of the Charter of Fundamental Rights, reiterating UNESCO's Universal Declaration on the Human Genome and the Council of Europe's Convention on Human Rights and Biomedicine, provides for "the prohibition on making the human body and its parts as such a source of financial gain". And the precedence of the principle of dignity over the freedom of economic initiative was explicitly recognized by the Court of Justice in the "Omega ruling (October 14, 2004).

In general, however, self-determination depends on the material conditions of the person, thus education, income, and so on. However, new technologies have introduced additional constraints, well reflected, for example, in some recent definitions of privacy, especially those referring to the "vindication of the boundaries protecting each person's right not to

be simplified, objectified, and evaluated out of context" and more directly to "freedom from unreasonable constraints on the construction of one's own identity".

Thus, two elements are highlighted: the importance of context and the link between self and identity. The growing availability of information on people and the growing number of technical procedures for its use have had a profound effect on the characteristics of our time, which has been defined as the age of records, classification, monitoring, control, and evaluation. Security needs and market pressure have led to a technological reduction of fundamental rights, with the spread of video surveillance, the use of biometrics, the creation of DNA databases, profiling techniques, and increasingly invasive body controls (as in the case of body scanners). Technological changes in the way personal information are processed have gradually changed the relationship between a person's freely constructed identity and the intervention of third parties, which is increasing all the time. Inaccuracies and partial truths, or even falsifications, are a constant feature of many biographies, freely written by people other than the person concerned, which then become part of socially accredited information (like Wikipedia). Identity is also "dispersed", since information concerning the same person is contained in different databases, each of which returns only a part or a fragment of the overall identity. We risk entering a time of "unknowable" identities, even to the persons concerned, since they are kept in places that are not only different but also difficult if not impossible to discover or access.

We have before us changes that affect the very anthropology of persons. We are faced with a series of progressions: from being "scrutinized" through video surveillance and biometric technology to being "modified" by the introduction of chips in the body, continually being "traced" from recordings made possible by the use of mobile phones, sending e-mails, being obliged to put on *wearable computers* or carrying other tools that can be remotely controlled. There is already a context that increasingly identifies us as "networked persons", people constantly on the network, gradually configured to transmit and receive impulses that allow us to trace and reconstruct movements, habits, contacts, thus changing the meaning and content of the autonomy of persons.

Along with more traditional approaches to the protection of fundamental rights, which should be strengthened by the constitutionalization of the person, strategies are emerging to help free ourselves from constant technological dependence. There is talk of a "right to make silent the chip", therefore an individual's power to terminate the connections that make us dependent on the outside. Rights are being identified, such as the right not to know and the right to oblivion, which aim to liberate people from the invasion of

unwanted information (such as spam) and even from the implacable weight of the past, thus converting the right to oblivion into the right to request the removal or short-term preservation of certain categories of personal data held by others. It has become important to assess the importance of collections of personal data in accordance with the principles of necessity, proportionality and purpose, to avoid being overwhelmed by the "digital tsunami" heralded by Web.2.0 and the even more so by Web 3.0. There is the gradual cancellation of the boundary between public and private life, documented particularly clearly in social networks, where people tend to project themselves fully in the public arena, making more difficult the reference to the consent principle as a tool for defending privacy.

The construction of identity is increasingly affected by all these factors. Is said that identity is no longer "what you say you are" but "what Google says you are." An identity increasingly built from the outside, therefore, increasingly dependent on processes governed by others, sometimes even unknown to the person concerned. At the same time, however, it has become easier to take on multiple identities or even communicate without revealing any.

These observations give an indication of the problems faced, which include the need to reduce the effects of expropriating identity determined by the incessant production of profiles of individuals, family members, groups, the spread of cloud computing and autonomic computing. Identity in the cloud has suggested a new approach to identity itself in the social context, going toward a "user- centric open identity network". The idea is an identity system that is scalable (so it works everywhere), user-centric (serving your interest, instead of something done to you by outside interests) and, importantly, customizable. This new system would recognize that each of us has multiple identities. We will be able to spoon out bits and pieces of our identity, depending on the social or business context we find ourselves. We could separate our identity into discrete units and assign different access permissions depending on our role in a given situation. We could create a business profile, a health care profile, a friend profile, a mom or singles profile, a virtual profile and so on. It is, essentially, a case of recognizing the right to build identities centred on the needs of the person which, depending on the contexts in which one is operating, will communicate only those aspects of identity that are strictly necessary for a specific operation, or allow access to only some of the information available (for example, in the case of health cards that contain the entire medical history of the person concerned). Thus, we enter the realm of what is called *identity,* personal information relevant to the

construction of identities collected and transmitted electronically. As regards the right to anonymity, which is seen as a typical network right, this depends on how it is related to the exercise of fundamental rights (guarantee of freedom of expression for political refugees), how it may affect the rights of others ("protected" anonymity, which can be removed in the case for example of defamation) or if it conflicts with general interests (those of security, in particular).

All this requires a review of the reference to privacy, which appears in all the above-mentioned contexts and which cannot be considered just from the perspective of the protection of privacy. Privacy today is a dimension of freedom, and must be considered as such. It is made apparent by the changes in the same definition of privacy. Privacy has been conceived as an "exclusion" device — as a tool to fend off the "unwanted gaze". However, by analyzing the definitions of privacy one can appreciate how privacy has changed over time by giving shape ultimately to a right that is increasingly geared towards enabling the free construction of one's personality — the autonomous building up of one's identity, and the projection of fundamental democratic principles into the private sphere. The initial definition of privacy as the "right to be let alone" has not been done away with; rather, it is now part of a context that has grown out of different contributions. The first real innovation was brought about by Alan Westin, who defined privacy as the right to control how others use the information concerning myself. Later on, privacy was also regarded as "the protection of life choices against any form of public control and social stigma" as "vindication of the boundaries protecting each person's right not to be simplified, objectified, and evaluated out of context" and more directly as "the freedom from unreasonable constraints on the construction of one's own identity". Since the information flows do not simply contain "outbound" data - to be kept off others' hands - but also "inbound" information - on which one might wish to exercise a "right not to know" - privacy is also to be considered as "the right to keep control over one's own information and determine the manner of building up one's own private sphere" and as "the right to freely choose one's life". This trend must be taken into account when we are dealing with the new perspectives opened, for instance, by behavioral advertising (Phorm) and by the new research devices, related to personal profiles, books, and so on.

V. THE RIGHT TO ACCESS

The word access has been increasingly used in recent years in a variety of situations. The right to access personal data has been introduced, no matter by whom it is kept, to avoid losing control of one's electronic body and to enable widespread control of the "lords of information." It has been argued that we now live in the age of access, which has changed the way we use property, governed in the past by property rights. If we are to live in what is described as the knowledge society, free access becomes a fundamental right, which calls into question rules on copyright. In the European Charter of Fundamental Rights there is a clause on the right of access to personal data (art. 8), "to vocational and continuing training" (art. 14), "to a free placement service" (art. 29), "to social security benefits and social services" (art. 34), "to preventive health care and the right to benefit from medical treatment"(art. 35), "to services of general economic interest" (art. 36), "to his or her file" in the framework of the right to good administration (art. 41), "to European Parliament, Council and Commission documents" (art. 42).

The situations are clearly very different, and the functions carried out by access are not all homogeneous. A common point, however, is the protection of the principle of equality and the guarantee of the preconditions of the democratic process itself (education, work, health). Access, then, may be seen as a tool to achieve additional goals, such as controlling the exercise of certain powers or the guarantee of identity through the correction of personal data.

As regards scientific and technological innovations, access is particularly important because it provides more opportunities for the protection of health, governance of the body, and even the design of human beings. The key point is represented by equality. It has frequently been noted that, unless there is equality in accessing new drugs or new ways of strengthening the body, we run the risk of a "caste" society in which only the rich will be able to enjoy the benefits of innovation. Not rights but the money would become the determining factor and thus alter the very concept of citizenship, with a regression towards citizenship based solely on income. Of course, this also involves a reflection on the notion itself of equality, which cannot refer only to equality of opportunity but also to equality of results.

It is argued that this approach does not take into account economic costs. Indeed, in many countries, to reduce the cost of public health, the elderly are excluded from access to transplants and receiving some categories of drugs free of charge. This not only denies

"the right of the elderly to lead a life of dignity and independence" (Article 25 of the Charter of Fundamental Rights), but creates a situation of evident inequality, since the well-off can still buy drugs that are not refundable or go to foreign countries to get transplants. At this point, we must reflect on the relationship between recognition of fundamental rights, scientific and technological innovations and distribution of resources.

VI. PUBLIC SPACE

The opportunities provided by technology are rightly considered of key importance to facilitating political participation, thereby strengthening democracy. It is no coincidence that in the Treaty of Lisbon a statement on representative democracy is followed by one on participatory democracy. In this document, however, we cannot analyze the various aspects of the functioning of the democratic system from the perspective of the overall use of new technologies, which, however, already produce significant effects through social networks and *peer-to-peer* communication. We focus on two specific issues directly related to fundamental rights: *digital* citizenship and the construction of the *scientific citizen.* Digital citizenship should not be seen as a category that replaces the traditional forms of citizenship but as an expansion of the concept of citizenship, understood as a set of rights and powers belonging to every person, wherever they may be in the world. In this sense, the Web can be seen as the privileged place, giving citizenship in general a strong connotation of universalism.

The rights of digital citizenship may be summarized as: the right to connection (indications in the regard have emerged in the European Parliament and the Council of Europe); the right to net neutrality (which excludes the content control powers and duties of network operators); the right to freedom of expression with the subsequent exclusion of forms of censorship (a problem that emerged clearly in the dispute between Google and the Republic of China, which led to a condemnation of censorship by Secretary of State Hillary Clinton, and which highlights the above mentioned theme of anonymity); the right of access to Web content (and the above-mentioned issues of copyright). The relationship between connection and access deserves special consideration. Connection universalization, in fact, must be accompanied by policies that prevent the progressive reduction of freely accessible content and the colonization of the Web by market logic. The unavoidable issue of knowledge as a common good must be addressed in a structured way, such as the one which led to the proposal and implementation of *creative commons.*

Otherwise, access to content would be increasingly conditioned by financial resources, and the right to connection would end up resembling a key that opens an empty room.

The theme of the *scientific citizen* regards the specific knowledge that must be made available to people to enable them to make conscious choices in areas directly affected by technoscience. This is true for both strictly personal choices and those of a public nature, such as those relating the increasingly frequent consultations of citizens on matters regarding the impact of science and technology on the entire social organization. Often, in fact, it is felt that the technical complexity of some issues is such that citizens should not have the right to intervene directly, since they are incapable of making proper assessments — a provocative but democratically dangerous argument. It would take away the sovereign right of people to look into matters affecting their own lives. We need to go a step further, towards a democracy of knowledge that is called, despite the fact it may create misunderstandings, "cognitive democracy." In a democracy, in fact, it is not acceptable for citizens to remain silent, whatever the subject matter.

To allow citizens to gain a critical understanding of issues, subtracting citizens from the dangers of unilateral information imposed by particularly influential Web sites, "electronic sidewalks" have been proposed: sites which provide links to sites offering different points of view. In general, this type of proposal is seen as an expression of the need for a *fairness doctrine* for the Internet, a necessary tool for the free development of personality.

VII. The World and the Rules

The projection of fundamental rights on a global scale raises the question of how legal rules should be understood in a world without frontiers. The approach most used in recent years is reminiscent of the medieval *lex mercatoria,* a body of regulations deriving from the established customs of merchants and traders. There is talk therefore of *lex digitalis* and *lex constructionis, lex labori internationalis* and *lex sportiva internationalis.* However, there is the risk of creating serious ambiguity and misunderstandings of reality, concealing the powers that effectively lay the rules and so rule the world.

To respond to this situation, emphasis has been placed on the role of major international law firms, the "merchants of the law," who write global rules on behalf of large multinational companies. Attention has been drawn to the "sovereign" power of entities such as Google, which deal directly with nation states in ways that may undermine the fundamental rights of millions of people. To achieve some sort of transparency, if not

control, of such powers, the U.S. Congress has proposed a Global Online Freedom Act, which envisages, inter alia, the requirement for Internet companies to inform a special committee at the State Department of all cases in which they have filtered or deleted content at the request of a foreign country.

These attempts to accompany the global dimension of fundamental rights with appropriate institutions have led to the possibility of setting up multiple "civil constitutions", linked to social and economic dynamics rather than the exercise of political and constitutional powers. But these efforts have been criticized by those who think it would lead to a world without a centre, characterized by "institutional neo-medievalism", precluding the establishment of common safeguards, and have been met with scepticism by a legal culture that does not think rights can be effectively enforced in a global dimension. But this hypothesis is partly refuted by the gradual establishment of a "global community of courts" linked to the protection of rights, and the realization that the effective protection of rights is no longer necessarily the sole domain of traditional judicial proceedings, but can put into effect by initiatives stemming from the civil society, which, using international documents as their point of reference, can put guarantees into practice. When news emerged that some transnational companies were getting children to sew shoes and soccer balls in India and Pakistan, civil rights groups threatened a boycott if the companies did not stop using child labour. They were successful for a variety of reasons but here it is worth underlining that the effectiveness of children's rights was ensured by means other than those assigned to traditional legal mechanisms, such as taking legal action.

It is possible, however, to suggest other models of "global constitutionalization." As regards the Internet, the business world has been particularly active, with initiatives from Microsoft, Google and Yahoo! But can we leave the protection of fundamental rights on the Internet only to the initiative of private entities, which tend to offer only guarantees compatible with their interests and which, in the absence of other initiatives, will appear as the only "institutions" capable of intervening? Can we accept a privatization of Internet governance or should we ensure that a plurality of actors, at many different levels, work together to develop common rules according to a precisely defined multistakeholder and multilevel model?

In answer to this question, work has started on establishing an Internet Bill of Rights, which is also being carried out in the annual UN Internet Governance Forums (the importance of this process was highlighted in a resolution of European Parliament).

However, in accordance with the nature of the Internet, the recognition of principles and rights cannot be imposed from above. It must be the result of a process involving the broad participation of a wide variety of players, which has already materialized in the form of "dynamic coalitions", groups of a different nature, formed spontaneously in the Net. This process may be able to achieve results such as the integration of codes of conduct and other forms of discipline, and common regulations for specific areas of the world. This is not a bottom-up universalistic approach but rather one involving different subjects at different territorial levels and different time-space assemblages.

The other model is represented by the European Union and its Charter of Fundamental Rights. Today, Europe is the region of the world that recognizes most fundamental rights, where there is a form of supranational constitutionalization. This fact has prompted talk of a "European dream". A document of the American Civil Liberties Union, dated February 2004, which bitterly criticized the U.S. administration's demand to obtain, with hardly any guarantees, a large amount of data on airline passengers travelling to the United States, made a demanding statement: "when it comes to privacy protection, we want to join Europe, not have them join us". We must insist on the need for Europeans to reflect on the political importance of actions that can ensure fundamental rights.

CONFLICT OF LAWS, CHOICE OF THE FORUM COURT IN THE US, AND THE DUE PROCESS IN FAMILY LAW DISPUTES

Zia Akhtar[1]

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In the United States (US) the family law litigant will have to consider the implications of laws that are federally recognised and those which the state embodies in its own family law statutes. The function of the equal protection clause and due process clause of the Fourteenth Amendment of the Constitution protects the parties in family disputes that reach the court. The operation of the Full Faith and Credit Clause is an important consideration and is central to the question if the court can apply the law of the forum court (lex fori) or that of the state where the dispute emanated. The federal constitution allows the state courts to apply marriage laws of another state. If the issue is procedural then the law of the state will be applied where the dispute that gave rise to the litigation (lex loci). This paper examines the interstate in family law by considering marriages, child custody, and adoption rules and it enquires whether the courts have been sufficiently consistent in interpreting family law of the state in accordance with Article IV, Section 1. There is also a section that compares the law in the US with the application of the lex fori rules in family cases in the Scottish jurisdiction and how that impacts on parties in family law disputes.

INTRODUCTION

In the US the family law procedure is determined by the formalisation and shape of the institution of marriage that embodies the concepts of "conjugality, privacy, and contract".[2] The Supreme Court has applied the Full Faith and Credit Clause (FFCC) to oblige state courts to hear family law claims that arise under sister-state laws.[3] The state court may apply its forum law to the substantive questions of a case whenever (a) the party resisting application of that law has acted in the forum or derived from the forum relatively direct benefits, or (b) there is some weaker connection between the defendant and the forum, and

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[2] Vivian Hamilton, Principles of U.S. Family Law, 75 Fordham L. Rev. 31 (2006). Available at: https://ir.lawnet.fordham.edu/flr/vol75/iss1/2

[3] Article 4 Section 1 of the US Constitution is the provision by which courts of the States of the Union determine if they have jurisdiction in the case. It reads as follows: *Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*

the forum's interests are relatively strong compared to interests of other states that would be disserved by the application of forum law. [4]

In the US the conflict of law rules are integral to family law disputes settlement because each state has its own legislature and courts system. These rules determine the extent to which courts at state level enforce legal rights, obligations, or claims affecting a non resident alien's assets located within the federal jurisdiction when there is a legal claim. This process arises in family law disputes when there is a marriage, child custody, and adoption where the court has to take into account the distribution of assets and the former partners are in different states. The US Constitution has a framework that bind one State to recognise the law of another and apply it in its own jurisdiction when parties to the dispute have raised it in the courts. The FFCC has given courts a wide discretion and the analysis should consider if they have been consistent in their rulings to provide certainty in family law proceedings.

The operation of FFCC is an important consideration and is central to the question if the court can apply the law of the forum (*lex fori*) which is usually the result when the question is if the court can apply the law of the site of the transaction, or occurrence that gave rise to the litigation initially (*lex loci*). This is usually the procedural law selected when the matter concerns *substantive matters in another state.* The impact of the clause is that if a final judgment is rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, it qualifies for recognition throughout the land.[5]

Since the 1950s the federal -State law has achieved a relatively high degree of consensus supporting a single choice-of-law approach and there has been an effort by states to adopt a common basis to choice of law by adopting a clause of mutual recognition between states. [6] The choice of law doctrine has been subject to relatively limited federal intervention under the FFCC. The privileges and immunities from the federal pre emption doctrine, equal protection, and the commerce clause impact on the constitutional choice-of-law limitations. The Supreme Court has clarified that there is no preexisting "public policy exception" to

[4] Frederic L. Kirgis Jr.,Roles of Due Process and Full Faith and Credit in Choice of Law, 62Cornell L.Rev. 94 (1976) Available at: http://scholarship.law.cornell.edu/clr/vol62/iss1/3

[5] See, *e. g., Matsushita Elec. Industrial Co. v. Epstein,* 516 U. S. 367, 373 (1996)

[6] Professor Symeon Symeonides has observed that there have been consideration, most notably in Louisiana and Oregon, to codify by statute conflict-of-laws rules. However, U.S. conflicts law is still largely judge-made. See generally SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD (2014).

the full faith and credit due *judgments*. This paper considers the framework of the family laws within the framework of the conflict of law doctrine governed by FFCC and considers its impact on marriages, child custody and adoption. These have been elevated to civil rights in the US Constitution and includes consideration of the equal protection and due process clause. The family law in the US is considered a private law matter and this can be examined by reference to the Supreme Court judgments that have established the parameters of states' approach in family law issues. Section B of the paper considers the law in Scotland to provide a comparative approach in dealing with courts that apply the lex fori principles in family law disputes. The doctrine of *forum non conveniens* originated in the 19 th century in the Scottish courts when they began to formulate principles of its application in common law courts. There has been forum shipping in the UK that has enabled the selection of the forum court by litigants when there is a concurrent power of jurisdiction. The comparative approach will illustrate the difference between the approach of the statute based litigation in the US to the more common law centred litigation of family law disputes in Scotland.

I. RECOGNISING MARRIAGE INTER STATE

Conjugality is a legal status (marriage), but it is also a powerful normative concept in federal and state law.[7] The concept of conjugality explains the rule that the legal status of family can override the actual biological connection based on the notion of stable marital families.[8] This is deemed "a critical social good, and thus preservation of the conjugal relationship and family outweighs recognition of biological parentage".[9] The states have the primary

[7] See, e.g., Martha Albertson Fineman, Our Sacred Institution: The Ideal of the Family in American Law and Society, 1993 Utah L. Rev. 387, 387.

[8] In Michael H. v. Gerald D 491 U.S. 110, 129 (1989) as a result of an extramarital affair, Carole D. gave birth to Victoria D and the issue was the circumstances of her cohabitation with 3 men that made it difficult to determine who was the paternal father. In the first three years of her life, Victoria D. lived with her mother but three different men lived with her mother during this period. The daughter spent less than half of her first three years living with Gerald D, when she became pregnant, her mother's husband and Victoria's legal father, and approximately the same duration living with her biological father whose name was Michael. When Michael sued for visitation rights the case made it to the Supreme Court and the issue was of analysing the extent of an unwed father's right to maintain a relationship with his child. The Court ruled that the states may decide that any child born to a married woman may be treated as a legal child of the marriage so long as husband and wife agree to this and the actual paternity was irrelevant. At 131.

[9] For a discussion and critique of the Court's opinion in Michael H., see June Carbone and Naomi Cahn, Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty, 11 Wm. & Mary Bill Rts. J. lOll, 1039-50 (2003).

approaches to the presumption of legitimacy which they follow.[10] States have historically promoted conjugality not only by directly supporting that relationship but also by prohibiting intimate sex acts outside of marriage. Such prohibitions have all but disappeared, as courts have extended privacy protections to such acts but some states retain laws (despite a near-certain inability to constitutionally enforce them, and the Supreme Court has prohibited consensual sodomy, fornication, or adultery.[11]

The Supreme Court has declared marriage as a constitutionally protected individual right and has implicitly recognized and respected the concept of marital and family privacy. This has brought the FFC within the framework of the Equal Protection and Due Process Clause of the Fourteenth Amendment. [12] It has given marriage a level of civil rights protection in law and has been ruled upon as such by the Supreme Court.

In *Loving v. Virginia* [13] the impact of the FFCC was in evidence when a mixed couple was convicted under Racial Integrity Act § 20-58 of the Virginia Code. They were barred from marrying in Virginia and they transferred and married under the laws of another state. Upon return they were convicted of a criminal felony in Virginia and were informed that if they moved residence to solemnize their marriage in another state it would still be void under Virginia's law. § 20-59 on ' *Leaving State to evade law'* stated :

" *If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in, and the marriage shall be governed by" the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage*". They married in Washington, District of Columbia but upon returning to Virginia were held to be in breach of its laws. The couple appealed against the state law on miscegenation. In a unanimous decision, the justices found that

[10] Susan Frelich Appleton, Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era, 86 B.U. L. Rev. 227, 228-37 (2006)

[11] See, Lawrence v. Texas, 539 U.S. 558 (2003)). The constitutional validity of any such prohibition is highly doubtful. at 578. See Singson v. Commonwealth, 621 S.E.2d 682, 687 (Va. Ct. App. 2005) (stating that Lawrence did not declare all sodomy statutes facially unconstitutional); see also Utah Code Ann. § 76-5-403(1) (2003).

[12] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

[13] 388 U.S. 1, 12 (1967).

Virginia's interracial marriage law "violated the 14th Amendment to the Constitution that provides due process and equal protection to all citizens".[14] Chief Justice Earl Warren ruled : "*It could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause... but with this language, the case casts doubt on the validity of much state regulation of marriage.*"[15] The Chief Justice stated further that "*[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the state*". [16]

The landmark ruling led to the laws against interracial marriage in 16 U.S. states including Virginia to be annulled. [17] Despite the court's decision, however, some states were gradual in altering their laws. The last state to officially accept the ruling was Alabama, which removed an anti-miscegenation statute by an amendment of Article 667 to its constitution from its state constitution in 2000 after a vote of its citizens.[18] Jeremy W Richter argues that "the Supreme Court ruling in Loving v Virginia had rendered the Alabama criminal statute prohibiting interracial marriage and sexual relationships, the state legislature had no authority to remove the nullified statutes or to otherwise legalize the institution of marriage between black and white persons. Only two avenues were available whereby the removal of the nullified code sections could be effected: drafting a new state constitution or allowing the residents of the State of Alabama to vote on an amendment directly". [19]

The impact of the state amending its laws as Virginia did in the Loving case does not have an automatic effect in terms of application in other states. It is only if the Court passes judgment that it has validity and is then binding on the courts of other states to follow with

[14] At 11-12
[15] At 12
[16] At 9
[17] National Constitution Centre. On this day Supreme Court rejects anti inter racial marriage laws. 22/6/20 https://constitutioncenter.org/blog/today-in-supreme-court-history-loving-v-virginia.
[18] Article IV, S 102 of the Constitution of Alabama of 1901 reads: "Miscegenation laws: The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro".
[19] Jeremy W. Richter, 2001, A Race Odyssey: Alabama's Anti Miscegenation Statute is Repealed. 14 June 2017 https://www.jeremywrichter.com/2017/06/14/alabama-anti-miscegenation-statute/

their own jurisdiction. While the FFCC has not been stated as the main cause of action Joanna Grossman has observed, "[t]he fact that the Full Faith and Credit Clause has not been invoked in the marriage context does not mean that it could not be."[20]

It is argued that there exists an "entrenched conventional wisdom that the FFCC actually is irrelevant to the question of whether one state must recognize another state's marriage." [21] Marriage, according to this conventional wisdom, is simply another subject for ordinary lawmaking and no different from things like workers' compensation, insurance regulation, gas royalties, or fishing licenses where each state gets to decide policy for itself. The Supreme Court's current Full Faith and Credit Clause jurisprudence prescribes minimal interstate effect for "acts"—that is, ordinary statutory policies—on the principle that a state should not be required "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[22]

Sanders has argued that the FFCC is relevant for the family law and the marriage contract in particular because "*(1) marriage is sui generis as a legal subject, a principle that was underscored by the Court's recent decision in Windsor; (2) accordingly, it misunderstands, even trivializes, marriage to assume that the Supreme Court would and should apply the same rules to marriage that it has applied to things like workers' compensation and insurance regulation; and (3) there is a national interest in uniformity of marital status which supports use of the Full Faith and Credit Clause to prevent states from denying married couples the full benefit of their legal unions in every jurisdiction*".[23]

There has been much debate about interstate recognition of valid marriages and "in recent years, the most controversial applications of the FFCC have involved family law".[24] Each state has different laws about marriage, and the judgments in each state have drawn

[20] Joanna L. Grossman, Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws, 84 OR. L. REV. 433, 454 (2005) (emphasis in the original); see also Gene R. Shreve, Choice of Law and the Forgiving Constitution, 71 IND. L.J. 271, 271 (1996) (observing that the Full Faith and Credit Clause "can easily be read to protect nonforum state interests . . . that are disrupted by parochial state conflicts decisions").

[21] Patrick J. Borchers, The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate, 38 CREIGHTON L. REV. 353, 353 (2005).

[22] Baker v. General Motors Corp., 522 U.S. 222, 232 (1998) (quoting Pacific Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939)).

[23] Steve Sanders, "Is the Full Faith and Credit Clause Still "Irrelevant" to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom," *Indiana Law Journal*: Vol. 89 : Iss. 1 , Article 6. (2014) pp 37-38
Available at: https://www.repository.law.indiana.edu/ilj/vol89/iss1/6.

[24] Stephen E Sachs, Steve Sanders, Article IV, Section 1: Full Faith and Credit Clause. Sachs, Stephen E., *Full Faith and Credit in the Early Congress* (September 2009). Virginia Law Review, Vol. 95, pp. 1201-1279, 2009. Available at SSRN: https://ssrn.com/abstract=1032676

nationwide interest and even the Supreme Court has never alluded to the matter,[25] and it has been the scholars who have drawn to the attention the impact of the Article 4 Section 1 on marriage contracts. It is necessary to evaluate the family law aspects in which this has been invoked and how states have interpreted its terms from the court rulings.

II. DUE PROCESS CLAUSE AND SAME SEX UNION

By tradition every state honored a marriage legally contracted in any other state. However, the issues concerning the same sex marriages concerned state jurisdiction and whether courts in one state will agree to this form of marriage in another state. This was because it raised issues about the sanctity of marriage or if this was a civil rights matter that the federal government could legislate by enacting a law to legalise same sex union.

However, in 1993, the Hawaii Supreme Court held that Hawaii's statute restricting legal marriage to parties of the opposite sex establishes a sex-based classification, which is subject to strict scrutiny if challenged on equal protection grounds. In *Baehr v. Lewin*, [26] a member of a civil union Nina Baehr sued the state of Hawaii, alleging that the state's refusal to issue her and her same-sex partner a marriage license amounted to illegal discrimination. The Hawaiian Supreme Court drew an analogy to *Loving v. Virginia*, where the U.S. Supreme Court ruled that laws based on racial classifications were unconstitutional.

The Court stated that the Hawaiian statute prohibiting gay marriage violated Hawaii Constitution's equal-protection clause and was subject to "strict scrutiny," meaning it was unconstitutional unless it was "justified by compelling state interests" and was "narrowly drawn to avoid unnecessary abridgements of the [plaintiffs'] constitutional rights".[27] It also found that the law prohibiting same-sex marriage discriminated on the basis of sex and therefore violated the Hawaiian Constitution. Under the state's Equal Rights Amendment, the state would have to establish a compelling state interest supporting such a ban, a fairly strict standard.[28] Although the court did not directly rule that the state's prohibition of same-

[25] Even the federal circuit court have not accepted it and at least one federal district court has rejected a full faith and credit argument for interstate recognition of a same-sex marriage. Wilson v. Ake, 354 F. Supp. 2d 1298, 1303–04 (M.D. Fla. 2005).
[26] (1993) 852 P.2d 44, 74 Haw. 530.
[27] HAW. CONST. art. I, § 6 (1978) ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.")
[28] Ibid at 50

sex marriages was illegal, it left little doubt of its skepticism regarding the proposition. The court remanded the case to a lower court to determine whether the state could prove this compelling state interest in prohibiting same-sex marriage.

This was the first time, a state Supreme Court had ruled that gay couples might have the right to marry. Although its immediate impact was only in Hawaii, the decision in *Baehr v. Lewin* encouraged the gay rights supporters and discouraged opponents throughout the country. The primary reason for these responses was the provision in the Article IV, Section 1, of the US Constitution that has the framework for recognising the judgments in one state and giving effect to them in other states where the parties reside and the ruling has same effect.

This sets out the principle that the FFCC shall be given in each state to the public Acts, Records and judicial proceedings of every other state. The Clause requires states to grant full weight to legal actions in other states, including marriages, divorces, and other family-related situations. Both opponents and proponents of gay marriage realized that the Full Faith and Credit Clause of the Constitution might mean that if same-sex marriages were legal in Hawaii, the marriages would be entitled to legal recognition in other states as well.

Although the court did not recognize a constitutional right to same-sex marriage, it raised the possibility that a successful equal protection challenge to the state's marriage laws could eventually lead to state-sanctioned same-sex marriages. In response to the *Baehr* case, Congress in 1996 passed the Defense of Marriage Act (110 Stat. § 2419), (DOMA) which defines marriage as a union of a man and a woman for federal purposes and expressly grants states the right to refuse to recognize a same-sex marriage performed in another state. Section 3 of the Act defined marriage for federal purposes as the union of one man and one woman, and allowed states to refuse to recognize same-sex marriages granted under the laws of other states. DOMA, in conjunction with other statutes, had barred same-sex married couples from being recognized as "spouses" for purposes of federal laws, effectively barring them from receiving federal marriage benefits.

The FFCC and the conflict of laws doctrine invites on all states to recognize marriages except for those that are “evasive” which are those where a couple briefly transfer their

domicile state to procure a marriage they could not consummate in their own state. [29] However, DOMA's enactment did not prevent individual states from recognizing same-sex marriage, but it imposed constraints and disallowed welfare benefits to all legally married same-sex couples. The mini-DOMA states applied the so-called "public policy exception" to the place of celebration rule, which was meant to be applied to evasive marriages,[30] they have abandoned the comity required by a sensible choice of law regime and made "protection" of their own marriage policies "the first (and often final) principle."[31] It has been argued that it is unjust for a mini- DOMA state to declare void a non-evasive couple who migrated from one state to another state.[32]

However, this defence was based on the FFCC on grounds that that states "are free to disregard the laws of sister states which compete for application,"[33] on account that they had always been permitted to do so. There is no provision in the Constitution that "creates a public policy exception to the full faith and credit mandate. The development of this exception has come solely from the common law . . . ." [34]

Larry Kramer has argued The States are allowed to not follow the FFCC against marriages they do not accept as valid because there is no constitutional rule to prevent the "chaotic results" that can happen when choice of law is left "almost entirely in the hands of state

[29] See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.").
[30] See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). For more on states' abuse of the public policy exception, see Sanders, supra note 21, at 1435–41.
[31] Lynn D. Wardle, From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-jurisdictional Recognition of Controversial Domestic Relations, 2008 B.Y.U. L. REV. 1855, 1919 (2008).
[32] See, e.g., Stanley E. Cox, Nine Questions About Same-Sex Marriage Conflicts, 40 NEW ENG. L. REV. 361, 377–79 (2006) (arguing that the public policy exception is unconstitutional and observing that "[i]f it is not intolerable that a couple can be married and not married at the same time, it is at least supremely frustrating"); Andrew Koppelman, Against Blanket Interstate Nonrecognition of Same-Sex Marriage, 17 YALE J.L. & FEMINISM 205, 208 (2005) (observing that such a rule "produces absurd and cruel results," is inconsistent with federalism, and likely violates equal protection); Linda Silberman, Same- Sex Marriage: Refining the Conflict of Laws Analysis, 153 U. PA. L. REV. 2195, 2214 (2005) (arguing that "[s]tates with 'defense of marriage' acts should not further their own policies at the expense of the legitimate interests of other states and the reasonable expectations of the parties" and that "states that choose to prohibit same-sex marriage should not undermine the rights of newly-arriving couples from established marriages in other states")
[33] L. Lynn Hogue, State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?, 32 CREIGHTON L. REV. 29, 38 (1998).
[34] Emily J. Sack, The Retreat From DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause, 38 CREIGHTON L. REV. 507, 523 (2005).

courts."[35] The FFCC is not involved and the Court has recognized a few relatively narrow policy-based exceptions to the states' obligations to enforce the judgments of other states' courts. The "*evolution of judgments recognition law in the United States from federal common law to state common and statutory law in the early twentieth century now results in significant substantive law differences from state to state*".[36] *This inference can be drawn by the recent decisions that indicate the problems created by "those substantive law differences" and in "state law differences in applying both constitutional principles of due process to questions of personal jurisdiction in the recognizing court" and the "doctrine of forum non conveniens" create further "opportunities for forum shopp1ing and manipulation in ways that create inefficiencies and inequities*". [37]

In *United States v. Windsor* [38] the appellant Edie sought a refund of the estate tax she was forced to pay after her partner died because the state did not recognise her marriage despite 44 years of coexistence as a gay couple. Edie alleged that DOMA violates the Equal Protection principles of the Constitution because it recognized existing marriages of heterosexual couples, but not of same-sex couples, despite the fact that New York State treats all marriages the same. The Supreme Court declared that section three of the so-called "Defense of Marriage Act" (DOMA) is unconstitutional and that the federal government cannot discriminate against married lesbian and gay couples for the purposes of determining federal benefits and protections. The Court held

"*DOMA's principal effect is to identify and make unequal a subset of state-sanctioned marriages. It contrives to deprive some couples married under the laws of their State, but not others, of both rights and responsibilities, creating two contradictory marriage regimes within the same State. It also forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect*". [39]

This case overruled the most significant clause of DOMA which enabled each state to refuse to recognize other states' acts, records, and judicial proceedings purporting to validate same-sex marriages. The Act specifically allowed each state to deny rights and claims arising from

[35] Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 YALE L.J. 1965, 1978 (1997).
[36] Ronald A Barrett, The Continuing Evolution of US judgments Recognition law, 55 Columbia Journal of Transnational Law 277 pp 277 – 34.jtl.columbia.edu › uploads › sites › 2017/05 › Brand_55-CJTL-277.

[37] Ibid.
[38] 133 S Ct. 2675 (2013)
[39] Pp. 20–26.

same-sex marriages created in other states and aimed to displace impact of the FFCC in these areas. This case led to further litigation and there was an appeal that reached the Supreme Court that had to decide upon the same sex marriages as to being of universal effect across all states and the issue of whether a state could refuse to sanction a marriage domiciled in another state was settled.

In *Obergefell v. Hodges* [40] groups of same-sex couples litigated against their relevant state agencies in Ohio, Michigan, Kentucky, and Tennessee to challenge the constitutionality of those states' bans on same-sex marriage or recognition of same-sex marriages that occurred in jurisdictions that had legalized the same such marriages. The plaintiffs in each instance argued that the states' statutes violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, and set of plaintiffs also brought claims under the Civil Rights Act. The issue reached the Supreme Court after the US Court of Appeals for the Sixth Circuit, which treated these separate lawsuits as a consolidated claim, reversed held that the states' bans on same-sex marriage and refusal to accept as legal marriages performed in other states did not violate the couples' Fourteenth Amendment rights to equal protection and due process.

The issue was does the Equal Protection Clause and the Due Process Clause under the Fourteenth Amendment require a state to license a marriage between two people of the same sex and would it require a state to recognize a marriage between two people of the same sex that was legally licensed and performed in another state. In a 5-4 decision for the same sex marriages as legally valid under the Full Faith and Credit Clause and as grounds for equal protection the Supreme validated the marriages within the states inter se bringing it on the same level as a marriage between opposite sex couples. The Court found that same-sex marriage bans are a violation of the 14th Amendment under both Due Process and Equal Protection clauses.

Justice Kennedy in ruling for the majority stated that "the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths". [41] Furthermore, that " The Fourteenth Amendment requires States to recognize same- sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to

[40] 576 US - (2015).
[41] at 23-27.

recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character". [42] Justice Kennedy concluded that " because marriage is a fundamental right, the government needs a compelling reason to deny it to some people".[43] Justice Scalia in his dissenting opinion stated that the supremacy of the Constitution permitted self rule to the states in order for them to exercise laws except those where "Regulation of domestic relations which is an area that has long been regarded as virtually exclusive province of the state ". [44]

The decision in this case changed "the conventional wisdom among those legal scholars who considered the Full Faith and Credit Clause as of no impact to couples whose marriages were not recognized, because marriage is simply another subject for ordinary state lawmaking".[45] It was not separable from any other act of state legislature such as workers' compensation schemes, insurance regulation, or industrial investment where, under the Supreme Court had allowed each state to enact its own legislation. However, the perspective in the decision that legalised this as a valid union for states to register took into consideration the factors such as the incidental interests such as marriage property, adoptions, and inheritance rights. This cover a broader landscape in which law and equity is part of the process and is essential in formulating the marital relationship whatever its composition.[46]

III. CHILD CUSTODY AND SUBJECT MATTER JURISDICTION

The US Congress has utilised its FFCC in certain specific contexts related to not only marriage, but also divorce, and children. The federal circuits courts are not definite on another question of family law on the application of Article 4 Section 1 to the extent and in what manner should one state be required to recognize an adoption procured by a couple in another state. The adoptions are finalized by court judgments and there is opinion "*that any adoption should be recognized by all other states for all purposes, even if it violates the public policy of*

[42] at 27-28.
[43] at 28.
[44] at 16.
[45] Prior to this ruling many states refused to recognize same-sex marriages performed in other states, sometimes even going as far as to declare such marriages "void" or "invalid." *See* Steve Sanders, *The Constitutional Right to (Keep Your) Same-sex Marriage*, 110 Mich. L. Rev. 1421 (2012)
[46] Steve Sanders, *Is the Full Faith and Credit Clause Still 'Irrelevant' to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, 89 Ind. L. J. 95 (2014).

the 'receiving' state (because, for example, it involves an unmarried couple)".[47] This view has been advanced to promote more certainty and stability in the parent-child relationship.

There is a distinction in the interpretation by the courts between recognition of an out-of-state judgment or record and enforcement of an out-of-state judgment or record.[48] The precise obligations that FFCC credit imposes on state actors is dependent on this separation. The court formulated the full faith and credit framework that could conceivably accommodate all types of state records. This supports the theory of recognition and enforcement that was set out by the Supreme Court's decision in *Baker v. Gen. Motors Corp* where Justice Ginsburg had ruled that these principles can be reconciled. These were that the obligation of states should *recognize* another state's judgment is "exacting", [49] and secondly that states are not obligated to "adopt the practices of other States regarding the time, manner, and mechanisms for *enforcing* judgments. [50]

This is particularly the case in divorce and child custody matters where the valid certification issue by the court becomes part of its record and is applicable across states. A public policy exception exists with regard to state statutes, as "The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[51]

The Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA") 1997 (28 US Code) governs the law for child custody cases based on the hierarchy of four principles, for taking jurisdiction over initial child custody determinations. The UCCJEA was drafted in 1997 to help reconcile differences between the UCCJA and federal laws such as the Parental Kidnapping Prevention Act (PKPA) 1980[52].It prevents any state from exercising

[47] *See* Thomas M. Joraanstad, *Half Faith and Credit?: The Fifth Circuit Upholds Louisiana's Refusal to Issue a Revised Birth Certificate*, 19 Wm. & Mary J. Women & L. 421 (2013).
[48] David Engdahl, The Classic Rule of Faith and Credit, 118 *YALE L.J.* 1584 (2009)https://digitalcommons.law.seattleu.edu/faculty/154
[49] Baker v. Gen. Motors Corp., 522 U.S. 222, 234 (1998), 522 U.S. at 232–35.
[50] *Ibid* at 233.
[51] Ibid *at* 232 (quoting Pac. Employers Ins. Co. v. Indus. Accident Comm'n 306 U.S. 493, 501 (1939).
[52] The PKPA forced every state to give full faith and credit to any custody decree, no matter in which state the decision was rendered, provided it met due process and the PKPA jurisdictional requirements. The PKPA also prevented other states from modifying a custody order issued by any other state, with only a few exceptions The PKPA requires that, before a court can decide any custody matter, reason able notice and opportunity to be heard has been given to all contestants, parents whose parental rights have not been

modification jurisdiction when there is already a pending proceeding in a state in accordance with the PKPA/UCCJA, (the previous statute before UUCJEA) [53] and further gives the original state the right to exclusive jurisdiction to modify any of its orders provided the child or one of the contestants continued to reside in that state.[54]

It also augments the Violence Against Women Act (VAWA) 1994 in terms of state jurisdiction that may lead determination where the child custody has to take place as a consequence of marital violence. [55] The UCCJEA is a uniform state law regarding jurisdiction in child custody cases. It specifies which court should decide a custody case, but not how the court should decide the case. The particular state's court is empowered to determine child custody matters only if one of these for tests is met. The four tests, in order of priority, are: 1) the child's "home state," 2) a "significant connection" between state and parties to a child custody dispute, 3) "emergency" jurisdiction when the child is present and the child's welfare is threatened, and 4) presence of the child in the event there is no other state with another sound basis for taking jurisdiction.[56]

The determinations for child custody cases is determined by the child's "home state" - the state where the child has lived for the past six, consecutive months.[57] Every state in the US has adopted the UCCJEA and the voluntary adoption by the states recognized FFCC but formulated its own procedures under the state civil code by which a state would make the initial custody determination for the child.

s1738A states a) "*The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State*".

terminated and to anyone actually having physical custody of the child. See 28 U.S.C. § 1738A(e). Specifically, for initial custody determinations, the PKPA prioritizes home state jurisdiction over significant continuing jurisdiction and otherwise repeats the temporary and no other state jurisdictional requirements of the UCCJA. See id. § 1738A(c).

[53] 28 U.S.C. § 1738A(d).

[54] The U.S. Supreme Court held that the PKPA does not create a cause of action in federal court to resolve which of two competing custody decrees is valid, thereby ending the litigation that was creeping into federal court to resolve these disputes. See Thompson v. Thompson, 484 U.S. 174 (1988).

[55] VAWA §§ 2265-2266 (1994) states (requiring states to honor and enforce orders of protection, including ex parte orders). Although the full faith and credit mandate of VAWA specifically exempts custody orders, certain practice orders, including stay- away from a child orders, might be inconsistent with the UCCJA.

[56] § 201(a).

[57] See the previous statute UCCJA § 3(a)(2) which states that "it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection training, and personal relationships"

The impact of this is that under the UCCJEA each state has to follow in custody proceedings by creating subject- matter jurisdiction over the child, i.e. jurisdiction that is based on the relationship between the child and the state. The court may exercise significant connection jurisdiction only if there is no home state and two conditions are met: (1) the child and the child's parents, or the child and at least one parent or a person acting as a parent, must have "a significant connection with the state other than mere physical presence"; and (2) "substantial evidence must be available in the state concerning the child's "care, protection, training, and personal relationships."[58] After the court makes a child custody determination, it has continuing jurisdiction over the case, with the exception of two circumstances. Firstly, the state will no longer have jurisdiction over the case if the child or his parents is no longer connected with the state, and secondly, the state will lose jurisdiction if another court determines that the child and his/her parent does not live in the original state anymore. [59]

The UCCJEA provides a general legal framework for recognition and enforcement of foreign custody and visitation decrees originating from foreign jurisdictions. It specifies that a decree made by a party to the Hague Convention on the Civil Aspects of International Child Abduction will be enforced and the United State is a party to Hague Convention on the Civil Aspects of International Child Abduction. Section 105 binds the US to the broader scope of treaty obligations and domestic law that predated the development of the Act, and influenced its formulation.[60]

IV. ADOPTION CASES AND CHOICE OF STATE

The Uniform Adoption Act 1994 sets down that the best interests of the child will be the only consideration. [61] The choice-of-law to be applied during an adoption proceeding is usually the law of the forum.[62] However, the instances of adoption, such as the parent's right to discipline the child and the child's inheritance rights, "are governed by the law of

[58] §201(a)(2).
[59] § 204
[60] The United States has been a party to the Convention on the Civil Aspects of Child Abduction since 1988.
[61] § 3-703(a) cmt., 9 U.L.A. 94 (1994) (—A judicial determination that a proposed adoption will be in the best interest of the minor adoptee is an essential—and ultimately the most important—prerequisite to the granting of the adoption.‖)
[62] L. L. Mcdougal III ET AL., American Conflicts Law § 223, at 781 (5th ed. 2001).

the state in which the parent and child are living when the issue arises, even though the adoption may have taken place in another state".[63]

The adoption can only be created by the legal relationship of parent and child that is created with the issuance of a judicial decree.[64] The court must determine a biological parent's consent (or waiver) and a child's best interests before any legal rights or obligations transfer.[65] Notwithstanding, a common standard of best interests, the state adoption statutes do not specify the term with precision.[66] Its consequence is that the courts have the power to evaluate and certify the adoptions.[67]

The application of the FFCC in interstate jurisdiction has to take into consideration the best interests which lacks any uniform statutory description,[68] and adoption law reflects varying state policies regarding domestic relations and family law.[69] Nevertheless, attempts to achieve uniformity among state adoption law and procedures have largely faltered.[70]

Terry argues that it has become a matter of debate "whether the Full Faith and Credit Clause governs the incidents of adoption".[71] There are different approaches one "*asserts that the incidental rights of adoption fall within an enforcement framework and are therefore outside the exacting full faith and credit owed to judgments.*[72] *Another approach asserts that an adoption's incidental rights fall*

[63] See Ralph U. Whitten, Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases, 31 CAP. U. L. REV. 803, 804 (2003), at 807.

[64] Joan Heifetz Hollinger et al, Adoption Law and Practice §§ 3.01–4 (2008)

[65] Ibid § 1.01[2][a]–[b].

[66] Ibid § 4.01[1]

[67] Ibid § 4.01[1] (noting that ―most adoption statutes do not include a list of specific factors to be considered in making a best interests determination‖); see also In re L.W., 613 A.2d 350, 355 (D.C. 1992) (asserting that a court's determination as to the ―best interests‖ of a child must be fact-specific because ―magic formulas have no place in decisions designed to salvage human values‖ (citing Lemay v. Lemay, 247 A.2d 189, 191 (N.H. 1968))

[68] Ibid § 4.01[1

[69] Compare FLA. STAT. ANN. § 63.042 (West 2003) (prohibiting any homosexual person from adopting), invalidated by Florida Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79 (Fla. 2010), and G.S. v. T.B., 985 So. 2d 978, 983 (Fla. 2008) (describing the goal of Florida's adoption scheme as a ―stable, permanent, and loving environment‖ for an adopted child), with In re M.M.D., 662 A.2d 837, 857 (D.C. 1995) (describing the purpose of the District of Columbia's adoption statute as to ―provide a loving, nurturing home‖ and concluding that a committed, unmarried same-sex couple could fulfill this purpose).

[70] Joan Heifetz Hollinger, The Uniform Adoption Act: Reporter's Ruminations, 30 FAM. L.Q. 345, 345, 377 (1996) (describing the process of drafting the Uniform Adoption Act of 1994 as ―bitterly divisive‖ and acknowledging that the Act faced immediate ―intense criticism‖ from lobbying groups).

[71] Pamela K. Terry, E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out-of- State Adoptions, 80 Fordham L. Rev. 3093 (2012). p 3119. Available at: https://ir.lawnet.fordham.edu/flr/vol80/iss6/23.

[72] See, e.g., Adar v. Smith, 639 F.3d 146, 161 (5th Cir.)

within the Clause's mandate of evenhanded enforcement.[73] *At least one court has declined to apply full faith and credit analysis to the issuance of revised birth certificates*".

In *Davenport v. Little-Bowser*[74] the Virginia Supreme Court held that the state registrar could not refuse to reissue a birth certificate with both names of an out-of-state adoptive same-sex couple when the relevant statute referred to only to the adoptive parents and the intended parents.[75]

The state initially argued that other birth certificate regulations referring to mother and father supported a restrictive reading of the adoption provision.[76] Furthermore, the state of Virginia argued that the state restriction of adoption to single individuals or to married couples maintained its application.[77] The Virginia Supreme Court held that a plain reading of the statute invalidated the state's arguments.[78] It refused to accept the plaintiff's FFCC claims, and affirmed that the only issue in this case is the enforcement was Virginia Adoption code.[79]

The FFCC has been invoked where an individual bring a federal cause of action against state executive officials for alleged violations in an across the state adoption case. In *Finstuen v. Crutcher*,[80] two same sex couples resident in Oklahoma, Lucy and Jennifer Doel adopted children in another state. Upon the Doels' return the Oklahoma State Department of Health (OSDH) refused to issue a revised birth certificate listing both parents, and instead issued a certificate that named only Lucy Doel as E's mother.[81] In 2004, the Oklahoma Attorney General issued an opinion stating that the FFCC required the OSDH to issue revised birth

[73] See Rhonda Wasserman, Are You Still My Mother? Interstate Recognition of Adoptions by Gays and Lesbians, 58 AM. U. L. REV. 1, 3–4 (2008) (identifying the tension between family, state, and federal interests). (arguing that ―just as states must recognize sister-state adoptions regardless of public policy objections, they must afford sister-state adoptions the same incidents they afford to local adoptions‖). Wasserman concludes that state, federal, and— especially in the adoption context—a child's ―overriding interest in stable family relationships, outweigh a single state's interest in denying recognition or enforcement to out-of-state adoption decrees), at 82 ; compare with Lynn D. Wardle, A Critical Analysis of Interstate Recognition of Lesbigay Adoptions, 3 AVE MARIA L. REV. 561, 598–99 (2005) (concluding that a state may decline to recognize or enforce incidental rights of sister-state adoption judgments that violate a strong, conflicting policy of the state).
[74] Davenport v Little and Bowser 611 S.E.2d at 371–72
[75] at 371–72
[76] Ibid
[77] at 372
[78] Ibid
[79] Ibid
[80] 496 F.3d 1139 (10th Cir. 2007).
[81] at 1142

certificates in accordance with the parental relationship in the legal adoption even if the parents were ineligible to adopt in Oklahoma.[82]

The Oklahoma state amended its adoption code to prohibit any state agency or court from recognizing a sister-state adoption by two individuals of the same sex.[83] The Doels then appealed but were again refused a new birth certificate for E that included both mothers' names.[84] They then petitioned in the federal court against three state executive officials: the OSDH Commissioner, the Governor, and the Attorney General.[85]The complaint was of breaches of the F FCC, the Equal Protection Clause, and the Due Process Clause, and the ability to move around of their own will.[86]

The U.S. District Court for the Western District of Oklahoma granted judgment for the plaintiffs under these constitutional provisions and ruled that the OSDH Commissioner, Dr. Michael Crutchen had to issue a new birth certificate listing both parents‘ names.[87] He appealed and the Court held that that the Commissioner‘s conduct in enforcing the amendment violated the state‘s obligation under the FFCC to recognize a sister-state's judgment.[88] The Court also ruled that Dr. Crutcher was an appropriately named defendant because the petitioners could litigate against a state officer responsible to the enforcement of a challenged law.[89]

The Court drew on the Supreme Court‘s precedent in *Baker v. General Motor Corp.* that there is "—no roving ‗public policy exception‘ to the full faith and credit due judgments" [90], and that the state of Oklahoma was under the obligation to recognize the Doels‘ California adoption decree.[91] By this ruling the court confirmed that "adoption decrees were final judgments and, therefore, were entitled to the unequivocal‖ mandate of the Full Faith and

[82]Ibid.
[83] at 1146 (quoting OKLA. STAT. tit. 10, § 7502-1.4(A) (2007) (—[T]his state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.‖)).
[84] Ibid.
[85] at 1142.
[86] Finstuen v. Edmondson, 497 F. Supp. 2d 1295, 1300 (W.D. Okla. 2006), affirmed in part, rev'd in part on other grounds sub nom. Finstuen, 496 F.3d 1139.
[87] Ibid. at 1315.
[88] Ibid. at 1156. The Tenth Circuit declined to address the Doels‘ additional due process and equal protection claims.
[89] Ibid. at 1148–49.
[90] Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).
[91]Finstuen, 496 F.3d at 1152.

Credit Clause".[92] The primacy of the FFCC was accepted as the Court dismissed the defendant's contention that in requiring Oklahoma to issue a birth certificate when the California adoption decree was produced amounted to the extraterritorial application of California law.[93]

The FFCC was invoked in the determination that by not allowing California effective jurisdiction but instead it was requiring that state executive officials apply Oklahoma law in an evenhanded manner.[94] In not being to provide equal protection the amended statute of Oklahoma violated the FFCC because it expressly denied the validity of the out-of- state adoption decrees as in these circumstances.[95] It had "improperly conflate[d] [a state's] obligation to give full faith and credit to a sister state's judgment with its authority to apply its own state laws in deciding what state-specific rights and responsibilities flow from that judgment".[96]

The substantive effect entitled to a sister-state's laws has complicated the Clause's since its earliest interpretation and it has been asserted that the modern full faith and credit doctrine has significantly diverged from what the framers intended.[97] This is because of the variables present in its interpretation that make it onerous for the courts to apply it in the given cases in family law. This is particularly noticeable in the realm of law where a state has to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.

In *Adar v. Smith* [98] Mickey Smith and Oren Adar were an unmarried, same-sex couple who adopted Louisiana-born child and went through a legal adoption in the state of Louisiana. They brought a law suit against the Louisiana Registrar after she refused to issue a revised

[92] Ibid.
[93] Ibid at 1153.
[94] Ibid at 1153–54 (quoting Baker v. Gen. Motors Corp., 522 U.S. 222, 234–35 (1998)).
[95] Ibid. at 1156.
[96] Ibid 1153
[97] David E. Engdahl, The Classic Rule of Faith and Credit, 118 YALE L.J. 1584, 1586–92 (2009) (arguing that the classic full faith and credit rule, concerning evidentiary sufficiency, has been obscured and forgotten because of judicial error and insufficient critical commentary); Also see Stephen E. Sachs, Full Faith and Credit in the Early Congress, 95 VA. L. REV. 1201, 1278–79 (2009) (contends that the Clause contained only an evidentiary framework, and that —[o]ver the past 200 years, courts have made ever more of the spirit of the Clause and of its implementing statute, but in doing so they have rendered the doctrine less and less coherent‖); Whitten, supra note 20, at 257 (—[M]odern Supreme Court decisions have . . . gone far beyond the original understanding of the provision . . . [and] there is little chance that the Supreme Court will revise its current interpretation of the Clause to return to the original meaning . . .
[98] 639 F 3d. 146 (2011) (5 th Circuit 2010) (en banc), cert. denied, 132 S. Ct. 400 (2011)

birth certificate for the couple‘s adopted child.[99] in New York in 2006.[100] In the adoption proceedings, Smith and Adar also changed J‘s name from the one registered on his original birth certificate.[101] The couple then sought to have J‘s Louisiana birth certificate reissued with both fathers‘ names overriding those of J‘s biological parents.[102] Section 40 of Louisiana‘s adoption code permitted the grant of a new birth certificate with the names of the adoptive parents upon the production of a properly executed out-of-state adoption decree.[103]

The state 's decision was upheld and it was not required to issue a new birth certificate recognizing two unmarried men as the parents of a Louisiana-born child whom they had adopted in New York. The appeals court reasoned that the FFCC binds state courts but not non-judicial officials actors such as the administrative staff who oversee a state's birth records. Therefore, Louisiana was not bound but the out of state adoption procedures that were not carried out within its jurisdiction. [104] The Court ruled that while Louisiana must recognize under the Clause the preclusive effect of a sister-state adoption judgment granted to a same-sex couple, the Louisiana statute providing for the reissuance of the adopted child‘s birth certificate was governed by Louisiana law and, therefore, permitted the exclusion of the couple);

The Court made a distinction between recognizing the existence of the parental relationship, which the Registrar had done, and was abided to enforce under the FFCC as it had the force of law being certified in another state and reissuing the birth certificate, which was construed as a separate act of enforcement.[105] The judgment stated that in issuing a revised birth certificate was part of enforcement and did not come under the mandate of the FFCC. [106] The Supreme Court ruling was invoked for the principle that the FFCC does not compel a state to substitute the legislative acts of other states for its own statutes concerning a subject matter jurisdiction where it is competent to legislate.‘[107]

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[99] at 149–50.
[100] Ibid. at 149. The Louisiana Registrar‘s surname was also Smith. Id. at 146, 149.
[101] Id. at 167 (Wiener, J., dissenting).
[102] Id. at 149 (majority opinion).
[103] See LA. REV. STAT. ANN. § 40:76(A), (C) (1990).
[104] At 161 citing Estin v Estin 334 US 541 (1948) at 554
[105] *Adar v. Smith*, 639 F 3d. 146 (2011) at 159 (—The Registrar acknowledged that even though she would not issue the requested birth certificate with both names, the Registrar recognizes [Adar and Smith] as the legal parents of their adopted child.‖)
[106] Ibid. at 160.
[107] Ibid. (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) (quoting Pac. Emp‘rs Ins. Co. v. Indus. Accident Comm‘n, 306 U.S. 493, 501 (1939)).

1) Concurrent jurisdiction and choice of court

The concept of *forum non conveniens* emanates from the Scottish legal system before its adoption in the common law world. This is a process by which common law courts provide a mechanism through which on the defendant's application to relinquish its established jurisdiction in favour of a more appropriate forum elsewhere. The allocation of the case for an appropriate forum or lex fori for the subject matter of the dispute the lex causae can be determined by the courts. [108] There has been concern that forum shopping based on court selection is increasing and there needs to be prevention by the courts in cases of concurrent jurisdiction and that Scottish courts should be less inclined to hear such dispute.

The existence of concurrent legal systems requires the evaluation of different schools of jurisprudence which need to be evaluated for laws that impact on disputes involving foreign parties. It is generally accepted that these are multi dimensional and they fall separately into a system of jurisprudence with their own corpus juris.[109] In Scotland the courts apply the common law principle of the forum non conveniens that enables the court to exercise a discretion as to which law to apply in a given case.

The European courts, by contrast, have adopted the HCCH 1953, which states, in Article 1 that "its purpose is to work for the progressive unification of the rules of private international law". [110] This applies in civil law countries and is generally the accepted model in civil law countries. [111] It has been of assistance in the implementation of multilateral

[108] Janeen M. Carruthers, Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages, *The International and Comparative Law Quarterly,* Vol. 53, No. 3 (Jul., 2004), pp. 691-711

[109]Konrad Zweigert, Hein Kötz classify the different groups of jurisprudence into the Roman family; German family ; Common law family, Nordic family, Family of the laws of the Far East (China and Japan) and the Religious family (Jewish, Muslim and Hindu law) *An Introduction to Comparative Law*, translation from the German original: *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* by Tony Weir, 3rd edition; Oxford, 1998, page 11 ; P Arminjon, B Nolde and M Wolff in Traite de droit compare 1 Paris, 1950 page 49 classified them without regard to the geographical factors and set them out in seven groups which were the French group that applied the Napoleonic Code; German group; Scandinavain group; English group; Islamic group and the Hindu group. Åke Malmström reviews the existing classifications of legal systems and legal families and concludes that within the Western (European–American) legal group four legal families can be distinguished: the legal systems of Continental Europe (with a German and a Romanistic subgroup), the Latin–American system, the Nordic (Scandinavian) system and the Common Law system. The Systems of Legal Systems, Notes on a Problem of Classifications in Comparative Law, 13 Scandinavian Studies in Law, 1969, pp 127

[110] Statute of the Hague Conference on Private International Law15/7/55 http://www.hcch.net/index-en.php?act=conventions.text.&aid=29

[111] Ibid

conventions promoting the harmonisation of conflict of laws principles in diverse subject matters within private international law. The HCCH has adopted 38 international conventions since its Statue was enacted in 1951 which brought about the framework for the adoption of conflict of law rules, jurisdiction and applicable law rules of maintenance obligations, matrimonial and inheritance. [112]

Although forum shopping may frequently be an international exercise between competing jurisdictions, often there are purely domestic UK cases where both the Scottish and English courts have concurrent jurisdiction. The Scotland and English law are separate legal streams for the purpose of substantive law and their court structure.[113] The Civil Jurisdiction and Judgements Act 1982 Section 20 requires the UK courts to have regard to the Court of Justice of the EU (CJEU) case law when applying Schedule 8 of the Act which deals with the allocation of jurisdiction within Scotland. There is a process of concurrent jurisdiction which is overriding and in which the parties can exercise their choice of law. This allows the selection by the litigants to select the court where they consider the forum to be better suited to their needs.

There is a need to carefully consider whether Scotland or England is the most convenient forum for issues that arise when there is concurrent jurisdiction. The failure to ascertain can result in the Court unilaterally dismissing an action on the basis of the principle of forum non conveniens, which can apply to any intra UK action. It is in broad terms, of no relevance to cases where the competing jurisdictions are EU member states, as forum non conveniens is excluded by the terms of the Brussels Regulation (Regulation 1215/2012). However it remains a proposition for the courts within the UK to consider and for them to apply in favour of one party or another.

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[112] The Member States of the EU have adopted the Hague Conference and in June 2005 the 20th Diplomatic Session of the Conference led to the major developments that were facilitated the Regional Economic Integration Organisations. The Conference has opened for ratification the Hague Convention on Choice of Court Agreements, under which states agree to recognise and enforce decisions by the courts of another signatory state if the dispute was governed by a valid choice of court agreement concluded between the parties to the dispute. The 21st Diplomatic Session of the Conference, held in November 2007 led to the adoption of two new instruments which were the International Recovery of Child Support and Other Forms of Family Maintenance and the Protocol of the same duration on the Law Applicable to Maintenance Obligations.

[113] The Civil Jurisdiction & Judgements Act 1982 allocates jurisdiction to the UK's three separate legal systems: England & Wales, Scotland and Northern Ireland. In terms of purely UK cases, Section 49 of the Act provides that nothing in it shall prevent any Court from staying or dismissing any proceedings on the grounds of FNC or otherwise. There are 2 sets of proceedings brought in the English courts, claiming damages for personal injuries alleged to be sustained in Scotland due to the defender's negligence.

In *RAB v MIB* [114] there was a family matter in which after divorce the mother had taken the child from Scotland to England and the father resided in Scotland. The father appealed in the Scottish courts as part of defended divorce proceedings against the findings that the Scottish courts were a forum non conveniens. This was for the purpose of deciding residence of a child where the mother had wrongfully removed her and relocated to England. The Court ruled that "*the English courts do consider themselves to have jurisdiction and that there is accordingly another court of competent jurisdiction enabled to consider and rule upon child welfare matters raised in these divorce proceedings*".[115]

The Court stated further in dismissing the appeal that there was the "undisputed fact that the jurisdiction of the Sheriff Court in Aberdeen in this divorce action is not open to question. Moreover, Aberdeen was the location of the habitual residence of both parties prior to the separation. At no time did the parties live together in England". Therefore, there was a nexus and Aberdeen had a "primary closer connection to all the members of the family" than the county court in England. The ruling affirmed that the court that had terminated the marriage has a "primary jurisdiction respecting the arrangements for the children of the marriage". [116]

The effect of the decision is to affirm that, in a purely domestic case, where there is no international element and the competing jurisdictions are England and Wales, Scotland, or Northern Ireland the court has power to stay a claim on the ground of *forum non conveniens*.. Further, such a power is available to the court, whether or not an application challenging jurisdiction is made by the defendant. The principle allows a flexibility to the courts in making the decision about which jurisdiction the parties should be adjudged in terms of the issues that involve the court exercising the power to stay proceedings in deciding the forum court.

2) Internal rules and international Conventions

[114] [2008] CSIH 52
[115] Para 18
[116] Para 27

The Scottish court has the power to strike out a claim on the grounds that the more appropriate forum is the English court and vice versa. As this would not involve an international element to the legal relationship, the Brussels Regime governing the courts of a particular EU Member State is not relevant. The applicable rules for allocation of jurisdiction within the UK would be the CJJA 1982 s 49, which expressly preserves the doctrine of *forum non conveniens* in domestic cases. There are also a discretionary power available to the courts where the litigants are non UK nationals and have commenced action in a foreign court.

In *RH v RH* [117] the parents and child were American citizens and the only connection with Scotland was the defendant commencing studies at St Andrews University in autumn 2015. The parties separated and the present proceedings were raised in April 2016. There was an action already pending for residence of a child raised in Dundee was that was sisted or adjourned due to legal proceedings continuing in Tennessee. The defendant was provided with the necessary visa and the claimant and child joined him soon afterwards in Scotland. There was an interregnum after which the defendant launched proceedings in Tennessee which were still in process when the law suit was filed in Scotland.

The adjournment was appealed and the Sherriff Appeal Court and the Sheriff Principal Murray noted that in considering s 14(2) of the Family Law Act 1986, and in particular the appropriateness of matters being determined in another court, the appeal court was not bound to sist but exercised a discretion having regard to the principles of *forum non conveniens.*[118] After some days the defender instituted proceedings in Tennessee which were sub judice. The sist was appealed and the SAC allowed the appeal. The welfare of the child was the paramount consideration in the context of which Scottish court was the more appropriate forum to hear the case in the interests of the parties and justice. In cases involving children there were five factors: habitual residence, convenience for the bulk of the evidence, ability to determine urgent matters expeditiously and with thorough

[117] SAC (Civ) 31 2017

[118] This distinguished the case from RAB v MIB where an authoritative determination on jurisdiction had been made by the Court of Appeal. The sheriff had erred in concluding that the respondent had established there was another court of competent jurisdiction because she had failed to give proper weight to the fact that the proceedings in Tennessee were subject to jurisdictional challenge on appeal. Para 18.

consideration, the circumstances of the actions being raised, and where the children presently were and how they arrived. [119]

The habitual residence was of considerable importance and that in the present instance was within the jurisdiction of Dundee Sheriff Court. The Sherriff had " *fallen into error in not having sufficient regard to habitual residence which weighs heavily in our view where the paramount consideration is ultimately the welfare of the child. The sheriff appears to have been deflected from the importance of habitual residence by focusing on what she described as the precarious nature of the appellant's residence in the United Kingdom* ".[120]

The Court held that the "welfare of the child is a very significant factor "and even if the decision of the Dundee Court is temporary if the appellant and the child left the jurisdiction this was "highly advantageous position to make a determination while the child and appellant are habitually resident within its jurisdiction".[121] The Court had to take into consideration that the "Tennessee Chancery Court could find in the favour of the appellant that would allow the substantive matters to be reopened" that would "materially change the circumstances of the case".[122]

The case was remitted back to the Sherriff Court at Dundee to take account the errors of law in the judgment arrived at previously. This had to include the habitual residence, the existing commitment and place of activity of the parties and the fact that case in Tennessee was still hearing the proceedings. The concurrent jurisdiction in this case did not prevent the *forum non convenie*ns to be heard in the local courts where the parties were temporarily resident. The Scottish courts have held that the doctrine of *forum non conveniens* applies when proceedings are issued in England against a party domiciled in Scotland in relation to harm suffered both in the UK and abroad. The principle established is that the deemed service rule in CPR 6.14 only comes into affect when parties should take steps subsequent to service. The relevant law was EU Regulation (Regulation 1215/2012 "Brussels Recast")

[119] Para 36
[120] Para 37
[121] Para 43
[122] Para 44

which provides, subject to some exceptions, that a person living in a EU Member State should be sued in their own Member State.[123]

The purpose of the Regulation is that judgments should be enforceable in other EU Member States without legal hurdles. This regulation is a very significant step and it regulates the conflict of laws in the EU, applicable to its members, Articles 29 to 34 of the Brussels Recast contains the basis of *lis pendens* and related actions due to this. This is a means to avoid duplication of legal proceedings by the plea of *lis pendens* and according to this principle, it is not permissible to initiate new proceedings if litigation between the same parties and involving the same dispute is already pending.[124] The European legislation on conflicts of jurisdiction has taken account of this fact and adopted the lis pendens concept as a way to harmonise jurisdiction that is being extended across borders and will apply if the same action is brought in the courts of different Member States .

CONCLUSION

The Full Faith and Credit Clause prescribed by the US Constitution is integrated with the due process and equal protection clause in family law cases which necessarily allows considerable choice of forum law. This process serves to an important purpose because the latter combines a check on power excesses by individual states with a regard to fundamental fairness to those who stand to be disadvantaged , while the former provides the functional legal requirements of a nonunitary (federal) national framework in which states must coexist in relative harmony. These are indispensible procedural requirements in family law cases.

In marriage, child custody and adoption the FFCC has the effect of a res judicata ruling which happens even the litigation was pursued in another state and concerned the subject matter of marriage. This is a rule for state courts, for them to execute the judgments of sister states within their own jurisdiction. There is no inherent public policy to enforce this clause in the private cause of action relating to marriage even if it raises public law issues. Those who are deemed to breach the clause are always state courts and not individual officers who are delegated the task of implementation such as state executive officials who have no liability for lack of enforcement.

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[123] Article 39 of Recast states : 'A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required'.

[124] J. Eisengraber, 'Lis Alibi Pendens Under The Brussels I Regulation-How To Minimise -Torpedo Litigaiton – And Other Unwanted Effects Of The -Fisrt-Come First-Served Rule' Centre for European Legal Studies, Exeter Papers in European Law No, 2004, p. 5. http://law.exeter.ac.uk/cels/documents/papepr_llm_03_04_dissertation_Eisengraeber_001.pdf 4.

The Supreme Court rulings have raised civil rights issues in relation to marriage and its judgments are applicable in all the states. The conflict of law rules are an essential factor in the cases where the private international law has an impact on the rulings depending on the courts powers. This provides a substantive and procedural rights in family proceedings and the forum is responsible for the exercise of the rights in the constitutional framework and international conventions.

TERMINATING OR RENEGOTIATING?
THE AFTERMATH OF COVID-19 ON COMMERCIAL CONTRACTS

Luca E. Perriello[*]

TABLE OF CONTENTS:

Covid-19 has been a stress test for commercial contracts, sometimes making performance impossible, sometimes making it more costly. The response fashioned by the most influential contract laws of the world has been varied. While the common law galaxy is traditionally restrictive in the face of contractual contingencies and tends to deny judicial remedies which may interfere with party autonomy, continental European legal systems have proved more sensitive to channeling the pandemic event into the civil law doctrines already consolidated in the written codes and strengthened as a result of the reforms of recent years. This paper will firstly explore the remedies available in the main contract laws to govern impossibility or hardship connected with the Covid-19 pandemic, exposing a tension between the liberal approach of the common law inspired by the pacta sunt servanda principle and the 'social' continental experiences revolving around good faith and constitutional solidarity. It will then exploit the outcomes of this comparative analysis to confront arguments for and against termination or renegotiation of commercial contracts affected by the pandemic. Finally, it will argue that contracting parties should remain free to renegotiate their contract, failing which the court should not have the power to adapt it to supervening circumstances, as the only remedy should be the termination of the agreement.

I. COVID-19 AS A STRESS-TEST FOR CONTRACT LAW

The Covid-19 pandemic has entailed a huge human cost in terms of lost lives and often irreversible health damage for those who have contracted the virus. The impact on the economy has not been less with many activities having to close their doors due to the measures adopted by public authorities aiming to contain the virus. The closures lasted for many months, sometimes interspersed with short periods of reopening, to the extent that many workers found themselves without income and the governments of the most advanced economies have had to implement various support programs seeking to provide basic means of subsistence. No sector was spared, including most supplies of non-essential goods and services such as catering, transport, tourism, construction and entertainment.

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Covid-19 has been a real stress test for contract law,[1] with repercussions not limited to this or that contract, or a particular contract category, but spreading like wildfire to most negotiations, including business networks and supply chains. Many commercial contracts have been affected not so much by the pandemic itself as by the subsequent emergency measures taken by the authorities, which have imposed lockouts of most manufacturing activities, border closures and other restrictions on freedom of movement.

Against this background, the traditional principle that covenants must be observed (*pacta sunt servanda*) has been put to the test. In its purest meaning, the principle requires the unaltered execution of contracts in spite of external circumstances making performance more onerous.[2] It responds to a vision of the contract which is, on the one hand, *hollowed*, insofar as it enhances the duty – moral even more than legal – to keep the promises given,[3] and on the other hand, *voluntary*, insofar as it rests on the idea that it is the contracting parties themselves, not the law, who may best manage possible contingencies in the drafting phase already (after all, '*contracter, c'est prévoir*').[4] If the parties have not foreseen anything in relation to these circumstances, it means that they have accepted the risk of their contingency, being aware, since the conclusion of the agreement, that no event occurring in the surrounding economic environment can release one of them from the obligations undertaken.[5] At the heart of this lies also an economic explanation, namely that the promisees would have a certain degree of hesitation in contracting if the legal system allowed promisors to easily escape their obligations due to changes of circumstances they might encounter in the life of the contract.[6] Still, the fear of such deterrence has seemed unjustified to others. As long as

[1] C. Twigg-Flesner, 'The Covid-19 Pandemic – a Stress Test for Contract Law?' 9(3) *Journal of European Consumer and Market Law*, 89 (2020).

[2] To this effect significant is Blackburn J.'s statement in *Taylor* v. *Caldwell* (1863) 3 B&S 826, 833: 'Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible'. See also Lord Simon in *British Movietonenews Ltd.* v. *London District Cinemas* [1952] A.C. 166, 185: 'The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in prices, a sudden devaluation of currency, an unexpected obstacle to execution or the like. Yet this does not of itself affect the bargain they have made'.

[3] R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996), 577.

[4] G. Ripert, *La Règle Morale dans les Obligations Civiles* (Paris: LGDJ, 2013), 151.

[5] See the ancient English case *Paradine* v. *Jane*, 82 Eng. Rep. 897 (1647). Prince Rupert, an invader, had dispossessed a tenant. The Court held that the tenant was not excused from his duty to pay rent to the landlord, on the ground that 'when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract'.

[6] P. Hay, 'Frustration and Its Solution in German Law' 10 *American Journal of Comparative Law*, 345, 346 (1961).

as the parties know that performance can only be required within certain limits, related to its possibility and not onerousness, this can only provide an incentive to negotiate.[7]

It is quite obvious that a blind application of the *pacta sunt servanda* maxim in times of Covid-19 would lead to outcomes incompatible with the duties of fairness and loyalty that should mark the execution of contracts or, in common law systems – which do not know a general duty of good faith in the interpretation and performance of contracts – to outcomes in any case incompatible with the intentions of the contracting parties, who, had they foreseen a similar development of the pandemic at the time of the drafting of their contract, would not have concluded it at all or would have concluded it under very different conditions. The response fashioned by the contract laws of the most influential legal systems has been varied, as it has been conditioned by different historical and cultural roots.[8] While the common law galaxy is traditionally restrictive in the face of contractual contingencies and tends to deny judicial remedies which may interfere with party autonomy, continental European legal systems have proved more sensitive to channeling the pandemic event into the civil law doctrines already consolidated in the written codes and strengthened as a result of the reforms of recent years (first and foremost, the recent reform of the French Civil Code). However, the remedies of the termination of the contract, its judicial adaptation, the duty to renegotiate – often theorized in an uncritical, generalized way – have not always proved adequate.[9]

This paper will firstly explore the remedies available in the main contract laws to govern impossibility or hardship connected with the Covid-19 pandemic, exposing a tension between the liberal approach of the common law inspired by the *pacta sunt servanda* principle and the 'social' continental experiences revolving around good faith and constitutional solidarity. It will then exploit the outcomes of this comparative analysis to confront arguments for and against termination or renegotiation of commercial contracts affected by the pandemic. Finally, it will argue that contracting parties should remain free to renegotiate their contract, failing which the court should not have the power to adapt it to supervening circumstances, as the only remedy should be the termination of the agreement.

[7] Cf. M. Cohen, 'The Basis of Contract' 46 *Harvard Law Review*, 553, 573 (1933).
[8] Noting that 'the pertinent rules in the various European legal systems tend to be very different from one country to the next; their history is complicated and the state of the law is confusing in many systems', see T. Rüfner, 'Art 8:108', in N. Jansen and R. Zimmermann eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), § 2.
[9] Highlighting that each remedy shall be tailored to the requirements of each individual case, see P. Perlingieri, 'Equilibrio delle posizioni contrattuali ed autonomia privata', in Id., *Il diritto dei contratti tra persona e mercato* (Napoli: Edizioni Scientifiche Italiane, 2003), 466.

II. THE *FORCE MAJEURE* DOCTRINE

It is difficult to piece together how the pandemic has impacted contracts. In some cases, performance has become impossible (e.g., airlines forced to cancel flights as a result of travel bans; people having booked hotel accommodation they could not reach because of the lockdowns; live performances being cancelled). In other, more problematic cases, performance has simply become more burdensome, such as a tenant of commercial property being required to pay rent despite the closure of his business or a supplier of raw materials having to face its unavailability on the market and the general rise in prices. In the event performance has become not excessively onerous but impossible as a result of supervening events (e.g. earthquakes, floods, fires, drought, civil unrest, terrorist attacks, etc.),[10] the legal systems concerned respond with the *force majeure* doctrine, developed by the Romans around the concept of *culpa levissima* (the promisor has been diligent, or has been guilty but to a lesser degree), and later worked on by the canonists on moral grounds (the promisor has not committed a sin).[11]

And so the doctrine was grafted onto modern civil codes, appearing in the *Code Napoléon*, though without a clear-cut definition (in truth, the code contained very few definitions, as it was meant to be pragmatic rather than dogmatic).[12] Only in 2016 did this state of uncertainty cease through the introduction of a specific notion of *force majeure* in Art. 1218 French Civil Code,[13] occurring when an event beyond the promisor's control, which could not reasonably be foreseen at the time of the conclusion of the contract and whose effects cannot be avoided by appropriate measures, prevents performance. The contract is automatically discharged and parties are released from their obligations.

If, on the other hand, the impediment is only temporary, performance is suspended unless the resulting delay justifies termination of the contract. In times of Covid-19, this could be the case where performance of a contract for the supply of goods or services resumes once businesses reopen, unless clients no longer have an interest in delayed performance.[14] The

[10] See, for example, the American case *Siegel* v. *Eaton & Prince Co.*, 46 N.E. 449 (1896), in which the doctrine of impossibility was applied to discharge a contract for the manufacture and installation of an elevator in a department store when the store was destroyed by fire.

[11] J. Gordley, 'Impossibility and Changed and Unforeseen Circumstances' 52 *American Journal of Comparative Law*, 513, 514-516 (2004).

[12] F. Geny, *La Technique législative dans la Codification civile moderne: a propos du Centenaire du Code civil* (Paris: A. Rousseau, 1904), 1005.

[13] Art. 1218(1): Il y a force majeure en matière contractuelle lorsqu'un événement échappant au contrôle du débiteur, qui ne pouvait être raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent être évités par des mesures appropriées, empêche l'exécution de son obligation par le débiteur.

[14] See C. Brunner, 'Rules on Force Majeure as Illustrated in Recent Case Law', in F. Bortolotti and D. Ufot eds, *Hardship and Force Majeure in International Commercial Contracts* (Alphen upon Rhine: Kluwer Law International, 2018), 98-99, noting that 'generally impediments to performance only exempt the obligor as long as they exist' and that a temporary impediment may become permanent 'when it appears

same distinction between permanent and temporary impossibility can be found in Art. 1256 of the Italian Civil Code.

The English frustration doctrine covers impossibility too. A frustrated contract is automatically discharged.

The factual or legal effects of the pandemic, not the pandemic itself, appear to meet the requirements of *force majeure* under the above-mentioned jurisdictions. The former include disease, death, quarantine, plant closures and disruption of supply chains; the latter, lockdowns, curfews, and generally all the restrictions adopted by public authorities.[15] However, the *force majeure* doctrine seems unsuitable to address the consequences of the pandemic, not so much because it requires a case-by-case judicial or arbitral determination,[16] but because of some inherent limits, the first, shared by many civil law systems, being that pecuniary obligations are never impossible, since impossibility must be objective, i.e. be such for any promisor, and absolute, i.e. be insuperable even with the utmost diligence.[17]

Some Italian scholars, particularly sensitive to constitutional solidarity, have advocated for the 'non-enforceability' (*inesigibilità*) of pecuniary debts in the face of the exceptionality of the Covid-19 emergency and the risks that compliance with governmental measures may entail for the survival of many businesses.[18] A contract should not be enforced where its

reasonable that the impediment will persist for the whole or such a large part of the period allowed by the contract for performance as to substantially interfere with the contractual purpose'.

[15] As far as lockdowns are concerned, see High Court of Delhi, *Halliburton Offshore Services Inc* v. *Vendanta Ltd & ANR*, OMP (I) (Comm) & IA 3697/2020, holding that 'the countrywide lockdown, which came into place on 24th March, 2020 was (…) prima facie in the nature of force majeure. Such a lockdown is unprecedented, and was incapable of having been predicted either by the respondent or by the petitioner' (§ 20).

[16] F. Gambino, 'Il rapporto obbligatorio', in R. Sacco ed., *Trattato di diritto civile* (Torino: Utet, 2015), 192.

[17] There is broad consensus to this effect in Italian case-law. See, e.g., Cassazione, 30 April 2012, no. 6594, *Giustizia civile*, I, 1873 (2013); Cassazione, 16 March 1987, no. 2691, *Foro italiano*, I, 1209 (1989). Concurring Italian scholarship includes M. Giorgianni, *L'inadempimento. Corso di diritto civile* (Milano: Giuffrè, 1975), 299; C.M. Bianca, 'Dell'inadempimento delle obbligazioni', in A. Scialoja and G. Branca eds, *Commentario del codice civile* (Bologna-Roma: Zanichelli-Foro italiano, 1979), 80; B. Inzitari, 'Delle obbligazioni pecuniarie', in F. Galgano ed., *Commentario del codice civile Scialoja-Branca* (Bologna-Roma: Zanichelli-Foro italiano, 2011), 13. Under French law, see Cour de cassation com., 16 September 2014, no. 13-20.306, https://www.legifrance.gouv.fr/juri/id/JURITEXT000029480960 (last visited 3 November 2021).

[18] Though with different nuances, cf. P. Sirena, 'L'impossibilità ed eccessiva onerosità della prestazione debitoria a causa dell'epidemia di CoViD-19' *Nuova giurisprudenza civile commentata*, 73, 75 (supplement no. 3/2020); A. De Mauro, 'Pandemia e contratto: spunti di riflessione in tema di impossibilità sopravvenuta della prestazione' *giustiziacivile.com*, 227, 231 (2020); V. Cuffaro, 'Le locazioni commerciali e gli effetti giuridici dell'epidemia' *giustiziacivile.com*, 233, 235 (2020). Occasionally, some Italian courts have followed suit: Tribunale di Bologna, 4 June 2020, *Foro italiano*, 2492 (2020); Tribunale di Rimini, 25 May 2020, *Foro italiano*, 2497 (2020).

performance conflicts with the promisor's rights which are hierarchically superior to those of the promisee (e.g. the protection of the company's productivity).[19]

This theory is not fully satisfactory, not even when the promisor is an entrepreneur and therefore economic interests of constitutional relevance are at stake. It is true that many businesses find it difficult to pay, but there are just as many, despite being affected by government measures, which continue to pay for supplies and leases, simply because they have more liquidity or have drawn up a financial plan. Exempting the struggling business from performing the contract would mean transferring the business risk to the counterparty who is to receive the supply of good or service or the rent for the premises. However, for this theory to be consistent, the business risk would have to be transferred in full, together with the associated benefits and the powers to manage it, with the consequence of allowing that counterparty to also share in the profits and the power to administer the business, but this conclusion is obviously absurd.[20] At the end of the day, if Covid-19 were to amount to supervening impossibility of fulfilling pecuniary obligations, not only entrepreneurs, but anyone could feel justified to no longer pay for supplies and leases.[21]

Solidarity cannot be a one-way street. One cannot look exclusively at the promisor's position, because it may well be the case that it is the promisee to be harmed in his constitutional rights by non-performance, that his survival is jeopardized by the asserted impossibility of performance. Without considering that the justified failure to perform the contract of the first promisor could trigger chain defaults, thereby seriously damaging the entire economy.[22]

What we are experiencing is a market crisis, not a crisis of a single contract, which, as such, requires a balancing extended to all the relevant interests at stake. Put differently, the pandemic is blind, having touched all contracting parties, both the weak and the strong.[23]

Not even a merely temporary impediment, in the form of a suspension limited to the time during which the containment measures last,[24] appears to be decisive, if it is true that this could equally damage the promisee and, once the cause of impossibility ceases, and therefore

[19] The interests that may determine the non-enforceability of the obligation on the debtor's part may relate to his life or health, his property or business: L. Mengoni, 'Responsabilità contrattuale', in C. Castronovo, A. Albanese and A. Nicolussi eds, *Obbligazioni e negozio, Scritti II* (Milano: Giuffrè, 2011), 332.

[20] A. Gentili, 'Una proposta sui contratti d'impresa al tempo del coronavirus' *giustiziacivile.com*, 6-7 (2020). See also T.V. Russo, 'L'*arma letale* della buona fede. Riflessioni a margine della "manutenzione" dei contratti in seguito alla sopravvenienza pandemica' *Rivista di diritto bancario*, 133, 146 (2021), claiming that rebalancing cannot mean transferring the business risk to the party who doesn't run that business.

[21] A. Gentili, n. 20 above, 6; G. Alpa, 'Note in margine agli effetti della pandemia sui contratti di durata' *Nuova giurisprudenza civile commentata*, 57, 60 (supplement no. 3/2020).

[22] N. Cipriani, 'L'impatto del lockdown da COVID-19 sui contratti' *Rivista di diritto bancario*, 651, 667 (2020).

[23] T.V. Russo, n. 20 above, 143.

[24] This was the solution offered by Italian emergency law: art. 3(6-*bis*) d.l. 23 February 2020 no. 6.

productive activities are resumed, the promisor could still have a hard time performing, due, for example, to a shortage of labor or credit crunch.

III. THE HARDSHIP DOCTRINE

The second situation is more complex, that is when, as a result of a change of circumstances, performance remains possible but becomes more onerous for the promisor.[25] While the lockdowns mainly called for the *force majeure* doctrine, during the following reopening of the activities and recovery of the economy, some contracting parties could experience an increase in costs or reduction in profits, as a result of constraints imposed to contain contagion that may last for a long time.[26]

In contract practice, the distinction between *force majeure* and hardship often blurs, and it is not clear whether the clauses referring thereto are mutually exclusive or, if they are compatible, in what order they should be applied[27] (which is why an accurate and separate regulation is certainly desirable).[28] The reason underlying this confusion is the influence of common law on international contracts, which tends not to differentiate *force majeure* and hardship clauses.[29]

Some scholars, probably inspired by what happens in contractual practice, have sometimes challenged the dichotomy, because after all, both clauses seek to solve the same problem: excusing the non-performing promisor.[30] Even the oldest Italian literature brought the two institutions together, considering hardship as a 'weak' form of impossibility of performance,

[25] Change of circumstances relates to the 'situation in which, due to supervening and reasonably unforeseeable events, the performance of the obligation has become excessively onerous for the debtor or the counter-performance he receives has severely diminished its value': R. Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives (Ius Commune Europaeum)* (Antwerp: Intersentia, 2011), 16.

[26] E. Navarretta, 'CoVid-19 e disfunzioni sopravvenute dei contratti. Brevi riflessioni su una crisi di sistema' *Nuova giurisprudenza civile commentata*, 87, 90 (supplement no. 3/2020).

[27] Contending that 'perhaps the most important question is the relationship between force majeure and hardship where both clauses exist in the same contract. Are the clauses mutually exclusive? If not, in which order should they be applied? At present, there are no clear answers to these difficult questions', see M. Furmston, 'Drafting of Force Majeure Clauses: Some General Guidelines', in E. McKendrick ed., *Force Majeure and Frustration of Contract* (London: Lloyd's of London Press, 2nd ed., 1995), 58. See also ICC Case no. 16369/2011, 39 *YB Comm. Arb.* 169, 202 (2014): 'commercial practice, in particular in cases where sophisticated legal advice is not available or has not been retained, does not always neatly distinguish between the fundamentally different concepts (of *force majeure* and hardship)'.

[28] F. Benatti, 'Contratto e Covid-19: possibili scenari' *Banca Borsa e Titoli di Credito*, 198, 200 (2020).

[29] K.P. Berger and D. Behn, '*Force Majeure* and Hardship in the Age of Corona: A Historical and Comparative Study' 6(4) *McGill Journal of Dispute Resolution*, 78, 88 (2019-2020).

[30] See C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford: Oxford University Press, 2nd ed., 2015), 58, arguing that 'though relief is granted in all these cases, confusion begins in the dichotomizing and subdichotomizing. I agree with critics of classical doctrine like Grant Gilmore, who sees there but a single problem'.

as if hardship were situated on a lower step in the scale of possibilities compared to impossibility.[31]

These attempts at unification do not, however, appear to be acceptable, since the nature of the contingency is different. In the event of hardship, it does not make performance impossible, but rather compromises the balance between the obligations originally agreed. But above all, different remedies may be envisaged,[32] because hardship, unlike impossibility, may not lead, as will be seen, to discharge.

There remains, however, the issue of charting the overall contours of hardship[33] and the risk of its excessive theorizing.[34] Some American commentators have ironically remarked that 'the doctrines of impossibility (and) commercial impracticability (...) comprise unclimbed peaks of contract doctrine. Clearly, all of the famous early and mid-twentieth century mountaineers, Corbin, Williston, Farnsworth and many lesser persons have made assaults on this topic but none has succeeded in conquering the very summit'.[35] While it is certain that impossibility excuses performance, it is not equally certain that mere hardship has the same effect. This is also reflected in the different terminology used to describe the concept in the various languages: *imprévision*; *Geschäftsgrundlage*; *eccessiva onerosità sopravvenuta*. Paradoxically, the English language, by now the lingua franca of international contracts, does not have an appropriate word, probably because it does not know the concept at its roots.[36]

In truth, such definitional issues are coupled with fundamental policy issues, whose solution may lead to admitting or denying the remedy.[37] Along these lines the legal systems have been classified as 'open' (Germany, the Netherlands, Italy, Spain) and 'closed' (England and

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[31] A. De Martini, 'Eccessiva onerosità della prestazione, diminuita utilità della controprestazione e principio di corrispettività, nella dinamica del contratto' *Giurisprudenza completa Cassazione civile*, III, 687 (1951); E. Betti, *Teoria generale delle obbligazioni* (Milano: Giuffrè, 1953), I, 188. See also A. Yildirim, *Equilibrium in International Commercial Contracts: With Particular Regard to Gross Disparity and Hardship provisions of the UNIDROIT Principles of International Commercial Contracts* (Nijmegen: Wolf Legal Publishers, 2011), 89, claiming that 'hardship is regarded as a lower degree of force majeure'.

[32] In the Italian scholarship see R. Scognamiglio, 'Contratti in generale', in G. Grosso and F. Santoro Passarelli eds, *Trattato di diritto civile* (Milano: Giuffrè, 3rd ed., 1972), 288; A. Pino, *L'eccessiva onerosità della prestazione* (Padova: Cedam, 1952), 84; A. Boselli, *La risoluzione del contratto per eccessiva onerosità* (Torino: Utet, 1952), 99; C.G. Terranova, 'L'eccessiva onerosità nei contratti', in P. Schlesinger ed., *Il Codice Civile. Commentario*, *Sub artt. 1467-1469* (Milano: Giuffrè, 1995), 47.

[33] See Art. 6:111 PECL Comment A: 'of course there is sometimes a very fine line between a performance which is only possible by totally unreasonable efforts, and a performance which is only very difficult even if it may drive the debtor into bankruptcy'.

[34] Arguing that the Courts' excessive theorizing of the frustration doctrine is a very unusual phenomenon for English contract law, see G. Treitel, *Frustration and Force Majeure* (London: Sweet & Maxwell, 1994), § 16-005.

[35] J. White and R. Summers, *Uniform Commercial Code* (St. Paul, MN: West Group, 2006), § 3-10.

[36] D. Tallon, 'Hardship', in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. Du Perron and M. Veldman eds, *Towards a European Civil Code* (New York: Kluwer Law International, 3rd ed., 2004), 500.

[37] Contending that 'all considerations of the extent to which an obligor may be relieved from the binding force of his obligation for reasons other than physical and objective impossibility must face some fundamental questions of theory and policy', see P. Hay, n. 6 above, 346.

France until the recent reform of contract law) depending on whether or not they grant the adjustment of contracts in the event of unforeseen circumstances.[38]

IV. *WEGFALL DER GESCHÄFTSGRUNDLAGE* UNDER THE GERMAN CIVIL CODE

'Open' systems include legal systems that consider it unfair, unjust, contrary to good faith, on the one hand, to force the promisor to perform a contract that has become, as a result of an unforeseen and unforeseeable circumstance, of disproportionate economic value compared to what was originally agreed, and, on the other hand, to allow the promisee to take advantage of the hurdles of the other party. These are, for the most part, systems with written constitutions which have preceptive and not merely programmatic value.[39] The constitutional instances of prevention of social injustice and inclusion in the market demand to construe contract law as having primarily redistributive purposes.[40] The economic benchmark is the social market economy (*soziale Marktwirtschaft*), prevailing in Germany since the end of the World War II, which is particularly considerate of the phenomena of social distress and marginality, and determined to counter the abuse of economic power in negotiations. The socio-economic upheavals that crossed Germany during the two world wars and the sufferings experienced by the Germans during the Nazi regime explain the social orientation of the German system and the divergence existing with common law jurisdictions in governing supervening circumstances.[41]

Historically, as early as the Middle Ages, the theorization of the so-called *rebus sic stantibus* clause was the first, dangerous inroad into *pacta sunt servanda*, thus slowly eroding the dogma of the absolute binding nature of contractual agreements. Two Italian jurists, Baldo degli Ubaldi and Bartolo da Sassoferrato, articulated that any contract is binding provided that the circumstances existing at the time of its conclusion remain the same (*rebus sic se habentibus*).[42]

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[38] E. Hondius and H.C. Grigoleit, 'Introduction: An Approach to the Issues and Doctrines Relating to Unexpected Circumstances', in E. Hondius and H.C. Grigoleit eds, *Unexpected Circumstances in European Contract Law* (Cambridge: Cambridge University Press, 2011), 3, 11.

[39] A. Karampatzos, 'Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law' 2 *European Review of Private Law*, 105, 120 (2005).

[40] Arguing that the redistributive capacity of contract law shall not aim at efficiency, but at inclusion within the market and prevention of social injustice: E. Navarretta, n. 26 above, 93.

[41] A. Karampatzos, n. 39 above, 121.

[42] A. Thier, 'Legal History', in E. Hondius and H.C. Grigoleit eds, *Unexpected Circumstances in European Contract Law* n. 38 above, 18. Contending that 'one of the most interesting, and potentially most dangerous, inroads into *pacta sunt servanda* has, however, been the so-called *clausula rebus sic stantibus* (…). It is obvious that such a proviso, if broadly interpreted, can be used to erode the binding nature of contractual promises very substantially; not surprisingly, therefore, the clausula doctrine fell into oblivion in the late 18th and the 19th centuries: the heyday of "classical" contractual doctrine when freedom of contract, economic liberalism and certainty of law reigned supreme', see R. Zimmermann, n. 3 above, 579.

Fearing that the *rebus sic stantibus* clause could undermine party autonomy, legal certainty and the tenets of economic liberalism,[43] the drafters of the German Civil Code (BGB) decided not to include it in the new code. It was not until a century later, in 2001, that § 313 BGB was amended to cover cases where there is a significant change of the circumstances which became the basis of a contract. In such cases, parties may ask the court for adaptation, proving that they would not have concluded the contract or would have concluded it under different conditions had they anticipated the change of circumstances. Adaptation is not granted if it appears that the preservation of the contract, even if adjusted, is unacceptable to one of the parties, taking into account all the circumstances of the case, in particular the contractual or statutory distribution of risk. When it is not possible to adapt the contract, the party may exercise the right of withdrawal.

The rule evidently draws on the doctrine of the disturbance of foundation of transaction (*Wegfall der Geschäftsgrundlage*), elaborated by Oertmann in 1921[44] on the basis of Windscheid's theory of presupposition,[45] and based on the idea that there are certain circumstances, although tacit or implicit, which the parties consider fundamental in their bargaining and of which they presuppose the unaltered existence for the entire duration of their agreement, so that their distortion would justify termination or adaptation of the contract. The theory of presupposition has also been transplanted into Italy, where, albeit with some criticism, it operates autonomously from hardship (*eccessiva onerosità sopravvenuta*).[46]

While subjecting the contract to an implicit condition, the doctrines of the disturbance of foundation and presupposition are grounded on a subjective/psychological foundation, which has rightly attracted criticism, as it purports to terminate or modify the contract on the basis of a fictitious and volatile element, i.e. the common assumption of the contracting parties, who may never have thought about the change of circumstances or even less reached an agreement on how to govern it.[47]

And yet, at the basis of the theory lies a key objective criterion too, the general principle of good faith laid down in § 242 of the BGB, which allows the court to review or subvert the

[43] H. Kötz and S. Patti, *Diritto europeo dei contratti* (Milano: Giuffrè, 2nd ed., 2017), 457.
[44] P. Oertmann, *Die Geschäftsgrundlage: Ein neuer Rechtsbegriff* (Leipzig: Deichert, 1921).
[45] B. Windscheid, *Die Lehre des römischen Rechts von der Voraussetzung* (Düsseldorf: Buddeus, 1850); Id., 'Die Voraussetzung' 78 *Archiv für die civilistische Praxis*, 161 (1892).
[46] C.M. Bianca, *Diritto civile, III, Il contratto* (Milano: Giuffrè, 2000), 467; C. Scognamiglio, 'Presupposizione e comune intenzione delle parti' *Rivista del diritto commerciale*, II, 130 (1985); G.B. Ferri, 'Motivi, presupposizione e l'idea di meritevolezza' *Europa e diritto privato*, 371 (2009); A. Cataudella, 'Eccessiva onerosità sopravvenuta e presupposizione' *Rivista trimestrale di diritto processuale civile*, 789 (2016). Italian courts tend to define presupposition as a kind of 'implied condition': Cassazione, 13 October 2016, no. 20620, in *www.dejure.it*
[47] Cf. L. Trakman, 'Frustrated Contracts and Legal Fictions' 46 *The Modern Law Review*, 39 (1983).

contract for the sake of justice.[48] Good faith requires the party not to enrich himself unduly if an unforeseen change of circumstances makes performance too burdensome and to cooperate with the other party. Good faith, which has a moral component, has thus made it possible to transplant into the German codified system the doctrines, having an equally moralistic nature, developed by the medieval jurists around the change of circumstances. Moreover, it was Windscheid himself who predicted that the hardship doctrine, thrown out by the door, would re-enter through the window, that is, not through the codification of the *rebus sic stantibus* clause but through the duty of good faith.[49]

Clinging to good faith, German courts applied the doctrine of the disturbance of foundation well before the reform of the BGB, thereby showing that the Parliament has done nothing more than give statutory cover to a practice already established in case-law. Nevertheless, the extraordinary nature of its applications (the 1920s hyperinflation, the end of the Third Reich, the 1948 siege of Berlin, the German reunification, the Iranian revolution, the Gulf War and the fall of the Berlin Wall)[50] strengthens the idea that the doctrine has been used not to make an inroad into the *pacta sunt servanda* principle but as an exceptional and subsidiary means of restoring the equity of the contract where other remedies are not available.[51] Not intending to change the way the doctrine has been applied so far in case-law, the new § 313 BGB should be understood as a sort of restatement[52] and has remained almost on paper, probably because of its stringent requirements or the hostility of the operators, anchored to the idea of its exceptional character.[53]

V. *IMPRÉVISION* UNDER THE NEW ART. 1195 OF THE FRENCH CIVIL CODE

France has now joined the ranks of open systems. In truth, this is a recent repositioning, since the *Cour de Cassation* has traditionally been hostile to allowing discharge or adjustment

[48] Arguing that the doctrine of good faith 'explicitly authorize(s) courts in the name of fairness to revise contractual arrangements or to overturn them altogether', see C. Fried, n. 30 above, 74. See also W.F. Ebke and B. M. Steinhauer, 'The Doctrine of Good Faith in German Contract Law', in J. Beatson and D. Friedman eds, *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1995), 171; B. Markesinis, W. Lorenz and G. Dannemann, *The German Law of Obligations, I, The Law of Contracts and Restitution – A Comparative Introduction* (Oxford: Clarendon Press, Oxford 1997), 513, claiming that 'good faith permeates almost the entire (German) law of contract and (…) goes even beyond that'.
[49] B. Windscheid, 'Die Voraussetzung' n. 45 above, 197.
[50] For further references on German case-law see M. Kovac and C. Poncibò, 'Towards a Theory of Imprévision in the EU?' 14(4) *European Review of Contract Law*, 344, 369 (2018); H. Rösler, 'Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law' 3 *European Review of Private Law*, 483, 487 (2007).
[51] K.P. Berger and D. Behn, n. 29 above, 124.
[52] A. Karampatzos, n. 39 above, 132-133.
[53] E. Ferrante, 'Pandemia e contratto. Alcune proposte per il contenimento dell'incertezza' *Actualidad Jurídica Iberoamericana*, 300, 311 (2020).

of contracts which have become excessively onerous.[54] In the leading *Canal de Craponne* case, dated 1876, the Court held that, however equitable the judicial decision may seem, in no case is the judge entitled to take into consideration time or other circumstances to adjust the contract and substitute new clauses for those which have been freely accepted by the parties.[55] On this basis, the Court refused to grant the revision of a fee for the maintenance of a canal, determined back in 1567. Art. 1134 French Civil Code establishes the force of law of the contract between the parties, which no judge could breach.[56] Moreover, unlike in Germany, the use of good faith in France as a corrective tool for contractual injustice has always been lukewarm (despite its codification in Art. 1104 French Civil Code), as confirmed by the most recent case-law of the Supreme Court.[57] This strict approach has been somehow mitigated by the *Conseil d'État*, but only when it comes to *contrats administratifs* between private parties and the public authority, based on the relevance of the public interest in the continuation of essential services.[58]

Already in the years preceding the 2016 reform of the Code Civil, a robust scholarly movement had pointed to the substantial decline of the Napoleonic code on a global level, due to the disconnection between the letter of the code and the intense interpretative activity undertaken by the courts, which has made French contract law inefficient, unpredictable and hostile to trade, thereby increasing the costs of commercial transactions. English common law had long since replaced French contract law as the preferred applicable law in international negotiations, as it was perceived as being more business-friendly and oriented at pragmatism and certainty of contract relations.[59] This led to the reformulation of Art. 1195 French Civil Code in an attempt to codify the hardship doctrine (*imprévision* in French), late in coming compared to other civil law jurisdictions.[60] The article now gives the party required

[54] I. de Lamberterie, 'The Effect of Changes in Circumstances – French Report', in D. Harris and D. Tallon eds, *Contract Law Today, Anglo-French Comparisons* (Oxford: Oxford University Press, 1989), 220.
[55] Cour de Cassation, 6 March 1876, *Canal de Craponne*, [1876] D 1876 I 193.
[56] Contending that 'la règle que les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites est générale et absolue', see Cour de Cassation, 15 November 1933, [1934] Gaz Pal I.
[57] See Cour de Cassation, 19 June 2019, no. 17-29.000, https://www.legifrance.gouv.fr/juri/id/JURITEXT000038734034 (last visited 3 November 2021), where the court held that a party is entitled to refuse to renegotiate the contract, even where such refusal could be detrimental to the other party.
[58] Conseil d'État, 30 March 1916, *Compagnie générale d'éclairage de Bordeaux*, [1916] Rec Lebon 125. The administrative court ordered the company to keep supplying gas and the State to pay an *indemnité d'imprévision* to cover the increased cost suffered by the company.
[59] Cf. S. van Loock, 'The Reform of the French Law of Obligations: How Long Will the Belgians Remain Napoleon's Most Loyal Subjects?', in S. Stijns and A. Jansen eds, *The French Contract Law Reform: A Source of Inspiration?* (Antwerp: Intersentia, 2016), 7; B. Fauvarque-Cosson, 'The French Contract Law Reform and the Political Process' 13 *European Review of Contract Law*, 337 (2017); S. Rowan, 'The New French Law of Contract' 44 *International & Comparative Law Quarterly*, 6 (2017).
[60] The first country to introduce hardship in its civil code was Poland in 1933, followed by other civil law jurisdictions, such as Italy and Greece, during/after WWII: C. Pédamon and R. Vassileva, 'Contractual

to perform a contract which has become excessively onerous due to a change of circumstances unforeseeable at the time of the conclusion of the contract, without having accepted the risk of such a change, the right to ask the other party for a renegotiation of the contract. In the event of refusal or failure to renegotiate, the parties may discharge the contract or ask the court for its adaptation. Absent an agreement, the court may, at the request of a party, adjust the contract or terminate it. The new Art. 1195 thus outlines a multi-stage process, beginning with the voluntary renegotiation of the parties and ending with the possible discharge or judicial adaptation.[61]

On closer inspection, the *imprévision* doctrine is based on different requirements compared to § 313 BGB, in that it does not require a disturbance to the foundation of contract but that the performance has become *excessivement onéreuse*, to be understood not as a mere increase in the cost of performance, which must always be reasonably expected in long-term contracts,[62] but as an extreme, extraordinary and unforeseeable economic imbalance.[63] From this point of view, the Italian Civil Code is more accurate, as it allows for the termination of long-term contracts in which performance of one of the parties has become excessively onerous, requiring that the event, in addition to being unforeseeable, be 'extraordinary' (Art. 1467 Italian Civil Code). Neither the French nor the Italian Civil Code quantify the relevant threshold of hardship, which, if on the one hand, seems to hamper legal certainty, on the other, suits more a judgment tailored to the circumstances of each particular case. Accordingly, the threshold is higher where the contract is highly speculative or concluded in a very volatile market, lower where there is immediate danger of the promisor's insolvency.[64] In international trade, unforeseeable and extraordinary events amounting to a change of circumstances may include a substantial devaluation of the currency, a dramatic drop in the price of a commodity, a regional or global financial crisis, civil riots, natural disasters, embargoes or other economic sanctions.[65] The contingencies arising from Covid-19 seem to fall fully within this casuistry, since the factual and legal effects of the pandemic cannot be

Performance in COVID-19 Times: Does Anglo-French Legal History Repeat Itself?' 1 *European Review of Private Law*, 3, 11 fn. 21 (2021).

[61] 'Processus fait de plusieurs étapes': B. Fages, *Droit des obligations* (Paris: LGDJ, 2016), 295.

[62] Most courts and arbitrators consider price fluctuations foreseeable. See the case-law cited by I. Schwenzer and E. Muñoz, 'Duty to Re-negotiate and Contract Adaptation in Case of Hardship' 20(4) *Internationales Handelsrecht*, 150, 153 fn. 49 (2020).

[63] P. Accaoui Lorfing, 'L'article 1195 du Code Civil français ou la révision pour imprévision en droit privé français à la lumière du droit comparé' *International Business Law Journal*, 449, 452 (2018).

[64] I. Schwenzer and E. Muñoz, n. 62 above, 153. See also E. Mckendrick, 'Article 6.2.2', in S. Vogenauer ed., *Commentary on the UNDROIT Principles of International Commercial Contracts (PICC)* (Oxford: Oxford University Press, 2nd ed., 2015), 816, § 8.

[65] K.P. Berger and D. Behn, n. 29 above, 82-84.

said to present a risk foreseen and accepted by the contracting parties at the time of the conclusion of the contract.[66] This is certainly not the first epidemic to hit the earth, so that it is not an entirely unpredictable event. For many years, experts have warned against the risk of transmission of pathogens from animals to humans, due to the increase in global population and the occupation of natural areas.[67] Yet, there is no doubt that the consequences of this pandemic, which are devastating from a human, social and economic point of view, cannot be said to be predictable.[68] Other epidemics, such as SARS (2002-2004) or MERS (2012) have had higher mortality rates, but have not spread as rapidly and widely as Covid-19, nor have they required significant containment measures.

However, an issue may arise in determining the exact date the pandemic can be considered to have begun, and therefore no longer unpredictable, which may be alternatively set at the official confirmations of public authorities, the subsequent lockdowns, or earlier moments such as the identification of the virus in China or the first communication of the World Health Organization (WHO).[69] Thus, a contract entered into when the existence of the virus in China was already known may not meet the requirement of unpredictability.

The idea behind this requirement is that, had the parties anticipated the adverse event, they would have negotiated a specific contractual clause; failing that, it is as if the parties had implicitly allocated the risk of its occurrence.[70] However, predictability is a slippery yardstick because it depends on: the duration of the contract (the longer it is, the more predictable the event will be at the time of its conclusion);[71] its possible 'relational' nature (i.e., where it draws

[66] J. Heinich, 'L'incidence de l'épidémie de coronavirus sur les contrats d'affaires: de la force majeure à l'imprévision' *Recueil Dalloz*, 611, 614 (2020). However, before Covid-19, French courts did not consider health emergencies (e.g. the dengue virus, the H1N1 flu epidemic, the chikungunya virus and the avian flu) to be force majeure, on the ground that they were foreseeable or avoidable: see the decisions cited by C. Pédamon and R. Vassileva, n. 60 above, 23.

[67] See the expert reports cited by K.P. Berger and D. Behn, n. 29 above, 110.

[68] C. Twigg-Flesner, 'A Comparative Perspective on Commercial Contracts and the Impact of COVID-19: Change of Circumstances, Force Majeure, or What?', in K. Pistor, *Law in the Time of Covid-19* (New York: Columbia Law School, 2020), 162-163. Supervening circumstances need to be considered not only for the nature of the event but also for the magnitude of the consequences. See P. Joskow, 'Commercial Impossibility, the Uranium Market and the Westinghouse Case' *Journal of Legal Studies*, 119, 160-161 (1977), arguing that 'if we had two similar occurrences, let's say embargoes, the seller would have to perform if the price rise were small, but would not be required to perform if the resulting cost increase were very large. Such asymmetric treatment of differing consequences from similar events only appears to make sense if we expand our notion of possible contingencies to include elements identified by both event and consequence'. A similar reasoning was articulated by Germany's Reichsgericht when it had to address the impact of the First World War on a lease signed in 1912 for eight years. The Court held that while the war was a predictable event, its dramatic consequences were not: Reichsgericht, 21 September 1920, RGZ 100, 129.

[69] C. Pédamon and R. Vassileva, n. 60 above, 24; F. Benatti, n. 28 above, 204.

[70] See *Lloyd* v. *Murphy*, 25 Cal. 2d 48, 54 (1944): 'If (the event) was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the interference that the risk was assumed'.

[71] M.A. Eisenberg, 'Impossibility, Impracticability, and Frustration' 1(1) *Journal of Legal Analysis*, 207, 216 (2009): 'for example, if a party rents a theater for twenty years, it is reasonably foreseeable that the

sap from the commercial context where it is placed, which may constantly change);[72] its placement in the international market (where price fluctuations are usually higher than those occurring in domestic markets, and therefore more predictable);[73] the subjective qualities of the contracting parties. If they are unsophisticated or involved in transactions of small value and on a small scale, they might consider the non-occurrence of a given circumstance as a certain fact, although the probability of its occurrence is objectively high. The opposite is true for highly sophisticated or large-scale parties.[74] Furthermore, in the event of markets for relatively standardized goods, where the occurrence of certain events appears reasonably predictable to the extent that suppliers are able to insure themselves and build the premium into the sale price, it would be difficult to afford a supplier, who passed the cost of insurance onto the consumer, a remedy based on the subjective unpredictability of the circumstance which has occurred.[75]

These remarks show that discharging the burden of proof in a judgment to obtain adaptation or termination of a commercial contract may be difficult, and this would make the new Art. 1195 French Civil Code unattractive for the most substantial business transactions, which, in any case, usually contain force majeure or hardship clauses.[76]

theater may be destroyed during the contract time by some catastrophic event. In contrast, if the same party rents the same theater for the next evening, destruction of the theater by a catastrophic event during the contract time may not be reasonably foreseeable'. See also C. Hardy, 'Risk and Risk-Bearing', in A. Kronman and R. Posner eds, *The Economics of Contract Law* (Boston-Toronto: Little, Brown and Company, 1979), 26-27; P. Trimarchi, 'Commercial Impracticability in Contract Law: An Economic Analysis' 11 *International Review of Law & Economics*, 63, 71 (1991); D. Campbell and D. Harris, 'Flexibility in Long-Term Contractual Relationships: The Role of Co-Operation' 20 *Journal of Law and Society*, 166, 169 (1993).

[72] K.P. Berger and D. Behn, n. 29 above, 87. For a definition of relational contracts, see the High Court of England and Wales in *Yam Seng PTE Ltd* v. *International Trade Corporation Ltd*, [2013] EWHC 111 (QB) § 142: 'such 'relational' contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty, which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements'.

[73] I. Schwenzer and E. Muñoz, n. 62 above, 154.

[74] M.A. Eisenberg, n. 71 above, 216-217. See also Id. and L. Lon Fuller, *Basic Contract Law* (St. Paul, Minn.: Thomson West, 2005), 769, arguing that: 'to one who has contracted to carry goods by truck over a road traversing a mountain pass, a landslide filling the pass may be a very disruptive and unexpected event. But one who contracts to build a road through the mountains might view the same event, occurring during the course of construction, as a temporary set-back and a challenge to her resourcefulness'.

[75] M.A. Eisenberg, n. 71 above, 217.

[76] C. Pédamon and R. Vassileva, n. 60 above, 29.

VI. RISK ALLOCATION CRITERIA IN COMMON LAW JURISDICTIONS

On the opposite side of the spectrum lie the more liberal and capitalistic Anglo-American systems, which show a lower sensitivity to the social instances that would justify the excuse of the promisor from excessively onerous performance. A general hardship doctrine has been met with hostility by those claiming that contracting parties, at the moment of stipulation, allocate, explicitly or tacitly, all possible risks that may condition performance, including those connected to unforeseen circumstances. From this point of view, a judicial reallocation of risks through the hardship doctrine is an interference with freedom of contract, that cannot be justified on the grounds of economic efficiency.[77]

Explicit risk allocation occurs through force majeure or hardship clauses, which may prevent the discharge remedy from being activated. As Williston wrote, 'a man may contract to do what is impossible, as well as what is difficult, and be liable for failure to perform'.[78] These clauses are widespread in international trade and Anglo-American contracts which, not by chance, are much more detailed and comprehensive than continental ones.

However, these clauses are naturally incomplete, since they certainly cannot foresee any contingency that might make performance impossible or burdensome in the future.[79] There has been discussion on whether the contractual list of adverse events should be considered exhaustive or susceptible to extension to circumstances with similar characteristics.[80] In addition, the clause frustrating the contract when performance has become impossible may not cover the different situation in which the party can only perform the contract with delay or incurring greater costs than those originally envisaged.[81] In some cases, the ambiguity is even intentional,[82] and the contracting parties postpone the necessary clarification to

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[77] G. Triantis, 'Contractual Allocation of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability' *University of Toronto Law Journal*, 450, 480 (1992). But see M.A. Eisenberg, n. 71 above, 247, contending that Triantis' theory is contradicted by 'the existence of systematic cognitive problems affecting decision-making, such as bounded rationality, which limits the future scenarios that actors can be realistically expected to envision; overoptimism; and defects in capability, including systematic underweighting of future benefits and costs as compared to present benefits and costs and systematic underestimation of low-probability risks'.

[78] S. Williston, *A Treatise on the Law of Contracts* (New York: Baker, Voorhis & Co., 1938), VI, § 1931. See also the US Supreme Court in *Chicago, Mil. & St. P. Ry.* v. *Hoyt*, 149 U.S. 1, 14-15 (1893), holding that 'there can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible'.

[79] R. Hillman, 'Court Adjustment of Long-Term Contracts: An Analysis under Modern Contract Law' *Duke Law Journal*, 1, 4 and 15 (1987).

[80] Cf. ICC Case no. 3093/3100 of 1979, § 366, in S. Jarvin & Y. Derains, *Collection of ICC Arbitral Awards 1974-1985* (Deventer: Kluwer Law and Taxation Publishers, 1990); ICC Case no. 11265 of 2009, §128, *ICC Bulletin* 20 no. 2 (2009), Final Award; ICC Case no. 16369 of 2011, § 201, 39 *Yearbook Commercial Arbitration*, 169 (2014).

[81] C. Twigg-Flesner, n. 1 above, 90.

[82] M. Polkinghorne and C. Rosenberg, 'Expecting the Unexpected: The Force Majeure Clause' 16 *Business Law International*, 49, 57(2015).

litigation. This means that the risk of litigation over the exact construction of these clauses is not neutralized, and the courts could frustrate the clauses by reading them strictly.

With some peace of mind, clauses covering 'diseases', 'plagues', 'epidemics' or 'health emergencies' could extend to Covid-19,[83] although their wording is not always so accurate. Often the parties do not draft them with due attention to the particularities of their relationship because they use standard models (such as the ICC force majeure or hardship clauses) or prioritize other elements such as price and securities.[84] In any case, careful negotiation of clauses increases transaction costs and not all parties can afford sound legal advice.[85]

It is therefore important to identify risk allocation criteria that can operate when the parties have not agreed on force majeure or hardship clauses or these are incomplete. American courts have sometimes inferred an implicit allocation from the circumstance that the party, who normally includes in its contracts a clause of exemption from liability in the event of a given contingency, enters into a contract without relying on this practice.[86] Law & economics scholarship claims that, absent explicit risk assignment clauses, performance shall be excused when the promisee is the 'superior risk bearer', i.e. the party who can bear the risk of the change of circumstances in the most efficient way either because he can prevent its occurrence at a lower cost than that inherent in the adverse event or because he is able to insure himself (by purchasing a policy on the market) or self-insure (by increasing the sale price). On the other hand, if the promisor is the superior risk bearer, non-performance amounts to breach of contract.[87] The ideal discharge situation is that in which the promisor could not have reasonably taken measures to prevent the occurrence of the event and the promisee could have insured at a lower cost than the promisor because he was in a better position to assess the probability of its occurrence and the extent of the loss.[88]

This way of reasoning has also had applications in the courts. In *Transatlantic Financing Corp.* v. *United States*,[89] concerning a dispute that arose around the discharge of a contract for the transport of wheat from the United States to Iran on the occasion of the closure of the Suez Canal which would have forced the circumnavigation of Africa, Judge Wright observed that

[83] K.P. Berger and D. Behn, n. 29 above, 114.
[84] F. Benatti, n. 28 above, 200.
[85] E. McKendrick, 'Force Majeure and Frustration – Their Relationship and a Comparative Assessment', in E. McKendrick ed., *Force Majeure and Frustration of Contract* n. 27 above, 52.
[86] *Barbarossa & Sons, Inc.* v. *Iten Chevrolet, Inc.*, 265 N.W.2d 655 (Minn. 1978).
[87] R.A. Posner and A.M. Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' 6(1) *Journal of Legal Studies*, 83, 90 (1977).
[88] ibid 92.
[89] 363 F.2d 312 (D.C. Cir. 1966).

'Transatlantic was no less able than the United States to purchase insurance to cover the contingency's occurrence. If anything, it is more reasonable to expect owner-operators of vessels to insure against the hazards of war. They are in the best position to calculate the cost of performance by alternative routes (and therefore to estimate the amount of insurance required), and are undoubtedly sensitive to international troubles which uniquely affect the demand for and cost of their services'.

In truth, it is questionable that the carrier (Transatlantic) was the superior risk bearer since it was able to better estimate the probability of the risk and the entity of the loss. Actually, the shipper (US Government) appeared to be the party who could better appreciate the risks of a war in the Middle East and the consequences of a delay in transportation, and could certainly have better self-assured.[90]

More generally, the economic analysis of law shows some shortcomings in the field of impossibility and hardship, because judges do not always have the economic competence to establish who the superior risk bearer is,[91] and it is not always easy to determine the party who could best foresee the risk, prevent it or insure against it.[92] The Covid-19 pandemic does not appear to be the kind of contingency that could have been foreseen by the parties or covered by insurance. In fact, it is well known that an efficient insurance of risks requires some statistical regularity and, therefore, the possibility of calculating them with a reasonable degree of accuracy, which does not seem possible for extraordinary events affecting not this or that contract but the entire market.[93]

On closer inspection, an efficient analysis of the doctrines of impossibility and hardship ends up reiterating the *pacta sunt servanda* principle, with the only difference that, instead of holding the promisor always liable, they require a complex factual examination of the superior risk bearer, who most often turns out to be the promisor.[94]

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[90] M.A. Eisenberg, n. 71 above, 252.

[91] 'Judges and lawyers are not economists and would certainly feel puzzled facing the numerous assumptions and calculations that an "economic" analysis of cases calls for; the uncertainty caused thereby would be much greater than the problem purported to be solved': M. Rapsomanikis, 'Frustration of Contract in International Trade Law and Comparative Law' 18 *Duquesne Law Review*, 551, 570 (1979-1980). See also C. Bruce, 'An Economic Analysis of the Impossibility Doctrine' 11 *Journal of Legal Studies*, 311, 321 (1982), claiming that 'in many cases (...) the court will be unable to determine which of the parties is the superior risk bearer, either because the parties' insurance costs are very similar or because the court lacks sufficient information'.

[92] J. Gordley, n. 11 above, 524; M.A. Eisenberg, n. 71 above, 251. For critical remarks see also T.V. Russo, n. 20 above, 147, arguing that the economic analysis of law conflicts with the principle of solidarity enshrined in the Italian legal system, which may justify a judicial adaptation of the contract in the event of hardship.

[93] P. Trimarchi, n. 71 above, 66-67.

[94] M. Cenini, B. Luppi and F. Parisi, *Law and Economics: The Comparative Law and Economics of Frustration in Contracts*, in E. Hondius and H.C. Grigoleit eds, *Unexpected Circumstances in European Contract Law* n. 38 above, 36.

Economic imbalances may not even be adjusted through a corrective use of good faith, which has always struggled to establish as a fully-fledged doctrine in the common law world. US scholarship appealing to fairness to justify discharge of contracts that have become excessively burdensome has remained isolated.[95] The decision of the English High Court in *Yam Seng Pte Ltd* v. *International Trade Corporation Ltd*, which supported an implied duty of good faith in relational contracts, has not been universally endorsed.[96] However, in the face of the emergency triggered by the pandemic, the Cabinet Office has issued a note inviting contractors to be 'reasonable and proportionate in responding to performance issues and enforcing contracts, acting in a spirit of co-operation and aiming to achieve practical, just and equitable outcomes having regard to the impact on the other party (or parties)'.[97] The British Institute of International and Comparative Law echoed this view, wondering whether there is room for a 'creative, graded, but nevertheless rigorous approach without prejudicing the underlying need for legal certainty'.[98]

VII. FRUSTRATION IN ENGLISH CONTRACT LAW

Yet, the hardship doctrine is foreign to the English common law. A contract can only be discharged if, after its conclusion, its substance has become impossible (*frustration of contract*) or the commercial purpose has been destroyed (*frustration of purpose*).[99] Any contract is supposed to be based on the implied condition of the persistence of the contractual thing or purpose throughout its duration; if these fail and the promisor is not at fault, performance may be excused. Contracts should, therefore, be construed not only on the basis of the terms expressly agreed on by the parties, but also on the basis of their tacit assumptions in relation to the non-change of the circumstances existing at the time of the formation of the

[95] See, for example, R.L. Birmingham, 'A Second Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligations in the Light of Economic Theory' 20 *Hastings Law Journal* 1393, 1396 (1969), claiming that 'fairness is arguably the foundation of all relief'.
[96] [2013] EWHC 111 (QB).
[97] Cabinet Office, 'Guidance on Responsible Contractual Behaviour in the Performance and Enforcement of Contracts Impacted by the COVID-19 Emergency', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final___7_May_.pdf (last visited 3 November 2021).
[98] British Institute of International and Comparative Law, 'Breathing Space – A Concept Note on the Effect of the Pandemic on Commercial Contracts', https://www.biicl.org/documents/10306_breathing_space_concept_note.pdf (last visited 3 November 2021).
[99] A. Burrows, *A Casebook on Contract* (Oxford: Hart Publishing, 2016), 731; J. Beatson, *Anson's Law of Contract* (Oxford: Oxford University Press, 2002), 236.

agreement, thereby making the contract a living organism, capable of absorbing all the legitimate expectations of the contracting parties.

The leading English case is *Taylor* v. *Cadwell*, where a music hall that had been rented for a concert burnt down.[100] Blackburn J wrote that 'in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance'. This is a typical case of impossibility[101] but sometimes the frustration doctrine has been used to discharge contracts which have become useless. Think of the famous coronation cases, such as *Krell* v. *Henry*, where the defendant had rented a room with a view over Pall Mall to attend the coronation process of Edward VII, which was postponed due to an illness.[102] Henry was released from his obligation to pay the rent, as the purpose of the lease had been frustrated. Frustration of purpose is seldom applied, as it requires the party be aware of the purpose that the other party is pursuing with the contract, and assumed the risk associated with changing circumstances.[103]

The doctrine of tacit assumptions has also taken root in American contract law. Parties necessarily remain silent on an indefinite number of circumstances, which appear too basic to merit explicit attention.[104] The uncertainty of future events means that the idea that a contract can cover any contingency affecting performance is clearly 'sheer fantasy'.[105] In fact, Section 2-615 of the Uniform Commercial Code (UCC) allows for the discharge of the contract if 'performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made'. In the times we are living, parties may have shared the assumption that a pandemic of unprecedented social and economic costs would never occur.

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[100] (1863) 3 B. & S. 826 (QB).

[101] But see A. Puelinckx, 'Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances: A Comparative Study in English, French, German and Japanese Law' 3(2) *Journal of International Arbitration*, 47 (1986), arguing that 'frustration is not the equivalent of *force majeure*'.

[102] [1902] 2 KB 740. A similar case is *Herne Bay Steamboat* v. *Hutton*, [1903] 2 KB 683, concerning the hire of a vessel to see the naval review accompanying the coronation and take a cruise around the fleet, which was not frustrated because the fleet could still be viewed. For a commentary on the coronation cases, see R. Mcelroy and G. Williams, 'The Coronation Cases–I' 4 *Modern Law Review*, 241 (1941), and, 'The Coronation Cases–II' 5 *Modern Law Review*, 1 (1941).

[103] H. Kötz and S. Patti, n. 43 above, 464; E. McKendrick, 'Discharge by Frustration', in H. Beale ed., *Chitty on Contracts* (London: Sweet and Maxwell, 33rd ed., 2018), I, § 23-007.

[104] 'Tacit assumptions are not made explicit, even where they are the basis of a contract, precisely because they are taken for granted. They are so deeply embedded in the minds of the parties that it simply doesn't occur to the parties to make these assumptions explicit': M. Eisenberg, *Foundational Principles of Contract Law* (Oxford: Oxford University Press, 2018), 628.

[105] R. Barnett, *Contracts: Cases and Doctrine* (New York: Aspen, 2003), 1027.

On the contrary, performance cannot be excused when a change of circumstances – and here we see a notable difference with continental legal systems – has made performance simply more costly.[106] Excessive onerousness does not in itself frustrate the contract, unless there is also a fundamental or radical change in the originally agreed obligations, so that the promisor would have to perform a radically different contract, if not actually impossible. And so, in *Davis Contractors* it was held that the fact that there had been 'an unexpected turn of events, which rendered the contract more onerous than had been contemplated, (is) not a ground for relieving the contractors of the obligation which they had undertaken'.[107] But already many years earlier, in the famous *Suez Canal* cases, the House of Lords had ruled that the closure of the canal, although it made the transport of goods much more expensive, did not frustrate the contracts, since the alternative route around the Cape of Good Hope was always available.[108] Only where it was demonstrated that the parties had, even tacitly, assumed that navigation through the Suez Canal was the only way to perform the contract, and not one of many, then performance may be excused.

Having construed the frustration doctrine in such restrictive terms, it is likely that it can apply only to contracts whose performance has been made impossible by compliance with the containment measures in the acute phase of the contagion, not to those contracts which have become more onerous in the post-lockdown period.[109] In fact, in the recent case *Salam Air SAOC* v. *Latam Airlines Group SA*,[110] the High Court of England and Wales refused to discharge a series of aircraft leases on the ground that the risks that the airline might be unable to undertake passenger flights for some significant time, or that there might be a dramatic and long-lasting fall in the demand for air travel, were inherent in the commercial operation of the aircrafts and assumed by the airline under the leases.

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[106] C. Twigg-Flesner, n. 1 above, 90. See also *Edwinton Commercial Corp* v. *Tsavliris Russ (Worldwide Salvage and Towage) Ltd*, [2007] EWCA Civ 547, holding that 'mere incidence of expense or delay or onerousness is not sufficient' (§ 111); and, more recently, *Canary Wharf (BP4) T1 Ltd* v. *European Medicines Agency*, [2019] EWHC 335 (Ch).

[107] [1956] AC 696 at 697. For a similar reasoning by a US court, see *Eastern Air Lines, Inc* v. *McDonnell Douglas Corp*, 532 F (2d) (5th Cir 1976): 'the rationale for the doctrine of impracticability is that the circumstance causing the breach has made performance so vitally different from what was anticipated that the contract cannot reasonably be thought to govern'.

[108] Cf. *Tsakiroglou & Co Ltd* v. *Noblee & Thörl GmbH*, [1962] AC 93; *Société Franco-Tunisienne d'Armement-Tunis* v. *Sidermar SpA*, [1961] 2 QB 278 (Comm); *Albert D Gaon & Co* v. *Societe Interprofessionelle des Oleagineux Fluides Alimentaires*, [1959] 3 WLR 622 (Comm); *Carapanayoti & Co Ltd* v. *E T Green Ltd*, [1958] 3 WLR 390 (QB).

[109] C. Pédamon and R. Vassileva, n. 60 above, 36.

[110] [2020] EWHC 2414 (Comm).

VIII. THE US DOCTRINES OF IMPRACTICABILITY AND FRUSTRATION

The regulation of change of circumstances in the United States is more articulated. The frustration doctrine appears in Section 265 of the Restatement (Second) of Contracts which makes room for the discharge of the contract when 'a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made'. This is precisely frustration of purpose.

Compared to English law, however, the legal framework is complicated by a parallel doctrine which also allows termination of a contract in the event of 'not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved' (Section 454 of the Restatement (First) of Contracts, but see also Section 261 of the Restatement (Second)). Impracticability had already been established, years earlier, in case-law whereby performance is impossible even when it is not practicable, i.e. when it can only be carried out at an excessive and unreasonable cost.[111] One of the best-known cases is *Florida Power & Light Co.* v. *Westinghouse Electric Corp.*, where a contract for disposal of spent nuclear fuel, which was anticipated to generate profits for $20 million, and instead would result in a $80 million loss due to the unforeseen cancellation of a government program, was found to be impracticable.[112]

In the United States, the doctrine of impossibility has been altered to encompass situations in which, although performance remains materially possible and the purpose of the contract is still achievable, its costs have risen disproportionately to what was originally anticipated. Impossibility, frustration and impracticability coexist to respectively regulate cases similar to *force majeure*, the supervening uselessness of the contract and excessive onerousness.[113]

However, although hardship has the dignity of an autonomous doctrine in the United States, the way in which it has been construed militates against an extensive application. In fact, the courts, while not agreeing on an unambiguous quantitative threshold,[114] have been consistent

[111] *Mineral Park Land Co* v. *Howard*, 172 Cal 289 (1916). A contractor had agreed to extract the gravel necessary for the construction of a bridge from the plaintiff's land. The contractor took some gravel from the plaintiff's land and then purchased the rest on the market, claiming that part of the gravel on the plaintiff's land was below water and extracting it would have required extremely expensive techniques. The Supreme Court of California found the contract to be discharged on the ground that 'although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then, it was impossible for defendants to take it'.

[112] 826 F (2d) 239 (1987).

[113] For this classification see R.A. Posner and A.M. Rosenfield, n. 87 above, 85.

[114] See *Louisiana Power & Light Co* v. *Allegheny Ludlum Industries*, 517 F Supp 1319 (ED La 1981), where an increase of 38 percent of the contract price due to fluctuations of the costs of raw materials was not deemed sufficient to excuse performance under the doctrine of commercial impracticability.

in stating that 'mere hardship is not enough',[115] that increased costs must be 'excessive and unreasonable',[116] that the risks involved must be 'unusual and have such severe consequences that they must have been beyond the scope of the assignment of risks inherent in the contract, that is, beyond the agreement made by the parties',[117] that discharge is 'limited to situations in which a virtually cataclysmic, wholly unforeseeable event, renders the contract valueless to one party'.[118] The commentary to Section 261 of the Restatement Second also refers to 'extreme and unreasonable difficulty or expense', reading that 'a mere change in the degree of difficulty or expense due to such cause as increased wages, prices of raw materials, or costs of construction unless well beyond the normal range, does not amount to impracticability'.

Accordingly, it remains to be seen whether US courts will be ready to excuse performance of contracts that have become impracticable or frustrated as a result of Covid-19. The recent decisions of the US courts seem to indicate that these doctrines are not to be invoked lightly. For example, *In re Condado Plaza Acquisition LLC*,[119] a New York bankruptcy court denied that a contract for the purchase of a hotel in Puerto Rico had been frustrated due to the hotel being required to shut down during the pandemic. The decisive argument was that the contract expressly disclaimed any obligation to maintain operations at the hotel.

In *Rosado* v. *Barry University*,[120] a Florida federal court rejected a University's claim that its contractual obligation to provide in-person instruction to its students during the pandemic had been made impossible or frustrated. The court argued that the COVID-19 pandemic 'does not conclusively establish the defense of impossibility or frustration of purpose on the facts alleged, particularly given the overlapping and sometimes contradictory state and local regulations, and evolving standards, for dealing with the virus'. Besides, there was indication that the University had assumed the risks connected with the pandemic, since 'it would certainly be anomalous, without sufficiently strong evidence of contractual intent, to permit a party to reap the full benefits of an agreement in return for only partial performance'.

[115] *Piaggio* v. *Somerville*, 119 Miss. 6 (1919); *Wischhusen* v. *American Medicinal Spirits Co.*, 163 Md. 565 (1933); *Browne & Bryan Lumber Co.* v. *Toney*, 188 Miss. 71 (1940). See also Comment no. 4 to UCC Section 2-615, (2002): 'increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance'.
[116] *Vernon* v. *Los Angeles*, 290 P.2d 841 (Cal. 1955).
[117] *Misahara Construction Co.* v. *Transit-Mixed Concrete Corp.*, 310 N.E.2d 363 (Mass. 1974).
[118] *United States* v. *General Douglas MacArthur Senior Village*, *Inc*, 508 F (2d) 377 (2nd Cir 1974).
[119] 2020 WL 6038813 (Bankr. S.D.N.Y. October 9, 2020).
[120] 2020 U.S. Dist. LEXIS 204355 (S.D. Fla. October 30, 2020).

IX. DISCHARGE AND JUDICIAL ADAPTATION OF CONTRACTS

Comparing continental and common law systems shows how the doctrine of hardship is the rule in the former, the exception in the latter.

Differences are not confined to the requirements but extend to the remedies to govern contingencies. Art. 1218(2) French Civil Code provides for the termination by operation of law (*de plein droit*) of contracts whose performance has become definitively impossible. The Italian Civil Code also provides for termination not only in the event of supervening impossibility (Art. 1463 et seq.) but also when performance has become excessively onerous (Art. 1467 et seq.).[121] In the event of hardship, the preservation of the contract would cause extraordinary damage to one party and, at the same time, a correlative extraordinary, unexpected and unjustified gain for the other.[122] In common law jurisdictions, termination under the frustration doctrine is the only remedy available to parties, with the consequence that they will be released from obligations not yet performed or will have to return what has been already performed.[123]

Discharge, especially in those jurisdictions where it is provided as an exclusive remedy (e.g. Italy), does not appear entirely adequate because many situations suggest that it is better to save the contract or terminate it at a later date, giving the parties the opportunity to engage in a process of adjustment of their relationship to the supervening circumstances. Where the contract is terminated by operation of law, parties may not even be aware thereof. Conversely, where it is necessary to go to court, discharge by hardship may take a long time, and in the meantime the party will likely have entered into a substitute transaction to remedy the other party's breach.[124]

In long-term contracts, hardship may be only temporary and the parties may still be interested in continuing the relationship and receiving future performance. But even in other contracts, discharge may be an inadequate remedy, as repayment obligations may expose the party to a liquidity crisis or bankruptcy.[125] The party who, for example, has received a loan would have to repay the outstanding amount immediately.

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[121] Earlier than the entry into force of the Italian Civil Code (1942), influential scholars advocated that the consequences of changes of circumstances shall be either termination or performance. See G. Osti, 'La così detta clausola «rebus sic stantibus»' *Rivista di diritto civile*, 1 (1912); M. Andreoli, 'Revisione delle dottrine sulla sopravvenienza contrattuale' *Rivista di diritto civile*, 309 (1938).

[122] P. Trimarchi, *Il contratto: inadempimento e rimedi* (Milano: Giuffrè, 2010), 234.

[123] E. McKendrick, n. 103 above, § 23-074; E. Allan Farnsworth, 'The Restatement (Second) of Contracts' 47(2) *Rabel Journal of Comparative and International Private Law*, 336, 340 (1983). See also *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd*, [1943] AC 32.

[124] I. Schwenzer and E. Muñoz, n. 62 above, 161.

[125] N. Cipriani, n. 22 above, 657.

These reasons have prompted various jurisdictions to identify a remedy better suited to the particularities of the case, such as judicial adaptation. As seen above, the new Art. 1195 French Civil Code gives the court, at the request of one party, the power to adapt the contract if the parties' attempts at renegotiation have failed. This is an unprecedented and surprising power,[126] all the more so considering the historical hostility of the French Supreme Court to interfere with freedom of contract. However, there remains to be seen whether the courts will use this new discretionary power or, as seems more likely, will return the renegotiation process back to the parties, thereby dismissing the unfortunate task of directly rewriting their contract.[127] In any case, a specific derogation clause, which is quite frequent in commercial contracts, would be sufficient to put Art. 1195 out of play.

§ 313 BGB appears even more adaptation-friendly, as the parties may ask the court for adaptation, even if they have not first tried to renegotiate it by themselves. Actually, the provision of judicial adaptation makes the preliminary attempt at a voluntary renegotiation redundant.[128] Discharge can only occur when adaptation proves to be unreasonable or impossible.

The court is thus endowed with flexible powers, being tasked with striking a fair balance between the conflicting interests of the parties, allocating the risks caused by the change of circumstances. The social orientation of German private law, which finds its highest expression in the general clause of good faith (§ 242 BGB), provides a solid justification for the judiciary to interfere with contracts in order to correct injustice carried out on the weaker party, i.e. the promisor obliged to perform a contract which has become of disproportionate economic value as a result of unforeseeable circumstances. Moreover, the maintenance of the contract, judicially adjusted, does not jeopardize the security of commercial transactions nor lead to their paralysis.[129]

International soft law instruments too provide for judicial adaptation as a default rule: Art. 6.2.3(4) of the Principles of International Commercial Contracts 2016 of the International Institute for the Unification of Private Law (UNIDROIT PICC); Art. 6:111(3) of the Principles of European Contract Law elaborated by the Commission on European Contract

[126] J. Heinich, n. 66 above, 614.
[127] P. Stoffel-Munck, 'L'imprévision et la réforme des effets du contrat' *Revue des contrats*, 30 (2016).
[128] Claiming that a duty to renegotiate 'makes you feel kinder and doesn't have a cost', see M. Barcellona, 'Appunti a proposito di obbligo di rinegoziazione e gestione delle sopravvenienze' *Europa e diritto privato*, 472, 501 (2003). See also G. Amadio, 'L'abuso dell'autonomia contrattuale tra invalidità e adeguamento' *Rivista di diritto civile*, 268 (2006).
[129] P. Hay, n. 6 above, 347, 363-364; A. Forte, 'Economic Frustration of Commercial Contracts: A Comparative Analysis with Particular Reference to the United Kingdom' *Juridical Review*, 1, 19-20, 22-23 (1986).

Law (PECL); Article III-1:110(2)(b) of the Draft Common Frame of Reference by the Study Group on a European Civil Code (DCFR). And some international law scholars construe the 1980 UN Convention on the International Sale of Goods (CISG) as affording courts a right to adjust contracts to changed circumstances.[130]

Clearly, however, the discretion of German courts to establish whether there has been a fundamental change in the basis of the contract, and adapt it to a socially just content, cannot degenerate into arbitrariness. The cautious approach of German case-law reflects this idea.[131] Some authors point out that adaptation should not be governed by equitable reasons, since the court should rather restore the fictional will of the parties, i.e. supplement the contract with the risk distribution clauses that the parties would probably have agreed upon had they foreseen the change of circumstances at the time of stipulation.[132] Others are simply wary of *Rechtsprechungspositivismus*, i.e. case-law positivism.[133]

Prior to the 2016 novel, French legal culture too showed strong hostility to judicial activism. The reasons are historical and stretch back to the Revolution and the reaction against the abuses of judicial power carried out during the *Ancien Régime*, which remained 'indelibly engraved in the memory of the nation'.[134]

The issue does not concern English law, as it does not give courts the power to rewrite the contract, and perhaps appropriately so, given that in other legal systems similar provisions end up discouraging the parties from considering reaching an amicable settlement agreement which is more efficient than a judicial decision (being quicker and less costly).[135]

The United States are more adaptation-friendly, since § 272(2) of Restatement (Second) provides that if frustration and impracticability rules 'will not avoid injustice, the court may grant relief on such terms as justice requires'. More explicit is Official Comment 6 to UCC § 2-615, which states that 'in situations in which neither sense nor justice is served by either

[130] P. Schlechtriem, 'Transcript of a Workshop on the Sales Convention: Leading Cisg Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More by Harry M. Flechtner' *Journal of Law & Commerce*, 18 (1999); Y. Ishida, 'Cisg Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something' 30(2) *Pace International Law Review*, 331, 378-379 (2018).

[131] H. Rösler, n. 50 above, 511.

[132] H. Smit, 'Frustration of Contract: A Comparative Attempt at Consolidation' 58 *Columbia Law Review* 287, 299, 307, 313 (1958); A. Puelinckx, n. 101 above, 61; R. Hillman, n. 79 above, 17.

[133] K. Adomeit, 'Der Rechtspositivismus im Denken von Hans Kelsen und von Gustav Radbruch' *Juristenzeitung*, 161 (2003).

[134] V.V. Palmer, ' "May God Protect Us from the Equity of *Parlements*": Comparative Reflections on English and French Equity Power' 73 *Tulane Law Review*, 1287, 1293 (1999).

[135] I. Schwenzer and E. Muñoz, n. 62 above, 159. On the Italian situation specifically, see A. Federico, 'Misure di contenimento della pandemia e rapporti contrattuali' *Actualidad Jurídica Iberoamericana*, 236, 239 (2020), arguing that the current length of Italian trials weighs against leaving the solution of the social and economic issues arising from the pandemic with the judiciary.

answer when the issue is posed in flat terms of "excuse" or "no excuse", adjustment under the various provisions of this Article is necessary'. However, only in rare and exceptional circumstances have courts made use of the power to make adjustments, but this has not translated into a 'license to reallocate gains and losses on the basis of distributional considerations', since the court must always act within the framework defined by the parties.[136]

It is not surprising, so, that US courts have refrained from revising the rent of commercial leases. For example, in *Palm Springs Mile Associates, Ltd.* v. *Kirkland's Stores, Inc.*,[137] a tenant of a shopping center claimed that he was excused from paying rent due to the governmental restrictions resulting from the Covid-19 pandemic. The Florida Court found the tenant's argument to be 'unavailing', since it failed to establish a direct causal link between the governmental restrictions and its inability to pay rent. Indeed, the legal consequences of the pandemic had only indirectly prevented the tenant from performing. A similar decision was taken by a NY Court in *BKNY1, Inc. d/b/a 132 Lounge* v. *132 Capulet Holdings, LLC.*[138] A tenant of a restaurant argued that the orders issued to contain the Covid-19 pandemic had made performance impossible and frustrated the purpose of the commercial lease. The Court held that the doctrine of impossibility does not apply when performance is merely more burdensome. Not even the frustration doctrine was relevant, since 'the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense', while in the case at issue the plaintiff had closed its business only for two months (April and May 2020).

These cases confirm that it is questionable that courts hold the key to ending the economic imbalances caused by the Covid-19 pandemic. Revising a contract requires technical expertise on market conditions, as well as information on the subjective costs and benefits of the contracting parties, which the courts do not always possess, and the decision may come too late, when the situation of impossibility or hardship has ceased, and may even be useless or harmful.[139]

It may be argued that both problems may be solved through an arbitration clause taking the decision away from courts and referring it to an arbitrator, chosen by agreement between the parties from among experts. However, not even arbitration is a panacea for these evils, if it

[136] M.A. Eisenberg, n. 71 above, 255.
[137] 2020 WL 5411353 (S.D. Fla. September 9, 2020).
[138] 2020 WL 5745631, 2020 NY Slip Op 33144(U) (N.Y. Sup. Ct., Kings Ctny., September 23, 2020).
[139] F. Benatti, n. 28 above, 209-210. See also H. Kötz and S. Patti, n. 43 above, 455, contending that the lawmakers, rather than the contracting parties, may better address the loss of purchasing power. In fact, that was the case with the inflation occurred in Germany after the two world wars.

is true that the average duration of arbitration proceedings administered by respectful institutions is 13 months, and it is controversial whether arbitrators have the power to adapt contracts absent an explicit attribution by the parties and a provision to that effect in the *lex contractus* of the place of arbitration.[140]

X. THE CONS OF A DUTY TO RENEGOTIATE

Given the limits of judicial adaptation, it is necessary to consider whether the best remedy is to let, or even compel, the parties renegotiate their contract quickly and away from the courts. It has already been seen that Art. 1195 French Civil Code gives one party the right to call for a renegotiation of the contract, which the other party may either accept or refuse. This provision has been criticized because during renegotiation the parties are not freed from their obligations, but in the pandemic context it is likely that they are more interested in their own survival rather than restoring economic balance to the contract.[141]

Although the point is debated, the prevailing opinion formed on the letter of the reformed § 313 BGB rules out a real duty to renegotiate, as the provision allows to apply immediately to the court for adaptation.[142]

The Italian Civil Code contains no rule on the renegotiation of contracts which have become excessively onerous. However, in the face of the economic imbalance generated by unforeseen events, some scholars have theorized an obligation on the part of the contracting parties to renegotiate their contract on the basis of the duty of good faith in the performance of contracts (Art. 1375 Italian Civil Code),[143] raised to a value of public policy, based on active social morality or solidarity.[144] The violation of the duty to renegotiate would amount to breach of contract and entitle the party interested in the maintenance of the relation to refrain from performing (*inadempienti non est adimplendum*: Art. 1460 Italian Civil Code),[145]

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[140] C. Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (The Hague: Kluwer Law International, 2008), 494. By contrast, advocating for the power of arbitrators to revise international contracts, see A. Crivellaro, 'La révision du contrat dans la pratique de l'arbitrage international' *Revue de l'arbitrage*, 69 (2017).

[141] C. Pédamon and R. Vassileva, n. 60 above, 28.

[142] H. Kötz, *Europäisches Vertragsrecht* (Tübingen: Mohr Siebeck, 2015), 407.

[143] F. Macario, *Adeguamento e rinegoziazione nei contratti a lungo termine* (Napoli: Jovene, 1996), 152; F. Criscuolo, 'Equità e buona fede come fonti di integrazione del contratto. Potere di adeguamento delle prestazioni contrattuali da parte dell'arbitro (o del giudice) d'equità' *Rivista dell'arbitrato*, 71, 76-78 (1999); P. Gallo, 'Revisione e rinegoziazione del contratto' *Digesto delle discipline privatistiche – Sezione civile*, agg., VI (Torino: Utet, 2011), 812; R. Sacco and G. De Nova, *Il contratto* (Milano: Giuffrè, 2016), 1710.

[144] Arguing this way, see the Italian Corte di Cassazione, Ufficio del Massimario, Relazione no. 56 of July 8th 2020, https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_Tematica_Civile_056-2020.pdf (last visited 3 November 2021), 21-22.

[145] A.M. Benedetti and R. Natoli, 'Coronavirus, emergenza sanitaria e diritto dei contratti: spunti per un dibattito' *dirittobancario.it*, 25 March 2020, 1.

claim compensation for damages,[146] or even seek a judgment producing the same effects of the contract the parties would have renegotiated (Art. 2932 Italian Civil Code).[147]

Cries for a duty to renegotiate have intensified during the pandemic and the measures to tackle it, which have affected the economic balance or the usefulness of many contracts.[148] Even lower courts have not hesitated to impose an obligation to renegotiate relational contracts affected by the pandemic, seeking to restore fairness, even where Parliament has not made law on the issue.[149]

A duty to renegotiate is laid down in all international soft-law instruments (Art. 6.2.3(1) UNIDROIT PICC; Art. 6:111(2) PECL; Art. III-1:110(3)(d) DCFR). The ICC Hardship Clauses 2003 and 2020 provide that 'the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow to overcome the consequences of the event'.

At a time like this of social and economic emergency, renegotiation has unquestionable advantages, being likely to be quicker and less costly than judicial adaptation, but above all it makes it possible to keep the contract alive by relying on a counterparty that most of the time can be hardly replaced. Trustworthiness in long-term contracts is an essential element in the business world. By renegotiating the contract, the parties themselves, not a third party, rewrite their agreement as the best possible interpreters of the changed set of interests, saving their existing relationship and not precluding future contracts. Moreover, by renegotiating the contract, the parties may not only address current contingencies that require immediate adjustment, but also define a medium-to-long-term path taking into account the expected timeframe for a return to normality, the resumption of economic activities, and the stabilization of the market and the individual business involved.[150]

However, the advantages of renegotiation exist to the extent that they are left to the voluntary choice of the contracting parties. Imposing a legal duty to renegotiate all contracts that have become unbalanced due to changes of circumstances would firstly infringe freedom of

[146] This is the solution provided for by Art. 6:111(3)(c) PECL.
[147] F. Macario, n. 143 above, 426; M. Costanza, 'Clausole di rinegoziazione e determinazione unilaterale del prezzo', in U. Draetta and C. Vaccà eds, *Inadempimento, adattamento, arbitrato* (Milano: Egea, 1992), 316; V. Roppo, *Il contratto* (Milano: Giuffrè, 2nd ed., 2011), 973. In case-law, see Tribunale di Bari, 14 June 2011, *Contratti*, 571 (2012). See also E. Ferrante, n. 53 above, 310-311, contending that an open-ended judgment, i.e. an order to renegotiate the contract, does not make sense. By contrast, an order to renegotiate a contract with a detailed content would be tantamount to judicial adaption.
[148] See, *ex multis*, F. Macario, 'Per un diritto dei contratti più solidale in epoca di coronavirus' *giustiziacivile.com*, 207 (2020); D. Maffeis, 'Problemi dei contratti nell'emergenza epidemiologica da Covid-19' *giustiziacivile.com*, 3 (2020); L. Guerrini, 'Coronavirus, legislazione emergenziale, e contratto: una fotografia' *giustiziacivile.com*, 345 (2020).
[149] Tribunale di Roma, 27 August 2020, *Giurisprudenza italiana*, 2443 (2020).
[150] F. Benatti, n. 28 above, 209.

contract. No rule under Italian law, for example, imposes equivalence of performance.[151] Without considering that, in the meantime, the relationship of trust and collaboration between the parties may have broken down, but that relationship is essential not only to reach a renegotiation agreement but also to make it work.[152]

At other times the parties need speed and certainty in defining a relationship that has become unstable, and have no interest in undertaking lengthy and tedious renegotiations.[153] But above all, a legal duty to renegotiate would produce effects potentially detrimental to the very instances of social solidarity invoked by its supporters. Consider a lease agreement. If, theoretically, a reduction of the rent may appear to be in accordance with good faith in order to cope with the financial hardship of the tenant, in practice this renegotiation may not be fair where the landlord economically depends on the lease and has no other sources of income, but at the same time continues to pay taxes or has a pending loan agreement for the purchase of that property whose payments have not been suspended. Or think of the entrepreneur demanding a renegotiation of the contract with a consultant or supplier, which could well drag these into the same liquidity crisis from which the entrepreneur would like to be saved. Think, again, of a restaurateur, forced, during the lockdown, to close the rented premises to the public, but who in the meantime has benefited from tax credits and layoff schemes for his employees, and has made considerable profits from the take-away business: is it fair to grant him the right to impose a revision of the rent on the other party?[154]

The injustice of a forced renegotiation depends on the subjective conditions of the parties being not all equal.[155] It is one thing if the promisee is a bank, a multinational company, a businessman who receives state aid[156] or discovers in the pandemic an opportunity to increase his profits, quite another if he is an employee, a supplier, a professional, and in general a party who does not have the stability and the means to undergo reductions, suspensions, postponements. It may well be the case that the party adversely affected by the lockdown measures, invoking an obligation to renegotiate, is actually the one economically

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[151] See P. Perlingieri, 'Equilibrio normativo e principio di proporzionalità nei contratti', in Id., *Il diritto dei contratti tra persona e mercato* n. 9 above, 454, arguing that the principle of proportionality bans only a blatant and unjustified disproportion between the duties undertaken by the parties. In a similar vein, see F. Galgano, *Trattato di diritto civile* (Padova: Cedam, 2010), II, 535-536.

[152] F. Benatti, n. 28 above, 207. See also G. Roth, '§ 313 Bgb', in W. Krüger ed., *Münchener Kommentar Zum Bürgerlichen Gesetzbuch* (München: CH Beck, 5th ed., 2007), § 93.

[153] Y.M. Atamer, 'Article 79', in S. Kröll, L. Mistelis and P. Perales Viscasillas eds., *UN Convention on Contracts for the International Sale of Goods – Commentary* (München: Hart Publishing, 2011), 1091, § 84.

[154] T.V. Russo, n. 20 above, 148.

[155] A. Gentili, n. 20 above, 9.

[156] See Tribunale di Roma, 15 January 2021, https://www.lanuovaproceduracivile.com/wp-content/uploads/2021/04/romanorinegoziazione.pdf (last visited 3 November 2021), which did not recognize a duty to renegotiate the rent of the lease of a guesthouse on the ground that the business could have benefited from tax credits and the suspension of mortgage payments.

stronger and able to cope with the pandemic.[157] The imposed renegotiation could also cause trouble to the other party in performing other contracts to which he is bound, triggering a chain effect of spreading the damage of an already serious economic crisis. This can be seen in the event of an entrepreneur who receives a lower amount for his supplies and is thus forced to fire his employees.

Determining the party deserving of greater protection in an exceptional context of economic paralysis in which every party seems to be the weaker party is an effort that cannot be left to judicial discretion or imposed on the parties through a legal duty to renegotiate all contracts whose economic balance has been altered by the pandemic. The discretion of the court may become arbitrary since it would have to invent the renegotiated agreement. Good faith never indicates a single content to the exclusion of everything else and it is not always the case that a series good faith solutions are also fair.[158] Nor can renegotiation be imposed on the parties if it is true that it can lead to outcomes incompatible with social solidarity and economic stability.

The government of solidarity, and the balancing of all the relevant interests, must be entrusted to the law-makers, not the courts or the contracting parties. Parties should be given the option of renegotiating their contracts, with all the associated benefits. There would not even be a need for a law that makes the renegotiation power explicit, since it is a power inherent in freedom of contract.

In the event of (legitimate) refusal or failure of voluntary renegotiation, the only remedy should be the termination of the agreement, because judicial adaptation poses the wide-ranging problems already seen. It is not surprising that, in common law systems, the general remedy provided for by the frustration doctrines is automatic discharge, which releases the parties from an agreement that may be long-term and require the continuation of a fiduciary element that in the meantime may have failed. Forcing parties to remain in a contract that no longer meets their interests may be an inefficient remedy, if only because it would generate

[157] N. Cipriani, n. 22 above, 663.

[158] A. Gentili, 'La replica della stipula: riproduzione, rinnovazione, rinegoziazione del contratto' *Contratto e impresa*, 667, 713 (2003). See also M. Barcellona, n. 128 above, 486, arguing that good faith may be used to define only accessory contractual duties.

further litigation.[159] Moreover, the very provision of an automatic discharge could encourage them to negotiate a new contract in order not to disrupt their business relation.[160]

If litigation ensues, the court should be granted the sole power to ascertain a discharge that has already occurred by operation of law. The simple alternative between voluntary renegotiation and discharge of contracts which have become useless or excessively burdensome in times of pandemic appears to be the fairest and most efficient solution, on the assumption that instances of social solidarity are adequately protected by the Governments.

[159] See *Co-operative Insurance Society Ltd* v. *Argyll Stores (Holdings) Ltd*, [1997] 2 WLR 898, where Lord Hoffmann held that judicial adaptation 'is not only a waste of resources but yokes the parties together in a continuing hostile relationship. The order for specific performance prolongs the battle. If the defendant is ordered to run a business, its conduct becomes the subject of a flow of complaints, solicitors' letters and affidavits. This is wasteful for both parties and the legal system'.

[160] H. Rösler, n. 50 above, 507. See also A. Schwartz, 'Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies' 21(2) *Journal of Legal Studies*, 271 (1992).

FUNDING GAP AND "BUDGET-ORIENTED CLASSIFICATION" OF FORMS OF GOVERNMENT

Luigi Testa

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The essay proposes a study of a selection of the most popular forms of government from the perspective of the funding gap in the public budget process. A distinction between an assembly-dominated model and an executive-dominated model is proposed, which may be useful for a deeper understanding of the functioning of the forms of government. Finally, the analysis offers some useful insights into the relationship between budgetary decision-making and the real state of democracy in a country.

I. INTRODUCTION

Right since the issue first arose, decisions concerning public finance have provided the terrain for the most intense (and heated) dialectical engagement between governments and parliaments. On some occasions, this engagement has led to important clashes, not only the past but also in the present day within our contemporary democracies.[1] This study will focus specifically on these clashes, which in some sense constitute a "state of exception" in public budgetary processes. The way in which states regulate this "state of exception" (in technical terms, the so-called "funding gap" arising in situations in which parliament is not willing or able[2] to approve a budget proposed by the government) will point towards a "budget-oriented" classification of systems of government. This will (in all likelihood) be useful in arriving at a deeper understanding of the dynamics operating within contemporary democracies and at a closer understanding of how specific systems of government operate.

[1] This can alternatively be read as a sign of good health of the democratic system, or as a symptom of some problems of the political system. However, this is not properly the aim of a legal analysis. Legal studies are primarily responsible for analysing the "skeleton" of the budget process, i.e. its normative structure, in order to verify how it conditions or is conditioned by the "musculature" of political, economic and social conditions.

[2] In the case of bicameralism, as we will see.

In actual fact, the law by which parliament approves the public budget[3] lies at the heart of the relationship between governments and representative assemblies, more so than any other parliamentary measure.

The historical roots of parliamentary government are closely linked to the issue of public finance, and thus to budgetary decisions. The first claims made by assemblies representing interests different from those of the sovereign related to financial resources, including their management and allocation. It could be said, from a historical point of view, that parliamentary budgetary processes in some sense constitute a prototype for the ordinary legislative process.[4]

One of the milestones in the initial development of parliamentary government – if not even the moment of its official birth – was the approval by the English Parliament of so-called 'appropriation clauses'.[5] These clauses constrained the sovereign when choosing how to allocate the resources granted by Parliament: the King was no longer able to dispose of them at his discretion, and was only allowed to use them for purposes authorised by the House of Commons.[6]

Moreover, even today, under some parliamentary systems the rejection by parliament of budgetary legislation is considered to be equivalent to a vote of no confidence, with

[3] Some notes are needed in order to clarify what we are speaking about when we talk of "public budget". As is well known, indeed, in the continental experience there is *an unique law* approved by Parliament containing an unified "budget", i.e. the representation of the whole of the cash flows in public finance. On the contrary, in the Anglo-Saxon model there is separation between appropriations and so-called 'Ways and Means'. In the U.S., for instance, we should distinguish an appropriation parliamentary cycle and the 'reconciliation process'. In this paper, we will use "public budget" with regard to *the whole of the Parliament's decisions about estimates and appropriations*.

[4] You will not be surprised in funding out that in the first volumes of Cobbett's Parliamentary Debates relationship between Crown and assemblies in taxes' field is specifically attentionated, since it represents the beginning of the long story towards Parliament's sovereignty (W. Cobbet, *Parliamentary History of England* (London, 1808)).

[5] There is no consensus in the exact dating of the appropriation clause. According to H. Hallam, *The constitutional history of England from the accession of Henry VII to the death of George II* (London, 1827) it was proposed for the first time in the parliamentary debate in 1665. On the contrary, R. Gneist fixs its birth in 1668, maybe when it had begun to be more easily accepted also by the Crown (*Gesetz und Budget. Constitutionelle Streitfragen aus der preussischen Ministerkrisis von Maerz 1878*, (Berlin, 1879)). Actually, there is no verified continuity until the Glorious Revolution: there is no appropriation clause, for instance, in 1685, due to a momentaneous weakness of Commons. That's why some Authors date it 1689, when relations between the House and the Crown had become clear (J. Hatsell, *Precedents of Proceedings in the House of Commons: Relating to lords and supply* (London, 1818)).

[6] It is no longer just a 'green light' for the Executive, but somehow a precise instruction binding the autonomy of the Government (or of the Crown).

the result that the government is obliged to resign. This is for an extremely simple reason. The budget in fact is the "transcription in accounting terms" of the executive's political programme[7]. The government needs resources in order to achieve its political agenda and, in contemporary democracies, these resources must be authorised (or technically speaking "appropriated") by parliament.[8]

A good example of this is provided by Article 1 of the United States' Constitution: «No money shall be drawn from the Treasury, but in consequence of appropriations made by law». Although other constitutions do not contain similar provisions, this is a universally accepted principle. In contrast to what might have happened in the 19th century and before, if a parliament chooses not to appropriate the resources requested by the government (and hence parliament chooses not to approve the budget proposed by the government), it can effectively bring the administration to a halt.

This article will proceed as follows with the aim of setting out a "budget-oriented classification" of systems of government:

a) First, I shall briefly demonstrate that a *budgetary state of exception* is a much more tangible possibility than a mere academic hypothesis. Budgetary law in its modern sense in actual fact arose in relation to a funding gap; however, all governments (or at least, all democratic governments) have frequently been obliged to engage with this spectre, irrespective of political colour. The risk obviously manifests itself in different ways: it may be higher or lower, and may have different consequences, depending upon the impact of a variety of factors, as section 2 will attempt to show.

b) Section 3 will seek to clarify how the adoption of rules to govern funding gaps is a genuine prerequisite for a democratic system.

Crises within the budgetary system are not only possible but also lawful. Indeed, where a parliament is not allowed to reject a budget proposed by the government, it is no longer possible to say that it is a parliamentary democracy.

But this is not all. It is possible to assert that, if no express provision is made for the consequences of such a rejection by parliament, it is possible to legitimately doubt the

[7] The definition is borrowed from a masterpiece in Italian literature in this field: S. Buscema, *Bilancio*, in *Enciclopedia del Diritto* (Milan, 1959) 379.

[8] We assume here that if there is no parliamentary control about appropriations, there is not democracy properly. Not *parliamentary democracy*, at least.

essentially democratic nature of the political regime. Some specific examples will help us to clarify this aspect.

c) Section 4 will then compare the rules applicable in certain countries with the aim of resolving the funding gap (or at least try of stemming the risk). The key issue is to establish *who has the last word under such a state of exception* – in other words: who is really *sovereign* in relation to the budgetary decision.

I shall try to propose a classification that identifies two models that reflect different traditional systems of government: an assembly-dominated model and an executive-dominated one, each of which can manifest itself internally in different ways.

The final section will set out some remarks on the validity and usefulness of this *budget-oriented classification*.

II. THE FUNDING GAP: ANYTHING BUT ACADEMIC

Posing the question as to who is sovereign under a state of budgetary exception is not a merely academic exercise. A funding gap is in actual fact a scenario that has arisen in the recent past – or that has risked arising – across a number of different legal systems. This is all the more the case against the backdrop of the deterioration in political debate which contemporary democracies have been experiencing.

Ultimately, modern budgetary law was born precisely out of a funding gap. In fact, studies by Laband[9] as well as, amongst others,[10] Gneist[11] and Jellinek,[12] were triggered by the Prussian crisis from 1860 until 1866.[13] During these six years, Minister President Bismarck obtained the financial resources necessary for his military operations without obtaining the approval of the Reichstag – and indeed against the specific wishes of the House of Representatives [*Abgeordnetenhaus*].

[9] P. Laband, *Das Budgetrecht nach den Bestimmungen der Preußischen Varfassungs-Urkunde unter Berücksichtigung der Verfassung des Norddeutschen Bundes* (Berlin – New York, 1871).

[10] A. Haenel, *Das Gesetz im formellen und materiellen Sinne*, in *Studien zum Deutschen Staatsrechte* (Leipzig, 1888); P. Zorn, *Das Staatsrecht des Deutschen Reiches*, vol. I, *Das Verfassungsrecht* (Berlin, 1895); C. Rotteck, *Lehrbuch des Vernunftrechts und der Staatswissenschaften* (Hamburg, 1835); C. F. von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Leipzig, 1865).

[11] R. Gneist, *Gesetz und Budget. Constitutionelle Streitfragen aus der preussischen Ministerkrisis von Maerz 1878* (Berlin, 1879).

[12] G. Jellinek, *Gesetz und Verordnung. Staatsrechtliche Untersuchungen auf rechtsgeschitlicher und rechtsvergleichender Grundlage* (Aalen, 1887).

[13] To know more about the Prussian crisis, it is useful to read E. R. Huber, *Deutsche Verfassungsgeschichte seit 1789*, vol. I, *Reform und Restauration 1789-1830* (Stuttgart, 1957), and Id., vol. II, *Der Kampf um Einheit und Freiheit 1830 bis 1850* (Stuttgart, 1960).

The crisis broke out in 1860 when the Government issued provisional decrees adopted under a state of exception in order to finance certain military operations. As a result, the Government was able to classify new spending as excess spending over and above the previously approved budget, for which it subsequently sought approval from the elected chamber on an exceptional basis. However, the House of Representatives did not have any intention of approving it, which resulted in its dissolution on two occasions until Bismarck was appointed as Minister President two years later.

Bismarck no longer bothered himself with seeking approval from the House of Representatives for exceptional spending that had already been approved, and changed strategy over three subsequent steps, none of which was formally legal under the Constitution.

The first step taken by the new government was to ask the House of Representatives to grant an exceptional derogation from the obligation laid down by the Constitution to present a state budget each year. Bismarck's intention was that this would be an exceptional measure, considering the military operations underway, with a view to avoiding any exacerbation of internal political tensions. However, this was not accepted by the House of Representatives, which claimed the right to receive a public budget each year from the Government for approval.

Bismarck's next step was to attempt to bypass the representative chamber with the support of the House of Lords [*Herrenhaus*]. According to Article 62 of the Prussian Constitution, the unelected chamber was only able to approve or reject as a whole a budgetary law previously approved by the lower chamber. However, the Minister President was able to convince the House of Lords to reject the amendments approved by the House of Representatives, and to pass the text in the original wording proposed by the Government. This choice was evidently not to the liking of the House of Representatives, which immediately passed a resolution declaring the vote taken by the House of Lords null and void.

In 1863, an attempt was made to break the deadlock by dissolving the House of Representatives; however, it was unsuccessful as the newly elected House confirmed its intention not to approve the excess spending authorised by the Government. Bismarck's next move involved making a clean break: the Government chose to ignore the will of Parliament, and continued to govern without a validly approved budget. The Minister President's words were damning: "Theory is of no value where necessity commands". The "theory" was Parliament's right to approve public spending; the "necessity" was the need to pursue the Government's military policies.

A turn of events only came in 1866 (six years after the original governmental decrees) when, following a new dissolution, the majority in Parliament changed, whilst Bismarck had in the meantime also reinforced his position also due to his military victories. Indeed, the shift marked a definitive victory for the Government, which was able to obtain approval of the budget and the endorsement of all off-budget spending ordered during the crisis.

That episode – a genuine funding gap that was resolved by a decision of the Government that departed from the Constitution as in force – came as a shock for contemporary legal commentators, who were forced to engage with a basic question: can the government dispose of resources without parliamentary approval? (Considered the other way around, the question can be formulated in the following terms: is it lawful for parliament to refuse to approve a budget proposed by the government?).

This was not a new question for legal debate during those years. The view endorsed by C. Rotteck had already had some resonance precisely in Prussia, in asserting the lawfulness of a parliamentary refusal as the most powerful weapon for asserting the rights of the people before the monarch.[14]

On the other hand, a number of authoritative voices had argued the opposite, or attempted to arrive at a kind of mediation. One may consider, for example, the study by C.F. von Gerber (which was published in the midst of the Prussian crisis), which took the view that Parliament was vested with a milder (and not precisely defined) "right of review", although its exercise could not go so far as to threaten the paralysis of the State.[15]

However, the view that would make the strongest mark on the literature in this area, which would have extremely important consequences also during subsequent centuries, would be the almost parallel stance proposed by Laband, Jellinek and Gneist. It is only possible to group together the three authors (and hence to classify their theorising as being "parallel") because they arrived at the same conclusion (and this is no minor issue). However, the routes they used to arrive at it were not entirely similar. It is therefore important to start first of all from their point of arrival. It may be noted that their conclusion is one which might have been expected from three authors operating within the ambit of *parliamentary government*, although not yet *democratic* parliamentary government. In fact, all three ended up asserting that it was lawful for

[14] C. Rotteck, *Lehrbuch des Vernunftrechts und der Staatswissenschaften* (Hamburg, 1835) 445.
[15] C. F. von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Leipzig, 1865) 175.

Parliament to refuse to approve a budget proposed by the Government: this is the essence of *parliamentary government*. And yet, none of the three ended up arguing that this refusal would force the government into paralysis (i.e. that it would prevent the Government from exercising spending powers nonetheless): in order for this to be the case, *parliamentary government* would need to be *democratic*.

The argument used in order to redach this conclusion, above all in Laband, might at first sight appear to be eccentric bearing in mind the initial question. This is why an answer was found using the instruments provided by the continental theory of legal sources, even though the results of that debate definitively sought to resolve a problem of the separation of powers.[16]

For Laband in fact, it is important first and foremost to engage with the issue of budgetary legislation from the standpoint of the theory of sources, and to establish that *it is indeed law* (even if only a formal law, according to the phrase coined by E.A.C. von Stockmar[17] as it does not give rise to any changes to reality). According to Laband, it is a law because law constitutes the result of the combined will of the Crown (i.e. of the executive) and the representatives of the people, irrespective of its specific substantive content.

Having asserted this, Laband was able to make the next step, which moved the discussion on to the issue of the separation of powers (and hence the system of government). For him, since under the Prussian constitutional system the law was the product of *the combined will of Parliament and Government*, the refusal of either of them to cooperate (which is always possible) would not prevent the free exercise of legislative power. To a certain extent (at any rate in the financial field), the Constitution was supposed to vest legislative authority not in Parliament and the executive *jointly*, but rather *equally* in Parliament and the executive.

In this way, Laband asserted two things, first the *ordinary* necessity of parliamentary involvement and approval. However, he also argued that it should be possible for the Government to take *full responsibility*, if Parliament had deliberately failed to act. In some sense, the choice by Parliament over whether or not to cooperate did not condition the Government's executive power, but ensured a kind of joint responsibility with it.

[16] Maybe it would have been more difficult to justify it on the field of the form of Government: saying something on the *subjective* field of Parliament and Government's powers and roles would have been accepted with more difficulties than something on the *objective* field of sources of law.

[17] E.A.C. von Stockmar, 'Studien zum preussischen Staatsrecht', *Aegidis Zeitschrift*, (1867) 201.

This joint responsibility would then lapse should Parliament refuse to cooperate, although without preventing the Government from acting on its own.

Although they reached the same conclusion, the arguments proposed by Jellinek and Gneist departed from Laband's in two different respects.

Gneist did not accept the classification of the budget as a law, an aspect that was by contrast decisive for Laband and Jellinek. For him, the fact that the House of Lords in the United Kingdom (as was the case also in Prussia during those years) was substantially excluded from the approval procedure necessarily led to the conclusion that the budget was not a legislative act. By contrast it was, so he argued, a kind of enforcement order (*Ausführungsverordnung*) of the lower house, in other words an authorisation, or mere consent to an administrative act carried out by the Government alone.

If this is the case, then the Government is even more entitled to act, irrespective of any parliamentary refusal. He thus arrived at the same conclusion as the other two authors, but at the cost of relinquishing a fundamental plank of his argument: that of the ordinary need for parliamentary involvement, which is more efficiently saved from the assertion of the legislative nature of the budget.

On the other hand, Jellinek's criticism of this choice by Gneist is very relevant. In his view in fact, the theory of the *Ausführungsverordnung* places too much weight on the law in action, over-hastily dismissing the law in books.[18] His argument is essentially that Gneist allowed himself to be over-influenced by the most recent parliamentary practice at the time of writing, and inferred from it a general rule that was in itself incompatible with the UK structure of parliamentary government (and of parliamentary government in general). This is not to mention the fact (which is still today a common error) that Gneist ended up generalising from the UK experience, inferring a universally applicable rule.

As regards Jellinek's argument, it does not overlap entirely with that of Laband, and the difference between the two is important for the purposes of comparison with the contemporary reality of today.

For Laband, and also for Gneist who agrees in this respect, any consequences of a refusal still lie within the confines of the law. According to Jellinek on the other hand,

[18] It is well known that the distinction is more recent than the debate about the Prussian funding gap, and it can be found in R. Pound, 'Law in Books and Law in Action', 44 AM. L. REV. (1910) 12. See also: K.H. Neumayer, '*Law in the Books, Law* in Action et les méthodes du droit comparé', in: M. Rotondi (ed.), *Buts et méthodes du droit compare* (Padova, 1973) 507.

the choice by the House of Representatives opens up a classic state of exception, which is a *de facto* situation and no longer a legal situation in a strict sense.

For Laband and Gneist, the fact that a decision is taken by the Government alone is a legal consequence of the choice made by Parliament; for Jellinek on the other hand, the outcome is not a legal solution to a dispute, but is rather born out of the *de facto* need not to leave the state without the ability to govern. This is not massively different from the fiction of assumed royal assent during the madness of King George III:[19] this was clearly an act that fell outside the legal order, and was dictated by a state of necessity.

Jellinek's theory matches up very well with the narrative proposed by Bismarck during the Prussian crisis. In fact, on various occasions the Minister President decisively invoked the dictates of "necessity" in his speeches to the House of Representatives. However, it is clear that this is an interpretation that may raise some perplexity within the context of contemporary democratic parliamentary government. In this sense, Laband and Gneist are more modern than Jellinek.

The history of the budgetary state of exception does not end with the Prussian crisis of 1860-1866, but recurs frequently in the chronicles of our times. Just to give a few examples, the US Congress was unable to approve President Obama's budget for fiscal year 2014[20]. The White House was therefore forced to proclaim a sixteen-day administrative shutdown, placing 850,000 civil servants on furlough and resulting – according to OMB estimates – in a loss equivalent to 0.3% of GDP.[21]

President Trump also had to deal with similar crises, for the first time in fiscal year 2018, and then again in the following fiscal year[22]. However, the longest shutdown is still the one under President Clinton in fiscal year 1996.

The USA is of course not the only place where crises of this type have arisen. Whereas other countries have not reached the crunch point, funding gaps frequently arise. Most of the time, parliaments approve budgets at the last minute, after exhausting negotiations.

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[19] G. Jellinek, *Gesetz und Verordnung*, 251.

[20] See L. Testa, 'The President and the «regular disorder» of the Budget process', in: G.F. Ferrari (ed.), *The American Presidency after Barack Obama (2009-2016)* (The Hague, 2017) 109.

[21] Executive Office of the President of the United States, *Impacts and Costs of the October 2013 Federal Government Shutdown*, 2013, 4. But also M. Labonte, B. Momoh, *Economic Effects of the FY2014 Shutdown*, Report del Congressional Research Service, 2015.

[22] See L. Testa, 'Appropriation of public funds in Trump era (or «Trump vs. Congress»)', in: G.F. Ferrari (ed.), *The American Presidency after Trump* (Eleven, 2021).

Where this occurs, it is nonetheless important to know the rules applicable to a state of exception: if they are not applied as occurred in the American shutdown, at least *they decisively influence the outcome* of the stalemate between government and parliament.

If the relevant rules provide the government with the option of proceeding even without parliamentary consent,[23] or if they provide for a form of provisional spending authorised by parliament but leaving considerable discretion to the government,[24] it can readily be predicted that parliament will not much of an interest in persisting in any clash with the executive, and may even pursue a more conciliatory approach. On the other hand, the legislative assembly has nothing to fear if the rules applicable to the budgetary state of exception exclude or limit any such unilateral powers of the government.

This is clearly apparent, for example, in France (an example which has been chosen not by chance, but rather as it represents the diametric opposite to the United States within the classification that will be proposed below).

In France too the budgetary process has frequently ended in stalemate also in recent times and, although the nuclear option has never been triggered (which would essentially involve governmental administration without any budgetary law approved by Parliament,[25] which is the exact opposite of what happens in the USA), the mere threat of this has been useful in order to force the National Assembly in one direction or the other.

The French budget is thus always approved right at the last minute at the end of a quite exhausting procedure involving: substantial disagreement between the two Houses (with the Senate rejecting *in toto* the law approved by the National Assembly, or otherwise approving it with substantial amendments); the calling by the Government of a conference committee, which is charged with agreeing on a compromise text; the failure of the conference committee, followed by the Government's choice to allow the National Assembly to definitively approve the budgetary law on its own, thus excluding the Senate.

All of this is compounded by the delays compared to the deadlines provided for under constitutional law, which are inevitably accumulated from one stage to the next, as well as last-ditch attempts by the opposition to turn the tables by filing a question of

[23] As it happens, for example, in the extreme case represented by France.

[24] As it happens in Argentina, for instance.

25 As will be seen below, if the Houses of Parliament are unable to approve the budget by the beginning of the new financial year, the Constitution provides that it may be enforced directly by the Government by ordinance..

constitutionality with the Constitutional Council (which occurs on an *ex ante* basis and thus further delays the entry into force of the legislation approved).

Naturally, the risk of a funding gap often increases in line with two factors. The first is due to the fact that the Government is not obliged to secure the confidence of Parliament, as occurs within parliamentary systems. In fact, due to the absence of such a requirement of confidence, it is possible for political imbalances to arise between the legislature and the executive (something which is not possible in a parliamentary system), which may result in disagreement in relation to budgetary issues.

The second is the existence of a bicameral system under which: 1) both houses have budgetary powers; and 2) the upper house and the lower house may reflect different political majorities.

Whereas the former is an exogenous factor – parliament vs. government – the latter is an endogenous factor – one house of parliament vs. the other house. When both factors operate in parallel, the combination is explosive.

For this reason, contemporary parliamentary systems envisage a largely subsidiary role for the upper house within the budgetary process. An extreme example is the exclusion of the House of Lords in the United Kingdom,[26] whilst less strict arrangements involve (only) a veto power (as is the case for the German Bundesrat[27]) or the right for the

[26] Parliament Act (1911) – about which see *Halsbury's Statutes of England*, London, IV, 1028 – , but there is a more ancient practice in this regard. See, for example, a resolution adopted by the House in 1671: «in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords»; and in 1678: «That all aids and supplies, and aids to his Majesty in Parliament, are the sole gift of the Commons; and all bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualification of such grants, which ought not to be changed or altered by the House of Lords». Along its history, the British Parliament has known several crisis between the two Houses in this matter – before the last crisis of 1909 (about which see among others R.M. Punnett, *British Government and Politics* (Aldershot, 1987) 301). According to the *Cobbett's Parliamentary Debates*, in 1671, there was a «Great Controversy between the two Houses» whit regard to an additional imposition on several foreign commodities. You can read from the transcription of the parliamentary debates: «A hard and ignoble choice is left to the lords, either to refuse the crown supplies when they are most necessary, or to consent to ways and proportions of aid, which neither their own judgement or interest, nor the good of the government and people, can admit» (W. Cobbett, *Parliamentary History of England* (London, 1808) vol. IV, 480-495).

[27] German Fundamental Law, Article 77.4. Once the Bundestag has given its approval, the territorial House may propose an opposition, which triggers the convening of a bicameral conciliation committee. If this conciliation fails, the lower House has the final say. It can overcome the Bundestrat's opposition by a majority vote (or by qualified majority, if the upper House has vetoed it by a two-thirds majority).

lower house to force through its position in the event of a persistent disagreement (as is the case in France).[28]

By contrast, the US system features both exogenous and endogenous risk factors. First of all, there is no requirement for the President to enjoy the confidence of Congress. Moreover, both the House of Representatives and the Senate have equal standing in relation to the President's budget, and the two houses may (and in fact often do) have different majorities, and thus take different positions concerning the President's proposed budget. This is why the USA has seen some of the most extreme outcomes in this area.

III. FUNDING GAPS AND DEMOCRACY

At this stage it is however necessary to make a preliminary clarification of a methodological nature in order to guard against an objection that may reasonably be anticipated.

The analysis and classification set out below will hold good as long as the strictly position under constitutional law (or rather, the formal position according to the Constitution) is not distorted by external factors – including first and foremost by political factors.

On the other hand, any aspect that is objectively intended to characterise a system of government risks falling prey to the same fate.

However, if no reference is made to the objective provisions of the formal Constitution, and the analysis focuses instead almost exclusively in favour of the political system, this will be tantamount to giving up on a study of the system of government as impracticable, and leaving the field open to political science.

In effect, the – as it were – 'formal' aspect nonetheless maintains some performative capacity over the system and if nothing else it remains (or should remain) a permanent parameter, which can thus be permanently invoked in order to re-establish the proper equilibrium. It is no coincidence, in all likelihood, that legal systems in which the process of democratic stabilisation has not been clearly resolved do not end up regulating a budgetary state of exception through specific rules, but rather allow

[28] French Constitution, Article 47: if a joint conciliation committee does not resolve the disagreement between the Houses, the Government may ask the National Assembly to take a final decision. It should be noted that other elements of predominance of the Lower House are present in the French system. Just think, for example, of the constitutional rule of the *priorité* of the National Assembly in the examination of the financial law.

sovereign authority to lie with the body that the political facts identify as the strongest operator.

This is the case, to provide one example, in Mexico. In 2008, a constitutional amendment enhanced the powers of the house with spending power, amending the previous wording of Article 74 under which the Chamber of Deputies had competence to "approve, examine and discuss". Moreover, since 2004 the Chamber has had more time for discussion and approval, whereas previously the mid-November deadline for the tabling of the budgetary law by the Government significantly shortened the time available for discussing the budget.

However, no provision within either constitutional or ordinary legislation directly or indirectly regulates the scenario of a funding gap, even though the Constitution contains a provision that is entirely analogous to Article 1 of the United States Constitution. Article 126, one of the few provisions still in the original form adopted in 1917, provides that «no payment may be authorised that has not been stipulated by the public budget or by a subsequently enacted law».

It should be noted that power to approve the budget lies with the Chamber of Deputies alone, and not also with the Senate,[29] which reduces the risk of a funding gap for the reasons mentioned above. However, under the Mexican constitutional system, there is nothing to prevent the Chamber of Deputies having a majority different from the governing party, and this mismatch may give rise to disagreements, which may in turn result in a funding gap. This is clearly a matter of law in books. The law in action on the other hand tells us that, within a system in which political pluralism is not yet mature, such a mismatch remains merely an academic hypothesis, and hence the funding gap is not something that it has been considered necessary to regulate.

[29] This exclusion is quite unusual. Generally, the role of the upper House in the budgetary process is limited in a certain measure due to two factors. The first is the non-elective nature of part or all of the chamber. The second is the exclusion of the upper chamber (which generally has territorial, not general, representation) from the relationship of confidence with the government, in systems that provide for it. In the Mexican case, neither of these reasons applies. The House of Deputies and the Senate have the same popular legitimation, and neither of them has a relationship of confidence with the government, which is not provided for in that system. Moreover, the Deputies and Senators share the legislative function on an equal footing, which makes it even more difficult to justify an anomalous monocameralism in the budgetary function. In fact, this is a historical legacy. When the bicameral system was reintroduced in 1874 (after a single-chamber system had been adopted in 1857), it was feared that this would lead to a weakening of the Deputies, which would once again be flanked by a Senate representing the naturally more conservative classes. For this reason, some measures (including the adoption of the budget) were reserved for the lower House alone. But this is clearly no longer the case and could be challenged in the future by the option for full bicameralism.

A similar (deliberate) omission allows the respective executives to play the part of the sovereign under a state of exception, despite the absence of any express rules establishing this definitive hegemony. If this is not accompanied – as it is not – by adequate checks and balances, it clearly runs contrary to the stated democratic process.[30]

It is interesting to note that legal systems in which the need for a public statement of democratic process is felt less intensely have not by contrast encountered any particular problems in regulating funding gaps according to mechanisms that expressly allow the government's position to prevail.

Perhaps the most interesting of these systems is the Cuban one, where the relevant constitutional amendment, adopted in 2019, failed to take the opportunity to align the budgetary process with a real democratic paradigm. Apart from the requirement of Government initiative and the rule mandating approval by the National Assembly of People's Power, the new Cuban Constitution does not dedicate any further attention to public budgets, leaving the matter for regulation at sub-constitutional level. The task is thus performed by the Law on the Financial Administration of the State which, in the event of a funding gap, provides for an automatic extension of the previous budgetary law approved, "subject to the appropriate adjustments made by the Government". Accordingly, this not only leaves open the option of extensions without any limit in time, but also leaves the Government the broadest freedom possible, turning it into the *de facto* master of the situation.

On the other hand, the choice made in Mexico is more underhand from this point of view as it allows the leaves the system open *de facto* to definitive dominance by the executive, without however enacting any specific provision to regulate the issue, as this would contrast with the stated democratic process.

On the contrary, a literal provision to the opposite effect – in the sense of safeguarding the role of the elected assembly – would if nothing else provide a certain point of reference for assessing the legitimacy of the actual equilibrium reached in relations between the Government and Parliament, which confirms (as if there were any need for it) the relevance of formal constitutional rules in this area. *Vacuum iuris* is often a perfect bedfellow for executive dominance. This is also the case in the area of public budgets.

[30] If not accompanied, as it is not, by adequate counterbalances.

IV. A BUDGET-ORIENTED CLASSIFICATION OF SYSTEMS OF GOVERNMENT

As we have already said, not only a budgetary state of exception is something that recurs fairly frequently "in the wild", but it is a fully legitimate parliament's choice.

The legitimacy of a refusal by parliament (whether expressly asserted, or merely as a consequence of an internal division that prevents agreement being reached between the two houses) is clearly established within the original literature written after the Prussian crisis. For Laband and (most) others, a refusal by parliament is entirely legitimate: quite simply, it leaves the government with full and exclusive responsibility for adopting the budget. Moreover, under the Prussian system this was not a particularly unusual outcome (in the sense of constituting a break with the constitutional order): indeed, government and parliament were *jointly* vested with legislative power and if – so Laband explains – the latter withdraws from the fray, then the exercise of legislative authority is entirely the responsibility of the government.

Naturally, even more so than in Laband's times, there is no doubt nowadays that, within a contemporary parliamentary democracy, any rejection of a budget by parliament will be legitimate.

However, this assertion may also be expressed in different terms: within a contemporary democracy there is no doubt that specific legislation needs to be enacted in order to regulate funding gaps (i.e. to regulate the consequences of the rejection of a budget by parliament). In fact, due to the very nature of a decision by parliament concerning a budget within a parliamentary democracy (i.e. necessary authorisation without which no financial resources can be allocated), the consequences of its rejection must be regulated.

This is naturally the case if we take the view that it is formally possible (and hence legitimate) and materially possible to reject a budget. If we have any doubts regarding either of the two possibilities, it does not make any sense to regulate something that is not possible. This means that it is possible to make the following assumption: if the funding gap is not regulated it is because it is not considered possible (either formally or materially) for parliament to reject a budget; and if it is not considered possible for parliament to reject a budget, the system is not a genuine parliamentary democracy.

It does not therefore come as any surprise that, adopting a comparative perspective, it is possible to identify some not fully mature democratic systems in which (whilst the formal possibility of the rejection of a budget by parliament is not denied) no provision is made for the consequences of such rejection (because rejection is materially

impracticable within that political context). This is an indication of the fact that, in substantive terms, these democracies are still not genuine democracies.

This issue has already been touched on in the previous section. At this juncture by contrast, we shall focus on those systems that have made provision to regulate funding gaps. Based on a study of these regulatory frameworks, it is possible to distinguish between two scenarios: an "assembly-dominated" model and an "executive-dominated" model.

4.1. The assembly–dominated model: the USA

The purest example of an "assembly-dominated" model is the United States of America,[31] where Congress in actual fact enjoys *double predominance.*

It is predominant first of all by virtue of the mechanism of temporary budgetary authorisation under a "continuing resolution", which temporarily extends the last approved budget.

This is a mechanism which, albeit with some differences, is incorporated into almost all systems (and without doubt into all systems with "assembly-dominated" models). However, in the USA, choices concerning it are completely in Congress's hands, much more than that in other similar systems. It is not surprising therefore that the United States has used it practically every year since 1977, with only a few of exceptions[32].

The purpose of these decisions is twofold: 1. to preserve congressional prerogatives to make final decisions on full-year funding levels; and 2. to prevent a funding gap and a corresponding government shutdown.[33]

Three features of these resolutions have been identified in practice as being essential. They are adopted following negotiations involving all stakeholders[34] with the aim of setting "spending levels ... high enough to let agencies function but not so high that

[31] A. Schick, *The Federal Budget. Politics, Policy, Process*, Washington, 2008; H.M. Robert, *Robert's Rules of Order Newly Revised* (Reading, 2011); P. Mason, *Mason's Manual of Legislative Procedure* (St. Paul, 2010). About the OMB, see S. L. Tomkin, *Inside OMB: Politics and Process in the President's Budget Office* (New York, 1998).

[32] P. Winfree, *A History (and Future) of the Budget Process in the United States*, (London, 2019), is fundamental in order to understand how balances between Congress and White House changed throughout history.

[33] C. T. Brass, *Interim Continuing Resolutions (CRs): Potential Impacts on Agency Operations*, Report of the Congressional Research Service, 2011.

[34] J. Tollestrup, *Continuing Resolutions: Overview of Components and Recent Practices*, Report del Congressional Research Service, 2012.

they removed the incentive for Congress and the President to agree on regular authorization and appropriations bills".[35]

a. The first necessary aspect is legislative coverage. In fact, temporary financing is only permitted for those activities that are already covered by an appropriation act relating to previous financial years (or at most an Appropriation Bill already being debated before Congress). For the sake of clarity, the resolution must in each case provide an ordered list of the Acts to which it refers, according to a pre-determined formula. A "prohibition on new starts" hence applies, which requires that a reference be made to legislation that is already in force (even though in practice there has been no lack of exceptions).[36]

On the other hand, continuing resolutions are very attractive for those seeking to introduce non-financial measures as the legislation will (almost) certainly be approved. Moreover, this poor practice is to some extent facilitated by parliamentary regulations. For example, in the House the rule that prevents legislative provisions from being included within appropriation acts specifically fails to refer also to continuing resolutions; the Senate[37] on the other hand does have a provision to this effect, although in practice it has largely ended up being applied in a liberal manner.

b. The second structural aspect that the temporary resolutions in question must feature is the quantity of budget authority under the continuing resolution. According to this perspective, an appropriation does not occur of a precise amount for each budget account. On the contrary, the continuing resolution provides "such sums as may be necessary" to avoid interrupting financing with reference to a "rate for operations" which, until a few years ago, could be defined in a variety of ways, largely with reference to past spending. The current tendency on the other hand is to refer to the ratio between the total available budget authority for each fiscal year and the portion of the year that the continuing resolution is intended to cover. This is no longer based on past spending, but rather on the spending proposals made by the President for the next fiscal year.

[35] J. White, 'The Continuing Resolution: A Crazy Way to Govern?', *Brookings Review* (1988) 30.
[36] Although there are exceptional cases in practice.
[37] Senate Rule XVI, 2-6.

c. The third aspect is the duration of the resolution, and hence of the temporary financial coverage. In reality, it should be pointed out that these acts are not always temporary in nature. In practice, some continuing resolutions in fact offer cover to activities throughout the whole of the following fiscal year ("full-year continuing resolutions").

In the event that a regular appropriation act is approved for the activities in question before the continuing resolution expires, the budget authority of the former immediately replaces that of the temporary resolution, which thus lapses. On the other hand, if there is any delay in the adoption of the definitive measure, Congress will be faced with the same alternative previously avoided on a temporary basis: either to proceed with a new continuing resolution in order to delay the spectre of a funding gap or alternatively to accept the risk of a shutdown.

However, the predominant status of the assembly is not based solely on the full availability of the emergency remedy of a continuing resolution. Congress can in fact definitively prevail if it is not willing or able approve a continuing resolution because, in such an eventuality, the Government is unable to take any initiatives, but is forced to declare a shutdown of any administrative operations that do not have legislative cover.

The dominance (or predominance) of Congress is clearly apparent within the constitutional provision that «no money shall be drawn from the Treasury, but in consequence of appropriations made by law».

The constitutional prohibition has been tightened up by the Antideficiency Act of 1982, which tried to put a halt to a lack of rigour in applying Article 1[38]. In fact, the

[38] Until the 1980s, most federal Agencies gave flexible application of the the Antideficiency Act. As matter of fact, they used to continue providing their services and activities, minimizing all non-essential operations and obligations, believing that Congress did not intend that agencies close down. Between 1980 and 1981, the Attorney General Benjamin R. Civiletti, in two opinions, argued that the Antideficiency Act should be given a strict interpretation, also in light of the constitutional provision it was intended to implement, so as to demand the effective interruption of any federal service, unless «some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property» (U.S. GAO, Funding Gaps Jeopardize Federal Government Operations, PAD-81-31, March 3, 1981). Although it had not obtained universal sharing, Civiletti's thesis has entered officially in force. In 1990, indeed, Congress statued that «the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property» (31 U.S.C. § 1342). On the other

1982 Act expressly prohibits – under threat of criminal sanction[39] – any federal official or employee from disposing of or even simply authorising obligations or other forms of economic commitments *in excess of the funds allocated by legislative act*.

Therefore, any failure to approve appropriation leads to a cut in non-discretionary public spending and therefore an interruption of the related federal services, except for «emergencies involving the safety of human life or the protection of property», with "unnecessary" civil servants being furloughed.[40]

In order to deal with such extraordinary circumstances – which are however not always entirely unforeseeable – Circular No. A-11, which is issued by the Office of Management and Budget at the White House at the start of the administrative phase involving preparation for the Presidential Budget, requires individual administrations to draw up a shutdown plan, and to submit it to the Office of Management and Budget in order to assess its sustainability and, where necessary, to implement it.

The plan must identify in particular the staff who are to continue working and those who are to be placed on furlough, along with any activities that must be guaranteed in order to protect human life or private property.

A shutdown is definitely a drastic option, which not only involves institutional friction. It also has a considerable impact on the national economy. It is therefore no surprise that some authors argue that the Antideficiency Act is unconstitutional.

Specifically, it has been asserted that «if ... suggestion of the operation of the laws through denial of funding is essentially legislative in effect, any device that permits a single house of Congress to accomplish this result is unconstitutional for violation of the Constitution's provision that the concurrence of both houses is needed for the enactment of legislation».[41] However, the argument is perhaps a little specious. In

hand, the OBM Circular No. A-11, asking agencies for preparing a shutdown plan, adopts the restrictive interpretation of relevant legislation given by Civiletti.

[39] What is more, in order to avoid circumvention of the regulations, the Antideficiency Act adds the prohibition to accept the offer of voluntary work to replace the personnel on leave, providing for the eventual infraction the same criminal sanctions provided for officials or employees who make payments or assume commitments without legislative appropriation.

[40] Only: Members of Congress; the President of the United States and his trustees; certain federal employees who engage in emergency activities involving the protection of human life or property, or for whom specific exceptions are provided; employees of Congress paid by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives in cases where the competent authorities of the House consider that the exemption is being invoked. In 1990, Congress clarifies «the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property» (31 U.S.C. § 1342).

[41] A. Hill, 'The Shutdowns and the Constitution', *Pol. Sc. Quarterly* (2000) 276-277.

providing that "All legislative Powers… shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives", Section 1 of Article 1 of the 1789 Constitution vests the exercise of legislative powers collectively in the two houses of Congress. Thus in all circumstances – and accordingly not only for financial budgetary decisions – they may also be exercised in a negative sense. According to Section 1 of Article of the Constitution, the failure by the two houses to adopt a joint position constitutes an exercise of legislative powers.

4.2. Other examples of assembly-dominated models

Amongst the systems examined in this comparative study, the USA is a *sui generis* one even amongst "assembly-dominated" systems. Its uniqueness lies in the fact that the system makes provision not only – as other systems also do – for a temporary and provisional emergency remedy (through continuing resolutions), but also the situation that arises where this remedy is not adopted.

By contrast, the other "assembly-dominated" systems that we shall examine do not go as far as this second stage: they regulate forms of temporary budgetary cover, but go no further. This is simply because "going further" is extremely difficult to imagine within a parliamentary system premised on a requirement of confidence. In fact, where a requirement of confidence applies, temporary cover is necessary in order to gain time for negotiations between the government and parliament. Albeit after some delay, such negotiations will certainly have a positive outcome, given that the government and (a majority in) parliament represent the same political forces.

Naturally, this is only entirely the case within monocameral systems, or alternatively within bicameral systems in which the government must have the confidence of both houses or where the upper house is essentially excluded outright from financial decision making.

The last two scenarios are those prevailing respectively in Italy and the United Kingdom. Specifically, the Italian and UK systems may be considered to be "assembly-dominated" because temporary spending power is entirely a matter for the House of Commons; however, this predominance ends here and does not go any further, as is the case in the USA.

In fact, the very nature of the system of government in the UK and Italy prevents things from going any further. The grant of temporary authority thus amounts to a mere delaying tactic in order to arrive at a political agreement which will certainly be

concluded, given that Government and Parliament – in Italy – and the Government and the House of Commons – in the UK – are backed by the same political forces.

For the sake of completeness, we should point out that Italy and the UK differ as regards the structure of temporary budgetary cover. Although there are many similarities (the main ones being: reference to past spending, with resources only being appropriated in advance for services that have already been authorised by Parliament through the enactment of legislation),[42] the structure is reversed from a temporal perspective.

In Italy in fact, the Constitution provides that Parliament must authorise a temporary budget by enacting legislation, which may not have a (total) duration in excess of four months. It therefore amounts to an emergency instrument, which operates *ex post*.

In the United Kingdom on the other hand, a temporary budget is adopted *ex ante* under so-called "votes on account". These are special forms of "Estimates", which are not adopted following any delay by Parliament in approving the budget, but rather occur in advance[43], providing a guarantee of the cover necessary for essential administrative activities until Westminster has approved the definitive spending authorisation (known as "Main Estimates").

Therefore, before the start of the new fiscal year, the Government presents the votes on account to Parliament along with a request that it allocate "resources, capital and cash to allow existing services to continue operating during the early months of the coming financial year, pending Parliament's consideration of the Main Supply Estimates in July".

Aside from this difference in temporary structure, *interim* financial measures are very similar in Italy and in the UK.

These two countries, therefore, share with USA the fact that provisional authority lies entirely with Parliament – which decides on its own initiative both whether to adopt it as well as the relevant amount. However, in contrast to the USA, there is no legislation in Italy or the UK governing the (improbable, due to the requirement of confidence) scenario under which Parliament fails to adopt the *interim* measure.

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[42] E. May, *Treatise on The Law, Privileges, Procedings and Usage of Parliament (Parliamentary Practice)* (London, 2011) 731.

[43] Except in exceptional circumstances, the advance requested for the new financial year (Required on Account) is generally calculated at 45% of the amount of resources already voted for each Request for Resouces for the previous year (so-called "Total to date on which provision on account is based"). Of course, in the Main Estimates the resources requested by the Administration will be allocated net of the figures already granted with the Votes on Account.

It can be said, therefore, that there is a sub-hierarchy within the assembly-dominated model due to differences in systems of government: *a strong* assembly-dominated model, such as the USA; and *a soft* assembly-dominated model, such as – among others – Italy and the UK.

The choice of classifying two systems of parliamentary government – the Italian and UK systems – that are so different from each other as assembly-dominated models might attract an important objection. While the skeleton budget process, under which parliament has the authority to approve a temporary budget, *de facto* ensures its predominance, it is also the case that the requirement that the government enjoy its confidence ends up, in practice, being decisive for the vote in parliament.

This is especially the case if the government has control over any instrument that is capable of "institutionalising" a dispute with parliament, confronting the latter with a choice that can potentially trigger a formal crisis. An example of this is the ability under Italian law to attach a confidence vote to any measure discussed in Parliament. In doing so, the Government undertakes to resign in the event that its proposal is rejected by Parliament. This is a kind of – as it were – moral blackmail against Parliament, which is confronted with a choice: either to approve the measure, or to risk bringing down the Government. In fact, the blackmail is particularly blatant since, in attaching a confidence vote to a measure, it is not possible to amend any aspect of the government's proposal: either the wording is approved *as is* or the government resigns. This formidable instrument has been used frequently in Italy and, as is apparent, has attracted significant criticism. It must in fact be considered that the pressure that this mechanism exercises on Parliament is even stronger if the Government engages it – as has happened on some occasions – within a timeframe that does not enable Parliament to carry out a more relaxed examination, given the need to approve the budget by a certain date.

The issue of confidence is therefore an aspect (characteristic of the system of government) that interferes with the budgetary process from the outside, *de facto* overturning its natural/structural assembly-dominance.

This objection certainly has its merits. However, the comments made above (which will be returned to below) concerning the significance for the research issue addressed in this paper of factors that are external to the essential structure of the budgetary process are also relevant here.

In fact, the fact that the Government's choice to invoke the responsibility resulting from the relationship of confidence results *ipso facto* in parliament endorsing the executive's proposal is a consideration more pertinent to political science. A parliament with a political majority that is more independent from the government might in fact object to being blackmailed. Indeed, a parliament can be prevented from giving in to the government's blackmail simply by opposition (not from the entire majority, but only) from a certain segment of the majority. It is even hypothetically possible to create a different political majority for such a vote from the majority that initially supported the government. On the other hand, once the government has been thrown into crisis after losing the confidence vote, there is nothing to prevent parliament from examining, amending and approving the finance bill initially presented.

Ultimately, any refusal by parliament to accept the government's proposal and a return to the ordinary terrain of parliamentary debate is entirely legitimate. Although this might not be *politically practicable* on some occasions, it is still *legally possible*. And it is what is *legally possible/impossible* (and not what is *politically practicable/impracticable*) that is the definitive and ultimate criterion for establishing the democratic nature of the system. That's why when conducting this analysis (at least from the perspective adopted here), the structural configuration of the budgetary process is more important than the effect that the intervention of an element external to the system might have.

This is first and foremost because such effects can vary in line with contingent political equilibria: as noted above, there is nothing to prevent the political majority in parliament from departing from the government's line.

Secondly, and perhaps more importantly, the structural configuration can always be invoked in support of the legitimacy of robust debate and disagreement on a political and institutional level. In other words, the structural assembly-dominance over the budgetary process (even if it is specifically altered or even negated as a result of the use of other mechanisms, such as association with a confidence motion) is always a criterion for assessing the specific state of equilibrium between government and parliament. This is especially the case given that the option of constitutional review is always available where that assembly-dominance is tangibly compromised or excluded. Moreover, the ability, as a last resort, to trigger such review (which would not be possible were the structure of the budgetary process different) in order to safeguard that dominance tells us something definitive about the extent to which the system conforms to the paradigm of representative democracy.

4.3. The executive–dominated model

Other systems regulate funding gaps by arrangements that shift the balance of power more in favour of the executive. Naturally, this "executive predominance" can be achieved in different ways, which can be situated along a sliding scale.

Simply put, these mechanisms are, from the weakest to the strongest: extension of the previous budget; temporary substitution by the government; and the definitive predominance of the government.

a. The first mechanism (extension) is distinct from temporary legislative budgetary approval under "assembly-dominated" systems due to the automatic nature of the extension, whereas temporary legislative budgetary approval is a discretionary option – both in terms of its actual adoption as well as the amount involved – for assemblies. Consider for example the position in Spain.[44] A temporary budget is automatically ordered, in the form of a *prórroga presupuestaria*, at the start of the year without any legislative cover. This *prórroga presupuestaria* can apply indefinitely until Parliament has reached agreement concerning the approval of the new budget.[45]

Under a system of parliamentary government such as the Spanish system, the open-ended nature of the extension saves the system from the need to dissolve parliament, which risks being the only possible exit strategy[46] (where dissolution is possible) when the limits on the temporary budget over a set period of time are exceeded (as can occur in Italy).

Naturally, such cases do not involve the absolute predominance of the executive. An extension still has to be approved (albeit not at the relevant time) by Parliament. Moreover, even if in practice an extension occurs in parallel with a government decree, such a decree does not have constitutive effect, but rather only declaratory (as well as providing details of provisional cover, for example by regulating the new revenues provided for under fiscal legislation enacted since the last finance act, or for instance services for which the cost ceiling has been exceeded) [47].

[44] M. Giner, L. Alfonso, *Manual de Derecho presupuestario y de los gastos públicos* (Valencia, 2013) 9.

[45] Spanish Constitution, Article 134.4.

[46] Where dissolution is possible.

[47] J. Pascual García, *Régimen Jurídico del Gasto Público. Presupuestación, ejecución y control* (Madrid, 1999).

Provision is also made for extensions in Argentina. However there, since the political system is presidential and not parliamentary, the Government has a more significant role. In fact, the General Accounting Act provides for an automatic extension of the last budget approved by Parliament; however, the Government may make changes "en los presupuestos de la Administración Central y de los Organismos Descentralizados".[48] Moreover, in practice these changes are very significant.

b. The situation in Germany does not involve an extension of the previous budget[49] and the Government's role is more important. In fact, Article 111 of the Basic Law rather provides that the executive may act in place of Parliament (considered as a collegiate body). Moreover, this power of substitution is in actual fact quite general in scope as far as public spending is concerned. Specifically, the constitutional provision authorises the Government to carry out all fiscal operations necessary in order to continue the provision of service that have already been authorised (subject to the spending limits in the last approved budget), and above all to comply with all legal obligations and "to maintain institutions established by a law and to carry out measures authorised by a law".[50] Essentially, it appears that the Government has authority to conduct any spending that is necessary in order to exercise its general executive powers.

The only true limit on the German Government is imposed – essentially *de facto*, rather than *de iure* – by the availability of financial resources. However, this is also a limit that can in some sense be set aside. In fact, Article 111(2) provides that if the Federal Government has exhausted existing resources in order any expenditure referred to above, in the event that a new budget has not been approved, it is authorised "borrow the funds necessary to sustain current operations up to a maximum of one quarter of the total amount of the previous budget". Here therefore (and only here) a type of extension of the last parliamentary decision takes place.

c. After extensions and substitute action by the executive, the most radical form of "executive predominance" is the definitive predominance by the government over parliament. Provision to this effect is made, as a last resort, under French law.

[48] Ley No 24.156, Ley de Administración Financiera y de los Sistemas de Control del Sector Público Nacional, Article 27.

[49] See T. Knörzer, *The Budget System of the Federal Republic of Germany* (Berlin, 2008); and S. Linn, F. Sobolewski, *The German Bundestag: Functions and Procedures*, (Rheinbreitbach, 2015).

[50] German Fundamental Law, Article 111.

In fact, Article 47(3) of the 1958 Constitution[51] provides that should Parliament fail to reach a decision[52] within seventy days of the tabling of a finance bill, the relevant provisions may be brought into force by ordinance. This is however a special ordinance which, in contrast to the *ordonnances habituelles* provided for under Article 38 of the Constitution, do not require parliamentary authorisation. As a matter of fact, in the event that parliament refuses or fails to reach a decision ("ne s'est pas prononcé") it is entirely deprived of any financial function, whereas it does not appear possible for an ordinance to be adopted if it has expressly voted against the budget.

It is necessary to make two comments regarding the mechanism laid down by the French Constitution. The first is that it could probably only arise under a parliamentary system under which the government is required to obtain the confidence of parliament. In fact, it is only under a system of this type that any abuse of that mechanism could be sanctioned by parliament in forcing the government to resign. In fact, a democratic system cannot tolerate such an over-bearing role for the government within a system characterised by the separation of powers – such as the USA or Argentina – without any ability to withdraw confidence from the government.

On the other hand, a budget adopted by governmental decree is an extremely drastic outcome – and indeed is perhaps the most drastic – even if one considers only parliamentary systems of government. It is thus no coincidence that, whilst situations involving temporary budgets or extensions are extremely frequent in other legal systems, since 1958 the French Government has never invoked its special power to approve budgets by decree. This is now because there have never been decision making deadlocks or other problems in relation to the approval of budgets. Indeed, within more recent practice, deadlocks involving the two houses of parliament have been frequent; however, they have always been resolved through the choice (provided for under the Constitution) to give the last word to the lower house.[53] Perhaps therefore, the option of a special government ordinance was incorporated into the Constitution

[51] P. Avril, J. Gicquel, J.-É. Cicquel, *Droit parlamentaire* (Montchrestien, 2014); and J.-L. Albert, *Finances publiques* (Paris, 2017).

[52] It should be noted that government ordinance is legitimate only in the case of Parliament's inaction («si le Parlement n'est pas prononcé»): it is not, therefore, if Parliament has rejected the executive's proposal with a negative vote. See F. Brigaud, V. Uher, *Finances publique* (Paris, 2017) 144.

[53] French Constitution, Article 45.4: «The Government may, after a new reading by the National Assembly and the Senate, request the National Assembly to take a final decision. In this case, the National Assembly may take over the text drawn up by the Joint Committee, or the last text voted by it, possibly as amended by one or more amendments adopted by the Senate».

as an instrument of dissuasion. Indeed, if one looks at what has happened in practice, this dissuasion appears to be entirely effective.

V. CONCLUDING REMARKS

Having concluded this work of classification, it is possible to make three concluding remarks, which arise in logical order.

a. Considering the systems addressed above in the order in which they have been addressed, a rising intensity (importance) in terms of the state of budgetary exception is immediately apparent, which parallels the rising intensity of the weight of the government in the general equilibrium under the system of government. For the sake of clarity, we shall refer to this direct parallelism as a "fundamental correlation".

Naturally, the reference to the "weight of the government" needs to be clarified in order to avoid misunderstandings. Nobody would dream of saying that the President of the United States does not have a significant role under the American system of government. The position is however different if the weight of the government's role is understood as *the capacity of the executive to dominate the assembly*, and it is clear that the existence the requirement of confidence facilitates this dominance. In fact, it initially arose out of an attempt to ensure parliamentary dominance over the government, rendering the latter an emanation of the former; however, things quickly changed. Within the more general context of the crisis within political representation, what might have been a weapon in the hands of the legislature (i.e. the threat of forcing the government to resign) can turn into an instrument of executive hegemony, due to the effect that its resignation can have on the legislature. It is thus clear that this assessment cannot avoid considering those mechanisms that are intended to rationalise the parliamentary system, i.e. the mechanisms that seek to guarantee executive stability. These mechanisms can vary in terms of their type and intensity, which explains why the system of parliamentary government cannot be treated as a monolithic whole, but manifests itself in various ways. (However, the consequences of this will be considered below.)

It may nonetheless be said that the ultimate "fundamental correlation" confirms the comments made in section one concerning the close correlation between budgetary decisions and the general form of government.

The first result of our analysis, therefore, is not so surprising. It consists in a readily predictable confirmation of an assumption that has never been seriously questioned.

However, it needs to be clarified in two respects in order to bring into focus the utility of a budget-oriented classification of systems of government.

b. The first clarification is that the classification of legal systems with reference to the criterion proposed in this paper is valid across all types of system, irrespective of their classification under the relevant traditional type of system of government. It may in fact be noted that – within the sample of systems focused on – "assembly-dominated" systems include (from the perspective of the classic types of system of government) US presidentialism, a weakly rationalised system of parliamentary government such as Italy as well as the *generis* model of the United Kingdom (Westminster model).
At the same time, "executive-dominated" systems encompass different systems of government, not all of which constitute different manifestations of the general category of parliamentary government: alongside Spain and Germany – and even these two represent different forms of parliamentary government – we have discussed the semi-presidential model in France and, moving even further, Argentinian presidentialism.
In actual fact, each system considered above is unique in its own way. Any classification that sought to provide a perfect reflection of the truth would perhaps have had to identify a separate isolated model for each case studied.
A less ambitious approach involves embracing the least imperfect classification, i.e. the one that betrays reality the least.
And yet, if this is indeed the case, it would appear in the light of the above that budget-oriented classification offers a more exact representation of the reality than that provided by classification according to the traditional types of system of government.[54]

However, perhaps a clarification is in order here in order to counter an objection that might potentially be raised. A budget-oriented classification does not fail to take account of the aspects taken into consideration by the more classic type of systems of government: on the contrary, it faithfully incorporates them.
Although there is not sufficient space here to revisit the well-known discussion concerning the identifying features of systems of government, we limit ourselves to

[54] Let's think, for instance, that in traditional classification the U.S. and the Argentine case receive the same tag of presidentialism, whereas in the budget-oriented classification they belong to two models that are opposed.

considering the one aspect that, out of all of these features, is probably the only that has not been addressed when defining the shifting boundaries of the types system of government. This aspect is the requirement of confidence.[55]

Under a parliamentary model, a focus on a potential funding gap and a contemplation of the political equilibria engaged in such an eventuality under a parliamentary model naturally implies also a consideration of the ease with which a motion of no confidence in the government can be adopted, and the potential consequences of such actions for parliament. It is in fact clear that this consideration also helps to assess how sovereignty is allocated within a budgetary crisis.

The more difficult it is a vote of no confidence (or rather: the more a parliamentary system is rationalised), the more a country shifts towards an executive-dominated model.[56] This is why, under our classification, systems in which the choice of no confidence lies in the hands of political parties, without any particular procedural constraints, fall under the assembly-dominated model. On the other hand, systems in which it is more difficult to pass a vote of no confidence due to procedural limits fall under the executive-dominated model (and the more difficult it is to obtain Government's resignation, the more the system is characterised by executive predominance)[57].

c. At this point, a second clarification is needed. We can assert the "fundamental correlation" proposed under point (a), subject to a methodological condition: that we remain free from the cognitive biases that the classical types of systems of governments risk engendering, even if unintentionally.

It is also instructive to offer an example of cognitive bias in this field. One might perhaps be tempted to believe that parliamentary systems are naturally characterised by a significant prevalence of executive power, due to the requirement of confidence. However, this idea is not entirely accurate, as we shall attempt to explain below.

[55] Therefore, the discourse concentrates the field of observation on those systems where a confidence vote is constitutionally provided, with the exclusion therefore of the United States and Argentina.

[56] Since relationship of confidence can be regulated in many different ways, it is possible to find a greater "plurality of possible worlds" among forms of parliamentary government than in relation to other traditional forms of government.

[57] In sequence: Spain, Germany and France (where maybe voting against the Government is simpler than Spain and Germany, but – on the other side – the direct election of the President of the Republic and the two-headed nature of the executive "compensates" considerably in terms of rationalisation of the parliamentary system).

Indeed, in the particular field we are interested in, some of the traditional parliamentary systems discussed – such as Italy and UK – are actually more characterised by predominance of the assembly, which has full discretion to adopt temporary measures to avoid a funding gap.

Moreover, there is no doubt that the opposite is not the case for countries that are traditionally branded as 'presidentialist', as there are major differences between these systems: consider, for example, the differences between the United States (assembly-dominated model) and Argentina (executive-dominated model).

In actual fact, it must nonetheless be pointed out that there are undoubtedly other aspects in this area of research for which the traditional classification of systems of government still hold good.

In fact, the distinction between the presidential system of government and the parliamentary system of government (in its various manifestations, after making the necessary approximations) can be endorsed with a good degree of accuracy if one considers the stability/fluidity in the allocation of sovereignty under a state of budgetary exception. Although the two forms of presidential government (as addressed in our sample) fall into two opposing camps, they are stable in this respect. Thus, both assembly-dominated and executive-dominated systems are subject to oscillations, whereas by contrast parliamentary models appear to be more fluid from this perspective.

This fluidity is apparent not only from a comparison *among* systems of parliamentary government: there is no need to repeat a discussion of the variety which may be encountered within the range of systems of parliamentary government, which is so great that some of them must be classed under the "assembly-dominated" model and others under the "executive-dominated" model. We use the former label for United Kingdom and Italy, and the latter for Spain, Germany, and France (assuming semi-presidentialism to be a variation of parliamentary government).

Moreover, the fluidity that characterises each system considered is also endogenous in a certain sense. Indeed, it does not appear possible to identify any clear and definitive rule enabling a branch of government to prevail (either one way or the other) in any of the systems that can be classified under parliamentary government, in contrast to the two examples of presidential government considered. Even where one branch appears to have ultimate power to impose its will – as is the case in France, where the government can ultimately impose its position by adopting an ordinance – systemic

factors nonetheless intervene in order to rebalance the positions, thereby rendering less stable the position of the branch which, owing to the system's closure rules, has ultimate sovereign authority over funding gaps.[58]

In the light of the considerations set out above, we can therefore assert that it is possible to propose a classification of systems of government that turns on the effective balance of power within the budgetary process – or indeed, more specifically, the effective balance of power during a crisis affecting the budgetary process.

In fact, it is the dynamics of this state of emergency that make it particularly clear which, between the executive and the legislature, is the real body with decision making power, and thus which has genuine sovereign powers over the process. Accordingly, the rules governing funding gaps actually conceal – in some cases burned under various layers of political considerations, which are more contingent than structural – a valid criterion for understanding the real state of parliamentary democracy within a given country.

This aspect is so crucial that the manner in which these crises are settled (along with academic commentary on them) has changed over time in parallel with developments in parliamentary democracy; moreover, differences are also apparent between contemporary systems characterised by incomplete or in some sense cumbersome democratic processes if one considers a snapshot at any given time.

Thus, the distinction between an assembly-dominated model and an executive-dominated model (with all the specifications and internal distinctions that this study has attempted to highlight) certainly does not seek to replace the more traditional classifications of systems of government, with which it does not overlap. On the contrary, it may be used as an auxiliary instrument for various reasons.

First of all, the distinction is useful in order to establish the approach – endorsed in this study from the outset – involving the identification of a fundamental relationship between the system of government and decisions concerning public finances. In other words, it is difficult to dispute that, if one detaches all contingent factors, the essential and original core arrived at, when classifying a system of government, is the

[58] Let's consider, for example, the French case. As we know, Constitution provides that the Government can adopt the budget by ordinance, if the two Houses do not find an agreement. It is the more radical prevalence of executive power provided *per tabulas*. However, since 1958 to the present, the Government has never made that choice.

relationship between government and parliament in terms of disputes concerning the allocation of public resources.

It is precisely the original – and hence foundational and in all cases necessarily formative – nature of this relationship that enables us, in some cases, to resist the temptation to engage in the excessive simplification that the current use of traditional classifications of systems of government (much more than those classifications in themselves) can potentially entail.

Thus, a budget-oriented classification can be a useful instrument for arriving at a more sincere and accurate understanding of the reality of each legal system – at least with reference to the category of parliamentary democracies. In this field, going back to the bare essence of the original core, shorn of any contingent embellishment, can offer a criterion both for valid interpretation as well as for proper practice.

"LEGAL BIG DATA": FROM PREDICTIVE JUSTICE TO PERSONALISED LAW?

Andrea Sstazi

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The phenomenon of Big Data intersects with comparative law and justice in several noteworthy profiles.
First, the comparative approach leads to identifying the peculiar characteristics of the data through a conceptual framework of the same in the perspective of other disciplines, in particular economics and information technology.
Then, in view of the different legal issues posed by Big Data, comparative law can help develop and provide data management and analysis services across national borders.
Finally, the application of data analysis methods to legal issues can give rise to "Legal Big Data" through which it might be possible to observe evolutionary patterns and paths of law, foresee or adopt jurisprudential decisions, develop and apply laws or regulations based on solid argumentative and comparative elements.

I. INTRODUCTION: BIG DATA AND COMPARATIVE LAW

Nowadays, computer science, internet networks and the connections that are established between these and material things allow us to collect, manage and analyze large quantities of data, so-called Big Data, which are collected and analyzed through advanced systems and technologies, and which allow to develop innovations, goods and services at unprecedented speed and socio-economic impact: this is the so-called Data Driven Innovation[1].

Big Data differs from "small data" in what are their characteristics, summarized in the so-called. 5V, i.e. volume, variety, speed, value and veracity[2]. In fact, what allows to extract value

[1] In this regard, see, *ex multis*: OECD, *Big Data: Bringing Competition Policy to the Digital Era*, October 2016. https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf, 5, according to which: "Big Data is the information asset characterized by such a high volume, velocity and variety to require specific technology and analytical methods for its transformation into value"; Id., *Data-Driven Innovation. Big Data for Growth and Well-Being*, October 2015. http://www.oecd.org/sti/data-driven-innovation-9789264229358-en.htm; Id., *Data-driven Innovation for Growth and Well-being*, Interim Synthesis Report, October 2014. https://www.oecd.org/sti/inno/data-driven-innovation-interim-synthesis.pdf; Schönberger V.M., Ramge T., *Reinventing Capitalism in the Age of Big Data*, New York: Basic Books, 2018, 1 ff.; Schönberger V.M., Cukier K., *Big Data. A Revolution That Will Transform How We Live, Work, and Think*, London: John Murray, 3 ff.

[2] See: Stucke M.E., Grunes A.P., *Big Data and Competition Policy*, Oxford: Oxford University Press, 2016, 16; De Mauro A., A formal definition of Big Data based on its essential features. *Library Rev.*; 2016, 122; Gandomi A., Haider M., Beyond the hype: Big data concepts, methods and analytics. *Intern. Journ. Inform. Manag.* 2015, 137; Lukoianova T., Rubin V.L., Veracity Roadmap: Is Big Data Objective, Truthful and Credible? *Advan. Classif. Research Online* 2014, 4. In particular, according to the Authors, the 5Vs are made

from data is their "smart analysis", that is, through advanced methods such as predictive analytics, data mining and data science, which make use of technologies such as cloud computing, sensors of the internet of things, machine learning, artificial intelligence, etc.[3].

The phenomenon of Big Data intersects with comparative law under several important profiles. First of all, the comparative approach leads to identify the peculiar characteristics of the data through a conceptual framework of the same in the perspective of other disciplines, in particular information technology and economics[4].

Then, comparative law is of particular importance in order to ensure that data management and analysis services can be developed and provided beyond national borders, while highlighting requirements and limits for this to take place in compliance with the various current regulations.

Furthermore, the collection and analysis of "Legal Big Data" can allow observing the evolutionary patterns and paths of the law, foreseeing or adopting jurisprudential decisions, drafting and applying laws or regulations, based on solid argumentative and comparative elements.

I. DATA DRIVEN INNOVATION AND BIG DATA: CONCEPTUAL FRAMEWORK IN MULTIDISCIPLINARY PERSPECTIVE

In computer science, systems are regularly modeled using data, information and knowledge[5]. This is a model that has long been used. The first version of the model is static, that is, a

up of: 1) volume of available data which is enormous and coincides with the overall size of the phenomenon; 2) variety of data and unstructured data sets or heterogeneity of sources and formats; 3) the speed with which the databases are fed and the high frequency with which the data circulate from a point of origin to a collection point; 4) value of the data which depends on the economic potential and the social value that can be attributed to the data as new production factors; 5) veracity of the data, or their authenticity and reliability.

[3] See: Gellert R., *Data Protection and Notions of Information: A Conceptual Exploration*, 2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3284493; Ackoff R., From Data to Wisdom. *Journ. Appl. Syst. Anal.* 1989, 3; Gandomi A., Haider M., Beyond the hype: Big data concepts, methods and analytics, cit., 140, who state that: "Big data is worthless in a vacuum. Its potential value is unlocked only when leveraged to drive decision making. To enable such evidence-based decision making, organizations need efficient processes to turn high volumes of fast-moving and diverse data into meaningful insights".

[4] On the importance of the other disciplines for the purpose of comparative analysis, see among others: Michaels R., Transnationalizing Comparative Law. *Maastr. Journ. Eur. Comp. Law* 2016, 352; Spamann H., Empirical Comparative Law. *Ann. Rev. Law Soc. Sc.* 2015, 131; Reitz J.C., How To Do Comparative Law. *Amer. Journ. Comp. Law* 1998, 617, who highlighted how one of the benefits of using the comparative method is "the tendency to force the researcher to expand the analysis to include the whole legal system and its relationship with the rest of human culture and its material and spiritual context in order to understand the differences and similarities observed"; one may see also: A. Stazi, *Biotechnological Inventions and Patentability of Life. The US and European Experience*, Cheltenham: Edward Elgar, 2015, 258 ff.

[5] See: European Commission, *The economics of ownership, access and trade in digital data*, JRC Digital Economy Working Paper 2017-01. https://ec.europa.eu/jrc/sites/jrcsh/files/jrc104756.pdf, 6 ff.; Ronquillo C., Currie L.M., Rodney P., The Evolution of Data-Information-Knowledge-Wisdom in Nursing Informatics. *ANS Adv Nurs Sci.* 2016, E1.

hierarchy: knowledge is made up of information that is composed of data. But this model is not adequately explanatory.

In practice, data is essentially acquired through three main channels. First of all, some data are offered voluntarily, that is, intentionally provided by an individual-user of services or products. Secondly, there are the observed data, or behavioral data acquired automatically by the activities of users or machines. Finally, some data are deduced, transforming in a non-trivial way data provided voluntarily and/or observed while they are still in relationship with a specific individual or machine[6].

With respect to the use of the data collected in this way, four modes are currently configured, namely: non-anonymous use of data at individual level, anonymous use of data at individual level, aggregated data and contextual data. Non-anonymous use of data at the individual level is typically aimed at providing services to the individual. The anonymous use of data on an individual level does not take place directly for this purpose, but for example to train machine learning algorithms and/or for purposes unrelated to those for which the data were originally collected. The aggregate data refer to more standardized data that has been irreversibly aggregated, such as for example national statistical information, sales data, etc. Finally, contextual data refer to data that does not derive from data at an individual level, such as information on the road network, satellite data etc.[7]

Hence, data is structured and organized through computation - human or automatic - in information, which in turn is interpreted and used as knowledge. Here emerges a value chain, in which data are organized into information through the use of tools and processing methods, and this information is then interpreted and used as knowledge through the use of attention[8].

In the debate on the subject, metaphors are frequently used on the value of data, including first of all the one according to which "data is the new oil"[9]. Economic analysis, on the other hand, leads to believe that this statement cannot be shared for three reasons, namely:

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[6] In this regard, see: European Commission, *Competition policy for the digital era - A report by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitze*r, April 2019. http://ec.europa.eu/competition/publications /reports/kd0419345enn.pdf, 24-25.

[7] See again: *European Commission, Competition policy for the digital era - A report by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer,* cit., 25 ff.

[8] Thus: Gandomi A., Haider M., *Beyond the hype: Big data concepts, methods, and analytics*, cit., 137-144; Drexl J., *Designing Competitive Markets for Industrial Data - Between Propertisation and Access*, Max Planck Institute for Innovation & Competition, Research Paper No. 16-13, October 2016. https://ssrn.com/abstract=2862975, 17; Varian H.R., Beyond Big Data. *Busin. Econ.* 2014, 27.

[9] See: Newman N., Search, Antitrust and the Economics of the Control of User Data. *Yale Journ. Reg.*, 2014, 436; Lerner A.V., *The role of Big Data in online platform competition*, 2014. https://papers.ssrn.com/abstract=2482780, 3.

i) There is no scarcity of data, on the other hand, they are not only abundant but increasingly abundant. An asset that is increasingly abundant behaves differently than one of which there is scarcity when it comes to value. The data is produced every second. In fact, with the passage of time, the amount of data in circulation increases exponentially. It is a mechanism profoundly different from oil[10].

ii) Data is not "consumed". When a person uses gasoline for her car, another person cannot use that same gasoline for her own. She cannot use even a small part of it. Oil and petrol cannot be shared. On the contrary, as regards the data, the user can transfer them to different service providers.

iii) Data is a non-rival asset: it can also be used by several people at the same time[11].

As a result, the data often has a very particular utility curve, with decreasing returns to scale. If you don't have any data, even a minimal amount is useful; then, as the amount of data increases, their usefulness begins to decrease. One of the reasons why the marginal utility of data decreases is that the number of variables in a set grows linearly, while correlations grow exponentially. It is the so-called Big Data tragedy, where more data will involve spurious or even insignificant correlations and significantly higher costs for identifying significant correlations[12].

While the value of the data in itself is small, it acquires value when it is organized in such a way as to obtain information from them or where knowledge can be extracted from that. If we look only at the raw data, we do not find the value to which it can instead give rise if properly analyzed. The key to extracting value from data is to have innovative ideas on how to use it and computer scientists and data scientists able to develop effective software and artificial intelligence systems to obtain useful information[13].

In this scenario, what is of central importance, beyond the amount of data available, the programming and processing skills, are the rhythm of learning and the ability to combine data analysis, machine learning and human learning in the best possible way[14]. Human

[10] In this sense, for example, the amount of data produced by the machines increases exponentially. Regarding the differences between data and oil, see widely: Frank M., Roehrig P., Pring B., *What To Do When Machines Do Everything: How to Get Ahead in a World of AI, Algorithms, Bots, and Big Data*, Hoboken: Wiley, 2017, 65 ff

[11] See: Gandomi A., Haider M., *Beyond the hype: Big data concepts, methods, and analytics*, cit., 137-44; J. Drexl, Drexl J., *Designing Competitive Markets for Industrial Data - Between Propertisation and Access*, cit. p. 28; Varian H.R., *Beyond Big Data*, cit.

[12] In this sense, see: Taleb N.N., *Antifragile: Things That Gain from Disorder*. New York: Random House, 2012.

[13] In this regard, see: European Commission, *Competition policy for the digital era - A report by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer*, cit., 27 ff.; Pitruzzella G., Big Data and Antitrust enforcement. *Riv. ital. Antit.* 2017, 80.

[14] See: Stiglitz J.E., Greenwald, B.C. Creating a Learning Society: A New Approach to Growth, Development, and Social Progress, New York: Columbia University Press, 2015.

knowledge specific to a particular field, therefore, still retains a high value in the data economy, not least because it is necessary to ask the right questions.

II. THE QUALIFICATION OF CROSS-BORDER TRAFFIC REQUIREMENTS

In the Big Data scenario, it is also of particular importance to ensure that data management and analysis services can be developed and provided beyond national borders, in compliance with the different regulations in force in the various legal systems[15].

In this perspective, first of all, with regard to data ownership, the European continental model is being questioned, because whatever the nature of the rights that individuals can claim on their data, their applicability seems, in most cases, illusory. The European model must also compete with other models including, first and foremost, the US model which, in practice, attributes the possibility for companies to make the most of data by drawing its value[16].

In this context, also in consideration of what has been noted above, the most relevant issues pertain not so much to the personal data that belong to individuals but rather to the management of the vast databases that are among the main components of the so-called datasphere.

A similar approach seems to be accepted also in those Asian systems where the fundamental question is not to protect individual rights, but rather to guarantee the general interest of the community. The model that is based on the protection of personal data, therefore, seems to be decreasing in terms of size, numerically and geographically[17].

In Japan, for example, non-personal and anonymized data do not have specific legal protection. Apart from contract law, individual data are not protected, while structured datasets have the possibility of being protected by the regulation on trade secrets and

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[15] In this regard, see among others: Drexl J., Legal Challenges of the Changing Role of Personal and Non-Personal Data in the Data Economy, in De Franceschi A., Schulze R. (ed.), *Digital Revolution - New Challenges for Law*, Cambridge: Intersentia, 2019, 5 ff.; Falce V., Copyrights on data and competition policy in the Digital Single Market Strategy. *Riv. ital. Antit.* 2018, 33.

[16] See: Sylvestre Bergé J., Grumbach S., Zeno-Zencovich V., The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance. *Eur. Journ. Comp. Law Gov.* 2018, 159; A. Coos A., *EU vs US: How Do Their Data Privacy Regulations Square Off?*, 17 January 2018. https://www.endpointprotector.com/blog/eu-vs-us-how-do-their-data -protection-regulations-square-off; see also the analysis conducted by William Fry, *Europe for Big Data*. https://www.williamfry.com/docs/default-source/reports/william-fry-europe-for-big-data-report.pdf?sfvrsn=2, 2 ff.

[17] In this sense, see: Sylvestre Bergé J., Grumbach S., Zeno-Zencovich V., *The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance*, cit., 163; Burk D.L., *Privacy and Property in the Global Datasphere*, Minnesota Legal Studies Research Paper No. 05–17. https://papers.ssrn.com/sol3/papers.cfm? Abstract_id = 716862.

copyright. This is due to the fact that structured datasets have characteristics that differentiate them from individual data and are substantiated in the fact that corporate entities apply their own vision and intuitions to that data.

Although the protection regime granted in Japan on trade secrets is not significantly different from that in force in the European Union and in the United States, the regulation on the protection of copyright presents some differences with respect to the sui generis rights granted in the EU and at the level of requirements in the United States. In Japan, moreover, protection against illegal acts is not effective since it does not extend to individual data and the Supreme Court attributes this possibility as well as the related protection only for data sets protected by copyright and by the regulation on trade secrets[18]. On the other hand, contracts offer greater flexibility and therefore the possibility of protecting individual data, unless a contract violates the rules for the protection of public order.

Since non-personal and anonymized data do not have specific legal protection, the Japanese government is considering the implementation of new policies, both legislative and non-legislative, similarly to what the European Commission is doing[19]. Recently, in fact, EU has successfully concluded the talks with Japan aimed at adopting a mutual adequacy decision, by which it is agreed to recognize the respective data protection systems as "equivalent"[20].

With respect to the issue of data circulation, in terms of defining the related legal conditions, the general system set up by the European Union for the protection of personal data is very ambitious, since it aims to regulate the flow of personal and non-personal data, while at national level the legal bases related to the circulation of data vary considerably from one area to another, depending on the nature of the data and the justification for their confidentiality or control[21].

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[18] Thus: Kaburaki Y., *Legal Protection for Non-Personal Data in Japan - Comparative Perspective with the EU and the US*, 2017. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3208068, 51.

[19] See: Kaburaki Y., *Legal Protection for Non-Personal Data in Japan - Comparative Perspective with the EU and the US*, cit., 47-50.

[20] See the press release on the conclusion of the talks between the European Union and Japan on mutual adequacy, available on: http://europa.eu/rapid/press-release_IP-18-4501_it.htm, as well as the decision available on: https://ec.europa.eu/info/sites/info/files/draft_adequacy_decision.pdf. In particular, the agreement on mutual adequacy is aimed at creating a secure data transmission space, based on a high level of protection of personal data. European citizens whose personal data will be transferred to Japan will benefit from strong data protection, in line with EU rules. The agreement will also complement the EU-Japan Economic Partnership Agreement, and European businesses will benefit from the unhindered flow of data with Japan, a key trading partner, and privileged access to 127 million Japanese consumers. Under the EU General Data Protection Regulation, an adequacy decision is the most direct way to ensure the security and stability of data flows.

[21] In this regard, see: Lazaro C., Le Métayer D., The Control over Personal Data: True Remedy or Fairy Tale?, *SCRIPTed*, 2015, 3; Dechesne F. et al., A comparison of data protection legislation and policies across the EU, *Comput. Law Sec. Rev.* 2018, 234.

The cross-border circulation of data poses specific problems of international law, whether it is a matter of regulating such flows through the adoption of international agreements or of taking unilateral decisions of international scope[22].

For example, with regard to the transatlantic data transfer, the so-called Safe Harbor and the following Privacy Shield have provided for a mechanism to support transatlantic trade through which companies operating on both sides of the Atlantic must comply with certain data protection requirements when transferring personal data from the European Union and from the Switzerland to the United States[23].

In particular, in order to join the Privacy Shield program, organizations must guarantee by self-certification that they respect the parameters of the agreement, also publicly committing to respect this constraint. The new regulation provides for stringent protection obligations for companies that transfer data and specific tools for the protection of people. Thanks to this agreement, moreover, for the first time, the US Administration has formally guaranteed that public authorities' access to personal data will be subject to compliance with a series of specific and defined limits, guarantees and control mechanisms.

Although membership of the Privacy Shield is voluntary, once an organization publicly undertakes to comply with the requirements therein, that commitment becomes enforceable under United States law.

Regulation (EU) 2016/679, so-called GDPR[24], on the other hand, is already demanding a higher level of legislative convergence. An incomplete study of over 30 countries outside Europe, in Africa, Asia and elsewhere, shows how six new "GDPR principles" have already

[22] For an overview of the issues and regulatory options, see: Casalini F., López González J., *Trade and Cross-Border Data Flows*, OECD Trade Policy Papers No. 220. Paris: OECD Publishing, 2019. https://www.oecd-ilibrary.org/trade/trade-and-cross-border-data-flows_b2023a47-en; Zeno-Zencovich V., Free flow of data. Is international law the appropriate answer?. Forthcoming in: Fabbrini F., Celeste E., Quinn J. (eds.), *Data Protection Imperialism and Digital Sovereignty*. Oxford: Hart Publishing, 2020.

[23] See: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, 2000/520/EC, OJEU L 215/7; Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield, C/2016/4176, GUUE L 207/1; *Maximillian Schrems v Data Protection Commissioner* [2015] CJEU C-362/14. In doctrine, see: Sylvestre Bergé J., Grumbach S., Zeno-Zencovich V., *The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance*, cit., p. 167-168; Miller R.A. (ed.), *Privacy and Power. Transatlantic Dialogue in the Shadow of the NSA-Affair*, Cambridge: Cambridge University Press, 2017; Svantesson D., Kloza D. (eds.), *Trans-Atlantic Data Privacy Relations as a Challenge for Democracy*, Antwerp: Intersentia, 2017.

[24] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016. For a systematic comment on the provisions of the Regulations, see among others: Kuner C. et al. (eds.), *The EU General Data Protection Regulation (GDPR). A Commentary*. Oxford: Oxford University Press, 2020.

been adopted by at least ten countries, and all the new principles enshrined in the GDPR only by one country.

The GDPR is also spreading through a new global phenomenon which is represented by the voluntary convergence of companies for which there is no legal obligation to the aforementioned regulation[25].

Moreover, there is a phenomenon of regulatory convergence also at a global level, as evidenced by the Data Protection Convention no. 108, which was drawn up by the Council of Europe and to which non-European countries have joined since 2011[26]. Recently, it has been "modernized" with new standards, including many, but not all those provided by the GDPR.

On the other hand, there are currently a number of potential obstacles to the adoption of high standards globally. First, countries could make commitments through regional agreements that require lower standards, including to allow for the export of data, and therefore could legislate to implement it. Secondly, free trade agreements can impose stricter bans than the global GATS agreement and restrictions on the export of personal data, creating conflicting standards[27].

In any case, it is appropriate to highlight how the legal regime of a dataset may be different from the regime of data intended as single entities. Therefore, the processing of a bulk of Big Data could coexist with the processing of individual data on the basis of a different regime[28].

The legal profiles of this coexistence, on the other hand, also following the European Union regulatory interventions on personal and non-personal data, remain widely debated. Lastly, in particular, with reference to the Regulation on the free flow of non-personal data in Europe, two main concerns were raised, namely on the one hand the indeterminacy and dynamism of the notion of non-personal data as a reference point of the legislation; on the

[25] In this regard, see: Greenleaf G., *Global Convergence of Data Privacy Standards and Laws: Speaking Notes for the European Commission Events on the Launch of the General Data Protection Regulation (GDPR) in Brussels & New Delhi*, UNSW Law Research Paper No. 18-56, May 2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184548, 3.

[26] See the 1981 Strasbourg Convention, or Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, available at the following link: https://www.coe.int/it/web/conventions/full-list/-/conventions/treaty/108. On 18 May 2018, the Council of Europe adopted a protocol amending the text of the Convention aimed at modernizing it to provide a legal framework more suited to a time when violations of the right to data protection have become a major concern. . In particular, the protocol provides a robust and flexible legal framework to facilitate the flow of data across borders and provide effective guarantees.

[27] See: Greenleaf G., *Global Convergence of Data Privacy Standards and Laws: Speaking Notes for the European Commission Events on the Launch of the General Data Protection Regulation (GDPR) in Brussels & New Delhi*, cit., 4.

[28] In this sense, see again: Sylvestre Bergé J., Grumbach S., Zeno-Zencovich V., *The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance*, cit., 168-69.

other, the possible occurrence of conflicts with the GDPR and with the fundamental right to the protection of personal data[29].

On the other hand, the EU Regulation 2018/1807 on non-personal data[30] appears to be based on a cautious approach aimed at reconciling the objective of promoting the free movement of the same with the fundamental rights at stake. It is intended, in fact, to ensure the free movement of data within the Union by focusing in fact on the elimination of data localization obligations, on the regulation of making data available to the competent authorities, and on the impulse to develop codes of conduct for the implementation of data portability.

III. "LEGAL BIG DATA" AS A NEW INSTRUMENT OF COMPARATIVE LAW

Finally, from a different point of view, the application of today's data collection and analysis technologies in the legal field can give rise to "Legal Big Data", collected and analyzed for descriptive, predictive or prescriptive purposes, that is, to observe the evolutionary patterns and paths of the law, to foresee or adopt jurisprudential decisions, to elaborate and apply laws or regulations, based on solid argumentative and comparative elements[31].

As is known, legal discipline has been at the center of a long debate regarding the possibility of considering law as a science or not[32]. This debate may recall the fact that the scientific method, based on an interactive process - formulating hypotheses, developing testable predictions, testing predictions, developing general theories - does not fit the law, which is essentially deontic and non-descriptive in nature, and in turn has developed its own *sui generis* methods[33].

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[29] See: Graef I. et al., *Feedback to the Commission's Proposal on a Framework for the Free Flow of Non-Personal Data*, 2018. https://ssrn.com/ abstract = 3106791.

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

[31] Similarly to what is happening in other disciplines. See, among others: Custers B., Methods of data research for law. In: Mak V. et al. (eds.), *Research Handbook on Data Science and Law*. Cheltenham: Edward Elgar, 2018, 355 ff .; Van Ettekoven B.J., Prins C., Data analysis, artificial intelligence and the judiciary system, ivi, 425 ff.; Leeuw F.L., Schmeets H., *Empirical Legal Research, A Guidance Book for Lawyers, Legislators and Regulators*. Cheltenham: Edward Elgar, 2016, 8 ff.

[32] On the theme of the relationship between science and law (and legal comparison), see: Fagan F., Big Data Legal Scholarship: Toward a Research Program and Practitioner's Guide. *Virg. Journ. Law Tech.*, 2016, 7; as well as: Langford P., Bryan I., McGarry J. (eds.), *Kelsenian Legal Science and the Nature of Law*. Springer: Berlin, 2017; Coyle S., Pavlakos G. (eds.), *Jurisprudence or Legal Science? A Debate about the Nature of Legal Theory*. Oxford: Hart Publishing, 2005; Mertz E., *The Role of Social Science in Law*. Farnham: Ashgate, 2008; Faignman D.L., To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy, *Emory Law Journ.*, 1989, 1007.

[33] See, among others: Taekema S., Van Klink B., De Been W. (eds.), *Facts and Norms in Law: Interdisciplinary Reflections on Legal Method*. Cheltenham: Edward Elgar, 2016; Bruncken E. et al. (eds.), *Science of Legal Method*. Farmington Hills: Gale, 2013; Moenssens A., Scientific Method Compared to Legal Method. In: Jamieson A., Moenssens A., *Wiley Encyclopedia of Forensic Science*, Vol. 5, Chichester: Wiley,

Although it is commonly said that law falls within the social sciences, in fact, there is a fundamental difference between what is commonly included in social sciences, such as economics or sociology, and law. The first are of a descriptive nature, in the sense that in order to achieve a result it is necessary to study, investigate, measure social phenomena and extract from such researches a general rule that describes what has been observed. Law, on the other hand, is essentially prescriptive, or deontic. It doesn't say how things are, but how they should be.

Therefore, while datification is an essential, though not the only, characteristic of the social sciences, this is not required for law, which expresses immeasurable values. The construction of a legal system, the logic through which the rules are applied and the relationships that must be established between the rules cannot be dated, in the sense that they cannot be described in numerical terms and even if this were possible it would be of little significance[34]. Likewise, this view can also recall the fact that much of legal research is generally not reproducible. Indeed, legal research conducted at the doctrinal level consists in expressing interpretative opinions developed through legal arguments and reasoning.

As is known, there are many factors that contribute to the increase in the volume of legal acts, but two stand out in particular: multi-level governance and socio-economic developments, driven by the influence of additional forces such as technological innovation, which bring existing legal frameworks under discussion and increase the need to develop new and more adequate regulatory responses[35].

Classical comparative law is of a doctrinal nature[36], as is the legal analysis provided in the comparative reports provided, for example, for the European Commission, even if the latter often uses questionnaires that can be integrated by empirical methods such as the use of surveys on a limited number of interested parties[37].

On the other hand, all in all, there is more law and more legal research in today's world than at any other historical moment, and with the help of technology this trend is on the rise.

2009, 2296. On the relations between law and logic, see: Navarro P.E., Rodríguez J.L., *Deontic Logic and Legal Systems*, Cambridge: Cambridge University Press 2014.

[34] See: Zeno-Zencovich V., Through a Lawyer's Eyes: Data Visualization and Legal Epistemology, in Degravem E. et al. (eds.), *Law, Norms and Freedoms in Cyberspace - Droit, Normes et Libertés*. Liber Amicorum Yves Poullet, Brussels: Larcier, 2018, 462 ff.

[35] In this regard, see: Fagan F., Successor Liability from the Prospective of Big Data. *Virg. Law & Bus. Rev.* 2015, 391; Macey J., Mitts J., Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil. *Corn. Law Rev.* 2014, 99.

[36] See: Hahn T., *From Big data to Smart data*, Siemens Future Forum 2014. https://w3.siemens.com/topics/global/en/events/hannover-messe/program/Documents/pdf/ Smart-Data-to-Business-Michal-Skubacz.pdf, 13.

[37] On such instruments, see in general: Keman H., Woldendorp J.J. (eds.), *Handbook of Research Methods and Applications in Political Science*. Cheltenham: Edward Elgar, 2016, 262 ff.; Dunn W.N., *Public Policy Analysis*, New York: Routledge, 2016, 65 ff.

Technology has certainly affected legal research and related methodologies, and this finding has been highlighted by scholars in one way or another for years now[38]. The benchmarking or indexing exercises, for example, show how the law can be transformed into data and further researched in order to integrate the most classic legal investigations[39].

In this perspective, while the elaboration of a legal norm or of a judicial practice can be based on non-legal texts and other types of data such as those of the large statistical repertories, the function of the latter when used in the context of the legislation is generally focused on the justification of the new rules[40].

On the contrary, data analysis methods can also be used to develop factual bases for the application of pre-existing rights established previously by law. Thus conceived, data analysis methods could be used to develop the factual basis aimed at strengthening the assertion of pre-existing rights. The object of this type of analysis are the repositories of the fact itself, for example a historical database of decisions that span various areas of protection of rights[41].

Judicial decision-making models can also be a useful tool for researchers to establish what is the positive law that exists in practice, or law in action, and how it should be interpreted in specific cases[42].

In general, therefore, data analysis methods can be used to describe theory and legal rules. What has emerged scientifically so far, however, at least in terms of Big Data's ability to describe legal rules, is essentially taxonomic. On the other hand, in terms of the ability to describe legal theory, Big Data does not appear to be as useful, indeed it has been claimed that they would rather provide another empirical method for falsification[43].

However, taxonomic studies are important, especially where there is a doctrinal debate concerning the series of events that leads to the judicial application of a particular doctrine,

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[38] See: Smith T., The Web of Law. *San Diego Law Rev.*, 2007, 309; Katz D.M., Bommarito M.J., Measuring the Complexity of the Law: The United States Code. *Artif. Intell. Law* 2014, 337.

[39] In this regard, see: Siems M., Numerical Comparative Law - Do We Need Statistical Evidence in Law in Order to Reduce Complexity?. *Card. Journ. Intern. Comp. Law* 2005, 521.

[40] See again: Smith T., *The Web of Law*, cit., 309 ff.

[41] See: Micklitz H.W., An Expanded and Systematized Community Consumer Law as Alternative or Complement ?. *Eur. Bus. Law Rev.* 2002, 583.

[42] See Custers B., *Methods of data research for law*, cit., 361 and 364 ff., who mentions among others the example of the Watson data analysis system, developed by IBM, which through artificial intelligence interprets the questions in natural language and answers these questions after having consulted a collection of digital sources such as encyclopedias, books, journals, scientific publications and websites; on law in action and law in books, v. *ex multis*: Halperin J.L., Law in Books and Law in Action: The Problem of Legal Change. *Maine Law Rev.* 2011, 46.

[43] Kitchin R., Big Data, new epistemologies and paradigm shifts. *Big Data & Soc.* April-June 2014, 4; the Author claims that the way to analyze data, even "(w)hilst this empiricist epistemology is attractive, it is based on fallacious thinking with respect to the four ideas that underpin its formulation". In particular, the author cites other scholars and notes that Big Data and the related analysis techniques mark the transition to a new era of knowledge production which coincides with "the end of theory".

or where there is a continuous change in the legal logic underlying it. For example, Macey and Mitts have been able to find a reading key and establish an authoritative taxonomy in the *mare magnum* of over 9,000 decisions on the so-called corporate veil, in which corporate law judges have put aside the limited liability of the company and held the shareholders or directors personally responsible for the company's actions or debts[44].

Thus, the data analysis methods offer classification techniques that severely limit the analyst's subjective prejudices and therefore can promote the resolution of legal issues in a shared way. Through a method known as "topic modeling", the analyst can use an algorithm to simultaneously examine a practically unlimited number of judicial decisions, without having to specify the reasons, opinions, motivations or characteristics underlying the case[45].

The algorithm itself does a job without knowing its purpose. The analyst specifies the number of topics that must be part of the model and the algorithm produces a list with a certain number of keywords. The analyst must then create categories for classification based on the contents of the list. The creation of a category requires a certain dose of subjectivity, which however is strictly limited when compared with other methods and understood in a scientific sense[46].

Doctrinal taxonomies created on the basis of data analysis appear more advanced than their counterparts built with traditional methods. Therefore, through large datasets and algorithmic models, the analyst can severely limit subjectivity through an automated analysis of the words contained in the judicial texts. The results are scientifically reproducible. The large data taxonomies, therefore, seem to represent progress in the search for objectivity and may be able to generate greater consensus in legal doctrine as a result[47].

In fact, the essential requirement for all attempts to find correlations is to collect the necessary data. Any researcher who tries to study legal developments by gathering all sorts of relevant statistics soon discovers that these are very difficult to obtain, due to two different factors: on the one hand, relevant statistics from a substantially legal perspective are scarce; on the other hand, the research databases themselves and the statistics are rare and difficult to verify[48].

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[44] See Macey J., Mitts J., *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, cit., 113 ff.

[45] See: Fagan F., *Big Data Legal Scholarship: Toward a Research Program and Practitioner's Guide*, cit. 15; Young D.T., How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Akerman's Theory of Constitutional Change. *Yale Law Journ.* 2013, 1990.

[46] In this regard, see: Sedgewick R., Flajolet P., *An Introduction to the Analysis of Algorithms*. Boston: Addison-Wesley, 2013, 465.

[47] So again: Fagan F., *Big Data Legal Scholarship: Toward a Research Program and Practitioner's Guide*, cit., 13 ff.

[48] See: Goanta C., Big Law, Big Data. *Law Meth., Special Issue - Comp. Law*, 2017. http://www.lawandmethod.nl/tijdschrift/lawandmethod/2017/10/lawandmethod-D-17-00007, 9.

In the scenario so far highlighted, therefore, an interesting option seems to be that of considering the collection and analysis of Legal Big Data as a new instrument of comparative law, for the purpose of investigating and outlining the models for processing, interpretation and application of the law in the various legal systems.

In other words, the most complex and voluminous legislation and legal decisions or interpretations can be codified in the form of quantitative observations on the basis of the data available in comparative law, or they can be analyzed with the help of new research technologies[49].

In this context, the rules or jurisprudential decisions of the different countries can be considered as data that must be analyzed and processed according to a specific methodology. Observing the law and using research to extrapolate data for further analysis can revolutionize the way legal research is understood. Viewing the underlying data can lead to the observation of new models and the development of new conclusions regarding legal developments. The potential for this has already been explored through the use of innovative methods such as the use of legal research software for so-called network analysis, a method used especially in information technology and sociology that maps and measures the relationships between people, groups, computers or information[50].

In this sense, for example, a new methodology has been proposed to measure the convergence effect of the European harmonization policies of the discipline on sales contracts to consumers: the "Convergence Index", which was developed in order to fill a gap in the consumer law literature of the European Union and showed the usefulness of adopting measurement indices[51].

The starting point was that the methods used to understand European consumer contract law were not sufficient to address the essential weaknesses of the current regulatory framework, since the classic methods of comparing the legal provisions and understanding

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[49] See again: Goanta C., *Big Law, Big Data*, cit., 13 ff.

[50] In this regard, see: Netherlands eScience Center, *How can network analysis lead to a new way of studying court decisions?*, 2017 https://medium.com/escience-center/how-can-network- analysis-lead-to-a-new-way-of-studying-court-decisions-686ccf4d46aa; Lupu Y., Voeten E., Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights. *Brit. Journ. Polit. Sc.*, 2012, 413; Fowler J.H., Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents, *Polit. Anal.*, 2007, 324.

[51] The methodology is based on Siems' work on "comparative numerical law", considered as a translation of the law into numbers (Siems M., *Comparative law*. Cambridge: Cambridge University Press, 2014, 146-187; and Id., *Numerical Comparative Law - Do We Need Statistical Evidence in Law in Order to Reduce Complexity?*, cit.), and on the Consumer Law Compendium database established by Schulte-Nölke (Schulte-Nölke H., Twigg-Flesner C., Ebers M., *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States*. Berlin: De Gruyter, 2009), also inspired by the OECD Manual of Composite Indicators (*Handbook on constructing composite indicators: methodology and user guide*, 2008. http://www.oecd.org/std/42495745.pdf).

the related similarities and differences were not suitable for the analysis which must be carried out on a vast quantity of observations.

Therefore, the Convergence Index is an aggregator that focuses on measuring the level of legal convergence that occurs following the transposition of European directives into national legal systems[52]. The outcome of the analysis carried out by using this index allowed the performance of the selected Member States to be displayed on certain European directives on consumer contracts, with results of considerable interest[53].

In the context of comparative law, therefore, the possibility of treating legal information such as legislation, jurisprudence and doctrine as data through the tools applied to Big Data could represent an innovative and effective solution. Comparative law has so far been based on a small-scale comparison, and the greater the number of jurisdictions chosen, the greater the research effort in terms of people, time and other resources.

From an accessibility point of view, the technical solutions that can be used in legal research already exist and can be easily adapted to the specific needs of researchers[54]. In this sense, consider for example the use of the aforementioned network analysis: while the traditional method of analyzing case law has been to summarize the number of judicial decisions consulted for a given legal problem, the analysis of the set of cases provides the opportunity to view an entire area with the help of technical support and to derive information based on a large and essentially exhaustive amount of data[55].

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[52] The Index comprises thirteen separate indicators, seven of which reflect the level of European governance, while the remaining six reflect national legislation. The indicators were chosen on the basis of an in-depth comparative study that examined the selected directives, that is, 85/577/EEC on contracts negotiated away from business premises, 93/13/EEC on unfair terms in consumer contracts, 97/7/EC on the protection of consumers in distance contracts, 1999/44/EC on the sale of consumer goods, and 2005/29/EC on unfair commercial practices, and the selected Member States - Belgium, France, Germany, Ireland, the Netherlands, Romania, and the United Kingdom - to understand what influences the convergence of legal systems in the field of European consumer law. As regards the object of the comparison, the Index reflects only the transposition process within the regulatory framework and does not extend to implementation, i.e. the application of European standards by courts or national professionals (because on this the sources of information are inconsistent).

[53] See: Goanta C., *Big Law, Big Data*, cit., 9 ff. In a critical perspective, see: Siems M., The End of Comparative Law. *Journ. Comp. Law*, 2007, 133; Mattei U., Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction. *Amer. Journ. Comp. Law*, 2002, 87; Reimann M., The End of Comparative Law as an Autonomous Subject. *Tul. Eur. Civ. Law Forum*, 1996, 49. Recently, the matter was then subject to a new regulatory intervention with the Directive on strengthening the application and modernization of EU consumer protection rules, aimed at ensuring effective sanctions and clear rules to contrast the quality differences in the goods of consumption, and greater transparency for consumers who shop online either through a cash payment or by providing personal data in exchange for digital content or services. Regarding data issues in the Directive approval process, see: Drexl J., *Legal Challenges of the Changing Role of Personal and Non-Personal Data in the Data Economy*, cit., 25 ff.

[54] In this sense, see: Michaels R., *Transnationalizing Comparative Law*, cit., 352 ff.

[55] See, for example, as regards the use of *network analysis* in the study of judicial decisions: Van Kuppevelt D., Van Dijck, Answering Legal Research Questions About Dutch Case Law with Network Analysis and Visualization. In: Wyner A., Casini G. (eds.), *Legal Knowledge and Information Systems*, Amsterdam: IOS Press, 2017, 95-100, and the project of the Netherlands eScience Center, *Case Law Analytics: Discovering new patterns in Dutch court decisions*, available on: https://www.esciencecenter.nl/projects/case-law-

IV. LEGAL BIG DATA AND JUSTICE: FROM PREDICTIVE JUSTICE TO PERSONALISED LAW?

Considering the law as a set of data to be collected and analyzed using today's technologies, therefore, can facilitate the understanding of legal issues and modify the legal practice allowing the development of new frameworks or forecasts[56], up to hypotheses leading to the possibility of a true and proper personalization of the law[57].

Through the analysis of Legal Big Data, it seems possible the so-called predictive justice, that is, to predict the results of court cases. In the United States, for example, when major Supreme Court rulings are awaited, there is much speculation in the media and by experts to predict whether the behavior of the judges - appointed by the President of the United States - will be in line with their political views or their decisions will be surprising.

In recent years, several experiments based on Big Data have provided remarkably precise predictions on the outcome of decisions, with correctness rates of forecasts between 70 and 75 percent. Even greater was the result achieved by a model developed by British and US researchers for the decisions of the European Court of Human Rights, with forecasts almost 80% correct[58].

Anticipating the outcome of court cases can be very useful for legal professionals, as it can help assess whether to present the case before a court. When the probability of success is

analytics. In practice, law firms seeking to keep up with others are already employing Big Data-based tools; see, for example, Juristat (www.juristat.com), which provides for the success of the patent process, or Ravel's Judges Analytics (https://www.ravellaw.com/judges), which allows users to map each decision taken by a particular judge.

[56] In this regard, see: Alarie B., Niblett A., Yoon A., How Artificial Intelligence Will Affect the Practice of Law. *Univ. Tor. Law Journ.*, 2018, 106; Brescia R.H. et al., Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice. *Alb. Law Rev.*, 2014, 553.

[57] In this regard, see: Busch C., Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law. *Univ. Chi. Law Rev.*, 2019, 309; Casey A.J., Niblett A., A Framework for the New Personalization of Law. ivi, 333; Busch C., De Franceschi A., Granular Legal Norms: Big Data and the Personalization of Private Law. In: Mak V., Tjong Tjin Tai E., Berlee A. (eds.), *Research Handbook on Data Science and Law*, cit., 408-24; Casey A.J., Niblett A., The Death of Rules and Standards. *Ind. Law Journ*., 2017, 1401; Hacker P., Personalizing EU Private Law: From Disclosures to Nudges and Mandates. *Eur. Rev. Priv. Law*, 2017, 651; Ben-Shahar O., Porat A., Personalizing Negligence Law. *New York Univ. Law Rev.*, 2016, 627; Busch C., The Future of Pre-contractual Information Duties: From Behavioral Insights to Big Data. In: Twigg-Flesner C. (ed.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham: Edward Elgar, 2016, 221-40; Porat A., Strahilevitz L.J., Personalizing Default Rules and Disclosure with Big Data. *Mich. Law Rev.*, 2014, 1417.

[58] See Custers B., *Methods of data research for law*, cit., 360 ff.; Katz D.M., Bommarito M., Blackman J., A General Approach for Predicting the Behavior of the Supreme Court of the United States. *PLoS One*, 2017. https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0174698; Aletras N. et al., Predicting Judicial Decisions of the European Court of Human Rights: a Natural Language Processing Perspective. *PeerJ. Comp. Sc.*, 2016. https://peerj.com/articles/cs-93.

low, the legal advisor might perhaps rather recommend an agreement to her client, with the relative benefits also in terms of deflation of the litigation[59].

Other types of forecasts can also be useful in legal practice. For example, in combating crime it could be very useful to analyze criminal data to make predictions about who will commit crimes, where the crime will occur and which people, buildings and objects will be at risk as potential targets. This approach is usually called predictive police[60].

Another legal area in which Big Data-based predictions can be useful is probation or conditional liberty. In different countries, criminal courts base their decisions on whether or not there is a repeat offender and on assessing the risk of how likely the repeat offender is.

In many risk assessment models, prior convictions play an important role, resulting in the paradigm that "if you offend once, you are likely to commit offenses again; if you offend twice, you will surely commit offenses again and again"[61]. Although these reports can be statistically correct, at group level they can prevent any other conclusion for those individuals who are actually willing and able to improve their behavior. This type of use of Legal Big Data can therefore aggravate the difficulties that such profiled people already have in obtaining a job, an education and a betterment of life[62].

Another area in which the collection and analysis of Legal Big Data can contribute to the development of law is that of improving the law and regulations. The use of Big Data for the development and improvement of laws and regulations can contribute to socio-legal research work, developing theories and regulations based on solid evidence.

Legal Big Data can be useful to improve the contents of laws and regulations, but also to evaluate the acceptance of them by the community. By combining legal data with behavioral data, for example on social media etc., it becomes possible to evaluate which rules or which types of rules are better respected and/or can be easier to apply[63].

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[59] See: Osbeck M.K., *Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, University of Michigan Public Law Research Paper No. 604, 2018. https://papers.ssrn.com/sol3 /papers.cfm?abstract_id=3138211.

[60] In this regard, see: Porcedda M.G., Wall D.S., Data science, data crime and the law. In: Mak V., Tjong Tjin Tai E., Berlee A. (eds), *Research Handbook on Data Science and Law*, cit., 214 ff.; Perry W.L. et al., *Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations*. Santa Monica: RAND Corporation, 2013.

[61] See: O'Neill K., *Weapons of Math Destruction*, New York: Crown, 2016; Harcourt B.E., *Against Prediction; Profiling, Policing and Punishing in an Actuarial Age*. Chicago: University of Chicago Press, 2006.

[62] In this regard, see: Custers B., *Methods of data research for law*, cit., 363-64.

[63] When trying to create rules that are better respected, the concept of "nudging" is highlighted, that is the offer of incentives, such as positive reinforcements or indirect suggestions, to try to make desirable behavior attractive, without forcing people to adopt that behavior or limit their freedoms. See, among others: Yeung K., 'Hypernudge': Big Data as a Mode of Regulation by Design. *Inf. Comm. Soc.*, 2016, 1; Thaler R.H., Sunstein C.R., *Nudge: Improving Decisions About Health, Wealth, and Happiness*. New York: Penguin Books, 2009.

In the near future, then, Big Data, super-human information processing skills and artificial intelligence could redefine the optimal complexity of legal rules and refine their content to a level of granularity that was previously unattainable. In such a scenario, granular or personalised legal rules could take into account the heterogeneity of the actor in a degree that impersonal laws are unable to do, allowing to repair the relationship between legal certainty and individual equity[64].

To make such a personalization of the law operational, of course, the legislator would have to establish at an abstract level the criteria on which the personalization will be based and define the consequences connected with the granularization of different personality profiles[65].

On the other hand, the collection and analysis of Legal Big Data gives rise to problematic issues and presents limits for the purposes of use in the legal field.

The most significant disadvantage is evidently that the adoption of data search methods limits the use of human intuition, since the volumes of Legal Big Data are usually too large to allow useful overviews and insights. The amount of data allows to increase the reliability of the results, but at the same time it can give rise to reliability problems since the results are statistical reports that describe probabilities, which could be of limited use for decision making, in particular in a legal context[66].

Another drawback is that in many situations data analysis methods can produce an abundance of patterns and relationships, most of which may not be new or useful. In many situations, especially in the legal field, it can be useful to know the underlying causal mechanisms. Finding out or even proving the underlying causality can be much more difficult and often requires further research.

A further question may arise because although large amounts of Legal Big Data are available, this data may have been collected in the past for other purposes. Aside from the legal restrictions on data reuse, this re-proposition could lead to problems, since when the data is used for new purposes it may no longer correspond exactly to these purposes. As a result,

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[64] On the dynamic relations between legal certainty and individual equity, see: Fenwick M., Siems M., Wrbka S. (eds.), *The Shifting Meaning of Legal Certainty in Comparative and Transnational Law*, Oxford: Hart Publishing, 2017; Ávila H., *Certainty in Law*. Berlin: Springer, 2016; Neuhaus P.H., Legal Certainty versus Equity in the Conflict of Laws. *Law Cont. Prob.*, 1963, 795.

[65] In this sense: Busch C., De Franceschi A., *Granular Legal Norms: Big Data and the Personalization of Private Law*, cit., 6 ff., who refer to some application options of this approach, in the field of contract law as personalised disclosure, in the field of tort law as a standard of diligence, and in the field of family law and succession as predefined custom rules.

[66] See: Custers B., *Methods of data research for law*, cit., 374, and Id., Effects of Unreliable Group Profiling by Means of Data Mining. In: Grieser G., Tanaka Y., Yamamoto A. (eds.), *Lecture Notes in Artificial Intelligence*. Heidelberg: Springer, 2003, 290 ff.

many of the discovered models can be based on approximate indicators, rather than on the actual factors that determine the results. Furthermore, the reuse of data can give rise to more complex privacy problems than those inherent to their use[67].

Linked to this is the problem of so-called self-confirmation. Since the data search methods are based on available historical data, the results of the analysis will mainly concern the past rather than the future. Therefore, gradual changes can be discovered and used to make predictions about the future, but more disruptive changes can be much more difficult to consider[68].

A further example of a problem of prejudice is that of "self-fulfilling prophecies". A typical example of this is when law enforcement surveillance focuses on neighborhoods with ethnic minorities, with the result that databases fill up with people from those minorities. When the databases are later used to find patterns of which people are more prone to fall into criminal behavior, since the data was partial, people from these ethnic minorities will be able to be profiled as a more likely criminal behavior[69].

In these cases, the problematic analysis of the Legal Big Data emerges with respect to the transparency of the data selection, the analysis methods and processes, the chosen criteria and the algorithms used. All these aspects are relevant with regard to the due process principle, whose protection is conditional on the existence of guarantees relating to the transparency of the methods and processes adopted, the contestability of the results of the analysis, and the responsibility for the decisions taken[70].

Finally, granular or personalised legal rules could give rise to relevant issues in terms of interference with fundamental rights to the protection of personal data, freedom and equality. The privacy risks arise from the fact that such a regulatory approach is based on the

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[67] On the subject of data reuse, see: Custers B., Ursic H., Big Data and Data Reuse: A Taxonomy of Data Reuse for Balancing Big Data Benefits and Personal Data Protection. *Intern. Data Priv. Law*, 2016, 4; Ursic H., Custers B., Legal Barriers and Enablers to Big Data Reuse - A Critical Assessment of the Challenges for the EU Law. *Eur. Data Prot. Law Rev.*, 2016, 209.

[68] See Hoffman S., Big Data Analytics: What Can Go Wrong. *Ind. Health Law Rev.*, 2018, 227.

[69] This is what emerged, for example, from recent US research which showed a clear prejudice between different population groups in the practice of assigning a score relating to the risk of recidivism. In this regard, see: Angwin J. et al., Machine Bias. *Pro Publ.*, May 2016. https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing; Larson J. et al., *How We Analyzed the COMPAS Recidivism Algorithm*, ivi. https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm; Petit N., *Artificial Intelligence and Automated Law Enforcement: A Review Paper*, 2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3145133, 5-6; Van Ettekoven B.J., Prins C., *Data analysis, artificial intelligence and the judiciary system*, cit., 442-43; Custers B., *Methods of data research for law*, cit., 373-74.

[70] On the subject, see: Petit N., *Artificial Intelligence and Automated Law Enforcement: A Review Paper*, cit., 10-11; Crawford K., Schultz J., Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms. *Bost. Coll. Law Rev.*, 2014, 93; Moses L.B., Chan J., Using Big Data for Legal and Law Enforcement Decisions: Testing the New Tools. *Univ. New South Wales Law Journ.*, 2014, 643; Keats Citron D., Technological Due Process. *Wash. Univ. Law Rev.*, 2008, 1249.

collection of personal data and on the profiling of individuals. On this point, the European GDPR provides the right not to be subject to decisions of significant impact based on exclusively automated processes, including profiling, with exceptions among which in particular the consent of the interested party[71].

Personalised law, then, would abandon the equal application of general standards to all individuals, so the question arises as to whether this approach would be compatible with the fundamental principles of equality and freedom. In this sense, it is useful to remember that the process of identifying the relevant differences from a legal point of view is a regulatory process, and not merely an empirical one[72].

V. CONCLUSION

In conclusion, beyond the problematic issues mentioned above, the possible developments related to the Legal Big Data that have emerged recently are starting to transform, so far mainly in the United States but increasingly also in other countries, on one hand legal research, legislation and jurisprudence - to have them based on solid argumentative and comparative elements - but also, on the other hand, the dynamics and markets of the legal professions[73].

Although the analysis of Legal Big Data does not appear to be able to lead to results capable of equaling human reasoning, as we have seen, it can still have a significant impact on law and legal practice[74]. However, considering the issues and limitations mentioned above, it is unlikely that such developments will completely replace legal work, legal research or legislative drafting and jurisprudential application processes.

Law is a deontic-normative discipline, for which the added value provided by the intellectual and emotional abilities of the human being appears irreplaceable through data, machines and methods of processing and analysis.

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[71] Regulation (EU) 2016/679, art. 22. In this regard, see: Busch C., De Franceschi A., *Granular Legal Norms: Big Data and the Personalization of Private Law*, cit., 14-15; Busch C., *The Future of Pre-contractual Information Duties: From Behavioral Insights to Big Data*, cit., 237-238; on the other hand, see: Wachter S., Mittelstadt B., Floridi L., Why a right to explanation of automated decision-making does not exist in the General Data Protection Regulation. *Intern. Data Priv. Law*, 2017, 76.

[72] See: Busch C., De Franceschi A., *Granular Legal Norms: Big Data and the Personalization of Private Law*, cit., 15-16; on the usefulness of Big Data for this purpose, see also: Hacker P., *Personalizing EU Private Law: From Disclosures to Nudges and Mandates*, cit., 659.

[73] See, among others: Custers B., *Methods of data research for law*, cit., 374-75; Pistone M.R., Horn M.B., *Disrupting Law School: How Disruptive Innovation will Revolutionize the Legal World*. San Francisco: Christensen Institute, 2016; Susskind R., *Tomorrow's Lawyers*, Oxford: Oxford University Press, 2013.

[74] In this regard, see: Surden H., Machine Learning and Law. *Wash. Law Rev.*, 2014, 87.

Moreover, in this regard it is worth remembering that the analysis of the data is strictly connected to the data entered and the questions posed. Therefore, to evaluate the result of the data analysis, it is necessary to verify the quality of the data entered, the ways in which it was collected, and whether the human or human-programmed analyst has asked the right questions: in this sense, notwithstanding the emerging legal relevance of the professional categories of computer scientist and data scientist, the persistent centrality of the role of the jurist is evident[75].

However, the problematic considerations referred to do not lead to the conclusion that law, and especially comparative law, cannot benefit from the methods of analysis of Legal Big Data. Conversely, these methods can facilitate the collection of information and provide previously difficult to find or unexpected knowledge, and thus increase the efficiency, accuracy and reliability of legal research, regulatory development, jurisprudential application and legal practice[76].

[75] See: Remus D., Levy F.S., *Can Robots Be Lawyers? Computers, Lawyers and the Practice of Law*, 2016. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701092.

[76] In this sense, see again: B. Custers, *Methods of data research for law*, cit., 377.