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Журнал «Право и управление. XXI век» включен в Перечень рецензируемых научных изданий, в которых должны быть опубликованы основные научные результаты диссертаций на соискание ученых степеней доктора и кандидата наук.
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The School of Governance and Politics of MGIMO University and the University of Macerata (Italy), one of the oldest and most honourable universities in Europe, have been closely cooperaing in implementing a multifaceted research and educational programme for many years.

As a result of this cooperation, hundreds of MGIMO and Macerata students have been involved, on a reciprocal basis, in annual and semi-annual educational programmes launched by each of the universities and have gained new knowledge and practical skills in governance, politics and economics. Our friendly cooperation is developing at a fast pace, and we hope that very soon we will be able to award double degree diplomas to our brightest students.

At the same time, I am sure that cooperation between our two universities makes its contribution to friendly relations between our countries.

Anatoly V. Torkunov
President of MGIMO University,
Academician of the Russian Academy of Sciences

Вступительное слово

Факультет управления и политики МГИМО МИД России и один из старинных и почетных университетов Европы Университет Мачерата (Италия) уже много лет в тесном контакте осуществляют многоаспектную научно-образовательную программу.

Сотни студентов МГИМО и Университета Мачераты прошли годовые и полугодовые стажировки друг у друга, обогатились новыми знаниями и профессиональными навыками для работы в сферах управления, политики и экономики. Наше дружественное сотрудничество динамично развивается и, надеемся, очень скоро мы достигнем уровня выдачи двойных дипломов нашим самым успешным студентам.

Одновременно уверен, что наше сотрудничество двух наших Университетов вносит свою лепту в укрепление дружбы между нашими странами.

Ректор МГИМО, академик Российской
Академии Наук Торкунов А.В.

THE FIRST HALF OF THE 21ST CENTURY: AN ISLAMIC CHALLENGE

Robert Yengibaryan*

Humankind faces two fundamental problems today - its excessive numerical growth and the deterioration of the environment, and the former problem aggravates the latter.

Opposite Poles

Humankind entered the 21st century with unprecedented developments in science, technology, IT, telecommunications, medicine and gene engineering. The pace, intensity, stress and, at the same time, duration of human life, our opportunities to travel and to get information about events happening all over the world have greatly increased. Beginning in the 1950s, on the initiative of such global actors as the Unites States, the USSR (Russia), the UK, France, China, Germany, Italy, Japan etc., very important international acts governing the legal status of a human/citizen and the mechanism of international relations in the field of business, politics, science and information technology have been drafted and approved. The modern civilization has achieved such a level of economic, political and cultural interaction that its evolution now continues in the framework of a united "planetary society"[1. P. 452-453].

In its turn, the international financial and banking system has unified the world and made it more capacious and convenient for the planetary human, or the citizen of the world. Dozens of millions of people have double or multiple citizenship. Still more people enjoy the right of temporary or permanent residence in various countries, primarily successful democracies.

Despite that, inequality does not decrease but, on the contrary, increases day by day in the world, especially in economic terms. Unprecedented economic and political globalization involving a great number of countries resembles the processes which occurred before WWII. There also exists the counter-process of global disintegration driven by the religion factor which has, in a totally furtive manner, regained a most important role in interpersonal and intergovernmental relations due to the aggressive growth of Islam and its hostile and irreconcilable position towards other civilizations, especially the Judeo-Christian civilization [2. P. 3].

Unfortunately, the Christian civilization, while creating the great contemporary civilization, discovering new worlds and continents, conquering outer space, and harnessing nuclear and thermonuclear energy, is shrinking like fertile lands and leaving various parts of the world. At the same time, Islam pushes the world back into the Middle Ages with its way of life, the Muslims' way of thinking, their obscurity and lack of skills in every aspect. Now Islam is attacking not only the south of Europe, but also its distant frontiers - Northern Europe, Germany, Norway and Sweden.

The sovereign global players compete with each other across all aspects of human activities, leaving negligently small room to any independent countries.

The countries belonging to the so called "golden billion" are especially successful. The United States, Canada, Western European

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countries, Japan and Australia provide broad democratic rights and freedoms and high living standards for their citizens; the per capita GDP reaches $50,000 to $60,000 in some of those countries. Their citizens enjoy a clean environment, high-quality education and state-of-the-art medical care, as well as broad opportunities for creative activities and personal development. While accounting for about one sixth of the world's population, they possess more than 70% of the global wealth. The gap between those countries and the poorest countries of the world, most of then being Islamic ones, in terms of per capita income is still wider. This gap is sometimes equal to 100 to 1 [See: 1]. At the same time, the "golden billion" countries (except for the USA) undergo a deep demographic crisis, their population steadily shrinking and ageing. The rather high birth rate in the USA is due to the high demographic activity of its Latin and Afro-American population, as well as immigrants from various Asian, primarily Muslim, countries, such as Pakistan, Bangladesh etc.

The human dimension, the index and potential of human intellectual development are now the main criteria of national success. Population numbers still mean a lot, of course, but it is the quality and level of human resources that would bring a given country to the top of the global political and economic ratings. One could cite the example of the tiny Israel which successfully withstands the massive hostile environment of Muslim countries due to its outstanding successes in all fields of human activities in addition to the favorable neutrality of the leading players of global policy seeking to maintain parity in the Middle East (1) [2. P. 4].

In this regard, one may recall the example of Germany and Japan which had lost WWII but, within a very short period from 1950 to 1955, managed to overtake the USSR, the main winner of that war, in all political and economic aspects, including public well-being and democratic rights and freedoms. During that period, however, the USSR managed to develop nuclear weapons with the assistance of its Western followers supporting communist ideology (2).

Both in the second half of 20th century and in the early 21th century, nuclear weapons have remained to be a decisive means of restraint. Due to this factor, the USA and Russia, whose economic potentials are far from being equal, but which maintain parity in these weapons, seek to solve politically all acute international problems since they understand the possible tragic consequences of a nuclear war (3). However, such parity cannot continue indefinitely. The eventual winner will be the country that will be able to reach a new level of technological development and to avoid domestic deterioration and destructive processes to which, unfortunately, Russia is more susceptible.

In terms of economic development, democratic freedoms, legal institutions and per capita GDP, China, Russia, Brazil, Argentina, and a number of Eastern European countries (such as Poland and the Czech Republic) lag considerably behind the leading "golden billion" countries (4). It is the latter countries that attract the best minds and the most qualified specialists, promising young scientists and artists from Russia, India, China and Eastern Europe, that largely contributes to the strengthening of their leading positions in the global community. Over time, if this process continues, the gap separating Russia and other countries from the leaders may acquire a long-standing if not irreversible nature. As yet, the imbalance between the developed countries and the developing ones continues to grow, because the training of skilled specialists is an exceptionally complex and expensive process which requires, first of all, the formation of schools of sciences and the existence of a strong economic basis for incremental investments in the development of scientific traditions, public demand and motivation for research activities – a process that may take decades.

Islam Remains Outside the Contemporary Civilization[1]

The opposite pole in terms of development is represented by the Islamic world and Africa, especially the Muslim part of Africa. They are so behind the rapidly developing advanced countries (and the gap grows day after day), that it is unrealistic for them to reach the level of the West and other civilizations (Confucianism, Daoism, Buddhism, Shintoism etc.) even in a very distant future. Of course, given today's unlimited opportunities for information exchange, tens of millions of Muslims, especially the youth, realize the hopelessness of their miserable and rightless situation. For a large portion of population, emigration is the only way to avoid eternal backwardness and poverty.

However, the mere fact of poverty and rightlessness would be a biased or even primitive explanation for today's unprecedented emigration of Muslims to Europe and other countries. This phenomenon is assisted by a

[1] See also: [6. P. 111]

number of very important factors, one of which is the failed attempt by the USA and its Western European allies to "liberalize" by force a number of archaic government systems of the Islamic world in such countries as Libya, Iraq, Afghanistan, and Syria. But it is beyond doubt that the key factors resulting in tectonic movements of multimillion masses from the Islamic south towards the Christian north, the rich, diverse, loose, tolerant and friendly Europe, are different. The Islamic world and its current central actors – Turkey, Saudi Arabia, the oil-producing countries of the Persian Gulf, Pakistan etc. – have never abandoned its main strategic plan to reincarnate (rebuild in a new image) a united global Islamic state, the Caliphate. Since the Islamic world has no military or economic means to achieve this goal, the first phase of the plan is to support population growth and continuous migration, first to Europe and then to Russia. Then, using money transfers from Saudi Arabia, Turkey and other countries, follows the construction of mosques, madrasas and schools in destination countries and the sending of imams, teachers and armed activists to such countries in order to direct the processes and prevent any attempts of assimilation into local culture. According to 2015 data, more than 2,400 mosques are active in France, including over 1,500 in Paris, that is much more than the number of all religious buildings used by Christians or other believers. Of course, mosques whose construction requires a lot of money cannot be built by immigrants living on government welfare. The question is: why don't Turkey, Saudi Arabia Qatar, Pakistan, Iran and other countries use these heaps of money for the needs of immigrants escaping from hunger? Another thing is still more surprising: do the liberal leaders of France and other European countries fail to understand that Islamic states pursue a different goal, i.e. to conquer Europe from the inside using poorly educated Muslims who are loyal to their clergy and who have been sent to Europe or moved there on their own? The mosque will be consolidating such individuals and transforming them into a powerful political force. Moreover, any mosque build on a non-Islamic land will be deemed an area conquered by Allah. In is an undisputable truth in the world of Islam.

According to the ideological doctrine of Islamic fundamentalism, the fact that some Muslim peoples live within non-Muslim states (the Russian Federation includes seven "Muslim" regions – Bashkortostan, Tatarstan, Ingushetia, Dagestan, Kabardino-Balkaria, Karachay-Cherkessia, and Chechnya) is considered as a "result of occupation", so their objective is to struggle for independence for the purpose of their further inclusion in an "Islamic unity – Caliphate"[See: 3].

This clearly resembles the Bolshevik doctrine of global socialism that called for protecting the proletariat all over the world by any means, including revolutions, armed struggle, the formation of revolutionary, communist or popular parties, their generous funding and their training with the use of "seconded" communist specialists.

Thus, history repeats itself, assuming new forms, colors, ideology and content. One thing is absolute – any misanthropic ideology, whether based on nationalism (fascism), social theory (communism) or religious bigotry (fundamental Islam) will eventually fail. But, given a number of factors, Islam and its radical strains can become extraordinarily dangerous. The opposition between Islam and Christianity is a multifaceted phenomenon and includes not only political and economic aspects (the poor wage a war against the rich), but also the civilizational, religious and racial ones. Moreover, this is a struggle of two fundamentally different civilizational and everyday cultures associated with different geographic latitudes and different human genotypes. One cannot deny that societies living in totally different conditions develop their own specific means to understand, and interact with, the world [See: 4].

Islam cannot live in peace with, and fights against, all civilizations of the world, including those which exist in China (Uyghurs), Asia (Pakistan-Kashmir-India), Africa, Europe and the USA. But, historically and geopolitically, the principal civilization opposing Islam includes Europe and Russia, the countries committed to Christian culture and values whose population belongs to the Caucasian race, the secular states based on a similar structure of society, gender equality, monogamy and a similar culture of everyday life, and occupying the same geographic latitudes.

Islam is a multiracial conglomerate which unites peoples belonging to the Mongoloid, Caucasian and Negroid races around the religion factor, whereas the ethno-territorial factor has absolute priority in the self-identification of the people-nation, country and individual in the areas belonging to Christian and other cultures. In its conflict with Christian countries and countries of other cultures, Islam is, with rare exceptions, represented by theocratic states. Those countries which have declared themselves secular, such as Turkey, Egypt, Tunis or Azerbaijan, are far from being such according

to international standards, since the clergy and religion remain extremely influential in the social and political life of those countries. Consequently, the conflict in international relations is between secular states and theocratic or, in some cases, semi-theocratic ones. Finally, such a sharp conflict of cultures also covers the human dimension, including such factors as the level of education, gender equality, the democratic rights and freedoms of citizens, the culture of everyday life, the "South-North" geopolitical line etc.

In fact, the Islamic world is now seeking a geopolitical revenge and a return to Europe through a "demographic jihad" (5). Indeed, the vast majority of the immigrants are reluctant to work and adapt themselves in European countries, to respect local rules and ethical standards of behavior. Their principal goal is to receive welfare (it is required to give birth to still more babies for this purpose) and to live according to the Sharia rules while enjoying the living standards and freedom they were deprived of back in their fatherland.

It is a surprising fact that most immigrants have believed the propaganda of Islamic activists and clerics that the West is obliged to nourish and maintain them since it is rich at their expense and, indeed, all of the territory now occupied by the Western countries once had belonged to Muslim peoples but then was taken by the infidels (kafirs) (6) with the use of deception and force. There is another, still more dangerous religious motivation, according to which everything good in the world should belong to faithful Muslims and, in order to correct the mistake that has been committed, coercion against the infidels should be used.

While clearly positioning itself as a different, specific civilization, the Islamic world is, in its turn, going global, but the basis for such globalization is of a confessional (affiliation with Islam) rather than political or economic nature.

As an example, one can mention the Organization of Islamic Cooperation (OIC), the most influential and the only intergovernmental among numerous other Islamic international organizations. The OIC consists of 57 Islamic states, including five former Soviet republics – Azerbaijan, Kazakhstan, Kyrgyzstan, Turkmenistan and Uzbekistan – admitted in 1993. Those post-Soviet countries, hoping for large financial aid from the wealthy oil-producing countries of the Persian Gulf, would make every effort to prove their belonging to the Islamic world, and the leaders of one of the former Soviet republics, the father and son Aliev, made their hajj to Mecca where they prayed, dressed in white, at the "sacred stone". Upon his return home, Geidar Aliev declared Turkey and Azerbaijan to be "two states of one and the same nation".

Europe passed the stage when states formed alliances along religious lines in the early Middle Ages. As such states secularized, they started to form alliances on the basis of political and economic criteria. This fact is another clear confirmation that the Islamic world and the rest of the world community live according to their own calendars and in different temporal dimensions. It is the year 1437 in the Islamic world today, and the year 2016 in the other countries worldwide (with rare exceptions) (7).

The Muslim countries of Asia and most African countries live in the early Middle Ages in many aspects of their social relationships. However, the Islamic world is far from being homogenous. Geographic proximity to Europe, a long period of being a colony of a European nation, the intensity of international exchange and, primarily, a comparatively moderate role of religion and the clergy results in a higher level of development of certain countries within the Islamic world, which include Turkey, still hoping to become an EU member, Egypt, the former French colonies of Algeria, Tunisia, Syria and Lebanon (Christians – Maronite Arabs and Armenians – account for more than quarter of the latter's population), and the post-Soviet Turkic peoples of Azerbaijan, Kazakhstan, Kyrgyzstan and Uzbekistan which belong to Islam and which, due to Soviet rule, made progress equivalent to decades of development. Tajikistan is less developed and more archaic, and the same is true for Turkmenistan, the motherland of the Oguz tribe, the predecessors of today's Turks and Azerbaijani.

The other extreme is represented by Saudi Arabia which, being the native land of Mohammad, act as a missionary for the Islamic world, as well as Iraq, Yemen, the Gulf countries, Afghanistan, and the Muslim countries of Central Africa. It should be noted that the high per capita GDP in the UAE, Qatar, Saudi Arabia and Bahrain, as well as the highly visible wealth of those countries' national elites, is not being used for public needs or for the improvement of the national "political and legal" institutions. Even the appropriateness of the expression "political and legal" is doubtful, since public life in those countries is governed by the rules of Sharia and adat (tradition) rather than law.

The following trend is evident: the higher the level of religiosity in society and the more important the theocratic element of the state,

the less the scope of rights being enjoyed in such society and state by an individual who is deprived of the status of citizen in the context of international law. Despite its evident backwardness, the Islamic world is far from being satisfied with its place in the global community and declares its dissatisfaction by all possible means.

Islamic civilization as a religion and, at the same time, a way of living for a great number of people is extremely immobile, revolves around its axis and, apparently, cannot change this situation by its own. The majority of population also fails to understand the need for transformation towards the liberalization of social life and for enhancing the legal status of an individual.

Whereas in the early Middle Ages the difference between the Christian countries and the Muslim ones had not been so significant and, due to active trade with China and India, the Muslim countries had even been ahead of the European continent in many aspects, they made virtually no progress during the subsequent 600 or 700 years as a result of religious restrictions. A constrained and depressed man obliged to pray five times a day and rightless vis-à-vis his sheikhs or a dependent, repeatedly pregnant and silent woman could not develop a progressive democratic society where people would enjoy equal rights. During that period, the Judeo-Christian civilization adopted the Magna Carta (2015), the Habeas Corpus Act (1679), the Declaration of Rights of Man and of the Citizen (1789) and the first written constitution (1787) and leaped into a democratic society of free equal individuals. It made flights to outer space and the Moon, developed supersonic aviation, cracked the atom, discovered computer technology and space communications, liberated Muslim countries from colonial dependence and set up a dialog with its yesterday's rightless subjects. But the result is poor: despite all efforts being made by the Judeo-Christian civilization in order to upgrade the Islamic world, the latter, due to its evil aggressiveness, remains to be an immense burden for it with a population of almost two billion people.

It is impossible and undesirable to reform Islam from the outside, because each people is entitled to chose the direction of its development as long as its choice is consistent with the overall interests and rhythm of global civilization and does not pose a threat to the existence of other countries or the world community as a whole.

The deep backwardness of Muslim countries, especially their uncontrolled fertility, has become not only their problem and already requires protective measures on the part of the global community. Today the Muslim countries, India, partly Latin America (especially Mexico and Colombia) give birth to more children that they can nourish and support. This extremely high fertility prevent those countries from increasing the sociocultural, law-awareness and educational level of their population. The extremely high fertility of population in Muslim countries results from their way of life, the backwardness and rightlessness of women, lack of responsibility to future generations and hope for humanitarian aid from the kind Europeans that they hate.

Year after year, hundreds of thousands of hungry people, wanted by nobody, risk their lives traveling the world in search for food and jobs. The more lucky will reach Europe or North America, the less fortunate will find low-paying, slavish jobs in neighboring Islamic states, such as Saudi Arabia or Qatar, or join international criminal organizations dealing in drugs or abducted people or such terrorist organizations as Al-Qaeda or ISIS.

Naturally, one feels sorry for those actually redundant people who die in thousands from such terrible living conditions, including hunger, hard work or poverty. In Saudi Arabia, at 40°C temperature and high humidity – conditions killing any living organism, - Indian Muslims who are paid $2 or $3 per day work at giant construction sites erecting magnificent buildings designed by European architects that strike us by excessive luxury, such as a copy of the Louvre or skyscraper hotels; in fact, they repeat the fate of the slaves who built the Egyptian pyramids.

Surprisingly, Islamic solidarity and brotherhood are forgotten in such situations. Indeed, few people can endure such a hard work; they will die in 3 to 5 years or return home in ill condition, with miserable several hundred dollars in their pockets.

A vast number of hungry people saving their lives from war and endless poverty, intoxicated by Turkish or Saudi propaganda, are being exported to the developed countries of Europe. For Turkey, this is not only lucrative business (recently, the European Union alone paid $3 billion to this country and promised to pay an equal amount in the future), but also a geopolitical goal – to destroy from the inside the European Union which rudely closed its doors before it when Helmut Kohl, the former German chancellor, declared that Turkey was a country culturally foreign to Christian Europe so Germany was against its admission to the EU.

The overall negative trend in the Islamic world is highly influenced by international Islamic religious/political, financial/economic or educational organizations formed at various times which seek to coordinate and direct the internal and external life of Muslims both within particular countries and globally.

The idea of establishing such organizations was proposed back in the 1920s by Turkey then headed by "secular leader" Kemal Ataturk. He managed to obtain mammoth financial and military aid from the Bolsheviks for the purpose of fighting "capitalists" represented by Greece, a small Orthodox country. After he had defeated Greece with the assistance of the Bolsheviks and successfully played the role of a friend and benefactor of the rebellious workers of the East, Kemal Ataturk drowned the Turkish communists in the Black Sea with stones tied to their necks. Due to that "friendship", Ataturk (meaning "father of Turks") had also got vast Armenian-populated areas in the Kars province and the Surmali district plus the symbol of Armenia, Mount Ararat, and then terminated his "tender love" with the Bolsheviks.

Having realized the diplomatic stupidity of the Bolsheviks, he provided his brotherly assistance for Azerbaijan, whose population belonged to the same Turkic tribe of Oguzes, and arranged for the inclusion in Azerbaijan of the Nakhichevan region separated by Armenian territory from Azerbaijan (Nakhichevan means "Noah's landing" in Armenian), as well as the primordial Armenian region of Nagorno-Karabakh with purely Armenian population.

It should be bitterly noted that Islamic solidarity in this case may in no way be compared with the policy of the Russian Bolsheviks who turned down their old Orthodox brothers, Greece and Armenia during that decisive period of history. As a result, Russia lost forever an extremely important geopolitical area rich in energy resources. The various Turkic khanates located in that area had been consolidated into the Republic of Azerbaijan which declared itself a strategic ally of Turkey just after the collapse of the USSR. However, the Bolsheviks during that period denied both Orthodoxy and the Orthodox Church, as well as God and common sense, indeed. Turkey has been and remains an implacable geopolitical and civilizational enemy of Russia, this is an evident fact that cannot be ignored.

I cannot rule out that over time the USA and NATO will arrange for another hostile arc (Sweden, the Baltic States, Poland, Ukraine, and, of course, Turkey) around Russia which will excel Russia in terms of both human resources and economic potential. This alternative should also be taken into account, so Russia should strengthen the reintegrated Crimea, as well as Armenia and perhaps Abkhazia as our most important southern strategic allies.

We should also be aware that Turkey will be using all possible means to penetrate into the Muslim regions of Russia, especially Tatarstan and Chechnya where it has achieved considerable success in Islamizing those republics.

International Islamic Organizations[2]

After the end of World War II, the following international Islamic nongovernment organizations were established: the Muslim World League (MWL) and the World Islamic Congress (WIC). Apart from them stands the League of Arab States with its headquarters in Cairo, formed in 1945 and including 20 Arab states. In these organizations, Muslim countries are represented by national spiritual leaders rather than political or secular leaders of the relevant countries. The key ideological concept of these organizations is "Muslim non-alignment", that in fact means to prevent convergence with the rest of the world and to develop concurrently with it, relying upon it for all necessary technical, humanitarian, scientific, medical and other aid while remaining a closed society with obedient (the word "Islam" itself means obedience) population living according to medieval standards. One may draw a sort of analogy with the collapsed Soviet society where the authorities made every effort to keep their citizens unaware of the achievements of developed capitalist countries in social and political life and totally closed national borders for their population.

In the international arena, a group of independent Islamic organizations conduct highly specialized activities in finance and banking. There exist the Islamic Development Bank, the International Association of Islamic Banks, international Islamic new agencies, the Islamic Educational, Scientific and Cultural Organization, the World Islamic Education Center, and the Islamic Call Society which actively conducts subversive operations seeing its principal objective in disseminating Islam all over the world and to help Muslim minorities in non-Muslim countries.

In addition, as part of a trend for independence from the global community, the International Islamic Court of Justice has been formed,

[2] See also: [7]

which may demand, where necessary, to transfer any Muslim who has committed a crime into its jurisdiction.

At different points in time, such clearly radical international religious organizations as the Muslim Brotherhood and Hezbollah were also established. They have become well-known worldwide for their numerous extremist acts.

The above-mentioned OIC (Organization of Islamic Cooperation), despite that it has declared the principle of commitment to the UN Charter and the principle of respect for basic human rights, tries to replace the UN in the Muslim world. But how can we speak about the secular nature of this organization, if its charter contains the mandatory principle of Islam's priority not only in domestic life but also in international relations?

The desire of Muslim elites to stand alone, to retain their rigid, medieval-type vertical of power with respect to their obscure, obedient population and, at the same time, to use widely the benefits of the civilization developed by a different world that they hate and look in a modern way, manifests itself in the adoption of the Universal Islamic Declaration of Human Rights, which is only superficially similar to the well-known UN Declaration of Human Rights.

Despite the principle of non-intervention with the domestic affairs of sovereign states contained in that act, it adds that all Muslim minorities of the world and each Muslim in particular constitute an integral part of the universal Muslim community (Ummah).

It turns out that the "legal jurisdiction" of a state does not extend to any Muslims living in its territory. This is a nonsense amounting to the non-recognition of not only international law but also the entire contemporary world order.

Thus, the European states, including Russia, which receive for humanitarian reasons migrants suffering from hunger or exposed to the bullets of gangsters or their own authorities and then authorize the construction of mosques, are forming in their respective countries a hostile "fifth column" living on its own according to Sharia. And when such European states demand that the newcomers obey local laws, those "kind" people feel obliged to react in the form of jihad. Then you should not irritate the uninvited guests with your Christian holidays (Epiphany, New Year), Christian symbols and especially women's short skirts which force them to undertake a sexual assault or terrorist attack. If you are really civilized, then you should tolerate it, because your Christian faith welcomes martyrdom, doesn't it?

There is another open question: may an ethnic Arab or Turk etc. be a non-believer or atheist when living in a Muslim state, or is the freedom of conscience a priori unacceptable in Islamic states? The latter is clearly true, otherwise he or she will be cruelly punished. And what about individuals living in such a country but belonging to a different civilization or religion? Prohibitions, oppression, the inability to build churches or to wear Christian symbols, like in Saudi Arabia, etc. That means that the main achievement of the civilized world – the equality of people irrespective of their ethnic origin, gender, religion or race – is also a priori ignored in Muslim countries. Unfortunately, it should be stated that in fact the Islamic world does not try to enter modern civilization but remains at its doorway.

Now hundreds of highly paid European lawyers, specialists, journalists, press representatives and politicians earn tens of millions of dollars by representing the interests of Islam in various Western countries and organizations, in courts and financial institutions in order to justify crimes of Muslims in Christian countries, defend their rights to build mosques, educate their children in Muslim schools, or legitimize polygamy or coercion with respect to women.

The Islamic international movement started in parallel to the Bolshevik one surprisingly resembles and, moreover, copies it in many aspects. Whereas the Bolsheviks called for communist solidarity, the unity of all workers, the protection of their interests all over the world and the dissemination of the communist ideas in order to achieve their victory all over the world, the Islamists do just the same but replace communism with their call for the protection and dissemination of Islam and use the word "Muslim" instead of "worker".

The main thing in common between the communist movement and today's Islam has been their desire to destroy the much more developed, free and rich democratic Western world. In the past, the communist countries, while setting barriers against the democratic world, strived to destroy it with the use of the communist proletariat and other leftist parties. Islamists try to do the same, but they use Muslim immigrants and the dissemination of their religion.

Anyway, we deal with a single phenomenon which has only changed its presentation and get-up. But there is another difference, and an essential one. The communists, being either Europeans or (as far as China or, partially, Vietnam is concerned) Confucians and understanding the role of science and education, rapidly

developed and, over time, transformed into more open societies with a considerable set of democratic freedoms. But Islam does not change in itself, continuing to live according to Sharia and a medieval calendar and maintaining its belligerent nature.

Of course, exterior changes in the economy of certain more successful Muslim countries supplying raw materials to Western Europe (there have been no processing industries, mechanical engineering or high-tech production in the Islamic world) are evident. But on the inside, people, except for those who have lost connection with the mosque and religion, remain virtually unchanged. Allah has given them oil that they do not need to fuel camels, horses or mules. The kafirs who need it pay heaps of money, pump it out and even compete with each other, thus pushing up its price. You idiots! We have managed to deceive your Christian God!

* * *

Today is the time to make decisions which will determine how things will go and what will be the outcome of such global contradictions between developed Europe and the controversial, hungry and poorly governed Islamic world penetrated by a medieval-type religious spirit and currently experiencing a new upsurge. It is not an exaggeration that the threat facing Europe and Christian culture is real and very high. The situation is aggravated by the fact that, with rare exceptions, the leaders of the European Union and Western Europe support neoliberal ideology. Instead of evaluating the situation realistically and taking appropriate measures, they use the tactics of repeated concessions and compromises, trying to retain control over the processes and, first of all, their temporary power this way.

They call their people to be tolerant, humane, merciful and ready for patience and suffering, to worry about the life and honor of their children and relatives and so to chasten their souls. One can see once more than the neoliberalism of today's European politicians has lost any reason and lives and acts in a different dimension like a religious cult which has lost touch with reality.

Whereas this sort of tactics yields some results in a short run, strategically it can result in disastrous consequences for a country. Let me give an example from French reality which may, over time, become extremely relevant for Russia as well. At the latest presidential elections, socialist Francois Holland got the votes of 80% of the Muslims who had received French citizenship. Officially, the number of such Muslims in France is over seven million (8), and they have actually turned into a significant political force. Holland was also supported by a majority of retirees and relatively poor citizens, most of them belonging to naturalized minorities as well. Therefore the democratic principle of general elections is transforming now from a progressive tool into a negative factor, because it automatically leads to power parties declaring populist, unrealistic social programs of wealth redistribution from the rich to the poor. Given the current trends of global development where the number of retirees and various welfare beneficiaries grows steadily and the number of the rich and those who produce wealth is on the decline, such policy would eventually result in the depletion of tax receipts and the outflow of the successful and affluent to offshore zones and abroad. In should be added that the welfare benefits going to millions of immigrants who do not work and are reluctant to work are close to the salaries of hard-working taxpayers. As a result, Holland is in power whereas hardliner Sarkozy, who approves the orderly deportation of systematically jobless or criminally involved immigrants, lost, and the interests of the state and the country lost as well. One could only hope that the natural instinct of survival and the tragic nature of the situation will cause all potent forces of Europe, including Russia, the biggest and most powerful country of European Christian culture, to fight back the avalanche-like attack of the Middle Ages in a consolidated manner. At the same time, tides of criticism and strengthening popular resistance will likely force the liberal leaders of Europe to adjust the current harmful political course. It is still more likely, however, that Merkel, Holland etc. will fail to receive public approval at the next elections. But now, despite their declining authority, they are still in office and, moreover, try to attract voters with new promises.

One can hardly agree with the statement by Chancellor Angela Merkel that the future of Europe and of the peoples living within its territory, as seen by her and her associates, will not involve any borders or any ethnic, cultural or religious identification and that it is the only way for Europe to become a fatherland for all of its residents. This is quite a luring outlook for the 35 to 40 million immigrants, primarily Muslims, who have obtained or are in the process of obtaining citizenship. And, on the face of it, this concept appears to be quite humane and promises a bright future for Europe. In fact, however, these generous promises conceal a desire to get the voices of deperso-

nalized voters in spite of common sense. Moreover, this sort of ideology poses a threat to great European Christian culture and its ethnic basis, the European traditions and languages. One cannot rule out, however, that this may be a new way to strengthen German domination in Europe when Germany's key strategic competitors, France and the UK, are involved in dealing with their serious domestic problems (9). There is only one question that should be answered: who will work, produce, think and create in such a depersonalized Europe? People wearing turbans and barefoot sandals? Or veiled women? Will they study Kant or Hegel, read Shakespeare or Heine, listen to Bach or Beethoven? Or the fate of the whole Europe is to fall down to the Middle Ages – not the European Middles Ages that the Islamic world is unable to achieve even now, but the primitive Asian Middle Ages, with caravans of camels and mules, slavery and harems? It is terrible to imagine what will happen to the population of old, kind, relaxed and gentle Europe when the uninvited guests/occupants outnumber them and start to actively form their own political and public organizations.

By the way, sometimes fiction writers, like Jules Verne, find themselves ahead of their time in their predictions as they describe what will happen decades or even centuries later (10). In this regard, it is worth noting Submission [5], a novel by French writer Michel Houellebecq describing an Islamic party taking power in France in 2015 and starting to rule an Islamic way.

But should we be surprised? A considerable part of Europe (Spain, Portugal, Greece, the Balkans, Romania and Moldova) saw several centuries of Islamic domination. Perhaps, history repeats itself, indeed, but this time it occurs in the form of a tragic grotesque?

During the last 20 to 30 years, the ethnic mosaic of the Middle East, Turkey, Iran, Indonesia, and Africa (South Africa is relatively less affected yet) has been fundamentally distorted. Tens of millions of Christians have left, or rather simply been forced to leave, certain areas where they lived for centuries. Their houses and churches would be destroyed and looted, ancient monuments would be exploded, and Christians would be openly oppressed everywhere. But the neoliberal leaders of mighty Christian nations ignore this, in every situation trying to swindle each other and obtain maximum benefit at the cost of their neighbors. This demonstrates the principle of individualism (the priority of personal success over all other considerations) implemented on a national scale.

The blatant oppression of Christians involving political demagogy, blackmailing and coercion is still underway (11). And if the press or some political or public activists protest against such practices, hired European human right advocates, liberals of all kinds and corrupt journalists will make great noise and accuse them of Islamophobia or even racism. As a conclusive evidence of Christian atrocities, the medieval crusades against Muslims are mentioned. But what was the purpose of the crusades, what did crusaders want to liberate? Christian shrines, Jerusalem? Should we think that it is a crime for Christian to liberate their shines and it is permissible for Muslims to conquer and hold them? Muslims hold the sacred Christian city Constantinople, founded by Constantine the Great in 324, and the Hagia Sophia Cathedral (12), transformed into a mosque called Ayasofya in 1453. So tolerance and political correctness go to the point where people of Christian culture must keep silence about key dates on the timeline of human civilization in order not to offend the "hapless" descendants of conquerors? To tell the truth does not necessarily mean to seek to reverse history. It would be appropriate to declare such shrines exterritorial all-civilization values and to safeguard those greatest creations of humankind against the fate of Palmyra.

But there exist less distant examples of the same trend, too. Look at today's ethnic structure of former "brotherly" Soviet (now Muslim) republics which acquired the status of states and elementary skills of public administration under Soviet rule. Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan which had never been sovereign nations, as well as Uzbekistan which had long since lost its sovereignty, became full-fledged members of the global community and the UN. At the same time, due to the policy of open Islamization pursued by the authorities of these countries and the oppression of the Christian minority, Christians were forced to leave these republics in great numbers. Whereas about 10 million Russians, Ukrainians, Germans, Byelorussians, Armenians and Jews lived there before the collapse of the USSR, now there remain only about 4 million of them, primarily in more successful Kazakhstan, and the exodus of that segment of population continues.

Such US allies as Saudi Arabia, Indonesia and other Muslim countries strictly prohibit, under the threat of criminal punishment, building Christian temples, wearing Christian symbols or celebrating Christmas and New Year. At the same time, those Muslim who have already

moved into Europe and who are mainly jobless and live on European welfare benefits, loudly demand the same from the authorities of France, Belgium and other European countries – to conceal and not to manifest their Christian values. Such demands do not prevent those Muslims from opening thousands of new mosques (13), madrasas and Islamic schools in Europe. But everything is interrelated in our world and, sooner or later, apt and realistic forces will unavoidably come into power instead of crying feminists and feminized liberals. Now the cancer tumor of Islam is expanding in the body of Europe hour after hour. Unless it is surgically removed, the continent – the cradle of Christian culture – and its people will die. God open the eyes of the cowardly European politicians who seek to gather votes at any price.

In the foreseeable future, Islam will not cease to fight against the global community, especially with its rich heterogeneous old neighbor, Europe. Using one migration tide after another, Islam will try to overwhelm it first in demographic and then in civilizational terms. This huge human mass will be boiling both in European countries themselves and in adjacent areas, threatening to penetrate instantly any country where the political funnel of a liberal regime is formed and where both statehood and historical and cultural values degrade under the pressure of feminists, sexual minorities or various human rights activists, as is the case with France which was the first to declare itself a secular state without adding that Christianity was the basis for its civilization. It is not by chance that Pope Francis has called France an "unthankful daughter of the Catholic Church".

Due to its ill-conceived activities in Africa, Asia and the Middle East, the USA have added momentum to these processes which only remotely affect it as yet. Moreover, turmoil in international affairs and the weakening of its political and economic rivals are even beneficial to the USA, because translating market rules into intercivilizational relations is fairly consistent with liberal values.

One may recall the events in Yugoslavia in 1999 when the USA bombed that country for 78 days in a row on the pretext of human rights protection, after which the first Islamic quasi-state, Kosovo, emerged in Europe. Then Kosovo became a drug trafficking and crime hub for the whole continent.

All attempts to make peace with Islam have been unsuccessful to date. It is hardly possible to reconcile Islam and Christianity or the two cultures or mentalities respectively based on them, either today or in the foreseeable future. They are fundamentally different in all key aspects of human activities. Christian culture and the philosophic and legal doctrine of Christianity view human life as a divine gift and the most precious value and believe that society and the government must do everything possible to preserve and secure it. Homicide, as well as suicide, is a great sin in Christian culture. A murderer or self-murderer may not be buried in a cemetery along with other people and must be condemned and excommunicated by the Church. Islam holds a contrary position on this issue which is extremely important for all of us. In Islam, human life means nothing, a human comes into a world which is not susceptible to change, and he is obliged to do everything in his power, including the sacrificing of his life, in order to kill infidels, and then he will become a "shahid", and the gates of the paradise will open before him (14).

It is difficult to imagine how dangerous this religious and worldview doctrine can be for the Muslims, the vast majority of whom consists of deeply believing, obscure and uneducated people living according to the medieval Sharia laws. One may wonder whether this is the reason why many of them do not appreciate their own lives as well as the lives of other people and may kill in cold blood innocent people for the only reason that they are not Muslims. Then would not it be better to live separately or to visit each other only for a limited period? Of course, there are a lot of civilized and decent people among the Muslims, but they are, as a rule, not religious although they may try not to expose this fact for fear of revenge from their own ethnic group.

After US presidential candidate Donald Trump proposed to close the US gates before those Muslims who had committed bloody terrorist acts in the past and to permit entry only to students, businessmen and other people coming for legitimate purposes (15), this idea, far from being new, was in fact legalized. Millions of people have endorsed it, and it has become a subject of a very broad discussion both in the USA and abroad.

The argument that the West and Russia undergo a demographic decline and need to attract new working force in order to support their economies is absolutely unfounded. If Mercedes Benz cars are in demand, then should the producer invite millions of Turks or Algerians in order to further expand its production? But what will those people, with their several wives and numerous children, be doing tomorrow, when the demand decreases? Anyway, they will not go back, because no Muslim

country will provide Muslims with such amenities or pay such benefits to them from their national budgets in the name of "humanism" or "tolerance". Therefore, the prosperity of the company will be maintained at the cost of significant social concessions and, most important, the shrinking living space of the country's population. It is an extremely unequal exchange which may have lethal consequences for the country (16). It turns out that the policy of the state, even in a matter of top national significance, gives priority to the short-term interests of mighty companies. But could it be different? Without the approval and financial support of those companies, Merkel and hired political managers of a similar kind could have neither come into power nor subsequently pursued policies convenient for those companies. Moreover, a large number of parliament and government members are also representatives of various financial groups who receive profits from their businesses.

The hope that Islam and its radical strains will, in a foreseeable future, become more moderate or tolerable to other cultures and adapt to contemporary realities means either mere ignorance with respect to Islam or a deliberate and dangerous fallacy. Now Islam is unable to break out of its closed circle. Its essence is coercion with respect to dissidents, women, those who adhere to other religions, who are in doubt or hesitate, atheists, adulterers, sexual minorities etc. They may be subjected to oppression or punishment up to a death penalty, stoning or other scary and disgusting acts. And who is to carry out the reformation and humanization of Islam? Its medieval-minded imams who have read nothing but the Quran? It is true that certain representatives of traditional Islam try to apply the archaic text of the Quran to contemporary realities by making it more tolerable to Christianity and other religions. But these efforts are of no avail as yet, because, unfortunately, the number of supporters of extreme Islamic varieties, such as Wahhabism, is on the rise, as evidenced by the ravaging ISIS, which easily recruits tens of thousands of thugs from all over the world, by regular terrorist attacks in peaceful cities of Europe and Russia, and by a lot of excited approvals from Muslims in social networks regarding the events in Paris and Brussels.

To summarize the above, I would like to emphasize a series of aspects.

- Islam is an ideology of nomadic peoples that formed in the early Middle Ages, and it will never accept modern democratic values, such as a secular state, the freedom of conscience, gender equality and non-coercion with respect to those who dissent. Look at today's political map. Do you see at least one Muslim state where the clergy and religion do not dominate public and political life, where religion and religious institutions are separated from the state and where secular rules of living are established (17)? In today's Saudi Arabia, Pakistan, Yemen etc., one will be put to death in a brutal way, in the presence of thousands of rejoicing people, for defection from, or dissent with, Islam, for homosexuality or a woman's marital disloyalty (men are exempt from such penalties). The cruel procedure of female circumcision, (18) which results in the death of many girls, is often used.

- All contemporary fundamental democratic values are rejected in Muslim countries. Any reform aimed at softening Islam or its practices would fail, as it was in Iran, or give way to the strengthening of the Islamic component in public life, as it is in today's Turkey. A similar situation arose in Egypt, where elections held after the overturn of Mubarak led into power the Muslim Brotherhood, the most reactionary group which has been existing in the Middle East since the 1930s. Only the intervention of the army and progressive generals saved the country from its return to the Middle Ages. All of this means that religion and the level of religiosity in Islamic countries have strong roots and, therefore, such democratic institutions as general elections will not result in progressive changes there. If necessary, Islam will employ the tactics of "takiyyah", Sharia-approved lies in relations with infidels. Please accept us and help us, but then… there will arise a situation like that which takes place in France or Belgium. As demonstrated by the latest terrorist attacks in Paris, individuals who live in those countries in the third generation, have French or Belgian citizenship (craved by thousands of people) and have been receiving, from generation to generation, welfare, education, and their own homes, explode themselves together with innocent people who are punished this way for their stupid gullibility and tolerance.

How long will this process continue? Isn't it the time for the global community to recognize the aggressive nature of this religion, to demand the governments of the Muslim countries that they take appropriate steps to check the disastrous population growth in those countries, and to pay attention to the horrific social conditions which generate flows of refugees. As yet, the principal problem for the Europeans is how to adapt the Muslims who have settled in their countries long ago rather than how to receive

the huge numbers of newly arriving people belonging to Islamic culture.

Things are evolving rapidly in Europe, and in Russia too. Neither Europe nor Russia should reach the point of no return where the outsiders, having reached a certain number and consolidated, would become a dangerous social and political force. To that end, they will certainly enjoy every assistance from abroad, as it was in the case of Chechnya. A ban on the construction of madrasas and mosques with the proceeds of foreign funding should become one of the most important and effective measures. In this regard too, Turkey and Saudi Arabia are the key players seeking to keep millions of Muslim emigrants within the limits of Islam and Sharia laws by means of newly formed cultural and religious organizations. It should be kept in mind that the Islamic world strictly adheres to the "Dar al-Islam" principle, i.e. any Muslim, irrespective of his or her residence or citizenship, is subject to the global Ummah through the local ummah formed around the relevant mosque and may be punished for disobedience. This principle contradicts the rule of international law according to which any state has jurisdiction over the citizens residing in its territory irrespective of their religion or race.

It is also necessary to prohibit money transfers to individuals from foreign-registered nontransparent sources. As practice shows, in many cases such transfers are intended for persons connected with jihadist groups. If a former student of a madrasa or a believer associated with a particular mosque commits an act of terror, the relevant institution should be suspended for five years. On a second occasion of that kind, the relevant institution should be closed forever without the right to appeal against such a court decision.

There also exist a lot of other methods which can help restrict the aggressive propagation of Islam in European countries. First of all, it is also required to prohibit the concentration of Muslims in certain areas and, most important, to cease welfare payments to unemployed Muslims. It would be also advisable to distribute them to jobs in various parts of the country, far from large cities where they may easily avoid control or be more susceptible to negative influence.

The European countries having a Muslim community, as well as Russia, should pay particular attention to the involvement of Muslim women into labor activities (personal and other services, medical care etc.) and to their education. It is the only way to achieve the initial socialization of Muslim children and to prepare them for admission to children's institutions and schools. At the same time, it is necessary to limit or cease welfare payments to families which give birth to more than two children without regard for their financial condition, thus shifting the burden of their maintenance onto the shoulders of the taxpayers. Those who repeatedly breach the law should be deported together with their underage children. Maybe that would be inhumane – but is it human to ignore our own children, to jeopardize their future? It is highly probable, indeed, that a socially handicapped Muslim child will end up in the slums or become a jihadist in the future.

In all European countries as well as in Russia which also has a Muslim community, it would be advisable to have an ombudsman or special watchdog organizations monitoring compliance with gender equality laws and preventing family violence against women and children. It is only by securing gender equality in Muslim families that we can check their skyrocketing demographic growth.

An ideology hostile to the Christian values is now taught by imams, school and madrasa teachers sent from abroad who typically share backward medieval-type views. Their activities should be subject to strict licensing, and those who are not entitled to live in the relevant country or lack appropriate education should be deported. These measures, as well as some other measures, would eventually serve not only the protection and safeguarding of great Christian culture, but also the benefit of the poor and rightless population of Muslim countries that is estimated at 1.5 billion. A prohibition to accept immigrants would force the Muslim rulers leading rich and luxurious life to take care of their citizens who would otherwise overthrow them because they would be unable to move to Europe anymore.

Muslim countries should strictly control the growth of their population. The Christian world they hate so much is no longer capable of accepting and feeding them. In addition, Europe already spends a lot of funds not for humanitarian purposes but for the maintenance of enhanced police and law-enforcement forces and for border protection. Any humanitarian aid for Muslim countries should be conditional upon population growth reduction.

Why has the great China managed to do that and the Islamic world failed? And, finally, where is the much-praised Islamic solidarity? Whereas the sheikhs of oil-producing Gulf countries build gold-plated skyscrapers in their capitals due to the petrodollars coming from

the West and strike the world and the Europeans with their luxury, millions of their starving compatriots are fed and supported by the kafirs (infidels) so hated by them.

Contrary to evident facts and the whole history of Islam, Islamic representatives repeat every time that it is a religion of peace, love and mercy, but one cannot understand why terrorists and murderers choose exactly the religion of Allah and why the countries where this religion dominates fight against their neighbors throughout the very long perimeter of their geopolitical domain.

To conclude with, I would like to note that exactly 101 years ago, in 1915, Turkey committed the brutal genocide of Christians, Armenians, Greeks, Assyrians and Russian old-believers who had lived in its territory. Two million people, primarily Armenians, were killed in a barbaric manner. A quarter of a century later, Hitler called the Nazis to exterminate Jews and Slavs and emphasized, "Be merciless. Who remembers today about the killing of Armenians, we need vacant territories."

He was wrong, the world remembers not only about that tragedy but also the subsequent Holocaust, as well as the close cooperation of Germany and Turkey in two world wars – a cooperation that still continues. Turkey, which has in effect launched a broad attack on Europe and the whole civilized world, remains to be the chief enemy of Christian culture in the Islamic world. This fact is evident to anyone except for the hypocritical European liberals engaged in the creation of a new multilingual Babylon without borders and without any religious, ethnic or cultural identification. Bringing to a level of absurdity the protection of human rights and especially the rights of sexual minorities, ignoring the interests of their countries and peoples and denying the civilizational danger facing Europe, they keep on working for the only purpose of retaining their power at any cost. After each bloody terrorist attack, instead of taking appropriate security measures, they stage theatrical rallies, fireworks and huggings intended for the voters. Perhaps, this is all what they can?

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The life of human beings on our planet becomes more and more challenging giving rise to new global concerns, of which the environmental problems are predominant. And, if these problems are mostly objective by nature, the contradiction and clashes between two religions are merely subjective and can be easily mitigated, or remedied. In the century of space exploration and nuclear arms humankind should be more reasonable, since the religion was made for man, not man for the religion.

Notes:

1. Russian political scientist Henry Sardaryan points to one extremely illustrative fact. For the latest two decades, Egypt, Saudi Arabia, Jordan, Kuwait, the UAE and Syria, i.e. the richest and relatively developed countries of the Islamic world, have registered as few as 267 patents of lesser significance, whereas Israel has registered 7,652 patents for the same period, many of them solving key problems of contemporary science and technology [See: 2. P. 4]
2. Ethel and Julius Rosenberg, the US citizens who had stolen nuclear secrets from US laboratories, were executed.
3. In recent years, many politicians have admitted the possibility of a local nuclear war, however, they do not indicate how to distinguish a local war from a full-scale one and who will do that.
4. The "golden billion" countries include the USA, Canada, the UK, Germany, France, Sweden, Norway, Finland, Japan, Denmark, Luxembourg, Switzerland, Austria, Australia.
5. A sacred war against infidels. A Muslim's refusal to participate in jihad amounts to one of the great sins which deserve death penalty.
6. Mohammad once called this way anyone who didn't follow him or accept him as the Prophet. So the Muslims consider all other monotheists as infidels.
7. The Islamic (lunar) calendar is an official calendar in some Muslim countries such as Pakistan, Bangladesh etc.; it is used to determine the dates for religious holidays. Years are counted from Hijrah (July 16, 622 AD), the day when Prophet Mohammad and the first Muslims moves from Mecca to Medina. The year consists of 12 lunar months and is equal to approximately 354 days. The day in the Muslim calendar begins at sunset rather than midnight as determined in the Gregorian calendar.
8. There is no exact figure reflecting the turnout of the Muslim voters.
9. France is still unable to "digest", or adapt, its giant, culturally different and hostile Islamic diaspore representing a mammoth financial burden for its taxpayers. And the UK, due to its disagreement with the migration policy of the European leaders, has declared its borders closed for migrants and tackled the problems related to separatist movements in Scotland and Wales.

10. In the 20th century, this genre transformed into the genre of "dystopia" which enables a writer to give forecasts regarding the evolution of society. One of the best-known authors employing this genre was Aldous Huxley whose predictions regarding the future of Western society have come real virtually in full.

11. This was repeatedly, with great anxiety, stated by spiritual leaders of the Christian world, including Patriarch Kirill. See *Nezavisimaya Gazeta,* Feb. 21, 2016.

12. The authors of the original design were Isidore of Miletus and Anthemius of Tralles, the new dome was designed by Armenian architect Trdat.]

13. Any mosque built in a non-Muslim country will be deemed an "Allah-conquered land", and this is the indisputable truth for any Muslim.

14. Surah Mohammad, Verse 4: "When you meet those who disbelieve, smite their necks till when you have killed and wouded many of them". Or: "Believers! Fight those of the infidels who are close to you; let them know your cruelty in you" (Surah Atonement, Verse 124).

15. The words by Donald Trump are treated in the USA as the basis for a new ideology, "Trumpism", which certainly has a lot of supporters and shows a trend for expansion.

16. But why do these prosperous companies refrain from setting up an outsourcing network where the head office stays in the country of incorporation whereas parts are produced and products are assembled abroad?

17. In this regard, the post-Soviet republics of Azerbaijan, Kazakhstan, Kyrgyzstan, Uzbekistan etc. favorably differ from other Muslim countries. But the problem is whether their present, Soviet-educated leaders will retain their power, or they will be ousted by the rising Islamist groups?

18. A cruel medieval tradition according to which a woman must not get pleasure from sexual intercourse, because Islam considers such pleasure sinful.

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ПЕРВАЯ ПОЛОВИНА XXI СТОЛЕТИЯ: ИСЛАМСКИЙ ВЫЗОВ

Перед человечеством сегодня стоят две важнейшие проблемы: его чрезмерный численный рост и ухудшающаяся экология. При этом первая проблема ускоряет и усугубляет вторую.

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ON THE ITALIAN STYLE: THE ECLECTIC CANON AND THE RELATIONSHIP OF THEORY TO PRACTICE IN ITALIAN LEGAL CULTURE BETWEEN THE 19TH AND THE 20TH CENTURIES

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In the 1960s the great comparativist John Henry Merryman (1920-2015) wrote three articles published in the Stanford Law Review on the "Italian style», seeking to identify specific characteristics in Italian contemporary doctrine, interpretation and law within the civil law tradition (§ 1). Merryman considered the Italian legal system to be an "archetype", more "typical" in some respects than the French and German systems. Merryman wrote that "Italy is perhaps the only one of the major civil law nations to have received and rationalized the two principal, and quite different, influences on European law in the nineteenth century: the French style of codification and the German style of scholarship" (§ 2).

My work, following some of Merryman's suggestions regarding the concept of a legal tradition and comparative legal history, aims to shed new light on Italian legal culture between the nineteenth and the twentieth century. The article seeks to identify in particular the "anthropological-cultural" dimension of the Italian jurist's experience. For this purpose I propose a new interpretative concept, namely, the "eclectic canon" (§ 3). It has to do with the general category of «eclecticism» but it is something different and more than this. It is an approach that can help us to appreciate the complexity of Italian legal culture by transcending the oft-told "tale" in two chapters (French influence first (1800-1870), German influence subsequently: 1870-1920). This scheme remains useful but it is only a part of the story, so we need to subsume it within a more complex plot.

The eclectic canon has a fundamental core, based on two founding "fathers". I refer to Giambattista Vico (1668-1744) and Giandomenico Romagnosi (1761-1835), philosophers, jurists and historians of great merit and distinction. We are concerned here with a cultural foundation pre-existing the so-called Schools (Exegèse, Historische Schule, Philosophical or Benthamit School…). The eclectic canon is not a school but rather a deep stratum. It does not produce a system or a legal order. It deals above all with the habitus, or the ways of being a jurist.The adjective "eclectic" underlines the structure of the canon, that is the aim to reconcile different orientations. The concept of stratum recalls a historical approach widely used and developed in anthropological and comparative law studies. The core of the eclectic canon is the "Historical-philosophical-dogmatic" approach. History, Philosophy and dogmatics taken alone are not sufficient to found a sound legal education and a good practice as a jurist. Only a balanced mixture could provide a correct solution. Italian style entails the tempering of different stances. In effect, another consequence of the eclectic canon - constantly noted by most Italian jurists - would be that of the combination of theory and practice in the actual design of legal culture (§ 4).

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1. Introduction

In the 1960s the great comparativist John Henry Merryman (1920-2015) wrote, after a period of study in Italy, three articles published in the *Stanford Law Review* (2). In aggregate these articles invoked an "Italian style",searching for specific characteristics in contemporary doctrine, interpretation and law within the *civil law tradition*. Merryman considered the Italian legal system tobe an "archetype" (3), more "typical", in some respects, than the French and German systems (4). In recent years "Italian law" [27. P. 163-200] as a "juridical model" (5) has given rise, in Italy, to extensive research. In this essay I will identify some original characteristics and "enduring traits" underlying the style or rather the *habitus* of italian juristsin its historical development. Of course, *Italian style*consists of legal science and doctrines, laws, styles of judgement etc.– as Merryman has described in his powerful and lucid synthesis - but here I would like to shed light on a sort of "anthropological-cultural" dimension of the Italian jurist's thought and practice. I am convinced that what I call the*eclectic canon* (§ 3) - seen as an interpretative paradigm and a set of issues - can help us to understand better what is genuinely distinctive in Italian legal experience during the nineteenth and part of the twentieth century (and perhaps beyond). It is a concept that can contribute to a recasting of the traditional "tale" about the making and the evolution of Italian legal culture (§ 2). The aim of this *new approach* is also to challenge some clichés or historiographical stereotypes. According to the nowfamiliar "tale", the history of the formation of Italian legal culture assumes the guise of an *opera* in two acts giving rise to an imposing *tradition*. This representation is not an *invention*, for it has a real historical foundation but it is not sufficient to restore to usthe overall framework. At the same time, the reference to the *eclectic canon* allowsus to grasp the relationship between theory and practice as an enduring feature of Italian legal culture (§ 4). This approach cannot be based on a typically rule- or legal system-oriented procedure because, on the contrary, it impinges upon several dimensions of the law that depend on culture and societal issues. One of the many merits of John Henry Merryman has been his readiness to take into consideration *Italian style* from a more realistic point of view, one consonant with Mauro Cappelletti's methodological preoccupations [16] and Gino Gorla's comparative-legal history approach,two positions"(…) very critical of Italian legal scholarship generally and of formalism and historicism, in particular" [41. P. 17]. The structural approach that I propose here, based above all on the notion of "culture", can offer to comparative legal studies a stimulus to relativize the often-reiterated commitment to positivism. Moreover, the reference to the *eclectic canon* in terms of legal culture is a way of contributing to a realistic definition of legal tradition. For, according to Merryman,legal tradition is "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which is a partial expression. It puts the legal system into cultural perspective" [53. P. 2].

In this regard, I would like to think that this article could perhaps have attracted the attention of John Henry Merryman.

2. An Opera in two acts: the tales of Alfredo Rocco and Francesco Carnelutti

Merryman has written that "… Italy is perhaps the only one of the major civil law nations to have received and rationalized the two principal, and quite different, influences on European law in the nineteenth century: the French style of codification and the German style of scholarship"[47]. This statement corresponds to historical reality and it is, as we shall see, the principal explanation used to characterize the Italian law tradition, taking into account developments in civil law (and in particular the influence of Napoleon's civil code) and German *Rechtswissenschaft*.

In fact, the making of Italian legal science has been toldas a tale divided into two main periods [37]. It is argued that the first period is marked by French influence, a consequence of Napoleonic domination [10, 86]. The French model was organized at that time (and also afterwards) as a more organic and system-building codification with at its heart the civil code (*Code Napoléon*after 1807) and a modern and efficient system of public administration. According to this "model", legal order is based on State law [15] and on the exegetical work of juristscommenting upon legal texts. The "French period" drew symbolically to a close in the 1870s due to the humiliating defeat suffered in the Franco-Prussian war and the growing prestige of the *Modell Deutschland* in the European political arena and in many scientific fields.This second period is characterized by «German method» and the Pandectist movement. Their methods and concepts seemed more appropriate and useful to represent the private legal order and to frame

the space of political sovereignty."Consider – John Merryman wrote–German legal science; it has never taken deep root in France, butthe Italians have, in this sense, become more German than the Germans"(6).

In this article I only have the space to recall two scholars from among the many I might have mentioned. Their narratives shed a great deal of light upon the making of Italian legal culture. In 1911 Alfredo Rocco (7) traced – fifty years after political unification – a profile of private law doctrine. He quoted Savigny's remarks from the 1820s and passed a negative judgementupon French influence. The introduction of French codes had, Rocco claimed, interrupted the continuity of Italian legal tradition. The national development of private law had been paralyzed. "Therefore, scientific activity in these fields of law was almost entirely limited to the translations of French works, and bad translations for the most part; and they still reflectedthe state of the culture among Italian jurists of that period, and not only of legal culture" (8).

But the unification of Italy laid the foundations and called into being a new approach common to many legal scholars based in the Universitiesthen undergoing a process of transformation.However, before forging something new, Italian jurists had to learn. Change required a period of assimilation (9) of "German" scientific method in order "to develop the passion and the practice of scientific investigation" (10).

Roman private law and *Modell Deutschland* were two dimensions presaging a new and more hopeful era. Italian scholars began to visit German Universities oriented, according to the Humboldt model,around a strong scientific vocation. They returned to Italy determined to disseminate ascientific approachand a number of new methods. But this transition towards "Germanism" could not be immediate. Two phenomena had to coexist. "Whereas on the one handthere was a proliferation of commentaries, treatises, jurisprudence articles consisting simply of a rehearsing of the opinions of French juristsand of a pedestrian exegesis, on the other hand the Universities witnessed a complete and profoundly fruitful renewal of method" [68. P. 15-16]. The Italian school of law – Rocco noted – was born from this apparent conflict, subsequently undergoing further independent refinement.

Just as in the period of assimilation/imitation, so too in the "constructive era"Italian jurists reiterated their commitment to Roman law [13],invoking the prestige of an extraordinary civilization blessed with a "natural" scientific vocation to spread the pandectist hegemony. Another distinguished romanist,Vittorio Scialoja (11), "was perhaps the first to understand that Italian legal science had to free itself from foreign influence in order to go its own way" (12). Legal science could now address the task of recasting the legal system and formulating a general theory. Much, Rocco conceded, had been done, but much still remained to be done [68. P. 33].

In 1935 Francesco Carnelutti (13) spoke of an "legal Italian school" and recalled in a positive sense the "formidable pressure" exerted by German legal science on Italian during the nineteenth century. A century since the triple movement substitution/assimilation/construction had begun. Carnelutti's account does not differ so much from the tale told by Rocco. In 1950 Carnelutti had been commissioned to write a *Profile of legal Italian thought* for an American volume – never published - dedicated to different aspects of Italian thought. When Italy became a State "the legal hegemony, at any rate in continental Europe, belonged incontestably to France. We felt for a long time – he noted – the weight of this primacy" [18. P. 167]. The Napoleonic civil code was the model but its influence was not only about legislative reception because "the mold of law or in other words of its own conception of law, at that time and for a long period subsequently was essentially French" [18. P. 167]. Then the "second act" began. German scholars saw once again in Roman law outstanding raw materials. "German Pandectics thus arose as the original kernel of modern legal dogmatics. Thereupon a legal science that was profoundly transformed in form and content emerged. The formal alteration was most evident in the substitution of *system* for *commentary*. We began to understand the value of the concept and even more of the order of concepts (…)"[18. P. 168]. According to Carnelutti, this work was at first unknown to Italy, its discovery being due to a number of great jurists. Credit is due here to Vittorio Scialoja for Roman law; Orlando for constitutional law, Anzilotti for international law, Chiovenda for civil procedural law, Cammeo for administrative law, Polacco for civil law, Vivante for commercial law. "Thanks to these and, as I have said, to many other jurists the Italian approach has abandoned French method and adopted German method in law studies" [18. P. 169]. Already in 1935 Carnelutti was proud to stress the fact that by this date Italian scholars had no cause to envy their German colleagues. Indeed, they had founded a general, integrated, theory of law [21. P. 324]. Italian legal science (14) was in a first phase oriented towards foreign

models, but quite soon it gained full autonomy, crystallizing in the process an entirely original vision (15).

3. The eclectic canon

The tale of the "opera in two acts" is essentially a frame serving to illustrate a general trend. What then is the problem? First of all, we should not judge Italian, national, legal culture during the nineteenth century using ex-post concepts, that is to say, employing the paradigm of the «true» scientific method. In fact, we note that the essential nature and 'quality' of Italian legal culture during the nineteenth century have been assessed in terms of two major paradigms.

The first paradigm depends on Savigny's comments during the 1820's when he made a number of trips to Italy, visiting Law Faculties and colleagues, and meeting his many Italian correspondents. He was thus quite familiar with the Italian context, but he judged it in terms of his own scientific paradigm and the «Humboldt Model». To simplify, our starting point has to do with the fact that Italian legal culture would not have been, at the beginning of the nineteenth century, *Wissenschaftlich*-oriented. I use this German word deliberately because it evokes, and derives from Friedrich Carl von Savigny's vision. In *Über den juristischen Unterricht in Italien* (16) the great German scholar described the existing situation as regards Italian legal culture. Law was little studied as *Rechtswissenschaft*. Law scholars had to pursue a specific *Beruf*; they were University Professors using and developing a method in order to build a new scientific legal theory. According to this scheme, Italian legal culture did not match the «German paradigm». In Italy lawyers appeared to be too much concerned with practice; Universities were weak, their curricula old-fashioned. The consequence was that Italians should, it was argued, set about changing their approach to the organization of legal knowledge, to scholarly research and to the writing of legal studies. Savigny's judgement represented a fairly accurate picture of the Italian legal milieu, but the leader of the *Historische Schule* did not understand that in Italy there was a real pluralism in regard to the sites and circumstances of legal culture making. So overpowering was the *Rechtswissenschaft* paradigm that it served to obscure and to devalue the *Italian style*.

The second paradigm is reflected in the perspective of Vittorio Emanuele Orlando (17). We could consider his thought to be a sort of "terminus".In Palermo, in 1889, this young but confident jurist gave an inaugural lecture on *The technical criteria for the legal reconstruction of public law* (18). After political unification (1860-1870), Italy was faced with the task of building a unitary legal system. From 1870 to the 1880s a number of Italian jurists, in a handful of the better legal Faculties,had begun to follow the «German method» and the Pandectist movement. In 1889, however, Orlando declared that it was the task of his generation to entrench and strengthen the new Italian State. A new public law science was urgently needed in order to overcome the excesses of the exegetical method; a new scientific paradigm was required. According to Orlando, Public Law Scholars were too much inclined to be historians, philosophers or "sociologists" rather than jurists. In the last analysis, the main adversary was eclecticism. Orlando, at the end of nineteenth century, evoked the by then triumphant German method and the great effort made by Italian Universities and jurists to change their orientation. Universities should have a monopoly over the scientific approach, and be synonymouswith «theory». By now there had clearly emerged a conceptual constellation based on the Universities as sites characterizedmore and more bysuch words as science, system, national culture. A number of dichotomies were taking hold: theory/practice, scientific/eclectic, systematic/chaotic, national/local.

The problem is that this conceptual framework has been projected ex post on the previous sixty years, serving as the main criterion not for understanding the past but for making value judgements [45]. Even the "opera in two acts" featuring in the accounts given by Alfredo Rocco or by Francesco Carnelutti was influenced by this narrative.

For these reasons we should for our part endeavor to know and understand the evolution of Italian legal culture in its specific historical context. The «new approach» that I suggest here entails reference to what I define as the *eclectic canon*. It has to do with the general category of «eclecticism» but it is something different and more than this. It is an approach that can help us to grasp the real complexity of Italian legal culture, going beyond the "tale" divided into two chapters (French infulence first, German influence subsequently). This scheme remains useful but it is only a part of the story, so we need to integrate it within a more complex account, thereby complicating the plot. With these preoccupations in mind I have developed the concept of *eclectic canon* (19).

This canon is designed to represent and give a name to a *cultural structure* that has been

elaborated during the first half of nineteenth century in the majority of the Italian states prior to political unification. It deals also with the idea that Italian culture of the Restoration period ought not to be seen as a "crisis period" before the birth of the "scientifica era" in the second half of the century when the scientific paradigm, or so the argument went, had won against pragmatism, the exegetical approach and eclecticism.

The word "canon" evokes here the consolidation of a core of jurists and authors, principles and themes establishing a common lexicon, shared categories and issues. The canon does in fact reflect affinities between jurists working in different parts of Italy. Reading Italian jurists we can appreciate that the *eclectic canon* has a fundamental core, based on two remarkable thinkers. I mean Giambattista Vico (1668-1744) and Giandomenico Romagnosi (1761-1835), philosophers, jurists and historians. These two authors, their works but also the associated mythology and discourses form the central pivot of this canon.

Vico and Romagnosi loom large in Italian legal culture. Indeed, they represent a *cultural foundation* that was in place prior to the actual creation of the so-called Schools (Exegèse, Historische Schule, Philosophical or Benthamit School…). The eclectic canon has *national* roots and is a *deep stratum*. It does not produce a system or a legal order. It deals above all with the *habitus* [9. P. 40-44; 8], the way of being of a jurist.It has to deal with a constellation of deep images (20): the need for a genealogy, "by bridging between strong precursors and strong successors" (21). Italian jurists have eminent ancestors: Roman *iurisperiti* and medieval "glossators" and "commentators". But at the beginning of nineteenth century it is necessary to reconstitute the last "link" in the chain of time: thusVico and Romagnosi are the bridge towards a real Italian legal culture during the *Risorgimento*.

The adjective "eclectic" underlines the structure of the canon,that is, the aim to reconcile different orientations and "schools". Pellegrino Rossi (22) is perharps the first European jurist to suggest that the "solution" lies in carefully appraising and then "combining" the three "Schools", the major cultural trends in evidence at the time of the political Restoration in Europe. "Nous pensons qu'il est surtout nécessaire de ne pas perdre de vue les trois diverses écoles de jurisprudence qui règnent actuellement en Europe, c'est-à-dire l'école *exégètique*, l'école *historique*, et l'école *philosophique*. Leur réunion seule peut amener la fusion du véritable esprit philosophique avec le positif du droit, moyennant la théorie des principes dirigéans… Ces écoles restant séparées, l'une perd de vue les choses et les principes pour ne s'occuper que de mots; la seconde prend pour la vie réelle les hommes et les choses qui ne sont plus; la troisième ressemble à une jeunesse sans expérience, qui au milieu de ses riantes illusions, prend ses désirs pour ses règles et méprise ce qu'elle ne connaît pas. C'est un malheur très-réel que l'éloignement actuel de ces diverses écoles»" [69. P. 188-189].

Girolami Poggi, a talented lawyer and magistratein Tuscany, echoed Rossi's suggestion a few years later. Each scientific orientation taken on its own was defective. Each contained positive elements but only their combination [65. P. 11] stood any chance of founding "a perfect treatise of jurisprudence" [65. P. 11]. In 1832 Poggi wrote that Vico and Romagnosi – two great Italians – were respectively the inventor of the philosophy of history and the creator of a method applied to the moral and political sciences. Juridical eclecticism has been seen as a "fourth" School but for us it represents the *habitus* of the Italian jurist throughout the nineteenth century. In Italy there is discernible the influence of the French eclectic philosophy of Victor Cousin. The *eclectic canon*is clearly linked to «eclecticism» as a general category but, as I have said, it is also something more specific. In Italy the core is represented by the combination of certain aspects of Vichian and Romagnosian thought. We need a sort of *anthropological approach* in order to apprehend the eclectic canon as a deep stratum of the Italian, national, legal culture. The concept of *stratum* recalls an historical approach widely used and developed in the context of anthropological and comparative law studies [44]. It is linked to the concept of *tradition* [58. P. XIII] and implicitly to the notion of "cryptotypes"[70. P. 125] or to that of a "hidden" cultural model.

The eclectic canon is therefore a *stratum* above which schools, methods, codifications and legal orders flow in the course of time. This phenomenon helps also to account for the fact of Italian legal culture being so "open" towards other cultures, asindeed the proliferation of translations and commentaries would seem to indicate (23).But the eclectic canon is not only a *deep stratum*. It also testifies to the fact that Italian legal culture possesses a genealogy: Vico and Romagnosi as the founding fathers of a tradition. This culture has deep national roots and historical continuity. And consequently the canon can play an important legitimizing function: to bolster ideological

awareness of the "natural" propensity of the "Italian approach"to favour the *juste milieu*. This is a "political-philosophical" propensity as Cesare Balbo [4. P. 401] noted, but it is also the *Beruf* of the Italian jurist to temper excesses, to reconcile "extremes". The national "genius"- one of the central elements of the *Risorgimento* – owed much to jurists drawing upon the cultural network succeeding Vico and Romagnosi. The bond of kinship was based on an approach that may be termed «Historical-philosophical-dogmatic" (24). Giuseppe Pisanelli, one of the protagonists of Italian unification, would say in the first Chamber of Deputies that in Italy – and especially in Naples – «There was a School (…) which included at the same time the rational element and the phenomenal element, embracing both history and philosophy; it was the School arising out of the great mind of Vico! This is the real law School …» (25). Vico/Vichianism and Romagnosi/Romagnosianism are the key cultural ingredients. History, philosophy and dogmatics taken alone are not sufficient to found a sound legal education and an effective practice as a jurist. Only a balanced mixture can provide a correct solution. An Italian *Beruf* entails tempering extreme positions.The correct approach should be historical-philosophical-dogmatic.

In the eclectic canon as *stratum* we find at one and the same time history and reason, the chain of times and the *filosofia dell'incivilimento* (philosophy of civilization), the idea of progress and the spirit of moderation, the nation and the different Italian traditions, the relationship between theory and practice. "L'Italie -Victor Molinier wrote in 1842 -, cette terre toujours feconde en hautes intelligences, qui cultive la science avec amour, nous offrira des hommes trop peu connus en France, et dont les travaux peuvent être placés en face de ceux qu'a produits l'Allemagne. Pendant que l'école de Paris vulgarise les doctrines toujours exactes mais souvent sèches et nebuleuses de la Germanie, il nous conviendrait, à nous hommes du midi, d'importer en France celle de l'Italie" [57]. We could say that the speculative dimension of the eclectic canon is fragile but asa *cultural and anthropological presence*it isrobust. History and philosophy are called upon to fertilize dogmatics. The *Italian styleis* born here. We plainly cannot explain it using the *Rechtswissenschaft* paradigm and the Humboldt model.

4. Against the excesses: "The close marriage that should occur between theory and practice"

Another component of the eclectic canon is of the utmost importance, and it is the key perhaps to a deeper understanding of Italian legal tradition. A characteristic of the *Italian style* – constantly reiterated by all Italian jurists in their different ways – would be that of the combination/dilemma of theory and practice [62. P. 233], one of the enduring traits of Italian tradition connected to the anthropology of the jurist and to the idea of a law science tempered by that of "culture" (26). Starting from the 1880s no Italian author could ignore the process of scientification of the Universities characterized by the initial applications of "German method" and the *assimilation* – to use Rocco's expression – of the Pandectist mouvement. So, Pietro Cogliolo, in his unusual book *Malinconie universitarie* (1887), often contrasts the relative backwardness of the Italian University with the great strides made by the German. Nevertheless, when he comes to define an ideal conception of the jurist he deals with the theme of excesses. The "real jurisconsult" is the one who can balance theory with the reality of things. "Two opposing tendencies, the practical and the scientific, have always contended in diverse guises since the world began: happy the period in which a fruitful armistice can be enjoyed" (27). Practice and systematics by themselves succumb to excess. "But there is an enlightened practice that is capable of elevating itself and combining with science; it reconciles theorems, furnishes the facts to be observed, tests and retests in the reality of things the truth of formal principles; and the scientist must take into account this practice, while Universities must study it. Our lectures are not empirical yet nor are they metaphysical; they do not crawl along the ground, but nor do they fly in the clouds; they supply at one and the same time theories and practical notions [26. P. 143].

In the same years we find in Vincenzo Simoncelli (28), who had been a student in Naples of Emanuele Gianturco, the idea of Roman law as the "inspired creation of perfect practical and theoretical jurists…" [81. P. 43]. Indeed,Gianturco, a highly original jurist, had underlined the limits of the exegetical method when searching for a systematic order of exposition following the *Italian style*. It would be ill-advised, he reckoned, to go from the prevailing and "essentially *practical*system of theFrench School" to its polar opposite. It was against "the natural tendency of the Italian mind, abhorring excesses in every aspect of national activity" (29).

The same Simoncelli recalled how Romagnosi had taught civil law without reducing it to a mere commentary upon the code, and how for Vico, a centurybefore Savigny, the jurist

should be a philosopher in order to establish the principles of the law and a historian in order to discover the causes and conditions that determine the development of these principles, with a particular reference to the positive laws of a nation [32. P. 39-42]. According to Simoncelli we needed to enhance "the great models of Germany" but also to profit from its mistakes. Moreover, Jhering had already attacked "the so-called 'constructionists' and their method of dogmatic isolation" [32. P. 40]. Windscheid likewise observed that the legal concepts are fundamentalbut still remain hypotheses and not mathematical axioms. "It follows that the lawyer cannot stand apart, a hermit of science, but must keep a watchful eye on life" [32. P. 41].

Simoncelli was particularly concerned to quote Savigny's foreword to the *System des heutigen römischen Rechts* where he analyzed the historical experience of the separation between theory and practice (30). Here Savigny reaffirmed the heuristic dimension of the historical approach but he took care to stress the fact that the famous controversy with Thibaut in 1814 was over and done with, and that every absolutization led to error. This also applied to correct knowledge of the dual element in what is right, the theoretical (doctrine, teaching, exposition) and the practical (application of rules to real life cases). "The healing remedy lies in the fact that everyone in his special activities keeps well fixed before his eyes the original unity, so that in some way every theoretical jurist retains and cultivatesa practical sense, while every practical jurist retains and cultivatesa theoretical sense. If he does not, if the separation between theory and practice becomes absolute, there inevitably arises a danger that theory degenerates into something vain and practice into manual labor" (31).

Savigny did not speak of everyday practice, but of the "sense or the practical spirit" that had to belong to the "scientific" jurist as well as to the practical jurist, who had to take into account the "scientific criterion" [72. P. 10-11]. "So if the deadly sin of our current legal circumstances consists of an ever more marked separation of theory and practice, only in restoring their natural unity can a remedy be found" [72. P. 13]. It was finally the unity, so natural, bright and efficacious, to be found among Roman jurisconsults: "University and Court – Simoncelli exhorted in conclusion – have to meditate on this advice and implement it, working together to restore to Italy what was the most radiant glory of its genius" [81. P. 47]. They were not obliged to abdicate to the scientific paradigm because theory was the most powerful aid to practice" (32). But practice is not the "contemplative ecstasy of mystical hermits" [81. P. 55].

A few years later it was Vittorio Scialoja, "prince" of the Italian Romanists, who addressed this issue. In 1911, inaugurating the Roman Law Society,he observed that "Italian legal life [lacked] the close relationship that should obtain between theory and practice; and we wish our Society to combine thetheory and practice, of what, that is, should be the true law, because the purely practical law and the purely theoretical law are only parts, and partsthat most of the time run the risk of being mere fragments. It is absolutely necessary that theory and practice not look from a distance and with a sense of reverential respect towards each other, with a reverence that comes from lack of knowledge and unfamiliarity. It is absolutely necessary that theory and practice reconstitute their unity, not only objectively, but also in the soul of each of us. And thus we will engage in work that is genuinely Italian" [78. P. 160].

On several occasions,at least since 1881, Scialoja had dealt with the methodological problem of teaching Roman law, and more generally that of the construction and dissemination of legal knowledge "scientifically prepared" in Italian Universities (33). It is superfluous to add that in the Pandectist approach there was no place for the "exegetical method". Studies were flourishing thanks to the efforts made to assimilate "German method", "important work, crucial for the progress of our scientific spirit" [78. P. 160]. The *Beruf* of the modern jurist in the civil law tradition was to integrate the historical dimension of Roman law, the individualistic foundation of European civil law, with Savigny's idea of system.

The University in Scialoja's conception could only be that of "science", with a specific method in teaching and learning [80. P. 208, 210], supported by practical activities and the analysis "of case studies drawn from real life, examining them in relation to theoretical principles that apply to them" [76. P. 195-196]. "The University must be scientific, the University must be theoretical ..." (34).Practice, properly understood, is what we learn in the course of "practicing our profession". Consequently, Scialoja did not agree with the lawyer Mario Ghiron, who had criticized the undue value generally accorded to theory in the German universities (35), whichleft the student with a "massive ignorance of real life, and [the] inability to understand the law as a living tool for engaging in every day activities…" (36). Scialoja, for his part, while stressing the practical pur-

pose of legal studies, felt obliged to admit that the assimilation process "ran and runs the risk of becoming excessive" [78. P. 160]."We have got to a point - and I think it is worth spelling it out - in which the character given to the theoretical study of the law serves no other purpose than to bring this study into a cloudy sphere, from which only damaging hail can descend on practice and not fructifying rain" [78. P. 160].

The Italian lawyer was not to be a mere exegete; indeed, he should not be far removed from reality and practice. And once again the "core" of the *Italian style* lay in its vocation to mediate between a historical and a comparativist approach. Because "We, as Italians, that is reasonable people who do not allow themselves to be swayed by violent impulses, we can say that they are one and the same thing" [78. P. 162].

Many other scholar underlined the "eclectic" stance of Italian jurists. So, Biagio Brugi, who has written a short but comprehensive summary of Italian legal developments after unification, invoking what he judges to be the dominant feature of the "Italian approach", insisted that "no science can be closed off as in pure theory: much less Jurisprudence". "It would be superfluous –Brugi observed in 1911 - to mention here the work of our old law teachers:professors and legal practitioners: lawyers, advisers, judges. Moreover the teaching of law in our universities continued to be theoretical and practical at one and the same time, even in their heyday; we have already seen that even in a period of decline they still bore some fruit as practical schools. There has been much debate, over the last half century, as to whether the Universities should have a scientific purpose and be professional schools; the contrary view, so rigidly argued, seems repugnant to the Italian cast of mind. Our natural inclination is to put the doctrine to a practical purpose: to enlighten future lawyers, offering them a way to understand and do their duty in civil society" [11. P. 29-30].

Likewise Alfredo Rocco, on the occasion of the same fiftieth anniversary, confirmed that there was indeed a particularly Italian vocation."Using the systematic method, refined by German lawyers to an exquisite degree of perfection, the Italian civil lawyers of this period took care to avoid the excessive formalism and the abstruse metaphysics of the German doctrine; it is the merit of the Italian school to have combined the use of generalizations and of systematic method with the social element of law, thus arriving at a clearer vision of the practical function of jurisprudence" (37). However, the result was not entirely positive. Law practitioners had played almost no part in the creation of an Italian school of law. Indeed, case law had been in effect excluded, everyday practice remaining "faithful to the old exegetes". Legal doctrine, being thus too isolated, had failed to renew the legislative field of private law, except in the case of the Commercial code. The failure of the Italian school of law lay in its not yet having been able to produce "a comprehensive treatise of civil law that might serve to guide and enlighten the practitioners" [68. P. 32-33].

As we have seen, in 1935 Francesco Carnelutti recalled the role of German legal science in having raised, on Roman foundations, the columns of Pandectics destined to preside over the modern phase of legal science [17. P. 7]. But having achieved the first, necessary, assimilation, Italian science had soon reached the stage of autonomy, and even a high degree of originality while the Germans, for their part, seemed to have lost their luster (38).Concepts remained the indispensable tools of science, although the process was not without its risks. There was the danger, first of all, of "losing contact with the ground and getting lost in the clouds. There is thus some justification for the mistrust felt by practitioners. When scholars are accused of being abstracted from reality, the reproach is unfair because they can-not operate save by abstracting; but there is truth in the charge, given the imperfection of their means, which not infrequently do not so much penetrate reality as lead them off into a world of chimeras" [17. P. 8]. Only living contact with reality can overcome this problem. Rational means (the concept) must be "integrated" through intuitive means (art). Of this fact there are wonderful examples that might be cited. "The justification for this, indeed, the credit must go, and we should frankly acknowledge it, to the combination of the study of law with the practice of it which is in an intrinsic feature of the mores of Italian scholars" [17. P. 9]. The possibility (or necessity ...) of reconciling science and art, theory and practice, teaching[law] and being a lawyer is an antidote to theoretical and conceptual isolation.

Carnelutti's remarks bring to mind those dazzling observations, made almost a hundred years ago, by the great German jurist Carl Mittermaier who, unlike Savigny, had shown in a positive light one of the enduring features of the "eclectic canon".

"Thus the law professors (in Italy) are also among the greatest lawyers; and this union of the ordinary business of living with science means that there is no need in Italy for the bitter

division between theoreticians and practictioners that prevails in Germany. There, the professors, being too removed from life, advance their theories to the detriment of the practitioner; the latter therefore heaps scorn upon the theoretician at every turn. The most distinguished law professors in Rome, Naples, Pisa and Bologna are at the same time distinguished lawyers. Even the taste that Italian people have for art and poetry, exercises a salutary influence on the scientific works of the scholars and the activitiesof statesmen (...) Those who relish public debate should attend the court sessions in Naples! What manly, dignified and lucid eloquence, consisting of more than merely empty phrases, may be heard in the discourses of many Neapolitan lawyers! It is a pleasure to follow the skilled orator who knows how to get to the very heart ofa question, and analytically disentangle every implication with admirable perspicacity. By way of confirmation of the practical approach and delicate touch of Italians, I would again cite the scientific conferences that were held in Pisa, Florence, Turin, Padua, Lucca and Milan"[55. P. 27-28]. The Italians were thus practical jurists, but "guidés par la science", as Mittermaier liked to put it.

As Carnelutti recalled,"thus it was that in Italy, as perhaps in very few other countries in the world, there were formed what could be described as the great "law clinicians". The fact that the most important of them, Vittorio Scajola, came to the art of law by way of Roman law is perhaps a sign that this integral vocation comes down to us by inheritance? The art of law is assuredly more a Roman thing than it is a science (…)"[17. P. 9]. Were these "clinicians" educated in a school? Indeed, they were not, since no such school existed. It was in fact the Italian temperament that led the best lawyers to become both scholars and artists in their practice of the law (39).

Carnelutti returned to this topic on several occasions, and for the last time in the early 1960s (40). In the course of refining his argument he bolstered his conceptualism (41) with a realistic view based on the recovery of natural law and the concept of legal experience. So, in his *Profileof Italian legal thought*–originally written to offer to American readers a taste of *Italian style*, he emphasized once again Italian *Beruf*in order to circumvent the dreaded gap between science and practice.Italian legal science continued to believe in the dogmatic but less and less in dogmatism, that is to say, in the mere self-sufficiency of concepts; more "realistic" than "positivist", with, once again, atemperament that was betwixt and between: "a special ability to balance between the two extremes, the abstract and the concrete, which would be, respectively, if I am not mistaken, the Germanic temperament or the Anglo-Saxon temperament. Latin temperament is a kind of bridge between these extremes" [18. P. 177]. As in 1935 Carnelutti once again pointed out the sense of balance of the *Italian style*: "it never separates, not even in the field of law, theory from practice, so that Italian professors of law, almost all of them, do in fact practice within the legal profession (and it would be better if, as in some American countries, there was also the possibility of being a professor and at the same time a judge): eminent figures consequently emerge, *law clinicians*, entirely analogous to medical clinicians, and they are the living expression of the realism of Italian legal science" [18. P. 177-178].

It is interesting to observe that while Italian legal science was focusing (during the first half of the twentieth century) on "system-building", searching for concepts and a higher order of abstraction, seeking to avoidany confusion between legal and social, economic and historical facts, emphasizing positive law regardless of justice and nonlegal criteria, jurists such as Alfredo Rocco and Francesco Carnelutti (among others) – often cited as "system-builders" by those subscribing to the Pandectist paradigms – were referring to an "Italian way" of being a jurist, which entailed combining eclectically science and art, theory and practice.

In the mid-1960s John Henry Merryman went on to describe the evolution of the *Italian style*. The Constitution of 1948 laid the foundations for viewing legal order and system-building in a different fashion. "Legal science" was for him a synonym for "*traditional, orthodox* doctrine (…) criticized by many thoughful jurists, and some of these criticisms will be described here, but the critics are the *avanguardia*, the voice (perhaps) of the future" (42). Merryman grasped the main lines along which Italian legal science had been transformed (43). Since then many things have changed, but it is not obvious to say what the*Italian style* is now. Anyhow, that's another story (44).

Notes

1. Merryman has told Pierre Legrand why and how he began studying Italian law. He spent the academic year 1963-64 at the Comparative Private Law Institute of the University of Rome "La Sapienza", associating with "two extraordinary Italian scholars", the comparativist Gino Gorla and the romanist Giuseppe Pugliese. See Legrand 1999:15 ff. In his *Note on the Italian style* (in Merryman,1999: 175), Merryman

observed that the three articles were written "in the company and with the enthusiastic encouragement and generous assistance of the late great Italian comparatist Gino Gorla and were revised in 1964-65 in response to suggestions by Mauro Cappelletti, who later became a colleague at Stanford and a major international figure in comparative law". Merryman's intellectual affinity with Mauro Cappelletti and Gino Gorla is underlined also by Amodio 2015: 213 ff.

2. "The Italian Style. Doctrine", 18, 1, 1965;"Law", 18, 2, 1966; "Interpretation", 18, 3, 1966.These articles were soon published in italian in *Rivista trimestrale di diritto e procedura civile*, "Lo stile italiano: la dottrina", with a note by Gino Gorla, 4, 1966;"Le font"' 3, 1967; "L'interpretazione", 2, 1968. These essays were published together, in modified form, in Cappelletti, Perillo, Merryman 1967. With these articles and other works on Latin-Americaas his starting point, J. H. Merryman published a broader and more general book on *The civil law tradition* 1969; translated in italian as *La tradizione di civil law* 1973, with a preface by G. Gorla who had reviewed the original version in *Rivista trimestrale di diritto e procedura civile* 1970: 1121-1124). The Italian style articles can now be read in Merryman 1999: 177-308.

3. "Indeed the Italian style is, in a sense, a paradigm of the civil law. Much of the legal tradition of the contemporary civil law world has its origin and its principal development in Italy" (Merryman, "The Italian Style: Doctrine", in Cappelletti, Perillo, Merryman, 1967: 165). See also Merryman 1969: 60.

4. This assumption has been contested by some scholarbut Merryman never changed his mind: Legrand 1999: 52.

5. See in particular Lanni, Sirena 2013; Bussani 2014; Pinelli 2015.

6. Merryman 1969:150. "The influence of the *Pandettistica* was particularly great in Italy. It affected Italian doctrine first, and through the doctrine it came to dominate the legal process, in legal education, the writings of judges, and the works of scholars" (Merryman, "The Italian Style: Doctrine", in Cappelletti, Perillo, Merryman 1967: 169-170). "I think you may have seen that I say somewhere that the Italians were more German than the Germans" (Legrand 1999: 17)

7. Alfredo Rocco (1875-1935), jurist and politician, was one of the leaders of the nationalist movement,he then joined Fascism and was Minister of Justice between 1925 and 1932.

8. Rocco (1911), 5. Likewise Biagio Brugi, again in 1911:2, evoked Savigny's paradigm (on which see below).

9. Rocco's narrative would be reiterated almost word for word by Ferrara 1954: 273 ff.

10. Rocco 1911:10. "Outside the Universities commenting upon the Code article by article began quickly to seem dull, pedestrian and inadequate" (Brugi 1911: 32).

11. Vittorio Scialoja (1856-1933) was the most influential Italian scholar in Roman law studies between the nineteenth and the first part of the twentieth century as well as a prominent politician.

12. Rocco 1911: 19. Scialoja, once again in 1911, underlined the fact that Italian legal doctrine had acquired a measure of originality: 1911a, 12.

13. Francesco Carnelutti (1879-1965) has been one of the most important scholars and a very famous lawyer. He dealt with many fields of law, starting with civil procedural law. Carnelutti 1935.

14. "It is summed upin the phrase legal science, which carries with it the assumption that the study of law is a science, in the same way that the study of other natural phenomena – say those of biology or physics – is a science. The work of the legal scholar is like the work of other scientists, not the search for scientific truth, for ultimates and fundamentals; not concerned so much with individual cases as with generic problems, the perfection of learning and understanding; not, in a word, with engineering but with pure science" (Merryman, "The Italian Style: Doctrine", in Cappelletti, Perillo, Merryman 1967: 170).

15. See Brugi 1911: 31-32, 144-145. Cf. on this point Marin 2002: 133 ff.

16. 1828: 201-228.For a broad reconstruction Moscati 2000.

17. Orlando (1860-1952) was the founder of the so called "Italian School of Public Law". He was a prominent jurist and an important politician (he was prime minister, as well as holding other cabinet posts at the beginning of twentieh century).

18. Orlando1889: 122. For further elements see Lacchè 1998.

19. On this theme see amplius Lacché2010: 153-228;Lacchè 2013: 317-361.

20. On this challenging idea see Banti, Ginsborg 2007: XXVIII ff.

21. "The deepest truth about secular canon-formation is that it is performed by neither critics nor academies, let alone politicians. Writers, artists, composers themselves determine canon, by bridging between strong precursors and strong successors" (Bloom1995: 487).

22. Rossi (1787-1848) was born in Italy in 1787 but lived subsequently in Geneva (1819-

1833) and in Paris (1833-1848). He was murdered in 1848 while he was in Rome heading the new Pope's government. An eclectic scholar, politician and diplomat, Rossi addressed many scientific matters,such as criminal law, economics, constitutional law. He was one of the most important European juristsof the first half of the nineteenth century.

23. See Ranieri1977: 1487-1504; Napoli1987; Beneduce 1994: 215 ff.; Alpa 2000: 126-149.

24. See Ungari 1967; Napoli 1987; Masciari 2006: 326 ff.

25. Quoted by Vallone 2005: 324-325.

26. On this point Ferrante 2015: 80-83.

27. Cogliolo1887: 88-89. Onthese reflexions see amplius Mecca 2013:184 ff.

28. Cfr. Grossi 1998: 33-68. On the 1880s and the Methodenstreit see Grossi 2000: 19 ff. Also Treggiari 1990: 119-138.

29. Gianturco1892. Cf. Alpa 2000: 178 ff.

30. On this aspect Orestano 1987: 31 ff;Mohnhaupt 1977: 277-296; Schröder 1979.

31. Savigny 1886: 10, quoted by Simoncelli 1899a: 46-47.

32. A similar vision in Gian Pietro Chironi in his inaugural lecture of 1885 Sociologia e diritto civile. Cf. Genta 2013: 307-308.

33. Scialoja 1881: 181-190. See on this aspect Cianferotti 1988: 339 ff.; Amarelli 1990: 59-69; Schiavone 1990: 283 ff.; Cianferotti 1991: 212 ff.; Cianferotti 2001:19 ff.; Nardozza 2007: 51 ff.; and above all Brutti 2013, Brutti 2014: 216 ff.

34. Scialoja 1914: 208."(…) In the universities we have always to remember that it is our task to prepare the mind of the student, and does not give him an "handbag" of practical notions, because he will procure them for itself, from time to time ... What the young man needs to know is how to find the solution of the issues; he must have the intellectual capacity to understand them and to solve them" (Scialoja 1913: 201).

35. Mario Ghiron took into account the reform proposals mooted by Zitelmann 1912: 289-324. Zitelmann proposed an alternance system between initial training, intermediate theoretical training, internshipsat a more advanced level, a further five semesters of theoretical preparation, and then professional training.

36. Ghiron 1913: 64. Scialoja criticized him in Scialoja 1914: 216-217. "(…) the theoretical education is the first preparation for practice" (p. 210).

37. Rocco 1911: 24. Rocco was speaking about the "new italian school of civil law… according to the orientation predicted by Gianturco, Chironi, Polacco".

38. The men, of course, are different; each has his own character, his qualities and his shortcomings; but it is certain that, for example, Chiovenda for procedural law, Alfredo Rocco for commercial law, De Ruggiero for civil law, Anzilotti for international law, Rocco Arturo for criminal law have, already in the field of purification and construction of concepts, a stature, that all the countries of the world, starting with Germany, might envy" (Carnelutti 1935: 7). "But while in Germany the dogmatic effort failed to reflect these divisions between major areas of legal order, it fell to Italy to carry it further and to elaborate a *real general theory of law*. There is a strong argument for speaking of an *integrated Italian theory of law*" (Carnelutti 1961: 324).

39. Carnelutti 1935: 9-10. On the methodology and the conceptual "fantasy" of Carnelutti see.Irti 2002a: 319-321; Irti 2002b: 323-338.

40. Carnelutti 1954. Carnelutti 1959, 255: "And if the mission of the jurist is to know the law, nor the exegesis nor dogmatic are enough to exhaust it. In simple words, it all comes down to the mutual implication of knowing and doing, which is beautifully expressed in the formula of Vico: *verum ipsum factum*. The gap between the theoretical dimension and the practical one can be a necessity; but a few times like this the word necessity expresses so exactly the idea of the deficiency to be".

41. See also Carnelutti 1960: 325, with some criticism of Kelsen and his reine Rechtslehre. Salvatore Pugliatti likewise called for a middle ground: Pugliatti 1950: 120.

42. Merryman 1967, "The Italian Style: Doctrine", in Cappelletti, Perillo, Merryman: 167; Merryman 1969: 156-157.

43. "On the whole the most incisive and perceptive criticism of the legal science comes from Italian scholars themselves, and since the fall of fascism a number of forces have been at work which indicate that Italian legal thought is taking new directions. To some contemporary Italian jurists the traditional doctrine represents the forces of reaction standing in the way of needed legal reforms. Other see itas a useful movement that has spent itself, and think that the time has come to move on to the next productive stage in the development of Italian legal sciences (…)" (Merryman 1967, "The Italian Style: Doctrine", in Cappelletti, Perillo, Merryman: 195).

44. See above, nt.6.

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ОБ ИТАЛЬЯНСКОМ СТИЛЕ: ЭКЛЕКТИЧЕСКИЙ КАНОН И СВЯЗЬ ТЕОРИИ С ПРАКТИКОЙ В ИТАЛЬЯНСКОЙ ПРАВОВОЙ КУЛЬТУРЕ В XIX И XX ВЕКАХ

В 1960-е годы великий компаративист Джон Генри Мерриман (1920-2015) написал три статьи, опубликованные в «Stanford Law Review» об «итальянском стиле», пытаясь выявить специфические особенности современной итальянской доктрины, толкования и права в рамках традиции гражданского права (§ 1). Мерриман считал итальянскую правовую систему «архетипом», более «типичным» в некоторых отношениях, чем французская и немецкая системы. Мерриман писал, что «Италия является, пожалуй, единственной из крупнейших стран гражданского права, которая получила и рационализировала два главных и абсолютно разных влияния на европейское право в XIX веке: французский стиль кодификации и немецкий стиль научности »(§ 2).

Моя работа, следуя некоторым предложениям Мерримана относительно концепции правовой традиции и сравнительной истории права, направлена на то, чтобы пролить новый свет на итальянскую правовую культуру в девятнадцатом и двадцатом веках В статье делается попытка определить, в частности, «антропологическо-культурное» измерение опыта итальянского юриста. Для этого я предлагаю новое интерпретативное понятие, а именно «эклектический канон» (§ 3). Он связан с общей категорией «эклектики», но это нечто иное и не такое. Это подход, который может помочь нам оценить сложность итальянской правовой культуры, превзойдя часто упоминаемый «рассказ» в двух главах (сначала влияние Франции (1800-1870 гг., затем влияние Германии 1870-

1920 гг.). Эта схема остается полезной, но это только часть истории, поэтому нам нужно включить ее в более сложный сюжет.

Эклектический канон имеет фундаментальное ядро, двух «отцов»-основателей. Я имею в виду Giambattista Vico (1668-1744) и Giandomenico Romagnosi (1761-1835), достойных и великолепных философов, юристов и историков. Нас интересует культурная основа, существовавшая до создания так называемых школ (экзегетика, историческая школа, философская или Benthamit школа ...). Эклектический канон - это не школа, а глубокий слой. Он не создает систему или правопорядок. В первую очередь речь идет о габитусе (мыслительно-социальной ипостаси) или о способах быть юристом. Прилагательное «эклектический» подчеркивает структуру канона, то есть цель примирить разные ориентации. Концепция страты напоминает исторический подход, широко используемый и развитый в антропологических и сравнительных исследованиях права. Ядром эклектического канона является «историко-философско-догматический» подход. Одной только истории, философии и догматики недостаточно для того, чтобы получить хорошее юридическое образование и хорошую практику в качестве юриста. Только сбалансированный комплекс может обеспечить правильное решение. Итальянский стиль влечет за собой объединение и кристаллизацию разных позиций. Фактически, еще одним следствием эклектического канона, постоянно отмечаемого большинством итальянских юристов, было бы сочетание теории и практики в реальном оформлении правовой культуры (§ 4).

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Ключевые слова:
Италия, итальянский стиль, Джон Генри Мерриман, правовая культура, правовая традиция, эклектика, эклектический канон, глубокая страта, девятнадцатый век, история права.

Keywords:
Italy, Italian style, John Henry Merryman, Legal culture, Legal Tradition, eclecticism, eclectic canon, deep stratum, nineteenth century, Legal History.

QUO VADIS PUBLIC LAW?

Alberto Febbrajo*

The article concentrates attention on the crisis of traditional theories of the state, probably never fully translated into reality, and on the emerging need of a new, more adequate constitutional semantics. After having considered, on the basis of a general system's theory approach , the legal system as the most abstract instrument that, thanks to adjustable borders, "constitutes" and "regulates" social games able to combine stabilisation, selection and variation of legal norms, the article draws critical attention to the borders of territory, sovereignty and people, traditionally considered as the main pillars of the state. Finally the article examines the present situation of the European Union, which offers a significant example of the difficulties met by nation states whenever they try to fulfil some of their traditional tasks within the framework of a supra-national entity.

1. Introductory remarks

The role of the state and of its constitution is generally under scrutiny in the present days. The problems are based not only on the crisis of traditional theories of the state, probably never fully translated into reality, but also on the emerging need of a new, more adequateconstitutionalsemantics. At the centre of this debate is the very ambiguous concept of "border". On the one side the traditional spatial borders of a modern state appear less and less controllable; on the other the internal structural borders between private and public law oreven the constitutional separation of powers into legislature, executive, and judiciary, appear more and more blurred under the pressure of transnational factors.

In the following pages I will try to point out some of these semantic changes. On the basis of a general system's theory approach (GST) I will tackle a still nation oriented concept of state in a pluralistic fashion. Thus I will consider the legal system as the most abstract instrument that, thanks to adjustable borders, "constitutes" and "regulates"in a modern society social games able to combine stabilisation, selection and variation (1)(par. 2). Starting from these presuppositions it is not surprising that the present crisis, having involved the traditional concept of state, produces diffuse uncertainty and still unclear attempts to envisage a higher level of equilibrium. I will thus draw attention to the borders of territory, sovereignty and people considered as the main pillars of the state. The present perception of each of these elements has contributedto eclipse the concept of state, still considered as the traditional point of reference of public law, and seems to require a new approach which has not yet found a clear outcome (par. 3). In the last section attention will be briefly oriented to the European Union, which offers a significant example of the difficulties met by nation states whenever they try to fulfil some of their traditional tasks within the framework of a supra-national entity (par. 4)

2. Towards a new concept of law and state

Classical sociology of law expressed criticisms against the formal borders of a state incapable of absorbing internal pluralism. Contemporary sociology of law, especially in its most important strand inspired by the general systems theory (GST), is developing a morearticulated and abstract idea of the state and its pluralistic borders (2). NiklasLuhmann, without any doubt the most articulate author to adopt this approach, devoted many of his wor-

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ks to an in-depth analysis of the legal system in a way which could be considered adequate to the complexity of the present situation (3).

According to this approach the concept of border is important for many reasons. The perspective of Luhmann, centered on the distinction between system and environment, has the possibility toshift toa more abstract level the analysis of the "crisis" of a state-centred model of law [10, Kjaer, Teubner & Febbrajo, 2011]. Using a systemic terminology,crises could be seenas the result of insufficient degree of complexity in the social system which produces circular, self-reinforcing interactions among subsystems, and underlines the problems of their reciprocal borders. The constitution is thus presented as a sort of "structural coupling" that is as an inter-systemic bridge that controls, at the most abstract level, the borders of the legal system and its relations with the political system [4, Febbrajo & Harste, 2013].

All in all Luhmann's systemic approach does have the merit of calling attention to an issue of increasing relevance in contemporary theory of state: the tension between the requirements of internal differentiation and of external unity towards the outside world. The borders of every social system are constantly under pressure because social rules, in certain circumstances, become so powerful as to impose strategies for balancing the increasing levels of complexity of the outside world.A legal system, in order to survive in a complex environment, has to combine such conflicting qualities as rigidity and adaptability, closure and opening, normativity and cognitivity, change and identity.

Analysing these paradoxical aspects from a systemic standpoint [3, pp. 1-10], Luhmann concentrates on three main questions: how can the legal system achieve unity and stability? How can law select external social stimuli to translate into the borders of law? How can law be cognitively open to continuous adjustments and changes, and be normatively coherent with itself?

In order to answer these questions, Luhmann reconstructs the fundamental features of legal orders as the social factors that enable internal stabilisation, selection and variation of the "irritations"coming from society through the language of the legal system.

In particular social systems have to be equipped:

1) with mechanisms of *stabilisation* so that its borders are able to balance operationally closed and cognitively open strategies;

2) with mechanisms of *selection* able to decide about the inclusion or exclusion of what is internal and what is external to the legal system;

3) with mechanisms of *variation*, able to reconsider the possibilities of decision previously chosen and adapt them to the new situations [7, Morin, 1977].

I will here shortly illustrate these three mechanisms.

1) Law is a system that is ready to become increasingly open, but has also to defend a certain level of closure and *stability*. Revealing in this point a partial proximity to Kelsen's vision, Luhmann depicts law as a "self-referential" social system capable of using legal decisions to produce other legal decisions. An essential indicator for monitoring the borders of the legal system is provided by the typical *binary code*: legal/illegal, lawful/unlawful. The claims of "purity" so vigorously upheld in his day by Kelsen, can thus be revived in a rather more sophisticated and sociologically grounded version.

The binary code can be used in particular to combine cognitive and normative expectations at different levels. It is possible to combine in this way moments of normativity or of coercive stiffening in reaction to disappointing deviant behaviours, moments of learning or of readiness to take deviance into account, so as to make corresponding modifications to the expectations that are disappointed.

In such a framework of relations with the outside world, the borders of the legal system are established by the system's internal legal culturenot only through a binary code capable of observing itselfin a "pluralistic" way, but also through the binary code of expectation/disappointment to which the recipients of legal norms entrust their individual decisions. The self-observation makes it possible to establish whether and to what extent certain social elements involve a system which has to be interpreted.

2) Learning from the outside world is therefore necessary for the legal system. But according to which kind of norms?Paradoxically enough a legal order has to regulate *normatively* its capacity for *learning* [9, Luhmann, 1982] Luhmann argues that a normative structure that selects what is relevant and what is not relevant, what is inside and what is outside the legal system, normally needs the support ofa specific instrumental system: legal *procedure* (4). Through legal procedures, social rules and legal cultures, social facts and their legally relevant reconstruction, are *selected* by the legal systeme specially if they belong to other systems. In other words, legal procedures can signifi-

cantly augment the law's capacity to evolve in advanced societies, defining how and through which channels normatively selected social elements can be learned.

What can be introduced into the procedure has to pass through suitable filters, so as to ascertain which kind of social elements can be relevant for the procedure, and may influence the legal decisions that constitute its final outcome. The selective entrance into the legal system of social factors filtered by procedures is important not only to procedural law and to trials, but also to every legally relevant sequence of acts to be concluded by uncertain legal decisions [8, Luhmann, 1983].

The selective inclusion of external elements into social systems is so important for Luhmann that he introducesseveral specific concepts, so as to designate different ways of mapping the borders of the legal system. By means of an "operational coupling", for instance, a system can constantly produce operations and connect them to another system's environment, even without moving outside its own field of relevance.The concept of "irritation" – used mostly in the sense of a negative stimulus – is employed to indicate all the external messages that break through the selective barriers erected by the system to defend its identity and trigger reactions of rejection, or at least of neutralisation, comparable to the ones produced by an immune system. Also the term "interpenetration" is used by Luhmannto describe the possibility that a given system's screen (in particular the legal system's) displays images coming from other systems. Instead of erasing the borders between different systems, interpenetration hints at a process that enables images arriving from other systems, to be captured by the receiving system (first selection), translated in ways that are compatible with the specifics of that system's operations (second selection) and with the structures that order the operations (third selection), on condition that they pass through the filters set on the system's learning capacity by its normative limits (4).

3) Luhmann's work shows that the relations between systems and their respective environments are not only based on stabilisation and selectivity but also on the *variation* of the legal system. The structures and the models elaborated by the rule of law are legitimated not so much because they are formally valid, just or effective, but because they correspond,through their continuous variations,to the system's functional requirements and to the prevailing techniques of argumentation. Law is, so to say, a complex game which knows different tables and a self-controlled level of risk because the additional table of the interpretation makes itpossible tochange previous legal decisions.

Increasingly important is in this context the logic of *communication*. The type of operations that use the imperceptible mutations produced by single acts to redraw the system's borders can be traced back to communicationsthat can be classified in terms not solely of the structure of the language or of the intentions of the communicator, but also of the interpretation and the forecast of their possible effects on social systems.

The language used to communicate external stimuli is recognised as legally relevant, if they may be translated into the language of the law. The structure of the language and the interpretations of the actors contribute to setting the parameters of a legal system that contains not only communications of direct relevance to the law, but also other communicative acts, until the process of reproducing communications by communication ultimately loses its reference to the law. When this happens, the communication has succeeded in establishing a connection between one system and another, possibly after having passed through an intermediate area of relevance. In a nutshell the GST takes credit for having suggested a series of conceptual connections relevant for a reconsideration of the concept of state:

Table 1. Functional and Structural Mechanisms of the State

Functional Mechanisms	*Structural Mechanisms*
Stabilisation	Binary Code
Selection	Procedure
Variation	Communication

This means, according to a GST approach,thatthe state and its legal system combine stabilisation, selection and variation through an internal "autopoietic" circuitcapable to combine internally specific instruments (5).

Fig. 1 Legal autopoietic circuit

Stabilisation provided by Dogmatics through a self-reflecting and self-referential *binary code*

Legal Systems assure possibilities of: ***Selection*** provided by Judges through *legal procedures*

Variation provided by Legislation through *inter-systemic communication*

The problem we have now to face is: how is possible to apply this conceptual reconstruction to the model of state which is emerging in a new transnational perspective?

3. The eclipse of the state

When we look at the state as it appears today we could easily observe that some of the elements ofLuhmann's reconstruction have to be reviewed. Actually all the state's essential pillars are loosing their traditional borders, and the claim of the "monopoly" of sovereignty on a given demos living in a defined territory appears no longer corresponding to reality.We can rather say that in a situation characterised by an extremely flexible concept of border,the *demos* is no longer a homogeneous entity, but rather a cluster of multilevel citizenships, the-*sovereignty* is strongly limited by powerful external factors and the *territory* offers as such a too restrictive setting to relevant legal relations [1, p. 82].

Under the pressure of external influences the concept of the state has therefore to be deeply reconsidered. The production of new norms without the umbrella of nation-states and their material constitutions is becoming a problem also for jurists, who can no longer find adequate solutions in traditional legal theories. They have in particular to admit that the *social* concept of *demos*, based on the peaceful relations among subjects, is fragmented and raises the question of how to solve possible conflicts in a multicultural reality. The *spatial* concept of *territory*, traditionally defined by clear-cut borders, is increasingly crossed by transnational interests in a larger horizon than that of the state, and the question raises of how to assure their control in this area. The *substantial* concept of *sovereignty*, traditionally considered in a monopolistic version, is depleted by the external criteria of heterarchical organisations incompatible with an effective legal regulation.

Table 2. Aspects of the State's Crisis

Pillars of the State	*Dimensions*	*Instruments*	*Emerging Forms of Pluralism*
Demos*	Social*	Coexistence*	Plural* citizenships
Territory	spatial	Control	Transnational associations
Sovereignty	substantial	Regulation	Heterarchical organisations

These complex connections point out some important side-effects. The emerging pluralistic approach might stimulate the expansion of material constitutions in a transnational perspective and consequently legal change is no longer a national problem (6) but is opening up in particular situations long phases of collective transition [5, Febbrajo & Sadurski, 2010]. Furthermore important constitutional bodies such as organised parties, which in the past took up the essential task to transform through democratic processes social norms into legal norms, are exposed to increasing competitions by trans-national movements with closer relations to new media and more flexible organisations.

The very concept of state, which by international law is still considered to be sufficiently homogeneous, appears profoundly articulated by new sources of stratification (7). At least four types of state define in a differentiated way their positions in the global arena. In addition to *traditional* states, we can register the presence of *imperialistic* states, which follow, with varying degrees of success, the strategies of older empires constantly oriented towards expanding their areas of cultural, economic and political influence (8); of *emerging* states, which try to compete with the former states, concentrating more on economic and cultural expansion (9), and of *spectator* states, which struggle for survival within the community of states in order to defend the level of autonomy proclaimed by their constitutions (10).

Despite the present fragmentation relevant convergences are arising. Jurists have reasonable grounds to believe that it is necessary for the legal order of the single state either to totally absorb the external pressures coming from a large variety of norms, more or less independent of the state, or to construct additional storeys for higher authorities. In other words, the present situation could be described either by larger horizontal connections with the functional requirements of a transnational society or by new forms of vertical institutionalisation and by structural hierarchies, higher than in the past.

4. The case of the EU

So far we have concentrated attention on the instruments of selection, stability and innovation that a GST approach is emphasising in a socio-legal interpretation of the role of the state and its legal order in a modern society. In this context, the largely studied experience of the EU is offering an interesting example. In general it is possible to say that the EU represents a casestudy where both, programmed and unplanned changes in the role of the state, are following highly differentiated paths and are still floating among various alternatives. The EU is an entity which could provoke positive or negative reactions because its legal, political, geographical borders are still to be defined and its final aims are not openly declared. The EU is in other word in a constant phase of transition and its identity is still in progress.

Firstly we have to underline that the cultural uncertainty and continuous flexibility of the extension of the EU affects, not only its self-regulation but also its possible external borders. Actually from a theoretical point of view these borders could include geographically, the most powerful among the neighbour countries (Russia), ideologically, the culturally closest among the distant nations (Israel) , strategically, the less remote among the culturally distant (Turkey) (11).

The uncertainty regarding spatial and cultural borders [2, pp. 91-114] has a strong impact on the definition of the legal borders of this meta-system and of its international role. It has the potential, on the one hand, to enhance a more relativistic perspective of European values in a globalised vision and, on the other, to justify a more radical defence of them as a reaction against the dangerous threats to which they seem to be exposed in this context. (12). This ambivalent attitude is capable of stimulating the expansion of material constitutions following different strategies: either through an emerging cosmopolitan vocation or through a reinforced sense of cultural identity. It is no surprise that in this context the Member Stateson the one side seem gradually opening to transnational trends and on the other seem to rediscover nationalistic and self-referential accents.

Following the same scheme applied for the analysis of the state we could recognise three main reasons of the present crisis of the EU. At the level of demoswe have to point out thedifficulty that even an important democratic institution as the European Parliamentis encountering in reflectingthe expectations diffused among the citizens of the single Member States. As a matter of fact the national political parties have rarely presentedduring the European electoral campaign, at least through their European organisations,clearand specific programmes or ideas with a view to mobilise consensus and assure a future *political stability*. This explains,not only the low level of turnout in the elections, but also why European policy makers are often prevented from being directly involved in the attempt to meet at least the most visible expectations of the voters. Furthermore,the lack of a lifeline between voters and their representatives explains also why,in view of assuring a high level of homogeneity in the interpretations of general provisions,the European legislation is often resorting to merely quantitative indicators. The consequentunusual rigidity produces stability at the cost of a restricted range of adjustment, with consequent disaffection and a deficit of *legitimacy* reinforced by the bureaucratic image of the EU machinery [6, pp.269-302].

A further reason of the present crisis , at the level of *territory*, is not only the politics regarding the problems connected with migration, surely a strong reason of disaffection towards the EU way to control the borders of the single state, but also the limited possibility to transfer resources from one state to anotheron the basis of a fundamental principle of solidarity. What is possible, and even natural, in federal states is explicitly excluded in the EU because of a diffused *negative selectivity* towards specific local problems. The single Member State is not only let alone even in front of particularly difficult economic situations, but in view of its economic recovery it has to select only strategies compatible with abstract economic standards. The concrete consequence is a reduced *autonomy* and a stronger territorial dis-unity in terms of economic indicators, a phenomenon particularly visible in the so called euro area.

The third reason of the present crisis , at the level of *sovereignty*, is the limited possibility of every Member State to effectively influence *innovative decisionsat* the EU level and to transform in this way a cluster of democracies into a real meta-democracy. The *accountability* of every single governments in their own country canbe hardly transferred to the central organs of the EU. Every democratic government has to communicate to its voters that it was able to achieve what requested having persuaded the representatives of the other Member States. This demands,as in any group,a generally accepted style of communication. In order to avoid isolation this also encourage the adoption, by the representative of the single Member State, of a'role taking process'within the organs of the EU. The almost inevitable outcomeis amore or less structured oligarchy based on the relatively clear distinction between leaders and gregarious.

These multilevel connections which nowadays characterise the transnational pluralism in the European Union could be summarised in the following conceptual scheme:

Table 3. Three Roots of the EU Crisis

Pillars of the State	*Dimensions*	*Functional Mechanisms*	*Deficit of*
Demos	Social	Stabilisation*	Legitimacy*
Territory	Spatial	Selection	Autonomy
Sovereignty	Substantial	Variation	Accountability

In order to reduce the negative impact of the present confused scenario,it would be ne-

cessary to reach, according to the systemic terminology, a more complex level of *reflexivity*. The constitution of the EU needs, not only to be more open to different variables,but also to recover different elements rooted in the tradition of its Member States. This cannot depend on single decisions, but also requires a slow autopoietic process of critical self-reflexivity which could leave only in the long term visible effects.

In this context a first strategy could be suggested by a *reflexive legitimacy*. This strategy, applied to a too rigid circulation of norms, could expand the use of more articulated rules equipped with a wider range of possible interpretations. The consequent exceeding number of possibilities of decisions ("redundancies"), might broaden the possibility of future solutions perceived as more adequate in different situations. In this way it could be possible to combine a more sustainable combination of flexibility with an acceptable level of stability.

A second strategy is offered by a *reflexive autonomy*. This could allow the selection of more articulated instruments for supporting in the name of common goods economically weaker states and enlarging the possibility to meet specific interests of single Member States. A more extensive use of this reflexive mechanism is especially requested in situations of transnational financial crises, produced by self-reinforcing instabilities and overlapping inter-systemic borders [10, Kjaer, G.Teubner, A. Febbrajo , 2011].

The third strategy is suggested by a *reflexive accountability*. This could allow a step back which recognises to the single states, independently from theirspecific weight within the EU, a larger,even if not unlimited,sovereignty. Nevertheless this strategy does not mean that it would be possible to reinstate former ideological models.

We have to underline here that the process of re-nationalisation registered in many countries as a reaction against a never totally accepted reduction of their own autonomy, is de facto representing a profound change in the theoretical premises of public law. These fluctuations cannot be interpreted as a zero sum process, as a simple alternation of steps in opposite direction which could restore the previous phase because they are only apparently reproducing previous theoretical models. Every attempt to return to the past requires, on the contrary, deep adjustments and renovations since it seems impossible to purely and simply reproduce in concrete cases the level of nationalisation of the single states before theiraccession.

In this context sociology of law, following the new structural and financial settlements of state and public law, has just to continue its lifelong fight against the model of a state-centred society, (13) only adapting the anti-hierarchical awareness of its past to a new kind of pluralism.In general, we have to admit that in the present situation the reduced relevance of a functionalism of differentiation, which considers separately the different sectors of society,forces us to recognise the increasing relevanceof a functionalism of links, which analyses several inter-systemic bridges based on mutually reflexive legal cultures, and is more capable to connect, at various levels, the legal system with its transnational environment.

Notes.

1. For the distinction, important for public law, between regulative and constitutive rules cf. J. Rawls, Two Concepts of Rules, The Philosophical Review LXIV (1955):3-12.

2. See A. Febbrajo, Constitutionalism and Legal Pluralism, in Febbrajo and Corsi (eds), *Sociology of Constitutions. A Paradoxical Perspective*, Routledge, New York, 2016, pp. 68-98; see also in the same volume from a historical and socio-legal point of view C. Thornhill, The Sociological Origins of Global Constitutional Law, cit., p. 68-96.

3. It should be noted here that Luhmann's sociology of law did not maintain a unique conceptual and theoretical framework, but gradually enriched its contents by importing from a variety of fields, such as cybernetics, biology and cognitive and communicative sciences.

4. N. Luhmann, *Law as a Social System*, .

5. Luhmann, *Law as a Social System*, cit., p. 25. In this and other cases, for Luhmann "the conditions for evolution" themselves produce further social evolution, because every change of social structures creates the conditions for new legal and social change (ivi, p. 243). On the concept of autopoiesis see also G. Teubner, Law as an Autopoietic System, Blackwell Publishers, Oxford-Cambridge, 1993. The scheme here suggested is an attempt to combine the perspectives of both authors.

6. Cf. Watson A. (1993), *Legal transplants: An approach to comparative law*, 2nd edition, University of Georgia Press.; M. Rosenfeld, *Modern constitutionalism as interplay between Identity and diversity* in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives,* Durham: Duke University Press, 1994, 35). These differentworks are clearly grounded on different aspects of the constitution, the first on the formal, the second on the material constitution.

7. On these issues cfr.A.Febbrajo, Constitutionalism and Legal Pluralism, cit. p. 83.

8. Russia can easily be identified with this type of state, being more aware than other comparable states not only of its global role, but also of its past at the head of an empire. The limits of historical experience apparently affect the parallel role of the USA.

9. With the exception of Russia, this seems to be the case of the countries normally identified as the BRICS, which are still trying to develop their global role. The nuclear weapons divide is obviously relevant in this context.

10. The limited size of some states or their institutionalised territorial divisions could be a precondition for playing this role, with at least one significant exception: the Vatican City, which in some circumstances exercises a much stronger cultural influence than that of a normal spectator.

11. Paradoxically enough the oldest embodiment of the paradigm of European integration (Switzerland) has remained, precisely for this reason, outside the EU.

12. For this second possibility cf. J. Weiler J, *The Constitution of Europe - do the New Clothes have an Emperor?* Cambridge University Press. 1998.

13. It seems still possible to overcome law's apparent disorder abandoning the fetishism of legislation and using the flexible and adaptive tools of jurisprudence . For a comparison of the present situation with that of theRoman empire cfr. R. Bragu*e, Europe, la voie romaine.* Paris: Criterion, 1992; M. T. Fögen, *Römische Rechtsgeschichten. Über Ursprung und Evolution eines sozialen Systems.* [Legal history in Roman Empire. The origins and evolution of the social system] Göttingen, Vandenhoeck&Ruprecht 2002 (here the judge is explicitly represented as the "thermostat of law").

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КАМО ГРЯДЕШИ, ПУБЛИЧНОЕ ПРАВО?

В статье концентрируется внимание на кризисе традиционных теорий государства, вероятно, никогда полностью не воплощенных в жизнь, и на возникающей потребности в новой, более адекватной конституционной семантике. Рассмотрев на основе теории общих систем правовую систему как наиболее абстрактный инструмент, который, благодаря способности к изменяемости, «составляет» и «регулирует» социальные игры, способные объединять стабилизацию, селекцию и изменение правовых норм, статья обращает внимание на границы территории, суверенитета и народа, которые традиционно рассматриваются в качестве основных опор государства. Наконец, статья анализирует нынешнее положение Европейского Союза, который представляет собой яркий пример трудностей, с которыми сталкиваются национальные государства, когда они пытаются решить некото-

рые из своих традиционных задач в рамках наднационального субъекта.

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COMPARATIVE CONSTITUTIONAL LAW: A CONTINUATION OF LAW BY OTHER MEANS (A FEW INCIPIENT THOUGHTS)

Benedetta Barbisan*

Comparatists are evidently in no position to see and investigate always the entire picture: even though one of the founders of comparative law stated that the student of problems of law must encompass the law of the whole world, past and present, and everything that affects the law, from geography, climate and race to developments and events shaping the course of a country's history passing through religion and ethics, the ambition and creativity of individuals, the interests of groups, parties and classes, we cannot actually expect that she can master such an overwhelming mass of information.

Comparatists, though, should be trained with the aim of observing legal documents, i.e. constitutions, through a syncretic intellectual equipment – law is the destination but, to get there, more than law is required. Then, CCL should still be included in the family of legal scholarships, but comparatists could not restrain themselves to learn law only. This assumption implies that comparatists should be trained to develop, nurture, and enhance this broader latitude of analysis and the necessary range of cultural sensitivities: to understand constitutions as culture, law may be not sufficient and many times we already know it is not. Paraphrasing von Clausewitz's well known aphorism, CCL is a continuation of law by (also) other means.

1. A few months ago, I submitted to an international journal an article about how the foundational canon of Comparative Constitutional Law (CCL) should be substantially thought over and changed when it is taught in English as a medium of instruction (EMI) [1]. My main argument was basically that CCL is still too focussed on the models and settings of the Western world to the detriment of other current constitutional experiences around the globe as meaningful and relevant as those which originated and developed constitutionalism since the end of the Eighteenth century. My idea was that CCL should abandon any presumption of constitutional birthright and open up its boundaries to include constitutional patterns that do not belong to the small club of Western countries whose constitutionalism has consolidated throughout the centuries, and consider them not as a belated replica of the original constitutional achievements, but dignify them for the unique efforts and hopes that each of them represents.

One of the reviews I received back from the editors in chief remarked that, to prove how CCL could enlarge its scope and latitude of investigation, I had selected some constitutional experiences, such as Colombia, India, and Estonia, that actually could not be considered properly outside the Western world: in fact, the Colombian Constitutional Court – whose case law I had illustrated with special reference to its decisions on economic and social rights – owes too much to the value-driven Spanish and Portuguese Constitutions to be alien from the Western influence; similarly, India is a com-

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mon-law country like so many others, and its Constitution is largely indebted with the legal influence of the British colonization; finally, Estonia would find very offensive to be excluded from the Western world or the Global North, being on the contrary unreservedly embedded in European history and tradition.

This comment gave me a great deal to think of, far beyond what was necessary for my reply to the unknown, insightful reviewer for whom my gratitude was deep and sincere: in fact, if Colombia, India, and Estonia for various reasons cannot be considered entirely different from the number of constitutional settings that, along the two coasts of the Atlantic, gave birth to constitutionalism in modern times, what is the ultimate space of action of CCL? In other words, if any constitutional model in the world to some extent recalls or echoes the constitutional examples from Europe and North America, what will prevent us from taking them merely as derivates from the originals? And, if this is the case, how comparative can CCL be, if inevitably all the constitutional settings in the world can be traced back to those paradigms that, directly or indirectly, inspired them? After all, even the Chinese Constitutions adopted in 1958, 1975, 1978, and 1982 have been drafted by jurists rather familiar with Western constitutional models: can we say, even in this instance, that the Chinese Constitutions are not entirely foreign to Western constitutionalism, and what implications on CCL has saying this?

I think that a few questions may be drawn from this set of perplexities: is CCL affected by a constitutional birthright prejudice? And, consequently, how truly comparative is CCL – i.e. how broad is its range of vision? Is its methodology well-equipped to contemplate a wide span of constitutional settings? Are comparatists themselves well-equipped in their knowledge to keep up with such task?

A host of questions is nearly all I have to offer in this Article; only here and there I will tentatively shed light on some motions that I feel necessary, if not urgent, at least to take into consideration to shake the most conventional, even occasionally conformist, premises of our scholarship.

2. One of the most puzzling (and also overlooked) issues when comparing different constitutional settings is how to make the selection of models to compare. For instance, recently I attended the presentation of a five-year long research, *Measuring Constitutional Reasoning with Numbers,* supported by the Volkswagen Stiftung and coordinated by András Jakab: the legal orders included in the survey were mainly European and North American, with the exception of Brazil, Taiwan, Australia, and South Africa. I asked the principal investigator whether there were a structural, organic reason why the bundle of constitutional models was put together in this way. In fact, if the research focus was on Europe and North America – say the most traditional and century-long constitutional experiences –, given the clear inclination of the study to dwell on those constitutional realities, I was confused by the insertion of constitutional systems from other continents which are not particularly meaningful or representative either of the variety of constitutional inspirations or of the geopolitical area to which they belong. And, since the study was specifically on measuring through quantitative methods constitutional courts decisions and arguments, I was dubious that the Supreme Federal Court of Brazil could be considered particularly descriptive of the Latin American context. Or, by the same token, that the Constitutional Court of Taiwan could raise as an especially representative model of Asian constitutionalism. Maybe they were relevant for themselves, no matter of their geographical position. In any event, in conducting the research this profile had been admittedly disregarded. I had good reason for asking the question: in fact, if they are not especially remarkable or noteworthy, their incorporation in the study seems merely to pay lip service to a certain polical correctness in the attempt of mitigating the Euro-North American constitutional privilege of the study. As a consequence, in this kind of comparative research, the methods applied neglect entirely the question of how and why choosing the terms of the comparison. I am convinced, on the contrary, that the selection of constitutional orders among which the comparison needs to be drawn must be part of the research; otherwise, CCL may ominously ends to resemble a tourist guide whose grip is proportional to the hint of exotic it displays. My assumption, then, is that the selection of what to compare should be part of CCL methodology. Paraphrasing the late Justice Scalia's notation, the selection of cases to compare should not be unprincipled or opportunistic [2].

But, arguing so, some problems come easily to mind: to begin with, comparatists are evidently in no position to see and investigate always the entire picture: even though one of the founders of comparative law stated that the student of problems of law must encompass the law of the whole world, past and present, and everything that affects the law, such as ge-

ography, climate and race, developments and events shaping the course of a country's history – war, revolution, colonization, subjugation – religion and ethics, the ambition and creativity of individuals, the needs of production and consumption, the interests of groups, parties and classes" [3], it is an unattainable goal and a very scarcely credible presumption to assume that every CCL study should be grounded in an overall knowledge of what is constitutionally relevant or important in that specific regard in the entire world or, also, of what is substantial in that particular national context. Moreover, there are practical obstacles on the pathway of getting more acquainted with particular constitutional settings: the language in which both legal documents and the CCL scholarship are presented, especially in case of national realities characterised by a narrow-spoken idiom; the difficulty of providing documents (e.g. lack of access to official data sources); the unfamiliarity with less frequently studied constitutional systems and contexts.

Nonetheless, once we have recognised the importance of selecting the constitutional settings to be compared with some structural, reasoned method, another reflection presents itself, that is the need to abandon the reductive idea that constitutions correspond essentially to their formal manifestation.

In a very enlightening article, Günther Frankenberg has argued that, in order to be rescued from the marginalised role in the curriculum of legal education it is seemingly doomed to assume, CCL needs to adopt a *layered narrative*, according to which comparatists should point at different, notably nonlegal concepts of 'constitution' and to indicate different theoretical perspectives.

Being a comparatist is far from being an easy job:

(d)oing comparative law is demanding and difficult textual work, which can be or at least should be exciting. The comparatist appears an 'intellectual nomad,' bereft of a genuine field of law that could measure up when compared with contracts or criminal law. She is left with nothing but a questionable and, in the recent past, challenged method with which to handle the 'explosion of fact' as it creates great piles of information. Wherever she may migrate and however much she may compare, at the end of the day she still has to settle with incomplete knowledge and less than total 'cognitive control.' [4].

For this reason, he proposes to abandon the meagre idea that constitutions are simply and straight forwardly higher law and, instead, to open up to a variety of meanings, going from the constitution as higher law to its related prescriptive aspects as an instrument of governance and government to its ground rules for social confict. "From this triad – higher law, governmental organization, and ground rules – the reader of constitutions may learn a lot about the visions of order imposed by elites or desired and shared by the constitutions' addressees" [4. P. 449].

Accordingly, constitutions should be envisioned not only as legal artifacts, but as *culture*, embracing their symbolic dimension: in this way, the comparatist should be forced to leave the safe heaven of legal norms, of rules and principles, of cases and legal methods – in short, the world of justice – and to enter a terrain […] [in which] it is crucial to view constitutions as not passively sitting 'at the receiving end,' operating as mere receptacles or reflectors of culture, but to consider that they actively intervene and, under certain circumstances, shape or transform culture [4. P. 449-450].

In this scenario, constitutions may be classified in four models or archetypes: constitution as *contract* (including social contract), *manifesto, program*, and *law*. The constitutional contract dates back to the Magna Carta, one of the foundational documents of the modern constitutional era. The constitution as a political manifesto is epitomized by the French *Déclaration* of 1789. 'Real-existing socialism' *(real-existierender Sozialismus*) introduced the third archetype of the constitution as program and, finally, the constitution as law, i.e. as the product of a legislative process, is tightly related to the worldwide proliferation of legislated constitutions during the Nineteenth and Twentieth century.

Frankenberg suggests, then, a method that, at one time, is deconstructive and structural – intending to unsettle an overly formalistic analysis and to prevent the reification of constitutional structures, types, or models as transnational and ahistorical givens. Therefore, the focus on odd details and loose ends, one might say, is not – or not only – meant to celebrate the narcissism of the small difference but to help contextualize constitution making and to capture the local, elitist, or popular fantasies, conflicts, and problems, as well as to bar the comparatist's way to all-too-easy classifications and typifications. This focus functions as methodological guerrilla warfare against grand narratives – the *grand récits* – in comparative constitutional law [4. P. 458].

Two considerations come to me as a corollary of the analysis and suggestions advanced by Frankenberg: firstly, that CCL cannot rely

only and exclusively on law as fact-finding and analytical instrument, since a broader periscope is in order to grasp the multilayered mechanics, ideas, and functions beneath a given constitution. All this considered, a comparatist should rely on her legal background as much as on her political science and history knowledge. Comparatists, then, should be trained with the aim of observing legal documents, i.e. constitutions, but through a syncretic intellectual equipment – law is the destination but, to get there, more than law is required. According to Frankenberg's point of view, then, CCL would still be included in the family of legal scholarships, but comparatists could not restrain themselves to learn law only. This assumption implies that comparatists should be trained to develop, nurture, and enhance this broader latitude of analysis and the necessary range of cultural sensitivities: to understand constitutions as culture, law may be not sufficient and many times we already know it is not. Paraphrasing von Clausewitz's well known aphorism, CCL is a continuation of law by (also) other means.

The second reflection I am led to formulate is that CCL must abandon any constitutional birthright prejudice, exclusive preeminence or cultural parochialism, and commit itself to exploring contexts in which constitutionalism may imply critical issues and questions not necessarily included in the traditional constitutional history. In his introduction to the book he edited, Daniel Bonilla Maldonado resentfully noted that the jurisprudence of the courts belonging to the global South is seldom known or relied on by constitutional scholars or judges in the Western world, to the point that their legal products have a very scarce dissemination in our branch of study. "It is very rare, – he adds – to see a course on comparative constitutional law in a North American or Western European university that includes a section about the constitutional law of a country in the Global South" [5].

The recurrence to a concept like the *global South*, excluded from the number of institutions and legal scholarships enforcing the basic rules and principles of modern constitutionalism, points to the *conceit* and *narrow-mindedness* of CCL as it is conceived and circulated essentially by the European and North American constitutional scholars, who conventionally open up the spectrum of their observation to the usual circle of constitutional models in the rather dull, drowsy conviction that the crib where constitutionalism was born still offers a sufficiently comprehensive variety of patterns and prototypes to decode the complexities of all modern constitutions – by now, a far more widespread and diversified genre than the novel itself. It is possible, then, to discuss the issue of secession in a distinguished CCL panel in front of an international audience making reference to meaningful attempts of secession in Quebec, Scotland or Catalonia, but totally overlooking the cases of Eritrea (seceded from Ethiopia in 1993), Montenegro (from Serbia in 2006), Kossovo (again from Serbia in 2008), South Sudan (from Sudan in 2011), all unsurprisingly sharing their belonging to the global South's conceptual family.

I am convinced that the content of Bonilla Maldonado's allegation is not meant to deemphasize or degrade the North American and European constitutional traditions, but only to defend the idea that modern constitutionalism includes a plentiful range of experiences, difficulties, achievements, instruments, solutions, and that pretending that the reliance on a fistful of models – all sited along the two coasts of the North Atlantic – is a conceited and narrow-minded cultural indolence. The thing is that constitutionalism as a collection of experiments, failures, and successes is a phenomenon occurring in almost every country in the world – with considerable exceptions just because they are very few – and we cannot keep ignoring the fact that the efforts, skills, and minds deployed at building a national constitutional heritage somewhere in the planet represent for CCL a historical event as crucial and special as ours. We cannot believe in good faith that the undoubted richness of our constitutional past and present can explain and solve every new manifestation of constitutionalism in the world. As Ran Hirschl brilliantly spurred to do, we should get rid of the "World Series syndrome," the pretense that insights based on the constitutional experience of a small set of 'usual suspect' settings – all prosperous, stable constitutional democracies of the 'global north' – are truly representative of the wide variety of constitutional experiences worldwide, and constitute a 'gold standard' for understanding and assessing it. The question here is this: how truly 'comparative' or generalizable is a body of knowledge that seldom draws on or refers to the constitutional experience, law, and institutions of the global south? [6].

These two considerations lead me to argue that only through this transformation of our scholarship comparatists will be able to tackle issues that, rather startlingly, are set aside the boundaries of CCL or even ignored. For example, there are special sets of problems that are normally treated by development economists,

global justice philosophers or political scientists, but much less frequently – and certainly not sistematically – by CCL scholars: I am particularly thinking of the pair constitutionalism/impoverishment, for instance, which refers to the problems specifically attached to those constitutional settings afflicted by poverty, spread illiteracy, economic underdevelopment, unequal distribution of resources, minimal political pluralism, a tendency to adopt authoritarian solutions of government.

But we might take also the case of corruption and how its evil consequences reverberate in the protection especially of ESCR, but not exclusively. My Latin American students, for instance, generally claim to be familiar with paying bribes. This system traces back to the centralised power established by the viceroys of the colonial era through buying the loyalty of local interest groups and then strenghtened along the line of *caudillos*, dictators and elected presidents always personalising power. Despite Brazil's constitution, enacted in 1988, conferred independence on the judiciary, only lately the tolerance for corruption has significantly decreased among the population and the officials in charge of fighting against it. Also some of my Asian students personally experienced the burden of a deeply corrupted system. And obviously it is not only a matter of perception: rampant corruption across Southeast Asia threatens even to derail plans for greater economic integration, according to the latest Transparency International's report [7].

Some of them may have in mind the Singaporean or the South Korean examples, two of the most innovative countries in the world, where standards of living are very high, rankings in education and quality of healthcare excellent and the ease of doing business at its best. These two virtuous realities stand as noticeable countertrends amongst extensive corruption and political recklessness in the region. Generalization about Asia hardly grasps the core of a continent whose size and cultural plurality produce "no quintessential values that apply to this immensely large and heterogeneous population, none that separate them out as a group from the rest of the world" [8]. However, generalization about Asian values is meaningful when Asia is compared to the West: indeed, the process of democratization began there only after a sustained economic growth, as specific of the East Asian Model – the building of a constitutional state was often undertaken rather instrumentally as an inevitable part of modernization, when the opening to foreign investments and international trade required political change. Do democracies preferably thrive after economic development? Does democracy need to be sacrificed in order to achieve development? Does democracy hamper economic growth? Is this the lesson to draw from the East Asian constitutional examples?

Perhaps it has come already to surface that, as a matter of fact, when dealing with these topics I am still and again calling for the implications of my two considerations: to be open to the many fascinating and troubling issues in the wide spectrum of constitutional experiences around the globe, comparatists need to go beyond law but, to feel necessary going beyond law, they have to be sensitive towards all those constitutional settings that do not belong to the historical crib of constitutionalism. In other words, if there are issues to be attended to by CCL that are eminently treated by non-legal scholarships, comparatists need to display a syncretic intellectual equipment and to emancipate from any birthright complex or prejudice.

If we go back to the objection moved by my anonymous reviewer with which I started this Article, presuming that Colombia, India, and Estonia are very much related to some traditional European constitutional models implies that they have not exactly much of their own – and, if they have something, it does not necessarily interest CCL. But this view resents disquietingly of a formalistic approach to constitutions, turning again to what Frankenberg was confronting in his contribution: when constitutions are *cultures*, they cannot be the exact replica of anything, despite the possible technical expertise or formal influence they received from the older constitutional experiences.

We cannot pretend that CCL gets to know everything constitutionally related under the sun and that the comparison is always impeccable and complete. Nonetheless, asking what we should learn from CCL contributes to orient its investigation. In this regard, comparatists should devote their attention to develop a methodology according to which the cases to be compared are selected complying with sensible standards of judgment and judiciously. The selection of comparative terms is part of the study and not an irrelevant, fortuitous detail. In the end, the question that needs to be put has to do with the purposes served by CCL – in other terms, the CCL's epistemology.

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СРАВНИТЕЛЬНОЕ КОНСТИТУЦИОННОЕ ПРАВО: ПРОДОЛЖЕНИЕ ПРАВА ДРУГИМИ СРЕДСТВАМИ (НЕСКОЛЬКО ЗАРОЖДАЮЩИХСЯ МЫСЛЕЙ)

Компаративисты, очевидно, не в состоянии всегда увидеть и исследовать всю картину. Хотя один из основателей сравнительного правоведения заявил, что студент, изучающий проблемы права, должен охватить право всего мира, в прошлом и настоящем, и все, что влияет на право, от географии, климата и хода развития до событий, формирующих ход истории страны, проходящих через религию и этику, амбиции и творчество отдельных лиц, интересы групп, партий и классов, мы но не всегда можем ожидать, что он сможет освоить такой огромный массив информации.

Компаративисты, тем не менее, должны учиться внимательному изучению правовых документов, т.е. конституций, используя синкретический интеллектуальный метод. Право – это конечная цель, но, чтобы попасть туда, требуется больше, чем только право. Сравнительное конституционное право должно быть включено в систему стипендий для изучения права, но компаративисты не могут ограничивать себя изучением только права. Это допущение подразумевает, что компаративистов необходимо обучать умению глубоко анализировать более широкий круг материалов и умению чувствовать особенности культур: чтобы воспринять конституцию как культуру; знания права может быть недостаточно, и мы уже много раз убеждались в этом. Перефразируя хорошо известный афоризм фон Клаузевица, сравнительное конституционное право является продолжением права (также) другими средствами.

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и международному праву, Гейдельберг.

Ключевые слова:
методология сравнительного конституционного права, инаковость в сравнительном конституционном праве, конституции как культуры.

Keywords:
Comparative constitutional law methodology, otherness in comparative constitutional law, constitutions as cultures.

THE LEGAL SYSTEM AND THE AUTONOMY OF THE LAW: A PERSPECTIVE FROM LEGAL HISTORY

Massimo Meccarelli*

If we consider the role the case law has played in recent years, we, as jurists of the "continent", are impressed by the prominence it has assumed in the production of law (1). This new case law, in fact, seems to operate in a context different to the conventional judge / statute law relationship observed in the so-called civil law legal system (2). This novel framework merits exploration and investigation.

Here, the autonomy of law emerges as a significant theoretical issue to be considered and understood against the background of historical experience. Using the lemma "autonomy of the law", I want to examine the scope of legal production, in which the rules are the result of self-organization practices or of institutional dynamics (for example those connected with the Judiciary), without the involvement or mobilisation of political power.

It seems to me that the law currently shows unprecedented trends towards autonomy within the legal system. I refer in particular to case law produced by the Constitutional Courts or by the Courts with respect to the application of international treaties (or maybe more in general by international Institutions with judicial and / or interpretation functions) (3).

None of these jurisdictional Institutions has the power to govern the entire process of improvement of the living law; each one, however, has a fundamental and specific task in that process of legal production.

In the national legal space the Constitutional Court, exercising the constitutional law review (4), has a merely functional link with the Judiciary; there is no hierarchical relationship between them. Nevertheless, by improving its own case law, the Constitutional Court has promoted the inclusion of the relationship between ordinary case law and constitutional case law within the processes of legal production. At supranational level, the European Court of Justice and the European Court of Human Rights operate with a similar mechanism (5).

Very schematically, the essential features of this novel scenario are as follows: case law arises from a field of open relations between the sources of law (between statutory law and principles as well as between principles and principles (from the constitutional, from the European or from the international legal system)); the development of this relationship is in fact determined by principles that need a jurisdictional improvement to express their exact value; the jurisdictions responsible for this task do not interact on the basis of a hierarchical principle but in accordance with a principle of recognition of competence; developments in case law are always the result of a problem of substantive justice; they stem from a search for the concrete legal dimension corresponding to a principle established by Constitution or Treaty.

These interactions – which form a space of autonomy of the law – assign a *nomopoietic value* to this kind of case law. In addition, a novel feature becomes evident: this case law attributes *degrees of freedom* to the law rather than stabilizing the law; the judicial Institutions I refer to

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(including the Supreme Courts) in fact induce, within the legal system, a development of case law, whose dynamic they control neither directly nor hierarchically. They introduce inputs intended to provide horizons of possibilities for case law, *rather than to apply constraints.*

As a matter of fact the present scenario exhibits some unusual traits. How can we understand this phenomenon? What does this imply for legal science? A perspective from legal history can give us some useful keys to comprehension. The following pages shall attempt to do this.

1. Features of the case law of the Supreme Courts in the 19th and 20th Century

Let us compare this framework with the one that has characterized the period between the Nineteenth and mid-Twentieth centuries. This was the golden era of statutory law in continental Europe, but close analysis shows that this period was also marked by a dialectic between case law and statutory law, between jurist, judge and legislator [11, Anonymous, 2011]. How can we explain – in this framework dominated by the principle of legality and the format of the Code – this recovery of a role for case law and jurisprudence?

It was necessary to resolve the issue of the sustainability of legal systems based on statutory law, which quickly showed that it cannot operate properly without solid case law and jurisprudence. This recovery of case law and jurisprudence has not emerged as contradictory to the regimes of the legality principle; on the contrary it was a factor *determining* the regimes of legality. And that rests on the fact that this case law, albeit creative, did not develop in a space of autonomy of the law.

Let me explain this statement. First of all we have to consider that the highest judicial level was the main channel for the emergence of the centrality of case law in the Nineteenth century. Note also the reconfigurations undergone by the supreme jurisdictions in different States of continental Europe.

I have studied three examples in particular: France, where the *Cour de Cassation* was established; unified Germany where, with the *Reichsgericht*, a Supreme Court as a third level of jurisdiction (the Revision) was instituted; and unified Italy, where a complex system of five regional Supreme Courts was developed as an hybridization of the french model of *cassation*.

These Supreme Courts [5, Meccarelli, 2005], although with different features and functions, stand out for their capacity to produce guidelines for the underlying case law. But we must note that this "*reference case law*" was developed in relation to the needs of *statutory law enforcement*. In France the problem was to renew over time the significance of the Civil Code by way of case law, without negating the fundamental ideological choices of the legislator. In the German case the issue was to harmonize the diverse regional legal systems through case law (*Rechtsharmonisierung durch Rechtssprechung*), to promote a unified national law (almost a parallel task to the construction, by the Pandektistik, of the system of dogmas, as a basis for the codification of private law).

In the third case, Italy, the question was to tackle the inherent inadequacy of the Civil Code, introduced prematurely after the Unification [12, pp.9-28], into a territory characterized by regional diversity. The very particular hybridization of the *cassation*, together with the pluralism of the Supreme Courts, made it possible to implement a dialectical relationship between code and case law (tasking the judicial situation with the weighting of statutory law, and enabling a hermeneutical improvement of codified law). This dialectic, however, worked in support of that codified law, saving it from the risk of more impactful erosion by the case law.

These supreme Courts were designed to produce case law behind the screen of the primacy of statutory law and in relation to it. In fact, in each of the three systems analyzed, case law was determined on the assumption of separation (though differently conceived) [5, pp.127-188] between *quaestio facti* and *quaestio iuris* through a process of subsumption. The creative potential of their case law was meant to assure a process of standardized interpretation of statutory law. In this they were called on to promote a case law that constitutes a *stabilizing factor for the law.*

2. The role of juridical thought in the 19th and 20th centuries

We can corroborate this conclusion by also studying, in the same time frame, the doctrinal debate on the interpretation of the law and the role of the jurist. We can consider in particular two main trends in the 19th Century: approaches to the *implementation* of the legal system, and approaches for the *innovation* of the legal system.

The first trend allowed legal science to act as a hermeneutical space for building "a System on the statutory law" [8, pp.39-44, pp.71-93][9, pp. 756-767].

Regarding the *epistemological* aspect, this produced a formalistic closure of legal know-

ledge as dogmatic; and on the *axiological* side it implied adherence (under the veil of neutrality) to the principles established by the legislator through statutory law; on the *strategic* level this stance aspired towards the guardianship of the individualistic conception of private law.

The approaches hinging on the *innovation* of the legal system were aimed at enhancing the interpretation of the law, elevating it as an hermeneutical activity able to affect the content of statutory law, in response to social and economic changes.

The task was to discover the law, in the process of formation, from below and to support its emergence. This encouraged legal science to open to other fields of knowledge capable of understanding social changes in progress; moreover, these approaches were able to improve the legal system with new principles and values not aligned with those originally chosen by the legislator. The strategy was in fact to promote a social conception of private law [8, pp.13-27] [10, pp.3-65].

In certain ways, these are two opposite poles; but the difference between legal theories in this regard is significantly reduced if we consider the position with respect to the *sources of law*. On this point, despite their diversity, the theories share a basic assumption: the indispensability of the legality principle [4, pp.723-727]. The hermeneutic circle, which binds the joint action of «zusammenwirken von Gesetz, Wissenschaft und Richterspruch» ("statutory law, legal science and case law") [3, p.278], is confirmed. The creative interpretation of law does not leave the confines of this circuit; in this way the jurist's interpretation continues and improves the work of the legislator [2, p.23-30].

In other words, these theories serve a *monistic conception* of the production of law, in order that it may be described only in the light of the primacy of a unique fundamental principle, on the basis of which it is possible to build a systematic fabric of relations among the sources of law.

The enhancement of the interpretation does not imply, therefore, the opening of real spaces of legal autonomy on a systematic level. It seems to me that these theoretical approaches, on the contrary, reflect the idea of a *stabilizing function of case law and legal knowledge.*

3. Historical roots of the monistic conception of law

Some of the reasons for this attitude are, in my opinion, deep rooted. I refer in particular to the change of paradigm on the conceptions of legal hermeneutics, which occurred in the modern age with the rise of Cartesian rationality in the place of the traditional Aristotelian-Thomistic *ratio*. This transition corresponds to the transition from the problem of the *Ordo* to that of the *Systema* [1, pp.307-358] [7, pp. 239-248.].

It may be useful to dwell briefly on the point. In medieval legal culture, legal production is conceived always as an act of hermeneutical nature; it is a matter of discovering and recognizing the *ordo* (already given by god to the earthly realm). Furthermore, the *interpretatio* is always an evaluative practice that involves a process of understanding (*intelligere*) the nature of things (the *aequitas*), an insight into social facts (6). This is made possible by a dialectic of opinions.

This activity does therefore not aim to pinpoint invariable rules. It aims to a search for the truth but it is able to detect only relative truths (*verisimiles*). The relationship with truth is a permanent feature of the interpretation of law, but it can never be fully resolved; it should instead be tested and upgraded in view of changing historical reality. For this reason, both jurisprudence and case law are tools to change the law (making possible its evolution) rather than to stabilize it. They produce, of course, points of synthesis, but they do not act as *constraints* that aim to prevent future developments; on the contrary they are the starting points from which to launch new processes of synthesis.

In addition, the autonomy of the law takes place on three levels: the *epistemological* level that I have just mentioned, in which the jurist interplay between reality and law takes place through the i*nterpretatio iuris*; the *socio-political* level, in which the law takes shape as an immediate product of social dynamics (think of the importance of customary law); and the systematic level, whereby the legal order is the result of an open field of interactions, not formally predictable, between sources of law [6, pp. 41-52].

In the modern age, especially with the new anthropocentric trend towards natural law, the setting changes profoundly. Modern reason (the *recta ratio*) is in the human being rather than in social facts and the order is describable *sicut mathematici* (7) as a System. This introduces a completely new way of theorizing (8): it proceeds from axiomatic premises; it is developed as a logical-deductive activity, oriented towards the demonstration of the truth (*veritas*). It is no longer a matter of drawing on social facts to build and justify the order; the starting point is to assume a basic, hypothetic, non-historical condition (the pre-social natural condition of human being) to detect, by way of *recta ratio*, fundamental and immutable rules.

In this context, the function of jurisprudence and case law assumes another feature: it tends to set rules and apply formal schemes, rationally identified in the abstract, and is capable of subsuming the reality on which it is based.

This new configuration of legal hermeneutics has produced important effects: it has helped turn legal knowledge into dogmatic knowledge; it has had the effect of rendering the creative hermeneutical circle closed and formal, compatible with a legal system based on statutory law. In this configuration, the space of legal autonomy is reduced to that of pure and self-referential knowledge.

To some extent it is a process of improvement, but at the same time a process of demarcation: here, the autonomy of the law loses its connection with the engine of social facts, which made it a field of action for legal production; the autonomy of the law will be restricted to a function of enforcement of statutory law.

This pattern unfolds alongside the rise of the primacy of statutory law, with the sources of law structured on a hierarchical paradigm and with the reconfiguration of the jurisdiction I have referred to above.

3. Conclusions

Let us however go back to the start. The historical perspective shows us that current case law is different from that of the Nineteenth and Twentieth centuries. The most remarkable novelty is the overstepping of both the *stabilizing role* of case law, and the *monistic horizon* that characterized the Nineteenth and the Twentieth century. This also applies to jurisprudence. History shows that the hermeneutical approach tends to arrange itself in relation to the features of the legal system.

I conclude very schematically questioning what this means for the work of legal scientists today:

In terms of legal theory, we have to obtain a new viewpoint in order to understand the process of law production in the current scenario. Rather than focusing on the *binding elements* (the constraints that make the legal order a System), it seems preferable to look at the features and *mechanisms that can enable developments* and changes in case law.

To this end, we must be prepared to review the analytical tools that we conventionally employ to describe legal production.

The conventional approach considers the issue of legal production as a problem of relations between legal sources. It is a matter of identifying the sites of legal production and of explaining the system of relations among them, and ultimately of describing a configuration capable of *representing the statics* of a legal order.

By contrast, the challenge would be to set aside the issue of *sources* and concentrate on the issue of the *scopes of legal production*, looking at the dynamic scenario of the making of a legal order. This is an approach that focuses on the *processes*, and, without abandoning an interest in systematic profiles, is freed from the problem of the *system*.

Following this path is not a simple task; it requires a renewed discussion on methodological issues regarding the production of legal science, requires interdisciplinary interaction between different legal sciences and between legal sciences and other humanities and social sciences; it asks us to focus our attention on themes that require analysis of interdisciplinary interaction.

It is a complicated task and not an easy one, but, in my opinion, this is the challenge.

Notes

1. This essay is a revised version of the paper presented at the conference „La coercizione nel diritto" University of Macerata 19th-20th may 2016 and it is to be published in the proceedings of this meeting

2. See, for example, *Massimo Vogliotti,* Tra fatto e diritto. Oltre la modernità giuridica, Torino, Giappichelli, 2007, pp. 210 ss; *Luigi Ferrajoli,* Principia iuris. Teoria del diritto e della democrazia, Roma-Bari, Laterza, 2007, in particolare pp. 846 ss; *Gustavo Zagrebelsky,* La legge e la sua giustizia, Bologna, il Mulino, 2008, pp. 161 ss; *François Ost, Michel van de Kerchove,* De la pyramide au raseau, Bruxelles : Facultés universitaires Sant-Louis, 2002; *Jürgen Habermas,* On Law and Disagreeement. Some Comments on "Interpretative Pluralism", in «Ratio iuris», 16, 2003, pp. 187-194

3. For example the *Committee on Economic, Social and Cultural Rights* in relation to the enforcement of the *International Covenant on Economic, Social and Cultural Rights* (1996); or the *European Committee of Social Rights* in relation to the enforcement of the *European Social Charter* (1961). See *Francesco Costamagna,* Riduzione delle risorse disponibili e abbassamento dei livelli di tutela dei diritti sociali: il rispetto del nucleo minimo quale limite all'adozione di misure regressive, in «Diritti umani e diritto internazionale», 8, 2, 2014, pp. 371-388; *Lorenza Mola*, La prassi del Comitato europeo dei diritti sociali relativa alla garanzia degli standard di tutela sociale in tempi di crisi economica, in Nicola Napoletano, Andrea Saccucci (a cura di), Gestione internazionale delle emergenze glo-

bali. Regole e valori, Napoli, Editoriale Scientifica, 2013, pp. 195-220; *Amrei Müller,* Limitations and Derogations from Economic, Social and Cultural Rights, in «Human Rights Law Review», 9, 2009, pp. 557-601.

4. See *Maurizio Fioravanti,* Costituzionalismo. Percorsi della storia e tendenze attuali, Roma-Bari, Laterza, 2009, pp. 98-104 e pp. 125-127; *Enzo Cheli, Filippo Donati,* La creazione giudiziale del diritto nelle decisioni dei giudici costituzionali, in «Diritto pubblico», 1, 2007, pp. 155-178; «Ratio Juris», 16, 2003, Constitutionals Courts; *Gustavo Zagrebelsky,* Il diritto mite. Legge, diritti, giustizia, Torino, Einaudi, 1992; «Giornale di storia costituzionale», 11, 2006, Storia, giustizia, costituzione. Per i cinquant'anni della Corte costituzionale; *Paolo Grossi,* Il diritto civile tra le rigidità di ieri e le mobilità di oggi, in Michele Lobuono (a cura di), Scienza giuridica privatistica e fonti del diritto, Bari, Cacucci, 2009, pp. 26-30

5. «Quaderni fiorentini per la storia del pensiero giuridico moderno», 31, 2002, L'ordine giuridico europeo, radici e prospettive; *Maurizio Fioravanti,* Costituzionalismo, cit., pp. 127-133, 156-158; *Mirelle Delmas-Marty,* Le pluralisme ordonné, Paris, Editions du Seuil, 2006; *Giuseppe Martinico,* L'integrazione silente: la funzione interpretativa della Corte di giustizia e il diritto costituzionale europeo, Napoli, Jovene, 2009; *Ombretta Di Giovine,* Come la legalità europea sta riscrivendo quella nazionale. Dal primato delle leggi a quello dell'interpretazione, in «Diritto penale contemporaneo», 1, 2013, pp. 159-181.

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7. Think as an exalple to the famous page of *Hugo Grotius,* De iure belli ac pacis, libri tres, Parisiis, 1625, Prolegomena, post medium e ante finem: «Primum mihi cura haec fuit, ut eorum quae ad ius naturae pertinent probationes referrem ad notiones quasdam tam certas ut eas nemo negare possit, nisi sibi vim inferat […] "Vere enim profiteor, sicut mathematici figuras a corporibus semotas considerant, ita me in iure tractando ab omni singulari facto abduxisse animum».

8. See *Antonio M. Hespanha,* A Cultura Jurídica Europeia, cit., pp. 307-358 in partic. 307-314; *Giovanni Tarello,* Storia della cultura giuridica moderna, Bologna, il Mulino, 1976, pp. 133-190; *Michel Villey,* La formation de la pensée juridique moderne, Paris, PUF, 2013, pp. 493 ss.

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ПРАВОВАЯ СИСТЕМА И АВТОНОМИЯ ПРАВА: ВЗГЛЯД С ТОЧКИ ЗРЕНИЯ ИСТОРИИ ПРАВА

Если мы рассмотрим роль, которую прецедентное право играет в последние годы, мы, как «континентальные» правоведы, будем поражены той значимостью, которую оно приобрело в генерировании права (1). Это новое прецедентное право, де-факто, кажется, работает в контексте, отличном от отношений между обычным судьей и статутным правом в так называемой правовой системе гражданского права (2). Этот новый формат заслуживает изучения и исследования.

Здесь автономия права выступает как существенный теоретический вопрос, который следует рассматривать и понимать на фоне исторического опыта. Используя лемму «автономия права», я хочу изучить диапазон генерирования права, в котором нормы являются результатом опыта самоорганизации или институциональной динамики (например, те, которые связаны с судебными органами), без участия или привлечения политической власти.

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THE DISTINCTION BETWEEN WRITTEN AND UNWRITTEN LAW AND THE DEBATE ABOUT A WRITTEN CONSTITUTION FOR THE UNITED KINGDOM

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This essay aims at reflecting on the persistent relevance of the traditional distinction between 'written' and 'unwritten' law as an essential feature of the English legal tradition, in order to better understand the current discussion concerning the enactment of a written Constitution for the United Kingdom, after the wide public consultation launched in 2014 by House of Commons. Three main aspects are considered: the difference between the idea of Rule of law and the continental idea of Staatsrecht, the concept of parliamentary sovereignty, the relationship between statute law and case law. It will be argued that even if a written constitution should ever see the light in the United Kingdom, it will presumably have a very particular status. A peculiarly 'British' one.

1. Introduction

One of the main features of the English legal system regarding the sources of law is the classical distinction between "written law" and "unwritten law", that is between statutes enacted by Parliament and cases decided by judges, which have the value of precedents for the solution of subsequent similar cases (1). This traditional classification has clear medieval origins and was defined by William Blackstone in the eighteenth century in his famous and influential *Commentaries*:

"The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds; the lex non scripta, or common law; and the lex scripta the written, or statute law. The lex non scripta, or unwritten law, includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions".

Blackstone questions by whom the validity of these customs or maxims is to be determined and his answer is: "by the judges", being

"the depositary of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. […] The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration".

From these assumptions, Blackstone concludes that the cornerstone of English law is "general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained on our reports, and digested for general use in the authoritative writings of the venerable sages of the law" [20, pp. 67-73].

One should not be misguided as to the meaning of written-unwritten law. Written law

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does not mean rules of law expressed in writing, but a law which is dictated in an imperative way, "an express precept which not only declares or contains, but in its very words constitutes the law" [6, p.233]. Conversely, unwritten law does not mean a law which is not formulated in writing, but one which consists in the reason and spirit of cases and not in the letter in particular cases (2). The difference lies in the fact that the former is compulsory because it is enacted, whereas the latter is compulsory as general custom.

The aim of these pages is to reflect on the persistent relevance of this traditional distinction as a key to understanding the current discussion concerning the enactment of a written Constitution for the United Kingdom. It is an issue that has been much debated in the past, but which came to the fore again in 2014, when the House of Commons (one of the two Chambers of the Parliament) launched a wide public consultation precisely on this topic.

It is impossible to foresee if this initiative will achieve any results, in a situation which appears even more complicated after the recent referendum on the exit of the United Kingdom from the European Union (the so-called Brexit) (3). Yet, it is useful to try to give an account of some aspects of the context in which this debate takes place. To this end, three aspects are to be considered: *i)* the difference between the idea of Rule of law and the continental idea of *Staatsrecht*; *ii)* the concept of parliamentary sovereignty; *iii)* the relationship between statute law and case law. A brief consideration of these three features will make it possible to give an account of the most contentious issues and to make some final remarks about the relevance and the persistency of a conception of law which continues to be grounded on the dichotomy between written and unwritten law.

2. The Rule of Law and its differences with the continental "Staatsrecht".

The distinction between written and unwritten law is essential to the understanding of the conception of Rule of Law in the English Legal System and the way it differs from the continental idea of *Staatsrecht*. Both doctrines share the same aim, that is the need to subject the exercise of public powers to legal regulation, in order to protect the rights of citizens. But the ways through which this aim is pursued differ significantly (4).

In the common law tradition, the limitation of state powers is achieved through a law which does not derive from the state itself, but from the common law, i.e. from an "unwritten" law (case law), which develops autonomously from the state (5). It is worth remembering the ancient *dictum* contained in the year books and expressed in the language of the time (the so-called "law French"), according to which the law is the King's greatest legacy; for by the law he himself and all his subjects are governed, and if there were no law, there would be neither King nor inheritance (6). It is easy to understand that the idea underlying this formulation is that law both preexists the sovereign's authority and binds him.

This concept is characterized by a slow and gradual process of adaptation of the medieval inheritance to the needs of modern society, culminating in the XIX century contribution by Albert Venn Dicey. But it still remains the core idea underpinning the Rule of Law in the common law tradition.

In contrast, the theory of *Staatsrecht* is an effect of the great change which took place on the Continent, culminating in the codification movement soon after the French Revolution of 1789. Obviously, it is neither possible nor useful to go into this in depth, but it is still worth noting, from a general comparative perspective, that the codifications led to a real disruption of continuity on the Continent. Previously, "law" had never been conceived only as the product of the will of the political authority, whereas from that moment on the situation changed radically and the law was identified with the legislation enacted by the state.

In this new context, the idea of *Staatsrecht* was shaped in Germany by Robert von Mohl in the eighteen thirties [16, R. von Mohl, 1832-34] as a compromise between the liberal doctrine (supported by the enlightened bourgeoisie) and the authoritarian ideology of the conservatives (the monarchy primarily). In fact, the Staatsrecht is opposed to the absolutist state, through the elaboration of the two classical liberal principles of public enforcement of individual rights and separation of powers. On the one hand , individual rights are conceived as a creation of the state and limit its power; so, in contrast with the French revolutionary view, the source of individual rights is not the people's sovereignty, but the legislative power of the State itself, which expresses the spiritual identity of the people. On the other hand, the principle of primacy of law is transformed into the principle of legality: the system of rules given by Parliament is to be respected rigorously by both the executive and the judiciary, as a condition of the legality of their acts. In this perspective, an arbitrary use of legislative po-

wer is not contemplated, because the assumption is that there is a perfect correspondence between the will of the state, legality and moral legitimacy [4, p.21]. The *Staatsrecht*, therefore, as it was originally conceived, is the State which limits itself through statute law [5, p. 310]. With substantial variation, this concept was later also followed both in France [3, p. 284] and Italy and we can say that it characterizes all the civil law countries.

As a consequence of this conception of *Staatsrecht*, in the civil law systems administrative law is seen as a distinct "special" branch of law, with a completely separate judicial structure (administrative courts). On the contrary, in English law "the citizen's remedies against the state have been enhanced by the development of a system of administrative law based on the power of the court to review the legality of administrative action" [8, p.296]. So, in contrast with the continental *Staatsrecht*, where public authorities are subjected to scrutiny regarding the legality of their acts by a separate jurisdiction, the Rule of Law implies and postulates a unity of jurisdiction, i.e. the submission both of private individuals and of public authorities to the same judge [11, p. 247], (7).

The dichotomy between written law and unwritten law, which underlies the conception of Rule of Law, explains the reason why the British constitution remains a diverse combination of statutes, common law, customs, manuals and parliamentary rules [1, p.74], so that it is impossible to clearly determine a formal dividing line "between what constitutes a core component of the constitution and what does not" [13, p.2]. In this context, the role of case law is essential, to the point that English jurists can make an assertion which sounds alien to any continental jurist: "constitutional law remains a common law ocean dotted with islands of statutory provisions […] Whether we like it or not, the common law is the responsibility of the courts" [18, p. 273].

Significantly, as we will see later, one of the chief reservations about adopting a written constitution is the fear that the relationship between the courts and Parliament would be affected in a way that could compromise the very delicate equilibrium which makes English law a unique and dynamic legal system. In order to better understand this point, the following paragraphs will try to describe, on the one hand, the formal preeminence of statute law over case law (expressed through the doctrine of Parliamentary sovereignty) and, on the other, the attitude with which statute law is considered by English judges.

3. The doctrine of Parliamentary Sovereignty: the (formal) preeminence of statute law.

In English law, there is no source of law more authoritative than an Act of Parliament and the doctrine of parliamentary sovereignty means that the courts are obliged to uphold and enforce the statutes, even if they consider them contrary to a constitutional principle.

This seems contradictory with respect to the Rule of Law described above. But this contradiction is only apparent (8). It is not the aim of this article to consider in depth either the meaning, or the historical and philosophical origins of the doctrine of parliamentary sovereignty (9). More simply, it is important to stress the peculiar relationship between statute law and case law. To this end, a useful guideline is the *dictum* of an eminent English judge, sitting in the (then) House of Lords: "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights […]. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual" [17] (10).

Once again, it is evident that this way of reasoning shows to what point the dichotomy between written and unwritten law is essential to the understanding of the English legal system: "In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law" [19]. In other words, "the rule of law recognizes two sovereignties, not one and not three" [18, p. 291].

This aspect cannot be underestimated, because it is essential to grasp that the hallmark of the English Legal System is the importance accorded to the decisions of judges as sources of law. In this sense, the common law is "unenacted", and so "unwritten", law [8, p.295] and it binds not only private individuals, but also public authorities. In Magna Carta we find the first formulation of a principle whose basis has been well summarized as follows: "the law of the realm should be written down to guide the king in ruling the kingdom" and "due process

facilitated by the judgment of peers and guided by the law of the land should be applied not only in the king's courts but *also to the king himself*" [9, p.51]. This idea, according to which the "king" is bound by a law which is not created by himself, continues to characterize the English tradition, in a never-ending variation of scenarios.

According to the doctrine of Parliamentary sovereignty, case law cannot contradict statute law and the courts are bound by statute law, but at the same time the idea of the "two sovereignties" is at the root of a cultural attitude that tends to consider the relationship between common law and statute law in terms of separateness, like oil and water [8, p. 300]. In this perspective, the reciprocal implication between the idea of Rule of Law and case law ensures the protection of individuals against the state by subjecting the action of public authorities to scrutiny under the jurisdiction of the common law courts.

4. The attitude of common law judges towards the interpretation of law.

The dichotomy written-unwritten law is also essential for understanding the strict approach of English judges and jurists to the interpretation of statute law, to the point that "Psychologically, if not statistically, statutes can still appear to many lawyers as exceptions rather than the rule" [19].

A recent example of this attitude can be drawn from a case decided by the UK Supreme Court in 2015 [15, UKSC, 2015] (11). Very briefly, a journalist employed by a newspaper sought disclosure (under the Freedom of Information Act 2000 and the Environmental Information Regulations) of correspondence sent by Prince Charles to various Government Departments between 1 September 2004 and 1 April 2005. The Departments refused disclosure and the Information Commissioner upheld that decision. The Upper Tribunal ordered that Mr Evans was entitled to disclosure of 'advocacy correspondence' falling within his requests, including advocacy on environmental causes, on the grounds that it would generally be in the overall public interest for there to be transparency as to how and when Prince Charles sought to influence government. But subsequently the Attorney General used the statutory 'veto', according to section 53(2) of the Freedom of Information Act 2000, enabling him to block disclosure. Under section 53(2), the Attorney General can decide that an order against a government department shall cease to have effect. The Supreme Court, dismissing the appeal against the decision of the Court of Appeal, upheld a very strict interpretation of the relevant statutory provisions.

It is obviously impossible to examine these decisions in depth, but it is useful to quote the *dictum* of Lord Neuberger (for the majority), focusing on "two constitutional principles which are also fundamental components of the Rule of law. First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the Rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinized statutory exceptions, reviewable by the court at the suit of an interested citizen" (12). For this reason, the right of citizens to seek judicial review of actions and decisions of the executive has "its consequences in terms of statutory interpretation", in the sense that "[t]he courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear" (13).

An aspect which emphasizes the strict approach to the interpretation of statute law is the so-called presumption against the alteration of the common law. This means that even if Parliament is sovereign and can alter the common law, in order to do so it must expressly enact legislation to that end. If there is no express intention, the courts assume that a statute is to be interpreted in a manner which does not introduce any change to the common law (14). This is further proof of the persistent importance and implications of the distinction between written and unwritten law, which continues to characterize the common law experience and mindset.

5. The debate concerning a written constitution.

In the light of what has been discussed above, it is now possible to give an account of the current debate concerning the adoption of a written constitution for the United Kingdom, which is one of the only three countries in the world not to have one (together with Israel and New Zealand) (15).

This issue is obviously not new and has been the subject of wide-ranging discussion (16), but in 2014 it was relaunched by the official initiative of the House of Commons, through its Political and Constitutional Reform

Committee. Significantly, the results of this consultation were published in 2015, during the celebrations of the 800th anniversary of Magna Carta (1215-2015), with the evocative title: "A new Magna Carta?" (17).

Very briefly, the House of Commons Constitutional Committee investigated three options. The first is to adopt a Constitutional Code, that is a document sanctioned by Parliament but without statutory authority, setting out the essential existing elements and principles of the Constitution and workings of Parliament. The advantage of this solution would be to substitute rules which are sometimes inaccessible and often unwritten with one text, a single document, easily accessible and intelligible, containing a set of rules about how the country is governed. In this sense, the process of constitutional codification would not imply a change in the rules applied, but only their rational and comprehensive formulation.

The second option is a Constitutional Consolidation Act, that is consolidation into a statute of the existing laws of a constitutional nature, common law principles and parliamentary practice, together with a codification of essential constitutional conventions.

The third option is a real written Constitution, that is a document of basic law intended to govern the United Kingdom, including the relationship between the state and its citizens, an amendment procedure and elements of reform (18).

The debate about these possible options is extensive and of course is also influenced by politics. In contrast with the cautious approach of the first two options, the third is preferred by those who emphasize the need for radical change, especially through a modification of the doctrine of Parliamentary sovereignty. The main argument is that a constitution should express the sovereignty of the people, so that at least in some cases Parliament should be subject to constitutional limitations. Moreover, some argue that a written constitution would improve the English legal system, because it would face and solve outstanding constitutional problems, especially concerning the relationships between England, Scotland, Wales and Northern Ireland, the parliamentary control over the executive prerogative powers, as well as integrating or replacing the Human Rights Act 1998 with a British Bill or Rights (19).

This last aspect is extremely controversial and has recently been discussed at length not only among scholars, but also at a legislative level: the House of Lords European Union Committee has just issued a very detailed report which appeared just before the referendum on Brexit, with the significant title: "The UK, the EU and a British Bill of Rights" (20).

The issue concerning the drafting of a UK Bill of Rights, to be inserted in a written constitution, is closely linked with the recent tendency to resist the monopoly of the protection of human rights at a European level. In this regard, it has to be remembered that, after a long period of reflection, at the end of the last century the United Kingdom implemented the European Convention for Human Rights through the Human Rights Act 1998. This legislation captivated English jurists and judges, to the point that they considered it the main source for the protection of human rights. More recently, however, the Supreme Court has questioned this approach. In a very important case decided in 2013, it clearly asserted that "the development of the common law did not come to an end on the passing of the Human Rights Act 1998" [12, UKSC , 2013]. In a subsequent case, it stated even more clearly: "it was not the purpose of the Human Rights Act that the common law should become an ossuary" [10, UKSC , 2014]. This new trend has been defined as a 'resurgence' of the common law protection of human rights against European sources, in order to make clear that human rights were already, and continue to be, a part of the British national inheritance. In this context, it is claimed that a written constitution could provide the opportunity to set a balance between the European and the domestic dimensions of the protection of human rights and also to better define the respective competence in their assessment (21).

6. Conclusive remarks.

Leaving aside the opposing arguments, whose analysis would of course need a far more exhaustive discussion than is possible here, it is very significant to point out that everyone recognizes that the main reservation concerning the enactment of a written constitution revolves around the relationship between the courts and Parliament [14, p.9]. As can be seen, the distinction written-unwritten law always lurks in the background and regularly re-emerges.

More specifically, opponents to a written constitution argue that it would politicize the judiciary, because non-elected judges will have to give judgments on questions of a political nature which should be left to the exclusive competence of Parliament (22). In fact, it is well-known that most written constitutions have a higher status and priority as law, enabling judicial review of ordinary legislation on the grounds of incompatibility with the con-

stitution itself. Should the British constitution be a document like this, it is evident that the doctrine of Parliamentary sovereignty would be radically affected, for the simple reason that Parliament could be prevented from adopting a statute if it is in contrast with the constitution.

In order to sidestep this outcome, which is considered serious even by those who plead in favour of a written constitution, a typically "British" solution has been put forward [14. P.9]. It takes inspiration from the mechanism adopted by the Human Rights Act 1998. One of the issues which was seen as an obstacle to the integration of conventional rights within the English legal system through a statute was precisely its intrinsic value: formally it was a simple statute, but substantially it had a 'constitutional' relevance, because it could limit the omnipotence of Parliament.

The way-out of this problem was fixed in Art. 3 of the HRA, according to which "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". At the same time, sec. 3.2 makes clear that sec. 3.1 "does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility".

Thus, while judges are given the power to interpret every statute (prior or subsequent to the HRA) in a way which is compatible with the convention rights, at the same time they are inhibited from affecting the validity of a statute if they consider it incompatible with the convention rights. This point is explicitly clarified by Art. 4, which provides that in case of incompatibility the judge does not have the power to invalidate the statute and is only allowed to make a declaration of incompatibility, not affecting "the validity, continuing operation or enforcement of the provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made".

All this shows that the HRA "has a dialectical tension at its core. On the one hand, the measure presents itself as establishing a new, justiciable language of human rights; on the other, it declares itself to be still in thrall to the fundamental constitutional principle of Parliamentary sovereignty" [2, p.248] (23).

It is exactly this kind of compromise which is suggested in the drafting of a written constitution in order to attempt to retain parliamentary sovereignty (24).

To illustrate this solution, it is pertinent to quote directly from the official document prepared by the Political Committee of the House of Commons: "One possible way for the UK to attempt to retain parliamentary sovereignty, should it adopt a codified constitution, would be to use a 'declaration of unconstitutionality'. This would be a variation on the method that is currently used under section 4 of the Human Rights Act 1998, whereby the courts can declare that a piece of UK legislation is incompatible with a provision of the European Convention on Human Rights" [7, House of Commons 2013-14].

As a result, it is clear that the only effect of a declaration of unconstitutionality would be of a political nature. It would be a mere warning to Parliament, leaving it the sole responsibility regarding the decision to modify or not the "unconstitutional" statute . With this solution the compatibility with the doctrine of parliamentary sovereignty is certainly guaranteed, but at the same time the impact of a written Constitution is substantially neutralized.

This highlights the uneasiness felt by English jurists when facing the concrete implications of a written constitution. In the background it is easy to perceive the heavy weight of the heritage of the English legal tradition and in particular the distinction between written and unwritten law. To the point that one should not be misguided by the use of the word 'Constitution': even if a written constitution should ever see the light in the United Kingdom, it will presumably have a very particular status. A peculiarly 'British' one.

Notes

1. For a general discussion concerning the sources of law in English law, see L. Moccia, *Comparazione giuridica e Diritto europeo* [], Milan, 2005, p. 409 and ff.

2. This is the well-known statement by Lord Mansfield in a case of 1762 (Fisher v. Prince, 3 Burr. 1363).

3. See P. Craig, *Brexit: a drama in six acts,* in Eur. Law. Rev., 2016, p. 447.

4. For a first approach, see D. Fairgrieve, *Etat de Droit and Rule of Law: Comparing Concepts*

5. For a full discussion, cf. L. Moccia, *Comparazione giuridica e diritto europeo* []. Milano, 2005, p. 219.

6. "La ley est la plus haute inheritance que le Roi ad; car par la ley il meme et touts ses

sujets sont rulés, et si le ley ne fuit, nul Roi, et nul inheritance sera" (19 Hen. VI. 63).

7. For an account of the recent debate in the United Kingdom concerning the utility of a bill of rights, foremost after the Human Rights Act 1998, see Lady Hale, *UK Constitutionalism on the March* // https://www.supremecourt.uk/docs/speech-140712.pdf and N. Walker. *Our Constitutional Unsettlement* // Public Law. 2014. p. 529

8. This point has already been extensively dealt with by A.V. Dicey, *An Introduction etc.,* p. 402.

9. For an in-depth account, see J. Goldsworthy, *Parliamentary Sovereignty. Contemporary debates,* Cambridge, 2010, especially chapters 2 and 3.

10. More recently, *Beghal v Director of Public Prosecutions* [2015] UKSC 49.

11. For a detailed analysis of this case, cf. T.R.S. Allan, *Law, democracy, and constitutionalism: reflections on Evans v Attorney General,* in C.L.J., 2016, 38.

12. *Ivi,* para 51 and 52.

13. *Ivi,* para 56, quoting the opinion of Lady Hale, in *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, para 159.

14. For a recent case in this field, see *R v Hughes* [2013] 1 WLR 2461.

15. In general, see the comprehensive study by A. Blick, *Codifying – or not codifying – the UK constitution. A*

16. The literature is immense; see O.H. Phillips, *Reform of the Constitution,* London, 1970; R. Holme-M. Elliott (eds), *1688-1988: Time for a New Constitution,* London, 1988; R. Brazier, *Constitutional Reform: Reshaping the British Political System,* Oxford, 2008; F. Vibert, *Constitutional Reform in the United Kingdom – An Incremental Agenda,* London, 1990; T. Benn-A. Hood, *Common Sense: A New Constitution for Britain,* London, 1993. More recently, see P. Bowen, *Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary?, in Eur. Human Rights Law Rev.,* 2016, p. 361.

17. The text is published at the following link: http://www.publications.parliament.uk/pa/ cm201415/ cmselect/cmpolcon/599/599.pdf. Magna Carta was enacted in 1215 at the end of a difficult period of controversy and civil war. It is still considered one of the fundamental statutes of the English legal system and it is at the origin of an idea of law as a limit to the sovereign's power, Among the most interesting volumes published see R. Griffith-Jones-M. Hill (eds.), *Magna Carta, Religion and the Rule of Law,* Cambridge, 2015. See also Lady Hale, *Magna Carta: Our Shared Heritage,* in https://www.supremecourt.uk/docs/speech-150601.pdf. In the words of an eminent English judge, "The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality" (T. Bingham, *The Rule of Law,* Oxford, 2010, p. 12).

18. These three options are considered in the Report drafted by the House of Commons in 2014, available at https://www.publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/463/463.pdf.

19. For an in-depth analysis of the different issues involved, see R. Blackburn, *Enacting a Written Constitution for the United Kingdom, in Statute Law Review,* 2015, p. 1. See also B.C. Jones, *Preliminary Warnings on « Constitutional» Idolatry,* in *Public Law,* 2016, p. 74; D. Grieve, *Can a Bill of Rights do better than the Human Rights Act?,* in *Public Law,* 2016, p. 223; Q. Butavand, *Quelle actualité pour la Constitution du Royaume-Uni* [] // *Rev. franç. droit constit.* []. 2015, p. 539.

20. Available at http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf.

21. On these issues cf. R. Masterman-S. Wheatle, *A Common Law Resurgence in Rights Protection, in European Human Rights Law Rev.,* 2015, p. 57. See also M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the United Kingdom,* London, 2011. About the utility of a Bill of Rights in a common law system, cf. J.D. Heydon, *Are Bills of Rights necessary in common law systems,* in *Law Quart. Rev.,* 2014, p. 392.

22. See for instance N. Barber, *Against a Written Constitution,* in *Public Law,* 2008, p. 11.

23. About the future prospects of the Human Rights Act, see R.J.A. McQuigg, *The Human Rights Act 1998: Future Prospects,* in *Statute Law Review,* 2014, p. 120. The implications of a possible repeal of the Human Rights Act are comprehensively dealt with by P. Sales, *Rights and fundamental rights in English law,* in *Cambr. Law Journal,* 2016, p. 86.

24. In this sense, cf. R. Blackburn, *Enacting a Written Constitution etc., op. cit.,* p. 9.

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4. Cf. D. Zolo. *Teoria e critica dello Stato di diritto* [Theory and Criticism of the Law-Based State]// P. Costa-D. Zolo, Lo Stato di diritto. Storia, teoria, critica [Law-Based State. History, Theory, Criticism]. Milano, 2002.
5. Cf. G. Sartori. *Nota sul rapporto tra Stato di diritto e Stato di giustizia* [Notes on the relationship between the State of Rule of Law and the State of Justice]// AA.VV. *Dommatica, teoria generale e filosofica del diritto* [Dogmatics, General Theory and Philosophy of Law]. Vol. 2. Milano, 1964.
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8. J. Beatson, *Has the common law a future,* in *Cambridge Law Journal,* 1997.
9. J.W. Baldwin, *Due process in Magna Carta. Its sources in English law, canon law and Stephen Langton,* in R. Griffith-Jones-M. Hill (eds).
10. *Kennedy v Information Commissioner* [2014] UKSC 20, per Lord Toulson (at 46).
11. L. Moccia, *Comparazione giuridica e diritto europeo* [Comparative Law and European Law]. Milano, 2005.
12. *Osborn v Parole Board* [2013] UKSC 61, per Lord Mance (at 61).
13. P. Norton, *Introduction: A Century of Change* // P. Norton. *A Century of Constitutional Reform,* London, 2011.
14. R. Blackburn, *Enacting a Written Constitution for the United Kingdom,* in *Statute Law Review,* 2015.
15. *R (on the application of Evans) v Attorney General* [2015] UKSC 21.
16. R. von Mohl, *Die Polizeiwissenschaft nach den Grundsatzen des Rechtsstaates* [Police Law according to the Principles of the Law-Based State. Tubingen, 1832-4.
17. *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, per Lord Hoffmann.
18. S. Sedley, *The sound of silence: Constitutional Law without a Constitution* // Law Quarterly Review. 1994.
19. *X v. Morgan-Grampian Ltd.* [1991] AC 1, per Lord Bridge of Harwich.
20. W. Blackstone. *Commentaries on the Laws of England.* Vol. 1, Oxford, 1765, facsimile version Legal Classics Library, 1983.

РАЗЛИЧИЕ МЕЖДУ ПИСАНЫМ И НЕПИСАНЫМ ПРАВОМ И ДИСКУССИЯ О ПИСАНОЙ КОНСТИТУЦИИ ДЛЯ СОЕДИНЕННОГО КОРОЛЕВСТВА

Статья анализирует сохраняющуюся актуальность традиционного различия между «писаным» и «неписаным» правом в качестве существенной особенности английской правовой традиции для того, чтобы лучше понять нынешнюю дискуссию в отношении принятия писаной конституции для Соединенного Королевство после широкого публичного обсуждения, начатого в 2014 году Палатой общин. Рассматриваются три основных аспекта: разница между идеей верховенства закона и континентальной идеей Staatsrecht (конституционного права), концепция парламентского суверенитета, отношения между статутным правом и прецедентным правом. Можно предположить, что даже если писаная конституция когда-либо увидит свет в Соединенном Королевстве, она, вероятно, будет иметь особый статус –специфически британский.

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Ключевые слова:
источники права, писаная конституции, верховенство закона, парламентский суверенитет, процесс конституционной реформы.

Keywords:
Sources of law – Written Constitution – Rule of Law – Parliamentary Sovereignty – Constitutional Reform Process.

SOCIO-ECONOMIC RIGHTS OF SENIOR PEOPLE IN URBAN AREAS: TOWARDS A NEW EUROPEAN PERSPECTIVE

Erik Longo*
Laura Vagni**

The paper considers aspects related to the evolution of EU social policy for the protection of senior people in urban areas. To begin, it offers an overview of the main policies enacted at an International and European level with the aim of protecting seniors' rights and empowering their participation in social and economic life. One main finding of the analysis is that the need of EU institutions to tackle the demographic change of European people and turn the phenomenon of ageing into a resource for the society heavily depends on the urban social policies that the EU shall implement in the future. The paper concludes that the challenges inherent the creation of ageing-friendly and green cities can be achieved only giving senior people freedoms in a public sphere of active democratic participation.

Albeit its unitary conception, Erik Longo drafted Sections 1, 4, and 5 while Laura Vagni drafted the other Sections.

1. INTRODUCTION

The population of the 28 Member States of the European Union was estimated at 506.8 million on January 2014 [3, Eurostat, 2016]. Young people made up 15.6% of the EU population, whereas persons considered to be of working age (15 to 65 years old) accounted for 65.8%. Senior people (over 65-years old) had an18.5% share. Across EU States, the highest share of persons aged 65 or older in the total population was observed in Italy (21.4%), while Ireland had the lowest proportion (12.6%).

According to Eurostat, population ageing in Europe is a long-term trend which is destined to last for many years [3, Eurostat, 2016]. The comparison of age pyramid for 2014 and 2080 shows that the EU population is projected to continue to age. By 2080, persons aged 80 years or above are expected to more than double and persons over 65 years old will be more than 28% of the European population. As a consequence, the rate of people in working age is decreasing from almost 66% to 56% in 2080.

Recent trends of population ageing are unprecedented and unparalleled in the history of mankind. This tendency is affecting every country in the world, with consequences for the intergenerational and intra-generational equity and solidarity that are the foundations of society [18, UN, 2002].

The last decade has witnessed the strongest economic crisis since World War II. This event has both emphasised and aggravated a range of fears and insecurities about economic inequalities, jobs, immigration, the environment, and the cost of welfare regimes, especially the affordability of pensions and healthcare [7, p.17].

In this framework, the challenge of ageing societies is affecting our lives more than we can figure out. The footprints of ageing are spread everywhere and are emerging with a faster pace at the level of larger cities, where the im-

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pact of a greyer world is much more visible than in other parts of a country.

Statistics present important data regarding the presence of senior people in the major European cities [4, Eurostat, 2016]. One hundred cities across Italy and Germany have an old-age dependency ratio (the proportion of older dependents per 100 working-age population) of at least 35%. The largest cities with a population of at least 500,000 inhabitants and an old-age dependency rate of at least 35% included: the Italian cities of Rome, Milan, Turin and Genoa; Nice in the south-east of France (data are for 2011); the German city of Essen in the Ruhr valley; and the Portuguese capital of Lisbon.

This situation shows how it is urgent for both EU Member States and EU institutions to build up a new strategy to overcome problems regarding healthcare, pensions, markets, services of general interest, and in general the life of senior people.

On the basis of these underlying demographic assumptions and predictions, the 2015 *Ageing Report* of the Council, for example, assesses the impact of an ageing population on expenditures necessary to cover pensions, health care, long-term care, education and unemployment benefits [2, EU Commission, 2015].

In our view, the large presence of older people in EU cities should be considered a resource for the community welfare. This approach is facilitated by the fact that the attitude of senior people changed profoundly in the last twenty years. The majority of this part of the population is more educated and more capable of adapting to changes in public and private welfare, which make them more active and flexible than before. These new circumstances are such as to allow more participation by seniors in their environment and it is already clear that they can contribute actively to social and cultural activities.

In this sense, this paper will provide an overview of the main policies enacted at an International and European level, with the aim of protecting seniors' rights and empowering their participation in social and economic life. In the last part of the paper the attention will be focused on cities, as the first test bed of democracy and inclusive citizenship, in order to investigate whether the problem of ageing population could be turned into a resource, through a new age-friendly model of governance.

2. THE INTERNATIONAL FRAMEWORK OF PROTECTION OF SENIORS' HUMAN RIGHTS

Throughout the world, a large number of old people face challenges such as discrimination, poverty and abuse that severely limit their human rights and their contribution to society.

The frailty of seniors and their consideration as a vulnerable group, to be specifically protected, have been addressed by law since the last decades of the 20th century. The first important international document on the issue was the Vienna Action Plan, adopted by the World Assembly of Aging in 1982. The Plan had the main aim to provide a forum among governments as to guarantee " […] economic and social security to older persons, as well as opportunities to contribute to national development" (1).

Since the Vienna international forum, many other documents where adopted by international institutions in order to bring attention to the need to provide legal safeguards for the protection of seniors and for tackling the problems deriving from the demographic change of society [9, p. 37].

Among them, a paramount value has to be attributed to the "Principles of Older Persons," adopted by the UN General Assembly in 1991, which constitute the most comprehensive document at an international level on the matter, although they are not binding for the States. Along the same line, ten years later, the second UN World Assembly adopted in Madrid the "Plan of Action on Aging" 2002, with the key challenge of building a 21st century society for all ages [17, p. 147] [5, Evrad, 2005].

More recently, the phenomenon of ageing has gained more attention than the past in the human rights arena [6, Martin, Rodríguez-Pinzón, & Brown, 2015] . In 2009, the UN published a report on the "Rights of Older Persons" where the international legal instruments for the protection of seniors' rights were investigated.

The report explored how fundamental human rights of older persons could be assured and deepened. It highlighted the need to consider all of the international documents for the protection of human rights, within a non - discriminatory framework, and included a specific reference to 'age' as a ground of discrimination, which was often neglected by the main international legal documents [15]. This recommendation was important considering the interpretative function played by international legal instruments, although not binding for the States. The report highlighted an "implementation gap", as national governments often failed to abide by the commitments that they have signed up through human rights instruments, and encouraged the establishment of a comprehensive international convention for the protection of seniors' human rights as

a valuable solution to force change in domestic legislation.

Looking at the European landscape, the UN framework for the protection of elderly human rights finds its main counterpart in the European Social Charter (ESC).

A specific provision protecting the human rights of seniors can be found in art. 4 of the Additional Protocol to the European Social Charter of 1988. For the first time, a provision guarantees seniors to be "full members of society", with the implication that the States Parties should take the necessary measures, so that the elderly could play an active role in society and not be marginalised. According to what is indicated by the Explanatory Report to the Additional Protocol of 1988, the expression "full members" implies that seniors should not be limited in the access to social life, even if retired or with reduced mental and/or physical abilities. Therefore, it is necessary that Member States provide services and facilities to improve seniors' living conditions.

The rule was later incorporated into art. 23 of the 1996 Revised European Social Charter, which guarantees the rights of seniors already indicated in art. 4 of the Additional Protocol and sets out important requirements for a full inclusion of adults in society. The importance of this article lies in the fact that it emphasises a protection policy for seniors with a radius of actions on all aspects of their life. The Parties that have signed the Charter have the duty to adopt and encourage those actions that privilege the freedom of old persons to choose their own lifestyle, to lead independent lives and to play an active part in society.

The article, while clearly defining its borders (living conditions and income security, guaranteed services for people with limited capacity, organization and provision of healthcare, etc.), leaves room for the States to decide which is the best way to ensure these rights according to their society and needs. Moreover, art. 23 of the ESC appears to be important also for being an inspiration to the enactment of successive European provisions, which have taken up the content in terms of protecting the rights of seniors.

Conversely, seniors' human rights are not specifically protected by the European Convention of Human Rights and Fundamental Freedoms. Indeed, neither the Convention nor its additional protocols contain a provision similar to art. 23 of the Revised European Social Charter. Nevertheless, the European Court of Human rights (ECHR), in the last years, dealt with the protection of seniors' fundamental rights and delivered many judgments indirectly concerning the full enjoyment of human rights by seniors, in different matters, from healthcare to discrimination or to right to life, etc. [16, p. 49]. Some scholars, however, noticed that the use by the European Court of a dynamic interpretation of the articles of the Convention does not assure enough protection of seniors' rights in some spheres, which are essential to the social inclusion of older persons, such as the social and economic rights and the right to participation in cultural life [10, p. 511]. For this reason, it is encouraged the adoption of a supplementary protocol to the ECHR, regarding the protection of the rights of older persons.

The adoption of hard law for the protection of seniors' human rights is not an easy task. For this reason, there are not any specific protocols for the protection of other vulnerable groups. Nonetheless, the urgency through which the phenomenon of demographic change of society is imposing in the European area pushes the States to assume specific measures, both to protect the elderly as a whole and to realise the legal premises for an integrated and inclusive society. Along this line, in 2014, the Committee of Ministers adopted a specific Recommendation to Member States on the promotion of the human rights of older persons (Recommendation on the human rights of older persons).

This Recommendation incorporates specific principles on the protection of the human rights of older persons and it recommends States to comply with them in national legislation and practice, encouraging States to examine, within five years, the implementation of the principles in cooperation with the Council of Europe (CoE).

The Recommendation proclaims that all human rights and fundamental freedoms apply to older persons on an equal basis with others. It aims to promote a right balance between the autonomy and the protection of older persons, the cohesion and active citizenship and the participation of older persons in social, economic and cultural life. Indeed, the Recommendation expressly states: "Older persons should receive appropriate resources enabling them to have an adequate standard of living and participate in public, economic, social and cultural life" [14, para. V, 21].

The Recommendation has a real potential for impact on the current State obligations in the context of ageing. Thus, the list of good practice included in the Recommendation shows that there is increasing attention from domestic legal policies on the theme of protection of older people. Active ageing is understo-

od as a process, applicable both to individual and community, with the purpose to ensure the social inclusion of elderly people. The development of this concept is important because, in the past decades, the policies of the different governments were all concentrated exclusively on ensuring the protection of fundamental human rights. In this new perspective, however, the older person is seen as a resource, whose experience should be protected and enhanced.

3. SOCIAL POLICY FOR SENIORS IN EU LAW

The history of the EU's social policy for older persons is very long. The recognition of the rights of seniors to lead a life of dignity and independence arises from their right to social protection, which is one of the fundamental social rights. The EU law has been providing legal instrument for the protection of older people in different ambits of social life since the early 1980s. However, these measures were random and sectorial and a coherent legislative framework within which the condition of older people was addressed in a holistic way was absent. Again, although both the UE Parliament and the Commission focused attention on the issue and on the importance of dealing with the phenomenon of ageing as a whole, these suggestions have not been transposed into European Union legislation.

This trend has changed in the last fifteen years: a decisive turning point was the adoption of the Charter of Fundamental Rights of the EU in 2000.

Art. 21 of the Charter of Fundamental Rights of the EU (legally binding for EU bodies and Member States when implementing EU law) refers explicitly to age as a ground of discrimination. Art. 25 of the Charter also recognises the "right of the elderly to lead a life of dignity and independence and to participate in social and cultural life." This article provides not only the protection of the right of older persons as individuals but also the recognition of the special needs of the elderly as a group, grounding the principle for a new approach to the issue.

The application of the article is not restricted to EU citizens, but it is extended to all the old persons who may be subjected to EU law, even if they have not EU citizenship or residence in the territory of EU Member States.

Art. 25 must be read in a coordinated manner with other provisions of the Charter [12, p. 693], especially with reference to the right to the integrity of the person (art. 3), non-discrimination (art. 21) and integration of persons with disabilities (art. 26).

In particular art. 26, although not specifically aimed at the elderly, provides protection to people with disabilities. It states that the EU recognises and respects their independence and participation in society through the promotion of measures to ensure the removal of architectural barriers. These items were included in Chapter III of the paper, entitled 'equality', and not in Chapter IV on solidarity. This shows that the approach of the European Union on the elderly and on people with disabilities is a positive one: the aim is not only to keep a mere protective attitude but also to ensure equal opportunities of involvement in social life to those people who have difficulty in mobility.

The EU constitutional framework was then completed by the adoption of the Treaty of Lisbon, which stated the recognition of binding effects to the Charter of Fundamental Rights of EU and the accession to the European Convention of Human Rights and Fundamental Freedoms by the European Union (art. 6 TUE). The Treaty of Lisbon established that human rights, as stated in the European Convention and derived from the constitutional traditions common to all Member States, constitute general principles of the Union's law (art. 6 TUE). The Treaty did not enrich the EU with new legislative competences; however, the focus of the Treaty on the centrality of human dignity and on the respect of human rights paved the way for a shift in the European Union action from the 'market' to the 'citizenship'. This change of perspective encouraged a more incisive action of the European Union in many ambits related to the protection of social rights. Indeed, even if the protection of social rights is a matter of State competence, the protection of these rights encountered a vast number of EU powers related not exclusively to the creation of a single market. The main example is constituted by the EU's competence on discriminatory law: art. 19 of the TFUE (former art. 13 TEC) empowers the EU to legislate against discrimination in terms of age as well as sex, racial or ethnic origin, religion, disability and sexual orientation.

Under the former art. 13 TEC, the Employment Directive was enacted in 2000. The Recital 14 states: "This Directive shall be without prejudice to national provisions laying down retirement ages." Moreover, age is expressly considered as a ground of discrimination by art. 1 of the Directive. Art. 6, however, states: "Member States may provide that differences of treatment on grounds of age shall not constitute discrimination […]." The article introduces the possibility of a difference among citizens on the basis of age. Scholars have long been debating on the

coordination between articles 1 and 6 of the Directive and on the value of age as a ground of discrimination, compared with the other criteria provided by art. 1 [8, p.79]. The case law of the European Court of Justice on this point has been considered controversial by some scholars [11, p. 253]: on the one hand, the Court made a rigorous application of the objective justification test and recognised more than once a margin of appreciation of Member States in using age-based distinction, when they are reasonable and objectively justified; on the other hand, the Court established a clear link between the prohibition of discrimination on the basis of age and on the principle of equal treatment, considered as a fundamental principle of EU law. This interpretation paves the way for a wider and more comprehensive protection of the elderly behind the matter of employment.

The Treaty of Lisbon draws a wider constitutional framework of protection of seniors' human rights and the prohibition of discrimination on the basis of age. Unfortunately, the potential of these fundamental principles has not yet fully developed into legislation. In this perspective, the European Union action for the promotion of elderly rights and active ageing seems less incisive than other non–European systems, such as the US, Canada or Australia, where the elder people are considered as a group and consequently protected as a whole by legislation. Moreover, the phenomenon of inter-sectorial and multiple discrimination of older people is not addressed specifically by EU legislation, with a gap in the protection of many cases, where age is only a sort of collector of different discriminatory actions.

The EU constitutional framework and secondary legislation addressing the problem of elderly rights, however, show only a part of the role that the EU plays in the implementation of social policy for elders and in the approximation of domestic legislations of Member States in this matter. In this context soft law instruments assume a paramount importance both as a guide within which national and EU law could be implemented and as driver of social changes.

4. SOFT LAW INSTRUMENTS ON ELDERLY IN THE EARLY EUROPEAN COMMUNITY POLICY

The focus of EU policies and programs on senior persons includes many areas, such as anti-discrimination policies, social protection and accessibility to public services, active ageing as well as research and innovation.

The European Commission and the Council have issued a number of communications and other documents relevant to economic and social well-being of senior persons [6, p. 125].

The Communication of 24 April 1990 (COM (90) 80 final) considers "the implications of the internal market for the elderly". It presents a basis for actions in favour of old persons, such as the exchange of information and knowledge to understand the contribution of elderly people to economic and social life.

The Council decision 91/49/EEC of 26 November 1990 on Community actions for the old persons confirmed the Commission's proposals for the period 1991-1993. The actions of the Community are set out to provide preventive strategies to meet the economic and social challenges of an ageing population, to encourage solidarity between generations and integration of the seniors, and to study the positive contribution of seniors to the development of the Community.

Later, the decision 92/440/EEC established the "European Year of the Elderly and of Solidarity between Generations". The objective of this event was to highlight the challenges of demographic evolution in order to facilitate the integration of seniors within Europe according to the objective to improve the social dimension of the internal market. Notwithstanding, the actions undertaken encouraged debates, studies, publications and events able to find innovative strategies for economic purposes of the Community related to the protection of the elderly: income levels and standard of living, care and services offered, employment of elderly workers, preparation for retirement and participation of seniors.

The Communication of 21 May 1999 "Towards a Europe for All Ages - Promoting Prosperity and Intergenerational Solidarity" proposed a strategy for political measures devoted to improving awareness among all actors concerned of the implications of an ageing population. This Communication constituted the contribution of the European Commission to the UN International Year of Older Persons (1999). It aimed to stimulate a debate between and with Member States.

The Communication describes the challenges with which the ageing of the population will confront our societies:

a) Relative decline of the working age population and ageing of the workforce.

b) Pressure on pension systems and public finances.

c) A growing need for health care for older persons.

d) Growing diversity among older people in terms of resources and needs.

e) Gender-related aspects.

On the basis of the impact of problems caused by the aging of the population of Member States, the Commission has presented a series of policy conclusions and new perspectives to be included:

a) in European employment strategy (keeping workers in the labour market longer, promoting life-long learning, increasing work flexibility);

b) in social protection policies (finding ways to reverse the trend towards early retirement, new forms of gradual retirement, better and more flexible pensions schemes);

c) in health and medical research policies (medical and social research in the fifth framework program for Community research);

d) in combating discrimination and social exclusion (proposals based on art. 13 TEC, now 19 of TFEU).

The Communication of 10 December 2001 raises the problem of health care for the elderly. In particular, the Commission sets out that national health care systems have to deal with longer life expectancy, changing family structures, the rapid development of treatment technologies and the growing demands of health care consumers. The Commission identified three common objectives: making healthcare and assistance for the elderly accessible to all, improving the quality of care, and guaranteeing the long-term financial viability of care systems.

On 10 March 2003, the Commission and the Council presented two joint reports on the conditions of the elderly. The first was entitled "Supporting national strategies for the future of health care and care for the elderly", and the second "Adequate and sustainable pensions." These two reports were presented to the Brussels European Council of 20 and 21 March 2003. They set out the challenges represented by maintaining standards for living, employment and social protection in the context of the ageing population.

Since 2009 the Commission, under the impulse of Council, has issued a series of Communications on the impact of the aging of population in the EU. These documents provide a key input to the analysis of the impact of population aging and are an integral part of the EU's multilateral budgetary surveillance.

5. THE STEER TOWARDS ACTIVE CITIZENSHIP IN EUROPEAN POLICY-MAKING: THE CASE OF DISABILITY

In recent decades, the role of EU in the enhancement of the elderly has been very important, although policy on these fields falls within the Member-States' sphere of power. In the last ten years the European Commission has focused its efforts on understanding how to promote the elimination of any barriers that prevent older people to live in an active way in this stage of their lives. These actions are aimed at adapting healthcare systems in Member States to provide adequate care and remain financially sustainable.

This is evidenced by the numerous communications and resolutions of the various European Institutions. In 2006 the European Commission published a communication entitled "The demographic future of Europe: from challenge to opportunity". It sets out a number of recommendations to take full advantage of the opportunities offered by longer lives. Likewise, in 2007 the European Council issued a resolution entitled "The opportunities and challenges of demographic change in Europe: the contribution of older people to economic and social development".

The European Union has also asserted that accessibility and mobility are the essential conditions to realise the active aging. Thus, the Commission developed the Action Plan on EU Urban Mobility (2009), which promotes the provision of integrated transport solutions focused at citizens in the context of demographic aging. The program aims to diffuse more ecological urban transports and increase accessibility, passenger rights, and intelligent transport systems.

To further promote an inclusive urban environment, the Commission also supports the creation of accessible cities awarding those cities that appear to have developed an accessible environment for all people with reduced mobility.

In addition, to underline the continued commitment of the European Union to allow for the integration of seniors within social communities, following public consultation, the European Council's conclusion of 2009 on "Healthy and dignified aging" and the European Commission's legislative proposal (COM (2010) 462 final.), with the decision 940/2011 adopted on 14 September 2011 by the Parliament and Council, 2012 was proclaimed the "European Year for active aging and solidarity between generations."

The objectives were to raise awareness of the importance of active aging ensuring that this issue occupied a prominent place on the political agenda. The aim of this action it is also to implement discussion, information exchange and mutual learning for promoting the adoption of policies for active aging. Furthermore, it

provided the development of a framework for commitment and concrete action by the European Union and its Member States involving stakeholders and the promotion of activities that would help to combat age discrimination, overcoming stereotypes and removing barriers.

In light of these policies, the European Commission has considered the idea of drafting a European Accessibility Act by using an approach called "design for all". Such an approach requires that environments, products and services are adapted and designed so that everyone can have access to them, in spite of age, gender, ability or cultural background. In this way, everyone enjoys the right to participate in all activities of cities.

In December 2015, the Commission has made public a proposal for a Directive of the European Parliament and the Council on the "approximation of the laws, regulations and administrative provisions of the Member States relating to the accessibility requirements of products and services".

The main purpose of the Directive is to improve the operation of the internal market for accessible products and services. This will enable the realization of the Commission's work program for 2015, which provides a renewed commitment to promote accessibility to the city's structures to ensure the social inclusion of all citizens.

The legal basis of this strategy can be found in art. 9 of the UN Convention on the Rights of Persons with Disabilities: the article requires to EU and EU Member States, as parties to the Convention, to take appropriate measures to ensure accessibility, within the limits of their competence.

Meanwhile, pending the enactment of the Directive, it was used the regulatory instrument, where the European Commission has a mandate to the main European regulatory bodies, CEN and CENELEC, to include "Design for All" in relevant standardization initiatives and ensure that are suitable to the accessibility standards.

6. THE IMPLEMENTATION OF ACTIVE AGEING STRATEGIES: FUTURE PERSPECTIVES FOR CITIES

The social policy for the elderly developed in the last decade within the European area shows a growing interest in the urban environment as a focal area for the protection of social rights.

Indeed, at an international level, the importance of environmental issues and the need to develop an adequate environment for the protection of human rights has been closely connected with policies for the protection of the elderly since the Vienna Action Plan of 1982. The recommendation n. 22 of the Plan states that "[…] The living environment should be designed, with support from Governments, local authorities and non-governmental organizations, so as to enable elderly people to continue to live, if they so wish, in locations that are familiar to them, where their involvement in the community may be of long standing and where they will have the opportunity to lead a rich, normal and secure life."

The Action Plan of Madrid of 2002 further highlights a similar goal, as a specific priority direction is "ensuring enabling and supportive environments." The Plan, on the one hand, addresses the needs of poor older people who migrate from rural areas to urban areas, promoting the implementation of measures for reducing the marginalization of older people who live in rural areas and the improvement of their opportunities to access services and enjoy social life. On the other hand, the Plan reveals a consistent trend toward urbanization and points out the importance of developing studies on the relationship between elderly social inclusion and urbanization. In this context, the Plan declares among its objectives "[…] the promotion of the 'ageing in place' in the community with due regard to individual preferences and affordable housing options for older persons." It particularly recommends the development of age-friendly housing and of an urban environment adequate to develop an independent living of the elderly and an integrated urban community.

The WHO published in 2007 a guide where It identified certain areas where action is needed to ensure that cities can really be "age-friendly," allowing in this way older citizens to exercise their citizenship right, without being excluded or having to depend on other people in order to participate in social life. These areas include: built environment (defined as sidewalks, entrances to buildings, etc.), technologies, housing (such as elevators), information and communication, transportation and services (such as cash machines or vending machines). Especially the outdoor areas and the organization of the buildings are considered significant in order to ensure the well-being and health of seniors. Consequently, the opportunity for older people to access to the services offered by the city without difficulty allows them, in spite of the psycho-physical difficulties that they can have, to continue to participate actively and in-

dependently in social life. Therefore, in the last decades, the key role of "space" for the effectiveness of human rights of vulnerable groups emerged and legal scholars started to investigate more and more the close connection between space and human rights [19, p. 1] [13, Oomen, Davis, & Grigolo 2016].

In this light, the cities have been considered the "new kids on the block" [13, p. 3] in the realization of human rights and are the natural incubators of human rights: in the urban areas the international and European framework of human rights is implemented, by the interplay of different actors (local governments, NGO, private actors) with the double effects of bringing international and European principles into practice and exploring new meanings of those principles, as a result of a bottom-up process.

At European level, this view inspired the European Urban Charter, adopted by the Congress of Local and Regional Authorities of the Council of Europe (CLRAE) on 18th March 1992. The Charter sets out the guiding principles in order to improve the quality of European cities, with specific reference to those aspects of urban development and quality of life that are in line with the Council of Europe calling for the protection of human rights and fundamental freedoms, particularly focusing on the notions of cooperation and solidarity.

The European Urban Charter expressed the idea that all citizens have a fundamental right to live in the city, having to take into account in the design process the differences in age, origin, race, religious belief, political, social, economic, physical or mental disability.

In particular, point 4.7 entitled "Disadvantaged and disabled persons in towns," on the assumption that many cities are designed exclusively by reference to the needs of adults in the prime of their working lives, sets out some principles to implement also the social inclusion of people with physical problems. The buildings architecture, both public and private, must indeed ensure the full enjoyment of all citizens. For example, it indicates that housing and the workplace must be structured in such a way that workers of all ages will find themselves comfortable. The art. 4.7, at principle 4, specifies that "[…] in respect of young people, remedial measures should include sound insulation, privacy, play areas and safety; for teenagers, meeting places, physical recreation and privacy; for seniors, measures to reduce isolation, insecurity and inaccessibility, to provide assistance, means of calling for help and meeting places; for the disabled, appropriate measures in transport, toilet facilities and widespread availability of technical devices to alleviate physical handicap, impaired hearing or vision, for people who walk slowly or with difficulty."

According to this principle, in 2000 it was adopted the European Charter for the Safeguarding of Human Rights in the City. The Charter opens with the proclamation of a right to the city. Indeed, art. 1 provides: "The city is a collective space which belongs to all those who live in it, who have the right to find there the conditions for their political, social and ecological fulfilment, at the same time assuming duties of solidarity."

Then, in 2008 The European Urban Charter was updated with the adoption of the "European Urban Charter II: Manifesto for a New Urbanity". The Manifesto proposes a new city model addressed to all categories of citizens, with special reference to children, elderly, minorities and people with disabilities. The aim is not only to design cities that are efficient from an economic point of view but also liveable for people who live there. European towns and cities have to take into account the new demands of democracy, particularly where participation is concerned. This is the reason why the Manifesto declares that the fight against discrimination of the most vulnerable people is getting stronger, trying to avoid all forms of social exclusion due to the city architecture.

These charters identify the cities as the core place of citizenship and presume the enjoinment of the rights to the city by all of the residents, with special regards to vulnerable people, as a basic condition for the full achievement of a real democracy.

The capacity of the European Union to tackle the demographic change of European people and turn the phenomenon of ageing into a resource for society will heavily depend on urban social policies, which the Union shall implement in the future.

7. CONCLUDING REMARKS

In last 50 years the world's population has seen a rise in the number of elderly people and this has increased attention from the global scientific community and public institutions, both at an international and local level.

The demographic change raised the question of the protection of older people as a vulnerable group, but also the need to achieve their full inclusion into social life and benefit of their contribution to the community where they live.

However, to ensure that senior people can continue to be an integral part of society, some

precautions are necessary to remove those barriers that prevent the self-determination of these people with decreased psychomotor performance.

This paper has provided an overview of the main policies enacted at an International and European level, with the aim of protecting seniors' rights and empowering their participation in social and economic life. One main finding of our analysis is that the need of EU institutions to tackle the demographic chance of European people and turn the phenomenon of ageing into a resource for the society heavily depends on the urban social policies that the EU shall implement in the future. In this sense, cities are the place for bridging across policy sectors to address the concerns of ageing populations in an integrated and cohesive way.

Our work marks the lack of a clear attribution to elders of a "right" to live in the city. A right of this sort is not merely a right to a private property or a "neo-Marxist motto" [1, p. 669], but a freedom related to a new common good, a public sphere of active democratic participation. The design of a right to live in the city as a real liberty needs a new consideration of social justice and democracy, whose main features are the social relationships, that each city as a public space is able to foster, and the services, that it can give to its population. As we have revealed in this paper, this conception needs a new understanding of what is a public space for the life of people, especially for those who are more vulnerable. The European Union must address this new conception to embrace a new idea of society, which is more inclusive and able to tackle the disintegration of everyday social relations.

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СОЦИАЛЬНО-ЭКОНОМИЧЕСКИЕ ПРАВА ПОЖИЛЫХ ЛЮДЕЙ В ГОРОДСКИХ РАЙОНАХ: К ВОПРОСУ О НОВОЙ ЕВРОПЕЙСКОЙ ПЕРСПЕКТИВЕ

В статье рассматриваются аспекты, связанные с эволюцией социальной политики ЕС для защиты пожилых людей в городских районах. Статья предлагает обзор основных политических линий, принятых на международном и европейском уровнях, в целях защиты прав пожилых людей и расширения их участия в социальной и экономической жизни. Один из основных выводов анализа заключается в том, что деятельность институтов ЕС по решению проблемы демографических изменений европейских народов и превращения явления старения в ресурс для общества в большой степени зависит от социальной политики городов, которую ЕС будет осуществлять в будущем. В статье делается вывод о том, что проблемы, связанные с созданием благоприятных для старения и "зеленых" городов, могут быть решены только путем предоставления пожилым людям свобод в публичной сфере активного демократического участия.

Идея статьи принадлежит обоим авторам, при этом разделы 1, 4 и 5 написаны Э. Лонго, в то время как остальные разделы написаны Л. Вани.

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Ключевые слова:
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Keywords:
Senior people; socio-economic rights; ageing-friendly cities; green cities; public sphere.

CONSTITUTIONAL BASICS OF THE PARLIAMENTARY ACTIVITY IN THE RUSSIAN FEDERATION

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The legislative branch of power, represented by the Parliament is one of the core elements of the system of separation of power in a developed democratic state and an effective part of the "checks and balances" mechanism. In this article the author reviews basics of the constitutional status of the Federal Assembly – the Parliament of the Russian Federation, defines main functions and methods of their implementation. The legislative process is under review as well, since it is one of the core functions of a modern parliament and its stages and participants are defined. The author reviews one of the youngest institutions of Constitutional law as well, which is typical for mixed types of republics – the parliamentary control.

The Federal Assembly–the Parliament of the Russian Federation is the highest federal legislative body in Russia. The Parliament is bicameral, which is typical for federative states and includes two chambers: the Federation Council and the State Duma.

The Federation Council is the permanently acting body, representing interests of the subjects of the Russian Federation in the Russian Parliament. It is formatted by two representatives of each subject of the Russian Federation (in total - 170 members) and plus up to ten percent of this number as a representatives of the Russian Federation, nominated by the President of the Russian Federation.

Competence of the Federation Council is defined by *the Constitution of the Russian Federation* and clarified in *the Regalement of the Federation Council*, dated January 30, 2002. It flows from the status of the Federation Council as the body representing the interests of the subjects of the Russian Federation, thus concentrating responsibilities interrelated with the area of federalism [4, P.17]

One of the core functions is *participation in the legislative procedure.* [1. P 246, 247]. The Federation Council participates in the development of legislative acts and adopts laws and amendments. The Federation Council possesses the legislative initiative right, which may be used by the Federation Council as a state body and by its members personally. The Federation Council has the right not to express its opinion regarding several types of laws; however there is a constitutional list of laws which is mandatory for review and approval by the Federation Council.

Subjects of the Federation in Russia have the inalienable right to agree with *changes of the borders between the subjects*. It is done in the form of a local referendum, which later on goes through the approval (in the form of law) process by the Federation Council.

Another function is Approval of Presidential Decrees *on the introduction of martial law and of a state of emergency, which is* introduced by the President of the Russian Federation in a case of aggression against the State or the threat of aggression.

The Federation Council *makes decisions on the possibility of using the Armed Forces of the Russian Federation outside the territory of the Russian*

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Federation. Armed Forces of the Russian Federation may participate in peacekeeping and other types of operations abroad only when they comply with constitutional provisions and are approved by the Federation Council.

In accordance with Federal Law #19-FZ "*On President of Russian Federation elections*" dated by January 10, 2003 and the Constitution of the Russian *Federation the Federation Council appoints elections of the President of Russia.*

The Federation Council plays an important role in *the process of dismissal of the President,* making the final decision on the dismissal in accordance with Article 93 of the Constitution of Russia. This decision should be accepted by at least two-thirds of the total list of members of the Federation Council and adopted within three months from the initiative, accepted by the State Duma.

The President of Russia proposes to the Federation Council candidates for the position of the high court's judges. *The Federation Council appoints the judges.*

Appointment of the *Procurator-General of the Russian Federation* is done on the basis of the Presidential proposal. When the Federation Council does not approve a candidate, the President proposes another candidate within thirty days. The general term of authority for the Procurator-General is *five years.* The Federation Council *appoints and dismisses the Deputy Chairman and half of the auditors of the Accounts Chamber.* The Federation Council may have other authorities regulated by federal laws. For example the Federation Council analyses the proposals of the President for the appointment of the diplomatic representatives in different countries.

The internal structure and activity of the Federation Council is defined by *the Constitution,* federal laws and the *Regalement of the Federation Council.* The basis for the decisions taken by the Federation Council is open to collective discussion of the different issues. Parliament's Chamber conducts hearings which may be both open and closed as defined by the Regalement.

The Federation Council elects the Chairman and several Deputy Chairmen. The Chairman and deputies should represent different subjects of the Federation. Most functions of the Chairman and his deputies are of a procedural nature: they conduct sessions, manage the apparatus of the Federation Council and conduct other procedural activity. The Council of the Chamber, which is a permanent collective body, is organized to arrange the activity of the Federation Council. It is formed by the Chairman of the Federation Council, his deputies, chairperson of all committees and several commissions. Major important bodies of the Federation Council are *committees and commissions,* since the majority of the work is done within these structural bodies. Committees function on a permanent basis, whereas commissions are more *ad hoc* bodies; however, there are still several permanent commissions. All members of the Federation Council except for its Chairman and Deputy Chairmen participate in the activity of one committee. The Federation Council acts on a permanent basis.

The State Duma is the chamber of the Federal Assembly which is formed by national elections. There are four hundred and fifty members, called "the deputies", representing the interests of the Russian population. The Chamber's term of authority constitutes five years. In accordance with the *Federal Law № 20-FZ "On elections of the Deputies of the State Duma of the Federal Assembly of the Russian Federation" dated February 22, 2014* the deputies are elected on the basis of a *mixed electoral system,* combining both proportional and majority systems. *Two hundred fifty deputies* are elected on the basis of the proportional system: from federal lists under a proportional representation system, another two hundred fifty deputies are elected on the basis of majority system.

The scope of competence of the State Duma is regulated by the Constitution in Article 103 and clarified in the Regalement of the State Duma, dated by January 22, 1998. The State Duma provides agreement to the President of the Russian Federation for the appointment of the Chairman of the Government. The proposal of the candidate is submitted by the President to the State Duma. The State Duma shall consider the candidate nominated by the President of the Russian Federation for the post of the Chairman of the Government of the Russian Federation during the week after the submission of the nomination. If the State Duma rejects the candidates three times for the post of Chairman of the Government of the Russian Federation, the President shall dissolve the State Duma and appoint new elections.

In accordance with Article 117 of the Constitution, the State Duma may express no-confidence in the Government of the Russian Federation by a majority of votes of the total number of the deputies of the State Duma. The President of the Russian Federation is free to announce the resignation of the Government or to reject the decision of the State Duma. If the State Duma again expresses no-confidence in the Government of the Russian Federation within three months, the President of the Rus-

sian Federation shall announce the resignation of the Government or dissolve the State Duma.

The State Duma *appoints and terminates the responsibilities of the Head of the Central Bank.* The term of authority of the Head of the Central Bank constitutes 4 (four) years. The Candidacy is proposed by the President of the Russian Federation. The State Duma *appoints and terminates the responsibilities of the Chairman of the Accounts Chamber and half of the Accounts Chamber auditors.*

The State Duma *appoints and terminates the responsibilities of the Commissioner for Human Rights of the Russian Federation.* The Commissioner for Human Rights of the Russian Federation is the official State Body, which was established to ensure the performance of the State guarantees in the sphere of the State defence of rights and freedoms. The term of authority of the Commissioner is five years. The State Duma is also empowered to resign the Commissioner.

Very typical for the parliament – the State Duma announces the amnesty which is a collective act and means official forgiveness of the past offences. The Amnesty Act is adopted by the State Duma in the form of the Resolution on Amnesty. Commonly the Amnesty Act is associated with special events or holidays.

Within the process of dismissal of the President *the State Duma Accuses the President within the procedure of the official dismissal of the President from his official position.* The proposal for accusing the President should include the defined characteristics of the crime and a clear explanation of the President's role in the performance of this crime and *one-third of State Duma members* should support the initiative of accusing the President. Afterwards, the State Duma forms the special temporary commission on the assessment of the case and the procedure of its performance, which reviews all the relevant documentation and finalizes its opinion in the form of a Conclusion, which should be supported by the majority of the commission. After acceptance, his Conclusion is sent to the Council of the State Duma and not less than two-thirds of the votes of the State Duma members should approve the accusation.

The State Duma *performs activity in the sphere of international relations,* namely ratifies and denounces international agreements, adopts decisions on different aspects of international relations. An international agreement is introduced to the State Duma by the President with the request for ratification thereof. The State Duma reviews and adopts the ratification in the form of federal law, which then, passes to the Federation Council and the President for promulgation. The State Duma actively participates in inter-parliamentary relations, signing the agreements with foreign parliaments and parliamentary organizations. The Chairman of the State Duma represents its interests in relations with other organizations.

The overall structure of the State Duma is regulated by federal laws. The *Chairman of the State Duma* is the head of the Chamber. The Chairman is elected from and by the deputies of the State Duma by secret voting. It is necessary to gain more than half the votes of the members of the Chamber. Normally such elections are held after the new State Duma has been elected by the voters. Simultaneously with the Chairman the deputies elect the First Vice Chairman and other Vice Chairpersons. The number of Vice Chairpersons is established by the State Duma Regalement. It is worth mentioning that all these people should represent the interests of different party factions.

The *Council of the State Duma* is created for the preliminary preparation and decision of organizational issues. This structural unit is permanently acting. The permanent members with the decision vote are the Chairman of the State Duma, the first Vice Chairmen, Vice Chairmen and leader of the party fractions. The heads of the Committees and Commissions can participate in the activity of the Council, however only with advising votes.

Another structural element of the State Duma *is the deputies' faction,* which is the organized community of the deputies, belonging to the one party. All deputies' factions act on the basis of strict party discipline.

Finally, there are *committees and commission* - the main structural units in the State Duma, where most internal work is done. As a general rule–the committee is the permanent structural unit; the commission is formed on a temporary basis for the decision of certain issues. However, there are still permanent commissions as well, like the Commission on Deputies' Ethics. Committees are formed on the basis of equal representation of the deputies from different deputy factions. All deputies should be members of the committees. This rule applies in such a way, that a deputy should be member only in one Duma committee, however the Chairman of the Duma and Vice Chairmen do not enter into any committee. Committees and commissions work in the form of meetings, so that there should be not less than two meetings within the month, once two weeks. A quorum constitutes more than half of the deputies.

There are two sessions within the year: *the spring session* from January 12 until June 20 and

the autumn session from September 1 until December 25.The State Duma conducts hearings twice a week. The President, Chairman of the Government, ministers, members of the Federation Council, the Commissioner for Human Rights, judges of the Constitutional Court and Supreme Court, Chairman and auditors of the Accounts Chamber, the Procurator-General, and the Head the Chief Elections Commission may present on the hearings. Members of the Government may be invited to participate and provide answers to deputies' questions.

The activity of the elected deputies of the State Duma is terminated in the following situations: expiration of the term of authorities; early termination of the authorities by the President of the Russian Federation.

Early termination is possible in two situations: when the State Duma is in conflict with the President or in conflict with the Government.

One situation of the *conflict between the President and the State Duma* is possible, when, in accordance with the Constitution *the President proposes the nominee for the position of the Chairman of the Government* and the State Duma rejects this proposal three times, done by the President. The President dismisses the State Duma and appoints the Chairman of the Government by himself.

A second situation o*f the conflict between the Government and the State Duma* takes place when the State Duma votes for non-confidence in the Government. In this situation if the State Duma votes for non-confidence twice within three months the President should make a decision and choose, whether the State Duma or the Government is dismissed. If the President dismisses the State Duma new elections should take place within four months after the dismissal date.

The Constitution of Russia proclaims the following *limitations for the dismissal* of the State Duma: its activity cannot be terminated within one year of the elections, within the period of the President's official dismissal, starting from the announcement of the charge of the President by the State Duma and until the Federation Council confirms the charge and within six months up to the expiration of the President's authority.

The competence of the Federal Assembly is realized in the form of laws, which are adopted by the chambers, thus the Federal Assembly actively participates in the *legislative process* [1. P. 260, 262]. The Federal Assembly reviews the following types of laws: laws on amendments to the Constitution, Federal Constitutional laws and Federal laws. The Legislative process includes several mandatory stages, which are important and follow in a certain sequence. Only completion of one stage permits transfer to the next one. All the stages are formalized and duly documented; all the rights and obligations of the participants are fixed by the constitutional regulations. This is quite typical for most of modern states [2. P. 15, 28]

First stage is called the *Legislative initiative* [2. P. 46] - when authorized bodies, empowered by the rights concretized by the Constitution, initiate drafts of constitutional and ordinary federal laws. In accordance with Article 104 of the Constitution of Russia, the right for legal initiative belongs to: the President of Russia; the Federation Council; members of the Federation Council; deputies of the State Duma; the Government of Russia; legislative bodies of the subjects of the Russian Federation; the Constitutional Court of Russia, the Supreme Court of Russia, within the scope of competence of these courts, which is limited by the Constitution and federal legislation.

The next stage is a *review by the Federal Assembly,* which includes the review by the State Duma and a further review by the Federation Council. In Russia the only way for the law to go through Parliament is to be introduced to the State Duma and afterwards move for review by the Federation Council, but not vice a versa.

The draft of the Law is introduced by the subject of the legislative initiative to the State Duma and is forwarded to the Chairman of the State Duma.

Readings are the legal form of the discussion and approval of the law draft. The legal draft considers the review in the State Duma in three readings. There is still a possibility for the draft to be approved after the first reading and we will review this procedure in this chapter in more detail. *The First reading* is the primary review of the draft by the State Duma deputies. Within the primary review the main provisions of the draft are being discussed and the question of the general necessity of the law, the overall concept and compliance with constitutional provisions. The responsible committee provides its position as well.

Within *five days* after acceptance in the first reading the draft is sent to the subjects of the legislative initiative. Within the first and second readings the subject of the legislative initiative may propose amendments to the law, which are further consolidated and provided for discussion during the *second reading*.

The Second reading means the discussion of the draft in detail by the deputies of the State Duma. This is the most detailed discussion

of the draft within the State Duma, when the proposed amendments are being discussed and voted on. The competent Committee gives advice on the list of amendments for rejection. In the case that the deputies agree with them– they reject such amendments. The discussion concerns the amendments for approval, the deputies' vote on them and as the result of the discussion the list of the approved amendments is created. After the second reading is finished deputies vote on acceptance of the draft in the second reading. The draft, accepted in the Second reading, is sent to the competent Committee for further adaptation in accordance with the amendments accepted.

The Third reading is the final reading of the draft of the law. It means the general discussion on the law with all amendments, agreed on the Second reading and incorporated into the draft text. It is not permitted to introduce any changes on the stage of the third reading, however in some situations, if supported by the majority of the deputies, the draft may be returned to the Second reading, where it can be discussed in more detail. In accordance with the Regalement of the State Duma the draft of law can be voted in Second and Third readings on the same day, in which case the final law draft is ready and legal and linguistic expertise of the draft has taken place.

If the draft is accepted it means that the law is approved by the State Duma. For approval by the State Duma the federal constitutional law should get two-thirds of the deputies' votes (301 votes). For approval of the ordinary federal law it is necessary to get a majority of votes (226 votes). This rule is applied to all readings in the State Duma. After the review and approval of the law in the State Duma the law is transferred to the Federation Council within five days.

The Federation Council plays an important role in the legislative process in the Russian Federation; however its participation varies, depending on the type of law and type of question, covered by the concrete law. In accordance with Article 106 of the Constitution of the Russian Federation the Federation Council is obliged to review the following types of federal laws: on the federal budget; on federal taxes and duties; on finance, currency, credit, customs' regulations, monetary emission; on the ratification and denunciation of international agreements; on the question of the status of the State border; on issues of war and peace. The Federation Council *is also obliged* to review the *Laws on Amendments to the Constitution* and the *Federal Constitutional Laws.*

The Federation Council should review the law *within fourteen days* of its provision to the Federation Council by the State Duma. When the law is entered into the plenary meeting of the Federation Council it is reviewed during one discussion. Upon discussion the Federation Council makes the decision on whether to approve or to decline the law. Federal law is approved by the majority of votes; Federal Constitutional Law is approved by a qualified majority (*three-quarters of the voices*). If the Federation Council is late with the review and does not provide its opinion within fourteen days, the term is prolonged to the next meeting of the Federation Council.

If the Federation Council approves the Law it is transferred further for review by the President of the Russian Federation. If the Federation Council declines the Law it is returned to the State Duma for consideration. The rejected law is supported by the official resolution by the Federation Council with clarification of the list of articles and parts opposed by the Federation Council, which is necessary to conciliate with the State Duma. The proposal to create the Conciliation Commission to solve all the disagreements may also be part of this official resolution.

The State Duma may *overcome the objection and opinion of the Federation Council* by the voting of the qualified majority, when two-thirds of the State Duma vote for the edition of the law, adopted by the State Duma; the objections of the Federation Council are treated as overcome and the law is transferred to the President for signature within five days.

The next important stage is called *promulgation by the President of the Russian Federation.* Promulgation means the sanctioning of the law by the Head of State–the President of the Russian Federation. Promulgation consists of two stages: *signature by the President and publication of the law.* Promulgation is very important on the way to the full legal force of the law and all the stages should be competed in full [5. P. 144, 145].

In accordance with Article 107 of the Constitution of the Russian Federation the President signs the law and publishes it. The President should sign it within fourteen days of receipt of the law from the Federation Council or use his *veto right.* Veto is one of the control functions of the President, permitting him to influence the legislative process on the stage of promulgation. The President of the Russian Federation possesses a *suspensive veto right,* which he may use for *ordinary federal laws.* A veto right cannot be applied for the Federal Constitution laws as

well as for the laws of amendments to the Constitution. When the President agrees with the law–he signs it within fourteen days and sends it for official publication. If the President uses his veto right, the law is treated as rejected and is returned to the Federal Assembly for further review.

Federal law should be officially published within *seven days* after the President has signed it. Official publication means publication in printed and internet sources, directly mentioned in the law. Federal laws enter into force on the expiration of *ten days* after the law has been officially published, until another term is directly mentioned in the law.

The Russian Federation is a republic of a *mixed type,* where the government is controlled by the Parliament, thus the parliamentary control is a widely used mechanism. The Federal Law "*On Parliamentary Control*" systematized all the forms of control in Russia and clarified the principles and forms of application.

Parliamentary control pursues several purposes. It is a valuable mechanism in the revealing of key problems in government activity; it assists in the support of the constitutional rights of a person, helps to strengthen legality and acts as an instrument in corruption mitigation [3. P. 148].

Parliamentary control can be applied in t*he following forms:* review by the State Duma of the question of confidence in the Government of the Russian Federation; taking measures by Chambers of the Parliament, committees of the Parliament and the Accounts Chamber on parliamentary control in the sphere of budget relations; hearings by the State Duma of the yearly reports by the Government on the performed activity, including answers to the questions from the members of Parliament; review by the State Duma of the annual reports by the Central Bank of the Russian Federation; hearings by the State Duma of the reports, done by the Chairman of the Central Bank; making Parliamentary inquiries, done by the Chambers; arranging deputies' inquiries, done by the deputies of the State Duma and members of the Federation Council; hearings of the reports, done by the ministers and other governmental officials within "governmental hour"; hearings of the Chairman of the Government, deputies of the Chairman of the Government, the Procurator-General, Chairman of the Central Bank, other state officials in review of the extraordinary situations; appointment and dismissal of the Chairman of the Accounts Chamber, his deputy and its auditors; coordination between members of the Parliament and auditors of the Accounts Chamber; coordination between members of the Parliament and the Commissioner for Human Rights in the Russian Federation; hearings by the Federation Council of the annual reports of the Procurator-General of the Russian Federation on legality and law and order maintenance in the Russian Federation; invitation of Government officials and other state officials to the Parliamentary committees and commissions; sending representatives of the Federal Assembly for the participation in the current activity of the organizations of different forms; conducting Parliamentary hearings; conducting Parliamentary investigations.

As a result of the measures taken for parliamentary control the chambers of the Russian Parliament are empowered to entrust the committee or commission of the Chamber to develop a relevant draft of federal law; propose the relevant state body or state officials to take measures for the mitigation of the violations of law and elimination of the reasons for such violations; review an issue of confidence in the Government; apply to the Procurator's office or the Investigative Committee of the Russian Federation; dismiss officials, whose dismissal is with the participation of the legislative body. No doubts, that the Parliament of the Russian Federation – the Federal Assembly plays important and valuable role in the mechanism of separation of power, established by the Constitution of 1993 and implemented during more than twenty years of constitutional development.

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КОНСТИТУЦИОННЫЕ ОСНОВЫ ПАРЛАМЕНТСКОЙ ДЕЯТЕЛЬНОСТИ В РОССИЙСКОЙ ФЕДЕРАЦИИ

Законодательная власть, представленная парламентом, в развитом демократическом государстве является основой функционирования системы разделения властей, эффективным элементом системы сдержек и противовесов. В данной статье автор рассматривает основы конституционно-правового статуса Федерального собрания – парламента Российской Федерации, определяет основные функции и методы их реализации. Детально изучается законодательный процесс, являющийся одной из ключевых функций современного парламента, выявляются его этапы и участники. Автор уделяет также внимание и относительно новому институту конституционного права в России, характерному для республик смешанного типа – парламентскому контролю.

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Ключевые слова:
Федеральное Собрание Российской Федерации, парламент, Российская Федерация, Россия, Государственная Дума, законодательный процесс, парламентский контроль, Совет Федерации, депутат парламента, федерация.

Keywords:
The Federal Assembly, parliament, Russian Federation, Russia, the State Duma, legislative process, parliamentary control, the Federation Council, member of the parliament, federation.

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FROM DATA PROTECTION TO «PRIVACY BY RESEARCH» FOOD FOR THOUGHT IN THE LIGHT OF THE NEW EUROPEAN GENERAL DATA PROTECTION REGULATION

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Valentina Pagnanelli**

The paper recalls the process which led to the adoption of the new european Data Protection Regulation, in the context of the rapid development of the Information and Communication Technologies and the amazing increase of data flows (Big data). Data Protection and Privacy Protection could be seen as limits to the development of technologies. On the other hand, the rapid evolution of Smart cities and ICTs brings new risks for the protection of fundamental rights. The new european Regulation n. 2016/679 could be insufficient to protect privacy rights in the age of Big data. Maybe some new instrument is necessary to protect personal data and, consequently, privacy. The paper proposes the concept of «Privacy by Research», intended as a new privacy-friendly method of design for devices, databases and apps.

Albeit its unitary conception, Simone Calzolaio drafted Sections 1, 2, 3 while Valentina Pagnanelli drafted Sections 4 and 5.

1. DIFFERENT POINTS OF VIEW ON PRIVACY AND THE INTERNET. PRIVACY AS A LIMIT TO EVOLUTION OR A WORTH PRESERVING VALUE?

Computer scientists and law scholars normally observe the evolution of the Internet from two different points of view.

The first ones act like pioneers in search of new technological discoveries; they do not worry much about the endless accumulation of data (and personal data).

The second ones, conversely, tend to see problems everywhere: it is no coincidence that many publications on data protection contain the word "threat".

The consequence is a clear distinction between two ways of observing the evolution of the Internet.

On the one hand there are those who see threats to privacy [5, Rodota, 1995], and on the other hand there are those who feel threatened by privacy protection, because of the risk that data protection could end up restricting the freedom of the Internet [4, Poullet, 2009].

This difference of views, as well as a substantial number of practical problems, is strongly influencing the way in which law experts intend to act in the field of privacy protection.

To get good privacy regulations it would probably be advisable to abandon the dispute between cyberlibertarians and cyberpaternalists (Bernal, 2014).

Anyway, it is a matter of fact that the rapid development of the Information and Communication Society has taken to a reality where *"The Internet is overturning traditional market structures by providing a common, global infrastructure for the delivery of a wide range of electronic communications services. Publicly available electronic communications services over the Internet open new possibilities for users but also new risks for their personal data and privacy* (1)".

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It's worth mentioning three cases related with the growth of ICT that can be seen as innovations and also as threats to privacy: the Internet of Things (IOT), the practices of Profiling and Behavioral Tracking, and the increasing Cross-border data Flows.

First, the so-called IOT: even if the definition is not universally shared, it can be said that IOT is the use of things through the Internet by man. IOT is the connection of everyday objects (eg TV, appliences and exercise equipments) to the Internet [3, p. 99]. Actually this innovation enables to collect a big amount of data about property, people, plants, animals [3, p.99].

Many aspects of life can be managed simply using a smart phone. This is a consistent innovation but at the same time it involves risks.

Security systems for data handled through IOT are not yet adequate. For example hackers could easily reach all the data (and consequently information) relating to the users, and use them for blackmail activities or to commit other crimes.

That particular kind of data mining called Profilation is another potentially dangerous activity.

"Profiling is a technique of (partly) automated processing of personal and/or non-personal data, aimed at producing knowledge by inferring correlations from data in the form of profiles that can subsequently be applied as a basis for decision-making.

A profile is a set of correlated data that represents a (individual or collective) subject.

Constructing profiles is the process of discovering unknown patterns between data in large sets that can be used to create profiles.

Applying profiles is the process of identifying and representing a specific individual or group as fitting a profile and of taking some form of decision based on this identification and representation". [1, p. 3]

Profiling could be considered a threat to privacy because of the amount of data handled and collected by the data processors and because of the private or governmental use of the results obtained (2).

The Directive 95/46/EC on privacy doesn't mention the word "profilation", even if there is a provision about activities related to profilation. The new european Regulation conversely contains a more specific provision about profiling techniques with the enunciation of stricter rules (3), but nevertheless the use of profilation is considered to be a risky pratice for the protection of privacy, as we shall see in the following parts of this paper.

Also the so-called Behavioral Tracking is strictly connected with smart technologies. This practice is based on cookies, that are useful to get information about life-style, interests and buying habits of individuals.

On-line tracking has enhanced the potential of off-line profiling; nowadays the on-line tracking, together with the volountary submission of personal information through the social networks (4), allows companies to collect a big amount of personal information of impressive commercial and economic value [6, p.35].

Third case, the cross-border data flows represent another example of potential data protection risk: it is still a priority for Goverments and Regional and International Institutions to ensure safety and privacy of data transmitted from a State to another, expecially if out of european borders.

Safe cross-border data flows are needed to develop the single market, and also to ensure international trade, but the security of those flows is not always adequate, and legislation need to be updated. Generally speaking, data protection rules should not interfere with business, but the market should not use personal data as "goods without owners (5)".

These examples seem to confirm the need to develop at least two additional fields of investigation and search for law scholars and computer scientists: Privacy Protection as an independent object of research and Privacy Protection as technological standard of research in progress.

2. THE SURFING IN THE INTERNET AND THE WAY BACK TO THE RIGHT TO BE LET ALONE

As highlighted above, the use of new technologies like email, social networks, on-line banking, GPS navigation system, video games, apps, public wi-fi and so on, makes people produce an avalanche of data.

Consequently, nowadays almost all law studies collect and list the actual risks associated with the evolution of the use of the Internet. Whether if we see it as an opportunity or as a risk, it is a matter of fact that the amount of data associated with us is increasing steadly. With the so-called *Smart cities* it is no longer to share information or services through the Internet, but to manage the things we do, and we use in our private life or in our personal businesses (6).

Normally it comes to personal data. Often it comes to sensitive data.

It is true that all the apps and services that people usually use could not exist without a constant data flow.

On the other hand, the set of data related to each person could somehow jeopardize the

so-called Habeas data (that is, the right to protection of personal data and the so-called right to informational self-determination (7)), with considerable impact on private life.

Today you can get very personal information (sensitive information) about any person just by crossing simple and/or personal data. This is the so-called "Big data": a huge amount of data, produced daily because of the digital lives of people, companies, governments, and then handled and stored in those non-places called "clouds (8)". This data, properly interrogated, becomes a source of endless information, with a great economic value. The result is a new and flourishing field of research: the "Big data analytics." Currently, it is no longer necessary to process personal or sensitive data, to draw analytical information on individuals.

Only by querying and crossing Big data (date inference and re-identification) it is possible to obtain personal, analytical, intimate, confidential information (9). It is interesting to note, therefore, how the technological evolution and the impact of the digital life on the real life is gradually making obsolete what only a few years ago was an acute innovation. Article 7 (on the right to respect for private and family life) and Article 8 (on the right to the protection of personal data) of the EU Charter of Fundamental Rights distinguish two rights that are probably one (10). In the case of the so-called Digital natives, data protection and protection of private and family life tend to coincide since their birth. Nowadays it seems almost impossible to defend our right to be let alone, as a right to withdraw from society (11); citizens seem to be able to defend at least their "right to be forgotten", which is a the renewed version of the right to privacy [8, Warren & Brandeis, 1890], connected to our digital life. Our privacy seems to coincide with our digital life, and as we said, privacy tends to become one with data protection.

Already before the adoption of the new Regulation, the European Court of Justice (ECJ) ruled on the fundamental right to privacy. In the famous Google Spain judgement (12), the ECJ proclaimed the existence of the just mentioned right to be forgotten, with and extensive interpretation of the provisions of Directive 95/46. The decision focused on the lack of a specific provision in the existing european set of rules, de facto highlighting the need for the european legislator to fill the gap (13). Today, Article 17 of the General Data Protection Regulation (GDPR) states the existence of a Right to Erasure (Right to be forgotten), which seems to be nothing but a personal data management tool, useful to protect private life, through data protection. The European Court of Justice has had the role of defender of personal data, in another important decision, the so called Facebook case, in which the judges of Luxembourg declared the invalidity of the Safe Harbour scheme, containing the fundamental principles about transfers of personal data from the European Union to United States (14). The decision states that "*the Commission did not state, in Decision 2000/520, that the United States in fact 'ensures' an adequate level of protection by reason of its domestic law or its international commitments* (15)", and therefore the data transfers from EU to US had to be considered at risk for data security. As a result of the Facebook decision, the Safe Harbour framework has been quickly replaced by the new EU-US Privacy Shield Framework (16). On 12/07/2016 the European Commission adopted its decision on the EU-US Privacy Shield, which allegedly contains more obligations for companies, guarantees for citizens, greater transparency in data processing and controls, as well as mode coded complaint. The possibility remains for the US Intelligence to get hold of personal data for security purposes, but with certain limitations. Only a trial period will allow to make assessments on the effectiveness of the new agreement. What is important to note is that the Court, by protecting in different ways the personal data of european citizens, has created a kind of "european personal data", which need to be protected because of its economic value, and because of the real risk for privacy of persons.

It is therefore easy to see that the evolution of the european legal framework on data protection was already in progress at the moment of the adoption of Data Protection Package. But it is certainly the GDPR that takes a very important step forward effectiveness of data protection, by defining and regulating profiling in several provisions (17).

Actually the previously mentioned technique of profiling is a perfect exemple of union between personal data and privacy – and plastically between Articles 7 and 8 of the Charter - and at the same time of the high risk associated with this technique. Profilation is a risky practice because the data subject could lose his/her right not to be subjected to a decision, which is based solely on automated processing of personal information and which produces legal effects concerning him/her, such as the automatic refusal of an application for online credit or electronic hiring practices without human intervention.

The two cases described above, together with the new European legislation on profila-

tion, show the huge importance of the control on personal data, that is an effective protection of privacy, and which is closely linked to the increase of the use of digital services.

3. A DEEPER LOOK ON WHAT A SENSITIVE DATA IS TODAY (AND THE NEW EUROPEAN WAY TO PROTECT PRIVACY)

As just said above, the evolution of the Internet makes us reflect on what is a personal data and, in particular, a sensitive data.

By itself the sensitive data is the personal data suitable to reveal the racial and ethnic origin, religious or philosophical beliefs, political opinions, trade-union membership, as well as the personal data suitable for disclosing health or sex life (18).

The difference between the personal and sensitive data is that the personal information allows or may allow the identification of data subject, while the sensitive data allows or may allow the identification of the personality of data subject.

However, the evolution of the Internet suggests that it is not easy and may not be sufficient to define abstractly what a sensitive data is.

For example, a multiplicity of personal data process do not produce - in European Directive 95/46 – a single sensitive data. None of them - normally - is a sensitive data.

Anyway, as already seen on paragraph 2, a simple set of (not personal) data referring generically to a certain environment which are crossed with another set of personal data are certainly allowing the disclosure of racial or ethnic origin, religious, philosophical and political beliefs, health status and sexual life of a person much more than a set of sensitive data.

The amazing growth of the use of the Internet produces huge quantities of data. From these data, often merely generic or personal, it is easy to obtain sensitive or highly sensitive data about people.

Therefore, "sensitive data" is not conditional only to the nature and to the character of the data, but are also involved with the amount of general and personal data available in the Internet. Sensitive data is something dynamic, related to the procedures and practices of Internet use, as much as to the nature and character of the data.

And indeed the new european Regulation takes into account this new context in which all data can give sensitive information if correctly crossed and combined with other data. The GDPR gives to Member States the opportunity to choose the way to protect special categories of data (sensitive data (19)), recognizing the need for Member States to assess wheter a processing of data leads to a revelation of personal information or not.

Even if Article 9 recalls the former statements about sensitive data, the real regulation is in Article 4. There we find new definitions, that better fit on the emergence of new risks for personal data (and privacy). In this context the reason for the introduction of definitions such "profilation (20)" and "'pseudonymisation (21)" seems clearer. The new european legislation has taken note of the profound change in conditions, primariliy due to the evolution of technologies. On the one side it sharpens the set of definitions about types of data and types of processess. On the other side it leaves a consistent "margin of manoeuvre" to Member States, to specify their rules for particular kind of informations.

But before going on with this reflection it shall be useful to have a look at a worldwide perspective about use of data and ICT. It will help to understand the reasons of such political and legislative strategies of the European Union.

4. A WORLDWIDE PERSPECTIVE. THE BIRTH OF "EUROPEAN PERSONAL DATA"?

If we look at the trend of data production, data processing and data retention on a map, we can easily observe that there are three major global players, playing different roles and having different rules on data protection.

Most of technological devices used to surf in the Web (personal computers, smartphones and so on) are produced in Asia and, in particular, in China. Nevertheless China is shielded from information and data flows coming from abroad, but it not committed to defending the privacy of chinese citizens.

The United States instead produces most of the necessary tools to surf in the Interet (and consequently to create Big Data): apps, Internet services as cloud computing, video games and so on. The US is the country where most of the data are collected and stored.

It is interesting to note that the United States does not have a general data protection law. However, it's no surprise that US has a legislation on Intellectual Property and protection of economic exploitation of softwares (22).

The European Union in this context plays a special role. It does not produce devices and is a not-so-big producer of services for the Internet. However, european citizens are the biggest consumers of devices and at the same time the biggest data producers in the world.

The European Union is the major producer of data, the ones we called "european personal data"; most of this european data ends up in the United States.

It is no coincidence, then, that the European Union data protection system is more restrictive than in the United States and China.

Let's briefly recall the european model of strict-regulation, and the opposite model of US self-regulation (23).

The continental model is based on a very pervasive set of rules, that try to govern all the aspects of the internet and the relationships trought the different actors of the economic scene (OTT, providers, devices producers, customers...). Strict-regulation corresponds to the presence of many sources of law, many rules from different institutions, and also to the creation of specialised, independent authorities.

The US model on the other hand is based on the idea that in some ways technology can rule by itself.

"Self-regulation" corresponds to a substantial absence of public institutions in the creation and impleementation of standards: the main actors shall be the ICT-companies and other stakeholders. This system is supposed to ensure a better protection of the activities on the Internet: control on contents, protection of personal data, protection of Intellectual Property rights (24).

Conversely, in the just described context of roles and relations, the European Union goes on on the path of strict-regulation, choosing to substitute a Directive with a Regulation on data protection. Many scholars seem to be doubtful about this choise, as we shall see.

5. THE STRANGE ROLE OF THE EUROPEAN UNION.

5.1 The path from the Directive to the General Regulation

The fast and irrepressible evolution of the information society, together with globalization and increasing digitization of human activities (e-commerce, e-government, e-health ...) have gradually revealed the inadequacy of 1995's law to cope with the digital and telematic transposition of traditional and new digital native cases.

The growing need to protect all these legal situations, joined to the strategic importance of the management and use of personal data in the development of the Digital Single Market, have been the engine of decisive legislative steps.

It is no coincidence that the power to regulate data protection has become - since the Treaty of Lisbon - a competence of the EU. And thus, the new EU Regulation on data protection n. 2016/679, repealing Directive 95/46/EC which regulated the protection of personal data in the EU over the last twenty years, seems to indicate a clear change of pace of European Union.

Indeed the European Union has the stated purpose to get *"the highest data protection standards in the world* (25)" to generate trust in the consumers and to accelerate and enhance the economic growth of the Digital Single Market. The adoption of the GDPR seems to confirm this aim.

Let's briefly recall the main difference between Directives and Regulations. The first ones leave Member States the power to implement the Directive through national legislation and, accordingly, the possibility of introducing significant variations in the regulation of specific aspects of national law. Instead, a Regulation is directly applicable throughout the EU and it does not need another Member state law to be applied (26).

The Directive 95/46 had equipped the then Community of a first European "model" of protection of personal data, with a matrix containing all the essential elements to afford the national data protection tools (definitions, regulations, establishment of a supervisory authority, sanctions, rules for special sectors). This scheme was then also significantly declined in different ways by Member States, in the transposition phase. Indeed Recent studies show that each European country applied the Privacy Directive very differently.

The GDPR n. 2016/679 is now supposed to ensure a uniform application of the rules on data protection (27).

As it has been said previously, the approval of the Data Protection Regulation was anticipated and in some way suggested by the activity of the European Court of Justice.

The mentioned decisions Google Spain (on the right to and responsibility for the search engine), Facebook (on the transfer of personal data to the United States) and the one about Data Retention (with declaration of invalidity of Directive 2006/24 (28)), have drawn attention on matters of crucial importance, on which later European legislator intervened [2, p.681].

So, the new Data Protection Package, together with the Roaming Directive (29), as well as that of 2013 on Re-use of Public Sector Data (30) now introduce in the European Union many instances of renewal, focusing attention on IT evolution, and placing the information society in the core of the Digital Single Market, the heart of the European Union.

5.2 Contents of the Regulation

The Regulation 2016/679 confirms the general principles of data protection, and introduces important new features.

As just mentioned, the innovations included in the Regulation were needed, given the prodigious development of the Information Society, and thus given the need to provide the EU with a unitary set of rules.

The guarantee of a single body of law uniformly applicable in the whole European Union will hopefully enhance the protection of personal data of citizens, and it is also supposed to accelerate and simplify the development of businesses.

Firstly the reform should lighten the bureaucracy, by reducing notification requirements. Another important step towards simplification should be the so called one-stop-shop system: a company operating in different States will only have to deal with one Data Protection Authority (DPA), that is the Authority of the Country where the company has its principal base (Art. 56).

Moreover, the new GDPR will apply also to extra-european companies offering products and services to european citizens (Art. 3), in this way trying to solve the huge problem of jurisdiction and applicable law to companies operating with ICT.

On the other hand, the new Regulation has te objective of strengthening the protection of fundamental rights of citizens.

It's the case of the many times mentioned right to be forgotten, at first theorized and protected by the Court of Justice, and now canonized in Art. 17, in a statement which takes into account the necessary balance between privacy and freedom of information.

The Regulation also introduces and formalizes the existing principle of Privacy by design. Actually a reference to Privacy by Design was already contained in the forty-sixth Considering the 1995 Directive (31), but it had not been transposed among the provisions of the act.

Furthermore, this rule was already part of the proposals for the review of the Convention n. 108 of the Council of Europe for the Protection of Individuals with Regard to the Processing of Personal Data (32), submitted in 2012 by the Consultative Committee (33).

Today the "Data protection by Design (and by Default)" is a general principle of privacy-friendly setting of products and services, regulated by Art. 25 of the new General Regulation.

The new Regulation introduces many other important rules.

Here is a quick mention of the main of them.

First of all, the data portability: it ensures that the transmission of personal data of a data subject from a controller to another takes place without obstacles (34).

The new rules also impose to organizations and companies to notify to the data subject and to the data protection authority if data is accidentally or unlawfully destroyed, lost, altered, accessed by or disclosed to unauthorised persons (35) (Data breaches, Art. 33-34).

The new GDPR should also increase responsibility and accountability for the controller and the processor, with the introduction of the data protection impact assessment and the introduction of the figure of the data protection officer (36) (Artt. 35 ff.).

Finally, the new GDPR reveals a greater awareness than in 1995 of the economic value of personal data and of the great risks that lie behind the processing of Big Data which characterizes the Information and Communication Society (37).

5.3 Limits of the Regulation and limits of law. The need of a «Privacy by research».

Many scholars analyzing the Regulation highlighted numerous critical flaws.

In the legal world it is now widely believed that the traditional principles governing data protection are no longer adequate to manage the communication and information through the Internet.

The reaction of the jurist - as can be seen also in the Regulation n. 2016/679 - is to introduce new laws.

But someone says that the new set of rules risks to be already outdated at the moment it will entry into force (38).

First, this Regulation will be effective from 2018, and the intervention of the Member States in the implementation phase will be sensitive. The timescale necessary for Member States to comply with the new law seems to be really extended, in comparison to the speed of change of technological development. There is the real risk for the new GDPR to be already obsolete once it comes into force. Large companies and stakeholders on the other hand will enjoy a good amount of time to deal with the new rules and possibly overcome them.

Second, the regulatory model adopted by the european legislator seems to be, once again, anchored to a traditional idea of privacy law, where rules are addressed to the controller and data protection does not empowers the data subjects (39).

Moreover, the new european Regulation, being a stiff instrument, risks not to be updated with respect to the continuous changes of technology (and Digital Market): with the GDPR the gap between law in the books and reality seems to increase rather than decrease (40).

Even singular instruments regulated by the GDPR seem to be not-so-effective.

For example, it is worth asking wheter forms of impact assessment of privacy (privacy by design) and self-management of data (privacy by default) will be effective or not.

In other words, we have to wonder if the new privacy impact assessment is enough to achieve the purpose of an effective guarantee of data protection or it is just a bureaucratic exercise more. From many parts it has been suggested to better protect privacy by strenghtening *habeas data*, which is the real control of our data, by creating new instruments and somehow overcoming the consent as the main tool to control personal data (41).

Privacy by design could be the right instrument, because of its very nature, and it could drive institutions and actors of the IC Society to move *from a reactive to a proactive approach to privacy* [7, p. 331].

But maybe it is not enough, because data protection is not in the hands of data subjects. A new instrument is needed, through which the person shall be the owner of his/her data, and he or she will be able to decide about the use of it.

So, a new way of thinking is needed. One option could be a contractual approach which is centred on the agreement of the parties on the use of personal data (42); otherwise it is necessary to introduce a flexible tool (43), not linked with stringent provisions, and focused on a prior understanding and prediction of the risks connected to the loss of the sovereignity of the people over their data. This new tool shall be useful to create a technological environment in which the data subject will be the real controller of his/her own data.

Privacy by Research shall be a new method of design for databases, apps and devices. The starting point is a quite different assumpion from the previous ideas of Privacy by Design and by Default. Actually, Privacy by Design and by Default endow the data subject of a device where the data protection-settings are already set (even if they're privacy-friendly). The new proposed method allows people to keep control of their own data and to decide case by case whether to consent to a specific processing or not, and whether to consent to data tranfers, especially when cross-boarder, or not.

Therefore, the transition from Privacy by Design to Privacy by Research shall ensure better protection of the right to privacy, through the obligation to create goods and services which leave to the users the freedom to decide, before each processing, the fate of their own data. This possibility of greater control over every processing of data, shall eventually give the opportunity for the revival of the *habeas data*, intended as a complete and effective informational self-determination.

In conclusion, even after the approval of the new european legislation, it is clear that an effective protection of personal data is tightly linked to the close alliance of computer scientists and jurists. Indeed, it is true that the effective protection of personal data should be stricly connected to a rigorous treatment planning (privacy by design). But it is especially true that no effective treatment planning is feasible without a digital infrastructure created just to enable effective protection of personal data («privacy by reasearch»).

Notes

1. E-privacy Directive 2002/58/EC, Whereas no. 6. Significantly the new european Data Protection Regulation n. 2016/679/2016 contains specific references to the concept of risk; see Whereas no. 75, Art. 35. About the links between data protection and the notion of risk, see GELLERT R., *Data protection: a risk regulation? Between the risk management of everything and the precautionary alternative,* in International Data Privacy Law, 2015, Vol.. 5 No. 1.

2. See D'ALFONSO S., *Tutela dei diritti e Governance della rete,* ARACNE Editrice S.r.l., 2012, p. 38 on the project of the Center for Collective Intelligence of Massachusetts Institute of Technology (MIT), in particular about the need of a balance between social benefits and contra legem use of personal data.

3. See Whereas n. 71: "*The data subject should have the right not to be subject to a decision, which may include a measure, evaluating personal aspects relating to him or her which is based solely on automated processing and which produces legal effects concerning him or her or similarly significantly affects him or her, such as automatic refusal of an online credit application or e-recruiting practices without any human intervention. Such processing includes 'profiling' that consists of any form of automated processing of personal data evaluating the personal aspects relating to a natural person, in particular to analyse or predict aspects concerning the data subject's performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, where it*

produces legal effects concerning him or her or similarly significantly affects him or her."

4. See Regulation 2016/679/UE, Art. 9, lett. e): it is allowed to process sensitive data when they are manifestly made public by the data subject.

5. And data subjects as "*mere objects*", POULLET Y., op. cit. p. 215.

6. About Ubiquitous computing and Ambient intelligence technologies, see POULLET Y., op. cit. p. 221.

7. See RODOTÀ S., *La "privacy" tra individuo e collettività, in Politica del diritto,* 1974; RODOTÀ S., *Persona,riservatezza, identità. Prime note sistematiche sulla protezione dei dati personali,* in Rivista critica del diritto privato,1997; CERRI A., *Riservatezza (diritto alla)*, Diritto costituzionale, in Enciclopedia giuridica, vol. XXVIII, Roma,Treccani, 1995; BUSIA G., *«Riservatezza (diritto alla)»*, in Digesto/pubbl., Agg., Torino, 2000, 481. DE SIERVO U., *Tutela dei dati personali e riservatezza,* in AA. VV., Diritti, nuove tecnologie, trasformazioni sociali: scritti in memoriadi Paolo Barile, Padova, Cedam, 2003; SALERNO G.M., *La protezione della riservatezza e l'inviolabilità della corrispondenza,* in RIDOLA P., NANIA R. (a cura di), I diritti costituzionali, Giappichelli, Torino, 2006, vol. II, pp. 617ss.

8. "Nothing in the last two thousand years has brought more fun to international law than the introduction of the Internet. There are cuontless entertaining legal situations arising of the fact that information can move across jurisdictions with no costs, efforts, or even without anybody really noticing – not to mention the fact that with latest cloud technologies, it is becoming impossible to physically locate or localise information at all", POLCAK R., Gettin European data protection off the ground, in International Data Privacy Law, 2014, Vol, 4 No. 4, p. 285-286.

9. A complete explanation of the phenomenon and the technical possibilities to combine it with data protection in D'ACQUISTO G., DOMINGO-FERRER J., KIKIRAS P., TORRA V., YA DE MONTJOYE, BOURKA A., *Privacy by design in big data. An overview of privacy enhancing technologies in the era of big data analytics,* European Union Agency for network and information security, december 2015, in <http://www.enisa.europa.eu>.

10. On the Charter of Fundamental Rights of European Union see BIFULCO R., CARTABIA M., CELOTTO A. (a cura di), *L'Europa dei diritti: commento alla Carta dei diritti fondamentali dell'Unione europea,* Il Mulino, Bologna, 2001; GONZÁLEZ FUSTER G., *The Emergence of Personal Data Protection as a Fundamental Right of the UE, Law, Governance and Technology Series, Springer, 2014, p. 163 ff.*

11. "*Our walls no longer hide us*", POULLET Y., op. cit., p. 213-214.

12. Court of Justice of the European Union, C 131/12, 13/05/2014 http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065 ; See PIZZETTI F., *Le Autorità garanti per la protezione dei dati personali e la sentenzadella Corte di giustizia sul caso Google Spain: è tempo di far cadere il "velo di Maya", in Diritto dell'informazione edell'informatica, 2014, pp. 805 ss.;* POLLICINO O., *Un digital right to privacy preso (troppo) sul serio dai giudici diLussemburgo? Il ruolo degli artt. 7 e 8 della Carta di Nizza nel reasoning di Google Spain, in Diritto dell'informazionee dell'informatica, 2014, pp. 569 ss. ;* FINOCCHIARO G., *La giurisprudenza della Corte di Giustizia in materia di dati personali da Google Spain a Schrems, in Diritto dell'informazione e dell'informatica, 2015, p. 779;* VAN ALSENOY B., KOEKKOEK M., *Internet snd jurisdiction after Google Spain: the extraterritorial reach of the "right to be delisted",* in International Data Privacy Law 2015, Vol. 5 No. 2.

13. See MARKOU C., The 'Right to be Forgotten': Ten Reasons Why It Should Be Forgotten, in *Law, Governance and Technology Series, Reforming European Data Protection Law,* Vol. 20, Gutwirth – Leenes – de Hert Editors, Springer, 2015.

14. Court of Justice of the European Union, C 362/14, 6/10/2015 http://curia.europa.eu/juris/document/document.jsf?docid=169195&doclang=en .

15. Ibidem, n. 97.

16. "*The EU-U.S. Privacy Shield Framework was designed by the US Department of Commerce and European Commission to provide companies on both sides of the Atlantic with a mechanism to comply with EU data protection requirements when transferring personal data from the European Union to the United States in support of transatlantic commerce",* https://www.privacyshield.gov/welcome .

17. See Whereas n. 71 and Art. 22.

18. See Directive 95/46/CE Art. 8, GDPR, Art. 9, and also Convention n. 108, Art. 6.

19. "*In conjunction with the general and horizontal law on data protection implementing Directive 95/46/EC, Member States have several sector-specific laws in areas that need more specific provisions. This Regulation also provides a margin of manoeuvre for Member States to specify its rules, including for the processing of special categories of personal data ('sensitive data')*", Whereas n. 10, GDPR.

20. See supra paragraph 2.

21. *"The processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person".*

22. On the contraposition between "TLC-centric" system and "OTT-centric" system see D'ALFONSO S., op. cit., pp. 71-72.

23. See D'ALFONSO S., supra, p. 85 ff.

24. Ibidem.

25. http://ec.europa.eu/justice/data-protection/files/data-protection-big-data_factsheet_web_en.pdf

26. Even if the GDPR leaves large margin of manouvre to Member States; see par. 3.

27. See PIZZETTI F., *Privacy e il diritto europeo alla protezione dei dati personali. Dalla Direttiva 95/46 al nuovo Regolamento europeo,* Torino, Giappichelli, 2016.

28. Court of Justice of the European Union, C 293/12 – C 594/12, 8/04/2014 http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1018385

29. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2120&from=IT

30. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0037&from=IT

31. *"Whereas the protection of the rights and freedoms of data subjects with regard to the processing of personal data requires that appropriate technical and organizational measures be taken, both at the time of the design of the processing system and at the time of the processing itself, particularly in order to maintain security and thereby to prevent any unauthorized processing; whereas it is incumbent on the Member States to ensure that controllers comply with these measures; whereas these measures must ensure an appropriate level of security, taking into account the state of the art and the costs of their implementation in relation to the risks inherent in the processing and the nature of the data to be protected".*

32. Avaible at https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680078b37 .

33. Avaible at http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD(2012)04Rev4_E_Convention%20108%20modernised%20version.pdf .

34. Regulation 2016/679, Art. 20, Right to data portability - *"The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided [...]".*

35. http://ec.europa.eu/justice/data-protection/document/factsheets_2016/factsheet_dp_reform_citizens_rights_2016_en.pdf.

36. This figure, which raises doubts on its independence and neutrality, will be designated by the controller and the processor, and will be involved in all matters relating to data protection. The data protection officer will give advice, will monitor the correct application of the Regulation, act as contact with the Control Authority. The data protection officer will be in contact with the DPA. It will operate both in private and in public enterprises as well as in public bodies and authorities.

37. This new awareness can be seen also in the renewed list of definitions (Art. 4): to the ones already contained in the Directive 95/46 are now added those of "profiling", "pseudonymisation", "recipient", "main establishment" and others.

38. Among others. ERDOS D., *European Data Protection Regulation and the New Media Internet: Mind the Implementation Gap,* in Legal Studies Research, Paper Series, Paper n. 30/2015, May 2015, University of Cambridge, Faculty of Law, pp. 19-20; KROOPS B.J., *The Trouble with European data protection law,* in International Data Privacy Law, 2014, Vol. 4, no. 4, p. 250: *"The trouble with the law, as with Hitchcock's Harry, is that is dead. What the statues describe and how the courts interpret this has usually only a marginal effect on data-processing practices. Data protection law is a dead letter; current ideas what to do with the body are not leading anywhere except that they offer entertainment to specators. With the current reform, the letter of data protection law will remail stone-dead".*

39. See BLUME P., *The myths pertaining to the proposed General Data Protection Regulation,* in International Data Privacy Law, 2014, Vol. 4, No. 4.

40. *"The on-going focus on command-and-control regulation to the neglect of other regulatory tools does not help either to achieve better data protection in practice",* KROOPS B.J., op. cit. p. 256.

41. About the effectiveness of consent see among others: POULLET Y., op. cit., KROOPS B.J., op. cit., BLUME P., op. cit.

42. POULLET Y., op. cit., p. 225.

43. POLCAK R., op. cit., p. 289.

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ОТ ЗАЩИТЫ ДАННЫХ ДО «ЗАЩИТЫ НЕПРИКОСНОВЕННОСТИ ЧАСТНОЙ ЖИЗНИ ПУТЕМ ИССЛЕДОВАНИЯ». РАЗМЫШЛЕНИЯ В СВЕТЕ НОВОГО ЕВРОПЕЙСКОГО ОБЩЕГО РЕГЛАМЕНТА ПО ЗАЩИТЕ ИНФОРМАЦИИ.

В статье описывается процесс, который привел к принятию нового европейского регламента по защите данных в контексте быстрого развития информационно-коммуникационных технологий и резкого увеличение потоков данных (Большие данные). Защита данных и защита права на неприкосновенность частной жизни могут

рассматриваться в качестве ограничения для развития технологий. С другой стороны, быстрое развитие интеллектуальных городов и ИКТ приносит новые риски для защиты основных прав. Новый европейский регламент №. 2016/679 может быть недостаточным для защиты права на неприкосновенность частной жизни в эпоху больших объемов данных. Возможно, необходим какой-то новый инструмент для защиты персональных данных и, следовательно, неприкосновенности частной жизни. В статье предлагается понятие «неприкосновенность частной жизни путем исследования» как новый метод проектирования для устройств, баз данных и приложений обеспечивающий неприкосновенность частной жизни.

Хотя авторство идеи совместное, разделы 1, 2, 3 написаны С. Калцолайо, а разделы 4 и 5 написаны В. Паньянелли.

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информационные и коммуникационные технологии, Большие данные, европейские персональные данные, защита права на частную жизнь в ходе конструирования, защита права на частную жизнь путем исследования, Habeas Data.

Keywords:
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MECHANISMS FOR IMPLEMENTING EU LAW AT REGIONAL LEVEL IN ITALY

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The essay analyzes the mechanisms adopted by the Italian regions in order to implement EU law. Indeed, under the Italian Constitution the regions must contribute to the implementation of EU law. The regional rules (regional charters, laws and administrative acts) are used to adapt the national provisions to the different territorial realities.

1. The regions and the EU

The Italian Constitution of 1948 introduced regions as an intermediate level of government between central government and local government formed by municipalities and provinces. The Italian regions were endowed with statutory, legislative, administrative and financial autonomy. The first two forms of autonomy are the most characterizing: on the one hand through the adoption of *regions' charters (statuti regionali),* each region determines its own form of government and the basic principles of organization and work (1); on the other hand, through legislation, regions expresses its own policies which must, however, comply with those at national level (a reason for which regional lawmakers can never exceed the limits and boundaries of legislative principles set by the state).

The Constitution also confers the *task of contributing to the implementation of EU law to the regions* although this competence lies primarily with the State (2). The intervention of the regions in the implementation of EU law, which can be more or less ample depending on the cases, allows them to adapt national provisions to the different territorial realities. To this end, the regions employ various tools: regional charters, laws and administrative acts. In this essay, we shall focus in particular on those rules adopted by the regions in order to implement EU law, and on the mechanisms they have developed.

2. The instruments

The Italian Constitution states that the regions "provide for the implementation of international agreements and European acts" (Article 117.5). Following constitutional provisions, *regions' charters* include some rules for implementing EU law. For instance, the possibility for the President of the Region to ask for a vote of confidence "on the implementation acts of EU law" [3, 49]; or to underline the need to provide for rapid implementation [7, art.10.4]; or even the mandatory establishment of a Council committee for EU Community Affairs *(Commissione consiliare per gli affari comunitari)* [7, art. 32.1]. Abrogative referendums are not allowed within the implementation process, in order to prevent the possibility that the referendum could result as being responsible for EU law non-implementation [8, art. 10.2].

At the same time, *regional laws* enforce regions' charters developing specific rules for the implementation of EU law *(procedural laws)* (3). The Italian Constitutional Court confirmed regional procedure of implementation – in the scope of procedural laws established by national laws – saying that regions can regulate through law *"a specific internal procedure aimed at establishing the method"* of implementation at a regional level (Case no. 372/2004). The relevance of procedural law is highlighted by, on one hand, the fact that regional laws can be abrogated only in a stipulated manner [14, Art. 10].

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3. Subjects and pre conditions

The regional implementation of EU law involves both the *Regional Council (Consiglio regionale),* which is the legislative body, as well as the *Regional Executive (Giunta regionale),* which is the executive body, chaired by the President of the Region who is elected directly by the inhabitants of the region. However, executive body is better equipped to deal with this task since it has more offices and more data available. For this reason, "the Council's right to precautionary and subsequent information on community affairs" is enforced and establishes that the Council committees can ask the Regional Executive to refer on the state of implementation [2, art. 42.2 and 31.3]. Subject to the regional government bodies, acting as the main players in the implementation procedures, the independent territorial authorities (municipalities and provinces) are also involved as are economic and social authorities [9, art. 39.6].

The Council of local government *(Consiglio delle autonomie locali),* that is a consultation body between the region and local government (municipalities and provinces) as provided by the Constitution, is also involved but only regarding some particular matters (local territorial organization, competences and attributions of local authorities, revenues and local authority expenditure) [1, art. 4.3].

The pre-condition of the implementation is the *assessment of the compliance* of the regional law with the EU law. Different options are available. On one hand, some regions establish that the assessment of non-compliance lies with the Regional Council; more precisely, they attribute the "constant assessment" of compliance to the competent Council committee [13, art. 4]. On the other hand, several regions attribute the assessment to the regional executive body in its various components: to the Regional Executive [12, art. 5.1], or the President of the Region [21, art. 6], or even to the regional departments which "communicate the outcomes to the President of the Region [19, art. 6.3]. An alternative way of determining the state of compliance takes into consideration the administrative practices: the Regional Executive presents a bill to substitute the regional dispositions which the administration decides not to apply due to incompatibility with EU law [14, Art. 8.1].

4. Legislative implementation

The regions have two tools to implement EU law. The first is the law that adapts the regional law following a change in EU law. Seeing as this is approved when needed, it can be defined as an *occasional law*. According to the legislative procedure the Regional Executive has to present the bill "at least three months prior to the adjustment time limit as set out in the Directive" [15, art. 4.2]. Furthermore, in order to speed up the process, it is possible to opt for the urgent procedure which involves the reduction of preliminary reviewing and the possibility to transcribe the text in the Assembly agenda even if the Council committee has not yet completed the review within the prescribed time limits (4).

The second tool is the law that adapts the periodic regional legal system *(Periodic law or Community law)* (5). Its distinctive characteristics are defined by the Region's Charter or procedural law: the yearly periodicity and the discussion in a special session of the Regional Council. Some regions add specific functional rules to this model in order to shorten the legislative procedure (we will come back to this later). However, the procedural law of the Region of Tuscany is slightly different from this model since, despite its periodicity, it does not precisely establish that the Law must be yearly and does not institute a specific session. Another distinctive characteristic of the Periodic law should be its heterogeneous content in so far as it enforces EU law of the preceding year. However, if we look at the standard procedure, we discover that sometimes even occasional laws regulate a great variety of subjects (6).

Observing the standard procedure, there are cases in which the Region's Charter introduces the Periodic law, although the law has not so far been effectively approved (Piemonte Region), and cases in which the region have used this tool even if it was not provided for by the Charter (Tuscany, Calabria, Marche, Puglia, Friuli Venezia Giulia, Valle d'Aosta). Other data emerge from the standard procedure: the regions which choose the yearly periodicity may encounter difficulties in respecting it, therefore some of them have still not adopted the Community laws (7).

Finally, it is worth to notice that the regions which have adopted the Periodic law do not consider it as an exclusive tool [9, arts. 39.1 and 5]. Occasional laws are usually enacted when it is necessary to implement an EU act in a time of the year which does not coincide with a Community session. However, occasional laws could also be used (as an alternative to the Periodic laws) when a reform of an entire sectorial law is preferred to ad hoc implementation.

5. Community law

Community law is discussed in a specific *council work session* held every year within the date previously set by the Region's Charter or the procedural law (so-called "Community session"). The bill is presented annually by the President of the Region, or by the Regional Executive (8).

The proposal bears the title "Regional Community law" and shows the year of reference [17, art. 3.1]. In the report attached to the bill, the Regional Executive reports on the compliance of the Community law and on the infringement proceedings which are ascribed to the regions [17, art.3.3]. It also reports on the state of implementation of Community law of the previous year [21, art. 8.3] and it lists the directives to be implemented as prescribed by regulatory or administrative rules [14, art. 3.3 letter b].

As mentioned before, some regions have introduced *functional rules to speed up the approval procedure* of Community law. These rules aim to predetermine the duration of the proceeding stages, beginning with the discussion by the relevant committee with regards to relations with the EU and which must be concluded within forty days of the bill approval [5, art. 38]. Where Assembly's examination is required there are a number of possibilities regarding who is competent to decide. This could be the Bureau of the Regional Legislative Assembly *(Ufficio di Presidenza dell'Assemblea),* which approves the work agenda of the assembly establishing a time limit for the final voting on the proposed bill [11, Art. 19.3] or the Council President, who "sets beforehand the day and the hour of the final vote" [10, art. 43.3]; or even the Conference of groups of the Regional Council *(Conferenza dei gruppi consiliari),* which sets the time limit for the final vote "after which the work of the Assembly, following a majority resolution, continues beyond the scheduled timetable until all votes have been cast" [6, art. 128]. There is also the possibility of a fixed time limit, directly indicated by the procedural law (9). It must also be pointed out that in practice the regions do not seem to follow effectively of the fast track procedures, which in fact depend on the capacity of the Council majority to respect the established procedure times (10).

As far as *content* is concerned, Community law sets out "provisions a) repealing or modifying regional laws in contrast with Community regulations or acts, b) implementing and enforcing the Directives and the Community acts, c) enforcing the sentences of the Court of Justice and other Council measures or those of the European Commission compelling regions to comply" [20, art. 7.2]. Other procedural laws provide further indications, in particular the indication of acts which can be implemented from an administrative standpoint and the authorization for implementation by means of regulations. However, the implementation cannot defer to such acts, and therefore the law must provide directly when "the fulfilment of Community obligations means an increase in costs and a reduction in revenues, the individuation of administrative penalties or the institution of new governing bodies" [16, Art. 8.3 letter h]. An annex to the law set out the directives where the Regional law is already compliant with EU law [19, art. 8.3.].

6. Regulatory implementation

Regions have two options to carry out regulatory implementation: 1) regulations set out by the Regional Council; and 2) those set out by the Regional Executive.

The *model of regulatory implementation by the Regional Council* allows it to make use of both the law and the regulations, whereby the Council's preference will inevitably be that of the law. In fact in the three-year period between 2009 to 2011 only one regulation was approved in Abruzzo Region, which, furthermore, was not related to the implementation of European Directives; a somewhat modest performance compared to the 87 regulations approved over the same period by the Regional Executive of Puglia (some of which implement European laws on the environment: e.g. R.L. 10/2010 on the energy certification of buildings, R.L. 24/2010 on plants fuelled by renewable sources). In the Marche Region, the situation is slightly different, also because the Region's Charter, while assigning regulatory competence to the Council, unlike the Abruzzo Region's Charter, allows the individual law to authorize the Regional Executive to adopt regulations, consequently, in the three-year period sixteen regulations were approved, nine of which by the Regional Executive.

The *model of implementation through regulations of the Executive Committee* is suitable for the executive function which characterizes this body. In this specific framework, it is worth distinguishing between the idea that the Regional Executive can adopt the regulation only subsequent to legislative authorization [7, art. 11.4], from the idea that it can proceed independently from such authorization [22, art. 42].

In the second hypothesis the law can give the Council competence to implement regulations [9, art. 42.1 letter c], and provides for

the reasoned opinion of the competent Council committee (11). This is a way to limit Regional Executive's power to be implemented through regulations. However, in one case there is the possibility to implement the urgent procedure allowing for the acquisition of the Council committee's opinion after the adoption of the regulations [Art. 8.2 letter b)].

More extensively, beyond the two hypotheses of the *general authorization* (by the Region's Charter) or by the *specific authorization* (by individual laws), the implementation of regulations by the Regional Executive is limited on the basis of various measures. Firstly, the previously mentioned exclusion of the regulation thorough the discipline of certain objectives reserved to Community law. Secondly, the Assembly's reasoned opinion on the compliance of the regulation with respect to the region's charter [4, art. 28.4 letter n]. Thirdly, the establishment of limits by the Regional Law [4, art. 49.2]. Finally, the submission of the regulation for the approval of the Council (12).

With regards to *types of regulation,* in most cases they regard implementation regulations, *i.e.* acts required to make EU law operative in regional fields. However, it is also necessary to make a distinction as to whether the regulations can directly implement the EU acts [10, Art. 27.4], or whether legislative intermediation is necessary, for which the regulations implement the Regional Community law which sets out criteria and principles [16, art. 8.3 letter b]. In some regions, Community law authorizes the adoption of regulations *(regolamenti di delegificazione)* in the subject matter not covered by legal reserve [18, Art. 5.3]. This means that Community law determines the abrogation of the law which disciplines the subject matter of the deregulation from the moment the regulation is adopted. However, Community law establishes that the criteria the regulation must follow and significantly reduces the Regional Executive range of action: furthermore, the Council committee competent for the matter expresses a prior "binding opinion" on the text [14, Art. 5.3].

7. Administrative implementation

The last type of implementation consists of administrative acts. This course of action can also be divided into Acts by the Regional Executive and Acts by the Regional Council, which can be adopted according to the respective competences defined by the Region's Charter, always when the implementation does not require "a prior regulation of the subject matter" [4, art. 12.1 letter *b*].

As far as the acts of the Regional Council are concerned, it is sufficient to note that the majority is put forward by the Regional Executive which has specialized offices available, and that they refer to "general provisions" [23, Art. 33.3 letter *e*].

Regarding the Regional Executive instead, there are two different options available. In the first, Regional Executive independently chooses the acts to be implemented on the basis of a *general authorization*. One example is provided by the procedural law of the region of Tuscany according to which the Regional Executive implements the EU Directives which modify "exclusively technical characteristics of Directives and of other Community acts already transposed into national or regional Community regulations" and provides "the administrative implementation of Community Acts" [20, rt. 8]. Another form of general authorization is linked to the adoption of temporary acts for emergency situations: the President of the region has the power to adopt "urgent and temporary administrative precautionary measures and primary adaptation to the Community acts to be immediately enforced" [7, art. 41.7]. A general form of authorization is also to be found in the laws on regional organization which assign the competence to issue general Directives and guidelines to the bodies of political – administrative management.

In the second alternative, it is the individual law which indicates which EU laws the Regional Executive must implement administratively. The *specific authorization* is contemplated by some procedural laws which refer to the Community law for the reference to which EU acts are to be implemented administratively, setting out the relative principles and criteria, as well as the various time limits (13). Naturally, the indication of the EU acts can also be implemented by occasional laws which in a few cases concede a wide time margin within which the Regional Executive can intervene (14).

8. Regulatory and administrative acts

The implementation process requires regions to follow specific procedures made by regulatory and administrative acts. EU law are usually first implemented at a national level (through Community laws, legislative decrees, governmental regulations, decrees by the Prime Minister, ministerial decrees etc.); subsequently they are implemented at a regional level by regional law and then by regulatory and administrative acts.

However, the combination among the acts can vary from case to case. The following two cases can serve as an example.

Case I (relating to the control of urban waste water treatment plants). There are six steps in the legal sequence: EU directives, national transposition act (environmental code), regional laws, regional regulation, resolution by the Regional Executive of Region of Lombardy, protocols between the actors involved in the control.

Case II (relating to the overseas destination of waste originating from disposal plants). A Deliberation by the Regional Executive (delibera della Giunta regionale) of Veneto temporarily suspends the efficacy of a previous Deliberation referred to an EU directive which was in the process of being transposed. Such circumstance creates a situation of interpretative uncertainty. The suspended resolution refers to European normative acts (including those which have not yet been transposed on a national level) as well as national ones, therefore the legal sequence only goes through three stages: EU directive, national transposition act (environmental code), Regional Executive Deliberation.

Notes

1. The regions are provided with a legislative body, the Regional Council *(Consiglio regionale)* and with an Executive body, the Regional Executive *(Giunta regionale),* chaired by the President of the Region (Art. 121.1 of the Italian Constitution), who, according to the regions' charters, is elected directly.

2. As is well known, EU law is divided into 'primary' and 'secondary' law. *Primary law* refers in particular to the Treaties that are the basis for all EU action. *Secondary law* is derived from the principles and objectives set out in the Treaties and includes regulations, directives and decisions. Member States have primary responsibility for the correct application of EU Treaties and legislation.

3. Most of the regions have their own *procedural law*: R.L. 44/1995 Liguria; R.L. 10/2004 Friuli Venezia Giulia; R.L. 8/2006 Valle d'Aosta; R.L. 14/2006 Marche; R.L. 3/2007 Calabria; R.L. 18/2008 Campania; R.L. 16/2008 Emilia-. Romagna; R.L. 32/2008 Molise; R.L. 22/2009 Abruzzo; R.L 31/2009 Basilicata; R.L. 26/2009 Tuscany; R.L. 13/2010 Sardinia; R.L. 10/2010 Sicily; R.L. 17/2011 Lombardy; R.L. 24/2011 Puglia; R.L. 26/2011 Veneto. From this point, when a regional law is referred to without indicating the number and year, it will be a procedural law. Moreover, only a single regional act will be referred to in the examples even if this provision can be found in other regional law systems.

4. Art. 82 Int. reg. Council of Region of Lombardy; for the same purpose Art. 8.2 R.L. of Puglia foresees the use of the priority proposal.

5. This legal tool is mentioned in Art 8.5 of the State Law 11/2005 which refers to "yearly transposition laws". Here the two names *Periodic law* and *Community law* shall be used indifferently.

6. For example, R.L. Liguria 14/2011 which implements the Directive concerning services on the domestic market but which also contains a reference dedicated to the provisions relative to environmental matters.

7. Molise, Calabria, Sardinia, Sicily.

8. The first hypothesis is provided for by Art. 39.3 st. Lombardy; the second by Art. 3.2 R.L. Basilicata.

9. Art. 5.1 R.L. Abruzzo according to which the law is to be approved "prior to the 31 July each year".

10. The rule of the Piemonte Region's Charter, according to which the Council President establishes the moment of the final vote, has remained on paper, because not even the legislative proceedings have been commenced; the procedural law in Abruzzo has not been respected, considering that the EU laws have been implemented after the time limit.

11. See Reg. Liguria 5/2011 on protection of the marine environment.

12. Art. 56.2 Campania Region's Charter. See Reg. Campania 1/2009 on the strategic environmental assessment.

13. In the first sense, see Art. 11.1 letter d) R.L. Sardinia; in the second, see Art. 8.4 R.L. Lombardy.

14. E.g. R.L. 3/2011 Lombardy according to which the Executive Committee "sets out provisions" limiting the use of heating systems.

References:

1. Abruzzo Region's Charter
2. Calabria Region's Charter
3. Campania Region Charter's
4. Emilia-Romagna Region's Charter
5. Int. Reg. Emilia-Romagna
6. Int. reg. Friuli Venezia Giulia
7. Lazio Region's Charter
8. Liguria Region's Charter
9. Lombardy Region's Charter
10. Piemonte Region's Charter
11. Reg. Int. Umbria
12. R.L. Calabria
13. R.L. Campania
14. R.L. Friuli Venezia Giulia
15. R.L. Liguria
16. R.L. Lombardy
17. R.L. Marche
18. R.L. Puglia
19. R.L. Sicily
20. R.L. Tuscany
21. R.L. Veneto
22. Tuscany Region's Charter
23. Veneto Region's Charter

МЕХАНИЗМ ИМПЛЕМЕНТАЦИИ ПРАВА ЕС НА РЕГИОНАЛЬНОМ УРОВНЕ В ИТАЛИИ

В статье анализируются механизмы, принятые итальянскими регионами в целях реализации законодательства ЕС. Действительно, в соответствии с Конституцией Италии регионы должны внести свой вклад в реализацию законодательства ЕС. Региональные правила (региональные уставы, законы и административные акты) используются для адаптации национальных положений к различным территориальным реалиям.

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Keywords:
UE law – Italian Regions - Regional rules - Implementation mechanisms - Community law.

WHO MUST BEAR INTERNATIONAL RESPONSIBILITY FOR WRONGFUL CONDUCTS OF UN PEACEKEEPING FORCES?

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The present paper aims at studying the international rules which have to be applied for the purposes of determining whether a certain conduct taken in the context of a UN-led multinational operation must be attributed to troop-contributing states or to the United Nations. It will also consider whether, and under what circumstances, the same conduct may be attributed to both subjects. The analysis will mainly rely on the interpretation of the rules of attribution set forth in the ILC's Articles on the responsibility of states, adopted in 2001, and in the Articles on the responsibility of international organizations adopted in 2011. In this regard, it is submitted that, when applying the criterion of attribution set forth in Article 7 of the 2011 Articles to UN peacekeeping forces, importance must be attached in the first place to the manner in which the transfer of powers was formally arranged between the organization and the troop-contributing state.

1. Introduction

Resort to domestic courts to obtain reparation for damages occurred in the course of multinational peace operations is not a novelty of the last few years. Already in 1969 the House of Lords was called upon to adjudge whether the United Kingdom had to pay compensation for acts taken by the British forces participating to the United Nations Peace Keeping Forces in Cyprus (UNFICYP) (1). Ten years later the *Oberlandesgericht Wien* had to rule on a similar claim made against Austria in relation to the conduct taken by a member of the Austrian Contingent participating to the United Nations Disengagement Observer Force (2). It is true, however, that in the last decade there has been a significant increase in the number of cases submitted to domestic courts and dealing with claims for compensation for the damage caused by national contingents employed in the context of multinational peace operations. This situation probably reflects the more prominent role played by international organizations, particularly by the United Nations (hereinafter "UN"), after 1990 in the field of the maintenance of international peace and security. The expansion of the scope of activities of the UN in the last two decades may explain the larger number of cases which raise the question of the responsibility of that organization or of the states participating to peace operations. At the same time, there is nowadays a greater awareness about the need of designing ways to make international organizations more accountable (3). While a few decades ago the legal regime governing the responsibility of international organizations (or of states acting within the framework of an international organization) was regarded as a rather obscure area of law, things have considerably changed. In this respect, the recent work of the International Law Commission (hereinafter "ILC" or "the Commission") on the topic of the responsibility of international organizations has contributed to shed some lights on the matter.

Claims for reparation are sometimes brought directly against the organization. One may mention, for instance, the case recently filed before a United States court against the UN for its alleged responsibility for an epidemic of

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cholera that had broken out in Haiti in 2010 as a consequence of the presence of Nepalese peacekeepers who were members of the United Nations Stabilization Mission in Haiti (MINUSTAH) (4). In most cases, however, such claims are directed against troop-contributing states, on the assumption that such states are to be held responsible for the conduct of their troops acting in the context of a multinational peace operation. The reason why this type of cases are generally submitted against the troop-contributing state, and not against the organization, is easy to explain. International organizations enjoy a sweeping immunity before domestic courts, as a recent string of cases testifies (5). Individuals cannot bring complaints against them before international human rights tribunals or other monitoring bodies, as they are not parties to human rights conventions. In principle, there might be the possibility of resorting to internal mechanisms set up by the organization for the purposes of redressing individuals injured by conducts taken in the course of a peace operations. However, with rare exceptions (6), mechanisms of this kind are generally lacking. In every Status of Force Agreement (hereinafter "SOFA") concluded by the United Nations with states hosting peacekeeping operations, it is provided that any dispute or claim of a private law character to which the United Nations peacekeeping operation is a party must be settled by a standing claims commission. In practice, no such commissions have ever been set up (7). Thus, submitting the case against the troop-contributing state constitutes for the injured individuals the only possible means for obtaining redress.

While claims of reparation are normally brought against the troop-contributing state, the question concerning the responsibility of the organization which promoted and conducted the operation resurfaces in most of these cases. This is so because the main argument usually advanced by the defendant states to rule out their responsibility is that the wrongful conduct at stake was not their own but the organization's. In other words, before addressing the substance of the claims brought by the plaintiffs, a judge is usually called upon to assess whether the conduct at stake is to be attributed to the organization or to the respondent state. Attribution is thus one of the core issues in this kind of cases.

The present paper aims at studying the international rules which have to be applied for the purposes of determining whether a certain conduct taken in the context of a multinational operation must be attributed to troop-contributing states or to the international organization. I will also consider whether, and under what circumstances, the same conduct may be attributed to both subjects. The analysis will mainly rely on the interpretation of the rules of attribution set forth in the ILC's Articles on the responsibility of states, adopted in 2001, and in the Articles on the responsibility of international organizations adopted in 2011 (8). While the latter text has been criticized for not finding support in international practice (9), such criticism does not seem to be well founded as far as the question of attribution is concerned. The fact that a significant number of cases have been brought against states for their participation in multinational operations has led to the development of a substantial amount of judicial practice in relation to this issue. The ILC gave due consideration to this practice when drafting the text on the responsibility of international organizations. Significantly, the European Court of Human Rights and a number of domestic courts took the ILC's work into account when determining the rules of attribution to be applied in relation to the conduct of troops of a state employed in a multinational peace operation (10).

Before entering into the merits of the problem of attribution, a few preliminary remarks have to be made in order to further clarify and delimit the scope of the present analysis.

In the first place, it is all too well known that it is difficult to classify in rigid terms the various types of multinational operations conducted under the aegis of an international organization. These operations may differ considerably one from the others and such differences may have important implications as far as the question of attribution is concerned [7, p.37]. For this reason, the present paper will limit its analysis to the problems of attribution arising in connection with the activities of UN peacekeeping operations. While certain variations can exist within the context of specific operations, they normally present some basic common features (11). In particular, peacekeeping missions are characterized by the fact that troop-contributing states normally retain only limited powers over their troops while the UN is given operational command and control. By contrast, this paper will not address questions of attribution concerning the conduct of UN-authorized missions (or UN mandated peace enforcement operations), in which the authorized forces remain under the command and control of the state, the UN power being limited to the possibility of withdrawing the authorization or delimiting its scope. Much has been written about this issue,

particularly after the decision rendered by the European Court of Human Rights (hereinafter the "ECtHR") in the *Behrami and Saramati* cases. As it is well known, the ECtHR found that, since the Security Council retained 'ultimate authority and control' over the activities of KFOR, the conduct of KFOR was to be attributed to the UN, and not to the troop-contributing state (12). There is very little to be added to the widespread criticism addressed against the 'ultimate authority and control' test resorted to by the ECtHR, a test which ends up to attributing to the organization the conduct of the troops even if they substantially remain under the complete control of the sending state (13). It suffices here to note that, in its subsequent decisions, the ECtHR appeared to have abandoned this test or, at least, to have narrowed down significantly its scope of application (14).

Secondly, reference must be made to the possibility that in this context the question of attribution is governed by special rules whose content differs from the general rules of attribution set forth in Articles 4-11 of the Articles on state responsibility and Articles 6-9 of the Articles on the responsibility of international organizations. Both texts contain a provision on *lex specialis* and therefore recognize the possibility for special rules of attribution to apply to specific situations (15). With regard to the responsibility of international organizations, special rules of attribution may include rules which apply to a particular category of organizations or to a particular organization (16). Admittedly, when considering the practice concerning the attribution of the conduct of UN peacekeeping operations, it is hard to find elements supporting the view that the matter is governed by special rules of attribution. This the more so since some of the general rules contained in the 2011 Articles, particularly the one set forth in Article 7, have been drafted having mainly the situation of UN peacekeeping forces in mind. A brief examination of the ILC's Commentary to that provision is sufficient to confirm it (17). Yet, the possibility that special rules govern the question of attribution with regard to peace operations possessing features similar to that of UN peacekeeping forces but operating under the aegis of a different organization cannot be ruled out. While practice in this respect is rather scarce, it may be interesting to investigate the conditions that are required for the determination of the existence of special rules of attribution. This issue will be briefly addressed later on in this paper (18).

Finally, a few words must be said about the distinction between attribution of conduct and attribution of responsibility. While the present paper will only focus on the criteria for determining when a given conduct is attributable to a state or to an organization, or to both, under specific circumstances a state or an organization may be held responsible even if the conduct amounting to a breach of an obligation is not attributable to it. Situations of this kind may also arise in relation to the activity of multinational peace operations. Thus, the fact that, contrary to the view held by the ECtHR in its *Behrami and Saramati* decision, acts taken by a national contingent in the context of a UN-authorized operation are to be attributed to the sending state does not exclude the possibility that the same act could also give rise to the responsibility of the organization. Article 17, para. 2, of the 2011 Articles provides that, under specific conditions, an organization has to bear responsibility for having authorized a state to commit an act that would be wrongful for that organization (19). Thus, if the Security Council authorizes states taking part to a multinational operation to take measures of extrajudicial detention which may be contrary to the basic requirements of human rights law or international humanitarian law, also the United Nations may be held responsible for any unlawful measures of this kind adopted by states in the course of the multinational operation. In this or other similar situations, the organization may therefore be held responsible together with the state to which the wrongful conduct is to be attributed. While this joint responsibility should enhance the possibility for the affected individuals to obtain reparation, in practice the absence of effective means of redress against international organizations renders the case that claims be brought simultaneously against the two subjects involved in the commission of the wrongful conduct extremely unlikely.

2. The complex legal status and command structure of UN peacekeeping forces

A number of elements must be taken into account when addressing the question of attribution with regard to the conduct of UN peacekeeping forces. While each element contributes to the determination of the subject that is responsible for the conduct of peacekeeping forces, some of them have been considered as more relevant. However, views are diverging on the elements that should play a paramount role. This explains at least in part why different positions have been expressed over time on this matter.

The first element concerns the legal status of these forces under the rules of the organiza-

tion. The practice of the UN has been very consistent over the time in recognizing that forces placed at the disposal of the organization by member states and forming part of a peacekeeping force established by the Security Council or the General Assembly are subsidiary organs of the UN (20). In the UN's view, the legal status of organs of the organization would have legal implications going beyond the question of attribution for the purposes of international responsibility. Thus, for instance, according to Article 15 of the Draft Model Status-of-Force Agreement between the United Nations and host countries, '[t]he United Nations peacekeeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations' [6, para. 15].

Despite their status as organs of the UN, national contingents do not cease to act as organs of their respective states during the time in which they are assigned to the peacekeeping force. National contingents are not placed under the exclusive authority of the United Nations and to a certain extant remain in their national service. As was observed by Lord Morris of Borth-y-Gest in the judgment rendered by the House of Lords in the *Nissan* case, 'though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British soldiers continued, therefore, to be soldiers of Her Majesty [8, House of Lords, 1969,p. 646] '. Indeed, in the case of UN peacekeeping forces, the UN has operational command over the forces but some important command functions (such as the exercise of disciplinary powers and criminal jurisdiction over the forces, and the power to withdraw the troops and to discontinue their participation in the mission) 'remain the purview of their national authority' [2, UN, 1994, p.3]. This latter point is normally specified in the agreement that the UN concludes with contributing states. By establishing which powers are transferred to the organization and which are retained by the sending state, this agreement substantially testifies to the dual nature of a force as an organ of both the UN and the sending state.

A last element relates to the command and control structure of UN peacekeeping operations. Unlike UN-authorized operations, UN peacekeeping operations are conducted under the exclusive command and control of the UN. As the UN puts it in a comment sent to the ILC, '[m]embers of the military personnel placed by Member States under United Nations command [..] are considered international personnel under the authority of the United Nations and subject to the instructions of the force commander. The functions of the force are exclusively international and members of the force are bound to discharge their functions with the interest of the United Nations only in view. The peacekeeping operation as a whole is subject to the executive direction and control of the Secretary-General, under the overall direction of the Security Council or the General Assembly as the case may be'[19, UN, p.17]. However, the overall picture appears to be rather more complex. An important feature of this command structure is that, while national contingents are placed under the operational control of the UN force commander, they are not under UN command (21). The orders and instructions of the force commander must be transmitted to the contingent through the national contingent commander, which is appointed by the sending state (22). The role played by the national contingent commander is a very delicate one. It has been observed that, through the national contingent commander, the sending state can exercise, at least potentially, a form of control over its contingent and, in fact, can decide whether to agree with (or to decline) instructions given to its contingent by the UN force commander (23). The fact that the sending state is in a position that enables it, in fact, to interfere with the chain of command leading to the UN, may evidently have an impact in the overall assessment of the question of attribution.

3. Can attribution be based on the status of peacekeeping forces as organ of the UN?

When an individual or an entity has the status of organ of a state, or agent or organ of an international organization, such status is generally decisive for the purposes of attribution. This reflects a general rule according to which an entity – be it a state or an international organization –must bear responsibility for the acts of its agents or organs. Both the Articles on state responsibility and the Articles on the responsibility of international organizations refer to this rule as the main criterion for attribution. Indeed, Article 6 of the Articles on the responsibility of international organizations, which corresponds to Article 4 of the Articles on state responsibility, provides that '[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.' Article 2(c) identifies 'organs' of

an international organization as 'any person or entity which has that status in accordance with the rules of the organization'. Article 2(d) further specifies that '"agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts'.

The UN has consistently held the view that, since UN peacekeeping forces have the status of UN organs, their conduct must be attributed to the organization on the basis of the general rule which is now set forth in Article 6 of the Articles on the responsibility of international organizations. This view was recently reiterated in a note sent to the ILC in the following terms: 'It has been the long-established position of the United Nations, however, that forces placed at the disposal of the United Nations are "transformed" into a United Nations subsidiary organ and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, "effective"' [20, UN, p.13]. The application of the general criterion of attribution set forth in Article 6 finds some support in legal literature [17, p.429][15, p.77][16, p.126]. In the same vein, in its decision in the *Behrami and Saramati* cases, the ECtHR found it sufficient to refer to the status of UNMIK as 'a subsidiary organ of the UN created under Chapter VII of the Charter' to justify its finding that the acts of UNMIK were attributable exclusively to the UN (24). It must be noted that, while relying on the status of organ of the UN to justify in general terms attribution of all conducts of the force to the organization, the UN did not exclude the possibility that, under certain circumstances, certain conducts of a national contingent have to be attributed to the sending state. In particular, referring to the control exercised by the sending state in matters of disciplinary and criminal prosecution, the UN observed that the retention of such powers is of no relevance for the purposes of attribution as long as it 'does not interfere with the United Nations operational control', thereby admitting that, if, to the contrary, the state interferes with the operational control of the UN, the conduct is to be attributed to state [20, UN, p.14]. Similarly, according a view recently advanced by an author, while the criterion set forth in Article 6 would be in principle applicable to peacekeeping forces, the conduct of national contingents should be attributed to the sending state if they in fact acted under the control of that state. In particular, it is said that the status as organ of the UN would create a presumption that their conduct is to be attributed to the organization but this presumption is a rebuttable one [15, pp.82-83].

While it is understandable that for policy reasons – namely 'for the sake of efficiency of military operations' [13, p.90] – the UN may wish to be regarded as the only entity that is responsible for the conduct of peacekeeping forces, the formal status of peacekeeping forces within the UN system can hardly be regarded as decisive for purposes of attribution. This view does not explain why one should only give relevance to the status as organ of the organization and disregard the fact that the force also continues to act as organ of the sending state (25). It is this dual institutional link that justifies the application of a special rule of attribution which is not based on the formal status of peacekeeping forces within the UN system, but rather on the effective control exercised over the conduct of such forces. Moreover, it is difficult to reconcile the application of the rule of attribution set forth in Article 6 with the idea that, if the national contingent acts under the instructions of the sending state, its conduct must be attributed to that state: either the decisive criterion is the status as organ or it is the control over the troops. Nor can one read Article 6 as a rule establishing a rebuttable presumption. If the status as organ of the organization is decisive, then all conducts taken in that capacity, including those which contravene instructions, are to be attributed to the organization.

Finally, the view which relies on the status as organ to justify attribution finds limited support in international practice. Significantly, in its decision in the Nuhanovic case, the Supreme Court of the Netherlands expressly rejected the argument submitted by the Dutch government, according to which, since peacekeeping forces are subsidiary organs of the UN, their conduct must be attributed exclusively to the organization on the basis of the rule set forth in Article 6 of the Articles on the responsibility of international organizations (26).

4. The criterion of effective control under Article 7 of the Articles on the responsibility of international organizations

4.1 The requirements that must be met for Article 7 to apply

The determination of the subject which must bear responsibility for wrongful acts committed in the course of UN peacekeeping operations is generally assessed on the basis of Article 7 of the Articles on the responsibility of international organizations. Under this provi-

sion, 'the conduct of an organ of a state or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international an act of the latter organization if the organization exercises effective control over that conduct'. This test has been applied by a number of judgments of domestic courts dealing with the problem of attribution with respect to acts of UN peacekeeping forces (27) [11, p.404].

Two conditions must be met for the conduct of a lent organ to be attributed to the receiving organization. First, the organ must be 'placed at the disposal of the organization'. Secondly, the organization must exercise 'effective control' over the conduct of the organ placed at its disposal. While most commentators place emphasis almost exclusively on the latter condition, the former one is equally important for understanding the content and scope of application of the criterion of attribution set forth in Article 7.

The Commentary to Article 7 does not clarify the meaning of the words 'placed at the disposal'. The ILC addressed this issue in the Commentary to Article 6 of the Articles on state responsibility, which correspond to Article 7. The point made by the ILC in that context is equally applicable to understanding the meaning of the same notion in the latter provision (28). In a lengthy passage, which deserves to be quoted in full, the Commission observed: 'The words "placed at the disposal of" in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ "placed at the disposal of" the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State'[21, p.44]. Thus, according to the Commission, for an organ of a state to be considered as placed at the disposal of another state, there must be a double link between the lent organ and the receiving state. On the one hand, there must be an 'institutional link': the organ must perform functions entrusted to it by the receiving state in conjunction with the machinery of that state. It is to be noted that the Commission does not require that the lent organ be given the status of organ of the receiving state. Whether the lent organ acquires that status or not is not relevant for the purposes of the application of the criterion of attribution set forth in Article 6 (29). On the other hand, the lent organ must act under the exclusive direction or control of the receiving state, 'rather than on instruction from the sending state'. This must not be taken as meaning that the sending state cannot retain some powers over the lent organ. (30). It only means that, for a conduct of a lent organ to be attributed to the receiving state, the organ must have acted under the control of that state.

Since the requirement that the lent organ be 'placed at the disposal' of the receiving organization presupposes that the organization exercises a degree of factual control over that organ, one may ask why the text of Article 7 also contains a reference to the requirement of 'effective control'. This latter requirement may appear to be superfluous (31). While the Commentary does not address this issue, a possible explanation can be found in the views expressed by the Special Rapporteur, Giorgio Gaja, in his Second Report. Referring to the abovementioned passage of the ILC's Commentary to Article 6, and in particular to the point where it is said that the lent organ must act under the exclusive direction and control of the receiving state, he observed that '[t]his point could be made more explicitly in the text, in order to provide guidance in relation to questions of attribution arising when national contingents are placed at an organization's disposal and in similar cases' (32). To that end, the Special Rapporteur proposed to include the notion of 'effective control' directly in the text of the provision.

If the reference to 'effective control' contained in Article 7 serves the purpose to render explicit what was already implicit in the requirement that the organ be 'placed at the disposal' of the organization, one may reasonably conclude that the conditions for attribution under Article 7 of the 2011 text are substantially the same as under Article 6 of the 2001 text. This means, in particular, that attribution under Article 7 would be dependent on the existence of both an 'institutional' and a 'factual' link between the lent organ and the receiving organization (33) [14, p.424]. This preliminary conclusion, however, is subject to a further investigation as to the degree of control which is required for an act of a lent organ to be attributed to the organization. Under Article 6 of the Articles on state responsibility, the test of control is relatively

straightforward. As we have seen, it is required that, when performing the functions entrusted to it by the receiving state, the lent organ must act 'under its exclusive direction and control, rather than on instructions from the sending State'. It must be asked whether the same test applies in the context of placing an organ at the disposal of an organization.

4.2 Does effective control require control of the organization over every single conduct of the national contingent?

Article 7 does not clarify the degree of control which is required to reach the threshold of 'effective control' and therefore to attribute the conduct of the lent organ to the organization. Several commentators hold the view that a very high threshold is required: the conduct of a lent organ can be attributed to the organization only if the organization was exercising a control over each specific conduct of that organ (34) [9, pp.348-349]. Two distinct arguments are normally put forward to justify this view. The first is based on a textual element: by establishing that the receiving organization must 'exercise effective control over that conduct', Article 7 seems to require from the organization a control over every single act taken by the organ placed at its disposal by a state. The second argument is based on the view that the notion of effective control referred to in Article 7 has the same meaning as the notion used in the context of the law of state responsibility. As it is well known, an 'effective control' test was employed by the International Court of Justice in the *Nicaragua* and in the *Genocide Convention* cases in order to determine whether the conduct of groups of individuals, who were not organs of a state and who were connected to the state only on the basis of a *de facto* link, was to be attributed to that state. According to the International Court of Justice, in order for the state to be legally responsible for the conduct of such individuals, it would have to be proved that the state had effective control over the operations during which the wrongful conduct occurred (35). The same test was subsequently adopted by the ILC in Article 8 of the Articles on state responsibility (36).

To interpret the notion of effective control in Article 7 as requiring such a high threshold of control would significantly complicate attribution of an act to the organization, as in many cases it would be extremely difficult to prove the existence of such an 'effective control'. This could lead to the unreasonable result that in many cases the sending state could risk to bear responsibility for acts taken by its national contingent in the performance of functions of the organization. This would be so because attribution of the conduct to the state would not be depending on the proof that that state was exercising effective control over the conduct at issue (37). Once it is determined that the conduct of a national contingent cannot be attributed to the organization for the lack of effective control, attribution to the sending state would be justified by the status of the contingent as organ of that state.

However, it does not seem that Article 7 requires such a high threshold of control for the purposes of attribution of the conduct of lent organs. As the Commentary to this provision makes clear, the notion of 'effective control' as it is used in Article 7 does not play the same role as in the context of the law on state responsibility. The ILC was careful to specify that control within the context of Article 7 does not concern 'the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity – the contributing State or organization or the receiving organization – conduct is attributable' [13, p.88]. Thus, the ILC seems to be aware of the fact that, if one requires a high threshold of control for attributing the conduct of lent organs to the organization, the result would be that in most cases the conduct of such organs would have to be attributed to the sending states. While the ILC does not say it expressly, the fact that it stresses the different meaning of the notion of effective control in the context of the placing of an organ at the disposal of the organization seems to imply that, unlike the rules on state responsibility, the attribution of a certain conduct to the organization under Article 7 does not necessarily depend on the proof that the conduct was taken on the instruction of, or under the specific control of, the organization. This suggests, at least indirectly, that a lower degree of control may also be sufficient to justify attribution to the organization.

4.3 What elements are to be taken into account for the purposes of determining whether the UN exercises effective control over the conduct of national contingents?

It is submitted that the degree of control which is required for an act of a lent organ to be attributed to a receiving organization is not different from the control which is required under Article 6 of the Articles on state responsibility. In this respect, the requirement of effective control under Article 7 has to be assessed in the light of the other requirement which is implicit in the fact that the lent organ has to be placed at the disposal of the organization, namely the existence of an 'institutional link' between the

organ and the organization. Once it is proved that the conduct was taken by the organ in the performance of functions entrusted to it by the organization and in conjunction with the machinery of that organization, there is little reason for requiring a higher degree of control for justifying attribution to the organization. As the Commentary to Article 6 seems to suggest, when the lent organ acts in the exercise of the functions of the receiving organization, the condition of the exclusive direction and control of the organization may be presumed to be met unless it is demonstrated that the organ was acting on instructions from the sending state. This interpretation of the notion of effective control is not inconsistent with the views expressed by the ILC according to which '[t]he criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 7 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal' [13, p.87]. Factual control over the specific conduct is certainly decisive for the purposes of attribution but this does not mean that, in the absence of different instructions from the sending state, the existence of a control by the organization cannot be simply presumed.

If one considers the question of attribution of acts of UN peacekeeping forces in the light of these elements, it becomes clear that the first point to be addressed is to determine whether the force was acting in the performance of functions entrusted to it by the UN. It seems that, in order to answer to this question, importance must be attached in the first place to the manner in which the transfer of powers was formally arranged between the organization and the troop-contributing state. As we have seen, the agreement concluded by the UN with troops contributing states normally provides that the UN has operational command over the forces while troop-contributing states retain the disciplinary powers and criminal jurisdiction over the forces, as well as the power to withdraw the troops. It can be held that, depending on the manner in which the transfer of authority over the forces is arranged, a presumption may arise that a certain conduct is attributable to the organization rather than to the contributing state. Indeed, by identifying the functions that formally fall under the authority of the UN and those that remain within the troop-contributing state, these agreements provide a key indication as to the subject on whose behalf members of the force were supposed to exercise a certain function. If the force is supposed to perform certain functions on behalf and under the formal authority of the organization, and not of the contributing state, it can be presumed that its conduct was taken under the exclusive direction and control of the organization and is therefore attributable to it. In other words, the formal transfer of powers giving authority the organization entails a presumption that the conduct is to be attributed to the organization, without the need to demonstrate that the conduct was the result of specific instructions or effective control over the specific conduct. Such a presumption should not be confused with the status as subsidiary organ of the organization (38). What matters here is not so much the status of the force under the rules of the organization but the agreement between the organization and the sending state, as one may presume that the delimitation of the respective powers agreed upon by the two parties provides an indication as to which entity, in principle, has control over the troops in relation to a given conduct (39). Obviously, this presumption may be rebutted. It may happen that a force, while acting under the formal authority of the UN (for instance, because it is engaged in combat-related activities falling in principle under the operational control of the UN) has undertaken a certain conduct because of the instructions given to it by the contributing state. In such circumstances, the act must evidently be attributed to the state and not to the organization.

The recent judgment of the Court of Appeal of The Hague in the *Nuhanovic* case appears to support the view that, for purposes of attribution, account must be taken of a combination of legal and factual elements [12, pp.1143-1157]. The Court of Appeal found that the criterion for determining whether the conduct of Dutch troops in Srebrenica had to be attributed to the UN or to the Netherlands was the effective control test now set forth in Article 7 of the Articles on the responsibility of international organizations (40). According to the Court, when applying this criterion, 'significance should be given [not only] to the question whether that conduct constituted the execution of a specific instruction, issued by the United Nations or the state, but also to the question whether, if there was no such specific instruction, the United Nations or the state had the power to prevent the conduct concerned' [3. para. 5.9]. While this statement is not free from ambiguities and may be interpreted in different ways,(41) a possible interpretation is that, when mentioning 'the power to prevent the conduct concerned' the Court of Appeal intended to refer to those powers which each contributing state formal-

ly retains over its troops. The Court makes the point that, for purposes of attribution, relevance must be given not only to effective control but also to the formal authority of the organization or of the contributing state over the acts concerned. This appears to find confirmation in the reasoning followed by the Court of Appeal in order to justify its findings that the conduct concerned was to be attributed to the Netherlands. The Court relied heavily on the fact that, during the evacuation from Srebrenica, the Dutch government had control over Dutchbat 'because this concerned the preparations for a total withdrawal of Dutchbat from Bosnia and Herzegovina' [3, para. 5.18] – the power to withdraw the troops being a power belonging to the sending state. The Court also referred to the fact that the Dutch government 'held it in its power to take disciplinary actions' against the conduct concerned [3]. The formal authority retained by the state over its troops during the evacuation period and the control it had actually exercised at that time were the two elements the Court of Appeal relied on in order to justify its conclusion that the conduct in question concerned had to be attributed to the Netherlands (42) [3, paras. 5.18 – 5.20].

4.4 Effective control and ultra vires acts

The manner in which the transfer of powers is arranged between the organization and the troop-contributing state appears to be relevant for the attribution of responsibility for an *ultra vires* conduct taken in the context of the peacekeeping operation. No doubt, the fact that a certain conduct was carried out by peacekeeper exceeding their authority or contravening instructions does not exempt the sending state or the organization from bearing responsibility. This principle is clearly stated in Article 8 of the Articles on the responsibility of international organizations and in Article 7 of the Articles on state responsibility (43). However, these provisions address, respectively, the situation of an organ or agent of an international organization and of an organ of a state. They do not refer specifically to the case of an organ of a state which has been placed at the disposal of an international organization or of another state. Given that peacekeepers are placed under the authority of both the UN and the sending states, it seems that, in order to determine the entity to which the *ultra vires* conduct must be attributed, the capacity in which the person in question was acting when taking such conduct has to be established. For these purposes, account must primarily be taken of the functions the peacekeeper was performing when engaging in the wrongful conduct and of the respective powers of the organization and of the state with respect to the exercise of this function. Here again, if a peacekeeper was performing functions under the formal authority of the organization (such as engaging in combat-related activities falling under the operational control of the UN), it can be presumed that the *ultra vires* conduct must be attributed to the organization (44) [4, p. 159]. This presumption can be rebutted if it is demonstrated that the peacekeeper had acted on the instructions of the sending state.

While the manner in which the transfer of powers was arranged may create a presumption which also applies to attribution of *ultra vires* conducts, the agreement that the UN concludes with the troop-contributing state can hardly be regarded as being decisive for the purposes of determining the subject to which the *ultra vires* conducts of peacekeeping troops must be attributed. Since Article 9 of the model contribution agreement excludes the responsibility of the UN for injury arising from 'gross negligence or willful misconduct of the personnel provided by the Government' (45), the view was advanced that, when the conduct was the result of gross negligence or was taken in willful disregard of UN instructions, then the conduct must be attributed to the sending state and not to the UN [7, pp.19-20]. However, such an agreement can only apply in the relation between the organization and the sending state. It cannot exclude the application of the general rule set forth in Article 8 in the relation between these two subjects and any third party [13, p.87].

5. Is there room for dual attribution of the same conduct to the UN and to the troop-contributing state?

In its Commentary to the Articles on the responsibility of international organizations, the ILC recognized the possibility that the same conduct may be simultaneously attributed to a state and to an international organization. According to the Commentary, 'although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded'[13, p.83]. While the Commentary does not say anything about the possibility of dual or multiple attribution in situations such as the one characterizing UN peacekeeping operations, the work of the ILC seems to lend little support to this possibility. The ILC's approach appears to be premised on the idea that, when an organ of a state is placed at the disposal of an international organization, it will have to be determined whether the conduct of such an or-

gan must be attributed to the organization or, alternatively, to the contributing state. Having said this, it is true that the criterion of attribution set forth in Article 7 is not incompatible with the possibility of dual attribution (46). Interestingly, Special Rapporteur Gaja recognized that, with regard to the activities of organs placed at the disposal of an organization, 'dual attribution of certain conducts' cannot be ruled out (47) [18, p.245].

Admittedly, practice supporting dual attribution is scarce. Such a view is diametrically opposed to the one defended by the UN. '[K]een to maintain the integrity of the United Nations operation vis-à-vis third parties' [20, p.14], the UN strives to be considered as the sole actor responsible for the conduct of peacekeeping forces operating under its command and control. In this respect, the recognition of dual attribution would increase the risk of sending states interfering with the UN chain of command. An implicit recognition of this possibility was contained in the ECtHR's judgment in the *Al-Jedda* case, which however concerned the conduct of a UN-authorized mission (48). A more explicit endorsement of this view was contained in the judgments rendered by the Dutch Court of Appeal and by the Supreme Court of the Netherlands in the *Nuhanovic* case. The Court of Appeal admitted that the actions taken by a national contingent in the course of a peacekeeping operation might be simultaneously attributed to the sending state and to the UN. It observed that 'the Court adopts as a starting point that the possibility that more than one party has "effective control" is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party' (49) However, apart from recognizing this possibility, the Court of Appeal did not clarify the specific conditions which may justify dual or multiple attribution. In this respect, the contribution given by this judgment to the identification of cases of dual or multiple attribution is rather limited. Similarly, in its judgment of 6 September 2013 in the same case, the Supreme Court of the Netherlands limited itself to admitting that 'international law, in particular article 7 of the Draft Articles on the Responsibility of International Organizations in conjunction with article 48 (1) of the same Draft Articles, does not exclude the possibility of dual attribution of given conduct', without providing any further indication on this issue (50) [1, p.9]. Apart from the brief statements contained in these judgments, judicial practice appears to be substantially lacking.

Dual attribution of the conduct of UN peacekeeping forces found some support in legal literature. The most coherent and forceful argument in support of dual attribution is the one which relies on the role played by the national contingent commander within the command and control structure of UN peacekeeping operations. The basic premise of such argument is that the sending state cannot avoid responsibility since, through the national contingent commander, it exercises a form of control over each and every conduct taken by its contingent, irrespective of whether such conduct was prompted by an order coming from the UN force commander or not. Because of this control, it has been held that the conduct of a peacekeeping force must be jointly attributed to the UN and to the contributing state – the UN for being the originator of the instructions, and the contributing state for having concurred in the instructions (51) [9, p.1].

In placing emphasis on the control that the sending state, at least potentially, may exercise over its contingent, this view certainly raises an important point. However, one may doubt that this 'potential factual control' is sufficient to justify attribution. As noted above, in the case of UN peacekeeping operations attribution is mainly dependent on the fact that the national contingent was placed at the disposal of the UN and therefore acted in the exercise of functions entrusted to it by the organization. It is not so much the control, which may be presumed, but the functions actually exercised by the force that matters for the purposes of attribution. Thus, the conduct of a national contingent is to be attributed to the organization if the contingent was acting in the exercise of functions appertaining to the organization and under a chain of command leading to the UN. The fact that the national contingent commander agreed with the instructions of the UN force commander does not appear to be sufficient to justify the conclusion that the contingent was also acting under the effective control of the state. Significantly, this view appears to have been expressly upheld by the District Court of The Hague in its 2008 judgment in the *Nuhanovic* case. According to the District Court, the fact that a state's authorities agree with the instructions from the UN does not amount to an interference with the UN command structure and therefore does not justify the attribution of the conduct to the state. The Court observed: 'If, however, Dutchbat received parallel instructions from both the Dutch and UN authorities, there are insufficient grounds to deviate from the usual rule of attribution [5, para. 4.14.1].'

Admittedly, the decision of the District Court was later reversed by the Court of Appeal of The Hague. In particular, while the District Court had expressly excluded the possibility of dual attribution [5, para. 4.13], the Court of Appeal admitted that possibility. However, there are no elements in Court of Appeal's decision which may suggest that it endorsed dual attribution in case of parallel instructions. As we have seen, attribution to the Netherlands of the conduct of Dutchbat was not based exclusively on factual control.

While it seems excessive to link dual attribution to the role played by the national contingent commander within the UN command structure, dual attribution might be admitted in those cases where it is not clear whether the national contingent was acting in the exercise of functions of the sending state or of the organization. In particular, a situation of this kind may arise where, with regard to the conduct concerned, both subjects were formally entitled to exercise their authority over the contingent and the conduct was in fact the result of instructions taken by mutual agreement between the organization and the state. One may refer, for instance, to the situation described by the Court of Appeal of The Hague with regard to the evacuation of Dutchbat from Srebrenica. As the Court put it, during the transition period following the fall of Srebrenica, it was hard to draw a clear distinction between the power of the Netherlands to withdraw Dutchbat from Bosnia and the power of the UN to decide about the evacuation of the UNPROFOR unit from Srebrenica [3, para. 5.18]. Since during that period both the Netherlands and the UN appeared to be formally entitled to exercise their respective powers over Dutchbat, and since in fact they both exercised their actual control by issuing specific instructions, dual attribution might be regarded as justified.

6. State organs placed at the disposal of an organization, effective control and *lex specialis*

The general rules of attribution contained in Articles 6 to 9 of the Articles on the responsibility of international organization are applicable only residually. They may be derogated from by special rules of attribution. According to Article 64 of the 2011 text, '[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members'. Thus, one cannot rule out the possibility that the conditions for the attribution to an organization of the conduct of contingents placed at its disposal by states are governed by special rules whose content differs from the criterion of effective control provided under Article 7.

Special rules of attribution may be contained in the rules of the organization (52). Examples of this kind of rules are difficult to identify. In any case, such rules would only apply in the relation between the organization and its members or between the members and would not be opposable to third states or third organizations.

The UN has frequently referred to rules contained in agreements concluded with troop-contributing states in order to exclude its responsibility for certain categories of acts committed by peacekeeping forces [20, p.12]. Special rules of attribution may certainly be contained in treaties that the organization concludes with member states or with third states. However, as the ILC's Commentary specifies, treaties of this kind may govern 'only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules' [13, p.87].

It may be that special rules of attribution apply to a particular category of organizations or to a particular organization. Thus, for instance, the European Union constantly advocated the inclusion in the Articles on the responsibility of international organizations of a provision recognizing that special rules apply to regional economic integration organizations [13, p. 168]. Exploring whether special rules of attribution apply to EU peacekeeping mission is beyond the scope of the present paper. It must be noted, however, that even those authors who most forcefully supported the view that special rules of responsibility apply to the EU are ready to admit that, when it comes to peacekeeping and police missions, 'the European Union is in many ways a classical intergovernmental organization with problems similar to the UN' (53) [10, p. 137] [16, p.126].

7. Final Propositions

a. Because of their dual status as organs of both the UN and the sending state, the formal status of peacekeeping forces within the UN

system can hardly be regarded as decisive for purposes of attribution. Such dual status justifies the application of a special rule of attribution, such as the one set forth in Article 7 of the Articles on responsibility of international organizations, which is based not on the formal status of peacekeeping forces within the UN system, but rather on the effective control exercised over such forces.

b. Two conditions must be met for the conduct of a lent organ to be attributed to the receiving organization under Article 7. First, the organ must be 'placed at the disposal of the organization'. Secondly, the organization must exercise 'effective control' over the conduct of the organ placed at its disposal. This means, first, that the lent organ must perform functions entrusted to it by the receiving organization in conjunction with the machinery of that organization and, secondly, that that organ must act under the exclusive direction or control of the receiving organization, rather than on instruction from the sending state.

c. The requirement of effective control under Article 7 must not be interpreted as meaning that the conduct of a lent organ can be attributed to the organization only if the organization was exercising a control over each specific conduct of that organ. A lower degree of control may be sufficient to justify attribution.

d. When applying the criterion of attribution set forth in Article 7 to UN peacekeeping forces, importance must be attached in the first place to the manner in which the transfer of powers was formally arranged between the organization and the troop-contributing state. It is submitted that, if the force is supposed to perform certain functions on behalf and under the formal authority of the organization, and not of the contributing states, it can be presumed that its conduct was taken under the exclusive direction and control of the organization and is therefore attributable to it. This presumption may be rebutted if it is demonstrated that the force, while acting under the formal authority of the UN has undertaken a certain conduct because of the instructions given to it by the contributing state.

e. If peacekeepers perform functions under the formal authority of the organization, this creates a presumption that all their conducts, including ultra vires conducts, must be attributed to the organization. This presumption can be rebutted if it is demonstrated that the peacekeepers had acted on the instructions of the sending state.

f. While the purpose of the rule of attribution set forth in Article 7 is to establish whether the conduct of an organ of a state placed at the disposal of an organization must be attributed to the organization or, alternatively, to the contributing state, dual attribution of the same conduct to the UN and to the sending state might be admitted in those (rather exceptional) cases where it is not clear whether the national contingent was acting in the exercise of functions of the sending state or of the organization.

g. Although the existence of the special rules governing the question of attribution with regard to the activities of military contingents placed at the disposal of the UN or of other international organizations cannot be ruled out, examples of such special rules are hard to find.

Notes

1. House of Lords, *Attorney General v. Nissan,* 11 February 1969, All England Law Reports, 1969-I, p. 646.

2. Oberlandesgericht Wien, N.K. v. Austria, 26 February 1979, International Law Reports, vol. 77, p. 470.

3. See generally Klabbers 2011, p. 285 et seq.

4. District Court (Southern District of New York), Georges et al. v. UN, October 2013. For an assessment of the responsibility of the UN see Mégret 2013: 161 et seq.; J. Alvarez, 'The United Nations in the Time of Cholera', AJIL Unbound, available at http://asil.org/remedies-harm-caused-un-peacekeepers.

5. See, for instance, Court of Appeal of The Hague, *Mothers of Srebrenica v Netherlands and the United Nations,* 30 March 2010, 49 *International Legal Materials* (2010), p. 1021 et seq.; Supreme Court of the Netherlands, *Mothers of Srebrenica Association et Al v The Netherlands,* 13 April 2013, 51 *International Legal Materials* (2013), p. 1327 et seq.

6. For an analysis of a special and innovative mechanism set up in relation to the activity of UN Mission in Kosovo (UNMIK), see Klein 2012: 225 et seq. Klein, P. (2012). "Le panel consultatif des droits de l'homme *(Human Rights Advisory Panel)* de la MINUK: une étape dans le processus de responsabilisation des Nations Unies?", in Perspectives du droit international au 21e siècle - Liber Amicorum Christian Dominicé

7. For an examination of the position of the UN on this issue see Dannenbaum 2010: p. 141 et seq.

8. See 'Articles on the responsibility of states for internationally wrongful acts', annexed to UN General Assembly resolution 56/83, UN doc. A/RES/56/83, 12 December 2001, and 'Articles on the responsibility of international

organizations', annexed to UN General Assembly resolution 66/100, UN doc. A/RES/66/100, 9 December 2011.

9. For such criticism see Alvarez 2011: 345; Hafner 2011: pp. 700–701.

10. See European Court of Human Rights (Grand Chamber), *Behrami and Behrami v. France and Saramati v. France, Germany and Norway,* 2 May 2007, and *Al-Jedda v. United Kingdom,* 7 July 2011; House of Lords, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence,* 12 December 2007; Supreme Court of the Netherlands, *State of the Netherlands v. Nuhanović,* 6 September 2013.

11. On this point, see Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines,* 2008.

12. ECtHR (Grand Chamber), *Behrami and Behrami v. France and Saramati v. France, Germany and Norway,* 2 May 2007, para 133.

13. See, among others, Klein 2007: 55; Sicilianos 2009: 376; Palchetti 2007: 689–690. In mild criticism, the ILC observed that 'when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question'. Report of the International Law Commission on the work of its sixty-third session, UN doc. A/66/10, p. 23. Palchetti, P. (2007). "Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi Behrami e Saramati", Rivista di diritto internazionale. Klein, P. (2007). "Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considerations critiques sur l'arrêt Behrami et Saramati", Annuaire français de droit international.

14. See, in particular, ECtHR (Grand Chamber), *Al-Jedda v. United Kingdom,* 7 July 2011, paras 84-85.

15. See, respectively, Article 55 of the 2001 text and Article 64 of the 2011 text (the latter provision is reproduced later, at paragraph 6 of this paper).

16. As the ILC's Commentary to Article 64 put it, 'special rules may concern the relations that certain categories of international organizations or one specific international organization have with some or all States or other international organizations.' Report of the International Law Commission, supra fn 14, p. 100.

17. Report of the International Law Commission, supra fn 14, pp. 85-91. See also Pronto 2011: p. 119.

18. *Infra,* paragraph 5.

19. Article 17, para. 2, provides that '[a]n international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.'

20. See the view expressed on this point by the UN in its comments to the work of the ILC on the responsibility of international organizations, UN doc. A/CN.4/545, p. 17.

21. Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines,* p. 68.

22. Ibid.

23. *Infra,* paragraph 5 of the present paper.

24. ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway,* 2 May 2007, para. 143.

25. The Commentary does not exclude that the conduct of an organ placed at the disposal of the organization can be attributed to the organization on the basis of the criterion set forth in Article 6 but limits this possibility to the case when an organ of a state is fully seconded to the organization. Report of the International Law Commission, supra fn 14, pp. 19-20. On this possibility see Jacob "Les définitions des notions d'"organe" et d'"agent" retenues par la CDI sont-elles opérationnelles? ", Revue belge de droit international. Pp. 24-25.

26. *State of the Netherlands v. Nuhanovic,* 6 September 2013, para. 3.10.2.

27. For an analysis of the relevant practice, see Report of the International Law Commission, supra fn 14, pp. 88–91. However, for the view that 'the test adopted by the Commission constitutes progressive developments'. A more radical view is expressed by Shraga, D. (2013). "ILC Articles on responsibility of international organizations: The interplay between the practice and the rule (a view from the United Nations)", in M. Ragazzi, ed., Responsibility of international organizations. Essays in memory of Sir Ian Brownlie, Leiden-Boston, 205: 'The interpretation by regional and national courts of "effective control", as a test of attribution of conduct and responsibility and its apportionment between the troop-contributing state and the United Nations, has no direct legal effect on the United Nations – a non-party to any of these proceedings'. Shraga, D. (2013). "ILC Articles on responsibility of international organizations: The interplay between the practice and

the rule (a view from the United Nations)", in M. Ragazzi, ed., Responsibility of international organizations. Essays in memory of Sir Ian Brownlie, Leiden-Boston

28. As the ILC noted in the Introduction to the Commentary to the Articles on the responsibility of international organizations, '[i] n so far as provisions of the present draft articles correspond to those of the articles on State responsibility, and there are no relevant differences between organizations and States in the application of the respective provisions, reference may also be made, where appropriate, to the commentaries on the latter articles'. Report of the International Law Commission, supra fn 14, p. 70.

29. This point was addressed by the Special Rapporteur, Roberto Ago, in his Third report on state responsibility. Ago observed that, irrespective of whether the lent organ acquires the status of organ or not, 'the basic conclusion is still the same: the acts or omissions of organs placed at the disposal of a state by other subjects of international law are attributable to that state if in fact these acts and omissions have been committed in the performance of functions of that state and under its genuine and exclusive authority'. *Yearbook of the International Law Commission,* 1971, Vol. Two, Part I, p. 199.

30. See G. Gaja, 'Second report on the responsibility of international organizations', *Yearbook of the International Law Commission,* 2004, Vol. Two, Part I, p. 14.

31. It must be noted that Article 6 is differently worded as it requires that 'the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed'. According to the ILC, while differently worded, the approach is the same as in Article 7: the use of different expression ('effective control' rather than 'exercise of governmental authority') is justified 'because the reference to "the exercise of elements of governmental authority" is unsuitable to international organizations'. Report of the International Law Commission, supra fn 14, p. 86. On the solution retained by the ILC see however the critical remarks by Messineo 2012: 38.

32. See G. Gaja, 'Second report', supra fn 41, p. 14.

33. Salerno observes that, while Article 7 does not make any reference to the functions performed by the lent organs, 'nothing prevents us from considering that the attribution of the conduct of organs placed at the disposal of the organization depends on the fact that they effectively exercise the "governmental" functions of the organization'.

34. For the view that, in providing the standard of effective control, the Articles on the responsibility of international organizations 'codified what was already a longstanding principle for the attribution of wrongdoing at international law', as recognized, among others, by the International Court of Justice, see Dannenbaum, 'Translating the Standard of Effective Control', supra fn 7, p. 141.

35. See International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* ICJ Reports 1986, para. 115; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* ICJ Reports 2007, paras. 399–400.

36. Article 8 provides that '[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.'

37. As rightly observed by d'Argent 2014: 26, '[i]t is indeed superfluous to assess whether the State exercised effective control since the person placed at the disposal of the organization is its organ and that State responsibility for conduct of organs is not conditioned by the positive assessment of any effective control by the State over the conduct of its organ'. d'Argent, P. (2014). "State organs placed at the disposal of the UN, effective control, wrongful abstention and dual attribution of conduct", QIL-Questions of International Law.

38. See however Sari 2013: 82, who, while recognizing the possibility of having recourse to a rebuttable presumption, places emphasize on the status of peacekeeping forces as organs of the UN and identifies the legal basis for attribution in Article 6, and not in Article 7.

39. This does not mean that the rules of the organization are irrelevant. They may serve to delimit and further identify the functions entrusted by the organization to the lent organ.

40. This 'reciprocal' reading of Article 7 has been criticized by d'Argent 2014: 26.

41. One possible reading is that the Court of Appeal applied the test proposed by Dannenbaum 2010: 141, according to which '"effective control," for the purposes of apportioning liability in situations of the kind addressed by Draft Article 5 [now Article 7], is held by the entity that is best positioned to act effectively and within the law to prevent' a breach of international obligations. According to Boutin 2012: 531, '[when asking whether the state had

had 'the power to prevent the alleged conduct', the Court in effect determined that the conduct was caused by the state'. Boutin, B. (2012). "Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić: The Continuous Quest for a Tangible Meaning for 'Effective Control' in the Context of Peacekeeping", Leiden Journal of International Law.

42. See also the judgment of the Court of First Instance of Brussels, where the conduct of the Belgian contingent taking part in the United Nations Assistance Mission for Rwanda (UNAMIR) peacekeeping force was considered to be attributable to Belgium since such conduct was taken at a time when the Belgian government had decided to withdraw from the peacekeeping operation: Court of First Instance of Brussels, *Mukeshimana-Ngulinzira and others v. Belgium and others,* 8 December 2010, ILDC 1604 (BE 2010), para. 38.

43. Article 8 of the Articles on the responsibility of international organizations provides that '[t]he conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions'. According to Article 7 of the Articles on state responsibility, '[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions'.

44. Dannenbaum has a different view.

45. Article 9 of the model contribution agreement (A/50/995, annex; A/51/967, annex).

46. See however d'Argent 2014: 31, who held the view that 'Article 7 ARIO is a provision which is designed to help identify one responsible entity, not several, the very notion of effective control being exclusive rather than cumulative'. For a more nuanced view see Messineo 2012: 41-12, who, while recognizing that in principle Article 7 is an exception to multiple attribution, admits the possibility of dual attribution when peace support operations are concerned.

47. See G. Gaja, 'Second report", supra fn 41, p. 14.

48. ECtHR (Grand Chamber), *Al Jedda v. United Kingdom,* 7 July 2011, para. 84. See M. Milanovic, 'Al Skeini and Al Jedda in Strasbourg', 23 *The European Journal of International Law* (2012), p. 136.

49. Court of Appeal of The Hague, *Nuhanovic´ v. Netherlands,* 5 July 2011, para. 5.9. As noted by Condorelli 2014: 10-11 'la Cour d'appel est sans doute allée bien vite en besogne quand elle a affiché la conviction que la possibilité […] d'une double attribution (aux N.U. et à l'État d'envoi) des agissements des FMP serait 'generally accepted', alors qu'en vérité rares sont les auteurs qui l'admettent'.

50. Supreme Court of the Netherlands, *State of the Netherlands v. Nuhanović,* 6 September 2013, para. 3.11.2. The reference made by the Supreme Court to Article 48 of the Articles on the responsibility of international organizations does not appear to be a pertinent one as Article 48 concerns cases of joint responsibility for the same wrongful act, and not dual attribution of the same conduct.

51. See the view expressed on this issue by Condorelli 1995: 893; and more recently Id, 'De la responsabilité internationale', supra fn 70, p. 1 et seq. Condorelli, L. (1995). "Le statut des forces de l'ONU et le droit international humanitaire", Rivista di Diritto Internazionale.

52. Under Article 2 (b), '"rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'.

53. See Paasivirta and Kuijper 2005: 174.

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КТО ДОЛЖЕН НЕСТИ МЕЖДУНАРОДНУЮ ОТВЕТСТВЕННОСТЬ ЗА ПРОТИВОПРАВНЫЕ ДЕЙСТВИЯ МИРОТВОРЧЕСКИХ СИЛ ООН?

Цель данной статьи состоит в том, чтобы дать анализ международных норм, которые должны применяться для определения того, должны ли определенные действия, проводимые в контексте многонациональной операции под эгидой ООН, приписываться странам, предоставляющим войска, или Организации Объединенных Наций. Статья также рассматривает вопрос о том, могут ли и при каких обстоятельствах одни и те же действия относиться к обоим субъектам. В основе анализа лежат толкования норм отнесения ответственности, изложенных в Статьях Международного правового комитета об ответственности государств, принятых в 2001 году, и в Статьях об ответственности международных организаций, принятых в 2011 году. В этой связи представляется, что при применении критерия атрибуции, изложенного в статье 7 Статей 2011 года, к миротворческим силам ООН, в первую очередь следует уделить внимание тому, как официально были распределены полномочия между ООН и странами, предоставляющими войска.

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Ключевые слова:
Организация Объединенных Наций, миротворческие силы, международная ответственность, атрибуция поведения, Статьи МПК об ответственности международных организаций.

Keywords:
United Nations, Peacekeeping forces, International Responsibility, Attribution of conduct, ILC Articles on the responsibility of international organizations.

FROM WELFARE STATE TO COHESIVE SOCIETIES: SOME CONSIDERATION ON THE HISTORY OF SOCIAL LAW IN ITALY

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The aim of this contribution is to observe the historical origin of the Welfare State crisis. Social law and national insurance systems have worked as a strategy to manage poverty and social exclusion. Jurists consider the new social laws as transient political measures so they do not extend them by means of interpretation. The policies put in place to combat poverty show that the collaboration between State and society was not intended to be a space to develop autonomy. Social bonds and solidarity do not depend solely on the State action, but also owe much to the spontaneous initiative of some members of society. At the origins, solidarity was realized through mutual aid societies. They represent an example of relationship between State and society which is alternative to the individualistic one, a «model» that combines the centrality of the individual with the necessary relational dimension of individual well-being.

1. Yesterday: social laws have no legal status

The first social laws in Italy were a few faint measures implemented by the liberal State to cope with the labor question. Some examples are the law on the labor of women and children, the legal recognition of workers' mutual aid societies, voluntary insurance coverage against injuries at work, the civil liability of owners, the establishment of arbitrators' colleges, the institution of compulsory insurance coverage, and the special maternity fund. There is, however, certainly a close connection with the labor question: «The labor law discipline in Italy was established not *against*, but *within* the traditional boundaries of private law» [4, p.156].

The true constitutional expression of the liberal State coincides with legislative codification, especially that of civil law. The legal model is French-Napoleonic, pivoting on the equality of the citizenowners. Nineteenth-century legal thought owes much to the principles stemming from the French Revolution, particularly freedom and equality: "Men are born and remain free and equal in rights" [7, art.1]. However, the universal principle of equality is based on the "mechanism of reciprocity" (1), where equal liberty implies mutual respect for one another's liberties. This principle influences the construction of the legal system, particularly the great importance given by the civil codes to the «*schéma contractuel*» [1, pp.33-34], as in the free encounter of the wills of parties that are supposed to be equal.

Any other alien element, apart from what has been freely agreed upon by the individual contractors, would constitute a violation of their individual liberty. This individualistic model leaves no room for collective aggregation and also affects the treatment of the mass phenomenon of poverty, which is addressed, as it were, as an individual problem of each single worker. The same vision affects the institution of social insurance systems, in which people help themselves through payment of national insurance premiums. The same applies to all contemporary literature on "self-helpism", the folk ideology in which relief from poverty is always

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connected to an individual path of education and hard work. This vision corresponds with the legal representation of society and of the relations between individuals, and it captures the actual legal status of the citizen non-owner.

Since the Enlightenment, law is to be rational. The goal of writing codes is legal certainty, but real life is expunged in the process, and this condemns the codes to remain at an unbridgeable distance from people's lives [12, p.50].

Legal science merely plays the role of a guardian of the law, and it omits the social and economic context of work from dogmatic speculation. The most insightful legal scientists ascertain the weakness of individuals in the legal code. Particularly the paradigmatic figure of the laborer is completely absent in the code. This "gap" justifies their request for State intervention in the face of injustices generated by the negotiating freedom granted to parties that are mistakenly presumed equal. The State has to intervene because it is considered as the friendly force working for both parties, or even as the only subject able to balance the contracting parties' forces and act as a guarantor of the common interest [5, pp.355-366].

So social awareness overlaps with individualism; the former should have changed the features of private law, leading to a completely different organization of the whole private law system. Only a minority of Italian legal scientists questioned the value attributed to the social laws, particularly Law n. 80 of 17 March 1898 on compulsory insurance against accidents at work for laborers, which undermined a central principle of the legal code: the relationship of cause and effect between accountability and fault. The "new law", drafted outside the code, should have been deemed a special law, not an exceptional law, and should have been subject to broad interpretation. However, «Social laws were not extended by means of interpretation, and did not determine conflicts in the civil law system» [4, p.164]. In other words, the myth of the sovereign State affects the innovators too: they do not go beyond generic requests for legislative intervention through social laws, and in the most daring examples they theorize a recodification of the private-social law [28, Stronati, 2012]. The common law remains untouched and lawmakers prefer to promulgate the first social laws. These can be interpreted as achievements of the socialist movements only indirectly and ambiguously. In fact, they are rather the result of anti-socialist policies. The invention of national insurance systems has been the response of nation-states to the conflict between property and livelihood, that is, a strategy to manage poverty and social exclusion [25, Santoro, 2013].

The link between work and social laws mainly lies in the identification of the "new" nineteenth century poverty with laboring pauperism: a problem of liberal governments to be solved through State intervention. Therefore, jurists reduce social laws to special and transient interventions, thus considering them more as political measures and not "authentically" legal. The need to preserve the common law jeopardizes the legal nature of the social laws. In essence, two parallel systems coexist: public and private law, socio-economic and legal rationale, social laws and the civil law code. This original verdict restricted genuine legal interest only to labor law, which, however, as mentioned above, was born in opposition to the intrusion of social legislation that was perceived as a threat to the dogmatic certainties of the code system. The term "social legislation" in common speech may coincide with "social welfare", which has some basis in legislative action in that the social security law has gained autonomy. Jurisprudence of labor law has shown little interest in the welfare sector, whose study was said, in the fifties, to be in decay: «Overall, the legal literature was a poor production, especially as regards quality, because, apart from for some isolated exceptions, it was limited to presenting the laws published in such matters, possibly showing their evolution, or at the most faced scientific and perhaps topical problems, but, however, never opened to questioning the foundations» [20, pp. 8-9].

The legal essays on welfare legislation are fragmentary. A systematic study does not exist and, when surveying the few monographs, they do not go beyond the mere chronological breakdown of the social laws (2), often compiled by public officials for teaching purposes or targeted at legal professionals.

On one hand, labor law, taught for decades as a specialist course, is now disappearing as a teaching assignment from the educational system. On the other hand, a revival of the seventies and eighties is now taking place in academia. This revival in fact only incidentally relates to the social laws, as in this case, the main topic is not surprisingly the socialist law studies movement. The socialist law studies movement yielded only «modest men and modest results». However, its merit was to have contributed a critical voice to jurisprudence: «(*the movement*) was not vocationally subversive, nor did it develop an alternative model of society; it only aimed, with diversity of tones and objectives according to the various authors, to break

the monolith of a bourgeois legal heritage that […] seemed, in the late nineteenth century, a cult object more than a field for discussion and possible revision» [11, p.2].

Without naively pretending to be exhaustive, we can, therefore, initially assume that legal science did not give birth to a discipline with social legislation as its object, a theme taken up by institutional historians, by historians in general, and absorbed by history of the welfare state.

2 Today: the »crisis« of the welfare state

The welfare state is a public policy system designed to guarantee citizens, from cradle to grave, basic welfare standards such as health, education, nutrition, housing and income. However, the space for State intervention in such areas seems to have reached its limit, so much so that public services are becoming increasingly inefficient, and it is almost impossible to pass new expenditures or expand the existing administrative system. It is widely argued that the welfare state is in deep crisis. This is certainly a complex issue also due to large demographic changes and economic choices taken in the international market, among others, which I am not qualified to assess. Still, the question should not be reduced merely to a State's financial capacity or to miraculous economic formulas chasing an increasingly dynamic global market. Indeed, the system in question was fully established after the Second World War, which was a moment of deep global crisis.

Therefore, we can talk of welfare state crisis for a given definition of "crisis", i. e. the meaning of change and choice. Indeed, "crisis" means here opportunity to rethink the idea of society and State, and consequently to rethink the role of the latter in social policies. In other words, every experience of State organization is the bearer of a specific idea of public policies and social rights. From this viewpoint, before talking about the welfare state in crisis, we should deal with the crisis of sovereignty of nation-states. The same principle of fraternity originates as an abstract and universal concept, though it has flourished in the very real dimension of the nation-states. The design of the welfare system in Europe, too, is based on the close connection between wealth and national territory.

This was indeed a fortunate combination at the times of the Fordist production, when the interests of State, businesses, and citizens' needs could be more easily balanced. After that time it became an outdated concept, if only because the interest of business is to move freely in international markets, and the interest of citizens is to get better products and a wider margin of decision in local self-government.

Consequently, redistribution is no longer «the exclusive task of the State which must take action when all is done, as then we would, inertly and hypocritically sad, assist to increasing inequality. On the contrary, action must also be taken at the moment of wealth production» [2, p.19]. Social solidarity cannot be realized solely by the State, «the recipient of all the expectations and, because of this, increasingly unable to adequately respond to them» [6, p. 63]. Rather, the role of the government should be that of a «coordination center of groups that spontaneously emerge from societal dynamics» [6, p. 63], or responsible for "shared administration" with civil society, whose autonomy and responsibility it recognizes [2, pp. 238-239]. Therefore, corporate social responsibility should be strengthened and, above all, all the living forces in society should be mobilized in order to escape the State /market dichotomy and to give greater importance to citizen organizations, because «The fate and effectiveness of democracy did not play only through the mechanisms of the parliamentary representative democracy or through the mediation of an administration responsible for the public interest, but also (in the first place?) in the proliferation of associative public spaces» [3, p. 13].

Despite appearances, the crisis of the welfare state cannot be inferred strictly by economic and financial analysis. Rather, there are social and cultural boundaries: «The real question behind the future of the welfare state is the future of society itself». The underlying question is how society will evolve, «how does the State transform society, what shape does it give to the relationships between individuals?» [22, p.16]. Ultimately, the reason for the "crisis" of the welfare state lies «in the same process of generation of the modern nation-state», particularly in the representation of society and nation-state depictedin the reference literature. The real convergence of the welfare state crisis would therefore be «the relationship between State and citizen (as has been built along the entire parabola of modernity)». This is exactly what we should reconsider: «the belief that social solidarity can be channeled by the State only, as if no intermediate entities existed between State and citizen. This assumption, typical of the liberal State, proudly supporting the healthy and final demolition of any intermediate entities by means of revolution, remains substantially unchanged even in the phase of construction and realization of the welfare Sta-

te, and is now showing all its fragility» [6, pp. 61-62].

The "crisis" of sovereignty necessitates a new and different perspective because social bonds and solidarity do not depend solely on the State action, but also owe much to the spontaneous initiative of a society's members: «Based on this assumption, we can rethink the traditional welfare state by relying on a recent phenomenon: the growing importance of what has been called the third sector of civil society, which is "third" with respect to the State and to the market, because it includes organizations and activities not attributable either to the action of the former nor to the logic of the latter» [6, p.62].

The civil associations' world basically forces us to abandon the State /market dichotomy and rediscover traditions that history had discarded. On one hand, it is true that, as a definition, the third, or non-profit, sector has emerged only recently. Nevertheless, it has in essence been an important part of European culture, even in regulation, if by third sector we mean: «those entities that are different from the market and from the State, and act in a sphere of action that is not totally "private" but not even comparable to the "public". They do not pursue a particular interest, but at the same time cannot be acknowledged as a surrogate of the public institutions. In this sense there always has been, in Italy, a "third sector", although only recently it has been well defined following on from a mainly English-based reference literature» [23, p.13].

The golden century of associations was the 19th, which «will go down in history as the century of associations» [10, p.226]. We must go back to the origins of the welfare state that «has its roots in that late nineteenth-century common language of solidarity that (although made of different theoretical idioms) claim[ed] the overcoming of individualism and a greater involvement of the State in the government of society» [6, pp. 32-33]. In this period of liberal societies, solidarity was realized through mutual aid societies [24, p. 811]. This time was a historical deviation that, however, today should be looked at in a different light as a phenomenon whose effects are measured in the long run and that perhaps deserves more attention in historical perspective. Firstly, this phenomenon is to be studied for its own sake and not «as a step toward transitional forms of more combative labor action» to avoid obscuring important aspects of society. Significantly, mutual aid societies are not limited to concretely improving the fortunes of part of the population. Rather, they «inspire a veritable spirit of independence and democracy in the social fabric, whatever the original intentions of their founders» [9, p.13, pp. 37-38] (3). In other words, we require an approach that does not see conflict as a category to understand the phenomenon of mutual aid societies. Mutual aid associations were born as a spontaneous means to limit liberalism and, in many respects, as a long-term project aimed at dismantling the capital-labor class relation in the capitalist system.

3 Tomorrow: more society, less State

The mutual aid association system values the citizen-member, an interesting alternative to the welfare state, where the citizen is a mere user of services offered because of abstractly identified needs, and the welfare mix, where the citizen is a customer [29, p.11]. The mutual aid societies are a modern tool of action for civil society, which self-organizes to respond to the real and concrete needs of communities. This example of State/society relation presents an alternative to an atomistic, individualistic type of relation. This "model" is based on self-help, solidarity and democratic participation, and it combines the centrality of the single individual with the need for relations, which are equally necessary for the welfare of individuals. The "one man, one vote" principle does not realize just a formal and abstract equality, but a substantial one among association members by involving them in participation responsible for the vitality of the association. Before being rights susceptible to claim, social rights must be pursued. Therefore, not only do the mutual aid associations represent a model of social inclusion, but they are also the expression of civil society activism. Modern associations originated in industrialization and the need to create forms of self-defense against the social risks brought about by deep socio-economic changes. The aims of the associations can be easily expanded and adapted to emerging needs. They often fertilize the growth of other forms of association, such as the cooperative societies of consumers as well as manufacturing and credit unions. The number of mutual aid societies has increased significantly with the granting of the Albertine Statute in a euphoric climate of constitutional liberties [16, p.30], holding great promise for equality rights, freedom of thought, opinion and so on.

Such liberties were left without real judicial protection, as the liberal State promoted the sovereignty of statute law and only recognized liberties that were expressly provided by positive law. In that perspective, the constitution is

not a legal source superordinate to the positive law, but it is essentially a political compromise and, therefore, does not have the legal power to ensure even the modest liberties declared there [8, p. 44].

The mutual aid societies, supported by a minority of the liberal bourgeoisie, break this individualistic vision of the contractual scheme by leveraging self-help principles in a context of relations and not merely of the individual. Self-help that values the individual is realized through the mottos: »there's safety in numbers« or »one for all and all for one«. In this sense, the principle of *Selbsthilfe* (self-help) does not mean «God (or heaven) helps those who help themselves«, but it is better expressed as »self-help in the context of mutualist structures» [14, p.55].

This reference model was developed by Schulze-Delitzsch, who was not surprisingly a lawyer and, from 1837, a magistrate. The project was constitutionally significant, because the final goal is a general «social reform of which the People's Banks would be only one facet» [17, p. 11]. Liberal reform considers not only the capital, but also the moral aspects, to be key factors. Individual freedom and strength are always fundamental, but it is free association that represents everyone when the individuals are not strong enough [17, p. 11]. The jurist understands that, in order to address people's miseries, the leverage action is economic in nature. Social and constitutional reform is entirely based on associations, particularly on the manufacturing cooperative societies, which must be realized by the means of consumer and credit unions. The German reforms profoundly inspired Italian Luigi Luzzatti [26, Schulze-Delitzsch, 1871], one of the founding fathers of the cooperative banks in Italy and popularizer of the cooperation model throughout Europe and beyond [15, p.11]. The formula elaborated by Luzzatti in order to realize the principle of equality in a substantial, not merely formal, sense of solidarity is to make credit democratic. According to Luzzatti, credit does not create capital, but simply increases capital utility [18, p.19]. The Luzzatti proposal is based on inter-class association, particularly on the link between banks and mutual aid societies. In other words, he argued that access to credit is the instrument to achieve economic equality, which is itself a key to civil and social rights. This, in many respects visionary, project was never achieved. Later, the social security system of the mutual aid societies came into decline and was finally replaced by the universal social protection of state systems. However, the reasons for this "failure" should not be ascribed to the inefficiency of mutual aid societies, but rather to specific political and juridical reasons. The first reason is the myth of national sovereignty. This limit is common to both the liberal and the democratic legal systems, which do not tolerate intermediate and autonomous entities in the State. Forms of association are allowed only as the sum of individual liberties or as forms of decentralization; that is, local State administration that cannot necessarily be equated with »democracy" [19, p. 65] [27, p. 135]. The policies against poverty reveal that the collaboration between State and society was not intended to be a space to develop autonomy, but rather "as a government strategy" [21, pp. 24-25]. Moreover, the myth of the absolute State sovereignty drastically simplifies the law by putting topdown authoritative legislation as the only source of law, excluding the bottom-up laws for regulating society [13, p. 203], thus depriving it of an essential instrument of expression.

Notes

1. Art. 4 Déclaration des droits de l'homme et du citoyen: "Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law".

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3. In Italy "Historians have been inclined to view the effort by liberal elites to form popular associations, before and after unification, as a half-hearted and short-lived prologue to the proliferation of truly independent, social trade unions. There are good reasons, however, to put aside the long view of popular associations as failed instruments of bourgeois hegemony or modern labor organization, and examine more closely what was new and meaningful about them in the specific context of Italian unification. Italian liberals were not united in their enthusiasm for popular associations, but this is neither surprising nor sufficient to explain historians' relative neglect of the topic", Soper, S.C . (2013), Building a Civil Society. Associations, public life, and the origins o f modern Italy, Toronto, Buffalo, London12–13

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ОТ ГОСУДАРСТВА ВСЕОБЩЕГО БЛАГОСОСТОЯНИЯ К СПЛОЧЕННЫМ ОБЩЕСТВАМ: НЕКОТОРЫЕ СООБРАЖЕНИЯ ПО ИСТОРИИ СОЦИАЛЬНОГО ПРАВА В ИТАЛИИ

Цель статьи - рассмотреть историческое происхождение кризиса государства всеобщего благосостояния. Социальное право и национальные системы страхования были и остаются главными направлениями борьбы с нищетой и социальной изоляцией. Юристы рассматривают новые социальные законы как временные политические меры, поэтому они не развивают их путем толкования. Проводимая политика борьбы с нищетой показывает, что сотрудничество между государством и обществом не предназначено для создания пространства для развития автономии. Социальные узы и солидарность зависят не только от действий государства, но также во многом обусловлены стихийной инициативой некоторых членов общества. В своем начале солидарность осуществлялась через общества взаимопомощи. Они представляют собой пример взаимоотношений между государством и обществом, который является альтернативой индивидуалистическому обществу, - «модель», которая сочетает в себе центральное положение человека с необходимым реляционным измерением индивидуального благосостояния.

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Ключевые слова:
социальное право, государство всеобщего благосостояния, солидарность, третий сектор, ответственное участие.

Keywords:
social law, welfare state, solidarity, third sector, responsible participation.

ФАКУЛЬТЕТ УПРАВЛЕНИЯ И ПОЛИТИКИ ОСУЩЕСТВЛЯЕТ ПОДГОТОВКУ БАКАЛАВРОВ И МАГИСТРОВ ПО НАПРАВЛЕНИЯМ «ГОСУДАРСТВЕННОЕ И МУНИЦИПАЛЬНОЕ УПРАВЛЕНИЕ», «ПОЛИТОЛОГИЯ» И «МЕЖДУНАРОДНЫЕ ОТНОШЕНИЯ».

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