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Indice

Leibniz and George I: an Alternate History of Anglophone Law for the Global Age

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The historiography of 18th-century England portrays the Hanoverian kings as simple - minded, but George I of Hanover was instead a particularly intelligent and resourceful person. He did not invite Leibniz to England, perhaps to avoid legal conflicts and thus focus on establishing a world empire. Leibniz was a prodigy of mathematics, physics and philosophy, but his contribution to jurisprudence was also significant. If a Lord Chancellor had defined justice as "the charity of the wise," history would have been very different.

La storiografia dell'Inghilterra del XVIII secolo dipinge i re di Hannover come ingenui, ma Giorgio I di Hannover era invece una persona particolarmente dotata di intelligenza e di risorse. Non invitò Leibniz in Inghilterra, forse per evitare conflitti di natura legale e concentrarsi così sulla creazione di un impero mondiale. Leibniz fu un prodigio della matematica, della fisica e della filosofia, ma anche il suo contributo alla scienza giuridica fu significativo. Se un Lord Cancelliere avesse definito la giustizia come "la carità dei saggi", la storia sarebbe stata molto diversa.

1. THE QUESTION

A twenty-first century global order is being established by a convergence of two historic traditions of Western law, Civilian and Anglophone. Although the two legal methods are very different in composition and method it is hoped that the new global regimen will benefit from advantages of each: The Civil law, philosophically based and principled in its operation, has the merit of predictability and certainty. Its legitimacy rests on an appeal to *Reason*. By contrast the Anglophone law, based in a fellowship and guided by internal consensus, is more malleable and adaptable to changing circumstance. Its legitimacy rests on an appeal to *Faith*[1].

There is occurring, however, an imbalance in relative influence between these two traditions as a global law is being constructed. Especially, because the global order is built on a technological foundation, with frequent change and innovation, the Anglophone law has a distinct advantage. It is less constrained by fixed doctrine and is more readily able to adapt at a rate equal to that of technical advance. An additional advantage is that the while Civilian methods tend to the explicit and defined, the English approach tends to be inexplicit and obscure, allowing latitude for adaptation. These differences have provided it with an advantage in the legal aspect of the globalization project, so that to some extent the project of globalization amounts to a process of Anglicization, or even Americanization[2].

Nonetheless these events of legal development are difficult to objectively examine and evaluate simply by reason of their overclose familiarity. They so completely define our world that, like the language we speak, they become invisible to us. In fact, this poses one of the great problems for those scholars, jurisprudents, and political leaders who have undertaken the task of constructing an enclosure of authority that would include all persons and regions of the earth.

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[1] S. LEVINSON, *Constitutional Faith*, Princeton University, 1988.

[2] R. DOMINGO, *The New Global Law*, Cambridge, 2010.

That is the difficulty of gaining perspective on the work they are doing. It is a work of many complexities in an environment of perpetual change. Yet, despite the difficulty of finding perspective for evaluation, the attempt to combine two disparate legal methods on a global scale deserves close examination[3].

There are, of course, obvious ways to gain some useful perspective upon each tradition to more fully understand the implications of combining the two. One way is to view each legal method historically, in terms of its development over centuries, and then to view this convergence as the culmination of a long historical process. That is, to go back to a time when the two Western traditions operated as distinct legal enclaves, in parallel proximity as unfriendly rivals, and with little cooperation or exchange between them. The other obvious approach is to analyze them in a comparative way. That is, to understand each tradition by understanding what it is not. Both these approaches are commonly employed by academic scholars to gain a useful perspective in the project to construct a global law.

However, another way to gain perspective on this global process is to imagine it in terms of a fictional history. That is, to consider where and how the two legalities might have converged to produce a different worldwide regimen of law had their previous mutual histories unfolded in a different way. This would have the benefit of both a historical perspective and a possibility of sharp contrast. To do this, probably no single event is more fraught with potential meanings than when, in the early eighteenth century the Elector of Hanover ascended the throne of the United Kingdom as George I. In the event it is sometimes conjectured that the new king might have named his close confidant and legal advisor, Gottfried Wilhelm Leibniz to be *Lord Chancellor*, highest legal office in the Kingdom—but he did not. Yet, purely as an exercise in speculation this non-event provides an excellent device to analyze and understand the current project of global law, along with the assumptions and values that guide it.

In fact, if Leibniz had influenced the English legal system during the eighteenth century as he had the Russian, French, German, and Austrian systems, the substance and purpose of a uniform worldwide legal culture in the twenty-first century might have been very different. There would probably have been a difference even in three defining premises of the new global order: Instead of *Global,* it might have been considered *Universal.* Instead of *Rule,* the system might have been intended to *Protect*. Instead of *Technology*, its foundation might have been *Nature*. There is, of course, no way to be certain that these novel outcomes would have occurred. But it can be assumed with great certainty that had George I appointed Herr Leibniz to be his *Lord Chancellor*, the history of English law, world history generally, and the project to construct a unified world order that included all regions and peoples, would have unfolded in a very different way[4].

2. THE TRANSFORMATION

It is important to remember that when George Ludwig of Hanover ascended the English throne in 1714, it was at the culmination of one of the most tumultuous periods in the development of modern Western law. Following on what historians call *The Renaissance* and *The Protestant Reformation*, the old legal edifice of Church and Empire had been broken apart. During *The Renaissance* there was a revival of the ancient tradition of the *ars rhetorica*. Young scions from wealthy families were taught from childhood in the regime of the *studia humanitatis*. They acquired a superiority of manner and speech along with the affinities of an aristocratic class. They also came to displace the old warrior nobility and monastic scribes in the councils of Pope and Emperor, bishop and king. In fact, they represented a new ruling stratum where the power of wealth and the knowledge of law came together[5].

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[3] Q. SLOBODIAN, *Globalists: The end of empire and the birth of neoliberalism*, Harvard, 2018.

[4] L. COLLEY, *Britons: Forging the nation 1707-1837*, Yale, 2012.

[5] D. CANNADINE, *Class in Britain*, Yale, 1998.

But the Europe of that time was still immersed in the religious culture of medieval Christendom. As a new rising class that combined legal expertise with enormous wealth, they engaged a battle for a new synthesis of law and religion known as the *Protestant Reformation.* Yet soon, because of the divisiveness and rancor caused by religious sectarianism there began a search for a new *Methodus,* a new paradigm of non-religious understanding on which law and government could be based. This search led eventually to the two predominant strands of a modern Western way of thinking, the *Empiricism* of Francis Bacon and the *Rationalism* of Rene Descartes[6].

On the Continent, in matters of law and governance, the impact of these new ideas concluded symbolically with the *Peace of Westphalia* in 1648. That event is looked back upon as the birth of what would become the modern territorial, law-based nation-state. It was also the time when Continental law began to be less theological, and religion began to be replaced by secular learning as the educative basis of legal order in Europe. The two categories of Protestant and Catholic would become permanent fixtures in a legal culture that claimed to be equally impartial to both.

However, in the momentum of change, there continued to exist two problems. First the thought of a divine aspect of human existence was being written out of the prevailing ideologies. Along with that, there had not been set forth a paradigm of adjudication and education that could fully replace the old universal framework of the Christian Empire. Bacon and Descartes had laid a foundation but neither had provided a means of applying either the *Empirical* or the *Rational* to practical requirements of governing[7].

Just as on the Continent, similar changes were sweeping across the Island Kingdoms of England and Scotland, but they were resolving themselves in a different way. In 1641 King Charles I of England was executed and the *Puritan Commonwealth* established under a militarist *Lord Protector*, Oliver Cromwell. Yet, without the stabilizing influence of a presiding monarch or an established nobility, England plunged into a prolonged and disastrous chaos. Every device of Calvinistic jurisprudence was employed to suppress resistance and dissent, including the most unspeakable forms of torture and execution. But the convulsions proved to be endemic to the legal regime being imposed and, in a desperate attempt to re-establish order, the Monarchy was restored in 1660[8].

Nonetheless, deep animosities remained, and only with the overthrow of King James II in the *Glorious Revolution* of 1688, was a permanent settlement finally achieved. William of Orange, *Stadtholder* of the Dutch Republics--whose wife, Mary held a remote claim of entitlement--was invited by the *House of Commons* to become William III, King of England. The new monarch was interested in England primarily as a source of revenue and soldiers, and he brought with him an entourage of maritime, financial, and legal expertise to fully exploit those Island resources. He then quickly returned to the Continent to direct his *War of the Grand Alliance* against France: He remained there until the end of his life. Meanwhile, with the passive complicity of Queen Mary, for the next nine years, the House of Commons became *de facto* ruler of England.

Yet, the ascension of William and Mary in many ways only covered over a myriad of unanswered questions about the shape this new parliamentary monarchy would take. Nonetheless, it demonstrated one of the lasting characteristics that would become crucial to the British Monarchy--although not always appreciated. That was the importance attached to the person of the King or Queen as what might be called the *essential figurehead*, in the composite of assemblages, charters, and statutes that would come to be accepted as constituents of a legitimate government. Although, of negligible authority and limited function, the monarch was

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[6] N. GILBERT, *The Renaissance Concept of Method*, New York, 2018.

[7] R. LESAFFER, *European Legal History*, Cambridge, 2010; D. CROXTON, *The Last Christian Peace*, London, 2015.

[8] D. COQUILLETTE, 1999: *The Anglo-American Legal Heritage*, Durham, 1999; N. GILBERT, *op. cit.*

an object of rite and ceremonial. He or she embodied a tradition of personal allegiance for a structure of governance operating of the doctrine of human contentiousness[9].

3. CONSTITUTIONAL LAW

But the settlement of the new constitution was further complicated in 1707, by an *Act of Union*, when England and Scotland were joined as the *United Kingdom*. The effect was to bring together at least six different legal traditions. These included English and Scottish laws, both mixed systems born out of the Roman *jus commune* of medieval Christendom. Along with these were customary practices, including the old *Lex Mercatoria* that operated among merchants. To these were added more recent innovations that followed on the *Peace of Westphalia,* including elements of the unique *Roman-Dutch Law* that William had brought with him. Finally, and predominant within Parliament and certain courts of the realm was the fellowship of *Common Law*[10].

In this period of confusion where lines separating law, politics, and custom were unclear, a famously *Unwritten Constitution* was asserted. It was, in fact, constructed on the bonds of fraternal oath, ties of hereditary entitlement, and aggregations of wealth, both landed and monetary. The guild fellowship of Common Law expanded its authority and dominion through the vehicle of the House of Commons. In doing so it altered the character of *Parliament* from being an occasional event convened by the Monarch, to that of a looming legal presence, a *High Court of Parliament*. Finally, against an age of *Royal Absolutism* was asserted a claim of parliamentary *omnicompetence* in all questions legal and religious. The influx of Dutch capital and Scottish legal acumen would culminate in the founding of both Lloyds of London (1688) and the Bank of England (1694). Although at this time London was dependent on the African slave trade as its main source of foreign revenue. But over time, with the help of Dutch expertise, London became the center of world finance and trade[11].

Historians generally look back upon the events of 1688 as a triumph of the Common Law, when that tradition and the new *Unwritten Constitution* became indistinguishable from one another. However, it is important to remember that until very recently, what came to be known as the Common Law tradition had been primarily a fellowship of trade, an appendage of the monarchy. It held a narrow access to certain departments, in which its judges acted as virtual oracles of law. Indeed, as a system of jurisprudence it was primitive to the point that, with the exception of the medieval *Glanvill* and *Bracton,* and the more recent Littleton and Coke, the Common Law was known to be virtually a law without books. Inevitably, with this new reach of authority there came to be strong disagreements and deep cleavages within the legal stratum concerning, not only the application of law, but the sources of law, its composition, and the purposes it served[12].

The Common Law had no philosophical or theological orientation, no constitutional concept, nor did it claim to represent any moral or ethical benefit to the larger public. Instead, it had an uncatalogued, mass of previous decisions collected in the medieval *Year Books*. Its definition of justice amounted to little more than whatever result was produced by the application of its procedures. As such, in fact, it in no way existed as a fully realized system of law comparable to what was taught at the universities or that existed on the Continent. What had come into being through these convulsions was, in effect, a structure of rule, with the outward forms of Norman Kingship, but answering to the caprice of Lords and Commons. The one great virtue of the Common law fellowship was its pragmatic agility, a property that allowed it to survive and evolve from medieval insignificance to predominance in the modern world.

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[9] M. TUININGA, *Calvin's Political Theology and Public Engagement of the Church*, Cambridge, 2018.

[10] J. ISRAEL, *Anglo-Dutch Moment: Essays on the Glorious Revolution*, Cambridge, 2011.

[11] J.H. BAKER*, An Introduction to English Legal History*, Oxford, 2002.

[12] H. POTTER, *Law, Liberty, and the Constitution: A brief history of the Common Law*, Martlesham, 2015.

In fact, from the time of the *Norman Conquest* in 1066, throughout the medieval age the actual law on which the English Monarchy was constructed was very similar in most respects to what existed on the Continent. That law, the Latin *Jus Commune*, was the law of *Christendom* and in its provisions combined the realms of both coercive and persuasive, *imperium* and *dominium*. This was the constitutional law that prescribed relations between bishop and king, king and noble, noble and commoner. It set down procedures for diplomacy, transactions of trade, and the conduct of war. It defined relations of priority and precedence between Pope and Emperor, Emperor and King, including ranks of succession[13].

Even though the old medieval order had been thrown off, much of the monarchical hierarchy in England was still constructed on the academic law of the universities, Oxford and Cambridge. Even though that learned law had diminished in importance, it did have influence in the equity courts introduced by Francis Bacon a century earlier, as well as, for example, the courts of heraldry, maritime law, and ecclesiastical matters[14].

Following the Act of Union in 1707, Scottish Law with its academic orientation, became even more dominant. It was centered at the universities, especially Edinburgh, with a deep historic influence from Leiden and Paris. In the new pattern of Parliamentary Rule the Scottish influence came, eventually, to be inserted by Lord Mansfield, who sat on the King's Bench from1756-1788. Mansfield attempted to rationalize legal practice and introduce commercial instruments long in use on the Continent. Nonetheless, in the new form of parliamentary government the most important man in the functioning of government would be the Prime Minister—but that was not always the case[15].

4. LORD CHANCELLOR

The office of Lord Chancellor had been a position of supreme importance, and was said to have been established in 1066, or even before. As head of the English Judiciary and all its courts, the Lord Chancellor presided over the House of Lords and was Keeper of the Great Seal. In other words, he managed the office through which all royal business was conducted. Originally, filled by a churchman of high rank—usually a Bishop or Cardinal—he was also "Keeper of the King's Conscience."

The office was intended to be occupied by a man of great learning and sophistication, who would have been educated in Roman law at either Oxford or Cambridge. But precisely because of the importance of the office as well as its proximity to royal power, the chancellorship was prone on occasion to drama and even tragedy[16].

Originally the *Norman Kingship* imposed on England by William the Conqueror reflected the evolving pattern of the *jus commune*, the law of Christendom on which all monarchical order was based. Initially, that legal construct maintained a balance between Holy Roman Emperor and Pope. However, during the twelfth century, under the Emperor Frederick Barbarossa, a legal revolution began to sweep across the entire Latin realm. In 1166 this took the form of a dispute between the English King Henry II and the Royal Court Justices[17].

That year the Lord Chancellor, Thomas a Becket came into conflict with Henry II. As a high churchman, Becket was of course, well educated in Roman Law and was its determined advocate. His murder in 1170 at Canterbury Cathedral was thought to have been orchestrated by the King. After his death the archbishop was sainted by the Pope, and was ever after revered by the common people. The events of 1166 to 1170 are traditionally cited as when the Common Law of England first came into being.

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[13] J. BRUNDAGE, *Medieval Origins of the Legal Profession*, Chicago, 2010.
[14] M. BELLOMO, *The Common Legal Past of Europe 1000-1800*, Washington, 1995.
[15] D. WALKER, *The Scottish Legal System: An introduction*, Edinburgh, 1992.
[16] J. BRUNDAGE, *op. cit.*
[17] M. BELLOMO, *op. cit.*

However, its origin had actually grown out of the highly centralized and very harsh rule established after *The Conquest.* This included the founding of three special *Royal Courts of Justice* that convened in London, under the direct authority of the King. Initially, these courts presided over by trained jurists, were primarily concerned with issues of possession and title to land. Because in the medieval era, land was the primary form of wealth, these courts—sitting at the juncture of royal authority and royal wealth—were very important[18].

As it occurred, the *Royal Court* justices were assisted in their work by a retinue of servants, messengers, and orderlies, who carried out the mundane tasks of legal procedure. Over generations these men organized themselves into guilds of trade to increase their earnings and to exclude unwanted competition. Following the expulsion of the learned jurists under Henry II, the work of administering the courts, including the roles of adjudication and advocacy were given over to the guildsmen to be operated as a commerce in litigation.

From that time forward they held a monopoly of trade in *Royal Court* procedures. The arraignment worked well since England came to be governed mostly by absentee kings whose primary interest in the Kingdom was as a source of revenue. The guildsmen supported themselves by fees and gratuities from their clients while the Royal Treasury benefited from fines, levies, and forfeitures. Thus, the birth of the Common Law of England had been coincident with the overthrow and death of a Lord Chancellor. In fact, this was the first of three very famous and tragic episodes involving a dispute between holders of that office and the fraternity of Common Law.

A second episode occurred during the *English Reformation* of the sixteenth century, when King Henry VIII broke with the Roman Church. For the first time, a layman and member of the Common Law guilds was appointed to the position of Lord Chancellor. But that man, Thomas More, had also been trained in Roman law at the university. He became famous in his spectacularly failed attempt to reconcile King and Pope, and to sustain principles of the Roman law that governed all of Christendom. That law, of course, imputed to the Pope or the Papal *Curia* the right of judicial supremacy. But such a concession came in conflict with the growing influence of the Royal Court Guildsmen.

The episode had to do with a royal marriage which at the time had very significant dynastic consequences. When Lord Chancellor More, as "Keeper of the King's Conscience" objected to the union he was charged in Common Law with high treason and, in1515, was executed at the Tower of London. Although the episode is most often viewed as a religious contest between English sovereignty and Papal supremacy, it actually unfolded in every step as a legal conflict that affected not only the judicial order, but also the constitution of the Kingdom. Parliament, becoming less beholden to the King, was now recognized as being *Omnicompetent* in all questions religious and legal[19].

Finally, the third famous and historically tragic event of the Lord Chancery was that involving Francis Bacon who held the office from 1617 t0 1621. A true *Renaissance Man* of prodigious learning in many fields, including both the Common and Roman law. Famous across Europe, he represented in many ways what Gottfried Leibniz would later become. But it was as highest legal officer of the realm that he made his most important practical contribution, which led to his downfall and imprisonment.

He was an advocate for the most enlightened legal methods of what was called in Latin, *aequitas,* equity, or fairness. He advocated a form of legal procedure based in arbitration between parties, emphasizing disclosure rather than manipulation of facts to a case. But difficulties began for Bacon when his office asserted that parties to an issue at Common Law could, if they agreed, move their case to a Court of Equity[20].

There were many advantages to doing so, including not only less delay, a less rancorous process, as well as much less expense--the guild courts were known to exact exorbitant fees. In

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[18] R. BARTLETT, *England Under Norman and Angevin Kings*, Oxford, 2000.

[19] P. ZAGORIN, *Francis Bacon*, Princeton, 1999.

[20] N. GILBERT, *op. cit.*

response to this new policy Bacon was charged with corruption by Sir Edward Coke, the most powerful jurist of the Common Law courts. Widely reviled and universally feared, Coke was able, by convicting and imprisoning Bacon, to contain the encroachment of Civil Law reasoning and insure the Constitutional predominance of the Common Law in England. These measures were later reconfirmed by the *Puritan Commonwealth* and made permanent by the *Glorious Revolution* of 1688. Although Bacon was excluded from public life, his fame would reach far beyond the British Isles as a philosopher and as the *Father of Modern Science*. After 1688 the importance of the Lord Chancellorship declined precipitously[21].

5. UNIVERSAL HARMONY

Viewed from a legal perspective, the seventeenth century was chaotic and dangerous. On the Continent newly constituted forms of governance--whether kingdom, commonwealth or republic--were still evolving. This was true in both adjudicative and educative aspects of the legal culture. Religion, long the doctrinal basis of *Christendom*, was now torn apart by sectarian divisiveness. Without a uniform ecclesiastical authority the attempts at new forms of governance failed. The solution to instability and rebellion often amounted to little more than judicial terror. The search for a non-religious *Methodus*, or paradigm of thought for legal rule, was first proposed by *Pierre de La Ramee* and then provided by Francis Bacon with an *Empirical* approach and Rene Descartes with a *Rational* approach[22].

However, although Bacon and Descartes had each laid out a philosophical *Methodus*, they provided no immediate program of practical application. Inevitably, the exploration of philosophic approaches was impeded because both men worked within the larger framework of assumptions that had shaped Christian jurisprudence. However, the discussion was suddenly interrupted by an unlikely and alien source; The approach of Baruch Spinoza was wholly divergent from his predecessors, drawing not only from Aristotle and Descartes, but probably from sources as divergent as the *Karaite* Jews, the *Sufi* masters, cosmopolitan Jesuits, and the deWitt *Republicans*. For his contribution, a turning point in the history of Western philosophy, he was banished by the Rabbinic Fathers of Amsterdam and died a pariah. Yet, before his death, in 1677, he was visited by an admirer who was already celebrated for his many achievements. This visit of the young Leibniz would be of world-historical significance[23].

As an adolescent Gottfried Wilhelm Leibniz (1646-1716) had already graduated from university and commenced legal training. By his early twenties he was widely published as a recognized legal authority. In the life he lived, Leibniz was everything Spinoza was not. He was widely feted, a man of affairs involved in diplomatic embassies, negotiations, and civic projects on the highest level. It is difficult to exaggerate his accomplishments or the high esteem in which he was held. But his brilliance was also unique in its breadth—mathematics, engineering, physics, philosophy, and more—where he made historic contributions in each. Little wonder he was called the "*universal genius*" Over his lifetime he carried on written correspondence with hundreds of persons, including the leading scholars and scientists of his age[24].

Yet, as a jurist Leibniz was not primarily interested in merely constructing a composite of *Rule* through which the multitude of population could be reduced by enforced ignorance to dependence and submission. Instead, like the Roman *Stoics,* his philosophy of *Optimism,* set forth an affirmative doctrine that applied to all persons, of whatever rank. It presented a holistic view of human existence within the context of a divine universe. The effect was to allow for the sacred side of human existence, but to do so in the language of *Reason*. His overall purpose was

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[21] A. BABINGTON, *The Rule of Law in Britain*, Chichester, 1995.

[22] M.R. ANTOGNAZZA, *Leibniz: An intellectual biography*, Cambridge, 2012.

[23] S. CONNELLY, *Leibniz: A contribution to the archaeology of power*, Edinburgh, 2021.

[24] R. BERKOWITZ, *The Gift of Science: Leibniz and the modern legal tradition*, Fordham, 2010; I. ALMOND, *History of Islam in German Thought: From Leibniz to Nietzsche*, London, 2011.

to cultivate the natural human impulse to *Harmony* through the instrument of a law that was intended—not to *Rule,* but to *Protect*[25].

To achieve this, his approach was very practical. First, against Calvinism he sought to mend the religious divisiveness that existed among Christians by appealing to the underlying sacred impulse he claimed to exist innately in all persons. Against Hobbes he asserted, as a fact of human *Nature,* the inclination for a common good—what the *Stoics* called the *Sensus Communus*: if people were allowed opportunity for cultivation and learning they could substantially govern themselves, the authority of law would be necessary only as a supplement. There was a wisdom he saw among tribal peoples that had once existed universally in the primordial world: he sought to restore it[26].

To pursue these objectives, he studied the most diverse sources: from the Jesuit translation of Confucius to the esotericism of Islamic and Jewish mystics. He especially admired the *Turks* who by the mildness of their law were known to be tolerant in matters of religion. These influences brought an unusual humanity to his writings, even to his jurisprudence. His idea of the *Inner Light* residing in all peoples closely resembled a similar teaching of both the German *Mennonites* and the English *Quakers*. The effect was to exceed what he thought was the sterility of Bacon and Descartes and to contradict the doctrine of human depravity advanced by Calvin and Hobbes[27].

In one of his most famous works, *The Theodicy*, Leibniz summed up his views on a method of order among peoples by bringing the entire judicial premise into question: Men should be judged by a law intelligible to them, that comports with the natural sense of fairness residing innately in all people from birth—in his words "*justice is the charity of the wise*". Similarly, although his original phrase, "*pursuit of happiness*", was later appropriated and redefined by his opponents, for Leibniz it had profound philosophical implications. It was about aligning the full expression of human existence, of both thought and action with the natural harmony of the universe[28].

The impact of Leibniz on legal affairs of the time was incalculable, stirring a deep interest across Europe, to Russia, and even to the Americas. His ideas, a major theme in both Protestant and Catholic Europe, looked to a rapprochement between the two religions, and like the Jesuits, to emulate the rational practicality of *Confucianism* in a unified world. By these teachings Leibniz would be a primary source of what came to be called *Republicanism* in the eighteenth century[29].

6. WAR FOR THE MIND

Remarkably, among all the notable events from the celebrated career of Leibniz, undoubtedly, the one most frequently recounted by historians, involves a dispute over credit for discovering *Calculus*. That dispute which became, in effect, a one-way *ad hominem* assault may never be resolved to the satisfaction of partisans on either side. The question is now only of antiquarian interest. But more importantly, at the time, the prominence of that dispute obscured a larger disagreement in which Leibniz was also being severely attacked. That disagreement was of a different category and, despite the passage of three centuries, remains of urgent importance, even into the global age[30].

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[25] J. MCDONOUGH, *A Miracle Creed: The principle of optimality in Leibniz physics and philosophy*, Oxford, 2022.

[26] N. JOLLEY, *Light of the Soul: Theories of ideas in Leibniz, Malebranche, and Descartes*, Oxford, 1998.

[27] F. PERKINS, *Leibniz and China: A commerce of light*, Cambridge, 2007; D. MUNGELLA, *Leibniz and Confucianism: The search for accord*, Honolulu, 1977.

[28] P. RILEY, *Leibniz Universal Jurisprudence: Justice as charity of the wise*, Harvard, 1996; E. KRIVENKO, *Space and Fates of International Law: Between Leibniz and Hobbes*, Cambridge, 2020.

[29] F. PERKINS, *Leibniz: A guide for the perplexed*, London, 2007.

[30] J. ISRAEL, *op. cit.*

One of the best ways to understand the philosophical *Optimism* of Leibniz is by comparing it with the doctrines set forth by John Locke. The debate between Leibniz and Locke concerned the nature and purpose of law as well as the sources of legal authority. In opposition to Leibniz, Locke became the chief proponent for a judicial order that was indifferent to theological or metaphysical assumptions, it offered an empirical secular line of reasoning, *w*hat in the nineteenth century would come to be called *Liberalism*. The importance of these ideas at the time can best be understood, not within England at the time, but in Europe where the most consequential parts of Locke's career took place. Specifically, it was during *The War of the Grand Alliance* (*Nine Years War*) on the Continent, led by William III against France[31].

In 1685 the *Great King* of France had revoked the *Edict of Nantes*, forcibly expelling thousands of *Huguenots*. They sought refuge in various localities, including England, Austria, Prussia, and Spain, providing loci of support against France. Displaced and suppressed they found a new champion in the Dutch *Stadtholder*. He had made his reputation by the brutal suppression of the *Republican* government of Johann de Witt. His barbaric cruelties ended an era of great cultivation and learning—Rembrandt, Vermeer, Grotius, and Huygens—as nascent *Republicanism* was expunged from the Netherlands[32].

Following events of that overthrow, the ideas of Spinoza, Leibniz and their many admirers were not so much refuted, as they were suppressed with inconceivable brutality. In the process, Leibniz became the primary target in a campaign of vilification mounted by an Anglo-Dutch oligarchy and their allies across Europe. This campaign only increased in intensity after William landed in England in 1688 and had been offered, by Parliament, the English Crown[33].

Within this confusion of events, one useful way to understand the teachings of Locke is to reason backward from the urgent necessities of his time. In England that was to legitimize rule by a privileged caste that employed the archaic forms of a medieval law. Beyond that, to do so in a way that avoided the intractable religious controversies of the seventeenth century.

In fact, the later promulgated version of Locke as a founder of *Liberalism* came to be based on retrospective readings and interpretations highly abstracted from the context in which it was written. The distance in thought between the time of Locke and the twenty-first century, can be demonstrated in the question of *African Slavery*.

It was an all-important matter for Parliament, because the *Slave Trade* was the primary source of revenue for the re-constituted Kingdom of England after the *Glorious Revolution*. However, any seeming inconsistency of Lockean ideas about *Liberty* and slavery was solved by simply re-defining the African Negroes as being a subhuman species, midway between animal and man. They were considered legally and morally subjectable to purchase and sale as well as coerced labor. The fact, this legal definition eventually led to a serious theological question of whether the Nego had a soul. It is evidence of how distantly the audience of Locke was removed from his later popularizers[34].

In the *Liberal* assault on *Republicanism*, the doctrines taught by Locke can be summarized in a few basic teachings, some expressed, some implied. At the foundation, of course, was the sanctity of *Property* and the *importance* of the Individual. Locke offered a logically consistent template for legal rule that no longer descended downward from the supernatural or the metaphysical. It was instead, anchored in the proven foundation of accumulated wealth. The result would be two strata of population, an elevated class of enormous wealth, bound together by hereditary descent and fraternal oath. Beneath them was a much more numerous laboring multitude, the producers of wealth. Each person of that mass stood as an individual, helpless against the ennobled families and fraternal brotherhoods who comprised the ruling class[35].

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[31] E. JORINK, *Newton and the Netherlands: How Isaac Newton was fashioned in the Dutch Republic*, Leiden, 2012; D. CROXTON, *op. cit.*

[32] S. SCHAMA, *Embarrassment of Riches: Dutch culture in the Golden Age*, New York, 1988.

[33] J. COLLINS, *In the Shadow of Leviathan: John Locke and the politics of conscience*, Cambridge, 2021.

[34] D. LUCCI, *John Locke's Christianity*, Cambridge, 2022.

[35] J. LOCKE, *Two Treatises of Government*, Cambridge, 2003; M. CLAWSON, *Constructing Brotherhood: Class, gender, and fraternalism*, Princeton, 1989.

In the extremities of Parliamentary rule under William and Mary, the Lockean idea, reached its domestic nadir with the *Enclosure Acts*. Rural lands were confiscated, villages and farmsteads leveled, for consolidation into landed estates of the ennobled lords. In an attempt to curb rebellion and maintain order the *Black Acts* of 1723 imposed the penalty of death by hanging, mandatory for more than two hundred offences, including petty theft and trespass. Like wealth concentrated among the ruling class, legal individuation of the laboring class was basic to its method of subjugation.

However, if the Lockean paradigm began with property, it concluded with the mind. He saw the human mind to be born into the world as a blank slate, a *tabula Rasa*, ready to be written upon. Mental content was wholly formed by a combination of experience and instruction. Beginning with such a view it was relatively easy for Locke to posit a stratum of entitlement by those trained to govern over a multitude trained to submission—it simply required two separate modes of learning. In fact, following on the teachings of Locke, Parliament imposed a strict policy of forced illiteracy on all common subjects.

But this importance of instruction led to another aspect of Lockean doctrine, the idea of religious tolerance. In fact, his attitude toward religion was a purely instrumental one—religion was important in shaping what might be called *governmentality.* The main program of instruction to compliance would be carried out through authorized institutions of tolerated region. Locke was less concerned with the veracity of religious teachings and more with their utility as an educative device of submission. In his *Letter Concerning Toleration* he outlined his definitions for a legally allowable doctrine. The legitimacy of the Common Law would continue to be based on *Faith,* and the legitimacy of government would be based on *Consent of the Governed*.

Finally, the obvious difference between *Republicanism* and *Liberalism* was the difference between obligation and freedom. The former, based on obligations of the citizen, averred that if a people were given opportunity for cultivation and learning, they could effectively govern themselves. The coercive instruments of law would only be needed as a supplement. By contrast, in the *Liberal* tradition each legal subject was allowed entire freedom—so long as they stayed within limits set down by the presiding judicial authority. The *Republican* approach asserted confidence in human potential as expressed by Leibniz. The *Liberal* view reflected the assumption of human weakness in the tradition of Calvin, Hobbes, and Locke[36].

7. THE IMPERIUM

Although the story of law in eighteenth-century Britain was tumultuous, in that regard it was not much different from affairs on the Continent. However, domestically the reign of George I was one of mild forbearance, as he stayed aloof from legal controversies. But from the perspective of that time, it is more useful to view the new king as a monarch of two distinct realms, one British, the other Germanic. From that foundation he directed his attention to colonial holdings, the most important part of which were three: on the Indian subcontinent, the Caribbean Islands, and North America--including the large but undeveloped colonies of the future United States and Canada. From that foundation the Hanover King began to formally establish what has come to be called the *First British Empire*. As a legal construct it was governed by a variety of customary and judicial traditions, but especially the Roman principle of *imperium*; it is in this wider imperial realm that the influence of Leibniz might be seen[37].

Like the original Roman Empire, the *First British Empire* was fundamentally militarist in nature. The primary role of British oversight was not to directly rule, but like the *Stoic* Roman system, to protect and maintain order between colonies within the Empire. Along with that, it defended the borders of the Empire against invasion from without. Settler colonies were

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[36] J. LOCKE, *op. cit.*

[37] A. PAGDEN, *Lords of all the World: Ideologies of empire: Spain, Britain, France*, Yale, 1995.

permitted broad latitude in terms of self-government. The role of the Metropole was primarily military protection, by the stationing of troops on land along with maritime protection by the Royal Navy.

Beneath this overarching framework of royal power, the legal atmosphere of the various colonies reflected the origin of their settlers. Hence, there were elements of Civil Law, Scots Law (Including Stair and Mansfield), Dutch, and German. (From Hanover and Hesse.) There was also, of course, a variety of English law. (Chancery, Heraldry, Ecclesiastical, Admiralty, and Common Law) In both the Indian and American colonies there were also strands of French law. Most importantly, the British Empire was administered through the Privy Council with Parliament—dominated by Common lawyers--having little direct influence[38].

One notable Hanover attempt to reshape the domestic law of the United Kingdom, however, began under George II, then continued under George III and his Prime Minister, Lord Bute. A Scotsman, Bute had been trained in law at both the German University of Groningen and at Leiden. Although his attempt to implement a more rational law was ferociously resisted by the London guildsmen, there was one aftereffect of his initiative that would have a historic impact. Lord Bute was a supporter of the *Vinerian Chair* established at Oxford in 1755[39].

This would be the first time the Common Law had ever been studied at a university. The inaugural occupant of that chair was William Blackstone. But the attempt to make that law more accessible to practitioner and public alike was rejected by the guildsmen of London. Nonetheless, the publication of Blackstone's *Commentaries on the Law of England* had an enormous impact, especially as the American Colonies sought their independence. Blackstone strengthened colonial autonomy in their domestic affairs and was a source of instruction that would later prove decisive.

One of the largest and most successful colonial examples of Blackstonian influence occurred in Pennsylvania, a colony founded by Quakers to escape Common Law prosecution. In fact, it became the most prosperous colony in North America, with a large German population. Its largest city: Philadelphia, became the founding capital of the new nation. Not incidentally, the writings of Leibniz seem to have been widely circulated among its German population. Benjamin Franklin, one of the Founding Fathers of the United States was well acquainted with the work of Leibniz, embracing his *Optimistic Republicanism* in opposition to Parliament and the *Liberal* methods of John Locke.

However, following on the American Revolution a major change occurred in the legal aspect of Imperial affairs; it began with the trial of Warren Hastings in 1787. That event marked the end of any attempt to "civilize" the Common Law. Hastings, Governor of India, had worked for the incorporation of both Islamic and Hindu law into the legal regimen there. With Edmund Burke as leading prosecutor before the House of Commons, the charge of treason and corruption against Hastings ended any attempt to rationalize the aged tradition of the English guildsmen. Parliament, by the voice and writings of Edmund Burke, came to embody a Common Law authority that would prevail not merely in domestic affairs of the Kingdom, but in a newly reconstructed Empire as well[40].

Yet, despite the growth of Hanover London to be a center of world finance and trade, despite the growing power of the Royal Navy, and despite the increased prestige brought to the British Monarchy by the Hanover Kings, there still did not exist in Britain a uniform system of law based on rational or explicit principles. More than that, despite the elaboration of an empire that surrounded the world, the British did not have a method of law equal in sophistication to their Civilian counterpart. The single great obstacle to governing the British Empire was the lack of a coherent legal method[41].

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[38] E. NELSON, *The Royalist Revolution: Monarchy and the American founding*, Harvard, 2014.

[39] D. BOORSTEIN, *The Mysterious Science of the Law: Essay on Blackstone's Commentaries*, Chicago, 1996.

[40] E. NELSON, *op. cit.*

[41] L. BENTON, *Rage for Order: The British Empire and the origins of international law*, Harvard, 2016.

8. THE DOMINIUM

Such an innovation would amount to a profound change in the structure of empire. But the change did not follow the method laid down by Locke, instead, it followed a historical interpretation of the past. That was the inestimable importance of the literary architecture laid out by Edward Gibbon in his masterful *Decline and Fall of the Roman Empire*. Published in several volumes between 1776 and 1788, it was, after all, not really a study of the Old Roman *Imperium,* but was, instead an extensive delineation of the Byzantine *Ecumene* and the *Dominium* founded at Constantinople[42].

The legal tradition of the United Kingdom had been built over centuries, and worked adequately well for a people who were deeply immersed in that culture. However, legal difficulties began to emerge with the development of an empire. The medieval Common Law had neither the structures, doctrines, nor instruments to administer a modern empire, much less the complexities of modern finance and trade. Especially, after promulgation of the Napoleonic Code of 1804, the British were at a clear disadvantage. The French Code, based on rational principles could be easily translated into other languages, its provisions were clearly understandable according to principles of fairness that were thought to universally guide human conduct. Thus, a concerted effort to construct a new imperial law, and with it a reformation of domestic law, began in 1826, when the Benthamite scholar John Austin spent a year of concentrated study in a German university with the *Pandectists* there[43].

What Austin learned in Germany would have a profound impact on the future history of Anglophone law. In fact, the meanings he brought back and applied in Britain amounted to an inversion of those doctrines being taught at Berlin and elsewhere. As a basic premise Austin chose *Positivism*: For him law was the command of the sovereign, and that sovereign could be any person or collection of persons who had the capacity to enforce their rule. Following on that premise, Austin asserted an insular, or *Analytic* view of legal reasonings: For him the realm of law was unrelated to any external philosophical principle, any standard of morality, any alternative determination of right and wrong, or any other system of knowledge[44].

Finally, Austin embraced the realm of what he called *Formalism* or *Abstractionism*. Following on the inventiveness of the Germans he introduced to the British an entire realm of legal possibility. After the publication of his *The Province of Jurisprudence Determined,* in 1832, the Common Law would be transformed. What had once been ridiculed as virtually a law without books--little more than Bracton, Granville, and Coke--the English language law suddenly became the source of endless publication. Within a generation the book of law and the law library became virtual symbols of the Common Law[45].

But Austin had only laid down a general premise within which to reconstruct a world empire. The next important contribution to imperial legality was the innovation of multinational corporations. Introduced by Robert Lowe. It became, in effect, the counterpart of the nation-state originated on the Continent. In fact, this type of juridic structure had several distinct advantages over the conventional state, especially for worldwide governance. First, it was not bound by territorial limits. While many separate states were required to cover the habitable earth, only a single transcending corporation was required to extend across that entire region[46].

Moreover, unlike the state where affairs are open to public view and subjected to the tumult of popular politics, officers of the corporation operated out of public view, immune to

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[42] G. FOWDEN, *Empire to Commonwealth: Consequences of Monotheism in antiquity*, Princeton, 1993; E. Gibbon, Edward 1996: *Decline and Fall of the Roman Empire*, London, 1996.

[43] L. BENTON, *op. cit.*; J.W. Burrow, *Gibbon,* Oxford, 1985.

[44] W RUMBLE, *The Thought of John Austin*, London, 1985.

[45] J. AUSTIN, *The Province of Jurisprudence Determined*, Cambridge, 2012; C. CUTLER, *Private Power and Global Authority: Transnational law and economy*, Cambridge, 2003

[46] J. RUGGLE, *Just Business: Multinational corporations and human rights*, New York, 2013; R. COSGROVE, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, Chapel Hill, 1980.

controversy. Finally, unlike the colonial government or state, the corporation, freed from the necessities of public benefit and oversight, were able to fully concentrate on the single purpose of enriching their stockholders and officers. It was the multinational corporation that made possible the *Reconstruction* of the Empire from an *Imperium* to a *Dominium* method of rule. Still backed by the power of the Royal Navy, this legalistic, rather than militaristic method of oversight marked the beginning of the *Pax Britannica*[47].

Finally, one more innovation of the early nineteenth century helped make the Common Law a fully realized method of litigation. That was the innovation by Garrow of the adversarial technique of court proceeding. Unlike methods of arbitration or conciliation, the purpose of the new process was to pose litigants against one another in a procedural battle. Participation by the litigants would be strictly limited by the judge who presided and who worked in concert with the attorneys who conducted the trial. The technique did not lessen emotion or mend relations. Instead, it exacerbated animosities and engendered them if they did not already exist. The logic of the technique was that no source could provide the energy required for the full disposition of a case equal to that of the parties involved. It was an innovation that not only solidified legal rule within Britain and its colonies. It also matched in a fortuitous way the overriding paradigm of British policy in relations with other nations—the strategic *Balance of Power*[48].

9. A GLOBAL LEIBNIZ

In twenty-first century academia, the mention of the name Leibniz might often evoke a smile, perhaps a derisive smile. Few among the great names of philosophy are considered less relevant, few are less often studied. In fact, it would be difficult to find an academic who would admit to a sympathetic understanding of him, at any of the prestige universities—at least in the Anglophone world. By contrast, the ideas of Locke are so reflexively assumed to have prevailed, that they virtually frame the institutional atmosphere in which philosophical or historical ideas are engaged[49].

There are, of course, at least two ways to view this neglect of Leibniz on one side, and the embrace of Locke on the other. One might argue that it is a mark of progress in the world of *Late Capitalism* that *Liberalism* is the basic premise to the extent it is inarguable as It frames the realm of ideas. Conversely, there may be voices, perhaps less acknowledged, who say that ignorance of Leibniz is a mark of decline, another symptom of a world order drowning in electronic illusion and superficial materialism[50].

Whatever position one might take in this discussion, both sides must agree that *Liberalism*, with its claim of Lockean provenance is reigning supreme. Moreover, that ideology has brought many tangible advantages to populations in many parts of the world. No aspect of this presence is more important than in the legal foundation upon which the project of globalization is established. The aspiration of a *Liberal International Rule Based Order* is looked upon as an unqualified good and the essential way by which to achieve a global *Rule of Law*[51].

Still, as an exercise in what might be called an anti-history of the future, the work of Leibniz can at least provide a clear contrast by which to better understand the full import of the transcendent mode of rule being constructed. Perhaps most of all it would be an alternative approach to order cultivated from the ground up, as it were, in contrast to a method imposed

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[47] J. MALONEY, *The Political Economy of Robert Lowe*, London, 2005; J. MICKLETHWAIT, *The Company: A short history of a revolutionary idea*, New York, 2003.

[48] J. HOSTETTLER, *Sir William Garrow: His life, times and fight for justice*, Hook, 2009; L. BENTON, *op. cit.*

[49] D. BELL, *Idea of Greater Britain: Empire and the future global order*, Princeton, 2007.

[50] K. SCHAKE, *Safe Passages: The transition from British to American hegemony*, Harvard, 2012; S. MOYN, *Liberalism Against Itself: Cold War intellectuals and the making of our time*, Yale, 2023; D. KENNEDY, *A World of Struggle: How power, law, and expertise shape the global political economy,* Princeton, 2016; E. BORGWART, *A New Deal for the World: America's vision for human rights*, Harvard, 2005.

[51] Q. SLOBODIAN, *op. cit.*

from the top down. At a minimum there is value in studying Leibniz for an entirely different understanding of existence, a different premise and vocabulary for life, different assumptions, and wholly different possibilities[52].

[52] F. PERKINS, *Leibniz: A guide for the perplexed*, London, 2007; E. NELSON, *The Theology of Liberalism: Political philosophy and the justice of God*, Harvard, 2019; P. RILEY, *op. cit.*

Axiomes Religieux : Réalité Contre Fiction

Jihane BENARAFA[*]

Cette contribution examine la relation entre les concepts de halal et de haram dans l'Islam, en se concentrant sur l'importance de ces notions dans divers aspects de la vie des croyants, tels que l'alimentation, les produits pharmaceutiques, les cosmétiques, les produits financiers et d'assurance, et leurs particularités. Les implications de l'hypothèse selon laquelle le principe islamique « tout ce qui n'est pas expressément interdit est permis » n'a pas été défini de cette manière sont également analysées. L'accent est mis sur le fait que cette définition joue un rôle crucial dans l'interprétation juridique de la charia et permet d'éviter les risques de confusion et d'insécurité juridique. L'évolution du concept de halal, qui est passé d'un adjectif désignant un comportement ou un aliment permis à un « espace normatif » autonome englobant de nombreux aspects de la vie quotidienne, est également mise en évidence.

Questo contributo esamina la relazione tra i concetti di *halal* e *haram* nell'Islam, concentrandosi sull'importanza di queste nozioni in vari aspetti della vita dei credenti, come cibo, prodotti farmaceutici, cosmetici, prodotti finanziari e assicurativi, e sulle loro particolarità. Vengono inoltre analizzate anche le implicazioni derivanti dall'ipotesi in cui il principio islamico secondo cui "tutto ciò che non è espressamente proibito è permesso" non fosse stato definito in questo modo. Si evidenzia come questa definizione svolga un ruolo cruciale nell'interpretazione giuridica della Sharia ed eviti potenziali confusioni e incertezze legali. Viene inoltre evidenziata l'evoluzione del concetto di *halal* da aggettivo che indica un comportamento o un cibo lecito a "spazio normativo" autonomo che comprende molti aspetti della vita quotidiana.

1. INTRODUCTION

La foi et l'organisation de la société, dans l'Islam, notamment dans des domaines tels que les droits de l'homme, le droit pénal et le droit de la famille, tendent à converger vers une seule dimension. Cette dimension est représentée par la charia, qui est la 'voie' prescrite par Dieu pour l'humanité, impérative, personnelle, éthique et immuable[1].

Ainsi, la première question qu'un croyant musulman se pose lorsqu'il est confronté à un problème est de savoir si un certain comportement, un certain aliment, ou même une certaine pensée est *halal* ou *haram*. Cela détermine si ces éléments sont conformes à la loi islamique ou, au contraire, en opposition aux principes fondamentaux sur lesquels repose la foi islamique, étant donné que tout phénomène est considéré comme une expression de la volonté divine.

En fait, la question ne se limite pas à cette distinction principale, mais s'étend à la question de savoir quel est le degré de pertinence islamique: *wajib* (obligatoire), *mustahab* (recommandé), *makruh* (réprouvé)[2].

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[1] Une introduction au sujet de la loi islamique peut être trouvée dans l'ouvrage de R. GLEAVE, E. KEMELY, *Islamic Law : Theory and Practice*, London, 1997; J. SCHACHT, *Introduzione al diritto musulmano*, Torino, 1995; F. CASTRO, *Diritto musulmano*, in Enciclopedia giuridica Treccani, 1989, XI.

[2] Les juristes musulmans ont classé les actes en cinq catégories : obligatoire (*wajib*), recommandé (*mustahab*), interdit (*haram*), répréhensible (*makruh*) et autorisé (*halal*). S. A. ALDEEB, ABU-SAHLIEH M. ARENA (eds.), *Il diritto islamico. Fondamenti, fonti, istituzioni*, Roma, 2022, p. 369 ss.; F. CASTRO, G. M.

Il faut également prendre en compte d'autres aspects, tels que les multiples interprétations faites par les *madhahib* juridico-religieux islamiques. Ces derniers s'engagent à rassembler tous les arguments faisant autorité pour déterminer si une action est permise ou non, ou si elle est obligatoire ou arbitraire en cas de désaccord sur ce jugement; ils peuvent ainsi aider les fidèles à respecter et à suivre correctement les enseignements religieux[3]. Pour certains, l'achat et la consommation de produits islamiques revient à respecter les préceptes du Prophète et une nouvelle voie pour accéder au paradis éternel.

Le cadre préceptuel susmentionné doit toutefois être encadré par le principe selon lequel « tout ce qui n'est pas expressément interdit est permis » ; il s'agit non seulement d'un des principes généraux essentiels de la tradition islamique, mais aussi d'une maxime juridique, en vertu de laquelle tout ce qui n'est pas expressément interdit par la loi islamique est en soi permis.

Ce principe repose sur la dichotomie *halal*, *haram*, qui représente le critère général de la qualification juridique du comportement humain.

Aujourd'hui, le concept *halal* ne se limite plus seulement à la nourriture ; Il est désormais perçu comme une dimension plus complexe, englobant un vaste éventail de produits et de services, tels que la finance et le tourisme *halal*, ainsi que des comportements relatifs à la sphère privée, comme la sexualité et le mariage[4]. Cependant, cette évolution dépasse simplement l'élargissement de la gamme des produits. En effet, on assiste à une extension des significations du terme *halal*. Auparavant un adjectif qui désignait un comportement ou un aliment permis s'est transformé en un nom désignant désormais un « espace normatif » autonome. Ainsi, on peut parler, par exemple, de 'vie *halal'*.

Le document à ce propos se concentrera ci-après, sans prétention d'exhaustivité, sur la relation qui existe entre *halal* et *haram*, deux concepts d'une importance vitale qui exercent un fort impact sur les choix de vie du croyant dans divers secteurs, tels que l'alimentation, les produits pharmaceutiques, les produits cosmétiques et les produits financiers et d'assurance ainsi que leurs particularités. En particulier, on tentera de déterminer dans quels termes le binôme *halal-haram* pourrait être appliqué si le principe considéré n'avait pas été défini de la manière suivante : « Tout ce qui n'est pas expressément interdit est permis ». Hypothétiquement, dans ce cadre, si ce principe n'était pas défini ainsi, les multiples interprétations juridiques de la charia pourraient devenir nettement plus restrictives. En effet, l'absence d'interdiction explicite n'impliquerait pas nécessairement la permission. Une telle situation pourrait engendrer un niveau considérable d'incertitude juridique concernant la légalité de divers comportements, produits et services. Cette incertitude pourrait entraîner des

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PICCINELLI (eds.), *Il modello islamico*, Torino, 2007, p. 10.

[3] Il existe quatre écoles juridiques orthodoxes sunnites, chacune portant le nom de son fondateur : Abou Hanifa (m. 767), Malik ibn-Anas (m. 795), Shafii (m. 820), Ahmad ibn-Hanbal (m. 855). Voir M. KHALFAOUI, *Pluralism and Plurality in Islamic Legal Scholarship*, New York, 2021; M. CAMPANINI, *I sunniti*, Bologna, 2016, pp. 31-42; S. LAGHMANI, *Les écoles juridiques du sunnisme*, in *Pouvoirs*, in AA.VV, *Islam et Démocratie*, 2003, 104, 1, pp. 21-31; à noter également L.A. BSOUL, *The emergence of the major schools of Islamic law*, in K.A. EL FADL, A.A. AHMAD, S.F. HASSAN (eds.), *Handbook of islamic law*, Londra, 2019, pp. 141-156; A. VANZAN, *Gli sciiti*, Bologna, 2016.

[4] V. FIDOLINI, *Le halal comme technique de soi : Interdit religieux, maîtrise du corps et discipline sexuelle*, in F. BERGEAUD-BLACKLER (ed), *Les sens du Halal: Une norme dans un marché mondial,* Paris, 2015 ; J. CESARI, *Les jeunes et l'islam : de l'exil des parents à la célébration de nouvelles origines*, in *Hommes et Migration,* 1220, 1999.

conséquences négatives sur la vie quotidienne des fidèles, qui pourraient se sentir contraints d'éviter des activités ou des produits dont l'adhésion aux règles de la charia n'est pas clairement définie.

2. ANALYSE CHARAIQUE DU PRINCIPE « TOUT CE QUI N'EST PAS INTERDIT EST PERMIS».

L'Islam a pris naissance dans le Hedjaz, situé à l'Ouest de la péninsule arabique, à proximité de la mer Rouge. Selon les récits traditionnels, c'est à La Mecque que Muhammad, le prophète de l'Islam, a reçu les premières révélations divines, marquant ainsi le début de sa mission prophétique. C'est seulement à Yathrib, désormais connue sous le nom de Médine, que Muhammad a pu établir les fondements d'une nouvelle religion et dessiner un système éthique, juridique et politique sans précédent[5].

Il est largement admis qu'avant la révélation ayant conduit à la naissance de la tradition juridique islamique, qui comprend un ensemble de normes et une hiérarchie des sources, la période était connue sous le nom de *Jahiliya* (ignorance), car la société était à cette époque idolâtre[6]. En effet, l'Islam a alors établi une rupture radicale avec ces coutumes préislamiques, qui s'est manifestée à travers une codification rigoureuse des pratiques.

Pour analyser le climat culturel, religieux et politique qui régnait à La Mecque à ce moment de l'histoire, il est essentiel de considérer deux aspects fondamentaux. Tout d'abord, La Mecque a joué un rôle crucial dans le contexte commercial en tant que point d'intersection pour les caravanes empruntant les routes du Yémen à la Syrie. L'importance de cet aspect réside non seulement dans sa dimension économique, mais aussi dans sa fonction de catalyseur culturel, puisqu'elle a contribué à la rencontre et à la diffusion de multiples patrimoines de connaissances et de traditions. Le second trait distinctif de La Mecque réside dans son importance en tant que centre de culte, dont le cœur battant était la Ka'ba, élément majeur de l'identité religieuse du lieu. Le second trait distinctif de La Mecque réside dans son importance en tant que centre de culte, dont le cœur battant était la Ka'ba, élément fondamental de l'identité religieuse du lieu. Ensemble, ces deux aspects configurent la Mecque comme un épicentre important de l'influence culturelle, religieuse et politique de son époque.

Cependant, il y a eu des moments historiques où certaines pratiques, aujourd'hui interdites par le système juridique, étaient considérées comme acceptables, en vertu du contexte social et culturel de l'époque.

À titre d'exemple, à l'époque préislamique, l'infanticide féminin était une pratique répandue et acceptée. La société arabe privilégiait en effet la progéniture masculine, percevant la naissance des femmes comme un fardeau, une charge, à tel point que les bébés de sexe féminin étaient parfois enterrés vivants immédiatement après leur

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[5] À cet égard, nous rappelons M. CAMPANINI, *Maometto*, Roma, 2020; T. ANDRAE, *Maometto, la sua vita e la sua fede*, Roma, 2015; F. DONNER, *Maometto e le origini dell'Islam*, Torino, 2011; C. LO JACONO, *Maometto*, Roma-Bari, 2011; ID., *Le religioni dell'Arabia preislamica e Muhammad*, in G. FILORAMO (a cura di), *Islam*, Roma-Bari, 1999; ID., *Maometto, l'inviato di Dio*, Roma, 1995; M. RODINSON, *Maometto*, Torino, 1995; K. ARMSTRONG, *Muhammad: a Biography of the Prophet*, San Francisco, 1990; M. LINGS, *Il Profeta Muhammad. La sua vita secondo le fonti più antiche*,Trieste, 1988; M. AL-TABARI, *Vita di Maometto*, Milano, 1985; S. NOJA, *Maometto, profeta, dell'Islam*, Milano, 1974; W.M. WATT, *Muhammad, Prophet and Statesman,* Oxford-London-New York, 1974.

[6] P. WEBB, *Al-Jāhiliyya: Uncertain Times of Uncertain Meanings*, in *Der Islam*, 2014, 91, 1, pp. 69-94.

naissance. Les femmes avaient alors des droits très limités, notamment en matière de mariage, de divorce et d'héritage. Avec l'islam, la situation a changé car cette pratique odieuse a été strictement interdite considérer *haram*.

En effet, Allah dénonce dans le Coran toute forme de discrimination entre les enfants de sexe masculin et féminin. L'Islam a également réglementé *al-nikah* (le mariage), en insistant sur la nécessité d'une dot par exemple et en mettant en place des règles restrictives concernant la polygamie. Les dispositions coraniques ont aussi établi clairement les lois relatives à l'héritage, en attribuant une part spécifique de celui-ci aux femmes. Ainsi, l'évolution des pratiques culturelles et des préceptes religieux a contribué à modeler la société, soulignant le contraste entre le passé et le présent.

L'importance de la distinction entre le bien et le mal, le pur et l'impur, entre ce qui est éthiquement acceptable et ce qui est moralement répréhensible, a été soulignée de manière décisive à ce moment de l'histoire. Cette distinction a contribué à faciliter la définition et la prescription conséquente de comportements vertueux par opposition aux comportements nuisibles qui doivent être évités au sein de la communauté en respectant leur interdiction.

Le Prophète s'est distingué en tant que réformateur et a condamné toutes les pratiques et conduites néfastes. Sa vision éthique et morale, privilégiant le bien-être de la communauté islamique dans son ensemble comme impératif essentiel, a conduit à une mise en valeur constante du concept *al-Umma al-Islamiya* - communité islamique. C'est pour cette raison que les musulmans se considèrent mutuellement comme des frères, c'est pourquoi ils ont réussi à rassembler toutes les tribus d'Arabie sous une seule bannière. Un autre objectif de la foi islamique est de rendre la justice pour assurer le bien-être social des musulmans par la charité et le paiement d'aumônes obligatoires telles que la *zakat*. Dans un État musulman idéal, en effet, personne ne devrait souffrir de la faim ou d'immenses privations, quoi qu'il arrive.

Les historiens s'accordent à dire que l'islam a eu un impact significatif et transformateur sur la société arabe. De nombreux changements sont intervenus du vivant du prophète Mahomet et sous la direction des quatre califes *al-Rashidun* (bien guidés). La pensée islamique met l'accent sur le concept de bien-être social, en accordant une attention particulière aux nécessiteux et aux personnes vulnérables. L'islam a donc mis en place un système juridique complexe qui intègre non seulement des prescriptions religieuses, mais aussi des règles séculières susceptibles de régir tous les aspects de la vie d'un musulman, tant dans la sphère privée que dans la sphère communautaire.

A la lumière des considérations qui précèdent, la racine du principe « Tout ce qui n'est pas expressément interdit est permis » se trouve dans la dichotomie du *halal* et du *haram*, c'est-à-dire ce qui est permis et ce qui ne l'est pas.

Le terme arabe *halal* signifie 'licite' ou 'autorisé' et le contraire de *haram*, 'illicite'. Théologiquement, ce terme fait référence à ce que les musulmans sont autorisés à faire. Toutefois, le marché a redéfini le sens de "*halal*" en l'associant à tout ce qui est prescrit pour être un 'bon musulman'.

La norme *halal* n'est pas clairement définie par les sources religieuses ou les institutions religieuses, contrairement à ce que prétendent les gouvernements, les organismes européens de normalisation alimentaire (tels que l'AFNOR, le Codex Alimentarius) et certains musulmans, en particulier les plus jeunes, qui n'ont aucun souvenir de ce qu'était cette norme avant l'émergence d'un marché *halal* mondialisé.

Avant l'avènement de ce phénomène les autorités religieuses considéraient les aliments des « gens du Livre » (juifs, chrétiens, et musulmans) comme *halal*[7].

Certains chercheurs affirment que ce marché est né en tant qu'industriel[8] et qu'il est en réalité le résultat de la rencontre, dans les années 1980, avec 'la révolution néolibérale', qui a imposé à tous les États une économie de marché globalisée, régulée par des organisations supranationales, qui transcendent les frontières nationales. Ella a également entraîné «la montée des fondamentalismes culturels et religieux, religions intégralistes, productrices d'idéologies identitaires, déterritorialisées, déculturées et particulièrement adaptables à la mondialisation »[9].

La volonté de contrôler le marché *halal* a conduit à l'émergence d'un modèle intégral qui inclut le contrôle de tous les produits et comportements alimentaires, sur la base d'un principe de pureté absolue. Ainsi, le marché *halal* s'est progressivement étendu à la finance, au commerce, à la mode, à la santé et au tourisme, créant à la fin des années 2000 un modèle de consommateur conscient de la charia comme « nouvelle cible marketing à séduire et à protéger » afin de développer un marché mondial *halal* potentiellement constitué d'un milliard des musulmans dans le monde[10].

Dans la tradition islamique, les actes sont généralement classés comme *halal* (licite) et *haram* (illicite). En fait, dans le Coran, le lemme *halal* est utilisé douze fois pour désigner les aliments autorisés. Ainsi, le terme *halal* est utilisé pour désigner une qualité et/ou identifier un produit de consommation destiné principalement à la consommation musulmane. On distingue deux catégories de produits : les premiers sont ceux qui ont subi un processus de transformation pour rendre leur utilisation licite ; les seconds sont ceux qui sont déclarés halal parce qu'ils ne contiennent pas ou n'ont pas été en contact avec une substance considérée comme illicite.

L'étendue du concept *halal* transcende désormais la simple idée de nourriture et de boisson pour s'établir comme un véritable mode de vie. En effet, le *halal* promeut une existence basée sur l'honnêteté et l'intégrité : cela implique de réfuter la notion d'enrichissement par des moyens illicite, contradictoire avec les principes de justice. Dans l'éducation des jeunes, le *halal* met l'accent sur la vérité, illustrant par l'exemple l'importance de l'emprunt d'une voie honorable.

En plus, le halal prescrit de maintenir ses sources de revenus immaculées et légales, et de ne pas mélanger de l'argent durement gagné avec de l'argent provenant de sources illégales. En somme, vivre *halal* revient à vivre avec intégrité, droiture et respect de la loi islamique.

En fait, on parle aujourd'hui d'éblouissement *halal*, de solutions financières halal qui englobent une gamme de produits et de services, y compris la banque, l'assurance (*takaful*), les certificats (*sukuk*) et tous les autres instruments financiers qui respectent les interdictions islamiques relatives au paiement ou à la perception d'intérêts, à l'incertitude, à la spéculation et aux investissements dans des domaines considérés comme immoraux et éthiquement discutables. Tous ces produits et services sont commercialisés et placés au sein d'un « marché *halal* » qu'il convient de différencier du « marché de la garantie *halal* », mais aussi de « l'industrie *halal* », organisation

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[7] M. RICCA, *Sapore, sapere del mondo. Tradizioni religiose e traduzioni dei codici alimentari*, in *Quaderni di diritto e politica ecclesiastica*, 2014, pp. 33-66.

[8] F. BERGEAUD-BLACKLER, *Le marché halal ou l'invention d'une tradition*, Paris, 2017, p. 4.

[9] F. BERGEAUD-BLACKLER, *op. cit.*., pp. 22-23.

[10] F. BERGEAUD-BLACKLER, *op. cit*, p. 95.

verticale dont l'objectif est de fédérer les unités de production autour d'une même « norme *halal* ».

3. UNE VISION « INVERSEE » ET SES IMPLICATIONS.

Dans la tradition juridique islamique, comme indiqué précédemment, le principe « tout ce qui n'est pas expressément interdit est autorisé », connu en droit islamique come « al-Asl fil-Ashyaa' al-Ibaha », est un pilier fondamental dans la formulation des normes de comportement et des lois. Cela signifie que si un acte ou un comportement n'est pas expressément interdit par le Coran ou la Sunna, il est considéré comme permis.

Imaginons maintenant un monde dans lequel ce principe n'existe pas. Dans ce scénario alternatif, la loi islamique suivrait le principe inverse : « Tout est interdit sauf autorisation expresse ». Cela représenterait un changement radical dans l'interprétation de la loi et aurait des implications significatives sur la façon dont les gens vivent au quotidien :

1. Premièrement, l'interprétation et la clarification de ce qui est permis et de ce qui ne l'est pas représenteraient une charge considérable, non seulement en termes de nourriture – quoi manger, quand et comment la préparer – mais aussi pour tout autre aspect de la vie, car les besoins de la société évoluent avec le temps. Par exemple, l'innovation technologique pourrait être envisagée avec méfiance si elle n'est pas explicitement autorisée par la loi islamique, ce qui pourrait entraver le développement et l'adoption de nouvelles technologies.
2. Deuxièmement, l'approche qui préconise que « tout est interdit sauf ce qui est expressément autorisé » pourrait engendrer une société nettement plus rigide et conservatrice. Elle limiterait la liberté individuelle et favoriserait la conformité aux normes religieuses, car les individus pourraient craindre de transgresser la loi en l'absence d'une autorisation explicite pour certaines actions ou comportements.
3. Troisièmement, une tendance dominante à l'interprétation littérale de la loi pourrait se manifester, plutôt qu'une assimilation de son esprit intrinsèque. En l'absence du principe « tout ce qui n'est pas expressément interdit est permis », la loi pourrait être interprétée de manière plus littérale, excluant toute autre forme d'interprétation telle que l'analogie ou la téléologie. Une telle perception renforcerait l'approche préconisant la fermeture de la porte de l'*ijtihad* autour du 10ème siecle justifiée par l'idée que toutes les questions pertinentes pour la communauté islamique ont déjà été résolues et que, par conséquent, la charia devrait rester statique[11].
4. Quatrièmement, l'application inverse du principe pourrait avoir un impact considérable sur la vie quotidienne. En effet, si une autorisation expresse était nécessaire, cela pourrait circonscrire la créativité et l'expression culturelle, en interdisant par exemple de nouvelles formes d'art.

Généralement, une société où le principe « Tout ce qui n'est pas expressément interdit est permis » serait inversé pour devenir « Seul ce qui est expressément indiqué comme permis est permis » serait probablement plus rigide et moins flexible. L'application d'un tel principe pourrait entraîner non seulement une réduction

[11] E. CHAUMONT, *Quelques réflexions sur l'actualité de la question de l'ijtihad*, in F. FRÉGOSI (a cura di), *Lectures contemporaines du droit islamique. Europe et monde arabe*, Strasbourg, 2004.

significative de la marge de manœuvre individuelle, car il faudrait constamment faire appel à des techniques d'interprétation pour élargir les limites de ce qui est autorisé, mais aussi une plus grande difficulté à mettre en œuvre l'*ijtihad*, ou effort intellectuel. Cet effort viserait à surmonter l'inversion du principe « Tout ce qui n'est pas expressément interdit est permis ». En effet, l'interprétation aurait pour but non pas d'identifier le périmètre de l'illicite par rapport à un principe général de licéité de l'action humaine, mais plutôt de redéfinir, face à une interdiction généralisée, une sphère spécifique d'activités licites.

4. CONCLUSION

La première conclusion qui s'impose est qu'une société sans règles serait une société abandonnée au libre arbitre, exposée à la violence et à l'oppression, et dépourvue d'héritage traditionnel. Les religions monothéistes, dans leurs fondements, posent la justice comme principe cardinal, à partir duquel des règles de conduite doivent être clairement définies.

À la lumière de ce qui précède, une société sans règles semble être une éventualité peu probable. Une société dans laquelle les règles ne sont pas ponctuellement établies ne peut être digne de confiance, que ce soit à l'intérieur ou à l'extérieur, étant donné l'influence potentiellement importante qu'une telle absence pourrait avoir sur le système économique, politique et social. En outre, si l'on opère dans un environnement où les règles ne sont pas respectées, la méritocratie, dans son sens le plus étymologique, celui du « pouvoir du mérite », ne peut prévaloir. Un tel scénario conduirait inévitablement à un manque de qualité, qui se refléterait négativement sur les performances d'une nation : laissée à elle-même, elle deviendrait une proie facile pour le chaos sous toutes ses formes et manifestations.

A brilliant future behind its back: the irresolute advance of privacy in the realm of US tort law

Biagio ANDÒ[*]

Privacy has been ill-fated in US law. Since this legal concept surfaced at the end of the nineteenth century as the 'right to be let alone', expectations of its success have been betrayed.

This result is the product of several related factors, two of which are particularly worthy of attention:

a) the traditional pigeon-hole approach affecting the structure of tort liability adjudication which resulted in the crystallization of privacy torts;

b) a utilitarian and instrumentalist understanding of tort law's functions and goals, widely shared by scholars since the second decade of the twentieth century, and still hegemonic.

At present some scholars are invoking a return to the ancient conceptual roots of US tort law, conceived of as a means of vengeance and satisfaction for aggrieved individuals. Might this approach bring back the grand idea of privacy as a major right, able to afford a robust protection to personality interests?

La *privacy* nella *tort law* statunitense ha attualmente un ruolo ancillare; le aspettative che ne avevano accompagnato l'emersione alla fine del diciannovesimo secolo sono state largamente disattese. Questa situazione è il prodotto di molteplici fattori, fra i quali:

a) il principio di tipicità dell'illecito (che ha limitato la tutela extracontrattuale degli interessi individuali di *privacy*);

b) una visione della responsabilità civile, affermatasi nel secondo decennio del ventesimo secolo e tutt'ora in auge, come strumento atto a perseguire interessi di carattere generale e a produrre effetti redistributivi della ricchezza.

Oggi parte della dottrina caldeggia un ritorno alle radici della responsabilità aquiliana quale dispositivo di repressione di condotte illecite. Potrà questa riscoperta creare le condizioni per una più efficace tutela extracontrattuale della personalità umana, nucleo originario della *privacy*?

1. 1. INTRODUCTION

Privacy has had an ill-fated destiny in US law. This legal concept, which surfaced at the end of the nineteenth century and was conceived as the right 'to be let alone', betrayed expectations of its success. Far from being the vehicle for a wider reception into the US legal order of personality rights and individual interests pertaining to the spiritual sphere, its legal relevance was reduced to narrowly tailored cases. This analysis will be an account of the reasons why privacy, conceived of by its early proponents as a basic right deserving of strong protection in tort, failed to gain proper attention.

This paper will try to imagine what would have happened if privacy had succeeded in becoming the proxy for personality interests in accordance with the vision conveyed

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by its early proponents. The issue is to ascertain which role personality interests would have achieved in the realm of those protected at tort law if a less peripheral place had been acknowledged to privacy.

I am aware that any reasoning based on hypothetical events that have not actually occurred may be criticized as highly abstract and arbitrary. Nevertheless, this attempt may pave the way for a more profound insight into what circumstances hampered the full blossoming of privacy's potential.

The analysis will be devoted to privacy in the physical world; issues related to privacy protection in the digital one will not be specifically dealt with.

2. PRIVACY IN TORT LAW (FROM WARREN AND BRANDEIS TO PROSSER VIA HOLMES) AND IN THE US CONSTITUTION

In the seminal article by Warren and Brandeis[1], privacy is located at the crossroads of the values of continuity and change steering the evolution of judge-made law. The right to privacy was in fact carved out according to the paradigm of the right to be let alone, definitely not a brand-new feature within the US legal landscape. In those years this formula was not altogether unknown, since it had been previously used by tort law scholars, such as Cooley, whose work was expressly cited by those authors[2]; yet this right–far from being related to the interest of physical safety at the core of Cooley's analysis–was referred by Warren and Brandeis to the individual's spiritual sphere. It was envisioned as a specification of the right to enjoy life, which in its turn was driven back to the right to life recognized in contract, tort, trust and copyright law.

Warren and Brandeis's analysis may be summarized through a string of sentences highlighting the main stages of their reasoning: full protection of person and property; right to life; right to enjoy life; right to be let alone; right to the immunity of the person; right to one's personality as a right against the world; right to prevent publication of personal writings; right to the inviolate personality.

Privacy in their analysis is deemed to be in keeping with the US common law and–at the same time–an effective legal vehicle for change, covering interests related to the individual intimate sphere, so far not safeguarded by libel and slander. It was based on a long-standing principle whose content was adapted and shaped to meet the needs of protection of inner feelings and psychic well-being (peace of mind), at that time not considered as legal values on their own. Under the cloak of the right to be let alone, privacy protection had two main objects: on the one hand, the individual's right to a private sphere free from interference aimed at (or ending in) the disclosure of private facts; on the other, the author's right to control the publication of her writings concerning specific private life events. In this latter respect, every individual may freely decide whether and to what extent to share a fragment of her inner sphere with the outer world. The protection of her intellectual property from third party attempts at commercial exploitation was outside privacy's remit. Both the above-mentioned facets

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[1] S. WARREN, L. BRANDEIS, *The right to Privacy*, in Harvard Law Review,1890, IV, p. 193.

[2] T. M. COOLEY, *A Treatise on the Law of Torts or Wrongs which arise Independent of Contract*, Chicago, 1888, mentioned the "right of complete immunity" among those covered by the law of torts under the heading of assault and battery.

of the right to privacy are meant to afford protection to the "inviolate personality" of human beings.

The acknowledgment of a right to personal immunity was aimed at affording a protection to the victim from suffered harms whose heart was immaterial–ethereal– involving a "shock to the nerves, and the peace and quiet of the individual […] disturbed for a period of greater or lesser duration"[3]. The recoverable damages were not of a pecuniary nature, being directed at providing satisfaction to victims for their mental suffering and distress.

In that era, getting an award for injuries to feelings was not easy (neither is it nowadays). Unlike harms impacting on the individual physical or economic sphere, prejudices affecting the psychological/emotional field were deemed to be hard to prove, their consequences not being tangible/visible[4]. For this reason, they were compensated for only when occurring as a consequence of physical damages; in other words, when they were parasitic to these latter[5].

In the view of Warren and Brandeis, these harms were able to stand alone and to be considered on an autonomous footing distinct from injuries to property which, in English common law history, was their legal cast[6]. From a tort law perspective, the setting they proposed emphasized the importance of the tortfeasor's conduct as a way of violating a given right. This approach was not puzzling in the light of the tort law understanding which took hold of US legal culture at the end of the nineteenth century; tort law was considered as a set of remedies affording protection against violated rights. The legal principle of the individual's moral satisfaction rather than that of economic compensation was the main rationale for the award of damages.

Yet at that time signs of change of jurists' way of thinking were already beginning to appear, leading to the progressive fading of some previously dominant legal concepts, such as:

1. law thought as a set of pre-existing, immutable, 'natural' principles laying down a given legal order, not created, but simply 'found', 'discovered' through the scientific

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[3] S. WARREN, L. BRANDEIS, *op. cit.*, p. 209.

[4] In this regard, it is enough to mention the highly demanding requirements to file a claim for the tort of Intentionally Inflicted Emotional Distress (IIED).

[5] The theoretical and practical challenges underlying these harms under tort law are discussed two decades after the Warren and Brandeis piece by R. POUND, *Interests of personality*, in Harvard Law Review, 1915, 28, p. 343, who identifies the hurdles to a full recovery for this kind of harm in the high risk of imposture ("the … impossibility […] of satisfactory proof"), due to their intangibility (ending in "the difficulty of tracing them to their source and of fitting cause to effect"), and in the "difficulty of devising adequate redress". Three major problems "stand in the way of complete securing by law of an interest which the law is quite willing to recognize fully": the lack of adequate knowledge of psychology and mental pathology ensuring an effective assessment of these harms; the backwardness of the trial procedure and remedies in force, in particular the preventive ones; last but not least, the need to narrow the protection only to ordinary sensibilities, leaving aside the safeguard of the over-sensitive ones (all the quoted passages are at p. 365). In this latter regard, Pound does not state the criteria to assess ordinary sensibilities.

[6] *Gee v. Pritchard*, (1818) 36 ER 670 is viewed by R. POUND, *Equitable relief against Defamation and Injuries to Personality*, in Harvard Law Review, 1916, 29, p. 640 as a significant example of framing privacy interests as property ones. What was secured in that case was a "right of privacy by the transparent device of protecting a nominal property in the letters" (p. 646). Since the boundaries of the equity jurisdiction were historically confined to property interests, the only way to afford protection to personality interests (whose infringement was a source of humiliation and injury to feelings and mental comfort of the victim) was cloaking them as proprietary entitlements. Pound's view is different; privacy interests (falling under personality interests' cloak) are repeatedly defined as "personal rights". This definition clearly aims at distinguishing them from property ones.

analysis of land-mark cases which were seen as a significant repository of fundamental legal principles;

2. courts considered as neutral (not political) actors sitting in their ivory towers, far from societal conflicts and deciding cases according to crystal-clear general rules;

3. morals as an essential substratum of law; this assumption–pivotal within US legal culture throughout the nineteenth century–was at the end of that century challenged as a source of growing uncertainty and arbitrary results.

A pragmatic approach–paying less attention to substantive law than to legal process–gained widespread acceptance. Courts got rid of the idea of a legal order whose boundaries were fixed and started to consider themselves committed to the task of governing new societal conflicts. They found a more fruitful approach to law by paying attention to social sciences–such as economics and sociology, able to foster an empiricist attitude–rather than to natural sciences, which were the background of the formalistic legal culture. Legal past was no longer considered valuable per se, but only as a way to understand and manage present legal issues.

All these changes crept into the US legal system via reformist sociological jurisprudence; in this regard, Pound's and Holmes's teachings have to be considered seminal. The emphasis they placed on public policy as a ground of judicial decisions and the view of law as experience (rather than logic) especially needs to be recalled. The idea of tort law as a seat for violated rights gave way to the quite different conception of it as law of accidents–synonymous with negligence[7]–whose aim was to establish the most efficient allocation of losses; a different view of fault was invoked, its meaning to be understood objectively (i.e., as a generalized standard of care). Clearly, this view placed at the limits of tort law the set of intentional torts which had been the original elective seat of privacy interests. Tort law shifted from the private law domain to that of public law and was burdened with policy goals connected to general interests.

It is no coincidence that from the second decade of the twentieth century onward, the tort law understanding endorsed by Warren and Brandeis fell into decline and was then abandoned in favor of a clearly different one, in which harm gained the status of major tort law's constituent (to the detriment of blameworthy defendant's conduct). Since that time, tort law has been seen as an array of legal tools devoted to the efficient management of damages and deprived of an autonomous conceptual identity; i.e. as a repository of legal duties "of all the world to all the world"[8], aimed at the compensation of damages–i.e., at shifting the cost of the economic loss from the victim to the wrongdoer–, and not anymore looked at as an area vested with the function of avoiding the risks of private vengeance by those who suffered wrongs.

All these new ferments were fully accomplished during the Realist era. Prosser's doctrinal method–which became mainstream between the forties and the sixties of the twentieth century–was an influential expression of legal Realism in the field of tort law and hammered the final nail in the coffin of Warren and Brandeis's grand idea of privacy.

Prosser strongly supported the comprehension of tort law as a domain devoted to dealing with *harms* and not *violated rights*. Alleging that his systematization was firmly

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[7] G. E. WHITE, *Tort law in America. An intellectual History*, New York, 1985, p. 13, stated that "Holmes's significant contribution was the isolation of negligence as a comprehensive principle of tort law". In the following pages, White considers negligence as "the touchstone (and principal limiting factor) of a general theory of civil obligation" (p. 16).

[8] O.W. HOLMES, *The Theory of Torts*, in American Law Review, 1873, 7, p. 662.

entrenched in state caselaw, he stated that privacy was just a convenient label covering four distinct torts: intrusion upon the plaintiff's seclusion or solitude; public disclosure of private facts; publicity placing the plaintiff in a false light in the public eye; appropriation of the plaintiff's name or likeness[9]. Privacy was just shorthand for four distinct causes of action. Four interests were protected by these torts, each having a distinctive character[10]. In Prosser's view, the first three torts aimed at securing a mental interest, while the latter shielded a truly proprietary one[11]. Damages for the infringement of privacy interests might be awarded without any proof.

From the standpoint of a European observer, one may ask if in the US individuals may defend their privacy interests in other ways, outside the field of tort law; for example, by enacting specific provision laid down by the federal Constitution. Yet, the commonly accepted reading of the US Bill of Rights does not endow individual liberties with horizontal effects, but only with vertical ones; constitutional rights are enforceable only against public bodies and not private actors. According to the state action doctrine, absent some action on the part of a state entity no constitutional violation is conceivable. In general, states are not burdened with positive duties to protect the rights' holders against infringements by private parties[12].

The current reading of the federal Constitution rests on the implicit norm envisioning a separation between the private autonomy sphere and public entities; it acknowledges individual liberty as an overarching principle, not constrained in its implementation by other concurring values, such as that of human dignity, at the basis of specific fundamental rights in many Western constitutional regimes. In the US, dignity is a

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[9] In a well-known passage showing the heterogeneity of the four torts, W. L. PROSSER, *Privacy*, in California Law Review, 1960, 48, p. 383, remarked that "[t]aking them in order – intrusion, disclosure, false light, and appropriation – the first and second require the invasion of something secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest" (p. 407).

[10] P.M. SCHWARTZ, K.N. PEIFER, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept*, in California Law Review, 2010, 98, p. 1925, by comparing the US and the German approach to privacy quite provocatively observed that Prosser's survey was "tailored to accord with and, in turn, influence American law and American values. Prosser's genius rested in providing just enough theory, doctrine, and rules of thumb to create a level of comfort for American judges deciding cases and state legislatures enacting tort privacy statutes. […] Prosser pragmatically assessed the kind and amount of privacy that the American legal system was willing to accommodate. Without Prosser's contribution, there would likely be less, and not more, protection of tort privacy in the United States" (p. 1929).

[11] The tort of appropriation – as a litmus test to assess the operation of the non-economic/property interests' dichotomy as applied to the human person – will be further discussed *infra*.

[12] For an instance of Constitution's 'vertical' reading applied to privacy as a personhood's outpost, L. TRIBE, *American Constitutional Law*, New York, 1988, who invokes a different conceptualization of privacy from the current one. According to Tribe, "privacy is nothing less than society's limiting principle […]" (p. 1302). In his opinion, privacy should be a bridge between two different – albeit adjoining – dimensions of personhood, namely the inward one (related to the individual protection from interferences) and the outward one, concerning the projection of one's identity in the public world, falling under the interested party's control. This second view conceives individuals not as isolated and closed monads, but as beings-in-the-world. At a more general level, for an interesting analysis (also concerning privacy interests) of the reasons why within the US legal culture individual rights are based on the paradigm of the 'lone rights-bearer'– grounded on an atomistic vision of the individual–, see M. A. GLENDON, *Rights Talk. The Impoverishment of Political Discourse*, New York, 1991, pp. 47-75.

bulwark of individual freedom against interference by public power, whereas in Europe it acts as the main foundation of the human personality's constitutional protection[13].

In the US, privacy is acknowledged as a constitutional right aimed at safeguarding fundamental individual life decisions. This result has been achieved through different, alternative patterns:

2a) privacy has been sometimes recognized as deriving from rights acknowledged by specific constitutional Amendments (enumerated rights);

2b) in other cases privacy has been deemed to be a right inhabiting the "zone" or "penumbra" created by specific constitutional Amendments;

2c) less frequently privacy has been framed as a (distinct) right rooted in the Ninth Amendment or enabled via this latter (when it is conceived of as a rule of construction), not to be a priori crowded out when conflicting with an enumerated right.

At present, an individual may not rely on the federal Constitution as a normative place securing protection to non-pecuniary interests infringed by private persons.

What would have happened if Warren and Brandeis's approach had become dominant?

Probably, privacy would have been a general outpost of personality interests; its inherent flexibility would have made possible the widening of its scope of application, enabling it to cover in the long run heterogeneous interests making up human personality[14]. Tort law damages would have been able to perform one of the two following functions: either compensatory, aimed at restoring the economic equilibrium negatively affected by the wrongdoer, or providing a just satisfaction to the harmed individual for non-economic injuries related to her emotional and psychic sphere (a non-pecuniary harm).

Yet, things went differently. Neither the Constitution nor tort law–in US law–afford general protection to interests related to the integrity of the individual intimate sphere. In this writer's opinion, the ultimate reason for this situation might not be found within the province of legal technicalities, but rather at the level of deeply rooted societal beliefs affecting the hierarchy of the values deemed worthy of legal protection.

The influence exerted by Holmes and Prosser is probably compelling evidence that their approach, their language, their way of reasoning was more in keeping with the US *Zeitgeist*[15].

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[13] For a well-documented survey of the manifold conceptions of dignity in the US constitutional law reasoning, L. M. HENRY, *The Jurisprudence of Dignity*, in University of Pennsylvania Law Review, 2011, 160, p. 169.

[14] N. M. RICHARDS, D.J. SOLOVE, *Prosser's Privacy Legacy; a Mixed Legacy*, in California Law Review, 2010, 98, p.1887, recognize the heightened order and harmony imprinted by Prosser to the privacy discourse, at the same time remarking that this latter has been stunted in its development, in its capacity to be forward-looking, to change and develop. In particular, the authors emphasize Prosser's choice to leave outside the privacy realm the torts of intentional infliction of emotional distress and breach of confidence, despite their clear connections to privacy. As to breach of confidence, a pivotal feature in the English tort law, the authors highlight its unexploited potential as privacy gap-filler.

[15] Nowadays market and individual freedom still enjoy a primary position within the pantheon of the US social values.

The frame of reference for privacy–inviolate personality–endorsed by Warren and Brandeis was too refined to be easily digested (and effectively used) by courts and scholars. Probably Warren and Brandeis's purpose was not to direct their time through formulas and ideas fitting in with the deeply-seated stances shared by the legal culture of their time, but rather to herald a new legal era by fashioning an advanced view.

Other theorizations of privacy–not fitting into the well-established view–will be discussed in the following paragraph; they might provide further support for this conclusion.

3. (SEQ.) AN 'ELITIST' ATTEMPT TO RESCUE THE DIGNITARY SUBSTANCE OF PRIVACY: BLOUSTEIN'S AND WADE'S GLORIOUS DEFEAT

In the 1960s, some scholarly voices distinguished themselves from the mainstream approach epitomized by Prosser. Their attempt was to hark back to the unitary roots of privacy unearthed by Warren and Brandeis, who identified human dignity as the bedrock of privacy. Among these scholars, Bloustein played a pivotal role[16]. His major concern–steering his view of privacy–was the pressure put on persons by societal expectations. The individual has "to live every minute of his life among others […] every need, thought, desire, fancy or gratification is subject to public scrutiny […] [he] has been deprived of his individuality and human dignity. *Such an individual merges with the mass*. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. *Such a being, although sentient, is fungible; he is not an individual*". In Bloustein's opinion, the right to privacy is meant to be a reaction to harms "demeaning to individuality" and understood as a remedy for an "affront to personal dignity"[17].

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[16] E.J. BLOUSTEIN, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, in New York University Law Review, 1964, 39, p.1003. According to S. W. HALPERN, *Rethinking the right of privacy: Dignity, Decency, and the Law's Limitations*, in Rutgers Law Review, 1991, 43, p. 539, "[i]f Dr. Bloustein's challenge to Prosser was judged only by the degree to which he succeeded in establishing a unitary, as opposed to a quadrilateral, privacy orthodoxy, his effort would be little more than an interesting historical footnote. It is, rather, as a grand moral statement that Bloustein's work will endure; and it is within the context of that moral statement that Bloustein's work will endure; and it is within the context of that moral statement that the law's response must be measured. By his continuing effort to illuminate the moral core of the right of privacy, Bloustein ultimately kept the issue from deteriorating into semantic quibbling […] If Prosser's analytic dissection was an attempt to define and rationalize the body of the right of privacy, Bloustein sought his soul" (pp. 544-545).

[17] The statements by E.J. BLOUSTEIN, *op. cit.*, reported in the text (and to which emphasis was added), refer to the so called "intrusion cases". Individuality was considered by Bloustein as a marking feature of the Western legal culture, involving "the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity" (p. 973). The core of this wrong is not "the intentional infliction of mental distress but rather a blow to human dignity, an assault on human personality" (p. 974). The theme of dangers to individuals created by mass is a rooted fear in the US culture permeated by anti-egalitarian sentiments, as reminded by M. A. GLENDON, *op. cit.*, pp. 52-54, who explores this topic by referring to Stuart Mill's influential views about the foundations of individual liberties. Yet a possible influence of Mill's thought on Bloustein does not necessarily imply that his position may be exclusively understood as an endeavor to safeguard the upper class privileges.

Bloustein built the concept of privacy on a unitary foundation, despite the fact that its normative fragments are scattered in diverse legal areas. He added that:

"The tort cases involving privacy are of one piece and involve a single tort. […] I believe that a common thread of principle runs through the tort cases, the criminal cases involving the rule of exclusion under the Fourth Amendment, criminal statutes prohibiting peeping toms, wiretapping, eavesdropping, the possession of wiretapping and eavesdropping equipment, and criminal statutes or administrative regulations prohibiting the disclosure of confidential information obtained by government agencies"[18].

The interests encompassed by this concept–having a homogeneous substance–go beyond that to an unsullied reputation[19].

A litmus test of the distinction between privacy and defamation will be found at the level of disclosure, to be considered as a constituent in both cases, albeit in different forms. Again, let's give the floor to Bloustein:

"In defamation, publication to even one person is sufficient to make out the wrong. In privacy […] some form of mass publication is a requisite of the action. […] Why should actionability in privacy sometimes depend upon the extent of publication? The reason is simply that defamation is founded on loss of reputation while the invasion of privacy is founded on an insult to individuality. […] the indignity and outrage involved in disclosure of details of a private life only arise when there is a massive disclosure, *only when there is truly a disclosure to the public*. The wrong in the public disclosure cases is not in changing the opinions of others, but in having facts about private life made public. *The damage is to an individual's self-respect in being made a public spectacle*"[20].

From a different viewpoint in the same time span, Wade invoked a more significant role of privacy as a principle able to absorb some interests traditionally defended through the law of defamation[21]. Since the law of defamation and the law of privacy (namely, disclosure of private facts and false light in the public eye) were found to be to a certain extent overlapping, that author predicted a gradual development of privacy as the ideal venue for the safeguard of peace of mind, and eventually its final confluence in the tort of intentional infliction of mental suffering[22].

The analysis must now be broadened in order to evaluate the legal breadth of privacy interests through the prism of the taxonomy of human personality.

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[18] E.J. BLOUSTEIN, *op. cit.,* pp. 1000-1001.

[19] E.J. BLOUSTEIN, *op. cit.,* p. 979, observed that "the cause for complaint is not loss of reputation but that a reputation was established at all. The wrong is in replacing personal anonymity by notoriety, in turning a private life into a public spectacle".

[20] At pp. 980-981, emphasis added.

[21] J.W. WADE, *Defamation and the Right of Privacy*, in Vanderbilt Law Review, 1962, 15, p. 1093.

[22] A passage in J. W. WADE, *op. cit.*, pp. 1124-1125, deserves being integrally reported: "[i]f the law of privacy then absorbs the law of defamation, it will merely afford a complete "unfolding" of the idea or principle behind that law. Indeed, there is real reason to conclude that the principle behind the law of privacy is much broader than the idea of privacy itself, and that the whole law of privacy will become a part of the larger tort of intentional infliction of mental suffering. That tort would then absorb established torts like assault and defamation and invasion of the right of privacy and join them together with other innominate torts to constitute a single, integrated system of protecting plaintiff's peace of mind against acts of the defendant intended to disturb it".

4. PRIVACY AND THE TAXONOMY OF PERSONALITY INTERESTS

If the weakness of privacy protection in the US is exclusively the by-product of how tort law is designed and works, that weakness should be faced by looking–at a wider level–at the scope of the legal protection of the individual personality. US Common law is not by and large acquainted with a general taxonomy of personality rights, which is deeply embedded in the continental European tradition (and is one of its most genuine offspring). In Europe, this nomenclature is able to accommodate non-bodily aspects of the human person–besides honor and reputation–and to encompass individual economic as well as non-economic interests. Yet, in Europe the marketization of personality may not be whole and irreversible, its most genuine bulk being intentionally outside the market's remit[23].

Personality rights is in between public rights–a taxonomy including fundamental rights as well as social/economic rights enforceable by common citizens against public authorities–and private ones (grounded on legal relationships voluntarily entered into by private parties), implying not only the possibility of shielding individuals from harmful actions by third parties, but also allowing the former to express their own identity in the public sphere (as well as control its representation).

On the contrary, in the US private law discourse privacy is circumscribed to the static dimension of seclusion and immunity, not involving the promotion of the free development of personality, which is a major (inherently dynamic) constituent of the European outlook. Furthermore, in the US legal world persons and market are regarded as two watertight compartments. Once personality interests are commodified, their legal transformation into a commercial good is irreversible.

The core idea that personality interests cannot once and for all be transferred through a contractual agreement is part of the European *weltanschauung*, but not characteristic of the American one.

The above-mentioned tort of appropriation of the plaintiff's name or likeness may be considered as a clear instance of the higher position enjoyed by property interests over non-commercial ones, even when persons (and their personality interests) are at first concerned. The statement by Prosser that this specific tort affords protection to a proprietary interest has to be seen as the final stage of a gradual process which led to this tort being seen as the other side of the coin of the right of publicity, involving the protection of economic interests linked to the exploitation of persons' identity, whereas initially the tort of appropriation aimed at safeguarding individual dignitary (non-pecuniary) interests. This tort was deeply affected by its radical conceptual transformation, which led to the eclipse of the interests originally lying at its core[24].

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[23] However, within the European legal framework peculiar features impacting at a national level on the scope of protection of personality interests may be singled out. The German and French approaches to the taxonomy of personality rights are clearly distinct, their peculiar traits depending on a different understanding of the concept of ownership. Whereas in France the semantic scope of *propriété* makes possible the accommodation of corporeal and incorporeal interests, such as those related to personality, in Germany the concept of *eigentum* (the German word for ownership) allegedly provides a legal protection only to *res corporales*. For this reason, German scholars created a new taxonomy of rights–*individualrechte*–, aimed at giving a heightened protection (analogous to that afforded by *eigentum*) to personality interests molded on the extra-patrimonial nature of these latter.

[24] See J. KAHN, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, in Cardozo Arts & Entertainment Law Journal, 1999, 17, p. 213.

Since the mid-1950s this tort's name–appropriation of the plaintiff's name or likeness–has been understood as conveying a metonymy. Not anymore focused on the right of a person to be free from unwanted publicity making her a marketable good and aimed at providing her with protection from the expansive and pervasive forces of the market, it was transformed into a remedy against the appropriation by third parties of the commercial value of a given identity, awarding the individual the opportunity to take economic advantage of her personality attributes. This tort has become a market-driven legal device aimed at ensuring that the personality's marketization pursued by her holder is preserved against the attempts of exploitation by free rider third parties.

In the continental European context, personality interests cannot be fully commodified. The bonds linking personality interests to the person are never (and may not be) definitively cut. No closed transaction involving personality interests may be considered irreversible; consent to the commodification of personality attributes may be withdrawn at any time. The policy principles underlying the basic Regulation governing data protection (Reg. 2016/679) are a crucial piece of evidence in this regard.

The US and European legal cultures therefore frame in a different way the boundaries between person (and personality interests) and market.

The US legal thought envisions these two spheres as dichotomic universes, able to be theoretically defined through a clear-cut distinction. If a personality interest crosses the border, it undergoes an irreversible transformation into a commodifiable good.

In Europe personality interests have an overarching importance, being a paramount expression of the person and of her dignity. Even if commodified, their characteristics stay unaltered vis-à-vis the marketable goods, not being entirely and once and for all seized by this latter. Furthermore, this category of interests is not fully at the disposal of the person to whom they relate. They are 'things' having a peculiar nature, straightforwardly distinct from the 'common' things, insofar as they cannot be strictly speaking 'owned'[25].

To sum up, from the standpoint of a European law scholar the narrow scope of privacy interests in the US legal system is the spillover of a theorizing of personality interests that is not fully fledged. The lack of a general category of personality interests in the realm of private legal relationships that is able to accommodate extra-patrimonial (and inalienable) interests as well as patrimonial (and alienable) ones and grounded on a unitary idea of person accounts for the weak safeguarding of those personality interests which are not monetized.

5. BACK TO PRIVACY'S CONCEPTUAL ORIGINS? THE PROMISING APPROACH OF THE CIVIL RECOURSE THEORY AND THE 'NEW PRIVATE LAW' MOVEMENT

The unfortunate turn taken by privacy in the twentieth century could perhaps be reversed by some recent scholarly trends–aimed at rethinking tort law's functions and rationale–which may lead to a greater and more effective protection of non-pecuniary privacy interests.

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[25] For further references, G. BRÜGGEMEIER, *Protection of personality rights in the law of delict/torts in Europe: Mapping out paradigms*, in G. BRÜGGEMEIER, A. COLOMBI CIACCHI, P. O' CALLAGHAN (eds.), *Personality rights in European tort law,* Cambridge, 2010, pp. 18-24.

At present a wider legal recognition of privacy interests[26] may be achieved through a different theoretical construction of the tort law foundations, labeled 'civil recourse theory'.

The major goal of this approach is the recovery of the ancient roots of US tort law (marginalized by Realists), re-emphasizing its traditional (and almost forgotten) function of means of vengeance and satisfaction for the victims of wrongs against tortfeasors. Victims of an injury are empowered by being entitled to a (private) right of action, enforceable through the state–the courts'–mediation. The state does not initiate the action in its executive capacity; rather, it acts responsively, being prompted by an individual claim. In Zipurski's words, "private rights of action in private law represent a domain within which individuals may pursue a state-created avenue of self-help"[27], and call for a remedial relief. A private right of action replaces violent self-help, being a civil response that takes the place of a non-civil violent response and accrues to substantive law rights owned by plaintiffs not deriving from statutory provisions. In this way through tort law victims may alter power relations, remedying the existing disequilibrium in favor of the defendant.

Within the framework of the civil recourse theory, tort law is seen as a set of *ex ante* guidance rules; the plaintiff who holds the right to a conduct (compliant with those rules) by the defendant may invoke the breach by this latter of the mandatory conduct. In this sense, tort law has a constitutive relational dimension.

The view endorsed by the civil recourse theory lays emphasis on tort law's structure, seen as a placeholder of its clear-cut conceptual identity. This perspective may be placed at the opposite end of the one that gained momentum at the beginning of the twentieth century and achieved a widespread consensus in the following decades; according to this latter tort law was simply a means–among many–aimed at pursuing public law goals. According to this established view, tort law, once deprived of its original moral roots, became an accident law proxy[28]. Since then, fault was not anymore referred to a morally wrongful act, but to conducts triggering a high level of risk of loss suffered by persons affected by the harmful acts. The civil recourse theory challenges some well-established assumptions steering tort law's comprehension in the twentieth century. The concepts making up the structure of tort law–*in primis*, right and duty–are not mere smokescreens hiding the free pursuit of policy aims by courts, as Realists thought; on the contrary, they have a precise and cogent content and meaning, circumscribing courts' discretion. The relationship between wrongdoer and wronged person constitutive of tort law is inherently bipolar. Bipolarity is constitutive since the injured person is entitled to be compensated by the injurer and the defendant has to pay the plaintiff.

As such, the civil recourse theory is non-instrumental, advocating a view of tort law as a legal area endowed with autonomous goals (not aimed at fulfilling the public law function of redistributing wealth within the community) and firmly entrenched in

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[26] In addition to the above-mentioned cases of intrusion upon the plaintiff's seclusion or solitude, public disclosure of private facts, false light, one may consider the infringement of digital privacy, occurring in the instances of online advertisements of goods conflicting with data subjects' religious, political, social beliefs or data subjects' misidentification with criminals or controversial figures.

[27] B. ZIPURSKI, *The Philosophy of private law*, in J. COLEMAN, S.J. SHAPIRO (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, New York-Oxford, 2004, p.632.

[28] On this point, see *supra*. J.C.P. GOLDBERG, B. ZIPURSKI, *Torts as Wrongs*, in Texas Law Review, 2010, 88, p. 917 wryly remark that "[b]y the mid-1960s […] the linkage of the idea of Torts as law for loss allocation to the idea of tort law as accident law was transformed from an already strong tendency to an axiom" (p. 923).

private law. On this ground it shows some similarities with the corrective justice theory (which is also non-instrumental), yet at the same time showing some peculiar features.

The corrective justice theory identifies the bulk of tort law in the goal of making whole the victim. At its basis lies a duty of repair (grounded on ethics) enforceable by the injured party against the injurer because of their violation of pre-existing duties of conduct. The victim may claim an award of damages aimed at the exact reinstatement of her assets disrupted by the wrong, according to the rectification principle.

The civil recourse theory assigns a broader bundle of goals to tort law than the corrective justice one. These goals may be pursued through manifold remedies; in this regard, injunction is a significant instance, which shows that damages are not the only way of redress in tort. An essential tort law feature is, according to this theory, the fact that the defendant's conduct is tortious relative to the plaintiff, it not being sufficient that the former is responsible for a wrongful loss suffered by the victim. Tort liability is not stated in all cases of losses incurred by someone because of someone else's acts[29]. Tort law is the law of private wrongs. This definition evokes a moral substratum; yet at the same time it hints at an autonomous legal meaning. Liability gives rise to independent duties and is owed not to the world at large, but to specific persons[30].

In this theoretical framework, economic losses are no longer considered as the core of legal harm. The related doctrine of standing, allegedly based on Article III of the US Constitution, stating that–absent economic losses–suits (in the first place, privacy class-actions) have to be dismissed because of the lack of a specific 'injury in fact' suffered by claimants, would lose much of the authority achieved in the last four decades[31]. Focus is shifted from the domain of accidents to that of intentional torts, emphasizing the idea of tort law as a route aimed at satisfying rather than compensating victims.

For these reasons, this doctrine may be a promising avenue for the rescue of the grand idea of privacy, understood as a major right endangered by the infringement of a duty owed to a specific person (or group of persons). The taxonomy of 'wrong' ensures a higher protection to personality interests since it is more apt to give value to interests whose nature is extra-patrimonial; the typical harm to privacy interests affects the psychic sphere, and the individual's well-being. This kind of injury may be better assessed through an approach focused on the defendant's conduct, aside from possible economic losses suffered by the plaintiff. Civil recourse theory therefore designs a more suitable setting for the treatment of injuries deriving from privacy violations, which typically show themselves as a direct affront to victims.

The theoretical framework underlying the civil recourse theory converges with the main ideological tenets guiding the 'New private Law' movement, whose main goals and ambition (exceeding the realm of tort law) are to overturn public law's hegemony over private law.

The emphasis on the conceptual basis of tort law rules however does not imply a return to the formalist approach to law whose heyday predated legal Realism. A pragmatic stance underlies the theory at stake, albeit of a different quality than the one characterizing legal Realism. The 'brass-tacks' pragmatism which was at the core of this latter, supported by the claim to dismiss mere appearances in order to realize what

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[29] For an in-depth analysis, B. ZIPURSKI, *Civil Recourse, not Corrective Justice*, in Georgetown Law Journal, 2003, 91, p. 714

[30] See J.C.P. GOLDBERG & B. ZIPURSKI, *op. cit., passim*.

[31] For an extensive analysis of this doctrine, C.R. SUNSTEIN, *What's Standing after Lujan—Of Citizens Suits, Injuries, and Article III*, in 91 Michigan Law Review, 1992, 91, p. 163.

is actually going on in the law, just led to backhanded results, marked by indeterminacy and vagueness. A sound alternative is a different kind of pragmatism: inclusive[32], inherently antireductionist, not disregarding the efforts of adequate theorization, since it acknowledges that the complexity of reality may effectively be managed through well-crafted concepts[33].

The ultimate goal underlying this proposal is to outweigh the private law skepticism typical to Realism by challenging its idea that all law is public law, at the same time keeping the good fruits of Realism, first of which is its pragmatic outlook (albeit in a new guise). Scholars should return to legal concepts constituting tort law structure, highlighting their historical substance and identity, emphasizing their autonomy, but at the same time their being part of a legal environment built on clear-cut blocks[34].

6. CONCLUSIONS

The aim of this survey has been to single out the reasons why in the US legal system personality interests–other than life, physical integrity, honor, and reputation–did not get a broad protection at law except in the case of their commodification[35].

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[32] As to the concept of inclusive pragmatism, seminal remarks are made by J. C. P. GOLDBERG, *Pragmatism and Private Law*, in Harvard Law Review, 2012, 125, p.1640: "there is more than one way to be pragmatic in one's thinking […] a distinct way to be pragmatic is to stick close to everyday practices and to be wary of concepts, categories, or methods that claim for themselves a certain kind of essential validity or primacy. Pragmatism of this latter sort–call it "inclusive pragmatism–supposes that reality is complex and that it will not advance the cause of knowledge to assume that one comes to understand reality by stripping away superstructure to get to base. Whereas the brass-tacks pragmatist impatiently demands that we cut to the chase, the inclusive pragmatist calls for a patient exploration of the many facets of a phenomenon or problem […] *An inclusive pragmatist supposes that law is a matter of both concepts and action*" (pp. 1650-1651, emphasis added).

[33] J. C. P. GOLDBERG, *op. cit.*, pp. 1654-1655, identifies as the key to law's complexity the feature that "[e]ach area of private law also has direct or indirect connections to others. […] the departments and concepts of private law interact in complicated ways, and a lot of what legal reasoning should involve is thinking through these connections and what they entail for particular cases. […] a lot of what law does is reduce the unmanageable complexity of the world into a manageable form".

[34] For an application of this theoretical framework to the area of property, H.E. SMITH, *Property as the Law of Things*, in Harvard Law Review, 2012, 125, p. 1691; T. W. MERRILL, *Property as Modularity*, in Harvard Law Review, 2012, 125, p. 151. J. C. P. GOLDBERG, *op. cit.*, sheds light on the systemic approach underlying Smith's essay, insofar as it "offers an "architectural" perspective on property law, which understands the categories and rules of that body of law as a means of managing informational complexity through structures consisting of components that only interact in limited ways (that is, through modularity). In a world of limited information […] property law structures interpersonal relationships in terms of in rem rights in order to enable individuals to interact constructively" (p. 1655).

[35] Seminal remarks about the process of treating as commodities the entire field of the individual's interests are made by M. J. RADIN, *Market-Inalienability*, in Harvard Law Review, 1987, 100, p. 1849. She mainly dealt with some controversial (at the time in which she wrote) grounds to which market rhetoric and methodology applied in the twentieth century, such as fetal gestational services, the sale of blood and human organs, sexual services, service of college athletes. The universal commodification approach is discussed at pp. 1859-1870.

An interesting survey of the relationship between personhood and personal property (at the crossroads of market and non-commercial spheres) is carried out by the same author in *Property and Personhood*, in Stanford Law Review, 1982, 34, p. 957. In the Italian legal system, the set of issues covered by the essay are dealt with in tort law under the label of *danno non patrimoniale* (non-pecuniary loss). On the one hand, personhood is seen as a sound justification (at a moral level) of the reasons why specific instances of personal property are worthy of an enhanced protection; on the other, the connection between personal property and personhood is the key to solve "specific disputes between rival claimants" (p. 958) in favor of those who may

The actual narrow scope of privacy is the result of several joint factors.

As to tort law, two main points have been highlighted:

a) the pigeon-hole approach underlying tort liability adjudication led to the acknowledgment of typified torts;

b) the utilitarian and instrumentalist view of tort law became mainstream to the detriment of its understanding as an area involved with the redress of violated individual rights. This approach was in clear discontinuity with the nineteenth century's legal formalism.

Neither do individual privacy interests enjoy general protection in the realm of constitutional law. The consolidated interpretation of Constitution as a ground governing only legal relationships among citizens and public authorities–and not as a set of rules and principles directly enforceable among citizens–fostered the limited legal relevance of privacy.

The lack within the conceptual framework of a general taxonomy of personality rights accounts for this situation. In the US privacy was not able to act as a crucial stand-in for the array of interests constituting the individual personality, therefore it was unable to play the role of fortress for those basic interests which express personhood.

Few tort law scholars assigned to privacy the role of spearhead of personality interests; this view so far has not become mainstream. Protection of personality interests was weakened by their ethereal nature and by the (not high) rank recognized to them among the values deemed to be worthy of protection. If Warren and Brandeis's approach to privacy had gained a dominant consensus among scholars, the story would have probably been different[36]. Privacy would have been the general mold of a wider array of personality interests. Warren and Brandeis's understanding of tort law had at its roots a shared view among the scholars of their time, that of a legal area affording remedies for violated rights. This conception was outweighed by a rather different one. This view–clearly the by-product of a deeply felt need (within the economic system) to immunize its economic actors against the risk of being made liable for the accidents caused by their activity–was focused on market demands. Furthermore, this push was made easier by the scholarly decisive rejection of formalism, the cultural climate in which the conception of tort law as law of wrongs emerged.

The US adopted an approach entirely based on market, which not only made it easier to manage tort law conflicts among individuals–within the national borders–by assigning an economic value to every legal interest (i.e. by 'translating' their encroachment in a pecuniary value), but was also tremendously influential abroad as the backbone (rooted in the US culture) of globalization.

Returning to the present, the issue to be faced is whether a significant change may be triggered by the widespread acceptance of the civil recourse theory, aimed at reshuffling

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invoke the involvement of their personhood in personal property's ownership. A particularly strong control on property should be admitted when it may be conceived as a projection in the outer world of a person's inner self, so that their "absence would hinder [her] autonomy or liberty" (p. 960). Radin aims at identifying situations in which property has the function of personhood's placeholder.

[36] This remark is also true as to the field of data protection, which calls into question privacy interests. Nowadays a well-accepted idea in Europe is that data have, from a legal standpoint, a composite nature, being conceivable as an aspect of personality as well as a valuable asset, albeit with a peculiar legal status. A broader understanding of the privacy concept–as a personality major proxy– may have eased the legal acknowledgment at the federal level of the right (by the data subject) to exert a more effective control on their data, insofar as these latter are seen as personality facets.

the well-established tort law underpinnings, grounded on market and money as the universal measure of the value of all the goods and interests protected in tort.

Might the reevaluation of the nineteenth century concept of tort law bring about a stronger and wider recognition of privacy interests, able to afford them stronger protection in the US common law?

Only time will tell.

Dystopian Visions and the Future of Western Liberal Constitutionalism: Analyzing Equality Infringements in "The Handmaid's Tale" and "Years and Years"

Miriam KLEMA[*]

This paper explores the impact of dystopian narratives on Western liberal constitutionalism, focusing in particular on the violation of equality in the television series "The Handmaid's Tale" and "Years and Years." Through a constitutional analysis, the way in which equality is portrayed in these dystopias is examined, highlighting the potential threats they pose to the fundamental rights and principles of a liberal constitutional system. The importance of recognizing and addressing these trends to prevent dystopian scenarios from becoming reality is thus emphasized.

In questo contributo si esplora l'impatto delle narrazioni distopiche sul costituzionalismo liberale occidentale, concentrandosi in particolare sulla violazione dell'uguaglianza nelle serie televisive "The Handmaid's Tale" e "Years and Years". Attraverso un'analisi costituzionale, viene esaminato il modo in cui l'uguaglianza viene rappresentata in queste distopie, evidenziando le potenziali minacce che esse pongono ai diritti fondamentali e ai principi di un sistema costituzionale liberale. Viene così enfatizzata l'importanza di riconoscere e affrontare queste tendenze per evitare che gli scenari distopici diventino realtà.

1. INTRODUCTION

What is the future of Western liberal constitutionalism? When we look at the number of crises the world faces today it is no wonder that the crisis discourse affects the principles of liberal constitutional states as well. Current incidents of democratic backsliding in many places around the world[1] suggest that it is far from certain that democracy will prevail throughout the majority of states as the desirable form of government. Likewise, it seems that we cannot count on the unfaltering support for the principles of separation of powers and rule of law anymore. It is even questionable if the protection of fundamental rights will continue to be the backbone of our society.

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[1] N. BERMEO, *On Democratic Backsliding*, in Journal of Democracy, 2016, 27, 5; T. DRINÓCZI, A. BIEŃ-KACAŁA, *Illiberal Constitutionalism: The Case of Hungary and Poland*, in German Law Journal, 2019, 20, p. 1140; D. LANDAU, *Abusive Constitutionalism*, in U.C. Davis Law Review, 2013, 47, p. 189; P.A. MARTINS, *Freedom at Stake in Brazil: An Illiberal Project Unfolds Under Bolsonaro's Regime*, in Int'l J. Const. L. Blog, 17.10.2020 <iconnectblog.com/freedom-at-stake-in-brazil-an-illiberal-project-unfolds-under-bolsonaros-regime/> (25.05.2023); L. PECH, K.L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in Cambridge Yearbook of European Legal Studies, 2017, 19, 3; J. RÍOS-FIGUEIROA, *Democratic Backsliding and the Supreme Court in Mexico*, in VerfBlog, 22.02.2023 <verfassungsblog.de/democratic-backsliding-and-the-supreme-court-in-mexico/> (25.05.2023).

Therefore, it may not be surprising that in recent years a heightened interest in dystopian narratives can be observed. The success of the numerous dystopias being told in books, films, and television[2] suggests that many people feel uneasy when thinking about the future of our rapidly changing world. Against this backdrop, my research interest is to examine how this phenomenon corresponds with real-life dangers regarding the regression of Western liberal constitutionalism. This is why I have chosen to analyse two recent dystopian television series from a constitutional perspective.

In the following, I will first provide some theoretical background on the use of dystopian analysis in constitutional theory, before explaining why it can be insightful to study television series from a legal perspective. For the main part, I will analyse the two TV series "The Handmaid's Tale"[3] and "Years and Years"[4] through a constitutional lens. Specifically, I will look at them from a fundamental rights-perspective by examining how the principle of equality is being portrayed. I will try to map out the extent and forms of equality infringements that occur within these dystopias compared to the standards of a liberal constitutional system. To conclude, I will touch upon current problematic trends in constitutional law and shortly reflect on what must be done in order for the dystopias not to become reality.

2. THEORY

2.1. *DYSTOPIAN THINKING IN CONSTITUTIONAL THEORY*

Dystopias show us a negative version of the future by referring to undesirable developments in our current society and thinking to ahead where they could lead us. Ideally, the recipients of a dystopia understand the warning inherent in the depicted worst-case-scenario so that they can take the necessary steps to prevent it.[5]

Which role might dystopian analysis be able to play in constitutional theory? Drawing upon the work of American constitutional law expert *Thomas Crocker*, the benefit of using dystopian constitutionalism as a method is two-fold: First, thinking about states of governance we would like to avoid, reinforces the constitutional values we wish to maintain. Second, dystopian analysis induces a holistic approach to constitutional theory by examining the systemic implications of rules. Especially during the process of adopting laws, dystopian constitutionalism is able to stimulate critical reflection. If agreement on certain details cannot be achieved, it might be helpful to consider which outcomes should be avoided in order to achieve a minimum consensus. After all, it is usually easier to agree on things you do not want than the other way round.[6]

As *Crocker* explains, contrasting the dystopian state model with that of the reference society basically constitutes a legal comparison. Thereby, the legal order of the reference society is compared to the dystopian one and is assessed according to how much they both have in common. It is also possible to evaluate individual rules based on the question whether they lead closer to the dystopian constitution. Therefore, so-called "consequence avoidance arguments" are applied: To ensure that dystopian visions do not become reality, it is necessary to counteract

[2] E.M. HAUSTEINER, *Mehr Dystopie wagen?*, in Zeitschrift für Politische Theorie, 2020, 11, p. 31.

[3] B. MILLER, *The Handmaid's Tale* (TV series), 2017 – today, Hulu.

[4] R.T. DAVIES, *Years and Years* (TV series), 2019, BBC/HBO.

[5] G. CLAEYS, *Dystopia*, Oxford, 2017, p. 501; E.M. HAUSTEINER, *op. cit.,* p. 33 ss.; P. SANDS, *Utopias and Dystopias*, in M. WOLF (ed), *The Routledge companion to imaginary worlds*, 2018, 177, 180; F. VIEIRA, *The Concept of Utopia*, in G. CLAEYS (ed), *The Cambridge Companion to Utopian Literature*, 2010, 3, 17.

[6] T.P. CROCKER, *Dystopian Constitutionalism*, in University of Pennsylvania Journal of Constitutional Law, 2015, 18, pp. 595, 605 ss.

their negative example. Consequently, legislators and policy makers must avoid enacting rules that either are an integral element of or eventually lead to the envisioned dystopia. Thinking about what kind of behaviour is detrimental to the principles of Western constitutionalism entails to clearly define what exactly constitutes those principles. Thus, dystopian comparison is able to substantiate and strengthen existing constitutional values.[7]

In practice, both courts and academic literature sporadically make dystopian comparisons to support a legal argument. Especially George Orwell's "1984"[8] is often cited when it comes to the advancing mechanisation of everyday life or permanent real-time surveillance and the concerns associated with it. Dystopian analogies can be used to support one's arguments, in particular to point out potentially negative effects of legal provisions or to advocate for a change in legal practice.[9]

2.2. *ANALYSING TV SERIES FROM A LEGAL PERSPECTIVE*

For my presentation I will analyse two television series – "The Handmaid's Tale" and "Years and Years". Since film and television have become increasingly popular in the past decades, their content tells us much about predominant themes in current societal debate.[10] Dystopian versions of society almost inevitably include references to law and politics. Not only does this make dystopian films and series a suitable object for legal analysis, it also sharpens the judgment of the general audience concerning their sense of what is right and wrong.[11] This is relevant for our case as well: The dystopian equality infringements in "The Handmaid's Tale" and "Years and Years", mirror our deepest fears. Analysing them makes us more aware of how the principle of equality could be threatened in real life, opening our eyes to where current developments could lead.

3. EQUALITY INFRINGEMENTS IN CONTEMPORARY DYSTOPIAN TV SERIES

3.1. *INTRODUCTORY REMARK*

The two TV shows I have chosen as objects of analysis are from 2017 and 2019. Both portray their own pessimistic version of the future: While "The Handmaid's Tale" tells a story of a complete and sudden change of regime and society, "Years and Years"

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[7] T.P. CROCKER, *op. cit.*, pp. 599 ss.

[8] G. ORWELL, *Nineteen Eighty-Four*, New York, 2021.

[9] EGMR, 25.05.2021 (GK), *Big Brother Watch and Others/The United Kingdom*, Nr 58170/13, 62322/14 and 24960/15, Joint Partly Concurring Opinion of Judges Lemmens, Vehabović and Bošnjak Rz 6; US *Supreme Court*, *United States v Jones*, No 10-1259, Oral Argument Transcript (08.11.2011), 13; *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, J., dissenting) ; *United States v. Sparks*, 750 F. Supp. 2d 384, 395 (D. Mass. 2010); *United States v. Cuevas-Perez*, 640 F.3d 272, 286 (7th Cir. 2011) (Wood, J., dissenting). L.R. BARROSO, *Technological revolution, democratic recession, and climate change: The limits of law in a changing world*, in ICON, 2020, 18, p. 334; T.P. CROCKER, *op. cit.*, pp. 594 ff.; S.K. PELL, C. SOGHOIAN, *Can You See Me Now?: Toward Reasonable Standards for Law Enforcement Access to Location Data That Congress Could Enact*, in Berkeley Technology Law Journal, 2012, 27, 117; N.M. RICHARDS, *The Dangers of Surveillance*, in Harvard Law Review, 2013, 126; T. THIEL, *Die Schönheit der Chance: Utopien und das Internet*, in Juridikum 2014, 459.

[10] L. MIKOS, *Film- und Fernsehanalyse*, 2015.

[11] J.W. MÜLLER, S. MALL, *Spuren des Juridischen in Serie(n)*, in A. BESAND (ed), *Von Game of Thrones bis House of Cards*, 2018, pp. 100 ff.

differs by dealing with the slow decay of the status-quo. They can both act as an example of what the audience can learn when engaging with dystopias, in this case from the perspective of constitutional law.

Reflecting on the future of modern Western constitutionalism, each principle from could be examined. For this paper, the goal is to explore what scenarios dystopias predict with regard to fundamental rights. The focus will be on the principle of equality because of its significance in the evolution of other fundamental rights and its wide scope of application.[12] The analysis will be structured according to different grounds of discrimination. Characteristics such as sex, race, property, or religion mentioned in many equality clauses of fundamental rights catalogues provide a suitable base for assessing equality infringements. By grouping together related types of discrimination, categories emerge that can serve as a framework for the analysis of both series in the following part.

3.2. *THE HANDMAID'S TALE*[13]

3.2.1. *ABOUT THE SERIES*

Based on the book "*The Handmaid's Tale*"[14] by Margaret Atwood from 1985, this series is set in a dystopian future where the United States has been transformed into a totalitarian state called the Republic of Gilead. We learn that Mexico and Canada still exist in the way we have known, however, they face the same problem that led to the downfall of the US: a steeply declining birth rate due to infertility. What has caused this fertility crisis is not completely clear but it is suggested that environmental pollution and climate change have been contributing factors.

Gilead is constituted as a totalitarian oligarchy and ruled by a Christian fundamentalist group known as "The Sons of Jacob". They overthrew the American government in a coup, declared martial law and eventually suspended the US constitution. The new order consists of rigid social classes, aiming at one goal: To create a society that facilitates a stable birth rate, which is planned to be achieved through gathering the remaining fertile women, now called Handmaids, and impregnate them systematically.

The TV series created by *Bruce Miller* aired in 2017 with its first season. As of today, five seasons have been released with the sixth and final season already announced. I will only take the first season into account of my analysis, which covers the plot of *Atwood's* novel.

3.2.2. *DETAILED ANALYSIS*

3.2.2.1 SEX OR SEXUAL ORIENTATION

Starting off with looking at inequality regarding sex and sexual orientation it is necessary to remember that a strict social hierarchy defines the Republic of Gilead. When contrasting the ranks eligible for men with the ones for women, we can already see that they reinforce gender stereotypes to the extreme: Men hold the positions of power as political decision-makers and security forces, while women are confined to

[12] A. GAMPER, *Staat und Verfassung,* 2021, pp. 279 ff.
[13] B. MILLER, *The Handmaid's Tale.*
[14] M. ATWOOD, *The Handmaid's Tale*, 1998.

domestic roles either as Wives, domestic servants (Marthas) or Handmaids, who give the series its name. The group of Aunts – usually unmarried women – take up a special position in the system: They train and oversee the Handmaids and typically are in charge for most matters connected to them, therefore granting them quite a powerful position.

Handmaids form the group of fertile women who possess no rights and are seen only as a resource for reproduction. They each live with Commanders and their infertile wives, enduring monthly ceremonies in which the Commander, the ruling class of Gilead, attempts to impregnate them. If it is successful, the Handmaid must hand over the new-born child immediately before she is relocated to a new household. Further emphasizing their lack of identity and autonomy, Handmaids are stripped of their original names and given new ones, which are each derived from their Commander's name.[15] This is only one example of a society that is patriarchal to the extreme. Gilead's women, with some exceptions regarding the group of Aunts, are generally subordinate to men and largely disenfranchised: They are not allowed to work, own property, read, or write and are not supposed to form an opinion concerning anything outside their sphere of action, which means they also don't possess any rights to political participation.[16]

Inequalities also exist within each sex as the various social classes already indicate. The Wives, who are married to the Commanders, have authority over the Handmaids and the domestic servants, whereby the Wives act particularly condescendingly and controllingly towards the Handmaids. If the Handmaids behave, they might get a cookie or some other small gift,[17] but if the Wives feel the need to discipline them, they might ground them or even punish them physically.[18] When the main character June first gets posted with a Commander, his Wife even compares the process of showing her everything with the training of a dog, which exemplifies this attitude.[19]

However, not even the Handmaids are all the same: Pregnancies elevate the status of Handmaids while they are expecting and during the days following the delivery.[20] In contrast, Handmaids that fail to conceive for a certain period of time and throughout several deployments are sent to work in the colonies, a radioactively contaminated area where they face certain death. This is because infertility in Gilead is solely attributed to women. As June explains: "There is not such a thing as a sterile man anymore […]. There are only women who are fruitful and women who are barren."[21]

Because of the social classes, inequalities can also be detected between the different ranks for men. For example, only men of a certain social status are allowed to have wives or to participate in politics.[22] So, while men also face inequalities in Gilead, the hierarchy between the different classes is not as steep as it is for women: Compared to

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[15] This leads to the main character June being called Offred – composed of the word "of" and the name of her assigned Commander "Fred": B. MILLER, *The Handmaid's Tale*, Season 1, Episode 6, 00:11:30.

[16] See e.g., B. MILLER, *The Handmaid's Tale, Season* 1, Episode 4, 00:07:40; B. MILLER, *The Handmaid's Tale*, Season 1, Episode 6, 00:31:55.

[17] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 2, 00:19:36; B. MILLER, *The Handmaid's Tal*e, Season 1, Episode 8, 00:46:20.

[18] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 3, 00:48:00; B. MILLER, *The Handmaid's Tale*, Season 1, Episode 10, 00:07:10.

[19] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 1, 00:06:18.

[20] See e. g., B. MILLER, *The Handmaid's Tale*, Season 1, Episode 3, 00:16:20.

[21] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 4, 00:18:13.

[22] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 1, 00:10:50: "He is the Commander's driver. […] Low Status – hasn't even been issued a woman".

the relationship between the Wives and the Handmaids, there is no social class of men that is completely at mercy of another. Also, the risk of being sent to the colonies is much lower for men than it is for women.

Additionally, discrimination is not only based on sex, but also on sexual orientation. Homosexuality is considered a crime termed "gender treachery", which in the worst case is punishable by death.[23]

3.2.2.2 PROPERTY, BIRTH, SOCIAL ORIGIN OR SOCIAL STATUS

Besides the outstanding inequality between men and women, Gilead's whole system is based on severe discrimination regarding social status. Those in higher-ranking classes receive recognition and privileges, while lower classes are stripped of rights. The distribution of goods is also tied to social standing: Commanders and their families live in large houses, whereas their drivers, domestic workers and Handmaids do not have an accommodation of their own; they all are assigned small rooms in the house of their Commander. The series also suggests that social origin is a basis for discrimination, since the life people have led before the takeover is significant for the classification into the different social groups.

3.2.2.3 RACE, COLOUR, LANGUAGE, NATIONALITY, OR NATIONAL MINORITY

Surprisingly, race and ethnicity play a subordinate role in "The Handmaid's Tale". According to what we see in the first season of the series, the people in charge are usually white. This does apply for Commanders, Wives, Aunts and Guardians. The domestic servant that lives in the same household as the main character, June, is a woman of colour, as is June's best friend from the time before the takeover, who is now also a Handmaid. Consequently, one could say that elements of white supremacy exist in Gilead, but individuals of different ethnic backgrounds are not systematically prosecuted or discriminated.

3.2.2.4 RELIGION, POLITICAL OR OTHER OPINION

The situation looks different when focusing on the discriminatory potential of different religious beliefs, ideologies, or worldviews. Gilead is a theocratic regime built on a fundamentalist form of Christianity that allows no room for other denominations. This goes so far that former places of worship are destroyed, and those who do not convert face execution.[24] Based on these strict religious beliefs, the new regime also holds strong ideological views and is intolerant of the expression of any contrasting opinions. This proves Gilead's totalitarian nature and is illustrated in the series by several examples. For one thing, we see that former employees of abortion clinics have been executed. On top of that, women with assumingly strong independent minds – like lawyers, CEOs, journalists, or university professors – are not trusted to take on the role of a Handmaid or a domestic servant and must work as prostitutes in secret establishments instead. At one point, June even confronts her Commander with the fact that before the takeover women had choices, to which he only answers: "Now you have respect. You have protection. You can fulfil your biological destinies in peace."[25]

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[23] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 1, 00:15:54; B. MILLER, *The Handmaid's Tale*, Season 1, Episode 3, 00:34:10.

[24] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 1, 00:15:48; *Miller*, The Handmaid's Tale, Season 1, Episode 7, 00:25:42.

[25] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 5, 00:31:18.

3.2.2.5 DISABILITY OR AGE

In "The Handmaid's Tale", unequal treatment regarding disability and age is hinted at but does not play a prominent role. Babies born with defects are referred to with the derogatory term "Unbabies".[26] If they are not stillborn, they usually die shortly after birth – probably also because all births are homebirths and no medical support is granted. The fate of people who are too old to fulfil their assigned tasks is not explicitly known, but it is likely that especially lower-class members are simply sent to the colonies.

3.2.2.6 INTERIM CONCLUSION

Overall, the series portrays Gilead as a regime characterized by terror and oppression, where equality and other fundamental rights are severely limited. Discrimination based on sex, sexual orientation, social status, religion, and political opinion is omnipresent. Consequently, the laws of Gilead do not apply equally to all. For example, as a domestic servant and a Handmaid are convicted of "gender treachery" for their same-sex relationship, the servant receives an immediate death sentence, while the Handmaid is "sentenced to redemption" due to her fertility, which involves punishment through mutilation.[27] The Commanders, however, are in no respect safe from the harsh laws of Gilead. They are monitored by the secret police called "The Eyes"[28] and can also face severe punishment if they break the law.[29] Still, they do have privileges: Instead of an external judge, a council composed of other Commanders decides their case when they are accused of having broken the law. In addition to that, they are allowed to speak during trial, which is not the case for domestic servants and Handmaids.[30] Despite claims that "[n]o one's above the law"[31] made at one point by a person loyal to the regime, the reality is different. The selective enforcement of the law for those in power becomes clear as June discovers the existence of brothels, which are officially forbidden in Gilead.[32]

The inequality between the different social classes is starkly contrasted with the egalitarianism found within each rank. There is no room for individuality, as everyone is expected to dress the same and to conform to their assigned roles. This kind of equality completely suppresses freedom and determines a person's worth solely according to their position in the system. The insignificance of the individual person is made clear in the scene of the "gender treachery" trial. Instead of reading out the names of the two accused women, the judge refers to them as Martha 6715301 and Handmaid 8967.[33]

The dangers of such a system and its hypothetical implications for Western constitutionalism are evident: We can see that equal treatment and the observance of other fundamental rights are significantly restricted within the depicted totalitarian

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[26] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 2, 00:10:46.
[27] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 3, 00:34:45.
[28] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 8, 00:39:55.
[29] See B. MILLER, *The Handmaid's Tale*, Season 1, Episode 10, 00:29:27.
[30] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 3, 00:34:00; B. MILLER, *The Handmaid's Tale*, Season 1, Episode 10, 00:27.30.
[31] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 8, 00:40:19.
[32] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 8, 00:23:00. As to why they turn a blind, one Commander explains: "Everyone's human after all" (00:23:09) – everyone meaning officers, senior officials, diplomats, and other people in high-ranking positions.
[33] B. MILLER, *The Handmaid's Tale*, Season 1, Episode 3, 00:34:31.

system. Thus, "The Handmaid's Tale" can be interpreted as emphasising the merits of constitutional democracy, especially concerning political pluralism, human dignity and the idea that the end does not justify the means.

3.3. *EQUALITY INFRINGEMENTS IN "YEARS AND YEARS"*[34]

3.3.1. *ABOUT THE SERIES*

In contrast to "The Handmaid's Tale", the British TV mini-series "Years and Years" could be categorized as the more realistic dystopia. Written by *Russel T. Davies*, it first aired on BBC One in 2019, which is also the year the story sets off. Although the whole show only consists of six one-hour-long episodes, the plot covers a span of 15 years, with the series ending in 2034. During that time, we follow four grown-up siblings and their respective families based in London and Manchester to witness how they must cope with political, technological and ecological turmoil. Each storyline deals with a different challenge of our time: the radicalisation of politics and the rise of populists, economic crisis and growing social inequality, the impact of climate change, migration and advancing technology. Unlike "The Handmaid's Tale", it does not show a sudden and complete subversion of the current constitutional system but rather portrays how it can be dismantled step-by-step. "Years and Years" tells a story that starts here and now but is becoming dystopian through imagining the worst possible outcome of the major challenges many Western societies face today.

3.3.2. *DETAILED ANALYSIS*

3.3.2.1 SEX OR SEXUAL ORIENTATION

"Years and Years" begins in 2019, portraying a United Kingdom where gender inequality largely belongs to the past and same-sex relationships are openly accepted.[35] While it never is a significant issue in the UK even as the story unfolds over the years, the series explores how discrimination based on sexual orientation still exists or worsens in other countries. We see, for example, how one of the main characters has to flee the Ukraine due to his sexuality, and how the US Supreme Court suspends the right to same-sex marriage.[36]

The series also explores a new aspect related to sexual orientation. When it comes up that some persons engage in intimate acts with their domestic robots, it raises questions about whether the ban of discrimination based on sexual orientation could also apply to machines. As their humanity increases, it would even have to be considered whether robots are entitled to certain rights like the right to sexual self-determination.[37]

Technology also becomes an issue with regard to gender identity, as the series delves into the concept of transhumanism[38] through the character Bethany who desires to integrate technology into her body. All her youth Bethany has suffered from not being able to identify with the body she was born with, thus creating a link to what people feel

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[34] R.T. DAVIES, *Years and Years*.

[35] See e.g., R.T. DAVIES, *Years and Years*, Episode 1, 00:10:50.

[36] R.T. DAVIES, *Years and Years*, Episode 1, 00:22:20; R.T. DAVIES, *Years and Years*, Episode 2, 00:40:00; R.T. DAVIES, *Years and Years*, Episode 3, 00:08:50; *Davies*, Years and Years, Episode 4, 00:05:13.

[37] R.T. DAVIES, *Years and Years*, Episode 1, 00:38:38.

[38] R.T. DAVIES, *Years and Years*, Episode 1 00:26:18: Bethany explains to people that she does not "want to be flesh" but to "become digital".

who do not identify with their biological sex. That opens up the question whether the ban of discrimination against people that are transgender or transsexual extends to people that are transhuman. Interestingly, the series does not portray the increasing integration of technology into everyday life as entirely dystopian. It does hint at some of the possible consequences of this trend but leaves room for the audience to consider its desirability for themselves.[39]

3.3.2.2 PROPERTY, SOCIAL ORIGIN OR SOCIAL STATUS

Inequality based on property and social origin is another prevalent theme in the series. We see how different areas of London and Manchester become segregated according to social aspects. On the one hand, there are elitist neighbourhoods for which you need to proof a certain income to enter.[40] On the other hand, there are marginalized "red zones" in which people need their ID-cards to get in and out and are not allowed to leave at all at night. It is also almost impossible to pursue a business in this area, as it is much harder to get a license.[41]

Social inequality grows even further as the UK is hit with several crises and the government fails to address them in a socially fair and just manner. For example, there is little intervention by the government in the event of a bank crash that causes life-threatening financial loss for many individuals. At the same time, people with spare bedrooms are forced to take in homeless British citizens during a nationwide housing crisis.[42] This leads to an increased self-interest among the population, which exacerbates social tension, and shows itself, for instance, in the declining support for welfare institutions.[43]

Social inequality is also linked to profession. This is illustrated through the character Stephen, who is exploited as a bike courier and medical test subject after he lost his job during an economic crisis. Bethany, on the other hand, earns well but feels like she is owned by the government after it paid for the technological implants in her body as part of her work. She cannot imagine living without them and has been terrified ever since to do something that would lead the government to take them away again.[44] Poor working conditions and disproportionate dependency are already part of many societies today. Still, the portrayal of these circumstances in the series reminds the viewer of the importance of humane working conditions and the equal right to a dignified life.

Equality provisions are often not conclusively formulated, prohibiting unjustified discrimination based on every characteristic that allows to distinguish between people or a group of people.[45] In this context, the series addresses the topic of discrimination based on cognitive abilities, as a populist politician suggests tying voting rights to a

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[39] As the years go by, new technical achievements become more widespread: In 2029, everyone at Bethany's workplace has merged to some extend with technology, allowing them to use their bare hands as their phones. At the very end of the series, another character even undergoes an experiment in which her mind is stored on water molecules, theoretically allowing her to live forever. This development raises fundamental rights issues that go beyond the principle of equality: e.g., implants in Bethany's brain allow her to spy on people that are in her contacts (R.T. DAVIES, *Years and Years*, Episode 5, 00:29:12), and a black market for cybernetic surgeries is emerging (R.T. DAVIES, *Years and Years*, Episode 3, 00:47:15).

[40] R.T. DAVIES, *Years and Years*, Episode 1, 00:16:18.

[41] R.T. DAVIES, *Years and Years*, Episode 5, 00:20:39; 00:22:39 and 00:37:07; *Davies*, Years and Years, Episode 6, 00:26:26 and 00:29:06.

[42] R.T. DAVIES, *Years and Years*, Episode 2, 00:54:00; *Davies*, Years and Years, Episode 5, 00:11:10 and 00:15:27: "bedroom law".

[43] R.T. DAVIES, *Years and Years*, Episode 6, 00:07:14.

[44] R.T. DAVIES, *Years and Years*, Episode 5, 00:30:40 and Episode 6, 00:03:40.

proof of intelligence. Although this does not become a reality in the series, it confronts the audience with the implications of this – sometimes hastily expressed – idea.[46]

3.3.2.3 RACE, COLOUR, LANGUAGE, NATIONALITY, OR NATIONAL MINORITY

Race and nationality become issues in the series primarily in the context of migration and refugees, which reminds the viewer of the situation many European countries have to deal with in real life. As the years progress, the audience gets to witness the growing hostility towards refugees in Europe through the character Victor, who flees the Ukraine because of his homosexuality. The story follows him and his British boyfriend while they face various – at times life-threatening – obstacles in the process of trying to get a positive asylum decision for Victor. After the UK has already adopted policies such as deportations within one day and cancelling legal aid for refugees,[47] the concerns for possible fundamental rights infringements increase even more: In an attempt to manage the high numbers of refugees coming to the UK, the populist British Prime Minister arranges the establishment of secret refugee camps. Refugees from detention centres are transferred there in the middle of the night without information or the possibility to file an appeal. The idea behind those camps is to "let nature take its course", meaning to not intervene when diseases start to spread in the hope that the "population of the camps regulates itself".[48] This degrading treatment of refugees is an example of discrimination based entirely on nationality, and violates human dignity.

3.3.2.4 RELIGION, POLITICAL OR OTHER OPINION

While "Years and Years" does not focus extensively on discrimination based on religion or political opinion, it touches on aspects related to the freedom of the press and media. Especially as the BBC loses its broadcasting license in the year 2029 and a journalist is banned from Downing Street for criticizing the Prime Minister,[49] the limitations on the freedom of expression become evident – even more so, as individuals are targeted by the police who voice suspicions about the existence of the before-mentioned refugee camps.[50] It seems that there is not yet a legal basis to justify discrimination based on the support of dissenting opinions. However, the conditions for fully exercising the right to freedom of expression have already begun to deteriorate.

3.3.2.5 DISABILITY OR AGE

The series addresses equality regarding disability through the character Rosie, who uses a wheelchair. We get to know her as an independent woman who raises two kids on her own and is fully integrated in society. As the years go by, advances in medicine allow for procedures to fix malformations and birth defects in the womb, thus making it possible to cure many forms of disabilities. This raises ethical questions about whether people with disabilities need fixing or if the outside world should be adapted instead.

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[45] J. MEYER-LADEWIG, R. LEHNER, *Art 14*, in J. MEYER-LADEWIG, M. NETTESHEIM, S. RAUMER (eds.), *EMRK*, 2017.

[46] R.T. DAVIES, *Years and Years*, Episode 3, 00:01:50-00:03:20.

[47] R.T. DAVIES, *Years and Years,* Episode 2, 00:33:31; R.T. DAVIES, *Years and Years*, Episode 5, 00:23:11.

[48] R.T. DAVIES, *Years and Years*, Episode 5, 00:51:16 and 00:51:32; R.T. DAVIES, *Years and Years*, Episode 6, 00:13:24 and 00:28:15.

[49] R.T. DAVIES, *Years and Years*, Episode 6, 00:01:07.

[50] R.T. DAVIES, *Years and Years*, Episode 5, 00:01:58.

Considering who would have access to or could afford such treatments is also a challenging issue and bears potential for discrimination.

3.3.2.6 INTERIM CONCLUSION

As opposed to "The Handmaid's Tale", the TV series "Years and Years" presents a dystopian vision of a near-future United Kingdom that struggles with many contemporary challenges, including migration, advancing technology and growing social tension. This leads to various forms of inequality and discrimination. Regarding the principle of equality before the law, the series shows different facets: For example, the promise by a populist politician to bring foreign CEOs to court in the UK expresses the idea that no one should be above the law,[51] especially not an elite abroad. In contrast, the suggestion to tie voting rights to intelligence[52] clearly undermines this concept. On top of that, in not granting refugees a fair trial and other basic human rights, they are also denied an equal application of the law.

Although the series gives enough examples of how positive laws can facilitate unequal treatment, we also see how sometimes inequality arises out of changed circumstances to which the state has failed to respond adequately. As the British Prime Minister is held accountable for her involvement in the illegal refugee camps and has to go to jail, "Years and Years", however, maintains hope by highlighting the importance of the separation of powers and an independent judiciary. Overall, the audience gets a sense of the significance of upholding human rights and striving for a fair and just society even in a fast-changing world instead of disregarding the principles of constitutional democracy.

4. CONCLUSION

Knowing that dystopias are not mere fantasy but always criticize real issues of our time means that their analysis needs to consider their subtext. So summing up, which parallels can be drawn between "The Handmaid's Tale" and "Years and Years" and current problematic developments regarding Western constitutionalism, especially the principle of equality?

"The Handmaid's Tale" tells a story of a sudden radical regime change, with large parts of the population losing rights they had fought for very hard in the past. This is a clear reminder that liberal-democratic achievements should not be taken for granted. That people, especially women, are inspired by this message show protests around the world: Whether it concerns the tightening of abortion laws in Poland and elsewhere or the appointment of ultraconservative judges for the US Supreme Court, we see protesters dressed up like Handmaids from the television series to warn against where this could lead to. Just recently, this dystopian reference has been used in demonstrations against the judicial reform in Israel and during a march in the UK to show support for Iranian women.[53]

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[51] R.T. DAVIES, *Years and Years*, Episode 2, 00:46:00.

[52] See R.T. DAVIES, *Years and Years*, Episode 3, 00:03:15: "2026 – let the people decide. But only the clever ones."

[53] AP, *Dystopian imagery from The Handmaid's Tale used against Trump nominee Amy Coney Barrett*, in Economic Times, 23.10.2020 <economictimes.indiatimes.com/news/international/world-news/dystopian-imagery-from-the-handmaids-tale-used-against-trump-nominee-amy-coney-barrett/dystopian-imagery/slideshow/78824622.cms> (24.05.2023); BELFASTTELEGRAPH, *Why women are dressing up like Handmaids to protest*, in BelfastTelegraph.co.uk, 04.09.2018 <belfasttelegraph.co.uk/news/viral/why-

Additionally, one could argue that "The Handmaid's Tale" cautions its audience against the wish for a simpler life. In an attempt to reduce the complexity of our current globalised world, people tend to think in black-and-white-categories and distance themselves from other groups of people they perceive not to be like them. Against this background, a highly regulated order in which everything is decided for you might sound tempting in a way. However, "The Handmaid's Tale" manages to portray how nobody is happy with this complete lack of freedom, not even the leaders, and how important solidarity is in a society.

„Years and Years", on the other hand, does not focus on a coup d´état, but rather on the slow erosion of regimes. We see discrimination on grounds of migration, technology and social status but all against the political background of increasing populist and illiberal tendencies. The series makes you think when you see how likeable main characters vote for Vivienne Rook, a textbook example of a populist, anti-establishment politician. "Years and Years" comprehensibly shows how Rook is democratically elected into power and eventually gets in the right position to get hold of the necessary resources to slowly rebuild the country.

That many countries today struggle with growing autocratization becomes clear when we look at democracy reports from recent years.[54] Especially the regimes in Hungary and Poland, Venezuela and Brazil haven been called out as examples of democratic backsliding or abusive constitutionalism.[55] They illustrate how enemies of democracy are often democratically elected into office, fuelling the debate about the legitimacy of militant democracy.[56] Although it is said that most constitutional crises today happen in the form of slow erosions,[57] scenarios of a fast and complete regime change like in "The Handmaid's Tale" are still plausible and even increased again in 2021.[58] Also, religious fundamentalist groups continue to threaten democratic movements.[59]

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women-are-dressing-up-like-handmaids-to-protest/37283344.html> (24.05.2023); P. BEAUMONT, A. HOLPUCH, *How The Handmaid's Tale dressed protests across the world*, in The Guardian, 03.08.2018 <theguardian.com/world/2018/aug/03/how-the-handmaids-tale-dressed-protests-across-the-world> (24.05.2023); IRANWIRE, *London's Handmaids' March: A Tribute To Iranian Women's Bravery*, in IranWire, 24.03.2023 <iranwire.com/en/women/115008-londons-handmaids-march-a-tribute-to-iranian-womens-bravery/> (24.05.2023); I. SCHARF, T. GOLDENBERG, *In Israel, TV's dystopian 'Handmaids' is protest fixture*, in Associated Press, 17.03.2023 <apnews.com/article/israel-protests-women-patriarchy-rights-legal-handmaids-49b4b5a4d4d3da81d6433f36dd22f215; A. WOODYATT, A. MORTENSEN, *Polish women disrupt church services in protest at abortion ban*, in CNN, 26.10.2020 <edition.cnn.com/2020/10/26/europe/poland-abortion-protest-church-intl-scli/index.html>.

[54] A. LÜHRMANN (ed.), *Autocratization Surges – Resistance Grows*, in Democracy Report, 2020; N. ALIZADA (ed.), *Autocratization Turns Viral*, in Democracy Report, 2021; V.A. BOESE (ed.), *Autocratization Changing Nature?*, in Democracy Report, 2022; E. PAPADA (ed.), *Defiance in the Face of Autocratization*, in Democracy Report, 2023.

[55] N. BERMEO, *op. cit.*; T. DRINÓCZI, A. BIEŃ-KACAŁA, *op. cit.*; D. LANDAU, *op. cit.*; P.A. MARTINS, *op. cit.*; K. SCHEPPELE, *Autocratic Legalism*, in University of Chicago Law Review, 2018, 85, p. 545.

[56] The following quote is attributed to *Joseph Goebbels*: „[I]t will always remain one of the best jokes of democracy that it provided its mortal enemies itself with the means through which it was annihilated." – As cited in J.W. MÜLLER, *Militant Democracy*, in M. ROSENFELD, A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, 2012, p. 1253.

[57] A. HUQ, T. GINSBURG, *How to Lose a Constitutional Democracy*, in UCLA Law Review, 2018, 65, pp. 93 ff.; D. LANDAU, *op. cit.*; M. LOUGHLIN, *The Contemporary Crisis of Constitutional Democracy*, in Oxford Journal of Legal Studies, 2019, 39, p. 437.

[58] V.A. BOESE (ed.), *State of the World 2021: Autocratization Changing Its Nature?*, in Democratization, 2022, 29, p. 983.

[59] V.A. BOESE, *op. cit.*; E. PAPADA (ed.), *op. cit.*

So, what must be done in order for the dystopian visions not to become reality? Being aware of the problem is the first step to improvement, as the saying goes. As *Crocker* pointed out, dystopias neither propose a plan of action to avert catastrophe nor offer alternative visions to the worst-case scenario; on the contrary, they are about upholding the status-quo.[60] If we do not like the future the dystopia is presenting us, we are forced to reflect on what we value instead. Ideally, it enables us not to take our liberal constitutional system for granted but rather to strengthen existing human rights institutions, democratic processes and checks and balances. For that, it is crucial to educate the population as a whole about the meaning of democracy, rule of law and, in our case most importantly, fundamental rights.

[60] T.P. CROCKER, *op. cit.*, pp. 605 ff.

From William the Bastard to William the Conqueror. What if the Norman invaders of England had been rejected on the shores of Sussex?

Francesco Paolo TRAISCI[*]

This paper examines how England would have developed its own legal tradition in the absence of William the Conqueror's victory at the Battle of Hastings and subsequent conquest of England, which resulted in a Norman/French reign. The author analyses the characteristics introduced by the early Norman kings and the historical background that led to these introductions.

Questo contributo si interroga su come l'Inghilterra avrebbe sviluppato il proprio diritto se Guglielmo il Conquistatore non avesse vinto la battaglia di Hastings con la conseguente conquista del Paese. L'autore analizza quindi le caratteristiche introdotte dai primi re normanni e il contesto storico che ha portato a queste introduzioni.

1. INTRODUCTION

Let me begin with my starting point: What if? What if William the Conqueror had not won the famous battle of Hastings and conquered England, making it a Norman/ French reign?

What if a famous arrow shoot at dusk by an anonymous archer from the Norman lines had not killed King Harold, the last Anglo Saxon king, and the battle would not have turned in favor of the invaders coming from Normandy? Would England be able to develop his own legal tradition, the Common Law, or it would have followed a jus commune model as the rest of Western Europe?

Or may be a Scandinavian one, whatever it could have evolved since then?

No one could answer to this question but the suggested dystopian prospective could be used to point out which are the characteristics really introduced by the first Norman Kings and which were already present in Anglo-Saxon or Danish England. And what was the historical background, which pushed the Norman kings for their introduction?

Thus, the answer to the question, I believe that the most important tool is the historical analysis not only done by legal scholars but also by historians, because, as O.W. Holmes wrote in the first page of his masterpiece *The common law*, "the life of the law has not been logic; it has been experience"[1]. And more than any other legal system now in force, English law (and after it, all the common law family) demands a study of its historical roots[2].

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[1] O.W. HOLMES, *The common law*, Boston, 1881, p. 1.

[2] See also R. DAVID, *Les grands systèmes de droit contemporains*, Paris, 1966, p. 319, who wrote : *Plus encore qu'en droit français la connaissance de l'histoire est indispensable lors qu'on envisage le droit anglais. Le droit anglaise n'a connu, …, ni le renouvellement par le droit romain, ni le renouvellement par*

This is because we are used to examine English Legal System with the connections between political, social and military history for being the prototype of the Common Law Family, thus characterized the historical continuity provided by a "Common Law" of the land as output of a *case law*, created by judges belonging to a central system of courts frequently using public policy reasons to shape the law in the way to provide a response to historical contingency, which is reputed to have been introduced by the Normans with their conquest.

Starting from 1066 the date of the conquest, which is commonly seen as the "birth-day of a unique model as English common law is".

I must confess that I, as many civil lawyers like me, don't know much about English Legal history before the Norman Conquest. Is it really true that without Norman invasion England would have been a ruled by *jus commune* as the rest of occidental Europe and have followed the stream of Codifications that were adopted in Continental Europe based on the contamination between roman law and barbaric customs?[3]

After all England has been a part of Roman Empire for many centuries as the rest of Europe and roman culture has slowly faded without a real unique invasion from barbarian peoples from German origin. In fact, more than an invasion, it was a slow settlement from Saxon mercenaries and their relatives, hired by Britton warlords after the departure of the last roman legions to support the claims for the imperial throne of some prominent general and the official abandon of the Isle in 410 when the roman emperor wrote that Brittain had to provide her defense by itself.

2. POST ROMAN ENGLAND AND THE BARBARIC INVASIONS

In fact, the removal of direct Roman administration and military defense around the year 400 coincided with changes to the cultural orientation of communities along Britain's eastern seaboard. Increasingly, their center of gravity shifted from Mediterranean world to North Sea. And immigration played an important role, with people coming from Northern Coast of Germany (Saxons above all, but also Frisians and other German peoples) South Scandinavia (Angles) and Low Countries, moving into eastern areas of England and old Celts/Britons concentrating in the west and north. Thus a distinction arose between English speaking people (which was a Germanic Language now called Old English) and the native British who spoke varying forms of a Celtic language known as Common, or Old, Brittonic, a distinction based on the language, as Bede wrote in his works. By the time, these English speakers became culturally, linguistically but also politically predominant, forming a tapestry of greater and lesser kingdoms which had grown out of an inconsistent pattern of tribal grouping and late Roman administrative districts.

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la codification, qui sont les caractéristiques du droit français et des autre droits de la famille romano-germanique".

[3] This is the issue set by F. MAITLAND, in F. POLLOCK, F.W. MAITLAND, *The History of English Law before the time of Edward I*, 1, Cambridge, 1898, p. 86.

The Norman Conquest is a catastrophe which determines the whole future history of English law. We can make but the vaguest guesses as to the kind of law that would have prevailed in the England of the thirteenth century or of the nineteenth had Harold repelled the invader. We may for example ask, but we shall hardly answer, the question, whether the history of law in England would not have closely resembled the history of law in Germany, whether a time would not have come when English law would have capitulated and made way for Roman jurisprudence"-

After this first Germanic wave of immigration and the merge of these population creating an Anglo-Saxon England came a second wave of invasion: the men from the other side of the Northsee, the Norsemen, only later called Vikings[4]. In fact this invasion could be can be considered as part of a more vast movement which brought, starting from the end of VIII Century, and continuing on for the next 300 years, these peoples to raise coastal and inland regions in Europe, conduct trade and settled in three main directions, the most important of which was westwards towards British Isles and Northern France and then, using France as a point of start, back to England, as did but not only[5].

This is one view…

In fact, the history can be seen in another perspective, even more rooted on contemporaries perceptions, which reconstruct the medieval history of England as a continuum of invasions from people from the North Sea Costs, evidencing the common Germanic origins of all the invaders, and distinguishing the two waves only on religious grounds. When the Norsemen arrived the Anglo-Saxons were already settled, they were converted by St. Augustin and other missionaries melting with already Christianized population, but they recognized to have the same blood as the new heathen invaders. Most of the earliest genealogical list of Anglo Saxon royal houses pretend to be related to Woden, the pagan deity equivalent to Odin in the old Norse mythology. Beowulf himself, the hero of the famous old English saga, was a member of a Scandinavian Tribe, fighting monsters in Scandinavia. Thus, a one historian wrote: "among the English speaking peoples, however, we are left with an apparent paradox – a set of attitudes to the North that painted it as booth shining ancestral homeland and infernal monster-in-

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[4] In fact, the term *Viking* has been used later to designate those men who took to the sea for the purpose of acquiring wealth by raiding in other lands, and the word we found most of the times in the medieval chronicles was heathen, used to put religion as a matter of difference between those warriors who composed many warbands and the Christian Englishmen. Someone has defined them as "a people which is not a people, who came to lands that were not yet nations". Thus the word Viking is used to designate many different peoples which came from Scandinavia, which had in common their "profession", there were seafarers from Norway, Sweden, and Denmark (though other nationalities were later involved) whose raids and subsequent settlements significantly impacted the cultures of Europe and were felt as far as the Mediterranean regions c. 790 - c. 1100 CE. But not all Scandinavians who were in England were raiders, many of them were there to trade with other cultures. Thus a more inclusive word to designate all the people coming from Scandinavia is Northmen, Norsemen (so later Normans), and before other terms designating their origin such as Dane, who was the term by which they were known in England. Thus, speaking about people coming from Scandinavia we must not think that they brough only violence and slaughter. In fact, although the Vikings were great warriors and their name in the present day is almost synonymous with warfare, slaughter, and destruction – an association encouraged by popular media representations – people from Scandinavia belonged to a more actually highly developed culture made also of trade, and even if the way was opened by warrior raids, this is only one aspect of this civilization, because in many areas after the raids came trade, settlement and colonization as in England, and in France, Russia, and even here in Sicily. For more details see P. ARKROYD, *Viking Britain: a History of England*, I, London, pp. 1 ff.

[5] Historians have evidenced three mainstreams: the first one westwards to England, Ireland, Scottish Isles (and from their military camp came the foundation of many modern towns as, for example, Dublin) and France colonizing Normandy. But also further on the Atlantic Oceans colonizing Iceland, Greenland and settling in Northern America arriving to what is today Canada many centuries before Columbus; the second southwards towards the Mediterranean Sea conquering Sicily from Arabs and Southern Italy contended between the Longobardi and the Byzantine Empire and arriving till Constantinople and the third eastwards and then southwards passing from Russia and Ukraine, opening trade routes and founding principalities as Novgorod and Kiev, in order to reach by the other way around Constantinople, even serving as the elite Varangian Guard for the Byzantine Emperor. Regarding Viking routes see G.M. TREVELYAN, History of England, London 1942, Italian abridged edition Milano, 1965, pp. 72 ff.

fested wastelands, and its inhabitants as both cousins and aliens"[6]. Thus, especially among contemporaries, the Norsemen were seen as invaders sharing the same origins and ethnics as the Anglo-Saxon who settled in the centuries before, in a continuum which brought heathen population from North Sea to the rich and fertile Great Britain Islands, arriving as heathens and becoming Christians in the merge with the indigenous population.

3. PRE-NORMAN ENGLAND: THE ANGLO-SAXONS REIGNS AND THE DANE LAW

These are two divergent historical reconstructions; but one consideration is certain: in none of them, the conquest by William in 1066 can be considered the first step of this invasion at all. In fact it was the last one. Thereafter only the way back: from time to time Englishmen invading Normandy and France.

The battle for conquest and the consequential conquest is however considered by the vast majority of scholars as the birthdate of Common Law as English Law: as a famous handbook reports "English legal history begins in 1066 when the Normans under William I dealt a crushing defeat to the Anglo-Saxon in the battle of Hastings and thereby made possible the gradual domination of nearly the whole British Isles in the following years"[7], but Danish sovereignty was already settled since the VII/IX Century in a vast part of the British Isles"[8].

According to historical reconstructions, the Conquest began at the end of VIII Century with the famous episode of the arrival of three ships of Northmen in Portland[9], who is considered as the first of a serie of interactions between British Islands inhabitants and people from Scandinavia, often based on violence and ravage, but also on trade and on sharing the common traditions. Along with warriors and pirates, people from Scandinavia were also masters of commerce, as their settlements in York and Dublin could testify. A net of new trading settlements specialized for trade with North Sea exploiting and facilitating long-distance trade, as Southampton (Hamwic), London (Ludenwic), Ipswich (Gispewic) where Northern Merchants integrated with English population.

At the time the map of Britain was a shifting patchwork of greater and lesser greater realms, and thus the political geography of the Isle was fractured along cultural, linguistic, religious, geographical and historical lines. In this patchwork emerged a few realms, with fluid borders and contaminations one to the others: the real dimension was the local community with its own customs issued from its inhabitants and a landlord who was its military and politic chief who alleged obedience to a higher warlord. On the top were

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[6] P. ARKROYD, *op. cit*., p. 32.

[7] K. ZWEIGERT, H. KÖTZ, *Einfürung in Reichvergleichung*, English Translation by T. WEIR, *Introduction to Comparative Law*, Oxford, 1998, p. 182.

[8] See Annals of St Neots as quoted by T. WILLIAMS, *Viking Britain*, London, 2017, p. 1.who reports "by the time of Norman Conquest, most of Britain might be justifiably described as Viking to vary degrees, and in language, literature, place names and folklore the presence of Scandinavian settlers can be felt throughout the British Isles".

[9] Historians reconstructions are mostly based on the Chronicles and the various manuscripts of the Anglo Saxon Chronicles, the first and the oldest of which is known as the A text, or sometimes the Winchester Manuscript dated of the late ninth century. Thus for a updated reconstruction of the historical facts see: T. WILLIAMS, *op. cit.*,.; P. ACKROYD *The History of England*, *Vol. I, Foundation*, London 2017. P. ARKROYD, *Viking Britain a History of England Vol. I Foundation*, London. F. BARLOW, *The Feudal kingdom of England*, London, 1988.

the kings of greater and lesser greater realms which strength, stability and extension depended on the political skills of his own leader and his military capacity (and even his physical ability) to expand and defend his territory and his throne borders and the strength and stability of each one was linked to the personality (and the military and even physical ability in combat) of the respective kings[10].

The Northmen melted quickly in English politics with armies allied in turn to one or the other English kings, acting as permanent force of occupation of the areas conquered, attacking on turn the various English kingdoms and subsequently making peace. And at the end of the IX Century, to the terminal collapse of the old Anglo-Saxon kingdoms corresponded the settlement of the Danish warriors, which began to occupy English earth, working it and forming local communities where their children were born to native mothers.[11]. And in 875 this occupation was almost completed with the Viking initially successful in their war against the last Anglo-Saxon kingdom: Wessex. But after having risked the complete annihilation, the West Saxon recovered and counterattacked having found a real leader: king Alfred who is reminded as the most important Anglo Saxon king. And the reconquest ended in a treaty between Alfred and the Norsemen leader, Guthrun, who was forced to accept the conversion to Christianity being followed by many of his men. The first clause of the Treaty set a boundary between Wessex and East Anglia, which is considered to be first kingdom to be ruled in a Anglo-Danish regime. A model of authority and cultural compromise that were the fusion between the Anglo-Saxon past and the Dane novelty which spread in all the territories north of an imaginary boundary and came to be known as Danelaw, with a colony of Norwegians, and the process of colonization was made more intense with successive waves of immigration from the coastline of northwestern Europe being organized by the leaders of the Danish army in England[12].

Within the Danelaw it is likely that what were winter camps, superficially urbanized in little over a generation developed into proper towns with communities gradually integrated with differences between newcomers and settled communities less sharply delineated. Regional identities rapidly swallowed ethnic distinctions and cultural practices homogenized. Mixed communities of Scandinavian and Anglo-Saxon began to be identified primarily with local places round which the economic aspects of their lives revolved and to which they increasingly looked for political, spiritual and military leadership. And developed local rules to be applied in case of disputes"[13].

Let me leapfrog over the struggle between the two reigns: sometimes Norse kings of Northumbria reigned sheltering under the shadow of the English Kingdom (Wessex) and other trying to get independent and leading armies raiding in southern England until the conquest of the Northumbria and the reunification of the whole England under the reign of Edgar the peaceful (or more probably the pacifier) who seemed to be obsessed with order and to be determined to bring the whole of his kingdom into administrative harmony and ensure that justice was both available and correctly applied. And follow-

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[10] For a brief survey, see also G. CRISCUOLI, *Introduzione allo studio del diritto inglese. Le fonti,* Milano, 1994, pp. 68 ff.

[11] This, according to historians "was no longer a harrying, not even a simple conquest, the exchange of one ruling dynasty for another. This was a colonization, with all the cultural, linguistic, geographical and political upheaval such a process brings in train". See T. WILLIAMS, *op. cit.*, p.161

[12] T. ARKROYD, *op. cit.*, p. 64.

[13] And as one scholar concluded: "far from establishing a coherent Danish realm in Britain, the Viking wars and the agreements of Alfred and Guthrum that followed had produced something far more enduring: Alfred and the Vikings invented England. See T. ARKROYD, *op. cit.*, p. 85 and note 15.

ing the model of justice of Wessex (organized in shires and hundreds), he created new stipulations for the way that public courts were held at the hundred, making attendance compulsory for the landlords. But in some sense he also seemed to have understood that local interests and national cohesion could be jointly served by recognizing the distinctiveness of local laws and customs of the regions that had become Danish, and thus in one of this Codes he stated that "there should be in force among the Danes such good laws as they best decide": it is the recognition of a separate and parallel legal tradition is however contradictory to the other stated intention to create laws for "all the nation, whether Englishmen, Danes or Britons, in every province" of his Kingdom. But we must see it as a political compromise, made to ensure the political union.

But a few years after his death, resumed the raids of Viking fleets: raids are recorded from 980 and continued with little pause thereafter. The crown authority loosened, slackened with mortality and interfamilial strife. And along with raids arrived also Svein Forkbeard, who became king of England in 1013, forcing the Anglo-Saxon king, Aethelred, to flee in exile across the Channel. We must say that the new Vikings from Denmark and Norway invasion had however little to do with the old raids of the war-bands following stateless warlords of old times, because Scandinavian society of the end of X century was a modern state, dominated by assertive dynasties, and modern Christian Kingdoms. In fact, it was nothing more than a shift in the reigning house with Svein's son Cnut considered as one of the most important kings in a line of continuity with the former Anglo-Saxon kings, ruling took the throne of the whole England and ruled England till 1035 and was succeeded by his sons Harald and Harthacnut, till 1042. In the same line we can collocate Edward the Confessor, who even if of Anglo-Saxon fatherhood (he was the son of king Aethelred) was a compromise between his Anglo-Saxon dynasty and the Danish origins of his mother, Emma of Normandy.

During those years England would lie at the heart of a North Sea empire, which swelled to include Denmark, Norway, parts of Sweden and northern and Western Isles of Britain. And even after the West Saxon Dynasty was restored with Edward the Confessor, these influences remained deeply enrooted. Thus, the death of the second of Cnut sons and the reestablishment of the house of Wessex by no means spelled the end of Scandinavian Britain. In fact, Edward was a compromise candidate for the throne, being the son of Aethelred and Emma of Normandy, who later married Cnut and was the mother of the two last kings of Danish origin. Furthermore, Edward had spent his early days in exile in Normandy, and after the abandon of his mother to marry king Cnut, he was raised by his uncle, Duke Richard and after the death of the latter had remained with his cousin duke Robert I the Magnificent. Thus, Edward united the lines of West Saxon kings and Normans and kept strong grip with Normandy[14]. Back from his exile on the other side of the Channel he brought with him servants and counselors and endowed some of his foreign friends with land and positions. An earldom in west was awarded to his nephew Ralf son of his sister Godgifu and a French count, other estates were bestowed to two Bretons. Also he introduced clerks within the English church, following naturally from the composition of his chapel, provoked many criticism. At the same time he reinforced the liens with Anglo-Saxon nobility, marring Edith of Wessex, the daughter of the most powerful landlord (yarl) of the country, Godwin. He was thus a

[14] As F. BARLOW, *The Feudal Kingdom of England 1042-1216*, London, 1988 p. 2, wrote "Edward who united the lines of Cerdic (one of the Anglo Saxon kings) and Rollo (the first , also but upbringing and taste more Norman than West-Saxon, was neither English nor French. He was the representative of that coarse synthesis of the dominant European tradition which the Normans had achieved".

stranger in England and while the internal problems which he had to face were difficult, the external position was also problematic. He cannot have been aware of the threatens coming from Scandinavia, with Magnus of Norway and Svein of Denmark ready for a new invasion at the first occasion, to restore the liens between England and Scandinavia. There was even a Danish party in England headed by his mother Emma of Normandy. And, at the beginning of his reign, only civil war in Denmark spared Edward a new invasion.

And the failed invasion of another King Harald of Norway, a few days before the successful one of William was just one the many, because even after the Norman conquest there has been attempts to restore Viking power on England. And it is likely that for the contemporaries Norman invasion was just one episode of the continuing raids and turnover of the sovereignty in England!

4. NORMANDY, WILLIAM AND THE CONQUEST OF ENGLAND. THE BATTLE OF HASTINGS: OUR REVOLVING DOOR?

In fact, what historians call Viking Britannia ended with the Norman conquest, and we can see there a paradox because Normans were themselves of Scandinavian origin even if Gallicized by a Century of permanence in French territory. And the famous battle which crowned with success their landing, giving the start to their invasion is an historical turnover to whom it is attributed the birth of one of the most prominent legal systems: Common Law. The historical facts are well known. William and his army invaded England leaving from France, from the region called after them Normandy were people sailing from Denmark settled down (probably after a pitstop in England). It was the famous warrior Rollo who after having ravaged the country with many raids going up the Seine and menacing Paris, accepted the deal offered by the King Charles III the Simple, grandson of Charles the Great, to settle down in the area of Rouen which today is now called after them the Upper Normandy and become the (French) Yarl of Normandy, in order to protect Paris and the rest of his reign from the raids of the other Viking parties. In exchange he changed his name in Robert, got baptized, and accepted partially the French customs. But not all of them. He didn't gave up polygamy, characteristic of the Viking society, with an official spouse and many fryllas (concubines), married following Danish customs (*More Danico*), that is without Christian ceremony. There was not a hierarchy of heirs in Viking society, but in the French prospective, the son of these unions were considered "bastards".

Five generations later Robert Le Magnifique, became the father of William (Guillaume), born in 1027. He had no legitimate sons by any official wife, and William is the son of one of his fryllas, Arlette de Falaise, of humble origin (her father was a tanner). After the death of Robert in the Crusade in 1035, William inherited the duchy of his father, but it is not without struggle with the barons and other "bastards" from the previous dukes, which contested to the young duke the same "bastard" origins together with the humble origin of his mother. In fact he was very young (8 years) and many powerful noblemen were aiming the duchy. He was thus chased all over the land and many times escapes to tentative of murder. Only in 1047 with the support of French King Henry he defeated his opponents in the battle of Val ès Dunes, near Caen. But he had anyway to continue to struggle to protect the borders of his land. In 1050 he married Mathilde de

Flandres and consolidate an alliance with one of the most powerful and richest countries of the time. But increasing his power made him on the target of the King of France, Henry I, who feeling threatened, changed his party and set up a coalition against him. To make it short, in 1054 and in 1057 William pushed back twice the French army winning to important battles, and therefore continued to expand his land and his power.

But his ambition had no limits: for many hears he had been in contact with English King Edward the Confessor. In fact, William wanted also to resume one of the ventures of his father, who had already tried before to invade England with a huge fleet in support to the young Edward the Confessor. And to legitimate his pretentions over English throne he affirmed that, at the end of his reign Edward promised his throne to him, one of his closest relatives. That could be truth or not but the important is that he convinced of that the pope who gave his blessing to his claim against two other pretenders.

One was home candidate: his brother in law, Harold the son of Godwin, who, as we mentioned him before, the most powerful Anglo Saxon Lord. And Godwin wasn't happy at all with the settlement of the Norman in the English court and with the ambition of William to succeed to Edward. And for many hears he tried to push back the Normans from the court. And as Edward became older and older, Godwin's son, Harold searched and found the support of the nobles to grant him the throne at the death of Edward. Furthermore there was a third pretender to the English throne: Norwegian King Harald Hardrada who wanted to reunite the England to Scandinavia under his control. And pretending to enforce the old treaty between Norway and England, he was preparing a new invasion of England by a Norwegian army.

When at the beginning of January 1066 Edward was waiting for the fatal stroke without a legitimate heir (it's a long story: celibate was what had been demanded by St. Peter in a vision forecasting him the throne), around the dying king were clustering fans of William and fans of Harold and fans of the Scandinavian party, but a quick agreement was found and Harold was crowed King of England with the support of the Anglo-Saxon nobles. But that made unhappy the other two pretenders to the throne. Harald who was preparing his invasion on the eastern coast and so was William, who had however to convince his barons to follow him and cross the Channel to conquer the Land. But the first to move was Harald who landed in the East of the land, but was defeated by a sudden attack from Harold on the famous battle of Stamford Bridge) the 25th September 1066, in which Harald died hit by an arrow. That was a crushing victory by the price was very high for the Anglo-Saxon Army…

And William took advantage from this battle, deciding to cross the Channel. He had been waiting a long time the propitious weather and finally the time arrived. Harold's navy had been expecting his invasion for the whole summer, but in September harvest time came and the English sailors decided to resume home to their fields: there weren't professional marines and the levy could not distract them too long from their homes and the needs of their agricultural occupations. And a few days after the dismissal of the fleet, another quick levy was needed to confront the landing of the Norwegian army of Harald which came by the Nordic sea and set down in York. And even though victorious, Harold and his army were strongly weakened by the battle against the Norwegian invaders, and had to move quickly from East to the south shore to confront the other invaders: the Normans coming from France. William succeeded in bringing the whole army across the Channel during the night: has been calculated that about 8.000 men and 3.000 cavaliers with their horses crossed the sea and landed near Hastings in the Sussex shore, where they were confronted by the army of Harold, arriving exhausted from its

march across from the north. The English were slightly inferior in number but had only infantry to confront an army with a strong cavalry and archers. The battle lasted the whole day and undoubtedly one of the cause of the defeat of the English was the exhaustion of an army that has already fought another battle and had to enter in an extremely quick day to intercept the invaders but also the reduction of his effectives after the first battle and the impossibility to raise another army in such a short delay. But also the death of Harold hit by an arrow or cut into pieces by an opponent made an end to the battle and to the Anglo-Saxon sovereignty in England[15].

But the battle itself was full of casualties: what if Harald of Norway hadn't decided to invade England and Stanford Bridge battle had never happened? Or if the huge fleet assembled by William had wrecked as did a few year before his father's venture? And what if Harold had not been hit by an arrow, putting with his death an end to the battle? Maybe the Anglo-Saxon could have won the battle, rejecting the French/Normans invaders back to Normandy, and Harold would have kept his throne. We now think of him as a unfortunate king, having lasted only a few months and we imagine him as the symbol of the weakness of the Anglo-Saxon sunset, but as far as we know, by contemporary standards, the Old English state was remarkable for its compactness, its administrative machinery and its organic unity, so that even a weak king as Edward the confessor could control his kingdom through troublesome times. And Harold, even if his reign lasted just a few months seemed to be a good and strong king.

In any case, history has gone the other way, and William after some other struggles conquered London and finally got crowned King of England on Christmas Day of 1066. Many though that it was one of the frequent turnovers in dynastic control of England. The new king did not control the entire land. Mainly south and West… And he soon returned to Normandy leaving his brother Odon and to William FitzOsbern, one of his closest companions who was made commander of the army and king's special representative in the north. The first orders were to respect the Saxon landlords and keep them their land, but after many rebellions William came back from Normandy and changed his politic. Of course not all the landlords were hostile, many of them were already of his party at the time of the succession of Edward, but the former Anglo-Saxon party still had many supporters. He raided pitiless the whole country, specially the north, leaving nothing more than dead men and ravaged fields, substituting the rebelling Anglo-Saxon barons with nobles of his entourage and imposed a huge taxation on the whole land.

5. COMMON LAW AS THE INHERITANCE OF WILLIAM AND HIS CONQUEST OR THE ROOTS OF ENGLISH LEGAL SYSTEM ARE TO BE STEPPED BACK TILL THE DARK AGES OF EUROPE?

We are used to learn that English legal history begins in 1066 with the Conquest of William with the introduction of a centralized administration with progressively got the

[15] The real development of the battle is not certain. And there are more than one reconstruction of the facts. The most common piece of evidence used by most of the historians is the famous tapestry kept in Caen, which was committed by William himself. It is thus the point of view of the winners which has also to be interpreted from the images sawn on a gigantic carpet.

input to move to a centralized system of administration and justice which gave birth to a *lex commune regni*[16] .

Indeed in legal context, we have always been taught that the most important product of William's conquest is certainly the Common law as we know him. We all know the main character of the Common law system: an unbroken continuity which was the mirror of the historical evolution of his case law, soon representing a unique set of rules, common to all, which has been seen as the reason why England was never affected in practice by the ideas of codification and the roman law has had just a peripherical importance in his formation (even if England has been an important part of the Roman Empire for centuries). A legal system made of rules coming from local tradition and the development of feudal relations, where continental law is based on doctrines and principles of roman and post-roman law[17].

But the real importance of the Conquest is highly disputed by those scholars who have dated the origin of the deep characters of the Common Law family back to High Middle Age, threating Europe after the fall of the Roman Empire as a unique social and legal area[18], and seen the roots of the common law far back in the Anglo-Saxon past[19].

But there is a strong controversy in English legal history about the origins of the institutions which characterize common law. In fact England suffered the same casualties as the rest of Europe which belonged to the Western Roman Empire. As the other parts of this area, British Island have suffered the invasion and the settlement of tribes of German origin. History tells us that in the British Islands the old Britons and Roman inhabitants were pushed on Western and southern part of England by German invaders. Among them were four predominant tribes: the Angles from Schleswig, the Saxons from the territories around the river Elbe, the Frisians from the northern coast of the Netherlands and the Jutes from the coast of Denmark. And later on came the Danes. When the first Germanic settlers came they followed the custom of their home country, in legal relations as well as in economic structures and social behavior and these traditions were maintained over the centuries. These continuities underlie the changing pattern of the lordship, and the absence of a any strong and enduring leading household and the constant turnovers of the control of the land may have accentuated this local dimension.

In fact we have only a partial vie of the legal or judicial institutions of the Anglo-Saxon period, also because we do not have too many written records. What is reported is that the reduction of any part of their customary laws to writing was in the first place due to foreign influence, in order to imitate the ways of imperial and Christian Rome.

Thus, in the post-roman period, England did not differ from the rest of the former Roman empire, with the barbaric invaders melting with roman population and their kings giving birth to roman-barbaric codifications or law books shaped in roman imita-

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[16] See for example K. ZWEIGERT, H. KÖTZ, *Einfürung in die Rechtsvergleichung*, english translation by T. WEIR, *op. cit.*, p. 182, who even admitting that "it is true that in the previous centuries England has its own legal practices, some of them were in written form, when it was a loosely organized state under the Anglo-Saxon kings, especially Alfred the Great. William I did not abrogate these traditional laws or make any sudden change in English Law in 1066, but the subsequent effect of the Norman Kings and their officials in the administration of law was so profound that we can confidently ignore any earlier influences":

[17] See for all, R. C. VAN CAENEGEM, *Judges, Legislators and professors, Chapters in European Legal History*, Italian Edition, *I signori del diritto*, Milano, 1991, pp. 100 ff.

[18] M. LUPOI, *Alle radici del mondo giuridico europeo*, Roma, 1995.

[19] See D.M. STENTON, *English Justice between the Norman Conquest and the Great Charter (1066-1215)*, Philadelphia, p. 164, p. vii, p. 26; P. WORMALD, *op. cit.*

tion, in which the barbarian kings had been issuing law-books for their Roman subjects and codifying their customs for their own people, and it is of great doubt that Justinian's Codex was introduced in England. It is however proved that during some centuries Pope Gregory the Great (590–604) is one of the very few westerns whose use of the Digest can be proved. And he sent Augustin to England to convert the German invaders who at their arrival were heathen. And, in "Augustin's day," about the year 600, Æthelbert of Kent set in writing the dooms of his folk "in Roman fashion" in order to reconcile his folks traditional customs with the new religion needs[20]. These are, unless discoveries have yet to be made, the first Germanic laws that were written in a Germanic tongue in England[21]. And even though law was made of traditional and immutable customs, the king, as others in Europe, introduced changes and new orders to adapt the rules to roman culture and, above all, to the new religion[22]. But as Maitland wrote "it seems all but certain that none of them did so with the intention of constructing a complete body of law", and their code are to be considered as mere superstructures on a much larger base of custom. All they do is to regulate and amend in details now this branch of customary law, now another"[23].

Kings became rulers and the VI century saw some additions made to the Kentish laws by Hlothær and Eadric, and some others made by Wihtræd constituting a group of Statutes known as the Kentish series. In the same period in one other realm, Mercia, King Ine, maybe influenced by Charles the Great, promulgated the West Saxon dooms representing the beginning of written law in Wessex. And historians believe that even in some other of the kingdoms which composed the patchy framework of England territory there have been other kings which codified their dooms. It is commonly believed that Offa the Mercian (ob. 796) legislated and it is reputed odd that also the very cultivated Northumbria no codification was issued. In these laws were the distinction between traditional rules immutable by the ruler and new rules issued from the power of the king, who, under the influence of the Church began an innovative production of rules[24].

But it was a temporary stream, once a race, or the kingdom hosting it had his own written Lex revising his ancestral dooms, the aspiration of Romanity and Christianity of its leaders was satisfied, who by innovation found the legitimation of their leadership non only on military power but also on religious grounds. This period of silence from the legislators was interrupted by Alfred giving birth even in England to the age of capitula, and then, for a century and a half we have laws from almost every king: Edward the Confessor, Athelstan, Edmund, Edgar, Aethelred and Cnut all of them had published their laws. The age of the capitularies starting with Alfred, in some sort it never ends,

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[20] The role of the roman church and his clerks in the development of Anglo-Saxon legal institutions has been definitely important. See G. CRISCUOLI, *op. cit.*,, pp. 70 ss.

[21] Historians explain that as elsewhere in the territories which had been part of the roman empire invaded by German tribes "the desire to have written laws appears so soon as a barbarous race is brought into contact with Rome". For an accurate historical review of F.W. MAITLAND, in F. POLLOCK and F.W. MAITLAND *The history of English Law before the time of Edward I*, 1898, pp. 3 ff.

[22] As F.W. MAITLAND, *op. cit.*, pp.14 ff. wrote "The acceptance of the new religion must have revolutionary consequences in the world of law, for it is likely that heretofore the traditional customs, even if they have not been conceived as instituted by gods who are now becoming devils, have been conceived as essentially unalterable. Law has been the old; new law has been a contradiction in terms. And now about certain matters there must be new law. What is more, "the example of the Romans" shows that new law can be made by the issue of commands. Statute appears as the civilized form of law. Thus a fermentation begins and the result is bewildering. New resolves are mixed up with statements of old custom in these Leges Barbarorum".

[23] F. MAITLAND, *op. cit.*, pp. 30 ff.

[24] See M. LUPOI, *op. cit.*, pp. 349 ff.

for William the Conqueror and Henry I continued with the same exercise of their law making prerogatives. Following the fashion set in Europe by Charles the Great, the English kings awarded themselves more and more power to lawmaking, not limiting themselves to collect the traditional folk's customs but issuing new orders and rules, without following the traditional procedure which required the people's consent in order to innovate the law. Thus one of the last pre-Norman Kings, Cnut had published in England a body of laws which, if regard be had to its date, has been called a handsome code. And as Maitland himself wrote "we might easily exaggerate both the amount of new matter that was contained in these English capitularies and the amount of information that they give us; but the mere fact that Alfred sets, and that his successors (and among them the conquering Dane) maintain, a fashion of legislating is of great importance. The Norman subdues, or, as he says, inherits a kingdom in which a king is expected to publish laws"[25].

It is therefore true that the three predominant kingdoms surrounded by smaller ones, with complex systems of administration and taxations, their political and military leaders were more interested in collecting taxes and men in case of conflict than to settle conflicts among individual members of the community but the rulemaking power exercise of their leaders cannot be underestimated even because William itself referred to it in his first statements. And this power was exercised not only by the means of these dooms, but more often by the means of another kind of legal writings, the charters or "land-books", which recorded the munificence of princes to religious houses or to their followers, or in some cases the administration and disposition of domains thus acquired.

And thus the roots of the country went much more deeper than the evolving patterns of the military and political lordship. The territorial kingdom, as opposed to the rule of the people and the community, was a concept already developed in the X Century with an administrative framework of shires and hundreds that took the place of the previous earldoms; and the monarchy itself had steadily increased his power since Alfred. The shires had no common origin, as entities differed greatly in age. Nevertheless, they were given a common function in the tenth century: each was at the same time an area of the local government under a royal officer (originally an ealdorman then the sheriff, shire reeve), a subdivision of national assessment of taxes, and the seat of a folk court.

The kingdom was too large for the king to exercise his royal powers: beneath him were the earls, which were greatly changed during the Danish Dynasty. Once the old English ealdorman were in great number because they often ruled a single shire, but Cnut reduced strongly their number, making a correspondence with the old greater kingdoms of Mercia, Wessex Northumbria and East Anglia. That because of the strong mortality among the traditional aristocracy during the Danish wars. Thus they acted as governors, royally appointed without any hereditary rank. But even if the office did not harden to hereditary rank, often the eldest sons of the Earls expected this royal appointment. Their duties was vice-regal: they exercised in their earldom military and administrative powers on behalf of the king, commanding military forces and keeping the peace and maintaining good justice. He received orders from the king and was responsible for their execution.

The increased extension of the Earldoms and the transformation of the Earl in a provincial governor increased the importance of the shire-reeve (which came into existence with the shires and hundreds in early X century), because the shire was still the basic administrative, financial, judicial and probably also military unit in the kingdom. His

[25] F. MAITLAND, *op. cit.*, pp. 23 ff.

duties were of two directions: he kept most of the functions of a king's reeve and he was the deputy of the ealdorman in the shire. Thus for the first he was responsible for the administration of the royal demesnes in the shire, for the collection and enforcement of royal customs (the *feom*, labour and carrying services, rent, geld and judicial profits), for the general supervision of the king's interests and for the maintenance of the police system. He was appointed directly by the king, held his office at pleasure of the latter and as royal agent has no superiors except the earl and the bishop. As deputy of the ealdorman he presided the court of the shire with the bishop, exercised judicial power in the court of the hundred and commanded the shire contingent of the fyrd (militia).

The judicial powers of the Anglo-Saxon kings were small, but large at the same time. The king was not yet the fountain of justice: he was more the ultimate temporal avenger of violations of a customary code of behavior. Law was the birthright if the individual man. It was the immemorial custom which bound men of his class and of his locality. And a man most of the times looked to the popular courts to enforce his rights under the law. The great mesh of laws was almost totally independent from the king: it was personal and local. Custom differed from estate to estate, from shire to shire, and especially from province to province.

But in the century and half before the Norman Conquest, the kings have become more confident in their judicial powers: they had set a net of public courts, under the control of their servants and they extended the concept of peace of the realm, introducing a criminal conception of it in a trial, preserving the right to penalties for the much injurious offences.

In fact the kings tried to enhance and organize a public system of justice in opposition to the private courts that were spread all over the country, allowing to his courts more and more strength to ensure the enforcement of its decisions as alternative to the ones which legitimacy was due to the consent of the local community.

In fact an Anglo-Saxon court of justice, whether of public or private justice, was not surrounded with such visible majesty of the law as in our own time, nor furnished with any obvious means of compelling obedience.

Thus, in a land where localism was the real dimension, as Anglo-Saxon England, each community had his own institutions of governance and administration: the moot or the manorial court representing an institution for settling the disputes in the community[26]. And among the tasks of the moot was also the maintenance of the peace in the community through judicial decisions[27]. As every elsewhere in Continental Europe, the community (or his leaders) used to assemble periodically to take decisions about the life of the community including the judicial decisions, taken by the means of the local customs. This community justice has been considered as a private justice, which the kings had tried to control superseding it with his own men or to limit providing his own public justice, organized in shire and hundred courts, often held in open-air[28].

The Shire courts, which met at least twice a year in the XI century, were concerned mainly with the traditional cases under folk law, of which theft and violence were the most important. The procedure was archaic but the constitution was new: they were officially presided by the bishop or by the earl or in his absence by the sheriff and atten-

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[26] For an accurate survey on the studies about medieval local communities and their jurisdiction and their role in asserting local customs, see L. ELDRIDGE, *Law and the medieval Village Community*, London - New York, 2023.

[27] See G. CRISCUOLI, *op. cit.*, pp. 77 ff.

[28] See W. MAITLAND, *op. cit.*, pp. 42 ff.

dance of suitors had become conventionalized. By the time of Edward the king's thegns formed the leading suitors in most of the shires and the function of declaring the law of the shire and giving judgement has passed to them. And in Danelaw shires, an hereditary class of lawyers had the same role. In this way the shire court had become an organ of government close to the crown. And even more closely connected were the hundred courts, for their main judicial purpose was the administration of police schemes devised by the king administration. Under the presidency if the king's reeve, or a private reeve in case of exemptions they met monthly.

Besides remodeling the judicial system, English (either in Anglo Saxon and Danish territories) kings had preserved jealously their prerogative to punish in the most severe offences: the "reserved cases" (what in the Norman rule became known as the "pleas of the crown"), and also those disobediences and derelictions of duties that closely touched the crown, such as neglecting a royal order[29].

Some scholars have therefore seen the roots of the writs, the legal document symbol of the Common Law form of action process, in Anglo-Saxon period, introducing the theory that the evolution of these kind of legal orders, originally, starting from the VIII Century, conceived as generical brief, of multiple usage, either regarding the recipients or the content and the purpose, then slowly becoming a brief in which the King would award rights or land and in general as instrument by which the King could notify his will, to end, after the beginning of the XII Century to be alternatively a technical document by whom to notify the beginning of a judicial process or an administrative order. At its origin in the VIII Century, the writ was therefore a document reporting a message issued from the Anglo-Saxon kings, and later became, always under Anglo-Saxon rule, a message to be read towards the community awarding publicly rights on land or other rights, and was known as "writ-charter", melting the structure of the writ with the function of a charter. Only the last part of the evolution of the writ as specific judicial instrument as introductory brief of a trial was accomplished after the Norman Conquest [30].

6. THE NORMAN CONQUEST IS REALLY THE "CATASTROPHE WHICH DETERMINES THE WHOLE FUTURE HISTORY OF ENGLISH LAW"[31]?

There would be many things to speculate about William and his successors way of dealing with the administration of the new conquered land, but we must here concentrate on the innovations in legal field: the common law which can be seen in a double focus: common law as unique law of the land, and common law as output of an unique set of courts, as if the Conquerors had brough with them across the Channel their law and their structures of governance, administration and justice.

According to the most diffuse textbooks, the Normans brought with them their French language which enriched the Anglo Saxon idioms and created a new legal language, focused on the introduction of new legal concepts; in addition William himself provided for a laicization of the public courts, separating the Lay Courts from the Ecclesiastical ones; he introduced a feudal system with him as lord paramount with direct report from his landlords; and a strongly centralized system of administration

[29] For more details see, F. BARLOW, *op. cit.*, pp. 40 ff.

[30] About the writ as instrument of Anglo-Saxon rulers, see M. LUPOI, *op. cit.*, pp. 389 ff.

[31] This is a famous label given by F. MAITLAND, *op. cit.*, p. 86.

aiming the taxation, and in order to be able to know the wealth of the new conquered country he organized the famous Domesday Book, an accurate survey of all the estates, real and personal property of the whole England[32].

Thus what we know as Common Law is the product of all these social innovations. And it is well known that that the foreign settlers imported with them their body of own customs, which were eventually modified and developed to govern personal and tenurial relationships of the new aristocracy. For some scholars, the introduction of a feudal system to reward his followers and companions in his venture and thus land law became one of the most important set of rules represents one of the key this represents innovations of the Conquest[33].

This feudal law, administered by the *curia regis* and lesser feudal courts, originally affected only those who had fiefs, but in time it influenced all land holding, providing a new land law. The immediate result of Norman Conquest was therefore to add complexity to an already intricate system of legal organization, because there were even more different systems of law for all condition of men than before the conquest, with the great amount of litigation that inevitably followed the changes in land ownership. In short, according to this view, the judicial work of the Domesday commissioners and the subsequent feudal litigation had the result "that English law was taken over wholesale and exploited from the very beginning by the newcomers. They became *Novi Angli*, and, with the submission to the law of the land, the former legal distinctions based on the race soon disappeared, to melt in a new English Law: the Common Law".

Moreover the interference of the king in the legal affairs of his subjects, by the means of his writs addressed to the bishop, the earl or to the lieges of the different courts, even if representing a continuity with a practice already used at least since Edward reign, contributed to create a common law. In fact, William and his successors, developed the doctrine of the peace of the king, holding themselves responsible for seeing that justice was done, and intervening on behalf of the petitioners, but only after a contumacious denial or default of administering justice but the court, the case arrived to the king or to his officers. Hence the use of the writ to start a case, and to obtain justice, dictating the procedure or the law which was to be used in the trial, as we know to be the most important character of the common law process, had long time to arrive: the development of a new royal law, emanating from kings administration, and provided by his servants, employing its special procedures, notably the inquest and the jury, had hardly begun under Norman dynasty.

The majority agree with this view. In Italy, Ugo Mattei has pointed out that that the divergence between Civil Law and Common Law models can be located between the XII and the XIII Century and got crystallized at the doors of Modern Hera when Sir Edward Coke set the basis for the conservation of the Medieval Characters of the System that were fading away in the rest of Europe[34].

7. THE CHANGES WERE NOT IMMEDIATE

In reality the common opinion is that the changes were not immediate. Even if the Conquest of 1066 is considered the birthdate of Common Law, this opinion states that the seeds for what we now identify as the Common Law trial and the a Common law as

[32] See G. CRISCUOLI, *op. cit.*, pp. 80 ff.

[33] R. SACCO, A. GAMBARO, *Sistemi giuridici comparati*, Milano, 2018, pp. 47 ff.

[34] In his textbook E. COKE, *Il modello di Common Law*, Torino, p. 3 ff .

the output of the judicial creativity (even if officially it is the discovery of traditional customs) were only planted, and the social and political innovations brought by the Conquest took a quite long time to get into force. Thus this traditional view binds the centripetal movement of the governance to the Norman rule, and even if not completely to William but starting from him. According to these scholars the real changes took place in the middle of XII Century under the kingdom of Henry II, who was the first Plantagenet to reign over England first of a dynasty that endured for more than 300 years before being supplanted by the Tudors[35]. For the traditional view it is believed that the period of his reign has been of "supremely important", because it has been the period of the judicialization of royal writs and thus can be considered as "the birth of the common law" [36]. it is in the course of his reign that the rule of law was amplified in England, devising a novel judicial process. It was him that decreed that royal justices should make regular visits to the shires and take over legal business before reserved for the sheriff or the country justice. Six groups of three judges each toured between four and eight countries so that the entire country came under their purview. They were based at Westminster, but the central administration was reaching out. It is what we know as the assises. And this group of royal judges was charged to have authority to deal with any first instance cases involving land disputes, that is feudal rights. Disputes over property were a common problem of the twelfth century were lords (great or small) were always trying to increase their dominions. The royal judges were inclined to call together twelve local men who would be able to tender advice on the matter. This is one of the theories to explain the origin of the jury. This is still disputed: some authorities place it earlier in the Anglo-Saxon period by it is true that it is in the twelfth century that we witness its systematic use in civil and criminal litigation as normal mean of proof instead of the old style probatory system: ordeal duel and so on. And within 50 years juries were also employed in criminal cases. Trial by jury replaced trial by battle or by ordeal. The parties of these processes were summoned to the courts by writs, which from this period took a standard form and became the introductive guideline of the trial.

With all the thee traditional royal courts King's Bench, Common Pleas and Exchequer had their own panels of judges and, according to historians (the creation of this royal law on a common basis called for a group of skilled professionals called to interpret and amend the principles of legislation. There had not been professional lawyers before, and judges were simply bureaucrats of royal administration. By the end of XII century, these laws were taught at Oxford and around the royal courts of Westminster there clustered ad hoc schools of laws and a group of "men of law" emerged organized in a corporation and into a profession of various roles, sticking together various hostels and became what we now call the inns. The professionalization of the justice was completed, with professional pleaders connected with the courts and pleading became more and more technical, and tended to rely on the precedent. The spread of uniform royal justice over the country laid the conditions for the development of common law. And National law took precedence over local custom, forming rapidly

[35] See R.J. WALKER, *The English Legal System*, London, 1995, p. 3 who states "it would be a mistake to suppose that William by one legislative act, created a centralized system to which he transferred all the jurisdiction of the various local courts and in which was administered a code of law created by the king…. What did in fact happen was that the king, over a period of time, assumed the control of the administration trough his judges and justices and created e central system of courts".

[36] Represented by Maitland (F. POLLOCK, F. MAITLAND *The History of the English Common law before the time of Edward I*, Cambridge, I, p. 137).

a great system of law and procedure, with a solid core which was "a synthesis or abstraction that was devised from usages of many English communities, but did not coincide precisely with any of them"[37].

8. SO… THE COMMON LAW: CONTINUITY OR INNOVATION?

According to Patrick Glenn even if "the expression of common law appears to have emerged only in the late twelfth century, so both the reality of a relational common law and the recognition of it appear to emerge only with the Normans", the essential feature of this new system of rules is given by the subsidiary character of the royal courts, which, according to Paul Brand were "limited to hearing only such litigation as they had been authorized to hear by royal writ" which extent was willfully limited[38].

In fact, seen in a substantial meaning common law is not the immediate result of the Conquest. As Maitland himself admits, the conquest did not brought an instant change with the law of the conquerors overlaying the native ones, even because it is strong doubt that there was some at Norman Law that was able to supersede the native ones for the general jurisdiction[39]. Thus the Conquerors did not impose their law: West-Saxon, Mercian and Dane laws were not abrogated, with all the particular variations they remained intact for those who were subject to them. All the technicalities of Anglo-Danish legal process still held good in shire, hundreds and even in private courts. The new kings edited new laws as evidence of old customs: the *Leges Edwardii Confessoris*, the *Leges Willelmi Primi*, and the *Leges Henrici Primi*, and even the old reserved pleas of the Anglo-Saxon kings changed their name in *Pleas of the crown* but not their substance[40].

And the unification of the judicial system, a public one superseding the local jurisdiction was the output of a long process not enhanced by any royal Statute or order. Un this focus, according to one scholar, "the existence and the development of royal jurisdiction did not preclude local jurisdiction" [41], because the royal courts systems was thus only suppletive jurisdiction. An arrangement, as we saw before, already part of the old Anglo-Saxon times, with an equilibrium between royal courts and shire and borough courts characterized by a high flexibility. And even if the use of local courts was cheaper and speedier, the royal courts began to prevail for the creativity and the higher performance of the writs issued by the royal administration. The growth of the common law therefore was not imposed on local particularity, which kept a large field of litigation for local judges[42]. Thus the royal courts were urged to extend their jurisdiction upon

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[37] For a description of the period of the early common law, see J. DAWSON, *The oracles of the Law*, 1968, pp. 1 ff.

[38] P. BRAND, *The making of common law*, London - Rio Grande, 1992, p. 96.

[39] As W.P. MAITLAND, *op. cit.*, pp. 24 ff. explains "The Normans in England are not numerous. King William shows no desire to impose upon his new subjects any foreign code. There is no Norman code. Norman law does not exist in a portable, transplantable shape. English law will have this advantage in the struggle: a good deal is in written".

[40] G. CRISCUOLI, *op. cit.*, pp. 86 ff.

[41] P. GLENN, *On common laws*, Oxford, 2005, pp. 25 ff.

[42] R. DAVID, *Les grands systèmes de droit contemporains*, Paris, 1964, pp. 325 ff. pointed out: "*l'extension de la compétence des juridictions royales ne s'est pas faite en Angleterre en donnant le caractère de juridictions royales aux juridictions locales ou seigneuriales préexistantes… Les juridictions royales ont accru leur compétence en développant l'idée originaire que l'intérêt de la couronne, justifiant seul leur*

the request of the plaintiffs for the quality and professionality of its verdicts and for the fact that it was the only system with adequate means to force the defendant to obey to a royal order to appear in the court, to summon the witnesses and to enforce his verdict. But as pointed out before, the doctrine of the peace of the king and the raising eagerness of royal justice to punish the most important crimes and disobediences' to his orders had already begun his course under the old Anglo-Saxon rule, with the doctrine of the "reserved cases". There is evidence that William and his successors carefully revived and enforced the ancient and somewhat primitive English institutions, and promised to the English as a whole, and to important groups of them (like the citizens of London in particular) that "their law, explaining in many occasions "that the rights which they held "on the day when King Edward (the Confessor) was alive and dead". And these for many scholars were not vague promises but concrete assumptions because "the whole course of English Legal History shows what William meant when he promised that the English their law and thus that enable all of them to protest, even in his lord's own Court, and been guaranteed for his rights by the monarch of whom that lord was vassal.

And even if the king retained jurisdiction over the most direct challenges to his authority, in most of the cases the resort to local court was not precluded. And they survived for a long time after the Conquest[43]Henry II himself made further specific promises to maintain these courts, such, as Patrick Glenn points out "that the progression of the royal courts was a matter of popular choice"[44].

Thus even the scholars who collocate the roots of common law during the reign of Henry II, evidencing the importance of his reforms [45], point out that the success of common law trial is due to the high quality of his performance in justice and not to any statute or policy of the king in general to criminal where the protection awarded by the local old court where inadequate. This is on the contrary due to the fact that the law provided by royal courts awarded a more effective protection to the rights on land, and in general to criminal repression with measures of strong efficacity. And only the king and his administration could afford that. These changes brought an massive recourse to royal justice and to these new courts, and the foundation of a new feudal common law, issuing from a new use of the writs, with the consequent creation of always new ones[46].

So, common law achieved his communality through local acceptance and not imposition by any sovereign power and his rules created by the royal system of justice are, by its own definition, selected among the traditional customs of the land[47].

And after our survey of I am more keen to agree with the latter position with the Norman monarchy recalling and resuming old Anglo-Saxon system and mechanism of justice. The common rule of the kingdom as opposed to the rule of people was a concept developed starting from Alfred and continuing with Edward; the administrative framework of shire and hundreds and their courts under the control of the monarchy was

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intervention, était en jeu dans la contestation ».

[43] Even if Shire Courts changed the name in County Courts. See G. CRISCUOLI, *op. cit.*, pp. 88 ff.

[44] P. GLENN, *op. cit.*, pp. 27 ff.

[45] Even if others tended to doubt that the reforms of Henry II were all that innovative S.F.C. MILSOM. *The legal Framework of English Feudalism*, Cambridge, 1976, pp. 36 ff.

[46] R. VAN CAENENGEM, *op. cit.*, pp. 100 ff.

[47] May be it is the reason why F.W. MAITLAND even without formally changing his view about the Conquest, has added at the beginning of the second edition of his History of English Law before the time of Edward I, a first Chapter "The Law in Dark Ages" and pointed out that "Nevertheless we cannot trace the history of our laws during the two centuries that followed the Conquest without having some general notions of the earlier period".

developed by Knut. The writ, who was a grant of land or privileges product of the chapel royal was originated in the time of Aethelred or even before, and was just adopted by the Norman administration and implemented by the "genius at work" in the time of Henry II, notably in the formulation of the greatest ones and form of actions. The organization of the popular courts and shire courts under the control of a royal clerk had already been provided by the Anglo-Saxon monarchy and in the last century and a half before the Norman conquest they had extended the operation of the royal peace. In fact, after the Conquest English law and administration "survived intact". William declared that the laws of Edward had to be respected and reissued the laws of Cnut. As a scholar wrote "the Normans had little or no, written law. They had everything to learn from the English". And according to him, the name changed but the institution did not[48].

Thus, even if the expression of "Common Law" appears to have emerged only in the middle of the XII century, we have no proof that if Henry II and the Norman (or Plantagenet) dynasty had not arrived his development would not have ended as it ended in the construction of a relational common law issued from a national system of courts. It is true that the *common law* or *comune ley* did not existed in 1066, as underlined by R. David: the former local courts applied local customs in their trials using archaic and non-rational procedures (often ordeal) and their substitute by William (Baron courts, Manorial courts ecc.) behaved in the same way. And that the Common law as we know him is the output of Royal the courts[49].

But their jurisdiction, based on the role of the king as custodian of the peace in his kingdom was an inheritance of the Anglo-Saxon Kings' doctrine. As one historian wrote "William the Conqueror did not need to create the role of a powerful and centralizing king, therefore; he simply had to take up the part acquired by him. He adopted his crown three times a year at a ceremony known as the festal crown-wearing"[50].

It is however true that whether imposed or not, for a vast majority of scholars, is it during the reign of the Plantagenet dynasty that the common law system got his own diverging route from the rest of Europe. So even if common law was not the immediate product of William and his administration, it was his descendants who, willingly or not gave a great contribution to his development. But maybe the seeds were already planted by the last Anglo-Saxon and Danish Kings.

It is certain that the Norman conquest contributed by adding immensely to the strength of English Law maintaining however its traditional spirit. It's the famous continuity of English Legal System, which has been enforced not only by the strong power of the Sovereign as were William and his successors, but also as were Alfred, Knut and the last Anglo Saxon and Danish Kings.

I believe that Common law is the product of an evolution which has not begun with the Conquest. Yet in the century and a half before the Conquest the Anglo-Saxon kings had become more confident with law. They introduced Codes and reorganized a system of public courts, and put them under control of their own servants, as some of the local ones. Thus the constitution of a net of courts controlled by the Central Administration was almost new, but the model and the procedure was archaic. Indeed, already with Alfred and his successors, it was taken from granted that every man must have a lord

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[48] P. ACKROYD, *op. cit.*, p. 102.

[49] R. DAVID, C. JAUFFRET-SPINOSI, M. GORÉ, *Les grands systèmes de droit contemporains*, Paris, 2016, pp. 248 ff.

[50] P. ACKROYD, *op. cit.*, p. 79.

and lordship was no longer dependent from tribal relations, but on the possession of land. Land granted power and wealth, with no other allegiances requested. A hierarchy was strengthened under the reign of the strong kings: and the feudal structure of the land was already drafted under the last Anglo Saxon kings. Thus "when in 1086 according to the chronicles all men of property in England swore the oath of allegiance to William the Conqueror, they were following an established procedure"[51]. The administrative framework had been set under the Danish kingdom of Knut and the concept of common rule of the reign as opposed to the rule of the people was a concept already in evolution to be shaped starting from Alfred and Edward. In fact the real improvement after the conquest was in the procedure, which could ease the melting of the different local customs which differed from estate to estate, from shire to shire and especially from province to province and erase the differences between West Saxon, Mercian and Danish Law and completing the creation a new common law spread from the royal courts. All in the path of this continuity we recognize as the main characteristic of the English Legal System. In fact the divergence between English Common Law English and Civil law Systems, but this is caused by the discontinuity trajectory assumed by the latter[52], needing to resume Roman Law as Lex commune, a retrieval which English legal system did not need, because its lex commune was already on its way, unifying the popular customs as reordered and reshaped by the courts[53].

Indeed, the discontinuity between Common Law and Civil Law System appeared later, with the retrieval of the Roman Law for unification purposes by the continental rulers, setting out the movement which ended in Continental Europe with the national codifications. Nothing of that appeared in England, enhancing the continuity typical of the Common Law System: Roman law and its retrieval were useless, because, at the time England had already shaped his common law stepping from the developed from his old customs of Germanistic origin: no need therefore of a new Codification based on Roman Law[54].

So… Which is my conclusion about the importance of Hastings and the Norman conquest on the English Legal History?

Let me end with a quote of Edward Jenks: "At one time it was fashion to assume that the victory of William of Normandy at Senlac in 1066 was the beginning of English legal history. That assumption is so grossly inconsistent with facts, that the reaction against it has been excessive; and there is now rather a tendency to assume that Norman

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[51] P. ACKROYD, *op. cit.*, p. 70.

[52] As pointed out by L. MOCCIA, *Comparazione giuridica e Diritto europeo*, Milano, 2005, pp. 140 ff., however without entering in the dispute over the supposed Anglo-Saxon roots of Common Law system.

[53] See R. POUND, *The spirit of the Common Law*, Boston, 1921, pp. 15 ff. who wrote "and thus when Roman Law swept over Continental Europe, the traditional law, local, provincial, and conflicting on the continent, was general, unified and harmonious in England", and thus "with vigorous, central judicial system behind it and an established course of teaching in the Inns of Court which gave it the toughness of a taught tradition, the Germanistic Law persisted"..

[54] F.W. MAITLAND, *op. cit.*, pp. 24 ff. who wrote " Were we to discuss the causes of this early divergence of English from continental history we might wander far In the first place, we should have to remember the small size, the plain surface, the definite boundary of our country. This thought indeed must often recur to us in the course of our work: England is small: it can be governed by uniform law: it seems to invite general legislation", and thus that "we are here but registering the fact that the age of capitularies, which was begun by Alfred, does not end. The English king, be he weak like Athelred or strong like Cnut, is expected to publish laws".

Conquest was an unimportant accident in the development of English Law. That assumption is, if possible more unfounded than its predecessor"[55].

Thus, my point is that the Conquest was an important historic episode, but its consequences have not been really disruptive in legal contest: it gave stability and strength to the political power who could continue on the path of a process of unification of the law on a national basis which had already started under the rule of the Anglo-Saxon and Danish kings.. It was the Anglo-Saxon kings who with their capitularies codified the ancestral law, adapting it to the context of a newly Christianized population, and the Norman kings, William as the first limited to report to them. It was the Anglo-Saxon kings who began to offer a public system of justice as alternative to the judicial role provided by the local community, enhancing progressively the role and the scope of his own jurisdiction. Norman kings on their side, independently from the political stability of their government and the dynastic struggles, granting a new order, continued and speeded up the process of centralization of the powers, with a well-organized central administration, who went up configuring and spreading the idoneous tools in order enhance the unity of the Law.

Indeed the roots of the system were already there before the arrival of the Normans, but the Conquest was the ideal gardener to water and numb the growing plant, on the prospective of the continuity of a Legal Tradition who has made of an unbroken continuity his main character.

[55] E. JENKS, *The book of English Law*, London, 1928, pp. 17 ff.

Some Comparative Reflections On The Unsolved Question Of Double Surname

Domitilla VANNI[*]

Thinking of dystopian visions of the law arises the idea of legal transplants of rules which weren't born in their actual context and have been placed successfully in different legal systems as consequence of circulation. In this flow legal rules lose its original features and acquire those derived from the new context in which they move. In this case the dystopian view allow us to discover what the legal framework would have been without the legal models circulation. This phenomenon is very frequent and more often concerns greater areas of law, for instance anti-discrimination law, given that today circulation concern general principles rather than specific, operative rules as in the past. In this perspective Italian Constitutional Court in a recent judgment (131/2022) recognized the non-compliance of art. 262 paragraph 1 of Italian Civil Code with the child's right to identity and with the parents' right to equality, protected by art.2 and art. 3 of Italian Constitution, as for the automatism of paternal surname derived from it.

This decision will be the starting point to analyse the relevance of anti-discrimination law in Italy as effect of a presumed legal transplant as, for instance, Italian legal system until it didn't recognize the possibility to use a double-barrelled surname, especially with reference to children born by parents joined in civil partnerships or same-sex marriages.

The research will be conducted by comparative method, taking into account overall those elements (cryptotipes), hidden in the folds of legal systems, which explain the divergence between effects of the same rules in different places.

Pensando a visioni distopiche del diritto nasce l'idea di trapianti giuridici di norme che non sono nate nel loro contesto attuale e sono state collocate con successo in sistemi giuridici diversi come conseguenza della circolazione. In questo flusso le norme giuridiche perdono le loro caratteristiche originarie e acquisiscono quelle derivanti dal nuovo contesto in cui si muovono. In questo caso la visione distopica ci permette di scoprire come sarebbe stato il quadro giuridico senza la circolazione dei modelli giuridici. Questo fenomeno è molto frequente e riguarda più spesso grandi aree del diritto, ad esempio il diritto antidiscriminatorio, dato che oggi la circolazione riguarda principi generali piuttosto che norme specifiche e operative come in passato. In questa prospettiva la Corte Costituzionale italiana in una recente sentenza (131/2022) ha riconosciuto la non conformità dell'art. 262 comma 1 del Codice Civile italiano. 262 comma 1 del Codice civile italiano con il diritto del minore all'identità e con il diritto dei genitori all'uguaglianza, tutelati dagli artt. 2 e 3 della Costituzione italiana, per quanto riguarda il diritto all'infanzia. 3 della Costituzione italiana, per quanto riguarda l'automatismo del cognome paterno da esso derivato.

Questa decisione sarà il punto di partenza per analizzare la rilevanza del diritto antidiscriminatorio in Italia come effetto di un presunto trapianto giuridico in quanto, ad esempio, l'ordinamento giuridico italiano fino a quel momento non riconosceva la possibilità di utilizzare un cognome con doppia barra, soprattutto con riferimento ai figli nati da genitori uniti in unione civile o da matrimoni omosessuali.

La ricerca sarà condotta con metodo comparativo, tenendo conto complessivamente di quegli elementi (criptotipi), nascosti nelle pieghe dei sistemi giuridici, che spiegano la divergenza tra gli effetti delle stesse norme in luoghi diversi.

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1. INTRODUCTION. THE ITALIAN PATH TOWARDS THE "DOUBLE SURNAME" AND THE EUROPEAN COURT OF HUMAN RIGHTS CASELAW

By a sentence No. 131 of 31 May 2022[1] – a decision of extreme interest both for its undoubted social effects and for the comparative reflections on circulation of legal models - the Italian Constitutional Court declared the constitutional illegitimacy of the rules providing for the automatic attribution of the father's surname, with reference to children born in wedlock, out of wedlock and adopted children.

Finally, after waiting for the legislature to intervene, the Court rewrote the rule on the child's surname, putting end to discrimination between parents based on the fact that in Italy the child's surname must be the paternal one.

In Italy, the rule of the paternal surname is applied to all children regardless of whether they were born within marriage, outside marriage or adopted. In the case of children born in wedlock, the rule was so deeply rooted in custom that the Italian legislator had not even felt the need to write it down expressly, because it was derived from certain ancient provisions in the legal system, since it was presupposed by them. This patent violation of the equality between spouses, solemnly proclaimed by Article 29 of the Italian Constitution, was justified on the basis of the guarantee of family unity, laid down in the same article. In the legislator's view, the father's surname served to preserve that unity. On the other hand, as far as children born out of wedlock were concerned, the disparity in treatment between parents was functional to guaranteeing the recognised child the same treatment as the legitimate child (i.e. the one born within marriage) and the adoption discipline, introduced by Law No 184 of 1983, was also inspired by the same uniformitarian logic. The Italian legislature has not felt the need to change the patronymic even recently when it intervened to reform the status of children with Law No. 219 of 2012 and the subsequent Legislative Decree No. 154 of 2013. Evidently, the reform would have been a suitable opportunity to begin a deep revision of the regulation of the surname in Italian legal system.

The surname, together with the first name, represents the nucleus of a person's legal and social identity[2]: it confers identifiability, in relations under public law, as under private law, and embodies the synthetic representation of the individual personality, which over time is progressively enriched with meanings. Constant in the jurisprudence of the Constitutional Court is the affirmation that the name is ""an autonomous distinguishing mark of [...] personal identity", as well as an "essential trait of [...]

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[1] Constitutional Court, 31 May 2022, n. 131, on which see E. FRONTONI, *La Corte scrive la nuova disciplina del cognome dei figli*, in Osservatorio AIC, 2022, 5, pp. 162 ff.; M.C. AMOROSO, E. PIERAZZI, *Il cognome della madre*, in www.giustiziainsieme.it; L. BARTOLUCCI, *La disciplina del "doppio cognome" dopo la sentenza n.131 del 2022: la prolungata inerzia del legislatore e un nuovo capitolo dei suoi rapporti con la Corte*, in Studi dell'Osservatorio AIC 2022, III, pp. 941 ff.; M. PICCHI, *La pronuncia della Corte Costituzionale sul cognome dei figli: una nuova occasione di dialogo col legislatore*, in Osservatorio sulle fonti, 2022, 2, pp. 274 ff.; C. MASCIOTTA, *L'eguaglianza dei genitori nell'attribuzione del cognome: una nuova regola iuris dettata dal giudice costituzionale*, in Osservatorio sulle fonti, 2022, 2, pp. 252 ff.

[2] P. PERLINGIERI, *La personalità umana nell'ordinamento giuridico*, Napoli, 1972; P. PERLINGIERI, *La persona umana e i suoi diritti. Problemi del diritto civile,* Napoli, 2006. About this, see also A. DE CUPIS, *I diritti della personalità*, in A. CICU, F. MESSINEO (eds.), *Trattato di diritto civile e commerciale,* Milano, 1961, p. 11; C.M. BIANCA, *Diritto civile, 1. La norma giuridica. I* soggetti, Milano, 2002, p. 189. The 'emblematic symbol of personal identity (...) deserving protection' is discussed in L. BIGLIAZZI GERI (ed.), *Diritto civile*, Torino, 2007, p. 162.

personality"", "recognised as a "good that is the subject of an autonomous right under Article 2 of the Constitution". [and, therefore, as] 'a fundamental right of the human person'" (Constitutional Court, 24 June 2002, no. 268). It follows that the surname, as the fulcrum - together with the first name - of legal and social identity, links the individual to the social formation that receives him through the status filiationis. The surname, therefore, takes root in the family identity and, at the same time, reflects the function it plays, also in a future projection, with respect to the person as it must reflect and respect the equality and equal dignity of the parents. Selecting only the paternal line from among the data prior to the attribution of the surname unilaterally obscures the parental relationship with the mother. In the face of the simultaneous recognition of the child, the sign of the union between two parents results in the invisibility of the woman. The automatism imposed bears the seal of an inequality between the parents, which reverberates and imprints itself on the child's identity. It is an automatism that finds a limit either in Article 3 of the Constitution, on which the relationship between the parents, united in pursuing the child's interests, is based, or - as the Court has already noted with reference to the attribution of the surname to the child born in wedlock - in the coordination between the principle of equality and "the purpose of safeguarding family unity, referred to in Article 29, second paragraph, of the Constitution". It is, in fact, ""precisely equality that guarantees that unity and, conversely, it is inequality that jeopardises it"[3], since unity "is strengthened to the extent that the mutual relations between spouses are governed by solidarity and equality"[4].

The 1975 reform of family law itself, which did not intervene on the discipline of attributing surnames to children, had, however, helped to focus on the meaning of the relationship between equality and family unity. The unity of the family founded on marriage is based on 'the same rights and duties' of the spouses (Article 143 of the Civil Code), on mutual solidarity and the sharing of choices[5]. Similarly, the assumption of responsibility by the parents, inside and outside marriage, is rooted in equality between them and agreement on decisions concerning the child. This was always emphasised by the 1975 family law Reform and the 2012-2013 filiation reform, which was also silent with respect to the censured rule, but which was in favour of removing another historical residue of the disparity between parents[6], still present in the original fourth paragraph of Article 316 of the Civil Code, under which only the father could adopt 'urgent and irrevocable measures' to remedy 'an impending danger of serious harm to the child'. Unity and equality cannot coexist if one denies the other, if unity operates as a limit that offers a veil of apparent legitimacy to sacrifices imposed in a direction that is only one-sided. In the face of the evolution of the legal system, the legacy of a discriminatory vision, which through the surname reverberates on the identity of each individual, is no longer tolerable. In the face of regulations that guarantee the attribution of the father's surname, the mother is placed in a situation of asymmetry, antithetical to equality, which, a priori, invalidates the possibility of an agreement, all the more improbable insofar as its object is the attribution of the mother's surname alone, i.e. the

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[3] Constitutional Court, 13 July 1970, n. 133.

[4] Constitutional Court, 8 November 2016, n. 286.

[5] Among the provisions, see the new article 144 of the Civil Code.

[6] See F. PROSPERI, *L'eguaglianza morale e giuridica dei coniugi e la trasmissione del cognome ai figli*, in Rassegna di diritto civile, 1996, pp. 841-858; V. CARBONE, *L'inarrestabile declino del patronimico*, in Familia, 2006, p. 951; C. CIRILLO, *Il cognome dei figli: tentativo di negare la parità dei coniugi?,* in Rivista giuridica del Molise e del Sannio, 2015, pp. 97-112.

radical sacrifice of what is rightfully the father's. Without equality, the logical and axiological conditions for an agreement are lacking.

Really, more than 15 years before the decision no. 131/2022, by decision no. 61 of 2006 the Constitutional Court had found that the child's surname regulation was in conflict with the Constitution, but it had not declared constitutionally unlawful the legal rule yet. In that occasion, the Court, while noting that *the system of attributing surnames is the legacy of a patriarchal conception of the family [...] no longer consistent with the principles of the legal system and with the constitutional value of equality between men and women*», observed that, faced with several solutions compatible with the Constitution, it is within the legislature's discretion to choose among the various options. For these reasons, the judgment closed with an invitation to the legislator to act as soon as possible.

Ten years after, in the absence of the hoped-for intervention of the Italian Legislator, the issue of a child's surname came before the European Court of human Rights. The European Court, in the *Cusan Fazzo v. Italy* judgment of 7 January 2014[7], condemned Italy for violation of Article 14 in conjunction with Article 8 of the EChR. According to the European Court, the provision of a paternal surname violates the equality of parents, who, by mutual agreement, cannot decide to give their child only the maternal surname.

So thanks to the family law reform of 1975 and then to the filiation reform of 2012-2013, several inequalities between spouses and between parents, which could no longer be tolerated because violating constitutional norms protecting women and the family, namely Articles 3, 29, 30 and 31 of the Constitution, have been ironed out. At the same time, these differences did not take into account the European and international law. On the one hand because they were not in line with the international obligations assumed by our legal system, in particular with respect to the ratification of the 1979 UN Convention for the the Elimination of Discrimination against Women[8]. On the other hand, discrimination between parents with respect to surname also violated Articles 8 and 14 of the European Convention of Human Rights, as the European Court of Human Rights has counted the name among the aspects of private and family life, as a means of personal identification and of connection to a lineage, thus drawing the right to choose the name to be given to children into the parents' private sphere and not only to public needs. In this regard, by the judgment *Cusan and Fazzo v. Italy* the European Court in 2014 found a violation of Article 14 (prohibition of discrimination) combined with Article 8 of the Convention (right to respect for private and family life)40 and it condemned Italy as it does not provide in surname

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[7] *Cusan Fazzo v. Italy*, ECtHR 7 January 2014, n. 77/07, in *Famiglia e diritto,* 2014, p. 212. See S. WINKLER, *Sull'attribuzione del cognome paterno nella recente sentenza della Corte europea dei diritti* dell'uomo, in La nuova giurisprudenza civile commentata*,* 2014, I, pp. 520-528; M. CALOGERO, L. PANELLA, *L'attribuzione del cognome ai figli in una recente sentenza della Corte europea dei diritti dell'uomo: l'affaire Cusan e Fazzo c. Italia*, in Ordine internazionale e diritti umani, 2014, pp. 222-246; V. CORZANI, *L'attribuzione del cognome materno di fronte alla Corte europea dei diritti* dell'uomo, in Giurisprudenza italiana,2014, pp. 2670-2675; G. DOLSO, *La questione del cognome familiare tra Corte costituzionale e Corte europea*, in *Giurisprudenza costituzionale,* 2014, pp. 738-758; M. ALCURI, *L'attribuzione del cognome paterno al vaglio della Corte di Strasburgo*, in Diritto delle persone e della famiglia*,* 2014, pp. 555-561; E. MALFATTI, *Dopo la sentenza europea sul cognome materno: quali possibili scenari?*, in Consulta online, 9.3.2014; F. BUFFA, *Nel nome della madre. Prime riflessioni sulla sentenza CEDU, II sez., 7 gennaio 2014, Cusan e Fazzo c. Italia*, in Questione giustizia, 15.1.2014 and S. NICCOLAI, *Il diritto delle figlie a trasmettere il cognome del padre: il caso Cusan e Fazzo c. Italia*, in Quaderni costituzionali., 2014, 3, pp. 453 ff. On the decisive influence of this pronouncement on the Constitutional Court's decision, see E. MALFATTI, *Illegittimità dell'automatismo, nell'attribuzione del cognome paterno: la "cornice" (giurisprudenziale europea) non fa il quadro*, in Forum quaderni costituzionali, 5.1.2017, pp. 1 ff. For a different perspective, see E. FRONTONI, *Genitori e figli tra giudici e legislatore. La prospettiva relazionale*, Napoli, 2019, pp. 101 ff.

[8] *Convention on the Elimination of All Forms of Discrimination against Women* . New York, adopted by United Nations General Assembly on 18 December 1979, entered into force on 3 September 1981 after the twentieth country had ratified it.

attribution for the possibility of assigning the maternal surname to the child (by agreement of the parents) under the principle of equality, inviting the Italian State to adopt the appropriate measures to comply with the aforementioned judgment and, thus thereby fulfilling its obligations under Article 46 of the Convention.

Later, by a historical decision no 286 of 21 December 2016[9], the Italian Constitutional Court' had declared unconstitutional the 'rule' that provided for the automatic attribution of the father's surname to a child, even against the wishes of the parents: the Court declared unconstitutional the rule in the part where it does not provide that, by mutual agreement, parents may derogate from the paternal surname rule by adding the mother's surname to the paternal one. However, in the event of failure to agree, the judgment leaves in place the automatism of the paternal surname, and thus the inequality between parents, not completely restoring constitutional legality. For this reason, the Court invited again the legislator to intervene to provide a regulation of the matter for eliminating the unconstitutionality at the root.

This ruling is the result of a slow transformation which inevitably has affected Italian family law[10]. Lawmakers and judges, operating in different formats, have begun to reconsider the relationship between parents and children, through a series of reforms and several judgments, in the light of changes in the system of the source of law. The doctrine itself has contributed to this evolutionary trend. By multiple debates on the matter, it has critically and continuously sought to re-design a new family model, no longer necessarily based on a conjugal bond far from the archaic concept of the 'patriarchal family'. This new model can be described as a 'social formation' consistent with the constitutional principles and abiding by supranational legislation.

The case before the Constitutional Court in 2016 concerned the prohibition on a married couple attributing to their child, who had dual citizenship (Italian and Brazilian), the maternal surname in addition to the paternal one. The minor was thus registered with different surnames in the two countries: this choice sacrificed the right to identity and constituted an obvious injury to that 'essential trait of personality' which benefits from autonomous constitutional protection as a distinctive sign of the person. It

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[9] Corte Costituzionale 21 December 2016, n. 286, in Giurisprudenza costituzionale, 2017, pp. 2435- 2437, with notes by R. FAVALE, *ll cognome dei figli e il lungo sonno del legislatore*, in Giurisprudenza italiana, 2017, pp. 815-824. See also L. TULLIO, *The Child's Surname in the Light of Italian Constitutional Legality*, in Italian Law Journal, 2017, 3, pp. 221 ff.; C. FAVILLI, *ll cognome tra parità dei genitori e identità dei figli,* in La nuova giurisprudenza civile commentata,2017, pp. 823-830; E. AL MUREDEN, *L'attribuzione del cognome tra parità dei genitori e identità personale del figlio,* in Famiglia e diritto, 2017, pp. 218-224; V. CARBONE, *Per la Corte costituzionale i figli possono avere anche il cognome materno, se i genitori sono d'accordo,* in Corriere giuridico, 2017, pp. 167-174; V. DE SANTIS, *ll cognome della moglie e della madre nella famiglia: condanne dei giudici e necessitA di riforma. L'unità della famiglia e la parità tra i coniugi alla prova*, in federalismi.it, Focus Human Rights, 2017, pp. 1-37; C. INGENITO, *L'epilogo dell'automatica attribuzione del cognome paterno del figlio (nota a Corte costituzionale no 286/2016)*, in Rivista AIC, 2017, 31 May, pp. 1-18; S. SCAGLIARINI, *Dubbie certezze e sicure incertezze in tema di cognome dei figli,* in Rivista AIC, 2017, 19 May, pp. 1-13; E. MALFATTI, *Illegittimità dell'automatismo nell'attribuzione del cognome paterno: la "cornice" (giurisprudenziale europea) non fa il quadro*, in Forum di Quaderni Costituzionali Rassegna, 2017, 5 January, pp. 1-4.

[10] In recent years, a lot of innovations have been implemented by Italian Legislator: the law Revisione delle disposizioni vigenti in materia di filiazione (legge 1 December 2012, n. 219; decreto legge 28 December 2013, n. 154), implementing the uniqueness of the child status, recognizing the equality between children born of a married couple, born out of the wedlock and adopted children; the Law Disciplina sui modelli alternativi di risoluzione delle controversie (legge l November 2014, n. 162, especially Arts 6 and 12) that, through 'assisted negotiation' and 'agreements reached before the registrar' allowed the friendly and out-of-court settlement of marital separation; the law Disposizioni in materia di scioglimento o di cessazione degli effetti civili del matrimonio (legge 6 May 2015, n. 55), allowing the so-called 'express divorce'; finally, the law *Regolamentazione delle unionicivili trapersone dello stesso sesso e disciplinadelle convivenze* (legge 20 May 2016, n. 76), that recognized for same-sex couples the same rights of married couples, allowing the registered same-sex couples to enter into common-law marriage agreements.

should be noted that this 'verbal sign' is suitable not only as a 'concise individual emblem', but also 'to summarize with great simplicity the personality of the individual', projecting it into the social context. The Constitutional Court recalls that 'the value of the identity of the person, in the fullness and complexity of its expression, and the awareness of the public and private value of the right to the name as an emergence of the belonging of the individual to a family group, identify the criteria for the attribution of the surname of the minor as profiles determining his personal identity, which is projected into his social personality'.

This double dimension of the surname (personal and social) strengthens its importance and justifies, especially for dual citizens, a fortified protection not only within the country, but in the wider 'legal place'. Moreover, the decision to attribute to the child only the father's surname created an unreasonable disparity in treatment between parents, a disparity that could not be justified in the name of safeguarding family unity.[11] On the contrary, as previously mentioned by the Constitutional Court itself, family unity 'is strengthened when mutual relations between spouses are governed by solidarity and equality'.

The impossibility of enrolling the child in public registries with the surname of both parents (the double surname, which had already been attributed in Brazil) was contrary both to Art 2 of the Constitution, since the right to personal identity was compromised, and also to Art. 3 and Art. 29 of the Constitution, with respect to the principles of equality and equal dignity of spouses; it was also in contravention of international law barring any form of discrimination against women' and any inequality between spouses in choosing the family name, as well as treaties seeking to safeguard the rights of the child and, more generally, civil and political rights.

The Constitutional Court therefore recognized with this interpretative ruling the 'full and effective implementation of the right to personal identity, which finds its first and immediate confirmation in the name', affirming the 'equal importance of both parental figures in the process of building the personal identity' of the child. As an immediate consequence of the unconstitutionality ruling, the Ministry of the Interior implemented the Circular 19 January 2017 no 1, which obliged registrars to accept the requests of parents who, by mutual agreement, intend to assign to a child a double surname, paternal and maternal, at the time of birth, adoption or in the case of joint recognition.

To better understand this topic, in Court's opinion, four issues must be examined: first, the absence of a specific 'rule' designed to provide for the automatic attribution of the paternal surname and the solutions adopted by Italian and European case-law; second, the obvious urgency of a constitutional intervention following the profound changes in regulations; third, the pre-existing presence of a double surname for recognized children and for dual citizenship children; and finally, the issues arising from the judgment of unconstitutionality in light of the dynamism of the legal system. This was not the first time the Constitutional Court had addressed the matter

[11] The paradigm stating that the unity of the name is functional to the unity of the family is overcome by the ruling of the European Court of Human Rights, *UnalTekeli v Turkey,* 16 September 2005, available at http://tinyurl.com/y8tsr38o (last visited 15 June 2017). It should be noted that, following this decision, the Turkish Constitutional Court declared unconstitutional Art 187 of the Turkish Civil Code obliging the woman to change her surname after the marriage. See B. ÇALI, *Third Time Lucky? The Dynamics of the Internationalization of Domestic Courts, the Turkish Constitutional Court and Women's Right to Identity in International Law,* in ejiltalk.org, 10 February 2014. See also: P. PERLINGIERI, *Riflessioni sull'unità della famiglia*, in P. PERLINGIERI (ed.), *Rapporti personali nella famiglia*, Napoli, 1982, p. 38; G. FERRANDO, *I rapporti personali tra coniugi: principio di eguaglianza e garanzia dell'unità della famiglia,* in P. PERLINGIERI, M. SESTA (eds.), *I rapporti civilistici nell'interpretazione della Corte costituzionale,* Napoli, 2007, pp. 317-332.

of the prevalence of the paternal surname. As already seen, on several occasions it had pointed out how the transmission of the father's surname to descendants was the legacy of a patriarchal conception of family, whose roots were firmly tied to Roman law: at that time, it seemed logical, building the *gens* system, to choose the progenitor's *nomen* to designate the *familia* on the basis of the legality of the bond of submission. The patronymic constraint later on, though not mentioned in the *Code civil ,*nor in the Italian Civil Code of 1865, continued to find justification in the presence of the *'marital authority*' and of *the 'patria potestas',* aised under the veil of a 'presumed' *egalité.*

The constitutional judges stated that this way of attributing the surname is no longer consistent with the values expressed by modem regulations. However, in previous cases, the Court limited itself to 'ascertaining' the invalidity of the rule without ever 'declaring' the rule unconstitutional. The established incompatibility of the rule with the constitutional values was therefore limited by the need to wait for a direct intervention that could address, in a coherent and careful manner, all the possible consequences arising from the 'fall' of the ancient and automatic attribution of the father's surname. Moreover, there was also the related issue of the husband's surname (discriminatory - in this case - against the husband). In other words, until 2016, the Constitutional Court had always abstained from a 'destructive' action, outside its powers, referring the matter to the 'area reserved to the legislator'. The Court awaited the opportunity to regulate the matter *ex novo,* replacing the 'rule' in force with regard to the imposition of the so-called *nomen familiae* with a different criterion, more respectful of the autonomy of spouses and of the principles of equal dignity and equality.

There is no a specific rule requiring the automatic attribution of the father's surname. It is inferred from an indirect interpretation of several articles of the Civil Code and from other specific laws. An example of a more explicit rule is Art. 237 of the Civil Code, which supports the use of the father's surname by including among the constituent elements of status ownership the circumstance that 'the person carries the surname of the father whom he/she claims to have'. The following articles similarly support the automatic attribution of the father's surname: Art. 262 of the Civil Code, about children recognition; Art. 299 of the Civil Code, on adoption; Art 72, para 1, of the royal decree 9 July 1939 no 1238, which provides for the prohibition of imposing on the child the same first name of the living father, as they have the same surname; and Arts 33 and 34 of the decree of President of Republic 3 November 2000 no 396. It is on the basis of these provisions that the Constitutional Court found grounds to rule on the constitutionality of the practice. Such a ruling had been repeatedly called for not only by the judges, but also by numerous appeals presented over the last thirty years, and by the ECtHR, which was the main driving force of this reforming effort. The ECtHR, intervening in this framework, pointed out that in Italy, in determining the surname to be attributed to the child, the father and the mother were 'in similar situations', yet 'treated in a different way'. Therefore, 'the registration of children in family status registries is excessively rigid and discriminatory against women'. The right to the 'name' is found under the protection provided by Arts 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR). As a result, 'the impossibility for a married couple to attribute to their children, at birth, the mother's surname' constitutes an infringement of European laws and international obligations.

In this sense the importance of a development in the direction of gender equality[12] was emphasised by the ECHR, which calls for the "elimination of all discrimination in the choice of surname, on the assumption that the tradition of manifesting the unity of the family by giving all its members the husband's surname cannot justify discrimination against women" (ECHR, judgment of 7 January 2014, *Cusan and Fazzo v. Italy*, paragraph 66).

These circumstances require greater attention to compatibility with constitutional precepts. The relevance of the ECHR is not limited to the adaptation of national laws. Rather, the ECHR

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[12] Y. TIROSH, *A Name of One's Own: Gender and Symbolic Legal Personhood in the European Court of Human Rights*, in Harvard Journal of Law and Gender, 2010, 33, p. 247.

contributes to the underlying unitary values of our legal system. Consequently, the violation of Arts 8 and 14 of the ECHR by national legislation does not raise a problem of 'hierarchical placement of conflicting rules, but rather issues of constitutional legitimacy', given the breach of Art 117, para 1 of the Constitution. The Constitutional Court states that the question is 'absorbed' in that article and emphasizes the centrality of the *Cusan Fazzo* judgment finding Italy to be in violation of the ECHR. Such a finding and the violation of ECHR rules implies that the Constitutional Court would review the matter. The Constitutional Court intervened to review its previous stance, showing itself to be fully aware of the fact that the proper protection of the 'right to name' requires a fair balancing of the interests involved in the light of the complex and changed regulation framework.

2. A LOOK AT SOME NATIONAL EXPERIENCES: THE REGULATION OF SURNAME IN UNITED KINGDOM, FRANCE, BELGIUM AND GERMANY

In a comparative perspective it can be useful looking at other legal systems to develop some comparative reflections also for finding the best solutions to unresolved issues in our legal system.

The common denominator of the foreign experiences that will be examined here is, on the one hand, the abandonment, albeit at different times and in different ways, of the model of patrilineal transmission of the surname, often allowing the attribution of a double surname, and on the other hand, having faced the adjustments that were necessary to fully implement both the principle of equality and non-discrimination between men and women and the principle of protecting the identity of the child.

At the outcome of the research, although the recognition of a beneficial circulatory effect between the legal models examined in the sense of the now shared use of both parents' surnames by the legal systems is undeniable, the influence of hidden elements in certain legal systems - which explain the divergence between effects of the same rules in different places - reveals a series of problems in the application of the new rules in some legal systems, such as the Italian one for which there are still many uncertainties as to how the new model of surname attribution can efficiently work.

In United Kingdom, the attribution of a surname to children, although left to the persons with parental responsibility, as in most legal systems is not, however, regulated by specific and inderogable provisions, but rather left to their decisional autonomy[13]. In fact, when registering the birth (which must be done within 42 days), the child can be given the name of the father, the mother or both parents (double-barreled). In the latter case, it is usually the patronymic that is placed in the first position, but it is not uncommon that the order of the surnames may follow the best 'sound'; it is also possible, although not frequent in practice, to assign a surname other than that of the parents.

In essence, there is a wide latitude in indicating the surname through which «at the date of the regis- tration of the birth it is intended that the child shall be known»[14].

[13] In accordance with section 9(3) of the Registration of Births and Deaths Regulations 1987 (Statutory Instrument 1987, n. 2088) as amended by the Registration of Births and Deaths (Amendment) Regulations 1994 (Statutory Instrument, n.1948).

[14] In the United Kingdom, the extreme valorisation of individual freedom and autonomy is also expressed in the fact that name and surname can be changed very easily by means of the *deed poll,* that is «a solemn declaration of your intent to assume a new change of name, and thus it's evidence that you've changed your

The situation just described seems, however, to be the result of a relatively recent change: in fact, still in the late 1990s, the House of Lords, in the leading case *Dawson v. Wearmouth*[15], had stated on the one hand that «A surname which is given to a child at birth is not simply a name plucked out of the air» ; on the other hand, it had recalled that <Where the parents are married the child will normally be given the surname or patronymic of the father thereby demonstrating its relationship to him. The surna-me is therefore a biological label which tells the world at large that the blood of the name flows in its veins.>.

In the same year, the guidelines drawn up by the Court of Appeal[16] for the case of changing a child's surname indicated that, if the parents were married, the surname should be changed, there should be «strong reasons to change the name from the father's surname if the child was so registered»; similarly, the judge should have taken into account that the initial registration could represent «the biological link with the child's father».

Indeed, among all the criteria that must inform the judges' decisions, the best interests of the child stand out as paramount, allowing the appreciation of the different circumstances of the case. Thus, for example, in *Dawson* case , judges considered to be in the child's best interests that he or she continue to bear the surname *Wearmouth* attributed to him or her at birth, despite the fact that it was the mother's surname from a previous marriage that had been dissolved and therefore did not represent the child's biological ancestry. The Court did not see any 'strong and countervailing' reasons to consent to the change of the surname, which was duly registered and was also the mother and siblings' surname with whom the child lived.

As far as double surnames are concerned, the examination of the most recent case-law, which is admittedly not copious, does not reveal any particular attention and use of this instrument. The words of Lady Hale in a case decided in 2001[17] are revealing: <Parents and courts should be much more prepared to contemplate the use of both names in an appropriate case, because that is to recognise the importance of both parents>. A double surname is also a useful vehicle for representing the child's different ties, as in the case, for example, in adoption cases[18].

Conversely in most civil law systems, the regulation of the surname has always been characterised by the transmission of the patronymic to the children: this fulfilled a public function of identifying the subject and at the same time signalled the unitary recognition of the family. This was the general rule, with the exception of Spain and Portugal[19], where the bilateral surname attribution had prevailed. The automatic transmission of the paternal surname alone has been abandoned by most legal systems: some now allow the choice between paternal or maternal surnames (e.g. Germany), while others, as the French experience shows, provide for both the choice of the maternal surname as an alternative to the patronymic and the solution of a double surname. And this seems to be the current trend toward the openness towards the possibility of transmitting both surnames, in line with the principle of equality between spouses and the principle of protecting the identity of the child.

As far as the French experience is concerned, there have been several interventions by the Legislator aimed at removing from the legal system all those provisions that maintained discrimination against women in the transmission of surnames to children.

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name in good faith». Cfr. UK DEED POLL OFFICE, *Choosing a double barrel surname*, 27 aprile 2020, https:// www.ukdeedpolloffice.org/double-barrel-surname.

[15] *Dawson v. Wearmouth* [1999] 2 WLR 960, [1999] 1 FLR 1167.

[16] *Re W, Re A, Re B* (Change of Name) [1999] EWCA Civ 2030.

[17] *Re R* (a Child) (Surname: Using Both Parents) [2001] EWCA Civ 1344.

[18] *Re Y* (a minor) (N. 2) (*Brussel II revised: Jurisdiction after Article 15 Transfer: Welfare*), [2022] EWFC 69.

[19] Although, in Portugal since 1997 there has also been the possibility of a single surname.

In 1985[20], an initial intervention had introduced the possibility of adding the mother's surname to the father's surname, but only as a usage, thus excluding transmissibility to future generations. This change was considered clearly inadequate with regard to the demands of equality, and therefore the provisions of the Civil Code were subject to a series of amendments, in particular from the early 2000s , through which parents were given a fourfold possibility with regard to the choice of surname to transmit to their children[21]. Given that in France, too, the attribution of the surname follows parental authority, it is therefore possible to choose between: father's surname, mother's surname, double surname in the order chosen by the parents, subject to a limit of two.

In order to do so, a joint declaration must be made before the civil registrar, in the absence of which, however (as well as in the event of non-agreement), the patronymic is revived and the child automatically acquires the father's surname. This solution isn't more feasible since 2013[22] as the automaticity of using the patronymic was replaced by the alphabetical criterion, as the former was not feasible in same sex couples. In fact, however, the modification was limited to cases of disagreement on the order of surnames , leaving the rule of automatic recourse to patronymic in the case of no choice. This raises some doubts, however, especially in the light of the European Court of Human Rights's case-law, which aims to sanction the automaticity of these mechanisms[23]. The child must be heard if he (or she) is over thirteen and the parents' choice of surname, made for the first-born child, is irrevocable and extends to all the children of the couple.

However, the numerous interventions did not have the hoped effects as most children were given only their father's surname[24]. The French legislator has again intervened on this issue by the law no 301 of 2 March 2022[25] which is intended to <*facilitate the faculté, pour toute personne, de porter le nom de celui de ses parents qui ne lui a pas été transmis à la naissance, qu'il s'agisse de le faire par le nom d'usage ou par le nom de famille*>. On the one hand, testifying to its importance in the French legal system, the rule on *nom d'usage*[26] is codified in the new Article 311-24-2 Civil Code. As far as we are concerned, the parents (or the parent exercising parental authority) may decide that the child bears, by way of use, one of the names provided for in the first paragraph of Article 311-21 Code civil: i.e. the father's or the mother's surname, or both. In addition, the parent whose surname has not been passed on to the child may add his or her own surname, also against the wishes of the other parent; the only condition is that the

[20] Loi 23 décembre 1985, n. 85-1372 du relative à l'égalité des époux dans les régimes matrimoniaux et des parents dans la gestion des biens des enfants mineurs

[21] Loi du 4 mars 2002, n. 2002-304 relative au nom de famille, JORF du 5 mars 2002; Loi du 18 juin 2003, n. 2003-516, JORF 19 juin 2003; Ordonnance du 4 juillet 2005, n. 2005-759, JORF 6 juillet 2005.

[22] Loi du 17 mai 2013, n. 2013-404 ouvrant le mariage aux couples de personnes de même sexe, JORF n. 0114 du 18 mai 2013.

[23] See ECtHR, *León Madrid c. Spagna*, 26 ottobre 2021, ricorso n. 30306/13, by which the Spanish legal system, which has espoused the double surname system since at least the end of the 19th century, was condemned by the European Court of Human Rights precisely with regard to the regulation of the order of surnames: according to the judges, the rule that automatically privileges the middle surname is to be considered discriminatory..

[24] M. LAMARCHE, *Égalité ou liberté: le double nom de famille doit-il être prioritaire?*, in Droit de la famille, 2021, 7-8, 62, p. 3.

[25] Loi du 2 mars 2022, n. 2022-301 relative au choix du nom issu de la filiation, JORF n. 0052 du 3 mars 2022, about which cfr. A. PHILIPPOT, *La Chancellerie éclaire les nouvelles dispositions relatives au nom d'usage et au changement de nom*, in La Semaine Juridique Notariale et Immobilière, 2022, 25, act. 690.

[26] A. BLANQUET, *Le nom d'usage au regard de l'identité de la personne*, in *Revue trimestrielle de droit civil*, 2022, 59, sees in *nome d'usage* which sees as a constitutive element of a person's personal identity and, while emphasising its differences from legal identity, considers it to be a figure that fits in well with the trend of liberalisation that characterises the choice of name.

latter must have been informed and that the child has been heard if over thirteen: <*et sous réserve de la décision du juge aux affaires familiales en cas de désaccord*>.

On the other hand the new French law provides for a new simplified procedure for changing one's name (Article 61-3-1 Civil Code), thanks to which all citizens, having reached the age of majority, can ask the civil registrar to keep the surname they have been using up to that moment or to adopt another one, that of their mother, father or both. The change can only be made once and it can be registered after the person concerned has informed the registrar, no earlier than one month after receiving the request. The change of name automatically extends to the applicant's or the applicant's children if they are under the age of 13; above that age their consent is required.

Already Law 2002-304 of March 4, 2002, which entered into force in 2005 and reformed in France the family name, allows parents to choose, when declaring the birth, to transmit to their children either the father's name or that of the mother, or again a "double name", that is to say a name made up of the names of each of the parents "attached in the order chosen by them within the limit, however, of one surname for each". These provisions modified the system of continuity of the name of women. Previously, their name could only be transmitted outside of marriage and only in the configuration in which they recognized alone or before the father an unborn child. Within the framework of marriage, the devolution of the family name placed women in a complex situation: to keep the use of their birth name different from that of their children, or to use the name of their spouse – a customary practice often perceived at erroneously as included in the matrimonial regime - and thereby "abandon" the use of their name. It was certainly possible under the law of December 23, 1985 children bearing the names of their two conjoined parents. This device, little known, only concerned the name of use and no transmission of the mother's name was possible. The patronymic order put in opposition the name of the women and the family name. In fact, it was the option of bearing the surname of the spouse which prevailed massively. This practice today has diminished under the influence of social transformations. By law of March 4, 2002 not only women can transmit children their own name, but as a result, they can keep their name and share it with their children. Thus, the "patronymic subordination of women" which was in force is undermined by this new system which remains however little used: a tenth of children are assigned a double name.

In Belgian legal system, similarly to what happened in Italian legal system, on the 14th January 2016 the Constitutional Court declared invalid article 335, § 1, second par. of Civil Code[27] on the basis of its contrariness to the constitutional principles of equality and non-discrimination (ex art. 10 and art. 11 of Constitution) and to the principle that the law must guarantee women and men the equal exercise of their rights and freedoms (art 1lbis of Constitution). The differential treatment was based on the criterion of the sex of the parents. Only very strong considerations can justify differential treatment based solely on sex. Neither tradition, nor the desire to ensure gradual progression, are, according to the Constitutional Court, strong enough considerations to justify a difference between fathers and mothers lacking a choice, being a priority ensuring gender equality. The Constitutional Court mitigated the consequences of the declaration of invalidity, but at the same time it obliged government or parliament to take action and thereby giving an *ultimatum*: <In order to avoid legal uncertainty, in particular having regard to the necessity of determining the child's surname from birth, and to allow Legislator to adopt a new regulation, the effects of the invalid provision shall be maintained until 31 December 2016>.

[27] Before Constitutional Court's intervention article 335 of the Civil Code provided for the possibility of transmitting the surnames of both parents to the child, with the parents having full autonomy in determining the order of precedence. However, in the event of a conflict or in the event that the parents had not formalised any choice, it established the prevalence of the father's surname.

The subsequent intervention of the French Legislator in December 2016, by the *Loi modifiant les articles 335 et 335ter du Code civil relatifs au mode de transmission du nomination à l'enfant*, now established that, in the event of disagreement, as well as in the event of non-choice, the alphabetical criterion must be used. The decision also applies to subsequent children.

So the surname determined corresponding to art 335, §§ 1 and 3 of Civil Code now applies to other children whose lineage in respect of the same father and mother is established (art 335 bis CC). This rule aims avoiding children born by the same parents having different surnames[28].

Parents who did not make a choice of name with their first child can no longer exercise their right of choice at the birth of further children. The civil status registrar will request that the parents make a solemn declaration that the child in respect of whom they exercise the option of name of choice is their first child together.

In Germany[29] the attribution of surnames to children follows parental authority, since the 1998[30] juvenile law Reform eliminated the distinction between children born in or out of wedlock.

The rules differ depending on whether the parental authority is shared or shared by only one parent: in the latter case, the child receives the custody of the parent who recognised him/her (§ 1617 a BGB), usually therefore that of the mother. If, on the other hand, the parental authority is divided but the couple is not married, a decision must be made as to whether the newborn child is to be given the surname of the father or the mother, who are then placed on an equal footing with each other. If the parents do not make a decision within a month of the child's birth, the family court intervenes, putting the onus on one of the parents to choose the child's surname, possibly also setting a time limit. If, at the expiry of the time limit, the parent to whom the right of choice had been attributed does not express his or her opinion, or if no agreement has been reached, the child receives his or her surname ex lege, i.e. the surname of the parent to whom the right of decision had been transferred (§ 1617 BGB). In fact, it is considered that the judge, in making the choice, has already assessed that this is the party that will best take into account and realise the best interest of the child, that is a criterion often used in decisions concerning children according to further provisions of BGB[31]. The decision also applies to the couple's subsequent children.

The question is different, and more complicated, when parental authority is vested in both parents as married persons. The rule of the transmission of the surname to the children can be deduced, in this case, from § 1616 BGB, which states that the family surname adopted by the parents is transmitted to the children born in wedlock; one cannot therefore disregard the complex evolution that the *Familienname* (§ 1355 BGB) has undergone over time. At the time of the

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[28] However nothing prevents half-brothers and half-sisters (with only one common parent) from having different surnames since their lineage on the mother's side or father's side differs.

[29] German courts ruled that the spouses choose the common family name, carrying the surname they have chosen. (§§ 1616 and 1618 BGB). This reform arose from the unconstitutionality judgement B*undesverfassungsgericht* 5 March 1991, with a note by O. KIMMINICH (translated by B. POZZO, *Alcune novità in tema di cognome della famiglia nel diritto tedesco*, in Quadrimestre, 1991, 11, pp. 887-895); U. DIEDERICHSEN, *Die Neuordnung des Familiennamensrechts' Neuejuristische Wochenschrift,* 1994, 1089; R. FAVALE retraces the evolution of German legislation in *ll cognome dei figli e il lungo sonno del legislatore*, *op. cit.*, pp. 819-823.

[30] *Gesetz zur Reform des Kindschaftsrechts*, *Kindschaftsrechtsreformgesetz*, in BGBl, 1997, 2942, su cui A. DUTTA, *Reform des Namensrechts*?, in Zeitschrift für Rechtspolitik, 2017, p. 49.

[31] S. LIERMANN, *Der "Namensrichter" des Familiennamensrechtsgesetzes vom 16-12-1993*, in Zeitschrift für das gesamte Familienrecht, 1995, p. 199; L. MICHALSKI, *Kindes- namensrecht. Das Namensrecht des ehelichen Kindes nach den §§ 1616, 1616a BGB unter Berücksichtigung des Regierungsentwurfs eines Kindschaftsrechtsreformgesetzes*, in Zeitschrift für das gesamte Familienrecht, 1997, 977.

entry into force of the BGB, the provision stipulated that the woman, upon marriage, would take her husband's surname and lose her own . The family surname, i.e. the man's surname, would then also become the surname of the legitimate children, a privilege that was not granted to children born out of wedlock.

Through a long series of interventions in case-law and legislation to implement the principle of equality between men and women[32] , the current version has been arrived at, whereby, on the one hand, spouses are free to adopt a family surname or not (otherwise, each will continue to bear the surname they used before the marriage), and on the other, *Familienname* may be either the husband's or the wife's surname. The only concession for the spouse whose surname has not been chosen as the 'surname of the spouses' is that he or she may put his or her own surname first or add his or her own25. Consequently, if the spouses have chosen a family surname, this will be attributed to the children born during the marriage; failing this, the procedure described above for children born out of wedlock, i.e. the intervention of the family court, will be applied.

No room is left for a double surname, despite the fact that this solution had already found support in doctrine since the 1980s and despite the difficulties in abandoning *patronymische Namenskonventionen*. In 2002, the German Constitutional Court had recognised the value of the double surname, which better signals both the family affiliation of the child and its connection (*Verbundenheit*) with both parents than the single surname. It did not, however, go so far as to declare the non-provision of double surnames contrary to constitutional principles: there would have been too many practical difficulties, including the formation of surname chains.

A complete reform of the matter has been discussed since 2020 and, in the wake of a government study[33], a new bill has also been proposed to introduce double surnames for both spouses and children.

The proposal is in fact rather meagre: the aforementioned § 1355 BGB would be amended by allowing the choice, as *Familienname*, of a double surname composed of the spouses' two surnames. In case of no choice and, probably, also of disagreement on the order of the two surnames, the judge would have to intervene according to the mechanism already mentioned. The path thus seems to be set in the direction of more and more liberalisation, especially if one is to give credence to the statements by Minister of Justice Buschmann to this effect. The fact that the provision of a *Familienname* can be well coordinated with the double surname is shown by the Austrian legal system, which intervened in this matter with the 2013 reform[34] . The declared aim is to make the right to a first name more dynamic and flexible and also to allow the adoption and transmission of a double surname, thus meeting a widespread desire in society on the one hand, and the need to certify the equal position of parents on the other.

Recently on 11 April 2023, the German Ministry of Justice made public a draft law that provides for the possibility for spouses to choose their second surname as *Ehename* (whether or not using the hyphen), and to give their offspring, whether born in or out of wedlock, a double surname, consisting of the surnames of both parents. A simplified way of changing the surname is also envisaged; finally, it is also possible to use a gender-adapted form of the surname, in accordance with those traditions that provide for it[35]. As it stands, one partner in a married couple - but not both - can add the other partner's name to his or her surname but their children cannot carry both surnames. The legislative reform will allow both partners to take on a double sur-

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[32] According to art. 3 of the Grundgesetz: <Men and women are equal in their rights. The state promotes the effective implementation of the equality of women and men and acts for the elimination of existing disadvantages>.

[33] This study was commissioned by the German Ministry of Interior and by the Ministry of Justice : *Eckpunkte zur Reform des Namensrechts* consultabile in *Zeitschrift für Standesamtswesen, Familienrecht, Staatsangehörigkeitsrecht, Personenstandsrecht, internationales Privatrecht des In- und Aus- lands*, 2020, p. 136.

[34] *KindNamRÄG* 2013, in *BGBI,* 2013/15, 1 su cui S. Ferrari, A. RICHTER, *Das österreichische Kindschafts- und Namensrechts-Änderungsgesetz*, in Zeitschrift für das gesamte Familienrecht, 2013, pp. 1457 ff.

[35] The current system <*is about as up-to-date as a coal stove and as flexible as concrete*>, minister Marco Buschmann said in a statement as he published the draft legislation on this matter.

name, with or without a hyphen, and for their children to take that name too. Even if the parents both keep their original names, they will be able to give their children a double-barrelled surname, regardless of whether they are married. The new system will not allow names that are more than double- barrelled[36]. The Minister foresees making easier for stepchildren or children born by divorced parents to change their family names.

3. THE COMPULSORY DOUBLE SURNAME IN SPAIN

The double surname is the only solution in Spain and, until recently, also in Portuguese law.

In the Spanish legal system, the use of double surnames dates back to the 16th century and, although it is not easy to specify when this custom became established, the provision became law in 1889[37] at the latest with the entry into force of the Codigo Civil.

The first surname of the parents was passed on to the children of the couple: in order, that of the father, followed by the mother's one . Within a generation, therefore, the matronymic name was lost. In 1981, the legislator intervened by providing the possibility for children of full age to reverse the order of surnames, thus also allowing the transmission of the mother's surname to subsequent generations[38]. However, the amendment was not sufficient to fully realise the equality between spouses: Law No. 40 of 5 November 1999 'Sobre nombre y apellidos y orden de los mi smos' amended Article 109 of the Civil Code, making it possible for spouses to independently determine the order of surnames to be given to their children)[39].

If, however, they did not make use of their right to choose, as well as in the event of disagreement, the combination of this provision with the Civil Registry Regulation automatically put the paternal surname back in first place[40] The European Court of Human Rights, called upon to deal with the matter last year in the León Madrid case[41] , stated that, although the rule favouring the paternal surname in the event of disagreement may be necessary for practical purposes and therefore does not necessarily contravene the Convention, the same cannot be said for the automatism of the rule itself, which does not provide for the possibility of exceptions, thereby discriminating against mothers.It was only with Ley 20/2011 (which came into force in 2017) that the provision of the Civil Registry was amended, which currently provides that in the event of disagreement or when the surnames are not indicated in the application for registration, the civil registrar shall ask the parents, or the person legally representing the child, to notify the order within a maximum of three days. After that period has elapsed without express notification, it is still the registrar who decides on the order of surnames in the best interests of the child[42]. The reference to the best interests is nothing new, but certainly assigning such a delicate task to

[36] See *Referentenentwurf des Bundesministeriums der Justiz* at the page *BMJ, Bundesministerium der Justiz.*

[37] Cfr. art. 114, Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil (with reference to legitimate children only).

[38] Ley 13 may 1981, n. 11/1981. Since 2011, the choice can be made upon reaching the age of 16.

[39] Art. 109, as modified by the art.1 of the Ley 5 novembre 1999, n. 40/1999, , in «BOE», 6 novembre 1999: «Si la filiaciòn està determinada por ambas lìneas, el padre y la madre de comùn acuerdo podràn decidir el orden de transmisiòn de su respectivo apellido [...] exigiendo mantener el mismo orden respecto de todos los hijos que posteriormente tuviera la pa- reja».

[40] The art. 194 of the Real Decreto de 11 de febrero, n. 193/2000, , de modificación de determinados artículos del Reglamento del Registro Civil en materia relativa al nombre y apellidos y orden de los mismos, «BOE» n. 49, de 26 de febrero de 2000, 8484-8485, stated that if filiation was established with reference to both parents, the first surname would be the father's surname followed by the mother's one.

[41] *León Madrid c. Spagna*, 26 ottobre 2021, ricorso n. 30306/13.

[42] Art. 49 Ley de 21 de julio, n. 20/2011 del Registro Civil: «*En caso de desacuerdo o cuando no se hayan hecho constar los apellidos en la solicitud de inscripción, el Encargado del Registro Civil requerirá a los progenitores, o a quienes ostenten la representación legal del menor, para que en el plazo máximo de tres días comuniquen el orden de apellidos. Transcur- rido dicho plazo sin comunicación expresa, el Encargado acordará el orden de los apellidos atendiendo al interés superior del menor*».

a civil registrar is not without problems[43]. Suggestions from the doctrine have gone in the direction of giving pre-valence to surnames with greater social roots, for example, or to those that facilitate the identification of the child, increasing however a more specific regulation by e.g. the *Dirección General del Registro y del Notariado.*

Portugal differs from the Spanish archetype for two reasons: on the one hand because it allows children to be given up to four surnames, and on the other hand because the rule, at least before the reformation at the end of the 1990s, was that the order of surnames was maternal/paternal. The liberalisation at the end of the 1990s meant that in Portugal either the father's surname or the mother's surname could be transmitted (Art. 1875 CC) as well as a double surname. The order is the one indicated by the parents at the time of birth (and normally the father's surname still appears in the second position): in the absence of agreement, the decision is left to the court, which will take the best interests of the child into account. The choice does not apply to all the children of the couple, so much so that the principle of the unity of the surname in the family seems to have been definitively abandoned in this order.

4. CONCLUSIVE REMARKS

The circulation of the double surname model in Italy, as it frequently happens also in civil law systems, occurred thanks to the initiative of the judiciary and, in particular, of the Constitutional Court, while representing a fundamental stage in the course of any democratic system from the point of view of the equality of spouses, leaves more than a few application problems of the new regulation unsolved, revealing those implicit elements of various kinds - hidden in the folds of the legal systems - that determine the different effectiveness of the same legal rule in this or that legal system, the so called cryptotipes[44].

Several bills have already been tabled in the current Italian legislature, and in particular DDL S. 2, S. 21 and S. 131 as well as proposals C. 256 and C. 425. While DDL S. 2 seems to be inspired by the German solution, providing that the spouses can adopt a common surname, choosing one or pairing them, which will be passed on to their children, the other bills do not provide for a family surname, providing (e.g. DDL S. 21) that each spouse retains his or her own surname with the possibility of adding the other spouse's surname to his or her own. On the other hand, all provide for the transmissibility of the double surname, albeit with some different nuances. The solution that seems to be more in line with the Constitutional Court's decision no 131/2022 seems to be that of DDL S. 131, according to which 'the surname of both parents shall be attributed to the child of married parents [...] without prejudice to the agreement to attribute the surname of only one of the parents'.

As for the criteria for settling any disputes, both DDL S. 21 and proposals C. 256 and C. 425, suggest the use of the alphabetical criterion (as it already happens in France, for example); DDL S. 131, on the other hand, hypothesises the intervention of the judge, who, if the disagreement persists despite attempts at mediation and conciliation, should draw lots; this solution would, however, most probably lengthen the time taken to reach a decision, with detriment of the child's rights. All the drafts provide that the surname chosen for the first child shall also be valid for the couple's subsequent children; in order to avoid the multiplier mechanism, as advocated by the constitutional judges, it is

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[43] S. TROIANO, *Cognome del minore ed identità personale,* in Jus Civile, 2020, p. 593.

[44] R.SACCO, *Introduzione al diritto comparato*, 1992, pp. 125 ff.

stipulated that the son or daughter, in turn, shall transmit to their offspring only one surname each, of their choice.

No proposal opts for the Spanish criterion of the automatic 'passing' of the first surname, a solution that would relieve the children of a decision that might not be easy. An adult, who has been given only the paternal surname or only the maternal surname on the basis of the law in force at the time of birth, can add the other surname by means of a simplified procedure.

For this purpose, a declaration, made in person or by means of an autographed deed, to the civil registrar, who could then make an entry in the birth certificate, would be sufficient (e.g. DDL S. 131 and DDL S. 2), in accordance with a requirement that mirrors recent French legislation.

With regard to the criteria to be followed to settle disputes on the order of the two surnames, the Constitutional Court found in the system and consequently indicated to the legislator as a possibility the resorting to the courts[45]. Wanting to find an alternative, the overview of solutions is broad: from the application of criteria such as the 'French' alphabetical order, to the drawing of lots, as in Luxembourg, to the attribution of the power of choice to third parties, as in Spanish law. The identification of an 'automatic' criterion, obviously linked to criteria other than the prevalence of patronimic over matronymic or conversely, resolves the issue once and for all, but fails to take into account the specificities of the case. The opposite course of action, i.e. not indicating a criterion that is always applicable, but entrusting the decision to a third party, is not without its problems: the reference to the principle of best interest may be too general; so much so that even the House of Lords, while indicating the criterion cited as the first yardstick, has long since drawn up analytical guidelines as a guide for judges in resolving disputes concerning requests to change the surname of minors.

German law, on which our legislator has already drawn prominently in the field of naming rights within the framework of the regulation of civil unions[46] , provides a solution, which, although conceived in a different context from that of the choice of surname order, could be a valid starting point. On the one hand because the intervention of the judge, who thus performs an indispensable function of guarantee for the child, is foreseen and on the other hand because the concrete choice is then ultimately made within the family, because the parent who is deemed best able to realise the child's best interest will be able to decide. A time limit on the right to choose would also allow for a rapid resolution of the matter, which is certainly in the best interest of the child involved. The question remains as to whether this course of action is feasible, especially in cases of strong conflict between the spouses, where the sole competence of the court could perhaps be revived.

Each legal system responds to society's demands in the time and manner it sees fit; any solution should be sufficiently 'elastic' to adapt itself to a constantly evolving society.

With reference to the ECtHR case law three factors make the ECtHR case law particularly interesting for our comparative analysis.

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[45] A similar solution was adopted also in Australia: see Z. GOODAL, C. SPARK, *Naming Rights? Analysing Child Surname Disputes in Australian Courts Through a Gendered Lens*, in Feminist Legal Studies, 2020, 237.

[46] As it is known, the Italian regulation of civil unions (L. 20 May 2016, n. 76) was inspired by the German *Lebensgemeinschaft*, and, in particular, as it is underlined by C. FAVILLI, F. AZZARRI, *Il cognome dei figli dopo la sentenza 131/2022 della Corte costituzionale e nella prospettiva del diritto europeo*, in Diritti Comparati, 2022, 7, it was taken as a model for the regulation of th e partner's surname.

First, all of the cases addressed by the Court are originated in civil law countries.

Unlike the common law, civil law systems have a strict and highly regulated approach to name-giving and name-changing, a fact that results in litigation that is absent in contemporary common law countries. Secondly, the countries in question have different naming systems: for example, in some systems the wife takes the husband's name, while in others, each partner takes a different surname, composed of his or her paternal grandparents' names. This diversity allows recognizing consistent principles that appear in domestic legal systems, despite the variety of naming practices. Third, as the ECtHR operates within the framework of human rights, its authority and substantive law are based on the European Convention on Human Rights and Fundamental Freedoms. The universal characteristics of human rights principles allow for an analysis that goes beyond the single jurisdiction and specific doctrines and that relies on a more general protection of basic rights such as equality and privacy.

Even after this important Italian Constitutional Court judgment, the long history of the child's surname cannot be said to be over. The Italian legislator must still intervene to provide a surname regulation that will resolve the various problematic profiles on which the Court's judgment could not intervene. In order to be effective, the constitutional justice needs the cooperation of the legislator.

First of all, the Court makes it clear that the declaration of constitutional illegitimacy affects the rules attributing the surname and will therefore take effect from the day after its publication in all those cases where such attribution has not yet taken place, including those in which legal proceedings for that purpose are pending. All the others will keep the paternal surname given at birth. This surname can only be changed through a special administrative procedure. In addition, the judgment provides guidance for couples who already have other children. In these cases, the Court seems to suggest the way of adopting the original surname, which after the decision would take on the value no longer of an imposed surname, but of the one freely chosen by the parents for their family. The Constitutional Court, however, states that in the event of disagreement between the parents, the choice cannot be replaced by a court decision. In that case, the general rule of double surnames will apply.

On this issue, the Court once again invites the legislator to intervene to lay down rules that, applying to all children of the same parents, do not undermine the identifying function of the surname. Moreover, the Court called for a legislative intervention to resolve the issue of the surname that will be passed on to the child in the generational transition. It is up to Parliament to provide for rules to avoid the effect of a «mechanism that multiplies the number of surnames with the passage of generations» which could be prejudicial to the identity function of the surname. Even with regard to this delicate issue, however, the judgment indicates to the legislature a possible solution, namely that it is the parent holding the double surname who chooses the one that he/she wants to be representative of the parental relationship, «unless of course the parents choose to give their child one of their double surnames».

These indications suggest that the Italian Constitutional Court, fearing that the legislator will continue to remain silent, is laying the basis for a new and definitive intervention to complete the process begun in 2006. Judgment No. 131 of 2022 is undoubtedly a revolutionary judgment that nevertheless has some grey areas. While the merit of the ruling is to have firmly and without hesitation cancelled the patronymic (considered as "heritage of a patriarchal conception of the family") and ordered, in the name of constitutional legality, the attribution of the double surname as a rule, there are

nevertheless problematic aspects of the ruling that in part can be resolved and overcome by the choices of the legislator and that in part will remain unsolved without diminishing or weakening the disruptive and revolutionary scope of the Judge of Laws's decision. For example, it will have to be the legislator, according to the Court's invitation, to regulate the attribution of surnames in successive generations in order to avoid the multiplier effect, just as it will be appropriate to regulate the imposition of the same surname on all brothers and sisters. However, in order to avoid the multiplier effect, whether the choice of the surname to be attributed is laid down by law (e.g. the first surname) or whether it is left to the parent (as the Court suggests) is in any case an unsatisfactory option since the first favours an automatic system sacrificing any peculiarities worthy of derogation and the second leaves it to the mere, and unquestionable, power of the parent which of the two surnames to transmit. Similarly, whatever solution is hypothesised for the surnames of siblings is questionable: if all siblings must have the same surname or a double surname chosen for the eldest son, it favours, also for reasons of publicity, an appreciable need for family homogeneity that nevertheless prevents the consideration of circumstances, arrangements and relational dynamics that have arisen. On the other hand, leaving parents free to determine for each child the surname, whether maternal or paternal, or the order of surnames would mean shattering a family identity that should tend to be unique for all siblings.

In the face of such discipline, it is necessary to preserve the surname's identity and identification function, both at a legal and social level, in public and private law relations, which is not compatible with a mechanism that multiplies surnames in the succession of generations. The need, therefore, to guarantee the function of the surname, and consequently the pre-eminent interest of the child, points to the appropriateness of a choice by the parent - holder of the double surname that bears the memory of two family branches - of the one that he wishes to be representative of the parental relationship, provided that the parents do not opt for the attribution of the double surname of only one of them.

Secondly, it is for the legislator to assess the child's interest in not being given - at the sacrifice of a profile that also relates to his or her family identity - a different surname from his or her brothers and sisters' one. This could well be achieved by reserving the choice regarding the attribution of the surname to the moment of simultaneous recognition of the couple's first child (or at the moment of his or her birth in wedlock or adoption), so as to make them binding with respect to subsequent children recognised at the same time by the same parents (or born in wedlock or adopted by the same couple).

Dystopian Competition Law

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History, and legal history is no exception, is shaped by a sequence of events, linked by some demarcation points. Therefore, the course of history is determined by the direction taken by events in these turning moments. In line with a diachronic approach to comparative law, understanding the impact of key points in the evolution of policies and provisions is essential to understand the origin of certain rules, the possible positive changes, and the nexus between history and evolution of the law. This is of particular importance in subjects, such as competition law, in which various 'souls', *i.e.*, public policy, law, economics, match. Therefore, it represents a very fruitful exercise the imagination of a *dystopic competition law*, which means a re-imagination of competition policy's evolution through a hypothetic different sequence of events in the history of this subject's development. This result is of particular interest given the 'practical' and jurisprudential matrix of competition law, and it can be particularly useful in order to understand – in the current epoch of rising market power's concentration – what 'demarcation point' could have led to particular problems in the evolution and interpretation of competition provisions and which approaches, which was maybe put aside in the past, could represent a viable solution in the present.

La storia, e la storia giuridica non fa eccezione, è plasmata da una sequenza di eventi, collegati da alcuni punti di demarcazione. Pertanto, il corso della storia è determinato dalla direzione presa dagli eventi in questi momenti di svolta. In linea con un approccio diacronico al diritto comparato, la comprensione dell'impatto dei punti chiave nell'evoluzione delle politiche e delle disposizioni è essenziale per capire l'origine di alcune norme, i possibili cambiamenti positivi e il nesso tra storia ed evoluzione del diritto. Ciò è di particolare importanza in materie, come il diritto della concorrenza, in cui confluiscono diverse "anime", ossia politica pubblica, diritto, economia. Pertanto, rappresenta un esercizio molto fruttuoso l'immaginazione di un diritto della concorrenza distopico, che significa una re-immaginazione dell'evoluzione della politica della concorrenza attraverso un'ipotetica diversa sequenza di eventi nella storia dello sviluppo di questa materia. Ciò risulta di particolare interesse data la matrice "pratica" e giurisprudenziale del diritto della concorrenza, e può essere particolarmente utile per capire - nell'attuale epoca di crescente concentrazione del potere di mercato - quale "punto di demarcazione" potrebbe aver portato a particolari problemi nell'evoluzione e nell'interpretazione delle disposizioni in materia di concorrenza e quali approcci, forse accantonati in passato, potrebbero rappresentare una soluzione praticabile nel presente.

1. INTRODUCTION: A DIFFERENT MATCH OF FORMANTS FOR A 'DYSTOPIAN' VIEW OF COMPETITION LAW

What if Napoleon would not have been defeated in Waterloo; *what if* America would not have been discovered; *what if* (*inter alia*) the radio would not have been invented? But also, *what if* the French *code civil* would not have been enacted; *what if* a certain legal doctrine would not have been proposed or a certain judicial decision would have been issued differently? All these questions shed a light on possible different narrations

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of history or legal history, they introduce what we can call *dystopian* views (*what if*) over the development of historical events or legal developments. In this context, the questions above focus in particular on certain key events or moments, which can be called turning points, or, better, points of demarcation. With this term we can define a point in history (or legal history, as well) in which the course of events took a certain direction which defined the subsequent development of the facts or the interpretation of a certain rule or policy. This exercise is of particular importance because it acts like a sort of 'time machine' and it allows us to explore different solutions which could prove useful in order to understand how a certain rule, interpretation of policy can be changed, integrated or better shaped, in light of the results it concretely provided in history, once applied.

The comparative method is the cornerstone of this exercise, as a refined and careful analysis is needed, and therefore, in order to be scientific and not merely speculative, it has to be guided by a method. Essentials in this task are the theory of formants, which helps in 'decomposing' and 'recomposing' the sequence of events and the influence of the various formants on a certain development in legal history, and the combination of both synchronic and diachronic comparison, in order to create always a link between the various legal systems analysed and their evolution, but without losing the trace of what is real and what is just *dystopian*.

A subject that proves particularly interesting and suitable for this kind of comparative exercise is competition law, due to the very development of this field of law. Indeed, the history of competition law has been brilliantly represented by Professor Eleanor Fox as a pendulum swinging from more conservative to more progressive interpretations.[1] In particular, if the first modern system of rules aimed at protecting competition on the market, *i.e.*, the U.S. one, is taken into consideration, it is evident how its development has been characterised by different interpretations of the provisions during various phases of U.S. political and economic history.[2] This observation underlines the interdependence among competition law and society, and, in particular, economy. This concept has brilliantly summarised also by the same U.S. Supreme Court back in 1897, in the *Trans-Missouri* decision, when it stated that *competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom*.[3]

Along the lines of this approach, it is evident how competition law can be subject to changes in history, changes in its interpretation, and therefore to a *dystopian* exercise, aimed at imagining how this subject could have been shaped if a certain judicial decision would not have been issued, or if it would have been decided differently, according to the points of demarcation approach introduced in the first paragraph of the present work.

The jurisprudential formant had for sure the most active role in this evolution, since in the U.S. it was mainly the U.S. Supreme Court to develop the interpretation of

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[1] E. M. FOX, *The Efficiency Paradox*, in R. PITOFSKY (ed.), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, Oxford University Press, 2008, 77 ff.

[2] Ibidem. See also, generally, E. M. FOX, *The battle for reform of US antitrust law*, in Journal of Antitrust Enforcement, 2023, 11, pp. 179 ff.; E. M. FOX, *"Consumer Welfare" and the Real Battle for the Soul of Antitrust*, Promarket, 19 April 2023, available at https://www.promarket.org/2023/04/19/consumer-welfare-and-the-real-battle-for-the-soul-of-antitrust/ (accessed 29 February 2024); J.B. Baker, *The Antitrust Paradigm*, Harvard, 2019, pp. 32-52.

[3] U.S. SUPREME COURT, decision 22 March 1897, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), at 337.

antitrust provisions, as it is normal in a common law system. This was favoured especially by the nature of the provisions contained in the Sherman Act, which are written in a broad and open drafting style. The same U.S. Supreme Court pointed out in *Apex Hoisery* that *The vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and, in the performance of that function, it is appropriate that courts should interpret its words in the light of the legislative history and of the particular evils at which the legislation was aimed*.[4] Anyhow, the same discourse can be made for the other major competition law system, which is the EU one. Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are broadly written and the Court of Justice was fundamental in shaping the content of such provisions. This development was not detached from the various – from epoch to epoch – policies of the same EU, with an initial focus on market integration, to the subsequent stress on other policy or economic objectives or values.[5] Indeed, form a comparative law perspective, it is interesting to note how, although not being the EU system a common law-based one, according to Sir Peter Roth in the field of competition law the Court of Justice behaved like a common law court in *moving it [competition law] forward incrementally and sometimes developing new principles*.[6]

However, not only the jurisprudential formant contributed to the evolution of competition law, but also the legislative and the doctrinal ones. In particular, the legislative one – as it can be imagined – had a quite central role in the EU context, through the enactment of proper legislative provisions or policy statements by the European Union.[7] The doctrinal formant had instead a huge impact in the 1970s and nowadays thanks to the *Neo-Brandesian* movement.

This article, through the application of the comparative method, will try to understand how the various formants contributed to the evolution of competition law, but through a *dystopian* perspective, aimed at underlining the key 'points of demarcation' in competition law's history in order to find alternative solutions or approaches, which, as a sort of dissenting or concurring opinion in a U.S. judicial decision, might resort to be a majority solution now, in a time of challenges for competition law and, in general, for our market economy model.

2. A PURELY COMMON LAW-STYLE EXERCISE: A DYSTOPIAN EVOLUTION OF U.S. ANTITRUST LAW

The history and the development of U.S. antitrust law are very complex and fascinating, but they do not represent the object of the present paper, since they have already been object of scrutiny.[8] For the purposes of the current work, what is important is to link the various point of demarcation that characterised the development of antitrust law in the U.S. and in the EU (in the following paragraph). Therefore, the

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[4] U.S. SUPREME COURT, decision 27 May 1940, *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), at 489.

[5] R. WESSELING, *The Modernisation of EC Antitrust Law*, Oxford, 2000, pp. 9-50; D. J. GERBER, *Law and Competition in Twentieth Century Europe*, Oxford, 1998, p. 334.

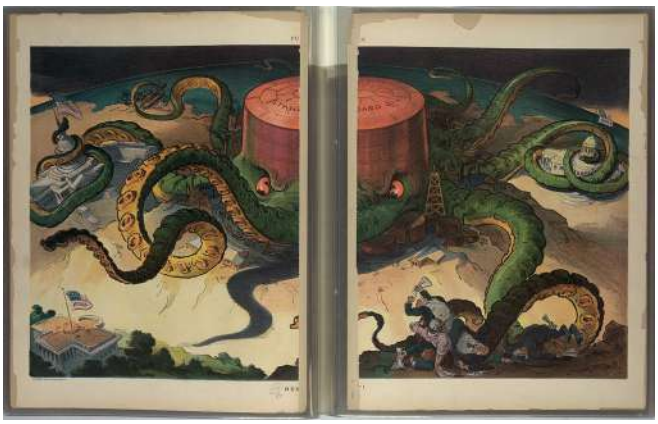
[6] SIR P. ROTH, *The continual evolution of competition law*, in Journal of Antitrust Enforcement, 2019, 7, 21.

[7] Particular reference is made to the *Guidelines* (in form of Communications) issued by the European Commission on the application of Articles 101 and 102 TFEU.

[8] A. PILETTA MASSARO, *Il diritto della concorrenza tra obiettivi di policy e proposte di riforma: verso un approccio multi-valoriale*, in La Cittadinanza Europea Online, 2021, 0, pp. 65 ff.; A. PILETTA MASSARO, *Antitrust Political Side*, in Opinio Juris in Comparatione, 2023, 1, pp. 364 ff.

knowledge of the history of this discipline will be presumed as known, and only the events which are deemed key will be mentioned, in order to reconstruct a *dystopian* version of the relevant passages.

The Sherman Act was enacted in the U.S. in 1890, as a result of the continuous and unprecedented accumulation of market power in the hands of few powerful firms, such as Standard Oil or American Tobacco (telling are the illustrations of Standard Oil as an octopus that captures all the American economic and political institutions[9]).



This event represents the first – and maybe the most important – turning point in a possible *dystopian* view of competition law. Indeed, *what if* the Sherman Act would not have been enacted of if it would have been enacted differently? The adoption of this bill was the result of a big political and economic debate around the role of the State in regulating the economy and, in last instance, on what system had to be chosen for the American economy. In the Congress not everyone was in favour of such a tough, and also structural (but we will return later on this aspect), set of rules for American businesses. In fact, promoters of the doctrines of individualism, linked to the theory of evolutionism, which were in favour of *laissez-faire*, justified advantages or inequalities on the economic system, since they were deemed as derived by a superior business acumen.[10] Therefore, the success of the Sherman Act's promoters was not granted at all, and the history could have taken a completely different direction. Anyway, we will return later on the scenario that could have emerged from this different approach, as it could be linked with subsequent passages of the present *dystopian* narration.

After its enactment, the Sherman Act was enforced quite rigidly by the U.S. Judiciary and it was recognised as a sort of fundamental law of the market, at the point that the same U.S. Supreme Court defined it as *the Magna Carta of free enterprise*, which is *as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms*.[11] This statement highlights the importance of antitrust law in the U.S. economic system, in order to preserve a competitive structure of the market and, consequently, avoiding excessive concentrations of economic (and consequently political) power, so as to allow

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[9] U.J. KEPPLER, 7 September 1904, Library of Congress Prints and Photographs Division, available at https://www.loc.gov/pictures/resource/ppmsca.25884/ (accessed 29 February 2024).

[10] H.B. THORELLI, *The federal antitrust policy: Origination of an American Tradition*, Crows Nest, 1954, 113-114.

[11] U.S. SUPREME COURT, decision 29 March 1972, *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), at 610.

market entrance and a flourishing economic initiative. This approach was stressed by the Court of Appeals for the Second Circuit (opinion delivered by Justice Learned-Hand) in the *Alcoa* judgement, where it was stated that *it is possible, because of its indirect social or moral effect, to prefer a system of small producers, each independent for his success upon his own skill and character to one in which the great mass of those engaged must accept the direction of a few*.[12]

The *'dystopian* question' that raise spontaneously at this moment is *what if* the Sherman Act, given its broad drafting, would have been interpreted differently? And the answer to this question can be paired with the analysis of the previous one, which is what if the Sherman Act would not have been enacted, or not enacted according to the principles that lie behind it? The possible '*dystopic* answer' is that the whole structure of the American economy would have been different, with a lot of consequences on multiple factors, including innovation and democracy. In particular, few companies would have dominated the market, causing a concentration of wealth towards the upper part of the 'social pyramid' and the innovativeness that was a trademark of the American economy would for sure have been negatively affected because the concentration of market power would have led to much narrower 'competitive portals to innovation'.[13] The resulting picture is for sure that of a more unequal and less developed society, characterised by *de facto* monopolies or oligopolies, characterised by the fact of being extractive,[14] which means – for our purposes – to extract wealth from the consumers without counter-offering valuables services in terms of price and quality. This *dystopian* view was not far at all to turn into reality, exactly because of the 'pendulum' dynamic characterising U.S. antitrust law described at the beginning of the present paper. It is exactly in this point that the interaction of the various formants constitutes the propulsive force of antitrust law in the United States. In fact, given a stable (but broadly written) legislative formant, the self-influence of the doctrinal and the jurisprudential formant can shape the way in which antitrust provisions are interpreted. This is possible because of various factors, such as the possibility of overruling a precedent decision, together with the 'political' connotation that characterises the U.S. judiciary, with, referring to the Supreme Court, judges nominated by the President and then finally appointed by the Senate. Moreover, given the life mandate of the Supreme Court's components, under which President (and, consequently, which party and political connotation) a judge will be appointed is, in the end, just a matter regulated by chance. On the other side, it has not to be undervalued the impact of the doctrinal formant on the jurisprudential one, sometimes by the direct appointment of a scholar to sit in the Supreme Court, or for the endorsement of certain scholar theories by the same Court. Having regard to the first aspect, a valuable example is provided by Justice Louis Brandeis, who was a scholar particularly interested in the issue of market power and which predicated an eminently structural approach to competition law and a decentralised structure of the American economy.[15] Once appointed as judge of the Supreme Court, in 1916, he of course put into practice his

[12] U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, decision 12 March 1945, *United States v. Aluminium Co. of America et al.*, 148 F.2d 416 (2d Cir. 1945), at 427.

[13] For the definition and the role of 'competitive portals to innovation' see A. EZRACHI and M. E. STUCKE, *Digitalisation and its impact on innovation*, in Report for the European Commission, 24 August 2020, available at https://op.europa.eu/en/publication-detail/-/publication/203fa0ec-e742-11ea-ad25-01aa75ed71a1/language-en (accessed 29 February 2024).

[14] J. STIGLITZ, *Towards a broader view of competition policy*, in T. BONAKELE, E. M. FOX, L. MNCUBE (eds.), *Competition policy for the new era: Insights from the BRICS Countries*, Oxford, 2017, 4.

ideas, which still constitute a sort of manifesto for those who sustain a progressive interpretation of antitrust rules, who, not causally, are referred to under the name of *Neo-Brandesians*.

Anyhow, the doctrinal and the jurisprudential formant became not anymore *ships that passed in the night*[16] after the publication of the book *The Antitrust Paradox* by Robert Bork in 1978,[17] in the context of the ideas promoted by the so-called *Chicago School*. Bork's ideas brought to a deep rethinking of how antitrust rules were applied and interpreted by the U.S. Judiciary and the focus passed from the structural protection of competition in the market to more 'technical', but also more evanescent, concepts like the *consumer welfare*. It is not here the place to start a review of this concept's nature – a topic that made a lot of ink to be put on academic papers[18] – but to understand the policy shift that the introduction of the consumer welfare as a new standard for antitrust law brought in the U.S. To explain in a nutshell, this change of perspective reshaped the interpretation of antitrust rules in light of neo-liberal economic concepts and put the price of products at the centre of the antitrust discourse. In fact, according to Bork – but in a cryptic language – the essential objective of antitrust is *to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or no loss in consumer welfare*.[19] This view, which emerged in the scholar discourse, became soon dominant also in the interpretation given to the antitrust statutes by the Courts, at the point that already in 1979 the Supreme Court stated that *the Congress designed the Sherman Act as a 'consumer welfare prescription'*.[20]

The impact of this change of direction (completely not based upon the legislative or interpretative history of the Sherman Act, but for sure in line with the economic and political theories *en vogue* at the time) led to a completely different approach to antitrust cases. The latter can be well exemplified by the cases of IBM and Microsoft. In particular, the case brought by the Justice Department against IBM,[21] after years of trial, was dropped after the election of Ronald Reagan – notoriously a supporter of neo-liberal economic theories and policies – as President of the United States. Anyhow, as sustained by Wu, the threat of an investigation, although without a formal sanction, led IBM to revise its behaviour on the market and allowed competition in the independent

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[15] See, generally, J. ROSEN, *Louis D. Brandeis: American Prophet*, Yale, 2016; M. I. UROFSKY, *Louis D. Brandeis: A Life*, New York, 2009.

[16] LORD NEUBERGER, *UK Supreme Court decisions on private and commercial law: The role of public policy and public interest*, Centre for Commercial Law Studies Conference 2015, 4 December 2015, 1, available at https://www.supremecourt.uk/docs/speech-151204.pdf (accessed 29 February 2024). This very effective expression is used by Lord Neuberger to explain – although with reference to the English context – the distance (and, consequently, lack of communication) between doctrine and judiciary in 'making the law'.

[17] R. BORK, *The Antitrust Paradox*, Free Press, 1978.

[18] See, *inter alia*, also with opposing views, M. STEINBAUM and M.E. STUCKE, *The Effective Competition Standard: A New Standard for Antitrust*, in The University of Chicago Law Review, 2019, 86, pp. 595 ff., available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6188&context=uclrev (accessed 29 February 2024); B. ORBACH, *Was the Crisis in Antitrust a Trojan Horse?*, in Antitrust Law Journal, 2014, 79, 3, pp. 881 ff.; B. ORBACH, *The Antitrust Consumer Welfare Paradox*, in Journal of Competition Law & Economics, 2010, 7, 1, pp. 133 ff.; D. A. CRANE, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, in Antitrust Law Journal, 2014, 79, 3, p. 835.

[19] R. BORK, *op. cit.*, p. 91.

[20] U.S. SUPREME COURT, decision 11 June 1979, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), at 343.

[21] U.S. DEPARTMENT OF JUSTICE, United States' Memorandum on the 1969 Case, available at https://www.justice.gov/atr/case-document/united-states-memorandum-1969-case (accessed 29 February 2024).

software and personal computers markets to flourish.[22] The second example is represented by the case regarding Microsoft for its monopolisation in the market of internet browsers, conduct that led the former leader of this market, Netscape, to quit in favour of Microsoft itself. Also in this case, the Department of Justice brought a case,[23] which was supposed to end with Microsoft's breakup, but, in the end, after the election of George W. Bush as President of the United States, the same Department of Justice settled the case, without breaking Microsoft up.[24] Since then, no big antitrust cases were initiated in the U.S., with the Supreme Court that took a quite 'soft' approach by stating, in the famous opinion delivered by Justice Scalia in *Trinko*, that *the opportunity to charge monopoly prices – at least for a short period – is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth*.[25]

Starting from the 2016 presidential campaign and the concerns brought by the increasing power held by big tech companies, together with the parallel spread of the ideas advanced by the already mentioned *Neo-Brandesians*, antitrust came back at the centre of the academic and also political debate, with a general quest for a more 'aggressive' application of the Sherman Act, in a sort of cyclic historical appeal to the years in which this piece of legislation was debated and enacted.[26] As a result, after his election, President Biden inaugurated a vigorous campaign to revamp the enforcement of antitrust rules, both through policy statements[27] and the appointment of *Neo-Brandesian* figures in key antitrust enforcement positions.[28] In parallel, the Congress started the debate aimed at passing four bills directed at contrasting the excessive market power and anticompetitive behaviour of tech giants.[29] Anyhow, these proposals,

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[22] T. WU, *The Curse of Bigness*, Ormond House, 2020, pp. 60-64.

[23] U.S. DEPARTMENT OF JUSTICE, Complaint: *U.S. v. Microsoft Corp.*, Civil Action No. 98-1232, filed before the United States District Court for the District of Columbia on 18 May 1998, available at https://www.justice.gov/atr/complaint-us-v-microsoft-corp (accessed 29 February 2024).

[24] *Ibidem*, 69-72.

[25] U.S. SUPREME COURT, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, (02-682) 540 U.S. 398 (2004) 305 F.3d 89, at III.

[26] T. WU, *op. cit.*, p. 161.

[27] THE WHITE HOUSE, *Executive Order on Promoting Competition in the American Economy*, 9 July 2021, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ (accessed 29 February 2024). See also U.S. FEDERAL TRADE COMMISSION, Chair Lina M. Khan, *Memorandum on Vision and Priorities for the FTC*, 22 September 2021, available at https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf (accessed 29 February 2024).

[28] C. KANG, *Lina Khan, a progressive trustbuster, displays get-tough approach to tech in confirmation hearing*, The New York Times, 21 April 2021, available at https://www.nytimes.com/2021/04/21/business/lina-khan-ftc.html (accessed 29 February 2024); C. Kang, *A Leading Critic of Big Tech Will Join the White House*, The New York Times, 5 March 2021, available at https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html (accessed 29 February 2024); THE WHITE HOUSE, *President Biden Announces Jonathan Kanter for Assistant Attorney General for Antitrust*, 20 July 2021, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/20/president-biden-announces-jonathan-kanter-for-assistant-attorney-general-for-antitrust/ (accessed 29 February 2024); L. HIRSCH, D. MCCABE, *Biden to Name a Critic of Big Tech as the Top Antitrust Cop*, The New York Times, 20 July 2021, available at https://www.nytimes.com/2021/07/20/business/kanter-doj-antitrust.html (accessed 29 February 2024).

[29] Legislative bills U.S. CONGRESS, *H.R.3816 – American Choice and Innovation Online Act*, available at https://www.congress.gov/bill/117th-congress/house-bill/3816/text (accessed 29 February 2024); U.S. CONGRESS, *H.R.3825 – Ending Platform Monopolies Act*, available at https://www.congress.gov/bill/117th-

after years, have not been definitively approved yet, probably also because of the lobbying power that the companies concerned can exercise.[30] Anyhow – and probably this represents the major obstacle to the prospected change of direction in U.S. antitrust law – all these efforts might result to be worthless, because of the composition of the U.S. Supreme Court resulting after the three appointments made by Donald Trump during his presidency, which turned the Supreme Court to a conservative-winged majority.[31]

After this very short narration of the main lines of development of U.S. antitrust policy, *what if* some of these events would have occurred differently or, even, it would not have happened? The answer to this question cannot be any more than *dystopic*, since infinite options might be considered. Anyway, some likely-to-have-happened common lines could be proposed. The first possibility is represented by the fact that Robert Bork would never have published his book, or, more broadly, that the Chicago School would have never existed or anyway be influent. A similar result could have occurred in case Bork would have published *The Antitrust Paradox*, but the Supreme Court would have sticked to the previous structural interpretation of antitrust provisions. Also, from a more politically focused viewpoint, a different narration would have happened in case Ronald Reagan would have not become President of the United States. The historical development which could have resulted by the alternative narration proposed could have shaped a completely different reality. Starting from the more concrete possible alternative developments, we can try to assume the following twofold line of events: If conservative ideas would have spread more rapidly – especially in the enforcers' environment – and both the IBM and Microsoft case would not have initiated. Contrarywise, if the investigation against Microsoft would have led to the company's dissolution. As well pointed out by Tim Wu, if IBM would not have felt the pressure of the antitrust probe initiated by the Department of Justice, we could have faced a big monopoly active on both the software and personal computers market, with the – really *dystopian* – possibility of Microsoft being not able to emerge as leader in the same markets.[32] In a similar vein, if the Microsoft investigation, although not brought until the company's breakup, would not have taken place, Microsoft would have probably resulted as the unchallenged monopolist in a plethora of IT-related markets, such as internet browsers, operative systems (likely also mobile ones), maybe search engines, and, it can be said, the whole IT's market spectrum.[33] Contrarywise, if Microsoft would have been dissolved, we would have probably seen more competition in the operative systems markets or in the market of productivity applications (Office). Anyhow,

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congress/house-bill/3825/text?r=34&s=1 (accessed 29 February 2024); U.S. CONGRESS, *H.R.3826 – Platform Competition and Opportunity Act of 2021*, available at https://www.congress.gov/bill/117th-congress/house-bill/3826/text?r=5&s=1 (accessed 29 February 2024); U.S. CONGRESS, *H.R.3849 – Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021*, available at https://www.congress.gov/bill/117th-congress/house-bill/3849/text (accessed 29 February 2024).

[30] See, *inter alia*, E. CORTELLESSA, *Congress is Close to Cracking Down on Big Tech. But Powerful Obstacles Remain*, Time, 20 April 2022, available at https://time.com/6168761/congress-big-tech-monopoly-antitrust/ (accessed 29 February 2024); B. SCHWARTZ, L. FEINER, *Facebook was the main donor to a group that fought antitrust reforms in 2020 and 2021*, CNBC, 1 May 2023, available at https://www.cnbc.com/2023/05/01/facebook-primary-donor-group-antitrust-fight.html (accessed 29 February 2024).

[31] A. JONES, W.E. KOVACIC, *Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy*, in The Antitrust Bulletin, 2020, 65, 2, pp. 239-240.

[32] T. WU, *op. cit.*, pp. 63-64.

[33] *Ibidem*, p. 71.

Microsoft was also sanctioned (but not with the breakup) by the European Commission and this, together with the indirect 'reputational sanction' represented by the cases themselves, led to an equilibrate solution, which allowed for instance Apple to compete in the operative systems market, Google and the same Apple on the mobile operative systems one, and Google to emerge in the search engines and web browsers market. What is interesting from this narration is a demonstration of the much-debated *tipping* nature of digital markets,[34] since it results evident that also in the cases in which the incumbent company's monopoly position is displaced, another dominant company is likely to take the stage.

However, focusing the analysis to more speculative possible developments of U.S. antitrust law in case some of the mentioned demarcation points would have occurred differently, it is first possible to assume that if the U.S. judiciary would have been less fascinated by Bork and the Chicago School's ideas and it would have sticked more to the original interpretation (based upon its legislative history) of the Sherman Act, the American market would have experienced a lesser degree of concentration and probably a more diffused entrepreneurial fabric, with all the positive or negative consequences – especially in a globalised context – that this would have brought. This could for sure also have had impacts on other spheres, such as the distribution of wealth (*i.e.*, inequalities[35]) or labour conditions. In addition – and notwithstanding the already highlighted *tipping* nature of digital markets – a more aggressive antitrust enforcement could have prevented, or at least reduced, the market power progressively gained by the companies that today are designated as tech giants, and that cause several concerns also outside the purely economic field, having impact even on the democratic process (it has to be considered for instance that more than 50% of Americans declared to receive almost often her/his news on social media, providing the latter company with an incredible 'filtering power' on the news that people read).[36]

Finally, it is worth returning on the already mentioned 'chance factor' that governs the appointment (and the consequent orientation) of the U.S. Supreme Court's components. We can imagine a situation in which the four bills laying at the Congress would be passed and they – together with the already existing antitrust provisions – would be rigorously enforced by *Neo-Brandesians*-led competition Authorities. But what after? These cases could just fail to pass the exam represented by the Supreme

[34] *Tipping* is defined as the situation occurring when *a firm pulling away from its competitors once it gains an initial advantage. The market tips when a winner takes most – if not all – of the market*. See N. PETIT ,N. MORENO BELLOSO, *A Simple Way to Measure Tipping in Digital Markets*, in Promarket, 6 April 2021, available at https://www.promarket.org/2021/04/06/measure-test-tipping-point-digital-markets/ (accessed 29 March 2024).

[35] For an analysis of the link between competition law and income inequalities see A. EZRACHI, A. ZAC, C. DECKER, *The effects of competition law on inequality – an incidental by-product or a path for societal change?*, in Journal of Antitrust Enforcement, 2023, 11, 1, pp. 51 ff.

[36] PEW RESEARCH CENTER, *News Use Across Social Media Platforms in 2020*, 12 January 2021, 4-5, available at https://www.journalism.org/wp-content/uploads/sites/8/2021/01/PJ_2021.01.12_News-and-Social-Media_FINAL.pdf (accessed 29 February 2024). A good example of the 'social power' enjoyed by tech giants is well represented by the *Facebook Files* scandal: *The Facebook Files*, The Wall Street Journal, available at https://www.wsj.com/articles/the-facebook-files-11631713039 (accessed 29 February 2024); M. MCCLUSKEY, *From Instagram's Toll on Teens to Unmoderated 'Elite' Users, Here's a Break Down of the Wall Street Journal's Facebook Revelations*, Time, 15 September 2021, available at https://time.com/6097704/facebook-instagram-wall-street-journal/ (accessed 29 February 2024); B. PERRIGO, *How Facebook Forced a Reckoning by Shutting Down the Team That Put People Ahead of Profits*, in Time, 7 October 2021, available at https://time.com/6104899/facebook-reckoning-frances-haugen/ (accessed 29 February 2024).

Court, and, consequently, everything would have changed in order nothing to change, just because – *inter alia* – President Obama was not able to appoint Merrick Garland at the Supreme Court[37] and the subsequent President had the opportunity to choose three conservative-winged judges. In the end, such a reality could appear more *dystopian* than some of the *dystopic* proposals we advanced, and all this is caused by the strange match of formants, historical situations and, ultimately, of the points of demarcation that shapes what then becomes reality.

3. AMONG LEGAL TRANSPLANTS, EVOLVING INTERPRETATIONS, AND POLICY OBJECTIVES: A DYSTOPIC APPROACH TO EU COMPETITION LAW

The development of EU competition law is slightly less suitable than U.S. antitrust law to the exercise of this paper,[38] but this does not mean that some points of demarcation have characterised this evolution in a way that would have been completely different in case these events would not have occurred or they would have followed alternative lines.

First, it is worth recalling that EU competition rules were drafted in the aftermath of World War II, and they are the result of various matrixes, such as the influence of the U.S. themselves and the doctrinal contribution of the Ordoliberal School. Anyhow, being not this work the venue for a deep analysis of the mentioned factors,[39] what is important to recall is the instrumental role of competition law to reach market integration throughout the Community during first decades since its creation.[40] A *dystopia* in this phase could be represented by the absence of competition rules in the Treaty of Rome, but we deem this not so interesting, because this speculation could easily fall out of the juridical technical field.

More interesting is the development that occurred in EU competition law between the current and the previous millennium. This aspect is also of particular relevance for showing, under a purely comparative law perspective, the circulation of models and interpretations, since the formant represented by the Chicago School approach had an influence also in the Old Continent, although its impact was softened by the different cultural, political and economic conceptions which characterise the EU and its member States (many of them coming from very different legal traditions, and some very far from the neo-liberal approach proposed by the Chicago School).

What is worth underlining is that since its establishment and almost until 2000, the focus of competition in the EU was mainly the process of competition in the market, therefore the possibility of markets to remain contestable and open for entrepreneurial

[37] E. BRADNER, *Here's what happened when Senate Republicans refused to vote on Merrick Garland's Supreme Court's Nomination*, in CNN, 19 September 2020, available at https://edition.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html (accessed 29 February 2024).

[38] This lies first in the longer history of U.S. antitrust tradition, in the peculiar role played by the U.S. Supreme Court (due to the common law approach and, as explained, its composition) and also the fact that the enforcement of competition rules is less focused on public enforcement than in the EU. The latter factor of course allows the blossoming of cases litigated in a more diffuse way than in a system in which public enforcement prevails.

[39] A. PILETTA MASSARO, *op. cit.*; C. OSTI, *Antitrust: a Heimlich manoeuvre*, in European Competition Journal, 2015, 11, 1, 238-241; D. J. GERBER, *op. cit*, pp. 232-265.

[40] R. WESSELING, *op. cit.*, p. 334.

activity. This approach, interestingly, is not at all far from the original interpretation of antitrust statutes in the U.S., especially in its 'mature' phase, after the 1929 crisis.[41]

This view can be summarised in policy statements such as the one by the first Commissioner for Competition, Hans von der Gröben, who, in 1961, affirmed that *the Treaty requires the establishment of a system which will provide a general assurance that competition in the Common Market will not be distorted*.[42] The practical implementation of such a policy statement is represented by the various positions assumed by the Court of Justice, which several times stressed that Article 102 TFEU *is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure*.[43]

Anyway, with the change of century and millennium also this approach experienced a transformation, which can be summarised in a policy statement by the former Commissioner for Competition Neelie Kroes, who sustained that *consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources*.[44] In other words, the Chicagoan consumer welfare standard crossed the Atlantic Ocean and made its appearance – although delayed – also in the European context.

Nevertheless, the impact of this reception, as anticipated, was softened by numerous factors, which allowed EU competition law to remain more effective than its U.S. counterpart. This can be seen, for instance, in the sanction that the European Commission imposed on Microsoft for the bundling of Windows and Windows Media Player[45] and in the stable approach followed by the Court of Justice, which, still in the *British Airways* case, decided in 2007, recalled the statement made in *Continental Can* and reaffirmed the importance of protecting competition as such.[46]

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[41] J. B. BAKER, *op. cit,* p. 41.

[42] H. VON DER GRÖBEN, *Competition in the Common Market*, speech delivered during the debate on the draft regulation pursuant to Articles 85 and 86 of the EEC Treaty in the European Parliament, 1961, 5, available at http://aei.pitt.edu/14786/1/S49-50.pdf (accessed 29 February 2024).

[43] ECJ, Continental Can, British Airways. Citare per 101 GlaxoSmithKline X European Court of Justice, decision 21 February 1973, case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, para 26. See also ECJ, decision 15 March 2007, case C-95/04 P, *British Airways plc v. Commission*, para 106. With reference to article 101 TFEU is worth quoting ECJ, decision 6 October 2009, joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v. Commission (GlaxoSmithKline)*, where the Luxembourg Judges, at paragraph 63, affirms that *like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interest of competitors or consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price.*

[44] Commissioner Neelie Kroes, *European Competition Policy – Delivering Better Markets and Better Choices*, speech delivered at the *European Consumer and Competition Day*, London, 15 September 2005, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512 (accessed 29 February 2024).

[45] European Commission, decision 24 March 2004, case COMP/C-3/37.792, *Microsoft*. This decision was then confirmed by the EU General Court, decision 17 September 2007, case T-201/04, *Microsoft Corp. v. Commission*. In the subsequent case involving Internet Explorer, instead of an infringement decision, commitments under Article 9 of Regulation 1/2003 were agreed, see European Commission, Antitrust: Commission accepts Microsoft commitments to give users browser choice, 16 December 2009, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_09_1941 (accessed 29 February 2024).

[46] ECJ, *British Airways*, cit., para 106.

Therefore, the 'European consumer welfare' standard appears to be more focused on consumer surplus[47] and it had the merit to have stimulated the evolution of a deep economic analysis of cases. However, the focus on the price dimension of transactions and conducts, led the Commission to clear some mergers such as *Facebook/WhatsApp*[48] and caused what we can define a sort of 'conceptual delay' in understanding and preventing the digital revolution that was occurring. Nevertheless, the European Commission went soon out of these quicksand by starting the well-known *Google Shopping*[49] and *Google Android*[50] cases and it tried to regain pace with tech giants especially through the policy impulse imposed by Commissioner Margrethe Vestager. This led, in the end, to the adoption of the Digital Markets Act (DMA) Regulation in 2022.[51]

Anyhow, at this point, *what if* the consumer welfare standard would not have taken space in the EU environment? *What if* the Court of Justice would not have maintained stable the roots of EU competition law after the advent of such a standard? And, *what if* cases such as the *Facebook/WhatsApp* merger would have been decided differently or whether important legislative initiatives such as the DMA would not have been proposed and then adopted? The answer to all these questions could delineate a completely different – and therefore *dystopian* – shape of competition law in the European Union.

First, it is possible to assume that if the consumer welfare standard would not have become the lodestar of competition law also in the EU the consequences could have been twofold: On one side, it is possible that some 'mistakes', such as in *Facebook/WhatsApp*, based on a price-centric conception, could have been avoided. Contrarywise, the analysis of cases would probably have lacked the essential deep economic background that, in order also to guarantee the certainty of proceedings, lies at the basis of competition law investigations. Therefore, the introduction of the 'European way' of the consumer welfare standard has surely the merit of having provided econometric analysis a prominent role in the evaluation of cases. Anyhow, maybe the stress on the price dimension went a little too far, making competition law

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[47] D. HILDEBRAND, *The equality and social fairness objectives in EU competition law: The European school of thought*, in Concurrences, 2017, 1, 8.

[48] EUROPEAN COMMISSION, decision 3 October 2014, Case No COMP/M.7217, *Facebook/WhatsApp*, available at https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf (accessed 29 February 2024).

[49] EUROPEAN COMMISSION, decision 27 June 2017, case AT.39740, *Google Search (Shopping)*, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf (accessed 29 February 2024). The relevant press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784 (accessed 29 February 2024) and a summary of the decision has been published in the Official Journal of the EU, 12 January 2018, C 9/11. See, *inter alia*, comments on this case by K. BANIA, *The European Commission's decision in Google Search*, in B. LUNDQVIST, M.S. GAL (eds.), *Competition Law for the Digital Economy*, cit., 264-301; B. MÄIHÄNIEMI, *op. cit.*, pp.110-272.

[50] EUROPEAN COMMISSION, decision 18 July 2018, case AT.40099, *Google Android*, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf (accessed 29 February 2024). The relevant press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 (accessed 29 February 2024) and a summary of the decision has been published in the Official Journal of the EU, 28 November 2019, C 402/19.

[51] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), published on the OJ of the EU 12 October 2022, L 265/1.

not well equipped, in the initial stage, to face the incipient challenge posed by digital markets, in which the price dimension constitutes a much less important aspect than in traditional markets, in favour of other parameters, such as quality. However, recently the European Commission plainly stressed that the European version of the consumer welfare standard *pertains not only to price reduction, but also to quality and innovation*.[52] It is exactly this different view of the consumer welfare standard that differentiated the European context from the American one. On this, an essential role was played by the Court of Justice, that, even when (before Commissioner Vestager took office) the Commission was probably excessively 'fascinated' by the Chicago wind, kept the roots of EU competition law safe and anchored to the concept of protecting the markets' competitive structure. In case the Court of Justice would not have acted so wisely, but – as its U.S. counterpart did – would have affirmed that Article 101 and 102 TFEU have been enacted 'as consumer welfare prescriptions', it is possible that we could have assisted also on this side of the Atlantic Ocean to a decrease in the enforcement of competition rules. However, it is worth underlining that even in the years during which the interest for the consumer welfare standard was at its peak, the Commission never stopped to bring significant competition law cases, and the 'Atlantic shift' between the behaviour towards Microsoft constitutes the best example. If also the European Commission would not have kept – maybe also under the stable influence of the Court of Justice – the right direction of EU competition provisions, cases such as *Google Shopping* or *Google Android* would not have been investigated. Of course, much more could have been done, and, for instance, a different decision in *Facebook/WhatsApp* could have led to a completely different scenario in the social network and internet-based messaging markets, making superfluous subsequent investigations like the case brought against Facebook by the German Bundeskartellamt.[53] Conversely, if the *Microsoft* case would not have been conducted and decided in such a decisive manner, it is possible – as anticipated – that the whole digital markets landscape would be even worse, with the sole Microsoft dominating almost all sectors.

An analogous consideration can be made for the *Google Shopping*[54] and *Google Android*[55] decisions issued by the General Court and by the *Facebook* decision taken by

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[52] EUROPEAN COMMISSION, *Competition Policy in Support of Europe's Green Ambition*, Competition policy brief 2021-01, September 2021, 5-6, available at https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF (accessed 29 February 2024).

[53] FACEBOOK BUNDESKARTELLAMT, decision 6 February 2019, case B6-22/16, *Facebook*. The decision is available in English at *https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf;jsessionid=58A8D2259D8362F34C21EB0870B963CA.2_cid508?__blob=publicationFile&v=5* (accessed 29 February 2024). An English summary of the decision is available at *https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4* (accessed 29 February 2024).

[54] EU GENERAL COURT, decision 10 November 2021, case T-612/17, *Google and Alphabet v. Commission (Google Shopping)*. The relevant press release is available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf (accessed 29 February 2024).

[55] EU GENERAL COURT, decision 14 September 2022, case T-604/18, *Google LLC and Alphabet, Inc. v. Commission (Google Android)*. The relevant press release is available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-09/cp220147en.pdf (accessed 29 February 2024).

the Court of Justice.[56] A different outcome of these judgements could have had a huge impact on the enforcement of competition rules vis-à-vis tech giants, and provoked a setback in the innovative and resolute approach adopted by the European Commission and certain national competition Authorities in the digital markets domain. In particular, a divergent response by the Court of Justice in the preliminary ruling raised in the context of the German *Facebook* case would have completely discarded the complementary enforcement approach of competition and data protection rules inaugurated by the German Bundeskartellamt and that it is seen as particularly relevant and effective with regard to the tech giants' data exploitative business models.

However, the true *dystopia* that could have characterised the recent evolution of EU competition law would have been not having experienced the determined guidance impressed by Commissioner Vestager during her two mandates. Under her tenure, the Commission adopted the necessary policy shift that was needed to challenge the emerging tech giants, and this can be seen by the mentioned decisions involving Google, but also by the proposal for the then enacted DMA. For sure, without these proceedings and the adoption of the DMA, the digital gatekeepers would feel much freer to infringe competition rules, with all the related negative consequences. The European Commission represents without doubt, nowadays, the strongest bastion for an equilibrated protection of competition. And this was undoubtedly possible by the reliance on stable and well rooted policy values such as those guiding the action of the European Union, like the *highly competitive social market economy* envisaged by Article 3, Paragraph 3, of the Treaty on the European Union (TEU). It is for sure on these bases that the EU competition model represents a highly mature and reliable one, and an example of how similar rules, such as Article 101 and 102 TFEU and Sections 1 and 2 of the Sherman Act, might reach different outcomes because of the interactions among the various formants and the influences of cryptotypes.

4. CONCLUSION: DYSTOPIAN VISIONS FOR A BETTER REALITY

The purpose of the present article is not limited at exploring the possible *dystopian* evolutions of competition law in the U.S. and in the EU for the pure aim of variously mixing formants and imagining different and alternative paths in legal history. This exercise could have a much more important result: Through the breakdown of the single events and demarcation points that have characterised the history of competition law, it is possible to understand which evolutions of this subject were worth it and which ones did not provide positive outcomes, or anyway the results they were expected to bring. This means understanding the history and its evolution, in order to re-compose the pieces of the puzzle at the scope of learning from the past in order to implement better solutions in the present and for the future.[57] In a nutshell, these *dystopian visions* can prove particularly important for the purpose of building *a better reality*.

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[56] ECJ, decision 4 July 2023, case C-252/21, *Meta Platforms Inc., Meta Platforms Ireland Ltd and Facebook Deutschland GmbH v. Bundeskartellamt (Facebook)*. The relevant press release is available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-07/cp230113en.pdf (accessed 29 February 2024).

[57] G. ROSENFELD, *Why Do We Ask "What If?" Reflections on the Function of Alternate History*, in History and Theory, 41, 4, 2002, 90.

Therefore, what we can extract from these alternative legal/historical reconstructions for the purpose of improving competition law systems?

The first issue that is worth taking into consideration from the reconstructions provided is the aim of antitrust provisions when they were firs enacted in the Sherman Act: Containing excessive economic power in the market; all the other by-products, in the already quoted words of the Supreme Court in *Trans-Missouri*, *result therefrom*. In this lies the foundation of the Sherman Act as *the Magna Charta of Free Enterprise*. What is of particular interest is also that such an approach is not at all far from the Ordoliberal roots of EU competition law,[58] with the concept of *economic constitution*[59] in which competition law plays a prominent role especially for the regulation of *private power in a free society*.[60] This parallelism delineates a common ideal and policy matrix between the two main competition law systems in the world and this constatation can lead to further reflections.

An important observation might be that recently competition law has often been seen as a 'technical' subject, as a niche field, as something that has regard to big companies and impacts the individuals as 'consumers', but not as 'citizens'.[61] This approach is evidently a by-product of the Chicago School ideas, with the 'more economic approach' and a decreased interest in the structural element of competition. Anyhow, the advent of tech giants reawakened the need to think out of the Chicagoans schemes and, as we pointed out, showed in all its importance how market power is not something that impacts only the market itself and consumers, but also the society and the citizens living therein.

Therefore, the rediscovered interest for the 'social' dimension of competition law (competition law and income inequalities,[62] competition law and democracy,[63] competition law and social regulation,[64] competition law and the social contract[65]) is something that must be welcomed and for sure can be justified by a rethinking of the events that characterised the evolution of this subject. In fact, competition law cannot be a detached field of law (and economics) just for some expert, but it is a subject that impacts the everyday life of people much more than what it can appear: If in the U.S. the Supreme Court compared antitrust law to the Bill of Rights for the protection of economic freedom, its societal importance is clear. The same can be said for the EU, where the *competitive* social market economy is the model that informs all the European market (and society) construction. Competition also impacts people as workers and entrepreneurs, because it can provide better conditions for employment or for starting an

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[58] C. OSTI, *op. cit.*, pp. 238-241; D. J. GERBER, *op. cit.*, pp. 232-265.

[59] D. J. GERBER, *op. cit.,* pp. 245-246, 255-256.

[60] F. BÖHM, *Die Forschungs und Lehrgemeinschaft zwischen Juristen und Volkswirten an der Universität Freiburg in den dreissiger und vierziger Jahren des 20. Jahrhunderts*, in E. MESTMÄCKER (ed.), *Franz Böhm – Reden und Schriften*, Zurich, 1960, p. 162, quoted by D.J. GERBER, *Law and Competition in Twentieth Century Europe*, cit., 235.

[61] About the vision of the citizen as a consumer it is worth mentioning C. SALVI, *Capitalismo e diritto civile*, Bologna, 2015, pp. 184-189.

[62] A. EZRACHI, A. ZAC, C. DECKER, *op. cit.*

[63] K. J. CSERES, *EU Competition Law and Democracy in the Shadow of Rule of Law Backsliding*, in C. M. COLOMBO, K. WRIGHT, M. ELIANTONIO (Eds.), *The Evolving Governance of EU Competition Law in a Time of Disruptions*, Oxford, 2024, pp. 19-44.

[64] I. LIANOS, *Competition law as a form of social regulation*, in The Antitrust Bulletin, 65, 2020, pp. 3 ff.

[65] M. S. GAL, *The Social Contract at the Basis of Competition Law. Should We Recalibrate Competition Law to Limit Inequality?*, in D. GERARD, I. LIANOS (eds.), *Reconciling Efficiency and Equity. A Global Challenge for Competition Policy*, Cambridge, 2019, p. 88.

economic activity. Moreover, on this point it is worth recalling the shift from the pre-Chicago approach, summarised in the attention of Louis Brandeis or Learned Hand in the small entrepreneurs, to the Chicago-oriented gospel that competition law has not to protect them. From a pure ideal or scholar viewpoint this approach can be deemed correct, but in reality here lies one of the major backdrops of the recent approach to competition law, that we re-discovered because of the challenged posed by digital gatekeepers: It is true that competition law has not to protect small enterprises, but it is also true that competition law has to guarantee the contestability of markets, in other words market entry.[66] This, in practical terms, means guaranteeing to new comers the possibility to establish an economic activity also in a market where an important player is active and also the opportunity to expand its business without being acquired by the incumbent at the first sign of success (the acquisition of WhatsApp and Instagram by Facebook is telling on this purpose). In addition, competition determines the price of all the products that we purchase on a daily basis, and therefore it shapes our lives: For the sake of exemplifying, without competition in the airline market, we would not be able to travel for very cheap prices, and flying would have remained an 'elite' service, for few, whilst nowadays it is something accessible to almost each individual. The same can be applied to a multitude of other fields, and this shows how competition is, intrinsically, an instrument of equality, social fairness and, in last instance, of democracy.

Therefore, what results, is that competition law is an essential part of our societies' constitutional structure, as, quoting Brandeis, *we can either have democracy in this country [the U.S.] or we can have great wealth concentrated in the hands of a few, but we can't have both*.[67] The regulation of private power, the prevention of its excess, is fundamental for the preservation of healthy and functioning democratic processes and institutions.

Anyhow, the last reflection is on the enforceability of competition rules, especially with regard to digital markets. It is indeed well known, especially thanks to the works of Bobbio, that a good legal provision does not automatically translate in a functioning rule, since it needs to be socially accepted and effectively enforced.[68] The new set of rules, such as the DMA, are for sure positive additions to the competition law's toolbox (or, regarding the DMA, it is probably better to discuss about 'regulation of competition'[69]), but it is essential to enact rules that can effectively lead to the expected result. Of course, it is too early to express a judgement on the DMA's effectiveness, but recently the so designated digital gatekeepers have started proposing us two kinds of subscription to their services: One for free (or in exchange of the usual nominal price), but with advertisements (which, as it is known, they constitute the core of their business

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[66] E.M. FOX, *Competition Policy at the Intersection of Equity and Efficiency*, in D. GERARD, I. LIANOS (eds.), *op. cit.*, p. 442.

[67] L. D. BRANDEIS, quoted by C. PAZZANESE, *The costs of inequality: Increasingly, it's the rich and the rest*, in The Harvard Gazette, 8 February 2016, available at https://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality-increasingly-its-the-rich-and-the-rest/ (accessed 29 February 2024); W. M. COLE, *Poor and powerless: Economic and political inequality in cross-national perspective*, *1981-2011*, in International Sociology, 2018, 33, 3, p. 357.

[68] N. BOBBIO, *Teoria generale del diritto*, Torino, 1993, pp. 23-31.

[69] A. PILETTA MASSARO, *The Rising Market Power Issue and the Need to Regulate Competition: A Comparative Perspective Between the European Union, Germany, and Italy*, in Concorrenza e Mercato, 2022, 29, pp. 13 ff.

model[70]), and another which costs more, but without advertisements. This choice is their response to the DMA and, unfortunately, it seems in line with the new Regulation, but if just this is enough to circumnavigate the mighty structure of the DMA, it seems that much ado was done for nothing. In fact, will consumers prefer to pay more or to see one minute of advertisement (in many cases without understanding all the implications of behavioural advertising, since not all citizens are expert competition lawyers or economists) for a much lower price? The answer appears quite simple to be provided and, moreover, it is evident how the companies, in a peculiar form of passing-on, discharged on consumers the price to be paid for the implementation of the DMA.[71] Anyhow, the 'battle' on this field is just started and it will for sure take the stage of the competition law debate for the years to come. However, a positive conclusion can be drawn: The *dystopian* storm brought by the advent of the Chicago School appear to have passed and a renewed interest in the (correct) social dimension of competition law flourished, providing us with the hope to have learnt from all the *dystopian* visions examined the right tools for building a better reality and future.

[70] See, *inter alia*, M. E. STUCKE, A. EZRACHI, *Competition Overdose. How Free Market Mythology Transformed Us from Citizen Kings to Market Servants*, New York, 2020, pp. 192-224.

[71] A. PILETTA MASSARO, *The Legitimacy of the Complementary Application of Competition and Data Protection Provisions: The Clarifications of the Court of Justice in the Facebook Judgement*, in Međunarodni Pravni Odnosi I Pravda, Zbornik Radova 36. Susreta Kopaoničke Škole Prirodnog Prava – Slobodan Perović, 2023, III, p. 450.

The construction of alternative legal comparisons. For a methodology of counterfactual comparative law

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This paper proposes a methodology for conducting alternative legal comparisons within the context of legal history. The article posits that the combination of alternate history and law is not only a dystopian experiment but also a scientific one, given that not everything in the historical discourse of law can be reduced to causal necessity. New methodological approaches are proposed to explore the complexity of modern legal systems, using alternate history as a tool to identify constant and variable elements in the process of legal formation.

Questo contributo propone una riflessione metodologica per condurre una comparazione alternativa nel contesto della storia del diritto. L'articolo sostiene che la combinazione di una storia alternativa e diritto non è solo un esperimento distopico, ma anche uno scientifico, in quanto non tutto nel discorso storico del diritto può essere ridotto a necessità causali. Vengono quindi proposti nuovi approcci metodologici per esplorare la complessità dei sistemi giuridici moderni, utilizzando la storia alternativa come strumento per identificare elementi costanti e variabili nel processo di formazione del diritto.

1. INTRODUCTION. A FRIEND AND A WORLD WITHOUT THE CORPUS IURIS CIVILIS

I happened to discuss with a colleague my fascination for alternate history and the feasibility of its application to legal studies. At that time, several colleagues in my office were involved in research pertaining to Roman law, and ancient Rome inevitably pervaded our daily working life. Thus, not surprisingly, my friend and colleague noted that, as far as Roman law is concerned, the most obvious alternate history would concern the elimination of Justinian's codification, i.e. the Corpus Iuris Civilis, from the Western Legal Tradition.

It had not been my specific intention to delve into a topic outside my fields of proper expertise, but as I questioned the feasibility of such elimination from history, I realized that the main issue I was interested in was not a substantial, but rather a methodological one.

Combining alternate history with law is not only a dystopian experiment, but also a thoroughly scientific one. The apparent escape from reality implied in such combination is, indeed, the realization than not everything in the historical discourse of law may be reduced to causal necessity[1].

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[1] I. VENZKE, *What if? Counterfactual (Hi)Stories of International Law*, in Asian Journal of International Law, 2018, 8, pp. 403-431.

Traditionally, regardless of its ethical and political orientation, law very rarely escapes rational impetus of the Hegelian philosophy of history, to the point that laws may either be regarded as truthful due to their inner rationality or be perceived as rational due to their entrenchment in reality[2].

However, historical accidents question the very possibility to depict law in history as a systemic process, governed by traceable trends. They argue instead for the existence of law as a «ever-changing product» of events and collisions that simply occur[3]. Such circumstances inevitably demand a creative effort which on the one hand detects variations and diversities in the history of legal discourses and, on the other hand, conceives legal history in comparison in comparison with its alternatives that never came to be. In doing so, it is possible to identify constant, dominant and recessive elements in the making of law. As Rodolfo Sacco pointed out, diversity and variation belong to the real dimension of the law, and lawyers should feel the ambition to «know what is real not only making the inventory of what exists, but also defining what could have existed, what could exist and what could come to be»[4].

Once one has decided that alternative history may be functional to the expansion of the field of exploration of legal realities, the great question is how to conduct the exploration. In other words, how to construct alternative legal comparisons?

An existing and interesting experiment focuses on punctual turning points in the history of international law, i.e. judicial decisions from the international court of justice[5]. Indeed, that of the court is an environment which very easily adapts to the style of alternate histories, especially in systems, such as the U.S. one, where judges are nominated for life and in the light of political alignment with the current presidency.

An eminently methodological probe, however, needs a broader scope, since it aims at proposing a blueprint that may be ideally followed in order to reflect upon any alternative legal history. The replacement of a judge with another is just one of the turning points one can imagine. Alas, how should a turning point be defined, chosen or selected?

By questioning the inevitability of historical legal processes, this paper seeks to put forward some potential ideas for new methodological approaches to explore the complexity of modern legal systems.

At first glance, the task could seem gargantuan. Comparative law, probably much more than any other field of research, has been injected with generous doses of realism over the centuries. The quest for the real forces pulling together legal notions, practices and traditions has been driving the comparative efforts of legal scholars for more than a century and has greatly benefited from equally reality-oriented social sciences such as sociology, anthropology or economics[6]. Depictions of legal families have been inspired by historical and scientific settings favoring globalization or, alternatively, nationalism and even racism[7]. Functionalist and structural perspectives, albeit from different viewpoints, all strove to focus on the real

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[2] G.W.F. HEGEL, *Lectures on the Philosophy of History* (translated by J. Sibree), Covent Garden-New York, 1894.

[3] J.F. WITT, *Contingency, Immanence, and Inevitability in the Law of Accidents*, in Journal of Tort Law, 2007, 1, 2, pp. 1-41.

[4] R. SACCO, *La diversità nel diritto (a proposito dei problemi di unificazione) Parte I. Diversità, variazione, diritto*, in Rivista di diritto civile, 2000, 1, , pp.10015 ff.

[5] I. VENZKE, *op. cit.*.

[6] M. SIEMS, *Comparative Law,* Cambridge, 2022, pp. 143 ff. and 174 ff. U. KISCHEL, *Comparative Law*, Oxford, 2021, pp. 112 ff. and 152 ff.; A. SOMMA, *Introduzione al diritto comparato*, Turin, 2019; M. SIEMS, *The Taxonomy of Interdisciplinary Legal Research*, in Journal of Commonwealth and Legal Education, 2009, 7, 2009, pp. 5 ff.

[7] M. PARGENDLER, *The Rise and Decline of Legal Families*, in The American Journal of Comparative Law, 2012, 60, pp.1043-1074.

components of legal ensembles. What was outside the domain of reality was, simply put, not comparable.

At the same time, however, comparative law has also proved to be able to free itself from dogmatic constraints much better than other legal subjects. Its capability of overcoming conceptual barriers and understanding the contextual elements of the law, if leading to a degree of cultural relativism not well-liked by all[8], it also provides the most effective tools to imagine how single changes in history could have affected the overall development of entire legal orders. The enhancement of theories on legal pluralism, empowered by legal anthropology, provides a picture of legal formants often so complex that its logic is almost inherently fuzzy to the human mind[9]. Furthermore, the increasingly important geopolitical outlook on comparative law favors a vision of legal evolution as a confrontation among potentially domineering forces, as such filled with turning points[10]. What if those turning points could be framed within a different logic, interested in outlining alternate paths for legal change, both in diachronicity and synchronicity?

Lastly, counterfactual reasoning as a psychological process is inherently comparative. In everyone's daily life, wondering about sliding doors means comparing, with one's own baggage of emotions, morals and ideas, real choices with their parallel, alternative ones[11]. Transposing this approach to law's domain brings rules into an arena of creative forces, among which the jurist is called to single out not only mere turning points, but also constant and variable elements of legal discourses. In other words, the jurist, as the real protagonist of law's tale, is called to conceive a new methodology to put legal systems in connection, rooted in counterfactual reasoning and focused on alternate visions of what law could have been or could be in the future.

2. COMPARATIVE LAW AND CONTINGENCY

The relation between law and contingency, when meant as an issue to be explored, inevitably raises almost overwhelming questions which have been and still are addressed by philosophers well before than comparative lawyers. A philosophical probe into the notion of contingency is not, however, the topic of this article. However, even a purely comparative effort must necessarily rely on a philosophical premise which, therefore, cannot be overlooked, i.e. the fact that events affecting the development of legal systems all over the world were, at the exact moment of their occurrence, but one of the many rationally feasible possibilities previously existing in potential[12]. Historically speaking, the methodological image of legal system as an ensemble of concepts logically connected not only pertains solely to the "Western" legal tradition, but is also a product of the philosophical rationalism and the bourgeois revolutions occurred in Europe since the seventeenth century. It is known that Roman law, as originally

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[8] U. KISCHEL, *op. cit.*, pp. 39 ff.

[9] See, also for further references, W. MENSKI, *Comparative law in a global context*, Cambridge, 2005, pp. 82 ff.

[10] M. BUSSANI, *Il diritto dell'occidente. Geopolitica delle regole globali*, Torino, 2010; E. CAVANAGH, *Empire and Legal Thought*, Leiden-Boston-Paderborn-Singapore-Beijing, 2020; S. POTTS, *Law as Geopolitics: Judicial Territory, Transnational Economic Governance, and American Power*, in Annals of the American Associations of Geographers, 2020, 110, 4, pp. 1192-1207; I. CASTELLUCCI, *Il diritto nel mondo dei molti "imperi"*, in Eurasia. Rivista di studi geopolitici, 2011, 3, pp. 103-122; A. SOMMA, *La geografia dei corpi politici. Classificazione e genealogie tra diritto privato comparato, diritto pubblico comparato e ortodossia neoliberale*, in Diritto pubblico comparato ed europeo, 2017, 4, pp. 1217-1250.

[11] N.J. ROESE, *Counterfactual thinking*, in *Psychological Bulletin*, 1997, 121, 1, pp. 133-148.

[12] N. LUHMANN, *Kontingenz und Recht*, Berlin, 2013, pp. 32–45.

shaped by its undisputed protagonists - the jurists - responded to contingent necessities, tackled by the *regula iuris* as a case-driven legal product[13]. It is no wonder that the renowned Italian jurist Aldo Schiavone has identified the roots of the modern "Roman-Germanic" legal family in the bourgeois appraisal of private Roman law, thus not even remotely as a genuine outcome of legal science in ancient Rome[14].

In Asian (e.g. Chinese, Indian or Japanese) and African legal traditions, the dialectic connection between relatively set systems of beliefs (from Confucianism to Hinduism and Buddhism) and the absence of a codified notion of general and abstract legal rules did not discount the role of law as mistakenly believed by past scholars[15], but it certainly made the relation between rules and legal systems more fuzzy, as well as open to flexible changes[16]. Reasoning in terms of macro-classifications, one might therefore assume, not without merit, that: a) the notion of legal system as a deterministic ensemble of logically connected rules is recessive in space and time; b) where such systems were indeed transplanted, their implementation occurred as a superimposition brought by historical circumstances, be they revolutions or colonial wars. Obviously, comparative law knows that legal models may circulate due to sheer force, e.g. due to imposed colonial or para-colonial domination[17]. However, once again, is such domination something more than a mere contingency due to the outcome of military confrontation among colonial powers?

The first logical premise for a theory of counterfactual comparative law is to assume contingency as the driving force of legal history, not merely as an element countering deterministic and abstract rules, but as the main cause of legal developments. In doing so, the theoretical admissibility of alternate paths would be as logic as real events, only projected through a different time sequence which is neither past nor present, but parallel[18]. To some extent, a contingent outlook upon law expresses a principle of uncertainty in the knowledge of legal history as opposed to legal determinism, thus forcing lawyers to confront their own incapability to infer precise causal connections from the mere observation of legal events[19]. At the same time, however, it is an outlook pushing lawyers to engage in production of legal hypothesis. Elaborating parallel legal histories by altering contingent elements becomes, from such viewpoint, a scientific tool to identify critical, constant and variable elements of legal discourses not only in past or present, but also - potentially - in future changes.

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[13] B. SANTALUCIA, *«Regulae iuris»*, in Labeo, 1974, 20, pp. 259 ff.; V. GIUFFRÈ, *Regulae" e metodi della "scientia iuris"*, in ID., *Divagazioni intorno al diritto romano*, Napoli, 2014, pp. 388 ff.; C. MASI DORIA, *Variazioni in tema di 'regulae iuris'*, in VV. AA., *Regulae iuris. Ipotesi di lavoro tra storia e teoria del diritto*, Napoli, 2016, pp. 1 ff.

[14] A. SCHIAVONE, *Alle origini del diritto borghese. Hegel contro Savigny*, Roma-Bari, 1984.

[15] R. DAVID, *Les Grands systèmes de droit contemporains*, Paris, 1964.

[16] W. MENSKI, *op. cit.*

[17] This kind of imposed legal transplant pattern is often referred to as "legal imperialism". On the topic see M. SIEMS, *op. cit.*, pp. 93-94; M. GRAZIADEI, *Comparative Law as the Study of Transplants and Receptions*, in M. REIMANN, R. ZIMMERMANN, *The Oxford Handbook of Comparative Law*, Oxford, 2006, pp. 442 ff. Comparative law, by reasoning ex post and on the basis of what has already happened, aims at outlining the logic connections between existing rules and their corresponding legal traditions and cultural background. Nevertheless, the ever-doubtful lawyer could wonder to what extent such connections were inevitable and to what extent they were instead put in place by the contingent action of historically relevant individuals. The experience of post-colonial countries provides a useful example: was there anything logic connecting African chthonic traditions to French civilian categories in a more convincing way than to German legal thinking?

[18] On contingency and the very notions of time and space see S. HAWKING, *A Brief History of Time*, New York, 1998.

[19] On the principle of uncertainty as a philosophical and physical argument, especially under the framework of Heisenberg's formulation, see J. HILGEVOORD, J. UFFNIK, *The Uncertainty Principle*, in E.D. ZALTA (ed.), *Stanford Encyclopedia of Philosophy*, 2016.

2.1. *INDIVIDUAL VS. COLLECTIVE FORCES IN LEGAL DEVELOPMENT*

Which are the contingent elements in the development of legal systems and legal traditions? A theory of comparative embracing contingency as a driving principle should begin by raising this issue.

Law, conceived as a cultural phenomenon, obviously implies the interaction of forces of several kinds - in terms of society, economy, religion, etc. As such, its evolutionary discourse justifiably fits into a notion of people's history rather than a romantic hero-driven one[20]. Nevertheless, as law places itself in the hands of men, it is inevitably drawn towards their own interpretations and ethical systems of beliefs. Individual morals are necessarily involved in a dialectic relation with the sets of values embraced by the social institutions they belong to, and it could be argued that mutual influences may be exchanged among these two different cultural layers[21]. Such argument is immediately visualized in the reference to singular actors of the legal discourse and, above all, judges. Studies focusing on the psychological connection between judges' and juries' personalities and the decisions they render are well-known[22]. However, if one frames such analysis within the macro-context of the evolution of legal systems, one may put forward interesting arguments. Depending on the value a legal system assigns to judicial precedents, judges' decisions shape the evolution of legal concepts and their interpretation. Even outside the scope of legal precedents, in legal systems adopting the so-called incidental constitutional review, constitutional courts are called into action by tribunal judges' preliminary questions. A somewhat comparable mechanism is at the basis of the interpretative function of the Court of Justice of the European Union, through the system of preliminary references[23].

The legal scholar may very focus on the outcome of such procedure, i.e. the final decision or the response of the CJEU or of a national constitutional court, but its beginning should not be overlooked: each of the possible results rests on the premise that a judge, in the light of its individual appreciation, has deemed a legal issue worthy of constitutional review or of scrutiny by the CJEU. The elements concurring to such evaluation - even if one limits to the more professional reasons - are uncountable: the innovative/conservative type of legal education received by the judge; the knowledge of the specific orientation of national constitutional law/European law on a certain matter;

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[20] On the role of hero and history and its representation in historiography see T. CARLYLE, *On heroes, hero-worship, & the heroic in history*, New Haven, 2013 (1st ed. 1841); S. HOOK, *The Hero in History: A Study in Limitation and Possibility* Milton Park, 1991; N. HARTER, *Between Great Men and Leadership: William James on the Importance of Individuals*, in Journal of Leadership Education, 2003, 2, 1, pp. 3-12; B.A. SPECTOR, *Carlyle, Freud, and the Great Man Theory more fully considered*, in Leadership, 2015, 12, 2, pp. 250-260.

[21] T.M. SCANLON, *Individual Morality and the Morality of Institutions*, in Filozofija I drustvo, 2016, XXVII, 1, pp. 3-19; J. RAZ, *The authority of law. Essays on law and morality*, Oxford, 1979.

[22] T.A. MARONEY, *Judicial Temperament, Explained*, in *Judicature*, 2021, 105, 2, pp. 49-57; D.E. KLEIN, G. MITCHELL, *The psychology of judicial decision making*, New York, 2010; C.T. KULIK, E.L. PERRY, M.B. PEPPER, *Here comes the judge: The influence of judge personal characteristics on federal sexual harassment case outcomes*, in Law and Human Behavior, 2003, 27, pp. 69-97. Similar assessments could be carried out with regard to lawyers, as done in R.S. REDMOUNT, *Attorney Personalities and some Psychological Aspects of Legal Consultation*, in University of Pennsylvania Law Review, 1961, 109, pp. 972-990.

[23] Art. 267 of the Treaty on the Functioning of the European Union

the judge's willingness to protect certain types of interests or certain "weaker" parties, and so on[24].

All these elements, obviously, are not declared in the judicial orders and decisions, nor are traceable in the mechanisms of judicial dialogue among courts. They may nevertheless be regarded as specifically targeted cryptotypes which contribute to the development of the legal order and which are, ultimately, also depending on contingency[25]. A different judge adjudicating the same dispute might very well lead to a different outcome[26].

This emphasis on the individuals' role in shaping the law does not want to overlook or underestimate the relevance of underlying forces in the social relations creating law, nor does it want to outright deny that even individuals' conscience is often framed within a common cultural environment, or a *volkgeist*, orienting it[27]. Alas, a theory of contingency in comparative law should criticize views keen on fully absorbing the role of individuals into those of peoples, meant as relatively uniform ensembles exerting spiritual forces in history. As such, it cannot but partially reject Hegelian or Marxist views of legal development, as they limit the object of comparisons by arguing for fixed laws in history and focusing on the universal (in Hegel) or collective (in Marx) creation in law as an epiphany of the human being[28].

2.2. *QUESTIONING LEGAL TRADITIONS*

The re-evaluation of the balance between individual and collective forces in legal history should move from the deconstruction and reconstruction of the notion of legal tradition as proposed by different theories. The common discourse of legal history tends to portrait tradition as true, in the sense that it reflects the aforementioned underlying forces which justify distinctions among traditions and shape their notions of rule and their ethical orientation. However, one should always keep in mind, tradition is not immune to manipulation. History provides useful examples of political movements, leaders and scholars which, for several different and contingent purposes, shaped the

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[24] The importance of such elements is further proved by the relevance of judicial training, which is managed by national schools and universities, often through projects financed by national governments and the European Union. The aim of these projects is that of promoting on the one hand the dialogue among judges working in different environments and even different countries (for instance within the EU) and, on the other hand, the judges' awareness of certain relevant matters, topics, foreign or European judicial decisions and so on. One of the most recent projects in the field of judicial training has been the FRIcore project (https://www.fricore.eu/) running from 2019 to 2022, co-financed by the European Commission and coordinated by the University of Trento, in cooperation with several foreign universities as well as the Italian High School of the Judiciary (Scuola Superiore della Magistratura). On the topic see P. IAMICELI, *Effettività delle tutele e diritto europeo: il ruolo del giudice nel prisma della Carta dei diritti fondamentali*, in P. IAMICELI (ed), *Effettività delle tutele e diritto europeo. Un percorso di ricerca per e con la formazione giudiziaria*, Napoli, 2019, pp. 1 ff.

[25] On the notion of cryptotype see R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law*, in The American Journal of Comparative Law, 1991, 39, 2, pp. 343-401.

[26] In the aforementioned example, a more conservative or self-restraining judge assessing a troublesome legal rule, in terms of compliance with the national constitution or the European law, could at the very least delay an official pronunciation of those courts on the matter by avoiding a preliminary reference or an incidental constitutional review.

[27] F.C. VON SAVIGNY, *Of the Vocation of Our Age for Legislation and Jurisprudence* (translated by A. Hayward), London, 1831.

[28] G.W.F. HEGEL, *Lectures on the Philosophy of History*, cit.; K. MARX, F. ENGELS, *The German Ideology (1845-1846)*, in K. MARX, F. ENGELS, *Collected Works*, London, 1974.

interpretation of legal traditions. To the Western lawyer, the clearest example would be that of Roman law, whose role as logical foundation of European legal systems was repeatedly exploited, by Napoleon, by Savigny or by Mussolini, each one with a different goal in mind[29]. Today, to a slightly lesser extent, the Roman legal tradition is used in Chinese academic circles as a way to reaffirm the independence of Chinese law from common law models, which indeed played a considerable influence on Chinese commercial and economic law. The deep and insightful debate about the actual Roman influences on the modern Chinese civil code represent, from this perspective, the last stage of a legal discourse initiated by Soviet legal scholars which, after attempting and failing at implementing legal nihilism after the October revolution[30], returned to civilian categories to give a legal form to the New Economic Policy and, afterwards, to Stalinist planned economy[31].

If the anti-formalistic and anti-Romanist approach of early socialist legal thinking gradually acquiesced to the return of bourgeois categories, it means not only that Roman law displayed technical features useful to govern complex economies, but also that it had the capability of adapting, even from the moral point of view, to the contingent needs of different political environments.

From a broader perspective, even the place of Roman law as foundation of the Western legal tradition has been challenged[32]. It has been noted that the «"Western" tradition has been, in a sense, quite successful, because it manufactured a picture of legal history that is received as common sense, shaping an almost universal cultural status quo»[33]. The credibility of such picture may indeed be debated, especially considering that one could argue that the main features of classical Roman law had been in turn developed as the outcome of a multicultural process involving legal transplants from Greece, Egypt, Palestine, etc.[34]

Moving away from a Western-centered viewpoint, it would be equally interesting to question the extent to which the Confucian tradition has been remodeled, in the past few decades, to project a coherent image of Chinese legal development, emphasizing relational "harmony", flexibility of rules and, especially in the last decade, a strong integration between legal and ethical paradigms[35]. An image of continuity between the ancient Chinese culture and the political pillars of Chinese socialism is made explicit by

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[29] Z. JINGWEN, 比较法总论 (*General Theory of Comparative Law*), *Zhongguo Renmin Daxue Chubanshe*, Beijing, 2019, p. 43; P.G. MONATERI, *Black Gaius: A Quest for the Multicultural Origins of the "Western Legal Tradition"*, in Hastings Law Journal, 2000, 51, 3, pp. 481-555; A. SOMMA, *"Roma madre delle leggi". L'uso politico del diritto romano*, in Materiali per una storia della cultura giuridica, 2002, 1, pp. 153-181.

[30] G. AJANI, *Il modello post-socialista*, Torino, 2008, pp. 33-37; G. AJANI, *Diritto dell'Europa Orientale*, Torino, 1996, p. 130; H.J. BERMAN, *Commercial Contracts in Soviet Law*, in California Law Review, 1947, 35, 2, pp. 191-234; G. KNORR, *Die sowjetische Staatsrechtslehre im Spannungsverhältnis von Wissenschaft und Politik: Ein Literaturbericht über die seit 1917 in der UdSSR erschienenen Staats rechtslehrbücher*, in Archiv des öffentlichen Rechts, 1985, 110, 1, pp. 55-92; N. REICH, *Oktoberrevolution und Recht*, in Kritische Justiz, 1971, 4, 2, pp. 133-147.

[31] A. OSTROUKH, *Russian Society and its Civil Codes: A Long Way to Civilian Civil Law*, in Journal of Civil Law Studies, 2013, 6, 1, 2013, pp. 373-400; G. HAMZA, *Lo sviluppo e la codificazione del diritto privato e la tradizione giusromanistica in Russia e nell'Unione Sovietica*, in Diritto@Storia, 2013, 11; S. SCHIPANI, *Le vie dei codici civili e il codice civile cinese*, in G. SABATINO, M. TOMLINSON (eds), *Codification throughout time*, Napoli, 2022, pp. 131 ff.; A.G. GOJCHBARG, Хозяйственное право (*Economic Law*), Moscow-Petrograd, 1923.

[32] P.G. MONATERI, *op. cit.*

[33] *Ibidem*, p. 482

[34] *Ibidem*.; Z. JINGWEN, *op. cit.*, p. 43.

the Historic Resolution of the Chinese Communist Party of 2021, where communitarian values upheld by the guiding ideology are traced back to an alleged moral fiber of the Chinese nation, *vis-à-vis* the Western individualism, inevitably connected with neo-liberal political and economic models[36]. Traditions may therefore be manufactured to serve contingent needs of elites. The risk of manufacturing, however, is not the only challenge to the collective and deterministic view of legal tradition.

Tradition itself, furthermore, is an inherently open concept. It has been defined in several different fashions[37], but one of the most recent ones – that of Patrick Glenn – views tradition as information[38]. Information of course flows through time and intertwines with other information, thus conceiving necessarily pluralistic traditions. Information, however, is also captured and selected. Glenn points out that traditions are the result of the information which has been preserved and draws its authority from this process of capturing, selection and preservation[39].

Given such premises, if one focuses on the action of capturing and frames it within the inherently institutional connotation of the process of legal development, one may conclude that the selection of information to be preserved is to a great extent up to the people composing those social institutions empowered to manage information. How much information did scholars, shamans, tribe chiefs, mandarins, scribes, judges and kings decide to discard? Sometimes such information may be kept alive and even be resuscitated, to the point that legal revolutions often contain an element of appeal to a seemingly forgotten past[40]. Other times – most times, one could argue – discarded information is lost or becomes a recessive or an extraordinary element of a legal tradition, such as customs under the hierarchy of legal sources upheld by European codifiers after the French revolution sanctioned the legislature's rational primacy[41].

The previous considerations should prove that the existence of underlying collective forces of legal evolution does not, nor it can eliminate the role that contingent forces, also when channeled through individual choices, play in legal history.

2.3. *FEEDBACK LOOPS, DETERMINISM AND PROBABILITY. COMPARATIVE LAW AS A STOCHASTIC PROCESS*

Law, even when framed within an explicitly progressive discourse, inherently displays a motion at once circular and linear. Legal developments, as biological and

[35] M. ZHANG, *On Marxist Confucianism: The New Direction of China's Ideological Development in the 21st Century*, in International Journal of Philosophy, 2021, 9, 2, pp. 90-99; D.A. BELL, *Reconciling Socialism and Confucianism?: Reviving Tradition in China*, in Dissent, 2010, 57, 1, pp. 91-99.

[36] Resolution of the Central Committee of the Communist Party of China on the Major Achievements and Historical Experience of the Party over the Past Century (中共中央关于党的百年奋斗重大成就和历史经验的决议), issued on 11 November 2021. On the topic see G. SABATINO, *Comparare (con) la Cina. Prospettive e spunti a partire dalla nuova Risoluzione storica del Partito Comunista Cinese*, in Nomos, 2022, 2. See also C.A. SMITH, J. DENG, *The rise of New Confucianism and the return of spirituality to politics in mainland China*, in China Information, 2018, 00, 0, pp. 1-21.

[37] T. DUVE, *Legal traditions: A dialogue between comparative law and comparative legal history*, in Comparative Legal History, 2018, 6, 1, pp. 15-33

[38] P. GLENN, *Legal Traditions of the World*, Oxford, 2014; ID., *Doin' the Transsystemic: Legal Systems and Legal Traditions*, in *McGill Law Journal*, 50, 2005, 865-898.

[39] *Ibidem*.

[40] H.J. BERMAN, *Law and Revolution. The Formation of the Western Legal Tradition*, Cambridge, 1983, p. 15.

[41] R. SACCO, *Mute Law*, in The American Journal of Comparative Law, 1995, 43, pp. 455-459.

evolutionary ones, rely to a great extent on feedback loops[42]. From this perspective, connoting traits of legal traditions were built upon contingencies which were able to justify themselves and reinforce their own authority by perpetrating and showcasing their alleged rationality to the legal culture they referred to. Custom-based legal developments are a clear example of such processes: tribal marriage practices; ancient Roman *responsa*; English common laws; Chinese *li* (礼 - rite); constitutional conventions as known in several liberal-democracies, all are traits which were not born as structural but rather became structural as a result, on the one hand, of their practical feasibility and, on the other hand, on the explicit willingness of legal actors to adhere to them. The circular motion of legal feedback loops encompasses the possibility that the appropriate "feedback" may be provided not only by multilayered societal responses to legal change, but also by individual engagement by authoritative figures, such as a political leader, a renowned judge or a scholar. If one removes such engagement, how would the feedback be affected?

As change happens, contingencies may determine the orientation (negative or positive) of feedback loops and then, through the self-perpetration tendencies of legal institutions, accentuate the authority and systemic connotation of change. Let one think, for example, of a judge who, exercising all their authority within a judicial panel, strikes down a specific interpretation of an article of a civil code. The decision rendered due to the judge's specific involvement enters into the judicial system and, depending on the underlying legal order, exercises different degrees of authoritativeness upon lower judges. Not everyone may agree with that interpretation, but the inherent tendency towards inner coherence of the legal system will allow the development of a set of case law upholding a certain interpretive trend.

Hard-line supporters of legal determinism would, however, challenge this view with a reasonable counterargument. Institutional and structural perspectives on comparative law, they would argue, inevitably stress the importance of collective entities over individual choices and, indeed, confirm the idea that no change would happen if not for the implicit support of social forces interacting with each other. In the previous example, therefore, the change promoted by the individual judge would become the object of a feedback loop only because the legal culture of lower judges would allow for it to happen. Feedback loops would therefore clarify why certain legal changes happened in one system and not in another. It was, in other words, the cultural environment of American constitutionalism which paved the way for the judicial review and not the intentions of William Marbury. The conditions for the start of a positive feedback loop were all set and Marbury v. Madison was just the right occasion. Had it not happened, another occasion would have presented itself.

It appears, actually, quite brave to challenge such reasoning as a whole, strengthened by more than a century of development in historiography. At the same time, it is undoubtable that historical events, including legal events, are the product of so many causes which are objectively difficult for the human mind to classify, enumerate, isolate. The natural choice, from a methodological point of view, would be that of focusing on only one or several perspective, thus discussing the history of colonial discourses, of military tactics, of trade routes, of foreign policy, etc. Legal history and

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[42] On the role of feedback loops in human evolution see R. FOLEY, *Causes and Consequences in Human Evolution*, in The Journal of the Royal Anthropological Institute, 1995, 1, 1, pp. 67-86; J. DIAMOND, *Guns, Germs and Steel*, New York-London, 1999; B.J. CRESPI, *Vicious circles: positive feedback in major evolutionary and ecological transitions*, in TRENDS in ecology and evolution, 2004, 19, 12, pp. 627-633.

comparative law sometimes tend to do the same, thus accepting general overviews of background elements and then emphasizing a specific dimension of the legal development, as well proved by the studies in "Law and ...", regardless of the "other" subject chosen[43].

In a more dogmatic fashion, a specific viewpoint on legal development - say, the idea of law as a progression toward economic liberalism or as class struggles derived from production relations - such approaches deliberately limit the scope of action of legal change, by arguing for the necessary character of certain elements and not of others. Conversely, a more cautious perspective would not argue for the comprehensiveness of such approaches, but rather it would seek to provide additional points of view. However, as a result, when trying to combine the different perspectives, outlining the exact impact of every possible variable becomes a gargantuan task. The lawyer is then almost encouraged to operate a selection, deliberately neglecting certain perspectives of the legal system examined while focusing on other ones, implicitly rendering them more important.

In the light of such circumstance, one may want to raise a provocative question: given that it is not possible to hold in proper regard all the elements insisting upon a specific legal development (economic, political, philosophical, religious, technological, agrarian, climatic, geographic, infrastructural, commercial, relational, and so on), is it logically acceptable to consider some background elements of law as purely random - i.e. contingent - in order to prove the necessary or non-necessary character of other, core elements the lawyer wants to focus on?

The methodological hypothesis here is, in other words, an attempt at turning comparative law into a sort of stochastic process[44]. If one conceives legal developments as the outcome of a bundle of random variables - i.e. contingent background elements - it might also be possible to try to detect and isolate the constant traits of such developments or, in other words, the features of a given legal system which remain constant regardless of the continuous change in the variables[45].

To frame such argument within a hypothetical discourse of legal alternative history, one could elaborate a simple example: considering the rise of equity as a legal development of the common law system, what would happen to it if one of its background elements - say, the changing economic conditions of late medieval England[46] - were changed?

Again, let one take the French civil code as a legal development of the civil law system and eliminate from its background the existence of Pothier's *Traite des Obligations*, whose historical influence on French codification has been recognized

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[43] M. REIMANN, *Comparative law and neighboring disciplines*, in M. BUSSANI, U. MATTEI (eds.), *The Cambridge Companion to Comparative Law*, Cambridge, 2012, pp. 13-34.

[44] J.L. DOOB, *What is a Stochastic Process?*, in The American Mathematical Monthly, 1942, 49, 10, pp. 648-653.

[45] On the relation between legal development and changing variables (e.g. economic ones) see G.D. LIBECAP, *Economic Variables and the Development of the Law: The Case of Western Mineral Rights*, in The Journal of Economic History, 1978, 38, 2, pp. 338-362.

[46] C.E. BERTOLET, R. EPSTEIN (eds.), *Money, Commerce, and Economics in Late Medieval English Literature*, Cham, 2018.

since a long time ago[47]. To which extent, in this alternate universe, the content and style of the *Code Napoleon* would have changed?

To sum up, changing variables in a stochastic approach to legal development allows the lawyer to determine the admissibility, the extent and the probability of change. By projecting this approach to the future, it could also provide logical basis for the elaboration of model hypothesis concerning the consequences of a certain legal reform - conceived as a changing variable - over other branches of the legal system.

Indeed, while the applications of stochastic models have been widespread, no comprehensive attempt has been made to apply them in the legal field[48]. The aim of this paper is not to conduct such a complex and ambitious experiment, but rather to put forward a methodological hypothesis which could help visualizing on the one hand the relevance of contingency in law and, on the other hand, the logic behind alternative histories of the law.

3. THE METHODOLOGY OF COUNTERFACTUAL COMPARATIVE LAW: ISSUES AND PROPOSALS

If a counterfactual approach to legal comparison is logically feasible and even useful, how should one approach it?

Alternative history, as a literary genre, exists in two main different forms. The first one is that employed by the most relevant uchronic pieces and novels, such as The Man in the High Castle or Fatherland: in such cases, the Point of Divergence (hereinafter also mentioned as POD) from real history is the premise upon which the background setting of the main plot is built, and the characters of the story operate and develop in an alternate reality which is already established. Readers should be able, for their own entertainment, to detect the divergent paths of history implicit in the narration, but their role is otherwise quite passive, they are just invited to enjoy the tale[49].

Another approach to alternative history, albeit not neglectful of the entertaining aspects of the endeavour, embraces a more scientific approach and aims at establishing a historical narration which is logically coherent in all its steps, from the POD onwards. Whereas the first approach usually takes the literary form of a novel, the second one often wants to resemble a history book[50].

The logical premise guiding this second approach - the one this paper is more interested in - is simple but fundamental: while the choice of the divergence relies on a principle of contingency, the subsequent narration relies on the a principle of necessity[51]. Alternate history, in other words, must maintain its internal coherence and must derive from the POD sustainable consequences. What does this mean from a methodological perspective? The main obstacle seems to be the identification of a point of balance between contingency and causation. To embrace contingency only at the

[47] L. THEZARD, *De l'influence des travaux de Pothier et du chancelier D'Agusseau sur le droit civil moderne*, in Revue historique de droit français et étranger *(1855-1869)*, 1866, 12, pp. 229-281; J. GORDLEY, *Myths of the French Civil Code*, in The American Journal of Comparative Law, 1994, 42, 3, pp. 459-505.

[48] On applications of stochastic processes see P. DEL MORAL, S. PENEV (eds.), *Stochastic Processes. From Applications to Theory*, London, 2014; Z. SCHUSS, *Theory and Applications of Stochastic Processes*, Cham, 2010.

[49] K. SINGLES, *Alternate History. Playing with contingency and necessity*, Berlin-Boston, 2013.

[50] A monumental overview of both kinds of approaches to alternate history is found in the renowned internet forum AlternateHistory.com (https://forum.alternatehistory.com/forum/tags/alternate-history).

[51] K. SINGLES, *op. cit.*, p. 9.

beginning of one's scientific endeavor and then favor causality would mean, in part, to contradict the earlier statement about conceiving contingency as the driving force of legal history. On the other hand, to build an alternate legal histories purely on the juxtaposition of contingencies would create tales so divergent from existing rules to impair the methodological core of a counterfactual comparative law, i.e. the comparison of parallel and alternate histories under the background of the historical reality. The lawyer is therefore called to properly balance contingency and necessity during a methodological process which could be very well divided into different steps.

3.1. *THE CHOICE OF THE POINT OF DIVERGENCE*

The choice of the Point of Divergence is the most critical choice in the configuration of uchronic visions of the law, since it should express the stochastic fiber of the reasoning at its most. Such choice could also, depending on the lawyer's preference, be the only stochastic element of a comparative narration which, after the selection of the divergence, begins to follow once again a causal (albeit divergent from reality) path.

The POD is an event deviating reality. In legal history, such Point could concern in the first place plain historical events or circumstances, such as for instance, a defeat of William the Conqueror at the Battle of Hastings or a Confederate victory in the American civil war. Obviously, the subsequent analysis would focus on the legal consequences of these changes. Would a Confederate U.S. have preserved and perfected the legal regulation of slavery up to more modern times, as hypothesized by a famous mockumentary?[52]

On the other hand, divergences may focus on specifically legal events, i.e. events which are more easily and immediately associated with law and the structural traits of legal systems. For example, a different outcome in a landmark decision[53], or the elimination from history of a relevant legal treatise of compilation[54].

In both cases, the divergence leads the comparative lawyer to depart from traditional approaches to legal comparison, especially when entrenched in the research or fascination of commonalities[55]. A POD is, literally speaking, the creation of a difference and the subsequent comparison revolves around differences. Obviously, this does not mean that universalist or strictly functionalist perspectives are neglected. Indeed, the selection of a divergence could concern a historical development favoring legal unification - e.g. the realization of the Franco-Italian project of codification of the law of obligations in the 1920s[56] - thus analysing an alternate reality from a universalist point of view.

In the selection of a POD, counterfactual comparative law is in the first place attracted by the Pareto theory of causal developments[57]. Consequently, it might tend to focus on relatively few events and figures exerting influence over multiple legal

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[52] *C.S.A: The Confederate States of America (2004)*, written and directed by K. Wilmott.

[53] Let one think to a different outcome in the Earl of Oxford case; a different outcome of the Coke v. King James controversy; a different decision of the U.S. Supreme Court in *Plessy v. Ferguson*.

[54] Such as the cancellation from history of the Corpus Iuris Civilis, maybe because of a sudden death of Justinian (see § 4).

[55] M. SIEMS, *op. cit.*, pp. 35 ff.

[56] D. DEROUSSIN, *Le Projet de Code des obligations et des contrats franco-italien de 1927: chant du cygne de la culture juridique latine?*, in Clio@Themis, 2009, 2, S.G. VESEY-FITZGERALD, *The Franco-Italian Draft Code of Obligations, 1927*, in Journal of Comparative Legislation and International Law, 1932, 14, 1, pp. 1-19.

changes. Great jurists such as Quintus Mucius Scevola, Bartolus from Sassoferrato and Oliver Wendell Holmes, or political figures such as Justinian, Napoleon, Lenin and F.D. Roosevelt could obviously be the object of several and interesting points of divergence, touching upon multiple legal issues. The subjection of counterfactual analysis to Paretian principles does not, obviously, discount the possibility of investigating alternate fates for apparently minor figures or legal developments, but it surely implies a higher degree of carefulness in selecting the Point of Divergence. It is perfectly reasonable to investigate the potential repercussions of an earlier death of King Edward VII on British law, but it certainly is an event which most people would not associate with a legal revolution as they do with the Norman conquest of the British isles. In the second place, counterfactual comparative law must be to some extent necessarily combined with other methodologies which may all be usefully employed to select the divergence as well as to orient the subsequent comparisons. As contingency theories tend to view law as the result of multiple (and unforeseeable) components, structuralist approaches such as the theory of legal formants are particularly fit to be reinterpreted through counterfactuals. On the one hand, divergences could be created focusing on a specific formant, e.g. legislation (cancellation of a law/death of a legislator); case law (outcomes of landmark decisions/death or removal of a judge); doctrine (cancellation of a treaty/death of a jurist), etc.[58] On the other hand, the research could be aimed at measuring the incidence of a divergence not on the legal system as a whole, but on specific formants[59].

Other approaches to law, more influenced by anthropology, would use points of divergence in a different way. Comparisons interested in legal traditions or in legal cultures tend to identify connoting traits at the macro-level of a given legal environment. Subsequently, divergences should concern events or people able to exert an impact on the historical course of such traits. For instance, if one traces the introduction of abstract and systemic reasoning in classical Roman jurisprudence back to Quintus Mucius Scevola, a particularly interesting path of divergence would be the measurement of the incidence of those characteristics in case of an early death of said jurist, so that he could not have had the impact he had in our timeline[60].

Again, visions rooted in legal pluralism could conceive points of divergence impacting upon one or more competing legal orders within a determined environment and then focus the analysis on the relations among such orders under different circumstances. As comparative legal scholars know, the traditional - albeit slightly

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[57] The principle, which owes its name to Italian economist Vilfredo Pareto, famously states that for several phenomena as much as 80% of the consequences is due to 20% of the causes. The principle was at first elaborated to describe wealth distribution and inequality, but has then been applied to countless other situations. See, on the topic, V. PARETO, *Cours d'économie politique*, 2, Lausanne, 1897, pp. 304 ff.; J. RODD, *Pareto's law of income distribution, or the 80/20 rule*, in Journal of Philantropy and Marketing, 1996, 1, 1, pp. 77-89.

[58] On the notion of legal formants see R. SACCO, *op. cit.*

[59] Let one explain such argument with an example: if one chose the elimination of the Corpus Iuris Civilis as POD and wanted to investigate the consequences of this change for the Western legal tradition, they could approach the inquiry from at least two perspectives. In the first place, the uchronic analysis could focus on the reaction of the different legal formants to the POD. One could therefore wonder how would medieval legal doctrine have evolved without Justinian's compilation as point of reference. Would medieval legal schools have existed nonetheless? Which materials they would have used and reviewed? The point is further elaborated in § 4.

[60] On the importance of Quintus Mucius Scevola for the development of Roman legal science see J.L. FERRARY, A. SCHIAVONE, E. STOLFI, *Quintus Mucius Scevola. Opera*, Rome, 2018, pp. 29-56.

stereotypical - vision of the Chinese legal tradition revolves around the dialectic between *li* (often associated with Confucian legal thought[61]) and *fa*, associated with the Legalist philosophical school[62]. Indeed, it is also known that the historical role of Chinese Legalism owed much to its adoption as the leading doctrine of the Qin state, the one that, at the end of the Warring States Period, managed to unify the country[63]. If one chose as Point of Divergence of alternate legal history the Chinese unification by a different one of the Warring States (for instance, the powerful state of Zhao) a dramatic change in the historical role of Legalism would have most likely occurred. Other doctrines which in our timeline were eventually eclipsed by Legalism (for example, Mohism) would have probably survived at least for some time as "alternatives" to Confucianism and inspired future leaders. The great divide between *li* and *fa* would have been less great, and other concepts such as Mohist *jian ai* (兼爱 - universal love) would have guided the oscillatory tendencies of Chinese imperial attitudes[64].

In such example, the choice of the historical divergence directly affects the logical connections and oppositions among competing doctrines of government, changing their relevance and recognition in the history of a legal tradition. Similar experiments could be carried out with virtually every plural legal order, by choosing one or more points of divergence concerning events leading to the diffusion or affirmation of a legal culture[65].

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[61] Y. RONGGEN, 儒家法思想通论 (*General Introduction to Confucian Legal Thinking*), Beijing, 2018.

[62] See, also for further reference, J. CHEN, *Chinese Law: Context and Transformation*, Leiden, 2008, pp. 5 ff.; W. MENSKI, *op. cit.*, pp. 493 ff.

[63] H. SCHNEIDER, *An Introduction to Hanfei's Political Philosophy: The Way of the Ruler*, Newcastle upone Tyne, 2018; J. ESCARRA, *Le droit chinois*, Paris, 1936, pp. 31 ff.; M. GRANET, *La civilisation chinoise*, Paris, 1968, pp. 48 ff.

[64] On Mohist thought, see J. CHING, *Chinese religions. Themes in comparative religion*, London, 1993, pp. 66 ff.; W.W. CHU, *Jian ai and the Mohist attack of Early Confucianism*, in Philosophy Compass, 2013, 8, 5, pp. 425-437; S. DING, X. WU, *Interpretations of Mohism's "Impartial Love" in the Republic of China: A Comparative Approach to Confucianism and Mohism*, in Journal of Chinese Humanities, 2021, 7, 1-2, pp. 23-51. Incidentally, it is worth noting how the role of mohism in the development of the Chinese legal tradition is undergoing attempts at re-evaluation, albeit to a seemingly smaller extent than Confucianism, especially with regard to the emphasis placed by Mohism on a "modern" notion of good governance, free from the boundaries of family hierarchies and thus more in line with the statist regulatory efforts, where the state – i.e. the Chinese Communist Party – perceives itself as the embodiment of the will of the people as a whole and not as a stratified social agglomerate. See R. HAITAO, 《墨子》中的宪法思想萌芽 (*The seeds of constitutional thought in《Mozi》*), in faxue zazhi, 2010, 5, pp. 133-135; S. QUANSHENG，论墨家良法善治思想 (*On the Mohist thought on good law and good governance*), in zhi daxue bao, 2021, 6, pp. 33-38; W. SHAOLI, 墨家法律观之现代价值 (*Modern value of Mohist view on law*), in fazhi yu shehui, 2014, 5, pp. 5-6; Y. ZHONG, 有法所度：墨子的法治憧憬 (*Measure by law: Mohist vision of the rule of law*), in zhongguo gaoji shehui kexue, 2020, 6, pp. 100-113.

[65] Let one think, for instance, of the diffusion of the Islamic tradition in African countries. On the topic see N. ANDERSON, *Islamic Law in Africa*, London, 1955; F. NGOUM, M.H. KURFI, T. FALOLA (eds.), *The Palgrave Handbook of Islam in Africa*, Cham, 2020; F. ISSAKA-TOURE, O.D. ALIDOU, *Introduction: Current Perspectives on Islamic Family Law in Africa*, in Islamic Africa, 2020, 11, pp. 153-162.

3.2. *THE OBJECT OF COMPARISONS. EXAMPLES. QUALITATIVE AND MORAL ORIENTATIONS OF ALTERNATE LEGAL HISTORY*

After the selection of the Point of Divergence, the most immediate and obvious evolution of a legal uchronia is a descriptive one. As a result, in terms of object of legal comparisons, alternate legal history would open three main perspectives.

In the first place, the lawyer might compare the "alternate" system resulted from the divergence with other systems left "untouched". For instance, the English common law tradition deprived of equity could be compared with late nineteenth century's continental system. Generally speaking, this kind of comparison seems better suited for relatively narrow or recent points of divergence, so to reduce the risk of uncontrollable "butterfly effects" which would effectively force the lawyer to assess the POD's repercussions on every legal system of the world[66]. Examples of this kind of approach could be: how would a victorious Hillary Clinton in the U.S. 2016 presidential elections would have impacted on the most recent developments of U.S. law, in terms of comparison with other Western countries?[67] How would the Italian criminal law system have developed *vis-a-vis* its European counterparts and the case law of the European Court of Human Rights in absence of the famous decision no. 30328/2002 of the Joint Chambers of the Italian Court of Cassation, which crystallized some fundamental principles for the ascertainment of causation in criminal law?[68]

However, it seems obvious that such approach suffers from an inherent weakness, namely the necessity of conceiving legal developments as relatively independent endeavors, so to clearly distinguish developments affected by the POD and not affected by the it. It is, indeed, a reasoning which is not reflected by reality. Those worrisome butterfly effects are, therefore, inevitable to a certain extent, so that even geographically limited divergences could result in worldwide legal changes, therefore greatly limiting

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[66] On the role of "butterfly effects" in alternate history see H. DANNENBERG, *Fleshing Out the Blend: The Representation of Counterfactuals in Alternate History in Print, Film, and Television Narratives*, in R. SCHNEIDER (ed.), *Blending and the Study of Narrative: Approaches and Applications*, Berlin-Boston, 2012, pp. 121-146. On the applications and notions of the "butterfly effect" see R.C. HILBORN, *Sea gulls, butterflies, and grasshoppers: A brief history of the butterfly effect in nonlinear dynamics*, in American Journal of Physics, 2004, 72, pp. 425-427; B. SHEN et al., *Three Kinds of Butterfly Effects within Lorenz Models*, in Encyclopedia 2022, 2, pp. 1250–1259; E.G. LORENZ, *The Essence of Chaos*, Seattle, 1993. Indeed, the notion of butterfly effect, undoubtedly also for its communicative appeal and its degree of embeddedness in modern pop culture, has been employed by legal scholars to assess the impact of single "formants" or elements of the legal discourse (e.g. a judicial interpretation) upon all other actors using a certain legal language. See, on the topic, C.C. FRENCH, *The Butterfly Effect in Interpreting Insurance Policies*, in Law and Contemporary Problems, 2019, 82, pp. 47-67.

[67] Indeed, there is already a small group of literary sources dealing explicitly with the influence of the Trump Presidency on American Law, both in terms of direct influence on the use of executive orders and indirect influence as derived from the appointment of judges. Different positions are in dialogue with each other, since some authors also emphasized the inherent continuity of Trump's presidency style with his predecessors, as far as certain institutional traits of the mandate are concerned, such as the relation between oversight and command authority according to U.S. constitutional law. The information detected and assessed in such studies represent an optimal perspective to reassess the evolution of U.S. law in a world where Hillary Clinton won the presidency in 2016. See J. KALB, *Courts Under Pressure: Judicial Independence and Rule of Law in the Trump Era*, in New York University Law Review, 2018, 93, pp. 1-6; D.M. DRIESEN, *President Trump's Executive Orders and the Rule of Law*, in UMKC Law Review, 2019, 87, pp. 489-524; P.L. STRAUSS, *The Trump Administration and the Rule of Law*, in Revue française d'administration publique, 2019, 170, pp. 433-446.

[68] F. VIGANÒ, *Il rapporto di causalità nella giurisprudenza penale a dieci anni dalla sentenza Franzese*, in Diritto Penale Contemporaneo, 2013, 3, pp. 380-398.

the scope of this type of counterfactual comparison. Let one think, for instance, to the French codification. Would it be possible to compare an alternative legal history of the Code Napoleon with any other system of codified civil law without taking into account the huge impact that the French experience historically had on other civil codes all around the globe?[69]

In order to tackle such issues, the lawyer could be tempted to embrace a second methodology, once again less focused on punctual developments but on broad changes in legal traditions and legal culture. The impact of the divergence, therefore, should be assessed not from the perspective of punctual legal mechanisms, but rather in terms of alterations in the conceptual orientation of a given legal system. Such orientation could concern technical tendencies, such as the preference for codification of civil law or for a certain style of codification, e.g. the integration of general principles in the civil code; it could also concern the sets of values underlying a specific legal environment[70]. From this perspective, the absence or the reduced importance of the French civil code should be addressed in terms of radical changes in the Western legal tradition caused by the absence of the archetype of modern codification[71].

The two approaches so far described obviously transpose at the level of alternate legal history methodological paths know to traditional comparative law. There is, however, a third approach which conceives comparison drawing mainly from legal history. In fact, counterfactual comparisons may very well concern the same legal system, as developed in reality and in the alternate history. Such third choice is, indeed, probably the most intuitive one and the most intriguing. It stimulates a qualitative assessment of the alternate legal path derived from the divergence, something to which the comparative lawyer may not be immediately familiar with and thus attracted to. Obviously, using alternate history to highlight positive or negative consequences of different legal solutions should not lead to a strictly functional use of comparative, otherwise one would fall victim to the same optimism which, repeatedly over the last 150 years, has convinced comparative lawyers to able to detect the best rules through legal comparison, so to promote legal unification[72]. Such approach would, in other words, display much of that blind confidence in unification which led Pierre Legrand to point out the logic weakness of traditional comparative law[73].

The qualitative comparison between the reality and the alternate history of a given legal system or a given legal institution should instead fulfill the purpose of indicating - also from the individual perspective of the scholar engaging in the analysis - the changing moral and ethical fiber of legal orders in connection with the technical functions of the specific rules. To provide an example, what if the Popular Front (comprising the Socialist and the Communist Party) had won the 1948 Italian general

[69] U. KISCHEL, *op. cit.*, pp. 359 ff.

[70] *Ibidem.*; P. GLENN, *op. cit*.

[71] The issues the comparative lawyer should raise are therefore: would such archetype have been replaced by another one? Would the very idea of codification have experienced the same success, maybe driven by different examples? How would systems with noticeable Roman law influences have reacted to the legal challenges posed by the rise of liberal bourgeoisie without the model of the French code? Would Roman law have played an even stronger role? This approach, coupled with the choice of punctual points of divergence, could also highlight the role played by individuals in shaping legal systems. For instance, one could wonder how European legal systems would have developed without Napoleon.

[72] M. SIEMS, *op. cit*., pp. 31 ff.; R. DAVID, *The Methods of Unification*, in The American Journal of Comparative Law, 1968, 16, 1-2, pp. 13-27; O. KAHN-FREUND, *On uses and misuses of comparative law*, in The Modern Law Review, 1974, 37, 1.

[73] P. LEGRAND, *Negative Comparative Law*, Cambridge, 2022.

elections?[74] How would a socialist-communist government have oriented the implementation of the newborn constitution?[75] How would it have interpreted Art. 41 § 3 which states that «The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and coordinated for social purposes»? Hypothetically, the uchronic comparison could develop the alternate legal history in connection with the assessment of the progressive interpretations of the "economic" articles of the Italian constitution advocated by the school of thought of the "Alternative use of the law" (*Uso alternativo del diritto*) in the 1970s[76].

It is, undoubtedly, an exercise in fantasy. It is, nonetheless, a new approach to legal comparison which, while eschewing childish optimism or radical pessimism, tries to give full voice to the creative force of the law, for better or for worse, as well as of the lawyer[77].

4. TESTING LEGAL HISTORY. HOW TO IMAGINE A WORLD WITHOUT THE CORPUS IURIS CIVILIS

After putting forward some suggestions for a methodology of alternate comparative law, it is due time to try and address the propositions of that colleague who recommended to eliminate the Corpus Iuris Civilis from history.

Now, from a specifically methodological point of view, it seems obvious that the endeavour, at least in such broad terms, is impossible. Strictly speaking, the Corpus Iuris Civilis cannot function as a feasible POD because it is not an event and its collocation in time and space is not punctual. Even if one can easily know when, where and how the Corpus Iuris Civilis was drafted, its content reflects the achievements of centuries of a complex and multilayered legal tradition. As such, the Corpus Iuris itself pertains to several formants, dimensions and perspectives of both Roman law and the traditions Roman law had an impact upon. Its inception, application, rediscovery and interpretation obviously involved the intervention of an wide array of social actors who cannot be reduced to a random link within a chain.

Having said that, the idea of using the Corpus Iuris Civilis as an example to test a method for alternate comparative law still has merit. One just has to select an appropriate POD, fitting the characteristics previously outlined. The most obvious choice would concern an early and untimely demise of either the emperor Justinian or his *Quaestor sacri palatii*, Tribonian, i.e. the head of the commission which, in concrete, drafted the compilation[78]. Such POD would not concern a specifically legal event, but would have nonetheless critical legal consequences.

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[74] This specific setting for a counterfactual historical probe has been the object of the Italian tv programme "La storia siamo noi", broadcasted on the Italian public television channel. See a presentation of the programme at the link https://www.recensito.net/archivio/25-cine-tv/3692-la-storia-siamo-noi-minoli-racconta-un-18-aprile-1948-vinto-dai-rossi.html (last access: 4 April 2023). See also G. CERCHIELLO, *Il Fronte democratico popolare nelle elezioni del 1948 a Roma*, in Italia contemporanea, 1996, 203, pp. 237-266.

[75] G. FERRARA, *I comunisti italiani e la democrazia. Gramsci, Togliatti, Berlinguer*, Rome, 2017; P. CIOFI, G. FERRARA, G. SANTOMASSIMO, *Togliatti il rivoluzionario costituente*, Roma, 2014.

[76] P. BARCELLONA (ed.), *L'uso alternativo del diritto*, Bari, 1973; ID., *Diritto privato e processo economico*, Naples, 1977; M. COSSUTTA, *Interpretazione ed esperienza giuridica. Sulle declinazioni dell'interpretazione giuridica: a partire dall'uso alternativo del diritto*, Trieste, 2011.

[77] G. PASCUZZI, *La creatività del giurista*, Bologna, 2018.

[78] T. HONORÉ, *Tribonian*, London, 1978.

One of the most credible temporal slots to establish a counterfactual involving these two figures is the Nika revolt of January 532 A.D. Some historians have partially discounted the actual relevance of the revolt, especially considering it as one among many other riots occurring in Constantinople in 5th and 6th Century A.D.[79] Be that as it may, for a lawyer this particular revolt is relevant since it happened exactly during the drafting process of the Corpus Iuris Civilis. In particular, as rioters demanded the dismissal of Tribonian, he was heavily occupied with drafting the Digest. In our timeline, he was actually dismissed for a while after the revolt, but then reinstated, thus completing the work[80].

Now, what if he was not reinstated? Or the rioters demanded more than his dismissal and the emperor complied with their requests to avoid further consequences?

Without the mind behind its main content and structure, the Corpus Iuris Civilis would probably not have existed as everyone now knows it, but it could have existed anyway. As long as the political intention to issue it survived, Justinian could have easily nominated another figure at the head of the drafting commission. Would such alternate commission have relied on Tribonian's work? To what extent? Would it have selected different materials from the ensemble of the works of Roman jurists? Would different Roman jurists have gained a prominent space in the Digest and the Institutions? Depending on the profile of the possible alternatives to Tribonian, one could imagine, for instance, that Justinian's *Institutiones* did not employ the tripartite structure of Gaius (i.e. *personae, res, actiones*) in the configuration of private law. Instead, other classifications could have been adopted, therefore impacting upon the taxonomy of modern private law, especially considering that the French civil code closely followed the structure of Gaius' *Institutiones* as reported in the Corpus Iuris Civilis[81].

A different content of Justinian's compilation, given the permanence of its political driving force, would have probably exerted similar influence in terms of diffusion and inspiration for modern compilations as it happened in our timeline. As medieval scholars started developing stronger interests in Roman society and law, they would have experienced, in studying the compilation, a similar fascination to that occurred in our timeline. On the other hand, the technical features of Roman law as passed down by the medieval jurists to their modern successors would probably be at least in part different, depending on the different criteria employed to select original sources both in the *Institutiones* and the *Digesta*.

A whole different picture would obviously arise if one directly alters the aforementioned political driving force, i.e. the person of Justinian. Let one suppose that an unfortunate development of the events during the Nika revolt led to the assassination of the emperor. His successor could maybe have been the nephew of the late emperor Anastasius, Hypatius, who, in our timeline, was indeed proclaimed emperor at some point during the revolt (though he was later killed) and enjoyed the support of certain political groups in Constantinople. Alternatively, other political figures who opposed Justinian could have claimed the throne. At that point, in 532 A.D., Justinian had already issued the *Haec quae necessario* and *Deo auctore* constitutions, which began the drafting process of its compilation; however, as just seen, such process was far from

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[79] G. GREATREX, *The Nika Riot: A Reappraisal*, in The Journal of Hellenic Studies, 1997, 117, pp. 60-86.

[80] *Ibidem.*

[81] E. CHEVREAU, *The Napoleonic Code and the Roman Law Tradition*, in G. SABATINO, M. TOMLINSON (eds.), *op. cit*., pp. 81-98.

concluded, though it had already produced the now lost *Codex Vetus*, a mostly practical handbook for practitioners containing the most relevant laws of the empire at the time[82].

A successor of Justinian, maybe presenting himself as his opponent, could have proceeded with the drafting process, by nominating another commission with or without Tribonian; alternatively, he could have decided to abandon his predecessor's projects, thus avoiding being too closely associated with him, his ideas and his style of ruling. So, what if, after the *Codex Vetus*, no other part of the Corpus Iuris Civilis ever came to be?

The Eastern Roman Empire already had a code, i.e. the code promulgated by emperor Theodosius II, in force since 438 A.D. and superseded by Justinian's code[83]. Such code, in the Western part of the empire and then in the Romano-germanic reigns was already exerting its influence, to the point that the *Lex Romana Visigothorum* was heavily based upon it[84]. With Justinian's compilation limited to the *Codex Vetus*, it might be assumed that the role played by the Theodosian code in the development of Western legal tradition would have been greater, especially in Western Europe[85]. Considering its role as basis of some Romano-germanic legislation, it is possible that, in this alternate timeline, the resurgence of interest toward Roman law starting from the 10th century A.D. would have mainly concerned the Theodosian code, in addition to the *Codex Vetus*[86]. However, such change would have had remarkable consequences for the mentality of Western lawyers. Without the *Digesta* as a conceptual basis to reflect upon and with the main references represented by an heterogeneous code and by its frequent transposition in form of Romano-germanic legislation, the medieval legal scholars would have probably deviated from the reasoning they developed in our timeline. The form and structure of the Theodosian code (i.e. mainly letters from emperors to their officials adjudicating specific cases[87]) would have maybe limited the spaces for theoretical reflections. The whole system of private law built by the school of Pandects upon the *Digesta* would have not existed or existed in a very different way. Furthermore, depending on the state of conservation of original materials, the content of the Theodosian code would have been known mainly through Romano-germanic law, thus, probably, indirectly augmenting the contribution of Germanic law to the formation of the Western legal tradition in places like Italy, France and Spain[88].

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[82] T. HONORÉ, *op. cit*., p. 46; S. CORCORAN, *Justinian and His Codification Through the Ages*, in G. SABATINO, M. TOMLINSON (eds.), *op. cit*., pp. 47-80; A. GUARINO, *Storia del diritto romano*, Napoli, 1981, pp. 525-526.

[83] B. SALWAY, *The Theodosian Code: Endings and Beginnings*, in G. SABATINO, M. TOMLINSON (eds.), *op. cit*., pp. 23-46.

[84] *Ibidem*.; M. CARAVALE, *Ordinamenti giuridici dell'Europa medievale*, Bologna, 1994.

[85] It is anyway presumed (A. GUARINO, *op. cit*., pp. 525-526) that the *Codex Vetus* was nothing more than an adaptation of the content of the Theodosian code, given the short time at the commission's disposal to draft. From such perspective, it could be argued that in absence of any further codification effort from Justinian, the legal system of the Eastern Roman Empire would have been centered upon the *Codex Vetus* and thus upon the main content of the Theodosian code.

[86] On the topic see C.M. RADDING, A. CIARALLI, *The Corpus Iuris Civilis in the Middle Ages*, Leiden-Boston, 2007.

[87] B. SALWAY, *op. cit*.

[88] As known, in our timeline the Theodosian code was in force for less than a century, until it was superseded by the *Codex Iustinianus*. As a consequence, it was soon forgotten and it was passed down only in fragments, to the point that today we have no complete version of the code (P. MARI, *L'armario del filologo ed I testi giuridici*, in Atti dell'Accademia Romanistica Constantiniana, 2003, XIV, p. 131). One might only assume that, without the existence of the complete Justinian's codification, the Theodosian code would have enjoyed greater attention and handled with greater care also in terms of preservation of its full

This is, obviously, just a brief and oversimplified overview of the possible consequences of an alteration the historical process leading to Justinian's compilation. However, even such simple sketch is enough to understand how different formants could have reacted to the elimination of the Corpus Iuris Civilis. Scholars could provide different opinions about the incidence of such reactions: some could argue that, one way or another, modern legal scholars would have built a theoretical system of private law drawing from available Roman sources but then altering them with their own mindset, as it actually happened with the Corpus Iuris in our timeline. Other scholars could instead argue that without the Corpus Iuris Civilis codification would have happened in a very different way and the theoretical system supporting it would have been much more feeble. Thus, the importance of judges and scholars *vis-a-vis* state legislation could have been higher.

Ultimately, in this case the process is more important than the result. Opinions about alternate legal realities may differ, but the methodological value of counterfactual reasoning stands firm: through it, one is able, in a non-dogmatic and non-prejudicial way, to evaluate the flexibility and dynamics of legal reasoning in the course of its historical development.

5. CONCLUSIONS. THE TRIUMPH OF CREATIVITY

Delving into counterfactual comparisons brings the lawyer into conflicts seemingly without solution for the legal mind. The first one is that between the stochastic nature of legal processes and their causal logic; the second one is that between reality and fantasy, especially when both these elements claim may be backed by moral and ethical settings or aspirations; the third one is that between truth and lie.

How to reconcile such apparently opposite research paths?

I would argue that there are two different ideal points where such different perspectives may be combined. The first one is negatively connoted and is the opposition to legal dogmatism. To the extent that it doubts the deterministic connotation of the law as well as its inherently formalistic reasoning, counterfactual comparative law shares methodological views with the theory of critical legal studies[89]. Conceiving alternate realities as a scientific endeavor inevitably questions the existence of determined paths for legal evolution and legal development. As it has been noted, even when one recognizes the existence of multiple variables insisting upon a certain legal event, legal alternate history, reasoning from a stochastic perspective, questions the capacity of lawyers to know, assess and properly analyze them all, thus accepting randomness as a result of its own cognitive limits. Such acceptance, however, implies a decisive refusal of legal dogmatism, in all its epiphanies. It refuses conceptual dogmatism as well as realist determinism, since it is aware that neither economic forces, nor "great men" 's actions, nor religious liturgies nor great power plays are able, alone, to determine the spirit and the evolution of law. Through a logical approach to legal dystopias, uchronic law shows that commitment to realism, when not immunized by a sincere dose of skepticism, might even produce feedback loops which distort the

content.

[89] R.M. UNGER, *The Critical Legal Studies Movement*, in Harvard Law Review, 1983, 96, pp. 561 ff.; A. ALTMAN, *Critical Legal Studies. A Liberal Critique*, Princeton, 1990; J.W. HARRIS, *Unger's critique of formalism in legal reasoning; hero, Hercules and Humdrum*, in The Modern Law Review, 1989, 52, pp. 42-63.

possible causal consequences of events to the point of overruling established rights and duties in the name of a supposed "deviance" which is however perceived not only as real and inevitable, but also normal[90].

At the same time, however, counterfactual comparative law criticizes excessively deductive approaches, distrusting abstract visions of interactions among legal systems on the basis of "codified" connoting traits. As such, it considers "fixed" comparative classifications as conceptual structures promoted by contingent events or studies and then consolidated by theoretical feedback loops often not even grounded on reality[91]. In each system, the rationality of connoting traits depends on such loops resulting from an interplay among endless factors, loops which are challenged every day. It is a task of the comparative lawyer that to test, even through the construction of counterfactual paths, their actual resistance to change and the potential of change.

Ultimately, the idea of a counterfactual comparative law and of its alternate legal histories fulfills the need for a new creativity in the approach to legal studies[92]. Two decades into the new century, lawyers have gained full awareness of the logic weaknesses of traditional methodologies and classifications in comparative studies[93]. The shortcomings of universalism, functionalism, structuralism, etc. have been widely noted as well as the negative implications of incomplete comparative approaches, focused on geographically limited points of view[94].

On the other hand, however, lawyers struggle to turn critical points of view into proactive ones, with the specific aim of putting forward new methodologies, fit to promote comparative legal analysis against the background of a global legal geography which is at the same time globalized and fragmented. The immediate reaction to such difficulties is that of emphasizing the relevance of interdisciplinary perspectives and of legal pluralism, which, together with the rejection of old classifications, are the concepts at the core of postmodern comparative law[95].

The polycentricity of global legal structures, together with the increased awareness of a new geopolitical era, inevitably promote research approaches capable of detecting and assessing legal fragmentations, regardless of the specific topics[96]. Comparative law, subsequently, perceives itself as the methodological key to correctly analyze legal environments such as those of global markets, of multicultural societies and even of newly competing great powers, due to its inherent inclination towards rules' background elements[97].

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[90] M. KRYZANOWSKI, *Normalization and the discursive construction of "new" norms and "new" normality: discourse in the paradoxes of populism and neoliberalism*, in Social Semiotics, 2020, 30, 4, pp. 431-448. Let one think, for instance, about issues known to international lawyers, such as the hypothetical normalization of war – echoing a purely Westphalian conception of states and power plays in a time connoted not only by evident imbalances in the military potential of states, but also by ever deadlier weaponry (see J. LINDSAY-POLAND, *The Normalization of Militarism and Propensity for War*, in W.H. WIIST, S.K. WHITE (eds.), *Preventing War and Promoting Peace*, Cambridge, 2017, pp. 77-89).

[91] M. PARGENDLER, *op. cit*.

[92] G. PASCUZZI, *op. cit*.

[93] M. SIEMS, *op. cit*.; A. SOMMA, *op. cit*.; U. KISCHEL, *op. cit*.; W. MENSKI, *op. cit.*.

[94] W. MENSKI, *Comparative law in a global context*, cit.; P. Glenn, *Legal Traditions of the World*, cit.; T. RUSKOLA, *Legal Orientalism: China, the United States and Modern Law*, Cambridge, 2013.

[95] M. SIEMS, *Comparative law*, cit., 141 ff.

[96] L.C. BACKER, *The structure of global law, fracture, fluidity, permeability and polycentricity*, in CPE Working Papers, 2012, 7, 1, pp. 102-122.

[97] T. AMICO DI MEANE, *Metodologia e diritto comparato alla ricerca della "creatività". Verso un approccio flessibile*, in Annuario di diritto comparato e di studi legislativi, 2019, pp. 165-197; A. SOMMA, *op. cit.*

At the same time, however, the lawyer could feel dissatisfied with interdisciplinary approaches placing too much emphasis on non-legal elements and therefore implementing innovation by rendering law ancillary to other subjects, such as politics (and geopolitics), economy, religion and so on.

The fascination for interdisciplinary methodologies as well as for pluralist outlooks on law is indeed often considered as a step of the never-ending quest for truth and reality in legal thinking.

From this perspective, the feasibility of a counterfactual comparative law would also mean the feasibility of a creative approach to legal studies which tries to incorporate non-legal elements in the development of legal reasoning but without using law as a mere mirror of other cultural epiphanies.

Counterfactual comparative is inherently sceptic, since it is aware of the incommensurable nature of law[98]. As such, it certainly shares the interest in law's complexity with "realists" such as Hobbes, Holmes or, once again, critical legal theorists[99]. Such skepticism, however, is not destructive. The sceptic engaging in counterfactual comparative law does not do so to destroy established values and structures in existing legal system, nor to fuel distrust towards them. Skepticism – and opposition to dogmatism – in counterfactual law serves the purpose of inducing lawyers to put forward new ideas through the construction of alternate paths for legal evolution and even, if one wants, evaluate them depending on personal beliefs. To a negative approach which criticizes dogmatism corresponds a positive approach which promotes legal creativity.

Creativity satisfies, in the first place, a thirst for knowledge of what "could have been", but it also offers insight into the actual incidence of events and "turning points" for legal development. In the third place, through its utopian/dystopian dimension, fulfills an aspirational purpose, which is however not dogmatic, since it is counterbalanced by anti-determinism and skepticism towards realist reasoning.

Lawyers invent new rules and tell new stories every day, sometimes unconsciously, other times – most times, one could argue – deliberately appealing to reason, history or other legal mythologies so to provide an acceptable vest for their creations[100]. Legal histories are driven by different forces. They may be due to individual or corporate interests, such as those of the law firm which needs to satisfy clients; they may be due to necessity, such as the need to obtain food and shelter; they may be due to an idea of justice developed by a judge according to their own personal experience; they may be due to otherworldly beliefs or to dreams of a better future.

A counterfactual comparative law is an attempt at envisaging a new methodology with full awareness and acceptance of the inherently creative dimension of the law. Its starting point is the realization of man's impossibility to know the world and his irresistible desire to use his own imagination to make up for it. In embracing randomness and countering with ideas, counterfactual analysis, even when pushed to its own extreme with utopian or dystopian visions, pushes the lawyer to strive for change and imagine it, while remaining wary of dogmatism-backed developments. Ultimately,

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[98] On skepticism in legal thought see L. LOEVINGER, *Dogmatism and Skepticism in Law*, in Minnesota Law Review, 1954, 38, 3, pp. 191-214; R.A. POSNER, *The Jurisprudence of Skepticism*, in Michigan Law Review, 1988, 86, 5, pp. 827-891.

[99] R.A. POSNER, *op. cit.*

[100] W. TWINING, *Law and Literature: A Dilettante's Dream?*, in Journal of the Oxford Centre for Socio-Legal Studies, 2017, 2, pp. 126-139.

it rests upon the belief that law - as all things human - is all the easier to understand the more one accepts its never-ending complexity.

Come circola il diritto italiano? Omaggio ai quarant'anni del codice civile peruviano

Domenico di Micco*

1. PREMESSA

L'anniversario di un codice è da sempre occasione di riflessioni importanti per la comunità dei giuristi e oggi sono proprio i quarant'anni del Codice civile peruviano a darci questa possibilità.

A ben vedere, riflettere *sul tempo in cui un codice "sopravvive" alla storia* – nel nostro caso quarant'anni – può voler dire molte cose che però, idealmente, possono essere tutte ricondotte essenzialmente a due filoni di ricerca. Il primo è certamente quello *nei contenuti del Codice*: si farà qui lo stato dell'arte, ci si domanderà se il codice sia o meno invecchiato – e, se sì, dove? – si esplorerà come la giurisprudenza lo abbia fatto vivere attraverso la sua opera di interpretazione e si rifletterà infine su che cosa la dottrina abbia dato e possa ancora dare al suo futuro. Il secondo è invece quello che sta *intorno al Codice*: come nacque questo codice? A quali tradizioni si ispirò? Quali contatti accademici ne influenzarono le scelte? E, infine, come si colloca – nel nostro caso, a quarant'anni di distanza – questo codice nello scenario del pensiero giuridico globale contemporaneo?

Il presente contributo – come già segnalato dal titolo – intende soffermarsi principalmente sul secondo filone di studio per riflettere così su quale ruolo possa aver avuto nella genesi del codice civile peruviano, e sulla sua successiva interpretazione, il contatto con il diritto civile italiano e in particolare con la sua dottrina.

Questa scelta è invero il riflesso di una innegabile evidenza: nel novero della grande famiglia di *civil law* – o, meglio ancora, nel novero dalla complessa *tradizione giuridica occidentale* – il diritto italiano non è certo percepito come un grande archetipo, vale a dire non è considerato un vero e proprio modello (né originale né chiaramente distinguibile dagli altri[1]); al contrario, il diritto italiano è solitamente visto come un "non-modello" in quanto frutto di una evidente e ben nota commistione tra modello francese e modello tedesco[2]. E dunque: perché ispirarsi al diritto italiano?[3]

La domanda – dichiaratamente un po' provocatoria – è quindi il punto di partenza inaggirabile di questo scritto che, in omaggio ai quarant'anni del codice civile

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[1] GRAZIADEI Michele, "Comparative Law as the Study of Transplants and Receptions", The Oxford Handbook of Comparative Law, Edited by Mathias Reimann and Reinhard Zimmermann, Oxford, Oxford University Press, 2006; LANNI Sabrina, SIRENA Pietro, (a cura di), *Il modello giuridico – scientifico e legislativo – italiano fuori dell'Europa. Atti del II Congresso Nazionale della SIRD, Siena, 20-21-22 settembre 2012*, Collana "Cultura giuridica e rapporti civili", vol. 9, Napoli, Esi, 2013.

[2] Si veda GAMBARO Antonio, SACCO Rodolfo, *Sistemi giuridici comparati*, IV ed., in Trattato di Diritto Comparato, Torino, Utet, 2018.

[3] GRAZIADEI Michele, "L'influenza del diritto privato italiano in Europa", Annuario di diritto comparato e di studi legislativi, 2014, pp. 307-338.

peruviano, intende allora raccontare la difficile circolazione di un "non-modello"; infatti, diversamente da quanto avviene per il Code Napoléon da una parte o per la pandettistica tedesca dall'altra, il "non-modello" italiano – se circola – circola su singole occasioni di contatto ed essenzialmente sull'innegabile fascino di alcuni grandi giuristi italiani.

2. IL TEMA DELLA CIRCOLAZIONE DEI MODELLI GIURIDICI

La circolazione dei modelli giuridici è un tema da sempre caro al comparatista[4]. La conoscenza di *come* i modelli circolino ci dice infatti "chi siamo" e "da dove veniamo"; meglio ancora, ci racconta da dove viene e in che direzione va un pezzo importante della nostra identità. Per queste ragioni, lo studio di come la circolazione avvenga ha da tempo interrogato in particolare i comparatisti che hanno così individuato almeno due modalità principali di circolazione: l'imposizione e l'imitazione[5].

La prima – ampiamente ravvisabile nella storia del diciannovesimo secolo – è appunto quella dell'imposizione da parte di una potenza conquistatrice del proprio diritto a quella conquistata; e pensiamo qui ad esempio all'epopea napoleonica nell'Europa continentale del primo decennio dell'Ottocento[6] o a quella coloniale in Africa pochi decenni dopo (sia pur con i numerosi *distinguo* del caso). La seconda modalità di circolazione, invece, completamente slegata da ogni logica militare, è quella che si fonda nel processo di imitazione; un modo di apprendimento che, a ben vedere, è così connaturato alla natura umana da riportarci indietro sino quasi a ricordarci, in fondo, la nostra appartenenza al mondo animale[7].

Certamente, oggi, lo stato avanzato di multilateralismo e interdipendenze funzionali sui cui si regge il mondo globale ha aggiunto, accanto a queste due modalità "classiche" di circolazione, anche altre possibilità – pensiamo, ad esempio, all'azione dei corpi intermedi sovranazionali come l'IMF[8] – che realizzano e di fatto impongono scelte di convergenza ampie su talune soluzioni giuridiche a discapito di altre in ragione di macro-cicli economici, geopolitici o di criteri di efficienza e standard qualitativi spesso parecchio discutibili[9]. Tuttavia, per restare qui sui due classici della teoria della circolazione dei modelli, possiamo senz'altro notare come un profilo, più di ogni altro, renda davvero lontane l'imposizione e l'imitazione: se infatti l'imposizione non lascia scelta ai popoli sottomessi, l'imitazione per converso è proprio la libera scelta di aderire

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[4] SACCO, Rodolfo, "Circolazione e mutazione dei modelli giuridici.", *Digesto disc. Priv. sez. Civile*, 2, 1988, p.365 ss.

[5] ID., *Antropologia giuridica. Contributo ad una macrostoria del diritto*, Bologna, il Mulino, 2007.

[6] GROSSI, Paolo, *Mitologie giuridiche della modernità*, Milano, Giuffré, 2007; RESCIGNO, Pietro e CAGGIA, Fausto, *Codici: storia e geografia di un'idea*, Bari, Laterza, 2013.

[7] SACCO, Rodolfo, *Antropologia giuridica*, op. cit.

[8] PISTOR, Katharina, "Standardization of Law and Its Effect on Developing Economies.", *Am. J. Comp. L,*. 50, 2002, p. 97 ss.; WAGNER, Helmut, "Is harmonization of legal rules an appropriate target? Lessons from the global financial crisis", *European journal of law and economics*, 33, 2012, pp. 541-564; MISTELIS, Loukas A., "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform-Some Fundamental Observations.", *Int'l L*., 34, 2000.

[9] MANCUSO, Salvatore, "Legal Transplants and Economic Development: Civil Law Vs. Common Law?", *One Country, Two Systems, Three Legal Orders-Perspectives of Evolution.* Berlin, Heidelberg: Springer Berlin Heidelberg, 2009. 75-89.

a un modello non autoctono. È dunque – sembrerà banale – proprio la *possibilità di scegliere* ciò che le rende davvero alternative.

Se infatti nel caso dell'imposizione di un modello occorre prendere atto delle vicende storiche che l'hanno determinata e quindi studiare come ciò si ripercuota nel sistema giuridico in cui è imposto, per converso, nel caso dell'imitazione di un modello, il tutto è certamente molto meno scontato: come avviene la scelta di guardare a quel modello giuridico e non a un altro? E, soprattutto, da che cosa dipende poi la scelta di adottarlo o ricalcarlo a dispetto di ogni autonomo sussulto di originalità?

È in fondo su queste domande che si gioca buona parte della differenza tra imposizione e imitazione. Nell'imposizione il Paese ricevente chiaramente non sceglie, mentre nell'imitazione sceglie eccome. Di conseguenza, il trapianto[10] che segue l'imposizione è l'espressione di una volontà politica esterna al Paese in cui il trapianto si realizza; nel caso dell'imitazione, invece, il trapianto è la conseguenza di una volontà interna alla tradizione giuridica del Paese ricevente. E in questo secondo caso è allora interessante capire *perché*, *come* e *chi* abbiano scelto in un senso piuttosto che in un altro.

In questa prospettiva è allora bene domandarci come si collochi la tradizione giuridica italiana nel contesto dei modelli imitabili; vale a dire come si collochi rispetto ad altre tradizioni storicamente giuridicamente come "esportabili" per imitazione, e penso in particolare a quella francese o quella tedesca. In altre parole, è qui importante domandarsi che ruolo abbia il diritto italiano nel gioco dei modelli europei: è forse un modello trainante o piuttosto una realtà giuridica trainata? E, su tutto può davvero definirsi un "modello"? E perché imitarlo?

3. I MODELLI EUROPEI EGEMONI E LA LORO IMITAZIONE

Per prima cosa è bene ricordare che nessuna tradizione giuridica, nessun istituto giuridico, nessuna regola nasce avendo tra le sue qualità quella di essere "un modello". Sarà banale, ma *modello si diventa*: nel momento in cui qualcuno decide di imporlo altrove come tale oppure nel momento in cui qualcuno, altrove, decide spontaneamente di copiarlo. Per così dire, la qualità di modello è dunque puramente "accidentale e accessoria" rispetto alla vita interna del modello stesso: essere o non essere un modello agli occhi degli altri non ha infatti alcuna conseguenza immediata e diretta sulla vita interna del modello in quante soluzione giuridica operante nel Paese che lo ha inventato; *essere un modello* attiene quindi unicamente al giudizio – evidentemente positivo – che i terzi, poi imitatori, vanno maturando su quella soluzione giuridica o su quel complessivo apparato di regole; e proprio in ragione di questo giudizio positivo danno poi corso al fenomeno imitativo che riproduce ciò che è stato apprezzato.

A ben vedere, l'umanità deve molto al meccanismo imitativo e di certo non solo per la circolazione delle soluzioni giuridiche ma anche, molto più in generale, per quelle tecnologiche, scientifiche e artistiche e ancor più per la semplice constatazione di quanto il bambino impari dall'adulto per imitazione. Tutto ciò al punto da poter facilmente affermare che la storia dell'umanità è in larga parte il risultato delle continue contaminazioni che avvengono proprio sulla base del meccanismo "conoscenza-osservazione-imitazione". Diritto incluso.

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[10] WATSON, Alan, "From legal transplants to legal formants", *Am. J. Comp. L.*, 43,1995, p. 469 ss.

Con questa premessa, per rimanere al tema di questo scritto, possiamo allora facilmente osservare come la storia del diritto europeo degli ultimi secoli sia stata essenzialmente tre cose: il risultato di una tradizione condivisa, l'innesto su quella di più soluzioni originali e divergenti tra loro e, infine, acquisizioni e contaminazioni reciproche[11]. In questa prospettiva, è quindi facile comprendere come la tradizione giuridica occidentale possa essere vista ora come una tradizione unitaria, ora come il coesistere di più modelli, ora come il contaminarsi inter-funzionale di questi[12].

Se non c'è dubbio che il riferimento alla tradizione comune si rifletta certamente nel diritto romano prima e nello studio scientifico da parte delle università poi, è però altrettanto vero che, perlomeno negli ultimi due secoli, due tradizioni nazionali hanno assunto per vie diverse l'indiscussa posizione di modelli rispetto alle altre realtà giuridiche del Vecchio continente: il modello francese e il modello tedesco[13]. Ma come circolano questi modelli? O, meglio, come queste tradizioni sono diventate dei modelli?

Il diritto francese – il modello francese – coincide essenzialmente con il prestigio del Code Civil. Di certo non si riduce al solo codice e comprende senz'altro anche la dottrina e più in generale la cultura giuridica francese nel suo insieme; eppure non v'è dubbio che il Code Civil sia stato e sia tuttora l'elemento più visibile di quella cultura e il suo maggior prodotto d'esportazione[14].

Se in un primo tempo il Code Civil circolò essenzialmente insieme alla avanzata militare di Napoleone e fu da lui imposto nei Paesi Bassi (Belgio incluso), in Italia (escluse Sicilia e Sardegna), nella Germania renana e in Polonia, successivamente, ovvero in seguito alla disfatta di Napoleone, poté continuare a circolare in ragione del suo prestigio e della conseguente imitazione che ciò ingenerava. Si spiega così, ad esempio, perché il Belgio, raggiunta nel 1831 l'indipendenza, conserverà integralmente il codice francese e che continuerà a influenzare a lungo anche l'Olanda dove il Burgerlijk Wetboeck ne ricalcherà strutture e contenuti fino alla riforma del 1992 che se ne distaccherà significativamente. In Italia (che sarà un Paese unito solo a partire dal 1861) verrà tradotto nei codici del Regno delle Due Sicilie, nel Codice Albertino (Regno di Sardegna-Piemonte) e da qui in quello unitario del 1865. In Spagna influirà ampiamente sul Código Civil del 1867 (sino alla ristesura del 1967 che recherà più evidenti i segni dell'influenza della pandettistica tedesca); in Romania con il codice del 1864.

Al di fuori dell'Europa, sempre in virtù del suo prestigio il Code Civil sarà alla base del codice civile egiziano del 1949 e successivamente da lì diffuso in molti altri paesi arabi. Analogamente, sarà riprodotto, pressoché immutato, nel codice civile boliviano del 1830 e eserciterà tutta la sua fascinosa influenza anche sul Codice argentino del 1869, poi imitato a sua volta dal codice del Paraguay del 1876. In tutti questi casi l'imitazione sarà dovuta esclusivamente al prestigio del modello, senza cioè che vi fosse alcun tipo di pressione militare; un prestigio che nel codice condensava e riassumeva tutte le più alte qualità di quel modello.

Quanto al modello tedesco, il discorso di come fu imitato è invece parecchio diverso. Se, come abbiamo appena visto, possiamo dire che per il modello francese ciò

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[11] ZOPPINI Andrea, *La concorrenza tra ordinamenti giuridici*, Bari, Laterza, 2006.

[12] DAVID, René, *Les grands systèmes de droit contemporains*, 12e édition, avec Camille Jauffret-Spinosi et Marie Goré, Paris, Dalloz, 2016.

[13] GAMBARO Antonio, SACCO Rodolfo, *Sistemi giuridici comparati, op. cit.*, p. 181 ss.

[14] PADOA-SCHIOPPA Antonio, "Codificazione e legislazione commercialistica in Francia (1778-1915)", in Saggi di storia del diritto commerciale, Milano, 1992, pp. 63-83; GRIMALDI Michel, "L'exportation du code civil", *Pouvoirs*, n° 107, *Le code civil*, 2003/04, pp. 80-96.

che circolò fu essenzialmente il Code Civil – prima per l'imposizione militare e poi per il suo stesso prestigio giuridico che ne determinò le numerose imitazioni – lo stesso non si può dire per il modello tedesco dove a circolare fu invece soprattutto la dottrina, e in particolare la pandettistica, con un minore e più limitato impatto del BGB[15]. In altre parole, nel caso del modello tedesco a circolare fu essenzialmente l'insegnamento sapienziale e metodologico elaborato dalla dottrina tedesca – di cui, peraltro, il BGB è frutto – ma a prescindere da qualsivoglia espansione militare dello Stato tedesco che raggiungerà infatti l'unità politica solamente nel 1871.

Ciò che osserviamo quindi a proposito del modello tedesco e della sua capacità di circolare fu dunque la capacità di quella scuola di pensiero – la pandettistica, appunto – di presentarsi come l'ultima evoluzione in ordine di tempo della *scientia iuris* e della tradizione romanistica, che si accreditava come capace di dar vita a un ordinamento giuridico concettualmente perfetto e finalmente indipendente da ogni altra forma di potere e legittimazione.

Così, mentre la circolazione del Code Civil francese è un esempio di circolazione che avviene essenzialmente nel formante legislativo, per converso la circolazione che avviene per il modello tedesco è un esempio di circolazione che avviene nel formante dottrinale e di conseguenza ha potuto contare, nei suoi vari approdi, sulla diversa forza che la dottrina aveva in ciascun paese rispetto agli altri formanti[16].

4. IL NON-MODELLO ITALIANO: CRONACHE DI UNA DOPPIA INFLUENZA

Quanto appena detto al paragrafo precedente rispetto alla circolazione dei modelli francese e tedesco ha certamente avuto un grande impatto anche sulle vicende del diritto civile italiano, condizionandolo pesantemente sino al punto di renderlo di fatto incapace – ritengo – di diventare a sua volta modello.

Proprio la doppia influenza esercitata sulla tradizione giuridica italiana ora dal modello francese ora da quello tedesco ha finito per sbiadire l'immagine autonoma del diritto italiano prima agli occhi degli stessi giuristi italiani e poi anche agli occhi dei giuristi stranieri; di fatto compromettendolo sia nella percezione della sua *originalità* sia in quella della sua *autonomia* che, non a caso, sono proprio i due caratteri essenziali affinché una soluzione giuridica nazionale possa diventare un modello da imitare altrove.

A ben vedere, infatti, già a partire dalle campagne militari di Napoleone, il modello francese – quindi il codice – fu imposto nei diversi Stati italiani pre-unitari che via via erano stati conquistati dai francesi. In particolare, a partire dal 1805 il Code Civil francese entrerà in vigore in Piemonte e in Liguria in quanto territori direttamente annessi alla Francia e sarà invece recepito – tradotto in italiano – in quel Regno d'Italia che Napoleone fonderà per il settentrione[17] e nella Napoli di Gioacchino Murat per il meridione[18].

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[15] Un caso quasi eccezionale di circolazione del codice tedesco è quello della sua imitazione da parte del Giappone.

[16] SACCO Rodolfo, "Legal formants: a dynamic approach to comparative law (Installment I of II)", *The American Journal of Comparative Law*, 39.1, (1991) pp. 1-34; GORDLEY James, "The Legacy of Rodolfo Sacco", *Italian LJ*, 8, (2022), pp. 7-9.

[17] Nel Regno d'Italia il Code Civil fu introdotto nella sua traduzione italiana il 5 giugno 1805.

[18] Nel Regno di Napoli fu introdotto, tradotto in italiano, il 22 ottobre 1808.

Si noti che questo processo di ricezione – o, forse, dovremmo dire di trapianto – non riguardò unicamente il codice civile bensì anche quello del commercio e quello di procedura civile, come è ben evidente nel caso del Regno d'Italia[19], a riprova del fatto che è proprio *l'idea codice* a costituire il vero cuore del modello francese. Di fatto, nel giro di un decennio tutto il territorio italiano (non ancora organizzato come nazione unitaria) utilizzava i codici di modello francese. Tutto ciò ovviamente a causa dell'imposizione militare e dell'occupazione napoleonica dei territori italiani.

Il discorso si fa però ancora più interessante se pensiamo a ciò che avvenne dopo la sconfitta di Napoleone a Waterloo. Se infatti in un primo momento la Restaurazione politica che ne seguì tentò di distaccarsi da quel modello attraverso la creazione di nuovi codici locali[20], poco dopo il modello francese si riaccreditò in larga parte degli stati pre-unitari ma questa volta in ragione del suo *prestigio*, con le sole eccezioni dello Stato della Chiesa, della Toscana e del Lombardo-Veneto. In questa seconda fase di circolazione, dunque, il modello francese si rivelò vincente non più perché imposto bensì per il suo valore organico-scientifico e per il prestigio che ne derivò.

In particolare, proprio per quel prestigio, già nel 1837 gli Stati Sabaudi si doteranno di un nuovo codice, poi detto *albertino* dal nome del sovrano Carlo Alberto, che altro non sarà se non la traduzione italiana del Code Napoléon. E lo stesso fenomeno imitativo si ripeté, con pochi adattamenti contingenti, anche nel regno delle Due Sicilie.

Così, quando nel 1861 il processo di unificazione nazionale italiano si realizzerà su impulso del Regno Sardo-Piemontese, (che di fatto annetterà – ora per conquista militare ora per plebiscito – gli altri Stati pre-unitari), il codice albertino sarà quindi il punto di partenza "naturale" da cui si ricaverà il nuovo codice civile unitario del 1865 e così il primo codice civile dell'Italia unita sarà di fatto riconducibile al modello francese. In tutto ciò, anche la dottrina italiana seguirà la "via francese" dando vita a quella che è stata chiamata scuola italiana dell'esegesi.

In altre parole, e per ironia della storia, la nascita dell'Italia come Paese finalmente unito non fu accompagnata da un sussulto di originalità autoctona per ciò che riguarda il diritto civile bensì da una evidente e pressoché dichiarata esterofilia giuridica che renderà il diritto italiano unitario sin da subito largamente debitore del modello francese sia per ciò che riguarda il codice sia per la dottrina. Così, il modello francese si impose vigorosamente sia nel formante legislativo italiano sia in quello dottrinale e ci sarebbe rimasto per diversi decenni.[21]

Il cambiamento arriverà infatti solo dopo la fine della prima guerra mondiale e consisterà in un sostanziale avvicinamento della dottrina italiana all'influenza di quella tedesca. L'operazione potrà contare su diverse ragioni tra le quali, non ultima, l'eco che la pandettistica tedesca andava riaccendendo negli studiosi per il diritto romano quale possibile base per costruire un ordinamento giuridico completo e autonomo rispetto a

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[19] Si noti come il codice di procedura civile francese, tradotto in italiano, entrò in vigore il 1° ottobre 1806 e quello del commercio il 1° settembre 1808.

[20] Ad esempio nel ducato di Parma si avrà il codice di Maria Luigia del 1820 che, pur con innegabile proposito di novità, conserverà comunque tratti evidenti della struttura del codice francese).

[21] Il codice civile italiano del 1865, pur ricalcando apertamente il codice francese, arriva però 60 anni più tardi e così avrà l'opportunità di aggiornare direttamente alcuni aspetti problematici del Code Napoléon come, ad esempio, le obbligazioni. Così, il codice italiano del 1865 sarà di fatto il recepimento del modello francese ma più moderno e potrà vivere pressoché senza grandi cambiamenti almeno sino alla prima guerra mondiale tanto da potersi dire che gli anni dal 1865 al 1915 furono un "mezzo secolo senza riforme" cfr. UNGARI Paolo, *Storia del diritto di famiglia in Italia*, Bologna 1974; BONINI Roberto, "Dal codice del 1865 al codice del 1942", in *I cinquant'anni del codice civile*, vol. I, Milano, 1993.

ogni altra disciplina o interferenza. Non fu infatti un caso che i primi grandi "importatori" italiani della dottrina tedesca furono proprio i romanisti italiani, a partire da Vittorio Scialoja[22] e passando poi per nomi illustri come quelli di Bonfante e Segré, Fadda e Bensa[23]. E dal diritto romano il passo fu breve; rapidamente la fascinazione per la dottrina tedesca raggiunse anche il diritto civile con Vassalli e De Ruggiero e persino processualisti come Chiovenda.

Di fatto, la dottrina tedesca prometteva un nuovo metodo – sistematizzante e concettualizzante – capace di riorganizzare logicamente tutto lo spettro del diritto dotandolo di interconnessioni logiche e possibilità deduttivo-induttive di muoversi all'interno di quelle. L'effetto fu travolgente anche se la ricezione della pandettistica trovò in realtà almeno due limiti.

Il primo fu che la ricezione della pandettistica in Italia avvenne in un tempo in cui il diritto civile era già solidamente codificato (e su modello francese, come abbiamo visto) e il secondo fu che il fascino della pandettistica raggiunse quasi esclusivamente il formante dottrinale con ben poche altre osmosi.

Di fatto nel modello italiano si determinò una sostanziale distopia: i giuristi italiani avevano un codice di chiara ispirazione francese e vivevano pertanto in un ambiente di chiara fede positivista ma pensavano e ragionavano attingendo al metodo e al pensiero della dottrina tedesca; sicché da una parte proclamavano di estrapolare i concetti giuridici dal codice civile ma di fatto li creavano a partire da schemi concettuali mutuati dal sapere pandettistico.

Un parziale cambiamento di quanto appena descritto si avrà pochi anni dopo, in età fascista, quando l'Italia deciderà di dotarsi di un nuovo codice – quello del 1942, tutt'oggi in vigore – "essendo confluite su quell'obiettivo le ansie legislative del regime, voglioso di spacciare i nuovi codici con la consacrazione definitiva di se stesso, il desiderio della dottrina universitaria di dare la misura della propria piena maturità e l'abitudine illuministica a pensare che le leggi nuove siano per forza migliori di quelle vecchie".[24] Anche in questa nuova fase, il fascino della dottrina tedesca non riuscirà però a scalzare del tutto il modello francese che, in circa settant'anni, aveva avuto buon gioco a radicarsi a fondo nel diritto italiano, soprattutto nell'organizzazione dell'amministrazione e nel formante legislativo. Di fatto, si arrivò a dar vita a un codice sostanzialmente ibrido ovvero ampiamente debitore di entrambi i modelli[25].

In particolare, il nuovo codice civile italiano rifiutò di adottare l'impianto generale del BGB, rimanendo fedele all'impianto gaiano di modello francese, e in particolare rifiutando di adottare una parte generale (vero cuore del modello tedesco); e sostanzialmente confermato fu anche l'impianto del diritto patrimoniale su modello francese. Parimenti, nel diritto dei contratti, rimase valido il principio consensualistico di matrice francese e allo stesso modo, per ciò che riguarda la responsabilità extracontrattuale, il principio generale del *neminem laedere* sopravvisse senza essere rimpiazzato da un sistema di tipicità degli illeciti. Di fatto, le tracce più evidenti dell'influenza tedesca sul codice italiano del 1942 si ebbero nella disciplina delle persone giuridiche[26] e in tema di proprietà; ma, con la sola eccezione di obbligazioni e contratti, per il resto il nuovo codice fu di fatto ben poco innovatore rispetto alla

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[22] Curò la traduzione italiana del sistema di diritto romane attuale di Savigny nel 1886.

[23] Fadda e Bensa curarono la traduzione di Windscheid.

[24] GAMBARO Antonio, SACCO Rodolfo, *Sistemi giuridici comparati*, op. cit. p. 285.

[25] GHISALBERTI Carlo, *La codificazione del diritto in Italia*, Bari, Laterza, 1985.

[26] BUSNELLI Francesco Donato, "Il diritto delle persone", in *I cinquant'anni*, vol.1 p. 112 seg.

precedente versione del 1865. A cosa si deve un simile atteggiamento da parte del codificatore italiano?

Come è stato ampiamente osservato dalla dottrina italiana, la volontà di fare un nuovo codice civile nel 1942 forse non arrivò nel momento giusto della storia e pertanto non fu né il superamento del precedente in virtù del nuovo, né una convinta scelta di conservazione a discapito della modernizzazione. Ai fini del nostro discorso, tuttavia, questo breve ricordo di ciò che avvenne nel diritto civile italiano è in realtà più che sufficiente per ritornare alla domanda iniziale: che cos'è il diritto civile italiano? Può davvero considerarsi un prodotto a sé stante o, forse, in questa doppia influenza di modelli, ha perso la possibilità di esserlo a sua volta? E, infine, può accadere che un "non-modello" – ovvero una tradizione giuridica nazionale nella quale non è chiara né la dose di autonomia né di originalità – riesca comunque a passare, agli occhi dei terzi, come un qualcosa meritevole di essere imitato? E quale sarebbe, in questo caso, l'ingrediente che giustificherebbe l'imitazione?

5. IMITARE UN NON-MODELLO

Quanto detto al paragrafo precedente, circa le scarse possibilità avute dal diritto civile italiano di essere percepito al di fuori dei confini nazionali *come modello* e dunque di essere imitato, è confermato dall'evidenza casistica di quanto residuale sia stata di fatto tale scelta rispetto a quelle ben più fiorenti di rifarsi ai modelli francese e tedesco; e si noti, in tutto ciò, come persino nei pochi casi in cui il modello italiano parrebbe aver avuto la meglio sui suoi maggiori competitori, ciò riguarda invero soluzioni delimitate e di dettaglio, ovvero singoli aspetti, e mai l'impianto complessivo del sistema.

A tal riguardo, non si può non ribadire come forse proprio la già richiamata commistione dei due modelli europei – francese e tedesco – nella tradizione italiana abbia di fatto alterato, sino a spegnere, agli occhi dei terzi la percezione del diritto civile italiano proprio in quei tratti di riconoscibilità, autonomia e originalità che sono i caratteri essenziali affinché una tradizione giuridica possa essere percepita dagli altri come un modello da imitare.

Tuttavia, e nonostante questi evidenti limiti, non si può però neppure dire che il "modello italiano" non abbia mai ricevuto alcun apprezzamento all'estero, come alcuni importanti lavori hanno infatti ricostruito con dovizia di dettaglio[27]. Certo è, però, che neppure in questi casi il *diritto* italiano è diventato *di per sé* fonte di ispirazione e dunque di imitazione; al contrario, le ragioni delle sue fortune all'estero sono state quasi sempre, ritengo, legate a doppio filo ad alcune eminenti figure di giuristi italiani e all'impatto che questi e il loro pensiero – ben più che il diritto positivo italiano in sé – hanno invero avuto all'estero.

In altre parole, ritengo che gran parte della fortuna (poca o tanta che sia) del diritto italiano all'estero sia in realtà da attribuirsi *al pensiero giuridico italiano nonché ad alcuni profili bibliografici e umani di indubbio spicco*. Non è dunque tanto un caso di "imitazione del diritto", inteso quale imitazione della soluzione giuridica in sé, quanto piuttosto di circolazione del pensiero e solo in ragione di quello si è avuta poi, a volte, anche la circolazione del diritto italiano inteso quale soluzione.

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[27] LANNI Sabrina, SIRENA Pietro, (a cura di), *Il modello giuridico – scientifico e legislativo – italiano fuori dell'Europa, op. cit.*; GRAZIADEI Michele, "Il codice civile in Italia e all'estero", Rivista Italiana per le Scienze Giuridiche, numero speciale 2022, *Il contributo della sapienza alle codificazioni*, pp. 535-569.

Se è infatti certamente vero che solitamente la dottrina circola *per tramite di se stessa*, come fu ad esempio in America Latina a cavallo tra Ottocento e Novecento per il positivismo di Lombroso e della sua fortunata Scuola e con figure di spicco come Enrico Ferri e Raffaele Garofalo, in particolare in Argentina[28] o come fu poco dopo per la Scuola Critica di Emanuele Carnevale, è però altrettanto vero che spesso le idee circolano anche perché portate in giro dalle donne e dagli uomini che lasciano il proprio Paese per nuovi approdi; e in questo gli Italiani hanno sicuramente maturato un primato quasi ineguagliabile.

In un suo recente scritto Mario Giuseppe Losano ricorda infatti come: "Le biografie dei giuristi traghettatori di idee fra i continenti e la storia contemporanea del diritto fanno parte di quella ricerca di base (*Grundlagenforschung*) che fornisce informazioni a più discipline e, quindi, favorisce la ricerca interdisciplinare. In particolare, le biografie dei giuristi e la storia contemporanea del diritto possono essere utili strumenti ausiliari per i comparatisti perché, illuminando il generale contesto culturale in cui avvengono il trasferimento e la recezione di idee e norme giuridiche, possono gettare luce sulle ragioni dell'accettazione o del rifiuto dell'una o dell'altra soluzione giuridica"[29].

Con questa consapevolezza, le vicende personali di molti giuristi italiani – penso soprattutto a quelli che durante il regime fascista furono costretti a lasciare l'Italia e a iniziare una nuova vita in America Latina o negli Stati Uniti[30] – assumono allora un significato prezioso, accanto al già noto fenomeno di circolazione della dottrina in generale, anche al fine di spiegare la circolazione del diritto italiano – o forse dovremmo più opportunamente dire *del pensiero giuridico italiano* – che ne seguì.

Colpiscono, al riguardo, le parole di una lettera scritta da Piero Calamandrei e indirizzata al processualista uruguaiano Eduardo J. Couture che molto si adoperò "in un periodo di grande tristezza" nell'aiutare i giuristi italiani a trovare un riparo e un impiego universitario in America Latina:

> Illustre e caro collega,
>
> mi permetta prima di tutto di esprimerLe la mia commossa riconoscenza per la premura e la comprensione colla quale Ella ha risposto alle mie ultime lettere, e per lo spirito di solidarietà umana con cui Ella ha preso a cuore le mie raccomandazioni.
>
> In un periodo di grande tristezza, le Sue lettere mi sono giunte come un motivo per non perdere le speranze nell'avvenire: se, dall'uno all'altro continente, senza precedenti legami di conoscenza personale, basta l'amore degli studi comuni a far sorgere nel momento del dolore le amicizie operose, possiamo continuare con fede il nostro lavoro di giuristi, e sperare ancora che il diritto possa servire prima o poi a riconciliare i popoli della Terra.
>
> Dei due colleghi di cui Ella mi chiede non posso, nel momento, darle notizie recentissime. Ma io credo che la sistemazione sia più urgente, ora,

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[28] TOBAL, Gastón Federico, Nuestro nuevo derecho. *Hacia una ley más humana y más justa*, Buenos Aires, Rosso, 1939.

[29] LOSANO Mario G. "Tra Uruguay e Italia: Couture e Calamadrei, due giuristi democratici nell'epoca delle dittature europee", POLOTTO María Rosario, KEISER Thorsten, DUVE Thomas (eds.) (2015), *Derecho privado y modernización. América Latina y Europa en la primera mitad del siglo XX*, Global Perspectives on Legal History, Max Planck Institute for European Legal History, pp. 275-311.

[30] Mi riferisco in particolare ai giuristi italiani colpiti delle leggi razziali volute dal governo Mussolini, e promulgate nel 1938, volte a discriminare i cittadini con ascendenze ebraiche.

> per il L[31]., e credo che Ella farebbe bene a concentrare su lui le Sue cure. Se avessi notizie più precise mi affretterei a scriverLe […][32].

Così, "le amicizie operose" dei colleghi dell'Amarica Latina, come quella di Couture, diedero di fatto ai giuristi italiani in fuga dal regime fascista la salvezza di un approdo lavorativo prima e il "ponte" culturale tra i due mondi poi; e così, da quelle sventure della storia, nacquero paradossalmente nuove occasioni di incontro per il pensiero giuridico italiano e i giuristi stranieri. In particolare, ciò avvenne per figure di spicco come Tullio Ascarelli[33], Renato Treves[34] e Enrico Tullio Liebman[35].

Molti decenni dopo, e al di fuori degli scenari di guerra, sarà nuovamente il contatto con il pensiero giuridico italiano e con alcuni giuristi di chiara fama a dare nuovo impulso alla circolazione del "modello italiano" in America Latina. A partire dagli anni Novanta, infatti, molti giovani giuristi provenienti dai Paesi dell'America Latina sceglieranno l'Italia – forse, anche grazie al fascino esercitato nel mondo dal mito del diritto romano – quale sede per il perfezionamento dei loro studi e in questo contesto avverrà quindi un nuovo incontro con (e una nuova esportazione del) pensiero giuridico italiano grazie soprattutto all'interesse dimostrato per autori del calibro di Paolo Grossi, Pietro Rescigno, Nicolò Lipari, Rodolfo Sacco, Pietro Perlingieri, Sandro Schipani, Gustavo Zagrebelsky e molti altri dopo di loro. Anche in questo caso, a circolare sarà la dottrina *nei suoi specifici incontri*; perché a differenza di quella tedesca – che poteva offrire un sistema, un modello e un ordinamento originali e indipendenti – la dottrina italiana poteva offrire unicamente lo spiccato ingegno di alcuni suoi eminenti rappresentanti, ma non aveva da offrire né un codice né una *scientia iuris* interamente nuova e compiuta.

Così, anche oggi, è allora l'incontro con il giurista italiano e con il suo pensiero critico il vero ingrediente di esportazione del "non-modello italiano" all'estero.

6. 40 ANNI!

Sono passati 40 anni dall'entrata in vigore del Codice Civile Peruviano e già in quell'occasione il dialogo tra giuristi peruviani e giuristi italiani fu intenso e produttivo. Tra il 9 e l'11 agosto 1985 si tenne infatti, presso l'Università di Lima, il *Congreso Internacional sobre el Código Civil Peruano y el Sistema Jurídico Latinoamericano*, organizzato dalla Facoltà di Giurisprudenza e Scienze Politiche dell'Università di Lima e dall'Associazione di Studi Sociali Latinoamericani (ASSLA) con la partecipazione italiana di studiosi come Pietro Rescigno, Sandro Schipani e Pierangelo Catalano.

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[31] Il riferimento è a Enrico Tullio Liebman.

[32] La lettera appare nella trascrizione operata da M. G. Losano e pubblicata nell'articolo LOSANO Mario G. "Tra Uruguay e Italia: Couture e Calamadrei, due giuristi democratici nell'epoca delle dittature europee", op. cit., p. 305.

[33] ASCARELLI Tullio, *Sguardo sul Brasile*, Milano, Giuffrè, 1949.

[34] Nel 1938, a causa delle leggi razziali volute da Mussolini, Renato Treves venne escluso da un concorso universitario. Di fronte a quella situazione, in ottobre s'imbarcò a Napoli alla volta dell'Uruguay.

[35] Sul punto LOSANO Mario G., op. cit.

I lavori confluirono poi in un corposo volume[36] ed ebbero certamente il grande merito di marcare con grande prontezza la riflessione internazionale su quel nuovo codice.

In quell'occasione, Pietro Rescigno, dopo aver apprezzato molto la scelta peruviana di porre nel codice un "subject de derecho" anziché continuare a parlare personalità e capacità giuridica, declinò il suo intervento cercando di far emergere le possibili contaminazioni dal diritto italiano alle scelte del neonato codice peruviano e non mancò di notare come le stesse, ove presenti, fossero in gran parte proprio il frutto di incontri personali e di pensiero giuridico (e non già di soluzione legislativa in sé). Scrive infatti Rescigno che il giurista italiano "descubre fácilmente en dicho código peruano los signos de la influencia ejercida en la obra por un estudioso, Carlos Fernández Sessarego, que conoce con amplitud y agudeza nuestro sistema. Si bien no tote sus propuestas y sugerencias encontraron adhesión, es clara su impronta sobre este código, el más reciente del área latinoamericana, que refleja en gran medida la experiencia italiana"[37].

Proprio Carlos Fernández Sessarego, indiscusso traghettatore di idee tra i due mondi, avrà cura in quel Congresso di esaminare la questione del danno alla persona nei due codici, quello italiano del 1942 e quello peruviano del 1984[38], costruendo la sua relazione su una magistrale comparazione tra le due vicende legislative anche e soprattutto alla luce dell'apporto della giurisprudenza e della dottrina italiana[39] e dichiarando: "Nos proponemos, en breves líneas, intentar un bosquejo comparativo entre el tratamiento que el Código Civil Peruano otorga al daño a la persona, y las complejidades, con el enfoque que le brinda la legislación y la doctrina italiana más retrate sobre la materia"[40].

Ancora una volta sembra dunque confermata l'idea di fondo di queste pagine per cui, del modello italiano, ciò che circola è in fondo il giurista italiano e il suo pensiero; non il diritto positivo in sé, né la dottrina intesa come sistema bensì come spunti e come pensiero critico.

Di certo, questo rende allora la circolazione del modello italiano molto diversa dalla circolazione del modello francese (dove, a come abbiamo visto, a circolare è essenzialmente il formante legislativo) e più simile alla circolazione del modello tedesco (dove circola appunto la dottrina molto più che il BGB). Tuttavia, anche questo confronto non deve trarre in inganno. Come abbiamo cercato infatti di far emergere poc'anzi, il modello tedesco ha infatti un solido formante dottrinale cui corrisponde però anche un altrettanto solido prodotto legislativo e un apparato concettuale originale e completo. Nel caso italiano, invece, al formante dottrinale non si accompagna con altrettanta evidenza né il codice del 1942 che, come abbiamo visto, non può dirsi interamente frutto della dottrina nazionale né un prodotto intellettuale sistematizzante e

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[36] AA. VV., *El Código Civil peruano y el sistema jurídico latinoamericano. Ponencias presentadas en el Congreso Internacional celebrado en Lima del 9 al 11 de agosto de 1985 organizado por la Facultad de Derecho y Ciencias Políticas de la Universidad de Lima y la Associazione di Studi Sociali Latinoamericana (ASSLA)*, Cultural Cuzco s.a., Lima, 1986.

[37] RESCIGNO Pietro, "*Comentarios al libro de derecho de las personas del nuevo código civil peruano de 1984", in El Código Civil peruano y el sistema jurídico latinoamericano, op. cit, p. 235*.

[38] Fernández SESSAREGO Carlos, "El daño a la persona en el código civil peruano de 1984 y el código civil italiano del 1942", in *El Código Civil peruano y el sistema jurídico latinoamericano*, op. cit, p. 251-257.

[39] Nello specifico si veda il paragrafo intitolato "*Aporte de la doctrina italiana en la materia de daño a la persona*", p. 255.

[40] *Ibidem*, p. 251

completo quale è invece quello offerto dalla pandettistica tedesca. Sicché questo dato sottolinea ancora una volta come la capacità della dottrina italiana di promuovere il "non-modello italiano" nel mondo – rendendolo cioè interessante pur senza aver mai generato un modello legislativo proprio, interamente originale e autonomo – dipenda in larga parte dalla sua capacità di saper *originare un pensiero critico esportabile* a prescindere cioè da un prodotto legislativo a lei schiettamente attribuibile e a prescindere anche dall'aver costruito un apparato concettuale ed ermeneutico paragonabile a quello tedesco.

Oggi, a distanza di quarant'anni dall'entrata in vigore del Codice Civile peruviano, in un mondo completamente cambiato[41], il codice peruviano potrebbe richiedere – al pari di quello italiano e di tutti gli altri codici – rimaneggiamenti e revisioni più o meno profondi. Se questo dovesse avvenire, auspico allora che il "non-modello" italiano, per come l'abbiamo qui ricordato, possa ancora essere, come lo è stato in passato, un interlocutore privilegiato e che i giuristi dei nostri due Paesi amici possano continuare a crescere insieme "per l'amore degli studi comuni" in quelle "amicizie operose" di cui parlava Calamandrei.

[41] DI MICCO Domenico, *Regolare la globalizzazione. Contributo giuridico-comparante all'analisi del fenomeno globale*, Milano, Giuffré, 2018.